IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. LUIS MACIEL, Defendant and Appellant.	Supreme Ct. No. S070536 Los Angeles County No. BA108995

APPELLANT'S OPENING BRIEF

APPEAL FROM A JUDGMENT OF DEATH
FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
THE HONORABLE CHARLES HORAN, JUDGE PRESIDING

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APPELLANT'S OPENING BRIEF

INTRODUCTION

On April 22, 1995, two men, a woman, and two young children were gunned down by Sangra gang members in their El Monte residence. At the time of the killings, appellant, Luis Maciel, was miles away, attending a baptismal celebration for his youngest son. Appellant was charged and tried for the murders on theories of conspiracy and aiding and abetting. The prosecutor theorized that Maciel had dispatched the killers to the victims' residence to vindicate the interests of the Mexican Mafia.

Appellant's chance at a fair trial was doomed long before the trial began. A Mexican national by birth, it is an adjudicated fact that appellant was denied his right to consular assistance in violation of the Vienna Convention on Consular Relations. (*Avena and Other Mexican Nationals (Mexico v. United States)* 2004 I.C.J. No. 128; 2004 I.C.J. LEXIS 11 (Judgment of Mar. 31, 2004; see Argument III, *post.*)[1] A month and a half before the trial began, appellant made

[1] Appellant was a prevailing plaintiff in the *Avena* case.

a timely pretrial motion to discharge his *retained* counsel, who seemed abysmally unprepared for trial. (*People v. Ortiz* (1990) 51 Cal.3d 975.) Applying an incorrect legal standard appropriate when a court rules on a motion to discharge *court-appointed* counsel (*People v. Marsden* (1970) 2 Cal.3d 118), the trial court denied appellant his right to counsel of choice.

Proof of appellant's complicity in the murders was entirely circumstantial. Hearsay evidence established that Raymond Shyrock, a Mexican Mafia operative, had at one time made statements – outside appellant's presence – evincing a motive to kill one of the two adult male victims. Additional evidence, both admissible and inadmissible, established a possible motive on the part of the Mafia to kill the second adult male victim. There was little evidence to connect appellant with the killings, other than his association with Shyrock, and apparent recent membership in the Mexican Mafia.

To establish Maciel's role as mastermind of the crimes, the prosecutor was forced to heavily rely on the testimony of two witnesses with strong incentives to implicate Maciel in the killings, and yet another questionable witness – an immunized participant in the crimes. Other than this, only a few brief calls made from the perpetrators' phones to appellant's pager established any connection between appellant and the killers, much less his involvement in the murders.

Despite the paucity of substantial evidence to prove Maciel played any role in the killings, the convictions and a death judgment were virtually guaranteed because of the atmosphere of fear that resulted from an avalanche of inadmissible and highly inflammatory evidence. For example, a videotape recording of Raymond Shyrock speaking about Maciel's alleged commission of prior violent crimes on behalf of the Mafia was played for the jury twice

during the trial. The jury also heard the inadmissible post-offense hearsay statements of a nontestifying codefendant, in which he admitted knowing there were children in the murder target's residence, and claimed he had received orders from the Mafia to kill not only the target but also any witnesses. There was virtually no possibility that the jurors, frightened of the Mafia and inflamed by the notion of child killings, could dispassionately consider the strength of the *admissible* evidence of appellant's guilt, much less ignore inadmissible evidence or evidence received for a limited purpose, and engage in a rational weighing of aggravating and mitigating factors.

In the arguments that follow, appellant will demonstrate that, due to the combined effect of judicial error, judicial misconduct, prosecutorial misconduct, and a serious violation of international law, the trial was so infected with unfairness that the entire judgment must be reversed.

STATEMENT OF THE CASE

In grand jury proceedings commencing held in September of 1995, the Los Angeles County District Attorney [hereafter, "DA"] obtained a six-count indictment against four of appellant's five co-defendants in this case, Anthony Torres, Richard Valdez, Daniel Logan and Jimmy Palma. Five of the six counts jointly charged the codefendants with the murder of five people, Anthony Moreno, Maria Moreno, Laura Moreno, Gustavo Aguirre, and Ambrose Padilla, during a single incident on April 22, 1995.[2] (L.A. County Sup. Ct. no. BA108995; Supplemental Clerk's Transcript [hereafter, SCT]1:1:4-5:929.) All defendants but Valdez, who was at that time still at large, pled not guilty to all murder counts, and denied the multiple murder special circumstance allegation and firearm and criminal street gang

[2] Torres was charged with an additional, unrelated murder count, to which he pleaded not guilty.

enhancements. (Supplemental Reporter's Transcript [hereafter, SRT] 1:1-14.)

The grand jury was reconvened to consider capital murder charges against Maciel and codefendant Jose Ortiz in December 1995. An amended indictment was thereafter filed, charging Maciel and codefendants Logan, Palma, Valdez , Ortiz, and Torres with the murders of the three Moreno family members as well as Gustavo Aguirre and Ambrose Padilla. (L.A. Sup. Ct. No. BA108995; SCT1:6:982 - 1194; CT1:103-109A.) In Counts 2 through 5, it was also alleged: that the murders constituted the special circumstance of multiple murder (section 190.2(a)(3))[3]; that the murders were committed for the benefit of, at the direction of, or in association with a criminal street gang and/or with the specific intent to assist in criminal conduct by gang members (section 186.22 (b)(1) & (b)(2)); that in the commission of the murders, a principal was armed with a handgun (section 12022(a)(1)); and that in the commission of the murders, each of the defendants personally used a firearm (sections 12022.5(a), 1203.06(a)(1)). (CT1:103-109.)

Maciel was arraigned, entered pleas of not guilty to murder and denied the special circumstance allegation and all enhancements. (CT1:110; Reporter's Transcript [hereafter RT] 1:120-126.) On June 13, 1996, the prosecutor advised counsel of his intent to pursue the death penalty as to all defendants. (CT1:193: RT2:335-346.)

On September 3, 1996, a hearing was held before the Honorable Cesar Sarmiento [hereafter, Judge Sarmiento] to address all pending pretrial motions. The court's rulings are more fully set forth more fully in the Arguments section of this brief, as necessary to address particular claims of error. (RT3:504-522; CT2:473-474.)

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[3] Unless otherwise indicated, all further statutory references are to the California Penal Code.

On November 17, 1997, a motion was filed by Maciel seeking discharge of retained counsel and his replacement with court-appointed counsel. (*People v. Ortiz* (1990) 51 Cal.3d 975; SCT1:8:1595-1608.) The motion was denied. (RT39:7470; RT50-1: 7497-7554; SCT1:8:1616.)

Appellant was the last of the codefendants to be tried; his case began with jury selection on January 5, 1998.[4] (CT3:631; RT51:7577.) Prior to submission of the case to the jury, the criminal street gang enhancement was dismissed on the DA's motion. (RT61:9538-9539.) The jury returned guilty verdicts on all counts (Counts 2-6), and found true the special circumstance of multiple murder as to Counts 2, 3, 4, and 5, on January 30, 1998. (CT3:734-748; RT62:9790-9799.)

The penalty phase trial commenced on February 2, 1998. (CT3:750; RT63:9821.) On February 5, 1998, the court granted a juror's request to be excused based on her claimed inability to continue deliberating. (CT3:754-755; RT65:10165-10184,10191.) Defense motions to set aside the guilt phase verdicts, to begin deliberations anew, and for mistrial, were denied. (CT3:754-755; RT65:10201-10208.) On February 11, 1998, the jury returned verdicts imposing the death penalty for Counts 2, 3, 4, and 5. (CT3:811-814; RT 65:10217-10221.)

At the May 8, 1998, sentencing hearing, the court denied motions for

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[4] Codefendants Palma and Valdez were tried by a single jury before the Honorable George W. Trammell III. Death verdicts were returned for both defendants. Palma was murdered after his remand to San Quentin State Prison. The Valdez appeal is pending before this Court. Codefendants Logan and Ortiz were eventually tried together before Judge Charles Horan. They were both sentenced to life imprisonment without parole, and their convictions were affirmed on direct appeal to the Court of Appeal (B113206; S073929). Torres was separately tried before Judge Horan; he was convicted of several murder counts, but the jury hung on penalty. He was sentenced to life imprisonment without parole (B113362; S078034; RT61:9525-9526).

a new trial, and to strike the special circumstance finding, and for automatic reduction of the death penalty. The court imposed a sentence of 25 years to life, plus one year for the principal-armed-with-a firearm enhancement for Count 6, the murder of Ambrose Padilla. Death sentences were imposed for the convictions in Counts 2 through 5. The sentences for all section 12022(a)(1) enhancements, and the life sentence imposed for Count 6, were stayed pending execution of the death sentences. (Sections 187, 12022(a)(1)). (CT1:108; CT3:830-851,890-897,904; RT66:10245-10274 .)

STATEMENT OF APPEALABILITY

This is an automatic appeal from a death judgment, taken pursuant to the provisions of section 1239.

STATEMENT OF FACTS

People's Case-in-Chief

Stipulations Regarding Identities and Ages of Victims At Death

The parties stipulated to the ages of the five homicide victims at the time of death. Three were adults. The two child victims, Laura Moreno and Ambrose Padilla, were five years old and six months old, respectively, at the time of death. (RT56:8710-8711.)

Events On Maxson Road Prior to the Murders

The murders took place at 3843 Maxson Road in El Monte during the late evening hours of April 22, 1995. During the afternoon before the killings, a number of neighbors, including witnesses #8, #9, and #11, saw a group of three or four young Hispanic men pay a visit the victims' house, and speak with witness #15 and Aguirre outside the residence. All looked like gang members; one had a tattoo on his hand and another a tattoo on his neck. (RT55:8610,8638-8639; RT56:8656-8658,8663.) Witness #9 saw a blue Jeep parked on the street near the victims' residence. (RT55:8648.) None of the witnesses was able to make any positive identifications. (Witness #8: RT55:8606-8627; Witness #11: RT55:8627-8644; Witness #9:RT8645-8652; RT56:8655-8667.)

Witness #11 was sitting with Aguirre on her porch when the men arrived. (RT55:8633,8641.) Aguirre leaned close to witness #11 and said that he was leaving because the Mafia, or the Carnals, had arrived, and he did not want to have any problems with them. (RT55:8636,8641.) He confided that there were going to be problems with drugs. (RT55:8642.)

A few hours prior to the killings, witness #8 spoke with Aguirre, who was in the next yard. (RT55:8610-8611.) Aguirre looked nervous and said that "the Mafia was going to come." (RT55:8615,8625.)

A number of witnesses, including witnesses #1, #2, #3, and #8 were in the vicinity of the victims' home when the shootings occurred. (Witness #1: RT56:8851-8857; Witness #2: RT56:8858-8873; Witness #3: RT57:8877-8887; Witness #8: RT55:8606-8627.) Their observations have been omitted here, as it is undisputed that Maciel was not present, and other codefendants either did the shootings or acted as lookouts.

The Scene of the Crime

Police were dispatched to the victims' residence at 10:34 p.m. (RT58:9086-9089.) The bodies of four victims, including two children, were found inside the residence. (RT58:9092,9102,9105,9107.) The fifth deceased victim, Gustavo "Tito" Aguirre, was lying toward the back of the house next door. (RT58:9098.) Although the children did not appear to be alive, they were transported to a hospital and declared dead after unsuccessful administration of life support measures. (RT58:9116-9117.)

The Cause of Death

Autopsies showed that the three adults died of gunshot wounds to the head. (RT58:9137,9143,9148.) Ambrose Padilla died of gunshot wounds to the head and chest. (RT58:9150-9151.) Laura Moreno died of a gunshot wound to the chest. (RT58:9154.)

Testimony of Victor Jiminez

Victor Jiminez is a longtime member of the Sangra street gang, located in the City of San Gabriel. Jimmy "Character" Palma, Danny "Tricky" Logan, Anthony "Scar" Torres, and Richard "Primo" Valdez are also members of Sangra gang. On April 22, 1995, Jiminez loaned his blue Jeep to Torres to go buy some beer. Jiminez, who was intoxicated on LSD and marijuana, waited at Torres' house. Torres returned with the Jeep about 15 to 45 minutes later. Jiminez denied any involvement in the murders and said he did not know

Maciel at the time. (RT56:8669-8679.)

Testimony of Witness #16

Witness #16 is a member of the Sangra gang. He knows Palma, Valdez, Torres, and Logan, by their gang monikers, Character, Primo, Scar and Tricky. (RT57:8888-8889.) Prior to trial, witness #16 did not know Maciel and had never even heard his name. (RT57:8928.) Witness #16 admitted driving the "lookout" vehicle on the night of the murders, and received immunity from prosecution for murder for his testimony. (RT57:8890-8891,8918-8920.) As a result of witness #16's cooperation with law enforcement, Sangra gang members wanted to kill him. (RT57:8922-8925; RT55:8550-8551.)

On April 22, 1995, witness #16 picked up Palma in witness #16's 1991 Thunderbird. Palma said he would be receiving a page, and would need to be dropped off at Torres' house to do a favor for the "carnal," which the witness took to mean the Mexican Mafia. (RT57:8894-8895.) After Palma was paged, witness #16 drove Palma to Torres' house, where they joined Torres, Valdez, Logan and Ortiz. (RT57:8892-8896.)

After several hours, the seven men left for the victims' Maxson Street residence in two cars. Before leaving, Ortiz made a phone call and several pagers went off. (RT57:8917.) Logan drove Palma, Torres and Valdez in his Nissan Maxima. Witness #16 drove the Thunderbird, accompanied by Ortiz and witness #14 [sic].[5] (RT57:8897-8905.) En route, witness #16 briefly lost

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[5] Witness #16 is apparently referring to witness #12, each time the redacted transcript of his testimony refers to witness #14. Witness #14 was with appellant at his son's baptismal party when the murders took place. Witness #12 admitted accompanying the perpetrators when the committed the murders. (See, Testimony of Witness #14 and Testimony of Witness #12, *post.*)

sight of the Nissan, but caught up with it a few minutes later.[6] Eventually, the Nissan stopped in a driveway on Maxson Road. Witness #16 pulled over several blocks past where the Nissan had stopped, and Ortiz got out of the car to act as a lookout. When a police car turned on its lights and drove in the direction of the Nissan, Ortiz got back in the Thunderbird and left the scene with his two passengers. (RT57:8903-8909.)

Witness #16, witness #14 [sic] and Ortiz stopped briefly at Valdez's house, then went to Torres' house, where they found Palma, Valdez, Logan and Torres drinking beer, listening to a police scanner, and talking about the crimes. (RT57:8909-8911.) Palma said they tricked the men into thinking they were going to buy a rock of heroin. Valdez admitted shooting the two men. Palma admitted killing the woman and children. (RT57:8913-8918.) Torres said he stood by the door with a shotgun to make sure nobody came up from behind. (RT57:8914.) (RT57:8918.)

Testimony of Witness #13 and Elizabeth Torres

Witness #13 is the sister of Anthony Torres. (RT57:8950-8951.) Elizabeth Torres is his mother. Torres' sister and mother were unacquainted with Maciel. (RT57:8955,8976.) Both witnesses testified that, on the evening of the murders, a group of six to eight Sangra gang members, including Valdez, Logan and someone with a Sangra neck tattoo like Palma's, congregated at the Torres' home in Alhambra, where codefendant Torres was then living. (RT57:8951-8952,8954,8955.) According to witness #13, Torres received a few pages and returned the calls. (RT57:8954.) The men left the house sometime before 9:30 p.m. (RT57:8977-8978.)

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[6] Investigator Steven Davis testified that the location where witness #16 said he lost sight of the Nissan was approximately a block from appellant's residence. (RT58:9188.)

On different occasions, both witness #13 and Elizabeth Torres spoke with Torres after the murders. Torres admitted being present and said that Palma and Valdez had done the shootings. (RT57:8957.) He intimated that he and fellow gang members would "take care of" Palma for killing the babies. (RT57:8966.)[7]

The Firearms Identification Evidence

Numerous expended bullet casings were collected at the scene of the murders, and bullet fragments were retrieved from several of the victims' bodies during autopsies. (RT 58:9145,9149,9163-9169.) There was no evidence a silencer was used when the projectiles were discharged. (RT 59:9246-9248.) A more extensive discussion of ballistics evidence is unnecessary because it is not disputed that the fatal shots were fired by codefendants Palma and Valdez.

Gang Expert Testimony

At the time of this trial, Sergeant Richard Valdemar was assigned to the Special Investigations Bureau of the Los Angeles County Sheriff's Department, Prison Gang Section. (RT55: 8486.) Valdemar gave lengthy expert testimony regarding the activities of the Mexican Mafia, or "Eme," which operates both in and out of prisons and jails. (RT55:8500.) An abbreviated account of his testimony is set forth below.

The Spanish word for brother, "Carnal," is applied to one with membership in the Mexican Mafia. All others who are merely associated with the gang are referred to as "Camarada" or "Camrade." (RT55:8510.) Eme has a set of unwritten standards of behavior that its members are expected to

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[7] Some of this evidence was received during testimony. Much of the evidence was introduced in the form of a tape-recorded statement made by witness #13 to investigators.

follow. (RT55:8509.) Loyalty to the gang is valued above all else, including the member's family, their local street gang, and God. (RT55:8905.)

A "dropout" is a member of a prison gang, like the Mexican Mafia, who decides to disassociate himself from the gang. (RT55:8501.) Dropping out of Eme is against the gang's rules. (RT55:8510.) If a person disassociates from Eme, he will be placed on a "hit list" or "green light list," which means that the "dropout" must be killed by any Eme member who is in proximity, and has the ability to kill. (RT55:8510-8511,8516.) A Mexican Mafia gang member may only be killed by another member. (RT55:8510.) A member of Eme who has an opportunity to kill someone on the hit list, but does not take action, risks being placed on a hit list and killed. (RT55:8516, 8568.) Passage of years or decades does not reduce the obligation of a gang member to "hit" someone who has dropped out of the gang. (RT55:8517.) Any Eme member can place a person on a "hit list." (RT55:8568.)

Members of the Mexican Mafia are expected to make a living through criminal enterprises such as drug dealing. Part of the funds a member raises from drug activities goes to support gang members who cannot support themselves, such as, for example, those who are in segregated housing units in prison. (RT55:8511.) Eme members also orchestrate the transfer of drugs from outside to inside prisons and jails throughout California and the Southwest. (RT55:8512.) In return for paying a "tax" to the organization, drug dealers expect protection. (RT55: 8512.) The sanction of death will be imposed on any person who robs a dealer who pays taxes to the Mafia. (RT55:8512.)

The Mexican Mafia has approximately 250 active members, according to CDC records. (RT55:8513.) Eme exercises strong influence over Hispanic street gangs throughout Southern California. (RT55:8513-8514.) There are

approximately 84,000 Hispanic street gang members in Los Angeles County alone, and with few exceptions, all claim allegiance to Eme. (RT55:8514.)

There are several community gang organizations that hire ex-gang members to head their programs. Often these ex-gang members have not disassociated from the gang, and they support the position of the Mexican Mafia. (RT55:8538.) One such organization, "The Cause", is headed by Albert Juarez, a Mafia associate who was recently released from Pelican Bay prison, and who claims to be intervening in the problems of gangs and mediating them. (RT55:8538-8539.)

The Mexican Mafia frequently employs "overkill" when it commits murders. Multiple wounds are inflicted by multiple assailants. (RT55:8524.) The gang uses extreme brutality, such as close range wounds, to send a message. (RT55:8524, 8540.) Eme often dispatches close friends or family members of the victim to accomplish the killing. (RT55:8524, 8569.) Sometimes they drug the victim, or find some other way to relax the victim so he will be easier to kill. (RT55:8524.)

Mexican Mafia has a rule which prohibits members from hurting innocent children. (RT55:8584.) A street gang member who participates in an act which results in accidental death of a child will be placed on a "hit list." (RT55:8585.) Palma was the "trigger man" in the instant case; he was convicted and sentenced to death. (RT55:8586,8603.) Palma was murdered while on death row at San Quentin. (RT55:8586,8603.)

The Mexican Mafia sometimes uses a person who is being considered for membership, or new members, to commit murder, as a test of the person's fortitude, courage and fighting ability. (RT55:8525.) Sometimes Mafia killings are accomplished by close associates, such as street gang members who are trying to earn their "bones," or status with the Mafia. (RT55:8525.)

There is a special mentorship relationship between a Mexican Mafia member and someone he has recruited and successfully sponsored for membership. (RT55:8526.) The mentor "raises his hand" for the new member, meaning he teaches the recruit how to conduct himself as a member of the gang. (RT8527.)

In April of 1995, the Mexican Mafia was using Hispanic street gangs to commit crimes, and for tax collecting in the San Gabriel Valley. (RT55:8518.) For an eighteen month period culminating in April of 1995, the Metropolitan Gang Task Force, comprised of the FBI, the CDC and the Los Angeles Police Department, found out where Mafia meetings were occurring and engaged in surreptitious videotaping of meetings. (RT55:8518-8419.) Sergeant Valdemar monitored approximately 12 or 14 of a total of 18 meetings himself. (RT55:8519, 8571-8573.) Most meetings occurred in motel rooms. (RT55:8519.) The Task Force used informants to book motel rooms adjacent to the meetings so electronic videotaping equipment could be installed. (RT55:8520.) Eme was not aware that its meetings were being monitored or videotaped. (RT55:8525-8526.)

Valdemar has known Shyrock, also called "Huero Shy", for about 15 years in his various law enforcement jobs. (RT 55:8528-8529.) Shyrock is not Hispanic. (RT55:8531.) He and several other white men are members of the Mexican Mafia. (RT55:8531.) Shyrock was the Eme member responsible for the San Gabriel Valley area, which includes El Monte. (RT55:8531.)

Valdemar first became aware of Maciel when he walked into one of the electrically monitored Mexican Mafia meetings. (RT55:8530.) During this electronically monitored meeting, on April 2, 1995, Shyrock placed Maciel up for membership, raised his hand as a sponsor, and Maciel was accepted into the gang. (RT55:8532.) Maciel was not present at other meetings monitored

by Sergeant Valdemar. (RT55:8574.) Nor did Sergeant Valdemar ever see Maciel meet with Shyrock on any other occasion while Shyrock was under surveillance. (RT55:8599.)

Videotape Evidence

During Valdemar's testimony, two pieces of videotape evidence were played for the jury: People's Exhibits 118 and 119. (RT55:8555,8557.) Jurors were also furnished transcriptions of the videotapes, which did not begin or end in the exact same places as the videotapes themselves. (People's Exhibits 118A and 119A; RT 55:8555.)

Exhibit 118 is a videotaped excerpt from a Mexican Mafia meeting that Sgt. Valdemar electronically monitored on January 4, 1995. (RT55:8556.) The transcription (Exhibit 118A) reads, in relevant part:

"U And, you know that – I don't know if ever heard of this brother named like Dido from, uh Puente ***.

"U Who?

"U Dido.

"U [* * *][8]

"U He dropped out a long time ago. Anyway, where I was living, we were in a monthly apartment, before I moved. The mother fucker was living right downstairs, all right, in an apartment – and – and I never – he never came up.

Well, after I moved, and he started showing his face, so somebody seen him and tole me about it. So – but, there's all kinds of people in the pad. There's a whole bunch of youngsters. And – and kids. And all kinds of shit.

So, I'm trying – I got to figure out how to, un – I – I well, I need a silencer is what I need.

"U What do you what? I got a * * * .

"U And then that dude – he's hanging around with that girl Corzito from Norwalk.

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[8] Stars enclosed in brackets indicate where lines, paragraphs or pages of text have been omitted by Maciel's appellate counsel. Stars without brackets are from the original transcription and appear to refer to unintelligible material.

"U What's he doing with her?
"U yeah, I know that. And he's hanging with Corzito, man in Norwalk, eh.
"U Hi. ***, yeah.
"U there both – their hangout is right.
"U That's where he lives at – El Monte. El Monte, yeah.
"U * * * . But, the thing is, I think I should get ***. ***.
"U. Never. See, now, I don't want to – I just want to kill him, not the little kids. (Unintelligible background voices are heard.)[***]"

(SCT1:8:1642-1643.)

After the videotape was played for the jury, Valdemar testified regarding what he heard at the Eme meeting on January 4, 1995. (RT55:8560.) During the January 4, 1995, meeting, Shyrock made no mention of Maria Moreno and Gustavo Aguirre. (RT55:8590.) Shyrock explicitly said that he did not want the children killed. (RT55:8589-8590; SCT1:8:1643].) This was consistent with the Mexican Mafia's policy since 1991; they do not sanction the killing of innocent women and children. (RT55:8594-8595.) After the meeting, Valdemar attempted to determine the identity of the "Dido" mentioned by Shyrock, but was unsuccessful until after "Dido," aka Anthony Moreno, was killed on April 22, 1995. (RT55:8561.)

During the videotaped meeting on April 2, 1995, Shyrock urged other Mexican Mafia members to vote appellant into the organization as a member. Unidentified speakers voiced concern that they had had no opportunity to get to know Maciel. They also objected that the group had already decided to close its ranks to new members. Shyrock talked at length about appellant's credentials for membership. He argued that Maciel had already taken care of a "lot of business" for the Mafia, and had "downed a whole bunch of mother fuckers." He also disclosed that Maciel had "taken care of" one of his

"homies" who killed a one-year-old baby.

While the meeting was in progress, Maciel arrived and was asked to wait outside while his membership was discussed. Shyrock eventually convinced members to vote Maciel into the gang. Maciel was thereafter invited back inside and welcomed into the Mexican Mafia. (SCT1:8:1644-1672.)

The transcription of the videotape (Exhibit 119A) includes the following passages:

" [* * *]

"U So I wanna get that out of the way real quick. There's this dude, Pelon. Pelon has been working with me for about –

"U * * *

"U Yeah. And the *** is the one that cut me into him. When I got out *** got busted. This is the Vato that he *** For a year I've been working real close with him, and this dude has gone way above and beyond the call of duty. Man, this mother fucker is sharp, he's taken care of a lot of business and I wanna make *** I don't raise my hand for a lot of dudes. You know, it's not something I just go around doing, and when I do it ta – it takes somebody, it takes something special.[***]

I – I know the Vatos don't know him, but take my word for it, the mother fucker's down. I'm not talking about just violence either. Okay, you know, he takes care of business real good and he's downed a whole lot of mother fuckers in the last year. And he went against his whole neighborhood for us. He's been fighting with them and downed them. And when – when that one-year-old baby, one of his homies killed that one-year-old baby a few months ago, he's the one that took care of them. [***]

"U This year, you know. So I'm raising – he's on his way down here right 'cause I want everybody to meet him face to face and not –

"U Well, who is this guy?

"U His name is Pelon. [***]

"U Okay. But – and I agree with it. I agree with it. But – and I'm not saying that, okay, well, I should get any special treatment,

but I'm saying this dude has asked for nothing. And, you know, he's not ready to say anything, he just does what he does because he's here, you know. And I * * *
So I'm just asking for a vote to make him a * * * and then if who wanna talk about closing the votes, we can do that.

"U Yeah, I was gonna say something about that *** saying, though, this decision, if we say yes to it, you know, it – it's happening before we decide on that on closing the votes, anyway. You know what I mean? It, you know, came up before that, so I just feel, you know *** in or not, we should put the vote up first before we decide on closing the book, because this came up first. [***]

"U That's Pelon.

"U [***] Yeah, we're – we're – we're discussing something right now, so if you wanna go on out or just come back later.

"U All right.

" [***]

"U There's a bar downstairs.

" [***]

"U Okay. Well, anyway, that's another issue. Like – well, like I said right now, I would like to bring this dude in because I've brought it up before this came up and I would like to – and – and I think he would an asset to us, not just because of any violence, any violence that he's done, he's got to go ahead. And he don't need anybody to hold his hand. You know, I don't have to hold his hand.

"U But how about if given *** how many brothers here know the guy?

"U Nobody here knows him.

"U Well, see, that's the thing. How about giving some of these other brothers a chance to – to know the dude?

" [***]

"U Well – see, this – this is another thing of – of – of voting against somebody, you know, just because you don't know him. But the – the– the point here I'm trying to *** here is give us a chance, the rest of the brothers a chance to know him.

"U Yeah, well, by then the votes are gonna be closed.

"U The votes is supposed to be closed now.

"U Not – not out here they aren't. ***

" [***]

"U His deeds. Know about his deeds, know about the person what – what he's about.

" [***]

"U Yeah, he doesn't have to *** anything else anymore *** You know, he's earned enough.

"U Because he's – he's earned everything. I never would have brought it up. ***

" [***]

"U And I agree with you. But what I'm saying is I personally have watched the Vato for a year, you know. Okay, and he was with another carnal before that.

"U Uh-huh.

" [***]

"U If Huero says he's a helluva mother fucker, then he's a helluva mother fucker. *** that's – that's me. You know, he's got my vote, I already gave it to him and I'm not gonna take it back.

" [***]

"U Huero's been running around with him for a year, Frankie's been running around with him before x-amount of time *** talk to him before *** the – the meetings before about this dude ***

" [***]

"U This dude, he does – I do know a lot of people that know him. Nobody in this room, of course. And he – he – the guy was recommended to me by other carnals, a couple of them, and I've been watching him and doing things with him for a year myself. And I'm basing what I'm saying, not just on what he's did over this year with me but on things that I know about him from the past from other people, you know. And – and I – I think it's time, the dude deserves it, man, he's got it coming. And I'm not just going on – on things he's done for the violence. Yeah, he's downed a whole bunch of mother fuckers, but he's got a good head on his shoulders.

"U All right. So – so we don't go over the issues over and over, over again. Like he said, let's go ahead and *** decide on – on that now. [***]"[9]

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[9] According to Valdemar, during this videotaped meeting, certain words and phrases were used which have particular meaning to prison gangs and Hispanic street gangs. (RT55:8532.) The word "vato" means "guy". (RT55:8534-8535.) The word "Carnal" means "brother". (RT55: 8535.) The

(SCT1:8:1644-1672.)

The Testimony of Witness #15

Witness #15 is the brother of the victim, Anthony "Dido" Moreno, and a longtime member of the El Monte Flores gang. (RT56: 8713,8715.) Convicted of multiple prior felonies, at the time of his testimony witness #15 was in protective custody, in jail on a pending third strike burglary charge carrying a potential 25 to life sentence. (Section 667 (b)-(i).) Yet he denied receiving any deals for his testimony.[10] (RT56:8709,8712-8723,8810-8812.)

Witness #15 knew Shyrock, who was imprisoned in San Quentin from 1972 to 1977. (RT56:8716.) He personally knew Maciel, who had been a friend of his family at one time. (RT56:8715.) The victim, Aguirre, was also a heroin addict and family friend. (RT56:8723.)

Victim Anthony Moreno had served several prison terms for robbery.

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phrase "taking care of business" means engaging in gang activity in furtherance of the gang. (RT55:8535.) The phrase, "raise my hand for" means that you give your word for, or sponsor the person. (RT55:8535.) When a person is "down" for something, it means that they into gang life, and do things to further that lifestyle. (RT55:8535-8536.) If one says that a person "went against his whole neighborhood," it means that the person took a position that benefitted Eme, but was possibly contrary to what the local street gang wanted. (RT55:8536.) References to "the Bay" mean the state prison at Pelican Bay. (RT55:8536.) The phrase "close the books" means that Eme is not open for new membership. (RT55:8536-8537.) The phrases "run their program" and "run our program" refer to the fact that the Mexican Mafia gives people confined in a particular facility autonomy to run that facility. Those who are not incarcerated run the business in the streets. (RT55:8537.) The Spanish word "cliqua" refers to the Mexican Mafia. The word "brother" is also a reference to membership. (RT55:8537.) "Y.A." means the California Youth Authority. (RT55:8537-8538.)

[10] Sometime after testifying, witness #15 was sentenced in his three strikes case to credit for time served. (RT66:10246-10247.)

While in San Quentin prison in 1972, Moreno and Shyrock had both become members of the Mexican Mafia. (RT56:8715-8716.) At the time, witness #15 and Moreno shared a cell. (RT56:8715.) Moreno dropped out of Eme in 1983. (RT56:8716.) Witness #15 is a member of El Monte Flores gang and an associate, but not a member, of Eme. (RT56:8795-8796.) Witness #15 assisted Eme from 1972 to 1983, when Moreno dropped out. Witness #15 "de-briefed" while in the county jail in Chino, sometime around 1985, and thereafter stopped associating with Eme. (RT56:8797-8798,8802.) As a consequence of de-briefing, witness #15 has a "green light" on him, which means that he is on a hit list to be stabbed or killed. (RT56:8799.)

Witness #15 was paroled in January 1995. (RT56:8717.) Upon his release, witness #15 and Moreno, both heroin addicts, continued to commit crimes to support their habit. (RT56:8722-8733,8764.) In late February, 1995, Moreno began living with the family of his sister, Maria Moreno, in a house on Maxson Road. (RT56:8717-8718.) Previously, Moreno had lived with his mother, father and siblings in a nearby apartment building. Shyrock had lived in the same building. (RT56:8719-8720.)

Witness #15 occasionally saw Maciel with Shyrock. (RT56:8721-8722.) Maciel told all the homeboys from the neighborhood that he was a member of Eme; he was proud of being a member and said he was "going to put in a lot of work." (RT56:8721-8722.)

On April 22, 1995, at about 2:30 p.m., Maciel and two younger males clad in T-shirts, tennis shoes and jeans paid a visit to Anthony and Witness #15 at the Maxson Street residence. The younger males could have been El Monte Flores gang members; one had a E-M-F tattoo on his hand. (RT56:8807.) Maciel said he had come by to see how the family was doing. He gave Witness #15 and Moreno a quarter gram each of heroin and his pager number,

and said to call him if they needed anything. (RT56:8728-8735,8804.) Witness #15 and Moreno, who had been out fencing stolen property, and buying quarter grams on the street all day, told Maciel they were out of money and would pay him as soon as possible. Maciel said not to worry, they did not owe him anything. Witness #15 thought this was unusual. (RT56:8737-8738,8767-8769.) He was afraid the heroin might be a "hot shot," containing poison, so he tried a small quantity first, which had no negative effect. (RT56:8792-8793.)

During the visit, Aguirre hid from Maciel. (RT56:8822-8823.) Aguirre and Tony Cruz had been robbing the Mafia's drug connections. (RT56:8741-8742.) A few weeks before the murders, Shyrock told Witness #15 that Aguirre and Cruz were robbing dope connections and would sooner or later pay for it. (RT56:8744,8752.)

After the murders, Witness #15 attended a meeting in Lambert Park, arranged by El Monte Police Officer Marty Penny. During a private conversation out of the officers' earshot, Witness #15 and one of his brothers asked Shyrock if he had anything to do with the murders. Shyrock gave Witness #15 his condolences for the deaths of Anthony and Maria Moreno, and the two children, and assured him, "I wouldn't have done it in that fashion." (RT56:8756.) Shyrock said he did not feel bad about the death of Aguirre, however, because "that bastard"was forcing him "to kill him or do something to him . . . ." (RT56:8755-8756,8819.)

The Testimony of Witness #14

Witness #14 is a member of the El Monte Flores gang. At the time of his testimony, he was in state prison for kidnapping and robbery, and had suffered prior felony convictions for sale of marijuana and cocaine. No promises were made in exchange for his testimony, except for a promise to

help him relocate out of state to a federal prison, for protection. (RT57:8979-8982; RT58:9054,9059-9060.)

A few days before the murders, Maciel had told witness #14 to stay away from Aguirre because Aguirre was no good. (RT57:8998-8999.)

The day prior to the murders, witness #14 left work at the Metropolitan Transportation Authority at noon. He went to El Monte to a trailer court to pick up some heroin in drug territory controlled by Maciel. (RT57:8983-8984,9007.) Witness #14 ran into Maciel, who invited him to attend his son's baptism in Montebello, and gave him the address. (RT57:8985.)

Witness #14 and a female companion arrived at the baptismal party between 8 and 9 p.m., and went into a room with Maciel and other men to watch a videotaped boxing match. While witness #14 was watching the fight, Maciel received a page and left the room. (RT57:8988-8989.)

Afterward, Maciel asked witness #14 to drive "Diablo," aka Carlos de la Cruz, and Maciel to the apartment where Maciel lived in El Monte. (RT57:8987,8990; CT1:1B; RT60:9332.) They arrived at the apartment at about 9 or 9:30 p.m., and waited inside for about 15 minutes. Maciel gave witness #14 two pieces of heroin to hold while they waited. (RT57:8992.) They went outside and after 10 more minutes, a dark Nissan Maxima drove by and parked at the corner, and a man got out and spoke with Maciel. Maciel introduced the man as "Character." (RT57: 8993-8995.) Character said they were going to take care of some business, but not to worry, they were carrying guns. Maciel told witness #14 to give Character a piece of the heroin. (RT57:8996-8997.) After the Nissan left, witness #14, Maciel and Diablo returned to the baptismal party.

The Testimony of DA John Monaghan

Los Angeles DA John Monaghan was the prosecutor in four

proceedings prior to Maciel's trial. (RT 58:9075.) Witness #14 had testified in these proceedings before Monaghan turned appellant's case over to DA Anthony Manzella. (RT58:9075.)

Monaghan said he did not intervene to influence or reduce the charges that were filed against witness #14, and he instructed investigators not to intervene on the witness's behalf. (RT58:9070-9072.) Monaghan further testified that he had spoken with high ranking officials at the Department of Corrections about special housing so witness #14's life would not be in danger. When witness #14 finished testifying, Monaghan said he would do what he could to get the witness transferred to federal prison. (RT58:9074.)

Monaghan further testified that he was present when witness #14 was interviewed on July 19, 1995. At the outset of the tape-recorded interview, witness #14 did make some demands. (RT58:9075.) At one point, witness #14 said he did not want to testify for fear of being killed. Witness #14 said he would lie if he were put on the stand. (RT58:9078.) Monaghan did accuse witness #14 of not telling the truth about everything, but had no concern about the witness' truthfulness. (RT58:9078,9079.)

Testimony of Investigator Stephen Davis

Investigator Stephen Davis interviewed witness #14 on June 21, 1995. At that time, witness #14 did not tell him about attending a baptismal party in Montebello on April 22, 1995. (RT 58:9198.) Witness #14 related that on the day of the murders, he went to Maciel's home to pick up some heroin. (RT58:9197.)

Investigator Davis interviewed witness #14 again on March 6, 1996, before the witness had completed his grand jury testimony. It was not until March 12, 1996, however, that witness #14 first mentioned going to a party with Maciel in Montebello. (RT 58:9200.)

Extrajudicial Statements of Anthony Torres

Detective John Laurie interviewed Torres on May 16, 1995. Torres told him they[11] knew there were kids at the victims' house when they went there earlier in the day. Torres told the people at the house they would be back later to sell them some dope. (RT59:9262.)

Tape-recorded Statement of Luis Maciel

Maciel was interviewed by Detective John Laurie on December 15, 1995, following his arrest. A redacted recording of Maciel's statement was played for the jury; the jury received a redacted transcription of the statement for assistance. (Exhibits 132 and 132A; RT59:9305-9314.)

Maciel admitted membership in the El Monte Flores gang. (SCT1:8:1679-1680.) He denied being a "carnal," meaning a member of the Mexican Mafia; he was an associate of the organization and did "little errands here and there for them," like paying for lawyers' fees. (SCT1:8:1675.) Maciel's name had come up on a list to be "taken out" because he supposedly claimed to be "Carnal" although he was not. (SCT1:8:1677-1678.)

Maciel knew Shyrock very well and occasionally did small favors for him. (SCT1:8:1679.)

Maciel claimed membership in an organization called "The CAUSE," which stands for "Cultural Awareness United Special Efforts." (SCT #1:8:1676.) Maciel admitted familiarity with most of the gangs in the San Gabriel Valley, including Sangra. (SCT1:8:1680-1681.) He said he was

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[11] Defense counsel objected to using the word "they" and moved to have the word stricken. (RT59:9262.) The witness rephrased the quote from Torres: "He [Torres] went to the house earlier that day and gave the people at the house some carga, which he later explained was heroin, and saw the kids– saw that there were kids at the house. And he told the people at the house that they would be back later to sell them some." (RT59:9263.)

involved in meetings with street gangs directed at trying to cut down on the violence. (SCT1:8:1676.)

Maciel denied knowing either Torres or Palma but he knew that Palma was in prison with his friends in "high power." (SCT1:8:1682,1685.) Maciel said he had talked to Torres on the telephone at the beginning of April, after having been contacted through his pager. (SCT #1:8:1689.) Maciel denied acquaintance with Ortiz, or Logan. (SCT1:8:1686.) Maciel was supposed to be, but had not been, introduced to Valdez in connection with a peace treaty needed because a Sangra member had killed by an El Monte Flores gang member. (SCT1:8:1687.) At the time, Maciel was aware that Valdez and Torres were "running the neighborhood." (SCT1:8:1688.)

Maciel repeatedly denied committing or setting up the murders, and said he was busy baptizing his son on the day they happened. (SCT1:8:1673, 1675,1682-1683,1691,1696,1697,1698,1699,1700.) Maciel learned of the Maxson Street killings when someone called him after he got home from the baptismal party. (SCT1:8:1684.) Moreover, Maciel grew up with the Moreno family, and at one time lived with Anthony in the same house. (SCT #1:8:1683.) After the killings, Maciel talked to some of the victims' family members, and gathered money together for a funeral. (SCT1:8:1684.)

Maciel indicated that someone had asked him to be involved but he said no, because he knew the family really well. (SCT #1:8:1697.) Maciel also indicated that the people who did the crime had badly "fucked up." (SCT1:8:1698.) Maciel admitted knowledge of who acted as the go between in the murders, but declined to tell the detectives more, expressing concern for the safety of his children and wife. (SCT1:8:1698,1700,1702.)

During the recorded interview, Detectives warned Maciel that he should give some thought to his own personal safety because of his affiliation, and

because he had indicated that people were "pissed off" at him. (SCT1:8:1694-1695.)

Telephone and Pager Record Evidence

Appellant's Pager Records

Pager records for Expo Electronics were introduced into evidence, showing a pager contract for the number (818) 710-4921, in the name of Luis Maciel, with activation on March 29, 1995. (RT59:9228-9233.)

From the Gomez Residence

On April 22, 1995, three calls were made from the home of Ortiz's mother, Soccoro Gomez, to Maciel's pager, at 10:51 a.m., 12:20 p.m., and 8:44 p.m. (RT59:9211-9218.) On April 23, 1995, calls were made to Maciel's pager at 9:30 a.m. and 9:35 a.m. (RT59:9218.)

From the Torres Residence

On April 22, 1995, calls were made from the home of Torres' mother, Elizabeth Torres to Maciel's pager at 9:21 p.m., 9:22 p.m., 9:30 p.m., 10:59 p.m., and 11:00 p.m. (RT59:9218-9219.) On April 23, 1995, calls were made to this pager at 12:52 p.m. and 2:53 p.m. (RT59:9219.)

From the Palma Residence

On April 22, 1995, a call was made from the home of Palma's sister Valerie to Maciel's pager at 2:47 p.m. (RT 59:9220.) On April 23rd, calls were made to the pager at 2:48 p.m. and 2:57 p.m. (RT 59:9220.)

The Guilt-Phase Defense

The Baptismal Party

On April 22, 1995, Maria Maciel was living with her brother, Maciel, his wife, Monique, and their three children. (RT60:9318.) She awoke at about 7 a.m. the morning of her nephew Joseph's baptism. Maciel was home until he left the apartment between 9 and 9:30 a.m. (RT60:9319-9320.) Maciel did

not receive any pages; he was running around the apartment getting ready. (RT60:9321-9322.)

Maria did not go to the baptism; she stayed behind to babysit for the two older children, then saw Maciel again at about 2 p.m. at the godparents' house in Montebello, where a baptismal party was taking place. (RT60:9321-9323.) Maciel remained at the baptismal party until 8:30 p.m.; he was involved in barbequing, cutting the cake and breaking the pinata. (RT60:9325-9326.) She saw Maciel on the house telephone several times; they were trying to determine why Maria's mother and sisters had not made it to the party. Maria's sister had accidentally run over Maria's niece and they were at the hospital. Maciel wanted to go to the hospital. (RT60:9327-9329.) On April 22, 1995, she never saw Maciel using a cellular telephone. (RT60:9340.)

Monique Pena is the former wife of Maciel, and the mother of his three children. (RT60:9386-9387.) They lived together on Rose Street in El Monte until November of 1995, when Maciel moved out due to their marital problems. (RT60:9387,9409.)

On April 22, 1995, they had a baptism and party for their youngest son. (RT60: 9387.) The baptismal ceremony was held at a church in Pico Rivera. The ceremony began at 11 or 11:30 a.m. and lasted an hour to an hour and a half. (RT60:9388.) One of the uncles, Uncle Mike, videotaped the service. (RT9389.)

On the morning of the baptism, Pena left with Maciel and Joseph at about 9:30 to go to her Aunt Maria Lopez's house. (RT60:9391.) Part of their baptismal tradition includes having the godparents participate in dressing the child. (RT60:9393.) Maciel was with her the entire time. After the child was dressed, Pena, Maciel and Joseph left separately for the church, with Maciel driving their faded green Buick. (RT60:9392.) They made no stops, and

arrived a few minutes before the ceremony started. (RT60:9395.) After the baptism, they drove straight to the Lopez's house for the baptismal party, arriving at about 1:30 p.m. (RT60:9396-9397.) The house had a telephone, with the number (213) 728-8226, which was working on that date. (RT60:94-2-9403.) Maciel did not have a cell phone in his possession on April 22, 1995. (RT60:9405.)

Pena was at the Lopez's home throughout the evening and left at about 10:30 p.m. (RT60:9403.) Most of the guests left at about 9 or 9:30 pm., but Pena stayed to help clean up and load everything in the car. (RT60: 9405.) Maciel was there the entire time. She would have noticed if he had been gone for 30 minutes or more. Maciel participated in everything; he barbequed, jumped on the Moon Bounce, broke a pinata, threw money for the children, opened gifts, and helped clean up and load the car. (RT60:9404,9416-9417.) After the party, Pena left with Maciel, her three sons, two neighbor boys, and her best friend Angie Hernandez. They dropped Angie off in San Gabriel, dropped off the neighbor boys next door, and went home, arriving at 11 or 11:30 p.m. (RT60:9407-9408.) Maciel and Pena unpacked the car and went to bed together; Maciel did not leave the house. (RT60:9407-9408.)

Maciel used the phone at the Lopez house several times because her niece had been hit by a car, and his parents and sisters were calling to let them know how she was doing. (RT60:9406.)

Pena knows witness #14. He arrived later in the evening; she saw him at about 9 p.m., right before they started opening presents. (RT60:9414-9415.) They opened presents for 45 minutes, and Maciel remained the entire time. (RT60:9415.) During the party, Maciel was out of Pena's sight for no more than five to ten minutes. (RT60:9418.)

Pena is not a gang member and was unaware of it if her husband was

a member of the Mexican Mafia. (RT60:9420-9421.)

Nora Pena Ledesma is the mother of Monique Pena, and an employee of the Internal Revenue Service. She attended the baptismal party at her sister's house, arriving at about 2:30 p.m., and leaving at about 10 p.m. (RT60:9436-9438.) When she arrived, the party was in progress and Maciel was there. Ledesma would have noticed it if Maciel had left the party for 30 minutes; she was watching him to make sure he was helping out. (RT60:9438,9466.) Maciel and Monique Pena were still there cleaning up when Ledesma left. (RT60:9439.)

Defense Exhibit A, a 20 minute home videotape showing scenes from the party, was played for the jury. (RT 60:9409,9413-9427.)

Testimony of Witness #12

Witness #12 is affiliated with an unspecified San Gabriel Valley gang. At the time of his testimony, he had never spoken with Maciel's trial attorney, in person or on the phone. (RT60:9345.) Witness #12 was granted immunity from prosecution for murder for his truthful testimony at trial. (RT60:9345.)

Witness #12 knows Maciel, but did not see or speak with him on April 22, 1995. (RT60:9347.) On April 22nd, witness #12 met with Logan and Ortiz near Leo's Liquor Store, and accompanied them to Ortiz's garage in a blue Nissan Maxima driven by Logan. (RT60:9348-9350.) The trio left Ortiz's house at about 8:45 p.m., and went to Anthony Torres' home, arriving at 8:45 or 9 p.m.. (RT60:9347-9348,9351,9354.) Witness #16, Torres, Palma and Valdez were also there. (RT60: 9355-9356.) Some people were drinking and "doing speed," and there two guns, a 9 millimeter and a .357 lying around. (RT60:9359.)

Ortiz said that they had to take care of some business. Witness #12 asked if he could go along. Logan and Ortiz debated this for a minute, but

allowed him to come. (RT60:9351-9352.) When they left, Torres took the shotgun and said they were going to "hit a connection." (RT60:9360.) Nobody said anything about a Mexican Mafia dropout, or children being present in a home. (RT60:9361.)

Everyone left approximately 10-15 minutes after Torres received a phone call. (RT60:9384.) Witness #16 drove his red Thunderbird, accompanied by witness #12 and Ortiz. Ortiz directed witness #16 where to drive. Torres, Logan and Valdez left in the Nissan. (RT60:9364,9384.) The two vehicles stopped for gas, and proceeded to Maxson Road, where they were supposed to meet. Witness #12 lost sight of the Nissan en route and did not see it again until several hours later. (RT60:9365-9372.) The Thunderbird parked near Maxson and Ramona, and waited for a sign (flashing lights) from the other car, which never came. (RT 60:9373.) The men in the Thunderbird left when they saw the El Monte police arrive. (RT60:9373.)

The Thunderbird drove to Valdez's home and the occupants waited for 45 minutes, but nobody ever showed up. (RT60:9375.) Next, they drove to Torres' house; Palma, Logan and Valdez were there and seemed very excited. (RT60:9376-9377.) Palma bragged about shooting someone in the head. (RT60:9377-9278.) Witness #12 did not want any part of the conversation so he left with Ortiz and witness #16. (RT60:9379.)

The Prosecution's Penalty Phase Evidence

The September 3, 1993, beating of Nathanial Lane

Nathanial Lane, the alleged victim of a beating with a baseball bat, was wheeled into the courtroom, and refused to raise his hand to be sworn, or to answer any questions. He was held in contempt and ordered incarcerated. (RT63:9822,9837-9842.)

On September 3, 1993, during the late evening hours, El Monte Police

Officer Santos Hernandez saw Lane on the 11600 block of Garvey in El Monte, with Maciel, Carlos "Diablo" De La Cruz, and Genaro Muro, known members of the El Monte Flores gang. (RT 63:9845-9848.) Lane had his back against the wall. He was being held down by Muro and De la Cruz, who were punching him in the face. Maciel was swinging a baseball bat at Lane's stomach and legs. (RT 63:9848.) Hernandez pointed his gun at the three. Maciel dropped the baseball bat and fled, but was captured. (RT 63:9850.) Lane had a swollen forehead, was bleeding from one eye, and was in pain, crouched against the wall, unable to stand up. (RT 63:9850.)

The August 30, 1994, Stabbing of Witness #17

Witness #17 is a member of the El Monte Flores street gang. (RT 63:9854.) On August 30, 1994, El Monte Flores gang member, Carlos Arroyo picked witness #17 up from work, and invited him to a party to help him finish a fight with another gang member. (RT63:9854-9856.) They drove to an apartment complex in El Monte. Arroyo led witness #17 to an alley behind the garage, where there were three El Monte Flores gang members waiting for them: Maciel, De La Cruz, and witness #14. (RT63:9859-9862.) Witness #17 stood back while Arroyo spoke with the other gang members. Witness #17 and Arroyo got in a car with Maciel and drove to a dead end street near the river. (RT63:9861-9866.) They walked for a few minutes and stopped. Arroyo watched as the other three gang members beat witness #17. Maciel punched him, then took out a knife and stabbed him in the eyebrow and right eye. (RT63:9868-9869.) Witness #17 lay down on his stomach and Maciel continued to stab him in the back, shoulder, head and hands, approximately 37-38 times. (RT63:9869-9870.)

Witness #17 blacked out for awhile. When he awoke he summoned help from a man on a horse. He was transported to a hospital, where he was

treated for two days and released. (RT63:9873-9875.)

When witness #17 was first contacted by sheriffs, he declined to say who stabbed him. (RT63:9877.) He believes he was attacked because El Monte Flores gang members thought he had been involved in another incident which resulted in the death of a little girl. (RT63:9878-9879.) Witness #17 was supposed to be a witness for the prosecution. (RT:63:9879.) El Monte Flores gang members wanted to retaliate against him for killing the little girl; however, witness #17 denied any involvement beyond brief possession of the killer's weapon after the killing. (RT63:9882-9884.)[12]

Incidents in County Jail

On September 27, 1997, Los Angeles Sheriffs Deputy Robert Poindexter was at the Bauchet Street jail, escorting an inmate named Wishum back to his cell from the shower area. As they passed Maciel's cell, Maciel stabbed Wishum in the stomach three times with a six-foot long spear device with a shank on the end. (RT63:9890-9893.) The shank was never recovered. (RT93:9896.)

On December 6, 1997, at the jail, Deputy Sheriff Paul Cruz was supervising the feeding of inmates, assisted by an inmate named Raymond Velasquez. Maciel reached through the slot where the food passes through and stabbed Velasquez in the right shoulder with a blade covered in white cloth. Velasquez suffered a puncture wound. Deputy Cruz searched the cell but could not find the blade. (RT63:9917-9921.)

On December 18, 1997, at the Bauchet Street jail, Deputy Sheriff Thomas Looney conducted a strip search of Maciel prior to transferring him to a different housing unit. He found an eight-inch piece of metal, sharpened

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[12] At defense counsel's request, it was stipulated that Maciel was not charged in connection with the killing of the young girl. (RT64:10034-10035.)

to a point, strapped between two pieces of shower thongs tied one on top of another. (RT63:9898-9902.) He found a second, seven-inch piece of sharpened metal in the other thong. (RT63:9903-9904.) Such devices are shanks, jail-made stabbing instruments made by inmates within the jail. (RT63:9935-9937.) Shanks are generally used offensively, to commit assaults on inmates or jail personnel. (RT63:9938-9941.)

On January 28, 1998, in the jail, Deputy Sheriff Craig Wiggins was preparing to take Maciel to court. Maciel was moved to the shower, where he was waist-chained, strip searched, and then allowed to dress. When deputies opened the shower door to put Maciel's legs in shackles, Maciel lunged and thrust his head at Deputy Wiggins, trying to hit his face. He hit the deputy in the chest and shoulder area. During the struggle that followed, Deputy Wiggins fell to the ground, but did not need medical treatment. (RT63:9925-9930.)

Penalty Phase Defense Evidence

The Testimony of Family Members and Friends

Family members and friends of Maciel, including his mother, his wife of eight years, his youngest sister, a former employer, and a cousin, all testified that Maciel was a loving, helpful family member, wonderful father to his three children, a good provider to his family, and reliable employee. They also testified that Maciel did not use drugs, abuse alcohol, or openly fraternize with gang members, and opined that he was not capable of committing the alleged crimes. (RT64:9947-9967,9983-9992,10009-10020.)

Gang Violence Prevention Activities

Leonzo Moreno [Leonzo] works for the Covina Valley Unified School District. He is actively involved in Little League, and Jr. High School and High School soccer and football. He is actively involved with Baldwin Park gang units and a member of the Baldwin Park North Side gang. Leonzo works

as a mediator to prevent gang violence. (RT64:9967-9971.)

Prior to 1994, there were many drive-by shootings, including one in which Leonzo's own brother was killed. Several years ago, Leonzo met with Maciel, and several other gang members, who wanted to stop the violence. They got members of all of the San Gabriel Valley gangs together to help stop the drive-by shootings. (RT649972-9973.) They held meetings between the gangs at which Maciel was present. Maciel and Shyrock were among the main gang members who talked with the gangs with dignity and respect. As a result, the drive-by shootings stopped. (RT64:9972-9982.)

Leonzo is not affiliated with the Mexican Mafia, but he is a member of the Cause, which collects "Toys for Tots" at Christmas, and has a blood drive. He has worked with the Cause for three years; the group's objective is to stop gang violence. (RT64:9976-0077.)

Rebuttal to Aggravation

On the Thursday preceding his testimony at Maciel's trial, Los Angeles County Jail inmate Rubin Egland[13] observed an incident in which Deputy Sheriff Craig Wiggins called an inmate named Lopez a "Mexican piece of shit." The inmate got angry and threw a box of orange juice at Wiggins. Wiggins got angry and threw it back. Maciel was coming out of the shower to get his shackles put on when the incident occurred. Maciel respectfully asked the deputy why he was saying these things. Wiggins grabbed Maciel by the neck and began choking him, and threw him to the floor. (RT64:9994-10000.)

Egland also observed an incident involving a jail trustee who was about to serve food to Maciel. The trustee, Raymond Velasquez, is black. He

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[13] Egland was serving time for assault with a deadly weapon. (RT 64:9994.)

disrespects Hispanic inmates by calling them names and spitting in their food. On one occasion, Velasquez became angry with Maciel. He threw Maciel's food through the slot and called Maciel a "fucking Mexican and wetback." (RT64:10001-10004.) Maciel swing back. Egland did not see any object in Maciel's hand, but Velasquez said he was stabbed. (RT64:10004.)

PART I: GUILT PHASE ARGUMENTS[14]

I. MACIEL'S CONVICTIONS OF FIVE FIRST DEGREE MURDERS, AND THE JURY'S FINDING IN SUPPORT OF THE SPECIAL CIRCUMSTANCE OF MULTIPLE MURDER THAT MACIEL INTENDED TO CAUSE THE DEATH OF FOUR OF FIVE VICTIMS, ARE NOT SUPPORTED BY CONSTITUTIONALLY SUFFICIENT EVIDENCE.

A. Applicable law:

1. Standard of Review:

The standard of review on appeal is so well-settled as to require little elaboration. On appeal, this Court must "review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) Only if a *rational* trier of fact could find the essential elements of the crime proven beyond a reasonable doubt are the requirements of the due process clauses of the state and federal constitutions satisfied. (U.S. Const., Amendment XIV; Cal. Const., art. I, § 15; *Jackson v. Virginia* (1979) 443 U.S. 307, 319; *Herrera v Collins* (1993) 506 U.S. 390, 401-402.) "Speculation and conjecture cannot take the place of reasonable inferences and evidence – whether direct or circumstantial...." (*Juan H. v. Allen* (9th Cir. 2005) 408 F.3d 1262, 1279.) Furthermore, where a challenge to the sufficiency of evidence supporting the degree of murder is made, the appellate court must "judge whether the evidence of each of the essential elements constituting the higher

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[14] Many errors occurring in the guilt phase also necessarily adversely impact the reliability of the penalty phase judgment; such errors are nevertheless included in this section of the brief.

degree of the crime is substantial; it is not enough for the respondent simply to point to 'some' evidence supporting the finding." (*People v. Bassett* (1968) 69 Cal.2d 122, 138.)

2. The prosecution's theory of the case:

The prosecution's theory was that Maciel, at the behest of Raymond Shyrock, arranged to have Anthony Moreno murdered by Sangra gang members. (RT61:9521; RT62:9660,9662,9669.) Moreno was purportedly targeted for murder because he had violated Eme's rules by dropping out of the Mexican Mafia fifteen years earlier, in 1983, and it was the practice of Eme to have "dropouts" killed. (RT56:8797; RT55:8501,8510-8511; SCT1:8:1642-1643.) A second victim, Aguirre, was a also a potential target for retaliation by the Mafia because he had been robbing Eme's drug connections in territory overseen by Shyrock. (RT56:8741-8742,8744,8752; RT55:8511-8512; RT57:8999.) According to the prosecution, Maria Moreno and Tito Aguirre were killed because the Sangra gang members who carried out the killing had been ordered not to leave any witnesses. The deaths of the two children were asserted to be the natural and probable consequence of the other murders. (RT61:9520-9521; RT62:9656.9660,9662, 9669; *People v. Prettyman* (1996) 14 Cal.4th 248, 267.)

Jury instructions on aiding and abetting, and conspiracy were given, as well as an instruction admonishing the jury that Maciel could be found guilty of first degree murder on any of four theories: (1) that he aided and abetted that particular murder; (2) that he conspired to commit that particular murder; (3) that the murder was the natural and probable consequence of a murder that he conspired to commit; or (4) that the murder was a natural and probable consequence of the murder he aided and abetted. (CT3:685-686,697-708,716; RT62:9623-9624.)

In order to establish liability under the "natural and probable consequences" doctrine on an "aiding and abetting" theory, the prosecution had to present reasonable, credible evidence of solid value proving that Maciel, (1) by act or advice, aided, promoted, encouraged, or instigated the murders of Anthony Moreno; (2) that he had knowledge that the perpetrators intended to commit murder; and (3) that he had the shared intent of encouraging or instigating the murder. In addition, the prosecution had to present substantial evidence (4) that Maciel's confederates committed murders other than those promoted, encouraged, or instigated, and (5) the extra murders were the natural and probable consequence of the aided murders. (*People v. Cummins* (2005) 127 Cal.App.4th 667,677.)

To prove Maciel liable on a conspiracy theory, it was necessary to produce reasonable, credible evidence of solid value of (1) Maciel's acquiescence in an agreement to kill Moreno; and (2) one overt act by a co-conspirator in furtherance of that murder. (*People v. Jurtado* (2006) 38 Cal.4th 72, 122; *People v. Russo* (2001) 25 Cal.4th 1124, 1134.) In addition, the murders of Aguirre, Maria Moreno and children had to be the natural, probable and foreseeable consequence of the crime that Maciel had conspired to commit. (*People v. Prettyman, supra*, 14 Cal.4th at 260.)

B. The evidence was incredible, unreasonable and unreliable, and thus constitutionally insufficient, to prove that Maciel either aided or abetted, or participated in a conspiracy to murder Anthony Moreno and Gustavo Aguirre.

Testifying witnesses who were *involved* in the crimes were unacquainted with Maciel, and/or were unaware of any involvement by Maciel in the killings. (RT56:8693 [Victor Jiminez]; RT57:8928 [witness #16]);

RT60:9361 [defense witness #12].)[15] Maciel also denied any involvement in the murders (SCT1:8:1673-1700), and presented testimony by numerous witnesses that he spent the entire day and evening of the murders in the company of family, at a baptism and baptismal party. (RT60:9318-9466.) Other than wholly irrelevant, inflammatory, improperly received bad character evidence, indicating that Maciel had committed numerous violent crimes on behalf of Eme (SCT1:8:1644-1672; Argument VII), proof that Maciel had some hand in Maxson Road killings was based largely on mere association, and intrinsically unreliable testimony by several witnesses whose identities were kept secret until trial. (*Juan H. v. Allen*, *supra*, 408 F.3d at 1279.)

1. Witness #15:

Maciel was placed at the Morenos' residence on the day of the killings by only one, highly incredible, witness – witness #15. Witness #15 was a gang member, heroin addict and career felon who, at the time of trial, had charges pending which carried a possible sentence of 25 years to life. (RT56:8709,8712-8715,8722-8723,8744,8761,8765-8766,8810-8812.) Although this witness strenuously denied receiving any *quid pro quo* in exchange for his testimony, after the trial defense counsel discovered that witness #15 had been sentenced to credit for time served. (RT66:10246-10247.) Witness #15 believed Maciel was associated with Eme. (RT56:8721-8722.) He felt threatened by Maciel and Eme as a result of witness #15's having "debriefed" in 1985. (RT56:8798-8799.)

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[15] Defendant Torres explained that he had paged Maciel because the El Monte Flores gang had come into San Gabriel and spray painted the walls, which he took as an act of disrespect toward the Sangra gang. This evidence was admitted at Torres' trial over Torres' objection. (RT43:6828-6833.) The record offers no explanation why, at appellant's trial, Esqueda did not seek to introduce Torres' potentially helpful explanation for the calls admittedly made to Maciel's pager around the time of the killings.

Witness #15's commitment to abstain from drugs and criminal activity was not long-lived. Witness #15 admitted that he used heroin in prison (RT56:8765), and he spent much of the day of the murders fencing stolen property, buying quarter grams of heroin and injecting it. (RT56:8725-8727,8769-8791.) Witness #15 alone identified Maciel as one of a group of gang-type men who inexplicably arrived at the Moreno residence on April 22, 1995, and gave witness #15 and victim Moreno some free heroin. (RT56:8728,8735-8738.) Significantly, none of the other percipient witnesses identified Maciel as one of the men who visited the Morenos during the afternoon preceding the murders. (RT55:8627 [witness #8]; RT55:868638-8644 [witness #11]; RT56:8665 [witness #9].) Furthermore, Maciel reportedly came and went from the Moreno residence at a time when a multiplicity of other witnesses without criminal records testified that Maciel was at a baptismal party for his son, in Montebello. (RT60:9321-9323,9396-9397,9418,9436-9438,9466; RT56:8728,8791.)

Witness #15 made multiple inconsistent statements regarding whether he saw Maciel arrive at the Moreno residence driving a white Cadillac, or a blue Cutlass Oldsmobile, or whether he saw him a car at all. (RT56:8840-8844.)

2. Witness #14:

A second key piece of evidence connecting Maciel with the murderous actions of Sangra Gang members on the evening of April 22, 1995, was the testimony of another inherently unbelievable informant – witness #14. This young witness, an admitted heroin user and El Monte Flores gang member (RT57:8984,9000,9011-9012), was already serving prison sentences for kidnapping, robbery and drug offenses at the time of the trial. (RT57:8980-8981.)

At the time of the murders, witness #14 was on methadone, and simultaneously using heroin, although he was employed by MTA. (RT57:8983,9011-9012.) At trial, witness #14 testified that he ran into Maciel at a trailer court where witness #14 was purchasing heroin at about 12:30 p.m. on the day of the murders. (RT57:8984-8985.) This was the same time when family members placed Maciel in church, at his own son's baptism, which was videotaped. (RT60:9388-9389.) At the trailer park, Maciel supposedly invited witness #14 to attend the baptismal party, and gave him the address. (RT57:8985.)

Witness #14 did attend the baptismal party; Maciel's wife saw him there at about 9 p.m., or before the family started opening gifts. (RT60:9414-9415.) Witness #14 testified that Maciel received a page, and afterward he drove Maciel home to El Monte in the middle of the party, arriving at the apartment about 9:00 - 9:30 p.m. (RT57:8991.) This occurred at the same time that Maciel's wife and mother-in-law testified that Maciel was opening gifts, helping to clean up after the party, and loading the car. (RT60:9405-9417,9438-9439,9466.) It was, according to Investigator Davis, approximately an 18-minute one-way drive from the party to Maciel's apartment. (RT58:9190-9191.) According to witness #14, he and Maciel had to wait 25 minutes before Palma arrived, accepted some heroin, and declared that he was armed and going to take care of some business for Maciel. (RT57:8987-8997.)

If witness #14 had testified truthfully, this would mean that Maciel was gone from the party for an entire hour. Yet nobody else at the party, including Maciel's wife, and mother-in-law, who worked for the Internal Revenue Service, saw Maciel disappear for a significant length of time. (RT60:9403-9408,9416-9417,9436-9438,9566-9439.) Witness #14 said he attended the baptism party with a girl named Denise. (RT57:8986.) Maciel's wife knew

everyone at the party, including witness #14, and could not recall anyone there named Denise. (RT60:9416.) In addition, witness #14 lied to detectives about Denise's address, and never was able to furnish a last name for this potentially corroborating witness. (RT57:9014; RT58:9046-9047.)

Witness #14's pretrial statements and grand jury testimony crucially and materially diverged from his testimony at trial. On June 21, 1995, at an out-of-custody interview conducted at a local community center, witness #14 told Investigator Davis that, on the day of the murders, witness #14 drove to Maciel's apartment alone to pick up some heroin from him. (RT58:9196-9197.) He did not mention driving Maciel home from a baptismal party. (RT58:9197.) In testimony before the grand jury on December 6, 1995, witness #14 also failed to mention attending a baptismal party. Witness #14 testified that, on the evening before he learned of the murders, he went to Maciel's house by himself to score a half gram of heroin. (SCT1:6:986-987.) While there, Maciel purportedly introduced him to "Character" [Palma], who arrived in a dark Nissan Maxima. (SCT1:6:987-989.) Maciel gave Palma some heroin. Palma told Maciel he was "packing" and going to take care of some business. (SCT1:6:991-992.)

However, witness #14's original account was problematic for prosecutors because it was completely inconsistent with Maciel's having been present at his own son's baptismal celebration for most of the day and evening of the murders. Conveniently, witness #14's account changed before trial.

Witness #14 was interviewed by investigators on two occasions in March 1996, after his grand jury testimony. (RT58:9200.) By the time of the March interviews, witness #14 was in custody on kidnapping and robbery charges for which he faced a life sentence. (RT58:9200,9029.) It was not until the second of these two interviews, on March 12, 1996, that witness #14

reported driving Maciel to El Monte in the middle of the baptismal party. (RT58:9200.) On March 20, 1996, witness #14 pled guilty to kidnapping and robbery and received a comparatively lenient sentence: 11 years and 8 months in prison. (RT58:9029; SCT1:1:1.)

On July 19, 1996, witness #14 was again interviewed by detectives and DA John Monaghan; he threatened to "take the Fifth" or lie on the stand unless there were some "changes." (RT58:9027-9028.) At this time, witness #14 was unhappily incarcerated in the SHU[16], without television, radio or cigarettes. He wanted the DA and investigator to effect changes in the conditions of his confinement. (RT58:9053-9054,9062.) DA Monaghan told witness #14 he would not bargain for testimony. (RT58:9062.) At trial, on January 20, 1998, Esqueda was improperly prevented from asking on cross-examination where witness #14 was being confined. Hence, the record does not reveal whether witness #14's circumstances had materially improved in the intervening year and a half between his amended statement and the trial. (RT58:9055.)[17] (See, Argument IV.; *Howard v. Walker* (2nd Cir. 2005) 406 F.3d 114, 129 [the right to confrontation is denied when a defendant is prohibited from exposing the jury to facts from which they could draw inferences relating to the reliability of the witness].)

The only arguable corroboration for witness #14's incredible account of a mid-party trip to Maciel's apartment came from another unreliable witness, witness #16. Witness #16's credibility was clearly an issue; he was

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[16] SHU stands for Security Housing Unit, and is customarily understood to refer to Pelican Bay State Prison.

[17] DA Monaghan thereafter testified that no promises were made to enlist witness #14's cooperation except a promise to seek a transfer to federal prison, where he would be safe and could go to school. (see, RT58:9059,9071-9074.)

directly involved in the murders as the driver of the lookout vehicle. He received immunity from prosecution for murder in exchange for his testimony at Maciel's trial. (RT57:8890-8891.)

On the way to the murder scene with the perpetrators, Witness #16 claimed to have briefly lost sight of the Nissan driven by Palma, Valdez and Torres. After his arrest, witness #16 led investigators to the place where he believed he had lost sight of the Nissan; investigators determined that this was within a block of Maciel's apartment. (RT57:8899-8906; RT58:9188.)

None of the testimony given by these witnesses (#14, #15, & #16) inspires the kind of confidence that is necessary to pass constitutional muster, particularly in a capital trial where the reliability of the death judgment is of paramount concern. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 ["the penalty of death is qualitatively different from a sentence of imprisonment, however long"]; *Satterwhite v. Texas* (1988) 486 U.S. 249, 262-263 ["the greater need for reliability in capital cases...has required that 'capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding'"]; *People v. Williamson* (1984) 161 Cal.App.3d 336 [rape convictions reversed based on inherently incredible evidence]; *People v. Headlee* (1941) 18 Cal.2d 266, 268-275; see also, *United States v. Earl* (9th Cir. 1994) 27 F.3d 423 [reversal of drug conviction based on uncorroborated testimony of an accomplice].) Yet without these dubious pieces of evidence, the record establishes little more than that Maciel was associated with Shyrock, and members of the Moreno family, and that he was familiar with, or had phone contact with, or received pages from, several of the Sangra gang members who committed the murders.

Maciel knew Shyrock, and did not deny it. (SCT1:8:1644-1672; People's Exhibit 16; RT55:8549; SCT1:8:1679; RT56:8721-8722). Maciel

had known the Moreno family for a long time. (RT56:8715.) Maciel told investigators he grew up with the Morenos, and at one time had lived in the same house. (SCT1:8:1683.) Maciel explained that he knew the family too well to agree to harm them. (SCT1:8:1697.)

During his interrogation, Maciel admitted having some telephone contact with Torres and Palma, Sangra gang members who were "running the neighborhood," in connection with a proposed peace treaty with the El Monte Flores gang. (SCT1:8:1682-1688.) In addition, there was evidence that on April 22 and 23, 1995, multiple calls were made from the residences of Torres' mother, Palma's sister, and Ortiz's mother to Maciel's pager number (RT59:9211-9220), but there was no evidence of solid value that Maciel ever returned any of the calls.[18]

Maciel's mere association with Eme, Shyrock, the victims and the murderers does not suffice to prove his involvement in the killings or his participation in a conspiracy to kill. (*People v. Durham* (1969) 70 Cal.2d 171, 185, citing *People v. Smith* (1966) 63 Cal.2d 779, 792; *People v. Ah Ping* (1865) 27 Cal. 489, 490.) To comport with federal due process, proof of more than mere association is required to impose criminal liability for the actions of gang members. (*People v. Castenada* (2000) 23 Cal.4th 743, 749; accord: *Scales v. United States* (1961) 367 U.S. 203, 228.)

Other than the inherently unreliable testimony of witnesses #14, #15, and #16, bolstered by a plethora of inflammatory bad character evidence and

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[18] Witness #14, who attended the baptismal party, said that Maciel received a page and left the room. (RT57:8989.) Phone records for the home where the party was held were evidently subpoenaed by the prosecution. (RT 50-1:7540.) Presumably, if they had contained any evidence of calls made from the party to any of the perpetrators, the evidence would have been presented to the jury.

inadmissible hearsay (see Arguments, *post*), there was no reasonable, credible, evidence of solid value, proving Maciel's participation in plan to kill Moreno and/or Aguirre. At most, there was evidence that Shyrock wanted "Dido" Moreno dead: the statements Shyrock made at the January 4, 1995, tape-recorded meeting of Eme. (SCT1:8:1642-1643.) However, Maciel was not present at that meeting, and he was not inducted into Eme until three months later. Mere association and an opportunity to conspire does not establish one's participation in a conspiracy. (See, *People v. Durham, supra*, 70 Cal.2d at 185; *People v. Smith, supra*, 63 Cal.2d at 791-792; *People v. Robinson* (1954) 42 Cal.2d 132, 136.)

Speculation and conjecture cannot take the place of reasonable inferences and evidence – whether direct or circumstantial ...." (*Juan H. V. Allen* (9th Cir. 2005) 408 F.3d 1262, 1279.)

> """The prosecution's burden is a heavy one: 'To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty. The trier must therefore have rejected all that undermines confidence' [Citation] Accordingly, in determining whether the record is sufficient in this respect the appellate court can give credit only to 'substantial' evidence, i.e., evidence that reasonably inspires confidence and is 'of solid value.'"""

(*In re Roderick P.* (1972) 7 Cal.3d 801, 809; internal citations omitted.) In this case, the prosecution failed to meet its burden to present proof to a near certainty that Maciel aided and abetted, or conspired to kill Moreno, much less the other four victims.

C. The record does not support the jury's finding that the murders of Gustavo Aguirre, Maria Moreno and the two children were the natural, probable, and foreseeable consequence of a Mexican Mafia contract to kill Anthony Moreno.

The prosecution's own evidence contradicts the jury's implied finding

that the killings of Aguirre, Maria Moreno and the two children were the natural, probable, and foreseeable consequence of a Mafia-engendered conspiracy to murder Anthony Moreno. During the January 4, 1995, meeting of Eme, Shyrock explicitly stated that he wanted "Dido" Moreno killed, "not the little kids." (SCT1:8:1642.) This was consistent with Eme beliefs, described at some length by the prosecution's gang expert. Valdemar testified that, since 1991, the Mexican Mafia has had a rule which prohibits gang members from hurting innocent women and children. (RT55:8584,8593-8594.) Gang members who violate this rule are killed. (RT55:8585.) At the time of his trial testimony in 1998, the gang *expert* was not aware of a single Mexican Mafia killing since 1991, where women and children were victims. (RT55:8594-8595.)

If the prosecution's theory of the case is to be accepted (RT61:9520-9521), Sangra gang members were dispatched to the Maxson Road residence with instructions to kill one person, Moreno, because he was a dropout. Aguirre, and possibly Mrs. Moreno, were killed because local gang members understood they were not to leave any witnesses. The killing of Mrs. Moreno and the two children were nevertheless accomplished in direct *contravention* of Eme's rules. Consistent with Torres' prediction to his sister, and Eme policy, Palma paid for killing the children with his life. (RT57:8966; RT55:8586,8603.)

"A result cannot be the natural and probable cause of an act if the act was unforeseeable." (*People v. Roberts* (1992) 2 Cal.4th 271, 322.) Consistent with the evidence produced by the prosecution, the cold-blooded killing of an innocent woman and two children by agents of the Mexican Mafia dispatched to kill two specific gang member targets was not, under the circumstances, reasonably foreseeable.

D. The evidence does not support the jury's implied finding that Maciel conspired, or aided and abetted Sangra gang members with the specific intent to kill Aguirre, or Maria and Laura Moreno.

The jury found Maciel guilty of five first degree murders, but found that only four of the convictions could be considered to establish the special circumstance of multiple murder. (CT1:3:738-739.) The jury was instructed that only those convictions counted toward the multiple murder special circumstance, wherein the jury was satisfied beyond a reasonable doubt that the defendant had the *intent to kill*, and aided, abetted, counseled, commanded, induced, solicited, requested or assisted any actor in the commission of the murder in that count. (CT1:3:719; *People v. Anderson* (1987) 43 Cal.3d 1104, 1138-1150; *People v. Turner* (1984) 37 Cal.3d 302.) Hence, inexplicably, despite evidence and prosecutorial argument to the contrary, the jury must have found that Maciel *intended* the deaths of Gustavo Aguirre, Maria Moreno and five-year-old Laura Moreno, but not the death of the infant, Ambrose Padilla.

Substantial evidence does not support any of the murder counts. (See, ¶ B, above.) Assuming *arguendo*, that sufficient evidence was presented to prove that Maciel aided and abetted, or conspired with Sangra and Eme to kill Anthony Moreno, and further, that he would have sanctioned the killing of Aguirre because he was robbing Eme's drug connections, there was no admissible evidence, much less credible evidence of solid value, to suggest that Maciel *intended* the deaths of Maria and Laura Moreno. The killing of innocent women and children was considered by Eme to be a violation of its rules, punishable by death, because such "dirty" killings tarnished the "supposed positive image of the Mexican Mafia." (RT55:8593.)

Inadmissible hearsay evidence of statements by Torres to his sister was

introduced over defense objection; Torres reportedly told his sister that he had been instructed by the Mafia not to leave any witnesses. (See, Argument X, *post.*) Even assuming this Court disagrees that receipt of this evidence was error, at most, Torres' statement would establish the Mafia's intent to kill Moreno and all adult witnesses. This is in fact what the prosecutor argued, based on inadmissible hearsay attributed to Torres. (RT62:9660-9669.)

In videotaped statements by Shyrock, which appellant also asserts were erroneously admitted (see, Argument VIII), Shyrock said he "just" wanted to kill Moreno, "not the little kids." (SCT1:8:1642.) Palma was murdered in retaliation for killing the children. ((RT57:8966; RT55:8586,8603.) *If* Maciel arranged to do Shyrock's bidding, which Maciel strenuously denies, there is no evidence, either admissible or inadmissible, direct or circumstantial, from which the jury could have inferred that he acted with the intent to cause the deaths of the children. (*People v. Williams* (1997) 16 Cal.4th 635, 690.) The overwhelming evidence suggests that the contrary was true. In closing argument, even the prosecutor stated: "we have not proven that he did intend the killing of the children." (RT62:9660.)

By analogy to the rule that the prosecution is bound by extrajudicial statements which it introduces that are irreconcilable with guilt (*People v. Acosta* (1955) 45 Cal.2d 538, 542), the prosecution should be bound by its own evidence, including expert testimony, which confirms that the murders of Maria and the children were not intentional, or even foreseeable. Accordingly, three of the murders were unintentional and were erroneously considered as intentional by the jury. Appellant submits that if this Court should decide he was involved in the homicides, there is insufficient evidence to support the jury's finding that he intended the deaths of anyone but Moreno. Hence, the special circumstance findings for counts 2 through 5 must be reversed.

Alternatively, at a minimum, the special circumstance findings in count 4 [Maria Moreno] and/or count 5 [Laura Moreno], involving a child victim, must be reversed based on the insufficiency of evidence that Maciel shared an intent to kill these victims.

E. The trial court erred by denying appellant's Section 1118.1 motion.

At the conclusion of the People's case-in-chief, defense counsel made an "1118 motion" for acquittal based on the insufficiency of the evidence. (RT59:9301.) Trial counsel did not articulate specific grounds for his motion, but articulation of grounds is not a requirement, nor is it necessary that a motion for acquittal take any particular form. (*People v. Cole* (2004) 33 Cal.4th 1158, 1213.) The trial court denied the motion on the merits. (RT59:9301-9302.)

In reviewing a motion for judgment of acquittal pursuant to section 1118.1, a trial court applies the same standard that an appellate court applies in reviewing the sufficiency of evidence to support a conviction. (*Id.*, at 1212-1213; *People v. Crittenden* (1994) 9 Cal.4th 83, 139, n.13.) The reviewing court independently reviews whether the evidence is sufficient under the federal and state due process clauses. (*Cole,* at 1213.)

For the reasons fully set forth in sections A through D, above, appellant submits that the trial court's order, denying appellant's motion for judgment of acquittal of all counts and all special circumstance findings, was erroneous, and resulted in an unconstitutional death judgment.

F. The trial court erred by denying the motion to dismiss the special circumstance finding.

Prior to sentencing, trial counsel filed a motion to dismiss the special circumstance findings based on the insufficiency of evidence to support the

jury's findings that Maciel conspired to kill, aided and abetted the killings, or intended the deaths of Gustavo Aguirre, Maria Moreno, and the two children. (CT1:3:841-842,862.) The trial court denied the motion, declaring that the jury's factual findings were "amply supported by substantial evidence." (CT1:3:863.)

For the reasons previously set forth in section B, C and D, above, the trial court's finding of "substantial evidence" lacks support in the record. Although the court could not have stricken the special circumstance findings in furtherance of justice pursuant to Section 1385, because the murders occurred after the effective date of Section 1385.1, the trial court could have, and should have, stricken the multiple murder special circumstance finding on the ground that there was *insufficient evidence* as a matter of law to prove that appellant intended the deaths of any victim other than Anthony Moreno.

G. If any murder count is reversed, or if this Court finds that insufficient evidence supports the jury's findings of four intentional murders, the death penalty must be reversed and the cause remanded to allow reconsideration of the death penalty.

Section 190.3 codifies the factors which a jury may consider in determining whether death or life imprisonment without parole should be imposed in a given case. In accordance with this provision, appellant's penalty phase jury was instructed that it "shall" consider and be guided by the presence of enumerated factors, including, inter alia, "the circumstances of the crime of which the defendant was convicted" and "any other circumstance which extenuates the gravity of the crime...." (Section 190.3(a)&(k).) The fact that any single murder was *not* reasonably foreseeable, or was completely unintended would clearly fall within the rubric of factors permissibly considered by the jury in selecting the penalty of death.

"The awesome severity of a sentence of death makes it qualitatively

different from all other sanctions." (*Satterwhite v. Texas* (1988) 486 U.S. 249, 262-263; citing *Lockett v. Ohio* (1978) 438 U.S. 586, 605 (plurality opinion).) For this reason, the U.S. Supreme Court "has emphasized the greater need for reliability in capital cases, and has required that 'capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding.'" (Id. at 263; citing *Strickland v. Washington* (1984) 466 U.S. 668, 704 (Brennan, J., concurring in part and dissenting in part).) This Court, too, has been mindful of the qualitative difference between the death penalty and any other sentence of imprisonment, however long, and the corresponding need for greater reliability in the determination that death is the appropriate punishment in a specific case." (*People v. Horton* (1995) 11 Cal.4th 1068, 1134.)

Allowing the prosecutor to *allege* more than one multiple murder special circumstance where multiple murders are joined for a capital trial is error. (*People v. Harris* (1984) 36 Cal.3d 36, 66-67.) This type of error is commonly found to be harmless on the theory that, in most cases, the jury is aware of the number of murders and cannot be misled regarding how to weigh the information unless the prosecutor exploits the error. (See, e.g., *People v. Harris, supra*; *People v. Sanders* (1995) 11 Cal.4th 475, 506, 562; *People v. Beardslee* (1991) 53 Cal.3d 68, 117; *People v. Gallego* (1990) 52 Cal.3d 115, 201; *People v. Miller* (1990) 50 Cal.3d 954, 1001; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1181-1182; *People v. Hernandez* (1988) 47 Cal.3d 315, 357; *People v. Allen* (1986) 42 Cal.3d 1222; *People v. Rodriguez* (1986) 42 Cal.3d 730, 787; *People v. Odle* (1988) 45 Cal.3d 386, 409, 421; *People v. Lucky* (1988) 45 Cal.3d 259, 300-301; *People v. Williams* (1988) 44 Cal.3d 1127, 1145-1146; *People v. Kimble* (1988) 44 Cal.3d 480, 504; cf. *People v. Crandell* (1988) 46 Cal.3d 833, 883-885.)

In appellant's case, the problem was not duplicate charging of multiple murder special circumstance allegations, but rather, factually unsupported findings by the jury (1) that the murders of Maria Maciel and the children were the natural, probable, and foreseeable consequence of the murders of Anthony Moreno and Gustavo Aguirre, or (2) that Maciel *intended* to cause the death of four of five victims. In contrast to the circumstances presented in cases involving excessive numbers of multiple murder special circumstance findings, the jury's erroneous factfinding in appellant's case dramatically increased the risk of an erroneous death judgment based on unproven facts. The Court can have no confidence that appellant's conviction and sentence were unaffected by the jury's consideration of what were alleged to be five intentional killings. The unsupported and duplicative homicide findings may have improperly swayed the verdict toward death.

Brown v. Sanders (2006) 126 S.Ct. 884, provides helpful analysis in a related context. In *Sanders*, the U.S. Supreme Court recently considered whether constitutional error occurs when a jury is allowed to consider invalid death penalty eligibility factors in imposing a sentence of death. The high court applies a different standard depending on whether the state is a weighing state, i.e., one in which only the aggravating factors permitted to be considered by the sentencer were the specified eligibility factors, or a non-weighing state, i.e., one which permits the sentencer to consider aggravating factors different from or in addition to the eligibility factors. (*Id.*, at 890.) In a weighing state, the so-called "eligibility factors" by definition identify distinct and particular aggravating features. If even one factor is invalid, the sentencer's consideration of the invalid eligibility factor necessarily skews the balancing of aggravators and mitigators, requiring reversal of the death sentence. (*Id.*, at 890; *Stringer v. Black* (1992) 503 U.S. 222, 232.)

In a non-weighing state, such as California, automatic skewing does not necessarily occur. Skewing does not occur, for example, if the eligibility factors are entirely different from the aggravating factors. *Sanders*, at 890. Nor does automatic skewing necessarily occur if the other aggravating factors added to the omnipresent "circumstances of the crime" factor allow the facts and circumstances relevant to the invalidated eligibility factor to be weighed in aggravation under a different rubric. (*Ibid.*) The consideration of an invalid eligibility factor amounts to constitutional error in a non-weighing state in two situations: (1) if the eligibility factor allows the jury to draw adverse inferences from conduct that is constitutionally protected, or attaches an "aggravating" label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, or to conduct that should militate in favor of a lesser sentence; or (2) if the jury's consideration of the invalidated eligibility factor allows it to hear evidence that it otherwise would not hear. (*Sanders*, at p. 891.)

What occurred in this case was comparable to what happens when an invalid eligibility factor is considered by a jury in a *weighing* state. The jury would necessarily have weighed into the death penalty calculus each and every killing wherein the jury found Maciel *intended* to cause the victim's death. Hence, whether this Court finds insufficient evidence to support the "intent" findings as to only one victim, or more, an unconstitutional "skewing" of the weighing process occurred as is described in *Brown v. Sanders*, requiring reversal of the death judgment. (126 S.Ct. at 890-891.)

An analogy can also be drawn to the situation in which a jury considering an invalid eligibility factor in a non-weighing state assigns weight to "totally irrelevant" evidence or conduct that "actually should militate in favor of a lesser penalty." (*Sanders*, at p. 891.) Appellant's jury – no doubt

based in part on inadmissible evidence – found that Maciel intended the deaths of four of five victims. If he intended the death of only one victim, such as Anthony Moreno for example, the fact that the one or more of the other deaths were unintentionally caused should have militated in favor of a lesser penalty. Accordingly, *Brown v. Sanders* strongly supports reversal of the penalty if any of the jury's findings of intentional murder are reversed.

A death sentence based on materially inaccurate information violates the Eighth and Fourteenth Amendments. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 587.) Accordingly, to meet the stringent standards imposed on capital sentencing proceedings by the Eighth and Fourteenth Amendments, as well parallel provisions of the California Constitution, Maciel must be granted a new penalty trial, to enable the jury to consider the appropriateness of imposing death, considering the lack of substantial evidence to support convictions on five first degree murder counts, and a factually unsupported jury finding that Maciel acted with the intent to produce the death of four of the five victims, including Maria Moreno and her five-year-old daughter, Laura.

II. THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION TO DISCHARGE RETAINED COUNSEL AND HAVE COUNSEL APPOINTED.

A. Introduction.

Maciel moved to discharge retained counsel Edward Esqueda on November 17, 1997, just over a month and a half before jury selection commenced. His dissatisfaction with Esqueda was piqued at this time, rather than sooner, because counsel had been preoccupied with other clients' trials. Although Maciel's trial was imminent, not much investigation appeared to have been undertaken in preparation for trial. Even before the motion was made, counsel's failure to take certain steps had occasionally been commented upon by the trial judge. Nevertheless, the court denied the motion, *applying an improper standard* based on *People v. Marsden, supra*, 2 Cal.3d 118, rather than the standard applicable when a defendant seeks to discharge *retained* counsel. (*People v. Ortiz* (1990) 51 Cal.3d 975.) This error alone entitles appellant to reversal of the judgment.

In addition, however, the trial court made findings – inapplicable under the *Ortiz* standard – that retained counsel was not incompetent, that there had been no irremediable breakdown in the attorney-client relationship. While this Court is not in a position on direct appeal to evaluate the deficiencies in trial counsel's performance or the likely impact of those deficiencies on the outcome of appellant's trial,[19] appellant has discussed at some length the particular failings of counsel that led Maciel to complain in order to show: (1) that the trial court failed to conduct an adequate inquiry into Mr. Esqueda's neglect of the case before declaring counsel competent; and (2) the trial

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[19] An ineffective assistance of counsel claim pursuant to *Strickland v. Washington* (1984) 466 U.S. 668 will have to await the appointment of habeas corpus counsel and the filing of a petition for a writ of habeas corpus.

judge's failure to investigate counsel's incompetency, as well as his reliance on the wrong legal standard cannot be deemed harmless.

B. Procedural background:

Maciel was indicted for capital murder on December 12, 1995, and was initially represented by court-appointed counsel, Joseph Borges; Esqueda entered his first appearance as retained counsel on February 14, 1996. (SCT1:1:110,126; SCT 1:6:982-1194; CT1:103-109A, 136; RT1:164-166.) Esqueda replaced Erick L. Larsh, another retained attorney who had substituted in for Borges only two weeks earlier. At the time of withdrawal, Larsh advised the court that Maciel was "indigent at this point," but otherwise declined to elaborate regarding the reasons for his withdrawal, other than to say he had a "conflict of interest." (RT1:147.)

Maciel was the last of the six defendants to be tried. On October 16, 1997, with the case set for trial on October 20th, Esqueda filed a motion to continue Maciel's trial, declaring that he was engaged in another client's death penalty jury trial. (SCT1:8:1591.) Maciel's trial was continued to November 17th. (RT49:7452-7455,7464-7465.)

On November 17, 1997, Esqueda filed another motion to continue this case, declaring that he had started jury selection in another client's case. (SCT1:8:1594A-D,1609; RT49:7468.) Contemporaneously, Maciel filed a sealed *ex parte* motion seeking to dismiss *retained* counsel and have substitute counsel appointed. (SCT1:8:1595-1608.) Maciel briefly appeared in court, and asked to fire Esqueda on the ground that he had not conducted a sufficient investigation, and was not adequately prepared to try his case. (RT49:7466.) The court denied the motion to discharge counsel, but granted Esqueda's motion for a continuance. (RT49:7470-7472,7475.) Trial was set for December 12, 1997, and Maciel was admonished that he could renew his

motion to replace retained counsel on that date and present his reasons for wanting to discharge counsel at an *in camera* hearing. (RT49:7868-7472.)

Maciel informed the court that, in order to prepare for the *in camera* hearing, he needed transcripts of statements of witnesses in order to explain his grounds for seeking to discharge counsel; the court's protective orders prohibited counsel from giving Maciel the information he needed. (RT49:7477.) The court disregarded the request for transcripts and instructed Maciel to tell the court if he felt there were matters he should look into, and to notify his counsel to bring those matters to the attention of the court. (RT49:7478.)

On December 12, 1997, Maciel made a brief court appearance with Esqueda, who informed the court he was still engaged in trial. (RT50-1:7489.) Esqueda acknowledged having "very little contact" with Maciel because he had been engaged continuously in other trials since September. (RT50-1:7490.) Counsel asked for a new trial date of December 29, 1997, to allow him time to "get up to speed" on this case. (RT50-1:7490.)

The court convened outside the presence of the prosecutor for a hearing on the motion to discharge retained counsel. Following the hearing, the motion was denied. The court found the motion to discharge counsel "on the eve...of a trial date" was "not the most timely request." (RT50-1:7550-7551.) The court acknowledged that some of Maciel's requests for investigation had merit, and "made pretty good sense." (RT50-1:7552.)

The court found that Esqueda had not "abandoned" Maciel, and that he was not "incompetent." (RT50-1:7553.) The court also found that there had not been a breakdown of the attorney-client relationship to the point where there was an "actual conflict of interest," where Maciel and his lawyer were going to "kill each other." (RT50-1:7553.) The court observed that there was

"obviously a little hostility from time to time," but opined that lawyer and client could work with one another if they tried. (RT50-1:7553.) Upon denying the motion, the court set the matter for trial on December 29th. (RT50-1:7555.) Jury selection actually commenced on January 5, 1998. (RT51:7602.)

C. Arguments:

1. The trial court applied the wrong legal standard in ruling on appellant's motion to discharge retained counsel.

The right of a criminal defendant to counsel and to present a defense are among the most sacred and sensitive of our constitutional rights (*People v. Ortiz, supra*, 51 Cal.3d 975, 982.) "The right of a nonindigent criminal defendant to discharge his *retained* attorney, *with or without cause*, has long been recognized in this state." (*Id.*, at 983; emphasis added; Code of Civil Procedure section 284(2).) The right to discharge retained counsel "is based on '"necessity in view both of the delicate and confidential nature of the relation between [attorney and client], and of the evil engendered by friction or distrust."'" (*Id.*, at 983; internal citations omitted.) A relationship of trust and confidence is especially essential when an attorney is defending his client's life. (*Ibid.*; *Smith v. Superior Court* (1968) 68 Cal.2d 547, 561.)

The right of an indigent defendant to discharge retained counsel is coequal with the right of a nonindigent defendant to do so. (*People v. Ortiz, supra*, 51 Cal.3d at 984.) If an indigent defendant's motion for court-appointed counsel is denied, "he must choose between proceeding with no legal assistance or continuing with a retained attorney reluctantly serving on a *pro bono* basis." (*Id.*, at pp. 984-985.) Accordingly, this Court applies the

same rules when an indigent[20] defendant seeks to replace retained counsel with court-appointed counsel, as it does when a defendant just wants to hire a different attorney. (*Ibid.*)

A *Marsden* hearing is not the appropriate vehicle to consider a defendant's complaints against retained counsel. (*People v. Hernandez* (2006) 139 Cal.App.4th 101, 108; *People v. Lara* (2001) 86 Cal.App.4th 139, 155.) To discharge retained rather than court-appointed counsel, a defendant has no burden to prove that counsel is providing inadequate representation, or that client and counsel are embroiled in irreconcilable conflict. (*People v. Ortiz, supra*, 51 Cal.3d at 984.) When a trial court imposes such a burden, and denies a defendant the right to counsel of choice, reversal is automatic without any showing of prejudice. (*Id.*, at 988; *People v. Hernandez, supra* 139 Cal.App.4th at 105-109.) The error is structural, requiring automatic reversal. (*United States v. Gonzalez-Lopez* (2006) 126 S.Ct. 2557, 2560-2566.)

The record plainly shows that the trial court erroneously imposed a burden on Maciel pursuant to the *Marsden* case to prove that his attorney was incompetent, and that the attorney-client relationship was irreparably damaged. The court referred to the proceeding as a *Marsden* motion (RT50-1:7554), and made the kind of findings demanded by *Marsden*. (RT50-1:7553.) Hence, the wrong standard was applied in ruling on the motion. Maciel is entitled to automatic reversal on this basis alone.

2. Application of the wrong standard was not "invited."

Maciel's pleadings in support of his motion for an *in camera* hearing

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[20] The trial court never appeared to question Maciel's eligibility for appointed counsel. It appears that Maciel was sufficiently indigent in December 1997 to qualify for court-appointed counsel. Initially, Maciel was represented by Joseph Borges, who was court-appointed. He apparently qualified for the APD when an unrelated indictment was filed in April of 1997. (RT28:3905.)

include a citation to *People v. Marsden, supra*, 2 Cal.3d 118. (SCT1:8:1598.) However, Maciel cannot be accused of inviting the court to apply the wrong standard. Maciel had no legal training and the court was apprised of the fact that a "fella that just passed the bar," not a fully licensed lawyer, was advising Maciel on his motion. (RT50-1:7552.) The court was also well aware that Esqueda was *retained*, not appointed. (SCT1L8:1608.) The trial court had "the ultimate duty to apply the correct law, and the court's duty can only be negated in that 'special situation' in which defense counsel deliberately or expressly, as a matter of trial tactics, caused the error." (*People v. Lara, supra*, 86 Cal.App.4th at 164.) Clearly, the error was not "invited" for tactical reasons.

3. The court did not find that discharge would cause "significant prejudice to appellant, or "disruption of the orderly processes of justice."

A trial court may only deny a motion to discharge retained counsel "if discharge will result in 'significant prejudice' to the defendant [citation], or if it is not timely, i.e., if it will result in 'disruption of the orderly processes of justice' [citations]." (*People v. Ortiz, supra*, 51 Cal.3d at 983.) In this case, the court speculated that some of Maciel's concerns about counsel "must have been surfacing in [Maciel's] mind prior to 2 or 3 weeks ago," yet he had brought them to the attention of the court "right on the eve, literally, of a trial date." The court also voiced concern that it would take new counsel a minimum of least six months to prepare, and that the longer the case was delayed, the more difficult it would be to get frightened witnesses to appear for trial. (RT50-1:7549-7551.) It is clear from the record, however, that the timing of Maciel's motion was, in the court's own words, "not necessarily the first and foremost consideration." (RT50-1:7550.)

After the hearing, Judge Horan mildly characterized the motion as "not the most timely request" to discharge counsel he had ever received. (RT50-1:7551.) Given that the trial was going to be delayed anyway, because counsel was engaged, the court placed greater emphasis on its findings that counsel was not incompetent, and that the relationship between Maciel and Esqueda had not completely broken down. (RT50-1:7550,7552-7554.)

The judge made no inquiry into the availability of court-appointed counsel; he could have inquired of several other counsel who were representing Maciel in other pending matters.[21] The court obtained no estimates from anyone other than Esqueda regarding how long it would take to prepare for trial. Under such circumstances, the court's articulated concern about the poor timing of the motion was not synonymous with a finding that discharging counsel would cause "disruption of the orderly processes of justice."

4. The trial court's finding that the motion was "not the most timely" lacks support in the record.

Assuming *arguendo* that the trial court's implied finding of untimeliness might be relied upon to affirm the denial of the *Ortiz* motion, an untimeliness finding is "not fairly supported by the record." (*Bland v. California Department of Corrections* (9th Cir. 1994) 20 F.3d 1469; overruled on other grounds in *Schell v. Witek* (9th Cir. 2000) 218 F.3d 1017, 1025-1025.) Maciel filed his *Ortiz* motion on November 17, 1997, while Esqueda was in trial elsewhere. (SCT1:8:1594A-D,1609; RT49:7468.) The court granted counsel's request for a continuance, but summarily denied the motion,

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[21] Notably, Maciel was being represented by several other counsel in unrelated cases in which indictments were filed after the indictment in this case, including Geoffrey Pope, Joel Garson and the APD. (CT1:1B-61; CT2:541; RT26:543-550; RT1:178; RT16:2291; RT28:3905.)

choosing to defer a hearing for nearly a month. On December 12th, the date of the *in camera* hearing, Esqueda was still engaged in trial. He frankly acknowledged that he had been engaged continuously in other clients' trials since September, and would need additional time to prepare. (RT50-1:7490.) Trial was continued again, to December 29th. (RT49:7562.) Jury selection actually began on January 5, 1998, *49 days* after Maciel made his motion to discharge. (RT51:7577-7744.)

In *Bland v. California Department of Corrections, supra*, the defendant made a motion to discharge retained counsel, which was denied. Trial was then continued several more times. (*Id.*, at 1476.) The Ninth Circuit Court of Appeals held that the motion to discharge was timely.

Comparable circumstances are presented here. At the time of the motion, a continuance was already inevitable because counsel was engaged in another trial. A somewhat longer delay to allow a different attorney to prepare would have caused little *more* inconvenience for trial participants than the postponement to allow Esqueda to finish his other trial. Maciel's motion was just as timely as the defendant's motion in *Bland*.

People v. Lara, supra, is even more supportive of appellant's position. In *Lara*, a defendant made a motion to fire retained counsel on the day scheduled for trial. Previously, the trial court had "repeatedly granted continuances on motions of both the prosecutor and defense counsel...." On the trial date, the attorney admitted he had not yet interviewed the witnesses. The trial judge denied the motion to discharge as untimely, and found that counsel would have sufficient time to prepare during jury selection. The Court of Appeal held that this was error, explaining:

> "...there is no evidence to suggest that appellant raised such complaints in an effort to delay the proceedings. The record strongly suggests that Mr. Roberts had not consulted with

> appellant during the numerous continuances, and appellant was unaware of the nature of Mr. Robert's preparation until the moment the trial was finally set to begin. Appellant was faced with the start of a trial in which he faced a possible third strike sentence, and he was clearly upset that counsel did not seem prepared. Under the circumstances, appellant informed the court of his concerns at the first possible opportunity."

(*People v. Lara, supra*, 86 Cal.App.4th at pp. 162-163; *People v. Stevens* (1984) 156 Cal.App.3d 1119, 1127-1128.)

As in *Lara*, numerous continuances of Maciel's trial had been granted at the request of both prosecution and defense counsel for the six defendants.[22] Many continuances were granted for additional defense or prosecution

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[22] See, RT1:165-166; CT1:136 [9/3/96 trial date established]; CT2:473,476; RT3:586-595,600-6 [Maciel & Ortiz cases continued to 10/17/96, to follow trials of Valdez, Palma, Logan and Torres]; CT2:483-485,600-11; RT4:615,641-642,645-650 [Maciel & Ortiz cases continued to 10/28/96; court & DA engaged in Palma-Valdez trial]; CT2:487; RT4:673 [Maciel, Logan, Torres, & Ortiz cases continued to 11/5/96]; CT2:489,490,493; RT5:687,701,767 [Maciel, Logan, Torres, & Ortiz cases continued to 12/16/96]; CT2:502; RT6:813 [Maciel, Logan, Torres, & Ortiz cases continued to 1/6/97]; CT2:503 [Challenge for cause filed by Maciel against Judge Horan]; RT7:847 [Maciel, Logan, Torres & Ortiz cases trailed to 1/10/97]; CT2:516 [Challenge for cause denied]; CT2:525; RT8:852-856 [Maciel, Logan, Torres & Ortiz cases trailed to 1/15/97; Esqueda engaged in another trial]; CT2:529: RT8:857-892 [Esqueda engaged in trial; Torres case continued to 1/23/97; Ortiz & Logan cases continued to 1/28/97]; CT2:530; RT8:893-905 [Maciel's trial continued on DA's motion to 2/17/97]; CT2:531; RT16:2290-2304 [Maciel's trial continued to March 6, 1997, because of pending motion to consolidate BA108995 with BA109288]; CT2:541; RT26:3863-3889 [BA108995 consolidated with BA109288; consolidated cases continued to 4/10/97 for further discovery on anticipated new indictment]; CT2:542; RT28:3902-3916 [consolidated cases continued to 5/5/97 for further discovery on new indictment]; CT2:551; RT40-1:6081-6082 [consolidated cases trailed behind Torres' trial to 5/9/97]; CT2:596: RT42:6583-6605 [consolidated cases continued for additional defense discovery to 4/4/97]; CT2:598; RT45:7165 [BA109288 dismissed on DA's motion]; RT47:7428-7435 [BA108995 continued for additional defense discovery re new indictment to 10/20/97]; RT49:7452-7465 [case continued to 11/17/97 because Esqueda is engaged in another trial].

discovery, to await the conclusion of codefendants' trials, or to obtain rulings on motions, or joinder and severance issues. A number of delays had occurred because subsequent indictments were filed against Maciel, which the prosecutor wished to consolidate with the capital murder case, and/or use against Maciel at the guilt or penalty phase trial.[23] Each new indictment created a need for additional discovery. Several lengthy postponements occurred because Esqueda had become engaged in other clients' trials.

As in *Lara*, Maciel's motion was certainly not made for the purpose of delay. To the contrary, Maciel was disturbed about delays caused by counsel's engagement in other trials, and inattention to his case. (RT50-1:7542; SCT1:8:1603,¶11.)

Although Judge Horan should have been more alert to the dubious thoroughness of counsel's pretrial preparations (see Subsection 7, *post*), like *Lara*, Maciel had no reason, and more importantly, no *opportunity* to move to discharge counsel any sooner than he did. When Maciel asked Esqueda about investigative matters, he was always given assurances. (RT49:7474.) As trial become more imminent, and counsel was perpetually engaged with other matters, Maciel's fears understandably grew. He tried to solve the problem by personally hiring Isaac Guillen as investigator. Esqueda appeared to be acquiescing, and using Guillen for investigation until mid-October, when Esqueda evidently advised jail personnel to "go ahead" and arrest Guillen when he tried to visit Maciel in jail. (SCT1:8:1606-1607; see Subsection 5,b, *post*.)

At a scheduled court appearance on October 17, 1997, shortly after

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[23] If the court or prosecutors were so concerned about the effect of the delays on frightened witnesses, these parties could have made their concerns a priority by forgoing attempts at consolidation, going forward with this trial.

Guillen's arrest, Maciel had no opportunity to voice his growing concerns to the court. Esqueda did not appear, having miscalendared the pretrial motions hearing. Maciel was never brought into the courtroom. (SCT1:8:1592-1593.)

On October 20, 1997, Maciel made an appearance without counsel, but he was obviously not yet aware of the role Esqueda had played in Guillen's arrest. (SCT1:8:1606-1607; see, Subsection 5,b, *post.*) Maciel asked permission to have Guillen approach him, to tell him what had occurred at the jail, and why sheriffs were denying him visitation. (RT49:7452-7459.) Judge Horan denied this request, and rescinded his previous order appointing Guillen as Maciel's investigator. The court instructed Maciel to have his attorney "put in a motion." (RT49:7462.)

On October 21, 1997, Esqueda appeared briefly in court *without* Maciel, offering no opportunity for Maciel to address the court. (SCT1:8:1594.) The next scheduled court date was November 17, 1997, the day the motion to discharge counsel was filed. (SCTI:8:1609; RT49:7466-7487.) The court refused to hold a hearing on the motion, and advised Maciel he could be heard on the continued trial date – December 12, 1997. Under the circumstances, the court's implied finding of untimeliness is belied by the record. The motion was only made on the "eve" of trial because the court refused to hold a timely hearing. Maciel's motion to discharge counsel was made sufficiently in advance of trial that its denial was *per se* reversible error. (*People v. Ortiz, supra,* 51 Cal.3d at 988.)

5. The trial court erred by ignoring glaring deficiencies in counsel's performance and by failing to genuinely examine most of Maciel's claims.

a. Denial of discovery violated due process.

Among other factors that deprived Maciel of a fair hearing, he was

denied access to the information essential to fully articulate the nature of trial counsel's investigative shortfalls. A standing protective order barred all counsel from sharing with the defendants grand jury transcripts, prior trial transcripts, investigative reports, witness statements, and generally anything that ran the risk of disclosing the identities of prosecution witnesses. (CT1:96, 128,130, 143, 174, 185, 188; RT1:130-140, 144-149; RT2:278-315; RT26:38673893.) (See, Argument IV, *post.*) With good reason, Maciel complained that he could not make a proper showing because of the denial of any discovery. The court took no action to remedy the situation. (RT49:7477-7478.) Instead, the court instructed Maciel to work through the attorney he was trying to discharge. (RT49:7478.)

Maciel was thus unfairly handicapped in his efforts to explain to the court what necessary investigation had not been done. Maciel was forced to prepare his motion to discharge without access to the discovery materials that were in counsel's possession. His position was no better than that of a defendant denied the tools necessary to confront and cross-examine, or to effectively impeach the witnesses against him at trial. (See, *United States v. Abel* (1984) 469 U.S. 45, 50; *Davis v. Alaska* (1974) 415 U.S. 308, 316; *Napue v. Illinois* (1959) 360 U.S. 264, 269; *People v. Memro* (1985) 38 Cal.3d 658, 677.) Maciel was given an opportunity to "confront" counsel at an *in camera* hearing, but he was denied access to much of the information that could have shed light on the issues to be determined by the judge. (*People v. Memro, supra,* at 677.)

Similarly, when a defendant's presence at a court proceeding will be useful, or of benefit to him, the lack of his presence denies him due process of law. (*People v. Jackson* (1980) 28 Cal.3d 264, 309-310; *People v. Harris* (1981) 28 Cal.3d 935, 955.) A multiplicity of constitutional rights may also

be violated when a defendant is denied the right to the services of an interpreter at trial. (*People v. Rodriguez* (1986) 42 Cal.3d 1005; *People v. Menchaca* (1983) 146 Cal.App.3d 1019, 1024; *Negron v. State of New York* (E.D.N.Y. 1970) 310 F.Supp. 1304, 1308, n.3 (affd. (2d. Cir. 1970) 434 F.2d 386).) The denial of discovery in the context of an *Ortiz* motion is analogous. Maciel was improperly burdened with the task of showing that counsel was incompetent, and denied the information necessary to make his case.

What resulted was a denial of due process at the *in camera* hearing, as well as a denial of Sixth Amendment counsel rights. (U.S. Const., Amend. XIV; Cal. Const., Art. I, § 7, 14, 15.) The error was not harmless. Denial of discovery was akin to a trial court denying a defendant's *Marsden* motion without any hearing; reversal is automatic in such cases. (*People v. Marsden, supra*, 2 Cal.3d at 123-124; *Hudson v. Rushen* (9th Cir. 1982) 686 F.2d 826, 829.) In any event, the record establishes prejudice, regardless of whether Maciel had the burden to show it. The denial of discovery deprived Maciel of the possibility of presenting additional evidence of counsel's ineptitude; hence, the trial court did not make as informed a determination as it might have if discovery had been granted, either to Maciel directly, or to someone else appointed to examine evidence subject to protective orders on his behalf. Under such circumstances, prejudice is established. (*People v. Memro, supra*, 38 Cal.3d at 684.)

b. The exclusion of appellant's "investigator," Mr. Guillen, deprived appellant of a fair hearing.

At the time of appellant's trial, Isaac Guillen was a UCLA law school graduate who was awaiting his California bar examination results. (SCT1:8:1604.) On August 27, 1997, with a trial date of October 20, 1997, looming (RT47:7428-7435), Maciel had personally hired Guillen to assist with

the investigation of his case. (SCT1:8:1604.) Guillen had no experience investigating a death penalty case. Acting as both investigator and law clerk, Guillen interviewed some witnesses and drafted several motions for appellant's case. He was concerned because his work was not being reviewed and he was not getting the guidance he needed from Mr. Esqueda. (SCT1:8:1606.)

On October 6, 1997, the court granted motion by defense counsel to grant Guillen the right to visit Maciel in jail as his investigator. (See, RT49:7448-7450.) On October 8, 1997, Guillen tried to visit Maciel in jail, but he was denied access. When he asked to speak with a supervisor, Guillen was arrested and charged with a violation of section 148, a charge later rejected by the prosecution. (SCT1:8:1606.) On October 13, 1997, Guillen mentioned his arrest at the jail, but Esqueda denied knowing any of the details. (SCT1:8:1606.) A few days later, Guillen learned that when jail personnel called Esqueda to verify his status as investigator, Esqueda told jail personnel that Guillen worked for Maciel but not for him. (SCT1:8:1606.)

On October 20, 1997, Maciel appeared in court without counsel, who was engaged in another trial. The court refused to allow Maciel to speak with Guillen, and rescinded the order allowing Guillen to visit Maciel in jail. (RT49:7452-7462.)

On November 17, 1997, the day Maciel filed his motion to discharge counsel, he demanded a full hearing regarding Guillen's arrest. (RT49:7479.) The court refused to hold a hearing. (RT49:7480.) On December 12th, Maciel requested that Guillen be present at the *in camera* hearing. The court denied the request as not "appropriate" and opined that it would "constitute probably a waiver." (RT50-1:7496.)

The court had no legitimate reason to exclude Guillen from the *in*

camera hearing. Attorney-client privilege (Evidence Code section 954) protects confidences related to a person's present or former counsel, as well as to disclosures the defendant makes to other persons, such as mental health experts and investigators, if "disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer....was consulted." (Evidence Code section 912(d); *People v. Meredith* (1981) 29 Cal.3d 682, 685-689.) For all intents and purposes, Guillen was acting as a law clerk, paralegal and investigator. Paralegals are expressly subject to the same ethical obligation to maintain inviolate the confidences of the attorney's clients. (Business & Professions Code section 6453.) Client communications to law clerks would also fall under the rubric of the privilege. (See, e.g., *Richards v. Lennox Industries* (Ala. 1990) 574 So.2d 736, 739-741; *Estate of Divine v. Giancola* (Ct. App. Ill. 1994) 635 N.E.2d 581, 587-588.)

Guillen was hired by Maciel – with counsel's apparent knowledge and consent – to assist in the drafting of motions, and belated investigation of the case. At Esqueda's request, Guillen had also been authorized by the court to conduct legal visits in jail, a privilege ordinarily reserved to attorneys and their agents. Even though the court rescinded Guillen's privilege to conduct legal visits after the arrest incident, all of Maciel's communications with Guillen were for purposes of obtaining legal advice, and reasonably necessary to accomplish the representation for which Esqueda had been hired.

Consequently, *the court had no legal basis upon which to advise Maciel that his privileged communications would be compromised by allowing Guillen to be present at the hearing.* The confidentiality of attorney-client communications to both Esqueda and Guillen would have been adequately protected by the exclusion of the district attorney from the *in camera* hearing. (*People v. Dennis* (1986) 177 Cal.App.3d 863, 871.) If the judge were really

concerned about a waiver of confidentiality, he could have invited Guillen *in camera* for the limited purpose of giving testimony, and excluded him for the remainder of the proceedings.

At the *in camera* hearing, Esqueda conspicuously offered no explanation for Guillen's arrest at the jail, and either disregarded, or was ignorant of, the fact that the trial judge had vacated the order allowing Guillen conduct legal visits of Maciel in jail. He repeatedly suggested that Guillen was performing all investigation that Maciel wanted done. (RT50-1:7503-7504 [taking photos]; RT50-1:7524-7525 [obtaining records]; RT50-1:7544 [Maciel has "hired Guillen to do a lot of these things."].) Despite the peculiar circumstances attending appellant's "hiring" of an unlicensed law graduate to perform investigation, the court never directly asked Mr. Esqueda the obvious question – was a proper investigation of the case being hindered by counsel's, or Maciel's, lack of sufficient funds. (RT49:7480-7482.)[24]

It was the responsibility of the court to insure that Maciel was receiving the necessary tools for an adequate defense. (*Ross v. Moffitt* (1974) 417 U.S. 600, 616; *Britt v. North Carolina* (1971) 404 U.S. 226, 227; *Ake v. Oklahoma* (1985) 470 U.S. 68, 80.) The court also had a constitutional imperative to assure that Maciel was "afforded a bona fide and fair adversary adjudication." (*People v. McKenzie* (1983) 34 Cal.3d 616, 626, limited on unrelated grounds

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[24] At the *in camera* hearing, counsel was never pressed to respond to allegations that he had been paid a total of $35,000 to handle the entire case, which was supposed to cover both legal representation *and* the costs of hiring an investigator. (SCT1:8:1600,1602,¶g.) Fixed fee arrangements are considered improper by the ABA because they create "an unacceptable risk that counsel will limit the amount of time invested in the representation in order to maximize the return on the fixed fee." (See, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,* Guideline 9.1, B (2); Commentary, 54.)

in *People v. Crayton* (2002) 34 Cal.3d 616.) "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused." (*Glasser v. United States* (1942) 315 U.S. 60, 71.) "[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and ... judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." (*McMann v. Richardson* (1970) 397 U.S. 759, 771; *Estelle v. Williams* (1975) 425 U.S. 501, 534.)

The court knew that counsel was possibly laboring under a severe conflict of interest, brought about by his engagement in an extremely complicated death penalty case for which he had arguably been paid far too little, given the nature of the case and its duration. There was ample cause to suspect that counsel was engaging in less than thorough preparation. (See, Subsection 7, *post.*) The trial court had a duty to inquire whether the situation was compromising counsel's ability to be a vigorous advocate. (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 347; *People v. Seaton* (2001) 26 Cal.4th 598, 642: *People v. Roldan* (2005) 35 Cal.4th 646, 677.) Instead, the court *failed to conduct a meaningful inquiry* into the obviously impaired relationship between Maciel, Guillen and Esqueda, and the circumstances that had led Maciel to feel he needed to hire an inexperienced law school graduate, whom counsel obviously did not like, to investigate his case.

6. The trial court's finding that there had been no irremediable breakdown of the attorney-client relationship is unsupported.

As argued above, the trial judge *refused to conduct a meaningful inquiry* into Esqueda's failure to hire a licensed investigator, his

unprofessional treatment of Guillen, and the reasons why Maciel felt compelled to fund his own investigator. Absent such an inquiry, the record leads to the inescapable conclusion that the attorney-client relationship had irretrievably broken down. Esqueda had repeatedly given hollow assurances regarding his preparedness, and willingness to work with Guillen, while at the same time subverting any real possibility that Guillen could do the necessary work to prepare the case. By the time of the motion to discharge counsel, Maciel would have had no reason to believe Esqueda had any real intention of cooperating with Guillen, or doing an adequate investigation of the case himself. Accordingly, the court's finding that there had been no breakdown in the attorney-client relationship to the point of creating an actual conflict of interest (see, *People v. Ortiz, supra*, 51 Cal.3d at 985) is contradicted by the record. (RT50-1:7553.)

7. The court failed to conduct an adequate hearing to determine whether there was any merit to appellant's complaints about counsel.[25]

a. The court failed to conduct an adequate inquiry into most of appellant's complaints about counsel's lack of guilt phase investigation.

(1) The court failed to adequately inquire after counsel admitted he had not investigated evidence with which to impeach witness #15.

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[25] As was previously stated, this argument is not intended to raise a claim of denial of effective assistance of counsel on the face of the appellate record. As this Court has acknowledged, appellant's ineffective assistance of counsel claims are more appropriately reserved for a petition for writ of habeas corpus. In that proceeding, if necessary, appellant can more fully develop the guilt and penalty phase prejudice caused by counsel's many errors and omissions. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1012.) The point here is that the trial court *did not conduct an adequate investigation* to draw reliable conclusions regarding trial counsel's competency.

Witness #15, the brother of deceased victim Anthony Moreno, was a key witness at the trial. (See, Argument I, B, a; RT56:8728-8730,8735.) Maciel had several complaints regarding counsel's failure to investigate witness #15. Maciel anticipated that witness #15 would testify he had lived next door to Raymond Shyrock for a time, and had often seen Maciel with Shyrock. (SCT1:8:1602; RT56:8719.) According to Maciel, witness #15 had never lived next door to Shyrock, but rather lived on different floors, an at the opposite end of the same apartment complex. Furthermore, according to Maciel, Shyrock had moved from that apartment complex before Witness #15 was released from prison. (SCT1:8:1602; RT50-1:7503.) Maciel accused Esqueda of refusing to take photographs of the building, or contact the landlord, or subpoena any records to prove this. (SCT1:8:1602; RT50-1:7503.)

Except for the taking of some photographs, Esqueda *admitted* that the investigation of the location of Witness #15's prior residence had not been done. Moreover, he *expressed doubt* whether he could track down the owner of the building, or a copy of a rental agreement. (RT50-1:7506.) Esqueda said he had previously planned to call Shyrock as a defense witness, but Shyrock was now in custody in Marion, Illinois, *beyond the jurisdiction of the court.* (RT50-1:7505.) Esqueda said he had also planned to call Shyrock's wife as a defense witness; however, he acknowledged he *no longer knew her whereabouts*. (RT50-1:7506.)[26]

Maciel's second complaint against Esqueda regarded his refusal to pursue evidence through discovery, that witness #15 had received a *quid pro*

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[26] In fact, the names of Shyrock and his wife had appeared on the defense's list of "percipient" witnesses. At that time, April 10, 1997, counsel had only interviewed most of his "alibi" witnesses. (RT28:3911-3913.)

quo for his testimony. At the *in camera* hearing, Maciel informed the court that Witness #15 had testified in the prior Torres trial that the prosecutor had promised to "help him out" if he testified against the defendants; yet the prosecutor was, denying that any deals were made. (RT50-1:7526.) Esqueda suggested that discovery was unnecessary, that the matter could be handled on cross-examination. (RT50-1:7527.)

An attorney cannot just impeach a witness by asking factually unfounded questions that intentionally create "through innuendo that which cannot be established by proof." (See, *People v. Ramos* (1997) 15 Cal.4th 1133, 1173-1174; *People v. Steele* (2000) 83 Cal.App.4th 212, 223.) One must have a good faith belief, based on investigation, that impeachment is based on actual documents, events or facts. (*Ibid.*) Furthermore, impeachment evidence "can make the difference between conviction and acquittal." (*Napue v. Illinois, supra*, 360 U.S. at 269; *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 51.) Aside from whether a discovery motion would have yielded evidence to prove the existence of a "deal," counsel's assumption that it would suffice to "impeach" Witness #15 through cross-examination bespeaks a lack of appreciation for the value of impeachment *evidence*. Given counsel's inadequate explanation, a more probing inquiry was warranted into whether counsel was conducting an adequate investigation of the case.

(2) The court failed to adequately inquire when counsel admitted he had not investigated evidence with which to impeach witness #14.

At trial, witness #14 provided important testimony from which the jury may have inferred that Maciel was the mastermind for the murders. (See, Argument I, B, b.) Witness #14 testified that Maciel left his son's baptismal party on the night of the murders and met briefly with Palma, one of the

shooters. (RT57:8996-8990.) Maciel voiced two main complaints about Esqueda's lack of investigation of witness #14.

Sometime prior to trial, Maciel asked Esqueda to subpoena some accident records from the Walnut Sheriff's Department, which he asserted would prove that witness #14 was lying. According to Maciel, these records would show that the witness had crashed, "totaled," his black [Nissan] Stanza several days prior to the murders; hence, he could not have driven Maciel from the party to the apartment in his car. According to Maciel, witness #14 had testified that he drove his black Stanza at the Torres trial.[27] Esqueda's failure to request these records was another reason Maciel wanted to discharge him. (SCT1:8:1601; RT50-1:7523-7526.)

When confronted with this omission at the *in camera* hearing, Esqueda turned to Maciel and asked whether Guillen had yet "gotten to that." Maciel replied, "No. He can't get nothing without a subpoena." (RT50-1:7525.) This exchange occurred weeks after the court had rescinded its authorization for Guillen to act as investigator. Yet the judge did not challenge Esqueda's disingenuous suggestion that Guillen was responsible for investigating the matter. Under the circumstances, *at a minimum* the court had a duty to inquire further regarding who was conducting an investigation on appellant's behalf.

Witness #14 had previously testified that he went to work at the MTA earlier on the day of the murders, left work and noon, and then encountered Maciel. Maciel felt certain the witness was lying about this, and he wanted Esqueda to subpoena the witness' work records. Esqueda had not yet done so, although trial was imminent. (SCT1:8:1602; RT50-1:7522-7524.) Confronted

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[27] The court seemed to vaguely recall something about this testimony. (RT50-1:7525.) The court denied appellate counsel a copy of the Torres' record during record correction. At Maciel's trial, witness #14 testified that he was using his company car, a Lumina, owned by MTA. (RT57:9002-9003.)

with this allegation at the *in camera* hearing, Esqueda *admitted* he had not investigated, and questioned the value of such evidence: "There are work records that say he wasn't at work that day. How is that going to move the ball one way or the other..." (RT50-1:7524.)

Contrary to counsel's opinion, impeaching the credibility of witness #14 would clearly have "moved the ball" in Maciel's favor. Given the other circumstances known to the court, further investigation into the reasons for the lack of investigation was warranted.

(3) The court failed to adequately inquire into the reasons for counsel's failure to file a *Pitchess* motion seeking citizen complaints of prior acts of dishonesty by investigating officers.

In support of his motion to discharge, Maciel complained that Esqueda was refusing to file a "Pitchess" motion, even though Maciel had received information that several investigating officers had lied in their reports. (SCT1:8:1601.) Maciel also wanted counsel to pursue records proving that two investigators, Davis and Laurie, had lied to get a murder conviction in another case. (RT50-1:7513-7519.)

The request for a "Pitchess" motion in this context can be generally understood as a request for disclosure of prior citizen complaints against the investigating officers for making false arrests, falsifying police reports, planting evidence, or engaging in other forms of dishonest conduct. (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1017; see, Evidence Code section 1043, 1045; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.)

Esqueda discounted the utility of making a *Pitchess* motion. He asserted that the motion was unnecessary because credibility issues were "best addressed before the jury," through impeachment with prior inconsistent

statements and jury instructions telling the jury how to judge credibility. (RT50-1:7515.)[28] This amounted to no explanation at all. ABA Guidelines require counsel to "investigate all sources of possible impeachment of defense and prosecution witnesses." (Guideline 10.7, Commentary, p. 79.) Death penalty defense counsel are not free to just assume "that investigation would be futile." (Guideline 10.7, Commentary, p. 80.) No reasonable lawyer would forego examining prior citizen complaints alleging serious misconduct by a material police witness, assuming he could "do as well" by cross-examining the witness on the stand. (Cf. *Rompilla v. Beard* (2005) 545 U.S. 374, 125 S.Ct. 2456, 2467.)

Yet the trial court conducted *no meaningful inquiry at all* into this instance of alleged neglect. The court expressed skepticism that an investigator would admit fabricating testimony. (RT50-1:7522.) In addition, the court *excused* counsel's inaction by suggesting that a *Pitchess* motion could only be used to get prior excessive force complaints in a case in which the defendant was charged with battery on a police officer, and intended to assert self defense. (RT50-1:7514.) *The court misstated the law.* Discovery of police internal affairs complaints is permitted when a defendant's account of events or facts differs from that of investigating officers, supporting an inference that the officers may have lied. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1036.) Hence, the court's failure to inquire was apparently based on its fundamental misunderstanding of the scope of discovery authorized by law.

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[28] Davis and Laurie testified at Maciel's trial, there was no cross-examination regarding the Manriquez case, or introduction of the officers' prior inconsistent statements. (Davis: RT56:8699-8701; 58:9157-9179, 9184-9200; 59:9250:9253; Laurie: RT59:9255-9264; RT60:9309-9311.)

(4) The court did not adequately inquire into the reasons why trial counsel was refusing to file a motion to dismiss the indictment based on the prosecutor's failure to present potentially exculpatory evidence to the grand jury.

Maciel had asked his attorney to file numerous motions, including *Johnson* motion (*Johnson v. Superior Court* (1975) 15 Cal.3d 248) seeking dismissal of the indictment on the ground that exculpatory evidence had been withheld from the grand jury. (SCT1:8:1601; RT50-1:7507.) At the *in camera* hearing, Maciel alleged that the prosecutors had withheld several pieces of exculpatory evidence from the grand jury, including testimony by one victim's young nephew, who had told police that on the day of the murders that he saw his uncle arguing about drugs with a man. The man reportedly put on a mask, went inside and afterward the shooting started. (RT50-1:7508.) Evidence that the violence erupted suddenly, possibly during a drug dispute, would have undermined the prosecution's assertion that the murders were the product of cold-blooded planning and premeditation by Maciel and Shyrock. If the prosecutor knowingly did not present such evidence, Maciel arguably was entitled to dismissal of that portion of the indictment that related to the withheld evidence. (See, *Johnson v. Superior Court, supra,* 15 Cal.3d at 255; section 939.71 ["added by Stats. 1997, c. to codify the holding in *People v. Johnson*, 15 Cal.3d 248, and to affirm the duties of the grand jury pursuant to Section 939.7"].)

At the *in camera* hearing, Esqueda averred that the motion had no merit. (RT50-1:7513.) The court stated that it was trial counsel's prerogative to decide what motions to file. (RT50-1:7511.) The court also advised appellant that a *Johnson* motion was a "tough motion to win." (RT50-1:7507.) Judge Horan commented: "I don't know, the fact that some kid says the guy

came in with a mask and they were arguing about narcotics, I don't know if that does much for you." (RT50-1:7510.) Rather than asking both prosecuting and defense counsel whether it was true that such a witness existed, and whether or not the witness had testified before the grand jury, the court simply discounted the probative value of testimony that would have contradicted the prosecutor's theory of the case.

(5) The trial court failed to adequately inquire regarding counsel's reasons for not taking crime scene photos before the crime scene was demolished.

Maciel had asked his attorney to take pictures of the crime scene because he believed there were obstructions at the location which would have made it impossible for eyewitnesses to see what they claimed to have seen. (SCT1:8:1600.) Esqueda had not taken any photographs, and, subsequent to Maciel's request, the buildings at the site had been torn down. (SCT1:8:1601; RT50-1:7497-7502.)

According to ABA Guidelines, death penalty attorneys are not supposed to solely rely on investigation conducted by prosecuting agencies. (Guideline 10.7, Commentary, p. 77, n.198.) Counsel must "scrutinize carefully the quality of the state's case...." (Guideline 10.7, Commentary, p. 78.) Among other necessary investigative steps, counsel should "view the scene of the alleged offense as soon as possible...under circumstances as similar as possible to those existing at the time of the alleged incident...." (Guideline 10.7, Commentary, p. 80.)

Esqueda did *not* deny that he failed to take crime scene photographs. (RT50-1:7501-7502.) Yet the court did *not* inquire *why* no photographs had been taken despite the imminent threat of demolition. The court likewise did *not* inquire whether counsel had ever visited the crime scene prior to

demolition, or whether an investigator had visited the location on appellant's behalf. Instead, the court asked whether the *prosecution* had taken photographs of the crime scene. (RT50-1:7501.) Judge Horan did not conduct an investigation reasonable in scope. Instead, he concluded – without even looking at the prosecutor's crime scene photographs – that Maciel could not have been harmed by counsel's failure to conduct an independent investigation of the crime scene on Maciel's behalf.

(6) The court failed to investigate why, on the eve of trial, counsel still had not subpoenaed phone records from the party host:

Maciel anticipated that a prosecution witness would testify that Maciel had made telephone calls from the baptismal party in connection with the murders.[29] Maciel had asked Esqueda to subpoena the phone records for the house at which the party was held. Esqueda had not done so. (SCT1:8:1602.) By the time of the *in camera* hearing, the *prosecutor* had subpoenaed phone records from the house of the party, but not yet turned them over to Esqueda. (RT50-1:7540.)

No explanation for this omission was sought from defense counsel. (RT50-1:7540.) Considering that the motion to discharge was being heard on the date set for trial – a date that was only continued again because counsel was still engaged in a different trial – Mr. Esqueda's indifference to the need to review the party host's phone records in advance of trial should have been of a source of greater concern for the court. Instead, the omission was ignored; this was a clear abdication of the court's obligation to inquire.

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[29] At trial, witness #14 testified that Maciel received a page during the party, left the room, then returned and asked the witness to drive him to his apartment in El Monte. (RT57:8998-8990.) No phone company records were introduced by the prosecution regarding telephone calls made from the residence where the baptismal party was held.

(7) The court did not adequately investigate why counsel had never interviewed prospective witnesses in jail before they were transferred to prison.

In his written motion, and at the hearing, Maciel complained that Esqueda had not yet contacted a number of people in county jail and state prison who were potential defense witnesses. According to Maciel, at least one witness had been released from custody and could no longer be found. (SCT1:8:1601; RT50-1:7532.) Another witness in prison had shared a holding cell with witness #14 (see, Argument I, B, b), and Maciel wanted Esqueda to talk to him. (See, Subsection (2), *ante*, discussing witness #14.) (RT50-1:7535-7536.)

Esqueda responded:

> "....and I have told Mr. Maciel, and I'll be very candid, because some of these witnesses that he wants brought down, that he has told me are witnesses, I've told him, listen, I can't just be bringing your buddies down here to get them out of Pelican Bay. I says, once you tell me precisely what they could testify to, and if in fact the court deems them to be material witnesses, we'll have them ordered down."

(RT50-1:7538.) Maciel pointed out that Esqueda had failed to take witnesses' statements while they were in county jail, *before* they were transferred to state prison. (RT50-1:7538-7539.)

Capital attorneys must conduct a thorough investigation of all possible guilt phase issues regardless of personal opinions held regarding the strength of evidence of guilt. (Guideline 10.7, A, 1, p. 76.) The attorney must "take seriously the possibility of the client's innocence," and seek out and interview all potential witnesses, including "eyewitnesses or other witnesses having purported knowledge of events surrounding the alleged offense itself...."

(Guideline 10.7, Commentary, pp. 78, 79.) No exception is made for clients charged with particularly heinous gang-related capital crimes, or witnesses housed in state prison.

The court opined that it was up to counsel to decide which people "might be profitable to interview." (RT50-1:7532.) Conspicuously, the court did not ask for the names of the witnesses in question. The court made no attempt to determine *why* appellant felt these witnesses might be helpful to his case. Nor did the court inquire why counsel had *not* bothered to have potential defense witnesses interviewed while they were still in the local jail. Instead, the court implied that trial counsel was justified in refusing to interview prison inmates because of the "strong suggestion" in prior trials that Maciel was a "member of the Mexican Mafia." (RT50-1:7532.) The court, like counsel, simply assumed, without investigating, that any witnesses in prison would have nothing worthwhile to contribute to appellant's defense.

(8) The court failed to adequately investigate whether Mr. Esqueda was too busy with other cases to prepare for appellant's case.

Maciel voiced concern that his attorney was too busy with his other cases to properly investigate his case. (SCT1:8:1600-1603; RT50-1:7541,7543.) It is undisputed that Esqueda was engaged in many other matters during the pendency of this case, especially during the months preceding appellant's trial. (1/13/97: RT8:852-854; 1/15/97: RT8:857; 2/6/97:RT16:2299; 5/31/97:7162; 10/16/97: SCT1:8:1588-1591; 10/17/97:SCT1:1592-1593; 10/20/97:RT49:7453; 11/17/97:SCT1:8:1594A-D,1609; RT49:7466-7468.) From October 3 to November 7, 1997, counsel was engaged in another death penalty trial. (RT50-1:7490.) On November 12, 1997, Esqueda was trying a case involving the kidnap, rape, and attempted

murder of a police officer. (RT50-1:7468.) On December 12, the date of Maciel's motion hearing, Esqueda was *still* engaged in the attempted murder-kidnap-rape trial, and hoping to be free by December 18, 1997. (RT50-1:7489.) Esqueda admitted he had been having very little contact with Maciel because he had been in back-to-back jury trials since September. (RT50-1:7490.)

Judge Horan did not dispute that counsel was possibly overtaxed. He told Maciel, "everybody is spread thin, including this court and including your lawyer." (RT50-1:7543.) No inquiry was made to determine whether Esqueda's engagement in other matters had prevented him from giving sufficient attention to Maciel's case. Given the facts known to the court at the time, some inquiry into counsel's ability to prepare was warranted.

b. The court made no inquiry to determine whether or not counsel was investigating potential mitigating evidence in anticipation of a penalty phase, and if not, why not.

The record as a whole suggests that Mr. Esqueda was not anticipating the need for a penalty trial. (RT5:687.) At one point, Esqueda had expressed certainty that he could win at the guilt phase based on "reasonable doubt," if he could just keep other crimes evidence out at the guilt phase. (RT50-1:7513; RT5:687.) Counsel's apparent failure to conduct any mitigation investigation was another source of Maciel's discontent.

By the time of the hearing on appellant's motion to discharge, defense counsel had not undertaken much, if any, investigation in anticipation of a possible penalty phase trial. According to Maciel, Esqueda had only visited his client three or four times in 1996, and four or five times in 1997. (SCT1:8:1600.) Each time counsel visited, he had stayed only 10 to 15 minutes, had not consulted with Maciel about his case, and had merely

reassured him that everything was "okay." (SCT1:8:1600.) Esqueda had never sent any investigators, mental health experts, or mitigation experts to visit Maciel in jail. (SCT1:8:1600,1602.) When Maciel had tried to call Esqueda by telephone to discuss the case, counsel had frequently been too busy to take his calls. (SCT1:8:1600.)

Since being retained, Esqueda had only spoken with family members twice, once when he first took the case and again several months later. Other than that, the family had not been in contact with Mr. Esqueda except in court. (SCT1:8:1608.) Maria Maciel had attempted to speak with Esqueda on several occasions, but he had always been too busy to talk, or had failed to respond to his pager. (SCT1:8:1608.) When Maciel voiced concern about the lack of investigation, Esqueda had merely reassured him he would complete an investigation within the 30 days before the trial. (RT49:7474.)

At the *in camera* hearing, Esqueda denied *neither* the lack of substantial client contact nor the absence of communication with family members. Mr. Esqueda explained that, once he had obtained Maciel's "version of the case," he regarded frequent or lengthy visits with Maciel as unnecessary hand-holding. (RT50-1:7530-7531.)

Counsel's failure to anticipate and prepare for a possible penalty phase should have been a source of concern to the court. The court *knew* that appellant had no investigator other than Mr. Guillen, a mere law graduate with no investigative training. More importantly, Mr. Guillen had no access to appellant in jail. Under the circumstances, the court should have inquired who, if anyone, was conducting investigation in anticipation of a possible penalty phase trial. Absent some indication that investigation was ongoing, the court should have asked a sufficient number of questions to determine whether the lack of investigation was due to appellant's, or trial counsel's, lack of

sufficient funds.

8. The denial of the motion to discharge was structural error requiring reversal of the guilt and penalty phase judgments.

The right to counsel is fundamental. "The right of one charged with crime to counsel may not be deemed fundamental in some countries, but it is in ours." (*Gideon v. Wainwright* (1963) 372 U.S. 335, 344.) "The denial of a motion to substitute counsel implicates the defendant's Sixth Amendment right to counsel...." (*Bland v. California Department of Correction, supra* 20 F.3d 1469.) As a component of the right to counsel of choice, an indigent criminal defendant has a right to discharge his retained attorney, with or without cause. (*People v. Ortiz, supra*, 51 Cal.3d at pp. 983-984, 988.)

The right to discharge retained counsel implicates state and federal due process rights, as well as the right to counsel, because it advances two goals:

> "(1) ensuring the reliability of the guilt-determining process by reducing to a minimum the possibility that an innocent person will be punished; and (2) protecting the ideal of human individuality by affirming the state's duty to refrain from unreasonable interference with a defendant's desire to represent himself in whatever manner he deems best."

(*Id.*, at 988.)

Because the death penalty is qualitatively different from a sentence of imprisonment, the right to defend with counsel of choice also advances the Eighth Amendment guarantee of reliability in the determination that death is the appropriate punishment in a specific case. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed. 944; accord: *Ring v. Arizona* (2002) 536 U.S. 584 [hereafter *Ring*].)

Reversal is automatic when a defendant is erroneously deprived of the right to discharge his retained attorney. (*Ortiz, supra,* at 988.) Reviewing

courts must refrain from speculating as to the prejudicial effect of injecting an undesired attorney into the proceedings, "especially when, as here, the defendant has repeatedly alleged inadequate assistance." (*Ibid.*; accord: *United States v. Gonzalez-Lopez, supra*, 126 S.Ct. 2557; *Bland v. California Department of Corrections, supra,* at 1479.) Because the court improperly denied Maciel the right to discharge his retained attorney, he is entitled to automatic reversal.

Reversal would be required even if this court does not find the error falls within the rubric of the *Ortiz* holding. As a matter of both federal and California constitutional law, when an indigent defendant requests substitution of his court-appointed attorney, summary denial of the motion without further inquiry violates the Sixth Amendment. (*People v. Marsden, supra,* 2 Cal.3d 118, 123-124; *Hudson v. Rushen, supra*, 686 F.2d at 829; *Brown v. Terhune* (N.D. Cal. 2001) 158 F.Supp.2d 1050, 1064.) In this case, as shown previously, the trial court failed to conduct a meaningful inquiry into the reasons advanced for the discharge of counsel.

"[T]o compel one charged with grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever." (*Brown v. Craven* (9th Cir. 1970) 424 F.2d 1166, 1170; *Hudson v. Rushen, supra*, 686 F.2d 826, 829.) If the relationship between a lawyer and client completely collapses, the refusal to substitute new counsel violates [the] Sixth Amendment right to effective assistance of counsel. (*United States v. Moore* (9th Cir. 1998) 159 F.2d 1154, 1158; *Brown v. Craven, supra*, 424 F.2d at 1170.) In this case, contrary to the court's finding, Maciel's relationship with counsel had totally collapsed.

"The decision to allow a substitution of attorney is within the discretion

of the trial judge unless defendant has made a substantial showing that failure to order substitution is likely to result in constitutionally inadequate representation." (*People v. Crandell, supra*, 46 Cal.3d at 859; accord: *Brown v. Terhune, supra*, 158 F.Supp.2d at 1064. Here, counsel had engaged in a pattern of conduct that would have supported a finding that Maciel was receiving legal assistance of a quality falling substantially below well-settled professional norms for death penalty representation. (See, *Rompilla v. Beard, supra*, 545 U.S. 374; *Wiggins v. Smith* (2003) 539 U.S. 510.) Accordingly, reversal of the entire judgment is necessary on this ground as well.

In addition, the error also deprived appellant of his state-created liberty interest in the correct, non-arbitrary application of California's state laws governing the discharge of retained counsel, which resulted in a violation of the Fourteenth Amendment's Due Process Clause. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Hewett v. Helms* (1983) 459 U.S. 460, 466; *Ford v. Wainwright* (1986) 447 U.S. 399, 428 [O'Connor, J, concurring].)

III. PURSUANT TO RULE 22 OF THE RULES OF COURT,[30] THE DECISION OF THE INTERNATIONAL COURT OF JUSTICE IN THE *AVENA* CASE,[31] AND THE PRESIDENT'S MEMORANDUM OF FEBRUARY 28, 2005, CONCERNING COMPLIANCE WITH THE *AVENA* DECISION, THIS COURT SHOULD REFER THIS MATTER FOR AN EVIDENTIARY HEARING TO DETERMINE WHETHER THE PROVEN VIOLATION OF APPELLANT'S CONSULAR RIGHTS WAS PREJUDICIAL.

A. The International Court of Justice in *Avena* held that the U.S. violated appellant's consular rights guaranteed by the Multilateral Vienna Convention on Consular Relations [hereafter, "VCCR" or "Vienna Convention"].[32]

Both the U.S. and Mexico are signatories to the VCCR, which first became binding on the U.S. pursuant to the proclamation of President Nixon on January 29, 1970. (115 Cong. Rec. 309997 (Oct. 22, 1969); *VCCR, supra*, 21 U.S.T. 77, 373.) The VCCR is a multinational treaty respecting consular relations, which provides that law enforcement authorities shall inform detained foreign nationals of their right to contact consular officials for assistance, and to have the consulate notified of their detention without delay. Consular officers have the right to communicate with, visit, and provide legal assistance to foreign nationals who have been detained or arrested. Local laws and regulations must give full effect to these rights. (*VCCR,* 21 U.S.T. 77, art.

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[30] Rule 22(c) of the Rules of Court provides in relevant part: (1) A party may move that the reviewing court take evidence. (2) An order granting the motion must: (A) state the issues on which evidence will be taken; (B) specify whether the court, a justice, or a special master or referee will take the evidence; and (C) give notice of the time and place for taking the evidence."

[31] *Avena and Other Mexican Nationals (Mexico v. United States)* 2004 I.C.J. No. 128; 2004 I.C.J. LEXIS 11 (Judgment of Mar. 31, 2004).

[32] *Multilateral Vienna Convention on Consular Relations and Optional Protocol on Disputes*, 21 U.S.T. 77 (1969), T.I.A.S. No. 6820.

36.)

The legally binding enforcement mechanism for the VCCR is contained in the Optional Protocol Concerning the Compulsory Settlement of Disputes [hereafter, "Optional Protocol"], which was ratified without reservation by the U.S. along with the Vienna Convention itself. The Optional Protocol authorizes signatory states to bring disputes under the VCCR to the International Court of Justice [hereafter, "ICJ"] for binding resolution. (*VCCR, supra*, 21 U.S.T. 77, 325-329.) "Under the fundamental principle of *pacta sunt servanda*, which states that 'treaties must be observed,' the U.S. has consistently invoked the Vienna Convention to protest other nations' failures to provide Americans with access to consular officials." (*United States v. Superville* (D. Virgin Islands 1999) 40 F.Supp.2d 672, 676.) At all times relevant to this appeal, the U.S. and California were bound by the VCCR and the Optional Protocol. (U.S. Const., art. VI, cl. 2; see, *Antoine v. Washington* (1975) 420 U.S. 194, 201; *Nielsen v. Johnson* (1929) 279 U.S. 47, 52.)

In the case of *Avena and Other Mexican Nationals (Mexico v. United States of America), supra*, 2004 I.C.J. No. 128 [hereafter, "*Avena*"], Mexico filed a complaint with the ICJ, alleging that the U.S. had violated the consular rights of 52 death-sentenced Mexican nationals. Among the 52 was the appellant in this case, referred to in ICJ pleadings as Luis Alberto Maciel Hernandez. As part of this litigation, Mexico established that Maciel, a Mexican national, was not advised of his right to seek the assistance of the Mexican Consulate, and Mexico was not aware that Maciel was in custody until after the conviction and death verdicts in this case.[33]

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[33] The U.S. acknowledged its failure to provide consular notification to many of the Mexican nationals; hence, as to most, the facts concerning notification were not disputed. (See, Provisional Measures Order and Declaration of Judge Oda, *Avena and Other Mexican Nationals, supra*, 2004 I.C.J. 128, p. 44

On March 31, 2004, the ICJ issued its final judgment. By a vote of fourteen to one, the ICJ found that for 51 of 52 Mexican nationals, including Maciel, the U.S. had failed to inform the detainees of their rights to consular notification without delay. In 49 of 52 cases, including Maciel's case, the ICJ found that the U.S. had violated its corresponding obligation to notify the Mexican Consulate of the detention without delay, and Mexico's right to communicate and have access to its citizens. (VCR, Art. 36, ¶ 1(b).) In 34 cases, including Maciel's case, the ICJ also found that the U.S. deprived Mexico of its right to arrange for legal representation of its nationals in a timely manner. (VCR, Art. 36, ¶ 1(c); see, *Avena*, *supra*, ¶¶ 106(1)-(4).)[34]

B. Appellant's is entitled to review and reconsideration of his convictions and death judgment, taking into account the violation of rights guaranteed by the VCR, and prejudice caused by the violation.

In *Avena*, the ICJ ordered the U.S. to "'provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals' to determine whether the violations 'caused actual prejudice,' without allowing procedural default rules to bar such review." (*Medellin v. Dretke* (2005) 544 U.S. 660, 662; quoting from *Avena, supra*, at ¶ 121; see also, the *La Grand Case*, 2001 ICJ 104 (June 27, 2001).) The ICJ further found that the clemency process did not suffice as adequate "review and reconsideration" as required by the ICJ's earlier decision in the

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(Feb. 5, 2003).)

[34] The record in the *Avena* case, including all pleadings and orders, is available on the website of the ICJ, at http://www.icj-cij.org/ . Maciel will be filing an application for judicial notice of the *Avena* case record shortly after filing the Appellant's Opening Brief.

La Grand Case. (*Avena,* 2004 I.C.J. 104, ¶ 142.)

On February 28, 2005, President George W. Bush issued a memorandum that stated the U.S. would discharge its international obligations under the *Avena* judgment by "'having State courts give effect to the [ICJ] decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.'" (*Medellin v. Dretke, supra,* at 663; quoting from *George W. Bush, Memorandum for the Attorney General (February 28, 2005), App. 2 to Brief for United States as Amicus Curiae 9a.*)[35] Shortly thereafter, President Bush withdrew the U.S. from the Optional Protocol, terminating the ICJ's jurisdiction over future VCCR disputes. (Adam Liptak, *U.S. Says It Has Withdrawn From World Judicial Body*, The New York Times (March 10, 2005); Kirgis, Addendum to ASIL Insight, President Bush's Determination Regarding Mexican Nationals and Consular Convention Rights.)[36] However, that does not affect Maciel's right to judicial review and reconsideration of his convictions and death judgement under the ICJ's ruling in *Avena*. (See also, *Jogi v. Voges* (7th Cir. 2005) 425 F.3d 367, 383-384 [U.S. withdrawal from the Optional Protocol is "a prospective action only" that has "no effect on disputes that were tendered to and finally decided by the ICJ before the withdrawal."].)

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[35] The Amicus Curiae Brief and appendices for the U.S. in the *Medellin* case are published online at 2004 U.S. Briefs 5928, 2005 U.S. S.Ct. Briefs LEXIS 231 (February 28, 2005).

[36] See, http://www.asil.org/insights/2005/03/insights050309a.html.

C. Pursuant to *Avena* and the President's February 28, 2005, memorandum, appellant's remedy is to seek an evidentiary hearing in state court to determine whether the U.S.' violation of his VCCR rights caused prejudice.

In *Medellin v. Dretke, supra*, 544 U.S. 660, the Brief for the U.S. as *Amicus Curiae* describes the judicial remedy for violation of consular rights that is contemplated by President Bush's February 28, 2005, memorandum regarding enforcement of the judgment in *Avena*.

> "...[I]n order to obtain 'review and reconsideration' of their convictions and sentences in light of the decision of the ICJ in *Avena*, the 51 named individuals may file a petition in state court seeking such review and reconsideration, and the state courts are to recognize the *Avena* decision. In other words, when such an individual applies for relief to a state court with jurisdiction over his case, the *Avena* decision should be given effect by the state court in accordance with the President's determination that the decision should be enforced under general principles of comity."

(2004 U.S. Briefs 5928, *supra,* at p. 42; 2005 U.S. S.Ct. Briefs LEXIS 231.)[37] Furthermore, the *Medellin* Amicus Curiae Brief also states that the President's memorandum presumes, "if prejudice were found, a new trial or new sentencing would be ordered." (*Id.*, at 47.)[38]

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[37] In *Medellin*, the U.S. Supreme Court dismissed its writ of certiorari as improvidently granted to allow the Texas courts to provide review "pursuant to the *Avena* judgment and the President's memorandum." (*Medellin, supra,* at 666.)

[38] Following issuance of the President's memorandum, Mr. Medellin filed a petition for writ of habeas corpus in the Texas Court of Criminal Appeals asking the court to give full effect to the *Avena* decision and the President's memorandum. (*Ex parte Medellin* (Tex. Crim. App. 2006) 2006 Tex. Crim. App. LEXIS 2236.) The Texas held that President Bush had exceeded his constitutional authority and intruded into the independent powers of the judiciary

D. Appeal on the present record would not provide adequate review and reconsideration.

Without a remand for an evidentiary hearing and fact-finding pursuant to Rule 22, this appeal will not provide adequate review and reconsideration to comply with the *Avena* decision. Maciel was convicted of multiple murder on January 30, 1998; his jury returned the death verdict on February 11, 1998. The Mexican Consulate learned of the case on April 28, 1998, when Maciel's father came to the Consulate seeking assistance. Maciel, too, was unaware of his consular rights until after the trial. (See, United Mexican States' Application Instituting Proceedings in the ICJ (January 9, 2003 General List, No. 128, p. 19, ¶¶ 110-112.) Maciel's declaration in support of Mexico's application establishes that he would have taken advantage of consular assistance had he known of his right to do so. The ICJ made a finding that by not notifying the appropriate Mexican consular post without delay, the U.S. deprived Mexico of the right, in a timely fashion, to render the assistance provided for by the Vienna Convention to Maciel. (*Avena, supra,* ¶ 153(5); cf. *Cardenas v. Dretke* (5th Cir. 2005) 405 F.3d 244, 252, n.3.) Consequently, neither Maciel nor the Mexican Consulate raised the denial of Maciel's VCCR rights during proceedings in the trial court. The appellate record in this case does not even affirmatively establish Maciel's Mexican nationality, much less a violation of consular rights, or prejudice stemming therefrom.[39]

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by directing the courts to give effect to the *Avena* decision under principles of comity. (*Id.*, at 45-46.) Medellin's application for relief was dismissed. It is anticipated that the petitioner will file a petition for certiorari.

[39] The probation and sentence report indicates that "prior probation reports indicate that defendant came to the United States from Mexico in 1972."

E. An evidentiary hearing, with the opportunity for discovery, investigation, and presentation of evidence, is necessary to determine prejudice caused by the undisputed violation of appellant's VCCR rights.

In the words of the ICJ in *Avena*, it is up to the American courts to ascertain whether the undisputed violation of the VCCR "caused actual prejudice" or whether the violation can be "regarded as having, in the causal sequence of events, ultimately led to the convictions and severe penalties." (*Avena, supra*, ¶¶ 121, 122.) "In so doing, it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking into account the violation of the rights set forth in the Convention." (Avena, supra, ¶ 122.)

In order to show prejudice, Maciel must be given an opportunity to make a particularized showing to a court, justice, special master or referee (see, Rule 22), that the Mexican Consulate, if given timely notice of Maciel's arrest on capital murder charges, would have furnished counsel, and/or provided assistance of a type which might have influenced the "causal sequence of events" that "ultimately led to the convictions and severe penalties." (*Ibid.*). In *Avena*, Mexico laid much emphasis upon the importance of arranging for legal representation,"especially at sentencing, in cases in which a severe penalty may be imposed," and the financial assistance that consular officers may provide "for investigation of the defendant's family background and mental condition, when such information is relevant to the case." (*Avena, supra,* ¶ 104.) In *Valdez v. State* (Ok. Cr. App. 2002) 46 P.3d 703, 710, the Oklahoma appellate court recognized the "significance and

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(CT4:919 [sealed].)

importance of the factual evidence discovered with the assistance of the Mexican Consulate." Even the U.S. has recognized that the consular assistance Mexico provides to its nationals in capital cases is "extraordinary." (1 Counter-Memorial of the United States of America at 186 (Nov. 3, 2003) (*Avena* case).) Of course, such a hearing would provide meaningful "review and reconsideration" if Maciel has a corresponding opportunity for discovery, investigation and presentation of evidence, assisted by counsel and the Mexican Consulate.

Several features of Maciel's case suggest that the Mexican Consulate's involvement could have had a material effect on the outcome of the proceedings. When Maciel was arrested in January of 1996, he waived his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, and gave a statement to Investigators Laurie and Davis. (People's Exhibit 132, 132A.) Maciel made exculpatory statements, but also admitted his association with the Mexican Mafia, for which he performed "little errands." (SCT 1:8:1673-1704.) He also implied that he knew who was responsible for the killings, and why the people were killed, but he refused to provide information so as not to put his wife and children at risk. (SCT 1:8:1694-1711.) Excerpts from Maciel's statement were played for the jury over defense objection. (See, Argument V.) Maciel may not have been so quick to speak with arresting officers had he been provided consular assistance without delay.

In addition, the record establishes that Maciel was so dissatisfied with performance of his retained attorney that he brought a motion to discharge him and replace him with court-appointed counsel. (*People v. Ortiz, supra*, 51 Cal.3d 975; SCT 1:8:1595-1608]; see, Argument II, *ante*.) At an *in camera* hearing held shortly before trial, Maciel voiced numerous complaints about counsel, including the lack of meaningful attorney-client contact and failures

by counsel to investigate. (Argument II, *ante*.) Had Mr. Esqueda enlisted diplomatic assistance on appellant's behalf, appellant might have had greater resources with which to conduct an investigation, and fewer complaints about the quality of his legal representation.

Accordingly, a Rule 22 hearing is necessary and appropriate so that Maciel can develop the a factual record to show that he would have accepted the offer of legal and financial assistance from the Mexican Consulate, which would have been forthcoming had the U.S. not deprived Mexico "of the right, in a timely fashion, to render the assistance provided for by the Vienna Convention...." (*Avena, supra,* ¶ 153(5).) Furthermore, Maciel should have the opportunity to develop facts showing how the denial of consular assistance "caused actual prejudice to the defendant in the process of administration of criminal justice," (*id.,* ¶ 121), or "in the causal sequence of events, ultimately led to the convictions and severe penalties...." (*Id.*, ¶ 122.)

For example, Maciel could show "concrete circumstances" proving that he would not have waived his *Miranda* rights, and would not have made inculpatory statements to investigators had he received timely consular assistance. (See, e.g., *Avena, supra,* ¶ 127 [excludability "has to be examined under the concrete circumstances of each case by the United States courts concerned in the process of their review and reconsideration"]; *United States v. Miranda* (D. Minn. 1999) 65 F.Supp.2d 1002, 1007 [denial of timely consular rights advisement to Mexican detainee would be prejudicial where "such contact might have prevented him from making the statements that he now seeks to exclude."].)

It is also possible that consular officials could have offered important testimony regarding cultural, environmental, historical, or individual factors influencing the voluntariness of his statement to investigating police. (*U.S. v.*

Garibay (9th Cir. 1998) 143 F.3d 534, 538; cf. *United States v. Lombera-Camorlinga* (9th Cir. 2000) 206 F.3d 882, 888 [refusal to invoke exclusionary rule *solely* because statements were made prior to advisement of consular rights]; *People v. Corona* (2001) 89 Cal.App.4th 1426, 1429; *Medellin v. Dretke, supra,* 544 U.S. at 665 [finding no "causal connection" between the violation of consular rights and Medellin's confession].) Although the U.S. Supreme Court recently ruled that courts cannot require suppression of evidence for Article 36 violations without some authority in the Vienna Convention (*Sanchez-Llamas v. Oregon* (2006) 126 S.Ct. 2669, 2682 [hereafter *Sanchez-Llamas]*), a defendant may raise an Article 36 claim as a part of a broader challenge to the voluntariness of his statements. (*Ibid.*; see also, *United States v. Rangel-Gonzales* (9th Cir. 1980) 617 F.2d 529, 532-533; *United States v. Amano* (9th Cir. 2000) 229 F.3d 801 [considering failure to provide consular notification as factor to be considered in determining voluntariness].) In addition, Maciel's waiver of *Miranda* rights remains a factor which this Court should consider in its assessment of prejudice caused by violation of the VCCR.

More importantly, at a Rule 22 hearing, Maciel could also show that significant exculpatory or mitigating evidence would have been discovered and presented, given a different attorney unconstrained by a $35,000 fixed fee, and the greater financial resources that consular officers may provide. (*Avena, supra,* ¶ 104; *Valdez v. State, supra,* 46 P.3d at 710.) A exemplary description of Mexico's "extensive and increasingly sophisticated program of consular assistance" in capital cases can be found in the Arizona Journal of International Comparative Law in an article published in 2003. (Michael Fleischman, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals in United States Death Penalty Cases*, 20

Ariz. J. Int'l & Comp. L. 359, 366-374 (2003).)

F. Practical considerations weigh in favor of a Rule 22 evidentiary hearing over deferring review until a state habeas corpus petition is filed.

1. The *Dixon/Waltreus* conundrum:

Under California law, the writ of habeas corpus is generally available to challenge the legality of imprisonment or other restraints of a persons liberty. (Section 1474; *In re Clark* (1993) 5 Cal.4th 750, 763.) Habeas corpus attacks on the validity of a judgment may generally be brought based on newly discovered evidence, claims going to the jurisdiction of the court, and claims of constitutional dimension. (*In re Clark, supra,* 5 Cal.4th at 766-767.) Habeas corpus relief may also encompass redress for prisoners held in violation of international law. (*Mali v. Keeper of Common Jail* (1887) 120 U.S. 1.) As a general rule, the writ will not lie where claimed errors could have been, but were not, raised upon a timely appeal from the judgment of conviction. (*In re Dixon* (1953) 41 Cal.3d 756, 759; *In re Harris* (1995) 5 Cal.4th 813, 821 [listing exceptions to the *Dixon* rule].) Given the availability of fact-finding pursuant to Rule 22, *if* Maciel fails to raise his VCCR claim on direct appeal, respondent may argue that Maciel has forfeited his right to habeas corpus review under *Dixon.*

This Court does not apply the procedural bar of *Dixon* to claims of ineffective assistance of counsel. (*People v. Michaels* (2002) 28 Cal.4th 486, 526, n.6; *In re Robbins* (1998) 18 Cal.4th 770, 814, n.34.) However, whether Maciel was prejudiced by the denial of consular rights found in *Avena* is a claim completely independent from the issue of whether trial counsel violated professional norms by failing to discover Maciel's nationality, and enlist the help of the Mexican Consulate.

A corollary rule to *Dixon* provides that habeas corpus will not lie to adjudicate claims that were raised and rejected on appeal. (*In re Waltreus* (1965) 62 Cal.2d 218, 225.) This creates a conundrum because, if Maciel raises the issue on appeal and the issue is adjudicated on an incomplete record, the *Waltreus* rule could bar him from adjudicating the issue on a complete record in later habeas corpus proceedings. For this reason, in the context of his direct appeal, Maciel moves this Court to allow a Rule 22 hearing at which additional evidence may be adduced regarding the adverse effects of the denial of Maciel's right to consular assistance. (Cal. Rules of Ct., Rule 22(b)&(c); Code of Civil Procedure section 909.)

2. Lack of habeas corpus counsel and probable delays in the filing of a petition.

Assuming habeas corpus would be available as a procedural vehicle to show prejudice resulting from the already proven violation of consular rights, adjudication of the claim by this method may not occur for years. Counsel has yet to be appointed by this Court to represent Maciel in state habeas corpus proceedings, although it has now been more than eight years since the death judgment was rendered on May 8, 1998. Moreover, once appointed, habeas corpus counsel will need at *least* three years to thoroughly investigate, and file a petition for writ of habeas corpus on Maciel's behalf. (*Supreme Court Policies Regarding Cases Arising From Judgements of Death*; Policy 3; 1-1.1 [as amended effective November 30, 2005].)

Further delay in the adjudication of Maciel's VCCR claim could unnecessarily impede his ability to establish the prejudice resulting from the *proven* denial of consular assistance from 1995 through 1998, while trial proceedings were pending. Courts have recognized that extreme delays in the appellate process may amount to a violation of due process. (*United States v.*

Antoine (9th Cir. 1990) 906 F.2d 1379,1382; *People v. Young* (2005) 34 Cal.4th 1149, 1230; see also, *United States v. Loud Hawk* (1986) 474 U.S. 302.) In *Harris v. Champion* (10th Cir. 1994) 15 F.3d 1538, 1546, for example, the Tenth Circuit Court of Appeals found that two-year delays in the processing of Oklahoma's state appeals was presumptively excessive; the court also found that in some cases, inexcusable or inordinate delays in processing claims for relief might make the state process ineffective to protect the defendant's rights, and excuse the requirement of exhaustion. Another federal circuit court has observed:

> "Delay haunts the administration of justice. It postpones the rectification of wrong and the vindication of the unjustly accused....The most erratic gear in the justice machinery is at the place of fact finding, and possibilities for error multiply rapidly as time elapses between the original fact and its judicial determination."

(*Rheuark v. Shaw* (5th Cir. 1980) 628 F.2d 297, 304.) The circuit courts' commentaries in *Rheuark, supra,* and *Harris, supra,* apply with equal force to claims arising from the deprivation of consular rights guaranteed by the Vienna Convention in a death penalty case. Justice delayed is likely to be justice denied.

3. Differences between habeas corpus review and the "review and reconsideration" required by *Avena*.

In addition, Maciel's habeas corpus petition, when finally filed, will undoubtedly include a multiplicity of claims apart from the violation of his VCCR rights. Under California's habeas corpus rules, there is no guaranteed right to evidentiary hearing or even an adjudication on the merits of individual habeas corpus claims. (See, *People v. Romero* (1994) 8 Cal.4th 728, 737-741; *In re Clark, supra,* 5 Cal.4th at pp. 763-797.) The vast majority of habeas

corpus petitions that are filed in this Court are denied without an evidentiary hearing. Moreover, even an evidentiary hearing were to be granted on one more of Maciel's future habeas corpus claims, this Court would presume that the trial court proceedings were fair and accurate, and habeas corpus counsel would bear the burden of showing that any proven error resulted in a fundamentally unfair proceeding or unreliable judgment. (*In re Clark, supra,* 5 Cal.4th at 766.)

In contrast, Maciel and other *Avena* nationals *must* be accorded "review and reconsideration" of their VCCR claims in state court, consistent with *Avena* and the President's proclamation.[40] Although this Court has never established a state standard for review of VCCR violations, in the context of deportation proceedings, the Ninth Circuit of Appeals has developed a three-prong test to assess whether a foreign national has sustained his or her *prima facie* burden of proving a violation of VCCR rights, requiring reversal of the judgment. (*U.S. v. Rangel-Gonzales, supra*, 617 F.2d at 531; *U.S. v. Esparza-Ponce* (9th Cir. 1999) 193 F.3d 1133, 1139.) The 9th Circuit's standard has been cited with approval by numerous courts. (*Torres v. State* (Ct. Crim. App. Okla. 2005) 120 P.3d 1184 1186-1187; *U.S. v. Wahalyore-Irawo* (E.D. Mich. 1999) 78 F.Supp.2d 610, 613; *U.S. v. Tapia-Mendoza* (D. Utah 1999) 41 F.Supp.2d 1250, 1254; *U.S. v. Briscoe* (D. Virgin Islands 1999) 69 F.Supp.2d

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[40] The procedural posture of this case, including Maciel's status as one of the Mexican nationals whose consular rights were litigated in *Avena* makes it unnecessary for this Court to address the question left open in *Medellin, Breard v. Greene* (1998) 523 U.S. 371, and *Sanchez-Llamas*: whether the VCCR confers individual standing on foreign nationals to enforce their rights to consular notification. (See, *Sanchez-Llamas v. Oregon, supra, 126 S.Ct. 2669; Medellin v. Dretke, supra,* 125 S.Ct. 2088, 2103-2104 [O'Connor, J., dissenting]; *Breard v. Greene, supra,* 523 U.S. at 376 ["The Vienna Convention – which arguably confers on an individual the right to consular assistance following arrest – has continuously been in effect since 1969].)

738, 747; *People v. Preciado-Flores* (Colo. App. 2002) 66 P.3d 155, 161; *Zavala v. State* (Ind. App. 2000) 739 N.E.2d 135, 142.)

Under the *Rangel-Gonzales* test, the foreign national has the initial burden to make a *prima facie* showing that: (1) he did not know of his right to contact consular officials; (2) he would have done so had he known; and (3) such consultation would have led to the appointment of counsel and/or assistance in creating a more favorable record to present to the court. Once the foreign national establishes a *prima facie* case, prejudice is presumed, and the state then must bear the burden of showing that contact with the consular officials would not have resulted in assistance. (*U.S. v. Rangel-Gonzales, supra*, 617 F.2d at pp. 529-533; *Torres v. State, supra*, 120 P.3d at p. 1186.)

Under the third prong of *Rangel-Gonzales*, the defendant need only show what efforts his consulate would have made to assist in his criminal case. It is not necessary to show that consular assistance would have produced a different outcome. (*Torres v. State, supra,* at 1186.) As the Oklahoma appeals court explained in the *Torres* case:

> "We reject any construction of the third prong of the test which would require a defendant to show that the consular assistance would, or could, have made a difference in the outcome of the criminal trial....[¶] The essence of a Vienna Convention claim is that a foreign citizen, haled before an unfamiliar jurisdiction and accused of a crime, is entitled to seek the assistance of his government. Even if that assistance cannot, ultimately, affect the outcome of the proceedings, it is a right and privilege of national citizenship and international law. The issue is not whether a government can actually affect the outcome of a citizen's case, but whether under the Convention a citizen has an opportunity to seek and receive his government's help. This protection extends to every signatory of the Convention, including American citizens. It is often impossible to say whether a particular action in a criminal trial could affect the outcome. However, it is possible to show what

> particular assistance, if any, a government would offer its citizen defendant against a crime in a foreign country. That is the right and privilege safeguarded by the Convention. This Court is unwilling to raise the bar beyond what the Convention guarantees. If a defendant shows that he did not know he could have contacted the consulate, would have done so, and the consulate would have taken specific actions to assist in his criminal case, he will have shown he was prejudiced by the violation of his Vienna Convention right."

(*Id.*, at 1187.)

In *Torres v. State, supra*, the case of a Mexican national was remanded for an evidentiary hearing in the Oklahoma trial courts to determine whether the defendant had been prejudiced by the state's proven violation of VCCR rights, as well as ineffective assistance of counsel. The trial court found prejudice, applying the *Rangel-Gonzales* test. On appeal, the Oklahoma Criminal Appeals Court reversed. Considering the unusual circumstance that Torres' death sentence had been commuted by Governor Brad Henry of Oklahoma, the appellate court concluded that Torres had not shown that he was actually prejudiced by the state's failure to inform him of his rights under the Vienna Convention. (*Torres v. State, supra,* 120 P.3d at1188.) The court explained that, at the evidentiary hearing, "[a]ll the evidence presented supports the conclusion that consular assistance, in Torres's particular circumstances, would have focused on obtaining a sentence of less than death. Evidence did not specifically show how consular assistance would have assisted in the guilt phase of the trial." (*Ibid.*)

In support of Mexico's petition in *Avena*, Maciel submitted a declaration under penalty of perjury attesting to his lack of knowledge of consular rights, and the fact that he would have sought consular assistance had he been informed of his rights. In most cases, including Maciel's case, the

U.S. did not challenge the Mexican nationals' asserted lack of knowledge. (*Avena*, ¶ 76.) Based on the evidence submitted, the ICJ determined that Maciel was a Mexican national, and that the U.S. failed to timely advise Maciel of his Article 36(b) consular rights, and denied Mexico the right to arrange for his legal representation (*Avena,* ¶¶ 57, 59, 106(1)-(4), 153(4)-(7).) All that remains to be adjudicated by this Court is whether Maciel suffered prejudice according to the third prong of *Rangel-Gonzales.* Maciel must show what assistance the Mexican Consulate would have provided at the time of his trial had timely consular notification been given.

Assuming Maciel can make such a showing, the burden should shift to the state to show that consular officials would not, or could not, have provided assistance bearing on the guilt and/or penalty phase proceedings. Given the Mexican Consulates' successful record of intervention on behalf of its nationals, this would be a difficult burden to sustain.

Accordingly, given the diametrically different standards of review applicable to the review of Maciel's VCCR claim and other types of habeas corpus claims, there is no real reason to defer adjudication until a habeas corpus petition is filed.

G. Appellant cannot be procedurally defaulted for failing to raise the issue in the trial court.

In *Avena,* the ICJ made it clear that application of procedural default rules may not be invoked by the U.S. to prevent the "'full effect [from being] given to the purposes for which the rights accorded under this article are intended....'" (*Avena, supra,* ¶ 113; see, e.g., *People v. Michaels, supra*, 28 Cal.4th at 511.) The Amicus Curiae Brief for the U.S. in the *Medellin* case likewise explains that the President's Memorandum means that for that the 51 Mexican nationals identified in *Avena*, state courts may not apply procedural

default rules to prevent review, in reliance on the U.S. Supreme Court's decision in *Breard v. Greene, supra,* 523 U.S. at 373. *Breard* holds that the Vienna Convention does not prevent application of procedural default rules to VCCR claims. (*Id.,* at 375; accord: *Sanchez-Llamas v. Oregon, supra,* 126 S.Ct. at 2682 [in which the U.S. Supreme Court, in a five to four decision, declined to reconsider the procedural default holding of *Breard* in light of the ICJ's decisions in *Avena* and *LaGrand*].) The U.S.'s Amicus Brief in *Avena* explains at 48:

> "Pursuant to his authority under the U.N. Charter and Article II of the Constitution, the President has determined that the foreign policy interests of the United States in meeting its international obligations and protecting Americans abroad require the ICJ's decision to be enforced without regard to the merits of the ICJ's interpretation of the Vienna Convention. Just as *Breard* would not stand in the way of legislation that provided for the implementation of the *Avena* decision, it does not stand in the way of the President's determination that the *Avena* decision should be given effect."

The President has ordered state courts to give effect to the *Avena* decision. *Avena* declares that procedural default rules may not be invoked to prevent review.

Such a presidential determination, even if in the form of a "Memorandum for the Attorney General," is the equivalent of an Executive order, "a public act of which all courts of the United States are bound to take notice, and to which all courts are bound to give effect." (*Armstrong v. U.S.* (1871) 80 U.S. 154, 156.)[41] Because the President is the "sole organ of the

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[41] It is the substance of a presidential determination or directive that is controlling and not whether the document is styled in a particular manner. (Department of Justice, Office of Legal Counsel, Memorandum for the Counsel to the President, January 20, 2000 [www.usdog.gov/olc/predirective.htm].)

federal government in the field of international relations (*U.S. v. Curtiss-Wright Exp. Corp.* (1936) 299 U.S. 304, 320), his decisions in that realm must command particular respect; state procedural bars must give way if they impair the effective exercise of national foreign policy. (*American Insurance Ass'n v. Garamendi* (2003) 539 U.S. 396, 419; *Zschernig v. Miller* (1968) 389 U.S. 429, 440; see also, *U.S. v. Pink* (1942) 315 U.S. 203, 240 [Frankfurter, J., concurring]; *U.S. v. Belmont* (1937) 301 U.S. 324, 331.)

Accordingly, under the authority conferred by Rule 22, Maciel requests a hearing, after an opportunity for discovery and investigation, on whether he suffered prejudice resulting from the proven violation of his VCCR rights.

IV. A DENIAL OF APPELLANT'S FUNDAMENTAL CONSTITUTIONAL RIGHTS TO COUNSEL, CONFRONTATION, DUE PROCESS AND A RELIABLE DEATH JUDGMENT RESULTED FROM THE TRIAL COURT'S VARIOUS NONDISCLOSURE ORDERS.

A. Factual background:

Prior to the grand jury's indictment of Maciel, the superior court granted motions by the prosecuting attorneys to redact witness names from investigative reports, and transcripts from grand jury proceedings held in September 1995, that had yielded indictments of four of the five codefendants. Defense counsel were ordered not to share discovery with the defendants, or any other persons, excepting investigators and defense experts. (RT1:123-124.)

After Maciel was indicted on December 12, 1995 (SCT1:6:982-1194; CT1:103-109A), the court directed that previously signed orders prohibiting defense counsel from providing copies of discovery, including the indictment or transcripts, to the defendants, or to persons other than defense investigators, was to remain in effect and apply to Maciel. (RT1:120-126; CT1:128-129.) On January 24, 1996, the court granted the prosecutor's *ex parte* motion for an order redacting witnesses names from the December 1995 grand jury transcripts. (CT1: 114-124.)[42] On January 30, 1996, over defense objection,

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[42] The declaration in support of the motion refers to an *in camera* hearing held before the Honorable James Bascue on September 2, 1995, culminating in the redaction of the names of 13 grand jury witnesses from the transcripts of grand jury proceedings in September 1995. It also refers to supplemental orders that were made by Judge Bascue on October 19, 1995, and a November 7, 1995, *in camera* hearing before the Honorable Robert A. Dukes, who thereafter extended all orders previously made by Judge Bascue. (CT1: 116; see also SCT1: 5: 945-946; SCT1:5: 967-976; RT of sealed *in camera* proceedings for November 7, 1995: 54-91.) The September 2, 1995, reference to an *in camera* hearing is apparently an error. Initial orders sealing grand jury transcripts were made on

copies of grand jury transcripts were furnished to defense counsel with the names of witnesses and other information redacted. (RT1:130-139,144-145.)

On February 7, 1996, the court, clarifying its previous orders, directed that all counsel were barred from disclosing any information to the defendants that could lead to the discovery of any witness. (RT1:149; CT1:130; RT1:144-153.)

On March 5, 1996, not long after Mr. Esqueda substituted in as Maciel's counsel, a motion was filed on defendant Logan's behalf, asking the court to lift the prohibition against the attorneys or the defense team discussing discovery materials with the defendants. (SCT1:7:1237-1243.)[43] At the DA's request, an *in camera* hearing was held pursuant to section 1054.7 on March 18, 1996, outside the presence of defense counsel. (Sealed SRT for 3/18/96: original RT1A:186-277; CT1:174.)[44] The transcript of the hearing was

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September 20, 1995; the redaction itself occurred following a hearing on September 29, 1995. (SCT1:5: 929; Duplicate Original Sealed Grand Jury Transcript for September 29, 1995:1-29.)

[43] A member of the press also filed a motion on March 5, 1996, seeking to unseal grand jury transcripts. (SCT1:7:1244-1265.) The March 18th hearing also adjudicated the press's request to unseal grand jury transcripts.

[44] At the *in camera* hearing, the court indicated that the other defense counsel had not filed written joinders with Logan's motion to lift the gag order against discussing discovery. (RT1A:274.) However, the defendants, including Maciel, had all objected to the redaction and nondisclosure orders at the inception. (RT1:130-139.) On March 29, 1996, Esqueda orally announced that Maciel was joining in all discovery motions filed by other defendants. (RT2:281.) The court told him that a written joinder was necessary, but this was after the hearing on the redaction and nondisclosure orders had already occurred. (RT2:282.) A motion for pretrial discovery was later filed on Maciel's behalf on June 28, 1996. (CT2:311-356.) The motion generally sought the names, addresses, and telephone numbers of all witnesses to the offense, as well as informants, and all reports documenting conversations with prosecution witnesses. It did not specifically "join" other defendants' motions. (CT2:311-369.) Under the circumstances, Maciel's objections were adequate to preserve the

ordered sealed. (RT1A:275.)

On March 29, 1996, a hearing was held before the Honorable Stephen Czuleger at which all defendants and counsel were present. All defendants objected to any limitations on disclosure to clients, arguing impairment of ability to prepare, and attorney-client relationship. Mr. Esqueda indicated he could accept a limited restriction requiring him to maintain the anonymity of "stranger witnesses." (RT2:289,292, 298,300.) The court ordered the DA to make the witnesses available for interview, without disclosing their identities to the defense. (RT 2:289.) The court denied the request for full disclosure of information in grand jury transcripts, and reiterated its ban on disclosure of the names, addresses, and telephone numbers of witnesses to defense counsel. The court also ordered that all grand jury transcripts remain redacted and sealed pending further order of the court. (RT2:278-322; CT1:185-189.) The court directed that the addresses and telephone numbers of witnesses be *permanently* sealed, with identities to be revealed only at the time each witness testified. (CT1:185-187.)

On July 30, 1996, a motion was filed on behalf of defendant Logan objecting to the court's order preventing counsel from revealing the names of witnesses to their clients. (SCT1:7:1379-1381.) A hearing on all pending motions, including a discovery motion filed on behalf of Maciel, was held on September 3, 1996, before Judge Sarmiento. (CT2:473-475.) Appellant joined the motions filed on behalf of his codefendants. (RT 3:495.) The court

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issue for appeal. (*People v. Vance* (2006) 141 Cal.App.4th 1104, 1112; *People v. Cummings* (1993) 4 Cal.4th 1233, 1285; cf. *People v. Avila* (2006) 38 Cal.4th 491, 553.) Furthermore, addressing the merits will not prejudice the state because, at the *in camera* hearing, the prosecutor and the judge assumed defendants were opposed to the redaction, nondisclosure, and gag orders. (RT1A:274.)

declined to disturb the nondisclosure orders previously made by Judge Czuleger. (RT3:481.)

During trial, evidence was elicited that a material prosecution witness, witness #14, had demanded that the prosecutor effect favorable changes in the circumstances of his imprisonment as a *quid pro quo* for testifying at trial. Nevertheless, while cross-examining witness #14, defense counsel was prohibited from asking where the witness was currently confined. (RT58:9055.)

B. The justifications for the court's nondisclosure orders:

A detailed recitation of the evidence produced at the March 18, 1996, *in camera* hearing is unnecessary. (RT1A186-277.) It suffices to say that this case involved five murders allegedly perpetrated by members of the Sangra street gang at the behest of the Mexican Mafia. One witness was murdered in October of 1995, allegedly because of his knowledge about the Maxson Street murders. Other evidence presented at the hearing suggested that the remaining witnesses could be in jeopardy if precautions were not taken. Appellant assumes for purposes of this argument, that the testimony at the hearing provided sufficient justification for the trial court's determination that some measures ought to be taken to prevent harm to the material witnesses in the case. (RT2:314.) Appellant contests the scope and duration of the court's orders, not the reasons why the orders were made.

C. The law governing nondisclosure orders:

The preeminent California case discussing judicial orders withholding witness information from criminal defendants is *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121. *Alvarado*, like this case, involved a homicide believed to have been ordered by the Mexican Mafia. A witness had been attacked by the member of a prison gang and warned not to testify. (*Id.*, at pp.

1128-1129.) The trial court granted a motion by the prosecution to withhold the names of its witnesses from the defense. The prosecutor was ordered to make witnesses available for interview by defense counsel 30 days before trial, but witnesses were not required to disclose their names. (*Alvarado, supra*, at 1130.) A subsequent clarifying order was made authorizing the prosecutor to *permanently* withhold from the defense the identities of several witnesses, and directing counsel not to disclose the names of witnesses to the defendant, even if discovered. (*Ibid.*)

This Court analyzed the defendant's federal constitutional challenge[45] to the orders, separately considering the validity of the order (1) "insofar as it permits the prosecution to decline to disclose the witnesses' identities to the defense before trial," and (2) "insofar as it permits the prosecution to continue to withhold the witnesses' identities at trial." (*Alvarado v. Superior Court, supra*, 23 Cal.4th at 1134.) The court found no impairment of constitutional rights in the court's order delaying disclosure "until shortly before the subject witnesses were to be called." (*Id.*, at 1136; citing *People v. Lopez* (1963) 60 Cal.2d 223, 246 [upholding disclosure 24 hours prior to witness testifying].)

In contrast, the court found that the court's order allowing permanent nondisclosure from the defense violated the defendant's Sixth Amendment right to confront and cross-examine the witnesses against him. (*Id.*, at pp. 1136-1152; see also, *Crawford v. Washington* (2004) 541 U.S. 36, 42 [referring to the Sixth Amendment Confrontation Clause as a "'bedrock procedural guarantee [which] applies to both federal and state prosecutions' [Citation.]"].) The court explained in relevant part:

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[45] "[T]he right of an accused to be confronted with the witnesses against him must be determined by the same standards whether the right is denied in a federal or state proceeding...." (*Pointer v. Texas* (1965)380 U.S. 400, 407-408.)

> "[W]ithout knowledge of the witnesses' identities, defense counsel 'will have difficulty obtaining complete information about the witnesses' location and ability to observe and testify about the crime[,]...[and] will be unable to [obtain] complete impeaching information, such as the witnesses' reputation for truthfulness or dishonesty, previous history and accuracy of providing information to law enforcement, and other motives to fabricate, such as revenge or reduction or dismissal of their own charges.' Indeed, without access to either the witnesses' names or their photographs, defense counsel are unlikely to be able to conduct an adequate investigation of the witnesses or of the veracity of their testimony, or challenge the accuracy of the information concerning the witnesses provided by the prosecution, including their prior criminal records or the benefits that may have been provided to them in return for their testimony."

(*Alvarado, supra*, at 1148.)

In *Alvarado*, this Court conducted a survey of relevant sister state decisions and failed to find "a single case upholding nondisclosure at trial of the identity of a crucial prosecution witness." (*Id.*, at 1145.) The Court found it significant that "in all those decisions in which a witness's name or address was deemed crucial, or the prosecution failed to allege a basis for nondisclosure of identifying information, the courts uniformly have concluded that disclosure at trial is required." (*Ibid.*) Last but not least, this Court found that "in every case in which the testimony of a witness has been found crucial to the prosecution's case the courts have determined that it is improper at trial to withhold information (for example, the name or address of the witness) essential to the defendant's ability to conduct an effective cross-examination." (*Id.*, at 1146.)

This Court also discussed relevant U.S. Supreme Court authority. For example, in *Alford v. United States* (1931) 282 U.S. 687, 689, the judgment was reversed because the trial court curtailed the defendant's cross-

examination of a prosecution witness, by refusing to let the defense attorney elicit the witness's *place of residence*. (See, *Alvarado, supra*, at 1139.) That is exactly what occurred in this case. In *Roviaro v. United States* (1957) 353 U.S. 53, the court reversed the defendant's convictions, holding that where an informant's identity was essential to a fair determination of a cause, the government's privilege to withhold the informant's identity had to yield to the defendant's right to confrontation and a fair trial.

In *Smith v. Illinois* (1968) 390 U.S. 129, a prosecution witness using a pseudonym testified that he purchased narcotics from the defendant. The judgment was reversed based on the violation of Sixth and Fourteenth Amendment rights because the trial court refused to allow defense counsel to ask the witness to state his true name and address. The U.S. Supreme Court, quoting, *Alford v. United States, supra,* explained:

> "'Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them....To say that prejudice can only be established by showing that the cross-examination, if pursued, would necessarily have brought out the facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial....'"

(*Smith, supra*, at 132; discussed in *Alvarado v. Superior Court, supra*, 23 Cal.4th at 1140; accord: *People v. Brandow* (1970) 12 Cal.App.3d 749.) The same principle mandates reversal in appellant's case. Appellant was denied a fundamental constitutional safeguard essential to a fair trial.

D. The trial court's nondisclosure orders, restricting counsel from discussing with appellant evidence that risked disclosure of witnesses' identities, withholding certain witnesses' identities until they testified, and permanently withholding their addresses and/or telephone numbers, violated appellant's Sixth Amendment confrontation rights, and Fourteenth Amendment right to a fair

trial.

The trial court's nondisclosure orders impaired Maciel's access to information regarding three categories of witnesses. The first category includes those people referred to by defense counsel as "stranger" witnesses (RT2:289), meaning those witnesses (such as the victims' neighbors) who were unacquainted with appellant, or the perpetrators or victims of the crime, and observed events from properties adjacent to, or across the street from the victims' home. "Stranger" witnesses would clearly include witnesses identified in redacted transcripts by the numbers 1, 2, 3, and 9. Defense counsel told the court he had no problem with maintaining the anonymity of the "stranger" witnesses. (RT2:289.)

The second category included material fact witnesses who were more akin to informants. These witnesses, identified in redacted transcripts by the numbers 14, 15, 16 and 17, were acquainted with some or all of the defendants, provided crucial evidence bearing on guilt, innocence, or penalty, and, and were themselves criminals and members of or affiliates of a gang. The record suggests that Maciel and his attorney either knew or obtained some identifying information for witness #14 and witness #15 prior to the commencement of Maciel's trial. (See, RT50-1:7523 [referring to witness #14 by name]; RT50-1:7527 [referring to witness #15 by name].) This does not necessarily mean that the witnesses' locations or addresses were known, or that comprehensive investigation was possible. With respect to witness #14, counsel was stopped by the court from eliciting the witness's present place of confinement, even after the witness testified that he had demanded a change in his conditions of confinement as a *quid pro quo* for testifying. (RT58:9055.) Excessively delayed, and permanently withheld discovery regarding these three witnesses, especially witnesses #14, #16, and #17 resulted in the denial of

appellant's Sixth and Fourteenth Amendment rights.

Witness #16 was a member of the Sangra gang who knew Palma, Valdez, Torres, and Logan, but *not* Maciel. (RT57:8888-8889,8928.) Since the witness and Maciel were not acquainted, Maciel could not have assisted counsel in investigating the credibility of this witness, absent disclosure of the witness's true name and address. (*Siegfriedt v. Fair* (1st Cir. 1992) 982 F.2d 14, 17.) Yet witness #16's credibility was clearly an issue; he was directly involved in the murders as the driver of the lookout vehicle. He received immunity from prosecution for murder in exchange for his testimony at Maciel's trial. (RT57:8890-8891.) This witness was crucial to proving the case against Maciel.

On the way to the murder scene with the perpetrators, witness #16 claimed to have briefly lost sight of the Nissan driven by Palma, Valdez and Torres while he was within a block of Maciel's residence. (RT57:8899-8906; RT58:9188.) This reportedly occurred in the same time frame when *witness #14* claimed to have driven Maciel to his apartment for a brief meeting with Palma, before Palma and his accomplices proceeded to the victims' residence. (RT57:8987-8997.)

Witness #14 had severe credibility problems, which meant that witness #16's testimony was extremely important to the prosecution because it bolstered the otherwise unsubstantiated claim of witness #14 that Maciel briefly met with the killers at his apartment immediately before the murders. (RT57:8983-8997.) Without the testimony of *both* witness #14 and witness #16, there was little to connect Maciel with the killings other than his association with Shyrock, and a few calls made from other defendants' phone numbers to Maciel's pager number. (See, Argument I, *ante*.)

Witness #14 was also a gang member with a prior record of serious

felonies. Witness #14's credibility problems stemmed from the fact that he did not tell officers about attending the baptismal party for Maciel's son until the third time he was interviewed by investigators. (RT58:9200.) In addition, this witness had at least one incentive to testify against Maciel; the DA had at minimum promised to help get the witness transferred to federal prison in exchange for his testimony at trial. (RT57:8979-8982; RT58:9074.) Defense counsel was prevented from inquiring on cross-examination where this witness was confined at the time of trial. (RT58:9055.)

Witness #15 was the only prosecution witness who placed Maciel at the home of the victims in the company of Sangra gang members on the afternoon prior to the killings. (RT56:8728-87837-8823; see, Argument I, *ante*.) Witness #15 was a convicted felon, an El Monte Flores gang member, a former associate of Eme, an admitted thief and a drug addict. Although he was incarcerated at the time of trial with a "third strike" case pending, he claimed no deals were being offered for his testimony. (RT56:8709,8712,8722-8733,8764,8795-8796,8810-8812.)

Witness #17, a penalty phase witness, was a member of the El Monte Flores street gang. (RT 63:9854.) He testified regarding an unadjudicated assault incident in which Maciel allegedly beat and stabbed him 37-38 times, aided by witness #14. (RT63:9868-9870.)

The third category of witness for whom identifying information was withheld includes witnesses #8, #11, and #13. All were strangers to Maciel. (RT55:8610-8616,8625; RT57:8955.) Manifestly, Maciel could not have lent counsel any assistance in investigating these witnesses because he did not know them, and no identifying information regarding the witnesses was furnished prior to the witnesses' testimony. (See, *People v. Lopez, supra*, 60 Cal.2d at 246.) Nevertheless, the testimony of these witnesses, while relatively

short, was material to proving guilt or innocence. Witnesses #8 and #11 knew Gustavo Aguirre and gave testimony implicating Eme in Aguirre's death. ((RT55:8610-8625.) Witness #13 provided material testimony that her brother, Torres, had revealed to her the names of the perpetrators and identities of the actual killers. She also testified that the Sangra gang intended to kill Palma for shooting the two child victims. (RT57:895708966.) Palma was later killed. (RT 51:7588.) While neither witness' testimony directly implicated Maciel, each was nonetheless damaging; their testimony helped to associate Maciel with ruthless gang members, predisposed to kill. For these three witnesses, as well as for witnesses #14, #15, and #16, the court's nondisclosure orders would have made it difficult for counsel to obtain complete impeaching information, such as the witnesses' reputations for truthfulness or dishonesty, their previous histories, their motives to fabricate testimony and facts raising a doubt regarding the accuracy of the information they gave to law enforcement. (*Alvarado, supra*, at 1148.)

To be entitled to reversal based on such nondisclosure orders, appellant is not required to prove that cross-examination of witnesses #8, #11, #13, #14, #15, #16, or #17, if pursued, would necessarily have brought additional facts to light tending to discredit these witnesses' testimony in chief. (*Smith v. Illinois, supra*, 390 U.S. at 132.) Nor does the fact that to some extent impeachment occurred automatically render harmless the court's interference with appellant's confrontation and cross-examination rights. (*United States v. Fuentes* (E.D. Pa. 1997) 988 F.Supp. 861.) Prejudice naturally ensues from the fact that the court permanently foreclosed numerous *other* avenues of in-court examination and out-of- court investigation which *could* have put the credibility of these witnesses to the test. (*Ibid.*; *Smith* at 132; *Howard v. Walker, supra*, 406 F.3d at 129.) Moreover, here this type of prejudice is

compounded by the fact that counsel was prohibited from discussing with Maciel anything that ran the risk of disclosing a witnesses' identity prior to trial. Consequently, channels of attorney-client communication were closed that otherwise might have suggested different avenues of investigation. Counsel was forced to defend his client at arm's length – without information that could have been crucial.

The Attorney General may argue, as it did in *Alvarado*, that Maciel was not prejudiced by nondisclosure because, once these crucial witnesses appeared in court, he could have advised his attorney of any prior contacts, and counsel could then have obtained a continuance, if necessary, to investigate. (*Alvarado*, 23 Cal.4th at 1148.) This argument was rejected in *Alvarado*, and should be rejected here. Appellant was not acquainted with most of the witnesses in question. Even where there was some acquaintance, Maciel may have known witnesses by monikers, not real names. Moreover, for those witnesses whose names were not discovered until trial, it was too late to conduct a meaningful investigation. (See, *People v. Lopez, supra*, 60 Cal.2d at 246.)

Furthermore, addresses and other identifying information were kept from the defense *permanently*. Under such circumstances, there is no reason to assume that the witnesses' mere appearance at trial would somehow enable counsel to "'place the witness in his proper setting and put the weight of his testimony and ... testimony to a test....'" (*Smith v. Illinois, supra*, 390 U.S. at 1149.) Furthermore, counsel was affirmatively prevented from eliciting testimony from witness #14 which might have shown – contrary to the trial testimony of one of the DAs – that he had actually received a tangible benefit, i.e., a transfer to much more pleasant prison than the secure housing unit at Pelican Bay, in return for his testimony against Maciel.

The Attorney General may also argue, as it did in *Alvarado*, that Maciel "waived" the right to challenge the court's permanent nondisclosure order by threatening certain witnesses. (*Alvarado*, at 1149.) In *Alvarado*, evidence had been introduced at the *in camera* hearing, from which the defense was excluded, indicating that the defendant had personally threatened a witness. This Court rejected the waiver argument because the defendant had not had an opportunity to contest the evidence of threats. (*Ibid.*)

In this case, evidence was likewise introduced at an *in camera* hearing, from which Maciel and his counsel were excluded. Witnesses for the state alleged that Maciel was the organizer and orchestrator of the Mexican Mafia's criminal activity in the county jail. The prosecution also alleged at the *in camera* hearing that, before his arrest, Maciel had been requested by someone in the county jail to inflict physical injury on a witness in another case. Maciel had no opportunity to contest this evidence. (See, Sealed Confidential Reporter's Transcript of March 18, 1996, *in camera* hearing before Judge Horan.) Consequently, the truth of these allegations cannot be presumed on appeal, and no waiver of confrontation rights may be implied.

No doubt the Attorney General will argue, as it did in *Alvarado*, that sheer magnitude of the alleged witness intimidation problem justified the court's permanent nondisclosure order. (*Alvarado, supra*, at 1150, n.15.) In *Alvarado*, however, this Court rejected this argument. Despite the seriousness of the problem of witness intimidation, the Court concluded the state had less constitutionally intrusive means of affording protection to witnesses, including protective surveillance and housing, relocation, provision of documents furnishing a new identity, and the transfer of incarcerated witnesses to prisons outside California. The Court also pointed out that the state could vigorously "enforce the numerous stringent sanctions ... available against witness

harassment and intimidation." (*Id.*, at p 1151.) This reasoning applies with equal force to this case.

Accordingly, belated disclosure of witness identities, and permanent denial of discovery regarding several witnesses' addresses clearly violated appellant's confrontation and due process rights, even if no other discovery errors occurred. (*Roviaro v. United States, supra*, 353 U.S. at 59-65; *Smith v. Illinois, supra*, 390 U.S. at p132; *Alvarado v. Superior Court, supra*, 23 Cal.4th at pp. 1145-1146; *Miller v. Superior Court* (1979) 99 Cal.App.3d 381, 386; *Eleazar v. Superior Court* (1970) 1 Cal.3d 847, 851-853; *United States v. Hernandez* (9th Cir. 1979) 608 F.2d 741, 744-746; *United States v. Fischel* (5th Cir. 1982) 686 F.2d 1082, 192-1094; *United States v. Palermo* (7th Cir. 1969) 410 F.2d 468, 472.) Interference with the attorney-client relationship also rendered defense counsel functionally absent at critical stages of these proceedings. Actual or constructive denial of the assistance of counsel is "structural error" which is considered presumptively prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 692; *Penson v. Ohio* (1988) 488 U.S. 75, 88; *Evitts v. Lucy* (1985) 469 U.S. 387, 396.).)

E. The court's redaction and nondisclosure orders violated Maciel's Fourteenth Amendment due process right, and the rights to effective counsel and confrontation guaranteed by the Sixth Amendment.

Maciel moved to discharge his retained counsel approximately a month before trial. Quite apart from arguments earlier presented on the trial court's treatment of this motion (See, Argument II), Maciel did not receive a fair hearing of his motion to discharge counsel. Throughout pretrial proceedings, he was not allowed to see transcripts or police reports, even redacted versions. Trial counsel was prohibited from giving him any information that could risk the disclosure of a witness's identity or location.

Because of the court's nondisclosure orders, Maciel was unfairly handicapped in his ability to demonstrate to the court what investigation, if any, Esqueda had done or not done regarding various witnesses. Even though Maciel advised the court of this problem, the court did not take remedial action. No investigator, or person with legal training was appointed to review the discovery furnished to Esqueda, and to point out for the court additional matters, if any, that Esqueda had failed to investigate. These circumstances resulted in a denial of due process at the hearing of the discharge motion. (See, Argument II.) The error also deprived appellant of his state-created liberty interest in the correct, non-arbitrary application of California's state laws governing discovery, which resulted in a violation of the Fourteenth Amendment's Due Process Clause. (*Hicks v. Oklahoma, supra*, 447 U.S. at 346; *Hewett v. Helms, supra*, 459 U.S. at 466; *Ford v. Wainwright, supra*, 447 U.S. at 428.)

The trial court's nondisclosure orders also fundamentally interfered with the attorney-client relationship. Maciel wanted to fire Esqueda in part because of the lack of consultation and communication. Once the court ordered defense counsel not to reveal anything to Maciel that might result in disclosure of witnesses' identities, Esqueda ceased to spend much time with Maciel, and stopped discussing substantive aspects of his case with him. (RT50-1:7529; SCT1:8:1600.) Maciel's relationship with counsel deteriorated to the point that he hired unlicensed counsel – Isaac Guillen – whom he hoped could fill the gaps in trial counsel's investigation of the case. (Argument II, C, 5, b.)

"Criminal defense lawyers are not fungible. The attorney client relationship '...involves not just the casual assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a

state of trust and confidence between the client and his attorney. This is particularly essential, of course, when the attorney is defending the client's life or liberty.'" (*Boulas v. Superior Court* (1986) 188 Cal.App.3d 422, 430; citing *Smith v. Superior Court, supra*, 68 Cal.2d at 561.) "Prejudice can result from 'government influence which destroys the defendant's confidence in his attorney.'" (*United States v. Amlani* (9th Cir. 1997) 111 F.3d 705, 711 [remand for a hearing to allow the prosecution to rebut the denial of Sixth Amendment right where the defendant fired counsel after the prosecutor disparaged the competency of retained counsel]; citing *United States v. Irwin* (9th Cir. 1980) 612 F.2d 1182, 1187.) Judges have been removed from office for unlawfully interfering with the attorney-client relationship. (See, e.g., *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 698.)

A change in defense counsel caused by governmental misconduct "itself establishes the requisite prejudice to vacate [a] conviction." (*United States v. Amlani, supra*, at 711; see also, *Barber v. Municipal Court* 1979) 24 Cal.3d 742, 759 [reversal based on presence of confidential informant at confidential attorney-client meetings].) In this case, the harm is no less egregious because the court refused to allow Maciel to fire counsel. Maciel's confidence in Esqueda was irremediably damaged by the court's order, which prohibited counsel from discussing with Maciel any matter that ran the risk of disclosing the identity of a witness. Appellant's fundamental rights to due process, and to effective counsel were thereby eviscerated in violation of the Sixth and Fourteenth Amendments.

Last but not least the nondisclosure orders ultimately deprived Maciel of his rights under the Confrontation Clause. His attorney was prohibited from questioning at least one witness, witness #14, about whether his conditions of confinement improved as the result of his testimony against Maciel.

(RT58:9055.) This violated the Sixth Amendment's Confrontation Clause. (*Howard v. Walker, supra*, 406 F.3d at 129; *Davis v. Alaska, supra*, 415 U.S. at 318.)

F. The nondisclosure orders violated appellant's Eighth Amendment right to the reliability of the death judgment.

The unique nature of the death penalty imposes a special need for reliability in the determination of the applicability and appropriateness of the ultimate sanction. (*People v. Horton, supra*, 11 Cal.4th at 1138.) By withholding the identities of witnesses until trial, and by permanently withholding witness address information, the trial court effectively denied Maciel the ability to present potentially mitigating or exonerating evidence, thereby depriving the judgment of the heightened reliability demanded by the Eighth Amendment. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.)

V. APPELLANT'S RIGHTS TO DUE PROCESS, CONFRONTATION, A FAIR TRIAL AND RELIABLE DEATH JUDGMENT WERE VIOLATED BY THE ADMISSION OF APPELLANT'S REDACTED, TAPE-RECORDED STATEMENT.

A. The statement and objections:

Maciel was interviewed by Detective John Laurie on December 15, 1995, following his arrest. A redacted recording of Maciel's statement was played for the jury, which also received a redacted transcription of the statement for assistance. (Exhibits 132 and 132A; SCT1:8:1673-1704; RT59:9305-9314.) The statement itself is summarized in the Statement of Facts. The jury was also permitted to take the tape-recording, the transcription, and a tape player into the jury room during deliberations. (RT62:9763.)

Defense counsel objected to admitting the statement as evidence. (RT59:9266.) Counsel also argued that many portions of the statement were more prejudicial than probative. (RT59:9268-9270.) The trial court held that the statement was admissible, and ruled that the extrajudicial statement was relevant because it contained many false and evasive statements by Maciel, admissible to show consciousness of guilt. (RT59:9266,9271.) In addition, the court ruled that the statement was had probative value to the extent that Maciel admitted having knowledge of the crimes, and, in the court's opinion, came close in his statement to turning over the real killers. (RT59:9271.)

The court redacted some prejudicial portions of the statement (RT59:9268-9270,9272-9273), but left in many accusatory statements and questions by the officers which clearly suggested that other people had implicated Maciel in the Maxson Street murders, that investigators believed Maciel to be guilty of arranging the killings, that Maciel's life was in danger because children were killed, and that he had committed other unspecified

criminal acts. The following statements by investigators are found in the tape-recorded statement:

"A: [Maciel]: I ain't involved in that shit, man.

"Q: [investigator]: You're name is up there."

(SCT1:8:1682.)

"A: [Maciel]: ...I ain't get involved in that shit, man.

"Q: [investigator] Well you're name is up there."

(SCT1:8:1683.)

"A [Maciel]: I'm not involved in this, I know.

"Q: [investigator]: People are saying –

"A: I ain't gonna fall for that shit.

"Q: – that you setting it up.

"A: I said it what?

"Q: People are saying that you set it up."

(SCT1:8:1685.)

"A: [Maciel]: Uh, the shit you guys are trying to put on me with 'Scar' and all them fools that did that shit.

"Q: [investigator]: I'm not trying to put anything on you that doesn't fit."

(SCT1:8:1691.)

"Q: [investigator]: ... Uhm, I think you oughta give it some real thought to your own personal safety, because I'll tell you, uh, we've talked to some folks about your affiliation and like you say you've had some letter – you've had some letters...and some people have kind of in – giving you little inklings that, uh, – that some people are pissed off at you. I know you got some tight friends and I know you think you might have some power, but let me just tell you."

"A: I don't --

"Q: You're going to a place – and I know you've been in the County Jail, and I – and I'm not saying this for any other reason, but I don't know if 'Pelon' is gonna come out of this thing alive."

"A: I haven't done nothing.

"Q: No, no, no, I'm not even talking about – I'm not talking about cops, I'm talking about people who know what you've been up to.

"A: Where?

"Q: People on the street."

(SCT1:8:1694-1695.)

"Q: [investigators]: What you get out of it, is perhaps the ability to do time where you don't have to look over your shoulder. You know you're gonna do time.

"A: [Maciel]: For what?

"Q: It's just the beginning. For all the shit – all the shit you've been involved in."

(SCT1:8:1696)

(SCT1:8:1694.)

The court admonished the jury not to speculate about blacked-out portions of the transcription of the tape-recording (Exhibit 132A), and instructed that the accusations or statements made by the officers during questioning were "not received for the truth of any allegation but because it is a part of the statement and helps judge the response of the defendant." (RT60:9308-9309, 9312.) However, the tape-recorded interview was re-played for the jury during the prosecutor's guilt phase closing argument, and, during deliberations, the jury was furnished tape playing equipment and the transcriptions of the interview. (RT62:9753,9763.)

B. The tape-recorded statement was insufficiently redacted to prevent the violation of appellant's constitutional rights.

1. It was reversible error to admit accusatory statements containing hearsay suggesting that Maciel "set up" the murders and might be killed in retaliation for his role in killing innocent children:

The trial court committed prejudicial error to the extent it overruled defense counsel's objections to tape-recorded statements or questions by investigators which clearly implied that unidentified informants had reported that Maciel was responsible for setting up the murders, and was in danger because children had been killed. (RT59:9273-9275,9288) Such accusatory statements are plain hearsay which may be received only as admissions, under familiar exceptions to the hearsay rule. (*People v. Simmons* (1946) 28 Cal.2d 699, 712; cited in *People v. Edelbacher* (1989) 47 Cal.3d 983, 1010.) If the accused responds to an accusatory statement with a flat denial, there is no "admission" and hence nothing that may be received in evidence. (*People v. Simmons, supra*, at 712.) Maciel denied having anything to do with the murders. Hence, the accusatory statements and questions of Investigators Davis and Laurie were inadmissible hearsay.

Accusatory statements are objectionable because

> "...there is placed before the jury under the guise of an accusatory statement a vast amount of hearsay testimony that is otherwise utterly inadmissible....Although the jury may properly be cautioned to receive it, not as substantive evidence in proof of the facts asserted but merely as a basis of showing the reaction of the accused to it, the fact is that a lengthy transcript containing any amount of extraneous matter apart from the direct accusation is read into the ears of the jury and the matter remains in their mind during their deliberations."

(*People v. Simmons, supra*, at 717; accord: *People v. Davis* (1954) 43 Cal.2d

661, 671; *People v. Burton* (1961) 55 Cal.2d 328, 338-339 [i.e., "'Would you have any explanation as to why the little girl would say [that defendant molested her]?'"].)

Accusatory statements that take the form of *questions* that insinuate incriminating information has been obtained from other hearsay sources are just as improper as purely accusatory statements. (*Hardnett v. Marshall* (9th Cir. 1994) 25 F.3d 875, 878-879.) For example, in the *Hardnett* case, a defendant was charged with murdering a pimp who had threatened and beaten his girlfriend. He testified that he acted in self-defense. On cross-examination, the prosecutor asked accusatory questions incorporating inculpatory statements made by the girlfriend who was not a witness at the trial. The questions insinuated "not at all subtly" that the prosecutor had in his possession a statement by the girlfriend tending to defeat the claim of self defense. (*Id.*, at 879.) The circuit court held that the questioning violated the defendant's Sixth Amendment right to confront and cross-examine the witnesses against him. (*Id.*, at 878.)

In *Hardnett, supra*, the judge's effort to cure the prejudice was unavailing. The trial court sustained the defendant's objections, rebuked the prosecutor, and instructed the jury that lawyers' statements were not evidence. The appellate court nevertheless opined that where the "inadmissible testimony [was] as relevant as it was," it would presume that the error could not have been cured by the court's instruction. (*Ibid.*) The judgment was not reversed, however, only because the admitted accusatory statements were relevant to prove premeditation. The jury had acquitted the defendant of first degree murder; hence, the error did not result in prejudice. (*Hardnett* at 880.)

In *Dubria v. Smith* (9th Cir. 2000) 224 F.3d 995, 1001-1003, the Ninth Circuit rejected a due process challenge predicated on the admission of

videotapes of a defendant's interrogation, incorporating accusatory statements by police. However, in *Dubria*, the officers' questions merely put the defendant's answers in context. Furthermore, in *Dubria*, *before* and *after* the evidence was received, the trial court gave a strong admonition, telling jurors they must not "assume as true" anything the officers had said. (*Id.*, at 1003.)

In appellant's case, officers repeatedly implied that unidentified people on the street had personal knowledge of appellant's role in the Maxson Street crimes. Officers also warned that appellant's life was in danger, inferentially because he had played a role in the murders. There was a palpable danger that appellants' jurors would consider investigators' statements on the videotape as substantive evidence of appellant's guilt.

Judge Horan's mild caution that statements by officers were "not received for the truth of any allegation," was insufficient to prevent prejudice. During deliberations, appellant's jurors were free to play the videotaped statement as many times as they wanted – without the benefit of any limiting instruction or admonition. (Cf. *Dubria v. Smith*, at 1003.)

Several state court cases finding similar error have reversed judgments. In *People v. Butler* (1953) 118 Cal.App.2d 16, an arson investigator testified regarding his conversation with the defendant several days following an arson fire. The conversation included accusatory questions by the investigator asking why the defendant went to his wife's house to burn it down, and asking whether the defendant remembered shooting a man, and going into his wife's house and setting fire to it. The Court of Appeal held that it was error to admit the conversation because the defendant flatly denied each of the accusatory statements; hence, the evidence "not only was hearsay but its main effect was to disclose the firm opinion of the investigator that the defendant had set fire to his house and had fired the gun at the constable." (*Id.*, at 21.) The error was

found prejudicial; the judgment was reversed.

In *People v. Staker* (1957) 154 Cal.App.2d 773, evidence was introduced of the defendant's statement following arrest, in which she categorically denied the accusatory statements of the accomplice implicating her in a series of thefts from stores. The Court of Appeal ruled that admitting the accusatory statements was prejudicial error, requiring reversal of the judgment. (*Id.*, at pp. 784-785.)

In this case, the accusatory statements and questions implied none too subtly that unidentified informants had furnished evidence that Maciel had "set up" the Maxson Street murders. Furthermore, as defense counsel argued, the interrogators' warnings to Maciel that his life was in danger would have left the jury with the distinct impression, given the other evidence in the case,[46] that Eme or local gang members believed Maciel, like Palma, should be held accountable as a "baby killer." (RT59:9288-9289.) Defense counsel specifically argued the prejudicial impact of telling the jury that the Mafia had "green lighted" Maciel. (RT59:9286,9292.) As in the above cases, the introduction of investigators accusatory statements and questions was erroneous.

2. It was reversible error to admit statements expressing investigators' personal opinions that Maciel was guilty:

As introduced, the interview of Maciel included statements by investigators which did not incorporate hearsay from unknown sources, but nevertheless amounted to expressions of personal opinion that Maciel was

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[46] The prosecutor's expert, Valdemar, testified regarding the Mexican Mafia's practice of placing on a "hit list" anyone who causes the accidental death of an innocent woman or child. (RT55:8585-8586.) He also testified that Palma, the killer of the two children, was murdered while on death row. (RT55:8586, 8603.)

guilty of setting up the Maxson Street killings. (See, A, above.) For example, the officers intimated that they just doing their jobs, and were not accusing Maciel of anything he did not do. (SCT1:8:1684-1685, 1691.) They also voiced the opinion that Maciel was going to serve time in prison for "all the shit" he had done. (SCT1:8:1696.) These expressions of opinion were not questions, and therefore were not particularly helpful to the jury for purposes of judging Maciel's responses to questions. In one instance, in fact, the investigator's accusation could not have been helpful to explain Maciel's answer, which was *deleted* from the statement played for the jury. (SCT1:8:1691, lines 3 - 5.) Moreover, Maciel's response when confronted with the investigators' opinions of his guilt, was to unequivocally deny any involvement in the murders. (SCT1:8:1685, line 2; 1691, line 14; see also, 1697, lines 18-19.)

With exceptions inapplicable here, a witness in a criminal case is not allowed to express an opinion concerning the guilt of an accused. (*People v. Torres* (1995) 33 Cal.App.4th 37, 44-46; *People v. Brown* (1981) 116 Cal.App.3d 820, 829; *People v. Mason* (1960) 183 Cal.App.2d 168, 173.) Such testimony is objectionable because it "invades the province of the court or jury." (*People v. Mason, supra*, at 173.) Opinion testimony regarding a defendant's guilt poses an even greater danger of prejudice when it comes from an officer who is investigating the crime. (*Martinez v. State* (Fla. 2000) 761 So.2d 1074, 1078-1-81.) "In this situation, an opinion about the ultimate issue of guilt could convey the impression that evidence not presented to the jury, but known to the investigating officer, supports the charges against the defendant." (*Ibid*; citing *United States v. Young* (1985) 470 U.S. 1, 18-19.)

It is also unethical for a prosecutor to express his personal opinion regarding a defendant's guilt. (*People v. Kirkes* (1952) 39 Cal.2d 719, 725-

726; *United States v. Young, supra*, 470 U.S. at 17-18; *United States v. McCoy* (9th Cir. 1985) 771 F.2d 1207, 1210-1213; *People v. Arends* (1957) 155 Cal.App.2d 496, 507-508.) In *People v. Arends, supra*, for example, a prosecutor testified that, from his talks with the defendant and investigators, it was his "considered opinion that the defendant was guilty." (*Id.*, at 507.) The appellate court concluded that the error resulted in a miscarriage of justice. (*Id.*, at pp. 511-512.) Likewise, in *United States v. McCoy, supra*, a testifying prosecutor opined that the state had "'an extremely strong case'" against the defendant. (*Id.*, at 1210.) The Ninth Circuit concluded that the prejudice to the defendant was so highly probable that it was "'not justified in assuming its nonexistence.'" (*Id.*, at 1213, quoting *Berger v. United States* (1934) 295 U.S. 78, 89.) The judgment was reversed. When the prosecution's investigator conveys to the jury that he has a strong conviction in the defendant's guilt, the prejudicial effect is just as great as when a prosecutor does so. (*Martinez v. State, supra*, 761 So.2d at 1078-1-81.)

In this case, playing a tape-recorded interrogation containing investigators' statements of opinion regarding Maciel's guilt was prejudicial error. The error was so egregious that it could not have been rendered harmless by the court's limiting instruction. (RT60:9308-9309, 9312; *People v. Kirkes, supra*, 39 Cal.2d at 726-727.) The trial court gave a jury admonition which advised that the accusatory statements and questions of investigators were not being received for the truth of the matter alleged, but to help "judge the response of the defendant." (RT60:9312.) This instruction was only given once, however. The tape recording was played at least twice: once during the trial and a second time during the prosecutor's guilt phase argument. In addition, the jury took the recording and tape-playing equipment into the jury room during deliberations. The record does not disclose how many more times

the recording was played without a reminder from the court that the evidence was offered for a limited purpose. (RT62:9753,9763.)

D. Admission of the tape-recorded statement denied appellant his Sixth Amendment confrontation rights, as well as his right to due process of law and a reliable death judgment, requiring reversal.

Unlike what occurred in *Hardnett v. Marshall, supra*, 25 F.3d 875, in this case, the admission of accusatory statements containing hearsay cannot be found harmless. Evidence of Maciel's guilt was entirely circumstantial and closely balanced. He was not present when the murders were committed. Proof of his involvement as an aider or abettor or conspirator was extremely weak, because it depended heavily mere association evidence – i.e., proof of his relationship with Raymond Shyrock and the Mexican Mafia – and crucial testimony from witnesses #14 and #15, both of whom had long criminal records and motives to give testimony for the prosecution which would yield favorable treatment in their pending criminal cases. (*Berger v. United States, supra*, 295 U.S. at 88.) Furthermore, Maciel denied involvement in the murders and presented an affirmative defense. Multiple defense witnesses *without* criminal records testified that Maciel was with his family, celebrating his son's baptism, at times when witnesses #14 and #15, both criminals and drug addicts, claimed Maciel was miles away, selling drugs, visiting the adult male victims, and/or surreptitiously meeting with the actual shooters. (Argument I, *ante*.)

A miscarriage of justice also resulted from introducing portions of the interrogation which included the gratuitous opinions of investigating officers regarding Maciel's guilt. It would "ignore human experience and the dictates of common sense" to find that the evidence did not produce a significant biasing effect on the jury. (*People v. Arends, supra*, 155 Cal.App.2d at 511-512..)

The tape-recorded interview was played twice for the jury: once during trial and again during guilt phase deliberations. The jury may also have re-played the recording in the jury room. (RT62:9753,9763.) A limiting instruction was only given once, when the evidence was first received. As in *Hardnett v. Marshall, supra*, 25 F.3d at 879, given the extremely strong relevance of the hearsay identifying Maciel as person who "set up" the five murders, it cannot be presumed that the jury paid no attention to it. In the form the tape-recorded statement was presented to the jury, it would nonetheless have "instilled a poison which the defense could not drain from the case." (*Ibid.*; accord: *People v. Arends, supra*, 155 Cal.App.2d at 513.)

The officers' statements during the interrogation incorporated extrajudicial statements attributed to unidentified witnesses who had identified Maciel as the person who "setup" the Maxson Street killings. To the extent jurors considered the statements for the truth of the matters asserted, the evidence constituted inadmissible hearsay. (Evidence Code section 1200.)

The Confrontation Clause of the Sixth Amendment provides that an accused shall enjoy the right to be confronted against the witnesses against him at trial. (*Davis v. Hammon* (2006) 126 S.Ct. 2266, 2273.) At the time of Maciel's trial, the proper test for determining whether the admission of hearsay violates the Confrontation Clause was set forth in *Ohio v. Roberts* (1980) 448 U.S. 56, 66.) Under *Roberts*, a hearsay statement can be admitted only if it falls within a firmly rooted hearsay exception, or bears particularized guarantees of trustworthiness. (*Id.*, at 66.)

Roberts has been overruled with respect to "testimonial" hearsay by *Crawford v. Washington* (2004) 541 U.S. 36, 53-54.) Pursuant to *Crawford*, "testimonial" hearsay statements of a person who does not testify cannot be admitted unless the witness is unavailable, *and* the defendant has had an

opportunity for prior cross-examination. (*People v. Roldan, supra*, 35 Cal.4th at 711, n.25.) In this case, the investigators' hearsay information that Maciel "set up" the killings was almost certainly testimonial, i.e., derived from suspects or witnesses being interrogated by investigators about their possible roles in, or knowledge of the murders. (*Crawford v. Washington, supra*, at 61.) Even if not, the investigators' accusatory statements do not fall within a firmly rooted hearsay exception, nor do they bear particularized guarantees of trustworthiness. The Confrontation Clause was violated by their admission.

Although ordinarily, hearsay will not violate the Confrontation Clause if *not* offered to prove the truth of the matter asserted, in this case, the hearsay that underlay the investigators accusations went right to the heart of the jury's guilt determination and would have been impossible to ignore. Consequently, the admission of interrogators' questions and accusations containing hearsay violated the federal and state rights to cross-examine the witnesses, guaranteed by the Sixth Amendment and Art. I, § 15 of the California Constitution. (*Hardnett v. Marshall, supra*, 25 F.3d at 878-879.)

Given the weak, circumstantial, and conflicted evidence of Maciel's complicity in the murders, playing the recording multiple times, without redacting the accusatory questions, statements and opinions of investigators, so infected the trial with unfairness as to make the resulting conviction a denial of due process. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181; *People v. Hill* (1974) 17 Cal.4th 800, 819; *Bains v. Cambra* (9th Cir. 2000) 204 F.3d 964, 973-974; *United States v. Murrah* (5th Cir. 1989) 888 F.2d 24, 26-27.) The error also deprived appellant of his state-created liberty interest in the correct, non-arbitrary application of California's state laws, which resulted in a violation of the Fourteenth Amendment's Due Process Clause. (*Hicks v. Oklahoma, supra*, 447 U.S. at 346; *Hewett v. Helms, supra*, 459 U.S. at 466;

Ford v. Wainwright, supra, 447 U.S. at 428.)

In addition, because the error occurred during the guilt phase of a death penalty trial, the reliability of the death judgment was irrevocably compromised in violation of the Eighth and Fourteenth Amendments. (*Satterwhite v. Texas, supra*, 486 U.S. at 262-263; *Beck v. Alabama* (1980) 447 U.S. 625, 637; *Spaziano v. Florida* (1984) 468 U.S. 447, 456; *Gardner v. Florida* (1977) 430 U.S. 349, 363-364; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885.)

VI. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ERRONEOUSLY OVERRULING OBJECTIONS TO TESTIMONY BY THE PROSECUTION'S GANG EXPERT.

Prior to trial, the prosecutor filed a motion to admit evidence against all defendants, including *inter alia* evidence: that (1) the defendants other than Maciel were members of the Sangra gang; (2) Maciel and Shyrock were members of the Mexican Mafia, and Maciel was also a member of the El Monte Flores gang; (3) Anthony Moreno was a Mexican Mafia "dropout"; (4) Victor Aguirre had robbed a drug dealer who was protected by the Mexican mafia; and (5) regarding the relationship between the Mexican Mafia and the Sangra gang. (CT2:421-427.) The evidence was offered to prove intent and motive. (CT2:424.)

In a motion joined on behalf of Maciel, defendant Palma requested an *in limine* hearing and orders limiting introduction of gang-related evidence not directly connected with the defendants. (CT1:213-214; RT3:427-442,495.) At a pretrial hearing before Judge Sarmiento, the court held that evidence of gang relationship would generally be admissible assuming a proper foundation were laid, but that the sufficiency of the prosecutor's foundational showing was a matter that should be left to the trial judges at the time of trial. (RT3:444.)

Following transfer of Maciel's case to Judge Horan, no *in limine* hearing was ever held regarding the admissibility of gang-related evidence,[47] although objections to particular testimony by the gang expert, were advanced during the trial. The trial court improperly overruled objections in several instances.

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[47] Whether trial counsel was ineffective for failing to seek orders circumscribing the scope of gang expert testimony is more appropriately addressed in habeas corpus proceedings.

A. The trial court erred by admitting testimony that even a son of a murder victim would commit perjury to aid the Mexican Mafia.

In the context of testimony regarding why sympathizers of the gang would do Eme's bidding, the prosecutor asked, "would the son of a murder victim come into court to lie for a Mexican Mafia member being tried for murder?" (RT55:8522.) Esqueda objected that determining credibility was the function of the jury. (RT55:8522.) The objection was overruled. (RT55:8522; see also, Argument XIII [assigning the court's manner of ruling as judicial misconduct].)

The ruling was erroneous. Trial counsel was correct; credibility questions are generally not a proper subject for expert testimony. (*People v. Smith* (2003) 30 Cal.4th 581, 628; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1012; *United States v. Call* (10th Cir. 1997) 129 F.3d 1402, 1406.) Since no son of a victim testified at the trial, the objectionable question and answer had no conceivable purpose but to communicate to the jury Valdemar's opinion that the influence of Eme was so extremely strong that any witness at the trial whose testimony favored Maciel, or the Mexican Mafia, was lying either in self-preservation, or to protect the Mafia. This sweeping opinion was beyond the permissible scope of the gang expert's testimony. (*Dawson v. Delaware* (1992) 503 U.S. 159 [error to admit into evidence at penalty phase the defendant's membership in the Aryan Brotherhood, a racist prison gang].)

B. The court erred by admitting testimony implying that a new Mexican Mafia recruit would do his sponsor's bidding.

Maciel's connection with the Mexican Mafia and his association with Raymond Shyrock were established by playing a surveillance videotape of a meeting of the organization on April 2, 1995, during which Shyrock vouched for Maciel, who was then voted in as a member. (Exhibits 119 & 119A;

SCT1:8:1644-1672.) Shyrock's motive to kill Anthony "Dido" Moreno was likewise proven by a surveillance videotape of an earlier Mexican Mafia meeting, held January 4, 1995, during which Shyrock referred to "Dido" as a "dropout," and said he needed a silencer to have "Dido" killed. (Exhibits 118 & 118A; SCT1:8:1642-1643.) Maciel's presence was not observed during any monitored Mexican Mafia meeting, except the April 2, 1995, meeting. (RT55:8574,8597.)

In order to implicate Maciel in the killings, the prosecution sought to convince the jury that Maciel had developed a special, student-mentor relationship with Shyrock, such that Maciel must have been the one to arrange to have "Dido" killed. To this end, Valdemar testified that, when a Mafia member successfully recruits a new member, the relationship is that of "mentor and student." (RT55:8527.) When Valdemar was asked how the new member would view the wishes of his sponsor, Esqueda properly objected that the question called for speculation. Over objection, Valdemar was allowed to testify that the new member would "pay great attention" to his sponsor in learning how to conduct himself as a gang member. (RT55:8527.)

Admission of this testimony was reversible error. (*People v. Brown, supra*, 116 Cal.App.3d 820.) In *Brown*, a narcotic drug expert testified that it was his opinion that in a drug transaction the defendant had played the role of a "runner." (*Id.*, at pp. 828-829.) The appellate court concluded that the answer given by the officer "was tantamount to an opinion that Brown was guilty of the charged crime." (*Id.*, at 829.) In the context of this case, Valdemar's answer was akin to testimony that Maciel – Shyrock's "student" – was the person guilty of arranging the murders . (Cf. *United States v. Mansoori* (7th Cir. 2002) 304 F.3d 635, 654 [expert testimony admissible that did *not* invite the jury to conclude that membership in a gang equated with

participation in the charged conspiracy].)

Applying *People v. Watson* (1956) 46 Cal.2d 818, 836, and article VI, section 13 of the state constitution, the court in *Brown* reversed the judgment based on this and other cumulatively harmful errors. (*People v. Brown, supra*, 116 Cal.App.3d at 829.) This Court should follow suit.

C. The errors violated appellant's constitutional rights to trial by jury, due process, freedom of association, and to a reliable death judgment.

In this case, the role of the jury in assessing witness credibility was effectively usurped. (U.S. Const., Amendment VI; Cal.Const., article I, section 16.) The trial was rendered fundamentally unfair by allowing gang expert testimony which, in effect, implied that any witness – even one related to the victims – who testified favorably to the defense was probably lying. (*Snowden v. Singletary* (11th Cir. 1998) 135 F.3d 732, 738 [allowing expert testimony that most child sex abuse victims tell the truth]; U.S. Const., Amendments V & XIV; Cal.Const., art. I, sections 7 & 15.) The First Amendment protects the right of both appellant and his witnesses to join groups and associate with others holding similar beliefs. (*Dawson v. Delaware, supra*, 503 U.S. at 163-164.) In violation of the First and Fourteenth Amendments, appellant's jury was invited to reject any favorable defense testimony, not based on the strength of each witness's testimony, but rather, based on the witness's supposed allegiance to a violent gang. (*Dawson v. Delaware, supra.*) The unfairness of asking the jury to discredit any witness associated with Eme was compounded by allowing an expert to testify, in effect, that Maciel, as Shyrock's recruit, would necessarily have arranged the murders. (See, *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1382-1386; see also, *United States v. Shwayder* (9th Cir. 2002) 312 F.3d 1109.)

In addition, the foregoing errors violated appellant's state-created liberty interest in the correct, non-arbitrary application of California's state evidence rules, which resulted in a violation of the Fourteenth Amendment's Due Process Clause. (*Hicks v. Oklahoma, supra*, 447 U.S. at 346; *Hewett v. Helms, supra*, 459 U.S. 460, 466; *Ford v. Wainwright* (1986) 447 U.S. 399, 428 [O'Connor, J, concurring].) The errors cumulatively require reversal of the guilt phase judgment.

Last but not least, reversal of the penalty is necessary because any significant error which occurs during any phase of a capital trial necessarily deprives the jury's penalty judgment of its reliability in violation of the Eighth Amendment and article I, § 17 of the California Constitution. (*Satterwhite v. Texas, supra,* 486 U.S. at 262-263.)

VII. THE ERRONEOUS ADMISSION OF A VIDEOTAPE OF A MEXICAN MAFIA MEETING CONTAINING HEARSAY STATEMENTS OF RAYMOND SHYROCK IMPLICATING APPELLANT IN VAGUE AND UNSPECIFIED ACTS OF GANG VIOLENCE VIOLATED STATE HEARSAY RULES AS WELL AS APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, CONFRONTATION AND CROSS EXAMINATION AND A RELIABLE DEATH JUDGMENT.

A. Evidence, objections and rulings:

Investigator Valdemar was present during the surveillance of a meeting of the Mexican Mafia on April 2, 1995, during which Maciel was introduced by Shyrock, and voted in as a member of the group. (Exhibit 119.) A lengthy excerpt of the videotaped meeting was played for the jury. Evidence that Shyrock sponsored Maciel's membership was offered to establish the relationship between Shyrock and Maciel and the identity of members of the conspiracy to kill "Dido" Moreno. Evidence of Shyrock's statements about Maciel's activities on his, or Eme's behalf, were offered by the prosecution as statements against Shyrock's penal interest. (RT3:520-523,528.)

At a pretrial hearing on admissibility held before Judge Sarmiento on September 3, 1996, defense counsel objected to the videotape evidence as irrelevant, with the proviso that he did not object to evidence showing that Maciel was "made a member of the Mexican Mafia." (RT3:532.) Counsel argued that the videotaped statements made by Shyrock about Maciel were *not* against Shyrock's penal interest, were "highly prejudicial," and should be excluded. (RT3:524,532.)

During the pretrial hearing, the prosecutor – John Monaghan – came close to conceding that the court would be warranted in excluding those portions of the videotape that included statements indicating Maciel has "downed a lot of so and so." (RT3:530.) Monaghan argued that at least the

fact that the meeting took place and that Shyrock put Maciel up for membership was "clearly relevant." (RT3:530.) He further indicated that, "even if the court [did] not allow what was actually said into evidence," it would be his intent to "play a portion of the videotape where Mr. Maciel is brought in, introduced around, and then later on comes in and embraces the people present." (RT3:531.)

Judge Sarmiento ruled that the videotaped statements about Maciel's activities were *not* admissible as declarations against Shyrock's penal interest. (RT3532-533.) Thereafter, Maciel's case was transferred for trial to Judge Horan, and Anthony Manzella took over as prosecutor. Despite Judge Sarmiento's rulings, at trial, the videotape that was played of the April 2, 1995, Mafia meeting was *not* redacted to exclude highly prejudicial statements by Shyrock clearly implicating Maciel in the commission of other crimes, including multiple murders.

For example, the jury watched, heard, and read the following statements by Shyrock, referring to Maciel as "Pelon":

> "Pelon has been working with me for about – *** For a year I've been working real close with him, and this dude has gone way above and beyond the call of duty. Man, this mother fucker is sharp, he's taken care of a lot of business and ...
> "***
> "I know the Vatos don't know him, but take my word for it, the motherfucker's down. I'm not talking about just violence either. Okay, you know, he takes care of business real good and he and he's downed a whole lot of mother fuckers in the last year. And he went against his whole neighborhood for us. He's been fighting with them and downed them. And when – when that one-year-old baby, one of his homies killed that one-year-old baby a few months ago, he's the one that took care of them.
> "***
> "...I think he would be an asset to us, not just because of any violence, any violence that he's done, he's got to go ahead. And

> he don't need anybody to hold his hand. You know, I don't have to hold his hand."
> "***
> "...And I'm not just going on – on things he's done for the violence. Yeah, he's downed a whole bunch of mother fuckers, but he's got a good head on his shoulders."

(SCT1:8:1645,1654, 1664.)

This videotape was *replayed* for the jury during the prosecutor's guilt phase argument, and the jury was furnished with the videotape equipment with which to play it again during jury deliberations. (RT62:9651,9763.)

B. The prosecutor committed misconduct by playing for the jury a version of the videotape which directly violated Judge Sarmiento's ruling by including Shyrock's references to prior violent or illegal acts allegedly committed by Maciel for Eme.

A half century ago, the U.S. Supreme Court observed that a prosecuting attorney "may prosecute with earnestness and vigor — indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones." (*Berger v. United States, supra*, 295 U.S. at 88.) Hence, a prosecutor's pattern of foul play violates the federal Constitution if it infects a criminal trial with such unfairness as to make conviction a denial of due process. (*People v. Hill, supra*, 17 Cal.4th 800, 819; *People v. Harris* (1989) 47 Cal.3d 1047, 1084; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643.) State constitutional provisions are violated if the prosecutor uses deceptive or reprehensible methods to persuade the jury. (*People v. Hill, supra*, 17 Cal.4th at 819.)

The playing of a videotape which included hearsay statements by Shyrock arguing that Maciel should be admitted to Eme due to his commission of numerous prior acts of violence on the group's behalf was prosecutorial misconduct. The videotape of the meeting greatly exceeded the scope of the

prosecutor's offer of proof, and included material ruled inadmissible by Judge Sarmiento at the pretrial *in limine* hearing. Moreover, it cannot be disputed that the erroneously admitted hearsay was extremely prejudicial. Given other testimony that a codefendant referred to the Maxson Road killings as "taking care of business" for Eme (RT57:8897), and expert testimony by Richard Valdemar equating Mafia "business" to violence (RT55:8511-8512, 8535), the only conceivable inference to be drawn from Shyrock's statements was that Maciel engaged in drug activities, and had previously "downed," i.e., killed or violently retaliated against, numerous people for Shyrock or Eme.

Maciel was credited by Shyrock with murdering even members of his own "neighborhood" or street gang, including one fellow gang member or "homie" who had killed a child. (SCT1:8:1645,1654, 1664.) The prejudicial effect this statement was heightened by Valdemar's testimony that members of the Mexican Mafia were expected to murder the killers of children, and would even kill their own friends or family members if they violated organization rules. (RT55:8524, 8569, 8584-8586.)

The fact that the identity of the prosecuting attorney changed between the pretrial motion hearings and trial does not negate a finding of prosecutor misconduct. Monaghan and Manzella were members of the same county prosecutor's office. (*Giglio v. United States* (1972) 405 U.S. 150, 153.) Presumably, Manzella would have consulted with Monaghan before redacting the videotape to comply with Judge Sarmiento's pretrial orders.

In any event, under both state and federal constitutional standards, prosecutorial misconduct need not be intentional, or committed in bad faith, to require reversal of a judgment. (*Smith v. Phillips* (1982) 455 U.S. 209, 219; *People v. Hill, supra*, 18 Cal.4th at pp. 822-823.) "[T]he term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a

prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error." (*Hill* at 823.) Even if the error was inadvertent, it was no less injurious to appellant, and no less compromised the fairness of the trial. (*Hill*, at 822.)

Here, the prosecutors – acting on behalf of *the* District Attorney – ignored the trial court's ruling, and introduced devastating hearsay evidence which intentionally focused the jury's attention on Maciel's asserted past willingness to commit murder to vindicate the interests of Eme. The statements did not fall within any hearsay exception. Judge Sarmiento correctly found that the statements about Maciel did not qualify as declarations against Shyrock's penal interest. This hearsay exception does not apply to collateral assertions within declarations that are broadly self-inculpatory. (*People v. Lawley* (2002) 27 Cal.4th 102, 153.) Nor does it apply to portions of a statement that are not specifically disserving to the interests of the declarant. (*People v. Leach* (1975) 15 Cal.3d 419, 441.) The statements about Maciel amounted to nothing more than collateral assertions about Maciel's willingness to commit violent crimes; they did not directly disserve Shyrock's own penal interest.

In addition,"[t]he focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration." (*People v. Frierson* (1991) 53 Cal.3d 730, 745.) Shyrock's statements bore none of the necessary indicia of trustworthiness. (*Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1172, overruled on other grounds in *Payton v. Woodford* (9th Cir. 2003) 346 F.3d 1204, 1218, n.18; see also, *People v. Spriggs* (1964) 60 Cal.2d 868, 874; *People v. Lawley, supra*, 27 Cal.4th at 153.) In assessing trustworthiness, courts look to the possible motivations of the declarant; if the speaker has reason to embellish or distort for the benefit of his audience, the

statements will not be sufficiently reliable to warrant admission as declarations against penal interest. (*People v. Bryden* (1998) 63 Cal.App.4th 159, 175.) At the time the instant statements were made, Shyrock had a motive to exaggerate Maciel's bravado in order to convince reluctant Mafia members that they should accord Maciel membership despite their lack of acquaintance with him, and group sentiment against admitting any new members. (SCT1:8:1645-1647.) The statements were inherently unreliable.

In *People v. Hogan* (1982) 31 Cal.3d 815 (disapproved on another point in *People v. Cooper* (1991) 53 Cal.3d 771, 836), a trial court ruled inadmissible passages of a recording of a conversation between the defendant and his wife in which the defendant mentioned his unwillingness to take a lie detector test. During deliberations, the jury requested to hear the tape. The tape and tape-playing equipment were sent into the jury room without notice to counsel. Subsequently, the court's error was discovered, but too late to prevent the jury from listening to inadmissible portions of the tape. The trial court admonished the jury to disregard the inadmissible material. This Court nonetheless reversed the judgment, finding the evidence too inherently prejudicial to be counteracted with a curative instruction. (*Id.*, at 845-848.) The Court commented, "'It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment.'" (*Id*, at 848; internal citations omitted.)

In this case, as in *Hogan*, the hearsay was of such an emotionally charged character that the jury would have been incapable of ignoring it, even if the judge had intentionally admitted it for a nonhearsay purpose. (*Thomas v. Hubbard, supra,* 273 F.3d at 1173; see, *People v. Saling* (1972) 7 Cal.3d 844, 856 ["the recordings contained other remarks of an inflammatory nature from which it could be concluded that defendant was a dope addict and under

the influence at the time of the killing and that he had on some earlier occasion driven his vehicle over the body of a police officer"].) Conveying the impression that Maciel had killed for the gang before would have made the jury much more likely to credit the testimony of otherwise inherently incredible prosecution witnesses – particularly those who testified that Maciel visited the victims on the day of the killing, and left his son's baptismal party to meet with the shooters shortly before the slaughter. As in *United States v. Beeks* (8th Cir. 2000) 224 F.3d 741, 746, this single misstep of the prosecutor was "so destructive of the right to a fair trial that reversal is mandated." (See also, *United States v. Auch* (1st Cir. 1999) 187 F.3d 125, 129 [prosecutor's disregard of rulings excluding references to defendant's prior robbery]; *United States v. Crutchfield* (11th Cir. 1994) 26 F.3d 1098, 1102 [prosecutor's disregard of rulings in a manner portraying the defendant, charged with illegal importation of reptiles, as a drunkard and violent man who mistreated his animals].)

C. The prejudicial effect of the evidence was increased by the trial court's failure to admonish the jury that Shyrock's statements about Maciel should not be considered for the truth of the matter asserted, but rather only for the limited purpose of demonstrating Maciel's relationship with Shyrock.

The error of the prosecutor was compounded by the trial court's failure to give any limiting instruction. Although this Court has generally held that a trial court has no *sua sponte* due to instruct on the limited admissibility of evidence of past criminal conduct, there is an *exception* to the "no-duty" rule when prior crimes evidence is a dominant part of the prosecutor's case against the accused, is highly prejudicial, and is minimally relevant for any legitimate purpose. (*People v. Collie* (1981) 30 Cal.3d 43, 63-64; *People v. Milner* (1988) 45 Cal.3d 227, 251-252.)

The exception to the "no duty" rule applies here. The violent propensities of the Mexican Mafia played a dominant role in the prosecution's case. The prosecution relied heavily on Maciel's mere association the organization, to establish his participation in a conspiracy to kill their purported enemies. Judge Sarmiento's ruling *against* admissibility underscores that the evidence was hearsay, and *not* relevant for any legitimate purpose. Consequently, once this highly damaging evidence was erroneously presented, Judge Horan had a *sua sponte* duty to give a limiting instruction to insure that the jury did not consider it proof of Maciel's propensity and willingness to arrange for the murders in this case.

D. The trial court erred, or at least compounded the prejudice, by failing to instruct the jury that Shyrock was an accomplice, whose statements were subject to the rule requiring corroboration.

The trial court instructed the jury:

> "If the crime of murder was committed by anyone, Anthony Torres, Jose Ortiz, Jimmy Palma, Danny Logan were accomplices as a matter of law and evidence relating to their statements is subject to the rule requiring corroboration."

(RT62:9603.)

The jury was further instructed:

> "You must determine whether [witnesses #12 and witness #16] were accomplices as I have defined that term. The defendant has the burden of proving by a preponderance of the evidence that these witnesses were accomplices in the crime charged against the defendant."

(RT62:9604.)

In the context of instructions on evaluating the "testimony" of accomplices, the trial court also defined the term "testimony" broadly, to include extrajudicial statements.

> "Testimony of an accomplice includes any out of court statement purportedly made by an accomplice received for the purpose of proving what the accomplice stated out of court was true."

(RT62:9600.) No instruction was given, however, telling jurors that cautionary instructions on accomplices applied to Shyrock's statements. (RT62:9599-9606.) This was error.

When there is sufficient evidence that a "witness" is an accomplice, the trial court is required on its own motion to instruct the jury on the principles governing the law of accomplices, including the need for corroboration. (*People v. Tobias* (2001) 25 Cal.4th 327, 331.) Manifestly, the prosecutor's theory of the case was Shyrock ordered the murder of Anthony Moreno, and Maciel carried out his orders. Evidence was introduced that Shyrock wanted Moreno and Aguirre dead, and that Maciel had a so-called special relationship with Shyrock, that would make it likely he would carry out Shyrock's orders. Shyrock was thus an accomplice: "one who is liable to prosecution for the identical offense charged against the defendant on trial." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103; section § 1111.)

Even though Shyrock was, technically, not a "witness" at the trial, neither were Palma, Valdez, Torres, and Ortiz. Yet, because out-of-court statements of these four individuals were introduced at Maciel's trial, the court gave cautionary instructions on the need for corroboration. The same cautionary instructions were equally, if not *more* important with regard to Shyrock's extrajudicial statements, which were used to prove that Maciel was a hired gun for the Mexican Mafia. Furthermore, the absence of Shyrock's name, when all other alleged coconspirators were listed, would necessarily of led the jurors to conclude that Shyrock's testimony did *not* have to be viewed with distrust, and required no corroboration.

This Court has sometimes found the lack of such accomplice instructions harmless where there is "ample evidence corroborating the witness's testimony." (*People v. Arias* (1996) 13 Cal.4th 92, 143.) In this case, however, there was no *admissible* evidence presented at the guilt phase of Maciel's prior criminal conduct. Only Shyrock's *inadmissible* characterizations, and the equally *inadmissible* accusatory statements of interrogating officers (see Argument V), furnished proof for the jury of Maciel's violent propensities, and willingness to kill for Eme. Consequently, there was no "corroborating" evidence, nor should there have been any propensity evidence received in the first place. (Cf. *People v. Mincey* (1992) 2 Cal.4th 408, 461 [necessity of cautionary accomplice instructions at penalty phase, when accomplice testifies regarding prior unadjudicated criminal conduct].) Consequently, the failure to include Shyrock's name among the listed accomplices was not harmless. Indeed, the omission greatly compounded the prejudice caused by admitting Shyrock's hearsay statements in the first instance.

E. Trial counsel's lack of a contemporaneous objection should not be deemed to have waived the error.

Inexplicably, despite Judge Sarmiento's earlier favorable ruling, defense counsel made no on-the-record objection when the videotape of the April 2, 1995, meeting was played not just once, but twice. The issue should nevertheless be treated as cognizable on appeal. Counsel's pretrial objection to Shyrock's hearsay statements had been sustained; the prosecutor's argument that the statements constituted declarations against Shyrock's penal interest had been rejected by the court. (See, A, above.) An objection to evidence in the form of a motion *in limine* is normally sufficient to preserve issues for appeal, even in the absence of a contemporaneous objection during trial.

(*People v. Morris* (1991) 53 Cal.3d 152, 187-189, overruled on different grounds by *People v. Stansbury* (1995) 9 Cal.4th 824, 830; *Thomas v. Hubbard, supra* 273 F.3d at 1175.) Hence, respondent's ability to litigate the admissibility of the evidence has in no way been prejudiced by Esqueda's contemporaneous failure to object. (*Stutson v. United States* (1996) 516 U.S. 193, 196.)

In addition, a defendant is excused from the necessity of a timely objection when doing so would be futile. (*People v. Arias, supra*, 13 Cal.4th at 159; *People v. Hill, supra*, 17 Cal.4th at 820.) Counsel did object to sending the transcripts of all audio- and videotapes into the jury room. (RT62:9564.) That objection was overruled. (RT62:9565.) It is unlikely an objection to the recordings themselves would have been sustained.

The failure to request a jury admonition does not forfeit the issue for appeal if an admonition could not have cured the harm caused by the prosecutor's misconduct. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1333; *People v. Hill, supra*,at 820.) In this case, once the jury heard Shyrock vouch to gang members that Maciel had "downed" – i.e., killed – numerous people, neither an objection nor a contemporaneous objection could have completely cured the harm. (*Thomas v. Hubbard, supra*, 273 F.3d at 1173.)[48]

F. The admission of Shyrock's statements implicating Maciel in other acts of gang violence, including retaliatory acts of murder, violated appellant's confrontation and due process rights, and his right to association, and undermined the reliability of the guilt and death judgments.

The insufficiently redacted videotape so infected the trial with

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[48] Counsel's arguable waiver of this error (as well as other assignments of error) will necessarily be addressed in a petition for writ of habeas corpus. (*People v. Pope* (1979) 23 Cal.3d 412, 426.)

unfairness as to constitute a violation of appellant's substantive due process rights in violation of the Fifth and Fourteenth Amendments and article I, sections 7 and 15 of the California Constitution. (*Thomas v. Hubbard, supra*, 273 F.3d at 1179; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at 643.) The error also deprived appellant of his state-created liberty interest in the correct, non-arbitrary application of California's state laws, which resulted in a violation of the Fourteenth Amendment's Due Process Clause. (*Hicks v. Oklahoma, supra*, 447 U.S. at 346; *Hewett v. Helms, supra*, 459 U.S. 460, 466; *Ford v. Wainwright, supra*, 447 U.S. at 428.)

The tape was played not just once but *twice*: once during trial and again at the commencement of the prosecutor's closing guilt phase argument. (RT62:9651.) At the conclusion of the second viewing, the prosecutor commented, "It's chilling, isn't it?" (RT62:9651.) Moreover, the jury may have watched the videotape any number of times during deliberations. (RT62:9763.) The terrifying effect this videotape must have had on the jury requires no imagination. After the guilt-phase verdict, one juror articulated her fear of retribution to the court. (RT63:9813.) At the conclusion of the trial, several fearful jurors requested the court to provide transportation back to their cars. (RT65:10235.) The fear and trepidation of jurors is not surprising. Shyrock's claims about Maciel would have left the unmistakable impression that Maciel was a "hit man" for the Mexican Mafia, who more likely than not carried out the retaliatory executions in this case, and might do so again in the future. As in *People v. Saling, supra*, 7 Cal.3d at 856, the introduction of recordings containing "remarks of an inflammatory nature" from which it could be concluded that Maciel committed prior violent crimes "destroyed the force of ...testimony that [appellant] was innocent and compelled the conclusion of guilt." (Accord: *People v. Hogan, supra*, 31 Cal.3d at 848-849.)

Receipt of this evidence likewise violated appellant's rights guaranteed by the federal and state Confrontation Clauses. (*Dutton v. Evans* (1969) 400 U.S. 74, 79; Cal.Const., art. I, § 15.) "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." (*Maryland v. Craig* (1990) 497 U.S. 836, 845; *United States v. Monks* (9th Cir. 1985) 774 F.2d 945, 952.) There was no assurance that Shyrock's claims about Maciel were factual, much less based on first-hand knowledge. (*Dutton v. Evans, supra*, 400 U.S. at 88-89; *People v. Kons* (2003) 108 Cal.App.4th 514, 522 [discussing "personal knowledge" as a component of trustworthiness under the Confrontation Clause]; *Brown v. Keane* (2nd Cir. 2004) 355 F.3d 82, 89-90 [911 call not based on contemporaneous observation or personal knowledge is inadmissible].) The surrounding circumstances do not suggest that Shyrock "was particularly likely to be telling the truth." (*People v. Kons, supra*, at 524.) Given the purpose of the meeting, Shyrock would have had a motive to embellish Maciel's qualifications for membership in Eme. Furthermore, the jurors would have been incapable of disregarding statements implying that Maciel had committed prior violent crimes. (*Thomas v. Hubbard, supra*, at 1172-1174.; *Bruton v. United States* (1968) 391 U.S. 123, 135-136, n.2; *People v. Bryden, supra*, 63 Cal.App.4th at 175.) Considering the overall weakness of the prosecution's case against Maciel, the importance of the videotape in discrediting Maciel's defense of innocence, and the prosecutor's repeated playing of the videotape at trial, the error necessarily undermined the reliability of the guilt phase judgment. (*Brown v. Keane, supra*, 355 F.3d at pp. 91-92.)

The error also violated appellant's right to a reliable death judgment

guaranteed by the Eighth Amendment, and article I, section 17 of the state constitution. (*Beck v. Alabama, supra*, 447 U.S. at 637; *Zant v. Stephens, supra*, 462 U.S. at 879; *Johnson v. Mississippi, supra*, 486 U.S. at 584; *Woodson v. North Carolina, supra*, 428 U.S. at 304.) This Court has "long applied a more exacting standard of review when [it] assess[es] the prejudicial effect of state-law errors at the penalty phase of a capital trial." (*People v. Brown* (1988) 46 Cal.3d 432, 447.) The U.S. Supreme Court has repeatedly recognized that the greater need for reliability in capital cases means that death penalty trials must be policed at all stages for procedural fairness and accuracy of factfinding. (*Satterwhite v. Texas, supra*, 486 U.S. at 262-263; cf. *People v. Hogan, supra*, 31 Cal.3d at 848 ["the presumption of prejudice from jury contact with inadmissible evidence is even stronger in the context of a capital case"].)

During penalty phase closing argument, the prosecutor argued: "The best predictor of future violence is past violence." (RT65:10130.) He also argued, "when Luis Maciel embraced the gang culture and gang lifestyle the way we all saw him embrace the Eme gangsters on the video, he, himself, when he did that, he, himself, chose the death sentence." (RT65:10131.) The latter argument directly contravenes the U.S. Supreme Court's holding in *Dawson v. Delaware, supra*, 503 U.S. 159, which forbids reliance on evidence of a defendant's mere criminal associations as a substitute for substantial evidence of a defendant's guilt. In the face of these arguments, referring to Maciel's history of violence, it would have been impossible for the jury to ignore Shyrock's chilling characterization of Maciel as a proven killer in choosing the sentence of death. (See, e.g., *Bains v. Cambra, supra*, 204 F.3d at 973-974 [hearsay evidence of mere threats by defendant violated the Confrontation Clause].)

The state cannot prove beyond a reasonable doubt that the error did not infect the guilt or penalty phase judgments. (*Chapman v. California* (1967) 386 U.S. 18; *United States v. McKinney* (9th Cir. 1983) 707 F.2d 381, 384-385.) Proof of Maciel's involvement in a conspiracy to commit murder was entirely circumstantial; moreover, he presented a credible affirmative defense. Excluding this improperly received criminal propensity evidence, the state's case for guilt on a conspiracy theory rested entirely on (1) proof that Shyrock, a member of the Mafia, wanted Moreno dead because he was a "dropout," (2) proof that Maciel was inducted into the Mafia by Shyrock shortly before the murders; (3) expert testimony regarding the violent and retaliatory practices of Eme; and lastly, but *most importantly* (4) the testimony of several key witnesses of highly questionable veracity, who claimed Maciel had visited the victims, and met with one of the killers on the day of the murders. (See, Argument I.) Redaction of the videotape in accordance with Judge Sarmiento's ruling could easily have tipped the scales in favor of acquittal. Instead, jurors, fearful of a defendant with an alleged penchant for execution killings, opted for the ultimate penalty. A death sentence on such a bases violates the most fundamental constitutional guarantees.

VIII. THE ERRONEOUS ADMISSION OF HEARSAY STATEMENTS BY RAYMOND SHYROCK CONTAINED IN A TAPE-RECORDING OF A MEXICAN MAFIA MEETING WHICH APPELLANT DID NOT ATTEND VIOLATED STATE HEARSAY RULES AS WELL AS APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, TO CONFRONTATION, AND TO A RELIABLE DEATH JUDGMENT.

A. The evidence and objections:

Investigator Richard Valdemar was eavesdropping when investigators surreptitiously videotaped a meeting of Mexican Mafia members in a hotel room on January 4, 1995. (People's Exhibits 118 and 118A.) During this meeting, which occurred before Maciel joined the organization, Raymond Shyrock mentions "Dido from ... Puente," and refers to him as having "dropped out" of Eme years go. (SCT1:8:1642.) Shyrock tells his colleagues that Dido was living downstairs in the same apartment building as Shyrock, and started "showing his face" after Shyrock moved. (SCT1:1642.) He states that there are "all kinds of people in the pad," including "a whole bunch of youngsters." (SCT1:8:1642.) Shyrock then mentions a "dude" who lives in El Monte, who is "hanging around with that girl Corzito from Norwalk." (SCT1:8:1642-1643.) Shyrock states that he needs a "silencer" to kill "him", but "not the little kids." (SCT1:8:1642-1643.)[49]

The videotape was admitted over a defense objection that the statements were hearsay, irrelevant, and more prejudicial than probative. (RT3:512-517.) The court found that the statements were admissible as declarations against the

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[49] A portion of the videotaped (Exhibit 118) meeting was played for the jury, while the jury contemporaneously read along, using a copy of a transcription of the videotape provided by the court (Exhibit 118A), which commenced slightly after, and ended slightly after the videotape itself. (RT55:8552,8555.)

penal interest of Shyrock, and more probative than prejudicial. (RT3:517.) [50]

B. Shyrock's videotaped hearsay statements were ambiguous, and did not qualify for admission as declarations against penal interest, or alternatively, as coconspirator statements.

For admission under Evidence Code section 1230 in a separate trial, an unjoined accomplice's "declarations against penal interest" must be (1) *relevant* to some issue in controversy, (2) against the speaker's penal interest *when made*, and (3) sufficiently reliable to withstand scrutiny under the federal Confrontation Clause. (*Lilly v. Virginia* (1999) 527 U.S. 116, 130-139; *People v. Duarte* (2000) 24 Cal.4th 603, 610-611; *People v. Lawley, supra*, 27 Cal.4th at 152-153.) Shyrock's statements met none of these criteria.

Shyrock's statements were only *relevant* to the extent they related to one of the victims in this case. (*People v. Lawley, supra*, 27 Cal.4th at 152 [hearsay declarant's statement, "I killed a man in Modesto," was only admissible assuming it related to the killing of the victim in that case].) Statements made during the January 4, 1995, meeting were ambiguous and did not clearly refer to the murder victim, Anthony Moreno. Dido's real name is never mentioned by Shyrock. "Dido" is a moniker used by many gang

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[50] Unavailability was also an issue at the *in limine* hearing. The prosecutor argued that Shyrock should be presumed unavailable because he had a federal RICO prosecution pending, scheduled to start trial shortly, and he had a right not to testify. (RT3:508.) The prosecutor also argued that federal officials would not accept a subpoena in Maciel's case as long as Shyrock had federal charges pending. (RT3:515.) Mr. Esqueda argued that Shyrock was not unavailable because he was willing to testify, and said the defense intended to subpoena him to testify; he also asked the court for a removal order. (RT3:514.) Admissibility was expressly conditioned on a sufficient showing of Shyrock's unavailability at the time of trial. (RT3:512-517.) By the time of Maciel's trial, Shyrock had been convicted in a federal RICO case, and was in prison in Marion, Illinois. (RT50-1:7505.) The record on appeal contains no further discussion of Shyrock's unavailability.

members. Richard Valdemar heard Shyrock mention "Dido" before the murders, but could not readily identify which gang member named "Dido" Shyrock was talking about. (RT55:8561-8562.) Shyrock talks about "Dido" living "right downstairs," but only the intrinsically unreliable testimony of witness #15 provides any corroboration that the victim, Anthony "Dido" Moreno even lived in the same apartment complex as Shyrock. (RT56:8719-8720.)

It is not even completely clear from the videotape that it is "Dido" that Shyrock wants to kill; he may be talking about another "dude" who hangs around with a girl named "Corzito." (SCT1:8:1642.) Further uncertainty regarding who and what Shyrock is talking about is injected because a ballistics expert found no evidence that a silencer was used in the slaying of any of the victims. (RT59:9248.) Plus, witnesses all heard the firing of guns. (RT55:8615; RT56:8864; RT 57:8883.) Therefore, Shyrock's statements fail the test of relevancy to prove Maciel's complicity in the killings in this case.

The statements were also not *against* Shyrock's penal interest at the time they were made. The conspiracy had not yet been conceived, as conceded by the state (RT3:535), and the crimes had not yet been committed. Nor had any steps been taken in furtherance of the objectives of an alleged conspiracy. Shyrock's musings to his fellow gang members about "Dido" the dropout and/or the "dude" from El Monte, and his professed need for a silencer to kill someone could not, realistically, have subjected him to criminal liability for murder at the time they were uttered.

For the same reasons, the statement could not have been received as a coconspirator statement.[51] Absent evidence of an ongoing conspiracy at the

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[51] The court did not rely on the coconspirator exception.

time Shyrock made the statements, Evidence Code section 1223 was inapplicable. (*People v. Moreno* (1989) 48 Cal.3d 527, 552.)

In addition, this Court has long held Evidence Code section 1230's exception inapplicable to portions of a statement that are not specifically disserving to the interests of the *declarant.* (*People v. Lawley, supra*, 27 Cal.4th at 153; *People v. Leach, supra*, 15 Cal.3d at 438-442.) Other than Shyrock's statement that he wants a silencer to kill "Dido," most of the hearsay statements on the videotape are collateral, and not specifically *disserving* to Shyrock's penal interest. The statement that "Dido" dropped out of Eme is not intrinsically incriminating to Shyrock. Nor is the statement that there are children in the apartment whom Shyrock does *not* wanted killed. These statements did not qualify for admission as declarations against penal interest. (*People v. Lawley, supra,* 27 Cal.4th at 153.)

As a whole, Shyrock's statements also lack sufficient indicia of *reliability* for admission. (*Lilly v. Virginia, supra*, 527 U.S. at 130.) In determining whether hearsay is reliable, this court may *not* rely on corroborating evidence establishing Moreno's status as a "dropout," or Eme's practice of killing "dropouts." To do so would be "constitute 'bootstrapping on the trustworthiness of other evidence at trial.'" (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 336; citing *Idaho v. Wright* (1990) 497 U.S. 805, 823.)

The truthfulness of Shyrock's statements is not so clear from the surrounding circumstances that the test of cross examination would have been of marginal value to defense counsel. (*People v. Greenberger, supra*, 58 Cal.App.4th at 327; *Idaho v. Wright, supra*, 497 U.S. at 817.) From the videotape itself, one cannot determine whether Shyrock's statement about Dido's status as a dropout, the location of his apartment and his behavior

following Shyrock's move, are based on first-hand knowledge, or hearsay within hearsay. Also, the January 4th meeting transpired roughly 12 years after the victim, Anthony Moreno, reportedly dropped out of the Mexican Mafia.[52] (RT3:512.) Significantly, Maciel was not present at this meeting, which occurred months *before* he joined Eme, and months *before* the date on which the *prosecutor* maintained that the conspiracy to kill Moreno began. (RT55:8556,8559; RT3:535.) Absent an opportunity for cross-examination, ambiguities in the record deprive the evidence of the high degree of trustworthiness necessary for admission as a declaration against penal interest. (*Lilly v. Virginia, supra*; *People v. Sprigg, supra*, 60 Cal.2dat 874.) Particularly in a capital case, conviction on such unreliable evidence offends the guarantee of due process. (*Gardner v. Florida* (1977) 430 U.S. 349, 361 ["We conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain."].)

C. The evidence should have been excluded as more prejudicial than probative.

Evidence Code section 352 confers judicial discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will ... create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The term "prejudice" within the meaning of the statute refers to evidence that "uniquely tends to evoke an emotional bias against a party as an individual, while having only slight

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[52] Gang expert Valdemar testified that Moreno dropped out of the Mexican Mafia in 1988. (RT55:8528.) However, investigator Davis testified that Moreno dropped out in 1983 (RT56:8716), and witness #15 also testified that his brother dropped out in 1983 (RT56:8797).

probative value with regard to the issues." (*People v. Garceau* (1993) 6 Cal.4th 140, 178.)

Judge Sarmiento ruled that the evidence of the videotape was more probative than prejudicial.[53] On appeal, the court's ruling is reviewed for abuse of discretion. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.) Admission of the January 4th videotape was an abuse of discretion.

For the reasons previously stated in section B, *ante*, Shyrock's statements were ambiguous and not clearly *relevant* to prove the El Monte murders. It is not sufficiently clear that Shyrock is referring to the same "Dido," or if so, that "Dido" was the person he intended to kill. Furthermore, the conversation's connection with the instant case is extremely attenuated because Maciel did not attend the videotaped meeting, was not yet a member of the organization, and a silencer was *not* used to commit the instant murders. (RT59:9248; RT55:8615; RT56:8864.)

Even assuming, *arguendo*, the nexus between Shyrock's statements and the murder of Moreno was clear, or that any ambiguity should have been left for the jury to determine, evidence of the videotaped Eme meeting, featuring Shyrock talking about a possible plan to kill someone using a gun with a silencer should have been excluded as more prejudicial than probative. The videotape was only marginally relevant to prove contested fact issues. Maciel's acquaintance with Shyrock, and his membership in the Mexican Mafia were not facts in dispute. (RT3:532.) Since the meeting occurred before the inception of the conspiracy, and Maciel was not there, it had little relevance to establish the *identity* of those who conspired to kill the victims at

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[53] Appellant's right to assert a denial of due process was preserved by his objection that the evidence was more prejudicial than probative under Evidence Code section 352. (*People v. Partida* (2005) 37 Cal.4th 428, 433-439.)

a later date.

The evidence was cumulative on other issues and therefore unnecessary. Moreno's status as a Mexican Mafia "dropout" was established by no fewer than three testifying witnesses. (RT55:8528 [Valdemar]; RT56:8716 [Davis]; RT56:8797 [Witness #15].) The gang expert testified at length regarding the rules of the Mexican Mafia, including their practice of murdering both dropouts – like Moreno – or those who robbed drug dealers who paid "taxes" to the gang – like Aguirre. (RT55:8512-8616.) Witness #15 testified, more specifically, that he knew both Moreno and Aguirre were potential Eme targets because one had dropped out, and the other and the other had been seen robbing Mafia-protected drug dealers. (RT56:8741-8742,8825,8760,8799-8800.) Hence, the videotape's marginal probative value was far outweighed by its potential to inflame, terrorize, and confuse the jury.

D. Even if the evidence was properly received, the court erred by failing to instruct the jury that Shyrock was an accomplice, to whom cautionary instructions on accomplice statements applied.

Although cautionary instructions were given with respect to other alleged accomplices and coconspirators, by name, no such instructions were given telling jurors that the cautionary admonitions applied to Shyrock's extrajudicial statements. (RT62:9600,9603-9604.) Appellant adopts and incorporates by reference the argument set forth in Argument VI, D, above, and asserts that this was error.

When there is sufficient evidence that a "witness" is an accomplice, the trial court is required on its own motion to instruct the jury on the principles governing the law of accomplices, including the need for corroboration. (*People v. Tobias, supra*, 25 Cal.4th at 331.) Shyrock was clearly an accomplice, i.e., "liable to prosecution for the identical offense charged against

the defendant on trial." (*People v. Coffman and Marlow, supra*, 34 Cal.4th at 103; section 1111.) Cautions were given regarding all other accomplices; consequently, the conspicuous *absence* of Shyrock's name, when all other alleged coconspirators were listed, would necessarily have led the jurors to conclude that in this case, the cautionary instructions did not apply. In other words, Shyrock's testimony did *not* have to be viewed with distrust, and required no corroboration.

The error was not harmless. There was admittedly some corroboration for the proposition that Shyrock wanted Moreno dead because he was a "dropout." But such error is harmless only when there is "ample" corroboration of the accomplice's statements. (Cf. *People v. Arias, supra*, 13 Cal.4th at 143.) Much of the corroborating evidence in this case came from other accomplices for whom defense counsel's opportunity to cross-examine was limited. (See Argument IV.) The statements of such witnesses could not properly be relied upon to corroborate the truth of Shyrock's statements. (Section 1111; *People v. Davis* (2005) 36 Cal.4th 510, 547.) Other corroboration for Shyrock's motives came from an extremely unreliable witness, #15, whose lack of credibility is discussed elsewhere in this brief. (See Argument I, A, 1.) In this case, corroboration was far from "ample." Accordingly, far from being harmless, this instructional omission greatly compounded the prejudice engendered by the jurors' exposure to Shyrock's hearsay statements in the first instance.

E. The admission of the videotape individually and cumulatively violated appellant's right to due process, a fair trial, confrontation, and a reliable death judgment.

As a result of judicial and/or trial counsel error, the jury repeatedly heard this marginally relevant, highly prejudicial videotape, which contained

Shyrock's hearsay statements about "Dido's" dropout status, and the need for a silencer to kill him. (RT62:9651.) There is no way to determine how many times jurors watched the videotape, since they had unlimited access to it during deliberations. (RT62:9763.)

Evidence violates due process if it raises no permissible inference for the jury to draw and is of such a quality that it necessarily prevents a fair trial. (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920.) Unfair prejudice can result, even from relevant evidence, if the evidence is such that it lures the factfinder into declaring guilt on a ground different from proof specific to the offense charged. (*Old Chief v. United States* (1997) 519 U.S. 172, 180.) "When the probative value of . . . evidence, though relevant, is greatly outweighed by the prejudice to the accused from its admission, then use of such evidence by a state may rise to the posture of fundamental fairness and due process of law...." (*Lesko v. Owens* (3rd Cir. 1989) 81 F.2d 44,52.) The error also deprived appellant of his state-created liberty interest in the correct, non-arbitrary application of California's state evidence rules, which resulted in a violation of the Fourteenth Amendment's Due Process Clause. (*Hicks v. Oklahoma, supra*, 447 U.S. at 346; *Hewett v. Helms, supra*, 459 U.S. at 466; *Ford v. Wainwright, supra,* 447 U.S. at 428.) In short, the repetitious use of the videotape of the January 4th Mexican Mafia meeting so infected the trial with unfairness that it violated appellant's substantive due process rights in violation of the Fifth and Fourteenth Amendments and article I, sections 7 and 15 of the California Constitution.

In accordance with the authorities previously discussed in Argument VII, the use of this evidence also violated appellant's rights guaranteed by the federal and state Confrontation Clauses. (*Dutton v. Evans, supra,* 400 U.S. at 79; Cal.Const., Art. I, § 15; see also, *Maryland v. Craig, supra*, 497 U.S. at

845; *United States v. Monks, supra*, 774 F.2nd at 952.) As the U.S. Supreme Court stated in *Lilly v. Virginia, supra*, 527 U.S. at 128, "the mere fact that one accomplice's confession qualified as a statement against his penal interest did not justify its use as evidence against another person." Here, the statements did not even qualify as against the declarant's penal interest.

The videotaped statements were inherently unreliable because they were ambiguous. Even if the court should consider that they were not ambiguous, they were of questionable reliability because, in their context, Shyrock could be expected to exaggerate in order to appear macho in front of fellow gang members. (*People v. Bryden, supra*, at 175.) In addition, Shyrock's claims about Dido's place of residency, or dropout status were likely founded on double hearsay – i.e., rumor rather than first-hand knowledge. Last, but not least, there was no opportunity for cross-examination because Shyrock did not testify as a witness at the trial.

Consistent with the authorities discussed in Argument VII, F, the admission of the January 4th meeting videotape also violated appellant's right to a reliable death judgment guaranteed by the Eighth Amendment, and article I, section 17 of the state constitution. (*Beck v. Alabama, supra*, 447 U.S. at 637; *Zant v. Stephens, supra,* 462 U.S.at 879; *Johnson v. Mississippi, supra*, 486 U.S. at 584; *Woodson v. North Carolina, supra*, 428 U.S. at 304; *People v. Brown, supra*, 46 Cal.3d at 447; *Satterwhite v. Texas, supra*, 486 U.S. at 262-263.) Future dangerousness was a central theme in the prosecutor's quest for a death judgment. "The best predictor of future violence is past violence." (RT65:10130-10131.) In the face of these arguments, it would have been impossible for the jury to ignore a videotape of Shyrock discussing his intent to obtain a silencer to kill Dido, in considering whether to impose the sentence of death.

For the reasons previously stated in Argument VII, the state bears the burden of showing that the error did not infect the guilt or penalty judgments beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. 18; *United States v. McKinney, supra*, 707 F.2d at pp. 384-385.) Respondent cannot sustain this burden. Proof of Maciel's involvement in a conspiracy to commit murder was entirely circumstantial, and he presented a credible defense. Exclusion of this evidence, particularly if the videotape of the April 2, 1995, meeting had also been excluded, could easily have tipped the scales in favor of acquittal.

IX. THE ERRONEOUS RECEIPT OF HEARSAY STATEMENTS BY VICTIM AGUIRRE UNDER THE STATE OF MIND EXCEPTION VIOLATED STATE HEARSAY RULES AS WELL AS APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, CONFRONTATION, AND A RELIABLE DEATH JUDGMENT.

A. Testimony and objections:

1. Witness #8:

The DA elicited testimony from witness #8, a neighbor of the victims, that at about 6 or 7 p.m. on the day of the murders, that Tito Aguirre "said that the Mafia was going to come." (RT55:8611,8615,8624.) This testimony was admitted over a defense hearsay objection. (RT55:8611.) The court admitted the evidence, not for the truth of the matter asserted, but to explain the later actions of Aguirre as described by other witnesses. (RT55:8612-8613.) The jury was admonished accordingly. (RT55:8614.)

2. Witness #11:

The DA elicited testimony from witness #11, another neighbor of the victims, that she saw three men visiting the victims on the day of the murders at about 12:30 a.m. (RT55:8629.) At that hour, Tito Aguirre was seated on the witness' porch. (RT55:8633.) Tito leaned over and said he was going to leave because "the Mafia had arrived and he didn't want to have any problems with them." (RT55:8636.) He also said that "there is going to be a really big problem here. I don't know what time and when, but there is going to be something." (RT55:8636-8637.)[54]

The testimony regarding Aguirre's statements was admitted over defense hearsay and confrontation objections. (RT55:8634.) The court received the testimony for the nonhearsay purpose of explaining Tito Aguirre's

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[54] On cross-examination, she testified that Aguirre said, "the Carnals are here and there's problems with drugs." (RT55:8642.)

subsequent behavior, to be described by subsequent witnesses. (RT55:8634-8635.) The jury was so instructed. (RT55:8635.)

B. The trial court erred and abused its discretion by admitting the hearsay statements of Tito Aguirre regarding his beliefs that the Mafia had come and there was going to be trouble.

The testimony of witnesses #8 and #11 regarding what Aguirre said was pure hearsay, subject to no exception. Whether Maciel – a recently inducted member of Eme – visited the victims' residence was clearly a disputed issue of tremendous import in the case. Also disputed was whether Maciel had arranged for the killing of Moreno for the benefit of Eme. The statements related to Aguirre's fear and expectation of being killed by the Mafia. When considered for the truth of the matters asserted, the statements logically supported the inference that the Mafia visited the victims before the murders, and, as feared by Aguirre, returned to kill them. For this purpose, however, the statements were hearsay and inadmissible under any authorized exception. (*People v. Noguera* (1992) 4 Cal.4th 599, 621.)

The court appears to have ruled Aguirre's statements admissible under Evidence Code section 1241, the "contemporaneous statement" exception to the hearsay rule, or alternatively, Evidence Code section 1250, the "then existing mental or physical state" exception. The former section creates a hearsay exception for statements offered to "explain, qualify, or make understandable conduct of the declarant" when the statement "was made while the declarant *was engaged in* such conduct." On its face, this exception does not apply because Aguirre's statements were not contemporaneously made while he was engaging in the conduct to be explained. The prosecutor ostensibly offered the statements to explain why Aguirre ran down the driveway of the victims' residence later that evening, when the shooters' car

arrived. (RT55:8612,8634.) Similarly, Evidence Code section 1250's hearsay exception applies when evidence is offered to "prove or explain acts or conduct of the declarant." This exception is also inapplicable, as demonstrated by the many previously published decisions of this court which discuss the near absolute restrictions on the use of "existing mental or physical state" exception.

For example, in *People v. Jablonski* (2006) 37 Cal.4th 774, the trial court admitted testimony from a friend of the defendant that, prior to the murders, the victim had called him and asked him to pick up the defendant's belongings because she was afraid of the defendant. (*Id.*,at 818.) Another witness also testified over objection that the victim had told him she did not want the defendant living with her because she was afraid of him." The victim's statements were received pursuant to Evidence Code section 1250 to prove or explain the acts or conduct of the victim.

This Court held that this was error.

> "'As our cases have made clear, "a victim's out-of-court statements of fear of an accused are admissible under section 1250 only when the victim's conduct in conformity with that fear is in dispute. Absent such dispute, the statements are irrelevant. [Citations]"'"

(*People v. Jablonski, supra*,at 819.)

This Court further explained that a murder victim's fear of an alleged killer may be in issue when the victim's state of mind is directly relevant to an element of the offense, or alternatively, when the defendant contends that the victim behaved inconsistently with that fear. (*Id.*,at 820; see, e.g., *People v. Thompson* (1988) 45 Cal.3d 86, 102-105 [victim's fear admissible to prove rape was not consensual].) Neither circumstance applies here. Aguirre's conduct immediately prior to the killings was not disputed. His fear of the

Mafia, and his anticipation of suffering harm from members of the group, were irrelevant to prove any element of capital murder. Evidence Code section 1250 simply did not apply.

In *Jablonski*, this Court found no prejudice, but on grounds inapplicable here. In that case, there was evidence the friend had communicated the victim's fears to the defendant. The Court concluded that the statements of the victim were properly admissible to show their effect *on the defendant*: that he did not go to the victim's house on a friendly visit, but planned to approach her by stealth, a factor relevant to premeditation. (*People v. Jablonski, supra*, 37 Cal.4th at 821; accord: *People v. Sakarias* (2000) 22 Cal.4th 596, 628-630.)

In most cases, however, this type of error has required reversal of the judgment. For example, in *People v. Lew* (1969) 68 Cal.2d 774, the victim of murder had made confidential remarks to various friends claiming the defendant had made several threats to kill or harm her, that the defendant had a terrible temper and she feared him. The court overruled a defense hearsay objection and allowed the friends to testify. Regarding the victim's statements describing threats, this Court acknowledged that the evidence, if not too attenuated, was relevant to prove the defendant's intent, a material issue. However, since not a single witness produced by the prosecution had actually heard the threats, the evidence was *inadmissible* double hearsay. (*Id.*,at 778.)

In *Lew*, this Court also ruled that admitting evidence of the victim's fear of the defendant was an abuse of discretion, and prejudicial error. Even though, as is the case here, the trial judge gave a limiting instruction telling the jury it could only consider the evidence as proof of the victim's state of mind, this Court recognized that it would be "an almost impossible task" for jurors to obey the instruction. (*People v. Lew, supra*, 68 Cal.2d at 780.)

People v. Ireland (1969) 70 Cal.2d 522, is in accord. There, the trial

court allowed testimony that before the victim's death, she had said to a witness, "'I know he's going to kill me. I wish he would hurry up and get it over with. He'll never let me leave.'" (*Id.*, at 528.) As occurred in this case, the hearsay was received to show the victim's "state of mind immediately prior to her death." (*Ibid.*)

This Court reversed, finding that the defendant had not raised any issue of fact respecting the victim's conduct on the day of her death. (*People v. Ireland, supra*, at 529-531.) The defendant had asserted a mental defense, and it was not disputed that the victim was reclined on the couch when the killing occurred. (*Id.*, at 531.) Under the circumstances, this Court opined that the fact that the victim's state of mind "might, through a series of inferences, be considered probative of defendant's intentions at the time of the utterance [did not] render her hearsay statement admissible under the state-of-mind exception." (*Id.*, at 532, n.8.) This Court found the error prejudicial, explaining that the jury might reasonably have inferred, consistent with the victim's belief and contrary to the defense, that the defendant formed the intent to kill hours earlier. (*Id.*, at 532.)

The case of *People v. Arcega* (1982) 32 Cal.3d 504, is also illustrative. In *Arcega*, the victim's mother was allowed to testify that her daughter had told her shortly before her death that the defendant was treating her "'weird'" and she was afraid he was going to "hit her, to beat her up." (*Id.*, at 527.) The trial court admitted this testimony under the "state of mind" exception, even though the defendant had admitted killing the victim while she slept. (*People v. Arcega, supra*, at 527.) On appeal, this Court found that the statements should not have been received to show the victim's state of mind because "there was no issue of fact raised by the defense with respect to [the victim's] conduct immediately preceding her death." (*Ibid.*)

In *Arcega*, the trial court also allowed the mother to testify that the victim had told her that she had ordered the defendant out of the apartment by the first day of the month. (*Id.*, at 528.) This testimony was held *inadmissible* under subdivision (b) of Evidence Code section 1250, which forbids use of the "state of mind" exception to prove facts remembered or believed by a hearsay declarant. (*Ibid.*) Although other errors also required reversal of the judgment in *Arcega*, this Court nevertheless opined that admission of hearsay was prejudicial because the victim's account of previous threatening behavior by the defendant had been the *only* evidence suggestive of premeditation. (*Id.*, at 529-530.) In this case, of course, Aguirre's hearsay was the only evidence to corroborate the testimony of witness #15, a career criminal with a motive to lie, that Maciel had visited the victims prior to the killings.

People v. Armendariz (1984) 37 Cal.3d 573, is another case in point. The defendant testified he went to the victim's house and found him dead; he claimed that he panicked, fled with some of the victim's property, and did not call the police. (*Id.*, at 584-585.) On rebuttal, the court allowed testimony by the victim's son, Alfred, that the victim, Joe, had telephoned him 17 months earlier to say the defendant had demanded money and threatened to assault him if he did not comply. Alfred had gone to Joe's house to provide protection. (*People v. Armendariz, supra*, at 585.) The trial court admitted this evidence "for the limited nonhearsay purpose of explaining why Alfred went to Joe's house." (*Id.*, at 585.) Addressing the error for the guidance of the trial court on retrial, this Court found the ruling erroneous, stating, a "hearsay objection to an out-of-court statement may not be overruled simply by identifying a nonhearsay purpose for admitting the statement." (*Ibid.*) In this case, Judge Horan appeared to justify his ruling on precisely that basis; he overruled the defense's hearsay objection simply by identifying a nonhearsay purpose for the

evidence. (RT55:8612-8613.)

In *Armendariz*, this Court found such error prejudicial. Citing *People v. Green* (1980) 27 Cal.3d 1, 23-26, as authority, this Court found "'a substantial danger that despite the limiting instruction, the jury – consciously or otherwise – might consider [the victim's] statement as evidence not only of her mental state but also of that of defendant....'"

Another supportive case is *People v. Coleman* (1985) 38 Cal.3d 69, in which a judge admitted the contents of three highly emotional and inflammatory letters written by the victim, the defendant's wife, prior to her death. The letters included statements that the defendant had twice threatened to hurt the victim, and had many times threatened to kill the whole family. The trial judge limited the admissibility of the letters to impeaching the defendant's credibility, and to explaining and challenging the basis for the opinions of the defense psychiatric experts. (*Id.*, at 81.) This Court reversed, explaining:

> "The potential for unfair prejudice from the prior statements of a victim declarant regarding either past or future conduct by an accused has been recognized repeatedly by this Court and the United States Supreme Court. The limitations imposed on the admissibility of such evidence have been sufficiently stringent as to virtually preclude the evidence unless the victim's state of mind has been placed in issue or the statements are relevant to prove or explain the acts of the victim (e.g., where the defendant claims provocation or self-defense). [Citation.]"

(*People v. Coleman, supra*, 38 Cal.3d at 83.)

The instant case is remarkably similar to all of the foregoing cases. As in the *Jablonski*, *Ireland*, *Arcega*, *Armendariz*, and *Coleman* cases, the inadmissible hearsay embodied facts remembered or believed by Aguirre, and his expressions of fear of the Mafia. Aguirre believed that the "Mafia" had arrived at the victim's residence, and he feared the "Mafia" would return later

to cause serious trouble. Evidence Code section 1250 forbids application of the "state of mind" exception to prove the truth of facts remembered or believed by the declarant. (*People v. Arcega, supra*, 32 Cal.3d at 528.)

As in the aforementioned cases, the defense raised no issue of fact respecting Aguirre's state of mind, or conduct on the day of his death. It was not contended that Aguirre did not fear the Mafia, or that he acted inconsistently with that fear. (*People v. Jablonski, supra*, 37 Cal.4th at 819.) Moreover, the defense did not dispute that the killings were murder; rather, it was asserted that Maciel, even though a member of the Mafia, did not participate in the conspiracy to kill and was not otherwise responsible for the wanton acts of Sangra gang members. Aguirre's belief about the identity of the visitors and his state of fear were not admissible to prove his "state of mind" when he ran from arriving gang members. (See, *People v. Jablonski, supra*; *People v. Ireland, supra*, 70 Cal.2d at 529-531; *People v. Arcega, supra*, 32 Cal.3d at 527; *People v. Armendariz, supra*, 37 Cal.3d at 585; *People v. Coleman, supra*, 38 Cal.3d at 83.)

The error was prejudicial. The jury obviously paid close attention to the evidence. During deliberations, the testimony of both witness #8 and witness #11 was *re-read* at the jury's request. (RT62:9776-9778; *People v. Saling, supra*, 7 Cal.3d at 856, n.11 [the request for a replay of a recording during deliberations was evidence that the jury gave the evidence weight].) Since Maciel's membership in the Mafia was not seriously disputed, and Witness #15 testified that Maciel visited the victims' home that day, Aguirre's hearsay references to the arrival of the Mafia, and the threat posed by the Mafia, would logically have been understood by jurors to refer to Maciel. The natural inference to be drawn was that Aguirre recognized Maciel as Mafia, and feared and anticipated his return.

As was the case in *Lew, supra, Armendariz, supra,* and *Coleman, supra,* the court's limiting admonitions were inadequate to prevent prejudice. Such "voice from the grave" evidence had the potential for jurors to give it great weight.) There was still a palpable danger that the jury would consider Aguirre's statement not only as evidence of his "state of mind," but also as substantive evidence that Maciel in fact visited the victim's residence that afternoon to set up the killings. In fact, this was how the evidence was used by the prosecutor in closing argument:

> "Even Tito knew that it was more than an old friend showing up that afternoon to give them some heroin for old times sake. Tito told both (witness no. 8) and (witness no. 11) that it was the Mafia."

(RT62:9737.)

The only other evidence of Maciel's presence at the victim's residence was the testimony of witness #15, a career criminal whose credibility left much to be desired. (See, Argument I.) His testimony was contested by defense witnesses who said Maciel was attending a baptismal and party. The fact that Aguirre's fear "might, through a series of inferences" be probative of the identity of the people who visited the victim's residence, and later killed them, did not render the hearsay admissible under the "state of mind" exception. (*People v. Ireland, supra,* 70 Cal.2d at 532, n.8.) To the contrary, it is this very inference that makes the evidence so incredibly prejudicial.

C. The admission of Aguirre's statements violated appellant's constitutional rights to due process, a fair trial, confrontation and cross-examination, and a reliable death judgment.

The prosecutor emphasized Aguirre's testimony in guilt and penalty phase closing arguments. At the guilt phase, he argued that the defense had failed to offer any explanation why "Maciel went to the crime scene that

afternoon other than to prepare the Sangras to commit the murders." (RT62:9672.) At the penalty phase, the prosecutor argued, "Tito Aguirre may have been under the influence as well, but we know that he was alert enough to run from his killers." (RT65:10137.) Both of these arguments assumed as proven facts that Maciel (1) did go to the victims' residence prior to the killings, and (2) was recognized as a member of Eme by Aguirre.

The admission of Aguirre's hearsay statements so infected the trial with unfairness as to constitute a violation of appellant's substantive due process rights in violation of the Fifth and Fourteenth Amendments and article I, sections 7 and 15 of the California Constitution. (*Thomas v. Hubbard, supra*, 273 F.3d at 1179.) The jury's focus on this evidence is underscored by the request to have it re-read during deliberations. The error also deprived appellant of his state-created liberty interest in the correct, non-arbitrary application of California's state evidence rules, which resulted in a violation of the Fourteenth Amendment's Due Process Clause. (*Hicks v. Oklahoma, supra*, 447 U.S. at 346; *Hewett v. Helms,* 459 U.S. at 466; *Ford v. Wainwright, supra,* 447 U.S. at 428.)

Receipt of this evidence likewise violated appellant's rights guaranteed by the federal and state Confrontation Clauses. (*Dutton v. Evans, supra*, 400 U.S. at 79; *Brown v. Dugger* (11th Cir. 1987) 831 F.2d 1547, 1557.) Indicia of reliability were entirely absent. (*Maryland v. Craig, supra*, 497 U.S. at 845; *United States v. Monks, supra*, 774 F.2d at 952.) First: it cannot be determined whether Aguirre's identification of the visitors as Mafia members was based on first-hand knowledge. Aguirre's fear that the Mafia was coming for him might well have been derived from a second-hand source. (*Dutton v. Evans, supra*, 400 U.S. at 88-89; *People v. Kons* (2003) 108 Cal.App.4th 514, 522; *Brown v. Keane, supra*, 355 F.3d at 89-90.) Second: as in *People v. Lew,*

supra, 68 Cal.2d at 780, Aguirre's credibility "was cast in doubt." Aguirre's was a heroin addict and thief whose statements were not necessarily trustworthy. (*People v. Kons, supra*, at 524.)

The error also violated appellant's right to a reliable death judgment guaranteed by the Eighth Amendment, and article I, section 17 of the state constitution. (*Beck v. Alabama, supra*, 447 U.S. at 637; *Zant v. Stephens, supra*, 462 U.S. at 879; *Johnson v. Mississippi, supra*, 486 U.S. at 584; *Woodson v. North Carolina, supra*, 428 U.S. at 304.) Reviewing courts apply a more exacting standard of review when they assess the prejudicial effect of errors on the penalty phase of a capital trial. (*People v. Brown, supra*, 46 Cal.3d at 447; accord: *Satterwhite v. Texas, supra*, 486 U.S. at 262-263.)

Consistent with section 190.3, appellant's penalty phase jury was instructed that it "shall" consider and be guided by the presence of enumerated factors, including, inter alia, "the circumstances of the crime of which the defendant was convicted." (Section 190.3(a).) The admission of unreliable hearsay which, in effect, identified Maciel as the person who visited victims on the afternoon prior to the murders was a factor that would have made the circumstances of the crime appear more heinous, because the jury could reasonably have inferred that Maciel knew that there would be children in the residence when gang members returned to kill Moreno and/or Aguirre. Accordingly, it cannot reasonably be maintained that the error did not infect both the guilt and penalty phase judgments beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. 18.)

X. THE ERRONEOUS ADMISSION OF THE HEARSAY STATEMENTS OF CODEFENDANT TORRES, THROUGH WITNESS #13, VIOLATED STATE HEARSAY RULES, AS WELL AS APPELLANT'S RIGHT TO COUNSEL, TO CONFRONTATION, DUE PROCESS, A FAIR TRIAL, AND A RELIABLE DEATH JUDGMENT.

A. Testimony and objections:

1. The trial testimony of witness #13:

Witness #13, the sister of defendant Anthony Torres was called to testify to events prior to the murders, and statements and admissions Torres had made to her after the murders. (RT57:8950.) In response to leading questions, witness #13 admitted that, at first, Torres admitted being at the scene of the killings, but said he was waiting outside in the car. (RT57:8957.) Witness #13 also admitted that later, Torres said he had not been waiting in the car; he had gone inside with the two people who committed the killings. According to Torres, Palma and Valdez had done the shooting. (RT57:8958.) This testimony was elicited over a defense hearsay objection, which was overruled by the court. (RT57:8957.)

At trial, the prosecutor also engaged in the following line of questioning, to which the defense added a relevance objection (RT57:8959):

> "Q: Did your brother ever tell you before that he had been involved in a murder?
> "Mr. Esqueda: Objection. Relevance.
> "The Court: Overruled.
> "The Witness: Before what?
> "By Mr. Manzella: Before this one....You know the point I am making? Your brother was involved in a murder. That is something that you'd remember, isn't it?
> "A: He didn't tell me that he killed anybody.
> "Q: But he told you eventually that he was inside the room where those people were killed.
> "A: No. He didn't tell me he was in the room. I'm sorry.
> "Q: But he told you that Jimmy and Primo had done the shooting.

"A: I believe, yes.
"Q: And he told you that the Mafia wanted it done.
"Mr. Esqueda: Objection. Leading.
"The Court: Overruled. Go ahead.
"The witness: I don't think he said it was the Mafia. All I remember is that it was something that had to be done. That is all I remember.
"Q: And did he tell you that they were supposed to kill just one guy?
"A: I think that is what it was.
"Q: And did he tell you, however, that they were also told: Don't leave any witnesses.
"A: I don't remember that. I don't recall."

(RT57:8958.)

2. The prior tape-recorded statement of witness #13:

The prosecutor then played a tape-recording of witness #13's prior statements to police. (Exhibit 74; RT57:8960.) The jury was given a transcription of the tape-recording prepared by a stenographic reporter, for assistance. (Exhibit74A; RT57:8961.) Witness #13 identified the voice on the tape as hers, and admitted that her answers had been truthful. (RT57:8965-8966.)

The tape-recording and transcription of the recording were sent into the jury room during deliberations, the latter over a defense objection. (RT62: 9564-9565.)

In Exhibit 74, witness #13 makes the following statements.

On the night of the murders, after Torres and his companions left the Torres residence, Torres' mother, Elizabeth Torres, went to witness #13's house and said, speaking of Torres,

"....he was acting weird, that he was kissing her and hugging her and telling her that, you know, he loved her and this and that. And he that he made a promise to somebody. He had to do

it, that he had to take care of it. And he had to go."

(SCT1:8:1626.) Witness #13 further states that Torres' mother said Torres said "he was told to do something by the Mafia." (SCT1:8:1626.)

The morning after the murders, witness #13 again talked with their mother. The mother related to witness #13 that she had asked Torres whether he had heard about the murders and he responded, "'You know, they killed two little – two little innocent kids....Well, there weren't supposed to be any kids there." (SCT1:8:1628.) Torres' mother asked him if he was there and he said, "yeah, he was there, but he didn't have nothing to do with any of the killings or what happened in the house." (SCT1:8:1629.) Later that day, Torres' mother said that Primo [Valdez] and the man with the Sangra tattoo on his neck [Palma] had done the shootings, and that the man with the tattoo "had shot the little baby in the mom's arms, or something like that." (SCT1:8:1629-1630.)

Witness #13 said in the tape that she subsequently spoke with Torres and asked about the truth of Torres' earlier statements to their mother. Torres admitted that he was present but said he "didn't kill anybody." He reiterated that Primo and the guy with the Sangra tattoo had done the shooting. (SCT1:8:1631.) He also told witness #13 that he "had promised this to this person .... meaning the Mafia. And it had to be. He couldn't back away from it. That he had to do that, because he had already promised." (SCT1:8:1631.) Torres said they were supposed to kill "one guy," but "if anyone got in the way," they were not "supposed to leave any witnesses." (SCT1:8:1632.)

Witness #13 spoke to Torres about the murders one more time, after talking with Detective Davis. (SCT1:8:1632.) Witness #13 asked Torres if he had any remorse for the killing of the children. In response, Torres reiterated that the man with the tattoo had killed the children. He further stated:

> "And he said that – that they were not known for killing innocent kids or his gang. I don't know if that's what he meant. But that they weren't known for that. And that that guy was hiding out somewhere in Pomona and that he – they were looking for him because they were going to take care of him."

(SCT1:8:1633.)

Witness #13 told officers on the tape that in a later conversation, their mother told her that she had come home from work and found a plastic storage tub with a gun in it. When their mother confronted Torres, he responded "that he was going to take care of it, and for her not to worry." (SCT1:8:1635.)

After the officers asked and received answers to several questions about witness #13's fear of retaliation, she was asked whether she had ever heard her brother talking about killing anyone else. (SCT1:8:1637.) She responded:

> ".... I think it was last year – when they shot one of his friends, that he – I guess when – I guess in retaliation to the other gang or whatever in El Monte also – that he was driving a car at that time, but I don't know if he did the shooting or anything like that. But I know he was driving."

(SCT1:8:1637.) She explained that the incident had occurred the previous summer, and that Torres was driving the car, when someone in El Monte was shot in retaliation for killing one of Torres' homeboys. (SCT1:8:1637-1638.)

Following the playing of witness #13's statement for the jury, witness #13 testified briefly, and admitted that Torres had told her that an El Monte gang had killed one of his homeboys. Then, in retaliation, the Sangra gang shot and killed someone from El Monte. (RT57:8967.)

3. The trial testimony of Elizabeth Torres:

After the testimony of witness #13, Torres' mother Elizabeth was called as a prosecution witness. (RT57: 8975.) The scope of her testimony was

extremely limited and did not include reference to Torres' admissions. Rather, she identified witness #13 as her daughter, and Torres as her son, and confirmed the address and telephone number of her residence. (RT57:8975-8976.) She denied knowing Maciel, and denied paging anyone from her residence on April 22nd or 23rd, 1995. (RT57:8976-8977.) She also confirmed that Torres and his friends had been at her residence the evening of the murders. (RT57:8977.)

B. The testimony of witness #13 regarding what Torres told her was inadmissible hearsay, not subject to exceptions for coconspirator statements and declarations against penal interest.

Although the trial court did not explain its reasons for overruling counsel's objection, on the face of the record, the admission of Torres' statements through the testimony of his sister was blatant error. First, since objectives of the alleged conspiracy to kill Anthony Moreno had been met before Torres spoke with his sister, the statements were not admissible as statements in furtherance of that conspiracy. (*People v. Leach, supra*, 15 Cal.3d at 431; *People v. Morales* (1989) 48 Cal.3d 527, 551-552; *Krulewitch v. United States* (1949) 336 U.S. 440, 443; *Howard v. Walker, supra*, 406 F.3d at 123; *People v. Smith* (1907) 151 Cal. 619, 626; *People v. Hardy* (1992) 2 Cal.4th 86, 147.) "A declaration, statement, or act of a conspirator, to be admissible as a in 'furtherance' of the conspiracy must, as the word 'furtherance' *ex vi termini*, imports, be an act, statement or declaration which in some measure, or to some extent, aids or assists towards the consummation of the object of the conspiracy." (*People v. Smith, supra*, 151 Cal. at 626.)

Second, the vast majority of statements recounted by witness #13 also did not qualify for admission as declarations against *Torres'* penal interest. An accomplice's confession that incriminates other defendants is considered

presumptively unreliable when it appears the declarant has a considerable interest in "confessing and betraying" his cohorts. (*Lilly v. Virginia, supra*, 527 U.S. at 131.) Hearsay statements must be "actually disserving" to the individual declarant to be admissible under Evidence Code section 1230. (*People v. Leach, supra*, 15 Cal.3d at 439.) One conspirator's hearsay statement implicating other coconspirators will *not* qualify as a declaration against penal interest if it shifts blame or minimizes the declarant's role in the crime. (*People v. Lawley, supra*, 27 Cal.4th at 174.) As in the case of *People v. Bryden, supra*, 63 Cal.App.4th 159, the circumstances surrounding Torres' statements suggest that he wanted to minimize his degree of culpability, and blame others, particularly for the deaths of the children; hence, it is likely the statements were "distorted" and thus, unreliable. (*Id.*,at 175.) A hearsay statement which admits some complicity but places the major responsibility on others does not meet the test of trustworthiness and is inadmissible as a declaration against penal interest. (*People v. Duarte, supra*, 24 Cal.4th at 612.)

C. The tape-recording of witness #13's extrajudicial statement incorporated inadmissible double and triple hearsay.

Although the prosecutor did not say so, appellant speculates from prosecutor's questioning, and witness #13's series of "I don't remember" answers, that at least some segments of the recording of her prior statement were offered as prior inconsistent statements. (Evidence Code section 1235; RT57:8956,8957.) Nevertheless, courts should be insure that prior inconsistent statements of a witness are not used as a subterfuge to place otherwise inadmissible hearsay before a jury. (*United States v. Buffalo* (8th Cir. 2004) 358 F.3d 519, 523; *United States v. Hogan* (5th Cir. 1985) 763 F.2d 697, 702.) The court failed to do so here.

Witness #13's tape-recorded extrajudicial statements describing Torres' out-of-court statements were double hearsay. Hence, even if the tape-recording of witness #13's "inconsistent" statements arguably qualified for admission under one hearsay exception, the hearsay within hearsay attributed to Torres – whether or not inconsistent – did not. (Evidence Code section 1201; *People v. Arias, supra*, 13 Cal.4th at 149.)

In fact, the lion's share of witness #13's recorded statements involved inadmissible *triple* hearsay: (1) statements made by Torres to his mother, who (2) repeated the statements to witness #13, who then (3) recounted the statements to investigating officers. Statements attributed to Torres by his mother also did not qualify for admission against Maciel under any hearsay exception. This is true whether such statements were made before or *after* the offense. The post-offense statements, including the threat to kill Palma, were clearly inadmissible because they were made after the conspiracy concluded. (See section B, above.)

Torres' *pre-offense* statement to his mother, regarding the need to take care of business for the Mafia, also did not qualify for admission as a statement *in furtherance* of the objectives of the conspiracy. Mere "narrative declarations" by a conspirator will not qualify for this exception unless they further the conspiracy's objectives. (*United States v. Eubanks* (9th Cir. 1979) 591 F.2d 513, 520.) Torres appears to have been telling his mother he loved her, possibly out of concern that he might not be coming back; his statements were merely explanatory, and did nothing to advance the objective of killing Moreno. (*People v. Noguera, supra*, 4 Cal.4th at 627.)

Statements by Torres implicating other accomplices also fail to qualify for admission as declarations against Torres' penal interest. (See section B, above.) Even if a few of Torres' statements to Elizabeth Torres might have

qualified for admission under Evidence Code section 1230, prejudicial error occurred. The statements were *not* introduced through the testimony of Torres' mother. Rather, they were introduced via a recording of witness #13 describing for police what her mother told her was said by defendant Torres. The probative value of hearsay decreases with each level of hearsay. (*People v. Zapien* (1993) 4 Cal.4th 929, 956.) The admission of triple hearsay in the form of tape-recorded statements of witness #13 was therefore error. (*People v. Schmeck* (2005) 37 Cal.4th 240, 280; *Thomas v. Hubbard, supra*, 273 F.3d at 1170-1172.)

The hearsay statement of Elizabeth Torres regarding her observation of a gun after the murders should not have been received. First and foremost, the statements made to witness #13 by her mother and repeated for investigators were all hearsay, subject to no exception. Secondly, evidence of the presence of the gun at Torres' house was irrelevant absent some showing the gun, or one like it, was used in the victims' murders. (*People v. Hooker* (1955) 130 Cal.App.2d 687, 692.) Otherwise, evidence of the gun was just another piece of irrelevant evidence with which to inflame the jury.

In short, there was nothing in the tape-recorded statement by witness #13 which justified its admission in the separate trial of Maciel.

D. Witness #13's testimony and recorded statements regarding Torres' admission to the unrelated murder of a rival gang member were irrelevant and improperly admitted.

The court also erred by overruling counsel's relevance objection when the prosecutor tried to elicit hearsay testimony from witness #13 regarding Torres' admitted complicity in an unrelated gang murder. (RT57:8958.) Although at first witness #13 denied that her brother had confessed involvement in a prior murder (RT57:8959), after the tape-recording of her

prior statement to police was played, including a segment about Torres' confession to the unrelated shooting (SCT1:8:1637-1638), witness #13 said that Torres had admitted involvement in the drive-by shooting of a rival gang member. (RT57:8967.) However, this evidence of a completely unrelated crime was completely irrelevant to any contested fact issue in the case, and served merely to tarnish Maciel with the random acts of his alleged cohorts. Nevertheless, Maciel was not charged in that crime, and there is no suggestion anywhere in the record that he was involved.

Evidence of uncharged crimes, particularly those involving gangs, is inherently prejudicial. (*People v. Carpenter* (1997) 15 Cal.4th 312, 380; *People v. Williams* (1997) 16 Cal.4th 153, 193.) Since Torres was not on trial with Maciel, introduction of evidence of a gang murder aided by Torres had no conceivable purpose but to invite the jury to conclude that Maciel – if and when he dispatched Torres to the Moreno residence – was well-aware of Torres' track record as a wanton murderer. The damaging effect of this evidence was compounded by Torres' hearsay statements that he intended to find Palma – who was subsequently murdered – and take care of him. This gang-related evidence was so extraordinarily prejudicial, and of so little relevance to prove guilt or individual responsibility, that it threatened to sway the jury to convict Maciel regardless of the weakness of the evidence of Maciel's involvement in the offense on trial. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048-1051.) The evidence amounted to nothing more than inadmissible bad character, inviting jurors to conclude that if Maciel associates with vicious killers, he must be one. (*People v. Felix* (1993) 14 Cal.App.4th 997, 1004-1005.) Neither the prosecutor nor the trial court offered any justification for introducing this evidence; no admissible purpose is apparent. The court erred by overruling counsel's objection.

E. The introduction of hearsay in witness #13's testimony, and prior recorded statement violated appellant's state and federal constitutional rights to due process, a fair trial, to confrontation and cross-examination, and a reliable death judgment.

The jury was instructed that it could consider evidence of a witness' prior inconsistent statements for the truth of the facts stated. (RT62:9582.) This court presumes that juries follow such instructions. (*People v. Coffman and Marlow, supra* 34 Cal.4th at 83.)

Evidence violates due process if it raises no permissible inference for the jury to draw and is of such a quality that it necessarily prevents a fair trial. (*Jammal v. Van de Kamp, supra*, 926 F.2d at 920.) Unfair prejudice can result, even from relevant evidence, if the evidence is such that it lures the factfinder into declaring guilt on a ground different from proof specific to the offense charged. (*Old Chief v. United States, supra*, 519 U.S. at 180.) "The admissibility of evidence over a Due Process Clause challenge turns on the 'reliability' of such evidence." (*United States v. Johnson* (N.D. Iowa 2005) 378 F.Supp.2d 1051, 1066.) For reasons explained in the previous sections B-F, Torres' statements to his sister and mother were self-serving and untrustworthy. (*Lilly v. Virginia, supra*, 527 U.S. at 130.) Maciel was convicted and sentenced to die based on unreliable evidence of bad character and guilt by association. The error also deprived appellant of his state-created liberty interest in the correct, non-arbitrary application of California's state evidence rules, which resulted in a violation of the Fourteenth Amendment's Due Process Clause. (*Hicks v. Oklahoma, supra*, 447 U.S. at 346; *Hewett v. Helms, supra*, 459 U.S. at 466; *Ford v. Wainwright, supra*, 447 U.S. at 428.)

The use of this evidence also violated appellant's rights guaranteed by the federal and state Confrontation Clauses. (*Dutton v. Evans, supra,* 400 U.S. at 79; Cal.Const., Art. I, § 15; see also, *Maryland v. Craig, supra*, 497 U.S. at

845; *United States v. Monks, supra*, 774 F.2d at 952.) "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." (*Maryland v. Craig,* at 845.) As the U.S. Supreme Court stated in *Lilly v. Virginia, supra,* 527 U.S. at 128, "the mere fact that one accomplice's confession qualified as a statement against his penal interest did not justify its use as evidence against another person." Admitting confessions by an accomplice which incriminate the defendant results in the functional equivalent of the "ancient ex parte affidavit system," which the Confrontation Clause seeks to prevent. (*Lilly v. Virginia, supra,* at 130-131.)

The jury relied on Torres' extrajudicial statements to prove that Maciel, a purported Mafia agent, had ordered Torres – a proven killer – to murder Moreno, and *not leave any witnesses*. Maciel had no opportunity to confront and cross-examination Torres, a nontestifying codefendant, about what he meant by his cryptic statements to his mother and sister, regarding having no choice but to act on orders from the Mafia.

None of the statements fell within a firmly rooted hearsay exception. The statements came too late to be coconspirator statements. (*People v. Leach, supra*, 15 Cal.3d at 431; *United States v. Eubanks, supra*, 591 F.2d at 520.) To the extent they blamed the Mafia and other codefendants, they did not qualify as statements against penal interest. (*People v. Leach, supra,* 15 Cal.3d at 441-443.) Nor did Torres' statements bear any particularized guarantees of trustworthiness. (*Ohio v. Roberts, supra*, 448 U.S. at 66.) Trustworthiness for confrontation purposes must be analyzed without "'bootstrapping on the trustworthiness of other evidence at trial.'" (*People v. Greenberger, supra*, 58 Cal.App.4th at 336; *Idaho v. Wright, supra*, 497 U.S. at 823.) At the time the

hearsay statements were made, Torres unquestionably had a motive to portray himself as appear less culpable, as a victim of circumstances in the eyes of his sister and mother. Because Torres stood to gain by appearing less blameworthy than others, his accusations were presumptively suspect, and precisely the type of hearsay that the U.S. Supreme Court has characterized as "inherently unreliable." (*Lilly v. Virginia, supra*, 527 U.S. at 131.)

For the same reasons, the error also violated appellant's right to a reliable death judgment guaranteed by the Eighth Amendment, and article I, section 17 of the state constitution. (*Beck v. Alabama, supra*, 447 U.S. at 637; *Zant v. Stephens, supra*, 462 U.S. at 879; *Johnson v. Mississippi, supra*, 486 U.S. at 584; *Woodson v. North Carolina, supra*, 428 U.S. at 304.) This Court has "long applied a more exacting standard of review when [it] assess[es] the prejudicial effect of state-law errors at the penalty phase of a capital trial." (*People v. Brown, supra*, 46 Cal.3d at 447.) The U.S. Supreme Court has repeatedly recognized that the greater need for reliability in capital cases means that death penalty trials must be policed at all stages for procedural fairness and accuracy of factfinding. (*Satterwhite v. Texas, supra*, 486 U.S. at 262-263.) This evidence rendered not only the guilt verdict, but also the penalty unreliable.

Because the error impinged upon fundamental constitutional rights, including the Sixth Amendment's right to Confrontation, the Fifth and Fourteenth Amendment's guarantee of due process, and the Eighth Amendment's guarantee of reliability in death judgments, the state bears the burden of showing that the error did not infect the guilt or penalty judgments beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. 18; *United States v. McKinney, supra*, 707 F.2d at 384-385.) This the state cannot do. As previously explained in subsection F, above, inadmissible hearsay

forged a crucial link connecting Maciel with the instant murders, *and* made Maciel's role seem more active and heinous. Under the circumstances, the error was not harmless beyond a reasonable doubt at either phase of the trial.

XI. ERRONEOUS ADMISSION OF HEARSAY STATEMENTS MADE TO WITNESS #15 BY SHYROCK VIOLATED STATE HEARSAY RULES AS WELL AS APPELLANT'S STATE AND FEDERAL RIGHTS TO CONFRONTATION, DUE PROCESS, AND A RELIABLE DEATH JUDGMENT.

A. Objections and rulings:

During the examination of witness #15, the DA asked witness #15 whether, before the murders, he had conversed with Shyrock about drug dealers. Esqueda objected "vague as to time." After the court clarified that the witness was talking about "before" the crimes (RT56:8745-8746), the DA asked witness #15 if Shyrock had told him something with regard to drug dealers. Esqueda objected on hearsay grounds. At a bench conference, the prosecutor made an offer of proof: "that [witness #15] would testify a few weeks before the murder that Huero Shy told him that dope dealers were paying protection and that he did not like the fact that Huero was robbing them." (RT56:8746.) The DA further proffered testimony on the issue of motive "that after the murders, Huero Shy expressed his condolences for the death of the family but said he was not sorry about Tito because he was going to kill Tito anyway because Tito was showing disrespect." (RT56:8747.) The court ruled the statements admissible under Evidence Code sections 1250 and 1251 to prove that Shyrock wanted Aguirre dead. (RT56:8748.)

Defense counsel then made an objection under Evidence Code section 352, arguing that the statements were not admissible in furtherance of the alleged conspiracy, and that they were substantially more prejudicial than probative of Maciel's involvement in the alleged murders. (RT56:8748-8749.) The court agreed that the statements were inadmissible as coconspirator statements, and overruled the objection on Evidence Code section 352 grounds. The court indicated that the statements were relevant in light of

evidence of a special relationship between Shyrock and Maciel to show that the wishes of the sponsor might be carried out. (RT56:8749.) The jury was then instructed that the evidence was being received for the limited purpose of showing Shyrock's feelings and intentions toward Aguirre. (RT56:8750-8751.) In other words, hearsay was received to show that Maciel acted in conformity with Shyrock's wishes.

B. Witness #15's testimony:

Thereafter, witness #15 testified that several weeks prior to the murders, Shyrock said he was tired of Aguirre and Tony Cruz "disrespecting him and robbing dope connections and that sooner or later they were going to have to pay for that." (RT56:8752.)

Witness #15 further testified that the morning after the murders, Officer Marty Penny of the El Monte Police Department arranged a meeting between witness #15 and Shyrock at Lambert Park. (RT56:8753.) After "shaking down" the witness and Shyrock, the officers stepped away to allow witness #15 and Shyrock to talk in private. (RT56:8754.) Witness #15 asked Shyrock if he had anything to do with the murders. Shyrock said "that he was sorry to hear about that and he had seen it on the news that morning at 5:00." (RT56:8755.) Shyrock offered his "condolences," and said "if he would have done something like that, he wouldn't have done it the way it happened. He would have done it in another way, if he had something to do with it." (RT56:8755.) Shyrock also said of Aguirre: "that bastard. He was forcing me to kill him or do something to him so I don't feel bad about him dying....As far as your brother, sister, and the two little babies, you have my condolences and I didn't do it because I wouldn't have done it in that fashion." (RT56:8756.)

C. Pre-offense and post-offense statements attributed to Shyrock by witness #15 were not admissible as coconspirator statements.

All statements attributed to Shyrock were hearsay. The court conceded that the statements were *inadmissible* as coconspirator statements. The court was correct. The prosecutor's theory, as articulated for the trial judge at an instructional conference, was that there was a conspiracy to kill Moreno, not Aguirre. The other adult victims were killed because they were witnesses. The deaths of the children were purportedly the natural and probable consequences of the murder of Moreno and the killing of witnesses. (RT61:9521; RT62:9660,9662,9669.) Since no conspiracy to kill Aguirre was alleged, the statements could not have been in furtherance of such a conspiracy. (*People v. Moreno, supra*, 48 Cal.3d at 552.)

Furthermore, this hearsay did not qualify for admission as a statement in furtherance of the alleged conspiracy to kill Moreno. Shyrock's pre-offense statements to witness #15 did not aid or assist the consummation of the conspiracy to kill Moreno. (*People v. Smith, supra*, 151 Cal. at 626.) Mere "narrative declarations" by a coconspirator will not qualify for this exception unless they further the conspiracy's objectives. (*United States v. Eubanks, supra*, 591 F.2d at 520.) Shyrock's post-offense statements also did not qualify as coconspirator statements. Obviously, they were made after the objectives of the conspiracy to kill Moreno had been met. (*People v. Leach, supra*, 15 Cal.3d 419.)

D. Hearsay was erroneously received to show Shyrock's state of mind, to prove that Maciel, by reason of his special relationship with Shyrock, would act in conformity with his sponsor's wishes.

The judge ruled that the evidence was relevant to prove Shyrock's animus toward Aguirre. (Evidence Code sections 1250, 1251.) The state of

mind exception is not an exception to the rules of relevance, however. (*UPS v. NLRB* (6th Cir. 2000) 228 F.3d 772, 781.) An out-of-court statement is *not* made admissible merely because its proponent states a theory of admissibility not related to the truth of the matter asserted. The nonhearsay purpose must also be relevant to an issue in dispute. (*People v. Jablonski, supra*, 37 Cal.4th at 820-821; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1204.)

Shyrock's hatred of Aguirre was deemed relevant because of Maciel's alleged special relationship with Shyrock. Shyrock's state of mind toward Aguirre was not really an issue in dispute, however. Nor was Maciel's attitude toward Aguirre. The prosecution' theory of the case was that Maciel dispatched gang members to kill Moreno, not Aguirre; Aguirre died because he was present and a potential witness. (RT61:9521; RT62:9660, 9662, 9669.) Torres' out-of-court statements established that the perpetrators of the murder went to the Moreno residence to kill only one man – Moreno. (SCT1:8:1632.) Consequently, Shyrock's motive to kill Aguirre was not relevant to prove that Maciel aided and abetted the killing of, or conspired to kill Moreno.

More importantly, courts should be cautious to guard against hearsay exceptions used as a subterfuge to place otherwise inadmissible hearsay before a jury. (Cf. *United States v. Buffalo, supra*, 358 F.3d at 523 [prior inconsistent statements must not be used as a subterfuge to introduce inadmissible hearsay]; *United States v. Hogan, supra*, 763 F.2d at 702.) In this case, admitting Shyrock's hearsay through witness #15 was a mere subterfuge to allow otherwise inadmissible hearsay for the truth of the matter asserted: that Shyrock was planning to have Maciel kill Aguirre. (See, *People v. Koontz* (2002) 27 Cal.4th 1041, 1078 [certificate proving that the defendant had completed an auto mechanics course was inadmissible hearsay to the extent offered to prove he *acted in conformity* with his state of mind, i.e., that he

behaved consistently with his familiarity with auto mechanics by not intending to steal a car with mechanical problems]; see also, *People v. Cummings, supra*, 4 Cal.4th at 1322.)

E. The court abused its discretion by overruling appellant's Evidence Code section 352 objection.

Evidence Code section 352 confers judicial discretion to exclude evidence that "uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." (*People v. Garceau, supra*, 6 Cal.4th at 178.) On appeal, the court's ruling is reviewed for abuse of discretion. (*People v. Cudjo, supra*, 6 Cal.4th at 609.)

The trial court abused its discretion by overruling the defense objection under Evidence Code section 352. The evidence had little or no probative value to prove contested fact issues. As explained in section D, above, the prosecutor conceded that the unlawful agreement if any, was only to kill Moreno. Shyrock's murderous intentions toward Aguirre had little relevance *to prove that Maciel was behind the plan or conspiracy to kill Moreno.* Furthermore, Maciel was not present when the killings occurred, and there was no evidence whatsoever to suggest that Aguirre's betrayal of the Mafia was the reason why Valdez, the *undisputed* shooter of the adult male victims, killed Aguirre as well as Moreno.

Admission of Shyrock's statements had great potential to cause prejudice and confusion in the minds of jurors. Hearsay of this nature was certain to instill unnecessary terror in the hearts of jurors by painting Shyrock as willing to kill Aguirre in cold blood, to advance the monetary interests of the Mafia. In fact, one juror did express a fear of retribution, and at the end of the trial, others asked to be escorted to their cars. (RT63:9813; RT65:10235.) The evidence was uniquely likely to evoke an emotional bias against Maciel

by virtue of his mere association with Shyrock. This hearsay was also completely unnecessary, because, even if marginally relevant, it was cumulative of other more general testimony by a gang expert and witness #15 that Aguirre had been robbing drug connections, which made him a potential target of the Mafia. Under the circumstances, it was an abuse of discretion to admit Shyrock's pre- and post-offense statements showing *Shyrock's* intent to kill Aguirre, or, inferentially, to have Maciel kill Aguirre.

F. Admission of Shyrock's hearsay statements deprived appellant of due process and a fair trial, violated his state and federal confrontation rights, and undermined the reliability of the death judgment.

1. Use of Shyrock's "testimonial" statements violated *Crawford v. Washington*.

Crawford v. Washington, supra, 541 U.S. at 68, held that "testimonial" statements are barred under the Sixth Amendment unless the declarant is "unavailable" and the defendant had "a prior opportunity for cross-examination." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1028, n.19.) In the wake of *Crawford*, the admissibility of "testimonial" statements, i.e., those that a declarant would reasonably expect to be used for evidentiary purposes, no longer turn on the "vagaries of the rules of evidence, much less [on] some amorphous notions of 'reliability.'" (*Crawford v. Washington, supra*, at 61; internal citations omitted.)

In *Bockting v. Bayer* (9th Cir. 2005) 399 F.3d 1010 (amended, 408 F.3d 1127), the Ninth Circuit Court of Appeals held that the *Crawford* rule was a watershed rule of criminal procedure, and thus retroactive. The U.S. Supreme Court has granted certiorari in that case. (*Whorton v. Bockting* (2006) 126 S.Ct. 2017.)

Assuming nevertheless that *Crawford* is applicable to this case, the

question becomes whether any of Shyrock's statements to witness #15 were "testimonial." In *Crawford*, the U.S. Supreme Court did not undertake to exhaustively classify all conceivable statements which might qualify as "testimonial." Rather, the court defined "testimonial" as encompassing ex parte in-court statements, or their functional equivalents: affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that the declarants would reasonably expect to be used for prosecution. (*Crawford v. Washington, supra*, at 51-52.) The Supreme Court has also declared that statements made in the absence of any interrogation are not necessarily "nontestimonial." (*Davis v. Hammon, supra*, 126 S.Ct. 2266, 2274, n.1.)

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

(*Davis* at 2273-2274.)

Officer Penny and his partner were actively investigating the murders when Shyrock met with witness #15. The statements were not, however, made during "an ongoing [police] emergency." (*Ibid.*) Although the police-arranged meeting ostensibly had a peacekeeping purpose, the attending circumstances suggest there was an underlying evidence-gathering objective as well. The police would naturally hope that Shyrock might make admissions, or reveal useful information to the victims' brothers. As such, the meeting was a plot or device by which officers hoped to gather evidence to "establish or prove past events potentially relevant to later criminal

prosecution." (*Ibid.*) In any event, regardless of what Sgt. Penny expected, Shyrock himself would reasonably have expected that any statements he made to witness #15 could be used for prosecution; indeed, they were used for exactly this purpose. (*Crawford, supra*, at 51-52.) Because appellant was denied an opportunity to cross-examine Shyrock, the use of his "testimonial" statements violated appellant's rights under the Confrontation Clause without regard to the "vagaries of the rules of evidence" and "amorphous notions of 'reliability.'" (*Crawford* at 61.)

2. Use of Shyrock's statements, to the extent nontestimonial, nonetheless violated the rights to due process, confrontation, and a reliable death judgment.

Even if *Crawford* does not apply, under the analysis of *Ohio v. Roberts, supra*, 448 U.S. 56, introduction of Shyrock's statements still violated appellant's confrontation rights. Despite the trial court's lip service to a purported nonhearsay purpose for the evidence, in reality, the statements were offered to prove the truth of the matters asserted: that Shyrock wanted Aguirre dead, so Maciel had him killed. No firmly rooted hearsay exception bearing particularized guarantees of trustworthiness applied. (See sections C and D, above.)

It bears repeating that Shyrock's motive to kill *Aguirre* was not strongly probative of Maciel's participation in the alleged conspiracy to kill *Moreno*. The fact that Aguirre was robbing Mafia drug connections does not appear to have been a factor in the actual shooter's decision to kill him. According to the prosecutor's theory of the case, Aguirre and Maria Moreno were shot to eliminate any witnesses.

Furthermore, witness #15's motives were suspect. The witness obviously blamed Shyrock and Maciel for the murder of the witness' brother

and his friend. Moreover, at the time of trial witness #15 was facing 25 years to life in prison on unrelated charges; suspiciously, after the trial, he received only credit for time served. (RT66:10246.) Under the circumstances, witness #15's convenient accounts of what Shyrock said should have been regarded as far too unreliable to obviate the need for cross-examination. (*Idaho v. Wright, supra*, 497 U.S. at 822; Cf. *People v. Cudjo, supra*, 6 Cal.4th at 609.)

Shyrock's post-offense statements were untrustworthy in the extreme. Shyrock and witness #15, along with another brother of victim Anthony Moreno, were directed to come to Lambert Park by the police. All were "shaken down" when they arrived, and the police stood by while they spoke. (RT56:8754.) Shyrock, having every reason to believe his statements would be used against him, offered condolences, denied involvement in the murders based on the manner in which they were committed, and indicated, in essence, that Aguirre got what he deserved. (*People v. Bryden, supra*, 63 Cal.App.4th at 175.) The statements amounted to nothing more than the unreliable statements of a coconspirator, exculpating himself, and casting suspicion on others. (*Lilly v. Virginia, supra*, 527 U.S. at 131: *People v. Leach, supra*, 15 Cal.3d at 439; *People v. Duarte, supra*, 24 Cal.4th at 612.)

The evidence was incredibly prejudicial. Not only did the evidence show that Shyrock harbored the intent to kill Aguirre. One could also infer from the statements that Shyrock did *not* order or approve of the killing of Mrs. Moreno and the children. Considered with other evidence presented at Maciel's trial, one possible inference was that someone *other* than Shyrock was responsible for the deaths of innocent women and children. The only person on trial, and available for the jury to blame was Maciel. Thus, despite the court's limiting instruction, there was a great danger that the jury would consider Shyrock's hearsay statements for the truth of the matter asserted –

that Mrs. Moreno and the children were killed *not* by Shyrock or at his request. In other words, jurors were likely to believe (based on the statement) that Maciel, or the shooters, rather than Shyrock, botched what was supposed to be an isolated "hit." Appellant was thus deprived of his constitutional right to confront and cross-examine Shyrock. (*Ibid*; see also, *People v. Lew, supra*, 68 Cal.2d 774; *People v. Armendariz, supra*, 37 Cal.3d at 584-585; *People v. Coleman, supra*, 38 Cal.3d at 81-83.)

Appellant's due process rights were also denied.[55] Whether the Due Process Clause is violated also turns on the *reliability* of the evidence wrongfully received. (*United States v. Johnson* (N.D. Iowa 2005) 378 F.Supp. 1051, 1066.) Due process is violated if evidence is such that it lures the jury into declaring guilt on a ground different from proof specific to the offense charged. (*Old Chief v. United States, supra*, 519 U.S. at 180.) For reasons previously stated, witness #15's account of Shyrock's statements was intrinsically suspect. Furthermore, Shyrock's statements, even if made, were self-serving and inherently untrustworthy. Violation of appellant's due process rights is manifest because jurors would necessarily have been tempted to blame Maciel for the killing of innocent victims based on Shyrock's intrinsically untrustworthy statements, described by yet another unreliable source. The error also deprived appellant of his state-created liberty interest in the correct, non-arbitrary application of California's state laws, which resulted in a violation of the Fourteenth Amendment's Due Process Clause. (*Hicks v. Oklahoma, supra*, 447 U.S. at 346.)

The error equally violated appellant's right to a reliable death judgment

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[55] Appellant's right to assert a denial of due process was preserved by his objection that the evidence was more prejudicial than probative under Evidence Code section 352. (*People v. Partida, supra*, 37 Cal.4th at 433-439.)

guaranteed by the Eighth Amendment, and article I, section 17 of the state constitution. (*Beck v. Alabama, supra*, 447 U.S. 625, 637; *Zant v. Stephens, supra*, 462 U.S. at 879; *Johnson v. Mississippi, supra*, 486 U.S. at 584; *Woodson v. North Carolina, supra*, 428 U.S. 280; *People v. Brown, supra*, 46 Cal.3d at 447.) The greater need for reliability in capital cases means that death penalty trials must be policed at all stages for procedural fairness and accuracy of factfinding. (*Satterwhite v. Texas, supra*, 486 U.S. at 262-263.)

Consistent with section 190.3(a), appellant's penalty phase jury was instructed to consider and be guided by the guilt phase evidence and the circumstances of the crime. During guilt phase closing argument, the prosecutor had argued that the evidence proved that Maciel had ordered the deaths of all witnesses. (RT62:9669.) The jury found Maciel guilty of *five* first degree murders, and *four* special circumstance findings, even though the prosecutor had conceded that there was no proof that Maciel intended the deaths of either of the children. (RT62:9660.) This unreliable evidence lent substantial weight to the otherwise insubstantial evidence that Maciel, not Shyrock, arranged the killings, and ordered any witnesses killed, which led to the killing of innocent children.

On this record, the state cannot meet its burden to prove beyond a reasonable doubt that the error did not infect either the guilt or penalty phase judgments. (*Chapman v. California, supra*, 386 U.S. 18; *United States v. McKinney, supra*, 707 F.2d at 384-385.)

XII. IT WAS PREJUDICIAL INSTRUCTIONAL ERROR TO GIVE CALJIC NO. 2.11.5 ON CONSIDERATION OF WHY OTHER PERSONS WERE NOT BEING PROSECUTED, WHERE WITNESS #16 TESTIFIED UNDER IMMUNITY FROM PROSECUTION FOR THE INSTANT MURDERS.

Witness #16, an accomplice, was granted immunity from prosecution for the instant murders in exchange for his testimony. (RT57:8890-8891,8918-8920.) Witness #12, who was called by the defense, was also granted immunity in exchange for his testimony. (RT60:9345.) In the guilt phase, the jury was instructed pursuant to CALJIC No. 2.11.5:

> "There has been evidence in this case indicating that persons other than defendant were or may have been involved in the crime for which the defendant is on trial. There may be reasons why those persons are not here on trial. *Therefore, do not discuss or give any consideration as to why the other persons are not being prosecuted in this trial or whether they [have] been or will be prosecuted....*"

(CT3:691; RT62:9603.)

The giving of the italicized portion of the instruction was error. A court should not use this instruction when there are persons testifying under a grant of immunity from prosecution. (*People v. Cornwell* (2005) 37 Cal.4th 50, 88; *People v. Hinton* (2006) 37 Cal.4th 839, 880-881; *People v. Crew* (2003) 31 Cal.4th 822, 845.) The use of CALJIC No. 2.11.5 would only have been proper if limited to exclude those accomplices who testified under a grant of immunity. (*People v. Carrera* (1989) 49 Cal.3d 291, 312, n.10.)

Defense counsel made no objection to the instruction as worded. However, when there is sufficient evidence that a witness is an accomplice, the trial court is required on its own motion to instruct the jury on the principles governing the law of accomplices. (*People v. Tobias* (2006) 25 Cal.4th 327,

331.)

The error was prejudicial, at least as to witness #16. The jury would necessarily have concluded that it could not give "any consideration" to the reasons why witness #16 was not being prosecuted. In *People v. Hinton, supra*, 37 Cal.4th 839, and *People v. Cornwell, supra*, 37 Cal.4th 50, this Court found this type of error to be nonprejudicial. However, in *Hinton*, the version of CALJIC No. 2.20 that was given to the jury advised that, in assessing a witness' credibility, the jury could consider the fact that the witness testified under a grant of immunity. (*Hinton* at 880-881.) Similarly, in the *Cornwell* case, the jury was instructed to keep in mind any sentencing benefits received by witnesses in assessing credibility. (*Cornwell,* at 88.) In Maciel's case, in contrast, no such instructions were given to countermand the effect of the erroneous instruction.

Witness #16 was a critical prosecution witness. His testimony was relied upon to corroborate the testimony of another witness, #14, that Palma, the child killer, stopped and met with Maciel at his residence shortly before the murders. (RT57:8903-8909,8993-8997; RT58:9188.) Witness #14 had severe credibility problems from a prosecution standpoint; these problems have been discussed previously and will not be reiterated here. (See Argument I, B, 2.) It suffices to say that other than witness #16's testimony, there was no corroboration for witness #14's claim that he and Maciel left the baptismal party to meet the shooters at this crucial moment in time. The entire defense turned on convincing the jury that several witnesses, including witness #16, were liars. "[D]ue regard must be accorded to the centrality of [witness #16's] credibility to the judicious resolution of this case." (*United States v. Rockwell* (3rd Cir. 1986) 781 F.2d 985, 990.)

Jury instructions which invade the province of the jury to determine the

facts and assess the credibility of witnesses deprive the accused of a fair trial. (*United States v. Rockwell, supra*, at 991.) Because jurors could reasonably have construed the instruction to mean that the immunity grant was irrelevant to determining witness #16's credibility, appellant's constitutional rights to due process, a fair trial. (*Ibid.*) In addition, the arbitrary denial of a purely state law entitlement – in this case, the right to have the instruction modified to exclude testifying accomplices given an immunity grant – may also violate the Due Process Clause. (*Hicks v. Oklahoma, supra*, 447 U.S. 343; *Hewett v. Helms, supra*, 459 U.S. at 466; *Green v. Catoe* (4th Cir. 2000) 220 F.3d 220.) The jury was effectively denied the opportunity to decide a relevant factual question in violation of the state and federal constitutional rights to trial by jury. (*People v. Figueroa* (1986) 41 Cal.3d 714, 724; *United States v. Voss* (8th Cir. 1986) 787 F.2d 393, 398.) This type of judicial error cannot be found harmless notwithstanding the strength of the evidence against a defendant. (*United States v. McCain* (5th Cir. 1977) 545 F.2d 988, 1003-1004.)

The error is particularly egregious because it occurred in the context of a death penalty proceeding, where it also violated appellant's right to a reliable death judgment guaranteed by the Eighth Amendment, and article I, section 17 of the state constitution. (*Beck v. Alabama, supra*, 447 U.S. at 637; *Zant v. Stephens, supra*, 462 U.S. at 879; *Johnson v. Mississippi, supra*, 486 U.S. at 584; *Woodson v. North Carolina, supra*, 428 U.S. 280; *People v. Brown, supra*, 46 Cal.3d at 447; *Satterwhite v. Texas, supra*, 486 U.S. at 262-263.)

XIII. THE TRIAL COURT ENGAGED IN A PATTERN OF MISCONDUCT DURING THE GUILT PHASE, WHICH DEPRIVED APPELLANT OF HIS STATE AND FEDERAL RIGHT TO A FAIR TRIAL AND TO RELIABLE GUILT AND PENALTY JUDGMENTS.[56]

A. Legal principles:

The rules governing judicial misconduct are well-established and require little elaboration.

> "A trial court commits misconduct if it 'persists in making discourteous and disparaging remarks to a defendant's counsel...and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge, and in other ways discredits the cause of the defense....'"

(*People v. Fudge* (1994) 7 Cal.4th 1075, 1107.) A judge has the right to curtail defense counsel from making incorrect or incomplete statements of law. (*People v. Ott* (1978) 84 Cal.App.3d 118, 132.) However, it is misconduct for a court to make "discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression that it is allying itself with the prosecution." (*People v. Sturm* (2006) 37 Cal.4th 1218, 1233; internal quotations omitted.)

B. The trial court engaged in a prejudicial pattern of misconduct during the guilt phase trial.

Throughout appellant's trial, the judge frequently interjected commentary from the bench in a way which either credited prosecution witnesses, and/or discredited defense counsel, thereby discrediting the defense. The following acts by the trial judge qualify as misconduct.

1. RT55:8522:

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[56] Instances of judicial misconduct during the penalty phase are addressed in Part II, *post*.

During the DA's examination of gang expert Valdemar, defense counsel objected to a question about whether a victim's son would lie for a Mafia member being tried for murder, and argued that credibility determinations were for the jury. The court responded:

> "Don't make a speaking objection. Just make an objection, gentleman. When you make one, if you do. State a legal ground rather than argue in front of the jury. I think I understand your objection.
>
> "Is that something in your experience with the Mexican Mafia would be a possible thing to happen?"

The witness answered, yes, and the court overruled counsel's objection.

2. RT55:8592-8593:

During the cross-examination of gang expert Valdemar, the following ensued:

> "Q. Tell us what you told the grand jury about a silencer.
>
> "The Court: Well, I would prefer that if counsel – if you want him to tell you something about a silencer, rather than what he told somebody else where else, ask him what you want to know? Okay?
>
> "Mr. Esqueda: I want to know what he told the grand jury –
>
> "The Court: *Well, I don't want to know what he told the grand jury.*
>
> "Mr. Esqueda: For impeachment."

The judge then questioned Sergeant Valdemar himself until he satisfied himself there was foundation for counsel's question, then allowed counsel to proceed.

3. RT56:8794-8795:

While cross-examining witness #15 about his heroin use, defense counsel asked the witness, "You were a down and out hype, weren't you?" After the witness answered affirmatively, the judge stated:

> "He is telling you that he has used heroin for 27 years and has been to prison for 25. He steals to get his heroin. Now to

characterize this gentleman as a down and out hype, is it necessary to do so? *Again, he is a witness here and testifying for counsel to question, not to name call.* Okay?"

4. RT57:8889-8891:

During the examination of witness #16, an immunized witness, the DA asked the witness what would happen to him if he did not testify truthfully, or did not answer all questions posed at appellant's trial. Defense counsel objected to the form of the question, arguing that it was for the jury to decide whether the witness was testifying truthfully. The following occurred:

"The Court: But there is an agreement and order by the court. I think he is asking about the terms of what happens if the agreement is breached. I think it is important for the jury to know. *What happens if you lie or the judge says you lie or you don't show up?*
"The Witness: I wouldn't be granted immunity.
"The Court: And then what? You would be prosecuted for murder?
"The Witness: Correct."

5. RT57:8939:

During Mr. Esqueda's cross-examination of witness #16, he attempted to cross-examine regarding the witness's prior criminal record, but was interrupted by the trial court.

"Q. Were you convicted in 1989 of assault with a deadly weapon?

"The Court: Well, counsel, what year are you talking about? '89? [To the witness] How old are you?

"The Witness: 24.

"The Court: he couldn't have been convicted of anything in '89 as a matter of law.

"Mr. Esqueda: 'CNV' means conviction.

"The Court: Not if you are a juvenile, as you know.

"Mr. Esqueda: In 1990 were you convicted –

"The Court: Before you ask questions where the answer may not be what you think, confer with counsel and take a look

at your rap sheet and make sure you are not asking questions that you should not be asking. *Juvenile adjudications are irrelevant, as you know.* So look at it over the noon hour. You may ask something else."

6. RT58:9082-9083:

During cross-examination of DA John Monaghan, trial counsel asked questions about the disposition of witness #14's kidnap-robbery case. Monaghan claimed he could not recall the identity of the DA was who took the witness's plea. Counsel started to ask again which D.A. had handled the case when Mr. Manzella objected, "That is insulting." The court responded:

"I don't know about insulting. It is argumentative. [Directed at Mr. Esqueda] You know who it is, I assume. *If so, give him a name. It's not a secret. It's a Public Record.*"

7. RT58:9199:

While Mr. Esqueda was cross-examining Detective Davis about a prior interview of witness #14, the following occurred:

"Q: If I asked you to go home and listen to the tape, ...and to review your notes and come back at some later date and tell us what you heard and saw in your notes, would you be willing to do that?

"Mr. Manzella: I will object on grounds that it is not relevant.

"The Court: Whether he would or would not is irrelevant. If you want to make arrangements, do it. *Don't waste the jury's time.*"

8. RT62:9813-9714:

During defense counsel's guilt phase closing argument, the court interrupted counsel and chastised him regarding his characterization of the law.

"Mr. Esqueda: What evidence does the prosecution have to convict Mr. Maciel of Count 6 that he had the specific intent to willfully, deliberately with premeditation and malice kill

Ambrose Padilla, a 6-month old child?

"The Court: Counsel, I will have to interrupt you. I hate to interrupt either counsel during argument, but I will do that. *That is a misstatement of the law and that is not required in this case.* If you want me to explain it, I will be glad to. I don't want the jury confused as to the law that applies to those counts. That is one theory as to how the defendant may be convicted of that count of four....

"...You certainly don't suggest that is the only one."

The trial judge's pattern of behavior in this case was remarkably similar to the behavior of the judge in *People v. Sturm, supra*, 37 Cal.4th 1218, in which this Court found that judicial hostility exhibited toward defense witnesses and defense counsel during the penalty phase required reversal of the death judgment. In *Sturm*, among other acts of misconduct, the judge chastised a defense mental health expert for "overusing descriptive words in her testimony," instructed her in a rude manner to answer yes or no, and interrupted to answer (incorrectly) a question posed to the witness.[57] (*Id.*, at p. 1234.) The judge also expressed overt indifference to the expert's testimony in front of the jury, by asking "what's the difference" whether the expert did or did not see signs of the defendant's depression by looking at his school records. (*Id.*, at 1239.)

The judge in *Sturm* disparaged counsel in front of the jury on a number of occasions. For instance, when counsel tried to ask a witness whether her sons would be upset of the defendant were to receive the death penalty, the judge – like Judge Horan – prefaced his remarks by saying he did not like to interrupt, but then chastised counsel at some length for asking an objectionable question and "holding the jury over late...." (*Sturm*, at 1234-1235.) At another

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[57] The judge asked, "Why don't you just answer yes or no, ma'am. If we need an explanation, you can do it." (*Sturm, supra,* at 1234.)

point, the judge accused counsel of trying to "sneak [a question] by," when counsel was simply attempting to rephrase a question to which an objection had been sustained. (*Id.*, at 1235.) On frequent occasions, the judge interjected objections where the prosecutor had voiced none. (*Id.*, at 1235.)

In *Sturm*, the judge attempted to neutralize the effect of his own biased behavior by explaining to the jury that he was trying to be "neutral," and was merely restricting the evidence to what he "considered relevant." (*Id.*, at p. 1235-1237.) However, this Court concluded that the trial judge only made matters worse because what he said merely reinforced the impression that defendant's attorney was wasting the court's and the jury's time by asking inappropriate questions. (*Sturm*, at p. 1242.)

Like the judge in *Sturm*, Judge Horan disparaged counsel's knowledge of the law and trial skills on numerous occasions. (See, ¶¶ 1, 3, 5, 6, 7, & 8.) He also accused counsel of wasting the jury's time. (See, ¶ 7.) He twice overtly demeaned the importance of information counsel was attempting to bring out by cross-examining the state's witnesses. (See, ¶¶ 2 & 3.) In such instances, the court's interventions were legally unfounded.

The court's caustic statement, "I don't want to know what he [Valdemar] told the grand jury," was completely inappropriate. In fact, Valdemar's inconsistent – and therefore inferentially false – testimony before the grand jury was highly relevant to his veracity and credibility in the instant proceeding. As was subsequently revealed, Valdemar inaccurately told the grand jury that Shyrock ordered the deaths of the children, and wanted a silencer so he could silence the children, i.e., keep them from screaming. (RT55:8593,8602.) This was untrue; Shyrock had said he did *not* want the children killed. (SCT1:8:1642-1643.) The judge clearly implied that what happened before the grand jury was unimportant.

Judge Horan's gratuitous remark, "Juvenile adjudications are irrelevant, as you know," was also misleading. (RT57:8939.) State law prohibits using sustained juvenile court petitions for impeachment purposes because they are not criminal "convictions." (*People v. Sanchez* (1985) 170 Cal.App.3d 216, 218.) However, a witness may be impeached with prior *conduct* evincing moral turpitude, even if such conduct was the subject of a juvenile adjudication. (*People v. Lee* (1994) 28 Cal.App.4th 1724, 1739.) A a person's conduct showing moral turpitude or dishonesty is considered *relevant* for impeachment. (*People v. Wheeler* (1992) 4 Cal.4th 284.) The court implied falsely that this young adult witness's prior juvenile misconduct was unimportant.

The court's interruption of closing argument was likewise premature and unjustified. (See, ¶ 7.) Counsel was arguing the facts, not misstating the law. He was merely pointing out, accurately, that the record lacked evidence that appellant premeditated or deliberated the killing of the six-month old victim, Ambrose Padilla. The court was unjustified in assuming counsel would not devote equal time to arguing the lack of evidence to support a first degree murder finding on theories of conspiracy and aiding and abetting. The court's interruption to berate counsel, and remind the jury that there might be evidence to support a first degree murder conviction on other theories, amounted to improper advocacy for the prosecution. (*People v. Sturm, supra*, 37 Cal.4th at 1233.)

Perhaps the court's most damaging misconduct came during the testimony of witness #16. (See, ¶ 3.) Judge Horan could have overruled counsel's objection without comment. Instead, by asking this immunized witness what would happen if the "judge says you lie," Judge Horan made himself guarantor of witness #16's truthfulness. This kind of vouching results

in "ursurpation of the jury's function as fact finder," and necessitates reversal. (*People v. Singhsergill* (1982) 1138 Cal.App.3d 34, 41; see also, *State v. Chappell* (Kan. 1999) 987 P.2d 1114, 1117-1119 [The trial judge stated, "I think that this child knows what we are here for today and that she has answered all the questions truthfully...."].)

C. Trial counsel's failure to object, or request curative admonitions should not be deemed a waiver.

In *Sturm*, the attorney failed to object to a number of the incidents assigned as misconduct on appeal. (*Sturm, supra*, at 1237; *People v. Hill, supra*, 17 Cal.4th at 819-823.) This Court concluded,

> "given the evident hostility between the trial judge and defense counsel during the penalty phase, it would...be unfair to require defense counsel to choose between repeatedly provoking the trial judge into making further negative statements about defense counsel and therefore poisoning the jury against his client, or alternatively, giving up his client's ability to argue misconduct on appeal."

(*Sturm*, at 1237.)

In *Sturm*, the judge admonished the jury not to construe its conduct as favoritism for the prosecution. This was found not to cure the prejudice. Given Judge Horan's demeaning and dismissive attitude toward Mr. Esqueda, it is unlikely that the judge would have sustained counsel's assignments of misconduct, or taken any January 27, 2007remedial steps sufficient to cure the real harm caused by his evident pro-prosecution bias. "'[A] jury has a natural tendency to look to the trial judge for guidance, and may find it even where it is not intended.'" (*State v. Chappell, supra*, at 1117; internal citation omitted.)

D. Appellant was denied the right to a fair trial and reliable guilt and penalty judgments by the cumulative effect of judicial misconduct.

The Due Process Clause requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant, and no interest in the outcome of the case. (*Bracy v. Gramley* (1997) 520 U.S. 899, 904.) Judge Horan's discourteous and disparaging remarks to defense counsel conveyed the judge's belief that the defense was a sham; this "'transcended so far beyond the pale of judicial fairness as to render a new trial necessary.'" (*People v. Sturm, supra*, 37 Cal.4th at 1233; internal citation omitted.) Although the murders in this case were undeniably heinous, appellant was not present at the time of the killings, and he presented an affirmative defense. His conviction of five counts of first degree murder, and the ensuing death sentence were not foregone conclusions. As in the *Sturm* case, the cumulative effect of the trial judge's misconduct – including misconduct during the penalty phase (see Argument XVI) – requires reversal of both the guilt and penalty phase judgments no matter what standard of review this Court applies. (*Id.*, at 1244; *Chapman v. California, supra*, 386 U.S. at 24; *People v. Watson, supra*, 46 Cal.2d at 836.)

Furthermore, the U.S. Supreme Court "has emphasized the greater need for reliability in capital cases, and has required that 'capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding.'" (*Satterwhite v. Texas, supra* 486 U.S. at 263; citing *Strickland v. Washington, supra*, 466 U.S. at 704 (Brennan, J., concurring in part and dissenting in part); accord: *People v. Horton, supra*, 11 Cal.4th at 1134 .) Consequently, even though the described judicial misconduct occurred during the guilt phase, the reliability of the death judgment was irrevocably compromised in violation of the Eighth and Fourteenth Amendments. (*Satterwhite v. Texas, supra*, 486 U.S. at 262-263.)

XIV. APPELLANT WAS DENIED HIS RIGHTS TO A DUE PROCESS, A FAIR TRIAL, AND A RELIABLE DEATH JUDGEMENT BY THE TRIAL COURT'S FAILURE TO GIVE LIMITING INSTRUCTIONS AT THE GUILT OR PENALTY PHASES, ON THE LIMITED USE OF EVIDENCE OF THREAT AND WITNESS FEAR EVIDENCE.

On numerous occasions throughout the trial, witnesses testified about their fear of testifying in anticipation of gang retaliation, or retaliation by unidentified people acting on appellant's behalf.

A. Guilt phase threat or fear evidence:

1. Richard Valdemar:

The gang expert, Richard Valdemar, offered expansive testimony regarding the violent and retaliatory practices of the Mexican Mafia. (See, Statement of Facts, *ante*.)

2. Witness #15:

Witness #15 testified that he warned his deceased brother that Raymond Shyrock was going to have him killed because the brother was robbing Mafia drug connections. Defense counsel objected, and the court sustained the objection and ordered the answer stricken. (RT56:8761-8762.)

Witness #15 also testified that, because he had debriefed, he was on the Mexican Mafia's "green light" or "hit" list, which was likely to get him stabbed or killed. (RT55:8799.) On re-cross-examination, witness #15 testified that during the previous twelve months, while he was in the county jail, five attempts to stab him had been made. (RT56:8833.)[58] He then volunteered that "Maciel sent people to do that." (RT:56:8833.) Defense counsel objected and the court struck the last part of the answer. (RT56:8833.)

3. Witness #16:

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[58] On cross-examination, defense counsel established that witness #15 had not been stabbed while in jail since 1985. (RT56:8800.)

Witness #16, who testified under a grant of immunity, was asked to identify a photograph of himself with his face scratched out, and the numbers "187" across his chest. (RT57:8925.) He explained that this meant Sangra gang members wanted to kill him for breaking their "code" and testifying. (RT57:8926.)

4. Witness #14:

Witness #14 told the DA he did not want to testify for fear of being killed. Initially, he said he would lie if he were put on the stand. (RT58:9078.) The DA promised to help get witness #14 transferred to federal prison, where he wanted to be for protection, because he was a witness in this case. (RT58:9059-9060.) DA John Monaghan spoke with high ranking officials at the Department of Corrections to try to get witness #14 placed at the most protective unit available within the system, because Monaghan felt the witness's life would otherwise be in danger. (RT58:9073.) Monaghan confirmed that he had promised to contact the Federal Bureau of Prisons to see if witness #14 could be confined there for protection. (RT58:9074.)

5. Witness #13:

Witness #13 did not testify about any direct threats. However, in her tape-recorded statement that was played for the jury (Exhibit 74; RT57:8960), she expressed concern that she had two little girls, ages 2 and 4, and gang members might "send somebody to hurt [her]."

B. Penalty phase threat or fear evidence:

1. Nathanial Lane:

During the penalty phase, prosecution witness Nathanial Lane was wheeled into the courtroom in a wheelchair. He refused to raise his hand to be sworn, and merely shook his head from side to side, refusing to answer any questions. Eventually, he stated, "I have nothing to say and I don't want to be

here....Bringing me here every day is not going to do any good." (RT63:9839.) After the court threatened him with contempt, Lane said, "Well, you might as well have me put in jail for the rest of my life because I don't have nothing to say here now or no other time." (RT63:9840.) Given the other evidence of threats, the jury would necessarily have assumed that Lane's reluctance to testify was due to his fear of retaliation.

2. Witness #17:

During the penalty phase trial, witness #17 testified that initially he did not identify Maciel as the person who stabbed him because he did not want "nothing against him." (RT63:9876.) He blurted out, "But now he is sending messages to my family." (RT63:9876.) Defense counsel objected and the court struck the last sentence as unresponsive. (RT63:9877.) Later, this witness blurted out, "I don't want to talk about that no more, I said already....Because that bothers me....I get stabbed and that thing bothers me." (RT63:9880-9883.)

C. The trial court committed prejudicial error by failing to give appropriate admonitions and instructions limiting the jury's consideration of evidence of threats to witnesses, and witnesses' fears of retaliation to assessing credibility.

In California, evidence of a witness's fear of testifying is admissible as relevant to credibility. (*People v. Sapp* (2003) 31 Cal.4th 240, 301.) This Court has also condoned the admission of third-party threats to a witness, whether the threats are tied to the defendant or not, as bearing on credibility. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1142; *People v. Burgener* (2003) 29 Cal.4th 833, 869.)

In this case, none of the evidence of fear or threats was admissible as direct evidence of appellant's guilt. Threats by unidentified persons do not show a defendant's consciousness of guilt without some evidence – other than

mere speculation and accusations by witnesses – that the defendant was responsible for the threats. (See, e.g., *United States v. Young* (4th Cir. 2001) 248 F.3d 260, 272.) In any event, it is clear in this case that the judge admitted evidence of witnesses' fears on the issue of *credibility*. (RT56:8705.)

Although this Court has generally held that a trial court has no *sua sponte* duty to instruct on the limited uses of evidence (*People v. Hernandez, supra*, 33 Cal.4th at 1051), there is an *exception* to the "no-duty" rule when such evidence plays a dominant role in the prosecutor's case against the accused, is highly prejudicial, and is minimally relevant for any other legitimate purpose. (*People v. Collie, supra*, 30 Cal.3d at 63-64; *People v. Milner, supra*, 45 Cal.3d at 251-252.) That exception applies to the evidence of fear and threats received here. Because so many of the state's witnesses were gang members, fear of Eme became a dominant theme in the prosecutor's case for guilt. During guilt phase final argument, the prosecutor argued:

> "You have seen almost first-hand the power of the Mexican Mafia in state prison to cause the death of other inmates.
>
> "You have witnessed the fact that we heard that Jimmy Palma was killed. Jimmy Palma was killed in San Quentin State Prison while on death row.
>
> "You have seen the power of the Mexican Mafia in our community to cause those brutal killings that took place, five people in one room at one time that was brought about by the Mexican Mafia."

(RT62:9650-9651.)

> "When those three people went in (Torres, Valdez and Palma), they were donned [sic] by the fact that they have more people behind them outside.
>
> "When they went in, nothing was going to stop them. Nothing was going to stop them.
>
> "Why is that? Why is that?
>
> "....
>
> "The commitment to the gang will be called into

question, or as we heard from Sergeant Valdemar, the gang expert, the prison gang expert, they may be come the subject of being killed themselves if they don't carry out the gang's wishes, especially the Mexican Mafia's wishes.

"They may be subject to being killed themselves."

(RT62:9663-9664.)

"You could imagine the power, the fear that these people have, these street gangsters have of the Mexican Mafia.

"Just because he promised somebody that he (Torres) was going to do this, he felt he had to go through with it because he promised the Mafia that he was going to do it.

"Imagine the fear that these people fear of the Mafia."

(RT62:9669.)

Later, in rebuttal argument, the DA argued:

"Sergeant Valdemar said that: Eme sets the rules. The Mafia sets the rules and if the rules are violated the penalty is death."

(RT62:9724.)

"Now we all know that Sergeant Valdemar testified about the risk and we know the risk that these witnesses were taking when they testified against the defendant.

"You will see the exhibit in the jury room of – it is Exhibit 81.

"...You will see the picture of (witness no. 16) in the middle with his face scratched out and '187' written across his chest.

"'187' written across the image meaning he is a marked man.

"Nobody is going to risk their life to come and testify about this fellow [Maciel]. If anything, they are going to come in and say he is not involved if they are going to lie. Nobody is going to risk their life.

"To finger an Eme member, a Mafia member, nobody will do that.

"(witness no. 15), (witness no. 14), they all came forward...."

(RT62:9730-9731.)

Nothing the court said to jurors deterred them from using evidence of fear and threats as substantive evidence of appellant's guilt. A general instruction on evidence limited as to purpose was given in the guilt and penalty phases. (CT1:3:209,772.) However, that instruction only directed jurors to follow any admonitions previously given regarding the limited purposes for which evidence was received. Guilt and penalty phase instructions also included instructions on the believability of witnesses. However, that general instruction lacked any language telling jurors that fear or threats were relevant to the issue of witness credibility. (CT1:3:667, 777.) Because the fear of witnesses became such a dominant part of the prosecution's evidence of guilt, there arose a *sua sponte* duty to give a limiting instruction at both phases of the trial. (Cf. *People v. Stewart* (2004) 33 Call.4th 425, 493-494.) The failure to do so was error.

D. The lack of limiting instructions violated appellant's right to due process and a fair trial, and deprived the guilt and penalty judgments of reliability.

The error cannot be considered harmless under any standard. Appellant's participation in the alleged conspiracy to kill Moreno depended heavily on witness #14 and witness #15, both of whom were of dubious credibility. Otherwise, little more than speculation, inadmissible hearsay, and a few unanswered pager calls established appellant's connection with the killers. Evidence of threats to witnesses, considered for the truth of the matter asserted, deprived appellant of his right to assert credible defenses at either phase of the trial "free from 'evidential harpoons.'" (*Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, 972.) The result was a violation of state and federal due process. (*Ibid.*) Reversal of both guilt and penalty judgments is necessary because any significant error which occurs during any phase of a capital trial

necessarily deprives the jury's penalty judgment of its reliability in violation of the Eighth Amendment and article I, § 17 of the California Constitution. (*Satterwhite v. Texas, supra*, 486 U.S. at 262-263; *Woodson v. North Carolina, supra*, 428 U.S. at 305 ["the penalty of death is qualitatively different from a sentence of imprisonment, however long"]; accord: *Strickland v. Washington, supra*, 466 U.S. at 704; *People v. Horton, supra*, 11 Cal.4th at 1138.)

XV. APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL BY THE TRIAL COURT'S REFUSAL TO INVESTIGATE AND HOLD A HEARING BASED ON AN ALLEGED VIOLATION OF *BRADY V. MARYLAND*, WHEN DEFENSE COUNSEL ALLEGED THAT WITNESS #15 HAD RECEIVED A SENTENCE OF "TIME SERVED" IN A THREE STRIKES CASE AFTER TESTIFYING.

A. Witness #15's denial of a bargain:

Witness #15 a convicted felon, an El Monte Flores gang member, a former associate of Eme, and an admitted thief and drug addict, was the only prosecution witness who placed Maciel at the home of the victims in the company of Sangra gang members on the afternoon prior to the killings. (RT56:8728-87837-8823; see, Argument I.) Witness #15 was not a willing witness. Prior to Maciel's trial, he wrote a letter to Judge Horan, asking to be excused from testifying for his own safety and the safety of his family. (SCT2:2-5.) Immediately before witness #15 testified, defense counsel asked the court to call the witness outside the jury's presence. Counsel expressed concern, in light of the letter, that witness #15 would refuse to testify in front of the jury, saying he was in fear of his life. (RT56:8703.) The court refused the request, ruling that witness #15's fear was admissible as relevant to credibility. (RT56:8705.)

At the time of his testimony, witness #15 had been in jail for more than two years, "fighting a three strikes case...." (RT56:8712, 8810.) Witness #15 testified that the three strikes case had been trailed for such a long time solely on the advice of the public defender, for reasons having "nothing to do" with this case. (RT56:8812-8813.)

Witness #15 testified that the prosecutor, John Monaghan [Monaghan] had "told [him] up front that there would be no deals. Monaghan could not get involved in [witness #15's] case." (RT56:8813.) Witness #15 asserted he was

testifying solely for altruistic reasons – "because my niece and nephew were murdered and I want to see justice done to these people that had my sister and brother and her two little babies killed." (RT56:8814.) He stated emphatically, "I am not here to make any deal. I have not been offered any kind of deal." (RT56:8814.) Asked if he had been offered any help from the district attorney's office, he responded, "none whatsoever." (RT56:8712.)

Defense counsel asked witness #15 on cross-examination: "Isn't it true that you are hoping that on January the 29th of this year when you return to court, after cooperating and testifying in three trials involved in this case you are hoping [for a deal]...?" (RT56:8815.) Witness #15 replied, "I am not hoping that. Whatever happens, I am ready for it. If I get 25, 10, 15, I did the crime and I deserve the time. I am here and volunteering because of my sister and her two little babies." (RT56:8815.) Witness #15 reiterated that the prosecution "would not make no deal [sic] or get involved with [his] three strikes case." (RT56:1115.)

Immediately after testifying in appellant's case, on January 15, 1998, witness #15 wrote a letter to Judge Horan, filed January 22, 1998, asking Horan to contact the judge [DeVanon] and the public defender handling his [witness #15's] three strikes case. (SCT1:1705.)

B. The Motion for New Trial:

On May 8, 1998, defense counsel made a motion for new trial based on newly discovered information bearing on witness #15's claim that he had received nothing in exchange for his testimony. Counsel asked the court to make a part of the record documents pertaining to the sentencing of witness #15, which showed that this witness had received "credit for time served" in the three strikes case in which he could have received a sentence of twenty-five years to life. (RT66:10246.) Counsel argued that it seemed witness #15

may have received lenient treatment in exchange for his testimony against Maciel and the other defendants. (RT66:10246; SCT1:8:1705.)

The DA made the following statement for the record:

> "With regard to (witness no. 15), your honor, I should put on the record at this point that the plea or the court – sentencing court in (witness no. 15)'s case was not advised by the District Attorney's Office but advised by the Sheriff's – representatives of the Sheriff's Department as to his testifying in this – in our case, the Maciel case. ¶ The representative of the District Attorney's Office who was handling (witness no. 15)'s case did not consent or join with the representative of the Sheriff's Department in advising the court of his cooperation in this case, his testimony in this case."

(RT66:10248.)

The judge assured counsel that the letter from witness #15 was in the court file and would be included in the record on appeal. (RT66:10247.) The court did not, however, include in the record the court documents showing the disposition of witness #15's three strikes case. Judge Horan denied appellant's motion for new trial without further inquiry, and did not indicate for the record whether he had been in contact with Judge DeVanon regarding witness #15's case. (RT65:10248.)

C. Appellant made a *prima facie* showing of a denial of due process in violation of *Brady v. Maryland* (1963) 373 U.S. 83, which obligated the trial court investigate and hold a hearing to determine whether express or implied promises of lenity had been made to witness #15 by any police agency or prosecutor in exchange for his testimony against defendants.

"A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused." (*Youngblood v. West Virginia* (2006) 126 S.Ct. 2188, 2190; *Brady,* at 87; *Napue v. Illinois, supra*, 360 U.S. at 272.) The U.S. Supreme Court has held that the *Brady* duty extends to

impeachment evidence as well as exculpatory evidence. (*Ibid.*; *United States v. Bagley* (1985) 473 U.S. 667, 676; *People v. Salazar* (2005) 35 Cal.4th 1031, 1042.) A violation of *Brady* principles even occurs when the government fails to turn over evidence that is "known only to police investigators and not to the prosecutor." (*Kyles v. Whitley* (1995) 514 U.S. 419, 438; *Salazar*, at 1042.) When prosecuting or police agencies fail to disclose express or implied promises made to, or rewards given to a material prosecution witness, the suppressed evidence is regarded as "material" because such information bears directly on credibility. (See, e.g., *People v. Ruthford* (1975) 14 Cal.3d 399, 409-410; *Banks v. Dretke* (2004) 540 U.S. 668, 705-706; *Bagley*, at 684; *Giglio v. United States, supra*, 405 U.S. at 154-155; *Napue v. Illinois, supra*, 360 U.S. at 272.)

In re Malone (1996) 12 Cal.4th 935, although a habeas corpus case, is illustrative of why it was error for the trial court in appellant's case to refuse to investigate and hold a hearing. In *Malone*, a witness testified that he received no promises in exchange for his testimony. The witness claimed he was "moved to inform on petitioner because of the violence of the crimes to which petitioner confessed." (*Malone*, at 948.) Just before the witness testified against the petitioner, felony charges pending for escape and robbery were dismissed, ostensibly based on "insufficient evidence." (*Malone*, at 951, 954, n7.) At a habeas corpus evidentiary hearing, one prosecutor asserted, among other reasons, that the escape charge had been dismissed because he believed the witness had a valid defense. Yet the evidence was to the contrary. (*Malone*, at 952-953.)

Regarding the robbery, another prosecutor testified that he had some problems "including the victim's lack of memory of the incident." (*Malone*, at 953.) However, the defense attorney appointed to represent the witness on

the robbery case had been told by his client not to do any work because the robbery charge was going to be dismissed. The attorney did not in fact bill for any work on the case. (*Malone*, at 954.) This Court found that the timing of the dismissals and lack of convincing explanations for the dismissals strongly suggested a link between the witness's assistance in the defendant's murder prosecution and the extraordinarily lenient treatment received in his own pending cases. (*Malone*, at 954.)

In appellant's case, defense counsel alleged that witness #15, a career criminal, had received "credit for time served" in a three strikes case carrying a mandatory penalty of 25 years to life in prison. If true, this certainly suggests the possibility that witness #15's extraordinarily lenient treatment was a reward for his testimony. The inference is even stronger than in the *Malone* case, given that witness #15 was very reluctant to testify; previously, he had written a letter begging the judge to excuse him from testifying. (SCT1:1705: SCT2:2-5.) In addition, witness #15's lenient sentence followed appellant's trial.

Mr. Manzella tacitly admitted the possibility that witness #15's lenient sentence was related to his cooperation in appellant's case. He shifted blame to another law enforcement agency – the Sheriff's Department – and asserted that the DA's office had not consented or "joined" in the Sheriff's unspecified advocacy on witness #15's behalf. However, the fact that the prosecutor did not directly participate in obtaining a more lenient sentence for witness #15 does not negate the need to investigate possible *Brady* error.

Prosecutors have a "duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." (*Kyles,* at 437; *Salazar*, at 1042.) Similarly, prosecutors working for the same agency are treated as one. "A promise made by one attorney must be

attributed, for [*Brady*] purposes, to the Government." (*Giglio v. United States, supra*, 405 U.S. at 154.) Furthermore, even if no specific deal was promised to witness #15 by deputy sheriffs, "the promise of a letter or phone call, or a vow to use one's best efforts to secure a deal" would be sufficient to establish a violation of *Brady*. (*Hovey v. Ayers* (9th Cir. 2006) 458 F.3d 892, 919.) A "deal" need not be express; failure to disclose an agreement of guarantee of leniency "indicated without making a bald promise" also may violate due process. (*States v. Butler* (9th Cir. 1978) 567 F.2d 885, 888, n4; accord; *Hovey v. Ayers*, at 917.) Consistently, the court had a duty to investigate the possibility that there was an express or implied offer of assistance or lenity by law enforcement agents, *whether or not condoned by members of the district attorney's office*.

D. This court should grant appellant a new trial, or alternatively, remand the matter for an evidentiary hearing to determine whether express or implied promises were made to witness #15 in exchange for his testimony at the trial.

At the time of sentencing, the court had good cause to suspect that witness #15's public defender had intentionally delayed witness #15's case for more than two years because there was a tacit understanding that law enforcement agents would advocate in favor of a more lenient sentence in the pending three strikes matter *if witness #15 testified at appellant's trial*. The prosecutor's tacit admission that (1) sheriff's representatives had argued in favor of lenity, and (2) witness #15 had actually received a "time served" sentence strongly supported such a suspicion. In the face of such compelling evidence of possible *Brady* error, it was incumbent upon the trial judge to investigate, and hold a hearing to determine whether appellant should be granted a new trial.

The fact that the jury had plenty of other reasons to disbelieve witness

#15 did not justify the trial court's refusal to investigate the possibility of an undisclosed promise of lenity. (*Horton v. Mayle* (9th Cir. 2005) 408 F.3d 570, 580.) Witness #15 was an extremely important witness for both guilt and penalty phases of the case. He was the *only* witness to place Maciel at the victims' homes with Sangra gang members at a time when defense witnesses said he was elsewhere, attending the baptism of his son. Witness #15 provided the most compelling evidence to support the prosecution's premise that Maciel took Sangra gang members to the victims' residence on the day of the murders, and plied them with drugs to set up the murders, and render the intended victim more vulnerable. Only a few unanswered pages *to* appellant's number, and the testimony of another inherently incredible witness – witness #14 – even established any connection between appellant and the actual killers. Any implied or express promise of lenity to witness #15 was unquestionably relevant and, beyond doubt, would have been helpful to the defense. (*Banks v. Dretke, supra*, 540 U.S. at 698.)

While the record on appeal does not suffice to establish the terms of any agreement with witness #15, and a wilful, knowing violation of the *Brady* duty, a remand for an evidentiary hearing should be granted. (See, *United States v. Young* (9th Cir. 1996) 86 F.3d 944 [remand to determine whether prosecutor misconduct distorted the fact-finding process].) Assuming there was some kind of "promise of a letter or phone call, or a vow to use one's best efforts to secure a deal" for witness #15 (see, *Hovey v. Ayers, supra*, at 919), pretrial disclosure could very well have changed the outcome of appellant's trial. (*Banks v. Dretke*, at 703.) Not only did witness #15 deny receiving any promise of lenient treatment, or any relationship between the long delay in his three strikes case and his testimony in appellant's case, he disingenuously asserted he had nothing but altruistic motives, and poetically proclaimed he

"did the time" and "deserved the time" and was ready to serve up to a 25 year sentence. (RT56:8815.)

To be entitled to new trial based on a denial of due process, the defendant need not show that previously undiscovered evidence will probably change the result if a new trial is granted. (*Bailey v. Rae* (9th Cir. 2003) 339 F.3d 1107, 1118; *Kyles*, at 434.) When nondisclosure of material evidence is inadvertent rather than intentional, a new trial is required if favorable evidence "could reasonably be taken to put the whole case in a different light as to undermine confidence in the verdict." (*Kyles,* at 435; *Bagley*, at 682.) When disclosure is willful and knowing, the standard of review is equivalent to the *Chapman* harmless error standard; the judgment will be set side if there is any reasonable likelihood that *Brady* error could have affected the jury's verdict. (*Bagley*, 473 U.S. at 680; *Napue v. Illinois, supra*, 360 U.S. at 271; *Giglio v. United States, supra*, 405 U.S. at 154; see, *Chapman v. California, supra*, 386 U.S. 18.)

Trial counsel made a sufficient factual showing to warrant an immediate, thorough investigation into why witness #15 received such an extremely lenient sentence. Assuming the jury *was* kept ignorant of the true motives underlying witness #15's testimony and the magnitude of the benefit received, one can hardly be confident that appellant received a fair trial. (*People v. Ruthford, supra*, 14 Cal.3d at 408; *Napue v. Illinois, supra,* 360 U.S. at 272; *United States v. Bagley*, 473 U.S. at 684; *Horton v. Mayle* (9th 2005) 408 F.3d 570.) Impeachment evidence "can make the difference between conviction and acquittal." (*Napue v. Illinois, supra*, 360 U.S. at 269; *Pennsylvania v. Ritchie, supra*, 480 U.S. at 51.) Accordingly, assuming what appears true proves to be true, appellant must be granted a new trial regardless of which legal standard applies.

PART II: PENALTY PHASE ERRORS

XVI. APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, CONFRONTATION, AND A RELIABLE DEATH JUDGMENT WERE DENIED BY THE PREJUDICIAL EFFECT OF PROSECUTORIAL AND JUDICIAL MISCONDUCT DURING PENALTY PHASE ARGUMENT.

A. Prosecutor misconduct:

1. Appellant was deprived of his rights to a fair trial, confrontation, and a reliable death judgment by the prosecutor's closing argument, in which he described the privileges appellant would enjoy if sentenced to life in prison, without any supporting evidence.

A half century ago, the U.S. Supreme Court observed that a prosecuting attorney "may prosecute with earnestness and vigor — indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones." (*Berger v. United States, supra*, 295 U.S. at 88.) Hence, a prosecutor's pattern of foul play violates the federal Constitution if it infects a criminal trial with such unfairness as to make conviction a denial of due process. (*People v. Hill, supra*, 17 Cal.4th at 819; *Donnelly v. DeChristoforo, supra*, 416 U.S. at 642-643.) State constitutional provisions are violated if the prosecutor uses deceptive or reprehensible methods to persuade the jury. (*Hill*, at 819.) Under both state and federal constitutional standards, prosecutorial misconduct need not be intentional, or committed in bad faith, to require reversal of a judgment. (*Smith v. Phillips, supra*, 455 U.S. at 219; *Hill*, at 822-823.)

During penalty phase argument, the prosecutor argued:

"Consider this. Consider what it means to serve life in prison. The defendant would have access to every recreational facility

> and activity. Basketball, weights, television, movies, magazines, law library, visiting privileges. He would have access to all of those activities."

(RT65:10133.)

The argument was improper. No evidence was introduced during the guilt or penalty phases of the trial regarding the privileges enjoyed by people sentenced to life imprisonment without parole. Referring to supposed facts that are *not* in evidence is prosecutorial misconduct. (*People v. Hill, supra*, 17 Cal.4th at 827; *People v. Hall* (2000) 82 Cal.App.4th 813, 816.)

Much of what the prosecutor said about life behind bars was also not true. Most persons convicted of capital murder, and sentenced to life imprisonment without parole serve their sentences in the Security Housing Unit [SHU] at Pelican Bay prison. The conditions of confinement at Pelican Bay Prison have often been written about, and are a matter of common knowledge. (Cf. *People v. Boyette* (2002) 29 Cal.4th 381, 463-464.) In *In re Calhoun* (2004) 121 Cal.App.4th 1315, the Court of Appeal described the Security Housing Unit [SHU] at Pelican Bay prison this way. "The SHU is 'a place which, by design, imposes conditions far harsher than those anywhere else in the California prison system. The roughly 1,000-1,500 inmates confined in the SHU remain isolated in windowless cells for 22 and 1/2 hours each day, and are denied access to prison work programs and group exercise yards. Assignment to the SHU is not based on the inmate's underlying offense; rather, SHU cells are reserved for those inmates in the California prison system who become affiliated with a prison gang or commit serious disciplinary infractions once in prison." (*Id.*, at 1326, n7; quoting *Madrid v. Gomez* (N.D. Cal. 1995) 889 F.Supp. 1146, 1155.) Appellant's alleged association with Eme, and his implication in the murder of five victims would

certainly qualify him for assignment at the Pelican Bay SHU, were he given a life sentence.

A recent story on Pelican Bay Prison published by National Public Radio [NPR] reports that SHU inmates spend 22 and 1/2 hours per day isolated in small individual concrete cells with stainless-steel sinks and toilets. There are no windows. Inmates cannot see the moon, stars, trees or grass. They have no access to exercise equipment. Even group therapy is conducted in a small room with six phone-booth-sized individual cages. (Laura Sullivan, *At Pelican Bay Prison, a Life in Solitary*, January 9, 2007; emphasis added; http://npr.org/templates/story/story.php?storyId=5584254.) The prosecutor's argument was not only factually unsupported; it was factually *wrong* and extremely misleading because it suggested that appellant, if sentenced to life, would pleasantly wile away his hours playing basketball, lifting weights or engaged in equally enjoyable pursuits while in prison. (Cf. Jennifer McNulty, *CRIME & Punishment: Social scientist Craig Haney exposes the psychologically devastating conditions inside our nation's 'supermax' prisons*; University of California, Santa Cruz Review (Summer 2000); http://review.ucsc.edu/summer.00/crime_and_punishment.html.) The prosecutor implied that such a prison term was not really punishment.

The prosecutor's reliance on facts not in evidence was "highly prejudicial." (*Hall*, at 817-818.) It went straight to the heart of the jury's delicate balancing to determine whether life without parole was sufficient punishment, given appellant's role in the murders. The statements also made the prosecutor a witness, whose unsworn testimony was not subject to cross-examination. (*Hill*, at 827.) The statements were apt to be "dynamite" to the jury because of the special regard most jurors have for prosecutors. (*Ibid.*; citation omitted.) Furthermore, the prejudicial effect of the argument was

compounded by judicial misconduct discussed in section B, below.

2. The prosecutor improperly appealed to the passions of jurors by asking them to close their eyes and imagine the victims' suffering as they died.

The prosecutor's final penalty phase argument included the following passages:

> "Finally, ladies and gentleman, the law allows you to consider the travail for which the victims went while they were being killed.
>
> "If you have not already done so, I suggest that some time you should close your eyes and based upon the evidence you heard think about what it was like and try to picture what it was like in that room when those five people were being slaughtered.
>
> "Dido was probably under the influence because of the amount of heroin you know he took that day.
>
> "Tito Aguirre may have been under the influence as well, but we know that he was alert enough to run from the killers.
>
> "Then there are Maria, Laura, and Ambrose the baby.
>
> "Maria, it appears, tried to run. She was shot in the hip and went down and was shot in the head at close range.
>
> "You are entitled to consider, in determining which penalty is appropriate what it was like for Maria to lay there knowing she was going to die.
>
> "It is appropriate for you to consider, in determining the penalty, the appropriate penalty, to consider what Maria may have felt when the bullet exploded in her brain.
>
> "We can hope that Ambrose was not awake when he was shot.
>
> "You recall the coroner's testimony that the bullet passed through his eyelid, the one that entered his brain, passed through his eyelid indicating that his eyes were closed at the time she was shot.
>
> "If that were the case, if little Ambrose was asleep when he was shot, then he would have had to have been shot first because enough shots were fired in that room to have awakened him if he had been sleeping.
>
> "So it appears that Ambrose was probably awake,

because it does not appear that he was shot first.

"He was probably awake which means that if his eyes were closed, and they were, they were closed in terror and fear.

"You are entitled to consider that.

"We know that Laura Moreno was awake. We know she was awake. And we know what her last act was.

"We know what her last act was as she lay dying on the floor after having been shot in through the back.

"We know that her last act was to reach over and to touch her mother. We know that because of People's Exhibit 41.

"You can see it clearly on People's 41. You can see the handprint of a little girl on the back of her mother's slacks.

"So we know that Laura Moreno's , five year old Laura Moreno's last act was to reach out for her mother. But we also know that Laura found no comfort there because her mother lay dying as well."

(RT65:10137-10138.)

The prosecutor ended by reading a passage popular with prosecutors, taken from Gaylin, *The Killing of Bonnie Garland* (1982). This passage is quoted in full in *People v. Rowland* (1992) 4 Cal.4th 238, 277, is not repeated here. It suffices to say the prosecutor ended his argument with that portion of the quote which begins "the criminal ...usurps the compassion that is justly the victim's, and he will steal his victim's moral constituency along with her life. Don't let that happen...," and concludes with a repetitive mantra asking jurors not to find appellant deserving of sympathy, good will, pity, warmth, compassion, mercy or leniency. (RT65:10140.)[59]

It is misconduct in argument for a prosecutor to appeal improperly to the jury's passions and prejudices. (*United States v. Weatherspoon* (9th Cir.

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[59] While use by other prosecutors of the identical quote from Gaylin has been condoned by this Court (*Rowland*, at 277; *People v. Cook* (2006) 39 Cal.4th 566, 612-613), the argument that preceded the quote has not.

2005) 410 F.3d 1142, 1149; *People v. Morales* (1989) 48 Cal.3d 527, 571-572; *People v. Fields* (1983) 35 Cal.3d 329, 362.) In California, asking the jury to view the crime through the eyes of the victim is clearly misconduct when done at the guilt phase of a trial. (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057; reversed on unrelated grounds in *Stansbury v. California* (1994) 511 U.S. 318; *People v. Fields, supra*, 35 Cal.3d at 362.) At the penalty phase, where the jury conducts a moral assessment of the facts, prosecutors have greater leeway to invite jurors to assess the offense from the victim's viewpoint, without necessarily violating due process. (*People v. Haskett* (1982) 30 Cal.3d 841, 863-864.) However, introducing "irrelevant information or inflammatory rhetoric that diverts the jury from its proper role or invites an irrational, purely subjective response" is still misconduct, even if it happens at the penalty phase. (*Haskett*, at 864; cf. *People v. Box* (2000) 23 Cal.4th 1153, 1214-1215.) Prosecutors "cross the line when they make up an imaginary script that purports to tell the jury what the victim was feeling, where there is no evidence to support such a script." (*State v. Kleypas* (Ka. 2001) 40 P.3d 139, 287-288 [distinguishing *Haskett*]; overruled on unrelated grounds in *State v. Marsh* (Ka. 2004) 102 P.3d 445, 534-535.) In *Kleypas*, for example, the Kansas Supreme Court held that "when the prosecutor began speculating as to the victim's thoughts and essentially making up an eternal dialog for the victim, he crossed the line into a blatant appeal to the emotions of the jury." (*Kleypas*, at 288.)

Garron v. State (Fla. 1988) 528 So.2d 353, is another illustrative case. In *Garron*, the prosecutor argued in relevant part:

> "You can just imagine the pain this young girl was going through as she was laying there on the ground dying....Imagine the anguish and the pain that Le Thi Garron felt as she was shot in the chest and drug [sic] herself from the bathroom into the

bedroom where she expired...."

(*Garron*, at 358-359.)

> "Ladies and gentleman, I believe at this point, I would hope at this point that the jurors will listen to the screams and to her desires for punishment for the defendant ...."

(*Garron*, at 359.) The Florida Supreme Court found these remarks, notwithstanding curative instructions, to be "so egregious, inflammatory, and unfairly prejudicial that a mistrial was the only proper remedy." (*Id.*, at 358.)

Mr. Manzella's penalty phase closing was even more inflammatory than the prosecutor's in the *Garron* case. In the first place, his appeal to passion was much more protracted. He asked jurors to *close their eyes*, and imagine the subjective feelings of all five victims, one at a time, with particular emphasis on the death experiences of Maria Moreno and the children. Not only did the prosecutor asked jurors to imagine how Maria felt "when the bullet exploded in her brain." He also invited them to assume that the infant victim, Ambrose Padilla, was awake when killed and imagine "terror and fear" he experienced as he listened to the fatal shots that killed others. Last but not least, the DA showed the jury a photographic exhibit with Laura Moreno's bloody handprint on her mother's clothing, and urged the jury to imagine, with eyes closed, how it felt to be Laura Moreno during her "last act" of touching her mother in a futile search for comfort. (RT65:10137-10138.)

The prosecutor's vivid entreaty to experience the deaths of Maria and the children created an emotionally charged and irrational climate in which jurors would have been incapable of "dispassionately weigh[ing] the aggravating circumstances against the mitigating factors." (*State v. Thompson* (Ohio 1987) 514 N.E.2d 407, 420-421 [prejudicial misconduct at penalty phase to invite jurors to re-experience the horror and outrage they felt when viewing

gruesome photographic slides at guilt phase]; *State v. Rizzo* (Conn. 2003) 833 A.2d 363, 418-419 [prejudicial misconduct at penalty phase to hold up autopsy photographs and refer to them as the victim's "family album,"].)[60] Graphically describing the imagined sensations of Maria and the children as they lay dying could not have been terribly helpful to the jury's assessment of appellant's moral culpability in this case. Even accepting as true the prosecutor's version of the crimes, the suffering of Maria and the children was caused by Sangra gang members, in Maciel's absence, *without* his express or tacit approval. The prosecutor's misconduct was therefore so gratuitous, egregious, inflammatory and unfair that appellant's rights to due process and a reliable death judgment were eviscerated.

B. Judicial Misconduct:

1. Appellant was denied due process, a fair trial, and a reliable death judgment by the trial court's disparate treatment of defense counsel and the prosecutor regarding the privileges enjoyed by life prisoners.

During penalty phase argument, defense counsel attempted to respond to the prosecutor's improper argument on the privileges of life imprisonment (section A, 1), as follows:

> "Why let him breathe and watch T.V., work out, lift weights, have visits? It would be grossly inappropriate for you to consider those factors. But that is the revenge that they are seeking. Because the truth of the matter is that as a Mexican Mafia member who receives life without the possibility of parole, you are sent to Pelican Bay and he is in his cell 23 hours a day."

(RT65:10150.)

At this point, the court interrupted Mr. Esqueda:

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[60] In *Rizzo*, the defense in the penalty phase had introduced a family album of twelve family photographs in mitigation. (*Id.*, at 419.)

> "Counsel, I will allow both of you latitude, but there is no evidence of that *and it is not always the case.* So on both counts, the court will sustain its objection. Ladies and gentleman, like it or not, you will have to decide this case based on the evidence we received in trial, not statements like that. It is not correct."

(RT65:10151.)

Judge Horan's disparate treatment of the prosecutor and defense counsel was blatant misconduct. The court allowed the prosecutor to argue at great length about all the alleged privileges appellant would enjoy in prison under a life sentence. Conversely, as soon as defense counsel attempted to respond, the court suddenly interrupted, sustained its own objection, and admonished the jury that there was "no evidence of that" and what counsel had said was "not correct." (RT65:10151.) The judge derisively implied that there had been no similar *lack* of evidence of prison conditions in other cases. The judge's disparate treatment reinforced the credibility of the prosecutor's unsworn testimony. January 27, 2007

Mr. Esqueda's assumption that Maciel would serve a life of deprivation at Pelican Bay prison was less speculative, and more true than the prosecutor's statements about basketball, weights, television, movies, magazines, law library, and visiting privileges. Maciel's association with Eme was a central theme in the prosecutor's case. Convicted of masterminding the killing of five innocent people *for Eme*, had death not been imposed, it is highly probable Maciel would have been confined in isolation, with few privileges, at Pelican Bay. (See, section A,1, *ante*.)

When a judge, in effect, [fills] in for an otherwise occupied prosecutor," it communicates to the jury that the trial judge is collaborating with the prosecution. (*People v. Sturm, supra*, 37 Cal.4th at 1241-1242.) It is not the

judge's job to take it "upon himself to make the prosecutor's objections for him." (*Id.*, at 1242, n4.) Judge Horan's commentary not too subtly conveyed an alliance with prosecution. The plain meaning of the court's admonition was that life imprisonment without parole was insufficiently punitive. The trial court's misconduct, although independently prejudicial, also compounded the prejudice caused by the DA's argument, which asserted untrue facts about life imprisonment which were equally unsupported by any evidence.

2. The trial court committed prejudicial error by its interruption of defense counsel's argument on the jury's unbridled discretion not to impose death:

During argument, Mr. Esqueda argued in relevant part:

> "And I suggest to you when the Government stands here and tells you, kill Mr. Maciel for the killings he is responsible for, there is no distinction between that and what occurs on the streets. It is a distinction without a difference because all killings are wrong. They're evil. And no one should die. The law in the State of California does not require you to ever impose the death penalty. You have heard the law. I'm not going to repeat it. ..."
>
> "The United States Supreme Court has held that the death penalty is not cruel and unusual punishment because the jury has unbridled discretion to select the appropriate penalty. And as long – ..."

The trial court interrupted:

> "I hate to interrupt, but I will, however, when counsel misstates the law. You do not have unbridled discretion to do whatever you feel like on a whim. The U.S. Supreme Court has never held so. *The reason we have a death penalty law that is constitutional is because you are guided by a list of factors that must be considered in this case.* Mr. Esqueda. They are the factors that were read to the jury. Go ahead."

(RT65:10143-10144.) In effect Judge Horan told the jury to impose death.

A judge has the right to curtail defense counsel from making incorrect or incomplete statements of law. (*People v. Ott, supra*, 84 Cal.App.3d 118, 132.) A court commits misconduct, however, if it "makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression that it is allying itself with the prosecution." (*People v. Sturm*, 37 Cal.4th at 1233; internal quotations omitted.) "Trial judges 'should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side or another.'" (*Sturm* at 1237; internal citation omitted.) This is because jurors "rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials." (*Id.*, at 1233.)

To the extent trial counsel's argument implied that under rulings of the U.S. high court, California juries retain "unbridled" discretion in sentencing, it barely qualified as a misstatement. In reality, during the *penalty* phase of a California death penalty trial, capital sentencing discretion *is* nearly unbridled. A jury's determination of appropriate penalty does not entail "a mere mechanical counting of factors on each side of the imaginary scale." (*People v. Vierra* (2005) 35 Cal.4th 264, 300 [internal quotations omitted].) Juries must be permitted to consider as mitigating factors *any* circumstances which extenuate the gravity of the crime and any aspect of the defendant's character or record that the defense proffers as a basis for imposing a life sentence. (*California v. Brown* (1987) 479 U.S. 538, 541; *Boyde v. California* (1990) 46 Cal.3d 370, 375; *People v. Boyer* (2006) 38 Cal.4th 412, 483; § 190.3(k).) Further, juries may consider "any sympathetic ... aspect of a defendant's character or record" in connection with the relevant statutory factors. (*California v. Brown*, 479 U.S. at 543; *People v. Nicolaus* (1991) 54

Cal.4th 551, 588-589.) Conversely, section 190.3(a)'s "circumstances of the crime" provision is applied so broadly that virtually *any* feature of *any* murder or murder victim may be used by a jury to justify death. (Argument XX, *post.*)

More importantly, Judge Horan's absolute characterization of federal death penalty law was not completely accurate. The U.S. Supreme Court has held "the constitutional prohibition on arbitrary and capricious capital sentencing determinations is *not* violated by a capital sentencing 'scheme that permits the jury to exercise *unbridled discretion* in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty by statute.'" (*Ramos v. California* (1983) 463 U.S. 992, at 300; quoting *Zant v. Stephens, supra*, 462 U.S. at 875 []; see also, *People v. Arias, supra* 13 Cal.4th 92, 190; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1268; *People v. Bolin* (1998) 18 Cal.4th 297, 342; *People v. Moon* (2005) 37 Cal.4th 1, 41.) California's scheme has been held constitutional predominantly because it employs eligibility factors – i.e., special circumstances which are found at the guilt phase – to narrow the subclasses of defendants to whom the death penalty may be applied, *not* because discretion is particularly limited at the penalty phase. (*Tuilaepa v. California* (1994) 512 U.S. 967, 971-980; *Brown v. Sanders* (2006) 546 U.S. 212.)

In other contexts, this Court has observed that sentencing juries may not act solely on "whim" or "unbridled discretion." (See, *People v. Lewis* (2001) 26 Cal.4th 334, 393; *People v. Clark* (1993) 3 Cal.4th 41, 164.) However, even if counsel's use of the adjective "unbridled" was technically incorrect in the context used, the misstatement did not suffice as an excuse for the judge to denounce counsel in front of the jury, and then offer his own incomplete pronouncement of the law.

In *People v. Fudge, supra*, 7 Cal.4th at 1109, this Court characterized as "close to impropriety" a trial judge's relatively innocuous "tart comment" to a defense attorney – "'I'll refer counsel to Evidence code section 1237....[¶] If you wish to read the section ...I'll furnish it to you.'" If such behavior even comes close to impropriety, Judge Horan's very public rebuke of counsel's argument on the unbridled discretion of the jury was egregious misconduct. The statement was discourteous and disparaging in tone. The court could have called counsel to the bench, and politely instructed him to correct his misstatement, or use some adjective other than "unbridled" to describe the jury's sentencing discretion. The court could have admonished the jury in a more neutral fashion that its discretion was to be guided by consideration of the factors enumerated in the instructions. Instead, the court made statements which undoubtedly signaled the jury (1) that defense counsel was untrustworthy or stupid, and (2) that his plea for a life sentence was not sanctioned by the law of the U.S. Supreme Court and should be rejected.

C. The failures of counsel to object should not constitute a waiver.

1. Prosecutor misconduct:

Appellant presumes respondent will argue that he is precluded from raising prosecutorial misconduct on appeal because his counsel did not object and ask for a curative admonitions. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072.) There are exceptions to the waiver rule, however, which apply here. Neither an objection nor a request for curative admonition is necessary if either would be futile. (*People v. Arias, supra*, 13 Cal.4th at 159.) Not objecting will not result in a waiver if an admonition could not have cured the misconduct. (*People v. Bradford, supra*, 15 Cal.4th at 1333.)

The prosecutor's argument regarding the privileges of life prisoners imparted factually unsupported, inaccurate information to the jury which could

very likely have played a material role in the decision to impose death. Counsel may at the time have elected *not* to object, assuming he would receive equally broad leeway from the court to respond. Unfortunately, he did not. Given the court's discourteous and disparaging treatment of defense counsel regarding the prior "unbridled discretion" incident, counsel may well have wished to avoid another confrontation with the court that might provoke additional disparaging commentary in front of the jury. (*People v. Sturm*, 37 Cal.4th at 1237.)

Regarding the prosecutor's protracted invitation to jurors to close their eyes and experience the emotionally and physically painful deaths of the victims, particularly Maria and her children, it suffices to say that the argument was so inflammatory as to be well beyond the curative power of the court. (*Garron v. State*, 528 So.2d at 358.)

2. Judicial misconduct:

Assuming respondent will argue appellant had some obligation to assign the judge's behavior as misconduct, the argument should be rejected for the same reasons previously set forth in Argument XIII, C, regarding a pattern of judicial misconduct in the guilt phase. In addition, in the penalty phase, the judge interrupted counsel's arguments on his own initiative on both occasions, even though the DA did not object. In the latter instance, it did so even though defense counsel was obviously *responding* to the prosecutor's own improper argument regarding the attendant luxuries of life imprisonment. In neither instance is it likely that, if asked, Judge Horan would have admonished the jury that he had acted improperly, or that his own assessment of the law or facts was misleading. Under the circumstances, counsel was not required to chose between provoking the judge into making further negative statements about the law, his ineptitude, or the lack of evidence to support a plea for

lenity, and alternatively, giving up the client's right to argue misconduct on appeal. (*People v. Sturm*, 37 Cal.4th at 1237.)

D. The cumulative effect of the errors, whether the fault of the prosecutor and/or the trial judge, violated appellant's confrontation rights, and undermined the fairness of the trial and resulting death judgment.

The above errors were extremely prejudicial character because all went to the heart of the jury's death penalty determination. First, the prosecutor's entreaty to experience the deaths of Maria and the children inflamed the passions of the jury, and created "a climate in which the jury herein was unable to dispassionately weigh the aggravating circumstances against the mitigating factors. (*Garron v. State*, 528 So.2d at 358; *State v. Thompson*, 514 N.E.2d at 420-421; *State v. Rizzo, supra,* 833 A.2d at 418-419.)

Secondly, the court diminished counsel's credibility in the eyes of the jury by audibly scolding him about the absence of law, or facts, to support his arguments in favor of a life sentence. (*People v. Fudge, supra,* 7 Cal.4th at 1109.) Thirdly, the prosecutor's inaccurate assertion that Maciel, if not executed, would enjoy a lifetime of basketball, weights, television, movies, magazines, law library, and visiting privileges was left uncorrected. Conversely, jurors were forcefully and inaccurately admonished that it was *untrue* that if imprisoned for life, Maciel would live in isolation for 23 hours per day. (*People v. Hill*, 17 Cal.4th at 827-828.)

Appellant's right to cross-examination guaranteed by the Sixth Amendment and article I, section 15 was violated by the jury's consideration of facts, introduced through the prosecutor's argument and unsupported by any evidence. (*People v. Hall, supra*, 82 Cal.App.4th at 817.) Correspondingly, because defense counsel's penalty phase argument was improperly circumvented, appellant was deprived of the right to have the jury consider all

relevant circumstances bearing on the adequacy of a life sentence, which fundamentally undermined the reliability of the death judgment in violation of the Eighth Amendment, and article I, section 17 of the state constitution. (*Skipper v. South Carolina* (1986) 476 U.S. 1.) The court's disparate treatment of prosecution and defense irreparably distorted the jury's penalty phase fact-finding. (See, *United States v. Young*, 86 F.3d 944.) Accordingly, the individual and cumulative prejudice caused by prosecutorial and judicial misconduct, or alternatively, ineffective assistance of counsel deprived appellant of a fair penalty trial and a reliable death judgment, requiring reversal of the death judgment. (*Hill*, at 844-848;; *Beck v. Alabama*, 447 U.S. at 637; *Zant v. Stephens*, 462 U.S. at 879; *Woodson v. North Carolina, supra*, 428 U.S. at 304; U.S. Const., amendments VIII & XIV; Cal. Const., Art. I, §§ 7 & 15.)

XVII. THE TRIAL COURT'S FAILURE TO EXCUSE JUROR #2 FOR CAUSE VIOLATED APPELLANT'S RIGHT TO DUE PROCESS AND A FAIR PENALTY TRIAL BY AN IMPARTIAL JURY.

A. Factual background:

Following the prosecutor's penalty phase opening statement, juror #2 approached the bench and informed the court that he had "close personal knowledge" of two prosecution witnesses who worked at the Central Jail, Deputy Poindexter and Deputy Looney. (RT63:9828.) For three years, Juror #2 had worked in "general maintenance" at the jail, and the deputies worked his "same shift." (RT63:9828.) Judge Horan questioned the juror, as follows:

"[Q:] Have you seen either one of the deputies outside of work?
"[A:] Never.
"[Q:] Socialized with either one?
"[A:] No.
"[Q:] Ever go out to grab a beer or get something to eat or go to their house or have they been at your house?
"[A:] I have had lunch with them in the cafeteria.
"[Q:] Have you spoken to either one of them about anything relating to this case or to the defendant, Mr. Maciel?
"[A:] No.
"[Q:] Or anything remotely related to this matter?
"[A:] No."

(RT63:9828-9829.)

After counsel declined the opportunity to ask questions, the Court asked,

> "They will be testifying as witnesses here. Therefore, their credibility like any other witness, as I instructed you, is always an issue in the case. You have to decide what weight to give the testimony of each witness, prosecution or defense. Do you believe that you can hold these two witnesses to the same standard and apply the same yardstick to their testimony or do you think your knowledge of them would make that difficult to do?"

(RT63:9829.) Juror #2 responded, "I would weigh it the same as I would weigh anybody else's testimony." (RT63:9829.) The court asked, "If you realize that it is not possible for you to follow the court's instructions re credibility and anything else, let me know. Will you do that?" Juror #2 answered, "yes." (RT63:9830.)

Afterward, defense counsel moved to dismiss Juror #2 for cause. (RT63:9830.) The court opined that the juror had not said anything "that would remotely rise to the level of a challenge for cause...." (RT63:9831.) The court then denied the request to dismiss juror #2 with the proviso that counsel could "reopen that request at any point" if counsel had anything he wanted the court "to read or anything." (RT63:9831-9832.)

B. The refusal to excuse juror #2 was reversible error.

The refusal to excuse juror #2 was reversible error.

> "In essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process."

(*Turner v. Louisiana* (1965) 379 U.S. 466, 470; internal quotations omitted.) "[T]he fact that jurors are acquainted with trial participants 'infects the whole process of guilt adjudication.'" (*People v. Williams* (1989) 48 Cal.3d 1112, 1130; quoting *People v. Tidwell* (1970) 3 Cal.3d 62, 74.)

Even though juror #2 claimed he had the ability to sit impartially, "such a claim is of course not conclusive." (*People v. Tidwell* at 72.) "It is not enough for the juror alone to evaluate the facts and conclude that they do not interfere with his or her impartiality." (*People v. Cleveland* (2001) 25 Cal.4th 466, 477; internal citations and quotes omitted.)

> "When the significance of associations between ... witnesses and the jurors who actually determined the defendant's fate is

> explored, the impossibility of an impartial adjudication of defendant's guilt and selection of penalty becomes obvious."

(*Tidwell* at 73; see also *United States v. Allsup* (9th Cir. 1977) 566 F.2d 68, 71 [bias may be implied or presumed from the "potential for substantial emotional involvement, adversely affecting impartiality"].) In this case, juror #2 had worked the same shift with two penalty phase prosecution witnesses – both law enforcement officers – for three years. He was still working at the jail at the time of trial. Juror #2 had even dined with the deputies in the jail cafeteria. Fear of the future reactions of Deputies Poindexter and Looney "to a verdict impliedly derogating their testimony" may have played a "significant role, conscious or otherwise" in juror #2's deliberations. (*People v. Tidwell,* at 74.)

The risk of prejudice was particularly acute because Deputies Poindexter and Looney were the lone witnesses to two of six unadjudicated acts of alleged force or violence relied upon by the state as factors in aggravation. Deputy Poindexter was the sole witness to testify to the alleged stabbing of another inmate. (RT63:9890-9893.) Deputy Looney was the sole witness to the recovery of shanks from Maciel's thongs. (RT63:9898-9904.) The credibility which the jurors attached to the testimony of these key witnesses may have determined whether appellant was "sent to his death." (*Turner v. Louisiana, supra*, 379 U.S. at 473.) Accordingly, it undermined the basic guarantees of trial by jury to permit juror #5 to remain on the jury. (*People v. Tidwell, supra*, 3 Cal.3d at 76-77; *Turner v. Louisiana* at 429-430.) The penalty judgment must accordingly be reversed.

XVIII. APPELLANT'S RIGHT TO A FAIR PENALTY TRIAL BY A UNANIMOUS JURY WAS DENIED BY THE REPLACEMENT OF JUROR #1 WITH AN ALTERNATE.

A. Objections, motions and rulings:

1. Objections to dismissal:

In the midst of penalty phase deliberations, juror #1 informed the judge that she wished to be dismissed. (RT65:10165.) Asked why, she responded, "It is affecting me emotionally and mentally." (RT65:10166.) She explained:

> "I have just been thinking about it a lot. I don't know if I can make, like, the right decision. I have been having a hard time sleeping because of this. I just really wish to get out of this now while we are still beginning the penalty than later when I know – I tried to see if I could. I tried to see if maybe I could get over it. Maybe I could make the right decision. But right now I really don't think I can. And I think it is better for me to get out now while everybody is not really started on it really yet."

(RT65:10166; [¶ breaks omitted].)

Judge Horan inquired when she had started feeling this way. The juror replied,

> "Yesterday, when we were starting to talk about everything, like the rules. We went over the rules again and I just – I was just thinking about it the whole weekend. Throughout the weekend I thought I was going to be okay, like you said to think about it. I thought maybe I could just finish it. Finish the whole trial....I don't think I can."

(RT65:10167; ¶ breaks omitted.)

The court then engaged in the following colloquy:

> "THE COURT: I have forgotten. Tell me again. You are a young lady. How old are you?
> "JUROR NO. 1: 22.
> "THE COURT: You are probably our youngest juror on the case.

"JUROR NO. 1: Yes.
"THE COURT: And the youngest one we have had on these. Are you with your folks?
"JUROR NO. 1: No. I'm on my own.
"THE COURT: Have you talked to anybody over the weekend about it?
"JUROR NO. 1: No.
"THE COURT: You need to approach it on your own the best you can. Could you sleep last night?
"JUROR NO. 1: No. Can you tell?
"THE COURT: No. I couldn't tell, but you said you had trouble.
"JUROR NO. 1: I think I had two hours, three.
"THE COURT: Two hours since when?
"***
"JUROR NO. 1: Since – for the past couple for weeks. I just have been having like an average of three to five hours sleep. I usually sleep eight hours a night, eight to nine.
"THE COURT: I noticed one thing yesterday, and maybe it was my imagination. You tell me if this was right. During the arguments of counsel, at one point a photograph was held up and it looked to me – a photograph –
"JUROR NO. 1: I couldn't look.
"THE COURT: I know. I was sort of watching, not you in particular, of course, but I keep an eye on things and I note that you turned your head and would not look at it.
"JUROR NO. 1: I couldn't look. Even throughout the other trials, I just – the other ones we had, I couldn't look. I have seen it, but I couldn't look at it again.
"THE COURT: This was a picture of the child, one of the children?
"MR. MANZELLA: Yesterday?
"JUROR NO. 1: The woman.
"MR. MANZELLA: Yesterday it was the mother."

(RT65:10167-10169.)

Thereafter, in proceedings at bench, the court conferred with both counsel. The court reiterated that he had noticed when during argument, juror #1 could not look at the photograph. (RT65:10170.) Defense counsel objected to dismissal, arguing that "it is rather apparent that she is not going to say yes

to death." (RT65:10171.) He further argued that the juror had not articulated her inability to deliberate. (RT65:10172.)

The court then resumed questioning of juror #1. The juror explained further:

> "His life is depending on me. I don't really know how to go about that. I mean if I decide to go one way and I agree with all – if the jurors and I all agree on the death penalty, it is like – that is too heavy on me. I don't really want that on my conscience. And if I decide to give him life in prison, I don't really know if I should do that either. I really don't know what to do. I can't really think too clearly right now.
> "***
> "And right now – since I can't really think too clearly, I feel like while deliberating, hearing the other jurors' opinions, it would kind of alter my opinion to go their way, not really thinking for myself, because I really don't know how to think right now. I'm young. I don't know."

(RT65:10173.)

After a brief interlude of banter about the juror's relative youth in comparison to counsel, the court told juror #1 that there was "no obligation back there for any juror to go the way the majority goes, just to do it." (RT65:10174.) Juror #1 replied:

> "That is another thing, too, I don't really know how to go about it. Just by listening to all the witnesses, it is just confusing. It is confusing me right now."

(RT65:10174.) The court pointed out that the instructions would give guidance as to how to approach the task. Juror #1 acknowledged that they had gone over the instructions, which helped make things clearer. (RT65:10175.) She also stated, in response to a question, that she had shared her feelings with other jurors. (RT65:10175-10176.)

Finally, the court indicated he needed "12 jurors that can decide this

most difficult issue based on a weighing of aggravation and mitigation and to do so clear headedly." (RT65:10176.) He asked if juror #1 could do this. She responded, "I don't think I can." (RT65:10176.) After some further discussion, the court stated:

> "I think I am getting the idea, but I need to know whether you can deliberate and look at this evidence, you couldn't look yesterday, for example, and decide this case based on a rational and clear-headed weighing of aggravation and mitigation. I need to know whether you can do that."

(RT65:10177.) Juror #1 replied, "I don't think I can," followed by, "I don't believe I can." (RT65P10177.) The court cautioned juror #1 against "bail[ing] out" to avoid being "the odd duck." (RT65:10178.) The juror answered:

> "I feel like I'm a strong person. If I believe one thing, I will go with it even if I have to go against everybody. But the thing is I am not going to be fair to Maciel because I am just confused right now and I believe that my opinion will be swayed to go towards, you know, whoever's opinion that might strike me like maybe he seems he is right. My opinion would just be to go his way because I am just confused. I really can't think right now."

(RT65:10178.)

At bench, the court invited counsel to stipulate to the dismissal of juror #1. Defense counsel refused to stipulate, and asked the court to encourage her to "go back there and continue deliberations." (RT65:10180-10181.) Over objection, the court ordered her excused, finding "more than a reality that the juror is not capable of doing her duties at this phase." (RT10181,10184.)

2. Motion to begin guilt phase deliberations anew:

Following the decision to dismiss, defense counsel asked the court to inquire of the juror whether she felt the same way during the guilt phase. (RT65:10182.) The court declined, based on the juror's failure to voice any

problem when queried after the guilt phase. (RT65:10182.)

Counsel then moved the court to order the jurors to begin *guilt* phase deliberations anew with the seated alternate. (RT65:10198.) The court denied the motion. (RT65:10201.)

3. Motion for New Trial:

Prior to sentencing, counsel moved for a new trial in part based on the "juror improperly dismissed." (CT1:3:831.) The court denied the motion. (RT66:10248-10249.)

B. The court relied on irrelevant considerations, including juror #1's youthful age, and her reluctance to look at photographic exhibits during argument, as evidence she was incapable of performing the duties of a juror during deliberations.

Section 1089 governs the use of alternate jurors. It provides in relevant part:

> "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall take his place in the jury box...."

"The most common application of [section 1989] permits the removal of a juror who becomes physically or emotionally unable to continue to serve as a juror due to illness or other circumstances." (*People v. Cleveland, supra*, 25 Cal.4th at 474.) The section has also been applied "to permit the removal of a juror who refuses to deliberate, on the theory that such a juror is 'unable to perform his duty' within the meaning of ...section 1089." (*Id.*, at 475.) However, a trial court has only limited discretion to determine that facts show an inability to perform the functions of a juror; that inability must appear in the record as a "demonstrable reality." (*People v. Collins* (1976) 17 Cal.3d 687,

695; *People v. Compton* (1971) 6 Cal.3d 55, 60.)

The court's initial response to juror #1's request for dismissal was to focus on the juror's young age, and the fact that she was the youngest juror to serve on any of the juries in this case. (RT65:10167.) The court also inquired whether the juror was "with her folks," i.e., living at home or on her own. This line of questioning was superfluous. Juror #1 did not initially claim that her disability to deliberate was age-related. Moreover, juror #1 was relatively young compared with other jurors during the *guilt* phase of the trial as well as the penalty phase, but that did not furnish any basis for excusing her from service.

Judge Horan next initiated an inquiry regarding juror #1's apparent unwillingness to view for the *second* time a photographic exhibit of the body of Maria Moreno. This described incident occurred *before* the case was submitted to the jury, i.e., *before* juror #1 claimed she developed a problem. (RT65:10167.) Juror #1 did not claim that gruesome photographic exhibits were the source of her inability to continue. Hence, the incident regarding the photograph should have played no significant role in the court's decision to excuse juror #1. However, immediately following the discussion of the juror's age and reaction to photographic exhibits, the court asked defense counsel to stipulate that the juror could be excused. Hence, it appears that the court had already decided to dismiss juror #1 based on her relatively youthful age, and her turning away from a single photograph, *before* asking any questions to determine whether she could actually continue to deliberate, and follow the court's instructions.

C. The record does not support the court's finding that juror #1 was unable to perform the duties of a juror as a demonstrable reality.

In this case, the record does *not* support a finding that juror #1 was

unable to deliberate as a demonstrable reality. There is no evidence in the record that juror #1 was refusing to participate in deliberations. The juror's remarks showed she was conscientious and took her vote seriously. By her own admission, immediately prior to discharge, this juror had diligently gone over instructions with the other jurors in a good faith attempt to understand and apply the instructions. Indeed, the juror admitted that her review of instructions had helped to alleviate some of her confusion. (RT65:10175.) The court should have instructed her to review the instructions again, and contact the court if she remained confused.

The statements of juror #1 clearly suggest that her reluctance to continue deliberating was merely a function of her realization that appellant's life lay in the balance. (RT65:10173.) "I don't know if I can make, like, the right decision." (RT65:10166.) "His life is depending on me." (RT65:10173.) However, the constitutionality of the death penalty under the Eighth Amendment depends on including jurors who, when confronted with the truly awesome responsibility of decreeing death for a fellow human, will act with due regard for the consequences of their decision. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 329-330; *McGautha v. California* (1971) 402 U.S. 183, 208; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1109.) A prospective juror may *not* be excluded from a jury merely because his or her conscientious views regarding the death penalty would lead make it very difficult to chose the penalty of death. (*People v. Stewart* (2004) 33 Cal.4th 425, 446-447.) Similarly, a juror should not be excusable for cause after commencement of penalty phase deliberations merely because the decision whether or not to impose death is emotionally difficult.

Juror #1 was understandably tired and confused by the enormity of her responsibility, and she did not *want* to continue deliberating. However, the

record as a whole suggests that she was perfectly capable of deliberating; she would have continued to make a good faith effort to obey the court's instructions had the court told her to "go back in there and continue deliberations," as defense counsel asked. (RT65:10180.)

D. Even if juror #1 made statements indicating an inability to decide, it was only in response to leading questioning by the court which effectively communicated what responses would result in discharge from the jury.

Juror #1, after a long series of leading questions by the court, acknowledged that she did not "think," and did not "believe" she could – in the court's words – "decide this case based on a rational and clear-headed weighing of aggravation and mitigation." (RT65:10177.) However, "it is not required that jurors deliberate well or skillfully." (*People v. Engelman* (2002) 28 Cal.4th 436, 446.) "The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge." (*People v. Cleveland, supra*, 25 Cal.4th at 485.)

More importantly, the court's conduct of questioning provides a classic illustration of how jury panelists will often yield to the "subconscious pressures to respond to the authority figure – the judge – by replying in conformity to what they get the sense their answer 'should' be." (John H. Blume, Sherri Lynn Johnson, A. Brian Threlkeld, *Symposium: Probing Life Qualification" Through Expanded Voir Dire*, 29 Hofstra L.Rev. 1209, 1233-1234 (Summer 2001).) Even though juror #1 was a seated juror, not just a panelist, the same subconscious pressures were clearly at play. For example, after the court commented about the juror's youth, she suddenly attributed her problems to her youth: "I'm young. I don't know." (RT65:10173.) It was obvious from the court's questioning that the request for dismissal would be

granted if only juror #1 replied in conformity with what the judge was signaling her the answer should be. She obviously obliged.

E. At most, there existed cause to conduct further investigation into whether juror #1 was incapable of performing the duties of a juror, or whether the impetus for dismissal was related to her view of the merits.

A trial court must conduct an investigation when it possesses information, which if proven to be true, would constitute good cause to doubt a juror's ability to perform his or her duties, and justify removal from the case. (*People v. Cleveland, supra*, 25 Cal.4th at p. 478; *People v. Ray* (1996) 13 Cal.4th 313, 343.) In this case, the juror asked to be dismissed based on the claimed mental and emotional effects of penalty phase jury service. (RT65:10166.) It is clear that juror #1 had been participating in deliberations up to that point; she did not claim otherwise. From some comments, it appears that juror #1 might have been feeling pressure from other jurors to impose the death penalty – an outcome which was causing her discomfort. (RT65:10173.) At one point she said, "I mean if I decide to go one way and *I agree with all* – if the jurors and I all agree on the death penalty, it is like – that is too heavy on me." (RT65:10173; emphasis added.)

Studies show that post-submission substitution procedures endanger a defendant's substantive right to a trial by an impartial jury and compromise the sanctity and freedom of the deliberative process. (Douglas J. McDermott, *Note: Substitution of Alternate Jurors During Deliberations and Implications on the Rights of Litigants: The Reginald Denny Trial,* 35 Boston College L. Rev 847, 882 (July 1994).) Broad exercise of juror replacement procedures encourages juries to become actively involved in their own composition, which impedes the unfettered deliberative process. (*Id.*, at p. 881.) Majority jurors

may pressure a dissenting juror to feign some justification for dismissal, thus placing the burden of decision on the alternate. The protection that generally results from the counterbalancing of a variety of juror views is lost. (*Id.*, at 882; accord: *United States v. Lamb* (9th Cir. 1975) 529 F.2d 1153, 1157.) Post-submission substitution should be severely circumscribed and trial judges should have very little discretion to alter the composition of the jury once deliberations have begun.

Instead of asking leading questions of juror #1 in a manner which merely increased the probability she would take the judge's cue and provide legally disqualifying answers, the court should have conducted a *bona fide* inquiry into this juror's functioning. Since juror #1 indicated she had discussed her desire to be excused with other jurors (RT65:10175-10176), at minimum the court should have inquired of the other jurors what was said by juror #1, and whether it appeared that juror #1 was participating, and could realistically continue to participate in deliberations. The court should further have made inquiry regarding whether juror #1's state of mind perhaps resulted from coercion or duress by other jurors. Here, the court failed to conduct inquiry with the most obvious source of additional information – the other jurors. So long as there is a reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss. (*Cleveland,* at 483; citing *U.S. v. Symington* (9th Cir. 1999) 195 F.3d 1080, 1087.)

F. Trial counsel's motion to begin guilt phase deliberations anew should have been granted in light of the trial court's implied reliance on juror #1's youth, and avoidance of exhibits, which pre-existed penalty phase deliberations.

Even though juror #1 declared that her problems surfaced at the commencement of penalty phase deliberations, the trial court apparently did

not believe her. Judge Horan clearly relied in part on the youth and immaturity of juror #1, and her unwillingness to view exhibits to justify her dismissal. These factors pre-dated penalty phase deliberations. Under such circumstances, counsel reasonably argued that the jury should be instructed to begin the guilt phase instructions anew.

In *People v. Green* (1971) 15 Cal.App.3d 524, the Court of Appeal held that it did not deny a defendant due process to have an alternate juror substituted for the sanity and penalty phases of the trial. (*Id.*, at 528-529.) This Court has cited *Green* for the proposition that unforeseen circumstances may require the substitution of a juror at the penalty phase of a capital trial, even though the alternate did not take part in the guilt phase deliberations. (*People v. Fields, supra*, 35 Cal.3d at 351.)

This Court should overrule *Green*. The fact that substitution must sometimes occur does not necessarily mean that no harm flows from the fact that the alternate did not participate in guilt phase deliberations. (See, section D, above.) Post-submission substitution interferes with a jury's group dynamic and places the alternate juror in an inherently coercive atmosphere. (*Note: Substitution of Alternate Jurors During Deliberations and Implications on the Right of Litigants, supra*, 35 Boston College L. Rev at 879-882.) The likelihood of a penalty mistrial is decreased because alternates who join ongoing deliberations late have already missed the opportunity to gain early support from other jurors, thus decreasing the probability that they will influence other jurors or hold out and cause a mistrial. (*Ibid.*) Consequently, even if post-submission substitution is absolutely necessary, its harmful effects should be partially ameliorated by requiring the alternate juror to participate in the process of guilt phase deliberations.

G. The errors require reversal of the death judgment.

Under the circumstances, dismissing such an obviously death-penalty scrupled juror was an abuse of discretion because the record does not establish juror #1's inability to serve as a demonstrable reality. For the same reasons, it was error to deny appellant's motion for new trial based on the improper dismissal of juror #1. Moreover, the harm caused by post-submission substitution of alternate was compounded by the court's erroneous refusal to direct the jury to begin its guilt phase deliberations anew.

As in *People v. Hamilton* (1963) 60 Cal.2d 105, 128, dismissing juror #1 was tantamount to loading the jury with jurors who might favor the death penalty. "Such, obviously, was prejudicial to appellant." (*Ibid.*) The dismissal violated appellant's state constitutional right to a unanimous verdict by a 12-person jury. (*People v. Collins, supra*, 17 Cal.3d at 692, n3.) This in turn deprived appellant of his state-created liberty interest in the correct, non-arbitrary application of the state constitution, which resulted in a violation of the Fourteenth Amendment's Due Process Clause. (*Hicks v. Oklahoma, supra*, 447 U.S. at 346; *Hewett v. Helms, supra*, 459 U.S. at 466; *Ford v. Wainwright* (1986) 447 U.S. 399, 428 [O'Connor, J, concurring].)

Last but not least, by depriving appellant of the one juror with death penalty scruples, the error also violated appellant's right to a reliable death judgment guaranteed by the Eighth Amendment, and article I, section 17 of the state constitution. (*Beck v. Alabama,* 447 U.S. at 637; *Zant v. Stephens, supra*, 462 U.S. at 879; *Johnson v. Mississippi, supra*, 486 U.S. at 584; *Woodson v. North Carolina, supra*, 428 U.S. at 304.) Reversal of the penalty is required. (*People v. Cleveland*, at 486; *People v. Hamilton, supra*, 60 Cal.2d at 127.)

XIX. APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND RELIABLE DEATH JUDGMENT WERE VIOLATED GIVING AN INSTRUCTION ADVISING JURORS TO NOTIFY THE COURT OF ANY JUROR NOT FOLLOWING INSTRUCTIONS.

In the penalty phase, the trial court gave the following instruction on its own motion:

> "It is the duty of each juror to notify the court promptly if you conclude that you are unwilling or unable to follow any instructions of the court. Likewise, you must notify the court if any of your fellow jurors appear to be unwilling or unable to follow any such instruction."

(CT1:3:730; RT64:10052; RT65:10107.)

This instruction is for all intents and purposes the same as former CALJIC No. 17.41.1, which was criticized by this Court in *People v. Engelman, supra*, 28 Cal.4th 436.[61] In *Engelman*, the defendant contended, inter alia, that the giving of CALJIC No. 17.41.1 impaired the free and private exchange of views that is an essential component of the state and federal constitutional rights to jury trial, and encroached on his state constitutional right to a unanimous jury verdict, including the right to an independent and impartial decision by each juror. (*Id.*, at 213.) This Court rejected the defendant's constitutional claims, but agreed that there was a risk that the instruction could "be misunderstood or ... be used by one juror as a tool for browbeating other jurors." (*Engelman* at p. 445.) This Court found that CALJIC No. 17.41 had the potential "needlessly to induce jurors to expose the content of their deliberations" (*Id.*, at p. 446), and also to "draw the court

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[61] CALJIC No. 17.41.1 informs jurors at the outset of jury deliberations that "'should ...any juror refuse[] to deliberate or express[] an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation.'" (*Engelman* at p. 439.)

unnecessarily into delicate and potentially coercive exploration of the subject matter of deliberations." (*Id.*, at 448.) Accordingly, this Court exercised its supervisory power and directed that CALJIC No. 17.41.1 not be given in trials conducted in the future. (*Engelman* at p. 449.) This case was tried prior to the *Engelman* decision.

Since *Engelman*, this Court has declined to find reversible error in the giving of CALJIC No. 17.41.1. (*People v. Brown* (2004) 33 Cal.4th 382, 393.) Federal courts that have considered the constitutionality of CALJIC No. 17.41.1 have found no violation of federal constitutional rights, or even assuming unconstitutionality of the instruction, they have found "no basis for finding or concluding that the giving of the instruction had a substantial and injurious effect or influence in determining the jury's verdict." (*Chamberlain v. Pliler* (C.D. Cal. 2004) 307 F.Supp.2d 1128; *Brewer v. Hall* (9th Cir. 2004) 378 F.3d 952, 957.)

This case is distinguishable from cases that have come before, however. Here, the instruction was given right before *penalty phase deliberations*. Furthermore, the record affirmatively suggests that jurors may actually have been improperly influenced by the instruction in their deliberations. (Cf. *People v. Brown,* 33 Cal.4th at 393.) Juror #1 self-reported her inability to deliberate shortly after the instruction was given. (RT65:10173; Argument XVIII.) The instruction may have furnished the other jurors just the ammunition they needed to pressure juror #1, possibly the sole dissenting juror, to withdraw from the case.

> "It is difficult enough for a trial court to determine whether a juror actually is refusing to deliberate or instead simply disagrees with the majority view....Drawing this distinction may be even more difficult for jurors who, confident of their own good faith and understanding of the evidence and the court's instructions on the law, mistakenly may believe that those

> individuals, who steadfastly disagree with them are refusing to deliberate or are intentionally disregarding the law."

(*People v. Engelman,* 28 Cal.4th at 446.)

The trial court's colloquy with juror #1 additionally intruded on the sanctity and privacy of jury deliberations by probing personal matters such as the juror's age, immaturity and family status, her inability to view gory crime scene photographs, and her inability to "clear headedly" weigh aggravation and mitigation. The court, in effect, spoon fed juror #1 legal justifications for her departure from the jury. This is precisely the type of harm that this Court's supervisory power was exercised to prevent. (*Ibid.*)

Accordingly, the giving of an instruction nearly identical to CALJIC No. 17.41.1 was not harmless in this case. The instruction impaired the free and private exchange of views that is essential to the right to a jury trial under both the federal and state constitutions. It encroached on appellant's constitutional right to a unanimous penalty verdict by treading on the right to an independent and impartial decision by each juror. The error also necessarily deprived appellant of his state-created liberty interest in the correct, non-arbitrary application of California's state laws, which resulted in a violation of the Fourteenth Amendment's Due Process Clause. (*Hicks v. Oklahoma, supra*, 447 U.S. at 346; *Hewett v. Helms, supra*, 459 U.S. at 466; *Ford v. Wainwright* (1986) 447 U.S. 399, 428; cf. *People v. Engelman*, at 445.) Furthermore, because the errors occurred in penalty phase of a capital trial, the errors deprived the death judgment of its reliability in violation of the Eighth Amendment, and article I, section 17 of the state constitution. (*Beck v. Alabama,* 447 U.S. at 637; *Zant v. Stephens, supra*, 462 U.S. at 879; *Johnson v. Mississippi, supra*, 486 U.S. at 584; *Woodson v. North Carolina, supra*, 428 U.S. at 304.) Reversal of the penalty is required.

XX. THE DENIAL OF AN INSTRUCTION ON CODEFENDANT SENTENCES AND IMMUNITY VIOLATED APPELLANT'S RIGHTS TO A FAIR PENALTY TRIAL AND RELIABLE DEATH JUDGMENT.

A. Defense request for instructions:

In this case, two immunized accomplices testified, witnesses #16 and #12. Three codefendants who actually participated in the murders of five people received life sentences – Torres, Logan and Ortiz. Logan and Ortiz were "lookouts" outside the premises, but Torres went inside the residence with the shooters, Palma and Valdez. Maciel's involvement – *if he was involved at all* – was in *arranging* for a single victim to be killed.

Defense counsel requested an instruction for the penalty phase that would have advised the jury it could consider immunity grants to witness #16 and defense witness #12 as a mitigating circumstance. (RT64:10042.) Counsel also wanted an instruction allowing the jury to consider the more lenient sentences life given to codefendants as mitigating factors. The court denied the request under this Court's decision in *People v. Danielson* (1992) 3 Cal.4th 691, 718. (RT6510075.)

B. Denial of the requested instruction violated appellant's federal constitutional right to equal protection, due process and a reliable death judgment; the *Danielson* rule should be reconsidered.

Although other states allow death penalty juries to consider more lenient sentences imposed upon, or immunity grants to the defendant's accomplices, this Court has established a contrary California rule. (*Danielson*, at 718; accord: *People v. Brown, supra*, 31 Cal.4th at 562-563.) The *Danielson* rule should be reconsidered. This Court should follow the better approach utilized by states like Florida, Delaware and Arizona, which consider disparities in sentencing between the defendant and accomplices to be mitigating in some cases. (*State v. Carlson* (Fla. 2002) 48 P.3d 1180, 586;

Washington v. State (Fla. 2005) 907 So.2d 512, 514; *State v. Ferguson* (Del. Super. 1992) 642 A.2d 1267, 1268; see also *United States v. Beckford* (E.D. Va. 1997) 962 F.Supp. 804, 807-813.)

The *Danielson* rule, as applied here, contravenes the Eighth and Fourteenth Amendments. California's death penalty sentencing scheme allows sentencing juries to consider virtually anything as aggravation under the vague rubric of the "circumstances of the crime." (See Argument XX, *post.*) For example, extremely broad evidence of victim impact is routinely introduced as a "circumstance of the crime." (*People v. Jurado, supra*, 38 Cal.4th at 131; § 190.3(a).) Use of such evidence has been approved, no matter how tangential or irrelevant to establish actual a defendant's culpability, so long as it is not "so unduly prejudicial that it renders the trial fundamentally unfair." (*Payne v. Tennessee* (1991) 501 U.S. 808, 824; *People v. Lewis and Oliver, supra*, 39 Cal.4th at 1056.)

A defendant's crime should not be treated as more or less heinous merely because a murder victim is married rather than divorced, has younger rather than grown children, is employed rather than jobless, or is venerated by more people in his or her community. Yet in *People v. Huggins* (2006) 38 Cal.4th 175, 222, the "circumstances of the crime" factor was so broadly construed that it allowed evidence that the community mourned the victim's death by placing a bronze statue of her at the public library. Similarly, in *People v. Jurado,* this Court found "relevant" as circumstances of the crime evidence that one family member died of cancer and another lost a job shortly after the victim's death. (*Id.*, at 132.)

The actions of accomplices and codefendants, and any unexplained disparity of treatment by the criminal justice system should fall at least on equal footing with evidence of "victim impact", which is allowed to be used

adversely in favor of death, even though such evidence often does not directly bear on a defendant's degree of culpability. To hold otherwise results in a violation of equal protection. (*Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.)

In addition, in *Parker v. Dugger* (1991) 498 U.S. 308, 314, the Supreme Court reversed a death judgment in a Florida case in which the sentencing judge did not consider as a mitigating factor that "none of Parker's accomplices received a death sentence...." This Court has consistently distinguished *Parker v. Dugger* on the ground that Florida law allows jury consideration of nonstatutory mitigating evidence of an accomplice's more lenient sentence. (*People v. Cain* (1995) 10 Cal.4th 1, 63; *People v. Bemore* (2000) 22 Cal.4th 809, 858; *People v. McDermott* (2002) 28 Cal.4th 946, 1005; *People v. Brown, supra*, 31 Cal.4th at 563.) However, the Court's application of *Parker* contravenes the requirement of *Lockett v. Ohio, supra*, 438 U.S. at 604, that a capital sentencer *not* be precluded from considering as a mitigating factor any circumstance of the offense or offender that the defendant proffers as a basis for a sentence of less than death. Since this court has broadly construed the "circumstances of the crime" factor to encompass almost any *aggravating* impact of a murder on *any person at all*, section 190.3(a) should be construed just as broadly to include the relatively lenient treatment of codefendants and uncharged accomplices as a factor in mitigation.

In the case at bench, two accomplices who acted as lookouts received immunity grants. Torres, who went inside the victims' residence with the intent to kill and was present when the murders occurred, received a life sentence. Two other codefendants, who acted as lookouts, also received life sentences. Appellant, who was not even present, and who was undisputedly *against* the killing of innocent women and children, received death. In obedience to *Danielson*, the trial court refused to allow the jury to consider or

speculate about what happened to the numerous other perpetrators. (CT1:3:691,774; RT62:9603.)[62] Construing the "circumstances of the crime" factor broadly *only* with respect to aggravating evidence violated appellant's rights to equal protection and due process and skewed the capital sentencing calculus in favor of death in violation of the Eighth and Fourteenth Amendments. Accordingly, *Danielson* should be revisited, and this Court should reverse the death judgment based on instructional error in this case.

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[62]Although trial counsel did not introduce evidence of the sentences of codefendants Logan, Ortiz, and Torres, it is likely, given the court's other rulings, that such evidence would have been refused as irrelevant. Should the court find that defense counsel invited the error by failing to move this evidence into the record, counsel's failings will more appropriately be addressed in habeas corpus proceedings.

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

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system. (*People v. Yeoman* (2003) 31 Cal.4th 93, 164-165.)

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 126 S.Ct. 2516, 2527, n.6;[63] See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 (while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster

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[63] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, " is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (126 S.Ct. at 2527.)

without such review.)

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders who might be subjected to capital punishment within the law. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers on Penal Code section 190.2 to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all, even as to the acts committed by a defendant. Paradoxically, the fact

that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question deals with foundational determinations for the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses from among the thousands of murderers in California a few victims of the ultimate sanction.

A. Appellant's death sentence is invalid because Penal Code section 190.2 is impermissibly broad.

> "To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)"

(*People v. Edelbacher, supra*, 47 Cal.3d at 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained twenty-eight special circumstances[64] purporting to narrow the

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[64]This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now thirty-three.

category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. *(People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.[65] (See Argument Section E, *post*, of this

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[65]In a habeas petition to be filed after the completion of appellate briefing, appellant will present empirical evidence confirming that section 190.2 as applied,

argument and Argument III, *ante.*).

B. Appellant's death penalty is invalid because Penal Code section 190.3(a), as applied, allows arbitrary and capricious imposition of death in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[66] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the

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as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

[66]*People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3.

crime,[67] or having had a "hatred of religion,"[68] or threatened witnesses after his arrest,[69] or disposed of the victim's body in a manner that precluded its recovery.[70] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California, supra*, 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa, supra*, 512 U.S. at 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on

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[67]*People v. Walker* (1988) 47 Cal.3d 605, 639, n.10, *cert. den.*, 494 U.S. 1038 (1990).

[68]*People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S. Ct. 3040 (1992).

[69]*People v. Hardy, supra*, 2 Cal.4th 86, 204, *cert. den.*, 113 S. Ct. 498.

[70]*People v. Bittaker, supra*, 48 Cal.3d at 1110, n.35, *cert. den.* 496 U.S. 931 (1990).

death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." *(Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C. California's death penalty statute contains no safeguards to avoid arbitrary and capricious sentencing and deprives defendants of the right to a jury determination of each factual prerequisite to a sentence of death; it therefore violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the

mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death.

1. Appellant's death verdict was not premised on findings beyond a reasonable doubt by a unanimous jury that one or more aggravating factors existed and that these factors outweighed mitigating factors; his constitutional right to a jury determination beyond a reasonable doubt of all facts essential to the imposition of a death penalty was thereby violated.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Cunningham v. California* (2007) ___ U.S. ___;

2007 U.S. LEXIS 1324; *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona, supra*, 536 U.S. 584; and *Blakely v. Washington* (2004) 542 U.S. 296, 124 S.Ct. 2531 [hereinafter *Blakely*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at 478.) The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, taken together, compelled this result. (*Id.* at 477-478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.* at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Id.* at 598.) The court found that in light of *Apprendi, Walton* no longer controlled. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 124 S.Ct. at 2535.) The state of Washington set forth illustrative factors that included both aggravating

and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The supreme court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 2543.)

In reaching this holding, the supreme court stated that the governing rule since *Apprendi* is that other than a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." (*Id.* at 2537, italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth and Fourteenth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*United States v. Booker,* 543 U.S. at 244.)

Any doubt regarding the *unconstitutionality* of California's capital sentencing scheme has been put to rest by the U.S. Supreme Court's decision in *Cunningham v. California*, 2007 U.S. Lexis 1324 (filed January 22, 2007), which declared unconstitutional California's Determinate Sentencing Law [DSL]. Mr. Cunningham had been sentenced in state court to an upper term

of 16 years for an offense punishable by a lower term sentence of 6 years, a middle term sentence of 12 years, or an upper term sentence of 16 years. In *Cunningham*, the upper term was imposed based on circumstances in aggravation found by the sentencing judge by a preponderance of the evidence. The U.S. Supreme Court held that by placing sentence-elevating factfinding within the judge's province, the DSL violated the defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments. (*Cunningham v. California*, at *42.) By the same reasoning, California's death penalty sentencing scheme violates the Sixth and Fourteenth Amendments because it places sentence-elevating factfinding in the hands of jurors' without requiring jurors to agree that any single alleged aggravating factor is true beyond a reasonable doubt, much less that the aggravating factors outweigh mitigating factors beyond a reasonable doubt.

Prior to *Cunningham*, this Court had upheld the DSL against constitutional challenges based on the holdings in *Apprendi*, *Blakely*, and *Ring*. (*People v. Black* (2005) 35 Cal.4th 1238, 1246-2363.) Under the DSL, an upper term sentence may be imposed if the judge finds true by a preponderance of the evidence one or more circumstances in aggravation defined by California Rules of Court, rule 4.421. The aggravating circumstances enumerated in rule 4.421 are comparable in may respects to the aggravating circumstances listed in section 190.3. (Section 190.3(g) & (j).) For both sentencing schemes, enumerated aggravating circumstances include "facts relating to the crime" and "facts relating to the defendant." (California Rules of Court, rule 4.421(a) and (b); *People v. Black, supra*, at 1247-1248.) Under both schemes, for example, the sentencer can consider as aggravating factors the defendant's dominant role in the crime or prior criminal conduct.

In *Black*, this Court concluded that the provisions of the DSL

> "simply authorize a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range. Therefore, the upper term is the 'statutory maximum' and a trial court's imposition of an upper term sentence does not violate a defendant's right to a jury trial under the principles sent forth in *Apprendi*, *Blakely* and *Booker*."

The U.S. Supreme Court explicitly rejected this holding in *Cunningham*:

> "... [A]ggravating circumstances depend on facts found discretely and solely by the judge. In accord with *Blakely*, therefore, the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum."

(*Cunningham v. California*, at *35.)

Under California's death penalty law, the *maximum* sentence that can be imposed is life imprisonment without parole, unless the sentencer finds (1) at least one aggravating factor true; and (2) that the aggravating circumstances outweigh any mitigating circumstances. (Section 190.3.) Factfinding is a necessary prerequisite to imposition of the death penalty. Although California defendants have the right to a *jury* determination of aggravating factors, unanimity is not required, nor must aggravating factors – other than prior crimes – be proven beyond a reasonable doubt. This violates the principles of *Cunningham*, *Blakely*, *Apprendi* and *Ring*.

a. In the wake of *Ring* and *Cunningham*, any jury finding necessary to the imposition of death must be found true beyond a reasonable doubt.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a

defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors. As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury (CT1:807; Rt:65:10124), "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[71] These factual determinations are essential

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[71]In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable

prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[72]

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. After *Ring*, this Court repeated the same analysis in *People v. Snow* (2003) 30 Cal.4th 43 [hereinafter *Snow*], and *People v. Prieto* (2003) 30 Cal.4th 226 [hereinafter Prieto]: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto, supra*, 30 Cal.4th at 263.)

This holding is based on a truncated view of California law. As section 190, subd. (a)[73] indicates, the maximum penalty for any first degree murder conviction is death.

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options:

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doubt.'" (*Id.*, 59 P.3d at 460)

[72]This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen, supra*, 42 Cal.3d at 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

[73]Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

death or life imprisonment, and *Ring* was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

> "This argument overlooks *Apprendi's* instruction that 'the relevant inquiry is one not of form, but of effect.' 530 U.S., at 494, 120 S.Ct. 2348. In effect, 'the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict.' *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151."

(*Ring*, 536 U.S. at 604.)

In this regard, California's statute is no different than Arizona's. Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring, supra*, 536 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can actually be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes the further findings that one or more aggravating circumstances exist and substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (2006).)

It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC 8.88). This Court has recognized that a particular special circumstance can even be argued to the jury

as a mitigating circumstance. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 863-864.)

Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency (Ariz.Rev.Stat. Ann. section 13-703(E)), while California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances (section 190.3). There is no meaningful difference between the processes followed under each scheme.

"If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 530 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the way in which the offender carried out that crime." (*Id.*, 124 S.Ct. at 2551; emphasis in original.) The issue of the Sixth Amendment's applicability of this fundamental Sixth and Fourteenth Amendment principle hinges on whether, as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes."

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to weigh those factors against the proffered mitigation. Further, as noted above, the Arizona Supreme Court has found that the statutorily-specified finding as to the relative

weightiness of aggravating and mitigating circumstances is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth and Fourteenth Amendments. (See *State v. Ring* (Az. 2003) 65 P.3d 915, 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450; see also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127.)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) As the high court stated in *Ring, supra*, 536 U.S. at 608, 609:

> "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death."

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the death-eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

b. The requirements of jury agreement and unanimity:

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; *People v. Stanley* (2006) 39 Cal.4th 913, 963.) Consistent with this Court's holdings, in this case the jurors were instructed that there was *no* need to reach unanimous agreement regarding the truth of aggravating factors. (RT65:10113-10114.) The prosecutor emphasized this instruction in final argument. (RT65:10128.) The prosecution had presented evidence of six unadjudicated violent acts as circumstances in aggravation. Thus, each juror may have relied on different aggravating factors or unadjudicated crimes to impose a death judgment. It is entirely possible only slim minority of jurors was persuaded of the truth of any single aggravating factor.

On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty. With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefor – including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments.[74] And it violates

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[74]See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].

the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the final deliberative process in which the ultimate normative determination is made. The U.S. Supreme Court has made clear that such factual findings must be made by a jury and cannot be attended with fewer procedural protections than decisions of much less consequence. (*Ring, supra*; *Blakely, supra.*)

These protections include jury unanimity. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.[75]) Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra*, 524 U.S. at 731-732; accord, *Johnson v. Mississippi, supra*, 486 U.S. at 584), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

In an ordinary criminal case, non-unanimous findings of guilt beyond a reasonable doubt by fewer than six jurors contravenes the Sixth Amendment right to jury trial. (*Burch v. Louisiana* (1979) 441 U.S. 130, 138-139.) Similarly, non-unanimous findings of aggravating circumstances, based on

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[75]In a non-capital context, the high court has upheld the verdict of a twelve member jury rendered by a vote of 9-3. (*Johnson v. Louisiana* (1972) 406 U.S. 356; *Apodaca v. Oregon* (1972) 406 U.S. 404.) Even if that level of jury consensus were deemed sufficient to satisfy the Sixth, Eighth, and Fourteenth Amendments in a capital case, California's sentencing scheme would still be deficient since, as noted above, California requires no jury consensus at all as to the existence of aggravating circumstances.

proof less than "beyond a reasonable doubt" contravenes the Sixth Amendment right to jury trial, as well as the Eighth and Fourteenth Amendments.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see *Monge v. California, supra*, 524 U.S. at 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and certainly no less (*Ring,* 536 U.S. at 609).[76] See Section D, *post.*

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[77] To apply the requirement to findings carrying a maximum punishment of one year in the county jail – but not to factual findings that often 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 (see Section D, *post*), and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury. (See *Richardson v. United States* (1999) 526 U.S. 813, 815-816.)

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[76]Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848, subd. (k).)

[77]The first sentence of article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

2. The due process and the cruel and unusual punishment clauses of the state and federal constitutions require that the jury in a capital case be instructed that they may impose a sentence of death only if they are persuaded beyond a reasonable doubt that the aggravating factors exist and outweigh mitigating factors and that death is the appropriate penalty.

a. Factual determinations:

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida, supra*, 430 U.S. at 349, 358; see also *Presnell v. Georgia (*1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. Imposition of life or death:

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*In re Winship, supra*, 397 U.S. at 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *In re Winship, supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky, supra*, the U.S. Supreme Court reasoned:

> "[I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . 'the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [Citation omitted.] The stringency of the 'beyond a reasonable doubt' standard bespeaks the "weight and gravity" of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that 'society impos[e] almost the entire risk of error upon itself.'"

(455 U.S. at 755.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky, supra*, 455 U.S. at 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship, supra*, 397 U.S. at 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson, supra*, 428 U.S. at 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California, supra*, 524 U.S. at 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual

bases for its decision true, but that death is the appropriate sentence.

3. California law violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution by failing to require that the jury base any death sentence on written findings regarding aggravating evidence.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown, supra*, 479 U.S. at 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank, supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations

with the requisite specificity unless he has some knowledge of the reasons therefor." (*In re Sturm* at 267.)[78] The same analysis applies to the far graver decision to put someone to death.

In a *non-capital* case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to more rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan, supra*, 501 U.S. at 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst, supra*, 897 F.2d at 421; *Ring v. Arizona, supra,* 536 U.S. 584; Section D, post), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, n.15.) Even where the decision to impose death is "normative" (*People v. Demetrulias* (2006) 39 Cal.4th 1, 41-42) and "moral" *(People v. Hawthorne, supra*, 4 Cal.4th at 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections

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[78]A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, ante.)

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra* [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

4. California's death penalty statute as interpreted by the California Supreme Court forbids inter-case proportionality review, thereby guaranteeing arbitrary, discriminatory, or disproportionate impositions of the death penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris, supra*, 465 U.S. at 51 (emphasis added), the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme so *lacking in other checks on arbitrariness that it would not pass constitutional*

muster without comparative proportionality review."

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can *not be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia, supra*. (See Section A of this Argument, *ante*.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh, supra*), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly

situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

5. The prosecution may not rely in the penalty phae on unadjudicated criminal activity; further, even if it were constitutionally permissible for the prosecutor to do so, such alleged criminal activity could not constitutionally serve as a factor in aggravation unless found to be true beyond a reasonable doubt by a unanimous jury.

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi, supra*, 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, in penalty phase argument, the prosecution relied heavily on evidence of unadjudicated criminal activity – six incidents allegedly involving force or violence committed by appellant – as aggravation. (RT63:9837-9944.) The prosecutor argued, inter alia, based on evidence of unadjudicated assaults allegedly committed while in custody that

> "Sentencing this defendant to prison is the same as handing him a credit card to commit assaults, allowing him to assault correctional officers, other inmates and prison staff."

(RT65:10134.)

The U.S. Supreme Court's recent decisions in *U. S. v. Booker, supra*, *Blakely v. Washington, supra*, *Ring v. Arizona, supra*, and *Apprendi v. New Jersey, supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally

permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

6. The use of restrictive adjectives in the list of potential mitigating factors impermissibly acted as barriers to consideration of mitigation by appellant's jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland, supra*, 486 U.S. 367; *Lockett v. Ohio, supra* 438 U.S. 586.)

7. The failure to instruct that statutory mitigating factors were relevant solely as potential mitigators precluded a fair, reliable and evenhanded administration of the capital sanction.

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton, supra*, 48 Cal.3d at 1184; *People v. Edelbacher, supra*, 47 Cal.3d at 1034). The 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, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina, supra*, 428 U.S. at 304; *Zant v. Stephens, supra*, 462 U.S. at 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an affirmative answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> "The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider 'whether or not' certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft* [(2000)] 23 Cal.4th [978], 1078-1079 [parallel citations]; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887 [parallel citations].) Indeed, 'no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors.' (*People v. Arias*, supra, 13 Cal.4th at 188 [parallel citations].)"

(*People v. Morrison* (2004) 34 Cal.4th 698, 730.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, 34 Cal.4th at 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People*

v. Carpenter, supra, 15 Cal.4th at 423-424.)[79]

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma, supra*, 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].

The likelihood that the jury would have been misled as to the potential significance of the "whether or not" sentencing factors was heightened by the prosecutor's statements during penalty phase closing argument. For example, the prosecutor argued:

> "Now the defendant's conduct, I respectfully submit to you, the defendant's conduct is not excused by poverty, racism, a dysfunctional family or bad parenting. Why not? Because we have strong evidence that he came from a good family. They weren't rich but they weren't poor. His mother and father are together. He has sisters that obviously love him. He has a cousin, the cousin who testified and grew up with him. A cousin who grew up with him and managed to stay away from gangs, stayed away from gang activity, never became a gangster, didn't commit crimes for a gang, doesn't and never did associate

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[79]There is one case now before this Court in which the record demonstrates that a juror gave substantial weight to a factor that can only be mitigating in order to *aggravate* the sentence. See *People v. Cruz*, No. S042224, Appellant's Supplemental Brief.

with gangsters."

(RT65:10132-10133.)

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black, supra*, 503 U.S. at 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings, supra*, 455 U.S. at 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

D. The California sentencing scheme violates the Equal Protection Clause of the federal constitution by denying procedural safeguards to capital defendants which are afforded to non-capital defendants.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California, supra*, 524 U.S.

at 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas, supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto,*[80] as in *Snow,*[81] this Court analogized the process of

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[80]"As explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.*" (*Prieto, supra*, 30 Cal.4th at 275; emphasis added.)

[81]"The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" (*Snow, supra*, 30 Cal.4th at 126, n.3; emphasis

determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias, supra*, 39 Cal.4th at 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, ante.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Section C.3, ante.) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[82] *(Bush v. Gore* (2000)

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added.)

[82]Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the

531 U.S. 98, 121 S.Ct. 525, 530.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland, supra*, 486 U.S. at 374; *Myers v. Ylst, supra*, 897 F.2d at 421; *Ring v. Arizona, supra.*)

E. California's use of the death penalty as a regular form of punishment falls short of international norms of humanity and decency and violates the Eighth and Fourteenth Amendments; imposition of the death penalty now violates the Eighth and Fourteenth Amendments to the United States Constitution.

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom*: *Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 [plur. opn. of Stevens, J.].) Indeed, all nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty

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Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring, supra,* 536 U.S. at 609.)

in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [dis. opn. of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409.)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia* (2002) 536 U.S. 304, 316, n.21, citing the Brief for The European Union as Amicus Curiae in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, 4.)

Thus, assuming arguendo capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia, supra*, 536 U.S. at 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot, supra*, 159 U.S. at 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S.

[18 How.] 110, 112; see also Argument III.)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, conspirators or others not directly involved in murder, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[83] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra.*)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

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[83]See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

XXI. GIVEN THE ATMOSPHERE OF FEAR WHICH PERVADED THE ENTIRE TRIAL, THE CUMULATIVE PREJUDICIAL EFFECT OF THE ERRORS DEPRIVED THE GUILT AND PENALTY PHASE JUDGMENTS OF FAIRNESS OR RELIABILITY.

A state court's erroneous application of state law does not, standing alone, violate the federal constitution, state law errors that render a trial fundamentally unfair may violate federal due process. (*Estelle v. McGuire* (1991) 502 U.S. 62, 68; *Jammal v. VanDeKamp, supra*, 926 F.2d at 919; *Walters v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1357.) Moreover, state law errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial that is fundamentally unfair. (*Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *People v. Hill, supra*, 17 Cal.4th at 844-845.)

Throughout these proceedings, the courtroom was pervaded by an undercurrent of fear – the result of a not too subtly implied threat spawned by the prosecutor's theory of the case – that the Mexican Mafia would retaliate violently against anyone contributing to appellant's conviction, including, possibly, witnesses and jurors. The state's gang expert, Sergeant Valdemar, testified regarding violent proclivities of the Mexican Mafia. Numerous witnesses expressed the fear and expectation that their participation in the trial put them at risk of retaliation by appellant or agents of the Mexican Mafia. On several occasions witnesses offered unsolicited testimony accusing appellant of making threats or attempting retaliatory acts of violence. At the conclusion of the guilt phase, one juror confided her fear or gang retaliation to the court. In measuring the effect of the legal errors in this case, this Court cannot ignore the compounding effect that the frightening specter of the Mexican Mafia's involvement had on the jurors in this case.

The jury heard completely inadmissible, highly inflammatory bad

character evidence which portrayed appellant as hired killer for the Mexican Mafia. Jurors also heard a plethora of inadmissible hearsay, including the pre-offense predictions of a Mafia "hit" by a deceased victim, the post-offense confessions of a codefendant that the Mafia had ordered Sangra gang members to kill all the witnesses, and the chilling statements of Raymond Shyrock, a Mexican Mafia operative, discussing is plan to get a silencer to kill "Dido." Inadmissible evidence combined to fill gaping holes in the prosecutor's proof. These myriad errors guaranteed that jurors would be unable to dispassionately assess the credibility of several disreputable and extremely biased witnesses, without whose testimony there would have been little to connect appellant with the crimes. The numerous evidentiary errors were compounded by judicial and prosecutorial misconduct, the denial of appellant's right to consular assistance, and the lack of vigorous advocacy by an underpaid retained attorney whom appellant had unsuccessfully tried to discharge.

The penalty phase instructions included an admonition to jurors that "the fact that one of the other defendants was killed while on death row can in no way affect your decision here...." (RT65:10093-10094.) Jurors were also instructed, "no juror may be influenced in his or her penalty determination by personal concerns, such as fear of retaliation, or concerns as to how the verdict may be viewed by others...." (RT10105-10106.) No similar instruction was given in the guilt phase. In any event, these instructions were clearly ineffectual to cure the harm; at the conclusion of the penalty phase, apparently fearful jurors requested the court to provide them with transportation to their cars.

The U.S. Supreme Court recognizes that the greater need for reliability in *capital* cases means that death penalty trials must be policed at *all stages* for procedural fairness and accuracy of factfinding. (*Satterwhite v. Texas, supra*,

486 U.S. at pp. 262-263.) The federal high court has further "emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." (*Parker v. Dugger, supra*, 498 U.S. at 321.) Appellant was not entitled to a "perfect trial," but he was entitled to a trial in which guilt and penalty were "fairly adjudicated." (*Hill*, at 844.) Neither was fairly adjudicated in this case. Even if no single error was sufficiently prejudicial to require reversal, the cumulative effect of so many errors deprived the guilt and penalty phase judgments of any semblance of reliability. Clearly, "if ever there were a case for application of cumulative error principles, this is it." (*Killian* (9th Cir. 2002) 282 F.3d 1204, 1211; *Hill*, at. 844-848; *In re Jones* (1996) 13 Cal.4th 552, 587.)

CONCLUSION

For the foregoing reasons, the entire judgment must be reversed. Additionally, the appellant should be afforded any further relief supported by the law and evidence including, in the alternative, reversal of one or more of the convictions of first degree murder; reversal of the multiple murder special circumstance finding; remand for an evidentiary hearing on the prejudicial effect of the denial of consular rights guaranteed by the Vienna Convention; remand for an evidentiary hearing to determine whether witness #15 received a *quid pro quo* for his testimony, and reversal of the death penalty with a remand for a new penalty trial.

Dated: January 31, 2007.

Respectfully submitted,

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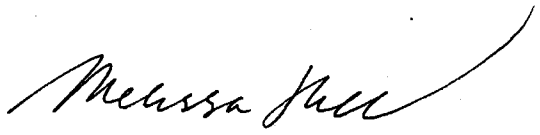

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PROOF OF SERVICE

I reside in the State of New Mexico, Sandoval County. I am over the age of 18 and I am a duly-licensed California attorney representing Luis Maciel, the appellant in this action. My business address is P.O. Box 2758, Corrales, New Mexico 87048.

On January 31, 2007, I served the within Appellant's Opening Brief on the interested parties to this action by placing a true copy thereof, enclosed in a sealed envelope with postage prepaid, in U.S. Mail in Corrales, New Mexico, addressed as follows:

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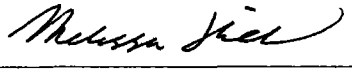

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