SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondents,

v.

PEDRO RANGEL, Jr.,

Defendant and Appellant.

S076785

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF MADERA

Honorable JOHN W. DeGROOT, Judge

APPELLANT'S OPENING BRIEF

(AUTOMATIC APPEAL)

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DEATH PENALTY

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APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

Appellant was originally charged in a criminal complaint filed on November 22, 1995, No. 95M18373. (1 CT 1-4.) In this original charging document appellant Pedro Rangel, Jr., was charged together with two co-defendants, Pedro Enriquez Rangel, III, and Rafael Vaca Avila. All three defendants were charged in five counts, all allegedly committed in Madera County on October 7, 1995.

In Count I the defendants were charged with the murder of Chuck Durbin. In Count II the defendants were charged with the murder of Juan Uribe. These allegations added the "special allegation" of multiple murder.

In Count III the defendants were charged with the attempted murder of Richard Fitzsimmons, with an allegation of premeditation. In Count IV the defendants were charged with the attempted murder of Cindy Durbin, also with premeditation. In Count V the defendants were charged with firing at an occupied dwelling house, 409 E. Central in Madera, in violation of Penal Code § 246. This count carried a "special allegation" of personal use of a firearm (.380 pistol and .22 rifle) in violation of Penal Code § 12022.5, as to the two Rangel defendants.

Appellant Pedro Rangel, Jr. and co-defendant Pedro Enriquez Rangel, III, were arraigned on the complaint on November 22, 1995. (1 CT 6-7.) An arrest warrant was issued for co-defendant Rafael Avila. (1 CT 5.) Avila was never arraigned on the complaint or the information, and evidence at trial indicated that he was a continuing abscond.

An amended complaint was filed on December 18, 1995. (3 CT 758.) Richard Diaz was added as a co-defendant in all counts. On January 6, 1996, the complaint was dismissed as to Richard Diaz. (4 CT 777.)

On January 12, 1996, Roger Litman appeared at further arraignment as counsel for appellant. (4 CT 781.)

In a declaration filed on April 12, 1996, Mr. Litman indicated that the District Attorney had designated this as a death penalty case, and requested the appointment of

second counsel. On the same date, the court appointed attorney Salvatore Sciandra as second counsel for appellant. (4 CT 785, 792.)

The preliminary hearing began on July 18, 1996. (4 CT 806.) It concluded with a holding order on both defendants as to all counts, on August 2, 1996. (6 CT 1597.)

An information was filed on August 13, 1996, naming appellant Pedro Rangel, Jr., and Pedro Enriquez Rangel, III. (7 CT 1602-1605.) As filed, the information charged the same five counts as charged in the complaint, all committed on October 7, 1995: murder of Chuck Durbin, murder of Juan Uribe, the special allegation of multiple murder, attempted murder with premeditation of Richard Fitzsimmons, attempted murder with premeditation of Cindy Durbin, and shooting at an inhabited dwelling house. It was further alleged that in the commission "of the above offense," both named defendants used firearms within the meaning of Penal Code § 12022.5.

Appellant was arraigned with counsel on August 12, 1996. (7 CT 1606.)

Both defendants subsequently filed motions to dismiss, including attacks on Counts III, IV, and V. (7 CT 1610, 1618, 1706.)

Appellant filed a motion to sever trials from his co-defendant, on *Aranda-Bruton* grounds.[1] (7 CT 1659.)

The motions were heard before the Hon. Paul R. Martin on February 3, 1997. (8 CT 1762.) The motions to dismiss Counts III and IV (attempted murder counts) were de-

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[1] *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123.

nied. Count V (shooting at a dwelling house) was dismissed on motion of the District Attorney.

On August 27, 1997, the court (Judge Martin) ordered that one trial be held, with two juries empanelled. (8 CT 1831.) It was later determined that there were no "resources" to empanel two juries for a single trial. Consequently, the motion to sever was granted on March 27, 1998, by Judge De Groot, who presided over subsequent proceedings. (9 CT 1878.) On April 3, 1998, a stipulation and order were entered that appellant's trial would proceed prior to that of his co-defendant. (9 CT 1939.)

Trial began on August 18, 1998, with the calling of prospective jurors and the distribution of questionnaires. (11 CT 2346.) On September 8, 1998, the information was amended to strike Count III, attempted murder of Richard Fitzsimmons. (11 CT 2354.) The count charging attempted murder of Cindy Durbin thereupon became Count III.

The presentation of evidence began on September 9, 1998. (11 CT 2357.)

Guilt phase arguments were heard, and the jury was instructed and retired to deliberate on September 30, 1998. (11 CT 2381.) Verdicts were returned late in the afternoon on October 1, 1998. Appellant was found guilty of the two murder counts, Counts I (Chuck Durbin) and II (Juan Uribe). The enhancement for personal use of a firearm was found true as to Count II, and untrue as to Count I. (11 CT 2385, 2386.) Appellant was found not guilty of the remaining attempted murder count, Count III (Cindy Durbin). (11 CT 2387.) The multiple murder special allegation was found true. (11 CT 2388.)

The penalty phase began with opening statements on October 6, 1998. (11 CT 2428.) Evidence was presented by both sides. The jury was instructed and the issue was

argued to the jury. Deliberations began on the early afternoon of October 8, 1998. (11 CT 2432.) Deliberations continued throughout the day on October 9th. (11 CT 2433.)

Deliberations resumed on October 13, 1998. On the early afternoon of that date, the jury announced a death verdict. (11 CT 2434, 13 CT 2803.)

On January 29, 1999, the defense filed an Application to Modify the Death Penalty, citing Penal Code §§ 1181 (7) and 190.4 (e). (13 CT 2855.)

A sentencing hearing was held on February 8, 1999. Following the hearing the trial court imposed a judgment of death as to both murder counts. The three-year enhancement for personal use of a firearm, now attached to Count II, was stayed. (13 CT 2865.)

The appeal to this Court is automatic. (Penal Code § 1239 (b).)

STATEMENT OF FACTS

GUILT PHASE

Prosecution Case

Appellant's co-defendant, Pedro Enriquez Rangel, III, is his son. Due to the close similarity in their names, and the possibility for confusion, the parties in the court below adopted the convention of referring to them as "Big Pete" (appellant) and "Little Pete" (his son). Appellant will follow this convention in this Brief, where necessary.

Many of the other suspects, accessories, victims, and/or witnesses are relatives or acquaintances of appellant or his son, or of each other.

Appellant's wife Mary or Maria was referenced in testimony but did not testify. Their only natural child is Little Pete. (2 ACT 394.) Mary's father, appellant's father-in-law, is Jose Enriquez. (2 ACT 465.)[2]

Appellant raised three stepdaughters, daughters of his wife, from the time they were small. Included in the witnesses called to testify for the prosecution were appellant's stepdaughter, Edora Avila (5 RT 1196, 5 RT 1208), and his stepdaughter Deanna Ramirez (6 RT 1477). Rafael Avila, who was originally named as a co-defendant and who did not testify, was Edora's husband. (5 RT 1196.) Juan Ramirez, who testified, was Deanna's husband. (6 RT 1467, 1477.)

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[2] "ACT" refers to the Augmented Clerk's Transcript. It includes transcripts of tape recorded interviews entered as exhibits.

Carmina Garza is also appellant's stepdaughter (2 ACT 394). She identified herself as appellant's daughter, a sibling of Little Pete, Deanna Ramirez, and Edora Avila. (7 RT 1789.) Carmina's boyfriend, whom she planned or hoped to marry, was Sanjeevider Singh, also known as "Romi." (7 RT 1840.)

Christina Bowles, a defense witness, also identified herself as appellant's stepdaughter because he raised her. (8 RT 2095.)

Angela Chapa is the girlfriend of Little Pete, and the mother of two small children by him. (4 RT 1114.) According to Ms. Chapa, prior to this offense Little Pete, his cousin Jesse Rangel, and Richard Diaz were all friends. (4 RT 1123.)

Frank Rangel, Sr. ("Big Frank"), is appellant's brother; his son Frank Rangel, Jr., ("Little Frank") is appellant's nephew. (7 RT 1635.)

Jesse Rangel is appellant's nephew by another of appellant's brothers, thus he is a cousin of Little Pete. (4 RT 1080.) His wife is Erica Rangel. (6 RT 1586.) His mother is Deanna Salas. (7 RT 1734.)

Richard Diaz was a friend of Big Pete and Little Pete; he had known them for six or seven years at the time of his testimony. (5 RT 1259.) A relative of Richard Diaz, Martha Melgoza, was the girlfriend of Juan Uribe, one of the named victims in this case. (4 RT 1004.)

According to the prosecution case, the events which led to the murders began with a baptism party on September 24, 1995, held at the Women's Center in Madera. The party was hosted by Michael Flores. Michael Flores' wife is Natalie Candia; she is related

to Jesse Candia, Jr., who was at the party. (4 RT 1007.) Michael Flores and Richard Diaz are cousins. (5 RT 1292.)

Martha Melgoza was at the party with Juan Uribe. Little Pete was at the party with Tino Alvarez and Richard Diaz. In Ms. Melgoza's opinion, Little Pete and Juan Uribe were good friends up to the time of the party. (4 RT 1006, 1012, 1036.)

However, Little Pete did not get along with another person at the party, David Varela (4 RT 1007), and unfortunately Varela was a good friend of Juan Uribe. (4 RT 1065.) Varela testified that he saw Little Pete approach Varela's younger friend Abraham Salazar, and an argument ensued. When Varela got involved Little Pete became angry and said, "You know who I am?" He wanted to fight Varela. Varela's uncle Jesse Candia ("Big Jesse") broke it up. Varela backed off when he saw a revolver stuck in Little Pete's waistband. (4 RT 1025, 1038.)

Another individual, Carlos Romero (since deceased), socked Little Pete in the face. Little Pete turned to Juan Uribe, who had been standing out of the fray with Martha Melgoza, and said, "what's up." Juan shook his head, and declined to get involved. At that point Big Jesse told Little Pete to leave the party. (4 RT 1011-1012.) As he left, Little Pete said, "Juan, why didn't you back me up?" Uribe replied, "It was none of my business." (4 RT 1042.)

Richard Diaz had left the baptism party earlier in the evening, and went to his girlfriend's house. Little Pete came by about 7:45 p.m., and said that someone at the party had socked him. They drove back to the party in Little Pete's BMW. Diaz had been carrying his .38 earlier in the evening, but he claimed that he was not carrying it with him

at this point. When they arrived at the Women's Center, everyone ran around and shut the doors. They drove by slowly, then left. (5 RT 1295-1297; 4 RT 1013 [Martha Melgoza]; 4 RT 1042 [David Varela].)

Little Pete drove Diaz back to his girlfriend's house to recover Diaz' car. They were driving both cars back to Diaz' house when they spotted Juan Uribe and Martha Melgoza on a dead end street off Yosemite. Little Pete cut him off, then got out of his car with Tino Alvarez. Diaz understood that Little Pete wanted to get even with Juan Uribe because Uribe didn't back him up. (5 RT 1298.) At this point Diaz' gun was underneath the seat of his car, but he claimed that he did not take it out. (5 RT 1299.)

Martha Melgoza observed the ensuing confrontation from Uribe's car. She saw Little Pete and Tino Alvarez walk toward them, and saw Diaz behind them in the driver's seat of another car. (4 RT 1014-1015.) She saw Diaz holding a gun, tapping it on the front passenger seat; in a prior statement she said that his hand was outside the car, holding a gun. (4 RT 1028, 1030.)

Tino Alvarez asked Juan, "Why did you hit him." Juan replied that he did not hit Little Pete; then Tino punched Juan, and they all walked away. (4 RT 1027; 5 RT 1320 [Richard Diaz].)

From the location of this confrontation off Yosemite, Juan drove Martha Melgoza to Chris Castaneda's house. He dropped her off there, then he and Castaneda drove away in a brown primered Monte Carlo. (4 RT 1028, 1031.)

According to Richard Diaz, he and Little Pete drove their cars from the scene of the confrontation off Yosemite, back to Diaz' girlfriend's house to return his car. (5 RT

1320.)[3] After dropping off Diaz' car, all three (Little Pete, Tino Alvarez, and Richard Diaz) were in Little Pete's BMW. They ran into Juan Uribe again; this time he had three or four cars with him. Shots were fired. Little Pete was hit in the head, and was taken to the hospital. Diaz did not see who fired the shots. (5 RT 1321, 1360.)

This incident was also witnessed by David Varela. Varela left the baptism party at 11:30 p.m. with Abraham Salazar. As they approached Grove Street, Varela saw Juan Uribe standing on the curb with a group of people. He saw a BMW making a U-turn. Little Pete was the driver, and Richard Diaz was the passenger. (4 RT 1046.)[4]

As Varela drove south on Grove Street, he heard four gunshots from the passenger side of the BMW. As Varela turned on Maple Street he heard three more gunshots, then more gunshots. Little Pete's BMW was behind him. He saw muzzle flashes as he turned right on Pine to Yosemite. The BMW continued further down, to "O" Street. When Varela turned left on Olive the BMW wound up in front of them. It turned on Stadium, and Varela didn't see it again. (4 RT 1047-1052.)

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[3] This was on cross-examination. On direct examination Diaz testified that they had been driving away from his girlfriend's house, to return his car to his aunt's house. (5 RT 1298.)

[4] At the preliminary hearing Varela testified that he saw other "people" in the car with Little Pete. In a prior statement to an investigator he suggested that one of them was big like Tino Alvarez. (4 RT 1057, 1060.)

Shortly after midnight on September 25, 1995, police officer John Markle was dispatched to the Madera Community Hospital.[5] There he observed Little Pete, with a gunshot wound to the head. The laceration was five or six inches in length, about one-half inch wide, from near the left temple diagonally to the right eye. The skull was almost exposed. The officer examined the victim's car. There was a bullet hole in the driver's side door, another in the windshield, and another just below the tail light by the bumper. There were blood splatters all over the interior of the driver's side door. (4 RT 1067-1069.)

Richard Diaz was questioned at the hospital. He said that he did not know who was in the other car. He later testified that he did know some of the people in the other car, including Juan Uribe, but he did not give that information to police. Diaz understood that they were shot at because of the earlier confrontation between Juan Uribe and Tino Alvarez, Little Pete, and himself. (5 RT 1323.)

According to a later statement by appellant to police, appellant received a phone call and rushed to the hospital, where he found his son injured and his BMW shot up. (2 ACT 398.) He was told that his son came within a fraction of an inch of losing his life. Appellant came to understand that Jesse Candia, Sr. was responsible. (2 ACT 401-402.) He felt that his son might know who shot him, but he did not tell appellant. (2 ACT 405.)

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[5] Markle put the date at September 24, 1995, however David Varela placed the baptism party on the night of September 24, 1995. (4 RT 1035.) If that date was correct, then the contact at the hospital was on the early morning of September 25, 1995.

There was retaliation for the shooting of Little Pete. On September 25, 1995, Little Pete's cousin Jesse Rangel received a phone call from another cousin, informing him that Little Pete had been shot the night before. He testified that he went to Little Pete's apartment in Fresno. Also present were appellant, appellant's wife Mary, Little Pete, a relative of Mary named Damian Allatore, and Tino Alvarez. The whole family, including Jesse Rangel, were angry about the shooting. (4 RT 1080-1082.)

That evening Jesse Rangel left with Tino Alvarez and Damian. They picked up Tino's cousin, "Bingo." They went to another friend's house where they drank. All of them were angry, and a joint decision was made to retaliate. According to Jesse Rangel, they only wanted to shoot up Juan Uribe's car, so they drove to Uribe's house. Jesse Rangel was armed with a 9mm at this point. (4 RT 1083.) Based on what Tino Alvarez said about the prior incident, Jesse Rangel believed that it was Juan Uribe who had shot Little Pete. (4 RT 1098.)[6]

Juan Uribe, like Little Pete, owned a BMW. They drove slowly past Uribe's house and the unoccupied BMW which was parked in front. Jesse Rangel was driving, though he was drunk. Tino was in the front seat, Bingo and Damian were in the back. As Jesse slowed the car, Tino pulled out a gun (not the 9mm) and shot at the BMW a couple of times. Jesse grabbed Tino's gun and did the same, then they drove off. Jesse did not claim that he used his own 9mm in this incident. (4 RT 1086, 1100.)

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[6] The trial court instructed the jury that this statement by Tino to Jesse could be considered only for state of mind, and not for its truth. (4 RT 1097.)

According to Richard Diaz, he had a confrontation with Juan Uribe at a market shortly after Uribe's car was shot up. Uribe thought that Diaz was responsible for shooting up his car. Diaz denied it, but Chris Castaneda, who was with Uribe, hit him. Diaz claimed that he was surprised but not upset. Diaz' father-in-law intervened, and said that Diaz was with him all day the day before. Diaz had a further conversation with Uribe then, Diaz claimed, he was not mad at Uribe anymore, and no longer wanted to retaliate for the shooting of Little Pete; "We squashed it." (5 RT 1340-1342.)

On the evening of October 7, 1995, a barbecue was held at appellant's house at 1034 Wessmith in Madera. Present at different times were Carmina Garza and Romi (Sanjeevider Singh), appellant and his wife Mary, their son Little Pete and his girlfriend Angela Chapa, Mary's sister Wanda and Roy, Rafael Avila, and Richard Diaz. (4 RT 1115, 5 RT 1260, 7 RT 1844, 2 ACT 423.)

At one point, Angela Chapa noticed that Big Pete was gone; this was about 8:30 p.m. (4 RT 1121.) According to Carmina Garza, appellant, Little Pete, and Romi all left the barbecue about 9:30, and returned 1 ½ hours later. (7 RT 1805.) In contrast, Romi testified that he left the barbecue about 10:30, with Carmina; he denied that he left with Big Pete and Little Pete. He testified that they went to a 7-11 across the street from his own convenience store at Lake and Cleveland. They bought some sodas there (rather than at his own store), then returned to the house on Wessmith. He stayed there another 30 minutes, then went home. (7 RT 1844.)

Richard Diaz arrived at the barbecue at ten p.m. He was carrying a .38 revolver in his car. Yet, he claimed that following the altercation with Uribe at the market, he no longer was looking for retaliation. (5 RT 1343.) He testified at trial that he had drunk no more than one-half of a Corona beer before going to the barbecue, but at the preliminary hearing he testified that he drank two. (5 RT 1359.)

Diaz heard appellant talking about "his son getting shot in the head, about getting back whoever did it." According to Diaz, appellant named Juan Uribe, and said that he wanted to go looking for him. Appellant asked to borrow Rafael Avila's car. Rafael refused but said that he would drive because appellant was "too drunk." Appellant was drinking Presidente brandy. (5 RT 1262-1264.)

Diaz retrieved his .38 revolver from his car, and got in the rear passenger seat of Avila's car. He saw Little Pete get a .22 rifle out of appellant's truck, then Little Pete sat in the front passenger seat. Appellant sat in the back seat next to Diaz, and Rafael Avila drove. (5 RT 1265-1266.)

According to Diaz, they drove to Juan Uribe's house. When they did not find him there, appellant wanted to know where Chris Castaneda lived. Avila continued driving, on Diaz' directions. (5 RT 1267.)

Meanwhile, there was a small gathering of people at the home of Chuck and Cynthia Durbin, at 409 East Central Avenue in Madera. The neighborhood is in a low-income area near the Fresno River. (4 RT 922.) Mrs. Durbin worked at Chubby's that afternoon, and returned home at 2:30 to 3:00. Chuck was at home with their three child-

ren: Brett (age seven), Natasha (age six), and Savanna (age three). Mrs. Durbin went shopping, and they ate dinner at 7:00 to 7:30. (6 RT 1375.) She began washing and folding clothes. Chuck was working on the plumbing; the bathtub and toilet were clogged up. (6 RT 1376.)

Alvin Areizaga arrived at the house at 8:00, intending to work on the plumbing. Richard Fitzsimmons arrived about 8:30. Juan Uribe arrived in between the two, then left and returned with a plumbing snake. Initially, Juan's girlfriend and her children were also present, but they left and did not return with him. The men finished working on the plumbing problem between 9:00 and 9:30, and came in to wash their hands. (5 RT 1169, 6 RT1377.)

The subsequent home invasion and shootings were described in the testimonies of Cindy Durbin and Alvin Areizaga.

The front door to the house was open. There was a security screen, which was closed but not locked. Alvin and Cindy were in the kitchen talking, when they heard gunshots from the front door. (5 RT 1170, 6 RT 1378.) Alvin ran into the back room. From there he heard Chuck Durbin say, "Hey, what the F-u-c-k," then another series of four or five shots. (5 RT 1172.) After a short period of quiet, he heard footsteps, then another series of two or three shots. (5 RT 1173.)

Cindy Durbin stood up to check on the children. She turned, and saw two men who she did not recognize, in the house near the front doorway. Both were Hispanic and dark, wearing baseball caps. One was stockier and an inch or two taller than the other, and had a bushy moustache. (6 RT 1379.) Although she testified at trial that both had on

dark clothes, at the preliminary hearing in July of 1996, she testified that one wore a white shirt and dark pants. (6 RT 1381-1382.)

As Cindy stood there, the men each raised a gun and began shooting. One of the guns was a handgun. The other was 16 to 18 inches long, too short for a rifle but bigger than a handgun. (6 RT 1383.) She ran back into the kitchen, and asked her husband what was going on. He told her to hide. (6 RT 1386.) The men in the living room were screaming for Juan: "They were going to get him." Chuck ran into the living room, where the children were. Cindy screamed for the children to hide under their blankets, then she hid under a shelf by the trash can. Juan was standing in front of her. One or both of the intruders entered the kitchen and started shooting Juan. Someone said that Juan was a "traitor." His body fell over her. (6 RT 1387-1388.)

When the house became quiet she crawled out from under Juan. She had a wound to the stomach, from left to right, and grazes to the legs. Screaming for her children, she found Brett and Natasha at the front door. Savanna was sitting on the floor next to her father. Chuck was still conscious, and raised his hands, but couldn't talk. (6 RT 1389, 1400.) Alvin came out and got towels to clean up. Chuck seemed to be choking. (5 RT 1173.)

Cindy took the children into the bedroom, and had Alvin call 911. (6 RT 1390.)

The gunfire drew the attention of at least two neighbors. Delores Rivera (Cervacio) lived at 401 East Central, west of the victims' house and separated by an apartment building. At 10:00 p.m. on October 7th she was playing Scrabble with her adult daughter, when they heard three gunshots, then shots from a larger gun. Looking out, she saw

two men[7] "walking across the street," "real close up against my neighbor's walls." This was suspicious because they could have walked next to the street. Both were Hispanic. One wore a baseball cap, the other had a hooded sweatshirt, pulled up. (4 RT 1104-1105.)

The distance of her observation was "from here to the door [of the courtroom]." Ms. Rivera knows appellant; they went to high school together. She does not know if one of the people she saw on the street was him. She told an investigator that she would have recognized appellant, but in her testimony she added the caveat, "if the lights would have been on." (4 RT 1109.)

Cindy Burciaga, at 417 North B Street, heard gunshots and screaming. Looking out her window she saw two people running up B Street. A sensor light went off on a corner house. (5 RT 1126.) Ms. Burciaga saw a little red car run a stop sign, turn south on B Street, then stop and back up, and someone, perhaps the running men, got in the car. (5 RT 1127.)

Ms. Rivera also saw a car which stopped and backed up, then made a U-turn and parked near where the two men were walking. They opened the door and got in. The interior light went on. She saw two other men in the car. The car left normally, as if there was no hurry. (4 RT 1105.)

At 10:14 p.m. on October 7, 1995, Police Corporal Brian Ciapessoni[8] was dispatched to 409 East Central in Madera. (4 RT 912.) On his arrival, he found a car with

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[7] In a statement to police, she described the people she saw as "boys." At trial she explained that this description was meant to refer to their mode of dress. (4 RT 1105.)

the windshield broken out.[9] He spoke briefly to Richard Fitzsimmons, who was walking out of the residence. Inside, he found a deceased male with blood on his face, dressed in a tank top and shorts, lying on the floor of the living room. (4 RT 914.) In the kitchen he found Cindy Durbin, seated at a table and surrounded by three children. She had a bullet wound to the stomach. Also in the kitchen was a male identified as "Archie" (apparently this was Alvin Areizaga). A second deceased male was found head first in a trash can between the stove and the kitchen sink. (4 RT 915.)

At 10:40 p.m. two officers, Bennie Munoz and Damon Wasson, arrived and were assigned to crime scene investigation. They photographed the entire scene, placed crime scene markers, and marked and bagged evidence items. (4 RT 922, 949.)

Officer Munoz testified on cross-examination that he collected three .380 shell casings from the scene. (4 RT 943.) This is inconsistent with his testimony on direct examination, where he identified only one .380 shell casing, which he found in the living room. (Ex. 18, 4 RT 933, 941.)[10] Officer Wasson collected another .380 shell casing, next to Durbin's body. (Ex. 14, 4 RT 955.)

A .380 slug was found next to victim Durbin's head (Ex. 15). (4 RT 928.)

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[8] Ciapessoni was employed as an investigator for the Department of Motor Vehicles at the time of his testimony. (7 RT 1761.) As a Madera police officer in 1995, he was assigned to the investigation of these homicides, and was referred to as "detective" in that role. (7 RT 1762.)

[9] No evidence was submitted as to whose car this was, or what caused the windshield to be broken out.

A .22 slug and a bullet fragment were found underneath Uribe's body. (4 RT 946.)

Fifteen .22 casings were found scattered around the house.[11] Nine .22 casings were found in or near the kitchen. (Ex. 19-25, 30, 31; 4 RT 934-940.) Six .22 casings were found in the living room. (Ex. 10, 11, 12 (on sofas), Ex. 13 (on floor between sofa and coffee table), and Ex. 16 and 17 (on floor next to victim Durbin and under living room chair).) (4 RT 930, 931, 952-954.)

A .38 slug was found on a blanket in front of the entertainment center in the living room. (Ex. 27, 4 RT 958.) Another .38 slug was found outside, in the gutter near a parked vehicle. (Ex. 29, 4 RT 959.)

At the autopsies the following day, five bullets were collected from the body of Chuck Durbin, and three from the body of Juan Uribe. (4 RT 925.)

Rafael Avila's red 1989 Dodge Colt (Ex. 53) was taken to the impound yard of the state Department of Justice in Fresno on November 1, 1995. (8 RT 1919.) Another .380 slug was found during the investigation of that vehicle. The slug was tracked on a path through the back of the front seat, and found in the floorboard. (7 RT 1718.)

Steven Avalos, M.D., a pathologist from Fresno, conducted the autopsies at Jay Chapel in Madera. (4 RT 964.)

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[10] Efforts to settle or correct the record in this respect have been unsuccessful. The criminalist was given two .380 casings collected from the crime scene (Ex. 14, 18). (7 RT 1703, 1712.)

[11] This number does not include Ex. 9, which was submitted to the criminalist and is listed on the exhibit list as a .22 casing, recovered by Officer Munoz (but was not identified in his testimony). The criminalist examined sixteen .22 casings, including Ex. 9.

The body of Chuck Durbin disclosed seven distinct gunshot entrance wounds. Because of the aspiration of blood the smaller wounds to the trunk probably preceeded the larger wounds to the head. (4 RT 976.)

The cause of death was gunshot wounds to the head and trunk. The smaller caliber bullets caused bleeding into the lungs and aspiration of blood. The head wound would have quickly ended respiration. (4 RT 975.) The bullet tracks permit the inference of many possible positions for the shooter and the victim. The victim could have been facing the floor when he was shot, but this was not a necessary conclusion. (4 RT 997, 1003.)

The body of Juan Uribe disclosed six distinct gunshot entrance wounds. All were small caliber. The cause of death was gunshot wounds to the head and chest. (4 RT 986.)

Conflicting reports were made shortly after the murders.

Carmina Garza testified that she had a conversation with Little Pete on October 8, 1995. He told her that "these guys" had shot him. He asked her to check the security tapes at Singh's convenience store, because "they're trying to blame him for it." (7 RT 1815.)

Jesse Candia visited Cindy Durbin at her parents' house (she apparently had been discharged from the hospital after receiving treatment for her gunshot wound). This was either the day after the shooting, or a couple of days later. He was accompanied by his wife and daughter, and perhaps by Juan Uribe's girlfriend, Martha Melgoza. He showed her an array of four photographs, and told her that "these were the people that had killed

Chuck and Juan." She picked out a photograph of Jesse Rangel and identified him as one of the shooters. (Ex. 52; 6 RT 1395-1397, 1413-1419, 1427; see 8 RT 1947.)

Ms. Durbin was interviewed by Detective Fabian Benabente on October 10, 1995. (6 RT 1483.) She gave another statement to Officer Ciapessoni, about two weeks after the shooting. She continued to identify Jesse Rangel as one of the shooters. (Ex. 57; 6 RT 1397, 1437.)

Edora Avila is the step-daughter of appellant. Her husband was Rafael Avila. On the evening of October 7, 1995, Ms. Avila went to a church revival with Brother Teodoro, in a church van. As they returned to Madera late in the evening, she saw Rafael's car "flying by"; she could not tell who was in it. She also saw Romi, driving his Mercedes. There were traffic cones at Central. (5 RT 1197-1199.)

When she arrived at her home Rafael was not there. The closet was a mess; it looked like he had been trying to find something to wear. Edora went to her parents' house at 1034 Wessmith to check on one of her children. Returning to her home, she found that Rafael was still not there, but he arrived some time later. He banged on the door "like a cop." He was acting nervous, pulling his hair. His pants were wet to the knees.[12] He went to the closet, pulled off his pants and shirt, and threw them in the garbage. (5 RT 1200-1204.)

They went to bed, then Little Pete came to the door. Rafael got up, and he and Little Pete argued. Rafael left the house. She has not seen him since, except for one

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[12] The Durbin house is close to the Fresno River.

brief contact. (5 RT 1205-1207.) Rafael's employer testified that he was scheduled to work all days from October 7 to 15. He called in sick on the 9th and the 11th. On the 15th he was granted a leave of absence, to return on the 23rd, but he never returned. (6 RT 1450-1452.)

In October of 1995 appellant's stepdaughter Deanna Ramirez was separated from her husband Juan Ramirez. She was living in her house on Martin Street. Juan came to visit her on an evening in October. They were watching television when appellant came to the house. (6 RT 1467, 1477-1478.)

Deanna was estranged from her family at the time, but appellant spoke to Juan. He told Juan that "they had resolved their problem." He gave Juan a basket containing clothing and bags, and asked Juan to throw it away. Juan testified that when he looked in the bags, he found two guns. Juan later went to the employment office to see about a check, and carried the basket with him. He intended to throw the contents in the San Joaquin River, but there were people there. Instead, he threw the contents in a canal near a vineyard, and later returned the basket to Deanna's house. (6 RT 1470-1472.)

On November 5, 1995, Officers Ciapessoni and Benabente interviewed Juan Ramirez at the Madera Police Department. (7 RT 1762.) He took them to an irrigation canal at the end of Ashlan Avenue near Biola. The canal was dry. Benabente retrieved two guns from the canal bed: a .380 handgun and a .22 rifle. (7 RT 1264, 8 RT 1918.)

A criminalist from the California Department of Justice test fired the .22 rifle. She compared the casing ejection markings with the markings of sixteen casings found at the

crime scene (Ex. 9, 10, 11, 12, 13, 16, 17, 19, 20, 21, 22, 23, 24, 25, 30, and 31). (7 RT 1705.)[13] The sixteen casings were all ejected from the .22 rifle, Ex. 67. (7 RT 1710.)

The .22 slugs recovered from the bodies (five from victim Durbin, three from victim Uribe) could not be positively linked to the recovered rifle. The 16 spirals on the slugs were unusual and consistent with the recovered rifle, but not unique. (7 RT 1701, 1711.) The .22 bullet and bullet fragment found underneath victim Uribe (Ex. 26 and 28) were also consistent with the recovered gun, but could not be positively linked to it. (7 RT 1722.)[14]

The criminalist was provided with two .380 shell casings (Ex. 14, 18) and one .380 slug found at the crime scene near victim Durbin's head (Ex. 15). (7 RT 1703.) She also examined a .380 slug which she recovered from under the front seat of Rafael Avila's car. (7 RT 1718.) She determined that the slugs were fired from the same gun. They were probably fired from the .380 handgun found in the canal, but the identification was not positive. (7 RT 1712, 1715.)[15]

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[13] This is one more than the number of .22 casings reported in the testimony of the crime scene officers. They did not testify to the recovery of Ex. 9. (See footnote 10 above.)

[14] The criminalist stated that these bullets were recovered from under the body of victim Durbin, but she apparently misspoke, since the crime scene investigator testified that they were recovered from under the body of victim Uribe. (4 RT 946.)

[15] The criminalist's testimony does not reflect a comparison of the .380 casings from the crime scene, with each other or with the .380 handgun – found in the canal near Biola – which she test fired.

The criminalist was provided with a box containing a .38 Rossi revolver (Ex. 50 [box]; Ex. 51 [revolver]). (7 RT 1702.)[16] This gun was test fired and the slugs were compared with two slugs recovered from the crime scene (Ex. 27 [bullet found on blanket in victim's house] and 29 [bullet found in gutter outside victims' house]). A positive match was found between both .38 slugs and the suspect revolver. (7 RT 1719.)[17]

The criminalist concluded that the fibers recovered from the neck wound of Chuck Durbin were too long to be carpet fibers. They could be stuffing from a jacket, but no positive identification was attempted. (7 RT 1721.)

Jerry Smith is the "thermo processing supervisor" at FMC in Madera. He supervised appellant for about one year. Mr. Smith was aware of the homicides on Saturday, October 7, 1995. Appellant missed work on Monday the 9th.[18] Smith contacted appellant's wife, and spoke to appellant on the phone one week after his last day at work. Appellant requested an open-ended leave of absence. (In a prior statement to police, Smith said that appellant requested a one-year leave of absence "because of personal family

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[16] The revolver was recovered from the backyard of a house in Fresno. (7 RT 1684; see description below.)

[17] The record is confused with respect to these exhibit numbers. The criminalist testified that Ex. 25 was the bullet found in the gutter. (7 RT 1718.) However, Ex. 25 is a .22 casing found in the kitchen. (4 RT 939.) It is likely that the District Attorney who posed the question misspoke, and meant to say Exhibit 29.

[18] Despite this testimony, the parties stipulated that appellant worked eight hours on October 9th. (6 RT 1465.)

problems.") He never came back to work, and was subsequently terminated by FMC. (6 RT 1454-1458, 1464.)

Richard Diaz was arrested in December of 1995. He was placed in the same jail module with the Rangels (appellant and Little Pete). They both said that they didn't do it, that someone else did it. (5 RT 1285.)[19] In going over the police reports while in custody, Diaz learned that Carmina Garza and Jesse Rangel were both accusing him of the murders. (5 RT 1361.)

Diaz did not give a statement to police initially because, he claimed, he was afraid of Little Pete and Big Pete. However, he also said that Carmina told him about an alibi videotape. She said that Diaz was cut out of it, "and I was going to go down for it along with Jesse and Juan...." (5 RT 1329.)[20] He told Ciapessoni, "That is what I feel like they're going to try to make me go down for this, that's why I'm willing to do whatever you guys want me to do." (5 RT 1331.)

In January of 1996 Diaz gave a statement to Officer Ciapessoni. By that point he had read the police reports and knew the prosecution theory of the case. He was released immediately after giving his statement. (5 RT 1326-1328.)

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[19] In light of Diaz' testimony that he was with the defendants when the crimes occurred, it is unclear why they would tell him that they were not responsible.

[20] This quote presumably refers to appellant's nephew Jesse Rangel, and perhaps to Juan Ramirez, appellant's son-in-law, who played an accessory role in disposing of the weapons.

Under his agreement with the prosecution, Diaz pled guilty to accessory. A copy of the plea agreement was entered into evidence (Ex. 49). (5 RT 1285-1286.) According to Diaz' testimony at the preliminary hearing, he was hoping for probation as a result of his testimony, but he had not yet been sentenced at the time of his testimony at trial. (5 RT 1326, 1336.)

Under the version of events presented under Diaz' plea agreement, after leaving the barbecue at the Wessmith house, they drove to Juan Uribe's house, but did not see his car there. Appellant wanted to know where Chris Castaneda lived. Diaz directed Rafael Avila, who was driving, to Central, then towards Gateway, but by happenstance they saw Uribe's car parked across the street from the Durbin house on East Central. Diaz testified that he did not know the Durbins. (5 RT 1267-1268; see summary at page 14 above.)

They drove past the Durbin house and turned on to a side street. Little Pete told Rafael to stop, and Little Pete got out carrying the .22 rifle. Diaz and appellant also got out. Appellant was carrying a .380 automatic handgun that Little Pete had been holding earlier. (5 RT 1271.) As Avila drove away, Little Pete ran straight to the Durbin house. Diaz walked across the street and stood next to a telephone pole. Appellant followed, but Diaz had to help him because he tripped and fell. As he got up, appellant asked where Little Pete was, then ran toward the Durbin house. (5 RT 1269-1270.)

Diaz claimed to be close enough to see Little Pete and Big Pete enter the house, however he claimed that he remained outside. Little Pete opened the screen door and walked in. Diaz heard Little Pete ask for Juan Uribe, and saw people running around in the house. (5 RT 1272.)

Diaz saw a person he assumed to be Chuck Durbin (he did not know Durbin) run through the living room. He saw appellant grab Durbin, put the gun to his chest, and shoot him. Diaz acknowledged that he had never told an interviewer that he saw appellant shoot Durbin, and his testimony was the first time he made that claim. (5 RT 1273, 1348.)

After those shots, Diaz, who was still standing in front of the Durbin house, fired twice at the house. He saw small shadows running around in the front room. He claimed that he fired seven feet high, "[j]ust to get them out of the house." (5 RT 1274.) Big Pete ran from the house, followed by Little Pete. Rafael was driving by, and Diaz stopped him near the corner. (5 RT 1276.)

As they drove off, Little Pete said that "he had got Juan Uribe," and thought that he had killed him. (5 RT 1277.) Appellant said that "he shot that guy because he thought he was running to get a gun." As appellant was trying to unload his gun it went off twice, into the floor of the car. (5 RT 1278.) Diaz identified a photograph of Rafael Avila's .380 (Ex. 53). (5 RT 1291.)

They drove back to the Wessmith house. Little Pete said that Diaz did not see him that night, and Diaz agreed. Diaz also had a conversation with Romi and Tino Alvarez. He then got in his car and left. (5 RT 1280-1283.)

Diaz was with Little Pete again about five days later: Romi and appellant were also present. Little Pete talked about his alibi. He said that they made a video to show them working at the 7-11 the night of the shooting. (5 RT 1283-1284.)

Diaz identified a gun which he first testified was identical to his .38, and which had been linked to the crime scene by the testimony of the criminalist (Ex. 51). (5 RT 1290.) However, on cross-examination he testified that Exhibit 51 was not his gun, that his had a longer barrel. (5 RT 1351.) Diaz could not say why he did not get rid of his gun immediately after the shooting. He first said that he did not think he had done anything wrong. He then switched his testimony, and testified that he felt that he did do something wrong. (5 RT 1354, 1357.)

At the time of the shootings, Jesse Rangel lived in Fresno with his wife Erica and their four children. Appellant is his uncle, but Jesse looked to appellant as a father figure for most of his life; Little Pete was more of a brother to him. (6 RT 1488.) Jesse claimed that he was invited to the barbecue on October 7, 1995, but did not go. He remained in Fresno that day and evening, and did not go to Madera. (6 RT 1489.) He denied any involvement in the shootings. (6 RT 1556.)

That evening Jesse borrowed his mother's car and used it to do grocery shopping with Erica and the kids at Foodland near his house in Fresno. After shopping, he returned the car to his mother. (6 RT 1490.)

Jesse's wife Erica testified that they lived in an upstairs apartment on Fairmont Street in Fresno. (6 RT 1586.) On October 7, 1995, at 8:30 p.m., Jesse walked to his mother's house to borrow her car. (6 RT 1604.) At about 9:00 p.m., they went shopping at Foodland. They shopped until close to closing time; the store announcer warned that

the store was closing. (6 RT 1587-1588.) They returned home and unloaded the groceries. Jesse returned his mother's car and walked home. (6 RT 1589.)

Jesse's mother Diane Salas lived one block from Jesse and his wife. She testified that on October 7, 1995, Jesse came by with Erica and the kids to borrow her car. He returned alone later that evening, and stayed about one-half hour talking. Ms. Salas' fiancé was there both times Jesse came by. (7 RT 1734-1735.)

Later that evening, according to Jesse, he received a call from Little Pete, who said that he "got Juan." Jesse told Erica what was going on. (6 RT 1491, 1590, 1602.)

Jesse went to sleep. Later that evening he got a call from Little Pete. Little Pete was drunk and laughing, and said that "he had killed Juan." Little Pete said that he, Big Pete, Richard, and Rafael were involved. In the same phone call Jesse spoke to appellant, who said that he "put those motherfuckers on ice." (6 RT 1492.) Jesse claimed that he was "shocked" by appellant's "on ice" statement; he had never heard violence on appellant's part in the past. (6 RT 1525.) On cross-examination he admitted that he failed to mention appellant's "on ice" statement during his interview by police. (6 RT 1535.)

Erica's father called Jesse and told him that they thought that Jesse had done it, and "for me to watch my back." (6 RT 1494.)[21] Although Jesse denied that he thought that he was a suspect, he admitted that he did not go to the police for protection. (6 RT 1531.)

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[21] The comment of Jesse's father-in-law was introduced only for Jesse's state of mind, and not for the truth of the matter stated.

According to stipulation, appellant worked eight hours at FMC on Monday, October 9, 1995, and did not come to work thereafter. (6 RT 1465.)

The day after the shooting Jesse called Little Pete at the Wessmith house. Jesse said that he had been getting threats, that people thought that he was the one who killed Juan Uribe. Little Pete hung up and called Jesse back. Jesse accused Little Pete of causing everyone to think that he was responsible, and told Little Pete to pick him up in Fresno. (6 RT 1495.)

After about an hour Rafael Avila picked up Jesse and Erica and the kids and drove them to the Wessmith house in Madera. Big Pete was acting "paranoid" because of strange cars driving by the house. He took Jesse to pick Little Pete up from work at Oberti's Olives, then to Little Pete's apartment. From there the three drove to the house of appellant's brother, Frank Rangel ("Big Frank") in Fresno. (6 RT 1496-1498.)

Erica also arrived at Big Frank's house, but soon went to "Dora's" house, where she stayed for a few days. (6 RT 1593.)

Appellant's brother Frank lived at 633 West Fountain Way in Fresno. Frank's son Frank Jr. (or "Little Frank") lived there in October of 1995. (7 RT 1635.) Big Frank had had three or four visits from appellant in the previous two or three years. He had not seen his nephew Jesse in years. (7 RT 1636.)

They arrived late in the afternoon. Frank did not have enough room in the house, so he pitched a tent in the backyard. They stayed in the backyard two nights.

According to Big Frank, appellant told him that "somebody was after his son." He said that Little Pete had been shot at and injured several weeks earlier. He said that he needed a place to stay "to get his senses together," and decide what to do. (7 RT 1638.) Appellant did not say that he was responsible for the shootings. (7 RT 1642.)

Frank Rangel, Jr., testified that he was surprised when appellant, Little Pete, and Jesse arrived at their house. At some point appellant said that people from Madera wanted to kill Little Pete, "so he was running, hiding my cousin." (7 RT 1646.)

Frank Jr. had been injured in a work accident the previous June. He was taking pain medication including Naproxen and Vicodin, and Dilantin for seizures. At the time of appellant's visit he was also binge drinking and abusing methamphetamine. His girlfriend helps to take care of him. (7 RT 1672-1675, 1678.) He was never sure of what appellant told him during the visit. (7 RT 1675.) He was later threatened with prosecution as an accessory. (7 RT 1680.)

Over a denial by Frank Jr. (and objection by defense counsel) the prosecutor read into the record a report by Investigator Benabente, that appellant told Frank Jr. that they "retaliated," and "[t]hey went to this house and started shooting." (7 RT 1650.) According to the Benabente report, "They went to this house and started shooting," and "they retaliated, they went to this house and they fucken shot the house up." He did not say that any person was shot. (7 RT 1654; Ex. 88 at 2 ACT 385-386.)

At some point in their stay, appellant handed Little Frank a handgun, and said "hold this for me." (7 RT 1655.)

According to Jesse Rangel, appellant told Big Frank that "him and little Pete had went and done a shooting." However, people on the street were blaming Jesse for it, so he could not be alone. Jesse slept that night in a tent in Frank's backyard. (6 RT 1499-1500.)

Jesse Rangel claimed that during their stay at Big Frank's, Little Pete provided more details. When Rafael dropped him off, Little Pete went to the victims' house, opened the door, and went in looking for Juan. In the account repeated in Jesse's testimony, Richard stayed outside. However, in his statement to Officer Ciapessoni, and in his testimony at the preliminary hearing, Jesse claimed that Little Pete said that all three went in the house. (6 RT 1548, 1549.)

In the statement attributed to Little Pete, Little Pete found Juan Uribe and shot him. Chuck Durbin came out "from the side," and appellant, who had stayed by the front door, "shot him in the head." Juan was wounded and ran to the kitchen, where Little Pete "just unloaded the rest of his bullets on him." (6 RT 1501.)

In this account, Little Pete had a .22 rifle, appellant had a .380, and Richard Diaz had a .38. (6 RT 1501.) Little Pete said that appellant gave the guns to Little Pete's sister's husband, to ditch them. (6 RT 1502.) Little Pete said that they burned their clothing in a pit in the backyard. (6 RT 1538.)

Little Frank testified that he kept the gun given to him by appellant in the house. Eventually he put it outside. (7 RT 1668.) (In a prior statement to Benabente on October 14, 1995, Little Frank said that he saw appellant hiding a gun in tires in the backyard. (7 RT 1671.)) When Big Frank determined that his son had a gun, he had him report it. (7

RT 1640.) In December of 1995, Benabente went to Frank Rangel's house. Frank Jr. pointed to a pile of tires, where Benabente retrieved a white bag containing a .38 revolver (Ex. 51). (7 RT 1684.)

From Frank's house, appellant, his son, and Jesse moved to a series of motels. (6 RT 1517, 1593-1594.) Motel receipts indicated that "Pete Rangel" stayed at the Economy Inn on Shaw Avenue from October 13 to October 16, 1995 (Ex. 69). (7 RT 1758.) "Pete Rangel Jr." stayed at the Days Inn on North Parkway in Fresno from October 15 to October 17, 1995 (Ex. 87). (8 RT 1919.) "Pete Rangel" stayed at the Days Inn from October 20 to October 21, 1995 (Ex. 87). (See also Ex. 83: Starlight Inn.) (11 CT 2375.)

Jesse Rangel testified that, after several days sleeping in a tent in Big Frank's backyard, he, Little Pete, and Big Pete went to a motel off Jensen in Fresno, where they stayed one day. From there they split up. Appellant's wife Mary took Jesse to the Starlight Motel off Highway 99. Jesse stayed with Erica and the kids; Mary had her own room. Mary told Jesse that he need to leave town, and cut his hair and shave his moustache. (6 RT 1517.)

Erica testified that she moved from Dora's to the Starlight Inn Motel. After a couple of days Erica and Jesse moved to a white motel on Jensen, while the children stayed at the Starlight with Mary's relatives Yolanda and Roy. (6 RT 1593-1594.)[22]

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[22] Jesse did not describe a stay with Erica at motel on Jensen, following the stay at the Starlight.

Erica described a statement made by appellant's wife Mary at the Starlight Inn, and attributed to appellant as an adoptive admission. Erica testified that she visited a room at the Starlight where appellant and Little Pete were staying. Jesse was also present, seated on the bed next to appellant. (6 RT 1610.)[23] Mary said to appellant, "You're a murderer. And now my son is one, too." Erica did not hear any response from appellant. (6 RT 1595.)

Jesse testified that he went to his mother's house for one day. Mary provided him with a couple hundred dollars and her car.[24] Jesse drove with his family to Santa Maria to pick up Erica's cousin Humberto. (6 RT 1504-1505, 1518.)

From Santa Maria they drove to New Mexico. They stayed in a motel for a few days, then with Humberto's girlfriend. (6 RT 1519.)

During that stay Erica spoke to her father, then to Officer Ciapessoni. (6 RT 1598.) She put Ciapessoni on the phone with Jesse. Ciapessoni said they could work something out. Ciapessoni said that Jesse was a "tool," and that Jesse could help himself. At the preliminary hearing Jesse testified that Ciapessoni told him that he was trying to get him "out of this mess." (6 RT 1531, 1547, 1552.) Jesse told Ciapessoni that Little Pete, Big Pete, Rafael, and Richard were involved. Then Jesse was arrested by Investiga-

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[23] This account does not appear in the testimony of Jesse Rangel himself.

[24] The trial court instructed the jury, following a defense objection, that evidence of Mary's arrangements for Jesse Rangel's flight from Madera was introduced for a non-hearsay purpose, the state of mind of Jesse Rangel. (6 RT 1517.)

tor Benabente, who arrived at the door with New Mexico police. (6 RT 1520, 1598 [testimony of Erica].)

As soon as Jesse told authorities that he wanted to "clear his name," Madera County paid for airline tickets, and he and his family flew back to California. (6 RT 1550.)

According to Jesse Rangel's testimony, during the stay in Frank's backyard Little Pete said that he and appellant made a videotape for an alibi. Romi was supposed to switch the dates on the videotape so it looked like they were mopping up Romi's store at the time of the shooting. (6 RT 1503.)

Robert Williams testified that as of October, 1995, he had worked at Romi Singh's Express Mini Mart at Lake and Cleveland in Madera for 1 ½ years. (7 RT 1739.) Williams worked seven days a week, from 3 p.m. to 11 p.m. on weekdays, and from 3 p.m. to 1:00 or 1:45 on Fridays and Saturdays. (7 RT 1740.) Williams commonly restocked the cooler and ice machine and mopped the floor at closing. Carmina Garza often worked with him, and Romi would occasionally help him. Big Pete and Little Pete occasionally came in to buy something, but they never helped him work. (7 RT 1742-1743.)

On October 7, 1995, a Saturday, Williams worked from 3 p.m. to 1 a.m. The following day (October 8th) he went on a ride-along with the Madera County Sheriff's Explorers. (7 RT 1745.) His time card was introduced into evidence (Ex. 47). (7 RT 1747.)

Carmina Garza testified that she was a partner with Romi in the Express Mini Mart. She paid the vendors, worked the register, and hired and fired employees. She

worked two or three shifts per week and regularly opened the store, but never closed the store. (7 RT 1791.) She testified that Robert Williams worked three days per week. (7 RT 1794.)

At the time of her testimony Carmina had charges pending with respect to her role in this case. (7 RT 1904.) She testified that she had been recently injured in an auto accident. She was on various medications, and still felt dizzy. (7 RT 1901.)

The store had three security cameras, positioned to catch people stealing and to monitor employees. The tapes ran from 5 p.m. Carmina kept some tapes that had something significant. Others were reused and taped over. (7 RT 1795, 1799, 1801.)

On October 8, 1995, Little Pete asked her to check the tapes at the store. (7 RT 1891.) She found one that showed appellant and Little Pete, and Danny Escobar (an employee), Jimmy Singh, and Romi. Little Pete was helping out like he always did. It was not unusual for him to help out even though he was not an employee. Carmina saved the videotape. (7 RT 1815.) In November of 1995 she spoke to Officer Ciapessoni. At his request she went to the store and retrieved the videotape. (7 RT 1799, 1833.)

The videotape (Ex. 71A) was played in open court, but it was not admitted into evidence. (7 RT 1823, 1835.) On the tape, Danny Escobar left and was replaced by Jimmy; this was a shift change. The clock on the wall indicated 9:37. At 9:39 Romi walked into the store. At 9:45 Little Pete walked in, followed by Big Pete. Little Pete mopped the floor while Big Pete and Romi watched. The clock indicated 10:15. (7 RT 1825-

1826.)[25] Mopping the floor was a chore performed five times a day, not just at closing. (7 RT 1879.)

The parties stipulated as follows: "In the videotape marked as Exhibit 71-A, the store is closed for the day. Approximately 50 minutes after the person's identified by Carmina Garza as her father Pedro Rangel, Jr., and her brother Pedro Rangel the III leave the store." (8 RT 1905.)

Carmina Garza questioned whether the identified tape was the same one that she found when Little Pete asked her to review the tapes. Romi was by himself in the tape that she reviewed; she speculated that Romi may have replaced it with another tape, because "Romi is sneaky." (7 RT 1834, 1879, 1902.)

Romi Singh was a reluctant witness; he was arrested prior to trial when he announced that he was moving to India, and he was facing charges, with Carmina Garza, with respect to his role in this case. (7RT 1859, 1864, 1868.) Although he and Carmina had plans to marry, he was already married to someone else, and had children. (7 RT 1863.)

Romi gave the videotape dated 10-7-95 (Ex. 71A), as well as another dated 10-8-95 (Ex. 70A), to Officer Ciapessoni on November 16, 1995. (7 RT 1846.) He retrieved the tapes from a safe at the store. He told Ciapessoni that he got the tapes from appellant, but this was not true. (7 RT 1856.) When he was arrested he changed his statement and

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[25] These times corresponded with the shootings on East Central; if the tape was recorded on October 7, 1995, the persons on the tape would necessarily have a convincing alibi.

said that Carmina had provided the tapes. He then participated in a pretext phone call with Carmina, to obtain a statement that could be used against her (the contents of that pretext call were not introduced in evidence). (7 RT 1871.)

Romi acknowledged that the store closed at 1:00 a.m. on Saturdays. According to his time sheet, Robert Williams, who did not appear on the tape, worked the night of October 7, 1995. (7 RT 1851.)

On October 31, 1995, after Jesse Rangel's return from New Mexico, he participated in a recorded pretext phone call with Carmina Garza. Jesse commented to Carmina that Richard Diaz was "acting like nothing even happened." Diaz seemed to think that he was on the videotape with Big Pete and Little Pete. (8 RT 1912.) Carmina said, "sorry, Richard, you are not. You thought you were but you are not no more." She laughed, and said, "if only he knew." (7 RT 1899; 8 RT 1913.)[26]

Motel receipts, introduced by stipulation, indicated that "Pete Rangel" stayed at an Economy Inn on Coolwater Lane in Barstow, California, from November 16 to November 17, 1995 (Ex. 85, 86). "Pete Rangel" stayed at a Motel Six in Phoenix, Arizona, from November 17 to November 18, 1995 (Ex. 84). (11 CT 2375; 8 RT 1919; see 2 ACT 455.)

On November 20, 1995, appellant was interviewed by Detective Ciapessoni at the Madera Police Department, in the presence of his then-attorney Rudy Petilla. (7 RT 1768.) The interview was tape recorded (Ex. 72 and 73). The redacted tape recordings

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[26] It is unclear from the record why Richard Diaz would think that he was on the alibi tape. He did not testify that he participated in a staged videotaping. He did not say that he was at the Express Mini Mart at the time of the shooting or any other time.

were played to the jury (8 RT 1906), and a redacted transcript was provided to the jury (Ex. 89, identified at 11 CT 2375 and 8 RT 1920, and reproduced at 2 ACT 387-455).

Appellant explained that he had to leave his job with FMC because his son had been shot. He heard that someone was trying to hurt his son, and he had to be with him 24 hours a day. (2 ACT 390.) He felt that they needed to "get the hell out of this place," because "it's getting pretty violent around here." They had not made a long-range plan of where to go. (2 ACT 407.)

Appellant described the barbecue at his house on the evening of October 7, 1995. He recalled that Rafael Avila came to the barbecue to drop off their baby, then he left. (2 ACT 426.) In appellant's opinion Rafael may have wanted to retaliate for the shooting of Little Pete. (2 ACT 454.)

Just prior to the interview, Detective Ciapessoni showed appellant the alibi videotape from the Express Mini-Mart. (7 RT 1918.) Appellant stated that the videotape seemed to represent the scene at the Mini-Mart while he and his son were there. (2 ACT 453.)

Appellant and Little Pete left the barbecue together and drove to Romi's Mini-Mart to pick up sodas and other supplies. Romi was already at the Mini-Mart. He asked appellant to move some stuff around; Little Pete did it. As indicated on the videotape, they were at the Mini-Mart for about 35 to 40 minutes, from some time before 10:00 p.m. to some time after 10:00 p.m. (2 ACT 429-430.) Appellant stated that he would be surprised to learn that the videotape was recorded on the 8th rather than the 7th of October. (2 ACT 445.)

Initially appellant could not place the name Richard Diaz. (2 ACT 436.) Then he remembered seeing Diaz at the house two or three weeks earlier. (2 ACT 448.)

Appellant recalled seeing guns at the home of Juan and Deanna [Ramirez]. (2 ACT 438.) Juan left the guns in appellant's garage, and appellant returned them. He confirmed that they belonged to Juan. (2 ACT 439, 453.) Since he handled the guns when he returned them to Juan, appellant surmised that his fingerprints might be on them. (2 ACT 442.) (It was stipulated that appellant's fingerprints were not actually found on any of the weapons. (8 RT 1907.))

Appellant denied that he or his son committed "some kind of crime," or that he had anything to do with the murders. (2 ACT 447, 448.)

Cindy Durbin began by identifying a photograph of Jesse Rangel as one of the assailants (see above). She estimated the age of both of the assailants at 20 to 21. At the preliminary hearing[27] she said that she could not estimate their ages. (6 RT 1406.) The shorter assailant was about her own height. She told Ciapessoni that the other assailant (not Jesse) was a head taller. (6 RT 1402-1406.)

Ms. Durbin was in court with appellant, who was a charged defendant, at the preliminary hearing. District Attorney LiCalsi told her "that the people that she was going to see in court did not comprise anyone that she had picked out." (6 RT 1422 [stipulation].) She identified appellant at that time as the taller of the assailants. (6 RT 1401.) At trial

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[27] The Reporter's Transcript of testimony to the jury does not contain a date for the preliminary hearing. The Clerk's Transcript indicates the date of the preliminary hearing as July 18, 1996. (4 CT 812.)

she identified appellant as one of the perpetrators, "I would say 80 to 90 percent sure." (6 RT 1391.)

Defense Case

Detective Ciapessoni interviewed Richard Diaz on January 6, 1996. Diaz insisted that he was not armed during the confrontation between Little Pete and Juan Uribe after the baptism party. Even though Ciapessoni was skeptical, Diaz said that none of his group had guns. They were not afraid to confront Uribe without guns. (8 RT 1969, 1982.)[28]

Appellant's father-in-law Jose Enriquez was in ill health in the period prior to the trial. He was subject to a conditional examination, held at his home on March 27, 1998. The conditional examination was videotaped and played to the jury. (8 RT 2075.) It was also transcribed, and the transcription was entered into evidence (Ex. 92A). (2 ACT 456-516.)

Mr. Enriquez testified that he was at appellant's house on Wessmith when he heard that Little Pete (whom he called "Boobie") had been shot. Mr. Enriquez was outside the house when Jesse Rangel (whom he called "Chewy") arrived. (2 ACT 467.)

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[28] At trial during the People's case Diaz testified that he had been carrying his .38 earlier in the evening, but he claimed that he was not carrying it with him when he and Little Pete drove by the Women's Center. (5 RT 1295-1297.) During the confrontation between Little Pete and Juan Uribe later that night, Diaz testified that his gun was underneath the seat of his car, but he claimed that he did not take it out. (5 RT 1299.)

During that confrontation Martha Melgoza saw Diaz holding a gun, tapping it on the front passenger seat; in a prior statement she said that his hand was outside the car, holding a gun. (4 RT 1028, 1030.)

Jesse told Mr. Enriquez, "Don't worry, Tio. I'm going to take care of everything." Then he pulled out a gun. Mr. Enriquez was afraid of guns, and left shortly thereafter. (2 ACT 468.) Mr. Enriquez could not describe the gun. (2 ACT 472.)

In addition, it was stipulated that defense investigator Micki Hitchcock interviewed Mr. Enriquez in June of 1996. He told her that Jesse Rangel had displayed a handgun, just as he indicated in the videotaped conditional examination. (8 RT 2084.)

Florentino Alvarez testified regarding the incident in which Jesse Rangel shot at Juan Uribe's car shortly after Little Pete was shot in the head. Alvarez testified that he was in the car with Jesse Rangel, as well as Damian Allatorre and Valentine Padilla (Alvarez' cousin, also known as "Bingo"). Jesse was the only one of that group who shot at Uribe's car. (8 RT 1985.)[29] Jesse used a 9mm handgun, which was placed back in the glove compartment. Mr. Alvarez acknowledged that he told Investigator Benabente that he shot the gun a few times. (8 RT 1991.) He clarified that he took the 9mm out of the glove compartment and fired it twice in the air. (8 RT 1994.)

Alvarez testified that he never told anyone that Richard Diaz told him that on the night of Juan Uribe's death Rafael Avila, with Jesse Rangel and Juan Ramirez, drove around casing Uribe's house for two hours. He denied saying that Diaz told him that the shooters were Jesse Rangel and Juan Ramirez. (8 RT 1988.)[30]

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[29] In his testimony Jesse Rangel claimed that both he and Tino Alvarez shot at Uribe's car. (4 RT 1086, 1100.)

[30] In his testimony in the People's case, Richard Diaz did not remember making this statement to Tino Alvarez. (5 RT 1337.)

However, Detective Ciapessoni interviewed Alvarez in the county jail on November 20, 1995. At that time, according to Ciapessoni, Alvarez said that Richard Diaz had spoken to him earlier that month. Diaz told Alvarez that they cruised around two hours before the shootings. The left rear passenger got angry and discharged his weapon. They found Uribe, but lost him in the area of the Snow White drive-in. After two hours they located Uribe again, and shot him and Chuck Durbin. The shooters were Jesse Rangel and Juan Ramirez. (8 RT 1996-1997, 1998.)

Christina Bowles regards appellant as her father, based on his role in raising her. (8 RT 2095.) She testified that she had contact with Jesse Rangel and Richard Diaz on October 6, 1995, the day before the murders. She left her house that day to look for Richard, "to buy a dime of crank." (8 RT 2086.)

She saw the two driving a Jeep that belonged to her aunt. They gave her a ride to a friend's house. She saw a gun under the driver's seat and asked Jesse if it was real. He said it was, then he said that they were going to "Go get even" with Juan. (8 RT 2088.)

Brian Ciapessoni interviewed Richard Diaz in the presence of his attorney on January 6, 1996. They discussed a tentative agreement in exchange for his testimony, to include no time in custody. (8 RT 1967.) Diaz said that he saw both guns – the .22 and the

.380 – taken from the back of Big Pete's truck on the night of the barbecue. (8 RT 1972.)[31]

Further evidence was introduced concerning Cindy Durbin's in-court testimony identifying appellant and his son as the assailants.

Madera Police Officer Kenneth Alley arrived at the murder scene as Ms. Durbin was being wheeled from the house on a gurney. She was coherent but in obvious pain. She told Officer Alley that she was in the kitchen, and her three children were asleep in the living room. She heard Juan Uribe yell from the front of the house. Her husband went into the living room, and she heard gunshots. (8 RT 1925-1926.) Juan stepped in front of her, and the next thing she remembered, Juan was on top of her. She did not say that she was in the living room during the assault, though she was not specifically asked that question. (8 RT 1927.)[32]

Detective Ciapessoni interviewed Cindy Durbin at the police department on October 21, 1995, two weeks after the shootings. At that time she stated that she could not remember the face of the taller of the shooters (who she later identified as appellant). She got a good look at the shorter assailant (who she identified as Jesse Rangel at that point in the investigation). Both were "kids," aged 20 or 21. She was age 32 at the time,

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[31] In his testimony Richard Diaz said that he saw Little Pete take the .22 from appellant's truck. (5 RT 1265-1266.) He testified that the .380 belonged to Rafael Avila. (5 RT 1291.)

[32] In her testimony in the People's case, Ms. Durbin testified that she was in the living room, and identified the defendants based on her observations there. (6 RT 1379.)

and she estimated the assailants as ten to twelve years younger than she. (8 RT 1931-1935.)

Ciapessoni also questioned Ms. Durbin about her contact with Jesse Candia on October 8, 1995. (8 RT 1936.) She told him that Candia tried to get her to provide an identification by suggesting names. (8 RT 1939.) Ciapessoni showed her a six-pack photo lineup (Ex. 52) which included Jesse Rangel in the number four slot, in the lower left-hand corner. (8 RT 1940.) She said that she had identified this person to Jesse Candia, as one of the persons responsible for the death of her husband (Ex. 57). She also picked Jesse Rangel's photo out of Exhibit 52; "she was positive." (8 RT 1947.) Ms. Durbin was never shown a photo line-up with appellant's picture in it. (8 RT 1939, 1980.)

In Detective Ciapessoni's opinion, Jesse Rangel and Little Pete look a lot alike. (8 RT 1979.)

Richard Fitzsimmons was called to testify as a defense witness; he did not testify in the prosecution case. He was present when Chuck Durbin was killed. Just prior to the shooting, Fitzsimmons was standing in the kitchen by the back door. Cindy Durbin was sitting or standing in the kitchen. (8 RT 2000.) He heard a yelp, looked up, and saw two young Hispanic males standing at the screen door. They were both in their early twenties, not over 30, dressed in dark clothes without hoods or hats. The only light in the living room was from the television. (8 RT 2007, 2031.)

Fitzsimmons heard eight or nine shots in rapid succession. He followed Alvin Areizaga into the bedroom. (8 RT 2001, 2003.)

Fitzsimmons used methamphetamine that evening at the Durbin residence, about ten or fifteen minutes before the shooting, and drank one beer. (8 RT 2032, 2035.) Fabian Benabente interviewed Fitzsimmons at the police department the night of the shootings. Fitzsimmons was coherent, though he appeared to have been drinking. (8 RT 2072.) Fitzsimmons told Benabente that both assailants were young. (8 RT 2034.)

Fitzsimmons denied telling Ciapessoni that he arrived at the Durbin residence after the shooting; indeed a photograph was introduced showing the bullet wound to Fitzsimmons' leg suffered during the attack (Ex. 90). (8 RT 2037-2038.)

The defense introduced further evidence concerning the alibi of Jesse Rangel.

Diane Salas was called as a defense witness. She denied that she tried to fabricate an alibi for her son. She could not remember telling Ciapessoni that she heard about the Durbin shooting on the news on Sunday evening, the day after it occurred. (8 RT 2040.)[33] She remembered turning to her fiancé and saying, "thank God Chuy was here with us." (8 RT 2041.)

Ms. Salas tried to explain why she did not bring her son in for questioning after the shootings. She claimed that she did not trust Benabente. Mary Rangel supposedly told her that "Benabente was on their payroll." Benabente was an informant for the Rangels, according to Ms. Salas, and he let them know about the investigation. (8 RT 2048.) She also testified that he was rude to her, so she was not comfortable speaking to him.

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[33] Testifying earlier in the People's case, Ms. Salas stated that she learned of the shootings on television the night they occurred. She denied telling Ciapessoni that she learned of them the following day. (7 RT 1737.)

She denied a statement from Benabente's report that she did not bring in Jesse because "it wasn't in his best interest." (8 RT 2047, 2052.)

She first spoke to her brother, who was also a police officer. (8 RT 2050.) Ultimately she spoke to another officer and told him where Jesse was hiding. (8 RT 2048.) She insisted that she did not know that Jesse was considered a suspect in the shootings. (8 RT 2052.)

Detective Ciapessoni testified that he spoke to Diana Salas on October 26, 1995, after Jesse was picked up in New Mexico. She said that she first heard about the shootings on television news on Sunday, the day after the shootings. (8 RT 2060.) She said that her son told her shortly after the shootings that he was a suspect and asked for help, and she did help him. They had an appointment to speak to Benabente, but she chose not to follow through with the appointment. (8 RT 2058.)

Detective Ciapessoni confirmed that he had telephone contact with Erica Bautista shortly before officers arrived at their hiding place in New Mexico. In the transcript of the recorded conversation, Erica stated that "the authorities did believe that Jesse was involved." (8 RT 1955.)[34]

People's Rebuttal

Fabian Benabente testified that he spoke to Tino Alvarez two weeks earlier, in the presence of District Attorney Ernest LiCalsi. Alvarez said that during the drive-by of

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[34] In her testimony in the People's case, Erica stated that she did not remember saying that police may have considered Jesse a suspect during their flight to New Mexico. (6 RT 1598, 1600.)

Juan Uribe's house, he grabbed a gun out of Jesse's hand and also fired it, consistent with Jesse Rangel's testimony in the People's case. (8 RT 2102.)

Jesse Rangel testified that he did not see Jose Enriquez around the time of the shootings. He denied displaying a gun in the presence of Enriquez, and denied saying, "Don't worry, Tio, I'll take care of everything." (8 RT 2110.) He also denied driving around Madera the day before the shootings, and claimed that he did not give a ride to Christina Bowles as described in her testimony. (8 RT 2111.)

Romi Singh testified that he did not see Jesse Rangel at the barbecue at appellant's house on October 7, 1995. He saw Richard Diaz in front of the house, not at the barbecue itself. (8 RT 2107.) He did not hear anyone say, "Let's go get Juan," or "Nobody is going to get away with shooting my son." (8 RT 2108.)

Detective Ciapessoni testified that he was the first officer on the scene, and Richard Fitzsimmons told him that he arrived after the shooting. (8 RT 2006.)[35]

Deanna Ramirez testified that she has never known her husband to possess guns, although she acknowledged that they were separated at the time of the shootings. (8 RT 2100.)

Fabian Benabente remembered speaking to Diana Salas in November of 1995. He denied that he was rude to her; he thought that she was rude to him. (8 RT 2106.) He witnessed a confrontation outside the courtroom between the Rangel and Diaz families.

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[35] This despite the photograph showing a gunshot wound to Fitzsimmons' leg. Fitzsimmons was named as a victim of an attempted murder (Count III), a charge which was dropped only on September 8, 1995, just before the presentation of evidence. (11 CT 2354.)

but he denied that he had any role in the confrontation between the two groups. (8 RT 2105.)

Defense Surrebuttal

Defense investigator Micki Hitchcock testified that during the preliminary hearing she saw Benabente seated in the hallway with Martha Melgoza during the family confrontation, as described in the testimony of Christina Bowles. (8 RT 2113; see 8 RT 2098.)

PENALTY PHASE

The prosecution introduced additional evidence regarding the circumstances of the offense and its immediate aftermath.

The Durbins' six-year-old daughter Natasha spoke to Officer Ciapessoni at the scene, and later to her grandmother. She said that she awoke to see two men in the kitchen. They said, "Juan, you disappointed us," and called him a "traitor." Daddy said to run and hide; she pulled the covers over the other kids. She heard shots fired, and the two men left the residence. She thought that she could identify them. (10 RT 2389, 2431, 2439.)

Cindy Durbin described the shootings again from her perspective. She testified that she went into the living room before the incident, and found that the girls were asleep and Brett was awake. She saw two individuals who raised guns and started firing. (10 RT 2425.) Back in the kitchen, Chuck said that they were real bullets. Chuck said to hide,

and he ran into the living room. As she dove under the counter she felt two burning sensations. She grabbed them so she would not bleed to death. Juan was on top of her. When he did not respond, she realized he was dead. She crawled out and screamed for the kids. (10 RT 2426-2427.)

She found Savanna sitting next to her father. Cindy herded the kids into the bedroom. She went back and told Chuck that she loved him. He raised his hands and tried to talk. (10 RT 2428.)

Cindy screamed at Alvin to call 911. The ambulance driver told her that her husband was dead. She called Ginger Colwell, Chuck's mother, and told her what had happened. (10 RT 2429.)

Several relatives responded to Durbins' house, where they were told that Chuck was dead. (10 RT 2384 [Maria Sanchez (Guzman), Juan Uribe's mother]; 10 RT 2393 [Randy Durbin]; 10 RT 2435 [Ginger Colwell]; 10 RT 2406 [Martha Melgoza].)

The prosecution introduced evidence of the impact of the deaths on the victims' families.

Juan Uribe's mother testified that she now lives in Tennessee with her three daughters and Martha Melgoza. All of Uribe's sisters went through counseling after his death. (10 RT 2381, 2387.)

Martha Melgoza testified that Juan Uribe's daughter cries and says that she misses her dad. She thinks that she sees him everywhere they go. (10 RT 2408.)

Chuck Durbin's son Brett told his mother that he is still looking for Chuck; he told his grandmother something similar. (10 RT 2430, 2439.) Brett is slightly autistic, which Cindy attributed to the effects of the shooting. (10 RT 2431.) The Durbin family have all been in counseling. (10 RT 2431.)

Cindy Durbin has gotten married again, and recently had a baby. She still wakes up crying, and her husband is unable to make her feel better. (10 RT 2432.)

Natasha died of influenza in August prior to appellant's jury trial, about three years after her father's death. Her mother felt that she was less able to deal with Natasha's death because of not having Chuck around to help her. (10 RT 2433.)

Chuck Durbin's mother testified that her grief has only gotten worse; she still waits for him at the beauty shop, and pretends that he is working at the Save Mart and will be coming home. (10 RT 2438.)

Chuck Durbin's younger brother Randy testified that he depended on Chuck as a father figure. (10 RT 2393.) He misses his brother, and has had a hard time being close to people since the shooting. (10 RT 2403.)

The defense presented evidence concerning the disadvantaged circumstances of appellant's upbringing. Joe Rangel is appellant's youngest brother; he was age 46 at the time of the trial, and appellant was age 51. When they were young they had a hard life as migrants, living in Texas, Arizona, Washington, and California. While they were staying in Madera their father contracted tuberculosis. (10 RT 2470.)

Appellant took responsibility for the family at that point. He quit school and went to work in the fields. The other brothers were able to finish high school. Joe cannot thank appellant enough for his contribution to the family. (10 RT 2471, 2476.) Their father was released from the sanitarium and went back to work, and appellant joined the Navy. He was a positive role model for his brothers. (10 RT 2473.)

Appellant's work history was partially recounted during his interview with Detective Ciapessoni on November 20, 1995. Appellant stated his date of birth as September 20, 1947. (2 ACT 388.) After leaving the Navy he worked for the U.S. Forest Service as a fire fighter. Then he worked for Bob's Cyclery as a small engine mechanic, and for Ray's Pool Service servicing crop dusters. (2 ACT 390-391.) Joe Rangel confirmed that appellant worked for Bob's Cyclery and for Ray's Pool service. (10 RT 2474.)

Jesse Coronado MacCrone knew appellant from childhood. He now works for the employment department. He had a role in getting appellant a job at FMC. He recommended appellant as a good person who was never in trouble and supported many children. (10 RT 2506-2508.)

Michael Percy was a fellow mechanic, who worked with appellant out of the same tool box, from 1980 to 1995. Percy transferred with FMC when the company relocated to Madera. Appellant was hired locally. (10 RT 2443.) Appellant introduced Percy to the community and invited him to barbecues and other social events. (10 RT 2445.) They were often called to repair machinery, and had to work in a "hostile environment." Appellant was very professional with unhappy customers. Appellant was very calm; he once calmed Percy down when they were called to work on Super Bowl Sunday. Percy

was aware when appellant's son was shot, but appellant would not talk about it. (10 RT 2449-2453.)

Jerry Smith, a witness in the guilt phase, was appellant's supervisor at FMC. They worked together for fifteen years. Smith described appellant as a nice guy, patient and not moody, and good at training new employees. (10 RT 2456.)

Ronald Edwards was a neighbor of appellant and a fellow employee at FMC. He has a very high opinion of appellant. (10 RT 2468.) Appellant once defused an argument which Edwards had with another neighbor. (10 RT 2465.) Appellant took in his nieces and nephews when his sister-in-law died, and raised them. (10 RT 2466.) Edwards had a conversation with appellant after his son was shot. Appellant said that he counseled his son to let it go, to let bygones be bygones. Appellant was afraid that something even worse would happen. "He didn't want things to escalate any further." (10 RT 2467.)

Another neighbor, George Helton, also testified to appellant's role as a peacemaker. (10 RT 2513.)

Appellant met and married Maria when he was just out of the military. He took responsibility for her children. (10 RT 2474.) Evidence at the guilt phase established that appellant played a step-parent role for Edora Avila (5 RT 1196, 5 RT 1208), Deanna Ramirez (6 RT 1477), Carmina Garza (2 ACT 394), and Christina Bowles (8 RT 2095).

Deanna Ramirez testified at the penalty phase. She was about two years old when appellant met her mother. In addition to taking the responsibility for Deanna and her siblings, appellant also supported her four cousins and Aunt Yolanda, who has Downs

Syndrome. The cousins' mother passed away when Deanna was age sixteen. (10 RT 2483.)

Deanna never knew her biological father. Appellant took her to her father's funeral in Mexico. (10 RT 2485.) At the funeral it was noticeable that her father's family was excluding Deanna and her sisters. Appellant counseled them and said that he would always be their dad. He took them to the zoo and to church, and provided the girls with quinceneras. He counseled Deanna not to have an abortion. He is close to Deanna's daughter, now age twelve. (10 RT 2487-2493.)

One of the cousins, Josephine Reyes, testified that she lived with the Rangels for sixteen years. Appellant was involved in all of the activities of the many children. He told her that he would accept her even if her father rejected her. Yet all was not perfect; Josephine once set a field on fire, and she remembered that appellant criticized some of the girls because of their weight. (10 RT 2521-2523.)

Angela Chapa dated appellant's son. When she became pregnant in 1993, her parents were angry, but appellant was supportive and she came to live in appellant's house. They got their own apartment, and when Little Pete was laid off, appellant paid their rent. He was at the hospital when their child was born. (10 RT 2515.)

On September 24, 1995, a call came from Madera Community Hospital. Everyone learned that Little Pete had been shot. Appellant was crying that night and the next day. (10 RT 2518.) On cross-examination she admitted that Little Pete "wasn't shot in the head, it was the scalp." (10 RT 2519.)

ARGUMENT

I. APPELLANT WAS DENIED THE RIGHT TO A JURY DRAWN FROM A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY, BY THE SELECTION OF JURORS IN ORDER ACCORDING TO THEIR APPEARANCE ON THE FIRST PANELS OF PROSPECTIVE JURORS.

Six separate groups or panels of prospective jurors were called to the trial department for selection of the trial jury. After voir dire and exercise of challenges for cause, prospective jurors were called to the jury box for the exercise of peremptory challenges. However, the prospective jurors were not selected by a random process. All the prospective jurors called to the jury box were from the first panels; none were called from the later panels; thus all the jurors and alternates were from the sub-set of prospective jurors called at the outset of the selection process. As a result of this systematic and non-random selection process, the pool available for selection of the trial jury grossly under-represented the Hispanic composition of the total qualified panel, and under-represented the Hispanic population of Madera County.

The constitutional right to jury trial by a jury chosen from a fair cross-section of the community was stated as follows in *People v. Sanders* (1990) 51 Cal.3d 471, 491:

> "In California, the right to trial by jury drawn from a representative cross-section of the community is guaranteed equally and independently by the Sixth Amendment to the federal Constitution (*Taylor v. Louisiana* (1975) 419 U.S. 522, 530) and by article I, section 16 of the California Constitution. (*People v. Wheeler* (1978) 22 Cal.3d 258, 272.)" (*Williams v. Superior Court* (1989) 49 Cal.3d 736, 740.) "In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the

> community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process." (*Duren v. Missouri* (1979) 439 U.S. 357, 364; see also *Bell, supra*, 49 Cal.3d at p. 525; *People v. Morales* (1989) 48 Cal.3d 527, 543.) If a defendant demonstrates a prima facie case of systematic underrepresentation under this tripartite test, the burden shifts "to the state to come forward with either a more precise statistical showing that no constitutionally significant disparity existed or that there was a compelling justification for the procedure which results in the disparity in the jury pool." (*Harris, supra*, 36 Cal.3d at p. 50.)

Trial began on August 18, 1998, with the calling of two initial jury panels to the trial department. The first initial panel was called in the morning and examined for hardship, and questionnaires were distributed. The second initial panel was called in the afternoon. Again the prospective jurors were examined for hardship, and questionnaires were distributed. Both of these initial panels were instructed to return on the morning of August 25, 1998. (11 CT 2346; 2 RT 295-381.)

Jury selection continued on August 19, 1998. The third initial panel was called in the morning, and the fourth in the afternoon. Prospective jurors were examined for hardship and questionnaires were distributed. The third initial panel was instructed to return on the morning of August 25; the fourth initial panel was instructed to return on the morning of August 26. (11 CT 2347; 2 RT 382-462.)

Jury selection continued on August 20, 1998. The fifth panel initial was called in the morning, and the sixth in the afternoon. Again the prospective jurors were examined for hardship and questionnaires were distributed. Both of these panels were instructed to return on the morning of August 26. (11 CT 2348; 2 RT 463-552.)

Voir dire and challenges for cause took place on August 25 and 26, 1998. Prospective jurors were called to the jury box and subject to peremptory challenges until a jury was constituted. The primary jurors were sworn on the morning of August 26, and the alternate jurors were sworn shortly thereafter. (11 CT 2350, 2351; 3 RT 554-780.)

In the process of jury selection on August 26, 1998, prospective jurors were called and seated in the jury box in their original order. Thus, all twelve jurors (Nos. 180007014, 180002532, 1800002598, 176135409, 180012932, 179059757, 180003786, 173558182, 179497035, 176040506, 179958767, and 180018729) and the four alternates (Nos. 174649689, 180005594, 18003809, and 18000352) were selected out of the first 84 names assigned to the trial department on August 25, 1998.

The remaining prospective jurors on the later initial panels, some 90 persons, did not reach the jury box for consideration as seated jurors or alternates.

This procedure violated the statutory guarantee of randomness in jury selection, and the state and federal guarantees of trial by a fair cross-section of the community.

Before proceeding with the analysis of this claim, some effort should be made to clarify the nomenclature used in reference to trial jury selection. The following definitions were provided in *People v. Bell* (1989) 49 Cal.3d 502, 520, fn. 3:

> To avoid the confusion arising from the imprecise and interchangeable use of terms, we adopt the usage proposed by respondent. The jury "pool" is the master list of eligible jurors compiled for the year or shorter period from which persons will be summoned during the relevant period for possible jury service. A "venire" is the group of prospective jurors summoned from that list and made available, after excuses and deferrals have been granted, for assignment to a "panel." A "panel" is the group of jurors

from that venire assigned to a court and from which a jury will be selected to try a particular case.

Definitions also appear in Code of Civil Procedure § 194, including definitions of "random" and "trial jury panel."[36]

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[36] The following definitions govern the construction of this chapter:

(a) "County" means any county or any coterminous city and county.

(b) "Court" means a superior court of this state, and includes, when the context requires, any judge of the court.

(c) "Deferred jurors" are those prospective jurors whose request to reschedule their service to a more convenient time is granted by the jury commissioner.

(d) "Excused jurors" are those prospective jurors who are excused from service by the jury commissioner for valid reasons based on statute, state or local court rules, and policies.

(e) "Juror pool" means the group of prospective qualified jurors appearing for assignment to trial jury panels.

(f) "Jury of inquest" is a body of persons summoned from the citizens before the sheriff, coroner, or other ministerial officers, to inquire of particular facts.

(g) "Master list" means a list of names randomly selected from the source lists.

(h) "Potential juror" means any person whose name appears on a source list.

(i) "Prospective juror" means a juror whose name appears on the master list.

(j) "Qualified juror" means a person who meets the statutory qualifications for jury service.

(k) "Qualified juror list" means a list of qualified jurors.

(l) "Random" means that which occurs by mere chance indicating an unplanned sequence of selection where each juror's name has substantially equal probability of being selected.

These sets of definitions, however, are not precise in one respect relevant to this analysis: they do not accurately or completely define the "trial jury panel." For most trials a single panel of 50 to 80 prospective jurors is enough to compose a jury. But in a capital trial, due to the large number of peremptory challenges and the large number of hardship excuses and challenges for cause, multiple panels are called in the course of jury selection. Here, by prior agreement, six panels were called. Therefore, the "trial jury panel" in a capital case is generally composed, as here, of multiple panels. For purposes of this analysis, the separate panels that are called in the course of capital jury selection are referred to as "initial panels."

Where multiple initial panels are called, and the capital jury is selected not from the trial jury panel as a whole but from one or two of the original panels, randomness is defeated.

Randomness is a statutory requirement, designed to insure that the trial jury represents a fair cross section of the community.

(m) "Source list" means a list used as a source of potential jurors.

(n) "Summons list" means a list of prospective or qualified jurors who are summoned to appear or to be available for jury service.

(o) "Trial jurors" are those jurors sworn to try and determine by verdict a question of fact.

(p) "Trial jury" means a body of persons selected from the citizens of the area served by the court and sworn to try and determine by verdict a question of fact.

(q) "Trial jury panel" means a group of prospective jurors assigned to a courtroom for the purpose of voir dire.

> It is well settled that no litigant has the right to a jury that mirrors the demographic composition of the population, or necessarily includes members of his own group, or indeed is composed of any particular individuals. (*People v. Wheeler, supra*, 22 Cal.3d at p. 277; *People v. White, supra*, 43 Cal.2d at p. 749; *People v. Hines* (1939) 12 Cal.2d 535, 539.) What the representative cross-section requirement does mean, however, is that a litigant "is constitutionally entitled to a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits." (*People v. Wheeler, supra*, 22 Cal.3d at p. 277.) [fn. 5]
>
> [fn. 5] The fair cross-section principles set forth in *Wheeler* were codified by the Legislature in 1980. As amended in 1988, [Code of Civil Procedure] section 197, subdivision (a), requires in part that jurors be selected "at random, from a source or sources inclusive of a representative cross section of the population of the area served by the court." Section 204 (former section 197.1) prohibits exclusion from jury service "by reason of occupation, race, color, religion, sex, national origin, or economic status, or for any other reason."
>
> (*Williams v. Superior Court* (1989) 49 Cal.3d 736, 741; emphasis added.)

In the present case, since there was no random draw from the entire "trial jury panel," there was a lack of randomness. "Nonrandom selection of a subgroup from a randomly selected group does not make for a randomly selected subgroup." (*United States v. Kennedy* (5th Cir. 1977) 548 F.2d 608, 612.)

As a result of the lack of randomness, appellant was tried by a jury which did not represent a fair cross-section of the population of Madera County, including its Hispanic element.

In the seated jury, only one person identified herself as Hispanic, No. 180002532. In the remaining initial panel from which the jury was drawn, seven other persons subject to the draw identified themselves as Hispanic (Nos. 18001583 at CT 4212; 177803217 at

CT 4975; 180001954 at CT 4082; 177386853 at CT 4134; 177365394 at CT 4732; 180007867 at CT 5773; 174326833 at CT 5305).

In the portion of the trial jury panel, composed of initial panels which were not reached by the draw, 26 Hispanic persons were potentially eligible. (180006599 at 5435; 180006445 at CT 3665; 180018866 at CT 5643; 180019876 at CT 3457; 180004682 at CT 7154; 180013242 at CT 5800; 180003906 at CT 7857; 180013436 at CT 7075/ 180012212 at CT 5852; 180006936 at CT 6477; 174572436 at 6086; 177537825 at CT 6320; 173159485 at CT 8169; 178496205 at CT 7388; 180016833 at CT 6346; 180009729 at CT 7883; 180009542 at CT 6659; 164564605 at CT 5982; 172824759 at CT 8056; 180019037 at CT 6789; 155403762 at CT 7040; 173036712 at CT 6138; 180005610 at CT 6616; 177189336 at CT 7830; 180012412 at CT 5826; 171655744 at CT 4733.)

About three-quarters of the Hispanic prospective jurors were excluded from consideration, as a result of calling prospective jurors in the order they were assigned to the trial department.

Jury selection procedures which arguably operate to deny a defendant trial by a cross section of the community have been challenged in other cases. In *People v. Visciotti* (1992) 2 Cal.4th 1, 41, the attorneys devised a stipulation whereby the trial court designated the first twelve prospective jurors to be seated. On appeal, the defendant challenged the procedure as a denial of the randomness requirement. This Court rejected the

challenge in part because there was no demonstration that a racial or other protected group was excluded, and in part because the parties agreed to the procedure.

> Defendant also argues that random selection is necessary to ensure the constitutional right to a jury drawn from a representative cross- section of the populace. To the extent that he claims the procedures utilized in selecting the jury before which he was tried denied him due process or rights under the Sixth Amendment of the federal Constitution and article I, section 16 of the California Constitution, the claim fails for similar reasons. Random selection does serve to ensure the jury trial rights granted by the Sixth Amendment and article I, section 16 of the California Constitution. Not every departure from the state statutory procedure, even if deemed material, necessarily denies a defendant the constitutional right to a jury selected from a representative cross-section of the populace, however. We reject defendant's claim that actual harm need not be shown. To warrant reversal of a judgment of conviction, the defendant must demonstrate that the departure affected his ability to select a jury drawn from a representative cross-section of the population. [fn. 14]
>
> [fn. 14] The state policy enunciated in the statutes mandating random draw reflects concern "that all qualified persons have an equal opportunity ... to be considered for jury service in the state and an obligation to serve as jurors when summoned for that purpose ...." (Code Civ. Proc., § 191.) The rights of prospective jurors are not before us in this appeal, however. We consider only whether the procedure ensured a fair trial at which the defendant's fundamental constitutional rights were protected. (See *People v. Harris* (1989) 47 Cal.3d 1047, 1071.)
>
> (Emphasis added.)

Again, in *People v. Mayfield* (1997) 14 Cal.4th 668, 729, the defendant challenged a jury selection procedure involving selection of prospective jurors from a trial jury panel by the letter of their last name. Again, there was no objection, and again there was a failure to demonstrate that a cognizable group had been excluded from the jury.

> Because the defense did not raise the present objection to the selection procedure before the jury was sworn, the claim has been forfeited. (*People v. Visciotti* (1992) 2 Cal.4th 1, 38.) Recognizing that we might reach this conclusion, defendant contends that his trial counsel's failure to

> object deprived him of his constitutional right to effective assistance of counsel. We reject the claim of ineffective assistance for lack of prejudice.
>
> Exclusion of prospective jurors whose last names began with a letter in the second half of the alphabet did not skew the jury selection procedure. There is no evidence, and no claim, that jurors of either gender or of any religious or racial or ethnic group are present in disproportionate numbers in the group of excluded jurors.
>
> (Emphasis added.)

In the present case, it can be demonstrated that a disproportionate number of Hispanics – 26 – were in the group of prospective jurors which appeared in the later initial panels. A process that eliminates the majority of potential Hispanic jurors unconstitutionally skews the jury selection process.

Appellant assumes for the sake of argument that there was racial balance in the master jury list, in the venire summoned to the courthouse in August 1998, and in the trial jury panel remaining after hardship excuses and challenges for cause. But the process of calling prospective jurors into the jury box was not random. The order of seating prospective jurors reverted to the order in which the initial panels were called. This process was nonrandom. It eliminated most of the prospective jurors identified as Hispanic. As a result, the jury sworn to try this case had almost no Hispanics.

As in any equal protection case, the "burden is, of course," on the defendant who alleges discriminatory selection of the venire "to prove the existence of purposeful discrimination." (*Whitus v. Georgia* (1965) 385 U.S. 545, 550.) In deciding if the defendant has carried his burden of persuasion, a court must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." (*Arlington Heights v.*

Metropolitan Housing Development Corp. (1977) 429 U.S. 252, 266). Circumstantial evidence of invidious intent may include proof of disproportionate impact. (*Washington v. Davis* (1976) 426 U.S. 229, 242.) Under some circumstances proof of discriminatory impact "may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." (*Ibid.*) For example, "total or seriously disproportionate exclusion of Negroes from jury venires," "is itself such an 'unequal application of the law . . . as to show intentional discrimination.'" (*id.*, at 241.)

Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion. (*Alexander v. Louisiana* (1972) 405 U.S. 625, 632.) The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties. (*Ibid.*, see *Jones v. Georgia* (1967) 389 U.S. 24, 25.) Rather, the State must demonstrate that "permissible racially neutral selection criteria and procedures have produced the monochromatic result." (*Batson v. Kentucky* (1986) 476 U.S. 79, 94.)

In these circumstances the defense could not use peremptory challenges to restore racial balance to the jury selection process. Even if racial balance were the only concern of the defense, exercising all 26 of its peremptory challenges on non-Hispanic prospective jurors would only have advanced the jury selection process incrementally into the later initial panels. It would have still omitted the vast majority of the Hispanic prospective jurors from the selection process.

Exclusion of even a single prospective juror, in violation of the Sixth Amendment right to trial by a fair cross section of the community, is reversible error without regard to prejudice or harmless error. (*People v. Silva* (2001) 25 Cal.4th 345, 386.) The non-random process of jury selection employed here had the effect of producing a virtually monochromatic jury. For these reasons, the judgment must be reversed.

II. APPELLANT WAS DENIED DUE PROCESS BY THE TRIAL COURT'S REFUSAL TO EXCUSE A PROSPECTIVE JUROR, ULTIMATELY SEATED ON THE JURY, WHO HAD A FIXED OPINION ON THE DEATH PENALTY AND WAS PROPERLY CHALLENGED FOR CAUSE.

Juror no. 180007014 was an "automatic death penalty" juror, a person who had fixed beliefs and could not consider the alternative penalty of life without parole. The defense challenged this prospective juror for cause, but the challenge was denied. The juror was ultimately sworn and seated in judgment of appellant's guilt and penalty. Appellant was denied a fair trial as a result of the participation of this juror in his trial.

The proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt* (1985) 469 U.S. 412, 424.) This standard has been adopted in California. (*People v. Ghent* (1987) 43 Cal.3d 739, 767.) Just as a prospective juror must be excused for cause if he or she says that he or she would automatically vote against the death penalty (*Lockhart v. McCree* (1986) 476 U.S. 162), a prospective juror must be excused for cause if he or she says that he or she would automatically vote to impose the death penalty, if the defendant is found guilty. (*Ross v. Oklahoma* (1988) 487 U.S. 81, 83-86; *People v. Coleman* (1988) 46 Cal.3d 749, 770.)

Juror no. 180007014 filled out a questionnaire on August 18, 1998. (15 CT 3249-3274.) In the course of the questionnaire, the juror indicated that she[37] would not automatically choose life without parole over the death penalty. (15 CT 3271.) (The form did not ask the converse, whether the prospective juror would automatically choose the death penalty over life without parole.[38])

Asked whether the death penalty is used "too often, not enough, about the right amount, or too randomly?" (question no. 81), the juror answered, "Not enough – If there is proof without a doubt that a person has viciously killed another their life should not be spared." (15 CT 3271.)

The prospective juror was examined as part of open-court voir dire on August 25, 1998. Defense counsel and the trial court questioned her about her statement of strong support for the death penalty; the court asked for an explanation of the prospective juror's "personal philosophy" on this subject.

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[37] At 3 RT 613:22, and thereafter, defense counsel referred to the prospective juror as "she."

[38] See *Morgan v. Illinois* (1992) 504 U.S. 719, 725, fn. 3: "The Illinois Supreme Court has subsequently emphasized that decision in this case was not meant 'to imply that the "reverse-Witherspoon" question is inappropriate. Indeed, given the type of scrutiny capital cases receive on review, one would think trial courts would go out of their way to afford a defendant every possible safeguard. The "reverse-Witherspoon" question may not be the only means of ensuring defendant an impartial jury, but it is certainly the most direct. The best way to ensure that a prospective juror would not automatically vote for the death penalty is to ask.' *People v. Jackson*, 145 Ill. 2d 43, 110, 582 N.E.2d 125, 156, 163 Ill. Dec. 859 (1991). See also *State v. Atkins*, 303 S.C. 214, 222-223, 399 S.E.2d 760, 765 (1990)."

See also *People v. Bittaker* (1989) 48 Cal.3d 1046, 1083.

> Well, I just feel that if they're – if it's proven without a doubt that all evidence weighed and it comes down to death or life without parole, that if this – I don't even know what this case is about. But other than murder, I just feel that if someone has maliciously and violently and on purpose taken the life of another that they shouldn't – why should our taxpayers have to keep this person alive for the rest of their life. Who knows. I mean, it could be a 22-year old, you know, and they could be living for a long time. That's a lot of taxpayer's money, when they didn't care about the life of someone else.
>
> But I certainly would take everything into consideration before I came to that. But if they didn't take any consideration for someone else's life, I just don't feel that we should keep them alive just to say they're alive and have to pay for them the rest of their life.
>
> (3 RT 606.)

The prospective juror then clarified that it was not the cost factor that led to the death judgment: "It's just why should they be alive and the other person not be alive." (3 RT 607.) Defense counsel sought to further clarify the juror's position. He pointed out that it would be necessary to reach a first-degree murder verdict in order to get to the penalty phase. "If that is the case," he asked, "are you telling us ... that you would not consider life without the possibility of parole under those circumstances?" The juror answered, "I don't think that I would, to be honest." (3 RT 607.)

Defense counsel then challenged the prospective juror for cause. The District Attorney was allowed to examine the prospective juror in an effort to rehabilitate. In response to the prosecutor's question, the juror expressed comfort with the burden of proof beyond a reasonable doubt, as opposed to proof "without a doubt." (3 RT 608.) The District Attorney went on to explain that the jury would hear aggravating and mitigating evidence, and asked if the juror could make a decision based on such evidence. The juror

responded, "Yes, I would think so. I have never been in this situation before where I had to make a choice, but I would certainly hope I could." (3 RT 609.)

Asked if the juror could listen to mitigating evidence and then weigh that evidence "before automatically just deciding," she responded, "Oh, yeah. I am sure I could." (3 RT 610.)

The trial court then entered into the questioning. The trial court explained again the process of presenting aggravating and mitigating evidence. The juror expressed an understanding of the process. The juror agreed to have an open mind, "even though," in the court's words, "you favor the death penalty." The trial court then denied the challenge for cause. (3 RT 610-611.)

Despite the denial of the challenge, defense counsel returned to the subject. The juror acknowledged that even with a finding of first degree murder, she "could consider" life without parole as an alternative. (3 RT 611.) Defense counsel then asked what matters would make the juror consider life without parole as opposed to the death penalty. The prosecutor objected, and the matter was taken up in chambers. (3 RT 612.)

In chambers, defense counsel cited *Morgan v. Illinois* (1992) 504 U.S. 719.[39] Defense counsel argued that the juror had said that if there were a finding of intentional

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[39] "A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If

murder. "[s]he is not going to spare their life. And that's what she said orally. That's what she said in the questionnaire. [¶] And I know that Mr. LiCalisi got her to say she would consider the alternatives, but someone like this who is a strong supporter of the death penalty who says if you viciously kill which I think under the theory of this case willful, deliberate, or premeditated, then she is not going to spare your life...." (3 RT 613-614.) The District Attorney objected to the defense question, arguing that "what she might feel" is not relevant. (3 RT 614.)

The trial court observed that counsel is prohibited from posing hypotheticals or discussing the facts of the case. Defense counsel disagreed, citing *People v. Pinholster* (1992) 1 Cal.4th 865, 913,[40] and *People v. Sanders* (1995) 11 Cal.4th 475, 539. (3 RT 615.) The trial court pointed out that asking about what "facts or hypotheticals where you would or would not impose death" was getting into "hypothetical situations which really are not relevant." (3 RT 616-617.)

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even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." (*Id.* at 729.)

[40] "We did say in *People v. Williams, supra*, 29 Cal.3d at page 408, that 'a question fairly phrased and legitimately directed at obtaining knowledge for the intelligent exercise of peremptory challenges may not be excluded merely because of its additional tendency to indoctrinate or educate the jury.'" (Quoting *People v. Williams* (1981) 29 Cal.3d 392, 408.)

Keenan counsel then entered the fray, citing *People v. Visciotti* (1992) 2 Cal.4th 1.[41] He argued that the question was aimed at obtaining relevant information in jury selection.

The trial court then decided to permit the question, but with the understanding that if the process appeared to be too time-consuming, further questioning would be curtailed. (3 RT 620-621.) Back before the jury, the objection was overruled. (3 RT 622.)

With the question posed again, juror no. 180007014 responded that "it would just be dependent on all the evidence." (3 RT 623.) Asked if she regarded the defendant's

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[41] [Questioning by prosecutor]: " 'If we get to the penalty phase, if we get that far, then you've already found the man guilty of first degree murder. It's a horrible crime. And you found he committed this murder while he was engaged in a robbery, based on facts that would be something like a man decides to commit a robbery, arms himself with a handgun to make sure he's successful, robs his victim. During the course of the robbery it occurs to him that if the victim is not alive, there won't be anybody going to the police and complain ... So, realizing that, the robber points his gun at the victim, pulls the trigger, shoots him once through the heart and kills him.

" 'That's the type of facts we're going to be dealing with, something along those lines, perhaps.

" 'Do you feel just, first of all, theoretically like it's possible you could vote for the death penalty if you're faced with facts such as those?' "

(*Id.* at 46.)

" ... Although voir dire is not a platform from which counsel may educate prospective jurors about the case, or compel them to commit themselves to a particular disposition of the matter, to prejudice them for or against a party, or to 'indoctrinate' them (see *People v. Williams* (1981) 29 Cal.3d 392, 408), the scope of the inquiry permitted during voir dire is committed to the discretion of the court."

(*Id.* at 47-48.)

background as a legitimate consideration, the juror said, "Not particularly." (3 RT 624.) Voir dire of this juror concluded without a renewal of the challenge for cause.

The defense exercised three peremptory challenges (3 RT 697 (seat no. 3); 3 RT 707 (seat no. 4); 3 RT 721 (seat no. 4)). One juror was excused for cause on the defendant's challenge (3 RT 736 (seat no. 4)). The prosecution exercised one peremptory challenge. (3 RT 741 (seat no. 8).) Juror no. 180007014 remained as "prospective juror seat number one," and was sworn with the rest of the jury. (3 RT 748.)

Appellant was denied due process by the seating of a juror who had a fixed belief that the death penalty must be imposed for premeditated murder.

The touchstone case for this issue is *Morgan v. Illinois*, *supra*, 504 U.S. 719. In that capital case defense counsel requested a "reverse-*Witherspoon*"[42] question on the voir dire questionnaire: "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" The state trial court refused to include the question on the voir dire questionnaire. The United States Supreme Court held that the defense had an absolute right to pose the question, and the refusal of the state trial court to permit the question required that the judgment be set aside.[43]

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[42] *Witherspoon v. Illinois* (1968) 391 U.S. 510 (although overruled in part by *Wainwright v. Witt*, *supra*, *Witherspoon* stands for the general proposition that an "automatic death penalty" juror is subject to challenge for cause and should not sit on a capital jury (*Morgan v. Illinois*, *supra*, 504 U.S. at 728)).

[43] Note that in the present case the jury questionnaire did not include a question which directly asked whether the prospective juror would automatically impose the death penalty. Instead, the questionnaire asked whether, in the opinion of the prospective juror, the death penalty is used "too often, not enough, about the right amount, or too random-

This Court has addressed responses by prospective jurors which suggested attitudes akin to the "automatic death penalty" jurors identified by the Supreme Court in *Witherspoon* and *Witt*.

In *People v. Boyette* (2002) 29 Cal.4th 381, this Court reviewed a capital conviction in which, during jury selection, a prospective juror indicated that he was "strongly in favor" of the death penalty, and would have to be convinced not to impose it on a defendant found guilty of murder. (*Id.* at 417.) A challenge for cause was denied. This Court held that it was error to deny the challenge for cause. "This was not a case in which the juror gave equivocal answers: He was strongly in favor of the death penalty and was not shy about expressing that view. He indicated he would apply a higher standard ("I would probably have to be convinced") to a life sentence than to one of death, and that an offender (such as defendant) who killed more than one victim should automatically receive the death penalty." (*Id.* at 418.) Relief was denied because the questioned juror was removed by a peremptory challenge. Although the defendant exhausted his peremptory challenges, he did not express dissatisfaction with the resulting jury. Accordingly, no unqualified juror sat on the trial jury. (See also *People v. Hillhouse* (2002) 27 Cal.4th 469, 487 [failure to exhaust peremptory challenges barred attack on denial of challenges for cause].)

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ly?" (question no. 81), the juror answered, "Not enough – If there is proof without a doubt that a person has viciously killed another their life should not be spared." (15 CT 3271.)

In *People v. Yeoman* (2003) 31 Cal.4th 93, 114, the defense used four peremptory challenges to excuse prospective jurors who had been unsuccessfully challenged for cause; at least two of those prospective jurors were challenged on *Witherspoon/Witt* grounds. The defense went on to exercise all of its peremptory challenges, and declared that the remaining jury was unsatisfactory, in part because it had been forced to needlessly exercise peremptory challenges on persons who should have been excused for cause. This Court declined to address any error in the refusal of challenges for cause. Although all peremptory challenges were exhausted, and persons sat on the jury who were unsuitable to the defense, the defendant could not assert that any seated juror was legally unqualified. Therefore the denial of the challenges for cause could not be addressed on appeal. (*Ibid.*)

In *People v. Ramirez* (2006) 39 Cal.4th 398, a prospective juror first answered that he could consider both punishments. When questioned by defense counsel, the prospective juror stated that death was "a just punishment for certain crimes." When asked what crimes he had in mind, he answered: "Mostly murder, I would think." He added that if the defendant were convicted of first degree murder and found to be eligible for the death penalty, he would vote to impose the death penalty unless he were convinced otherwise." (*Id.* at 447.) On appeal the defendant argued that his right to a fair jury under *Witherspoon* and *Witt* had been compromised. This Court held that the claim had been waived on appeal, because the questioned juror had been removed by a peremptory challenge, and the defense had not exhausted its peremptory challenges. In addition, there was sufficient evidence to support the denial of the defense challenge for cause. The prospective

juror assured the court multiple times that he would not automatically vote for the death penalty and would, instead, reach a decision based upon all of the evidence.

In the present case, the challenge for cause was improperly denied. Juror no. 1800007014 indicated in writing that in cases of malicious murder, the defendant's life "should not be spared." (15 CT 3271.) Questioned orally, the prospective juror indicated that although she would consider all the evidence, the murderer should not be kept alive. She further clarified that her concerns had to do with fundamental fairness, not with the cost to the state. (3 RT 606.)

Questioned further, the prospective juror stated that she could listen to all the evidence and consider the alternative of life without parole. (3 RT 610-611.)[44] However, she never abandoned her firmly held belief that death is the only appropriate punishment for murder.[45] In these circumstances, the juror's preconceived attitudes were guaranteed to "prevent or substantially impair the performance of [her] duties as a juror in accor-

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[44] See *Nance v. State* (Ga. 2000) 526 S.E.2d 560 [Trial court erred in failing to excuse for cause a prospective juror whose answers to voir dire questions clearly showed that she would always vote for death if defendant was convicted of murder and the jury found an aggravating factor. Although the trial court told the juror the sentencing options and asked her if she could listen to the law and the facts and choose the appropriate sentence, to which she replied affirmatively, it was clear from her other responses that the juror believed the appropriate sentence would always be a death sentence. The death sentence was therefore reversed.]

[45] See *People v. Gardner* (1984) 151 Cal.App.3d 134, 142 (Franson, J. conc.): "Every juror who admits an original bias usually can be rehabilitated by adroit questioning by opposing counsel and the court -- all of which is mere window dressing, i.e., an attempt by the juror to cover up the originally revealed bias."

dance with [her] instructions and [her] oath." (*Wainwright v. Witt, supra.*) It was an abuse of discretion to deny the defense challenge for cause.

Even if the juror's voir dire testimony is viewed as equivocal, the lack of a clear statement of impartiality undermines the trial court's finding that the juror was qualified.[46]

The issue was not waived on appeal, because an unqualified juror was seated on appellant's jury. (*People v. Yeoman, supra.*) Even though the juror could have been removed by a peremptory challenge, the defense did not use a peremptory challenge on this juror.

With the seating of this juror, appellant was sure to be judged by a juror who was predisposed to a death verdict. Accordingly, appellant was prejudiced by the denial of the defense challenge to this juror.

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[46] See *White v. Mitchell* (6th Cir. 2005) 431 F.3d 517, 542: "With a transcript reflecting statements as internally inconsistent and vacillating as these, including numerous statements of strong doubt regarding impartiality and merely a few tentative or cursory statements that she would be fair, [the juror] was simply unbelievable as an impartial juror. Despite the deference usually owed to trial judges, we conclude that nothing about [the juror's] demeanor could cure the weighty concerns raised by her voir dire testimony. Accordingly, we find that the trial judge's failure to excuse [the juror] and the Ohio Supreme Court's finding that the trial court did not abuse its discretion in failing to strike [the juror] were contrary to or an unreasonable application of Supreme Court precedent."

III. IT WAS ERROR TO DENY DEFENSE CHALLENGES TO TWO SWORN JURORS, ONE OF WHOM KNEW VICTIM CHUCK DURBIN'S BROTHER RANDY, AND ONE OF WHOM WAS FORMERLY RELATED BY MARRIAGE TO DURBIN'S MOTHER.

After the jury was sworn, information came to light that cast doubt on the impartiality of a juror who knew Randy Durbin. There was good cause for the removal of the juror and replacement with an alternate juror, and it was an abuse of discretion to refuse the defense request to have her replaced.

A juror's failure to disclose in voir dire information indicating bias may result in a denial of due process for failure to remove the juror when the information later comes to light. (*Williams v. Taylor* (2000) 529 U.S. 420, 442 [a trial juror failed to disclose that she had once been married to a deputy sheriff who was the prosecution's lead witness, and also failed to disclose that the prosecuting attorney had represented her and the deputy sheriff in their divorce; the defendant was entitled to the opportunity to demonstrate that the juror was "not impartial"]; *Smith v. Phillips* (1982) 455 U.S. 209, 217, 219-221, [a juror failed to disclose that he had an employment application pending with the prosecutor's office; defendant entitled to opportunity to demonstrate bias].)

Prospective juror no. 180002598 was ultimately seated as juror number nine. In her questionnaire she indicated that the death penalty was the only appropriate punishment for murder: "I use[d] to believe you shouldn't take a life --- but a lot of violent criminals that are in prison for life & no parole are getting out. I feel now if they are proven guilty for a violent killing the punishment should be death." She also indicated

that the death penalty is not used enough: "people are getting out on lesser sentences." (14 CT 3063.) She indicated that several friends and relatives were employed in law enforcement or the prison system. (14 CT 3051.)

On questioning by the trial court, the prospective juror indicated that she would not automatically vote for the death penalty. (3 RT 598.) She volunteered that she perhaps should not be on the jury because her family worked in corrections, "and I wouldn't want any harm coming to them because I am a juror." (3 RT 599.) The trial court assured her that her name would not become known. (3 RT 599.)

On September 8, 1998, after the jurors and alternates were sworn, the trial court indicated that two jurors had "come forth." Juror no. 173558182, seated in seat number twelve, had announced that she was formerly the sister-in-law of Ginger Colwell, the mother of victim Chuck Durbin. In addition, juror no. 180002598, seated in seat number nine, had indicated that she was acquainted with Randy Durbin, the victim's brother. (4 RT 846.)

Juror no. 173558182 was called into court. She indicated to the court that her sister-in-law's brother had been married to Ginger Colwell. The juror had not spoken to Mrs. Colwell for 15 or 20 years. (4 RT 849.) No challenge was made to the continued service of this juror.

The attorneys commented that Randy Durbin's name was mentioned orally during voir dire, though his name was not on the witness list. (4 RT 849-850.) Juror no. 180002598 was then called into the courtroom. She indicated that Randy Durbin was her instructor in water aerobics about four years earlier. Currently, her husband was taking a

course taught by Randy Durbin at Madera College. (4 RT 850.) She indicated that the relationship with Randy Durbin would not affect her judgment in the penalty phase. (4 RT 851.)

Defense counsel then asked that the juror be excused and replaced with an alternate. He recalled that due to her close connection with law enforcement, "it was a very close question whether we were going to use a peremptory challenge." He noted that "it seems rather incredible" that her relationship with Randy Durbin did not come out on voir dire. He asked that the court "reopen the issue of jury selection." (4 RT 852.)

The trial court noted that the only remedy was to disqualify her, and replace her with an alternate. The prosecutor underlined the rule that the defense had lost its opportunity to use a peremptory challenge. The trial court then indicated that it did not find that she should be disqualified. The court noted that they "went to the same gym" four year earlier. Although her husband currently went to a class taught by Durbin, "[t]here's no relationship there whatsoever." It was understandable that she would not bring it up in voir dire. (4 RT 853.)

Defense counsel then asked to exercise a challenge for cause, because the juror had failed to bring up this information during voir dire. (4 RT 854.)

The trial court denied the defense motions. The court found a lack of any personal relationship, and no indication of bias or prejudice. (4 RT 855.)

In the penalty phase of the trial Randy Durbin testified that he depended on Chuck as a father figure. (10 RT 2393.) He misses his brother, and has had a hard time being close to people since the shooting. (10 RT 2403.)

The trial court improperly denied the defense request to disqualify juror no. 180002598. Randy Durbin was a major victim impact witness, and the relationship between him and the juror, lately divulged, required that she be excused.

The trial court correctly found that with the close of voir dire, the defense could no longer exercise challenges to the jurors. They could, however, be removed for good cause.

> In repealing former Penal Code section 1068, the Legislature did not replace it with a similar provision authorizing the reopening of jury selection after the trial jury has been sworn. Instead, it added Code of Civil Procedure sections 226 and 231. Subdivision (a) of section 226 provides: "A challenge to an individual juror may *only* be made before the jury is sworn." (Italics added.) Subdivision (d) of section 231 then explains: "Peremptory challenges shall be taken or passed by the sides alternately, commencing with the plaintiff or people; and each party shall be entitled to have the panel full before exercising any peremptory challenge. When each side passes consecutively, *the jury shall then be sworn*, unless the court, for good cause, shall otherwise order." (Italics added.)
>
> Here, both sides consecutively passed their peremptory challenges, and the jury was sworn. (Code Civ. Proc., § 231, subd. (d).) At this point, by its terms, section 226, subdivision (a) barred the court from reopening jury selection and permitting further peremptory challenges. (See also *People v. Hernandez* (2003) 30 Cal.4th 1, 12 (conc. opn. of Werdegar, J.) [reopening voir dire and permitting a party to exercise additional peremptory challenges violates Code Civ. Proc., § 226, subd. (a).]) Under the plain language of the applicable statutes, the trial court could discharge Juror No. 12 only if there was good cause for his removal. (Code Civ. Proc., §§ 233 & 234; Pen. Code, § 1089.) [fn.]
>
> (*People v. Cottle* (2006) 39 Cal.4th 246, 254-255.)

The trial court abused its discretion by not finding good cause to remove the juror in these circumstances.

The juror here expressed doubt about whether she should be on the jury. In her mind, there was a risk of retaliation to her family members in the prison system if she should vote for death. From the defense perspective, this translates into a strong bias against criminal defendants in general – better to execute them, or keep them in prison, than have them in a position where they could harm the juror herself or her family.

Moreover, in her questionnaire she expressed an "automatic death penalty" position which alone could have disqualified her. The trial court asked a leading question which rehabilitated the juror as a matter of form. Nevertheless, in the eyes of the defense she presented as a person who might not consider evidence in mitigation at all. (See discussion in Argument II above.)

This juror's previously undisclosed relationship with one of the victims[47] was enough to disqualify her, and it was an abuse of discretion to leave her on the jury. Moreover, the trial court should take into account the entire record of the voir dire in deciding whether to disqualify a juror on the basis of recently-discovered information. Here, the trial court isolated the new information and did not consider it in the context of the earlier voir dire.

Even taken out of context, new information indicating a personal relationship between the juror and victims or witnesses should be enough to disqualify the juror. In *Conaway v. Polk* (4th Cir. 2006) 453 F.3d 567, 584-585, the court reviewed a state proceeding in which a juror was alleged to be a "double first cousin" of an essential prosecu-

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[47] Under the familiar definition of "victim impact," Randy Durbin was a victim.

tion witness. The federal court found the concealment of this information to be a violation of the Sixth Amendment.

> Turning to the merits of the Juror Bias claim, we conclude that the MAR[48] Court's denial of MAR I involved an unreasonable application of clearly established federal law as determined by the Supreme Court. The text of the Sixth Amendment mandates that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial[] by an impartial jury." U.S. Const. amend. VI. And the Supreme Court has long recognized that the Sixth Amendment prohibits biased jurors from serving on criminal juries. See *United States v. Wood*, 299 U.S. 123, 133, 57 S. Ct. 177, 81 L. Ed. 78 (1936) (recognizing Sixth Amendment's text prohibits partial jurors, whether bias is "actual or implied"). The Court has explained that a juror's bias may be established by showing (1) that the juror "failed to answer honestly a material question on voir dire"; and (2) that "a correct response [to that question] would have provided a valid basis for a challenge for cause." See *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984) (the "McDonough test"). [fn.] Additionally, a litigant must show that the fairness of his trial was affected either by the juror's "motives for concealing [the] information" or the "reasons that affect [the] juror's impartiality." *Id.* [fn.]

(See also *Andrews v. Collins* (5th Cir. 1994) 21 F.3d 612 [where it is discovered that a juror is a close relative of one of the participants in the trial or the criminal transaction, a finding of implied bias would be justified].)

This Court has declined to find an abuse of discretion in cases involving later-discovered evidence of possible juror bias. However this Court's previous cases have not involved information as germane to the penalty determination as we see in the present case.

In *People v. Holt* (1997) 15 Cal.4th 619, the Court reviewed a capital conviction in which a seated juror revealed that his son had been arrested for burglary in connection

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48 MAR refers to state post-conviction non-appellate relief, similar to habeas corpus.

with the entry of an apartment owned by the juror but occupied by a renter. The Court found no connection to the case on trial, and no basis for a finding of bias. "The circumstances are simply not comparable to those in the decisions on which defendant relies in some of which jurors were excused and the defendant complained of that on appeal. (See *People v. Morris* (1991) 53 Cal.3d 152, 154 [same deputy district attorney had prosecuted juror]; *People v. Williams* (1988) 199 Cal.App.3d 469 [juror personally facing prosecution in case filed by same deputy district attorney]; *People v. Farris* (1977) 66 Cal.App.3d 376 [juror facing current criminal charges, had past charges and attitude]; *In re Devlin* (1956) 139 Cal.App.2d 810 [juror charged with felony did not believe he could be fair].)" (*Id.* at 659-660.)

Similarly, in *People v. Ray* (1996) 13 Cal.4th 313, 343, this Court found no abuse of discretion in the trial court's decision not to inquire further into a question of possible bias. The juror in that case wrote a note indicating that he was familiar with the daughter of a victim, a student at a high school where the juror worked as a guidance counselor. The Court interpreted the record as suggesting no direct relationship between the juror and the victim's daughter.

The present case is more similar to cases such as *Conaway v. Polk, supra,* in which the juror had some substantial relationship to the witness. It would be particularly difficult for the average person to set aside an acquaintanceship with a victim, in a case in which the prosecution case for the death penalty was based so heavily on victim impact. The juror here had two substantial social contacts with Randy Durbin, and could expect

further contacts with him in the future; it would be particularly difficult for the juror to face a victim/ acquaintance if the juror were to fail to vote for the death penalty.

Taken together with the juror's own expression of potential bias during voir dire, there was good cause to excuse her, and it was an abuse of discretion to deny the defense request.

IV. THE RECORD CONTAINS INSUFFICIENT EVIDENCE OF PREMEDIATION TO SUPPORT THE CONVICTION ON COUNT I, MURDER OF CHUCK DURBIN.

According to the prosecution case, appellant rushed into the home of Chuck Durbin, a person he did not know, stumbling drunk. When Durbin unexpectedly confronted him, appellant shot him. This evidence does not establish premeditation and deliberation. Count One must be reduced to second degree murder, and the death judgment must be set aside.

Rule. The sufficiency of evidence of premeditation depends on evidence of planning activity or evidence of motive and manner of killing.

> To evaluate this claim, we must "examine the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value that would support a rational trier of fact in finding [the defendant guilty] beyond a reasonable doubt." (*People v. Lewis* (2001) 25 Cal.4th 610, 642; see *People v. Johnson* (1980) 26 Cal.3d 557, 578.) Three categories of evidence are helpful to sustain a finding of premeditation and deliberation in a murder case: (1) planning activity; (2) motive; and (3) manner of killing. (*People v. Anderson* (1968) 70 Cal.2d 15, 26–27; see also *People v. Welch* (1999) 20 Cal.4th 701, 758.) Evidence of each of the *Anderson* factors need not be present in order to support a finding of deliberation, but planning, or motive in conjunction either with planning or with manner of killing, must be present to support such a finding. (*People v. Hawkins* (1995) 10 Cal.4th 920, 956–957, overruled on other grounds by *People v. Blakeley* (2000) 23 Cal.4th 82, 89–91.) A judgment will not be reversed so long as there is substantial evidence to support a rational trier of fact's conclusion that the murder committed was premeditated and deliberate. (*People v. Perez* (1992) 2 Cal.4th 1117, 1126–1127; *People v. Sanchez* (1864) 24 Cal. 17, 30 (*Sanchez*).)
>
> (*People v. San Nicolas* (2004) 34 Cal.4th 614, 657-658.)

By this settled authority, the manner of killing alone will not support a finding of premeditation; there must be evidence of planning, or evidence of motive in conjunction with planning or manner of killing.

The reviewing court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. A lack of sufficient evidence on any element is a denial due process under the Fifth and Fourteenth Amendments to the United States Constitution. (*Jackson v. Virginia* (1979) 443 U.S. 307, 326; *People v. Johnson* (1980) 26 Cal.3d 557, 578; see *In re Winship* (1970) 397 U.S. 358, 364, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.")

Due process is denied when the elements of willfulness and deliberation are collapsed into the single element of premeditation, and when the element of premeditation is satisfied by evidence of a sudden intention, as "instantaneous as successive thoughts of the mind." (*Polk v. Sandoval* (9th Cir. 2007) 503 F.3d 903, 911.)

Factual and Procedural Background. In the guilt phase of the trial Richard Diaz testified that during the barbecue in the hours before the shooting, appellant talked of "getting back" at the person who had shot his son in the head. Appellant was drinking Presidente brandy, and was too drunk to drive. (5 RT 1262-1264.)

Appellant set out in a car driven by Rafael Avila, accompanied by Richard Diaz and Little Pete. They looked for Juan Uribe, first at his house, then in the direction of Chris Castaneda's house. They came upon Uribe's car by happenstance, parked across the street from the Durbin house. Diaz testified that he did not know the Durbins and had never been to their house; there was no evidence that anyone in appellant's group knew anyone in the Durbin family. (5 RT 1267-1268.)

According to Diaz, Little Pete went into the house holding the .22 rifle; Big Pete held the .380. (5 RT 1269-1270.) The shooting began moments later. The forensic evidence indicated that Juan Uribe was killed by six small caliber gunshot wounds (presumably .22 caliber). (4 RT 983-986.)

Chuck Durbin was shot to death when he ran into his living room. Durbin suffered seven gunshot wounds. Four of the wounds were to the trunk of the body, and were inflicted by a small caliber weapon, a .22. (4 RT 967-969.) There were three large caliber (.38 or .380) wounds, one to the neck, one to the lower back, and one to the right side of the head. (4 RT 970-974.)

The pathologist, Dr. Stephen Avalos, testified that the smaller caliber wounds may have been inflicted before the large caliber head wound, inasmuch as they caused aspiration and swallowing of blood, which would only have occurred prior to the fatal head wound. (4 RT 975-976, 992.) The bullet tracks gave no indication of where the victim was positioned at the time of the shots. (4 RT 996.)

Fabric fragments were found in Durbin's neck wound. In the opinion of the pathologist, the presence of the fibers could have suggested that the victim's head was near

the carpet when the fatal shot was fired, however without a comparison to the carpet material, such a conclusion would be "total conjecture." (4 RT 998.)

Nancy McComb, a criminalist with the California Department of Justice in Fresno, examined the fibers taken from Durbin's neck wound. She concluded that the fibers were too long to be carpet fibers. The fibers could have been stuffing from a jacket, but no comparison was made. (7 RT 1721.)

Richard Diaz testified that he saw a man, assumed to be Chuck Durbin, run into the living room as appellant and his son entered. He saw appellant grab Durbin, put the gun to his chest, and shoot him. (5 RT 1273.)

The jury was instructed on premeditated murder, in the language of CALJIC 8.20:

> All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree.
>
> The word "willful," as used in this instruction, means intentional.
>
> The word "deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word "premeditated" means considered beforehand.
>
> If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.
>
> The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

> The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.
>
> To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill.
>
> (12 CT 2662.)

There was no jury instruction on felony murder.

In argument to the jury, the District Attorney placed little reliance on premeditation as to Count I, the killing of Chuck Durbin. After all, all that was required for the special circumstance was one count of first degree murder, and one count of second degree murder.[49]

The prosecutor argued, incorrectly, that as to premeditation in general, it was enough that the killing was accompanied by "clear and deliberate intent to kill." (9 RT 2124; see Argument XII, below.) As to the killing of Chuck Durbin, the prosecutor argued that "there's clearly express malice," based on the number of gunshot wounds. (9 RT 2127.) He pointed out that in the opinion of the pathologist, the shots fired from the larger weapon came after the shots fired from the .22. "[T]hat's what they were there for" – to kill. "Chuck Durbin got in the way, and they killed him." (9 RT 2128.) The

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[49] "You have the special circumstances allegation in this case. And you are going to be instructed on that. That's basically if you find that one of these murders is a first degree murder and the other murder is either first or second degree murder, then that allegation is true and you must find. So very simple. One first and the other first or second, the allegation is true." (9 RT 2128.)

prosecutor's argument did not acknowledge or discuss the elements of premeditation, including "pre-existing reflection," set forth in the jury instruction

Most of the defense argument was devoted to the question of identity, and whether it was actually Jesse Rangel and/or Richard Diaz who were responsible for the shootings. (9 RT 2158-2206.) Reluctantly, defense counsel also addressed the question of whether, assuming identity, the two murders were premeditated. He argued that appellant's intoxication could be considered on the issue of premeditation. (9 RT 2200-2201.) None of the defense argument was addressed to the circumstantial evidence, or lack of evidence, on the element of premeditation and deliberation. None of the defense argument addressed the possibility that the Durbin homicide was not premeditated even if the Uribe homicide was premeditated.

The prosecution closing argument was devoted entirely to the identity issue. There was no further discussion of premeditation. (9 RT 2207-2235.)

Analysis. This record lacks sufficient evidence to sustain a verdict of premeditated murder in the killing of Chuck Durbin.

The planning of this offense was directed entirely at killing Juan Uribe. None of the planning, such as it was, had anything to do with the killing of innocent bystanders.

The motive for the killing of Juan Uribe had to do with the prior sniping between the factions of Little Pete and Uribe. Chuck Durbin was not known to appellant or any of his associates. Contrary to the argument of the District Attorney, there was no motive for

appellant to kill everyone in the house, or everyone who got in the way, or indeed anyone other than Juan Uribe.[50]

According to the testimony of Richard Diaz, as they drove away from the scene, appellant said that he "got that guy that was going for the gun.... He said that he shot that guy because he thought he was running to get a gun." (5 RT 1278.)

This statement does not establish premeditation because it indicates a response to the victim's actions, not a planned assault. An honest but unreasonable belief in the necessity for self-defense does not establish a motive for murder. To the contrary, it is a partial or imperfect defense to murder. (*People v. Flannel* (1979) 25 Cal.3d 668; *In re Christian S.* (1994) 7 Cal.4th 768; see *People v. Randle* (2005) 35 Cal.4th 987 [imperfect self defense of others]; and see *People v. Quach* (2004) 116 Cal.App.4th 294 [imperfect self defense available to initial aggressor].)

Moreover, to the extent that the jury disbelieved appellant's statement as quoted by Diaz, this does not provide evidence that appellant had some motive other than self-defense. "Disbelief of a witness' testimony does not create affirmative evidence to the contrary of that which is discarded." (*People v. Jimenez* (1978) 21 Cal.3d 595, 613.)

The manner of killing must be "particular and exacting." That is, the manner of killing must be so particular and exacting that the defendant must have intentionally killed according to a "preconceived design" to take his victim's life in a particular way

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[50] See comment of trial court after guilty verdict: "... He [Durbin] wasn't the target of the offense. He was a victim of circumstances." (10 RT 2338.)

for a reason which the jury can reasonably infer from facts related to planning and motive. (*People v. Anderson, supra,* 70 Cal.2d at 27.)

The most that can be said is that appellant shot Chuck Durbin three times, assuming that the .380 fired the fatal bullets and that he was the person who wielded the .380. In the opinion of the autopsy surgeon, the head wound may have come after Durbin was shot with the .22 rifle.[51] This was not a "particular and exacting" means of killing. There

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[51] The body of Chuck Durbin disclosed seven distinct gunshot entrance wounds. These were numbered 1 through 7, for convenience and not in the order of occurrence, except that because of the aspiration of blood the smaller wounds to the trunk probably proceeded the larger wounds to the head. (4 RT 976.)

No. 1 was a small caliber wound to the lower right side of the back. It did not penetrate the body cavity, and the slug was recovered from soft tissue on the lower left side of the back. No. 2 was also small caliber, and entered higher and more toward the front of the body. This bullet lacerated the liver, and was recovered from the lower bone of the thoracic spine. No. 3 was also small caliber. It entered the front right upper chest, perforated the right lung, and was recovered form the 8th level of the thoracic spine. No. 4 was also small caliber. It entered just above No. 3, grazed the upper lobe of the right lung, and exited through the back upper ribs. It was recovered from the soft tissue of the upper back. (4 RT 967-969.) Stippling was found around wound No. 4, indicating that the gun muzzle was six inches to three feet from the wound. (4 RT 982.)

No. 5 was a larger caliber wound. It could have been a .38 or a .380; the diameter of these bullets is indistinguishable, and they cannot be distinguished based on holes in the skin. (4 RT 995.) No. 5 entered on the lower right side of the neck toward the front of the body. It damaged no major blood vessels and exited from the lower right of the back. That bullet was not recovered from the body. (4 RT 969.)

No. 6 was also a large caliber wound, .38 or .380. It entered on the right side of the head, above the right ear. It struck the skull at a tangential angle, but it fractured the skull and caused bleeding into brain tissue. It exited just in front of the right ear, and the bullet was not recovered from the body. Oddly, a wad of "fiber type material" was "blown back" several inches into the wound. (4 RT 970-972, 997.) The criminalist concluded that the fibers recovered from the neck wound of Chuck Durbin were too long to be carpet fibers. They could be stuffing from a jacket, but no positive identification was attempted. (7 RT 1721.)

was no evidence that appellant set about to kill Durbin according to a plan or with any object or motive in mind.

This Court has observed that evidence of a gunshot fired to the head or neck at close range is "arguably sufficiently 'particular and exacting' to permit an inference that defendant was acting according to a preconceived design." (*People v. Caro* (1988) 46 Cal.3d 1035, 1050.) However, in this context it is more accurate to say that a shot to the head or neck "evince[s] a calculated and deliberate design to kill." (*People v. Morris* (1988) 46 Cal.3d 1, 23.) Intent to kill alone does not establish premeditation. Even a calculated, deliberate, intentional killing is not necessarily a premeditated killing, for it may well lack the element of "careful thought and weighing of considerations for and against," or any form of "pre-existing reflection." (CALJIC 8.20.)

"'A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. [Citation.] "Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance. [Citations.] "The process of premeditation ... does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly....' [Citations.]"'" (*People v. Halvorsen* (2007) 42

No. 7 entered in the lower left back, and exited the lower mid back. A bullet associated with this wound fell out of the victim's clothing. (4 RT 974.)

Cal.4th 379, 419, quoting *People v. Koontz* (2002) 27 Cal.4th 1041, 1080; emphasis added.)

A shot to the head or neck is a very quick and certain way of committing homicide. However much it bespeaks an intentional means of killing, it does not alone establish premeditation. A shot to the head or neck may be entirely consistent with "a sudden heat of passion or other condition precluding the idea of deliberation." (CALJIC 8.20.)

The *Anderson* triad of planning, motivation, and/or exacting manner of killing is not meant to be a straightjacket for the reviewing court. The *Anderson* guidelines are "descriptive and neither normative nor exhaustive," and "reviewing courts need not accord them any particular weight." (*People v. Halvorsen, supra,* 42 Cal.4th at 420, citing *People v. Young* (2005) 34 Cal.4th 1149, 1183, and *People v. Perez* (1992) 2 Cal.4th 1117, 1125.)

Having said that, there yet must be something in the record to rest the judgment on. The *Anderson* factors may not be ignored; if they are lacking there must be something to take their place, or the finding based on premeditation and deliberation must be reversed. The reviewing court must be able to point to some evidence of premeditation either within or without the *Anderson* guidelines to support a first degree murder conviction.

In the present case further search of the record leads to no information to add to the calculus of premeditation. Appellant was preoccupied by the need or impulse to retaliate for the attempted killing of his son. No significant police investigation took place after Little Pete was shot in the head on September 24, 1995, so appellant must have felt

that he was left to his own devices. All indications pointed to Juan Uribe as the responsible party. Nothing pointed to Chuck Durbin, he was nothing but an innocent bystander.

Beyond that, appellant was drunk. He acted completely out of character, in the grip of hatred and passion, the opposite of the reflective state of mind necessary to carefully weigh the considerations for and against the killing. (Compare *People v. Marks* (2003) 31 Cal.4th 197, 232: "The 'calm,' 'cool,' and 'focused' manner of a shooting also supports the finding of premeditation and deliberation.") Normally, appellant was a mature man, a husband and father, employed long term, with no evidence of prior violence in his personal history. These circumstances do not explain or excuse his conduct, but neither do they lend support to the hypothesis of premeditation.

The jury had every reason to feel sympathy for Chuck Durbin and his family. As an innocent bystander he might be considered uniquely deserving of the law's protection, especially in comparison to appellant's indirect role in the death of Juan Uribe, who at least contributed to the chain of events leading to his own death.[52] These circumstances suggest sympathetic and emotional reasons for the jury to go beyond the bounds of the evidence to find premeditation in the killing of Chuck Durbin; in the absence of sufficient evidence of premeditation, such considerations cannot support the judgment on review.

Prejudice. The lack of sufficient evidence of premeditation requires that the conviction on Count One be reduced from first degree to second degree murder.

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[52] See Penal Code § 190.3 (f), concerning the penalty determination: "Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct."

This does not automatically invalidate the death penalty, since the multiple murder special circumstance and the death judgment may rest on a conviction of one count of first degree murder and one count of second degree murder. (Penal Code § 190.2 (a)(3); *People v. Halvorsen, supra,* 42 Cal.4th at 431.)

However, the prejudicial effect of a misunderstanding on the critical element of premeditation requires that the death judgment be set aside. Premeditation is a circumstance of the crime (Penal Code § 190.3 (a)). As a circumstance of the crime, the presence of premeditation is a factor in aggravation[53]; its absence makes the imposition of the death penalty far less likely.

For these reasons the insufficiency of the evidence of premeditation requires that the judgment be modified to second degree murder on Count One, and that the death judgment be set aside.

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[53] See 28 U.S.C. § 848(n)(8). Under that provision the government may prove, as an aggravating factor for the death penalty, that "the defendant committed the offense after substantial planning and premeditation." (*United States v. Flores* (5th Cir. 1995) 63 F.3d 1342, 1373.)

V. THE RECORD CONTAINS INSUFFICIENT EVIDENCE TO SUPPORT THE FINDING OF PERSONAL USE OF A FIREARM AS TO COUNT II, MURDER OF JUAN URIBE.

According to the evidence and argument presented by the prosecution, appellant was an aider and abettor to the murder of Juan Uribe. The prosecution claim was that appellant went to the Durbin house, armed, to assist his son in a firearm attack on Juan Uribe. However, appellant did not personally use a firearm in the murder on Juan Uribe. His conviction for personal firearm use as to that count must be reversed for insufficient evidence.

The reviewing court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 326; *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

"There are no precise formulas, or particular fact patterns to follow, to determine whether a gun has been 'used' for purposes of a sentence enhancement." (*Alvarado v. Superior Court* (2007) 146 Cal.App.4th 993, 1002.)

In *People v. Walker* (1988) 47 Cal.3d 605, 635, this Court found no error in a failure to fully instruct on firearm use under Penal Code § 12022.5. In that case, the defendant used a firearm to herd the victims into the back room of a store, where the co-defendant shot and killed one of the victims. The defendant's own gun use was not found

to be so separate from the fatal shooting to relieve the defendant from liability under the gun use enhancement.[54]

In *People v. Lerma* (1996) 42 Cal.App.4th 1221, 1226, the court reviewed past holdings on weapons use enhancements, and found that there is a necessary nexus between the defendant's own gun use and the death of the victim, in order to justify the gun use enhancement.

> [T]he defendant's use of the weapon need not be the cause of the death of the victim in order for a weapon use finding to be upheld. This is entirely consistent with views taken by this court, and others, as to the meaning of the word "use." In *People v. Poindexter* (1989) 210 Cal.App.3d 803, to which Lerma calls our attention, this court held, in another context, that "use" means that there must be "a nexus between the offense and [the item at issue] . . . [that the item] was . . . an instrumentality in the crime." (*Id.* at p. 808.) Other decisions have referred to "conduct which produces a fear of harm or force by means or display of a [weapon] in aiding the commission of [the crime]. 'Use' means . . . to 'make instrumental to an end . . .' and to 'apply to advantage.' . . . The obvious legislative intent to deter the use of [weapons] in the commission of [crimes] requires that 'uses' be broadly construed." (*People v. Chambers* (1972) 7 Cal.3d 666, 672.)
>
> (*Ibid.*)

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[54] *Walker*, like the other cases cited herein, was decided under a regime that required no jury findings, as a matter of constitutional law, for an additional sentence for the firearm use enhancement. The jury trial requirement was solely a matter of California statutory law. See *People v. Wims* (1995) 10 Cal.4th 293, 304, citing *McMillan v. Pennsylvania* (1986) 477 U.S. 79. That rule has changed; the firearm use finding is now subject to the jury trial guarantee under the Sixth Amendment to the United States Constitution. Since any finding which increases the maximum sentence is subject to jury trial under the Sixth Amendment (*United States v. Booker* (2005) 543 U.S. 220; *Cunningham v. California* (2007) 127 S.Ct. 856), the jury trial requirement now attaches to firearm use enhancement findings as a matter of constitutional law.

People v. Lerma, supra, was later cited with approval in *People v. Jones* (2003) 30 Cal.4th 1084, 1120, which observed that, "If two robbers display guns to intimidate robbery victims and one shoots and kills a victim, both robbers could be found to have personally used a gun in the robbery and the felony murder, even though only one is the actual killer."

Therefore, the rule for imposition of the personal firearm use enhancement in California includes a "nexus" or proximate cause requirement: even if the co-defendant fired the fatal shot, the defendant's personal use of another firearm may support the enhancement, if, but only if, the defendant's gun use was a causative factor in the murder.

In the information filed August 13, 1996, appellant and his son were charged with the murder of Chuck Durbin (Count I), the murder of Juan Uribe (Count II), the premeditated attempted murder of Richard Fitzsimmons (Count III), the premeditated attempted murder of Cindy Durbin (Count IV), and firing at an inhabited dwelling house (Count V). It was further alleged that in the commission of "the above offense," the named defendants used firearms; this enhancement allegation followed Count V. (7 CT 1605.)

Evidence was introduced concerning firearm use in the offenses. Richard Diaz testified that when the car stopped near the Durbin house, Little Pete got out carrying a .22 rifle, and appellant got out carrying a .380 automatic handgun. (5 RT 1269.) From his vantage point outside the house, Diaz claimed to have seen appellant shoot Chuck Durbin. (5 RT 1273.) According to Diaz, as they drove off Little Pete said that he had shot Juan Uribe. (5 RT 1277.)

The crime scene investigation yielded .22 casings scattered around the house. (4 RT 934-940.) Juan Uribe suffered six small caliber gunshot wounds, all consistent with a .22 caliber, and three .22 slugs were recovered from his body. (4 RT 983-986.)[55] Chuck Durbin suffered seven gunshot wounds. Four were small caliber, and three were large caliber, consistent with a .380. (4 RT 969, 974, 982.)[56]

In Jesse Rangel's version, attributed through a statement of Little Pete while they were at the house in Fresno, Little Pete shot Juan Uribe, and appellant shot Chuck Durbin. (6 RT 1501.)

Counts III and V were subsequently dismissed, so that when the charge went to the jury, the paragraph alleging the use of a firearm in the commission of "the above offense" followed the charge of attempted murder of Cindy Durbin.

The jury acquitted appellant of attempted murder of Cindy Durbin. (11 CT 2387.)

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[55] No. 1 entered the lower right chest, perforated the right lung, the heart, and the left lung. The slug was recovered from the left chest. No. 2 entered the right back shoulder blade, traversed the lung and was recovered from an upper spine bone. No. 3 entered the right ear, traversed the brain, and was recovered from the left frontal lobe. (4 RT 983.)

No. 4 grazed the right ear lobe, entered the right cheek, traversed the underside of the skull, and exited the left nostril. That slug was not recovered. No. 5 entered the right side of the jaw, fractured teeth and bone, and exited the mouth. That slug was not recovered. No. 6 entered the right shoulder area, traversed the right upper arm bone, and exited the right shoulder. That slug was not recovered. (4 RT 985-986.)

[56] They were also consistent with the .38 wielded by Richard Diaz, which has the same diameter.

Despite the failure to charge a firearm use enhancement separately for each count,[57] the jury was given separate verdict forms for findings on the firearm use enhancement, as applied to Counts I and II (11 CT 2389, 2390), as well as Count III (11 CT 2398). Paradoxically, the jury found the firearm use allegation untrue as to Count I (Chuck Durbin) (11 CT 2389), and true as to Count II (Juan Uribe) (11 CT 2390). The allegation on Count III, attempted murder of Cindy Durbin, went unused in light of the acquittal on that count.

On a claim of insufficient evidence, the evidence must be viewed in the light most favorable to the People. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1574.) Without conceding its truth, the People's evidence indicated that Little Pete entered the house with a .22 rifle. He found Juan Uribe in the kitchen and shot him multiple times. Appellant remained in the living room. According to Richard Diaz, appellant shot Chuck Durbin several times, in the living room. The forensic evidence indicated that Durbin was shot three times with a .380 or .38, and four times with the .22 wielded by Little Pete.

The other accounts attributed to Little Pete in the following days were consistent with this scenario. In none of these accounts did appellant shoot Juan Uribe directly. By the People's case, interpreted strongly in favor of respondent, appellant's involvement in Uribe's murder was strictly as an aider and abettor.

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[57] For the reasons stated in this Argument, a firearm use allegation charged as to Count II (Juan Uribe) would not have survived a defense motion under Penal Code § 995.

Under the holdings in *People v. Walker, supra*, 47 Cal.3d at 635, and *People v. Jones, supra*, 30 Cal.4th at 1120, there was insufficient evidence of a nexus or causation between appellant's firearm possession and the shooting of Juan Uribe.

This scenario is not similar to "herding" the victims into a place of confinement where they are immediately shot by a co-defendant (*People v. Walker, supra*), nor was it like the display of two guns to robbery victims (*People v. Jones, supra*); here no confrontation occurred between appellant and Uribe. Appellant's gun was not used to facilitate the killing of Juan Uribe.

This situation is unlike shooting into a crowd by two shooters; there both may be liable for firearm use even though only one of them causes injury. (See *In re Londale H.* (1992) 5 Cal.App.4th 1464.) Here, appellant did not shoot at Uribe or contribute to his shooting through firearm use.

In *People v. Berry* (1993) 17 Cal.App.4th 332, 335, the court of appeal upheld a firearm use enhancement where the defendants committed a home invasion robbery. Both defendants were armed. The victims were held at bay, and one victim was taken into another room and shot to death by the co-defendant. The court of appeal held that in that situation the defendant's firearm was used to facilitate a series of offenses that led up to the shooting. "[I]t is clear from the case law that use encompasses a situation where the defendant is armed and uses his firearm in furtherance of a series of related offenses that culminates in a fatal or near fatal shooting even though the defendant does not personally fire the actual shot." (*Ibid.*) Here, in contrast, appellant's son charged into the

house and shot Juan Uribe. There was no series of related offenses leading up to the shooting of Uribe. Appellant did not use his firearm to facilitate that shooting.

For these reasons, there was insufficient evidence to support the firearm use allegation in the killing of Juan Uribe. Appellant was prejudiced by the improper inclusion of an enhancement finding which was part of the circumstances of the crime and which therefore contributed to the death verdict.

VI. APPELLANT WAS DENIED THE RIGHT TO CONFRONTATION BY THE ADMISSION OF OUT-OF-COURT STATEMENTS AGAINST PENAL INTEREST OF HIS SON AND CO-DEFENDANT, PEDRO RANGEL III, THROUGH THE TESTIMONY OF ANOTHER SUSPECT, JESSE RANGEL, AND BY THE USE OF AN OUT-OF-COURT STATEMENT OF HIS WIFE, MARY RANGEL, INTRODUCED AS A N ADOPTIVE ADMISSION THROUGH THE TESTIMONY OF JESSE'S WIFE ERICA RANGEL.

In pretrial proceedings the superior court first granted appellant and his son separate juries in a single trial, then granted separate trials. The purpose of separate juries, then trial severance, was to protect each defendant from the use of out-of-court statements attributed to the other defendant, including statements of appellant's son which incriminated appellant. Despite this protective measure, the trial court permitted the introduction of hearsay statements attributed to Little Pete, which placed appellant on the scene and provided a detailed scenario of the shootings.

Since this trial, the United States Supreme Court has forbidden the use of out-of-court statements without confrontation, regardless of the purported "reliability" of the statements. It was prejudicial error to permit introduction of the out-of-court statements attributed to Little Pete. It was also a violation of confrontation to permit introduction of a statement attributed to appellant's wife Mary Rangel, which placed the primary blame for the shootings on appellant.

Rule. The Confrontation Clause of the Sixth Amendment applies to both federal and state prosecutions. (*Pointer v. Texas* (1965) 380 U.S. 400, 406.)

The trial court here applied the constitutional confrontation rule of *Ohio v. Roberts* (1980) 448 U.S. 56. Under that rule, the admissibility of an out-of-court statement over a confrontation objection depended on a determination of the reliability of the statement. In *Crawford v. Washington* (2004) 541 U.S. 36, the high court rejected the *Roberts* rule and returned to a rule excluding out-of-court testimonial statements, regardless of any asserted reliability.

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. Cf. 3 Blackstone, *Commentaries*, at 373 ("This open examination of witnesses . . . is much more conducive to the clearing up of truth"); M. Hale, *History and Analysis of the Common Law of England* 258 (1713) (adversarial testing "beats and bolts out the Truth much better").
>
> (*Id.* at 61-62.)
>
> Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.
>
> (*Id.* at 68-69.)[58]

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[58] The *Crawford* rule applies to the present case on direct review. "Under the *Teague* framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review." (*Whorton v. Bockting* (2007) 127 S.Ct. 1173, 1180.)

Background. Counsel for appellant filed a Motion to Sever Trials initially on November 19, 1996. (7 CT 1659.) The motion was brought on *Aranda-Bruton* grounds,[59] and attached the statement of Jesse Rangel implicating both defendants through purported admissions of appellant's son. Counsel for appellant's son filed a severance motion on November 20, 1996, on similar grounds, pointing to mutually incriminating statements attributed to appellant. (7 CT 1731.)

The prosecution filed an Opposition to the defense severance motions on January 21, 1997. (8 CT 1738.) The prosecution argued that some of the mutually incriminating statements were made in each others' presence, and therefore became admissible against both as adoptive admissions. It also argued that the statements could be edited to avoid any incriminating references to the speaker's co-defendant.[60]

On June 4, 1997, appellant's counsel filed Additional Argument and Authorities in support of the severance motion. (8 CT 1793.) It was noted that in a joined trial some witnesses might be forced to choose between the defendants because of family loyalties. Counsel for Pedro Rangel III, filed a Declaration and Points and Authorities in support of the severance motion on February 17, 1998. (9 CT 1854.)

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[59] *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123.

[60] However, as a practical matter, it was not possible to edit the statements of appellant's son in a manner which would not incriminate appellant. See *People v. Fletcher* (1996) 13 Cal.4th 451.

On August 29, 1997, the trial court (Hon. Paul R. Martin) heard argument on the severance motion, and ruled that a single trial would be conducted with two juries to accommodate the *Aranda-Bruton* objection at the guilt phase, and to sit in separate trials in the penalty phase. (8 CT 1831; 1 RT 80.)

On February 27, 1998, the District Attorney filed another Opposition to the continuing motions to sever. (9 CT 1880.) The Opposition cited *People v. Greenberger* (1997) 58 Cal.App.4th 298 and *People v. Fuentes* (1998) 61 Cal.App.4th 956, for the proposition that the co-defendant statements were "reliable" and thus admissible over a Confrontation objection, and argued that severance was therefore unnecessary.

On March 2, 1998, counsel for appellant filed another Motion for Severance. The motion noted that Judge DeGroot had determined that Madera County lacked the resources to conduct a single trial with two juries.[61] The motion for complete severance was brought in part because of continuing concern over the "divided loyalties" of witnesses for appellant and his son, and in part on the danger that statements of Little Pete would be introduced in a joint trial without opportunity for confrontation and cross-examination. (9 CT 1895.)

On March 27, 1998, counsel for the co-defendant (Little Pete) filed declarations in support of complete severance. The declarations, all from experienced capital defense counsel, pointed to prejudice which commonly ensues from joint trials of capital defen-

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[61] This determination was apparently made in an unreported conference in which the parties were invited to submit further briefing. The formal order was entered on March 27, 1998.

dants. (9 CT 1919, 1925, 1932.) Counsel for appellant joined in the supplemental declarations. (9 CT 1938.)

Also on March 27, 1998, the trial court granted the defendants' motions for complete trial severance. (9 CT 1878.) The trial court (Hon. John W. DeGroot) noted that the motion for separate juries had already been granted, but it was impossible to carry out because the courtroom was not big enough to accommodate two juries. (1 RT 126.)

On July 6, 1998, after the severance was granted but still about six weeks before trial, the defense filed Motions in Limine. (10 CT 2204.) The motions included a request to exclude out-of-court statements of appellant's son, as "unreliable hearsay." (10 CT 2205-2209.) The hearsay objection included specific references to three statements: (1) the telephone statement of appellant's son to Jesse Rangel, in which Little Pete allegedly said, "We did it," and "we got them"; (2) a later phone conversation in which appellant's son allegedly said to Jesse, that "they had did it, and that they had killed Juan and they were laughing about it"; and (3) statements by Little Pete to Jesse Rangel at Frank's house, when Little Pete described the shootings in some detail. (10 CT 2207.)

The Motion reprised much of the argument presented in the severance motions. It was argued that the use of the statements would violate appellant's constitutional right to confrontation. (10 CT 2207.) According to the Motion, there was a lack of personal knowledge of the statements on the part of appellant, and thus a lack of foundation for their admission, citing *People v. Ramos* (1997) 15 Cal.4th 1133, 1177. The Motion acknowledged that the offered statements were statements against penal interest under Evi-

dence Code § 1230, but argued that the statements were insufficiently reliable, citing *People v. Frierson* (1991) 53 Cal.3d 730, 745.[62]

On July 22, 1998, the prosecution filed an Opposition to the motion to exclude the statements of Little Pete. (10 CT 2234-2237.) In the Opposition it was argued that appellant's confrontation rights would be satisfied if the offered statements were sufficiently "reliable," citing *Ohio v. Roberts* (1980) 448 U.S. 46, 65. The Opposition went on to cite *People v. Greenberger, supra,*[63] and *People v. Fuentes, supra,*[64] for the proposition that statements against penal interest are sufficiently reliable to satisfy the reliability requirement of the confrontation clause under *Ohio v. Roberts, supra.*

The Motion was heard on July 24, 1998. (1 RT 234-247.) The trial court found that the purported statements of appellant's son were "perfectly admissible" in appel-

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62 "In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant. [Citations.]" (*Ibid.*)

63 "In order for a statement to qualify as a declaration against penal interest the statement must be genuinely and specifically inculpatory of the declarant; this provides the 'particularized guarantee of trustworthiness' or 'indicia of reliability' that permits its admission in evidence without the constitutional requirement of cross-examination. Therefore, the determination that the statement falls within this hearsay exception also satisfies the requirements of the confrontation clause." (58 Cal.App.4th 298 at 329.)

64 "In our view, a declaration which 'so far subjected [the declarant] to the risk of . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true' (§ 1230) bears adequate 'indicia of reliability' so as to satisfy the confrontation clause. '[T]he very fact that a statement is genuinely self-inculpatory . . . is itself one of the "particularized guarantees of trustworthiness" that makes a statement admissible under the Confrontation Clause.' (*Williamson v. United States, supra,* 512 U.S. at p. 605.)" (61 Cal.App.4th 956 at 966.)

lant's trial. They were statements against penal interest; moreover, the "real factor" for admissibility was said to be trustworthiness, including whether the statements were sufficiently corroborated by each other or by other evidence, citing *Greenberger* and *Fuentes, supra.* (1 RT 237.)

Defense counsel argued that there was insufficient corroboration that the statements were actually uttered, and pointed out that they could not call Little Pete to testify. The trial court reiterated that the real issue was the reliability of the person who was to testify (Jesse Rangel), that there was no evidence of the declarant's motive to speak untruthfully,[65] and that the hearsay statements therefore met the test of reliability. (1 RT 239.)

The trial court agreed to hold a hearing on reliability of the statements, under Evidence Code § 402 (b). The hearing was tentatively scheduled for August 21, 1998, to coincide with a break in jury voir dire. (1 RT 248.) The 402 hearing was ultimately held just after jury selection, on September 1, 1998. (11 CT 2352; 3 RT 783-810.)

At the time scheduled for the evidentiary hearing, the prosecution took the position that two issues were before the court – the against-penal-interest nature of the statements, and their reliability – and argued that both questions were answered by the transcript of the preliminary hearing. (3 RT 783-784.) The defense again conceded that the statements were against penal interest, but asserted that it was the prosecution's burden to

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[65] This despite the fact that Jesse Rangel was the other major uncharged suspect in the murders, and had every reason to testify untruthfully.

advance evidence of their reliability. (3 RT 784-785.) The trial court agreed with the prosecutors that their burden of proof was satisfied by the preliminary hearing transcript. (3 RT 789.) The defense then called Jesse Rangel on the motion.

Jesse Rangel testified that he received two phone calls from his cousin Little Pete on the evening of October 7, 1998. In the first phone call, Little Pete seemed "calm." (3 RT 792.) In the second phone call, Little Pete's voice was slurred, as if he were intoxicated. (3 RT 793.) The following day Jesse was driven to appellant's house on Wessmith, then to Little Pete's apartment, and from there to Frank Rangel's house in Fresno. Everyone including Little Pete and Jesse drank beer at Frank's house. (3 RT 797.) Little Pete snorted "a lot" of methamphetamine at Frank's house. (3 RT 798.) He seemed to be "paranoid" as a result. (3 RT 800.) The following day Little Pete spoke to Jesse about the shootings. (3 RT 801.)

Defense counsel cited the United States Supreme Court decision in *Williamson v. United States* (1994) 512 U.S. 594,[66] dealing with a parallel federal rule of evidence. Counsel argued that under the reasoning of that decision, only those portions of the hearsay statement should be admitted which were specifically incriminating of the declarant.

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[66] "Nothing in the text of Rule 804(b)(3) or the general theory of the hearsay Rules suggests that admissibility should turn on whether a statement is collateral to a self-inculpatory statement. The fact that a statement is self-inculpatory does make it more reliable; but the fact that a statement is collateral to a self-inculpatory statement says nothing at all about the collateral statement's reliability. We see no reason why collateral statements, even ones that are neutral as to interest, ... should be treated any differently from other hearsay statements that are generally excluded." (*Id.* at 600.)

here appellant's son. The trial court promised to take the *Williamson* opinion under consideration. (3 RT 808.)

The trial court ruled that the statements made by Little Pete, and offered through the testimony of Jesse Rangel, were sufficiently reliable to warrant admissibility over a confrontation objection. (3 RT 810.)

Jesse Rangel testified to the jury on September 15, 1998. Jesse claimed that he received a call from appellant late in the evening of October 7, 1995, after his trip to the grocery store in Fresno. Little Pete said that he "got Juan." Jesse told his wife what was going on. (6 RT 1491, 1590, 1602.)

Jesse went to sleep. Later that evening he got another call, again from Little Pete. Little Pete was drunk and laughing, and said that "he had killed Juan." Little Pete said that he, Big Pete, Richard, and Rafael were involved. In the same phone call Jesse spoke to appellant, who said that he "put those motherfuckers on ice." (6 RT 1492.)

Jesse claimed that during their stay at Big Frank's appellant described the shootings, then Little Pete provided more details. According to the statement attributed to Little Pete, when Rafael dropped him off, Little Pete went to the victims' house, opened the door, and went in looking for Juan. In the account repeated in Jesse's testimony, Richard stayed outside. However, in his statement to Officer Ciapessoni, and in his testimony at the preliminary hearing, Jesse claimed that Little Pete said that all three went in the house. (6 RT 1548, 1549.)

In this statement attributed to Little Pete, Little Pete said that he found Juan Uribe and shot him. Chuck Durbin came out "from the side," and appellant, who had stayed by

the front door, "shot him in the head." Juan was wounded and ran to the kitchen, where Little Pete "just unloaded the rest of his bullets on him." (6 RT 1501.)

In this account, Little Pete had a .22 rifle, appellant had a .380, and Richard Diaz had a .38. (6 RT 1501.) Little Pete said that appellant gave the guns to Little Pete's sister's husband, to ditch them. (6 RT 1502.) Little Pete said that they burned their clothing in a pit in the backyard. (6 RT 1538.)

A related issue arose later in the afternoon of September 15, 1998. The District Attorney indicated to the court that he intended to call Erica Rangel, Jesse's wife, to testify concerning adoptive admissions of appellant, statements by appellant's wife made in the presence of appellant which he did not reply to. The prosecutor understood that they were required to wait on the outcome of the hearsay and confrontation objection to Jesse Rangel's testimony (see above). The trial court indicated that a 402 (b) hearing would be held as to Erica's testimony as well. (6 RT 1560.)

Erica Rangel then testified out of the presence of the jury. She testified that some time after the shootings she was in a room in a white motel on Jensen with several other people including appellant and his wife Mary. Mary said a lot of things to appellant, "mostly out of anger," some of which Erica could not remember. Mary accused appellant of being a murderer. She said that "he was a murderer," and "their son was, too." Appellant made no reply. (6 RT 1563.) She also said that she didn't want to be married to him any longer, and that "she didn't care if he was drunk that he was the adult, he should have taught his son better." (6 RT 1574.)

The trial court found that appellant was present and heard the statement. It was the kind of statement that would give rise to immediate response and denial. Under the circumstances the jury could consider it as an adoptive admission. (6 RT 1579.)

In her testimony before the jury immediately following the 402 (b) hearing, Erica Rangel described a statement made by appellant's wife Mary at the Starlight Inn, and attributed to appellant as an adoptive admission. Erica testified that she visited a room at the Starlight where appellant and Little Pete were staying. Jesse was also present, seated on the bed next to appellant. (6 RT 1610.)[67] Mary said to appellant, "You're a murderer. And now my son is one, too." Erica did not hear any response from appellant. (6 RT 1595.)

On September 16, 1998, appellant's son Little Pete appeared with his attorney, out of the presence of the jury, and invoked the Fifth Amendment. (7 RT 1695.) The availability of Mary Rangel to testify was never resolved; presumably the defendant continued to hold the marital privilege, but she was never called to testify, and there was no stipulation concerning her availability.

The jury received the standard instruction on adoptive admissions, CALJIC 2.71.5. (12 CT 2633; 9 RT 2252.)[68]

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[67] This account does not appear in the testimony of Jesse Rangel.

[68] "If you should find from the evidence that there was an occasion when the defendant:

"(1) under conditions which reasonably afforded him an opportunity to reply;

Analysis. The hearsay statements introduced against appellant were introduced in violation of the Confrontation Clause of the United States Constitution.

The statements were testimonial because they were all made well after the offense, in the context of information gathering. The statements were not made as a means of reporting crime, nor were they made in the heat of the moment or in the stress of the criminal event itself. Instead, they were made as part of information gathering, by persons who had a direct interest in the outcome. (See *Davis v. Washington* (2006) 547 U.S. 813 [call to 911 in the course of a crime was not testimonial; statement to investigating police officer shortly after the crime, while defendant was present, was testimonial].)

All the reporting witnesses (Jesse and Erica Rangel and Mary Rangel) had an interest in fixing guilt and shifting blame: Jesse Rangel was a prime suspect in the murders, who could only benefit by the conviction of appellant; Erica was his wife; and Mary

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"(2) failed to make a denial or made false, evasive or contradictory statements, in the face of an accusation, expressed directly to him or in his presence, charging him with the crime for which this defendant now is on trial or tending to connect him with its commission; and

"(3) that he heard the accusation and understood its nature, then the circumstance of his silence and conduct on that occasion may be considered against him as indicating an admission that the accusation was true.

"Evidence of an accusatory statement is not received for the purpose of proving its truth, but only as it supplies meaning to the silence and conduct of the accused in the face of it.

"Unless you find that the defendant's silence and conduct at the time indicated an admission that the accusatory statement was true, you must entirely disregard the statement."

Rangel had decided that the whole incident was appellant's fault, choosing her son over her husband. Though not police officers, they were interrogators.

> We use the term "interrogation" in its colloquial, rather than any technical legal, sense. Cf. *Rhode Island v. Innis*, 446 U.S. 291, 300-301 (1980). Just as various definitions of "testimonial" exist, one can imagine various definitions of "interrogation," and we need not select among them in this case. Sylvia's [the defendant's wife] recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition.
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> (*Crawford v. Washington, supra*, 541 U.S. at 53, fn. 4.)

Even if the statements offered here over a confrontation objection were "nontestimonial," and therefore outside the core rule of *Crawford*, they still should not have been admitted if they were unreliable. The testimony of prime suspects such as Jesse and Erica Rangel, repeating statements of the co-defendant, is highly unreliable. Their testimony should not be exempted from Confrontation Clause scrutiny entirely, but should be tested for reliability.[69]

The high court cautioned of this dilemma: "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law – as does [*Ohio v.*] *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." (*Crawford v. Washington, supra*, 541 U.S. at 68.)

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[69] But see *United States v. Fields* (5th Cir. 2007) 483 F.3d 313, 365; *United States v. Ellis* (7th Cir. 2006) 460 F.3d 920, 923; *United States v. Feliz* (2d Cir. 2006) 467 F.3d 227, 231.

The California Court of Appeal has taken this holding to mean that even "non-testimonial" out-of-court statements continue to be assessed under the *Roberts* reliability standard. In *People v. Corella* (2004) 122 Cal.App.4th 461, the Court of Appeal concluded that, after *Crawford*, "a 'nontestimonial' hearsay statement continues to be governed by the *Roberts* standard, but the admission of a 'testimonial' hearsay statement constitutes a violation of a defendant's right of confrontation unless the declarant is unavailable to testify at trial and the defense had a prior opportunity for cross-examination. (*Crawford*, 124 S.Ct. at pp. 1369, 1374.)" (*Id.* at p. 467, emphasis added; *People v. Butler* (2005) 127 Cal.App.4th 49, 58.)

All of the challenged hearsay statements of appellant's wife and son were introduced in violation of the Confrontation Clause. The hearsay statements were all testimonial, because they were acquired when the speaker were in the process of justifying themselves in the presence of a sympathetic audience, who were actually acting in the role of information gatherers for the police investigation. The use of the statements without confrontation and cross examination therefore violated the rule of *Crawford v. Washington, supra.*

To the extent that any of the statements were non-testimonial, they were unreliable and violated the rule of *Ohio v. Roberts, supra.*

A. Statements of Appellant's Son.

Severance of the co-defendants was granted, and separate trials were held, in order to prevent the use of co-defendant statements without cross-examination. And yet, de-

spite the refusal of appellant's son to testify in appellant's trial, the purported statements of Little Pete to his cousin Jesse were offered against appellant, and admitted as statements against penal interest. (Evidence Code § 1230.)[70]

The United States Supreme Court has noted that accomplice confessions are excluded because of confrontation concerns.

> We similarly excluded accomplice confessions where the defendant had no opportunity to cross-examine. See *Roberts v. Russell*, 392 U.S. 293, 294-295, 20 L.Ed.2d 1100, 88 S.Ct. 1921 (1968) (per curiam); *Bruton v. United States*, 391 U.S. 123, 126-128, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968); *Douglas v. Alabama*, 380 U.S. 415, 418-420, 13 L.Ed.2d 934, 85 S.Ct. 1074 (1965)....
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> *Lee v. Illinois*, 476 U.S. 530, 90 L.Ed.2d 514, 106 S.Ct. 2056 (1986), on which the State relies, is not to the contrary. There, we *rejected* the State's attempt to admit an accomplice confession....
>
> (*Crawford v. Washington, supra,* 541 U.S. at 57 and 58.)

Indeed, the United States Supreme Court in *Bruton v. United States, supra,* held that a ground for severance of co-defendants, which was granted in the present case, is the lack of confrontation when the co-defendant's mutually incriminating statement is presented without cross-examination. "[B]ecause of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of [the co-defendant's] confession in this joint

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[70] "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." (*Bruton v. United States, supra,* 391 U.S. at 126.)

The attempt to make an "end run" around the confrontation guarantee, by introducing a co-defendant's admissions or confessions as statements against penal interest, has been deflected by the Supreme Court. In *Lilly v. Virginia* (1999) 527 U.S. 116, 134, a plurality of the United States Supreme Court said that the admission of an accomplice's out-of-court custodial confession that incriminates the defendant is not admissible as a declaration against interest because it "does not come within a firmly rooted hearsay exception." (527 U.S. at 134, fn. 5.) (See *People v. Schmaus* (2003) 109 Cal.App.4th 846, 856.)

Mere off-hand remarks, fitting within the definition of spontaneous utterances and made to neutral witnesses, have been held to be non-testimonial and outside the ambit of confrontation guarantees. See *People v. Cervantes* (2004) 118 Cal.App.4th 162, 174, and *People v. Rincon* (2005) 129 Cal.App.4th 738. But the statements in question here were not off-hand. They were complete accounts of the offense, made in response to inquiries by persons intensely interested in the subject.

Furthermore, the testifying witnesses in *Cervantes* and *Rincon* were disinterested. Here, Jesse Rangel was anything but disinterested. He was the prime suspect from the beginning of the investigation, and he was involved in prior efforts to retaliate against Juan Uribe. His photograph was identified several times by Cindy Durbin. He fled the area and left the state within days of the shooting. He was a prime candidate for accessory or accomplice status, at least, through the time of appellant's trial. The out-of-court

statements offered through Jesse Rangel were testimonial; even if they were non-testimonial they were from an unreliable source, and should have been excluded.

Under these circumstances, the statements of Little Pete, introduced through the testimony of Jesse Rangel, violated appellant's constitutional right to confrontation.

B. Statement of Appellant's Wife.

Mary Rangel's accusation of appellant – her out-of-court statement that appellant was a murderer – was admitted in violation of confrontation guarantees.

In *Crawford v. Washington, supra,* the conviction was based in part on statements of the defendant's spouse. In that case the statements were introduced over a claim of marital privilege, however, an exception was granted, not for adoptive admissions as here, but for statements against penal interest.

> In Washington, this [marital] privilege does not extend to a spouse's out-of-court statements admissible under a hearsay exception, see *State v. Burden*, 120 Wn.2d 371, 377, 841 P.2d 758, 761 (1992), so the State sought to introduce Sylvia's [defendant's wife] tape-recorded statements to the police as evidence that the stabbing was not in self-defense. Noting that Sylvia had admitted she led petitioner to Lee's apartment and thus had facilitated the assault, the State invoked the hearsay exception for statements against penal interest, Wash. Rule Evid. 804(b)(3) (2003).
>
> (541 U.S. at 40.)

The difficulty perceived by the high court in *Crawford* was that the defendant could not cross-examine his wife without calling her to the stand and thereby waiving the marital privilege. The court in *Crawford* assumed that waiver of the marital privilege was an impossible burden to place on the defendant, as a cost of preserving his right to confrontation. ("In this case, the State admitted Sylvia's testimonial statement against

petitioner, despite the fact that he had no opportunity to cross-examine her." (541 U.S. at 68.)) Similarly, in the present case the defendant could not call his wife to the stand without waiving the marital privilege. As in *Crawford,* that waiver could not be exacted as a price of asserting his right to confrontation.

In this case the statement of Mary Rangel, repeated by Erica Rangel, was introduced as an adoptive admission against appellant, because he was present and made no reply or protest. Adoptive admissions are listed as an exception to the hearsay rule, under Evidence Code § 1221.[71]

This Court has held that the adoptive admission exception to the hearsay rule, standing alone, does not implicate the right to confrontation, because the declarant's veracity is not in issue. Instead, this Court has reasoned, the declarant's statement has been adopted by the defendant, and becomes his statement, an admission against penal interest. (See *People v. Combs* (2004) 34 Cal.4th 821, 842-843,[72] and *People v. Roldan* (2005) 35 Cal.4th 646, 711.[73])

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[71] "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

[72] "...[D]efendant's Sixth Amendment right to confrontation was not implicated. As in *Crawford,* here, Purcell's statements made during the police interrogation are testimonial, and it does not appear from the record that defendant had a prior opportunity for cross-examination. (*Crawford, supra,* 541 U.S. at pp. 53, 61-62, fn. 4.) Defendant did not dispute Purcell's unavailability at trial, nor does he do so on appeal. However, Purcell's statements incriminating defendant were not admitted for purposes of establishing the truth of the matter asserted, but were admitted to supply meaning to defendant's conduct or silence in the face of Purcell's accusatory statements. (*People v. Silva* (1988) 45 Cal.3d 604, 624; CALJIC No. 2.71.5.) '[B]y reason of the adoptive admissions rule, once the defendant has expressly or impliedly adopted the statements of another, the

Despite these holdings, the statement of Mary Rangel violated appellant's right to confrontation. Mary Rangel was in a position to make an accusation against appellant

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statements become his own admissions ... . [Citation.] Being deemed the defendant's own admissions, we are no longer concerned with the veracity or credibility of the original declarant.' (*Silva, supra*, 45 Cal.3d at p. 624.)

"'Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.' (Evid. Code, § 1221.) The statute contemplates either explicit acceptance of another's statement or acquiescence in its truth by silence or equivocal or evasive conduct. 'There are only two requirements for the introduction of adoptive admissions: "(1) the party must have knowledge of the content of another's hearsay statement, and (2) having such knowledge, the party must have used words or conduct indicating his adoption of, or his belief in, the truth of such hearsay statement." [Citation.]' (*People v. Silva, supra*, 45 Cal.3d at p. 623.) Admissibility of an adoptive admission is appropriate when '"a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution ...."' (*People v. Riel* (2000) 22 Cal.4th 1153, 1189.)"

[73] "Defendant presented no evidence suggesting he did not hear the comments testified to by Barrios and Christine Zorns. Nor is there any suggestion he failed to speak because he was relying on his Fifth Amendment rights. Although, as defendant emphasizes, the witnesses did not specifically attribute each comment to a particular speaker, that is irrelevant on the facts of this case, where defendant heard the comments, had the opportunity to reply, and the comments were made under circumstances that normally would call for a response. Although he claims there was no evidence of his reaction to the comments, his silence may be taken as an adoption of them. We conclude the trial court properly admitted the statements as adoptive admissions excepted from the hearsay rule.

"Defendant also contends the admission of this same evidence violated his federal constitutional rights. He did not, however, make a specific objection on constitutional grounds at trial. Assuming without deciding the issue was properly preserved for appellate review (*People v. Champion, supra*, 9 Cal.4th at p. 908, fn. 6), we conclude defendant fails to persuade us the admission of his adoptive admissions rendered his trial so fundamentally unfair that it violated his due process rights. (See *Estelle v. McGuire, supra*, 502 U.S. at p. 75.) In short, we find no constitutional error. [fn.]"

which would shift the blame to him and away from their son. Appellant was not in a position to protest since anything he said would seem to be an accusation of his own son, and moreover would be guaranteed to launch a further domestic quarrel with his wife. This is not a situation in which appellant's silence "manifested his adoption or his belief" in the truth of his wife's statement. (Evidence Code § 1221.)

Mary Rangel's statement was very much her statement, based on her desires and speculations. She was in a position to know something about the shootings. She was at the barbecue on Wessmith just before the shootings; she had a motive similar to appellant's to account for the shooting of Little Pete, indeed she could have had an accessory role in the murders (she certainly assisted Jesse Rangel in his flight from California). She was well acquainted with appellant and her son. Her statement did not represent an account of the shootings, since she was not at the scene of the shootings on East Central Avenue. Rather, her statement represented her personal judgment of the relative responsibilities of the two people who she believed were responsible, her husband and her son.

Since it was appellant's son who had the primary motive to retaliate against Juan Uribe, without Mary Rangel's statement the jury could well have viewed appellant's role as secondary or tangential. Even if the jury accepted everything else argued in support of the People's case, and reached a valid verdict at the guilt phase, it was still important for the jury to assess the relative roles of the two shooters. Appellant was falling down drunk by the time of the shootings, and may have had little idea of what was going on beyond wanting to help to protect his son from someone who had recently shot him. As-

signing to appellant a primary or planning role in the murders, which was Mary Rangel's personal conclusion, was crucial to the death penalty decision.

Appellant was in a Catch-22. He could not very well contradict his wife on this subject, without casting blame on his son. This was not a situation in which his silence implied belief in the truth of his wife's accusations.

His wife's accusations should have been subject to cross-examination. Her statements should not have been introduced unless and until defense counsel could confront her on the stand. The defense should have been able to ask her why she concluded that appellant was primarily responsible for these murders. What did she know about the planning and preparation that would suggest that appellant was the primary mover? Perhaps she knew nothing of importance, and was simply choosing her son over her husband. But we will never know, since she did not testify.

For these reasons, it was a violation of the constitutional right to confrontation to permit the introduction of evidence of Mary Rangel's accusations.

Prejudice. The statements introduced in violation of confrontation had a substantial impact on the outcome of both the guilt and penalty phases of the trial.

Violation of the constitutional right to confrontation is reviewable under the beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680; *People v. Dyer* (1988) 45 Cal.3d 26, 46.)

Jesse Rangel claimed an alibi, and his wife and mother backed him up. Beyond trying to exonerate himself, his testimony should not have played a role in this trial. But, since he was identified as one of the shooters, merely presenting biased evidence of an alibi may not have been enough to distance him from prosecution. Since he was also in a position to repeat alleged statements by Little Pete, he had every reason to create a hearsay scenario which placed appellant, and not himself, at the scene as one of the shooters.

Jesse Rangel's version of the offense, attributed to Little Pete, interlocked with the version offered by Richard Diaz. Both of their versions placed Little Pete and Big Pete, and no other perpetrators, inside the house when the fatal shots were fired. Their versions were at odds with the statements of Cindy Durbin, who identified Jesse as one of the shooters. When she changed her statement to conform to theirs, the prosecution case was superficially complete. However, it remained subject to substantial doubt, because Richard Diaz was in a position to conform his statement to Jesse Rangel's, and Cindy Durbin had an obvious interest in changing her identification at the preliminary examination, to conform to the scenario adopted by the prosecution.

Without the out-of-court statements attributed to Little Pete, the jury would not have reached the same result, beyond a reasonable doubt.

In addition, lingering doubt over appellant's role as the actual shooter was relevant to the penalty determination. (See discussion in *People v. Gay* (2008) 42 Cal.4th 1195, 1217-1228.) Improper admission of the statements at the guilt phase also undermined the penalty phase verdict, and requires that it be reversed.

The prejudice which flowed from the out-of-court statement of Mary Rangel, offered through Erica Rangel, went more to the penalty phase of the trial. Mary Rangel was not at the scene of the shootings, and her opinion on who was involved may have been given little weight at the guilt phase. But her opinion as to who was primarily responsible undoubtedly had a great effect on the jury at the penalty phase.

Little Pete had the primary motive to kill Juan Uribe. There was bad blood between the two of them, dating at least since the shooting following the baptism party on September 24, 1995. Appellant was much older than his son and his nephew and their associates such as Richard Diaz. He was a dutiful husband and father, a hard worker, and a person who took in foster children. He was drunk on the night of the offense. Whatever his level of involvement, he may have been led into it by his son; this could have been an important consideration in mitigation of punishment.

But this was not Mary Rangel's opinion, and she clearly did not want to aid appellant at the expense of her son. According to her, appellant was primarily responsible for the shootings: "You're a murderer. And now my son is, too." (6 RT 1595.) This opinion, from appellant's own wife, undoubtedly had a major role in shifting the jury's opinion toward the death penalty.

For these reasons the use of out-of-court statements without confrontation, as to both appellant's son and his wife, was prejudicial error.

VII. THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON FLIGHT AS EVIDENCE OF CONSCIOUSNESS OF GUILT, WHERE OTHER SUSPECTS ALSO FLED THE CRIME SCENE AND LATER FLED MADERA, BUT THE STANDARD FLIGHT INSTRUCTION ONLY PINPOINTED APPELLANT'S CONDUCT.

California statutory and case law mandate the reading of an instruction which draws the jury's attention to the defendant's flight immediately after the commission of a crime. According to the instruction, the jury may consider such evidence in reaching a conviction. Yet, in the present case there was no concomitant instruction drawing the jury's attention to the flight of other suspects in the shootings, including Jesse Rangel and Richard Diaz. Inevitably, the California requirement of an instruction pinpointing the defendant's post-offense conduct, while passing over evidence of the flight of other suspects, will operate to deny the defendant a fair trial. So it is in the present case; by pinpointing only the defendant's conduct, the jury instruction enhanced the weight attributed to his conduct and diminished the weight attributed to the flight of third-party suspects, and thereby denied appellant a fair trial.

Rule. In *People v. Sears* (1970) 2 Cal.3d 180, 189-190, this Court held that a defendant is entitled to an instruction relating evidence at trial to the doctrine of reasonable doubt.

In *People v. Wright* (1988) 45 Cal.3d 1120, this Court clarified and limited its holding in *Sears*. In *Wright* this Court emphasized "the well settled rule against argumentative instructions on a disputed question of fact." (*Id.* at 1141.) The *Wright* court

held that under a proper instruction, what is pinpointed is not specific evidence as such, but rather the theory of the defendant's case. (*Ibid.*)

This Court has accepted, at least tacitly, the proposition that the rule against argumentative jury instructions, expressed in *People v. Williams, supra,* applies equally to jury instructions which focus on evidence offered in support of the prosecution case. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 131.) There is no reason, and certainly no reason consistent with equal protection and due process, to permit pinpoint instructions for one party that would not be permitted for the other party.

CALJIC 2.52 refers to specific prosecution evidence – evidence of appellant's flight – and not to a theory of the case. An instruction which applies to prosecution evidence, but which does not mention parallel evidence which might raise a reasonable doubt of the defendant's guilt, is an unequal application of state law.

A state's failure to equally apply state law may be a violation of federal due process. (*Hewitt v. Helms* (1983) 459 U.S. 460, 466; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295; *Walker v. Deeds* (9th Cir. 1995) 50 F.3d 670, 673.)

Background. There was evidence of flight by several potential suspects shortly after the shootings.

Immediately after the shootings, neighbors saw the suspects fleeing the scene. (4 RT 1104-1105 [Delores Rivera]; 5 RT 1126-1127 [Cindy Burciaga].) Therefore, the persons who might have fallen within a flight instruction included anyone who was identified at the scene, and who did not immediately contact law enforcement to explain what

had happened. These included not only appellant and his son and Rafael Avila, but also Richard Diaz, who identified himself as an accomplice, and Jesse Rangel, who was identified as a perpetrator by Cindy Durbin.

Several potential suspects left Madera within days of the shootings.

Appellant and his son stayed with Frank Rangel in Fresno for a few days, then moved to local motels. (6 RT 1496-1498, 1517, 1593, 1593-1594.) Jesse Rangel moved with them. To the extent that this was evidence of flight supporting an inference of guilt, the inference runs as much to Jesse Rangel as to appellant.

Jesse Rangel then left the area entirely. Appellant's wife Mary provided him with a couple hundred dollars and her car.[74] Jesse drove with his family to Santa Maria to pick up Erica's cousin Humberto. (6 RT 1504-1505, 1518.) From Santa Maria they drove to New Mexico. They stayed in a motel for a few days, then stayed with Humberto's girlfriend. (6 RT 1519.) They were in her mobile home in New Mexico when they were tracked down by law enforcement.

Evidently, appellant and his son left the state about the same time. Motel receipts, introduced by stipulation, indicated that "Pete Rangel" stayed at an Economy Inn on Coolwater Lane in Barstow, California, from November 16 to November 17, 1995 (Ex. 85, 86). "Pete Rangel" stayed at a Motel Six in Phoenix, Arizona, from November 17 to November 18, 1995 (Ex. 84). (11 CT 2375; 8 RT 1919; see 2 ACT 455.)

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[74] The trial court instructed the jury, following a defense objection, that evidence of Mary's arrangements for Jesse Rangel's flight from Madera was introduced for a non-hearsay purpose, the state of mind of Jesse Rangel. (6 RT 1517.)

The district attorney requested the reading of CALJIC 2.52[75] at the conclusion of the guilt phase of the trial. (12 CT 2730.) No objection was entered by the defense, and no countervailing instruction on the flight of other suspects was requested.

The prosecutor made extensive reference to evidence of appellant's flight in guilt phase argument to the jury.

> We have more evidence. What did the defendant do? The defendant had a job at FMC for 16 years. It was a good job. He earned good money. What did he do? He immediately after the killings of Chuck Durbin and Juan Uribe, he quit that job. And what is even more unusual is he just didn't walk in and say I quit. He just didn't show up. He gave no notice. He didn't even give notice to his supervisor Jerry Smith who is not just his supervisor, his friend. You heard Jerry Smith testify he was looking for him and wanted to know what's going on. He didn't even give him notice he was quitting this job of 16 years.
>
> What else did he do? He left town. He went from motel to motel in Fresno. We have the motel receipts to show that. You have the testimony of Ms. Kennedy to show that. You have the testimony of Erica Rangel and Jesse Rangel to show that as well.
>
> What did he do next? He then went to Barstow, California. And you have the motel receipt to show that he was in Barstow, California. And then finally he went to Phoenix, Arizona. And you have the motel receipt from the motel in Phoenix, Arizona. So he left town immediately after these killings.
>
> (9 RT 2138-2139.)

Defense counsel in argument tried to cast blame on Jesse Rangel: "He knew he was a suspect." (9 RT 2182.) Oddly, however, defense counsel made no reference to Jesse Rangel's flight to New Mexico. Instead, he seemed to cast Frank Rangel, Jr., in the role of a fugitive: "Why would he [Jesse Rangel] choose Frank Rangel, Jr.? He knew

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[75] See now CALCRIM 372, adopted many years after appellant's trial.

Frank Rangel, Jr., was on the run with little Pete." (9 RT 2182.) In actuality, Frank Jr. was never on the run: it was Jesse Rangel who was on the run.

In rebuttal, the prosecutor returned to appellant's asserted consciousness of guilt through flight, while disavowing any similar implication from Jesse Rangel's behavior.

> So why did the defendant, Pedro Rangel, Jr. leave town? Why did he quit a job he had for 16 years? Why did he leave town two days after the homicides without even bothering to call his boss and friend? Why did he bounce from hotel to hotel over the next month and a half? Because he knew that him and his son were guilty of murder.
>
> Getting back to Jesse, it's not really important why Jesse left town or where he went. What is important is what happened after he left town. Shortly after Jesse arrived in New Mexico he got a call from Officer Ciapessoni. Within the first five to 10 minutes of that phone call, Jesse Rangel told Officer Ciapessoni everything he knew about the homicides. Everything he had been told about the homicides. He told this information – talked about this information over the phone to a person he had never even met. And he told him everything.
>
> When he told Officer Ciapessoni that information he was unaware that he was a suspect in the case. He was unaware there was a warrant out for his arrest. He was unaware that he was about to be arrested very shortly thereafter. But still, he told him everything.
>
> (9 RT 2215-2216; emphasis added.)

Shortly after the attorneys' arguments, the jury was instructed, including the flight instruction in the language of CALJIC 2.52:

> The flight of a person immediately after the commission of a crime or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.
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> (9 RT 2252; 12 CT 2629.)

Analysis. A jury instruction focusing solely on appellant's flight was unfair in these circumstances.

The reading of a flight instruction on appropriate evidence is mandated by Penal Code § 1127c:

> In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows: The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine. No further instruction on the subject of flight need be given.

In *People v. Bradford* (1997) 14 Cal.4th 1005, 1055, this Court approved the reading of CALJIC 2.52, against the argument that there were other possible explanations for the defendant's conduct.

> We disagree. In general, a flight instruction "is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt." (*People v. Ray, supra*, 13 Cal.4th at p. 345; § 1127c.) "'[F]light requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested.'" (*People v. Visciotti* (1992) 2 Cal.4th 1, 60, quoting *People v. Crandell* (1988) 46 Cal.3d 833, 869.) "*Mere* return to familiar environs from the scene of an alleged crime does not warrant an inference of consciousness of guilt [citations], but the *circumstances* of departure from the crime scene may sometimes do so." (*People v. Turner* (1990) 50 Cal.3d 668, 695, original italics.)
>
> Here, while defendant did not leave the apartment building in which the murder occurred, he left Kokes's apartment after killing her, told Stevens, "I really got to get the hell out of here," packed his belongings, asked DeLong if he could stay with her near Fresno, and repeatedly pleaded with his roommate to drive him out of town. This is sufficient evidence to warrant instructing the jury to determine whether flight occurred, and, if so,

> what weight to accord such flight. (See *People v. Mason* (1991) 52 Cal.3d 909, 943.) Moreover, the instruction given adequately conveyed the concept that if flight was found, the jury was permitted to consider alternative explanations for that flight other than defendant's consciousness of guilt.

It must be demonstrated that the defendant was leaving the scene of the crime; in a situation where the defendant left the crime scene, but intended to return, and was arrested a short distance away on his way back, it was error to read the flight instruction. (*People v. Crandell, supra,* 46 Cal.3d at 869-870.)

The jury may properly consider evidence of flight whether the issue before it is identity (*People v. Mason, supra,* 52 Cal.3d at 943, overruling *People v. Anjell* (1979) 100 Cal.App.3d 189, 199) or mental state (*People v. Smithey* (1999) 20 Cal.4th 936, 982).

This Court has held that CALJIC 2.52 is unobjectionable because it is aimed in part at benefiting the defendant. (See *People v. Bolin* (1998) 18 Cal.4th 297, 327.) Nevertheless, the instruction is aimed entirely at focusing the jury's attention on evidence of the defendant's flight. Evidence of flight may be highly persuasive in some cases. Indeed, it is considered highly relevant in contrast to evidence of lack of flight, which has little relevance and will not support a pinpoint instruction. (*People v. McGowan* (2008) 160 Cal.App.4th 1099; 1105; *People v. Williams* (1997) 55 Cal.App.4th 648, 652.)

For these reasons, the standard instruction calling attention to the defendant's flight has no benefit to any criminal defendant, and specifically no benefit to the defendant in this case. The instruction is meant to draw attention to the defendant's conduct as evidence of guilt; it has no other purpose. Its use should be balanced by instruction on evidence of flight by third party suspects.

Since the trial in this case, it has been held that the defense may request an instruction pinpointing evidence of flight by a third party suspect. In *People v. Henderson* (2003) 110 Cal.App.4th 737, 744, decided about five years after appellant's trial, the court of appeal held that an instruction on flight by a third party suspect may be the subject of a defense-requested instruction. The court of appeal found that such an instruction was appropriate even though there was no earlier California authority which would have supported such an instruction.

> ... In the abstract we are inclined to agree with Henderson that evidence of flight by a third party after being accused of a crime or after acquiring knowledge of the crime, could be relevant to the jury's determination of whether the third party's conduct raises a reasonable doubt as to the identity of the perpetrator. Accordingly, we believe a defendant would be entitled to a special instruction, in the nature of a pinpoint instruction, if properly prepared and submitted by the defense. (See *People v. Sears* (1970) 2 Cal.3d 180.) On the other hand, we are satisfied there is no authority which would compel a trial judge to draft such an instruction or to give it on the court's own motion.
>
> There is a sua sponte duty on the part of trial judges to give a jury instruction on the effects of flight as it relates to a defendant in a criminal case....
>
> Plainly, both the code section and the CALJIC instruction deal with the charged defendant and address the proper uses of the evidence of flight. The focus of the instruction is on the defendant and the question of whether there was flight and whether it is reasonable to infer consciousness of guilt from such flight. The instruction goes on to limit the jury's use of the evidence in that it advises the jury that flight alone cannot support a finding of guilt. Thus CALJIC No. 2.52 serves the dual purpose of permitting an inference of guilt, but at the same time provides the defendant with some protection against misuse of such evidence. (*People v. Han* (2000) 78 Cal.App.4th 797, 808; *People v. Batey* (1989) 213 Cal.App.3d 582, 586.) Under current law the trial court has no sua sponte duty to modify CALJIC No. 2.52. (*People v. Prysock* (1982) 127 Cal.App.3d 972, 1002-1003.) In order to use an instruction such as CALJIC No. 2.52 to deal with alleged flight by a third party, the instruction would have to be totally rewritten.

The focus would shift to the third party and would be for the purpose of determining if such flight points to a reasonable doubt as to the identity of the perpetrator. Further, the court would have to determine if like section 1127c, no knowledge of the crime by the third party would have to be demonstrated in order to justify the instruction, or whether the court should revert to the common law view that the person had to first be accused or at least aware of the crime. (See *People v. Hill* (1967) 67 Cal.2d 105, 120.)[76]

Neither the parties to this appeal nor this court has found any California case, which addresses the question of an instruction on flight of a third party. Henderson has, however, found authority from Pennsylvania, which does address the issue.

The most recent of the Pennsylvania cases cited by Henderson, *Commonwealth v. Milligan* (Pa. Super. Ct. 1997) 693 A.2d 1313, 1317, indicates, without any significant analysis, that flight could be relevant to the question of whether a third party's actions raise a reasonable doubt. Accordingly, the court concluded that a defendant should also be able to obtain an instruction to the jury on such issue. To a great extent, the Pennsylvania court's analysis is reminiscent of the reasoning of *People v. Sears, supra*, 2 Cal.3d 180, and the cases which have followed it. [fn.] The essential conclusion of the Pennsylvania court was that third party flight could be relevant to the issue of identity in a given case. Accordingly a defendant should be able to obtain an appropriate instruction on the issue. We view such analysis as consistent with the *Sears* line of authority that permits a defendant to obtain a special or pinpoint instruction on an issue relevant to the defendant's efforts to raise a reasonable doubt. Logically, a properly tailored instruction could assist a jury in determining what weight, if any, to give to the alleged flight of a person about whom the court has permitted evidence of third party culpability. It would seem that a jury could draw an inference, favorable to the defendant, if a person, so closely connected with a crime as to permit the admission of third party evidence, from that person's abrupt departure from the area upon learning of the discovery of a crime. Such inference would be permissive and would potentially be a factor to be considered in determining whether the prosecution has proved identity beyond a reasonable doubt.

Thus we are persuaded that a defendant relying on a third party culpability defense is entitled to have the trial court give an appropriate pin-

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[76] This consideration is thoroughly satisfied in the present case. Jesse Rangel testified that he knew that people on the street were blaming him for the shootings. (6 RT 1499-1500.)

> point instruction on the issue of the alleged flight of the third party upon proof that the third party was aware of the discovery of the charged crime. We have not been presented with any authority or reasoning that would justify holding that trial courts have a sua sponte duty to give such instruction without request.
>
> Although we agree that Henderson might have been entitled to an appropriate pinpoint instruction in this case, none was offered. The trial judge had no duty to craft such instruction for the defense, thus we find no error by the trial court.
>
> (*Id.* at 741-744; emphasis added.)

As acknowledged in the *Henderson* opinion, no California authority existed at the time of appellant's trial which would have supported a request for a jury instruction pinpointing the flight of Jesse Rangel and Richard Diaz. Generally, a failure to anticipate a rule of law which has yet to be announced will not lead to a waiver of the argument on appeal. (*People v. Turner* (1990) 50 Cal.3d 668, 704.) Moreover, a pure question of law may be raised on appeal even in the absence of a specific request or objection. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *People v. Hines* (1997) 15 Cal.4th 997, 1061; *In re Samuel V.* (1990) 225 Cal.App.3d 511, 515.)

The lack of objection to CALJIC 2.52, on grounds that it unfairly singles out evidence of the defendant's guilt, is a separate issue. Penal Code § 1259[77] permits a crimi-

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[77] "Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

nal defendant to object on appeal to a jury instruction read at trial, even in the absence of an objection below. (See *People v. Prieto* (2003) 30 Cal.4th 226, 268.) Even if CALJIC 2.52 is an appropriate instruction in general, it is not appropriate where it shifts the jury's focus to the defendant's flight while ignoring evidence of flight of a third party, and thereby invites the jury to give diminished attention to the evidence of flight by a third-party suspect. This argument against the use of CALJIC 2.52 is cognizable on appeal without objection.

For the reasons set forth above, CALJIC 2.52 was unbalanced on this record, and should not have been read. It resulted in an unconstitutional shift in the burden of proof. (See *Carella v. California* (1989) 491 U.S. 263 and *People v. McCall* (2004) 32 Cal.4th 175.)

Prejudice. Appellant's strongest line of defense was the argument that Jesse Rangel and Richard Diaz were the shooters, to the exclusion of appellant and his son. Since Cindy Durbin identified Jesse Rangel initially and repeatedly, there was evidence to support a reasonable doubt based on Jesse Rangel's possible or probable involvement. Jesse Rangel's flight, even though he was supposedly at the market with his family at the time of the shooting, was a strong reason to conclude that he was accurately identified as one of the shooters.

Richard Diaz was admittedly on the scene. He claimed to be outside at the time of the fatal shots, but we have only his word on that. (See the police statement of Jesse Rangel, in which he stated that Little Pete told him that Richard Diaz also went in the

house. (6 RT 1548, 1549.)) A properly instructed jury could have easily been left with a reasonable doubt as to the identification of the perpetrators, and could have acquitted appellant on this record.

By reading CALJIC 2.52 on flight of the defendant, and not reading a balancing instruction focusing on the flight of Jesse Rangel and Richard Diaz, the trial court effectively shifted the burden of proof and denied appellant a fair trial.

VIII. THE TRIAL COURT FAILED TO INSTRUCT *SUA SPONTE* ON THE LESSER INCLUDED OFFENSES OF VOLUNTARY MANSLAUGHTER AND INVOLUNTARY MANSLAUGHTER.

As to appellant's liability for the killing of Juan Uribe (Count II), there was evidence that appellant was intoxicated and in a state of fear and anger, sufficient to support a claim of heat of passion, raise a reasonable doubt on the element of malice, and reduce the offense to voluntary manslaughter. As to appellant's responsibility for the killing of Chuck Durbin (Count I), there was evidence, again, that appellant was intoxicated, and also in a state of actual but unreasonable belief in the necessity for self-defense, sufficient to raise a reasonable doubt on the element of malice and reduce the offense to voluntary manslaughter.

As to both murder counts, the evidence of intoxication was sufficient to negate malice and intent, and reduce both counts to involuntary manslaughter. Despite this, no instructions or alternative verdict forms were offered or read on voluntary or involuntary manslaughter. In these circumstances the trial court was under a sua sponte duty to instruct the jury on voluntary and involuntary manslaughter.

A. Rule. Voluntary manslaughter is a lesser included offense to premeditated first degree murder.

> Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) A defendant who commits an intentional and unlawful killing but who lacks malice is guilty of . . . voluntary manslaughter. (§ 192.)" (*People v. Barton* (1995) 12 Cal.4th 186, 199 (*Barton*).) Generally, the intent to unlawfully kill constitutes malice. (§ 188; *People v. Saille* (1991) 54 Cal. 3d 1103, 1113; see *In re Christian S.* (1994) 7 Cal.4th 768, 778-78 (*Christian S.*).) "But a defendant who intentionally and unlaw-

> fully kills lacks malice . . . in limited, explicitly defined circumstances: either when the defendant acts in a 'sudden quarrel or heat of passion' (§ 192, subd. (a)), or when the defendant kills in 'unreasonable self-defense'--the unreasonable but good faith belief in having to act in self-defense (see [...]*Christian S.*[, *supra*,] 7 Cal.4th 768; [...]*Flannel*, *supra*, 25 Cal.3d 668)." (*Barton*, *supra*, 12 Cal.4th at p. 199.) Because heat of passion and unreasonable self-defense reduce an intentional, unlawful killing from murder to voluntary manslaughter by negating the element of malice that otherwise inheres in such a homicide (*ibid.*), voluntary manslaughter of these two forms is considered a lesser necessarily included offense of intentional murder (*id.* at pp. 201-202). [fn.]
>
> (*People v. Breverman* (1998) 19 Cal.4th 142, 153-154.)

The requirement of instruction on lesser included offenses is not satisfied merely by instruction on some lesser offense (here, second degree murder), where there are other lesser included offenses subject to instruction. "On the contrary, as we have expressly indicated, the rule seeks the most accurate possible judgment by 'ensur[ing] that the jury will consider the *full range of possible verdicts*' included in the charge, regardless of the parties' wishes or tactics. (*Wickersham, supra*, 32 Cal.3d 307, 324, italics added.) The inference is that every lesser included offense, or theory thereof, which is supported by the evidence must be presented to the jury." (*People v. Breverman*, *supra*, 19 Cal.4th at 155.)

Heat of passion and unreasonable self-defense are partial defenses leading to voluntary manslaughter, a lesser offense included in murder. They are within the requirement that the trial court provide *sua sponte* instructions on all material issues which are presented by the evidence.

> ... In the interests of justice, this rule demands that when the evidence suggests the defendant may not be guilty of the charged offense, but only of some lesser included offense, the jury must be allowed to "consider

> the *full range* of possible verdicts--not limited by the strategy, ignorance, or mistakes of the parties," so as to "ensure that the verdict is no harsher or more lenient than the evidence merits." (*Wickersham, supra*, 32 Cal.3d 307, 324, italics added; see also *Barton, supra*, 12 Cal.4th 186, 196.) The inference is inescapable that, regardless of the tactics or objections of the parties, or the relative strength of the evidence on alternate offenses or theories, the rule requires sua sponte instruction on any and all lesser included offenses, or theories thereof, which are supported by the evidence. In a murder case, this means that both heat of passion and unreasonable self-defense, as forms of voluntary manslaughter, must be presented to the jury if both have substantial evidentiary support.
>
> (*People v. Breverman, supra*, 19 Cal.4th at 160; underlining added.)

This Court has held that a failure to instruct sua sponte on a necessary lesser-included offense in a non-capital case is an error of state law only, reviewable under the standard of *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Breverman, supra,* 19 Cal.4th at 172.) The present case is a capital case; first degree murder liability on at least one count was necessary to death eligibility. The reading of necessary lesser included offense instructions was therefore a matter of federal due process (*Beck v. Alabama* (1980) 447 U.S. 625), and the error is reviewable under the standard of *Chapman v. California* (1967) 386 U.S. 18.[78]

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[78] Moreover, the Ninth Circuit has held forth the possibility of federal relief for failure to instruct on a lesser included offense, if the issue is central to the defendant's theory of the case. (*Bashor v. Risley* (9th Cir. 1984) 730 F.3d 1228, 1240; *Solis v. Garcia* (9th Cir. 2000) 219 F.3d 922, 928.) See also *United States v. Hernandez* (9th Cir. 2007) 476 F.3d 791, 801, citing *Beck v. Alabama, supra*, and *Gilmore v. Taylor* (1993) 508 U.S. 333, 361.

B. Background. As to Juan Uribe (Count II), there was substantial evidence that appellant's involvement was motivated by heat of passion – appellant's continuing sense of fear and anger over the shooting of his son.

On the evening of September 24, 1995, there was a confrontation at the baptism party between Little Pete and Juan Uribe. Another person punched Little Pete in the face. (4 RT 1011-1012, 1042.) A short time later, Little Pete and Richard Diaz performed a threatening drive-by of the baptism party. (5 RT 1295-1297.) When the party broke up, Little Pete and Tino Alvarez cornered Uribe on a side street. Alvarez punched Uribe, while Richard Diaz displayed a gun from his car a short distance away. (4 RT 1014-1015, 1028, 1030.)

Later that night Little Pete was in his car with Alvarez and Diaz when they ran into a caravan of cars including Juan Uribe. Shots were fired from Uribe's faction, and Little Pete was hit in the head. (5 RT 1321.) An officer who examined Little Pete's car that night found three gunshot holes: one in the driver's side door, one in the windshield, and one just below the tail light. (4 RT 1067-1069.)

In his statement to police during the murder investigation, appellant said that he rushed to the hospital, where he found his son injured. He was told that his son came within a fraction of an inch of losing his life. (2 ACT 398.) Appellant told the detective

that he came to believe that Jesse Candia, Sr. was responsible for the shooting. (2 ACT 401-402.)[79]

Little Pete and his friends and cousins held Juan Uribe responsible. (4 RT 1098.) The following night, Jesse Rangel and Tino Alvarez shot up Uribe's BMW. (4 RT 1086, 1100.) Richard Diaz described a confrontation at a market, in which Uribe accused Diaz of shooting up his car, and his companion hit Diaz. (5 RT 1340-1342.)

The cat-and-mouse game continued in downtown Madera between the two factions of former friends. On the night of October 7, 1995, appellant hosted a barbecue at his house on Wessmith. According to Richard Diaz, appellant talked about "his son getting shot in the head, about getting back whoever did it." Appellant said that Juan Uribe was responsible. (5 RT 1262.) He said that he wanted to go look for Juan Uribe. (5 RT 1263.)

According to the prosecution case, there followed an armed expedition which led to the Durbin house and the shooting deaths of the two victims.

There was also evidence that appellant was intoxicated at the time of the shootings. Richard Diaz testified that appellant was drinking Presidente brandy at the barbecue. (5 RT 1263.) Rafael Avila refused to let appellant take his car, but agreed to drive instead, because appellant was "too drunk." (5 RT 1264.)

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[79] There was no other explanation or corroboration for this statement. There is no evidence to suggest that appellant had any reason to blame anyone other than Uribe for the shooting of his son.

At the Durbin house appellant was, according to Diaz, falling down drunk. As they walked across the yard toward the Durbin house, appellant tripped over some tree branches, and fell down. Diaz had to help him get up, because he was so drunk. (5 RT 1270.)

As they drove away from the scene after the shootings, appellant accidentally discharged his handgun in Avila's car, twice. (5 RT 1278.) (A .380 slug was recovered from under the front seat of Avila's car. (7 RT 1718.).)

In addition, there was evidence that the shooting of Chuck Durbin (Count I) resulted from an unreasonable but good faith belief in the necessity for self-defense.

Cindy Durbin testified that her husband rushed into the living room in response to the intrusion by the gunmen. (6 RT 1386-1387; see 5 RT 1172 [Alvin Areizaga].)

According to testimony of Richard Diaz, as they drove away from the scene, appellant said that "he shot that guy because he thought he was running to get a gun." (5 RT 1278.)

Jesse Rangel quoted a statement by Little Pete, in which Little Pete supposedly said that Chuck Durbin came out "from the side," and appellant shot him. (6 RT 1501.)

There was no evidence that appellant knew Durbin or had any reason to shoot him.

The jury was instructed on the elements of first and second degree murder. The jury received an instruction on voluntary intoxication as related to premeditation. (CALJIC 4.21; 12 CT 2657.) No instructions were read on voluntary manslaughter (see CALJIC 8.37-8.44) or involuntary manslaughter (see CALJIC 8.45-8.47), and the record

reflects no request for, or discussion of, instructions or alternate verdict forms on voluntary or involuntary manslaughter.

C. Analysis.

1. Voluntary Manslaughter: Juan Uribe.

The record in this case necessitated an instruction on voluntary manslaughter as to Juan Uribe, Count II, and it was error for the trial court to fail to read the instruction sua sponte. This analysis assumes, for purposes of this argument, that appellant was properly identified as one of the gunmen in the invasion of the Durbin home.[79]

There was substantial evidence that appellant's involvement in the shooting of Juan Uribe was driven by fear and anger, and that he acted in heat of passion.

"Heat of passion" is not well-defined in the case law or the standard jury instructions. (See *People v. Lasko* (2000) 23 Cal.4th 101.) CALJIC 8.42, in effect at the time of appellant's trial (but not read to appellant's jury) offered the following somewhat circular explanation of sudden quarrel or heat of passion and provocation:

> To reduce an unlawful killing from murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of the character and degree as naturally would excite and arouse the passion, and the assailant must act under the influence of that sudden quarrel or heat of passion.
>
> The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not

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[79] The convictions in this case were obtained through allegations of premeditation and intentional killing. There were no instructions on felony murder, and none were requested. (See 12 CT 2697: prosecution checklist of requested jury instructions.)

> permitted to set up [his] [her] own standard of conduct and to justify or excuse [himself] [herself] because [his] [her] passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted [him] [her] were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation. Legally adequate provocation may occur in a short, or over a considerable, period of time.
>
> The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from passion rather than from judgment.
>
> If there was provocation, whether of short or long duration, but of a nature not normally sufficient to arouse passion, or if sufficient time elapsed between the provocation and the fatal blow for passion to subside and reason to return, and if an unlawful killing of a human being followed the provocation and had all the elements of murder, as I have defined it, the mere fact of slight or remote provocation will not reduce the offense to manslaughter.
>
> (Emphasis added.)

CALCRIM 571, adopted well after the trial here, makes a more concerted effort to define "heat of passion." The current instruction states that "[h]eat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection." (Quoting *People v. Berry* (1976) 18 Cal.3d 509, 515.)

The immediacy of the provocation is a factor to be considered in assessing provocation and heat of passion, but immediacy is not a *sine qua non*: provocation may be ongoing, and a serious but remote provocation may have a long-term effect. In *People v. Wharton* (1991) 53 Cal.3d 522, 571, this Court stated the rule as follows:

> ... [T]he court erred in refusing to instruct the jury, at defendant's request, that legally adequate provocation could occur over a considerable period of time. It was defendant's theory at trial that no single action on the part of the victim provoked the fatal blow but that the book-throwing incident was merely the culmination of his pent-up frustration and anger emanating from his ongoing dysfunctional relationship with the victim. In other words, his defense theory at trial was that he killed after enduring provocatory conduct by the victim over a period of weeks.
>
> The People argue there was insufficient evidence of this theory to justify the instruction. We disagree; defendant proffered evidence from which reasonable persons could have concluded there was sufficient provocation to reduce murder to manslaughter. (See *Wickersham, supra*, 32 Cal.3d at p. 324.) Because defendant requested a "pinpoint" instruction on his theory of the case that was neither argumentative nor duplicated in the standard instructions, the trial court erred in failing to deliver it to the jury. (*Wright, supra,* 45 Cal.3d at p. 1144.)

By the standard CALJIC instruction, the defendant is not permitted to set up a personal or subjective standard of conduct. The sufficiency of provocation must be judged by both a subjective and an objective standard. Appellant must have been motivated by the victim's provocation, and his reaction must have been objectively reasonable by the standard of a reasonable person.

The CALCRIM Commentary to No. 570 contains a comprehensive summary of cases which have considered the sufficiency of evidence of provocation.

> *Heat of Passion: Sufficiency of Provocation—Examples*
>
> In *People v. Breverman*, sufficient evidence of provocation existed where a mob of young men trespassed onto defendant's yard and attacked defendant's car with weapons. (*People v. Breverman* (1998) 19 Cal.4th 142, 163-164 [77 Cal.Rptr.2d 870, 960 P.2d 1094].) Provocation has also been found sufficient based on the murder of a family member (*People v. Brooks* (1986) 185 Cal.App.3d 687, 694 [230 Cal.Rptr. 86]); a sudden and violent quarrel (*People v. Elmore* (1914) 167 Cal. 205, 211 [139 P. 989]); verbal taunts by an unfaithful wife (*People v. Berry* (1976) 18 Cal.3d 509,

515 [134 Cal.Rptr. 415, 556 P.2d 777]); and the infidelity of a lover (*People v. Borchers* (1958) 50 Cal.2d 321, 328-329 [325 P.2d 97]).

In the following cases, provocation has been found inadequate as a matter of law: evidence of name calling, smirking, or staring and looking stone-faced (*People v. Lucas* (1997) 55 Cal.App.4th 721, 739 [64 Cal. Rptr.2d 282]); insulting words or gestures (*People v. Odell David Dixon* (1961) 192 Cal.App.2d 88, 91 [13 Cal.Rptr. 277]); refusing to have sex in exchange for drugs (*People v. Michael Sims Dixon* (1995) 32 Cal.App.4th 1547, 1555-1556 [38 Cal.Rptr.2d 859]); a victim's resistance against a rape attempt (*People v. Rich* (1988) 45 Cal.3d 1036, 1112 [248 Cal.Rptr. 510, 775 P.2d 960]); the desire for revenge (*People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1704 [54 Cal.Rptr.2d 608,]); and a long history of criticism, reproach and ridicule where the defendant had not seen the victims for over two weeks prior to the killings (*People v. Kanawyer* (2003) 113 Cal.App.4th 1233, 1246-1247 [7 Cal.Rptr.3d 401]). In addition the Supreme Court has suggested that mere vandalism of an automobile is insufficient for provocation. (See *People v. Breverman* (1998) 19 Cal.4th 142, 164, fn. 11 [77 Cal.Rptr.2d 870, 960 P.2d 1094]; *In re Christian S.* (1994) 7 Cal.4th 768, 779, fn. 3 [30 Cal.Rptr.2d 33, 872, P.2d 574].)

In *People v. Brooks*, *supra*, the court of appeal reversed a murder conviction for failure to read an instruction on heat of passion and provocation.

Since appellant did not actually see Todd murder his brother, the provocation for killing Todd might more properly be characterized as hearing from bystanders that Todd murdered his brother. A sudden disclosure of an event, where the event is recognized by the law as adequate, may be the equivalent of the event itself, even if the disclosure is untrue. (*State v. Yanz* (1901) 74 Conn. 177 [50 A. 37].) In [a] California case, citing *Yanz*, the court explained that where there is a reasonable belief in the information disclosed, the provocation is adequate. (*People v. Logan* (1917) 175 Cal. 45, 49.)

(185 Cal.App.3d at 694.)

The heat of passion referred to in these examples must have both a subjective and an objective component.

To satisfy the objective component, there must be evidence of such a passion as would naturally be aroused in the mind of an "ordinarily reasonable person" under the given facts and circumstances. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.) The motive of revenge does not satisfy the requirement for instruction on heat of passion or provocation. (*People v. Valentine* (1946) 28 Cal.2d 121, 139; *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1704.) Here, the feud was ongoing and the sense of fear was constantly present, along with the sense of anger at the shooting of appellant's son; it was reasonable to expect a further violent incident to happen at any time. For these reasons, the element of provocation did not lessen with the passage of time.

Moreover, operating in tandem with the looming sense of danger was appellant's intoxication. Everyone who came into contact with appellant the night of the shootings observed that he was intoxicated. This was substantial evidence that intoxication had interfered with appellant's ability to calmly reason. Even if there was an intent to kill, the formation of malice was prevented by the combined effects of intoxication and fear and anger at the threat posed by Uribe.

The trial court recognized the substantial evidence of intoxication by reading CALJIC 4.21 on the effect of voluntary intoxication on premeditation. (12 CT 2657.)[80]

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[80] "In the crimes of murder in the first degree and attempted murder of the first degree a necessary element is the existence in the mind of the defendant of the mental state of premeditation and deliberation.

"If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding whether defendant had the required mental state.

For these reasons it was error to fail to instruct the jury on the effect of intoxication and heat of passion and provocation on the formation of malice, and on the lesser included offense of voluntary manslaughter, in the killing of Juan Uribe.

2. Voluntary Manslaughter: Chuck Durbin.

The shooting of Chuck Durbin presented different potential defenses, and different issues for the jury's consideration. Appellant had no prior contact with Chuck Durbin. He did not know Durbin, and he had no reason to fear him. By the same token, there was no cause to premeditate the killing of Chuck Durbin. (See Argument IV above.) The shooting of Chuck Durbin was entirely spontaneous, in reaction to Durbin's response to the invasion of his home.

An actual but ureasonable belief in the necessity for self-defense can negate the element of malice, and reduce even an intentional killing to voluntary manslaughter. (*People v. Flannel* (1979) 25 Cal.3d 668, 674-683; *In re Christian S.* (1994) 7 Cal.4th 769, 783; see *People v. Blakeley* (2000) 23 Cal.4th 82, 87-88.)

The response by Chuck Durbin was unanticipated – appellant did not know who was in the house before entering – and the evidence of premeditation was thin at best. Added to appellant's state of voluntary intoxication, the honest but unreasonable belief in the necessity for self-defense could have supported a verdict of voluntary manslaughter.

"If from all the evidence you have a reasonable doubt whether the defendant formed that mental state, you must find that he did not have such mental state."

For these reasons, it was error to fail to instruct on voluntary manslaughter as to Count I.

3. Involuntary Manslaughter – Both Murder Counts.

Involuntary manslaughter is the unlawful killing of a human being without either express or implied malice. (Penal Code § 192.) A reduced mental state may be used to negate an element to a charge of murder, perhaps leading to a conviction of involuntary manslaughter. Evidence of voluntary intoxication may be considered in deciding whether there was malice. (Penal Code §§ 22, 28, and 188.) A defendant may show that because of his voluntary intoxication, he did not in fact form the intent unlawfully to kill, that is, that he did not have express malice aforethought. (*People v. Saille* (1991) 54 Cal.3d 1103, 1114-1117.)[81]

Evidence of voluntary intoxication alone will not reduce an offense to voluntary manslaughter unless combined with evidence of heat of passion and provocation, or evidence of actual but unreasonable belief in the necessity of self-defense (see discussion above). But evidence of voluntary intoxication alone may serve to reduce an offense to involuntary manslaughter, if it is extreme enough to raise a reasonable doubt of the elements of intent and premeditation. (*People v. Saille, supra.*)

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[81] By the 1995 amendment to Penal Code § 22 (b), effective after these offenses, evidence of voluntary intoxication may not abrogate a finding of implied malice, an element of second degree murder. This jury was instructed on implied malice second degree murder. (CALJIC 8.31, 12 CT 2665.)

Here the evidence of appellant's drinking shortly before the shootings, together with the evidence that he fell down and needed help to stand up as he blindly rushed toward the victims' house, was substantial evidence to support a defense of voluntary intoxication. The evidence of intoxication was sufficient to raise a reasonable doubt as to the existence of intent and premeditation, hence the jury should have been instructed on involuntary manslaughter as a lesser included offense.

C. Prejudice.

There was ample evidence for the jury to conclude that appellant had been brooding on the life-threatening injury to his son, and the continuing threat posed by Juan Uribe, and acted from heat of passion and provocation. Moreover, the jury must have concluded that his ability to premeditate and deliberate was impaired by drunkenness. Finding himself in the Durbin living room, without any clear idea of what he was doing or why he was there, appellant may have shot Chuck Durbin in the actual but unreasonable belief in the necessity for self-defense. However, none of these considerations was placed before the jury under the jury instructions read in this trial.

In *People v. Webber* (1991) 228 Cal.App.3d 1146, 1163, the defendant claimed that he shot the victim in a methamphetamine-induced state of paranoia. On appeal he argued that the trial court erroneously failed to instruct the jury on principles of involuntary manslaughter.

> Under [*People v.*] *Ray* [(1975) 14 Cal.3d 20], there has to be evidence of two factors -- a sort of cause and effect relationship between intoxication and lack of intent to kill. Even though Ray's defense was also self-defense, the court determined that there was sufficient evidence of a lack of

an intent to kill. The sufficient evidence in *Ray* was that: "Defendant and others testified that he had taken a number of 'reds' (secobarbital) during the day of the killing, and there was expert testimony to the effect that analysis of specimens taken from defendant on the day of the killing disclosed .15 milligrams percent of secobarbital in defendant's bloodstream. According to the testimony of an expert witness such a drug level in conjunction with a concussion of the brain would result in difficulty in thought transmissions and in the formation of sound judgments. Several lay witnesses testified that defendant appeared dazed at the times of the encounters." (Fn. omitted.) (14 Cal.3d at p. 25.)

We imply from *Ray* that a lack of an intent to kill may be indicated by evidence that a defendant was acting like an automaton, robot-like or in a trance or dazed, i.e., that the body was moving without the mind.

(228 Cal.App.3d at 1162-1163; emphasis added.)

Again, in *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1467, the court of appeal held that it was reversible error to fail to instruct on involuntary manslaughter.

In the case before us, Glenn testified repeatedly he did not intend to kill Thomas. Furthermore, either version of events described by Glenn is consistent with a lack of intent to kill. Under the first version the killing could be viewed either as accidental or involuntary manslaughter based on criminal negligence. Under the second version the killing could be viewed as a case of imperfect self-defense. (Cf. *People v. Welch* (1982) 137 Cal.App.3d 834, 840.) The fact Glenn testified to different versions of how the stabbing occurred did not undercut his request for an involuntary manslaughter instruction but at most raised a credibility question to be resolved by the jury. (*People v. Flannel, supra*, 25 Cal.3d at p. 684.)

In the present case, the jury received instructions on premeditation, and on the effect of voluntary intoxication on premeditation. (CALJIC 4.21; 12 CT 2657.) They did not receive instructions on provocation and heat of passion or on the actual but unreasonable belief in the necessity for self-defense. The jury had no route to reduce the offenses on the basis that the killings were done intentionally but without malice, leading to voluntary manslaughter. No instructions linked evidence of intoxication to lack of malice or

lack of intent to kill. The jury had no route to reduce the offense to involuntary manslaughter.

There was substantial evidence to support these lesser verdicts, and the failure to instruct on them *sua sponte* was a denial of due process and the right to jury trial guaranteed by the Sixth Amendment.

IX. THE TRIAL COURT FAILED TO INSTRUCT *SUA SPONTE* ON THE PRINCIPLES OF ACCOMPLICE TESTIMONY, AS APPLIED TO THE OUT-OF-COURT STATEMENTS OF HIS SON AND CO-DEFENDANT.

The prosecution relied on the statements and testimony of several persons who were potential suspects and/or accomplices to these crimes, including Richard Diaz, Juan Ramirez, and Jesse Rangel, but also including appellant's son, Little Pete. Since the statements of Little Pete were introduced through unreliable sources – the testimonies of Jesse Rangel and Frank Rangel, Jr. – and since Jesse Rangel himself was a potential accomplice, it was particularly important that the statements be viewed with distrust, and subject to the corroboration requirement.

Penal Code § 1111 states the rule that accomplice testimony must be corroborated.

> A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

Since well before appellant's trial, it has been held that it is error for the trial court not to instruct the jury, *sua sponte*, that the testimony of an accomplice called by the prosecution should be viewed with distrust. (*People v. Hamilton* (1948) 33 Cal.2d 45, 51.) Since *Hamilton*, the cases on point have consistently affirmed that an instruction on accomplice testimony must be given on the court's own motion when the accomplice is called solely by the prosecution. (See, e.g., *People v. Terry* (1970) 2 Cal.3d 362, 399;

People v. Cortez (1981) 115 Cal.App.3d 395, 406; see discussion in *People v. Najera* (2008) __Cal.4th __, 2008 Cal.LEXIS 6736 [*6].)

Several statements of appellant's son were introduced as evidence of appellant's guilt.

Richard Diaz was with Little Pete about five days after the shootings; Romi and appellant were also present. According to Diaz, Little Pete talked about his alibi. He said that they made a video to show them working at the 7-11 the night of the shooting. (5 RT 1283-1284.)

Jesse Rangel testified that he spoke to Little Pete on the phone the night of the shootings. Little Pete said that he, appellant, Richard, and Rafael were involved. (6 RT 1492.) In a later statement by Little Pete to Jesse while they were at Frank's house in Fresno, Little Pete allegedly said (according to Jesse) that Chuck Durbin came out "from the side," and appellant, who had stayed by the front door, "shot him in the head." (6 RT 1501.)

A standard jury instruction, CALJIC 3.16, was read, identifying Richard Diaz as an accomplice as a matter of law. However, no instruction was read identifying appellant's son as an accomplice, or directing the jury to require corroboration or view his alleged statements with distrust. Under the instructions, the jury was free to use the testimony of Jesse Rangel, quoting Little Pete, as a means of corroborating the account of Richard Diaz. This was permitted despite the fact that all three of them were accomplices: Richard Diaz and Little Pete by the terms of the prosecution's case, and Jesse Rangel by

the repeated early identifications voiced by Cindy Durbin. (See Argument XIV below, concerning argument of the prosecutor on accomplice corroboration.)

The accomplice corroboration requirement applies not only to an accomplice's testimony, but also to his or her out-of-court statements. (*People v. Andrews* (1989) 49 Cal.3d 200, 214.)[83]

This Court has rendered contradictory opinions on whether statements of a co-defendant and alleged accomplice, such as Little Pete, are subject to section 1111.

In *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, this Court reviewed a case in which two defendants were charged with the same crimes. Both defendants testified, and their testimonies were subject to the standard instructions that their testimonies were

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[83] "Section 1111 applies to an accomplice's out-of-court statements when such statements are used as substantive evidence of guilt. In *People v. Belton* (1979) 23 Cal.3d 516, we reversed a conviction for discharging a firearm at an inhabited dwelling because the extrajudicial statement of an accomplice had provided the sole evidence linking the defendant to the offense. The trial court in that case admitted the statement as a prior inconsistent statement after the accomplice denied on the witness stand that either he or the defendant had been involved in the commission of the offense. We observed, '[although] section 1111 speaks in terms of "testimony," it is instructive to note that courts of this state have focused on the *source* of the statements rather than their evidentiary form in articulating the legislative intent behind that section.' (*Id.* at pp. 524-525, italics in original.) We determined that the Legislature's purpose in enacting section 1111 was to prevent convictions based solely on evidence provided by such inherently untrustworthy sources as accomplices. (23 Cal.3d at pp. 524-525; see also *In re Miguel L.* (1982) 32 Cal.3d 100, 108.) In holding that the accomplice's prior inconsistent statement in *Belton* constituted testimony within the meaning of section 1111, we said: 'To conclude that such evidence does not fall within the ambit of section 1111 merely because an out-of-court statement is not, strictly speaking, synonymous with testimony would be to thwart the purposes of that section. Accordingly, applying the basic principle that legislative intent prevails over literal construction, this court concludes that [the accomplice's] prior inconsistent statement constituted "testimony," as the term is used in section 1111.'

subject to the accomplice corroboration rule and were to be viewed with distrust. On appeal, both defendants complained of the instructions, since the instructions cast doubt on their self-exculpatory testimonies. This Court held that despite the disadvantage to the defendants from having their own testimonies labeled as untrustworthy, it was necessary that each of the co-defendant testimonies be subject to the standard instructions on accomplice statements.

> Because the evidence abundantly supported an inference that each defendant acted as an accomplice to the other, and because each testified and, to some extent, sought to blame the other for the offenses, the court was required to instruct the jury that an accomplice-defendant's testimony should be viewed with distrust to the extent it tended to incriminate the co-defendant. [fn.] (*People v. Alvarez* (1996) 14 Cal.4th 155, 217-218.) Such, essentially, is what the foregoing instruction did. The instruction correctly informed the jury that, insofar as it assigned one accomplice-defendant's testimony any weight in determining the codefendant's guilt, it must view such testimony with distrust and find sufficient corroboration, as elsewhere defined for the jury.
>
> (*Id.* at 105-106; emphasis added.)

This Court has taken a similar position several times, as noted in *People v. Alvarez, supra*, 14 Cal.4th at 218:

> ... In *People v. Terry* (1970) 2 Cal.3d 362, 399, we stated that when, as here, a defendant testifies on his own behalf, denies guilt, and incriminates his codefendant, a trial court has authority to instruct the jury that his testimony should be viewed with distrust as that of an accomplice. We believe our statement was sound, and now so hold. The superior court delivered such an instruction: the testimony of an accomplice-defendant that tends to incriminate his codefendant should be viewed with distrust. Its limitation--the accomplice-defendant's testimony should be viewed with distrust to the extent that it tends to incriminate his codefendant--was altogether proper. (Cf. *People v. Williams, supra*, 45 Cal.3d at pp. 1313-1314 [im-

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(*People v. Belton, supra*, 23 Cal.3d at p. 526.) Similarly, here accomplice Sanders's tape-recorded statement was subject to the corroboration requirement of section 1111."

plying that a trial court may instruct the jury that an accomplice's testimony should be viewed with distrust insofar as it tends to incriminate the defendant, but should not be so viewed insofar as it does not].)

As noted, an accomplice's out-of-court statements are treated as "testimony" under the accomplice-corroboration rule. (*People v. Andrews, supra.*) Nevertheless, this Court has held that a co-defendant's out-of-court statements may not be subject to the accomplice-corroboration rule.

> Recall that Fields's statements were properly found to be declarations against penal interest. "The usual problem with accomplice testimony--that it is consciously self-interested and calculated--is not present in an out-of-court statement that is *itself sufficiently reliable* to be allowed in evidence." (*People v. Sully* (1991) 53 Cal.3d 1195, 1230, italics added.) For example, we have explained that out-of-court statements made in the course of and in furtherance of a conspiracy "were not made under suspect circumstances and therefore were sufficiently reliable to require no corroboration." (*People v. Williams* (1997) 16 Cal.4th 635, 682.) Fields's statements to Esquivel were themselves made under conditions sufficiently trustworthy to permit their admission into evidence despite the hearsay rule; namely, they were declarations against his penal interest. Therefore, no corroboration was necessary, and the court was not required to instruct the jury to view Fields's statements with caution and to require corroboration.
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> (*People v. Brown* (2003) 31 Cal.4th 518, 555-556.)

The rationales of these two lines of authority – the *Sully/Brown* line emphasizing the reliability of a co-defendant's out-of-court statements against penal interest and the *Coffman and Marlow/Alvarez* line emphasizing the unreliability of a co-defendant's in-court sworn testimony – cannot be easily reconciled.

An accomplice always has a motive to shift the blame away from himself and onto a co-defendant. Here, appellant's son had a natural motive and impulse to put appellant fully into the scenario at the Durbin house. For instance, if Little Pete had shot both vic-

tims, while appellant stood by in a drunken stupor, it might be expected that in the retelling by Little Pete, appellant would play a more active role.

In addition, the statements of Little Pete implicating appellant came into evidence through unreliable sources: Jesse Rangel and Frank Rangel, Jr. Jesse Rangel in particular was motivated to provide a false accusation against appellant (see Argument VI above). By providing incriminating statements against appellant, Jesse effectively removed himself from the scene; by providing evidence to implicate both Big Pete and Little Pete he bought himself additional insurance against prosecution. Since he was identified by Cindy Durbin as one of the shooters, there was evidence to conclude that he was an accomplice. (See Argument XIV below.)

Frank Rangel, Jr. was a drug and alcohol abuser, and an unreliable conduit of statements by Little Pete describing the shootings.

The confrontation considerations enunciated in *Crawford v. Washington* (2004) 541 U.S. 36, dictate that an out-of-court statement be viewed with caution or distrust. Little Pete's out-of-court statements were not well-authenticated; had he been available to testify, it could have been established that he did not even make them. Even if Little Pete's out-of-court statements are not deemed "testimonial" under *Crawford*, they are still subject to the "reliability" assessment of *Ohio v. Roberts* (1980) 448 U.S. 56. (*People v. Corella* (2004) 122 Cal.App.4th 461, 467; see discussion at p. 117 above.) Due to their source, the Little Pete statements were not reliable and should have been tested under standard rules applied to accomplice testimony.

In short, the out-of-court statements attributed to Little Pete were less reliable than in-court accomplice testimony. They should have been subject to the accomplice instructions.

Appellant was prejudiced by the lack of instructions.

The standard accomplice instructions (corroboration of accomplices (CALJIC 3.11 at 12 CT 2650); testimony of accomplice to be viewed with distrust (CALJIC 3.18 at 12 CT 2654[84]) were read in this case, but only as to Richard Diaz, who was deemed an accomplice as a matter of law. (CALJIC 3.16 at 12 CT 2653.)

Pedro Enriquez Rangel, III (Little Pete) was not included as a designated accomplice.[85] Since he was a charged co-defendant, he would properly have been designated an accomplice as a matter of law.

The accomplice corroboration rule would have made a substantial difference in this case, if applied to the alleged out-of-court statements of Little Pete. To a very large extent, the prosecution case was based on the interlocking accomplice testimonies of Richard Diaz and Jesse Rangel, corroborated by statements attributed to Little Pete. Indeed,

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[84] The language referencing "distrust" of accomplice testimony was later changed to "care and caution," after appellant's trial. See *People v. Guiuan* (1998) 18 Cal.4th 558, 569.

[85] The District Attorney proposed an instruction on the defendant's burden to prove that a corroborating witness is an accomplice (CALJIC 3.19), directed at the testimony of Jesse Rangel. Defense counsel opposed the instruction because it put the burden of proof on the defense to prove that Jesse Rangel was an accomplice. (8 RT 2017; 9 RT 2118; see 9 RT 2176-2177 [defense counsel argued that Jesse Rangel provided a false alibi].) Little Pete was never mentioned in the context of potential witnesses subject to the accomplice instructions.

it could be supposed that Cindy Durbin's testimony identifying Little Pete rather than Jesse Rangel was adapted to conform to the emerging accomplice testimony. By including the statements of Little Pete in the accomplice corroboration rule, the jury would not have been disposed to reach a conviction based solely on accomplice testimonies and statements.[86]

The rule requiring distrust of accomplice statements (later modified to "care and caution") would also have had a substantial impact on the outcome of this trial, if applied to witnesses other than Richard Diaz. It was particularly crucial that the jury recognize that at the same they were permitted to hear the out-of-court statements of Little Pete because the statements were made against penal interest, there was also a self-serving aspect to the statements, shifting blame to appellant. It was not fair to emphasize one aspect over the other.

In addition, to the extent that the accomplice testimonies and statements corroborated each other, the jury should have been informed that Little Pete's statements were not to be used to corroborate Richard Diaz' testimony (CALJIC 3.13: one accomplice may not corroborate another).

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[86] See *Bruton v. United States* (1968) 391 U.S. 123, 135-136: the need for confrontation is particularly acute "where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. [fn.] The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination."

For these reasons, it was reversible error to fail to identify Little Pete as an accomplice in standard jury instructions.

X. THE CONVICTION ON COUNT TWO, MURDER OF JUAN URIBE, MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO READ, *SUA SPONTE*, A JURY INSTRUCTION ON THE EFFECT OF VOLUNTARY INTOXICATION ON THE ELEMENT OF SPECIFIC INTENT TO AID AND ABET.

Appellant had a lot to drink on the evening leading up to the murders. In his befuddled state he could barely keep up with his son, who was intent on tracking down Juan Uribe. The intoxication defense became an issue at trial. However, the jury was not properly instructed that intoxication is a defense to the element of specific intent to aid and abet in criminal conduct which results in murder, as a natural and probable consequence.

Rule. In *People v. Mendoza* (1998) 18 Cal.4th 1114, the Court considered whether evidence of voluntary intoxication is relevant to the criminal liability of an aider and abettor. In that case the defendant (Valdez) consumed eight to ten beers early in the evening. Later he was involved in a violent confrontation, during which a co-defendant shot into a building and killed a person. An expert testified that the defendant's alcohol consumption might have been related to his later inability to remember the events around the shooting.

The Court held that evidence of voluntary intoxication is relevant to criminal liability as an aider and abettor.

> Defendants may present evidence of intoxication solely on the question whether they are liable for criminal acts as aiders and abettors. Once a jury finds a defendant did knowingly and intentionally aid and abet a criminal act, intoxication evidence is irrelevant to the extent of the criminal liability. A person who knowingly aids and abets criminal conduct is guilty of

> not only the intended crime but also of any other crime the perpetrator actually commits that is a natural and probable consequence of the intended crime. The latter question is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable. [Citation.]
>
> (*Id.* at 1133.)

Moreover, if there is instruction on voluntary intoxication, as here, then a jury instruction is required to connect the evidence of intoxication to the defendant's criminal responsibility as an aider and abettor.

> If the court gives any instruction at all on the relevance of intoxication (see *People v. Castillo, supra*, 16 Cal.4th at p. 1014 [no sua sponte duty to instruct on intoxication]), it might simply instruct that the jury may consider intoxication in determining whether a defendant tried as an aider and abettor had the required mental state. It might also instruct that the intoxication evidence is irrelevant on the question whether a charged crime was a natural and probable consequence of the target crime....
>
> (*Id.* at 1134.)

Background. The prosecution of this case was undertaken on the theory that, as to the killing of Juan Uribe, appellant was an aider and abettor to the actions of his son (see discussion in Argument V above).

This record contains abundant evidence that appellant was drunk from the time the plan to assault Uribe was hatched, through the shootings on East Central Avenue, and later in the evening.

Richard Diaz testified that appellant was drinking Presidente brandy at the barbecue. (5 RT 1263.) Rafael Avila refused to let appellant take his car, but agreed to drive instead, because appellant was "too drunk." (5 RT 1264.)

At the Durbin house appellant was, according to Diaz, falling down drunk. As they walked across the yard toward the Durbin house, appellant tripped over some tree branches, and fell down. Diaz had to help him get up, because he was so drunk. (5 RT 1270.)

As they drove away from the scene after the shootings, appellant (who was a proficient mechanic) accidentally discharged his handgun in Avila's car, twice. (5 RT 1278.) (A .380 slug was recovered from under the front seat of Avila's car. (7 RT 1718.).)

According to the testimony of Jesse Rangel, in a telephone conversation later that evening Little Pete was drunk and joking, and appellant's speech was uncharacteristically violent. (6 RT 1493, 1526.)

The trial court instructed the jury on aiding and abetting and on the doctrine of natural and probable consequences, and on the relevance of voluntary intoxication to specific intent.

The trial court read CALJIC 3.00 on principals, to include aiders and abettors as well as perpetrators.[87] The court then defined aiders and abettors, in the language of CALJIC 3.01.[88]

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[87] "Persons who are involved in committing or attempting to commit a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation is equally guilty.

"Principals include:

"1. Those who directly and actively commit or attempt to commit the act constituting the crime, or

The liability of aiders and abettors for the natural and probable consequences of a criminal act aided and abetted was explained in the language of CALJIC 3.02.[89] Howev-

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"2. Those who aid and abet the commission or attempted commission of the crime."

(12 CT 2646; 9 RT 2258.)

[88] "A person aids and abets the commission or attempted commission of a crime when he,

"(1) With knowledge of the unlawful purpose of the perpetrator, and

"(2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and

"(3) By act or advice aids, promotes, encourages or instigates the commission of the crime.

"Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.

"Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting."

(12 CT 2647; 9 RT 2259.)

[89] "One who aids and abets another in the commission of a crime is not only guilty of that crime, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime originally aided and abetted.

"In order to find the defendant guilty of the attempted murder of Cindy Durbin, you must be satisfied beyond a reasonable doubt that:

"1. The crime of murder was committed;

"2. That the defendant aided and abetted that crime;

"3. That a co-principal in that crime committed the crime of attempted murder; and

er, CALJIC 3.02 was modified to apply only to the attempted murder of Cindy Durbin. Under the instruction, murder (presumably the murder of Juan Uribe) was the target offense, and the attempted murder of Cindy Durbin was posed as, potentially, the natural and probable consequence.

Appellant was acquitted of the attempted murder of Cindy Durbin.

The instructions went on to explain the relevance of voluntary intoxication to the mental state for first degree murder. CALJIC 4.21 was read, explaining the connection between evidence of intoxication to the elements of premeditation and deliberation.[90] The court also read CALJIC 4.22, defining voluntary intoxication.[91]

"4. The crime attempted murder was a natural and probable consequence of the commission of the crime of murder."

(12 CT 2648; 9 RT 2259.)

[90] "In the crimes of murder in the first degree and attempted murder of the first degree, a necessary element is the existence in the mind of the defendant of the mental state of premeditation.

"If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding whether defendant had the required mental state.

"If from all the evidence you have a reasonable doubt whether the defendant formed that mental state, you must find that he did not have such mental state."

(12 CT 2657; 9 RT 2262.)

[91] "Intoxication of a person is voluntary if it results from the willing use of any intoxicating liquor, drug or other substance, knowing that it is capable of an intoxicating effect or when he willingly assumes the risk of that effect.

"Voluntary intoxication includes the voluntary ingestion, injecting or taking by any other means of any intoxicating liquor, drug or other substance."

Defense attorney Sciandra addressed voluntary intoxication in his argument to the jury.

> Now, the District Attorney talked about the lesser included offenses of second degree murder also. And I guess would be attempted second degree murders. You will get an instruction about voluntary intoxication. I'm in a terribly awkward situation here, but I'm going to argue this, our position.
>
> Let me make it absolutely clear our position is that this case has not be[en] proven beyond a reasonable doubt. Sure there is suspicion, but it is not proven beyond a reasonable doubt. However, I must argue the lesser included offenses here. All I'm going to say about that is you will be given an instruction that talks about voluntary intoxication. You can consider that in this case. You can consider it as to whether or not there was premeditation and deliberation.
>
> I'll just cite to you the testimony of Richard Diaz about the state of intoxication of Pedro Rangel, Jr., and the fact that he tripped getting out of the car. The fact he was drinking. The fact he was drunk. And you can consider that when you are determining whether or not these were first degree murders, the attempted first degree murder of Cindy Dixon [*sic*].
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> (9 RT 2200-2201.)

The prosecution did not refer to the intoxication defense in either its opening argument or closing argument.

The jury, however, addressed the subject specifically in a question to the trial court. Jury deliberations began on the afternoon of September 30, 1998. The jury requested a read-back of the testimonies of Cindy Durbin, Richard Diaz, Jesse Rangel, and Richard Fitzsimmons. (9 RT 2283.) Deliberations resumed on the morning of October 1,

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(12 CT 2658; 9 RT 2262-2263.)

1998. That afternoon, the jury sent a note which read, "Clarification of a law, CALJIC 3.02, 3.01, Intoxication Consideration." (10 RT 2292.)

Calling the jury into the courtroom, the trial court informed them, "I discussed the matter with counsel and we can't clarify the general instruction any further than it's already set forth. If you had a specific question we might be able to answer that if you would want to put that in writing." The court declined to take an oral question from the jury foreperson, and asked that any further question be in writing. The trial court commented that the court had read the jury instruction wrong. (10 RT 2293.)

The foreperson replied, "Okay. But it needs to come from you." The court then reread CALJIC 3.01 and 3.02. (10 RT 2293-2295; see above.) On its own suggestion, the trial court also reread the instruction on voluntary intoxication, CALJIC 4.21. (10 RT 2295; see above.)

The jurors retired for further deliberations. Verdicts were returned later that afternoon. (11 CT 2383.)

Analysis. There was substantial evidence of intoxication on this record. The trial court read the standard jury instruction on intoxication, and defense counsel argued the issue to the jury. (Compare *People v. Roldan* (2005) 35 Cal.4th 646, 715 [insufficient evidence to trigger intoxication instruction].) However, the jury instructions utilized here were insufficient to permit the jury to make proper use of the intoxication defense.

There are two distinct forms of aider and abettor liability under California law, and the intoxication defense relates to each form in different ways. In one form of aider and

abettor liability, the aider and abettor must share the knowledge and intent of the perpetrator; in a charge of first degree murder (non-felony murder), the aider and abettor must have the specific intent to kill, and must deliberate and premeditate the killing. See CALJIC 3.01 and *People v. Beeman* (1984) 35 Cal.3d 547.

In the other form of aider and abettor liability, the aider and abettor must aid and abet a criminal act (target offense), the natural and probable consequences of which include the charged offense. See CALJIC 3.02 and *People v. Prettyman* (1996) 14 Cal.4th 248.

The jury instructions read in appellant's trial, perhaps inadvertently, triggered both forms of aider and abettor liability. The trial court instructed on the traditional form of aider and abettor liability, expressed in CALJIC 3.01. The trial court also instructed on the "natural and probable consequences" form of aider and abettor liability, expressed in CALJIC 3.02: "One who aids and abets another in the commission of a crime is not only guilty of that crime, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime originally aided and abetted."

The language of modified CALJIC 3.02 goes on speak of the attempted murder of Cindy Durbin, but there is no reason to think that the jury did not apply the natural and probable consequences doctrine to the murder of Juan Uribe as well. The jury could have viewed appellant as a follower in this scenario, struggling to keep up with his son.

Appellant may have believed that his son was bent on threatening or assaulting Juan Uribe, but that he was not necessarily out to kill him.

The "natural and probable consequences" doctrine allowed the jury to assign responsibility for the murder to appellant, through his participation in his son's extremely dangerous conduct.

The intoxication defense relates to each of the two aider and abettor doctrines in different ways. In the first, the older and more traditional form,[92] the defendant's intoxication is relevant to the mental state (here, deliberation and premeditation) and to the necessary element of specific intent to kill. In the modified language of CALJIC 4.21 (see above), this jury was instructed that evidence of intoxication is relevant to "the mental state of premeditation."

There was no parallel instruction to encompass the role of intoxication affecting the specific intent to aid and abet the conduct of appellant's son, conduct which then resulted in the killing as a natural and probable consequence. Appellant's role as an aider and abettor to Little Pete in tracking down Juan Uribe could have been viewed by the jury as enough to create liability for the murder, as a "natural and probable consequence." It was essential that the intoxication defense, already recognized by the trial court, be extended to this species of criminal liability.

The opinion in *People v. Mendoza, supra,* relating evidence of voluntary intoxication to the "natural and probable consequences" form of aider and abettor liability, was

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[92] CALJIC 3.02 was not modified to include the "natural and probable consequences" instruction until the 1992 revision, approved in *People v. Mouton* (1993) 15 Cal.App.4th 1313, 1320.

filed on August 13, 1998. Appellant's trial began with jury selection on August 18, 1998. (11 CT 2346.) The jury was instructed on the guilt phase at the end of September. To the extent that *People v. Mendoza* changed the rule for instruction on voluntary intoxication and aider and abettor liability, it was fully effective at the time of appellant's trial.

CALJIC 4.21.2 was adopted almost immediately, and appeared in the pocket part to CALJIC 6th Edition in early 1999:

> In deciding whether a defendant is guilty as an aider and abettor, you may consider evidence of voluntary intoxication in determining whether a defendant tried as an aider and abettor had the required mental state. [However, intoxication evidence is irrelevant on the question whether a charged crime was a natural and probable consequence of the [target] [originally contemplated] crime.]

More recently, CALCRIM treats the defense of voluntary intoxication on aider and abettor liability in at least three separate instructions: 404 among the instructions on aiding and abetting,[93] 625 among the instructions on homicide,[94] and 3426 among the instructions on defenses.[95]

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[93] "If you conclude that the defendant was intoxicated at the time of the alleged crime, you may consider this evidence in deciding whether the defendant:

"A. Knew that _____ <insert name of perpetrator> intended to commit _____ <insert target offense>;

"AND

"B. Intended to aid and abet _____ <insert name of perpetrator> in committing _____ <insert target offense>.

"Someone is intoxicated if he or she (took[,]/ [or] used[,]/[or] was given) any drug, drink, or other substance that caused an intoxicating effect.

"[Do not consider evidence of intoxication in deciding whether _____ <insert charged nontarget offense> is a natural and probable consequence of _____ <insert target offense>.]"

[94] "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill[,] [or] [the defendant acted with deliberation and premeditation[,]] [[or] the defendant was unconscious when (he/she) acted[,]] [or the defendant _____ <*insert other specific intent required in a homicide charge or other charged offense*>.]

"A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.

"You may not consider evidence of voluntary intoxication for any other purpose."

[95] "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted [or failed to do an act] with _____ <insert specific intent or mental state required, e.g., 'the intent to permanently deprive the owner of his or her property' or 'knowledge that ...' or 'the intent to do the act required'>.

"A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.

"[Do not consider evidence of intoxication in deciding whether _____ <insert non-target offense> was a natural and probable consequence of _____ <insert target offense>.]

"In connection with the charge of _____ <insert first charged offense requiring specific intent or mental state> the People have the burden of proving beyond a reasonable doubt that the defendant acted [or failed to act] with _____ <insert specific intent or mental state required, e.g., 'the intent to permanently deprive the owner of his or her property' or 'knowledge that ...'>. If the People have not met this burden, you must find the defendant not guilty of _____ <insert first charged offense requiring specific intent or mental state>.

"You may not consider evidence of voluntary intoxication for any other purpose. [Voluntary intoxication is not a defense to _____ <insert general intent

Under the natural and probable consequences doctrine, the necessary mental state is the specific intent to aid and abet criminal conduct of the perpetrator, the natural and probable consequence of which, viewed objectively, was the charged offense. Evidence of intoxication is then relevant, not only to premeditation, but also to the specific intent to assist the perpetrator in criminal conduct. (*People v. Mendoza, supra,* 18 Cal.4th at 1131: "... the intent requirement for aiding and abetting liability is a 'required specific intent' for which evidence of voluntary intoxication is admissible under section 22.")

The latter point was controversial up through the time of the *Mendoza* opinion; many believed that intoxication should not be a defense to this form of aider and abettor liability.[96] As a point of controversy, it was essential that the intoxication defense be made clear, as it applied under the "natural and probable consequences" doctrine of aider and abettor liability.

Appellant was undoubtedly convicted as an aider and abettor to the murder of Juan Uribe; he may well have been convicted as an aider and abettor in the home invasion, leading, as a "natural and probable consequence," to the killing of Uribe. The jury instructions, in line with the *Mendoza* opinion, should have made it clear that intoxication was also a defense to the specific intent element under the "natural and probable consequence" doctrine of aiding and abetting.

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offense[s]>.]"

[96] See concurring opinion of Justice Brown in *People v. Atkins* (2001) 25 Cal.4th 76, 96, continuing to assert that *Mendoza* was wrongly decided.

Prejudice. The note from the jury to the trial court sought further clarification on the issues posed by CALJIC 3.01 and 3.02, specifically "Intoxication Consideration." (10 RT 2292.) In response, the trial court simply reread the original instructions superficially related to these issues.

Since the jury was evidently confused about the relationship between aider and abettor liability and the intoxication defense, it was not enough to merely repeat instructions already read. "Rereading previously given standard CALJIC instructions in response to a jury's question on the law when those instructions are inadequate rather than responding directly to the jury's question out of fear of committing error is not a rarity. The trial court left the jury in this case floundering." (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 391.)

The trial court must "at least consider" how it can best aid the jury in response to its inquiry. (*People v. Beardslee* (1991) 53 Cal.3d 68, 79.) Even where instructions on voluntary intoxication are not clearly necessary, once the issue has been posed, partial and incomplete instructions are prejudicial error. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015.)

This jury evidently accepted the intoxication defense. These violent acts were so out of character for appellant that he must have gone along in the search for Uribe in a state of drunken confusion. The jury was unclear, however, about the relationship of intoxication to the "natural and probable consequences" doctrine of aider and abettor liability; thus they asked about CALJIC 3.02 (the natural and probable consequences doctrine) and "Intoxication Consideration."

CALJIC 4.21 was an inadequate response in these circumstances. It only related intoxication to "the mental state of premeditation." CALJIC 4.21 did not relate intoxication to the defendant's participation in the criminal enterprise which led to the murder of Uribe; for that form of liability for "natural and probable consequences" the element of premeditation was unnecessary. The trial court's unhelpful response merely reinforced the incorrect impression that appellant's intoxication had nothing to do with this form of aider and abettor liability.

An instructional error that omit an element of an offense or raises an improper presumption or directs a verdict is federal constitutional error reviewable under the standard of *Chapman v. California, supra.* (*Neder v. United States* (1999) 527 U.S. 1, 10; see *People v. Flood* (1998) 18 Cal.4th 470, 503.)

The jury's verdict followed a short time after their failed attempt to seek clarification on this central issue in the case. Without the error appellant would not have been convicted of first degree murder in Count One. That portion of the judgment, along with the death penalty, must be reversed.

XI. THE TRIAL COURT ERRED BY FAILING TO CONSIDER A JURY INSTRUCTION ON ACCESSORY AS A LESSER-RELATED OFFENSE.

The defense of these capital murder charges was based primarily on the argument that appellant was no more than an accessory to the murders. He helped his son get out of town, and tried to construct an alibi for him, but appellant did not personally participate in the murders. The defense sought an instruction on accessory as a lesser-related offense, but the instruction was denied; the trial court viewed such instructions as outside its authority under the then-recent decision of this Court in *People v. Birks* (1998) 19 Cal.4th 108. Yet, the *Birks* decision did not foreclose trial court discretion to instruct on lesser-related offenses, it only rejected the former rule which treated lesser-related instructions as mandatory. Lesser-related offense instructions are permissible in the sound discretion of the trial court. It was prejudicial and reversible error for the trial court to refuse to consider accessory instructions in these circumstances.

California courts must instruct the jury on any offense which is necessarily included in any charged crime, and which is supported by substantial evidence in the record. (See Penal Code § 1159.[97]) For a time, this Court also mandated jury instructions on any uncharged lesser-related offense supported by the evidence.

> California law has long provided that even absent a request, and over any party's objection, a trial court must instruct a criminal jury on any less-

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[97] "The jury, or the judge if a jury trial is waived, may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense."

> er offense "necessarily included" in the charged offense, if there is substantial evidence that only the lesser crime was committed. This venerable instructional rule ensures that the jury may consider all supportable crimes necessarily included within the charge itself, thus encouraging the most accurate verdict permitted by the pleadings and the evidence. The rule also accords both parties equal procedural treatment, and thus benefits and burdens both to the same degree. Neither party is unfairly surprised by instructions on lesser necessarily included offenses because, by definition, the stated charge gives notice to both that all the elements of any such offense are at issue. By the same token, neither party has a greater right than the other either to demand, or to oppose, instructions on lesser necessarily included offenses. Finally, if lesser offenses are necessarily included in the charge the prosecution has chosen to assert, instructions on the lesser offenses, even when given over the prosecution's objection, cannot undermine the prosecution's traditional authority to determine the charges.
>
> More recently, *People v. Geiger* (1984) 35 Cal. 3d 510 (*Geiger*) held that in certain circumstances, the defendant has a state constitutional right to instructions on lesser offenses that are not necessarily included in the stated charge, but merely bear some conceptual and evidentiary "relationship" thereto. Because the accusatory pleading gives the defendant no notice of such "nonincluded" offenses, *Geiger* concluded that instructions on lesser merely "related" offenses can be given *only upon the defendant's request.*
>
> (*People v. Birks* (1998) 19 Cal.4th 108, 112; underlining added.)

In *People v. Birks, supra,* this Court reconsidered the *Geiger* rule and rejected it. This Court found that the *Geiger* rule had proven to be unworkable in practice, and unfair to the prosecutor, who could be bound to proof of a charge chosen on the option of the defense and which the prosecutor had not prepared to prove or disprove.

> Moreover, the prosecution chooses the charges on the basis of the information then available. Indeed, those charges must conform to the evidence adduced in pretrial probable cause proceedings (§ 739 [information after preliminary examination]; see § 889, 939.8 [indictment by grand jury]), at which a full defense is rarely presented. Often evidence suggesting that the true crime, if any, is other than the charged or necessarily included offenses comes to light only in the course of trial, when the com-

plete defense case is first revealed. The prosecution thus may suffer unfair prejudice when the trial evidence first suggests the lesser offense, and the defendant then has the superior power to determine whether instructions thereon shall be given.

Nor is unfairness to the prosecution fully alleviated by virtue of the statutory provisions allowing midtrial amendment of the pleadings. Such provisions do not address the inherent prejudice the prosecution suffers when evidence suggesting guilt only of a lesser uncharged offense is first disclosed at trial. Moreover, because the Constitution demands that the defendant have fair notice of the charges, the prosecution's statutory right of amendment to conform to proof is more restricted than the defendant's *Geiger* right to demand instructions on uncharged lesser-related offenses that may be suggested by the evidence. "An indictment . . . cannot be amended . . . to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination." (§ 1009.) Moreover, after arraignment on the original charges, the accusatory pleading can be amended only by "order or permi[ssion]" of the court. (*Ibid.*) The court has broad discretion to deny leave to amend, and must do so if the amendment would prejudice the defendant's substantial rights. (See, e.g., *People v. Brown* (1973) 35 Cal.App.3d 317, 322; *People v. Hernandez* (1961) 197 Cal.App.2d 25, 31; see also *People v. Valladoli* (1996) 13 Cal.4th 590, 606, fn. 3 [construing similar provision of § 969a].) Finally, any affirmative right of the prosecution to seek leave to amend the pleadings does not address the converse difficulty presented by *Geiger*. If the prosecutor declines to amend to allege a lesser-related offense on which its case has not focused, the *defendant* can demand that the lesser offense be placed before the jury anyway, and the prosecutor is powerless to object.

This inequality of rights and burdens is thus no mere abstraction. Instead, it directly contradicts the principles of neutrality and mutual fairness which, to a substantial degree, have informed and justified the rule requiring instructions on lesser necessarily included offenses. Moreover, the inherent imbalance of *Geiger* interferes in particular with a role traditionally accorded to the People alone, the responsibility to determine the charges. (See discussion, post.) These concerns are an important reason why we now determine that the rule announced in *Geiger* is incorrect.

(*People v. Birks, supra,* 19 Cal.4th at 129-130; emphasis added.)

This Court rejected as unfair the *Geiger* rule that instructions on lesser-related offenses, supported by the record, are necessarily given at the request of the defendant. This Court did not, however, adopt the rule that instructions on lesser-related offenses are automatically inappropriate or forbidden just because they are requested by the defendant. The most important question for the trial court in considering instructions on a lesser-related offense is whether the prosecution would be unfairly prejudiced. Consistent with the *Birks* decision and the doctrine of separation of powers, the trial court acts within its discretion in considering instructions on lesser-related offenses.

On September 9, 1998, the first day of presentation of guilt phase evidence, defense counsel submitted a set of proposed jury instructions. (12 CT 2487.) Among the defense instructions was the standard instruction defining accessories, CALJIC 6.40.

> Defendant is accused [in Count[s]] of having committed the crime of being an accessory to a felony in violation of § 32 of the Penal Code.
>
> Every person who, after a felony has been committed, harbors, conceals or aids a principal in that felony, with the specific intent that the principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that the principal has committed that felony or has been charged with that felony or convicted thereof, is guilty of the crime of accessory to a felony in violation of Penal Code § 32.
>
> In order to prove this crime, each of the following elements must be proved:
>
> 1. A felony, namely _____, was committed;
>
> 2. Defendant harbored, concealed or aided a principal in that felony with the specific intent that the principal avoid or escape [arrest] [trial] [conviction or punishment]; and

3. Defendant did so with knowledge that the principal [committed the felony] [was charged with having committed the felony] [was convicted of having committed the felony].

(12 CT 2526.)

Also included in the defense-requested instructions was CALJIC 17.10 on lesser-included or related offenses.

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may nevertheless convict [him] [her] of any lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime.

[The crime of _____ [as charged in Count ___] is lesser to that of _____ charged in Count ___.]

[The crime of _____ [as charged in Count ___] is lesser to that of _____ charged in Count ___.]

[The crime of _____ [as charged in Count ___] is lesser to that of _____ charged in Count ___.]

Thus, you are to determine whether [a] [the] defendant[s] [is] [are] guilty or not guilty of the crime[s] charged [in Count[s] ___] or of any lesser crime[s]. In doing so, you have discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it productive to consider and reach a tentative conclusion on all charges and lesser crimes before reaching any final verdict[s]. However, the court cannot accept a guilty verdict on a lesser crime unless you have unanimously found the defendant not guilty of the [charged] [greater] crime.

This Court's opinion in *People v. Birks, supra,* had been filed on August 31, 1998. The trial court addressed the subject of jury instructions on the morning of September 18, 1998.

THE COURT: I am not giving accessory as a lesser-related.

MR. SCIANDRA: Well, we will discuss that, Your Honor.

THE COURT: Well, People vs. Birks overruled –

MR. SCIANDRA: I am not prepared to argue that at this point.

MR. SCIANDRA: I have written that down.

(8 RT 1921-1922.)

On the morning of September 25, 1998, toward the end of the guilt phase trial, another jury instruction conference was held. The proposed instruction on accomplice liability came up again in due course.

> MR. SCIANDRA: Your honor, I'm aware of the Burks [*sic*] case, which I do believe is finally affirmed. Therefore, it's probably overwhelmingly in favor of it becoming final. I'm going to request – maintain my request for 17.10 on reasonably related offense and 6.40 on accessory.
>
> THE COURT: All right. Well, it's a unanimous decision.
>
> MR. SCIANDRA: I can see the odds are not real good, your Honor.
>
> MR. LiCALSI: For the record, we object.
>
> THE COURT: Well, since that decision came down, was reported in the Daily Appellate Report of the LA Daily Journal, September 1st, 1998, would appear to be good law and deny your motion for an accomplice [*sic*] instruction.
>
> MR. SCIANDRA: I believe that's it on the instructions, your Honor.
>
> (8 RT 2021.)

The jury was instructed on first and second degree murder, and on their duty to determine the degree of murder. (13 CT 2774-2776.) The jury was not instructed on accessory or on any other lesser or related offense.

In argument to the jury, defense counsel contended that appellant's role was that of an accessory, not a principal. There were three unreliable witnesses who placed appellant in the role of principal, but otherwise the evidence supported only an accessory role. In the absence of an alternative verdict on the lesser-related offense, he should be acquitted.

> [MR. SCIANDRA] ... What has this case shown? This case has shown that Mr. Rangel is a dedicated father. A dedicated father in the past and continues to the present, has tried to protect his son while all the time putting himself in peril. This case if you pick out Jesse Rangel, Richard Diaz, and Cindy Durbin, you pick out those witnesses and just for the moment you set them aside – and we will talk in depth about those witnesses. Then, you take all of the other evidence, there's not one piece of evidence, all the other evidence that is inconsistent with our theory that Mr. Rangel was an accessory after the fact in this case, was not the murderer. He helped his son. And by helping his son, helping others cover up what had occurred. But if you take all the other evidence as I stated there's nothing inconsistent with that theory.
>
> (9 RT 2164-2165; emphasis added.)

Continuing, defense counsel emphasized the evidence that appellant's role was at most that of supporting in the getaway.

> I would commend you to listen to any portion of that tape [of the interview of appellant on November 20, 1995], use your memories. Listen to the tape. Do whatever is necessary. I submit, there is absolutely nothing on that tape which is inconsistent with the theory that Pedro Rangel, Jr. is guilty, only of accessory.
>
> On the chart that was shown to you by the District Attorney one of the circles indicating evidence against Mr. Rangel was giving of the guns to Juan Ramirez. The biggest point to be made there is when he gave the guns to Juan Ramirez. I don't believe there is any dispute as to this. There has been an interpretation of his language, he was speaking Spanish. When Mr. Ramirez was testifying, and his testimony is Peter told him, "They solve their problem." Not, "We solved our problem." "Not, I solved my problem." "They solved their problem."

> I think that is very significant. Again, getting rid of the gun was part of this attempt to help his son who – based on all the evidence, is pretty reasonable to believe that Pete Rangel, Jr. believed that his son was involved in this killing. He was trying to help, trying to protect his son.
>
> And his statement, not only to Juan Ramirez, but to Frank Rangel, Jr., who testified again, Pete Rangel, Jr. made the statement they, they did this, they did that. It shows that he was not directly implicating himself, in any way, he was talking about other people who had taken care of this problem.
>
> (9 RT 2196-2197; emphasis added.)

The trial court erred by denying the request for an instruction on accessory as a lesser-related offense. The trial court improperly treated the issue as foreclosed by the *Birks* opinion, as though the *Birks* opinion had eliminated any consideration of lesser-related offenses. The trial court therefore declined to use its discretion to consider giving the accessory instruction.

The Birks Opinion. The *Birks* opinion eliminated the *Geiger* rule under which the defendant could insist on instructions on lesser-related offenses supported by the evidence. But it did not eliminate the ability of the trial court to consider instructions on lesser-related offenses, depending on the entire record and including the question of unfair surprise to the prosecution.

The *Birks* opinion contains a thorough treatment of the history of the requirement of trial court instructions on lesser-included and lesser-related offenses, and the pros and cons of requiring such instructions.

The *Birks* opinion first noted the very old rule that mandates instruction on lesser-included offenses, subject to the requirement of substantial evidence and regardless of the objections or protests of either party. (19 Cal.4th at 119.) The opinion then noted the change wrought by *Geiger*, which created a similar mandatory instruction requirement as to lesser-related offenses. (*Id.* at 120.) The opinion noted that at the time of the *Geiger* opinion, the result found some support in an earlier opinion of the United States Circuit Court for the District of Columbia, *United States v. Whitaker* (D.C. Cir. 1971) 447 F.2d 314. That opinion had expanded the federal definition of a "lesser-included offense," and thus expanded the trial court's duty to instruct on lesser offenses, a result similar to that achieved under *Geiger* by expanding the instructional rule to include lesser-related offenses. (19 Cal.4th at 121.)

The opinion then noted that since *Geiger*, the mandatory requirement of instructions under *Whitaker* had been disavowed by the United States Supreme Court. In *Schmuck v. United States* (1989) 489 U.S. 705, 715-721, the high court limited the defendant's right to insist on such instructions to a strict elements test which compares only the statutory definitions of the two crimes. The federal rule had thus reverted to a strict test for lesser-included offenses, similar to California's rule pre-*Geiger*. See also *Hopkins v. Reeves* (1998) 524 U.S. 88. (19 Cal.4th at 123-124.)

The *Birks* opinion then turned to a consideration relied on in the *Schmuck* decision, which was deemed particularly important in disposing of the issue of mandatory instructions on lesser-related offenses: the unfairness to the prosecution in a rule which allowed the defendant to control the charge which was given to the jury, either to insist on

an instruction on a lesser-related offense, or to object and prevent it from being offered, for lack of notice; this is an "unfair one-way street where lesser-related offenses are at issue." (*Id.* at 127.)

The Court then noted the uncertainty that had been spawned by the *Geiger* rule, under which the courts of appeal had great difficulty discerning when a lesser-related offense was supported by the evidence, leading to conflicting results. (*Id.* at 131.) The Court also held that although the rule of instruction on lesser-included offenses increases the reliability of the jury's fact finding process, the *Geiger* rule distorted the process by exposing the prosecution to the burden of proof on a charge which it had not sought or anticipated. (*Id.* at 132.)

The *Birks* opinion went on to note the cool reception received by the *Geiger* rule in other states. (*Id.* at 133.)

Finally, the *Birks* opinion concluded that "a serious question arises whether such a right can be reconciled with the separation of powers clause." (*Id.* at 134.) However, on this last point the *Birks* opinion declined to reach a conclusion. "We need not finally resolve the separation of powers issue here. It is enough to invoke the established principle that when reasonably possible, courts will avoid constitutional or statutory interpretations in one area which raise '"serious and doubtful constitutional questions"' [citations]." (*Id.* at 135.)

All of the above considerations were deemed enough to jettison the *Geiger* rule of mandatory instruction on lesser-related offenses. A criminal defendant may not <u>insist</u> on an instruction on a lesser-related (but not included) offense merely because it is supported

by the evidence in the trial record, and could support a lesser conviction as an alternative to the charged offense.

Subsequent opinions of this Court have referred to the *Birks* opinion only as rejecting the *Geiger* mandatory rule, without discussing the trial court's discretion to consider lesser-related offense instructions on a proper record. (See *People v. Rundle* (2008) 43 Cal. 4th 76, 147 (emphasis added): "In *Birks*, however, we overruled the holding of *Geiger* that a defendant's unilateral request for a related-offense instruction must be honored over the prosecution's objection.")

Of course, the issue does not even arise in the absence of substantial evidence supporting the lesser-related offense. (See *People v. Kraft* (2000) 23 Cal.4th 978, 1064-1065: "Defendant contends the trial court erred in refusing to instruct on accessory after the fact (§ 32) as a lesser-related offense to murder in connection with those counts where the evidence showed some connection between defendant and the victim, but no evidence showed the degree of his involvement in the killing. We disagree: Even were there evidence supporting a theory of accessory liability, which the trial court properly found lacking, defendant was not entitled to instructions on lesser-related offenses. (*People v. Birks, supra*, 19 Cal.4th at p. 136, retrospectively overruling *People v. Geiger* (1984) 35 Cal.3d 510.)" (emphasis added.))

Birks in the Courts of Appeal. Nevertheless, the courts of appeal have often read the *Birks* opinion as taking the issue of lesser-related offenses entirely away from the trial

court.[98] These court of appeal decisions treat the issue as one of jurisdiction or separation of powers, as if the *Birks* opinion had gone on to say that trial courts have no inherent constitutional authority to present an uncharged lesser-related offense to a jury. The conclusion reached by those opinions – that trial courts lack the authority to consider instructions on lesser-related offenses – is unsupported by the *Birks* opinion, and should be rejected.

California trial courts can and should retain the authority to present instructions on lesser-related offenses to the jury, where necessary and appropriate. The main concern expressed in the *Birks* opinion was one of fairness to the prosecution, that it not be surprised by a charge, even a related charge, which it must prove or disprove at the cost of

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[98] See the following appeals court opinions:

"The obligation to instruct includes giving instructions on lesser-included offenses when warranted by substantial evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) However, a defendant has no right to instructions on lesser-related offenses even if he requests the instruction and it would have been supported by substantial evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1064.) California law does not permit a court to instruct on an uncharged lesser-related crime unless agreed to by the prosecution. (*People v. Birks* (1998) 19 Cal.4th 108, 136–137.) Here, the prosecution objected to the instruction." (*People v. Valentine* (2006) 143 Cal.App.4th 1383, 1387; emphasis added.)

"Since *Cowan* was decided, our state Supreme Court has held that instructions on lesser-related offenses must not be given over the People's objection. (*People v. Birks* (1998) 19 Cal.4th 108, 136.)" (*People v. Overman* (2005) 126 Cal.App.4th 1344, 1359; emphasis added.)

"Martinez next contends the trial court erred in refusing to instruct on the lesser-related offense of trespass. He recognizes that the court in *People v. Birks* (1998) 19 Cal.4th 108, 136 overruled *People v. Geiger* (1984) 35 Cal.3d 510, which had permitted courts to give such instructions. Under *Birks, supra*, 19 Cal.4th 108, trial courts can no longer instruct juries on such related, but not included, offenses without the prosecutor's permission." (*People v. Martinez* (2002) 95 Cal.App.4th 581, 586; emphasis added.)

losing a conviction on the higher charged offense. This concern can and should be addressed on a case by case basis, by which the trial court retains the discretion to consider instructions on a lesser-related offense, if necessary to the ends of justice.

This was the essential point of Justice Mosk's concurrence in *Birks*:

> ... By giving *any* instruction that is over-favorable *in any way* to *any* defendant, the trial court, by definition, erroneously invites the jury to find the defendant not guilty of the offense charged. But simply by erring in this regard, it does not exceed its power. True, it may be deemed to misuse its authority to dispose of charges. It cannot be said, however, to *use* the prosecutor's authority to bring charges in the first place. The result is no different if, by instructing on a lesser "related" offense, it erroneously invites the jury to find the defendant not guilty of the offense charged. Here too, it may *mis*use its own authority, but does not *use* the prosecutor's.
>
> (*People v. Birks, supra,* 19 Cal. 4th at 139.)

In this view, presenting the jury with an alternative lesser-related offense does not impinge on the prosecutor's authority, because it does not involve a reformulation of the original charge.

The Issue in Other Jurisdictions. This Court in *Birks* was concerned with the relatively cool reception received by the *Geiger* decision in other states. Only a handful of states ever warmed to the *Geiger* concept, particularly the mandatory aspect of the lesser-related instruction requirement. (19 Cal.4th at 133, fn. 17.) However, the other-states comparison changes considerably when the lesser-related instruction is viewed as a dis-

cretionary option for the trial court. There are a substantial number of states which acknowledge the trial court's discretion to consider lesser-related offenses.[99]

Many states still adhere to the view that instructions are only permitted on lesser-included offenses.[100] However, those states adopting the traditional strict elements stan-

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[99] Alaska (*Lampkin v. State* (2006) 141 P.3d 362 and *State v. Minano* (1985) 710 P.2d 1013); Colorado (*People v. Early* (1984) 692 P.2d 1116); Florida (*Sanders v. State* (2006) 944 So.2d 203 ["necessary" versus "permissive" lesser offense instructions]); Georgia (*Gibson v. State* (2004) 593 S.E.2d 861); Hawaii (*State v. Kupua* (1980) 620 P.2d 250); Michigan (*People v. Jones* (1984) 354 N.W.2d 261 and *People v. Beach* (1988) 418 N.W.2d 861); Mississippi (*Moore v. State* (2001) 799 So.2d 89); Montana (*State v. Gopher* (1981) 633 P.2d 1195); Nevada (*Moore v. State* (1989) 776 P.2d 1235); New Jersey (*State v. Clarke* (1985) 486 A.2d 935); New Mexico (*State v. Collins* (2005) 110 P.3d 1090); Rhode Island (*State v. Raposa* (1966)217 A.2d 469); South Dakota (*State v. Hoadley* (2002) 651 N.W.2d 249); Tennessee (*State v. Allen* (2002) 69 S.W.2d 181); Utah (*State v. Baker* (1983) 671 P.2d 152, and see *State v. Knight* (2003) 79 P.3d 969).

[100] Alabama (*Apricella v. State* (2001) 809 So.2d 841); Arizona (*State v. Ennis* (1988) 689 P.2d 570); Arkansas (*Cluck v. State* (2005) 209 S.W.3d 428); Connecticut (*State v. Arreaga* (2003) 816 A.2d 679); Idaho (*State v. Curtis* (1997) 944 P.2d 119); Illinois (*People v. Gibson* (1985) 484 N.E.2d 858, but see *People v. Dace* (1984) 470 N.E.2d 993); Indiana (*Fisher v. State* (2004) 810 N.E.2d 674); Iowa (*State v. Mateer* (1986) 383 N.W.2d 533); Kansas (*State v. Percival* (2003) 79 P.3d 211); Kentucky (*Rogers v. Com.* (2002) 86 S.W.2d 29); Louisiana (*State v. Wright* (2003) 840 So.2d 1271); Maine (*State v. Crocker* (1982) 445 A.2d 342); Maryland (*Howard v. State* (1986) 503 A.2d 739); Massachusetts (*Com. v. Wilson* (2001) 754 N.E.2d 113); Minnesota (*State v. Campbell* (1985) 367 N.W.2d 454; *State v. Penkaty* (2006) 708 N.W.2d 185); Missouri (*State v. Thurston* (2003) 104 S.W.3d 839); Nebraska (*State v. Williams* (1993) 503 N.W.2d 561); New Hampshire (*State v. Gordon* (2002) 809 A.2d 748); New York (*People v. Barney* (2003) 786 N.E.2d 31); North Carolina (*State v. Burgess* (2007) 639 S.E.2d 680: Ohio (*Stae v. Johnson* (2006) 858 N.E.2d 1144); Oklahoma (*Scott v. State* (2005) 107 P.3d 605); Oregon (*State v. Sears* (1984) 689 P.2d 1324); Pennsylvania (*Com. v. Einhorn* (2006) 911 A.2d 960); Texas (*Sorto v. State* (2005) 173 S.W.2d 469); Vermont (*State v. Alexander* (2002) 795 A.2d 1248); Virginia (*Keyes v. Com.* (2002) 572 S.E.2d 512); Washington (*State v. Godsey* (2006) 127 P.3d 11); West Virginia (*State v. Louk* (1981) 285 S.E.2d 432); Wisconsin (*State v. Verhasselt* (1978) 266 N.W.2d 342); Wyoming (*Dean v. State* (2003) 77 P.3d 692, but see *Balsey v. State* (1983) 668 P.2d 1324).

dard often require lesser-included offense instructions on the basis of "some evidence," or "slight evidence," with the result that instructions on lesser-included offenses may be mandatory where they would not be required under a more stringent regime. In California, in contrast, lesser-included offense instructions are only mandatory where there is a demonstration of "substantial evidentiary support." (*People v. Breverman* (1998) 19 Cal.4th 142, 160.) Since California requires "substantial evidentiary support" to trigger mandatory instructions on lesser-included offenses, trial court discretion to instruct on lesser-related offenses is necessary. Instruction on lesser-related offenses, where appropriate, will keep California's procedure in conformity with procedure in the majority of American jurisdictions.

Separation of Powers. This Court has found no separation of powers violation in similar situations, where trial court decisions may alter the nature of the offense charged by the prosecutor. (See *People v. Tenorio* (1970) 3 Cal.3d 89; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497; *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968; *People v. Carmony* (2004) 33 Cal.4th 367.)

The Court's avoidance of the separation of powers rationale was underlined by the concurring opinion of Justice Werdegar in *Birks*, which found the discussion of separation of powers "unnecessary to the result." (19 Cal.4th at 139.)

See, in general, Annot. "Lesser-Related Offense Instructions: Modern Status," 50 A.L.R.4th 1081.

Justice Mosk, concurring, also opined that, while the *Geiger* rule had proven to be unworkable and should be abandoned, it would not be beyond the trial court's jurisdiction to instruct on lesser-related offenses. (*Ibid.*)

Shortly after the *Birks* opinion, Justice Werdegar, now speaking for the Court, again emphasized that the discussion of the separation of powers doctrine in *Birks* was unnecessary to the result. (*People v. Hernandez* (1998) 19 Cal.4th 835, 846-847.)[101]

On the same day it delivered the *Birks* decision, the Court delivered its decision in *People v. Breverman* (1998) 19 Cal.4th 142. The majority opinion in *Breverman*, authored by Chief Justice George, summarized that the effect of the *Birks* opinion was "to abrogate the California rule entitling the defendant to demand instructions on lesser merely related offenses supported by the evidence." (*People v. Breverman, supra,* 19 Cal. 4th at 168; emphasis added.)

Thus, the majority opinion in *Birks* rejected the *Geiger* rule, which had given the defendant absolute control over the reading of lesser-related offenses. The opinion strongly stated that it would often be unfair to the prosecution to force it to bear the burden of proof on a lesser-related offense, fighting on a ground which it had not chosen, or

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[101] "The rule requiring that a court address a potentially dispositive statutory issue before turning to a constitutional one 'is itself an application of the larger concept of judicial self-restraint, succinctly stated in the rule that "we do not reach constitutional questions unless absolutely required to do so to dispose of the matter before us."' (*Guardino, supra* at p. 230, quoting *People v. Williams* (1976) 16 Cal.3d 663, 667; see also *People v. Reyes* (1998) 19 Cal.4th 229, 250 (conc. and dis. opn. of Werdegar, J.) [because reasonable suspicion existed on the facts, court should not decide whether Fourth Amendment permits warrantless search of adult parolee absent reasonable suspicion]; *People v. Birks* (1998) 19 Cal.4th 108, 139 (conc. opn. of Werdegar, J.) [declining to express an opinion on majority's gratuitous discussion of the separation of powers question];...."

suffer the risk of conviction on a lesser-related offense, not included in the elements, which it had not charged. But the Court stopped short of invoking the separation of powers doctrine. This Court did not hold that the trial court is limited by separation of powers. It did not hold that consideration of lesser-related offenses is beyond the constitutional authority of the trial court, or that the trial court cannot consider the reading of instructions on lesser-related offenses.

The only question in *Birks* was whether lesser-related instructions are mandatory. They are not mandatory. But the trial court may nevertheless have the discretion to consider lesser-related instructions in an appropriate case – that discretion has not been foreclosed by this Court.[102]

Prosecution Right to Notice. There was certainly ample evidence that appellant assisted his son in his flight from Madera, as well as in the effort to create an alibi by creating the false alibi videotape. These were the acts of an accessory.

Whether the prosecution would have been unfairly prejudiced by instructions on the lesser-related offense is an issue that could have been addressed by the trial court, but was not. From this record it appears that the prosecution would not have tried its case in any different manner by taking into account the possibility of an alternative verdict of ac-

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[102] Note that the opinions in *Schmuck v. United States, supra,* and *Hopkins v. Reeves, supra,* contain no discussion of the separation of powers doctrine. *Schmuck* involves an interpretation of federal criminal procedure, while *Hopkins v. Reeves* involves the scope of federal due process protections in habeas corpus; neither found any occasion to address a separation of powers question.

cessory; indeed the prosecution case was aimed precisely at avoiding the conclusion that appellant was merely an accessory and therefore not guilty of murder.

The prosecutor's right to notice is not absolute. Even the defendant's constitutional right of notice is subject to a requirement of prejudice or materiality. "No accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits.' (Penal Code § 960.)" (*People v. Thomas* (1987) 43 Cal.3d 818, 826; *People v. Ramirez* (2003) 109 Cal.App.4th 992, 999.)

By the same token, only a lack of notice which has a real effect on the People's ability to present its case should negate the public interest in having a verdict based on consideration of all appropriate alternatives; otherwise there should be no impediment to instruction on a lesser-related offense which is fully supported by evidence in the record.

Prejudice. Appellant was prejudiced by the lack of a jury instruction on accessory as a lesser offense. The jury was given an all-or-nothing choice, a situation to be avoided if courts are not to become, in the phrase of the *Birks* opinion, "gambling halls."

The defense proceeded on the theory that Jesse Rangel was at the crime scene, and was one of the shooters. Since Jesse Rangel was with appellant and his son for several days after the murders, he had plenty of plausible occasions to fabricate false confessions and admissions by appellant and his sons. Since he participated in the shootings, he could easily provide convincing details which were borne out by later investigation. By providing a convincing story to law enforcement, he was able to avoid prosecution.

Once Richard Diaz was arrested, he was given the complete criminal discovery documentation including the account rendered by Jesse Rangel. He then only needed to conform his account to Jesse Rangel's. Once Diaz offered this statement and followed it up with his testimony, his charges were reduced and he was effectively allowed to walk away from his involvement in these murders. His motives and credibility were thus also questionable, and it is entirely reasonable to suppose that he created or inflated appellant's role in the shootings precisely in order to gain an advantage for himself.

Cindy Durbin eventually learned that the tide had shifted away from her original identification of Jesse Rangel as one of the shooters. By the time of the preliminary hearing many months later she must have understood that her testimony was worthless, and there was a chance that no one would be punished for her husband's murder. When she saw appellant and his son in custody at the preliminary hearing, her identification shifted conveniently to them.

These circumstances may have led the jury to harbor a reasonable doubt of appellant's direct involvement in the murders. The jury surely believed that he was at least an accessory through his cover-up efforts. But they were given no alternate ground for conviction on accessory as a lesser-related offense. In these circumstances, with such extremely serious charges under deliberation, and evidence of close involvement by appellant, it was unreasonable to expect the jury to return an outright acquittal. The murder verdict was forced by the erroneous lack of a lesser-related alternative verdict.

This error must be assessed under the standard for review of federal constitutional error, applied when a lesser included offense is omitted in a death penalty trial. (*Beck v.*

Alabama (1980) 447 U.S. 625, and see discussion at p. 141 above.) For violation of the separation of powers doctrine as federal constitutional error, see *Coolidge v. New Hampshire* (1971) 403 U.S. 443.

There is a reasonable probability that the jury would have accepted accessory as a lesser-related offense. For these reasons appellant was prejudiced, and the conviction must be reversed.

XII. THE PROSECUTOR COMMITTED MISCONDUCT BY ARGUING TO THE JURY THAT MURDER, INCLUDING IMPLIED MALICE SECOND DEGREE MURDER, MUST BE ACCOMPANIED BY AN INTENT TO KILL.

Appellant was prejudiced by the prosecutor's guilt phase argument, that implied malice second degree murder requires an "implied intent to kill." Implied malice murder does not require an intent to kill.

To the extent that the prosecutor's argument was accepted by the jury as a clarification of standard jury instructions, it raised the bar for conviction of implied malice second degree murder, a lesser included offense to Count One (murder of Chuck Durbin). By virtually eliminating a lesser alternative offense, it made conviction of premeditated first degree murder more likely, and overwhelmed any reasonable doubt on the elements of intent and premeditation.

A verdict of implied malice second degree murder would have been supported on this record, because appellant's drunkenness and lack of motive raised a reasonable doubt on the elements of premeditation and intent to kill (see Argument IV above). Yet, a verdict of manslaughter was unlikely, given the egregious circumstances of the shootings. A lesser alternative verdict, which included a murder conviction on Count One, was essential to any hope of leniency at the penalty phase.

A verdict of implied malice second degree murder would have benefited appellant in these circumstances. Although a death verdict would still have been statutorily authorized, it would have been far less likely. The Chuck Durbin murder count was surely the most serious consideration in support of the death penalty, since he was an innocent bys-

tander. A conviction of implied malice second degree murder would not have been as aggravated as a conviction of premeditated first degree murder, and it would have greatly decreased the case in aggravation

Rule. Prosecutorial misconduct requires reversal under the federal constitution when it "so infect[s] the trial with unfairness" that the conviction is a denial of due process. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.) Under state law, use of deceptive methods can amount to misconduct calling for relief, even when the misconduct does not result in an unfair trial. (*People v. Cook* (2006) 39 Cal.4th 566, 606.)

In determining whether there has been prosecutorial misconduct in argument to the jury, this Court will inquire "whether there is a reasonable likelihood" that the jury misconstrued or misapplied the prosecutor's words in violation of state or federal law. (*People v. Clair* (1992) 2 Cal.4th 629, 663 [adopting the test applied to error in trial court jury instructions by United States Supreme Court in *Estelle v. McGuire* (1991) 502 U.S. 62].) In making that determination, it will be presumed that the jury understood the prosecutor's argument as "words spoken by an advocate in an attempt to persuade." (*Ibid.* fn. 8.)

Prosecutorial misconduct in closing argument can take several forms. It sometimes involves a misstatement of the applicable law, as here. "'[I]t is improper for the prosecutor to misstate the law generally (*People v. Bell* (1989) 49 Cal. 3d 502, 538), and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. (*People v. Gonzalez* (1990) 51 Cal. 3d 1179,

1215.)' (*People v. Marshall* (1996) 13 Cal. 4th 799, 831.)" *People v. Hill* (1998) 17 Cal. 4th 800, 829-830; see *People v. Morgan* (2007) 42 Cal.4th 593, 612 [kidnapping conviction argued on improper legal ground].)

The trial court had a duty to instruct on lesser included offenses including implied malice second degree murder (*People v. Breverman* (1998) 19 Cal.4th 142, 162), and it did so. However, a misleading argument injecting an additional element in the lesser offense was likely to affect the jury deliberations and shift the burden of proof. (Compare cases in which the trial court delivers conflicting instructions on the elements of crime, *People v. Lee* (1987) 43 Cal.3d 666, 674, and *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1129.)

No objection was entered to the prosecutor's argument misstating the elements of second degree murder. The requirement of objection was excused in these circumstances because defense counsel did not argue the existence of implied malice, and thus was not in a position to object.

> Generally, a defendant cannot complain on appeal of the prosecutor's misconduct at trial unless he timely objected and requested that the jury be admonished to disregard the impropriety. (*People v. Fierro* (1991) 1 Cal.4th 173, 207.) Any misconduct is waived unless an admonition would not have cured the harm. (*People v. Miller* (1990) 50 Cal.3d 954, 996; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1030.) To determine whether an admonishment would have been effective, we consider the statements in context. (*People v. Edelbacher, supra*, at p. 1030.) If the defendant objected or if an objection would not have cured the harm, we look to see whether the improper conduct was prejudicial, i.e., whether it is reasonably probable that a jury would have reached a more favorable result absent the objectionable comments. (*People v. Haskett* (1982) 30 Cal.3d 841, 866.)
>
> (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1074.)

An objection would not have cured the prosecutor's misstatement of the law in the present case; stated in a different way, defense counsel could not object because defense counsel could not concede, or appear to concede, identity. (See defense counsel's guilt phase argument, stressing his reluctance to even discuss lesser offenses, at 9 RT 2200-2201.) The defense argued that appellant was misidentified as a perpetrator, particularly through the testimonies of Richard Diaz, Jesse Rangel, and Cindy Durbin. An objection to the definition of second degree murder, taken during the prosecutor's argument, would have given the appearance of conceding identity.

Appellant's challenge to misstatements in the prosecutor's argument should therefore be addressed on appeal.

Background. In his guilt phase argument to the jury, District Attorney Ernest Li-Calsi began by thanking the jurors for their service. He then likened the prosecution case to a jigsaw puzzle, in which it was his duty to show how the pieces fit together. (9 RT 2122.) He started with the law reflected by the allegations of the charging document.

> And at first like to go over the information and exactly what the defendant is charged with. In Count 1, he is charged with the first degree murder of Chuck Durbin. In Count 2, he is charged with the first degree murder of Juan Uribe. In count – there's a special allegation following these counts in that this is a multiple murder. There's Count 3 which is the attempted murder of Cindy Durbin. And finally there's a special allegation which refers to all of these counts that he personally used a firearm in the commission of these charges.
>
> At first I would like to go over the elements of first degree murder. And you will be instructed on this. Judge is going to give you detailed instructions. [F]irst degree murder is the unlawful killing of a human being with expressed malice aforethought. What is malice aforethought? Malice aforethought is an intent to kill. And the law determines that there are two

types of malice aforethought, express and implied. And in first degree murder, there has to be an express intent to kill. And does that mean the individual has to say I am going to kill him? No. It has to be manifested through their actions or through their words that at the time the act was committed there was an intent to kill. The law is not going to imply anything from the actions. It has to be shown by what the defendant did and what the defendant said.

And then the final is the willful, deliberate, and premeditated that's required in first degree murder. And with respect to willful, deliberate, and premeditated does that mean there has to be a certain amount of plan[n]ing ahead of time? They get together and they draw diagrams and everything? No. It does not mean that at all. It means that the intent to kill, that the killing was accompanied by clear and deliberate intent to kill. That this intent to kill was formed upon pre-existing reflection and that the slayer must have weighed and considered the question of killing, the reasons for and against killing, and having in mind the consequences of killing, he chooses to kill and he does kill.

And does this mean that there's a duration of time that's required? No. There's no – the law does not require any specific duration of time for willful, deliberate, and premeditated murder. The true test is not the duration of the time, but the extent of the reflection. A cold and calculated judgment can be arrived at in a short amount of time.

(9 RT 2123-2124; emphasis added.)

The argument then purported to explain the element of premeditation and deliberation, but conflated that element with simple intent (see Argument XIII below). The prosecutor continued with argument intended to demonstrate the existence of premeditation. (9 RT 2125-2129.) He then turned to second degree murder. He suggested that the evidence supported an alternative verdict of second degree murder on Counts 1 and 2, based on a finding of "implied intent to kill."

Now, you are going to be instructed on a lesser-included with respect to first degree murder and that [is] second degree murder. And second degree murder is an unlawful killing of a human being with malice aforethought. No premeditation or deliberation is required. But malice

aforethought means two different things when it comes to second degree murder. It can either be express malice aforethought or the intent to kill that I referred to earlier or it can be implied.

The law will in certain cases imply an intent to kill. And the judge will instruct you that it's going to be implied when the killing resulted from an intentional act, the natural consequences of that act were dangerous to human life. And the act was deliberately performed with knowledge of the danger, and with the conscious disregard for human life.

So even if you were not to find an intent to kill, an express intent to kill, the actions of the defendant and his son in that house definitely were intentional. They knew the consequences of a danger, that danger to human life. The had knowledge of the danger and the conscious disregard for human life at the time they committed those acts. The law is going to imply an intent to kill in that case, second degree murder. You just have to have an unlawful killing and either express or implied intent to kill. And you don't need premeditation and deliberation.

It's our position that they have been proved in both murders, the murder of Juan Uribe and Chuck Durbin. But you would only find attempted murder if you find the defendant not guilty. I mean, you would only find second degree murder if you find the defendant not guilty of first degree murder.

(9 RT 2130-2131; emphasis added.)

The prosecutor then argued at length that the evidence established the identity of appellant and his son as the killers. (9 RT 2131-2157.) In conclusion, the prosecutor argued that the "one true issue" in the case was not identity, nor whether the murders were first or second degree (he claimed that they were first degree), but whether there was an intent to kill necessary to support the charge of attempted murder of Cindy Durbin, Count 3. (9 RT 2157-2158.)[103]

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[103] The jury acquitted appellant of attempted murder in Count 3. (11 CT 2385.)

Defense counsel Salvatore Sciandra argued at length that the evidence of identity was not sufficient to support a guilty verdict. (9 RT 2158-2200.) Toward the end of his argument, Mr. Sciandra pointed to the lesser-included offenses of second degree murder, and attempted second degree murder. He acknowledged that even to mention the lesser-included offenses put him in a "terribly awkward situation," presumably because he did not concede identity. He pointed to the jury instruction on voluntary intoxication, and urged the jury to consider it "as to whether there was premeditation and deliberation." (9 RT 2200-2201.) The defense made no other reference to the elements of second degree murder.

The closing argument for the prosecution, delivered by Deputy District Attorney Robert McGurty, was devoted entirely to the issue of identity. No further reference was made to the elements of second degree murder. (9 RT 2207-2235.)

The jury was given standard instructions on the effect of voluntary intoxication on the element of premeditation (CALJIC 4.21; 12 CT 2657; 9 RT 2262), and on implied malice second degree murder (CALJIC 8.31; 12 CT 2665; 9 RT 2263).

Analysis. As noted above, the prosecutor argued to the jury that "[m]alice aforethought is an intent to kill." (9 RT 2123.) By this argument, the prosecutor excluded non-intentional implied malice second degree murder. He effectively closed the door on any consideration of second degree implied malice murder as an optional verdict on this record.

The prosecutor went on in an apparent attempt to explain the concept of second degree implied malice murder ("conscious disregard for human life"), but did so in terms of the fictional doctrine of "implied intent": "The law is going to imply an intent to kill in that case, second degree murder." (9 RT 2131.) Again, the effect was to eliminate implied malice second degree murder as a separate, non-intentional, lesser-included offense, by which the jury could have found a reduced level of criminal responsibility.

In the trial court's jury instructions, second degree implied malice murder was defined to the jury in the language of CALJIC 8.31:

> Murder of the second degree is also the unlawful killing of a human being when:
>
> 1. The killing resulted from an intentional act,
>
> 2. The natural consequences of the act are dangerous to human life, and
>
> 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.
>
> When the killing is the direct result of such an act, it is not necessary to prove that the defendant intended that the act would result in the death of a human being.
>
> (12 CT 2665; 9 RT 2263; see *People v. Watson* (1981) 30 Cal.3d 290, 300.)

Despite the inclusion of the implied malice definition as an aspect of second degree murder in the jury instructions, the argument of the District Attorney obscured that basis of criminal liability. According to the District Attorney, a second-degree murder conviction requires intent; according to his argument, there is no path to second degree murder based on an unintentional killing, even one committed with conscious disregard

for human life. Even if the jury had a reasonable doubt that appellant's role in the killing of either of the victims was intentional, they were given no path around a first degree murder conviction, short of outright acquittal.[104] The prosecutor's argument defeated the judicial policy in favor of having instructions on lesser-included offenses.

Implied Malice Murder Does Not Require an Intent to Kill. As held in *People v. Watson, supra,* implied malice second degree murder may be established by the intentional commission of an act dangerous to human life, which is deliberately performed with knowledge of its danger to human life and with conscious disregard to its consequences. Implied malice murder does not include the intent to kill, as stated in the instruction, however it does require the intentional commission of an act dangerous to human life. Such a fine distinction between levels of intent invites misunderstanding.

Attacks on the standard instruction for lack of specificity have been rejected. (See *People v. Nieto-Benitez* (1992) 4 Cal.4th 91.) However the instruction is notoriously subject to misinterpretation. (See, *inter alia, Ho v. Carey* (9th Cir. 2003) 332 F.3d 587 [federal relief granted due to conflicting jury instructions suggesting incorrectly that implied malice second degree murder is a general intent crime]; see also *People v. Knoller* (2007) 41 Cal.4th 139, 155-156, correcting the Court's earlier misstatement of the knowledge of danger element of implied malice murder in *People v. Coddington* (2000) 23 Cal.4th 529, 592.) Since the standard jury instruction requires the knowing commission of an act dan-

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[104] No instruction was read on voluntary or involuntary manslaughter. See Argument VIII above.

gerous to human life, it is not farfetched to convince a jury that the intent to kill is a necessary element of implied malice murder.

The Prosecution Argument Created a Reasonable Likelihood that the Jury Misconstrued the Argument in Violation of Due Process. The prosecutorial misconduct here affected the integrity of the trial court's instructions on a lesser-included offense. Under *People v. Sedeno* (1974) 10 Cal.3d 703, the trial court has a *sua sponte* duty to instruct on any lesser-included offense supported by evidence or argument. This rule extends to any theory of liability which has "substantial evidentiary support." It is not limited to theories obviously and openly presented by the trial record. (*People v. Breverman* (1998) 19 Cal.4th 142, 162; see *People v. Barton* (1995) 12 Cal.4th 186.)

Overlying the trial court's instructions to the jury, the prosecutor argued that intent is a necessary element of all forms of murder. If that were true, i.e. if intent were a necessary element of all forms of murder, and all forms of second degree murder, then this jury was not free to consider a murder conviction, or any conviction, once they formed a reasonable doubt on the element of intent to kill. If the jurors, or any of them, had a reasonable doubt whether the defendant intended to kill, their only option was to acquit, a path which the jurors were surely loathe to take on this state of the record.[105] Since there was substantial evidentiary support for a verdict of implied malice second degree murder, the jury should have had a free path to a verdict on that lesser offense, unimpeded by any misstatement or misunderstanding of the law.

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[105] No instruction was read on voluntary or involuntary manslaughter. See Argument VIII above.

Raising the Bar on Implied Malice Second Degree Murder Had a Prejudicial Effect on Penalty Phase Deliberations. A conviction of second degree murder on Count One would not have prevented this case from going into a penalty phase. A conviction on one count of second degree murder and one count of first degree murder would have still have left appellant statutorily eligible for the death penalty. (See Penal Code § 190.2 (a)(3).) Nevertheless, such a conviction is obviously far less egregious than conviction of two counts of first degree murder.

There are two purposes of the rule requiring instruction on lesser-included offenses. One is prophylactic, specifically, to avoid the harm of "over-conviction" and "over-acquittal." (See, e.g., *People v. Barton* (1995) 12 Cal. 4th 186, 195.) That is to say, it aims to prevent the jury from finding the defendant guilty of a greater offense, even though he is guilty only of a lesser one, out of a desire to keep him from going unpunished. (*Ibid.*) At the same time, the rule aims to prevent the jury from finding the defendant not guilty of a greater offense and letting him go unpunished, even though he is, in fact, guilty of a lesser one. (See discussion in dissent of Justice Mosk, *People v. Breverman, supra,* 19 Cal. 4th at 181. See also *People v. Wickersham* (1982) 32 Cal.3d 307, 324.)

Here, the danger is that the jury may have found appellant guilty of the greater offense, first degree murder, out of a desire to keep him from going unpunished, even though he was guilty only of the lesser offense of implied malice second degree murder. The consideration of the lesser-included offense of implied malice second degree murder,

technically permissible under the jury instruction, was precluded by the District Attorney's argument that all forms of murder require intent.

Prejudice. This error should be treated as federal constitutional error, reviewable under the beyond-a-reasonable doubt standard of *Chapman v. California* (1968) 386 U.S. 18. The prosecutor's argument went beyond advocacy, and impinged on the trial court's authority to instruct the jury, in violation of constitutional due process.

The barrier which the prosecutor erected to the jury's consideration of the lesser-included offense of implied malice second degree murder amounted to a restriction of the jury's ability to consider the lesser-included offense. In death penalty cases, this amounts to federal constitutional error.

In death penalty cases the failure to provide instructions on lesser-included offenses creates federal constitutional error. Thus, in *Beck v. Alabama* (1980) 447 U.S. 625, the court concluded that Alabama could not constitutionally impose a death sentence after applying a state statute, limited to capital cases, that prohibited the jury from considering a lesser noncapital offense necessarily included within the capital charge and supported by the evidence (as occurred here under the prosecutor's argument). On the other hand, the Supreme Court noted the "value to the defendant of this procedural safeguard," as evidenced by "the nearly universal acceptance . . . in both state and federal courts" that a defendant is entitled to instructions on lesser-included offenses warranted by the evidence. (*Ibid.*) Indeed, the court pointed out, Alabama itself granted the right under appropriate circumstances in noncapital cases. (*Id.* at pp. 636-637.) Such protection, the

court reasoned, is "especially important" in a capital case, and the risk that a jury will convict of the charged offense as an alternative to complete acquittal when it believes the evidence shows only some lesser crime "cannot be tolerated in a case in which the defendant's life is at stake." (*Id.* at p. 637.) "Thus, if the unavailability of a lesser-included offense instruction enhances the risk of an unwarranted conviction, [the state] is constitutionally prohibited from withdrawing that option from the jury in a capital case." (*Id.* at p. 638.)

Here, a second degree murder conviction on one count would not have been a non-capital option, since it would have still qualified appellant for the death penalty. (Penal Code § 190.2 (a)(3).) But a second degree murder conviction on Count One would have greatly influenced the outcome of the penalty phase.

One reason for additional reliability in the context of this case, with specific reference to the element of premeditation, is the relevance of premeditation to the penalty determination. The presence of premeditation is part of the circumstances of the crime. It is a very significant aggravating factor. (See *People v. Thomson* (1990) 50 Cal.3d 134, 181-182.) The absence of premeditation in a felony murder case is a mitigating factor. (See *People v. Bonillas* (1989) 48 Cal.3d 757, 793; see also *Sochor v. Florida* (1992) 504 U.S. 527.) The absence of premeditation is also part of the circumstances of the offense, a consideration which would inevitably reduce the aggravated nature of the offense. It would suggest a verdict of life rather than the death penalty.

To the extent that the erroneous argument of the prosecutor impinged on the trial court's instructions, it should be evaluated under the principles for review of erroneous

jury instructions. (Compare *Brown v. Payton* (2005) 544 U.S. 133, 146, and *People v. Payton* (1992) 3 Cal.4th 1050, 1070 [erroneous argument of prosecutor did not hamper jury's consideration of mitigating evidence under "factor (k)."].)

Since this is a capital case, and since the argument effectively removed a lesser-included offense instruction which was required on this record, the *Chapman* standard for review of federal constitutional error applies.

This judgment cannot be upheld under any standard of review, because there was substantial evidence of intoxication and surprise, and room for reasonable doubt on the element of premeditation necessary for first degree murder. The jury should have been allowed unfettered discretion to consider implied malice second degree murder as an alternative verdict. A verdict which lacked a finding of premeditation would have had a substantial effect on the penalty phase deliberations. Accordingly, the first degree murder conviction on Count One must be reversed, and the death penalty judgment must be reversed.

XIII. THE PROSECUTOR COMMITTED MISCONDUCT BY ARGUING TO THE JURY THAT PREMEDITATED MURDER IS ESTABLISHED MERELY BY EVIDENCE OF AN INTENT TO KILL.

Appellant had been drinking brandy during the time leading up to the expedition which wound up at the Durbin house; he was literally falling down drunk. Moreover, he had no prior knowledge or awareness of Chuck Durbin. The jury must have had a difficult task in evaluating premeditation on this record. The prosecutor misspoke in guilt phase argument, claiming that premeditation was demonstrated merely by evidence of a "clear and deliberate intent to kill." Despite the trial court's instructions to the jury, the jury was misled on this crucial element.

Prosecutorial misconduct requires reversal under the federal constitution when it "so infect[s] the trial with unfairness" that the conviction is a denial of due process. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.)

In determining whether there has been prosecutorial misconduct in argument to the jury, this Court will inquire "whether there is a reasonable likelihood" that the jury misconstrued or misapplied the prosecutor's words in violation of state or federal law. (*People v. Clair* (1992) 2 Cal.4th 629, 663; see Argument XII above.)

Prosecutorial misconduct in closing argument may involve a misstatement of the applicable law, as here. (*People v. Hill* (1998) 17 Cal. 4th 800, 829-830.) More specifically, the prosecutor's misstatement here effectively omitted the premeditation element of first degree murder, in violation of the federal constitution. (See *Neder v. United States*

(1999) 527 U.S. 1 and *People v. Flood* (1998) 18 Cal.4th 470.) Moreover, the misstatement, by diminishing the necessary elements of the offense, effectively shifted the burden of proof away from the prosecution, again in violation of the federal constitution. (See *Francis v. Franklin* (1985) 471 U.S. 307, 315 and *Sandstrom v. Montana* (1979) 442 U.S. 510.)

Due process is denied when the elements of willfulness and deliberation are collapsed into the single element of premeditation, and when the element of premeditation is satisfied by evidence of a sudden intention, as "instantaneous as successive thoughts of the mind." (*Polk v. Sandoval* (9th Cir. 2007) 503 F.3d 903, 911.)

No objection was entered to the prosecutor's argument misstating the premeditation element of murder. The requirement of objection was excused in these circumstances because defense counsel were only contesting identity, and could not be seen as also contesting the mental elements of murder. (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1074.)

Appellant's challenge to misstatements in the prosecutor's argument should therefore be addressed on appeal.

In his guilt phase argument the District Attorney first misled the jury as to the availability of implied malice second degree murder (see Argument XII above). He then moved immediately to conflate premeditated murder with a simple intentional killing.

> And then the final [element] is the willful, deliberate, and premeditated that's required in first degree murder. And with respect to willful, deliberate, and premeditated does that mean there has to be a certain amount

> of plan[n]ing ahead of time? They get together and they draw diagrams and everything? No. It does not mean that at all. It means that the intent to kill, that the killing was accompanied by clear and deliberate intent to kill. That this intent to kill was formed upon pre-existing reflection and that the slayer must have weighed and considered the question of killing, the reasons for and against killing, and having in mind the consequences of killing, he chooses to kill and he does kill.
>
> And does this mean that there's a duration of time that's required? No. There's no – the law does not require any specific duration of time for willful, deliberate, and premeditated murder. The true test is not the duration of the time, but the extent of the reflection. A cold and calculated judgment can be arrived at in a short amount of time.
>
> (9 RT 2123-2124; emphasis added.)

The argument of defense counsel and the prosecution's closing argument did nothing to clear up the misstatement of the definition of premeditation.

The prosecutor's argument contradicted the court's later instruction, that premeditation means not only "a clear, deliberate intent ... to kill," but also that the intent was "the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation." (12 CT 2662; CALJIC 8.20.) The District Attorney's statement also conflated premeditated first degree murder with express malice second degree murder, which requires an intentional and unlawful killing, but does not require premeditation. (CALJIC 8.30; see 12 CT 2664.)

This Court has established a framework for reviewing evidence of premeditation and deliberation, particularly to determine whether there is evidence of pre-existing reflection. (*People v. Anderson* (1968) 70 Cal.2d 15, 26; see Argument IV above.) The re-

levant criteria are (1) evidence of prior planning activity: (2) evidence of motive to kill; and (3) evidence of a "particular and exact means and manner of killing." (*Ibid.*) The *Anderson* criteria are descriptive, not normative, and only provide a framework for review. (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.) Nevertheless, they are presumptively the criteria used by a reasonable jury to assess evidence of premeditation.

Although counsels' arguments were devoted primarily to identity, the jury had to determine the issue of premeditation as a necessary element to the offense. There was considerable room for debate on the issue of premeditation. For instance, as to the killing of Chuck Durbin, there was no evidence that he was known to the perpetrators in advance, and harm to him played no role in whatever plans they may have had. There was no motive to kill Durbin. The manner of killing was not particular and exact. Moreover, as to all counts, the jury had to take into account appellant's extreme level of intoxication at the time of the offense. (See CALJIC 4.21 at 12 CT 2657: voluntary intoxication relevant to specific intent.) Premeditation, or lack of premeditation, was central to the first degree murder verdicts.

This jury could well have had a reasonable doubt as to the existence of premeditation and yet, tracking the advice of the District Attorney, convicted appellant of first degree murder. This result is unacceptable, for it denies appellant the right to due process and fair trial.

This Argument should be treated as federal constitutional error, reviewable under the beyond-a-reasonable doubt standard of *Chapman v. California* (1968) 386 U.S. 18.

The prosecutor's argument went beyond advocacy, and impinged on the trial court's authority to instruct the jury. The prosecutor's elimination of the element of premeditation, substituting "a clear and deliberate intent to kill," altered the trial court's instructions and created federal constitutional error.

Under the standard of review for constitutional error, the alteration of an essential element of the offense was reversible error. A jury which was not misled on this essential element would not have delivered a first degree murder verdict on Count One. Even if it had delivered a second degree murder verdict on that count, the jury would not have been likely to reach a death penalty verdict on the reduced charge (see discussion of reversible error in Argument XII above).

XIV. THE PROSECUTOR COMMITTED MISCONDUCT BY ARGUING TO THE JURY THAT THE TESTIMONY OF RICHARD DIAZ, AN ACCOMPLICE, COULD BE CORROBORATED BY THE TESTIMONY OF JESSE RANGEL, ANOTHER ACCOMPLICE.

Richard Diaz, at a minimum, was responsible for firing his weapon into the Durbin house. He was properly identified to the jury as an accomplice subject to corroboration. The prosecutor offered the testimony of Jesse Rangel, and argued that it was a means of corroborating Diaz. This was improper argument because there was substantial evidence that Jesse Rangel was also an accomplice, and his testimony should not have been used to corroborate Diaz.

Prosecutorial misconduct requires reversal under the federal constitution when it "so infect[s] the trial with unfairness" that the conviction is a denial of due process. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.)

In determining whether there has been prosecutorial misconduct in argument to the jury, this Court will inquire "whether there is a reasonable likelihood" that the jury misconstrued or misapplied the prosecutor's words in violation of state or federal law. (*People v. Clair* (1992) 2 Cal.4th 629, 663; see Arguments XII and XIII above.)

Prosecutorial misconduct in closing argument may involve a misstatement of the applicable law, as here. (*People v. Hill* (1998) 17 Cal. 4th 800, 829-830.) More specifically, the accomplice corroboration rule (Penal Code § 1111) should not be subverted by the use of one accomplice to corroborate another.

In his guilt phase argument the District Attorney concentrated on the credibility of Richard Diaz. He pointed to details of Diaz' testimony which were consistent with other evidence. In particular, the prosecutor pointed to corroboration of Diaz through the testimony of Jesse Rangel.

> Richard Diaz was corroborated by Jesse Rangel's testimony. Richard Diaz testified that little Pete had the .22 rifle. That big Pete had the .380. Jesse Rangel at a later time testified that that's exactly what he was told. Richard Diaz testified that Rafael was the driver. At a later time Jesse Rangel testified that's exactly what he was told by the defendant and the defendant's son. Richard testified he had the .38 and stayed outside and fired two shots. Jesse Rangel testified that's what he was told. That Richard didn't go into the house.
>
> (9 RT 2151; emphasis added.)

Shortly after the conclusion of arguments, the trial court gave instructions which covered the subject of accomplice corroboration. The court's instructions included CALJIC 3.10 defining accomplice:

> An accomplice is a person who was subject to prosecution for the identical offense charged in Counts 1 through 5 against the defendant on trial by reason of aiding and abetting.
>
> (12 CT 2515.)

CALJIC 3.11, requiring corroboration of the testimony of an accomplice, was also read:

> You cannot find a defendant guilty based upon the testimony of an accomplice unless that testimony is corroborated by other evidence which tends to connect such [*sic* in printed copy] the defendant with the commission of the offense.
>
> Testimony of an accomplice includes any out-of-court statement purportedly made by an accomplice received for the purpose of proving that what the accomplice stated out-of-court was true.
>
> (12 CT 2516.)

The trial court also read CALJIC 3.12 on the sufficiency of evidence to corroborate an accomplice:

> To corroborate the testimony of an accomplice there must be evidence of some act or fact related to the crime which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the crime charged.
>
> However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the crime charged, or that it corroborate every fact to which the accomplice testifies.
>
> In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the crime.
>
> If there is no independent evidence which tends to connect defendant with the commission of the crime, the testimony of the accomplice is not corroborated.
>
> If there is independent evidence which you believe, then the testimony of the accomplice is corroborated.
>
> (12 CT 2517.)

The trial court also read CALJIC 3.13, stating that one accomplice may not corroborate another:

> The required corroboration of the testimony of an accomplice may not be supplied by the testimony of any or all of his accomplices, but must come from other evidence.
>
> (12 CT 2518).

and CALJIC 3.14, on the criminal intent necessary to make one an accomplice:

> Merely assenting to or aiding or assisting in the commission of a crime without knowledge of the unlawful purpose of the perpetrator and without the intent or purpose of committing, encouraging or facilitating the commission of the crime is not criminal. Thus a person who assents to, or aids, or assists in, the commission of a crime without that knowledge and without that intent or purpose is not an accomplice in the commission of the crime.
>
> (12 CT 2519),

as well as CALJIC 3.16 on accomplice as a matter of law:

> If the crimes alleged in Counts 1 through 5 of he Information were committed by anyone, the witness RICHARD DIAZ was an accomplice as a matter of law and his testimony is subject to the rule requiring corroboration.
>
> (12 CT 2520.)

Finally, the trial court read CALJIC 3.18, instructing that the testimony of an accomplice is to be viewed with distrust[106]:

> You should view the testimony of an accomplice with distrust. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in this case.
>
> (12 CT 2521.)

The jury was not given CALJIC 3.19, concerning persons such as Jesse Rangel who could have been determined to be accomplices[107]:

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[106] This instruction was later amended to provide that the accomplice's testimony be viewed "with caution." (See *People v. Guiuan* (1998) 18 Cal.4th 558, 569.)

[107] The District Attorney proposed an instruction on the defendant's burden to prove that a corroborating witness is an accomplice (CALJIC 3.19), directed at the testimony of Jesse Rangel. Defense counsel opposed the instruction because it put the burden of proof on the defense to prove that Jesse Rangel was an accomplice. (8 RT 2017; 9 RT 2118; see

You must determine whether the witness _____ was an accomplice as I have defined that term.

The defendant has the burden of proving by a preponderance of the evidence that _____ was an accomplice in the crime[s] charged against the defendant.

The prosecutor's argument contradicted the rule that one accomplice may not corroborate another. Prosecutorial misconduct in closing argument may involve a misstatement of the applicable law, as here. "'[I]t is improper for the prosecutor to misstate the law generally (*People v. Bell* (1989) 49 Cal. 3d 502, 538), and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. (*People v. Gonzalez* (1990) 51 Cal. 3d 1179, 1215.)' (*People v. Marshall* (1996) 13 Cal. 4th 799, 831.)" *People v. Hill* (1998) 17 Cal. 4th 800, 829-830; see *People v. Morgan* (2007) 42 Cal.4th 593, 612 [kidnapping conviction argued on improper legal ground].)

The error was not corrected by the trial court's instructions. The jury instructions stated the accomplice corroboration rule (CALJIC 3.11), and stated that one accomplice may not corroborate another (CALJIC 3.13), but did not allow for the possibility that anyone other than Richard Diaz was an accomplice (see CALJIC 3.19, not read).

The defense position was that both Jesse Rangel and Richard Diaz were principals in the killings, and that their testimonies were tailored to conform to each other. Jesse

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9 RT 2176-2177 [defense counsel argued that Jesse Rangel provided a false alibi].) On the defendant's burden to prove a witness' accomplice status, see *People v. Belton* (1979) 23 Cal.3d 516, 523.

Rangel's testimony provided a flexible platform, because he claimed an alibi, and claimed that his information came from Little Pete; thus he could claim to know many details of the offense while insisting that he was not present at the time of the killings.

The prosecution case faced a formidable obstacle, in the early identification statements of Cindy Durbin. She identified Jesse Rangel as one of the assailants within a day or two of the shootings. (Ex. 52; 6 RT 1395-1397, 1413-1419.) She continued to identify Jesse Rangel in police interviews in the following weeks and months, through the time of the preliminary hearing. (Ex. 57; 6 RT 1397, 1437.) Meanwhile, Jesse Rangel fled California and went into hiding in New Mexico. (6 RT 1519.)

Jesse Rangel's status as a possible accomplice should have nullified any use of his testimony to corroborate the testimony of Richard Diaz. Defense counsel objected to the reading of CALJIC 3.19 to identify Jesse Rangel as a potential accomplice (8 RT 2017), but only because the standard instruction would have required the defense to shoulder the burden of proof on Jesse Rangel's accomplice status. (See *People v. Belton* (1979) 23 Cal.3d 516, 523.)

In these circumstances it was prejudicial error for the prosecutor to argue that the testimony of Jesse Rangel, quoting Little Pete, could be used to corroborate the testimony of Richard Diaz. Both accounts were in dire need of corroboration, but they could not be used to corroborate each other.

The prejudice was particularly extreme because appellant's son Little Pete was himself an accomplice as a matter of law (see Argument IX above). To whatever extent

Jesse Rangel was being truthful, he was merely quoting Little Pete, who had a motive to diminish his own role in the killings and exaggerate the role of appellant.

The Jesse Rangel/Little Pete accounts all came to Richard Diaz in written discovery before he decided to cooperate with the prosecution. (5 RT 1326, 1328, 1361.) He was therefore in a position to tailor his account to the version provided by Jesse Rangel. The accounts provided by Jesse Rangel and Richard Diaz were not independent of each other, and thus should have had no value as corroboration. The account of one accomplice (Jesse Rangel) quoting another accomplice (Little Pete) should not have been used to corroborate the account of yet another accomplice (Richard Diaz), especially since the last accomplice in the chain had studied the other statements. (See discussion in *People v. Najera* (2008) __Cal.4th __, 2008 Cal.LEXIS 6736 [*6].)

There was good reason to conclude that Richard Diaz and Jesse Rangel were the actual perpetrators of these offenses. It was prejudicial error to argue that they should corroborate each other.

XV. THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE THAT JUAN URIBE WAS A DRUG DEALER, AND THAT THERE WAS DRUG USE AND DRUG DEALING AT THE DURBIN HOUSE AT THE TIME OF THE SHOOTINGS, TO IMPEACH PROSECUTION WITNESSES AND TO REBUT VICTIM IMPACT TESTIMONY IN SUPPORT OF THE DEATH PENALTY.

The prosecution presented a case in aggravation of the death penalty which relied largely on victim impact evidence. Yet, the trial court excluded defense evidence which would have shown that Juan Uribe was a drug dealer; that Chuck Durbin was a regular customer of Uribe; that drug paraphernalia were on the kitchen table at the time of the shootings; and that Chuck Durbin had a high level of methamphetamine in his system at the time of his death. The exclusion of this evidence created a one-sided impression of the victims and the effect that their deaths had on their surviving family members. Moreover, it deprived the defense of an opportunity to argue that dangerous drug users were in the Durbin house, helping to explain if not excuse the use of deadly force. The exclusion of evidence denied appellant the opportunity to defend against the death penalty, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Rule. The federal constitutional rights to due process, compulsory process and confrontation (Fifth, Sixth, and Fourteenth Amendments) mandate that the defendant be allowed to present evidence and valid defense theories in response to a criminal prosecution. (See *Washington v. Texas* (1967) 388 U.S. 14, 22; *Chambers v. Mississippi* (1973)

410 U.S. 284, 302; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Martin v. Ohio* (1987) 480 U.S. 228, 233; *Rock v. Arkansas* (1987) 483 U.S. 44.)

This principle extends to the introduction of evidence in mitigation, which must be allowed as a matter of constitutional due process. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Boyde v. California* (1990) 494 U.S. 370, 382.)

It is no less essential that the defense be allowed to attack prosecution evidence which is offered in aggravation of the death penalty. (See *United States v. Barnette* (4th Cir. 2000) 211 F.3d 803, 821-825 [defense rebuttal evidence was improperly excluded, when offered to rebut prosecution evidence of mental illness of defendant].)

Rebuttal evidence on the issues presented at trial is essential to a fair trial, regardless of which side offers it. By comparison, when the defense offers evidence of his own good character, the prosecutor is absolutely empowered to rebut that evidence with evidence of poor character.

> In light of the defense presentation, the prosecutor was entitled to introduce evidence in rebuttal that defendant was cruel and callous toward others in varied situations, suggesting that intrinsic evil rather than external circumstances out of defendant's control predominated in governing his behavior or was the sole cause of it. (See *In re Lucas* (2004) 33 Cal.4th 682, 720, 719 [suggesting that to rebut "evidence of institutional failure and positive character traits," the prosecution could introduce evidence "that from a very early age, petitioner demonstrated lack of conscience, a propensity for violence, and defiance of authority that did not respond to psychotherapy and that he committed criminal offenses as a juvenile, was subject to temper tantrums and uncontrollable rages as a child, was destructive, and sought only to please himself"].) ....
>
> (*People v. Thornton* (2007) 41 Cal.4th 391, 458; emphasis added.)

By the same token, the defendant must be permitted to offer rebuttal evidence, to question the strength of prosecution evidence in aggravation and the veracity of its witnesses. Where the aggravation case includes victim impact evidence, the defendant must be allowed to call into question the effect on the survivors' quality of life caused by the loss of their family member. If the effect of a homicide is portrayed as devastating to the survivors, then it is only appropriate in an adversarial system to permit the defense to offer evidence to paint a truer picture of the shared family life that was altered by the homicide. Where victim impact evidence is the determining factor in imposing the death penalty – as it was here – it is a denial of due process to exclude evidence of salient features, good or bad, of the life that was lost.

Factual and Procedural Background. The record contains a copy of an autopsy toxicology report prepared with respect to the victim Brent (Chuck) Durbin, on October 9, 1995. The report indicates a level of .15 mg/L of methamphetamine, and .01 mg/L of amphetamine. (2 CT 445.)[108] Although not entered in evidence, this report was referred to in the arguments of counsel and thus serves as part of the defense offer of proof.

In his opening statement to the jury at the guilt phase, defense counsel Litman asserted that there was drug dealing at the Durbin house.

> Sergeant Alley asked Miss Durbin if she knew of any drug involvement by her husband or by Juan Uribe and she told him, and you will hear

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[108] This level of methamphetamine is indicated as above the top "effective level" of .10 mg/L, and below the low "potentially toxic" level of .2 mg/L. The toxicology report is not attached to any motion, and is not otherwise identified as an exhibit.

in evidence that Sergeant Alley put this in quotes in his police department report, "No one is allowed in my house that does drugs."

The evidence will show that at least in that regard Miss Durbin was not honest with Sergeant Alley. At a later interview she admitted that her husband was purchasing crank or methampehetamine regularly from Juan Uribe. She also admitted she had seen her husband using drugs at the family home. And she also in this interview on the 21st told Officer Ciapessoni a specific amount, I believe 70 to $80 per week that he was spending on drugs.

And in addition, you will hear evidence that when the officers searched the residence over on Central after the shooting had taken place, that they found a narcotics scale on the kitchen table. That they found a mirror with a powdery substance and a cutting instrument under the bed in the master bedroom. And they found items for use of drugs in the garage.

(4 RT 893-894.)

Following the opening statements, the prosecution objected to defense evidence on drug usage as outlined in the opening statement. The District Attorney argued that the drug evidence was "completely irrelevant," and was used to "inflame the jury against the victim in this case." (4 RT 906.) The defense countered that the subject had to do with the credibility of Cindy Durbin; she told officers at the scene that no one who does drugs was allowed into the house, all the while there was a narcotics scale on the kitchen table. At that point the trial court accepted the defense argument on credibility; "I mean apparently she made a statement to the police and contradicted it later ... [I]t goes to credibility." A limiting instruction would be necessary. (4 RT 907.)

On September 5, 1998, during a break in the presentation of prosecution evidence, the District Attorney announced that "we are still not giving up on this cross-examination of Cindy Durbin as to what she told the police about drugs." (5 RT 1191.) The District

Attorney argued that the subject was not relevant. The trial court observed that the drug evidence was "collateral impeachment," subject to Evidence Code § 352. (5 RT 1192.)

Cindy Burciaga, a neighbor, testified on September 10, 1998. Defense counsel proposed to question her about the large number of people seen coming and going from the Durbin house. This testimony was offered as an indication of probable drug activity at the house. (5 RT 1139.) The trial court sustained the prosecutor's objection on grounds of lack of relevance and section 352. (5 RT 1140.)

Alvin Areizaga also testified. Just prior to his testimony the prosecution brought a motion in limine to prohibit reference to drug usage at the Durbin house. (5 RT 1153.) Mr. Sciandra for the defense argued that the evidence of drug usage was relevant to impeaching Cindy Durbin. The trial court ruled that any reference to drug usage by anyone other than Mr. Areizaga himself would be irrelevant. (5 RT 1154.)

On September 11, 1998, evidence was presented and further argument was heard. The prosecution cited *People v. Singer* (1963) 217 Cal.App.2d 743 and *People v. Grayson* (1959) 172 Cal.App.2d 372, 376, for the proposition that a witness may not be examined on matters outside the scope of direct examination for the purpose of testing the witness' credibility. (5 RT 1213.)

Cindy Durbin testified outside the presence of the jury. She did not remember making a statement to Sergeant Alley as she was being loaded onto an ambulance gurney. (5 RT 1223.) She remembered having an interview with the chief of police sometime later. She told him that Chuck engaged in the "recreational use" of methamphetamine. He got it from Juan Uribe. (5 RT 1230.) Sergeant Alley testified that he spoke to Ms. Durbin

at the scene. She told him that she knew of no drug involvement by Chuck and Juan Uribe, and that "no one was allowed in her house that does drugs." (5 RT 1236.)

During argument the trial court observed that the *Singer* case cited by the prosecution pre-dated the enacted of the California Evidence Code, and was thereby overruled. Moreover, in the trial court's view, Proposition Eight[109] abrogated Evidence Code § 787,[110] so that "specific instances of conduct are admissible." (5 RT 1240.)

Mr. Litman argued that impeachment should be allowed because Ms. Durbin's credibility, particular in her identification of appellant as one of the shooters, was critical. (5 RT 1243.) The prosecutor argued that the drug issue was collateral and would mislead the jury regarding the issues in the case. (5 RT 1245.)

Turning to a section 352 analysis, the trial court determined that the drug evidence had probative value, but very little probative value. "Drugs are not involved in this case. Motive is revenge, and not drugs." (5 RT 1246.) The trial court considered the offered drug evidence inflammatory. The trial court reversed its prior ruling and excluded evi-

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[109] Cal. Const. Art. I § 28 (d): "Right to Truth-in-Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press."

[110] "Subject to Section 788, evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness."

dence of drug usage in the Durbin house during the guilt phase of the trial, citing Evidence Code § 352. (5 RT 1247.)

Richard Fitzsimmons testified as a defense witness. On redirect examination Fitzsimmons testified that he used methamphetamine at the Durbin house ten or fifteen minutes before the shootings. (8 RT 2035.) However, no evidence was permitted on the defense claim from the opening statement that there was open methamphetamine use at the Durbin house, that a drug scale was in the kitchen at the time of the shootings, that Juan Uribe was a supplier, that Chuck Durbin had a methamphetatmine habit, and that Cindy Durbin tried to mislead investigating officers on the subject.

The guilty verdicts were returned on October 1, 1998.

In the penalty phase of the trial the issue of drug usage at the Durbin house was raised again, in the context of victim impact evidence.

On October 5, 1998, at the beginning of penalty phase proceedings, Mr. Litman for the defense raised the question of admissibility of Cindy Durbin's statements about drug usage, which had been admitted then excluded at the guilt phase. Counsel also pointed out that in autopsy results Chuck Durbin was found to have methamphetamine in his system. (See 2 CT 445.) The prosecutor replied that victim impact testimony, which was to be offered in this case, does not include evidence of the character of the victim. (10 RT 2321.) Mr. Sciandra for the defense replied that the evidence was not offered to establish the character of the victim, but to show that "it was not paradise in the house." Chuck Durbin was using 60 to $80 per week to support his drug habit. This evidence was relevant to show how much his family really misses him. (10 RT 2322.)

The matter was continued to the following day. Returning to the issue, the trial court announced that it had not been able to find any cases for guidance on the admissibility of evidence of drugs in Durbin's system. Mr. Sciandra argued that the evidence was relevant to balance the picture of Durbin as a loving father and heroic victim. (10 RT 2337)

The District Attorney replied that the drug evidence was not relevant to any issue concerning Chuck Durbin as a loving father. The prosecution did not intend to introduce evidence of specific acts of kindness by Durbin. The trial court took the view that Chuck Durbin's character could not be impeached. "Well, he is a blameless loving father. He wasn't the target of the offense. He was a victim of circumstances." The court determined to continue to exclude the drug evidence. The defense protested that the exclusion of evidence was a violation of the Eighth and Fourteenth Amendments. (10 RT 2338.)

That afternoon Chuck Durbin's brother Randy testified as a victim impact witness. He testified that he depended on his brother, and that Chuck had been a father figure for him. (10 RT 2393.) The defense then argued that by painting a portrait of Chuck as a role model, the door had been opened to evidence of drugs in the residence; to exclude that evidence would be to perpetrate a "fraud on the jury." (10 RT 2399.)

The prosecutor reiterated that the murder had nothing to do with drugs. "None. Zip." The trial court agreed that there was no evidence that drugs had anything to do with the case, and reiterated its earlier decision to exclude the evidence. (10 RT 2400.)

Shortly thereafter, Mr. Sciandra moved to cross-examine Martha Melgoza on the drug issue. (10 RT 2410.) Juan Uribe's mother had testified that Juan always made sure

that the bills were paid. (10 RT 2411.) The defense wanted to explore the source of Uribe's income. The trial court continued to exclude the evidence, ruling that "this is not a drug case." (10 RT 2412.)

Cindy Durbin testified a second time to the circumstances of the shooting. She added that her son Brett was slightly autistic, a condition which was inferred to be associated with his father's death (see Argument XVI below). (10 RT 2431.) Her daughter Natasha had died of influenza "last August."[111] She attributed her inability to deal with Natasha's death to "the fact that Chuck was not there to help [her] and console [her] in that situation...." (10 RT 2433.)

Analysis. The trial court erred by excluding evidence of drug usage and drug dealing at the Durbin house. In seeking the death penalty the prosecution relied very substantially on victim impact testimony. By this evidence the prosecution sought to demonstrate that the victims were a source of positive influence: the survivors were devastated by the deaths of the victims because the victims were stable and healthy influences on their respective families. The defense should have been permitted to present a more nuanced picture of the relationship of the victims to their families.

The admissibility of victim impact testimony in capital trials is a proposition which appellant does not challenge in this appeal. The use of victim impact in general might be debated, and one of the grounds of the debate would be whether it is proper to

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[111] Ms. Durbin testified on October 7, 1998. The killings occurred on October 7, 1995.

assess the death penalty on the basis of the personal characteristics of the victim – either his character in isolation, or the effect of his death on his surviving family members. This debate has been settled – victim impact evidence is relevant and admissible. But it carries with it the corollary that a true and accurate picture may not be wholly to the benefit of the victim's memory. It may not disclose a wholly unblemished life story, nor may it show a seamless relationship with his survivors.[112]

In the recent past, victim impact evidence was deemed inadmissible. (See *Booth v. Maryland* (1987) 482 U.S. 496 and *South Carolina v. Gathers* (1989) 490 U.S. 805.) In *Payne v. Tennessee* (1991) 501 U.S. 808, the then-recent opinions in *Booth* and *Gathers* were overruled, and victim impact evidence was deemed admissible over any federal constitutional objection.

> We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "The State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." *Booth*, 482 U.S. at 517 (WHITE, J., dissenting) (citation omitted). By turning the victim into a "faceless stranger at the penalty phase of a capital trial," *Gathers*, 490 U.S. at 821 (O'CONNOR, J., dissenting), *Booth* deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.
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> (*Id.*, 501 U.S. at 825; emphasis added.)

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[112] Indeed, to press the analogy, such negative information is common fodder for the prosecution rebuttal to a defense case in mitigation of the death penalty.

There are two aspects of the *Payne* opinion which are particularly relevant to the present issue. First, there is a distinction between evidence of the character of the victim on the one hand, and the effect his or her death may have had on the surviving family members on the other. Second, the admissibility of positive or laudatory victim impact evidence carries with it the potential for its opposite or converse: rebuttal evidence of poor conduct, or rebuttal evidence of slight or reduced impact of the victim's death on the surviving family members.

Both of these potential issues were recognized at the time the door was opened to victim impact evidence. Although much of the discussion in the *Payne* opinion lumped the victim's character together with the impact of his or her death on the surviving family members, there was some acknowledgement that there might be different rules of admissibility for these two categories of victim impact evidence.

> Payne echoes the concern voiced in Booth's case that the admission of victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. *Booth, supra*, at 506, n. 8. As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind -- for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. <u>It is designed to show instead each victim's "uniqueness as an individual human being," whatever the jury might think the loss to the community resulting from his death might be</u>. The facts of *Gathers* are an excellent illustration of this: The evidence showed that the victim was an out of work, mentally handicapped individual, perhaps not, in the eyes of most, a significant contributor to society, but nonetheless a murdered human being.
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> (501 U.S. 823-824; see also Souter, J., conc., at 835; emphasis added.)

And, the potential for adverse testimony was dimly acknowledged.

> The fact that each of us is unique is a proposition so obvious that it surely requires no evidentiary support. What is not obvious, however, is the way in which the character or reputation in one case may differ from that of other possible victims. Evidence offered to prove such differences can only be intended to identify some victims as more worthy of protection than others....
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> (501 U.S. at 866 (Stevens, J. diss.); emphasis added.)

1. Victim Character versus Victim Impact.

The prosecution argued in the present case that the victim's character was not in issue; it was claimed that only the effect of his death was offered in aggravation. (10 RT 2338.) This narrow distinction has been employed in some capital cases on review in this Court, but on contrasting facts.

In *People v. Boyette* (2002) 29 Cal.4th 381, the defendant sought to show through cross-examination of relatives that one of the victims had been to prison, and was not the "cherished family member" portrayed in the prosecution's penalty phase evidence. This Court held that the limitation on the defense case was not error.

> There was no error and, in any event, no prejudice. Testimony from the victims' family members was relevant to show how the killings affected them, not whether they were justified in their feelings due to the victims' good nature and sterling character. Accordingly, defendant was not entitled to disparage the character of the victims on cross-examination. Even if we assume for argument that the trial court erred, there was no prejudice; the several family members who testified did so briefly and relatively dispassionately. The jury was aware from the evidence adduced at the guilt phase that the victims were probably drug addicts and were killed in a dispute at a disreputable house at which drug addicts congregated. In short, the jury already knew the victims were not upstanding citizens, so defendant's inability to emphasize this point in cross-examination could not have affected the penalty judgment. In concluding there was no error and no prejudice, we also reject the claims that the trial court's evidentiary rulings on this topic deprived defendant of his rights to due process, to a fair trial, to confront

> and cross-examine the witnesses against him, and to a reliable, individualized and nonarbitrary penalty determination. (U.S. Const., 5th, 6th, 8th & 14th Amends.)....
>
> (*Id.* at 445; emphasis added.)

The circumstances of the present case, contrasted with the circumstances of *Boyette*, demonstrate that the drug evidence was relevant and admissible here. (1) The victim impact evidence here was not brief or dispassionate. (See 10 RT 2441: jurors were crying during impact testimony of Cindy Durbin.) It was a major feature of the prosecution case in aggravation.[113] The powerful implication was that the Durbin family and the Uribes were both robbed of a strong moral guiding influence. (2) It was hardly suggested to this jury that the victims were drug abusers. Richard Fitzsimmons testified that he used methamphetamine shortly before the shootings (8 RT 2035), but his drug usage was not associated with Durbin or Uribe, or even with the Durbin house. Evidence of the drug scales, evidence that Chuck Durbin had a near-toxic level of methamphetamine in his blood at the time of death, evidence that Juan Uribe was Durbin's dealer, testimony by Areziaga that there was drug usage in the kitchen shortly before the shootings, all were excluded in an effort to avoid disparaging the victims. (3) This jury had every reason to regard the Durbins and Uribe as "upstanding citizens," people whose deaths

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[113] In argument to the jury, the prosecutor read from a book written by a surviving homicide victim. "The dead person ceases to be a part of every day reality. Ceases to exist. She is only a figure in a historic event. And we inevitably turn away from the past towards the ongoing reality. And the ongoing reality is the criminal[:] trapped, anxious, now helpless, isolated, often badgered and bewildered. He usurps the compassion that is justly due his victim. He will steal his victim's moral constituency, along with her life...." (10 RT 2552.)

were an extraordinary societal loss, meriting the severest punishment, and no reason in the evidence to think otherwise.

Finally, the character of both victims was very much in issue in this trial. The snapshot of the Durbin home from the description of the crime itself illustrated a loving and close-knit family. The children were gathered in the living room, surrounded by their parents and their parents' friends. Chuck's brother Randy testified that Chuck was a positive example to him (10 RT 2393); this necessarily implied that Chuck was a person of merit. The testimony of Martha Melgoza and Juan Uribe's mother indicated that he was a reliable provider, close to his daughter. (10 RT 2381, 2408.) This distorted positive evidence of the moral influence of the victims on their families required the opportunity for rebuttal; the exclusion of defense rebuttal evidence was a denial of due process.

2. Rebuttal Evidence as a Due Process Requirement.

The appropriate relationship between properly admitted victim impact evidence and negative rebuttal evidence is an inevitable source of disagreement. From the prosecution perspective the victim's murder in itself exalts the dead person and makes any criticism hard to contemplate. From the defendant's standpoint an arbitrary restriction on rebuttal testimony unfairly paves the road to an unjust death verdict.

The issue has split this Court. In *People v. Harris* (2005) 37 Cal.4th 310, the Court reviewed a drug-related murder of a young woman who was knowingly living with a dangerous drug dealer. The defense sought to introduce evidence of the fiancé's cha-

racter, and the victim's knowledge of his character, to demonstrate that the victim knowingly put herself in harm's way.

> Defendant argues the court erred in excluding evidence that was relevant pursuant to section 190.3, factors (a) (circumstances of the offense), and (c) (whether the victim was a participant in or consented to the homicidal act), to rebut the prosecution's penalty phase evidence, and in mitigation.
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> "The Eighth and Fourteenth Amendments require the jury in a capital case to hear any relevant mitigating evidence that the defendant offers, including '"any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."' ([*People v.*] *Frye* [(2004)] 18 Cal.4th [894,] 1015.) In turn, the court does have the authority to exclude, as irrelevant, evidence that does not bear on the defendant's character, record, or circumstances of the offense. (*Ibid.*) '[T]he concept of relevance as it pertains to mitigation evidence is no different from the definition of relevance as the term is understood generally.' (*Id.* at pp. 1015–1016.) Indeed, 'excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense.' (*People v. Fudge*[, *supra*, 7 Cal.4th at p.] 1103.)" (*People v. Ramos* (2004) 34 Cal.4th 494, 528.)
>
> Under this standard, we find no error.
>
> Before trial, and again before the penalty phase, defendant moved to admit evidence that Canto's ex-wife had warned Allen that Canto was dangerous and that living in the same house with him could get her killed; that Allen had actual knowledge of Canto's drug dealing; and that Allen in the past had used a false driver's license. Defendant proffered the evidence to establish that Allen's choice to live with Canto contributed to her own death. The court refused to admit the proffered evidence. Defendant argues the evidence was admissible to show Allen was not the innocent victim portrayed by the prosecution but rather a person who made voluntary choices to live in a dangerous situation and maintain a lifestyle that contributed to her death. We disagree. Contrary to the implications in the concurring and dissenting opinion, the proffered evidence did not show that Allen participated in or was otherwise associated with Canto's or defendant's criminal activities. The fact that Allen had a false driver's license and may have known that she was living in a dangerous situation did not constitute evidence that she participated in or consented to the acts leading up to her

murder. The trial court did not err in excluding the proffered evidence as irrelevant.

(*Id.* at 352-353; emphasis added.)

The dissent agreed with the defendant's contention, that the victim's knowledge of and acquiescence in the drug activities of her fiancé was relevant to her status as a blameless victim.

As used in factor (a) of section 190.3, the phrase "the circumstances of the crime" is broadly defined. It "does not mean merely the immediate temporal and spatial circumstances of the crime. Rather it extends to '[t]hat which surrounds materially, morally, or logically' the crime." (*People v. Edwards* (1991) 54 Cal.3d 787, 833; see also *People v. Smith* (2005) 35 Cal.4th 334, 352.) Here, Canto's activities as a drug dealer, and Allen's knowing acquiescence in those activities, were circumstances that surrounded both morally and logically the murders of Allen and the fetus she was carrying, in particular because the presence of the drugs and the cash proceeds from drug sales provided the motive for the robbery murders.

The evidence was also admissible to rebut the prosecution's victim impact evidence. In *Payne v. Tennessee* (1991) 501 U.S. 808, the United States Supreme Court held that in capital prosecutions the Eighth Amendment's prohibition of cruel and unusual punishment does not bar presentation of evidence "about the victim and about the impact of the murder on the victim's family," and that a state may properly conclude that such evidence "is relevant to the jury's decision as to whether or not the death penalty should be imposed." (501 U.S. at p. 827.) The court explained that "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." (*Id.* at p. 825.) The court acknowledged a concern "that the admission of victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy" (*id.* at p. 823), but the court thought this concern unfounded: "As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind—for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead each victim's 'uniqueness as an individ-

> ual human being,' whatever the jury might think the loss to the community resulting from his death might be." (*Ibid.*)
>
> Here, the prosecution's case in aggravation at the penalty phase relied heavily on victim impact testimony showing the effect of Allen's death on her mother and grandmother. As part of this testimony, the jury learned that in high school Allen had been a cheerleader who was on the debate team and loved to dance. Defendant should have been permitted to add to this portrait by presenting evidence that Allen's fiancé, Canto, was a drug dealer who kept drugs and drug money at their apartment, and that Allen was aware of and acquiesced in this drug dealing and, by reasonable inference, benefited financially from it.
>
> (37 Cal.4th at 374-375 (Kennard, J., dissenting as to penalty); emphasis added.)

The issue in *Harris* was whether the defense evidence concerning the victim's fiancé was relevant to the impact testimony concerning the victim herself. The majority opinion in *Harris* did not suggest or infer that the defense is prohibited from offering rebuttal evidence concerning the victim. Rather, the majority concluded that the evidence regarding Canto's lifestyle was remote to the character of Allen, the homicide victim, and therefore excludable.

Here, the evidence of drug dealing and drug usage related directly to the two homicide victims, Juan Uribe and Chuck Durbin. Both were fathers. The prosecution was offered a clear and direct path to demonstrate that both were moral beacons, adept at the task of parenting, whose presence would be missed. Uribe was cast as particularly useful in providing income to the family (10 RT 2411), though the source of his income was excluded. Chuck Durbin was cast as a moral guidepost for his family members. It was inferred, though without supporting expert testimony, that Brett's autism and Natasha's death from influenza were linked to their father's death, and that both could have been

prevented had he not been killed (see Argument XVI below). The victim impact evidence was related directly to the character of the victims.

3. Drug Evidence as Relevant to the Circumstances of the Offense.

Evidence of the circumstances of the offense, including evidence creating a lingering doubt as to the defendant's guilt of the offense, is admissible at a penalty trial under Penal Code section 190.3. (*People v. Gay* (2008) 42 Cal.4th 1195, 1221.) A self defense response would have been considered as more reasonable in view of evidence that the occupants of the Durbin house were engaged in a pattern of serious drug abuse. In addition to its significance as evidence in rebuttal of the prosecution's victim impact evidence, evidence of drug dealing and drug usage at the Durbin house would have affected the jury's consideration of self-defense or imperfect self-defense as lingering doubt evidence. (See *People v. Minifie* (1996) 13 Cal.4th 1055, 1068 [defense may introduce evidence of past acts of defendant's group to support claim of self-defense].)

Conclusion. The evidence offered by the defense in this case was not drug evidence offered merely to make the victims look bad. (See *People v. Kelly* (1992) 1 Cal.4th 495, 523, and *People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) The evidence was offered to correct and rebut prosecution evidence on the extent of loss suffered by the survivors as a result of these deaths. In another context such as a civil wrongful death action, the relevance of the evidence, in mitigation of damages, would readily be recognized and accepted.

It may legitimately be asked whether any murder victim should be exposed to such a searching postmortem, including evidence which could reflect poorly on the decedent's moral character. But that question has already been asked, and answered, twice. First, the issue was addressed by the United States Supreme Court when it overruled prior authority in *Payne v. Tennessee, supra.* In the 1987 majority opinion in *Booth v. Maryland, supra,* it was foreseen that to permit victim impact evidence would be to invite rebuttal and a "mini-trial" on the victim's true role in his or her family, and perhaps on the victim's character as well.

> ... A threshold problem is that victim impact information is not easily susceptible to rebuttal. Presumably the defendant would have the right to cross-examine the declarants, but he rarely would be able to show that the family members have exaggerated the degree of sleeplessness, depression, or emotional trauma suffered. Moreover, if the state is permitted to introduce evidence of the victim's personal qualities, [fn.] it cannot be doubted that the defendant also must be given the chance to rebut this evidence. See *Gardner v. Florida,* 430 U.S. 349, 362 (1977) (opinion of STEVENS, J.) (due process requires that defendant be given a chance to rebut presentence report). See also Md. Ann. Code, Art. 27, § 413(c)(v) (1982). Putting aside the strategic risks of attacking the victim's character before the jury, in appropriate cases the defendant presumably would be permitted to put on evidence that the victim was of dubious moral character, was unpopular, or was ostracized from his family. The prospect of a "mini-trial" on the victim's character is more than simply unappealing; it could well distract the sentencing jury from its constitutionally required task -- determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime....
>
> (*Booth v. Maryland, supra,* 482 U.S. at 506-507 (majority opinion); emphasis added.)

The Court in *Payne v. Tennessee,* and this Court in its decisions adopting the *Payne* rule, were thus well aware of the potential for a mini-trial on the victim's charac-

ter, triggered by a glowing but incomplete portrait of the victim and his role in his family in the prosecution's case in chief.

Second, the prosecutor is never obliged to introduce victim impact evidence. If it chooses to do so, like any litigant it must be prepared for rebuttal. No person, and no homicide victim, is perfect. Since the prosecution's own investigation promptly uncovered the drug evidence, the effort at rebuttal could hardly have been unexpected. The victims' families had multiple problems, but those problems may have been pre-existing, and were not necessarily entirely the result of the homicides; no such impression should or could have been conveyed to the jury, without the selective presentation of evidence. The dispute over the character of the victims was entirely avoidable, and was entirely engendered by the prosecution attempt to present one-sided and misleading portraits of Uribe and Durbin and the effect of their deaths on their families.

For these reasons appellant was denied due process by the exclusion of evidence relevant to an accurate portrait of Uribe and Durbin and the impact of their deaths on their survivors.

XVI. EVIDENCE WAS IMPROPERLY INTRODUCED OF THE DEATH OF CHUCK DURBIN'S DAUGHTER NATASHA AND THE AUTISM OF HIS SON BRETT, WITHOUT FOUNDATIONAL EVIDENCE THAT THESE CIRCUMSTANCES WERE RELATED TO DURBIN'S DEATH.

Victim impact evidence was introduced as part of the prosecution case in support of the death penalty. As part of the case in aggravation, the prosecution introduced evidence that Natasha died of influenza about a year after her father's death, and evidence that his son Brett suffered from autism. These were extremely aggravating circumstances, yet no evidence was introduced that either circumstance was causally related to Durbin's death; both circumstances would have occurred without his death. Appellant was denied the constitutional right to trial on relevant penalty evidence.

The rules of evidence must be applied at the penalty phase. (Penal Code § 190.3, first ¶; see *People v. Richardson* (2008) __ Cal.4th __, 2008 Cal. LEXIS 6208 (*147) ["The death penalty statute does not adopt any new rules of evidence peculiar to itself, but simply allows the generally applicable rules of evidence to govern."].)

Prosecution evidence in aggravation must be relevant to an enumerated aggravating factor. (*People v. Boyd* (1985) 38 Cal.3d 762, 776 [evidence of past nonviolent acts inadmissible]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1033 [evidence relating to factor (k) may not be introduced or relied upon as affirmative evidence in aggravation]; *People v. Wright* (1989) 48 Cal.3d 168, 220 [evidence of past prison misbehavior inadmissible].)

The introduction of irrelevant evidence in aggravation denied appellant the right to due process and the right to a reliable determination that death was the appropriate punishment, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (*Gardner v. Florida* (1977) 430 U.S. 349, 362 [denial of due process to base death judgment on information in undisclosed presentence report]; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 332 [denial of due process to base death judgment on availability of appellate review, a factor wholly irrelevant to the penalty process]; *Johnson v. Mississippi* (1988) 486 U.S. 578, 589 [denial of due process to base death judgment on evidence prior conviction which was "materially inaccurate" because conviction was later reversed on appeal].)

On October 5, 1998, the defense filed written *in limine* motions requesting limitations on prosecution evidence in aggravation of the death penalty. Included was the argument that "[a]llowable victim impact evidence does not include testimony or inflammatory rhetoric aimed at arousing the emotions of the jury." (11 CT 2400.)

On the afternoon of October 5, 1998, the defense made specific objection to prosecution evidence concerning the death of the Durbins' daughter Natasha.

> MR. LITMAN: Could we go back on Miss Durbin, talk about an issue?
>
> THE COURT: All right.
>
> MR. LITMAN: We would submit that the fact that Natasha passed away, I believe in 1997 with – we have heard as a result of asthma.[114]

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114 The cause of death was influenza, according to the testimony of Cindy Durbin, below.

That fact, your Honor, should be excluded. It's highly prejudicial. And under 352 of the Evidence Code it should be ex – should be excluded.

THE COURT: The fact she died?

MR. LITMAN: Right. I think it is getting into an area that you are looking at so much sympathy it's going to bear upon Mr. Rangel's ability to get a fair trial. And diverts the attention away from what we are doing here, mitigation versus aggravation, and focuses instead of on Mr. Rangel, it focuses more on her and what she has had to go through.

THE COURT: Just – all right. Mr. LiCalsi, is it necessary?

MR. LICALSI: I think that's proper impact evidence when you have a death of a child, your husband isn't there to help you get through it. That's tremendous impact.

THE COURT: All right. We will do a little more research on that issue.

MR. LITMAN: I guess my response would be it depends on what her situation is. My understanding – I understood at one point she was living with her parents, with her parents who provided her support or just on her own and had no one to talk to.

MR. LICALSI: That's correct. I think –

MR. LITMAN: No, but I think it goes to the – yeah, that goes to the issue of – before we even get to the issue of cross-examination, I think that goes to the issue of admissibility.

(10 RT 2326-2327.)

The trial court returned to the issue the following day.

THE COURT: Very well. With regard to the circumstances of the death of the minor child Natasha, I couldn't find any guidance on that either. Anything further?

MR. LITMAN: Well, I would say since it's the prosecution that wishes to offer that as the proponent, they should be able to find you some-

thing to give you guidance on that. If they can't then I would think we should have a similar ruling.[115]

THE COURT: Mr. LiCalsi.

MR. LICALSI: I don't see how I can find you case law on a specific point like that. The fact of the matter is it's relevant only to the extent that the victim's death impacted Cindy Durbin. She had to go through the death of a child without her husband to help her and console her, help her make funeral arrangements. That's relevant.

I will ask her outside the court before I put her up. And if the answers are not as I anticipate, I won't ask her the questions. But it's relevant just with respect to the impact of a victim's death and what that had in relationship to this child dying. And we can establish that this child's death had nothing to do with this case.[116]

MR. SCIANDRA: Your honor, I think that just as the court ruled earlier on the amount of methamphetamine in the system of Chuck Durbin in this case here, we are already dealing with I think very high impact emotional testimony. And now we are going to have testimony concerning the tragic death of this young child at some time substantially after these homicides occurred. And I think bearing little relevance on the culpability of our client in that it is so emotionally charged it is clearly going to divert the attention from – of the jury from the task of deciding based on Mr. Rangel's actions whether he should receive the death penalty or life imprisonment without the possibility of parole. And so on constitutional grounds, the Fourteenth Amendment, the Eighth Amendment, and also on 352, that the prejudice in this case far outweighs the probative value of that particular evidence.

THE COURT: Well, this is the victim's family, and the impact of death of Mr. Durbin had on them and the fact that Mr. Durbin was not there to assist Cindy Durbin, to give her support, and comfort over the death of their minor child. I think it is highly relevant. How emotional it will get, I can't predict.

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115 The trial court had just excluded evidence of drug dealing from the Durbins' house, for lack of relevance (see Argument XV above). (10 RT 2339.)

116 No such evidence was introduced by either side.

MR. SCIANDRA: Well, I think we can predict that it's going to be extremely emotional. I mean, as is common sense.

THE COURT: Well, yeah. There's going to be emotion. There is all levels of emotion. Mr. Durbin died three years ago. And the District Attorney could make it so inflammatory to cause a mistrial. However, if he asks the question matter of fact, and doesn't stir the emotions of the witness, I think it's allowable.

MR. LICALSI: And I have tried to advise my witnesses that the more cring they do, inability to answer the questions, is going to negatively impact this case. That they need to be able to keep their composure and answer the questions the best they can.

THE COURT: These are all mature adults; they should be able to. All right....

(10 RT 2340-2342.)

Cindy Durbin took the stand and delivered penalty phase testimony. At the conclusion of direct examination she was asked about the impact of her husband's death on their children.

Q. Did this incident effect [*sic*] your children in any way?

A. Yes. My son Brett for at least the first year, year and a half, every time the doorbell would ring at night he would run and hide underneath the coffee table. Savana still won't sleep alone.

Q. Did Brett receive counseling?

A. All of us did for the first year and a half. Tasha was affected most by it. Counselor saw her longer than the rest of the kids because she saw more, I think. She saw – she told me she saw the guy shoot Chuck. And she saw Chuck fighting with one of them.

Q. Now you say Brett is still affected. Does Brett have any disability?

A. He is autistic slightly.

Q. Does he have a difficult time communicating?

A. Yes. He is getting better. His speech – if you don't know his personality and stuff, it's hard for some people to understand what he is saying.

....

Q. Are you re-married?

A. Yes. Six months ago I got re-married.

Q. And now that you are re-married do the affects [*sic*] of the murder three years ago tonight, are they no longer a problem for you?

A. Oh, no. We still have a lot of problems. But my husband is very patient with me. I still wake up crying and stuff.

Q. And does that cause some marital problems?

A. Some, because I have been real depressed and real sad.

Q. And how does that make your husband feel?

A. He feels bad because he can't make me feel better.

MR. SCIANDRA: Beyond pain [*sic*; should be *Payne* (*v. Tennessee*)]. Beyond victim impact.

THE COURT: Overruled.

BY MR. LICALSI:

Q. Last – I believe last year did something – year and a half ago, did something happen to Natasha?

A. My daughter died of influenza last August.

Q. And did the fact that Chuck was not there to help you and console you in that situation have any effect on your ability to deal with that death?

MR. LITMAN: Objection. Leading.

THE COURT: Overruled.

THE WITNESS: Yes. I still don't think I dealt with her death.

(10 RT 2431-2433; emphasis added.)

Shortly after the conclusion of Ms. Durbin's testimony, the defense moved for a mistrial.

> MR. LITMAN: At this time we make a mistrial for this penalty phase based on the testimony elicited particularly from Cindy Durbin and from the other witnesses, the other family members. We just feel that this evidence has crossed the line of what Payne envisions and Payne rule[d] was admissible. I mean, you have people in here crying, sobbing. You have jurors crying.
>
> There's no way in the world, Your Honor, that our client can get a fair penalty phase with this kind of evidence being adduced. No admonition to the jury would be adequate. And in particular, when you have the testimony that we objected to, this testimony about Natasha passing away, which I would submit is highly prejudicial. And you have testimony elicited that Ms. Durbin hasn't dealt with the death of her daughter. I mean, just highly inflammatory. And I just submit there's no way that due process and a fair trial can result with that kind of testimony.
>
> THE COURT: Well, I was just thinking the opposite. It went quite well, considering the nature of what the testimony is about. Witnesses although were crying, it was to be expected. It wasn't so outrageous or inflammatory to create, you know, an atmosphere that the defendant was going to be prejudiced of either testimony.
>
> I think Mr. LiCalsi handled the examinations well. He could have gone a lot further inflaming or he could have done a lot more to bring out more emotion than he did. And I just had an impression that it was – what we were talking about was rather subdued. And it didn't get out of hand. So, no, I don't think there's any error in the testimony. It all goes to victim impact. It was fair. It was reasonable. It was reasonably under control. So your motion is denied.
>
> (10 RT 2441-2442.)

Evidence that Brett Durbin suffered from autism, and Natasha Durbin died of influenza, was outside the scope of permissible victim impact testimony, because neither circumstance was related to the homicide of Chuck Durbin. In the absence of a certain connection between the homicide and these tragic but unrelated subsequent events, the evidence was irrelevant and, at a minimum, more prejudicial than probative (Evidence Code § 352). The evidence should have been excluded.

"...[E]vidence offered in aggravation must be excluded if not relevant. In this regard, the rules are similar whether the evidence is offered in mitigation or in aggravation. When offered for either purpose, the evidence must be relevant to the penalty determination." (*People v. Kelly* (2007) 42 Cal.4th 763, 798.)

Testimony concerning Chuck Durbin's surviving family members was introduced under the rubric of victim impact evidence, part of the circumstances of the crime. The admissibility of such evidence in general is not challenged in this appeal (but see Argument XV above).

> Defendant acknowledges that so-called victim impact evidence may be introduced at penalty phase proceedings under the federal Constitution (*Payne v. Tennessee* (1991) 501 U.S. 808 (*Payne*)) and that we also have found such evidence (and related "victim character" evidence) admissible as a "circumstance of the crime" under section 190.3, factor (a). (*Roldan, supra*, 35 Cal.4th 646, 730–731; *People v. Panah* (2005) 35 Cal.4th 395, 494–495 (*Panah*); *People v. Benavides* (2005) 35 Cal.4th 69, 107 (*Benavides*); *People v. Brown* (2004) 33 Cal.4th 382, 396–398 (*Brown II*); *People v. Pollock* (2004) 32 Cal.4th 1153, 1181 (*Pollock*); *People v. Edwards* (1991) 54 Cal.3d 787, 832–836 (*Edwards*).) Defendant contends, however, that the testimony and photographic evidence described *ante* should have been excluded because it was partially irrelevant, largely cumulative, and "so unduly prejudicial that it render[ed] the trial fundamentally unfair" (*Payne, supra*, 501 U.S. 808, 825) and/or constituted "'irrelevant informa-

> tion or inflammatory rhetoric that divert[ed] the jury's attention from its proper role or invite[d] an irrational, purely subjective response ... .'" (*Edwards, supra*, 54 Cal.3d at p. 836; see also *Roldan, supra*, 35 Cal.4th at pp. 732–733; *Panah, supra*, 35 Cal.4th at pp. 494–495; *People v. Taylor* (2001) 26 Cal.4th 1155, 1172.) [fn.]
>
> (*People v. Robinson* (2005) 37 Cal.4th 592, 650.)

In resolving this claim, the Court in *Robinson* adopted the observation of the Texas Court of Criminal Appeals in *Salazar v. State* (Tex.Crim.App. 2002) 90 S.W.3d 330: "*we caution that victim impact and character evidence may become unfairly prejudicial through sheer volume.* Even if not technically cumulative, an undue amount of this type of evidence can result in unfair prejudice ... . Hence, *we encourage trial courts to place appropriate limits upon the amount, kind, and source of victim impact and character evidence.*" (*Id.*, at p. 336, italics in original, quoted with approval in *People v. Robinson, supra*, 37 Cal.4th at 652 and in *People v. Kelly, supra*, 42 Cal.4th at 795.)

By the fundamental test of relevancy, neither Brett's autism nor Natasha's death from influenza should have come to the attention of the jury. Brett's autism may have been the result of the homicide, as implied by the prosecutor's question and Ms. Durbin's answer. ("Q. Now you say Brett is still affected [by the homicide]. Does Brett have any disability?" "A. He is autistic slightly." (10 RT 2431.)) But no qualified expert was offered to establish a connection between the killings and Brett's autism.

Indeed, it would have been impossible to connect Brett's autism to the homicide. If a doctor properly diagnosed his condition as autism, then it must have existed, by defi-

nition, before age three.[117] Brett was age seven at the time of the shootings. (6 RT 1375.) Moreover, this is not a mere matter of medical definition. Significant research has been undertaken to determine the causal factors leading to autism. Of all the factors thought to contribute to autism, trauma has not been suggested as a possible or even contributing cause. (See, *inter alia*, Volkmar, et. al., *Handbook of Autism and Pervasive Developmental Disorders, 3rd Edition*, vol. I, pp. 425, 434-436.)

The death of Natasha was also unconnected to the homicide, according to the prosecutor's own representation. ("And we can establish that this child's death had nothing to do with this case." (10 RT 2340.)) But the jury had no way to know of this concession by the prosecution. To the contrary, they were invited to conclude that Natasha's death was the result of seeing her father shot to death. (Cindy Durbin: "Tasha was affected most by it. Counselor saw her longer than the rest of the kids because she saw more, I think. She saw – she told me she saw the guy shoot Chuck. And she saw Chuck fighting with one of them." (10 RT 2431.))

A causal connection here is suggested intuitively even though not supported by the evidence. Natasha was age six at the time of the shooting in October of 1995. (6 RT 1375.) She died in August of 1998 (10 RT 2433), when she was presumably age nine or ten. The jury was invited to conclude that she died "of a broken heart," because of depression and vulnerability from lack of a parent. Common sense would suggest to the

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[117] See *Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, Test Revision*, American Psychiatric Association (DSM-IV-TR) (2000), § 299.00 "Autistic Disorder," p. 73: "By definition, the onset of Autistic Disorder is prior to age 3 years."

jury that they would not have been informed of such devastating information if it was not related to the homicide and if they were not to weigh Natasha's death in the balance of the death penalty determination.

The purported pretext for the admission of the evidence – that Cindy Durbin was deprived of the support of her husband during the stressful period of her daughter's death – is unsound and has slight probative value. Many things could have happened to this family in the three intervening years. Given Chuck Durbin's drug usage and his drug associates, it requires speculation to assume that the Durbin marriage would have remained stable,[118] or that he would have been a solid moral force in the face of adversity.

Many unrelated events, good and bad, are bound to happen within a family in the years following a homicide. They do not all relate to the homicide. The death of Chuck Durbin's daughter was an unrelated event which was uniquely bound to create an emotional reaction on the part of this jury. His contribution to Cindy Durbin's well being in the face of their daughter's death is largely a matter of speculation. Since there was no causal connection to the homicide, the evidence should have been excluded.

If Natasha's death was the result of the killing of her father – and the jury was bound to so conclude by the mere fact that it was introduced in evidence – then it was devastating evidence in aggravation of the death penalty.

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[118] See allusion to the Durbins' "marital problems," suggested in police statement of Alvin Areizaga. (5 RT 1156-1157.) Although the subject was alluded to during discussions by the attorneys during the guilt phase, it was not developed in evidence at either phase.

Normally, a person is criminally liable for the reasonably foreseeable results of his criminal acts. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 106.) If a jury is invited to infer that the death of the victim's child is related to the homicide, and the child's death was a reasonably foreseeable result of the homicide, then the jury will inevitably base the punishment on the child's death as well as the charged offense. In effect this evidence added an additional uncharged murder count to the death penalty balance.

In these circumstances the jury did not reach the death judgment automatically or without reflection, solely as a result of the two murder allegations. Juan Uribe contributed to his own death by his involvement in the shooting of Little Pete. (See Penal Code § 190.3 (f).)[119] Moreover, as to Uribe appellant was an accomplice, not a direct perpetrator. (See § 190.3 (j).)[120]

Chuck Durbin was an innocent victim, however his murder and the simultaneous shooting of Uribe by Little Pete would not have led the jury to impose the death penalty without some additional consideration in aggravation. This death judgment was attributable in significant part to the conclusion, invited by the prosecution over defense objection, that appellant was also responsible for the death of Natasha Durbin. The presence of multiple innocent victims is a circumstance which is bound to provoke the death penalty. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 420.)

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[119] "Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct."

[120] "Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor."

This result was unacceptable by any standard. There was no showing of the circumstances of Natasha's illness or Brett's autism. Both were attributable to other causes, unrelated to their father's death, though this was not communicated to the jury. Appellant was entitled to notice and jury determination of these causal links, if they even existed, and especially since they did not. Instead, the poisonous implication was wafted to the jury on the slightest of breezes.

The death sentence was unconstitutionally imposed on the basis of uncharged and unproven allegations, that appellant's crime caused Brett Durbin's autism and contributed to the death of Natasha. This procedure violates the fundamental due process requirement of relevant evidence. (*In re Winship* (1970) 397 U.S. 358.) It fails to satisfy the hightened standard of review necessary when irrelevant information is relied upon to reach a death judgment. (*Caldwell v. Mississippi, supra*; *Johnson v. Mississippi, supra.*) The death judgment must be reversed.

XVII. APPELLANT WAS DENIED THE CONSTITUTIONAL RIGHT TO CONFRONTATION BY THE USE IN EVIDENCE OF A STATEMENT TAKEN FROM NATASHA DURBIN.

The prosecution penalty phase case relied in part on the statements taken from Natasha Durbin on the night of the murders. Natasha had passed away by the time of the penalty trial, and was thus "unavailable" as a witness. By the current interpretation of the Confrontation Clause of the Sixth Amendment, applicable to this case on appeal, appellant was denied the right to confrontation. The use of Natasha's statements not only emphasized the fact of her own intervening death, but also contributed new and unrebuttable information to the crime scene scenario.

By the rule applied in *Ohio v. Roberts* (1980) 448 U.S. 56, in effect at the time of appellant's trial, an objection based on the Confrontation Clause did not bar admission of an unavailable witness's statement against a criminal defendant if the statement bore "adequate 'indicia of reliability.'" (*Id.* at 66.) To meet that test, evidence had to either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." (*Ibid.*)

This rule was changed during the pendency of the present appeal by the decision in *Crawford v. Washington* (2004) 541 U.S. 36. In *Crawford* the Court found and declared that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused." (*Id.* at 50.) It wholly rejected the test of "particularized guarantees of trustworthiness" formerly applied under *Ohio v. Roberts, supra.* While

leaving a precise definition of "testimonial" to another day, the *Crawford* court held firmly that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Id.* at 68-69.)

The *Crawford* decision is applied to all cases pending on direct appeal on the date of its decision. (*People v. Price* (2004) 120 Cal.App.4th 224, 238.)[121]

On the afternoon of October 5, 1998, the trial court heard penalty phase motions in limine. Defense counsel (Litman) indicated that they had no idea what victim impact testimony the prosecution was prepared to introduce. (10 RT 2309.)

The District Attorney enumerated the penalty phase witnesses. He indicated his intention to present, through other witnesses, "the statements of Natasha Durbin she made regarding what she saw in the house at the time of the shooting." (10 RT 2311.) "And we believe that we will get them in under a hearsay exception. She is deceased so she is unavailable. We believe that given the time she made those statements and the circumstances around them they will fall under the hearsay exception." (10 RT 2312.)

On a defense objection, the trial court indicated that the manner in which the survivors heard of the victims' deaths would not be relevant. (10 RT 2313.)

Defense counsel expressed a further objection to hearsay statements from the Durbin children. He argued that hearsay rules apply to the penalty phase, citing *People v.*

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[121] The *Crawford* rule is not retroactive to cases which have completed direct appeal and which were final on the date of its filing, even though pending in federal court habeas corpus review. (*Whorton v. Bockting* (2007) 127 S. Ct. 1173.)

Ray (1996) 13 Cal.4th 313, 371, as well as *People v. Hamilton* (1963) 60 Cal.2d 105 and *People v. Nye* (1969) 71 Cal.2d 356. The trial court agreed with that general principle. (10 RT 2331-2332.) The arguments on in limine motions were continued to the following morning.

On October 6, 1998, the trial court conducted a hearing under Evidence Code § 402 (b), on the admissibility of Natasha Durbin's statements. Out of the presence of the jury, Detective Brian Ciapessoni testified that he responded to the crime scene on the evening of October 7, 1995. The children were in the kitchen of the Durbin home, upset and crying. (10 RT 2348.) Natasha Durbin told Ciapessoni that she awoke to see two males in the kitchen area. One said, "Juan, you disappointed us." She heard shots, then saw the two males leave through the front door. (10 RT 2349.)

Ginger Colwell, Chuck Durbin's mother, also testified out of the presence of the jury. She went to the Durbin house shortly after the shootings, and took the children home with her. They were "scared to death." Natasha told her that she heard them call Juan a "traitor." Daddy said to run and hide. She put a pillow over Savanna's head and pulled the covers up. (10 RT 2352.)

Defense counsel objected to this testimony. In the defense view Natasha's reaction was "heroic" and "commendable," but it would divert attention from the penalty determination. (10 RT 2353.)

The trial court observed that Natasha's account went to "the facts and circumstances of the crime." It would come into evidence under Evidence Code § 1240, the exception for statements made under stress or excitement.[122] (10 RT 2354.)

The prosecution offered case authority that the child's statement describing the murder could be admissible even if uttered several days after the event. (*People v. Trimble* (1992) 5 Cal.App.4th 1225; *People v. Jones* (1984) 155 Cal.App.3d 653.) Defense counsel responded that it would be "a violation of [the] confrontation clause of the United States Constitution." The trial court overruled the objection, based on the exception to the hearsay rule. Due to the excitement of the event, the child's out of court statements were "reliable and trustworthy." (10 RT 2355.)

Brian Ciapessoni testified in the presence of the jury. Again he testified that he found three children in the kitchen of the Durbin house when he responded following the shooting. He interviewed Natasha in the master bedroom. She said that she was asleep in the living room when she was awakened and saw two strange men in the kitchen. One of the men said, "Juan, you disappointed us," then she heard shots, and observed the two

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[122] "Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and

(b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

men leave the residence. She thought she could identify the two men.[123] (10 RT 2388-2390.)

In the course of Cindy Durbin's penalty phase testimony she repeated a statement by Natasha: "... she told me she saw the guy shoot Chuck. And she saw Chuck fighting with one of them." (10 RT 2431.)

Ginger Colwell testified in the presence of the jury. On the night of the shooting she took the children to her house. Natasha said, "grandmother, they were calling Juan a traitor." Her father said to "run and hide." She said that "she put a pillow over Savanna's head, and it went over Brett's head. She pulled the covers up so they wouldn't get hurt." (10 RT 2439-2440.)

Appellant was denied confrontation by the use of out-of-court statements of Natasha Durbin as an additional perspective on the shootings.

Natasha's statements were "testimonial" within the meaning of the Confrontation rule established in *Crawford v. Washington, supra.* The *Crawford* opinion left undecided the precise definition of "testimonial" for Confrontation Clause purposes (see above). Recently, in *Davis v. Washington* (2006) 547 U.S. 813, 126 S.Ct. 2266, the Court created a provisional, though not completely exhaustive, definition of "testimonial."

> ... 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

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[123] No evidence was introduced that Natasha made, or attempted to make, an identification of the perpetrators.

> 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.
>
> (126 S.Ct. at 2273-2274.)

Crawford involved a state court defendant from the State of Washington. *Davis* involved two state court defendants, Davis from the State of Washington, and Hammon from the State of Indiana. In *Crawford* the witness' statement was found to be testimonial by any test because the witness' statement was derived during police interrogation during which the witness herself was a suspect. In *Davis* the witness' statement was recorded during a 911 emergency call, just after the witness was assaulted in a domestic violence incident and while the defendant was fleeing from the scene. In *Hammon* the witness' statement was taken by officers who responded to a 911 call and questioned both the defendant and the victim in their home. The Court determined that under its definition of "testimonial," the 911 call in *Davis* was a reaction to a present emergency, not an account of past events, and hence not testimonial; the interview in *Hammon* was an account of something that had recently happened, not a crime in progress but foreseeably for later use in court, and hence testimonial for Confrontation Clause purposes. (126 S.Ct. at 2278.)

Detective Ciapessoni's interview of Natasha Durbin produced a testimonial statement for Confrontation Clause purposes. All danger had passed once he arrived. The children had to be interviewed to determine if they could identify the perpetrators. The purpose was to investigate and reconstruct the crime, to identify and arrest the perpetra-

tors, and to assemble a case for presentation in court. The process took several weeks, but it started as soon as the detective arrived and began asking questions.

The testimonial process continued when the children were taken to their grandmother's house. Mrs. Colwell was not a casual or unconnected observer. She had every justifiable reason to find out what the children knew of her son's murder. Ms. Colwell "asked [Natasha] what happened" (10 RT 2352), and Natasha responded. The case had passed well into the investigation phase, and any of Natasha's statements to a responsible adult could be reasonably anticipated to wind up as evidence in a future trial. (See *People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1402 [post-offense interview of child sex offense victim in hospital setting].)

It is understandable that the most useable testimonial statements would be extracted from a child witness during directed questioning by a trusted person such as a grandparent. The situation would be quite different if the statements were made casually during a "back fence" conversation with a friend or other disinterested, uninformed person.[124]

Evidence Code § 1240 permits the introduction of spontaneous declarations over a hearsay objection. However, the hearsay exception does not cure the objection taken, as here, under the Confrontation Clause.

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[124] Compare *People v. Griffin* (2004) 33 Cal.4th 536, 579, fn. 19 [victim's pre-offense statements to a school friend were non-testimonial under *Crawford*]; *People v. Cervantes* (2004) 118 Cal.App.4th 162, 175 [accomplice statement to lifelong friend in the course of obtaining medical treatment, held non-testimonial]; *People v. Butler* (2005) 127 Cal.App.4th 49, 59 [spontaneous statements to co-workers were not testimonial under *Crawford*].

A testimonial statement can be taken shortly after the incident, while the declarant is still under the stress of the excitement of a violent confrontation and thus within the hearsay exception for spontaneous declarations. Thus the statement may be a spontaneous declaration, and yet excludable under the Confrontation Clause. This apparent dichotomy is well illustrated by the *Hammon* portion of the opinion in *Davis v. Washington, supra.* In that case, officers responded to the scene of a domestic disturbance, finding the husband-perpetrator still in the living room, and broken glass on the floor from the face of a furnace which was still blazing into the room. The wife-victim, still under the stress of the assault, reported that he had pushed her into to the glass. She was not available to testify at trial. Such a hearsay statement would be admissible in California, as in Indiana, as a spontaneous declaration. Yet the Supreme Court held that it was received in violation of the Confrontation Clause because it was derived from an interview intended to produce information and evidence in a criminal trial.[125]

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[125] "It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct--as, indeed, the testifying officer expressly acknowledged, App. in No. 05-5705, at 25, 32, 34. There was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything, *id.*, at 25. When the officers first arrived, Amy told them that things were fine, *id.*, at 14, and there was no immediate threat to her person. When the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in *Davis*) 'what is happening,' but rather 'what happened.' Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime--which is, of course, precisely what the officer should have done."

(*Davis v. Washington, supra,* 126 S.Ct. 2278.)

The young girl whose statement was used in the present case was under the stress of the event – the shooting death of her father – but this does not mean that she could not give a testimonial statement in response to interrogation or mild prompting.

Post-*Crawford*, some cases have approved the use of spontaneous declarations when the statements were made in a casual, non-interrogation setting with no anticipation of the later use of the statements in court. It is the interrogation aspect of this case, in response to a legitimate and critical need for information, which distinguishes the present case from those cases.

The *Crawford* opinion itself intimated that there might be an unresolved issue of the admissibility of spontaneous declarations, based on one of its own decisions dating from 1992.[126] However, it gave no reason to suppose that there is "spontaneous declaration exception" to the Confrontation Clause. The language from prior authority alluded

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[126] "One case arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial is *White v. Illinois*, 502 U.S. 346, 116 L. Ed. 2d 848, 112 S. Ct. 736 (1992), which involved, inter alia, statements of a child victim to an investigating police officer admitted as spontaneous declarations. *Id.*, at 349-35, 1116 L. Ed. 2d 848, 112 S. Ct. 736. It is questionable whether testimonial statements would ever have been admissible on that ground in 1791; to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made 'immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage.' *Thompson v Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K. B. 1693). In any case, the only question presented in *White* was whether the Confrontation Clause imposed an unavailability requirement on the types of hearsay at issue. See 502 U.S., at 348-349, 116 L. Ed. 2d 848, 112 S. Ct. 736. The holding did not address the question whether certain of the statements, because they were testimonial, had to be excluded even if the witness was unavailable. We '[took] as a given ... that the testimony properly falls within the relevant hearsay exceptions.' *Id.*, at 351, n. 4, 116 L. Ed. 2d 848, 112 S.Ct. 736."

(*Crawford v. Washington, supra*, 541 U.S. at 58, fn. 8; emphasis added.)

to in *Crawford* (*White v. Illinois*) was *dicta*. It did not infer a broad exception to the Confrontation Clause.

Indeed, nothing could be closer to the point than the Court's own opinion in *Hammon, supra*. There the victim was interviewed in her home, in the presence of her husband – the perpetrator – within a short time of the offense. She was unquestionably under the stress of the recent assault. If there was ever a time to apply a "spontaneous declaration" exception to the Confrontation Clause, that was it. But the *Davis/ Hammon* opinion suggests nothing of the sort. There is no Confrontation Clause exception just because the witness was excited, fearful, or stressed by the recent crime.

Accordingly, California case authority which was decided post-*Crawford* but pre-*Davis/Hammon*, suggesting that there might be a spontaneous declaration exception to the Confrontation Clause, is out of step with the *Davis/Hammon* definition of "testimonial," and must be overruled.[127]

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[127] See *People v. Rincon* (2005) 129 Cal.App.4th 738, 757 [pre-*Davis*]: "From *Crawford*'s reasoning, we conclude that Salas's out-of-court statements are not testimonial. They are not similar to *Crawford*'s concrete examples of testimonial statements: prior testimony and police interrogations. It bears repeating that we are not here concerned with the Sanchez-to-Heieck level of hearsay. Although Sanchez's out-of-court statements to Detective Heieck resulted from police interrogation, Sanchez appeared for cross-examination at trial, and use of his out-of-court statements at trial raises no issue under the confrontation clause. (*Crawford v. Washington, supra*, 541 U.S. at p. 59, fn. 9.) Further, Salas's statements lacked any degree of legal or procedural formality. Rather, Salas spoke to a civilian, Sanchez, at Sanchez's home in the immediate aftermath of a shooting — a shooting in which Salas himself was wounded. Salas could not reasonably have anticipated that Sanchez, a former gang member, would relate the statements to law enforcement, or that the statements would somehow be used in court. Moreover, as we have held, Salas's statements qualify as spontaneous statements under Evidence Code section 1240, the requirements of which are largely identical to the common law hearsay exception for spontaneous declarations as described in *Crawford*. That is, substantial

The police response in *Hammon*, as here, had passed from intervention and rescue, to investigation and interrogation. There is no spontaneous declaration exception to the Confrontation Clause.

Appellant was prejudiced by the use in evidence of Natasha's statements describing the shootings. Apart from their content, her statements were a "voice from the grave," a reminder of the tragic circumstances of her own life and death. Since her death was not attributable to her father's death, it was not fair to emphasize such unrelated considerations in penalty phase evidence. (Evidence Code § 352; compare *People v. Mendoza* (2007) 42 Cal.4th 686, 698 [statements of deceased victim used to establish defendant's motive, and not for the truth of matters stated].)

Turning to their content, the following specific penalty factors were injected solely through the out-of-court statements of Natasha Durbin.

1. In her statement to Detective Ciapessoni, Natasha stated that she saw both of the intruders in the kitchen shooting Juan Uribe. (10 RT 2388.) This contradicted or added to testimony by other eyewitnesses, who claimed that only Little Pete was directly involved in the shooting of Juan Uribe. (The autopsy evidence indicated that only the .22 rifle was used in that homicide. (4 RT 967-969.)) Cindy Durbin was not sure if one or both of the

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evidence supports a finding Salas spoke "'immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage.' [Citation.]" (*Crawford, supra*, 541 U.S. at p. 58, fn. 8.) Such a statement, *Crawford* strongly implies, is not testimonial."

(Emphasis added.)

intruders entered the kitchen.[128] In Richard Diaz' account, appellant did not leave the living room. (5 RT 1273.) Jesse Rangel repeated a version which he attributed to Little Pete, in which Little Pete was solely responsible for shooting Juan Uribe, while appellant remained by the front door. (6 RT 1501.) Richard Fitzsimmons only saw the perpetrators at the front door, just before he fled to another room. (8 RT 2008.)

Thus, in Natasha's version appellant was a direct perpetrator of the murder of Juan Uribe; in other accounts he was an aider and abettor. This hightened degree of criminal involvement inevitably contributed to the death penalty verdict.

2. In her statement to Ciapessoni, Natasha stated that one of the men said, "Juan, you disappointed us." (10 RT 2388.) This statement added to the portrait of the scene provided by the adult witnesses, none of whom mentioned it. In this context it is a particularly chilling statement, and added to the weight of the case in aggravation of the death penalty.

3. Natasha's statement that the assailants called Juan a "traitor," while similar to her mother's testimony, was used as corroborating evidence on that point, in prosecution argument to the jury. (10 RT 2549.)[129]

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[128] "One or both of them, I don't know, came in and started shooting Juan." (6 RT 1388.) Compare her statement to police shortly after the shootings (8 RT 1925-1926), and her testimony describing the shootings again at the penalty phase. ((10 RT 2426-2427.)

[129] "You heard the testimony of Cindy, and you heard the testimony of the statements of Natasha. And they both say the same thing. That a voice in that house said Juan, you are a traitor."

4. Natasha's statements describe her efforts to protect her siblings, by covering them with blankets and pillows. While it is natural to infer or assume that the children were potential victims of the random shooting, Natasha's account brought the point home with particular acuity.

For these reasons, it cannot be said that the violation of the Confrontation Clause was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18; *Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259.) Appellant was prejudiced by the use of Natasha Durbin's out-of-court statements, introduced in violation of the Confrontation Clause, and the penalty phase judgment must be reversed.

XVIII. THE TRIAL COURT ERRONEOUSLY REFUSED REQUESTED PENALTY PHASE INSTRUCTIONS THAT WOULD HAVE INCLUDED THE MOTIVATION FOR THE KILLING OF JUAN URIBE AMONG MITIGATING FACTORS.

Appellant's son suffered a near-fatal gunshot wound to the head, about two weeks before the fatal shootings at the Durbin house. By the prosecution's own guilt phase evidence and argument, it was that shooting which furnished the motive for appellant to join in the effort to hunt down and kill Juan Uribe. In the defense view, motive was a mitigating circumstance on this record, because fear was a natural human reaction which would have been shared by reasonable people in the same circumstances. While not a legal excuse, motive here was an important mitigating circumstance. The trial court erred by refusing to read requested defense instructions on motive as a mitigating circumstance.

Rule. As a matter of state law, a criminal defendant is entitled, on request, to jury instructions which "pinpoint" a theory of the defense. "A defendant is entitled to an instruction relating particular facts to any legal issue." (*People v. Sears* (1970) 2 Cal.3d 180, 190, citing *People v. Kane* (1946) 27 Cal.2d 693, 699-702; *People v. Cook* (1905) 148 Cal. 334, 346-347; *People v. Eckert* (1862) 19 Cal. 603, 605; *People v. Mayo* (1961) 194 Cal.App.2d 527, 536-537; *People v. Plywood Mfrs. of Cal.* (1955) 137 Cal.App.2d Supp. 859, 872-875; *People v. Cohn* (1949) 94 Cal.App.2d 630, 638; and *People v. Wilson* (1929) 100 Cal.App. 428, 431-432; see also *United States v. Smith* (9th Cir. 2000) 217 F.3d 746 746, 750, expressing the same principle as a matter of federal criminal procedure.)

The *Sears* principle is meant to pinpoint a theory of the defense. It is not meant to pinpoint particular evidence, which would put the trial court in the position of advocating a particular view or interpretation of the evidence. A *Sears* instruction should therefore be framed in terms of a defense theory, and not by reference to particular witnesses or evidence. (*People v. Wright* (1988) 45 Cal.3d 1126, 1137; *People v. Wharton* (1991) 53 Cal.3d 522, 570.) The defense instructions proposed here on motive focused on a defense theory of mitigation, and therefore were properly framed under the *Sears* principle.

Beyond the state procedural consideration is a fundamental requirement of constitutional law. The jury instructions to a penalty phase jury must permit the sentencer to consider all mitigating evidence. In *Lockett v. Ohio* (1978) 438 U.S. 586, the Court set aside Ohio's death penalty statute as unconstitutional because it unduly restricted the mitigating evidence that a jury could consider in deciding whether to impose the death penalty. In his opinion announcing the judgment, Chief Justice Burger wrote: "There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Id.*, at 605 (plurality opinion).)

Background. The presentation of guilt phase evidence began on September 9, 1998. (11 CT 2357.) On that date, the defense submitted Defendant Pedro Rangel, Jr.'s Jury Instructions. (12 CT 2487-2558; see date of submission at 12 CT 2487.) This set of instructions included proposed jury instructions for both the guilt and penalty phases of the trial. The proposed instructions were submitted in numerical CALJIC order, therefore the penalty phase instructions, 8.84 through 8.88, appeared in the midst of instructions which applied only to the guilt phase (12 CT 2538-2543).

CALJIC 8.88 as proposed by the defense was modified from the standard version. An additional death penalty sentencing factor was inserted as factor (e); the remainder of the list was renumbered (thus the final factor (k) became (j)). The proposed factor (e) was a continuation of factor (d):

> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (e) Whether or not the victim in whole, or in part, contributed to the extreme mental or emotional state of the defendant.
>
> (12 CT 2540; emphasis added.)

No discussion of the proposed modification appears in the record. The original standard version of CALJIC 8.85 was read to the penalty phase jury, without the proposed modification referring to whether the victim contributed to the defendant's "extreme emotional state." (12 CT 2575-2577.)

Evidence of motive, related to the shooting of Little Pete, Juan Uribe's likely involvement, and appellant's reaction to that shooting, was introduced during the guilt phase trial.

According to the prosecution case, on the night of September 24, 1995, following a series of skirmishes between loosely defined or undefined factions (some former friends) in the streets of Madera, appellant's son was hit in the head by a bullet. He suffered a laceration five or six inches long, about one-half inch wide, from near the left temple diagonally to the right eye. Police found several bullet holes and blood splatters in his car. (4 RT 1067-1069.) No arrest was made for that incident.

Richard Diaz testified that Juan Uribe was in the car from which the shot was fired. He understood that they were shot at because of the series of confrontations earlier in the evening. None of this information was provided to police. (5 RT 1323.)

Appellant received a phone call and rushed to the hospital, where he found his son injured and his BMW shot up. (2 ACT 398 [interrogation transcript].) He was told that his son came within a fraction of an inch of losing his life. Appellant came to understand that Jesse Candia, Sr. was responsible. (2 ACT 401-402.) He felt that his son might know who shot him, but he did not tell appellant. (2 ACT 405.)

There was retaliation for the shooting, directed mainly at Juan Uribe. (See 4 RT 1086 [shooting of Uribe's BMW on September 25, 1995]; 5 RT 1340 [fight at a market between Uribe and his friend Chris Castaneda, and Richard Diaz].)

The shooting of his son weighed on appellant's mind. During the barbecue on the evening of October 7, 1995, appellant got drunk. He talked about "his son getting shot in the head, about getting back [at] whoever did it." (5 RT 1262.) According to the prosecution case, appellant and his group went to Juan Uribe's house. When they did not find Uribe there, they set out for Chris Castaneda's house. On the way they came upon

Uribe's car, which was parked near the Durbin house. (5 RT 1267.) The homicides followed immediately thereafter.

In a statement to police on November 20, 1995, although he denied involvement in the murders, appellant said that he had to leave his job with FMC because his son had been shot. He heard that someone was trying to hurt his son, and he had to be with him 24 hours a day. (2 ACT 390.) He felt that they needed to "get the hell out of this place," because "it's getting pretty violent around here." (2 ACT 407.)

The prosecutor argued that the killings were motivated by "revenge" and "respect."

> Now the judge is going to instruct you that in this case we don't have to prove what the motive was in order to get a conviction. That's not one of the elements of the crime. But we have proved what the motive was in this case, revenge. Revenge caused by a macho idea of what respect means.
>
> And the defendant gives you a little idea of this in his statement to Detective Ciapessoni. When he is talking about his relationship with his son, he says we have respect for one another. And then when he is talking about his relationship with Romi Singh, he says we have respect for one another. Respect is very important to that man. And when his son got shot in the head, that was disrespectful. It was disrespectful to his son and to him and his family. He had to get revenge.
>
> (9 RT 2145-2146; emphasis added.)

Defense counsel, in contrast, argued that Jesse Rangel was one of the shooters. Jesse Rangel had a similar motive, to avenge the shooting of his cousin, evidenced by the shooting of Juan Uribe's car, thus it was plausible to point the finger at Jesse Rangel. (9 RT 2177.)

The trial court instructed the jury in the language of CALJIC 2.51, that motive may be considered in the guilt phase.

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty.
>
> (12 CT 2729; 9 RT 2251-2252.)

On or before October 7, 1998, the defense submitted two identical sets of proposed jury instructions solely for the penalty phase.[130] Among the proposed instructions was Defense Special Instruction No. 8.

> You may consider the motive for the commission of the crime as a mitigating factor which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any other aspect of the defendant's character or background that the defendant offers as a basis for sentence less than death.
>
> (12 CT 2476, 2590.)

In support of this proposed instruction the defense cited *People v. Easley* (1983) 34 Cal.3d 858, 878, fn. 10,[131] and *People v. Cox* (1991) 53 Cal.3d 618, 672 [same].

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[130] One set appears at 12 CT 2469-2486. The other set appears at 12 CT 2585-2599. The format of the two sets is slightly different, but most of the content appears to be the same.

The first reference on the record to the defense proposed penalty phase jury instructions was on October 7, 1998, the second day of the penalty phase trial. The trial court had reviewed the proposed instructions by that point. (10 RT 2414.) One set of proposed instructions was stamped filed on October 13, 1998 (see 12 CT 2559), the day penalty phase deliberations began. The other set, which begins at 12 CT 2585, has no stamped filed date.

[131] "[T]rial courts -- in instructing on the factor embodied in section 190.3, [factor] (k) -- should inform the jury that it may consider as a mitigating factor 'any other cir-

In a colloquy on October 7, 1998, defense counsel argued that the proposed instruction served an important purpose. It pointed to evidence of motive as mitigating, even if not a justification. (10 RT 2418.) The prosecutor responded that he would be arguing motive as an aggravating circumstance of the crime. "And I believe that the instructions under K[132] clearly allow the jury to consider motive, and this should not be given." (10 RT 2418.) The trial court agreed with the prosecutor, reasoning that if both sides were to argue motive, "then it's up to the jury to determine whether it's a factor A or factor K." (10 RT 2418.) "... Form of number 8 in light of Mr. LiCalsi's projected argument would confuse the jury." (10 RT 2419.)

Defense counsel offered to modify the proposed instruction to cross-reference factor (k), but the proposal was rejected. (10 RT 2419.)

At the penalty phase trial Angela Chapa testified that she was present when the call came from the hospital that Little Pete had been shot. Appellant was crying that night and the next day. (10 RT 2518.) On cross-examination she admitted that, in the prosecutor's words, Little Pete "wasn't really shot in the head, it was the scalp." (10 RT 2519.)

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cumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime' and any other 'aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.' [Citation.]"

132 "(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character, background or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial."

(CALJIC 8.85, given at 12 CT 2576-2577.)

On October 8, 1998, following the close of evidence and just before penalty phase arguments, the trial court reviewed the jury instructions and again rejected the proposed instruction on motive. "Eight, the court has rejected motive instruction. Both sides will argue motive under A or K, factor A or factor K. Therefore, the motive instruction will be misleading." (10 RT 2535.)

In penalty phase argument the prosecutor addressed the specific penalty factors related to motive that might conceivably apply to mitigate the penalty for the murder of Juan Uribe – extreme mental or emotional disturbance, victim participation in homicidal conduct, and moral justification.[133] In his view none of them applied to this evidence.[134]

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[133] See Penal Code § 190.3, subd. (d), (e), and (f):

> "**(d)** Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> "**(e)** Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
>
> "**(f)** Whether or not the offense was committed under circumstances which the defendant was reasonably believed to be a moral justification or extenuation for his conduct."

[134] "Factor D is whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. He was not. There's no evidence that this factor applies. Now since it doesn't apply, does that mean it's an aggravating factor? No, it doesn't. It just means that it's not a mitigating factor.

"Factor E, whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act. Doesn't apply. You don't consider as an aggravating factor. Just doesn't apply. Factor F, Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct. Once again, ladies and gentlemen, we submit to you that it doesn't apply. So you shouldn't consider it...." (10 RT 2542.)

In a reprise of his guilt phase argument, the prosecutor defined appellant's understandable frustration at his son's near-fatal shooting injury as merely a matter of "respect." Likewise, he diminished the seriousness of Little Pete's gunshot injury as a legitimate source of parental concern.

> Now we get to the motive that we talked about earlier. This wasn't a situation of jealousy. This wasn't a sudden heat of passion or rage which developed over a certain period of time. This wasn't greed. The motive in this case was respect. His family wasn't given the respect he felt it deserved. You heard little Pete Rangel wasn't seriously injured. It was just a graze to the top of his head.
>
> ... This was about respect. And then the motive for the killing of Chuck Durbin is even worse. There wasn't even this hatred or the lack of respect to his family for that. He was just in the way. So he had to kill him. He had to kill him. And all Chuck was doing was trying to save his children....
>
> (10 RT 2549-2550; emphasis added.)

Defense counsel Litman disagreed on the reaction to Little Pete's shooting injury as a factor in aggravation, as claimed by the prosecution.

> I just want to mention something that I think was very inconsistent on behalf of Mr. LiCalsi in his argument. When he is trying to put things in perspective and he is talking about the injury that Cindy Durbin suffered and the injury our client's son suffered, he minimizes the injury our client's son suffered. But if you think about it, he was shot in the head. He went to the hospital. He needed stitches. And if that shot had been that much lower, his son could have been killed. His son could have been a vegetable. So I mean, this was very close to being a fatal or substantial injury to his son.
>
> And I think you heard how this affected Mr. Rangel. How he reacted at the hospital. How he reacted later at home when he was found by Mrs. Chapa sitting on the stairs crying over the injury that his son suffered. But despite that you heard evidence – you heard from Mr. Edwards that Mr. Rangel was trying to keep things under control. He was trying to

talk his son into putting this behind him. He was trying to tell his son to forget about it. He was concerned that his son could be killed.

I'm a father. I'm sure you gentleman – I don't know for sure – some of you, you know, at least are fathers. The ladies, I know, have children. I think it would be just absolutely false to say that any one of us whose child was shot or injured, that we would not be angry about it. That we would not be outraged about it. That we wouldn't be furious at the person who did this to our child.

(10 RT 2560-2561; see also argument of defense counsel Sciandra at 10 RT 2588.)

At the conclusion of the penalty phase of the trial the jury was instructed, "Disregard all other instructions given to you in other phases of this trial." (CALJIC 8.84.1; 12 CT 2539; 10 RT 2595.) This instruction effectively erased the earlier guilt phase instruction on motive;[135] no further instruction was read at the penalty phase on the use or consideration of evidence of motive.

Analysis. The trial court erred by refusing the requested instruction that would have focused on appellant's motive for the attack on Juan Uribe (12 CT 2476), as well as the earlier proposed instruction that would have focused on Uribe's contribution to appellant's emotional disturbance (12 CT 2540). The guilt phase instruction on motive was eliminated by the reading of CALJIC 8.84.1.

The general factor (k) instruction is notoriously non-specific. It cries out for clarification, and a pin-point instruction when requested by the defense should be seriously

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[135] See *People v. Carter* (2003) 30 Cal.4th 1166, 1221, *People v. Brasure* (2008) 42 Cal.4th 1037, 1073, and *People v. Wilson* (2008) 43 Cal.4th 1, 28, finding error in this instruction where gaps are left in the jury's consideration of penalty phase evidence.

considered. It was error to refuse the requested instructions as a matter of state law. (*People v. Sears, supra.*)

As a matter of constitutional law, the United States Supreme Court has directly discussed factor (k), and the necessity for clarification of the scope of that "catch-all factor," in three opinions.

In *Boyde v. California* (1990) 494 U.S. 370, the Court reviewed a version of factor (k) which did not provide specifically for jury consideration of mitigating evidence which was not related to the circumstances of the crime, such as the defendant's background and character.[136] The defendant in *Boyde* introduced good character evidence, the effect of which, he argued, was obscured by the former language of factor (k). The *Boyde* court formulated the standard for review of such contentions as a "reasonable likelihood" of misunderstanding by the jury. "We think the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (494 U.S. at 380.) Under that test, the Court determined that there was not a reasonable likelihood

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[136] "(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." ...

"If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole."

(Quoted in *Boyde v. California, supra,* 494 U.S. at 374 and 375. The standard jury instruction was amended after Boyde's trial, to reference the defendant's background and character, and to accommodate the holding of *People v. Easley, supra.*)

that the jury was misled, or ignored the evidence of pre-offense background and character offered in mitigation.

In *Brown v. Payton* (2005) 544 U.S. 133, the high court again reviewed a state death judgment, again under the pre-amendment language of factor (k) ("[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."). As in *Boyde*, the jury instruction did not provide explicitly for jury consideration of evidence of the defendant's character and background, including his post-offense conversion to Christianity. The trial judge in *Brown v. Payton* permitted argument under the assumption that such evidence was relevant to the penalty determination, but declined to modify the jury instruction. This Court affirmed, relying on *Boyde*. On federal habeas corpus review, the Supreme Court held that it was not unreasonable for this Court to conclude that post-offense conduct was embraced in a common-sense reading of the old factor (k), just as the defendant's pre-offense background was embraced by a common-sense reading of old factor (k) in *Boyde*, and despite the prosecutor's argument that the mitigating evidence was of little significance.

In *Ayers v. Belmontes* (2006) 549 U.S. 7, the Court again considered the scope of an instruction on factor (k), again involving a pre-amendment jury instruction. The defendant in *Belmontes* relied on "forward looking" evidence, evidence that he would be a source of positive contribution to the community if allowed to live; he had had a pre-offense religious conversion, but had lapsed. On appeal he argued that the pre-amendment language of factor (k), limited to the circumstances of the crime, hobbled the jury's ability to consider this mitigating evidence. The Supreme Court, as in *Brown*, held

that there was nothing to prevent the jury from considering the proposed evidence in mitigation.

In the *Boyde-Brown-Belmontes* line of cases, directed at California's factor (k) as formerly worded, the Court thus emphasized the perceived inclusiveness of unadorned factor (k), to matters which the jury would normally assume to be relevant to punishment, even in the absence of a specific instruction.

In contrast to that line of cases is the high court's opinion in *Penry v. Johnson* (2001) 532 U.S. 782. In that case the defendant offered evidence of his mental retardation and childhood abuse, in mitigation of the death penalty. The standard jury instruction in Texas provided that the jury must answer three penalty questions: (1) whether the killing was deliberate, (2) whether the defendant poses a risk of future dangerous conduct, and (3) whether the killing was provoked by the victim. The *Penry* jury was also instructed that it could consider in mitigation "any aspect of the defendant's character and record or circumstances of the crime" – language similar to the language later added to the California jury instruction following *Easley*, and used in the present case, but not used in *Boyde, Brown,* or *Belmontes.*

The *Penry* court held that this instructional framework, even with the "catch-all" reference, was insufficient to give full effect to the defendant's offered mitigating evidence.

> ... *Penry I* (*Penry v. Lynaugh* (1989) 492 U.S. 302) did not hold that the mere mention of "mitigating circumstances" to a capital sentencing jury satisfies the Eighth Amendment. Nor does it stand for the proposition that it is constitutionally sufficient to inform the jury that it may "consider" mitigating circumstances in deciding the appropriate sentence. Rather, the

> key under *Penry I* is that the jury be able to "consider and *give effect* to [a defendant's mitigating] evidence in imposing sentence." 492 U.S. at 319 (emphasis added). See also *Johnson v. Texas*, 509 U.S. 350, 381, 125 L. Ed. 2d 290, 113 S. Ct. 2658 (1993) (O'CONNOR, J., dissenting) ("[A] sentencer [must] be allowed to give *full* consideration and *full* effect to mitigating circumstances" (emphasis in original)). For it is only when the jury is given a "vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision," *Penry I*, 492 U.S. at 328, that we can be sure that the jury "has treated the defendant as a 'uniquely individual human being' and has made a reliable determination that death is the appropriate sentence," *id.* at 319 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 305, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976)).
>
> (532 U.S. at 797; emphasis added.)

What was missing in the factor (k) instruction in the present case was the key element which was missing in the *Penry* scenario: a means for the sentencing jury to give full effect to the defense mitigating evidence. Motive was a key part of the prosecution case at the guilt phase, and the prosecution led off the penalty phase with an argument that the motive for the killing was merely a matter of "respect" – clearly an aggravating consideration. It was not by any means clear, as a matter of common sense, that a motive for murder could ever be mitigating. The guilt phase trial had already eliminated by inference motives which might be legal justifications for murder, including heat of passion and defense of others.

And yet, the defense had an important point: that appellant was acting out of understandable parental concern when he joined in the pursuit of Juan Uribe. The threat to appellant's son was, in his eyes, on-going. The threat remained unaddressed by law enforcement, which was completely unable to provide protection in these circumstances. Moreover, the gunshot wound to the head was more than a matter of "respect"; it

represented a deadly threat to his son's life. Indeed, evidence of such a shooting would have supported a conviction for premeditated attempted murder and a life prison sentence, if properly prosecuted (a point that the public prosecutor seemed to be blind to).

Even outright vengeance would have been at least understandable in such a situation, which in itself distinguishes this from capital murders which are committed for motives which are petty or trivial, or entirely undecipherable.

The language of factor (k) does not operate to give "full effect" to the defense view of motive. Rather, under a common sense reading of the instruction, a jury could well conclude that evidence of motive was not something which could be considered at all in mitigation.

The defense was reduced to trying to counter or rebut the prosecution argument that appellant's motive operated solely and entirely in aggravation of the offense. Since there was no jury instruction on point, the prosecutor was free to argue motive as a factor in aggravation. Defense counsel then had to reduce the effect of the aggravation argument, before the motive evidence could ever be considered in mitigation. (10 RT 2560-2561, 2588.) Their plea to the jury was a means of damage control, to try to humanize something which could apparently only function as aggravation.

Appellant was thus prejudiced by the trial court's refusal of pin-point instructions on motive as mitigation. Either side should have been free to argue the relative effect of motive evidence. But the defense should have had the better part of the argument, supported by an appropriate jury instruction. By introducing the use of lethal force, Juan Uribe provoked a defensive move and/or retaliation by appellant, a person who was law-

abiding and who would not otherwise have been drawn into this cycle of violence. The jury should have been directed to consider motive evidence in mitigation. It was reversible error to refuse the requested instructions.

XIX. THE TRIAL COURT IMPROPERLY REFUSED DEFENSE-REQUESTED PENALTY PHASE INSTRUCTIONS ON THE ASSESSMENT OF MITIGATING EVIDENCE.

In addition to its refusal of an instruction on evidence of motive as mitigation (see Argument XVIII above), the trial court improperly refused other defense-requested jury instructions on aspects of the case in mitigation of the death penalty: an instruction that mitigating circumstances need not be proven beyond a reasonable doubt, and an instruction that evidence of favorable prosecution treatment accorded to an accomplice may be considered in mitigation.

As a matter of state law, a criminal defendant is entitled, on request, to jury instructions which "pinpoint" a theory of the defense. (See *People v. Sears, supra*, and cases cited in Argument XVIII above.) The *Sears* principle is meant to pinpoint a theory of the defense, as opposed to particular defense evidence. (*Ibid.*)

In addition, as a matter of federal due process, the jury instructions to a penalty phase jury must permit the sentencer to consider all mitigating evidence. (See *Lockett v. Ohio, supra*, and discussion in Argument XVIII above.)

A. Mitigating Circumstances Need Not Be Proven Beyond a Reasonable Doubt.

During the penalty phase trial, on or before October 7, 1998, the defense submitted two almost identical sets of proposed instructions, related solely to the penalty phase. (See discussion in Argument XVIII above.)

Each set of proposed instructions contained a proposed instruction which would have informed the jury, in identical language, that a mitigating circumstance does not need to be proven beyond a reasonable doubt. See latter portion of Defense Special Instruction No. 11 at 12 CT 2479, and latter portion of No. 11 at 12 CT 2592:

> The mitigating circumstances that I have read for your consider[ation] are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a sentence of death in this case.
>
> You should pay careful attention to each of these factors.
>
> Any one of [...] them may be sufficient, standing alone to support a decision that death is not the appropriate punishment in this case.
>
> But you should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances relative to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty.
>
> A mitigating circumstance does not have to be proved beyond a reasonable doubt to exist.
>
> You must find that a mitigating circumstance exists if there is any substantial evidence to support it.
>
> Any mitigating circumstances presented to you may outweigh all the aggravating factors.
>
> You are permitted to use mercy sympathy, or sentiment in deciding what weight to give each mitigating factor.
>
> (12 CT 2479, 2592-2593; emphasis added.)

In discussing jury instructions, just before discussing proposed instruction no. 11, the trial court rejected defense proposed instruction no. 9[137] because it removed any unanimity requirement for mitigating circumstances, but did not do the same for aggravating circumstances. (10 RT 2419-2420.)

The court then turned to Instruction No. 11, including the proposed instruction on the standard of proof for mitigating evidence.

> THE COURT: ... Eleven is objectionable for the same reasons [as no. 9]. It does not mention anything about aggravating. Single aggravating incident may outweigh single mitigating circumstances. There's authority on that. People v. Hines, H-i-n-e-s 1997 case reported at 15 Cal. 4th 997, 1068.
>
> MR. SCIANDRA: May I have the cite again?
>
> THE COURT: It's 15 Cal. 4th 997 at 1068. It's considered argumentative. Number 12.
>
> (10 RT 2420-2421.)

The entire proposed defense instruction no. 11 was taken verbatim from an instruction recounted in *People v. Wharton* (1991) 53 Cal.3d 522, 600-601 (see defense citation to *Wharton* at 12 CT 2479):

> In addition to several other special penalty phase instructions, the court, at defendant's request, informed the jury that "You must find a mitigating circumstance exists if there is any substantial evidence to support it." [fn. 23] Defendant claims this improperly placed on him the burden of proving the existence of mitigating circumstances by substantial evidence, thereby violating the Eighth Amendment's proscription against limiting the jury's consideration of any relevant mitigating information that may con-

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[137] "It is not necessary that the jury unanimously agree that any factor in mitigation exists. ¶ Each juror may decide for themselves which mitigating factor exists and the weight to give thereto." (12 CT 2477, 2591.)

vince it to impose a sentence less than death. (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 308; *McCleskey v. Kemp* (1987) 481 U.S. 279, 305-306.)

[fn. 23] The entire instruction states: "The mitigating circumstances that I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death sentence in this case. You should pay careful attention to each of those factors. Any one of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case. But you should not limit your consideration of mitigating circumstances to these specific factors. [para.] You may also consider any other circumstances relating to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty. [para.] A mitigating circumstance does not have to be proved beyond a reasonable doubt to exist. You must find that a mitigating circumstance exists if there is any substantial evidence to support it. [para.] Any mitigating circumstance presented to you may outweigh all the aggravating factors. [para.] You are permitted to use mercy, sympathy, or sentiment in deciding what weight to give each mitigating factor." [end footnote]

We find the challenged instruction consistent with Eighth Amendment guarantees. At the heart of defendant's interpretation of "Special Instruction II" is his assumption that it precludes the jury's consideration of a mitigating circumstance unless he establishes its existence by a certain standard of proof. Interpreting the instructions as a whole and as would a reasonable juror, we find defendant's proposed interpretation is unreasonable. The entire special instruction, read in context, is clearly favorable to defendant, informing the jury to give him the benefit of any doubt it may have regarding the appropriateness of the death penalty. In short, we find nothing in the instruction preventing the jury from considering a mitigating circumstance no matter how strong or weak the evidence is.

(Emphasis added.)

The trial court here relied on the later holding of *People v. Hines* (1997) 15 Cal.4th 997. In *Hines*, the defense requested an instruction which enumerated and pinpointed the evidence which was claimed to be mitigating, including the defendant's age, his mother's alcoholism, his own drug addiction, his remorse, etc. (15 Cal.4th at 1067, fn.

18.) It was the recounting of this litany of defense mitigating evidence which the Court in *Hines* found argumentative: "The trial court properly refused to give this proposed instruction as it was argumentative, that is, 'of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' (*People v. Gordon, supra*, 50 Cal.3d at p. 1276; see also *People v. Fauber, supra,* 2 Cal.4th at pp. 865-866; *People v. Cooper, supra,* 53 Cal.3d at p. 844.)" (15 Cal.4th at 1067-1068; the proposed instructions in *Gordon, Fauber*, and *Cooper* all similarly sought to enumerate and emphasize specific items of defense mitigating evidence.)

In contrast, the proposed instruction here did not enumerate the defense mitigating evidence at all. The emphasized language from the proposed instruction would have warned the jury, properly, that the defense mitigating evidence, whatever it may be, need not be proven beyond a reasonable doubt.

An instruction on the burden of proof could have been clipped out of the proposed instruction without destroying its integrity. "The trial court must correct defects in proffered instructions where the nature of the of the defendant's theory is made clear to it." (*People v. Brady* (1987) 190 Cal.App.3d 124, 136; disapproved on other grounds in *People v. Farley* (1996) 45 Cal.App.4th 1697, 1704.)

The proffered instruction here, pinpointing the principle that mitigating evidence need not be proven beyond a reasonable doubt, was a necessary and appropriate means of avoiding what would otherwise be an impediment to proper consideration of the defense case in mitigation. There were substantial factors in mitigation, including appellant's

lifetime of hard work and faithful support of his family. The defense proof of mitigating factors should not have been burdened by a standard of proof beyond a reasonable doubt.

The homicidal incident here arose from a fit of drunkenness, totally out of character for this defendant. The defense was not required to prove this beyond a reasonable doubt. It was prejudicial error to refuse the requested instruction on the standard of proof.

B. Favorable Prosecution Treatment of Accomplices.

Under *Lockett v. Ohio, supra,* the jury must be empowered to consider all relevant mitigating evidence offered by the defendant.

In some states the appellate court is required to maintain a register of death penalty cases to form a basis for comparison with each new case (intercase review). See *Gregg v. Georgia* (1976) 428 U.S. 153, 187. California's death penalty statute, which does not provide for intercase proportionality review at an appellate level, is not unconstitutional for that reason. (*Pulley v. Harris* (1984) 465 U.S. 37, 51-54.)

At the trial court level there is no likewise no requirement of intercase proportionality review. (*People v. Lang* (1989) 49 Cal.3d 991, 1043.)[138] In contrast, intracase proportionality review may be undertaken on appeal, in this Court's discretion. See *People*

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[138] "In support of his argument that trial courts may undertake proportionality review, defendant relies on *People v. Leigh* (1985) 168 Cal.App.3d 217. But the holding in that case is that trial courts have discretion to determine intracase proportionality -- i.e., to determine whether the sentence imposed is proportionate to the individual culpability of the defendant, irrespective of the punishment imposed on others (see *People v. Adcox, supra,* 47 Cal.3d 207, 274; *People v. Dillon* (1983) 34 Cal.3d 441, 477-482). Defendant's motion in the trial court did not seek intracase proportionality review."

v. Dillon, supra. In light of this Court's superior experience with a great many death penalty judgments, intracase appellate review is a necessary and proper exercise of this Court's appellate jurisdiction, and should be exercised here. (See Argument XXII (D) below, and see *Puccio v. State of Florida* (1997) 701 So.2d 858 [on appellate review, imposition of death penalty on only one codefendant is a disproportionate penalty]).

There is no impediment to the jury's use of intracase proportionality review as part of the jury's penalty determination. There should have been a specific instruction on intracase proportionality review.

There were at least four persons whose role in this offense, and subsequent punishment or lack of punishment, should have been considered by this jury before it imposed the death penalty.

(1) Richard Diaz was an accomplice by the terms of the prosecution case itself.[139] By his own testimony, he fired into the Durbin house. (5 RT 1274.) Yet, by the terms of his plea agreement with the prosecution, Diaz pled guilty to accessory. (Ex. 49; 5 RT 1285-1286.) He did not face the death penalty. Although he had not been sentenced at the time of his testimony, he was hoping for a grant of probation. (5 RT 1326, 1336.)

(2) Pedro Enriquez Rangel III, appellant's son and co-defendant, was charged with exactly the same crime. He was the driving force in the pursuit of Juan Uribe. Appellant was motivated less by malice and more by a need to protect and defend his son (see Ar-

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[139] See trial court's guilt phase instruction to the jury: "If the crimes charged in the Information were committed by anyone, the witness Richard Diaz was an accomplice as a matter of law and his testimony is subject to the rule requiring corroboration." (12 CT 2653.)

gument XVIII above), and was therefore relatively less culpable than Little Pete. The cases were severed prior to appellant's trial, and appellant's trial was held first. (11 CT 1878, 1939.) Appellant's jury therefore could not know of the outcome of his son's trial. However, his jury could conclude that appellant was not as culpable as his son.

(3) Rafael Avila was charged jointly with appellant and his son in the original complaint. (1 CT 1.) However, Avila was not arraigned on these charges. According to Richard Diaz, Avila was the driver on the night of the fatal shootings. (5 RT 1267.) Since shortly after the shootings Avila had not been seen by his employer or his wife, except for one brief contact. (5 RT 1205-1207, 6 RT 1450-1452.) Evidently, Rafael Avila had evaded arrest, and was not to be punished for his important role in the killings.

(4) Jesse Rangel was the initial suspect in the killings. Cindy Durbin identified a photograph of Jesse Rangel shortly after the killings (6 RT 1395-1397, 1413, 1427), and continued to identify him in police interviews until the preliminary hearing nine months later (6 RT 1397, 1422, 1437, 8 RT 1948). He fled to New Mexico a few days after the killlings. (6 RT 1519.) As a matter of lingering doubt (see *People v. Gay,* supra), the jury could rightfully consider that Jesse Rangel may have been one of the perpetrators, yet he was never charged or otherwise punished.

It is said that proportionality review, that is review by comparison of the defendant's case with all similarly situated defendants convicted of the same criminal violation, is not constitutionally compelled. (*United States v. Mitchell* (9th Cir. 2007) 502 F.3d 931, 980, citing *Pulley v. Harris, supra.*) However, that broad statement does not neces-

sarily apply where the jury has before it, as here, evidence of the commission of the same crime by multiple persons.

Under article I, section 17 of the California Constitution, the state constitutional ban on cruel and unusual punishments, a capital defendant on appeal "is entitled to intra-case review [i.e. comparison with co-participants] to determine whether the death penalty is disproportionate to his personal culpability." (*People v. Williams* (1997) 16 Cal.4th 153, 279.)

Indeed, the federal death penalty statute contemplates the consideration of precisely this sort of evidence by a penalty phase jury. See 18 U.S.C. § 3592:

> (a) **Mitigating factors.** In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider any mitigating factor, including the following:
>
> ....
>
> (4) **Equally culpable defendants**. Another defendant or defendants, equally culpable in the crime, will not be punished by death.
>
> (Emphasis added.)

The issue here is not whether comparison with the penalties imposed on co-participants constitutionally compels the reduction of a death sentence. (See *Getsy v. Mitchell* (6th Cir. *en banc* 2007) 495 F.3d 295.) The issue here is whether a jury may be permitted to consider the penalties imposed on co-participants. Factor (k) has been broadly applied to permit the introduction of virtually any evidence "which extenuates the gravity of the crime." Punishment, or lack of punishment, rendered to a co-participant has not been held irrelevant to the penalty determination.

Treatment of co-participants is presumably a relevant consideration, although this jury was given no instruction that said so. An instruction directing the jury's attention to the penalties inflicted on co-participants is a proper and necessary subject of jury instructions, and it is constitutional error to refuse such an instruction. (*Lockett v. Ohio, supra.*)

This jury should have been instructed that it could properly consider the punishments, or lack of punishments, received by the co-participants in these killings. Had the jury been properly instructed, appellant would not have received the death penalty. The death judgment must be reversed.

XX. THE TRIAL COURT FAILED TO INSTRUCT THE PENALTY PHASE JURY *SUA SPONTE* ON THE CIRCUMSTANTIAL EVIDENCE RULE.

Both the prosecution case in aggravation and the defense case in mitigation relied substantially on circumstantial evidence. In California, all circumstantial evidence is subject to the Circumstantial Evidence Rule, which requires that the jury adopt any reasonable interpretation of circumstantial evidence which points to a defendant's innocence. The trial court was under a *sua sponte* duty to instruct on this important principle, the absence of which likely affected the outcome of the penalty trial.

The trial court instructed on the Circumstantial Evidence Rule at the guilt phase, but the instruction was not repeated at the penalty phase, and the jury was instructed to disregard the guilt phase instructions. This Court has addressed the trial court's failure to carry forward evidentiary instructions from the guilt phase to the penalty phase. See *People v. Carter* (2003) 30 Cal. 4th 1166, 1218-1222, 1221, *People v. Brasure* (2008) 42 Cal.4th 1037, 1073, and *People v. Wilson* (2008) 43 Cal.4th 1, 28. In *Carter,* "[w]e noted that omission of certain instructions routinely given at the guilt phase might actually benefit a capital defendant in the penalty phase because the effect could be, for example, to 'cabin less strictly the jury's consideration of mitigating evidence' or to 'avoid an unfavorable focus on the aggravating evidence.' (*Id.* at p. 1220.) Rather than assume prejudice or speculate as to the effect of the court's direction, we required the defendant to 'demonstrate that the omission of the evidentiary instructions here resulted in prejudice.' (*Ibid.*) We found no such demonstration had been made in that case, but cautioned future

trial courts not to dispense with evidentiary instructions at the penalty phase. (*Id.* at p. 1222.)" (*People v. Brasure, supra,* at 1073; emphasis added.)

The Circumstantial Evidence Rule, as to evidence in general, was stated in CALJIC 2.01, in effect at the time of appellant's trial.[140] As to evidence of a necessary mental state, the rule was stated in CALJIC 2.02.[141]

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[140] "However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.

"Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.

"Also, if the circumstantial evidence [as to any particular count] permits two reasonable interpretations, one of which points to the defendant's guilt and the other to [his] [her] innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to [his] [her] guilt.

"If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable."

[141] "The [specific intent] [or] [and] [mental state] with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not [find the defendant guilty of the crime charged [in Count[s] , , and], [or] [the crime[s] of , , , which [is a] [are] lesser crime[s]],] [or] [find the allegation to be true,] unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required [specific intent] [or] [and] [mental state] but (2) cannot be reconciled with any other rational conclusion.

"Also, if the evidence as to [any] [specific intent] [or] [mental state] permits two reasonable interpretations, one of which points to the existence of the [specific intent] [or] [mental state] and the other to its absence, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the

Both of these instructions were read at the guilt phase of the trial. (12 CT 2714, 2715.) However, at the penalty phase of the trial the jury was instructed to ignore these prior instructions: "Disregard all other instructions given to you in other phases of this trial." (12 CT 2539.) No instructions were read on circumstantial evidence at the penalty phase of the trial.

The penalty phase trial relied substantially on circumstantial evidence.

In aggravation, a major issue was whether the murders were premeditated. There was evidence of heavy drinking by appellant, so much that he stumbled and fell as he approached the Durbin house. (5 RT 1262-1264, 1269-1270.) After the shootings he accidentally discharged the .380 twice in Rafael Avila's car. (5 RT 1278.) Intoxication may well have interfered with his ability to premeditate. (See Penal Code § 190.3 (h): "Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.") Impaired capacity was not under consideration at the guilt phase. Reasonable jurors may have had a lingering doubt whether appellant committed premeditated murder under the doctrine of impaired capacity. Determination of an impaired capacity defense hinged entirely on circumstantial evidence. The jury's judgment on impaired capacity would have been substantially affected by the Circumstantial Evidence Rule, had it been applied.

[specific intent] [or] [mental state] appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable."

In mitigation, jurors may have considered whether appellant was motivated by a need to protect his son (see discussion in Argument XVIII above). Motive was not a necessary element for determination at the guilt phase. The evidence of motive for the crimes was also entirely circumstantial.

A jury instruction on the Circumstantial Evidence Rule is required as a *sua sponte* duty of the trial court. (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49-50.) There is no reason why the Rule should not be stated and applied at the penalty phase, where evidence is considered under all the rules of evidence.

The Circumstantial Evidence Rule is not intuitively obvious. A reasonable juror could as easily conclude that, given two reasonable interpretations of circumstantial evidence, he or she should adopt the interpretation which points to guilt, or to increased punishment. Where so much of the penalty phase determination hung on the interpretation of circumstantial evidence, the absence of these essential instructions prejudiced appellant, and reversal is necessary.

XXI. THE TRIAL COURT'S FINDING OF PREMEDITATION IN COUNT ONE, IN DENYING THE DEFENSE MOTION TO MODIFY THE DEATH VERDICT, WAS AN ABUSE OF DISCRETION AND A VIOLATION OF DUE PROCESS.

As set forth in Argument IV above, the record lacks support for a finding that appellant premeditated the murder of Chuck Durbin (see also Arguments XIII and XIV). Any evidence of premeditation that can be gleaned from this record should not have provided the basis for a circumstance in aggravation of the death penalty. This record surely provides the least imaginable support for premeditation as a factor in aggravation. Accordingly, the trial court should not have used premeditation as a factor in aggravation. It was an abuse of discretion to use premeditation on Count I as a reason to deny the motion to modify the judgment, and the death judgment must be reversed.

Under Penal Code § 190.4 (e), the trial court is obligated to consider an automatic motion to modify a death penalty verdict.

> **(e)** In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.
>
> The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes. The denial of the modification of the death penalty verdict pursuant to subdivision (7) of Sec-

> tion 1181[142] shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the People's appeal pursuant to paragraph (6).

The trial court's proper performance in ruling on the motion for modification is essential to the constitutional functioning of the death penalty statute. Under the California death penalty statute, the trier of fact is required to make specific and affirmative findings on special circumstances, but is not required to make findings on aggravating circumstances. This procedure is deemed constitutionally adequate for the requirements of appellate review, but only because the trial court is obligated to make findings on the relevant aggravating and mitigating circumstances, findings which are then "reviewed on the defendant's automatic appeal."

In *People v. Frierson* (1979) 25 Cal.3d 142, this Court upheld the death penalty statute, precisely because "at the time of the automatic motion for modification of verdict (§ 190.4, subd. (e)), the trial court must make an independent evaluation of the evidence and state on the record the reasons for its findings." (25 Cal.3d at p. 179.) These protections, it was held, constitute "adequate ... safeguards for assuring careful appellate review." (*Ibid.*; *People v. Diaz* (1992) 3 Cal.4th 495, 571, 572.)

It follows that the trial court's findings under section 190.4 (e) are subject to appellate review, including review for sufficiency of the evidence and abuse of discretion. Any failure in this constitutionally mandated procedure is a denial of due process guaranteed by the United States Constitution. (*Bonin v. Calderon* (9th Cir. 1995) 59 F.3d 815,

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142 Penal Code § 1181 authorizes the grant of a new trial. Subdivision (7) authorizes the trial court to reduce the punishment ordered by a jury verdict.

842; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Chambers v. Bowersox* (8th Cir. 1998) 157 F.3d 560.)

The evidence concerning the element of premeditation is summarized in Argument IV above. As noted there, the evidence is insufficient to sustain a conviction for premeditated murder in the killing of Chuck Durbin, Count One.

On January 29, 1999, defense counsel filed an Application for Modification of Verdict Imposing Death Pursuant to California Penal Code § 1181 (7). (13 CT 2855.)

Despite the lack of evidence, in denying the modification motion[143] the trial court made unsupported findings of premeditation.

> ... For the purpose of clarifying the court's reasoning, this will be a recital of the principal factors which most powerfully inform and influence the decision at hand.
>
> The Court finds that the first degree murder of Chuck Durbin was an intentional killing personally committed by the defendant and the court further finds that the murder of Chuck Durbin was premeditated, deliberate, willful, and committed with malice aforethought.
>
> (11 RT 2644; emphasis added.)
>
> ... [T]he defendant brutally and in cold blood murdered Chuck Durbin. Mr. Durbin had been seriously wounded and posed no threat to the defendant when the defendant killed him by shooting him in the head at close range...

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[143] Inexplicably, the defense modification motion made no reference to the lack of premeditation in the shooting of Chuck Durbin. (13 CT 2855-2859.) In penalty phase argument the prosecutor argued that the motive for the shootings was "respect." (10 RT 2549.) Nevertheless, it was argued (in apparent aggravation of the penalty) that appellant did not know Chuck Durbin, and Durbin was not "an object of his hate." (10 RT 2547.) In penalty phase argument to the jury, defense counsel made no reference to the absence of premeditation as to Count One. (10 RT 2553-2572.)

(11 RT 2645.)

The trial court erred by finding premeditation on this record, and by basing the death penalty verdict on premeditation.

Any claim with respect to the denial of a motion to modify penalty is to be considered by this Court on automatic appeal. (*People v. Mayfield* (1993) 5 Cal.4th 220, 224-225.) Reversal is required if there is a "reasonable possibility" that a trial court error affected the decision to deny the motion. (*People v. Benson* (1990) 52 Cal.3d 754, 812; *People v. Frierson* (1991) 53 Cal.3d 730, 751.)

The trial court certainly erred in its characterization of the shooting of Chuck Durbin. The trial court concluded that "Mr. Durbin had been seriously wounded and posed no threat to the defendant when the defendant killed him by shooting him in the head at close range." (11 RT 2645.) But the record does not show that Durbin was disabled by the .22 shots; according to Richard Diaz, Durbin was standing up when appellant shot him, and appellant's statement quoted by Diaz indicated that he thought he was under attack by Durbin. There is no evidence that Durbin was prone or disabled when any of the large caliber shots were fired.

Most important, there was a lack of evidence of premeditation. Appellant did not even know that Chuck Durbin existed before he entered the Durbin house. Whatever malice he may have had toward Juan Uribe, it did not extend to the occupants of the house or to Durbin himself. The element of premeditation was unsupported on this record.

There is a reasonable possibility that a different result could be reached in the absence of the premeditation finding. Appellant's role in the shooting of Juan Uribe certainly did not justify the death penalty: under the prosecution's theory of the case, appellant thought that he was aiding and protecting his son and, however wrongheadedly, helping to exact justified retaliation for the shooting of Little Pete. Besides, he was not the perpetrator of the Uribe shooting under the prosecutor's own theory of the case.[144]

This death judgment was certainly based primarily on the shooting of Chuck Durbin, which was committed personally by appellant according to the guilt phase verdict. The presence or absence of premeditation has everything to do with the justification for the death penalty. If there was nothing more than a brief opportunity for reflection, and reason to think that the defendant's capacity to deliberate was impaired,[145] the death penalty was not justified on this record. No reasonable jurist would impose it, and no appellate tribunal should affirm it.

Premeditation on this record, if it exists, is of a highly technical nature: at a minimum, there was a lack of planning or motive in the killing of Chuck Durbin. The intention to kill, based on an awareness of the existence of Chuck Durbin, could not have pro-

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[144] See *In re Hardy* (2007) 41 Cal.4th 977, 982-983: "[T]he allegations of third party culpability, as sustained by the referee, require we vacate the penalty judgment because, had the jury entertained a reasonable doubt that petitioner was the actual killer and concluded he was merely a coconspirator, there is a reasonable probability it would have returned a sentence of life instead of death...."

[145] See Penal Code § 190.3 (h): "Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication."

ceeded the shooting by more than a few seconds. Without premeditation as a factor in aggravation, the death penalty should not have been imposed. It was an abuse of discretion and a denial of due process for the trial court to confirm the jury's death judgment on the basis of premeditation, and the death judgment must be reversed.

XXII. MANY FEATURES OF THE CALIFORNIA CAPITAL SENTENCING SCHEME, AS INTERPRETED AND APPLIED BY THIS COURT, VIOLATE THE FEDERAL CONSTITUTION AND INTERNATIIONAL NORMS.

The following challenges to the California death penalty sentencing scheme have been addressed, at least in part, by this Court in past decisions. They are summarized in this Argument because they retain validity under the federal constitution, because there is always reason to believe that this Court may change its position, and because lengthy briefing on each of them would not be a wise expenditure of court resources. Nevertheless, appellant does not intend to present a "perfunctory" argument (*People v. Roberts* (1992) 2 Cal.4th 271, 340-341), and asks that each of the following challenges be seriously considered in the context of the present case and recent authority. As held by this Court in *People v. Schmeck* (2005) 37 Cal.4th 240, 304, "... routine or generic claims that we repeatedly have rejected, and which are presented to this court primarily to preserve them for review by the federal courts, have been and will be deemed by this court to be fairly presented so long as the claim is stated in a straightforward manner accompanied by a brief argument. Such a claim is fairly presented even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision."

A. Lack of Written Findings.

The failure to require written findings on aggravating factors which the jury relied upon violated appellant's constitutional right to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) As noted throughout the penalty phase arguments in this Brief, the jury was invited to impose the death penalty on inapplicable and improper sentencing factors. In the context of other arguments set forth above, respondent may argue that it requires speculation to say what evidence the jury used to base its verdict. Written findings would have alleviated this uncertainty, and it was therefore a constitutional violation to fail to require them.

Written findings are a necessary part of the jury's penalty determination, guaranteed under the Sixth and Fourteenth Amendments. (*Ring v. Arizona* (2002) 536 U.S. 584.)

B. Failure to Apply Beyond a Reasonable Doubt to Sentencing Decision.

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 these interpretations have been rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 and *Ring v. Arizona* (2002) 536 U.S. 584.

The failure to require that all aggravating factors be proved beyond a reasonable doubt, that aggravation must be weightier than mitigation beyond a reasonable doubt, and that death must be found to be the appropriate penalty beyond a reasonable doubt, vi-

olates federal principles of due process (see *Santosky v. Kramer* (1982) 455 U.S. 745, 754-767; *In re Winship* (1970) 397 U.S. 358), equal protection, the constitutional requirement of heightened reliability in the death determination (*Ford v. Washington* (1986) 477 U.S. 399, 414; *Beck v. Alabama* (1980) 447 U.S. 625), and the right to a jury determination of penalty. (*Ring v. Arizona, supra.*)

C. Lack of Jury Unanimity.

Under the California statutory scheme, there is not only no requirement of written findings, and no requirement that the jury apply the beyond-a-reasonable-doubt standard to the penalty decision, but there is no requirement that the jury be unanimous on its sentencing factors, even on the elements of the committing offense and the existence of other criminal conduct. In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the United States Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. Jury unanimity is also part of the Sixth Amendment guarantee set forth in *Ring v. Arizona, supra.*

D. Lack of Proportionality.

California has no procedure to compare death penalty cases statewide to achieve proportionality in sentencing. (See Argument XIX (B) above at p. 291.) Yet, 29 of the 34 states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review.

The lack of any requirement of inter-case proportionality violated constitutional requirements that the death penalty not be imposed arbitrarily or capriciously (*Gregg v. Georgia* (1976) 428 U.S. 153), that all potential mitigating factors be considered by the sentencer, and that a death-sentenced defendant receive meaningful appellate review. (See *Parker v. Dugger* (1991) 498 U.S. 308, 316.)[146] See the concurring opinion of Justice Mosk in *People v. Hines* (1997) 15 Cal.4th 997, 1081, in which he suggested that this Court has the inherent authority to modify a death judgment in order to secure uniformity.

E. Vague Standards.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see CALJIC 8.85, subds. (d) and (g)) and "substantial" (subd. (g)) acted as barriers to the consideration of proper mitigating evidence. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.) The use of this wording rendered those factors unconstitutionally vague, arbitrary, capricious, and incapable of principled application. (*Maynard v. Cartwright* (1988) 486 U.S. 356; *Godfrey v. Georgia* (1980) 446 U.S. 420; *Stringer v. Black* (1992) 503 U.S. 222.)

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[146] See *In re: Proportionality Review Project* (N.J. 1999) 735 A.2d 528 ["When the United States Supreme Court restored the constitutionality of the death penalty, it imposed a concomitant obligation on states to provide 'the further safeguard of meaningful appellate review' of every death sentence. *Gregg v. Georgia*, 428 U.S. 153 (1976)."]

F. Lack of Narrowing Special Circumstances.

The statutory scheme under which appellant was sentenced contains so many special circumstances that it fails to perform a narrowing function. Indeed the expressed intent of the drafters of the death penalty initiative language was to make the death penalty applicable to all murderers.

> And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.

(1978 Voter's Pamphlet, p. 34; emphasis added.)

Almost all felony murders, like the present case, give rise to a special circumstance for the underlying felony. First degree murders which are not established by the felony murder doctrine are necessarily established through premeditation and deliberation. Premeditated and deliberate murder may, in almost every case, be pled as lying-in-wait murder. (See dissenting opinion of Mosk, J., in *People v. Morales* (1989) 48 Cal.3d 527, 575.) Lying in wait is a special circumstance, and any premeditated/lying in wait murder can therefore be charged as special circumstance murder. In addition, the electorate has expanded to 32 the number of special circumstances qualifying for the death penalty, and includes aiders and abettors. (Penal Code sec. 190.2.) Thus, with very few exceptions, any first degree murder may be charged as special circumstance murder.

For these reasons, the California statute fails the requirement that the statute must, by rational and objective criteria, narrow the group of murderers upon whom the ultimate

penalty may be imposed. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305; *Zant v. Stephens* (1983) 462 U.S. 862, 878.)

G. Prosecutorial Discretion.

This Court has upheld the authority of the District Attorney to decide whether or not to include special circumstance allegations in an accusatory pleading, as well as whether or not the death penalty will be sought if the special circumstances are found to be true. (See *People v. Keenan* (1988) 46 Cal.3d 478, 505.) There is no statewide standard by which the decision to seek the death penalty may be reviewed, there is no oversight agency to insure uniformity, and there is no authority accorded the trial court to review the death decision for abuse of discretion. Therefore, there is a substantial risk of county-by-county arbitrariness, in violation of the Equal Protection Clause. (See *Bush v. Gore* (2000) 531 U.S. 98.)

As noted above, the death penalty may be sought in almost any first degree murder case. The decision to seek the death penalty under California law will inevitably be influenced by irrelevant considerations such as the size of the county budget, the notoriety of the victim, the race of the defendant, and the proximity of the next general election. These factors are particularly exaggerated where, as here, the prosecution is personally undertaken by an elected official. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420], and see dissenting opinion of Justice Broussard in *People v. Adcox* (1988) 47 Cal.3d 207, 275-276.)

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 called into question by the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Ring v. Arizona* (2002) 536 U.S. 584; *Blakely v. Washington* (2004) 542 U.S. 296; and *Cunningham v. California* (2007) 127 S.Ct. 856, and should now be reconsidered.

Such unprincipled, broad discretion is contrary to the principled decision-making mandated by *Furman v. Georgia* (1972) 408 U.S. 238.

H. International Law.

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (See *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 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. 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. 367, 409.)

For the foregoing reasons, appellant's death judgment was reached through an unconstitutional statutory process, and the death penalty must be set aside.

CONCLUSION

For the foregoing reasons, appellant's conviction must be reversed. In the alternative, the death penalty judgment must be reversed, or the matter must be remanded for further proceedings.

Date: June 12, 2008

Respectfully submitted,

CHARLES M. BONNEAU
Attorney for Appellant

STATEMENT OF COMPLIANCE

Pursuant to Rule 8.630 (b), Cal. Rules of Court, the foregoing Brief is in Times New Roman font, 13-point, and contains a word count of 78,000.

Date: June 12, 2008

CHARLES M. BONNEAU
Attorney for Appellant

CASE NAME: **PEOPLE v. RANGEL**
CASE NO.: **S076785**
COURT: **SUPREME COURT OF CALIFORNIA**

PROOF OF SERVICE BY MAIL

I declare that I am employed in the County of Sacramento, California. I am over the age of eighteen years and not a party to the within cause; my business address is 331 J Street, Suite 200, Sacramento, CA 95814.

On the dated below I served the APPELLANT'S OPENING BRIEF on the parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as follows:

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