No. S087569

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JUAN SANCHEZ, Defendant and Appellant.	Tulare County Case No. CR-40863

APPELLANT'S OPENING BRIEF

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

HONORABLE JUDGE GERALD SEVIER

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STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code, § 1239.)[1] This appeal is taken from a judgment which finally disposes of all of the issues between the parties.

INTRODUCTION

After two unsuccessful attempts that resulted in hung juries, the prosecution succeeded on its third attempt to convict appellant of the murders of Ermanda Reyes and her 16-year-old daughter Lorena Martinez. The prosecution also obtained true findings of the multiple murder and rape by foreign object special circumstances and secured a death verdict. The

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

prosecution's case at all three trials depended heavily on the statements and testimony of Reyes's five-year-old son, Oscar, and on appellant's confession. Neither, however, was reliable. Insofar as the instant trial differed from the earlier mistrials, it was due to the court's changed rulings insulating Oscar's testimony from impeachment and its admission of irrelevant, inflammatory evidence of appellant's homosexual activities, that distorted the jury's assessments of credibility and unfairly tilted the outcome in favor of the prosecution.

Oscar was asleep in his mother's bedroom when the shootings occurred elsewhere in the house. He was awakened at about 4:30 a.m. when his mother came into the bedroom after she had been shot. From under the bed covers, Oscar got a brief glimpse of a man who followed his mother into her bedroom. Oscar was unsuccessful in his attempt to wake his mother and sister who also had been shot. He then ran to his aunt Rosa Chandi's house where family, neighbors and friends gathered during the day to discuss what had happened. From the beginning and throughout the proceedings, Oscar was exposed to the suspicions and suggestions of others, including family members, the police and even his own therapist. Further, Oscar made numerous inconsistent, confabulated and fantastical statements regarding what had happened in his mother's bedroom the night she was killed. By the time of the instant trial, Oscar had repeatedly shown that he had no understanding of the importance of telling the truth or the difference between fact and fantasy. Nevertheless, the trial court allowed Oscar to testify at the instant trial and, when he claimed a near-complete memory loss, admitted his previously excluded out-of-court identifications to bolster his testimony, while sharply restricting appellant's cross-

examination and impeachment of Oscar with Oscar's prior incredible and contradictory statements.

After three days of police interrogation, during which appellant denied committing both the shootings and the sexual assault, the police were able to extract a limited, factually inaccurate confession from him, wherein he admitted the shootings, but could supply no real motive and continued to deny the sexual assault. Appellant's two prior juries also heard his confession, along with his recantation of his admissions, and failed to convict.

What the two earlier juries did not hear, and the instant jury repeatedly heard, was that appellant had been involved in a homosexual relationship with a relatively minor prosecution witness. At the prior two trials, the court had properly excluded this evidence because its prejudicial impact outweighed any possible relevance it might have had. There was no significant change in the evidence at the instant trial, certainly none that would overcome the prejudice arising from the historical, moral and religious condemnation of homosexuality, and the nature of the sexual allegations in this case.

In short, without the injection of the inflammatory evidence of homosexuality, as well as the other erroneous evidentiary rulings that skewed the evidence in the prosecution's favor, it is unlikely that the instant jury would have found the prosecution's case any more compelling than did the juries at the two earlier trials, which divided 9-3 in favor of conviction at the first trial and 10-2 in favor of acquittal at the second. Accordingly, appellant's convictions and the judgment of death must be reversed.

STATEMENT OF THE CASE

On May 26, 1998, an information was filed in the Tulare County Superior Court charging appellant, Juan Sanchez, with two murders, two special circumstances, and alleging that he personally used a firearm during the commission of both offenses. (1CT 252.)[2]

Count 1 charged appellant with the wilful, deliberate and premeditated murder of Ermanda Reyes in violation of Penal Code section 187, subdivision (a), on or about August 4, 1997. Count 1 also alleged a multiple-murder special circumstance, that appellant also murdered Lorena Martinez, pursuant to section 190.2, subdivision (a)(3). It was further alleged that appellant personally used a firearm during the commission of Count 1 within the meaning of section 12022.5, subdivision (a). (1CT 253.)

Count 2 charged appellant with the wilful, deliberate and premeditated murder of Lorena Martinez on or about August 4, 1997, in

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[2] "CT" refers to the clerk's transcript on appeal; "SCT" refers to the supplemental clerk's transcript on appeal; and "RT" refers to the reporter's transcript on appeal.

Appellant notes that the reporter's transcript contains the following duplicate, misnumbered pages: (1) RT volume 54 includes duplicate page 11226; page 11226 is also found in RT volumes 53 and 55; and (2) RT volume 55 includes (a) duplicate page range 11139-11156, which is also found in RT volume 52; (b) duplicate page range 11157-11226, which is also found in RT volume 53; (c) duplicate page 11226, which is also found in volumes 53 and 54, and duplicate page range 11227-11397, which is also found in RT volume 54.

To be clear, there is no duplication of content, only page numbering. All pages appear in their proper sequence in the reporter's transcript. Therefore, where the instant brief cites different reporter's transcript volumes for the same page or pages, this is not an error; each such record citation is independently accurate.

violation of section 187, subdivision (a). (1CT 253.) Count 2 also contained a special circumstance allegation that appellant committed rape by instrument in violation of section 289, within the meaning of section 190.2, subdivision (a)(17)(K). It was further alleged that appellant personally used a firearm during the commission of Count 2, within the meaning of section 12022.5, subdivision (a). (1CT 254.)

On May 27, 1998, appellant was arraigned and the Tulare County Public Defender was appointed as counsel. Appellant entered a plea of not guilty to all counts and denied both the gun use enhancements and the special circumstance allegations. (1CT 255.)

On July 8, 1998, the prosecution filed a "Notice of Intention to Seek the Death Penalty and Introduce Aggravating Evidence" involving the circumstances of the present offense, including victim impact, and one prior felony conviction involving the "Transportation of a Controlled Substance committed by the defendant in 1989." (1CT 268-269.)

There were three guilt phase trials, two resulting in mistrials. Prior to the first trial, in limine motions were heard on December 11, 14, 17, 23, 1998, January 11, 12, 13,14, 25, 26, 27, 28, February 18, and March 10, 11and 12, 1999. (4CT 983-986, 988, 995, 1038-1039; 5CT 1163-1164, 1165-1166, 1167-1168, 1169-1170, 1182-1183, 1184-1185, 1186-1188, 1189-1190, 1192, 1234-1236, 1239-1241, 1242.) The defense motions adjudicated on those dates included, but were not limited to, motion to exclude evidence of appellant's sexual relationship with Hector Hernandez (Evid. Code, § 1101, subd. (b); motions re: capacity of minor (Oscar Hernandez) to testify and for a hearing to determine Oscar's reliability (Evid. Code, §§ 701 & 702) (2CT 482-531; 4CT 1041-1094); motion to exclude Oscar's pretrial identification of appellant (3CT 759-765); motion

to limit aggravating evidence at penalty trial (4CT 857-878); and motion to suppress statements made by appellant (7CT 1696-1756).

On December 11, 1998, the court granted appellant's motion to exclude the sexual nature of his relationship with Hector Hernandez pursuant to Evidence Code section 352. (2RT 272-273; 10RT 1979-1980.) On February 19, 1999, the trial court filed written rulings denying appellant's motions to find Oscar incompetent to testify and to exclude his testimony for lack of personal knowledge. (5CT 1194, 1197-1198.) On March 11, 1999, the court heard additional motions, issued some oral rulings and deferred some evidentiary rulings pending further development at trial. (10RT 1978-2105.) On March 29, 1999, the court filed additional in limine rulings denying appellant's motion to suppress his statements and the motion to exclude Oscar's initial identification of appellant when shown a single photograph, but excluding evidence of Oscar's subsequent identifications of appellant in a photo and live lineup, finding them unduly suggestive. (6CT 1341-1345.)

The first trial commenced on March 16, 1999. (5CT 1313.) In clarifying its prior orders, the trial court excluded Oscar's pretrial identifications of appellant in both the single-photo showup and the six-photo lineup. (16RT 3319.) On April 30, 1999, after presentation of the evidence, arguments, jury instructions and deliberations, the jury deadlocked, the court declared a mistrial, and the jurors were discharged (6CT 1586; 27RT 5963, 5966, 5970-5971; 48RT 10088 [jury split 9-3 in favor of guilt].)

Prior to the second trial, appellant re-noticed all prior in limine motions. (7CT 1651-1756.) On June 3 and 17, 1999, the trial court issued orders adopting its prior rulings. (7CT 1831-1832; 8CT 1940-1942.) The

second guilt phase trial began with jury selection on June 7, 1999. (7CT 1883-1884.) On July 19, 1999, the second jury deadlocked; a mistrial was declared, and the jurors were discharged. (9CT 2218; 48RT 10073, 10075, 10080-10081; 48RT 10088 [jury split 10-2 in favor of acquittal].)

Prior to the third trial, which is the subject of this appeal, a different prosecutor was assigned to the case. (9CT 2282.) On August 2, 1999, appellant re-noticed his motions in limine. (9CT 2221-2254.) On September 1, 1999, the court filed its ruling on the renoticed motions, reiterating its prior rulings as modified and applied at the second trial. (9CT 2313.) The instant trial began on September 14, 1999. (9CT 2418.) The prosecution began presenting its case on September 23 and rested on October 18, 1999. (9CT 2469-2470; 10CT 2550-2551.) The defense began presenting its case the same day and rested on October 29, 1999. (10CT 2551-22569, 2579-2581, 2596-2598, 2603-2609.) The prosecution began presenting its rebuttal on October 29, and rested on November 1, 1999. (10CT 2610-2614.)

Jury deliberations began on November 3, 1999. (10CT 2766-2767; 76RT 15339-15341.) On November 4, 1999, the jury reached its verdicts, finding appellant guilty on all counts, and all of the gun use and special circumstance allegations were found true. (10CT 2772; 76RT 15349-15350.)

On November 8, 1999, the penalty phase began. (10CT 2788.) On November 10, 1999, the jury retired to begin its deliberations. (11CT 2881.) On November 12, 1999, the jury reached death verdicts for both counts. (11CT 2885-2886.)

On February 29, 2000, the defense filed motions for a new trial (11CT 2939-3017), and to modify the verdict. (11CT 3018-3040.) On March 17, 2000, the court denied both motions. (11CT 3067-3068.)

On March 31, 2000, appellant was sentenced to death on Counts 1 and 2. The court also imposed the upper term of 10 years in state prison for personal use of a firearm in Count 1. It further imposed a consecutive one-third of the upper term ("3.34 years") in state prison for personal use of a firearm in Count 2. The court stayed the sentences on the gun use enhancements. (12CT 3106-3108, 3143-3145.)

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STATEMENT OF FACTS

I. The Guilt Phase

A. Introduction

Appellant spent Saturday evening, August 2, 1997, with Ermanda Reyes and saw her again on the morning of August 3. Appellant spent part of the evening of August 3 with his friend, Hector Hernandez, leaving Hector's house at about 11:30 p.m. Appellant returned home and went to bed. Mary Lucio, appellant's common-law wife, had gone to sleep in her daughter's room but joined appellant in their bedroom at about 4:30 a.m. and saw him asleep in bed when she woke up at about 6:30 or 7:00 a.m.

At about 4:30 a.m on August 4, 1997, Reyes's neighbor, Evelyn Vanciel was awakened by the sound of three gunshots. At about that time, Reyes's five-year-old son, Oscar Hernandez (Fennell), who was sleeping in his mother's bed, woke up when his mother came into the room and collapsed. When Oscar could not wake his mother or his sister, Lorena Martinez, he ran to the his aunt's house and she called the police.

Both Reyes and Lorena[3] died of gunshot wounds; Lorena had been sexually assaulted. Based on a photo-identification by Oscar and a name and address provided by his brother, Victor Martinez, appellant was arrested on August 4 for these crimes.

Appellant was interrogated by four or five different officers over a three-day period. He repeatedly denied committing any of the crimes. On the third day, however, after continued interrogation, police obtained a confession. Appellant stated he shot the victims but denied having sexually

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[3] Because there are several witnesses surnamed Martinez, Lorena Martinez will be referred to as "Lorena."

assaulted Lorena. At trial, appellant denied committing all of the charged crimes.

B. The Investigation

On August 4, 1997, Rosa Chandi was living in Porterville at 680 North Wellington Street, two doors from Reyes, her former sister-in-law; Reyes had been married to Chandi's brother Efrain Martinez. (62RT 12510, 12530, 12571; 68RT 14004.) At about 5:30 a.m., Oscar Hernandez, Reyes's son from a subsequent relationship, ran to her house to report that he could not rouse his mother or sister, Chandi walked back with Oscar to his house. (62RT 12514; see 2CT 308.) The front door was open. (*Ibid.*) With Oscar, Chandi went into the kitchen area, where she saw a trail of blood leading into Reyes's bedroom. (62RT 12515.) There was also blood on a wall in the kitchen. (62RT 12516.) Chandi could see into Reyes's room, but she did not go in. (*Ibid.*) As Chandi went toward Lorena's room, she saw blood on the wall in the kitchen area. (62RT 12516.) When she entered Lorena's room, Chandi saw Lorena sitting on the floor leaning against her bed. (*Ibid.*) A sheet with blood on it was thrown over her; her left side was bare, and her underpants were down around her thighs. (*Ibid.*) According to Chandi, "Oscar noticed something was wrong. I guess 'cause the way I behaved, you know, I was acting, and he told me to dial 9-1-1." (62RT 12517.) Chandi tried to call 9-1-1 from the phone in the kitchen, but the call did not go through. She then left the house with Oscar and rang a neighbor's doorbell. (62RT 12517.) When no one answered, Chandi took Oscar back to her house, where her family gathered in the living room while she called 9-1-1. (62RT 12557-12559.) Chandi was hysterical, yelling and crying. (62RT 12726-12727; 65RT 13338-13340.) Oscar, still with her,

looked confused. (62RT 12728 .) At some point he was taken into another room. (62RT 12728-12729.)

Chandi's son, Michael Martinez, and his girlfriend, Areli Orosco, who were staying at Chandi's house, went to the Reyes residence after Chandi called 9-1-1. (63RT 12918-12919.) Michael went in and saw Reyes's and Lorena's bodies (63RT 12918-12924); Areli waited outside (63RT 12943). Michael and Areli then returned to Chandi's house. (69RT 14130.)

Chandi's daughter Melissa then called her uncle Efrain Martinez. (62RT 12540-12542.) Martinez and his brother Ben were staying at their mother's house. (62RT 12523, 12540-12541, 12557, 12571-12572.) Victor, who lived with his mother and Oscar, had spent the night there, after a family picnic. (62RT 12532, 12571.) Martinez, his brother, and Victor then drove to Chandi's house and went inside, just before 7:00 a.m. (64RT 13099-13100; 69RT 14140-14141.) When they arrived, Victor, who by then "knew what had happened" and was aware that appellant's involvement was suspected, talked to Oscar about what he had learned. (64RT 13110.) Oscar recalled hearing people at Chandi's house talking about what had transpired at his mother's house and who might have been responsible. (75RT 15051-15052.)

Meanwhile, law enforcement personnel were processing the Reyes residence. Officer Ty Lewis, with the Porterville Police Department, was dispatched to the house at 5:45 a.m. and arrived within minutes. (61RT 12355-12357.) Other police officers and fire department emergency personnel were already on the scene. (61RT 12357-12359, 12363.) Detective Eric Kroutil arrived at about 6:20 a.m. (55RT 11171.)

The bodies of Reyes and Lorena were found in their respective bedrooms. (62RT 12754-12755, 12758; 55RT 11180-11182.) A light was on in Lorena's bedroom. (55RT 11184.) The stove light in the kitchen and a vanity light in Reyes's bedroom were the only other lights on in the house. (55RT 11186.) The window in Victor's bedroom was wide open with the screen removed, the sliding glass door at the back was open, and the front door was open. (55RT 11269, 11173-11175, 11182-11183.) A small kitchen knife was found on Lorena's bed. (55RT 11188; Peo. Exh. 50.)

Three bullets were recovered at the crime scene: one was recovered from inside the entertainment center (55RT 11192), a second was found in the mattress in Lorena's bedroom (55RT 11200), and a third was later recovered from Lorena's clothing (55RT 11212). All had been fired from the same gun, a 9mm semiautomatic handgun. (58RT 11829-11831, 11836.) Two unexpended cartridges were also found in Lorena's bedroom. (55RT 11206.) Autopsies showed that Reyes had been shot once (52RT 11089-11090; Peo. Exh. 1), and Lorena twice (52RT 11061, 11067; Peo. Exh. 2). Lorena's underpants had been cut and were pulled down to above her knees (55RT 11185); she had been sexually assaulted and evidence was presented consistent with anal and vaginal penetration (52RT 11078-11080; 61RT 12427, 12432-12435, 12437-12444).

Officer Lewis inspected the scene briefly, gave instructions on maintaining logs and securing the scene, briefed Kroutil, and then went up the street to Chandi's house. (61RT 12359-12360, 12363-12365, 12380.) Lewis spoke briefly with Chandi at the front door; she was crying. (61RT 12385.) He then entered and conducted several 10 to 15 minute interviews, each at the kitchen table, while other family members were in the living

room. (61RT 12366, 12383-12384, 12386.)[4] He was seeking information about possible suspects, and to determine whether anyone there had been at the crime scene. (61RT 12365, 12367-12368.)

Lewis interviewed Chandi first. (61RT 12385-12386.) According to Lewis, when asked who she thought might have committed the crime Chandi said she was not sure, but had seen a "new boyfriend" at Reyes's house "a couple [of] evenings before" the homicides. (61RT 12477.) She described the man as Hispanic, about 40 years old, 5'11" tall, with brown hair, brown eyes, a beard and a mustache, and said he drove a yellow truck. (61RT 12477.) She did not know the man's name. (61RT 12476.) At trial Chandi denied describing the man as Reyes's "boyfriend" (62RT 12564, 12568), and confirmed that she had not seen him at Reyes's house before that weekend (62RT 12526).

Lewis also spoke briefly with Michael and Areli, and with Chandi's daughters Michelle, Melissa and Melinda, her nephew Benny and her boyfriend Francisco. (61RT 12365; 62RT 12510-12511.)

Lewis interviewed Oscar last. (61RT 12368, 12476.) Oscar was calm; neither talkative nor crying. (61RT 12368-12369.) He was "pretty much a five year old boy," and Lewis "had to make things real easy for him to understand . . . ." (61RT 12368.) Oscar told Lewis that "he had been sleeping in his mother's bedroom on the floor and that he awoke to a man's loud voice, and there was a man standing in the bedroom." (61RT 12375.) Oscar answered Lewis's questions, "up until a point," but then became nonresponsive and withdrawn, and essentially "shut down." (61RT 12369,

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[4] Officer Lewis referred to his report (2CT 306-310) during his testimony (e.g., 61RT 12461).

12375, 12393.) Lewis ended the interview without getting the name or description of anyone Oscar might have seen at his house the morning of the homicides. (61RT 12394-12395, 12475.)

Detective, later Sergeant, Chris Dempsie, also with the Porterville Police Department, arrived at the Chandi residence at about 7:00 a.m. and also interviewed Oscar. (64RT 13203.)[5] This time, Oscar said he had been sleeping the night before in his mother's bed, when he woke to the sound of firecrackers; that he saw his mother, who was bleeding, walk toward the phone near the bed, grab the phone, and fall backwards; and that there was a man in the room with her. (54RT 13204-13205.) Oscar described the man as having a "whisp" on his chin, and said he was the man who had bought him ice cream. (64RT 13205-13206.) He also said he heard his sister screaming, that she too was bleeding, and that there was blood on the walls. (64RT 13207.) He tried to open his mother's eyes and wake her up, and then ran outside and to his aunt Rosa Chandi's house. (*Ibid.*) Dempsie noted that Oscar was crying and shaking. (64RT 13207-13208.)

Dempsie then interviewed Victor. Asked whether he knew anyone who had given Oscar ice cream, Victor eventually remembered the name "Juan," based on the tattoo he had seen on the man's hand. (64RT 13208-131209.) Victor said Juan lived in one of the apartments on Putnam Street, near the drive-in theater, and drove a white and yellow pick-up truck. (64RT 13209, 13179; 2CT 312.) Victor had seen Juan at his own house on Saturday, August 2. (64RT 13171.) Juan left at some point and returned with beer. (*Ibid.*) Juan also brought ice cream for Oscar. (64RT 13116.)

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[5] Detective Dempsie referred to his report (2CT 311-313) during his testimony (e.g., 64RT 13206-13207).

Victor recognized Juan from when he and his mother lived on Putnam Street, near appellant's house (64RT 13104, 13122-13123), but Victor had not seen him since then until that Saturday (64RT 13122, 13124, 13170-13171). Chandi's daughter Michelle, like Victor, recalled that the first time she saw appellant was on Saturday, August 2, when he was talking with Reyes outside her house. (62RT 12722-12725.) Victor said he saw Juan again at his house Sunday, in the morning. (64RT 13124-13125.)

With the information provided by Chandi and Victor, detectives located appellant's parked pick-up truck and, using vehicle registration information, obtained a prior booking photograph of appellant. (64RT 13219-13220; Peo. Exh. No. 75.) Detective Kroutil then went back to Chandi's residence and spoke to Oscar. When he showed Oscar the photo, Oscar said it was "Juan," the man who was in the house when his mother was bleeding. (64RT 13220-13221, 13226.) Kroutil believed that Oscar had gotten the name from Victor. (64RT 13221.)

At about noon, Dempsie interviewed Oscar again, in the "soft interview room" at the Porterville police station. (2CT 313, 492-509.) When Dempsie showed Oscar a six-man photo-lineup, Oscar identified appellant as the man who had bought him ice cream and was in his house. (2CT 498; 64RT 13231-13233; Peo. Exh. 76.)

As noted above, Victor testified that the only time he had seen appellant at the Wellington house was Saturday, August 2, and Sunday morning, August 3. (64RT 13122, 13124, 13170-13171.) The only time Chandi and her daughter Michelle saw appellant at the Reyes house was also on Saturday, August 2. (62RT 12526, 12722-12724.)

Felicita Mata, a friend of Lorena's, claimed to have seen appellant at Reyes's house at a barbecue about a month before the homicides, and once

again when she drove past the house and saw Reyes and appellant engaged in a loud, "boisterous" conversation. (57RT 11684, 11689-11690, 11694, 11698.) However, Lola Ortiz, who saw Reyes and Lorena nearly every day and attended all of Reyes's barbecues and parties that summer had never seen appellant at any of these barbecues or parties. (70RT 14273, 14275.) In fact, she had never seen appellant at Reyes's house. (70RT 14274-14275.)

Myrna Feliciano, testified for the first time at the instant trial. She stated she saw appellant at Reyes's house twice on Sunday, August 3, and once during the night on August 4. At the time, Feliciano was living at 631 North Wellington Street, diagonally across from Reyes's house. (56RT 11543.) She testified that she had lived on Wellington for about a year, since "January 1997." (56RT 11544; 11567.) More than two years later, although she could not remember the dates, she claimed she could remember the times she had seen appellant at Reyes's house the weekend of the homicides. (56RT 11570.) She testified she saw appellant and Reyes talking outside Reyes's house at about 3:00 p.m. on Sunday afternoon. (56RT 11552-11555.) Reyes was sitting near a tree facing Feliciano; appellant was standing, facing Reyes. (56RT 11552-11553.) She said that she later saw appellant drive by in his truck at about 9:00 or 9:30 p.m. Sunday evening. (56RT 11556-11557.) She said that the driver was wearing a "cowboy" hat and that she could only see the side of the driver's face. (56RT 11557, 11585.)

On August 4, at about 1:30 a.m., Feliciano went outside for a smoke and saw a man talking to Reyes in her garage. (56RT 11558-11561.) She saw Reyes gesturing. (56RT 11562-11563.) The man was facing Reyes and all Feliciano could see was the "back of his head" (56RT 11588); she

could not hear anything that was being said. (56RT 11591.) After finishing her cigarette, Feliciano went back inside. (56RT 11594.)

Feliciano testified that she had seen appellant's yellow and white truck drive by Reyes's house occasionally during the months preceding the homicides. (56RT 11548-11549.) She did not see the truck on August 3 or on August 4, when she said she saw appellant talking to Reyes. (56RT 11550, 11591.) She did not recall seeing appellant or the yellow truck at Reyes's house on Friday, August 1, or Saturday, August 2. (56RT 11578, 11579.)

Feliciano testified that she had a habit of looking at her watch. (56RT 11555.) On August 3, she said that she went to bed at midnight "or something like that" (56RT 11558), got up at 6:00-6:30 a.m. "somewhere around then" (56RT 11565), heard nothing during the night (56RT 11572), "guess[ed]" she took the children to school around 7:00 a.m. (56RT 11574), spoke to police officers sometime later that morning (56RT 11565), and then went to Chandi's house, but could not tell whether that was "early morning or late, lunchtime or whatever" (56RT 11574).

Hector Hernandez, a long-time friend of appellant's, testified that appellant came to his house Sunday evening, August 3, at about 8:00 p.m. (55RT 11306, 11309.) At Hernandez's request, appellant then went to run some errands, and returned at about 10:00 p.m and left again at about 11:00 p.m. (55RT 11309-11310, 11313.) Appellant had agreed to give Hernandez a ride to work the following morning, but did not show up. (55RT 11323.)[6] Hernandez phoned his brother Eddie at about 5:00 a.m.

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[6] Hernandez also testified that he had had a sexually intimate relationship with appellant. (62RT 12579-12580.)

Monday morning, and his brother picked him up and drove him to work. (62RT 12751-12752.)

Appellant lived with Mary Lucio, his common law wife, and their eight-year-old son John ("J.J.") Sanchez (56RT 11455, 11500); Lucio's teenage daughter Tammy Lucio, her son Henry Lucio and her nephew Michael Stevens were staying with them as well. (56RT 11461.) Henry Lucio was with his friend Donnie Locke on August 3. (62RT 12651.) After leaving church, Henry Lucio and Locke went to Lucio's house; Locke stayed there untill about 10:00 or 11:00 p.m. when he went to get his girlfriend from work. (*Ibid.*) Donnie and his girlfriend picked up something to eat and some movies and went back to the Lucio house. (62RT 12652.) When they got back to the house, at about midnight, appellant's truck was not there. (*Ibid.*) Locke heard the truck drive up at about 1:30 a.m. or earlier. (62RT 12653-12654, 12656 [witness testified on July 6, 1999 that appellant arrived between 12:45 and 1:00].)

Locke saw appellant enter the house and go directly to his bedroom. Appellant was still in his bedroom when Locke left at about 3:30 a.m. (62RT 12654-12656.)

Mary Lucio testified that she went to bed Sunday night at about midnight in her daughter Tammy's bedroom. (56RT 11466-11467.) She got up at about 3:00 a.m. when Tammy and her cousin Michael came home and spent some time with Tammy, Michael and Henry in the living room. (56RT 11467.) At about 4:30 a.m. she retired to the bedroom she shared with appellant, who was already in bed at that time; he was there when she woke up at 6:30 or 7:00 a.m. (56RT 11465, 11468-11469.) Lucio testified that it would not have been possible for appellant to have left the house between 4:00 and 7:00 a.m. without her noticing because the bedroom door

squeaked and her truck was loud. (56RT 11473-11476.) She acknowledged that she had previously told the police appellant could have left unnoticed, but she had meant from outside the house and not from inside their bedroom. (56RT 11472, 11474.)

Oscar testified repeatedly that he did not remember what happened the day his mother and sister were killed. (59RT 11967, 11970, 11981-11982, 11988-11989, 11991 ["I don't remember all of this"], 12002 [same].) When the prosecutor pointed to appellant, sitting at counsel's table, and asked Oscar whether he had seen him at his house the night his mother was killed, Oscar first said yes, but then said he did not remember seeing appellant. (60RT 12216, 12218.)[7]

C. Appellant's Arrest, Interrogations and Confession To Shooting Reyes and Lorena

Appellant was arrested at his home on Monday, August 4, at about 11:00 a.m. (52RT 11141-11143.) He was taken into custody and interrogated several times, over the course of three days: first on Monday, August 4, by Detective Kroutil (8RT 1628, 1649); then on Tuesday, August 5, by Detective Steven Shear (8RT 1521; Court Exh. 8); and finally on Wednesday, August 6, by Detective Steven Paul Ward (9RT 1755-1756) and by Sergeant, later Lieutenant, Ernie Garay (9RT 1797). Until the interrogation by Garay, appellant had denied any involvement in the charged crimes. Garay testified that appellant "went back and forth" as to what he had done before confessing to killing Reyes and Lorena (9RT

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[7] Defense counsel presented the expert testimony of Dr. Susan Streeter, Ph.D., on the reliability and suggestibility of child witnesses (71RT 14335-14396), and called Wanda Newton, Oscar's treating counselor (74RT 14759-14819).

1851). During the videotaped portion of Garay's interrogation, appellant said he entered the Reyes residence by the front door, shot Reyes and Lorena with a .22, left immediately, tossed the gun out the window of his truck, and went home. (13CT 3450-3451, 3453, 3455.)[8] He denied having any sexual contact of any sort with Lorena or Reyes. (13CT 3475, 3478, 3481-3482.)

At trial appellant testified that he confessed because he had been threatened and coerced, but that he was in fact innocent. (66RT 13602-13605.)[9] He acknowledged being at Reyes's house Saturday, August 2, and said he brought a six-pack of beer and some ice cream for Oscar. (66RT 13560-13561.) Sunday night he went to his friend Hector Hernandez's house at about 7:30 or 8:30 p.m., left to run some errands and then returned, leaving finally at about 10:30 or 11:00 p.m. (66RT 13567, 13571.) He went straight home; his wife and son were out. (66RT 13571.) He went to the drive-in, thinking they might be there, but decided not to go in and instead went back home. (*Ibid.*) He was watching television in bed when his wife and son returned. (66RT 13572.) He went to sleep when his wife came to bed, and awoke Monday morning when she got up to go to work. (66RT 13573-13574.)

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[8] At trial an acquaintance of appellant's, Lee Lewis, testified that some time in 1991 or 1992, when he first met appellant, appellant had shown him a .22 revolver he had purchased. (66RT 13551-13552.) Appellant's friend Ron Mena, who had also known appellant for about two years, testified that he had never seen appellant with a gun, nor ever heard him mention a gun. (57RT 11675, 11680-11681.)

[9] Defense counsel sought unsuccessfully to suppress appellant's confession on multiple grounds, including that it was obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436).

Defense expert Richard Ofshe, Ph.D., a social psychologist, described how the misuse of police interrogation tactics, including threats and coercion, can result in false confessions. (72RT 14580-14582, 14587-14600, 14652-14653, 14673-14675, 14690-14691.)

Joseph Buckley, an employee of a private firm in the business of assisting law enforcement agencies, private companies, attorneys and others with criminal investigations and interviews (75RT 14946-14948), testified in rebuttal regarding police interrogations and resulting confessions. (75RT 14968-14973).

D. Forensic Evidence

Department of Justice employee Delia Frausto-Heredia testified that blood could be detected on clothing even after it had been washed. (61RT 12349.) No blood was found on the items of appellant's clothing that had been seized from his house. (58RT 11907-11908; 61RT 12335-12336, 12347-12350.) Police searched for shoes with a "running W" pattern to see if they matched the bloody "running W" shoe print found at the crime scene, but found no such shoes at appellant's house. (55RT 11386.) The fingerprints found on the doorknob of Lorena's bedroom were not appellant's. (60RT 12281; 61RT 12309-12310.) The fingerprint found on the open window of the northwest bedroom had a similar pattern to the two fingerprints detected on the knife found near Lorena's body, but none matched appellant's prints. (60RT 12283-12286, 61RT 12300, 12309.) The three fingerprints detected on a paper bag in Lorena's bedroom did not match appellant's prints, and did not belong to anyone who lived at Reyes's house. (61RT 12309-12310.) The prints detected on the doorjamb leading to the laundry room and on the back sliding door could not be matched to appellant. (61RT 12312-12313.) No semen was found on Lorena's

clothing or in the sexual assault kits taken from Lorena and Reyes. (61RT 12332, 12334, 12336-12337.) Nor was semen found on any of the bedding. (61RT 12335, 12351, 12352, 12353.) Reyes had gun shot residue on her hands which could have been caused by holding the gun when it was fired, or her hands could have been near the gun when it was fired. (52RT 11130-11131; 13CT 3417.) The report of the gun shot residue tests taken of appellant stated, "No particles of gunshot residue on either the right hand or left hand adhesive lift sample" (13CT 3418), and no gunshot residue was found in appellant's pickup. (13CT 3419; 74RT 14819-14820 [stipulation to Def. Exhs. MM, NN, OO.) Blood found at the crime scene did not match appellant's blood. (61RT 12339-12340, 12342.) 23CT 4880-4883; 61RT 12347-12350.) Hairs found on Lorena's stomach, in her right hand, and under her left forearm were consistent with Reyes's head hair. They did not match hair samples taken from appellant. (59RT 12102-12106, 121011.)

The prosecution sought to prove that the small knife found at the crime scene (Peo. Exh. 50; 63RT 12875) was the mate to a larger knife found at appellant's home (Peo. Exh. 48; 63RT 12876). The defense presented evidence that Mary Lucio had purchased two kitchen knives at a 99-Cent Store, and that one been lost. (56RT 11510-11512.) Prosecution metallurgy expert Michael Smith testified that the knife found at the crime scene and the larger one found at appellant's home were similar in some ways (63RT 12830-12832, 12839, 12841), but he could not attest that the knife found near Lorena was the mate to the knife found at appellant's home, or that the two knives were part of a set purchased at the same store. (63RT 12863.) He also acknowledged that the knife handles were not produced by the same molds (63RT 12867); that the tangs were different (63RT 12842-12844); that the letters on the knives were stamped differently

and by different machines (63RT 12871-12872.); and that the blades themselves, including the steel they were made from, differed in several respects (63RT 12887, 12902).

In short, no forensic evidence tied appellant to the crimes.

II. The Penalty Phase

A. Evidence In Aggravation

Rosa Chandi testified to the lingering traumatic effect of the events of August 4. (77RT 15498-15499.) Chandi's daughter Michelle described the impact of the loss of Lorena's friendship (77RT 15500-15502), and Victor described the impact of the deaths of his mother and sister, both of whom he missed (77RT 15504).

Tammy Lucio, appellant's step-daughter, described an incident when appellant gave her a "gentle tap" on the head (77RT 15506); she denied that appellant ever hit or struck her (77RT 15507). She acknowledged that appellant once struck her mother in the eye, prompting the police to come and necessitating hospital treatment. (77RT 15507-15508.) Mary Lucio confirmed that she went to the hospital after appellant hit her when they had been arguing about his talking to other women. (77RT 15520-15521.) Lucio also testified that appellant had a quick temper when he was drunk, and that he had damaged his truck when she got angry at him for being at a neighbor's house. (77RT 15522-15523.) Martha Sanchez, appellant's sister, testified that she saw appellant strike Lucio twice, including with a closed fist. (78RT 15585-15586, 15589.)

Solomon Bravo and Israel Orosco testified regarding a time when appellant became so angry that he picked up a chair, but did not throw it. (77RT 15531-15532; 78RT 15574-15578.)

B. Evidence In Mitigation

A number of appellant's friends and relatives testified to his good character and described his difficult upbringing. Mary Lucio, for example, testified that appellant had been a devoted father to their son J.J., tending to him as an infant and showing him love and affection. (78RT 15615, 15624.) J.J. himself testified that he loved his father and described the things they did together. (78RT 15625-15627.) Lucio's daughter Pearl Mascorro, who first was introduced to appellant when she was 13, testified to her love for appellant, who was the only father she had ever known, and said that her son Carlos calls him Grandpa Juan. (78RT 15631-15636, 15367.) Appellant never threatened her or raised a hand to her, and he taught her to be respectful of her mother. (78RT 15636-15638.) Pearl's son Carlos confirmed that appellant had been a grandfather to him and that he loved him very much. (78RT 15645-15646.)

Jose Luis Sanchez Ramirez (Jose Sanchez), appellant's older brother, testified that their father was rarely present and failed to provide adequately for their family. Appellant was only six or seven years old when their father died. Their brother Raul Sanchez became head of the household. It was hard for the children because they had to begin working picking cotton when they were little. Their mother made food to sell, along with the oranges and lemons their uncle would bring them. Appellant was little but also helped. Jose Sanchez testified that he believed in his brother, and loved him, and would still want a relationship with him if he were sent to prison. (78RT 15653, 15657.)

Raul Sanchez confirmed that he took over as the head of household when he was 15, and appellant was nine. Appellant was like his son; he loved appellant and believed in him. (78RT 15684-15686.)

Sandra Sanchez, appellant's sister-in-law, testified that appellant was a part of her family and that she loved him. Her four daughters loved him dearly. He treated them well, encouraged them to get good grades, and visited them often. She testified that she still believed in appellant, and he would still have value for her if he were sent to prison. (78RT 15664-15666.)

Appellant's nieces, Adrianna Sanchez, Viviana Sanchez, and Sonia Gomez, testified that they had known appellant all their lives. He encouraged them to get an education so they would have a better life than he and their father had when they were growing up. Appellant motivated them. They testified they would stay in contact, rely on his advice, and still believe in him. Appellant was always there for them, and they looked forward to his arrival at their father's barbeques on weekends. (78RT 15667-15675.)

Jose J. La Calle, Ph.D., a clinical and forensic psychologist, testified that he had reviewed various transcripts and records, evaluated and tested appellant, and interviewed many family members, friends, and women who had a romantic relationship with appellant. (79RT 15777-15781.) Dr. La Calle administered the Spanish version of the WAIS-R Adult Intelligence test to determine appellant's IQ and obtain information regarding possible organic brain syndrome, appellant's moods and personality characteristics, and his ability to communicate and to deal with stress. Dr. La Calle testified that appellant's IQ is 84, "the lowest end of the dull normal intelligent level." An IQ of 79 is the borderline where mental retardation begins. (79RT 15782-15784.) A person with an 84 IQ would not excel in school, and appellant only sporadically attended about three years of elementary school. Dr. La Calle also opined that appellant's Spanish

vocabulary was at about the third or fourth grade level. Appellant could problem solve in mechanics, but because of his very low abstract reasoning ability, his problem solving in abstract concepts was very poor. Also, appellant's short term attention span was poor and his recollection, especially as to abstract concepts was limited. Appellant gave up easily. He had a "short-fuse," meaning a low tolerance threshold to stress. (79RT 15785-15787.) Dr. La Calle clarified that "short fuse" did not mean "violent reaction" or "blowing your top," nor did it mean prone to physical violence. (79RT 15790.)

Officer Mike Harvey, who oversaw inmates at the jail, testified that no disciplinary actions had been brought against appellant. (78RT 15810-15812.)

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ARGUMENT

I

APPELLANT WAS DEPRIVED OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, WITNESS CONFRONTATION AND A RELIABLE GUILT AND PENALTY DETERMINATION BY THE ADMISSION OF THE TESTIMONY OF OSCAR HERNANDEZ WHO WAS NOT COMPETENT TO TESTIFY

A. Introduction

By necessity, the prosecution's case against appellant rested on the statements and testimony of a child witness, Oscar Hernandez, who was age five when he saw his mother die and seven at the time he testified at appellant's trial. Other than the perpetrator or perpetrators, Oscar was the only other person in the home when his mother and sister were killed. He was awakened by the sound of shots in another part of the house. He saw his mother come into the bedroom after she was shot and he may have seen another person or persons in the room at that time. Because of the importance of what he saw, Oscar was repeatedly interviewed by police officers and district attorney investigators. Over the course of these interviews, Oscar made up an assortment of contradictory and fantastical stories. When he testified in court his primary aim was to get off the witness stand as quickly as possible and go home. (16RT 3411-3412; 17RT 3633-3634 [when asked whether he was doing this to get out of here, Oscar answered, "yeah"].) Based on the mounting evidence that Oscar had no conception of his duty to tell the truth, appellant moved before each trial to exclude Oscar's testimony for lack of competency, within the meaning of Evidence Code section 701. (Evid. Code, § 701, subd. (a)(2).) The court repeatedly denied the motion.

Yet, each time he testified, Oscar showed that he was not a competent witness, as required by Evidence Code section 701. Even if he understood the difference between truth and fantasy, Oscar had no understanding that his duty as a witness was to tell the truth, not just to say what he thought would get him off the witness stand as quickly as possible. Nevertheless, the court allowed Oscar to testify at the third trial, abdicating its non-delegable duty to ensure that the jury hear only competent evidence. Perhaps no greater prejudice exists in a criminal case than permitting a capital murder and death verdict to be based on incompetent, fundamentally unreliable evidence. That is precisely what occurred here. In erroneously allowing Oscar to testify, the trial court denied appellant a fair trial, as well as his rights to confrontation, due process and a reliable judgment. (U.S. Const., Amends. 6th, 8th and 14th; Cal. Const., art. I, §§ 15 and 17.) Appellant's convictions must be reversed and the judgment of death set aside.

B. Procedural Background

1. In Limine Motions

In September 1998, prior to appellant's first trial, defense counsel filed a motion in limine to preclude Oscar from testifying on the grounds that he was not competent within the meaning of Evidence Code section 701, subdivision (a) ("section 701").[10] (2CT 482-531.) In support of the

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[10] Evidence Code section 701, subdivision (a), provides:

> A person is disqualified to be a witness if he or she is:
>
> (1) Incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or

(continued...)

motion defense counsel proffered excerpts from transcripts of two of Oscar's interviews with law enforcement personnel, in which he gave inconsistent, nonsensical and even fantastical accounts when asked what had occurred the night and early morning of the homicides. (2CT 485-489, 492-509, 511-530.) At a hearing commencing on January 11, 1999, the court heard testimony bearing on the question of Oscar's testimonial competency.[11] Oscar, who by then was seven years old, was the prosecution's first witness.

The prosecutor's examination included the following colloquy:

Q. Now, Oscar, I know in the past people has [*sic*] talked to you about the difference between telling a truth and telling a lie. Do you know what that difference is?

A. No.

Q. You don't know the difference between the two?

A. No.

Q. If I asked you – let me put it this way: If I told you that this is a car. Can you see what I'm holding up?

A. A pen.

Q. If I told you this is a car?

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[10](...continued)

(2) Incapable of understanding the duty of the witness to tell the truth.

[11] In Argument II, *post*, appellant argues that Oscar's testimony also should have been excluded under Evidence Code section 702 for lack of a present, independent and reliable recollection of his own perceptions the night his mother died. Because the evidence in support of appellant's competency and personal knowledge challenges to Oscar's testimony overlapped to some degree, appellant will endeavor to separate the section 701 testimony from the section 702 testimony. (See 4RT 515-516.)

A. That would be a lie.

Q. Okay, that wouldn't be the truth, would it?

A. No.

Q. Now, when you sit in that chair and you talk on that microphone, what are you supposed to do when you talk; are you gonna tell us lies or are you gonna tell us the truth?

A. The truth.

. . . .

Q. You're always going to tell the truth when you sit in that chair?

A. Yes.

Q. And you wouldn't tell a lie while you're sitting there, would you?

A. No.

(4RT 524-526.)

When defense counsel asked Oscar whether he knew "what truth is," Oscar replied, "It's not telling a lie." (4RT 527.) When he was asked, "How do you know when you're telling the truth?" Oscar said, "Ah, that's hard to understand." (*Ibid.*) Defense counsel's examination of Oscar continued,

Q. Now, when you tell the truth, does the truth mean that you're gonna say only that which you saw yourself or that you heard yourself; is that truth or do you know?

A. I saw myself.

. . . .

Q. Okay. So you're not going to talk about anything you didn't see?

A. No.

Q. And you're not going to tell us about anything you didn't hear?

A. No.

Q. Okay.

A. Because I don't know very well.

Q. You don't really know, huh?

A. No.

Q. You don't remember what you saw, do you?

A. No.

Q. And you don't remember what you heard, do you?

A. No.

(4RT 528-529.)

On redirect examination Oscar responded, "Yeah," when asked, "Do you know what the truth is?" and, "Do you know when you're not telling the truth?" (4RT 533.) He said he did not know what would happen to him if he "told something that wasn't true," but then agreed ("Yep") that he "might get in trouble." (4RT 534.)

Defense counsel then called Susan Streeter, Ph.D., a psychologist specializing in childhood trauma, who had previously qualified to testify as an expert on child competency and reliability. (4RT 538-542.)

Dr. Streeter testified on direct examination that she had reviewed a number of reports and statements by Oscar and others. Defense counsel questioned Dr. Streeter regarding the definition of competency:

A. That the person is able to understand the information presented to them and the questions asked of them and the person is able to respond to those questions and the person is able to process that information, in other words, to make sense of it and be able to respond.

Q. Does this have anything to do with their ability to tell whether or not what they're speaking is true or – or not?

A. It has to do with their ability to accurately represent reality.

(4RT 546.)

Defense counsel then asked Dr. Streeter whether, by competency, she meant more than the ability to process information. (4RT 549.) Dr. Streeter responded that, "it's also the ability to discern the truth." (*Ibid.*) Dr. Streeter detailed numerous inconsistencies in Oscar's successive accounts of the events the night of the homicides which evidenced confusion and stress "to the point where he is unable to think clearly which affects his competency." (4RT 670; see also 671 [Oscar reports that a clock was broken, his toys were broken and the walls were "ripped"], 671-672 [Oscar gives different descriptions of the gun appellant allegedly had, and says he had a gun and a knife, in his pocket], 673 [Oscar states appellant broke a window, got a hammer and hit his sister on her head and stomach], 673-674 [Oscar states five of appellant's "friends" were also there, "broking" things], 674-675 [Oscar states appellant choked him and tried to "hurt [him] on the walls"], 675-676 [Oscar states appellant hit him on his stomach, back and "everywhere"], 676-677 [Oscar states appellant tied him up with a rope], 677-678 [Oscar reports that his brother Victor was there, standing behind appellant, and then took him to his grandma's], 678-679 [Oscar describes appellant as wearing black cowboy boots, a green or white cowboy hat, a blue shirt and blue jeans], 680 [Oscar states the "other men" who were there "got lost"], 681-682 [Oscar had described appellant as wearing a red shirt, black pants and black shoes].)

Dr. Streeter was asked whether Oscar was capable of understanding his duty to tell the truth that day. She opined that she thought that "[Oscar] was confused, and I do not think that he totally understood what telling the truth means." (4RT 552-553.) When asked for the basis of her opinion, Dr. Streeter stated:

> His hesitancy; his inability to state what the definition of the truth was, unless he was given specific, concrete circumstances to respond to; the fact that at one point I believe he stated I don't know what it is.

Dr. Streeter continued:

> What it indicates to me is that he's a very confused little boy and that he can respond to a rote question that is clearly presented to him that contains the answer to the question, but if you ask him an open-ended question, he becomes confused and has significant difficult answering it.

(4RT 553.)

Dr. Streeter stated that, in her opinion, Oscar, "in fact, today doesn't understand what truth is or his duty to tell the truth." (4RT 553.)

The defense also presented testimony from Oscar's kindergarten teacher, Andrea Culver. (4RT 573.) She was Oscar's teacher for a full year, including the time when Oscar's mother and sister were killed. (*Ibid.*) At that time, Oscar was still primarily Spanish speaking. (4RT 574.) Ms. Culver communicated with Oscar through his cousin Gilbert, who was also in her class and was bilingual.[12] (4RT 576.) She had not found Oscar to be dishonest or a liar. (4RT 579-580.)

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[12] Ms. Culver testified that Oscar had academic difficulties in both Spanish and English. (4RT 574-575.) She also recalled having considerable concern regarding his home life and thought he might have suffered from fetal alcohol syndrome. (5RT 577-578.)

Wanda Newton, Oscar's counselor in Idaho,[13] testified for the prosecution at the Evidence Code section 701 hearing.[14] (5RT 942-988, 6RT 989-1141) She had spoken with Oscar about "what truth was," because if an individual who has experienced trauma, "allow[s] themselves to rearrange the reality of that trauma, they will then set a pattern for themselves [for] the rest [of] their lives." (5RT 971.) "[T]he truth means being aware of what was going on and being real with himself and remembering it today just like it happened. . . ." (5RT 973.)

Ms. Newton acknowledged that Oscar sometimes appeared to fantasize and make up stories – sometimes "because it's fun. He is really a fun child" – and other times because "he was uncomfortable with the reality of the emotions that we were talking about," in which case she would say, "listen, help me understand here, are we dealing with the truth or are we not dealing with the truth?" (5RT 974-975.) Ms. Newton also described a session when Oscar said that Juan did not shoot his mother; that his mother was under the couch, telling him she did not get shot. (6RT 1003.) Oscar was "very emphatic" that Juan had not shot his mother and

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[13] Shortly after the murders, Oscar's father, Jose Hernandez, took Oscar to live with him in Caldwell, Idaho. (66RT 13487.) After a few months with his father, Oscar went to live with the Fennells, who eventually adopted him. (66RT 13501; 60RT 12263.)

[14] Ms. Newton also testified for the prosecution at the 402 hearing on Evidence section 702, as discussed in Argument II, *post*. Nevertheless, despite admonishing the parties not to intermingle the Evidence Code section 701 and section 702 issues, the court interrupted Ms. Newton's testimony at the section 701 hearing to ask her about the implications of Oscar's mental health problems, i.e., post-traumatic stress syndrome and depression, on his ability to "have a present recollection of past impressions," within the meaning of section 702. (6RT 1133-1134.)

sister. (6RT 1114-1115.) Ms. Newton described this behavior as just "goofing around" and "acting silly." (6RT 1003, 1004, 1007.) Asked whether she impressed upon Oscar the importance of telling the truth, Ms. Newton testified that, "in prior sessions over the last couple of months, he was talking about giving me some very different versions of what had happened . . . the last night that his mom and . . . sister were alive." (6RT 1011.) She would talk to him "in generalities about . . . the difference between truth and lies and why that it's important to tell the truth in my office. . . ." (*Ibid.*) Asked whether Oscar could communicate with her in a way she could understand and could retell events he had witnessed, Ms. Newton said yes. (6RT 1038.)

Ms. Newton also described a "courtroom walk-thru" conducted with Oscar in Idaho by the victim-witness coordinator, Denise Himes. (6RT 1130-1131.) In orienting Ms. Newton and Oscar to courtroom practices, Ms. Himes talked to Oscar about "truth, lies, right, wrong, guessing, pretending, faking, real, not real, promises, teasing." (6RT 1131.)

Finally, when asked whether Oscar had been unreliable in giving differing versions of past events, including those on August 4, 1997, Ms. Newton disputed the characterization because, in her view, "he has very intentionally given those versions." (6RT 1138.) She did agree that one, more or all of the differing versions would be inaccurate. (6RT 1139-1140.)

Officers Kroutil and Dempsie testified regarding Oscar's identification of appellant on August 4. (6RT 1172-1174, 1184-1185 [Kroutil], 1194-1203, 1228-1244 [Dempsie]). Officer Dempsie also testified regarding a subsequent 45-minute tape-recorded interview of Oscar, excerpts of which had been submitted by appellant in support of his

motion to suppress Oscar's statements. (6RT 1247-1269; Court's Exhs. 5, 6, 7.)

On February 18, 1999, the court heard argument on defense counsel's motion to preclude Oscar from testifying on the grounds that he was not competent as a witness because he did not understand his duty to tell the truth (Evid. Code, § 701), and because he lacked personal knowledge of the events in question (Evid. Code, § 702). (8RT 1690-1736.)

In a written ruling dated February 19, 1999, the trial court denied the motion under Evidence Code section 701, stating that it had considered Oscar's demeanor and responses and found him to be "capable of expressing himself concerning the matter so as to be understood and the minor understands his duty to tell the truth." (5CT 1194.)

Appellant renewed his motion to exclude Oscar's testimony for lack of testimonial competency at each successive trial. (16RT 3349; 28RT 6068; 48RT 10096, 10103; 7CT 1672-1695; 9CT 2243.) Each time, the court reiterated its ruling denying appellant's motion to exclude Oscar's testimony. (16RT 3349; 28RT 6082; 48RT 10109-10110.)

C. Oscar Did Not Understand His Duty to Tell the Truth

As a general rule, every person is qualified to testify except as provided by statute. (Evid. Code, § 700.) However, a person may be disqualified as a witness if he or she is incapable of expressing himself or herself so as to be understood (Evid. Code, § 701, subd. (a)(1)), or is incapable of "*understanding the duty of a witness to tell the truth*" (Evid. Code, § 701, subd. (a)(2), italics added). A party challenging the witness bears the burden of proving disqualification, and a trial court's determination will be upheld in the absence of an abuse of discretion.

(Evid. Code, § 405, subd. (a); *People v. Anderson* (2001) 25 Cal.4th 543, 572.)

Inconsistencies in testimony and a failure to remember aspects of the subject of the testimony do not, in themselves, disqualify a witness. (*People v. Mincey* (1992) 2 Cal.4th 408, 444; *Adamson v. Department of Social Services* (1988) 207 Cal.App.3d 14, 20.) However, where the witness is unable to distinguish truth from fiction, or the witness's testimony is contradictory and fantastical, the witness should be disqualified.[15] (*People v. Lyons* (1992) 10 Cal.App.4th 837, 842-844; *In re Cindy L.* (1997) 17 Cal. 4th 15, 18 [child witness who cannot distinguish between truth and falsity is incompetent to testify under Evidence Code section 701, subdivision (a) (2)].)

Oscar's incredible and inherently contradictory statements to the police, family members and on the witness stand, as detailed below, established his inability to distinguish the truth from his own imaginings and invented stories. More importantly, Oscar had no comprehension of the oath or his duty to tell the truth in court. In view of the compelling evidence of incompetency before it, the trial court clearly abused its discretion in allowing Oscar to testify at the third trial.

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[15] In *People v. Lyons* (1992) 10 Cal.App.4th 837 the witness was found incompetent to testify on the ground that her belief that the defendant had penetrated a non-existent third orifice and had murdered her two husbands demonstrated her lack of ability to distinguish truth from fantasy. (*Id.* at pp. 842-843.)

D. Oscar's Prior Statements Showed That He Did Not Understand The Difference Between Telling The Truth and Telling a Story

1. Oscar's Statements to Detective Dempsie On the Day Of The Crimes

Oscar told Detective Dempsie during his fourth interview on the day of the crimes that he was 14 years old; Oscar was only five. (6RT 1247; 2CT 493.) Oscar also told Dempsie that he fought off "Juan," who was trying to get his mom and catch him. (2CT 495.) Oscar hit him in the stomach and Juan left in his car. (6RT 1252; 2CT 495-496.) Juan had a knife and a skinny gun which Oscar described as being as long as his (Oscar's) outspread arms. (6RT 1252-1253; 2CT 496.) Juan went to his house and got his other gun, a small one. (6RT 1254.) Then, Juan was trying to catch Oscar, and caught him by the hand. (2CT 497.) Oscar ran and hit him. (*Ibid.*) Oscar said he also heard loud music and his sister playing with knives. "She was throwing up. She was screaming. . . . She said 'everybody do wake up.'" (2CT 500.) Oscar also said that "Michael" was in his mother's room. Michael had long hair, looked like a woman, wore a red shirt and brand new shoes. (6RT 1261; 2CT 504-505.)

Detective Dempsie agreed at trial that when he asked Oscar, "Are you sure that Juan was at the house and not somebody else?" Oscar shook his head, "No." (26RT 5467-5468; 64RT 13233; Peo. Exh. 100.)

2. Oscar's Statements to Prosecution Investigators Spencer and Montejano

On November 4, 1997, three months after the murders, prosecution investigators Wayne Spencer and Michael Montejano interviewed Oscar and asked him whether he saw what happened to his mother the night she was killed. Oscar replied, "No." (2CT 512, 513.) Oscar also told them

that he was awakened by his mother who was screaming because his sister talked on the telephone every day. She got mad and "they fighting with some things." (2CT 512.) They were pushing and screaming. His mother and sister woke him up, his mother fell down behind the telephone and he ran. (*Ibid.*) When asked if he saw anyone else at his mom's house, Oscar replied, "Yeah, just my brother. And he left all myself." (2CT 515.) Oscar was asked if he saw anyone else there at that time and he replied, "No, only myself." (2CT 514.)

Oscar also said that his sister got mad and did something to his mother. "She . . . she got something and they come out blood. There was some . . some . . some . . worms in her body." (2CT 516.)

Oscar also told Spencer and Montejano that, among other things, Juan: (1) got a stick and was trying to hit his mother's head and stomach (2CT 517); (2) was running through the house breaking everything, hitting the walls and ripping Oscar's toys (2CT 519); (3) had a gun and a knife in his pockets (*ibid.*); (4) got something out of his pocket and broke the window (2CT 520); (5) got a hammer and blood on his hat, hands and arms (2CT 521); (6) locked himself in the house and took money from some bags (*ibid.*; 2CT 525); (7) had five friends, the "bad ones" with him in the room when he was hurting Oscar's mother (2CT 521); (8) then told his friends to get Oscar to hurt him (*ibid.*); (9) was choking Oscar, hitting his back and "hurting" him against the wall (2CT 524); and (10) chased Oscar, almost "got him in the shirt" with a gun and tied him up with a rope (2CT 523, 526). Oscar also said in the same interview that he hid from Juan under the bed, that he put water on the floor to make Juan slip, that his brother Victor was behind Juan and pulled Juan's hair, and that he and Victor then ran away. (2CT 527, 528.)

Oscar's statements were rife with fabrications. These included, at different times, that (1) Oscar was choked, tied up and hit in the stomach with a hammer; (2) windows were broken and money was stolen; (3) Victor was in the bedroom with Oscar and that he that he pulled the man's hair; and (4) the brothers ran away together. Perhaps Michael was in the bedroom, but Juan's five older friends certainly were not. Further, it is impossible to tell what Oscar was referring to when he stated that his sister got mad and "she got something and they came out blood," and there were "some . . . worms in her body." In short, Oscar's statements to Officer Dempsie, as well as those to investigators Montejano and Spencer, demonstrate that Oscar had no comprehension of his duty to tell the truth to representatives of the law nor the ability to tell a consistent, reality-based story.

3. Oscar's Other Fabricated Or Contradictory Statements

Oscar told Lola Ortiz three days after the crimes that Lorena's boyfriend, Domingo, was at his house when his mother and sister were shot. (18RT 3886, 3900.) A few weeks later, Oscar told his father, Jose Hernandez, that three men had entered his house the night his mother and sister were killed. They cut the telephone cord and manhandled his mother and sister. The men gave them beer and soon his sister was face up with two men while the third was with his mother. Oscar's mother hid him under the bed. Then, Oscar ran to where the blood was and started to move her, then ran and told the neighbors. (40RT 8612.) Oscar then told his father that one of the men was "Juan" and one was "Marcos." Oscar's father could not recall the name of the third man. (40RT 8613.)

4. Oscar's Testimony During The First Trial

Immediately before Oscar took the stand at the first trial, defense counsel renewed her motion to exclude Oscar's testimony under Evidence Code section 701, as well as under Evidence Code section 702. (16RT 3349.) The court responded that those objections had "previously been ruled on" and denied. (*Ibid.*) The prosecutor then called Oscar and elicited that he knew that his job was to tell the truth and the difference between the truth and telling a lie.[16] (16RT 3350.) But when later asked what "a truth" was, Oscar said he could not remember. (17RT 3559.)

Oscar repeatedly testified that he could not remember "all that stuff" and did not understand what was being asked; basically, he just wanted to get everything over with and go home. (16RT 3412; 3361, 3363; 17RT 3560, 3561, 3629, 3633-3635.)[17] Still, Oscar testified that "Big Man," his brother Victor and "Mike with the long hair" were in his mother's room the night she died. (17RT 3583.) Later, after a recess during redirect examination, Oscar testified that "Juan" was there too with Michael, "Big Guy" and another man whose name he could not recall. (17RT 3627-3628.) Oscar remembered Michael better than Juan and he remembered Big Guy on his own. (17RT 3636-3637.)

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[16] Oscar knew it would be a lie if the prosecutor said there was a dog sitting on Detective Kroutil's head. (16RT 3351.)

[17] For example, during direct examination, Oscar asked, "Now could we go?" (17RT 3629.) The prosecutor responded, "Now we're going to talk about your aunt's house; okay?" and Oscar said, "Okay. After this one, that's all." (17RT 3630.) When the prosecutor indicated that "the other lady" [defense counsel] might have some additional questions, Oscar said, "I'm gonna be sick today." (17RT 3630) Told they were getting "closer" [to being finished] Oscar said, "I want to be over with now." (*Ibid.*)

5. Oscar's Testimony at The Second Trial

At the beginning of appellant's second trial, the court reiterated its earlier February 19, 1999, ruling denying defense counsel's motion to exclude Oscar's testimony under Evidence Code section 701. (28RT 6082.)

When Oscar took the stand at the second trial he had difficulty with the oath. When the clerk asked Oscar to raise his right hand, Oscar asked, "Like this?" (34RT 7473.) The clerk said, "Hm-hmm." (*Ibid.*) When Oscar then said, "Um, um, I don't know this part" the clerk said, "Just say I do if you're going to tell the truth." (*Ibid.*) Oscar said, "I do if they're gonna tell the truth." (*Ibid.*) The clerk said, "Well, that's fine. Have a seat." (*Ibid.*) The prosecutor then asked Oscar whether he "promised to tell us the truth today[,]" and Oscar said "Yes." (34RT 7475.) When the prosecutor followed up with, "And you're not gonna tell us anything but the truth today?," Oscar replied, "Um, um, I don't know that part." (*Ibid.*) When the prosecutor asked, "Oscar, are you gonna tell us the truth today when you talk to us?," he said "Yes." (*Ibid.*) Asked whether "the truth mean[s] what you know" Oscar said, "could you please skip that one?" (34RT 7476.) Oscar then said yes, he would tell the truth, meaning what he knew, saw and heard; but when asked whether he would "tell us things that [he didn't] know," he also said yes, and again asked the prosecutor to "please skip that one." (34RT 7476.)

Oscar then testified, among other things, that he saw a gun in "Big Man's" hand and a gun in "Michael's" hand. There were also two other guys with guns in their hands. (35RT 7678.) Oscar also testified that two of the men "were just squeezing [his] hand." (35RT 7688.) They all knew that Oscar was there. Oscar tried to escape, he took their hands off, then

ran under his covers. (35RT 7689.) Oscar then testified that he saw five men with five guns shooting at his mother and sister. (35RT 7703-7704.)

Oscar's prior statements and his answers at trial were a succession of fantastic, inherently incredible or simply contradictory stories which showed that he was not capable of understanding his duty as a witness to tell the truth. Oscar was not competent to testify.

6. Oscar's Voir Dire at The Instant Trial

When Oscar was called to testify at the instant trial, defense counsel renewed her objection that there had been no showing that Oscar was competent to testify within the meaning of Evidence Code section 701, subdivision (a)(2). (59RT 11968.) The trial court informed the prosecutor that he had to lay a foundation under that code section before he could question Oscar about what had happened the night his mother and sister were killed. (*Ibid.*) The prosecutor then asked Oscar whether he knew the difference between telling the truth and telling a lie. (59RT 11969.) When Oscar did not respond, the prosecutor followed up by asking Oscar,

> Q. If I said I was wearing a blue shirt, would that be the truth or would it be a lie?
>
> A. A lie
>
> Q. . . . If I said I was wearing a tie with elephants on it, would that be the truth or would that be a lie?
>
> A. The truth.

(*Ibid.*)[18]

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[18] Presumably the prosecutor's tie had elephants on it and Oscar answered correctly.

Although Oscar's responses to these questions demonstrated, at most, that he had the ability to discern and relate the truth of an immediate, neutral fact, they did not show, as required by Evidence Code section 701, that he had the "capacity to understand the oath and to perceive, recollect and communicate *that which he is offered to relate*" – namely, what occurred two years earlier in his mother's bedroom. (Law Rev. Comm. Comment to § 701 (italics added), citing *People v. McCaughan* (1957) 49 Cal.2d 409, 420.) Indeed, as his prior statements and testimony showed, Oscar was incapable of understanding his duty to tell the truth, or of distinguishing between truth and fabrication in describing the traumatic events of August 4. By the time of the instant trial, the court had ample proof that Oscar's conflicting accounts of the events surrounding his mother's death were at times fantastical, inherently unbelievable, or a factual impossibility, and that he told these incredible tales as readily on the witness stand as he did to the police and others.[19]

E. The Trial Court Erred In Ruling That Oscar Was Competent To Testify

When the court initially denied appellant's challenge to Oscar's competency as a witness, it had already been presented with compelling evidence that Oscar was incapable of distinguishing truth from fantasy. By

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[19] In the wake of Oscar's virtual amnesia at the instant trial, defense counsel moved for the admission of Oscar's prior statements and trial testimony pursuant to Evidence Code section 1237, the hearsay exception for past recollection recorded. (59RT 12035-12037 [all Oscar's post-incident statements); 60RT 12149-12151 [Oscar's statements to Montejano and Spencer].) The prosecutor, in opposing the motion, and the court, in denying same, both acknowledged that the proffered prior statements and testimony were, at best, unreliable, or in the prosecutor's words "factually impossible." (60RT 12153-12156; see also 64RT 13046.)

the time of the instant trial, the evidence of Oscar's incompetence to testify was overwhelming. He had shown in the first two trials that, no matter what he said on voir dire, Oscar was incapable of complying with his duty to tell the truth when the questions turned to the events on the night of August 4.

As noted above, when asked twice at the pretrial hearing whether he knew the difference between telling a truth and telling a lie, Oscar answered, "No." (4RT 524-525.) But when asked whether he was going to tell the truth or lie on the witness stand, Oscar answered, "the truth." (4RT 525-526.) Oscar then took the stand in the first two trials and, instead of telling the truth, repeated some of the same stories he had been telling the police and others outside of the courtroom. (See 17RT 3583, 3627-3628; 35RT 7678, 7703-7704.)

A child witness may not be competent to testify where he or she cannot tell the difference between truth and falsehood. (See, e.g., *In re Cindy L.*, *supra*, 17 Cal.4th at pp. 19-21 [finding child not competent as a witness where her responses to questions showed that, though she understood lies were bad, she did not understand the duty to tell the truth].) A child may also be found to lack testimonial competence where he or she cannot distinguish "perception from imagination."[20] (*People v. Cudjo*

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[20] Apart from the more extensive case law pertaining to child victims of sexual or other abuse, where special rules apply (e.g., Evid. Code, § 767, subd. (b)), there is very little decisional law regarding the competency of child witnesses in other types of criminal cases. *People v. Cudjo*, *supra*, 6 Cal.4th 585, a capital murder case, offers little guidance because the competency objection was not preserved or reached in the opinion. The issue was addressed in *People v. Dennis* (1998) 17 Cal.4th 498, 525-526, also a capital case, where this Court upheld the trial court's

(continued...)

(1993) 6 Cal.4th 585, 622.) That is a major part of the problem here. Nothing in the prosecutor's voir dire of Oscar showed that Oscar understood that telling the truth also meant not repeating or making up stories when he testified.

That Oscar could distinguish between the truth and a lie when the subject was the difference between a car and a pen, or the color of the prosecutor's shirt showed at most that he was competent to testify to the veracity of statements made by other persons regarding commonplace, neutral facts or present sense-perceptions. (See 25RT 5342-5353.)[21] But these few truthful answers regarding trivial facts offer no assurance, in light of his actual, fantastical testimony at the first two trials, that Oscar understood his duty to tell the truth regarding the events of August 4.

Even more to the point in relation to Oscar's performance on the witness stand at the instant trial, Wanda Newton, his therapist, stated emphatically that she did not always believe Oscar when he claimed not to remember because his inability to recall was "at times" "willful." (45RT 9647, 9651 [when Newton pushed Oscar, he frequently started talking about

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[20](...continued)
finding of the child witness's competency to testify after voir dire questioning which showed that she understood her obligation to tell the truth. *Dennis* is distinguishable from the present case, however, because, unlike the present case, there was no evidence in *Dennis* of repeated fabrications by the child both out-of-court and on the stand.

[21] When asked whether a child saying it was a lie for someone to state that he had a teddy bear on his head, when he did not, was a good indicator of his understanding of the difference between the truth and a lie, Dr. Streeter responded that it was a very superficial indicator because it did not require the child to recall information. (25RT 5343.)

what he had just stated he did not remember, "showing that he actually did remember"]; 45RT 9682.) The following colloquy between defense counsel and Newton put the court on notice early on that Oscar would frequently say he forgot things when he, in fact, remembered them:

Q. You did observe that frequently he would forget things?

A. No, not that he would forget things, but that he would say he'd forgotten things.

Q. Just wouldn't remember?

A. He would say he didn't remember.

Q. But you didn't believe him?

A: Not always.

Q. So do you think that was willful on his part when he said I don't remember?

A. Yes.

Q. And that's not any kind of defiant behavior?

A. That could be considered defiant.

Q. Okay. Had that been going on for longer than six months?

A. His – since I met him.

(26RT 5633-5634.)

In sum, before Oscar took the stand at the instant trial, he had demonstrated that he had no comprehension of his duty to tell the truth where he repeatedly confused perception with fantasy and claimed a loss of memory when he did not want to answer questions. Given this record, the trial court manifestly abused its discretion in allowing Oscar to testify. The error, moreover, was prejudicial and requires reversal of the entire judgment.

F. The Erroneous Admission Of Oscar's Testimony Was Prejudicial and Requires Reversal Of Appellant's Convictions and The Judgment Of Death Under State and Federal Law

If an error violates a state statute alone, courts apply the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836, requiring reversal if there is a reasonable probability of a result more favorable to a defendant in the absence of the error. (See *People v. Duarte* (2000) 24 Cal.4th 603, 618-619; *People v. Roberto V.* (2001) 93 Cal.App.4th 603, 618-619.) If, on the other hand, the error violated appellant's Confrontation Clause, Eighth Amendment or federal due process rights, the *Chapman* harmless error standard applies. (*Chapman v. California* (1967) 386 U.S. 18, 24 [harmless beyond a reasonable doubt]; *Sullivan v. Louisiana* (1993) 508 U.S. 275. 279 [federal constitutional error not harmless unless the state can show beyond a reasonable doubt that the error did not contribute to the verdict].) Appellant submits that the court's erroneous competency ruling violated his state and federal constitutional rights, and was not harmless under the applicable state law and federal prejudice standards.

1. The Erroneous Admission Of Oscar's Testimony Violated Appellant's Federal Constitutional Rights

Oscar's trial testimony was a litany of I don't remembers punctuated by a few substantive statements elicited by the prosecutor's leading or suggestive questions. Consequently, defense counsel had no meaningful opportunity to cross-examine or impeach Oscar and the jury had no reliable basis for assessing Oscar's credibility in rendering its verdicts. Accordingly, appellant's federal constitutional rights to confront and cross-examine witnesses, and to a reliable and fair trial were violated. (U.S. Const., Amends. 6th, 8th and 14th; Cal. Const., art. I, §§ 15, 17.)

Appellant acknowledges that this Court has previously rejected the notion that allowing a witness who lacks competence, within the meaning of Evidence Code section 701, to testify violates the confrontation clause and the Eighth Amendment's guarantee of heightened reliability in a capital case. (*People v. Dennis*, *supra*, 17 Cal.4th at p. 526; *People v. Cudjo*, *supra*, 6 Cal.4th at pp. 622-23.) The Court's prior reasoning, however, is inapposite here.

The Sixth Amendment to the federal Constitution requires that an accused receive "an adequate opportunity to examine adverse witnesses." (*People v. Cudjo*, *supra*, 6 Cal.4th at p. 622, citing *United States v.* Owens (1988) 484 U.S. 554, 557; accord, Cal. Const., art. I, § 15.) It does not guarantee testimony free from forgetfulness, confusion, or even evasion. (*Ibid.*) For example, in *Cudjo*, this Court was satisfied that the examination and cross-examination of the child witness in that case satisfied the requirements of the confrontation clause where,

> Not surprisingly, the testimony contains some inconsistencies, and the witness did not demonstrate total recall of the events on the day his mother died. But the witness's answers on the whole were lucid and responsive, and nothing in his testimony reveals either an inability to distinguish truth from falsehood (or perception from imagination) or failure to appreciate his obligation as a witness to tell the truth.

(*Ibid.*)

Here, in contrast, Oscar's testimony was neither lucid nor responsive, nor did it show that he had any regard for the obligation to try to tell the truth. Oscar did not want to answer questions; he wanted to go

home.[22] (60RT 12219.) A careful review of Oscar's testimony shows that, while he would occasionally answer a question posed by counsel, he would almost immediately revert to "I don't remember" as soon it became clear that his answer would trigger a series of follow-up questions. For example, after pointing to appellant and getting Oscar to agree that he saw appellant at his mother's house the day she was killed, the prosecutor followed up:

Q. A minute ago you said you knew him [appellant] and why is that?

A. I forgot.

Q. You've forgotten in a minute?

A. Yes.

Q. . . . Would you like to go home right now?

A. Yeah.

(60RT 12218-12219.) Defense counsel also got similar answers from Oscar:

Q. How's your memory?

A. Pretty good.

Q. . . . How many people were in your mother's room . . . when she died?

A. I don't remember.

Q. . . .Okay. Do you know if you were in your mother's room?

A. I don't remember that one.

(60RT 12187-12189.)

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[22] Although the court tended to believe that Oscar's failure to remember was genuine rather than a means to get off the stand and go home, the record fairly shows that "I don't remember" was Oscar's default position whenever he did not want to answer questions – which was most of the examination. (See Argument V, *post.*)

Q. Do you remember which one of these guys is David [the prosecutor, David Alavezos]?

A. I just don't remember?

(60RT 12191.)

Oscar's reflexive assertion of lack of recollection here, unlike in *Cudjo*, totally frustrated defense counsel's ability to conduct a meaningful cross-examination to show that Oscar was a wholly unreliable witness. The jury heard only Oscar's most damaging statements to the police – unimpeached – but none of his prior testimony that was favorable to the defense theory of the case. As a result, the jury had no adequate basis on which to evaluate Oscar's credibility in violation of appellant's rights under the Sixth Amendment's confrontation clause.

This Court has recognized that the Eighth Amendment imposes heightened reliability standards for both guilt and penalty determinations in capital cases. (*People v. Cudjo*, *supra*, 6 Cal.4th at p. 623, citing *Beck v. Alabama* (1980) 447 U.S. 625, 638.) Nevertheless, this Court has rejected the claim that the admission of the testimony of an unreliable child witness violates the Eighth and Fourteenth Amendments where the defendant "'was given an opportunity to be heard and to cross-examine in a judicial forum.' [Citation.]" (*Ibid.*, quoting *People v. Mincey*, *supra*, 2 Cal.4th at p. 445.) However, none of the cases addressing this argument found the child witness to be incompetent to testify. (See, e.g., *People v. Cudjo*, *supra*, 6 Cal.4th at p. 622 [competency claim forfeited]; *People v. Mincey*, *supra*, 2 Cal.4th at pp. 444-445.) Here, Oscar repeatedly demonstrated that he lacked testimonial competency. Nevertheless, he was the prosecution's most critical witness because he was the only person, other than his mother, his sister and the perpetrator(s), present at the crime scene when the killings

occurred. Besides Oscar's statements, the case was devoid of any physical or reliable circumstantial evidence connecting appellant to the crime, and appellant had an alibi.

Under these circumstances, appellant's severely compromised ability to cross-examine Oscar due to his testimonial incompetency substantially affected the reliability of the third trial in violation of appellant's Eighth Amendment and due process rights to heightened reliability in capital cases.

2. The Error Was Prejudicial

The weakness of the prosecution's case is demonstrated, in part, by the fact that two earlier juries were unable to agree that appellant was guilty of the crimes alleged against him. The jury in appellant's first trial deadlocked nine to three in favor of a guilty verdict. (27RT 5966; 48RT 10088; 6CT 1586.) The second jury deadlocked ten to two for an acquittal. (48RT 10075, 10088; 9CT 2218.) The evidence at all three trials was substantially the same.[23]

One difference, which should have favored the defense, was that Oscar claimed to remember almost nothing about what occurred the night his mother and sister died. However, even though he claimed a near-total loss of memory, Oscar seemingly remembered just enough to satisfy the prosecutor's objective of laying the foundation for Oscar's prior identifications – without the instant jury knowing the extent of Oscar's

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[23] In Arguments III-IX, *post*, appellant argues that erroneous changes in the court's rulings prejudiced appellant and accounted for the guilty verdicts at the third trial. (See *Kyles v. Whitley* (1995) 514 U.S. 419, 455 ["The fact that the jury was unable to reach a verdict at the conclusion of the first trial provides strong reason to believe the significant errors that occurred at the second trial were prejudicial"].)

previously demonstrated unreliability and incapacity at times to distinguish truth from his own fantasies and stories. (See Argument V, *post.*)

When, at the first two trials, Oscar tried to describe what he observed the night his mother died, he showed both the court and the jury that he was incapable of consistently telling the truth, that is, distinguishing his perceptions from his confabulations and imagination. As such, he became a detriment, rather than an asset, to the prosecution's case. Consequently, as the prosecutor repeatedly stressed, he was not interested in having the jury hear Oscar repeat his testimony at the two earlier trials; but rather, the prosecutor's only purpose for putting Oscar on the stand was to lay the foundation for admitting Oscar's prior identifications of appellant. (See 59RT 11976 [prosecutor stated: "My purpose for putting him on the stand was solely to establish a 1238 prior I.D. Situation"]; 64RT 13028 [when trial court found the prosecutor had not met the requirements of Evidence Code section 1238, he sought admission of prior identifications as prior consistent statements under Evidence Code section 1236].) The prosecutor's strategy was a success. (See Arguments III and IV, *post.*)

Oscar's prior identifications were critical to the prosecution's case because Oscar had been unable to consistently identify appellant in open court and had, at different times, named or described numerous persons he claimed were present in his mother's bedroom the night she was killed. (16RT 3358.) Even with the prior identifications, the prosecution's evidence of appellant's guilt was not that strong.

No forensic evidence linked appellant to the crimes. Appellant was arrested the day of the shootings and his residence and truck were

thoroughly searched.[24] (55RT 11375-11376, 11382.) No blood was found on any of the numerous items of appellant's clothing seized from his house. (58RT 11908; 61RT 12335-12336, 12347-12350.) No shoes were found at appellant's house that matched the distinctive, bloody "running W" shoe print found at the crime scene. (55RT 11386.) Blood found at the crime scene did not match appellant's blood. (61RT 12339-12340, 12342.) None of the suspicious fingerprints found at the crime scene matched appellant's prints. (60RT 12281; 61RT 12309 [doorknob of Lorena's bedroom]; 60RT 12283-12286, 61RT 12300, 12309 [fingerprint found on open window northwest bedroom similar to fingerprints detected on knife near Lorena's body]; 61RT 12310 [fingerprints on paper bag in Lorena's bedroom]; 61RT 12311-12313 [prints on doorjamb to laundry room and back sliding door].) No semen was found on Lorena's clothing, on her bedding or in the sexual assault kits taken from Lorena and Reyes. (61RT 12332-12339, 12353; see also 1CT 240-241 [stipulation to negative results rape kits at preliminary hearing].) No gun shot residue was found on appellant's hands or in his pickup. (74RT 14819-14820 [stipulation to Def. Exhs. MM, NN, OO].) Hairs found on Lorena's stomach, in her right hand, and under her left forearm did not match hair samples taken from appellant. (59RT 12102-12106.) The knife found in Lorena's bedroom was not the mate of the knife found at appellant's house. (63RT 12863, 12867, 12971-12872, 12881-12885, 12902.)

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[24] The bullets recovered from the victims were probably fired by a nine millimeter weapon. (58RT11828.) The weapon was not found. (55RT 11386.) The only ballistic evidence found at appellant's residence were some .22 caliber shells and a BB gun that the police did not even bother to report or seize. (*Ibid.*)

Further, appellant's confession had little, if any, probative value; it was unreliable, if not false. Appellant was questioned and pressed to confess by at least five different police officers over a three-day period. (8RT 1641, 1648-1649; 55RT 11213-11217 [Kroutil]; 8RT 1639; 9RT 1775, 1777-17778 [Dempsie]; 54RT 11295-11300 [Shear]; 55RT 11375, 11391; 56RT 11415 [Ward]; 52RT 11138, 11145, 53RT 11162-11163 [Garay].) Nevertheless, with the exception of the last hour or so of staged questioning, appellant consistently denied his guilt. (52RT 11147; 53RT 11663.)

The day before a confession was obtained, appellant had been questioned for more than an hour by Detective Shear, who had also administered a Voice Stress Analyzer test. In the course of that interview, Shear had confronted appellant with many of the details of the crime and the evidence collected by the police. (8RT 1557-1558; Court's Exh. 8.) The next day, Sergeant Garay took over the questioning. For nearly two hours, Garay went back and forth with appellant, intentionally not recording what was said. (9RT 1797 [took over interview at 12:30 p.m.], 1809 [began taping at about 2:20 p.m.], 1846.)

Even when he began taping the "confession," Garay, like Shear, supplied more details regarding the crimes – some of them false – than did appellant. Appellant stated that he went to Reyes's house with a gun because he was angry at her, but did not know why he shot her or Lorena. He said he came into the house through the front door, first encountered Reyes, shot her two to three times and then shot Lorena two or three times with a .22 caliber gun. He did not know if he hit either of them. He saw no one else at the house and followed no one into another room. He said he

was there for only about five minutes, drove away and tossed the gun on his way home. (13CT 3447-3448, 3450, 3451, 3454-3455, 3457, 3462.)

The supposed confession had the basic facts wrong. The gun used was a nine millimeter luger and Lorena was shot twice, Reyes only once. (58RT 11828; 52RT 11065-11067, 11069-11070.) Further, despite Garay's provocative questions and pressure to get appellant to confess to the sexual assault of Lorena, appellant repeatedly denied having sexual relations with her or Reyes. (See 13CT 3465 [Garay: "She was pretty. . . . But she was pretty]; 3468 [Garay: "But . . . Lorena and Ermanda both changed in their bodies. Right? Did they change a lot? . . . But Lorena, she wasn't a little girl anymore? . . . A big girl then?"]; 3463, 3465-3466, 3475, 3480.) Even after Garay lied to appellant, telling him that his prints were found on the knife and on Lorena's body, appellant was unshaken in his denials. (13CT 3475.) Indeed, when told that fingerprints had been found on the knife, appellant responded "that's good," and urged the police to investigate more. (13CT 3472, 3476.)

Of the few details appellant provided, none were corroborated. To the limited extent what he said was accurate, it was information he would have learned from the officers over the course of the various interrogations. (See 72RT 14623-14624 [defense expert Richard Ofshe noting that the strongest form of corroboration of a confession is information not known to the police because it rules out contamination during the interrogation]; cf. Garrett, *The Substance of False Confessions* (2010) 62 Stan. L. Rev. 1051, 1066 [of the 250 persons exonerated by post-conviction DNA evidence, more than 40 falsely confessed and majority of confessions included

specific details only perpetrator likely to have known].)[25] In sum, appellant's confession was a confession more in form than in substance.

Consequently, at the instant trial, the prosecution's case rose or fell on the strength of Oscar's in-court identification of appellant bolstered by the admission of his prior identifications. None of this evidence should have come before the jury because Oscar had repeatedly demonstrated that he was not a competent witness and had no conception of a duty to tell the truth even under oath. Thus, taking into account both the weakness of the evidence and the history of deadlocked juries in this case, it is reasonably probable that the error in allowing Oscar to testify, in the face of proven testimonial incompetency, adversely affected the outcome of the third trial. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1135, fn. 13, citing *People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Partida* (2005) 37 Cal.4th 428, 439.) Moreover, even if the error were found harmless under state law, the state cannot demonstrate on this record that the error was harmless beyond a reasonable doubt under the prejudice standard for federal constitutional error. (*Chapman v. California*, *supra*, 386 U.S. at p. 24;

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[25] False confessions were identified as the second most frequent cause of wrongful convictions in a national study reviewed by the California Commission on the Fair Administration of Justice (2006) *Final Report and Recommendations Regarding False Confessions*, at p. 35, fn.1.) Subsequent data has confirmed the significant correlation between false confessions and homicide exonerations. (See Gross, *Exonerations in 2013* (2014) National Registry of Exonerations, at pp. 16,17, available at https://www.law.umich.edu/ special/exoneration/ Documents/ Exonerations_in_2013_Report.pdf> [of 597 reported homicide exonerations, 20 percent involved false confessions]; *False Confessions* (2014) Innocence Project <http://www.innocenceproject.org/ understand/False-Confessions.php> [about 30 percent of DNA exonerations had false confessions as a contributing factor to the convictions].)

Sullivan v. Louisiana, *supra*, U.S. at p. 279 [such errors will be found prejudicial unless the state can show beyond a reasonable doubt that the error did not contribute to the verdict].) Reversal of appellant's convictions and the judgment of death is required.

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II

APPELLANT WAS DEPRIVED OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO CONFRONTATION, DUE PROCESS AND A RELIABLE GUILT AND PENALTY DETERMINATION UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS BY THE ADMISSION OF UNRELIABLE STATEMENTS AND TESTIMONY OF OSCAR HERNANDEZ

A. Introduction

Beginning the day his mother died, Oscar Hernandez was repeatedly exposed to suggestions or coaching by his family, the police, the prosecution and their personnel, and even his own therapist, leading to his misidentification of appellant as the man he saw in his mother's bedroom. Indeed, as early as the first trial, the court, after hearing Oscar's testimony, initiated a reconsideration of the question whether Oscar had a present recollection of the impressions he formed the night of his mother and sister's death. (See 17RT 3589.) By the time of the instant trial, the court finally acknowledged what had been obvious all along – that "[a]t this point, it may well be that he's been exposed to this so much that he really and truly does not remember and he does not have personal knowledge of the matter,. . . ." (59RT 12006.) But well before then, the court had compelling grounds to exclude or strike Oscar's testimony pursuant to Evidence Code section 702 for lack of the requisite present recollection based on personal knowledge. On this record, the court abused its discretion in admitting Oscar's statements and testimony.

The United States Supreme Court, which has demanded that "fact finding procedures aspire to a heightened standard of reliability" in capital proceedings (*Ford v. Wainwright* (1986) 477 U.S. 399, 411; *Beck v. Alabama* (1980) 447 U.S. 625, 638), has also recognized the "special risks"

posed by "unreliable, induced, and even imagined child testimony" in cases like appellant's that rely on such evidence (*Kennedy v. Louisiana* (2008) 554 U.S. 407, 443). Oscar's testimony and statements, upon which appellant's convictions and death sentence rest, were so unreliable that admission of this evidence also violated appellant's rights to due process and a reliable guilt and penalty trial under the state and federal Constitutions. (U.S. Const., Amends. 5th, 6th, 8th, 14th; Cal. Const., article I, §§ 15, 17.)

B. Procedural History

On December 28, 1998, before the commencement of appellant's first trial, defense counsel filed a motion in limine to exclude Oscar's testimony on the grounds that he lacked personal knowledge of relevant events, within the meaning of Evidence Code section 702 – i.e., he had been subjected to suggestive interview techniques and his purported recollection had been tainted by conversations and interviews with others. The motion also sought a pretrial "taint hearing," under Evidence Code section 402, to determine the reliability of Oscar's testimony and his personal knowledge. (4CT 1041-1048.) The prosecutor agreed that appellant was entitled to a taint hearing, but argued, citing Evidence Code sections 1253 and 1360, that Oscar could not be forced to testify to the facts of the case and be subject to cross-examination before the trial.[26] (4CT 1100-1104.)

The court agreed that a hearing was required to determine "[w]hether Oscar Hernandez has the capacity to have a present recollection of

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[26] Evidence Code sections 1253 and 1360 have no applicability here as they are strictly limited to proceedings involving allegations of child abuse or neglect.

impressions derived from the senses relating to his experiences on August 4, 1997." (5RT 906.) The court noted that the prosecutor, as proponent of Oscar's testimony, had the burden to establish personal knowledge, but deferred ruling on whether Oscar could be called to testify at the hearing. (5RT 906, 935.)

Dr. Susan Streeter, Victor Martinez, Wanda Newton, Rosa Chandi, Detective Dempsie and Sergeant Kroutil testified at the Evidence Code section 702 hearing; their testimony is summarized below. Oscar did not testify. On February 19, 1999, the court issued its ruling and denied the motion to exclude Oscar's testimony for lack of personal knowledge. (5CT 1197-1198.) Finding there was no issue that Oscar acquired impressions from his senses as to the events on August 4, the court focused on whether Oscar had a present recollection of those impressions.

First, relying on *People v. Dennis* (1998) 17 Cal.4th 498, the trial court found that despite Oscar's inconsistencies and lack of recollection, a jury could reasonably find Oscar had personal knowledge. (5CT 1197.) Second, again citing *Dennis*, the court found the fact that Oscar received therapy to assist him in coping with his mother's and sister's deaths did not disqualify him as a witness. (*Ibid.*) Finally, after considering appellant's contentions related to "'contamination,' 'shaping,' 'confabulation,' and related matters," the court concluded that the prosecution had met its preliminary burden to prove personal knowledge and Oscar's credibility would be resolved by the jury. (5CT 1198, citing *People v. Mincey* (1992) 2 Cal.4th 408.)

On August 2, 1999, appellant re-noticed the motion in limine pursuant to Evidence Code section 402 and 702, which the court again denied. (9CT 2243-2245, 2313.) The court's ruling was erroneous when

originally made and became increasingly untenable as the full extent to which Oscar's personal, minimal recollection had been supplanted by suggestion and coaching was disclosed. The court clearly abused its discretion in allowing Oscar to testify at the instant trial.

C. The Prosecutor Failed To Establish That Oscar Had Personal Knowledge

Even if a witness is not entirely disqualified for incapacity to communicate or to understand his duty to tell the truth, his testimony "concerning a particular matter is inadmissible unless he has personal knowledge of the matter." (Evid. Code, § 702, subd. (a).) Personal knowledge requires that the witness have a "present recollection of an impression derived from the exercise of the witness's own senses." (*People v. Lewis* (2001) 26 Cal.4th 334, 356.) In order to have personal knowledge, a witness must have the capacity to both perceive and recollect. (See *People v. Dennis*, *supra*, 17 Cal.4th at p. 525.)

The proponent of the proffered testimony has the burden of producing evidence as to the existence of personal knowledge. (Evid. Code, § 403, subd. (a)(2).) The court's function is then to determine whether there is evidence sufficient to permit the jury to find that the preliminary fact, i.e., personal knowledge, exists. (*People v. Lucas* (1995) 12 Cal.4th 415, 466-467.) Unlike other foundational or preliminary facts, evidence challenged under Evidence Section 702 may not be admitted conditionally subject to proof of the preliminary fact being supplied later at trial. (Evid. Code, § 403, subd. (b).) If it admits the proffered evidence and subsequently determines that the jury could not reasonably find that the preliminary fact exists, the court must instruct the jury to disregard the evidence. (Evid. Code, § 702, subd. (c)(2).) The court's determination of

the existence of the preliminary fact of personal knowledge is reviewed under the abuse of discretion standard. (*People v. Lucas*, *supra*, 12 Cal.4th at p. 466.)

Here, the prosecution's proffer was inherently deficient because, in refusing to call Oscar at the Evidence Code section 702 hearing, the prosecution necessarily failed to show that Oscar had a current, untainted recollection of what he perceived the night his mother and sister were killed. At most, the prosecution showed that Oscar was present in the home when the shootings occurred, but his exposure to a welter of intervening suggestions, suspicions and outright coaching made it virtually impossible to reliably determine what he actually saw and heard that night.

D. The Record Establishes That Oscar Lacked a Present Recollection Of What He Personally Observed In His Home The Night His Mother and Sister Were Killed

The instant trial was the culmination of Oscar's progressive loss of recollection of what and who he actually saw the night his mother and sister died. Because this memory loss was coupled with compelling evidence of coaching and suggestion, Oscar should not have been allowed to testify.

From the moment Oscar ran to Rosa Chandi's house, he was exposed to the speculation, suspicions, suggestions and coaching of other people who were not percipient to the crime. As a result, anything Oscar said beyond his initial statements to Chandi were the inevitable product of these persistent outside influences, not his own sense impressions.

1. Oscar's Statements On The Day Of The Murders

Rosa Chandi was the first person Oscar spoke to after seeing his mother die. He told Chandi that his mother and sister were sleeping; he could not wake them up; and they were bleeding. He said nothing else. (6RT 1047-1050.) Over the next hour, before the police arrived, Oscar was

in Chandi's house with her three daughters, Michelle, Melissa and Melinda, her son Michael and his girlfriend Areli, and Chandi's nephew, Benny. He said nothing to any of them about seeing someone in his mother's room when she died. (See, e.g., 33RT 7382.) Later that morning, appellant's older brother, Victor, went to Chandi's house with his father, Chandi's brother, Efrain Martinez, and his uncle Ben. (62RT 12530.) By the time Victor arrived there were already a large number of family and friends gathered at Chandi's house. (62RT 12534.)

Officer Lewis arrived at Chandi's house about an hour after the 9-1-1 call to interview the members of her household. (61RT 12365.) According to Lewis, Chandi, who was the first person he interviewed, had given a detailed description of Reyes's new "boyfriend" and of his truck. (61RT 12386, 12477.) Lewis interviewed Oscar last and did not know where he was when Chandi and the others were interviewed. (61RT 12387-12388.) Oscar told Lewis that he had seen a man standing in his mother's room, but did not name or describe him. (61RT 12375.) Sergeant Dempsie was the next officer to interview Oscar. (64RT 13203-13204.) Oscar again did not give Dempsie the name of the man in the bedroom but did say it was the man who had bought him ice cream and had a "whisp" on his chin. (2CT 311; 64RT 13205-13206, 13210.) Later Oscar told Officer Dempsie that "Juan" wore a red shirt; but, as Dempsie acknowledged, he had already shown Oscar a photo line-up in which appellant was shown wearing a red shirt. (6RT 1259-1260.)

Dempsie then asked Oscar's brother Victor whether he knew who had bought Oscar ice cream, and Victor said the man's name was "Juan." (34RT 7623.) Victor described Juan, his vehicle and told Dempsie where Juan lived. (6RT 1197-1198; 64RT 13208-13209.)

After he spoke to Dempsie, Victor went inside and talked to Oscar, who was sitting at the table eating. (5RT 801-802.) Victor told Oscar what had happened, and later told Oscar that the man who bought him ice cream was named "Juan." (5RT 803-804.)

Still later that morning, Detective Kroutil showed Oscar a single booking photograph of appellant; Oscar identified the photo as "Juan." (64RT 13220-13223.) Kroutil knew that Oscar had not previously provided this name and believed that Oscar had possibly heard it from someone in the residence. (6RT 1184-1185; 2CT 350.) Dempsie admitted that when he asked Oscar during a second, videotaped interview whether the man in his mother's room had any hair on his face, he "gesture[d] mustache and beard" on his own face before Oscar responded. (42RT 9043-9044.)

2. Oscar's Counseling By Wanda Newton

a. Wanda Newton's Testimony

Wanda Newton, Oscar's counselor, was the prosecution's primary witness at the 702 hearing. She explained her therapeutic objectives and reviewed a series of treatment notes to show, among other things, that she had not coached Oscar. Dr. Streeter had already commented on Ms. Newton's conduct of Oscar's therapy during her testimony which preceded Ms. Newton's. Appellant will discuss Dr. Streeter's and Ms. Newton's testimony in their logical, rather than temporal order – i.e., Ms. Newton's testimony first, then Dr. Streeter's – because the prosecution had the burden of production on the Evidence Code section 702 issue.

Ms. Newton testified that she had four or five treatment goals for Oscar, including identifying and accepting his feelings and recalling his memories of all his history, including the death of his mother and sister. (5RT 960-963.) She testified that when asked about the homicides, Oscar

said he was not scared, but was mad. (6RT 996-997.) Because this was Oscar's first spontaneous statement, she interpreted it to mean that he was in fact scared. (6RT 997.) The first time Oscar admitted he was scared, he lowered his voice when he said so; he did so again when he learned from Denise Himes, the victim witness coordinator who took Oscar to visit a courtroom in Idaho, that "Juan" would be in court and he again said that he was scared. (6RT 997-998.) Oscar also said he had seen his mother, his sister, and "Juan" yelling the morning of the homicides, and was sad and scared when he saw his sister with blood on her face and neck. (6RT 999.) Ms. Newton's notes reflected that when she asked Oscar why it was difficult for him to talk about what had happened, and why he said so many different things, he said it was "partly because he's scared that Juan will kill him, too." (6RT 1012, 1013.) Ms. Newton's notes also reflected that together they "processed his fears of Juan." (6RT 1115.)

Ms. Newton acknowledged she felt she would be doing Oscar a disservice if she did not help him "pinpoint" his fears, and therefore had "blatantly" asked him, "so are you worried that Juan might shoot you, too?" (6RT 1002.) When Oscar said yes, she reminded him that he had also said Juan did not shoot his mother; that she had just died and that Juan was just there. (*Ibid.*)

Ms. Newton also described how she had focused Oscar on the set of facts Oscar had originally given her and, on at least one occasion, had told him she believed that set of facts, rather than subsequent versions, and that she would "challenge him" if she thought what he was saying was incorrect. (6RT 1052-1054.) Shown notes of a session in which Oscar had said Juan did not shoot his mother, and that she was under the couch, Ms. Newton acknowledged she "reinforced his memory that Juan shot mom and

sis . . . ." (6RT 1087.) Ms. Newton also acknowledged that Oscar had given different versions of what had happened, but said "[she] wouldn't say he's unreliable in giving those versions because he has very intentionally given those varying versions." (6RT 1138.) Ms. Newton also agreed that children ages five to eight are particularly suggestible, and agreed that Oscar would be affected by her telling him what she believed to be true. (6RT 1089-1090.)

Ms. Newton also testified that Oscar sometimes drew pictures during counseling sessions, and once drew one of "Juan," though Oscar did not remember "Juan's" name that day. (6RT 1101-1103.) He also had forgotten his sister's name. (6RT 1014-1015.) According to Ms. Newton, "it's not just his sister's name. Names are not important to Oscar." (6RT 1015; but see 6RT 1002 [big deal for Oscar to remember names].) The picture Oscar drew of "Juan" showed a head "shaved around the bottom" with hair sticking up on top, and no facial hair. (6RT 1105-1107, 1108.) Oscar also drew a picture of the interior of his house, on which Ms. Newton labeled various rooms, stick figures and items. (6RT 1109-1114.) In the course of drawing the house, Oscar said Juan did not shoot his mother; she just bled and died, as did his sister. (6RT 1114-1115.) According to Ms. Newton, Oscar was "emphatic" about that. (*Ibid.*)

Ms. Newton also testified that Oscar told her Juan had taken him out for ice cream, which he thought was "white," because that is his favorite. (6RT 1116.) On another occasion, Oscar said Juan took the whole family out for ice cream. (6RT 1119.)

As noted (see Argument I, *ante*, p. 34, fn. 14), Ms. Newton testified that Oscar suffered post traumatic stress disorder, but stated she did not

believe this was "blocking his ability to perceive – to talk about past perceptions." (6RT 1134.)

b. Dr. Streeter's Testimony

Dr. Streeter testified extensively regarding the influence Wanda Newton exerted over Oscar. She based her opinion on a review of Ms. Newton's therapy records where she found significant examples of Ms. Newton's deviation from her duty of neutrality. (4RT 554, 559.) For example, although Oscar gave Ms. Newton differing accounts of what happened the night his mother died, including that appellant "did not shoot his mother," Ms. Newton wrote in her notes that "I think I believe what [Oscar] told her first about Juan shooting mom and sis and that we should tell truth," and, in another entry, that Oscar "can't yet admit he changed the memory." (4RT 560.) Dr. Streeter also noted that Ms. Newton's notes included a reference to "[t]he man he knows murdered his mother," when in fact nothing in Ms. Newton's records indicated that Oscar had ever said that he knew who had killed his mother.[27] (4RT 569-570.) Dr. Streeter opined that these were the type of comments having the potential to suggest to a child what the therapist expects the child to say or expects the child to believe. (4RT 559 ["It's imposing the therapist's sense of reality or perception or belief on the situation rather than allowing the child to have their own opinion . . ."].) Because children frequently want to please authority figures, over time, the child would have a tendency to conform to the opinion they feel the adult is expecting or wanting them to have. (5RT

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[27] Dr. Streeter also pointed out that when Oscar forgot appellant's name, Ms. Newton would supply it. (4RT 594.)

562, 748.) When asked how Ms. Newton's therapeutic approach would likely affect a child, Dr. Streeter responded:

> The – the word that I'm gonna use is shaping. A therapist has a very powerful ability to shape a child's behavior, a child's thought processes, what a child says by the type of response that the therapist provides. . . . That's what appears to have happened from the progress notes that I have.

(4RT 568-569.)

On cross-examination, Dr. Streeter gave additional examples of how Ms. Newton had attempted to shape Oscar's memory. (See 5RT 753.) For example, she explained that Ms. Newton's note that she had asked Oscar whether he was worried "that Juan might shoot him, too," seemed very suggestive, given there was no record that Oscar had ever said Juan had shot anyone and Oscar had in fact said to her, "Wait, he didn't shoot my mom; remember, I told you that." (5RT 739, see also 5RT 740, 829 ["direct indication of [Newton] influencing what version she believes is correct and what version she does not believe is correct"].) According to Dr. Streeter, Ms. Newton was telling Oscar, "which version she thinks she believes, which is going to imply to him what version he should say or not say." (5RT 831.) Dr. Streeter explained that, "when you do therapy with children you can influence them very easily. They're going to want to please you." (5RT 748.) She also noted on several occasion that Ms. Newton's notes evidenced "a lot of court preparation;" i.e., that Ms. Newton's sessions with Oscar were substantially devoted to preparing him to testify, rather than to therapy. (4RT 563, 583-591; 5RT 815-816, 832.)

At trial, Dr. Streeter described the cognitive development and reality testing of five- to seven-year-old children. Critical features of cognition and perception at that stage include fluidity of thought processes and

reliance on imagination, limited focus, distractability, poor grasp of time and resulting merger or inaccurate sequencing of events and susceptibility to suggestion and influence by people who have authority over them. (25RT 5336-5339.) Dr. Streeter also explained the unconscious process of confabulation which may occur when children witness events that make no sense. (25RT 5340.) Children have a natural tendency to fill in the gaps in their perception with information they hear from other people or is supplied by their own minds. (*Ibid.*)

3. Oscar's Testimony at The First and Second Trials

During the first trial, Oscar said that he had, in fact, heard people at Rosa Chandi's house talking about what had happened to his mother and who might have committed it. (16RT 3455-3456.) Oscar also said he had talked to Victor about what had happened. (16RT 3456.)

Oscar also confirmed that he and Newton went over what he was going to say in court and that she would tell him when she liked what he said.[28] (16RT 3403-3404.) After he had answered a series of questions from the prosecutor, Oscar asked, "Do I have to check; check?" (16RT 3415.) The prosecutor asked Oscar if this was something he and Wanda did, "like she says check and you do something," to which Oscar responded "never mind." (16RT 3416.) Defense counsel followed up on this line of questioning. She managed to elicit from Oscar that Ms. Newton sometimes said check to him when they were talking about what happened at his

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[28] Although, according to Oscar, Ms. Newton did not say she did not like what he said, she did tell him that she did not believe something he said, and told Oscar to tell the jury that he was "joking" or "playing" when that occurred. (16RT 3405.)

mother's house, sometimes when she wanted him to think about something again. (17RT 3560-3561; 26RT 5654.)

Further, when the prosecutor had initially asked Oscar whether the person in his mother's room, whose name he did not then remember, was in the courtroom, he answered no. (16RT 3358.) After the recess, the prosecutor again asked who came into his mother's bedroom and whether Oscar knew his name. (17RT 3626.) Oscar answered that there was "Juan, and then Michael and – I can't remember his other –." (17RT 3627.) This time, when asked who Juan is, Oscar identified appellant.[29] (*Ibid.*)

On cross-examination, defense counsel asked Oscar if his adoptive mother (Nancy Fennell) told him if he "just talked to Juliet [the prosecutor] about Juan he could go home?" Oscar said, "Yeah." (17RT 3633.) Asked whether, "before that," he remembered anyone named Juan, Oscar said, "No." (*Ibid.*) Asked whether he was "doing this to get outta here" Oscar replied, "Yeah, I want to get over with [*sic*]." (17RT 3633-3634.) The exchange continued:

> Q. You want to get outta here, don't you? So you're just gonna say whatever Juliet wants, aren't you? Aren't you?
>
> A. No. I feel like just zipping home.
>
> Q. Yeah, I know. You're doing this, though, to get outta here, aren't you?
>
> A. Yeah.

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[29] The association between the name "Juan" and the person who bought Oscar ice cream was provided by Oscar's brother Victor. (64RT 13208, 13221.) The further association between the name "Juan" and the person in his mother's house resulted from the suggestive single- photo showup, which in fact lacked the single physical characteristic, the "whisp," described by Oscar. (See Argument III, *post.*)

Q. You didn't know Juan?

A. I didn't know Juan?

Q. No, you didn't identify him yesterday, you didn't point him out in court yesterday; you remember that?

A. Yeah. I didn't know which guy she was talking about.

Q. Oh, but you did today?

A. Um, yeah – I think so.

. . . .

Q. Okay. How - - did you know today where to point?

. . . .

A. I just knew it.

Q. Somebody told you, didn't they?

A. No.

Q. Juliet told you?

A. I mean yeah.

Q. Anyway, you've been practicing this for a while, haven't you?

A. Yeah.

(17RT 3634-3635.)

After observing Oscar's testimony at the first trial, Dr. Streeter concluded that he had been rehearsed or coached. (25RT 5343.) She based her opinion on differences between Oscar's testimony at the in limine hearing and his testimony at trial, including his use of phrases at trial that "he had obviously been taught by an adult." (25RT 5343-5344.) She also commented on the inadequacy of the voir dire regarding Oscar's understanding of the difference between the truth and a lie which presented a concrete situation that did not require Oscar to recall information or test whether he could recall information accurately. (25RT 5343.)

Similarly, at the second trial, after Oscar had given a few narrative answers, defense counsel asked him if "this is all the things that you talked about to Wanda [Newton], isn't it, what you just told me now, the story? Oscar answered, "yeah." (35RT 7686.) When asked if "that's what you've been practicing," Oscar again answered "yeah." (*Ibid.*)

4. Oscar's Testimony at The Instant Trial

Oscar testified on direct examination that he did not recall very well the day his mother and sister were killed. He also did not recall being questioned by police about what had happened. He recalled talking to "some people" and that he told them the truth, but did he not recall whether they showed him any photos. (59RT 11967, 11970-11971.) The prosecutor ended this brief examination even though Oscar had not identified anyone who may have killed his mother and sister, and he had not testified about what happened that night. (59RT 11971.)

During cross-examination, Oscar continued to testify that he did not remember what happened the night his mother and sister died. In fact, he did not recall seeing anyone else in his mother's room that night. (59RT 12002; 60RT 12206-12207.) He did not recall if he was in his mother's room that night (60RT 12189), how his mother died (60RT 12197), or anything about what happened to her (60RT 12208). In addition, he testified that he could not, in fact, recall if he told the truth when he talked to people about what happened the day his mother died. (60RT 12210.)

On re-direct examination, Oscar could not identify the person in the single photograph (Peo. Exh. No. 75), or anyone in the six-man photo lineup (Peo. Exh. No. 76), when the prosecutor placed these photos in front of him while he was testifying in front of the jury. (10CT 2501; 60RT 12211-12215.) Nevertheless, over defense objection, the prosecutor was

able to lead Oscar to identify appellant as someone he saw in his mother's house the day she died. (60RT 12216.)

Defense counsel tried but was unable to refresh Oscar's recollection. She then moved for admission of Oscar's prior testimony and statements under section 1237, as prior recollection recorded.

In discussing defense counsel's request to attempt to refresh Oscar's recollection, and her renewed challenges to Oscar's testimonial competency and personal knowledge, the court stated:

> I question whether or not this witness has personal knowledge of the matter under Evidence Code section 702, personal knowledge . . . means a present recollection of an impression derived from the exercise of the witness's own senses. [¶] This witness has repeatedly said – in fact, has said to every question asked of him since soon after the inception of cross that he doesn't remember. . . .
>
> [¶] At this point, it may well be that he's been exposed to this so much that he really and truly does not remember and he does not have personal knowledge of the matter, and if that's the case, I would strike his testimony and admonish the jury.

(59RT 12005-12006.) While Oscar's professed loss of memory at the instant trial was more extensive than at the prior trials, the court's observations regarding Oscar's lack of personal knowledge were apposite from the outset and should have resulted in the exclusion of his testimony.

The court yet again acknowledged that Oscar had been subjected to outside influences that affected his present recollection in discussing appellant's motion to admit Oscar's prior statements and testimony under Evidence Code section 1237, prior recollection recorded. The court stated:

> [W]hat occurs to me is we have not only the interval of substantial period of time, which . . . I cannot see how that could be – such statements could meet the requirement of fresh, but in addition to the time – substantial time factor is

> *the intervening therapy wherein fantasy play was used and all the other . . . evidence that – that I have heard before about what went on in therapy sessions.* I do not see how that would meet the reliability test that seems to be attendant to the fresh requirement of 1237.

(60RT 12136, italics added.)[30]

Long before its belated recognition of Oscar's exposure to disqualifying outside influences, the court had ample reason to exclude Oscar's testimony for lack of personal knowledge. Indeed, it was already evident at the first trial that Oscar had been influenced, coached or rehearsed to the point that he no longer had a present recollection of his own perceptions. By the third trial, it was therefore incumbent on the court to exclude Oscar's testimony. The court abused its discretion in failing to do so.

E. The Trial Court Abused Its Discretion In Admitting Oscar's Unreliable and Untrustworthy Testimony

"[R]eliability is the linchpin in determining admissibility" of evidence under the due process clause of the Fourteenth Amendment. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 114.) The admission of unreliable evidence violates a defendant's due process right to a fair trial under the Fourteenth Amendment. (See *Jackson v. Denno* (1964) 378 U.S. 368, 385-386; see also *United States v. Wade* (1967) 388 U.S. 218, 230.)

The methods used to insure that only reliable evidence is considered by the jury include rules regarding the competency of witnesses and their

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[30] Although the court's analysis was narrowly directed to the requirements of Evidence Code section 1237, its observations regarding the influence of Oscar's therapy sessions were equally relevant to the issue of present personal knowledge.

personal knowledge of the subject matter of their testimony. (See, e.g., 1 McCormick On Evid. (7th Ed. 2013) § 10, p. 61 [one of the earliest and most pervasive manifestations of the common law insistence on the most reliable sources of information is the requirement that a witness must testify from personal knowledge].) Thus, "questions of trustworthiness and reliability are intertwined with the issues of whether the declarant is competent to be a witness and has the required personal knowledge. [Citation.]" (*People v. Tatum* (2003)108 Cal.App.4th 288, 297, citing *Idaho v. Wright* (1990) 497 U.S. 805, 824-825.) Evidence Code section 702 and Federal Rules of Evidence, rule 602,[31] which directly parallels it, limit the testimony of lay witnesses to those matters about which the witness has personal knowledge and embody "one of the most fundamental tenets of a rational system of evidence law; testimony should be reliable and, thus, must be based on the perceptions of the witness rather than conjecture or second-hand information.'" (27 Wright & Gold, Fed. Prac. & Proc.: Evid. (1993) § 6021, p. 187; *United States v. Hoffner* (10th Cir. 1985) 777 F.2d 1423, 1425 ["The perception requirement stems from F.R.E. 602 which requires a lay witness to have first-hand knowledge of the events he is testifying about so as to present only the most accurate information to the finder of fact"].) As noted above, this Court has recognized that a heightened reliability standard applies in capital cases. (*People v. Cudjo* (1993) 6 Cal.4th 585, 623, citing *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

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[31] Rule 602 of the Federal Rules of Evidence (28 U.S.C.) provides in pertinent part, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

This strict demand for reliability must be reconciled, however, with the jury's primacy as the section 403 strikes the balance by limiting judicial gatekeeping to determining whether there is sufficient evidence to sustain a finding of the existence of personal knowledge within the meaning of Evidence Code section 702. (See *People v. Lewis*, *supra*, 26 Cal.4th at p. 356.) Here, by the time of the instant trial, the record showed conclusively that Oscar had no present, reliable, uncontaminated recollection of what he perceived or thought he perceived the night his mother and sister died. In other words, there was no reliable evidence before the court that would have sustained a finding that Oscar had the requisite personal knowledge; therefore, his testimony should have been excluded or stricken pursuant to Evidence Code section 702, subdivision (c)(2).

In *People v. Dennis*, *supra*, 17 Cal.4th 498, the child witness was four years old at the time of the crimes and eight years old when she testified at trial. (*Id.* at p. 524.) In response to the defendant's challenge under section 701, the court conducted a pretrial evaluation of the child's competency in camera and found her competent. (*Ibid.*) On appeal, the defendant also argued in connection with this determination that the child lacked the capacity to perceive and recollect her perceptions. (*Id.* at pp. 525-526.)

This Court rejected the latter argument on the ground that the in camera voir dire of the witness showed that she could perceive and recollect and had been an eyewitness to events surrounding her mother's death. The Court reasoned that once the trial court had properly determined the witness was competent, it had no basis for excluding her testimony for lack of personal knowledge. (*People v. Dennis*, *supra*, 17 Cal.4th at p. 526.) This Court did not regard as disqualifying the facts that the witness received

therapy to cope with the crime, that she discussed the events with the prosecutor and others, and that she had gaps in her memories of the evening the crime occurred. (*Ibid.*)

On the record in *Dennis*, the Court had to strain to address the personal knowledge claim inasmuch as the only subject of the voir dire and the only issue decided by the trial court was testimonial competency. (*People v. Dennis*, *supra*, 17 Cal.4th at pp. 525-526.) The Court may have reached out for the purpose of clarifying the distinction between a witness's competency under Evidence Code section 701 and a witness's lack of personal knowledge under section 702. (See *People v. Lewis*, *supra*, 26 Cal.4th at p. 356, fn. 4 [noting confusion in referring to witness's capacity to perceive and to recollect as an issue of competency, which more precisely refers to a witness's qualification to testify].) If that was its purpose, *Dennis* was not the right case for dispelling the confusion.

Prior to the enactment of the Evidence Code in 1965, the test of witness competency included the "*ability* to perceive, recollect. . . ." (*People v. McCaughan* (1957) 49 Cal.2d 409, 420, italics added ["It bears emphasis that the witness's competency depends upon his *ability* to perceive, recollect and communicate"].) The new Code limited the scope of witness competency to the *capacity* to communicate intelligibly and the *capacity* to understand the duty to tell the truth. (Evid. Code, § 701 comments.) Rightly, questions relating to the witness's capacity to perceive and recollect were assigned to the personal knowledge inquiry under section 702.

The Court in *Dennis*, however, interpreted this history too narrowly to mean that the only preliminary determination to be made by a trial court is whether the witness lacked the capacity to perceive and recollect a

particular matter. (*People v. Dennis, supra,* 17 Cal.4th at p. 525.) Moreover, as its analysis makes clear, what the Court really meant by "capacity" was the "opportunity" to perceive; hence, its conclusion that because the witness was found to be competent and was present at the scene when the crime was committed, Evidence Code section 702 was satisfied. (*Id.* at p. 526.) Under this analysis, however, section 702 is surplusage – effectively a merger of section 701 and the hearsay rule. (See *People v. Valencia* (2006) 146 Cal.App.4th 92, 103 [emphasizing that the "rationale for requiring a hearsay declarant to have personal knowledge when the declarant's statement is admitted for the truth is identical to the rationale for requiring a witness to have personal knowledge of the subject matter of the witness's testimony"].)

Dennis, supra, 17 Cal.4th 468, is correct that the opportunity to perceive is a threshold requirement for personal knowledge, but it is not the only requirement. (See McCormick, *supra,* at p. 61 [a witness testifying to a fact "must (1) have had an opportunity to observe, (2) have actually observed the fact, and (3) presently recall the observed fact"].) Personal knowledge has been said to have four parts: (1) sensory perception; (2) comprehension of perception; (3) present recollection of what was perceived; and (4) ability to accurately testify at trial as to what was perceived. (See Wright & Gold, *supra,* at pp. 204-205, discussing Federal Rules of Evidence, rule 602.) These components are implicit in the definition of personal knowledge under Evidence Code section 702, as explained in the California Law Revision Commission Comments to Evidence Code section 702, that is, "a present recollection of an impression derived from the exercise of the witness'[s] own senses."

Thus, a witness who had the opportunity to perceive an event could still be disqualified from testifying concerning that matter if the witness lacked a present, personal recollection of what he or she perceived. If, or to the extent, *Dennis*, *supra*, 17 Cal.4th 468, may be read to limit section 702 to a single foundational requirement, i.e., the opportunity to perceive, the decision is inconsistent with the settled meaning of personal knowledge and the purpose of the section 403 hearing, and should be reconsidered.

Further, *Dennis*, illustrates the problem attendant to fashioning a rule of law based on an undeveloped factual record. The Court in *Dennis* concluded that the witness's participation in therapy, discussion of the events with the prosecutor and others, and gaps in her memories were questions for the jury, not foundational facts to be determined preliminarily by the trial court. (*People v. Dennis, supra,* 17 Cal.4th at p. 526.) However, other than these bare facts, there was no evidence or argument in the trial court and hence no consideration in *Dennis* that, as a result of these outside influences, the witness could no longer testify from personal memory, perception or knowledge. Indeed, the two cases cited in *Dennis* to dispense with the section 403 determination by the court, *People v. Mincey*, *supra*, 2 Cal.4th at pp. 444-445, and *People v. Cudjo*, *supra*, 6 Cal.4th at pp. 621-622, involved claims of testimonial incompetency, not lack of personal knowledge, based on some "unsurprising" inconsistencies and lack of total recall in the witness's testimony. Neither case involved the claim, which also went unstated in *Dennis*, that the child witness had no present, independent recollection of what he or she had observed.

Unlike California, some states still consider pretrial suggestion or taint a foundational criterion in determining witness competency. (See, e.g., *Commonwealth v. Delbridge* (Pa. 2003) 855 A.2d 27, 39 [allegation of taint

centers on second element of competency test – capability to observe the event to be testified about and ability to remember it]; see also *State v. Fulton* (Utah 1987) 742 P.2d 1208, 1218, fn. 15 [court's determination of competence of child witness "may take into account the child's susceptibility to suggestion and whether the child has been intentionally prepared or unconsciously influenced by adults in such a way that it is likely the child is only parroting what others have said about the relevant facts']; *English v. Wyoming* (Wyo. 1999) 982 P.2d 139, 146 [question of independent recollection considered at pretrial hearing on child witness's competency].) The court in *Delbridge* made an important distinction between the determination of the competency and credibility of a witness:

> A competency hearing concerns itself with the minimal capacity of the witness to communicate, to observe an event and accurately recall that observation, and to understand the necessity to speak the truth. [Citation.] A competency hearing is not concerned with credibility. Credibility involves an assessment of whether or not what the witness says is true; this is a question for the factfinder. [Citation.] An allegation that the witness's memory of the event has been tainted raises a red flag regarding competency, not credibility.

(*Id.* at p. 40.) This distinction has not lost its force because the allegation that the witness's recollection has been tainted by outside influences is an element of personal knowledge, not testimonial competency, under California law.

In contrast to *Dennis*, *supra*, 17 Cal.4th 468, the record in this case contains abundant evidence demonstrating that, as the court belatedly observed: "it may well be that [Oscar's] been exposed to this so much that he really and truly does not remember and he does not have personal knowledge of the matter. . . ." (59RT 12006.) Indeed, as Wanda Newton

admitted at the earlier trials, because of the constant reminders that "Juan" was the perpetrator, it "would be very difficult later on to know whether it was reality or a result of coaching."[32] (26RT 5655; 45RT 9694-9695.) Newton stated that Oscar did not always remember Juan's name. (26RT 5637.) She then admitted that she talked about "Juan" a lot; 40 to 50 percent of the sessions included discussions about "Juan," though not always by name. (26RT 5638; 45RT 9695 [when Oscar said he did not want to talk about Juan, Newton engaged Oscar in a "once upon a time story" about going to California and talking to the judge].)

Thus, by the instant trial, having twice seen Oscar's questionable performance on the stand, and having heard substantial testimony regarding his regular exposure to outside influences, including coaching by his therapist, the court had a duty to exclude Oscar's testimony to ensure that the evidence admitted at trial was sufficiently reliable so that the jury could draw trustworthy conclusions of guilt or innocence. (Cf. *State v. Michaels* (N.J. 1994) 642 A.2d 1372, 1379-1380 [lack of objectivity also indicated by interviewer's failure to pursue any alternative hypothesis that might contradict an assumption of defendant's guilt, and a failure to challenge or probe seemingly outlandish statements made by the children].) Accordingly, it was a manifest abuse of discretion to admit Oscar's testimony at the third trial, or alternatively to fail to instruct the jury to disregard, where there was indisputable evidence that Oscar lacked a

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[32] Although Newton was the most overt in coaching Oscar to identify appellant or "Juan" in court, she testified that Denise Himes, the Victim Witness Coordinator for the District Attorney's Office in Idaho, told Oscar where "Juan" would be sitting in the courtroom, next to his helper, defense counsel. (26RT 5632; 45RT 9675.)

present, personal recollection of the only relevant matter – i.e., what he saw and heard in his mother's bedroom the night she died.

F. The Admission Of Unreliable Evidence Violated Appellant's Right to Due Process and Cannot Be Found Harmless

The court's failure to exclude or strike Oscar's unreliable testimony denied appellant a fair and trustworthy adjudication of guilt and ultimately penalty. Plenary, rather than deferential, review is appropriate in such cases, as here, in which the reviewing court is called upon to determine whether a defendant has been deprived of a fair trial based on the improper admission of evidence. (See, e.g., *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [whether prosecutor's remarks in closing argument violated due process]; *People v. Badgett* (1995) 10 Cal.4th 330, 350 [claim of coerced statements of third party reviewed de novo for due process violation]; *People v. Sully* (1991) 53 Cal.3d 1195, 1216-1218 [whether third party immunity agreement was coercive and admission deprived defendant of fair trial]; *Wilcox v. Ford* (11th Cir. 1987) 813 F.2d 1140, 1148, fn. 15 [same].)

Thus, although appellant maintains that the admission of Oscar's testimony at the instant trial amounted to an abuse of discretion, alternatively, he urges that an independent review of the record by this Court is appropriate because the error in admitting Oscar's unreliable testimony resulted in a gross distortion of the truth-finding process. Oscar's susceptibility to suggestion and prior coaching allowed the prosecutor to lead Oscar to an in-court identification of appellant which, as argued in Argument III, *post*, was also irreparably tainted by the suggestive photo lineups the day of the incident. Further, as argued in Argument V, *post*,

appellant's right to due process was violated because Oscar's professed lack of recollection, whether genuine or feigned, insulated him from any meaningful cross-examination.[33]

Oscar was the closest thing to an eyewitness in this case, and his identification of appellant as one of the persons he claimed to have seen in his mother's bedroom the night she was killed was unquestionably the most important evidence at a trial that was devoid of any physical evidence connecting appellant to the crime.

Over time, with the increased recognition of the fallibility of eyewitness identification testimony, courts have singled out this category of evidence for special and very detailed instruction. (See, e.g., *People v. Wright* (1988) 45 Cal.3d 1126, 1143; *People v. McDonald* (1984) 37 Cal.3d 351, 363, citing *United States v. Wade* (1967) 388 U.S. 318, 228 ["The vagaries of eyewitness identification are well-known; the annals are rife with instances of mistaken identification"]; CALCRIM No. 315; CALJIC No. 2.92.)

The jury in this case was instructed on witness reliability generally (CALJIC No. 2.20), evaluation of the testimony of a child witness (CALJIC No. 2.20.1), and the facts to consider in proving identity by eyewitness testimony (CALJIC No. 2.92) – all to no purpose here. Because Oscar was allowed to testify and claim, truthfully or not, that he remembered virtually nothing about the night his mother and sister died, except – as led by the

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[33] In Argument V, *post*, appellant submits that allowing Oscar to testify and claim a near-total loss of memory, making him essentially impeachment-proof, violated appellant's Sixth Amendment confrontation rights. Rather than repeat those arguments, appellant adopts and incorporates these arguments as though fully set forth herein.

prosecutor – to identify appellant, the carefully crafted criteria of witness credibility were of no guidance to the jury in determining the accuracy of Oscar's identifications. Because the jury was kept unaware of all the vagaries of Oscar's prior identifications and the untrustworthiness of his recollections, appellant was denied his due process right to a fair and reliable adjudication of his guilt.

Further, allowing Oscar to testify denied appellant the minimum reliability of evidence upon which a death verdict may rest. (See, e.g., *Gregg v. Georgia* (1976) 428 U.S. 153, 188); *Beck v. Alabama, supra*, 447 U.S. at p. 638; *People v. Murtishaw* (1981) 29 Cal.3d 733, 771 & fn. 33 [imposition of a death sentence cannot rest upon unreliable or highly prejudicial evidence]; U. S. Const., Amends. 8th & 14th; Cal. Const., art. 1, § 15.)

This Court has rejected the argument that a death sentence based on a child's testimony is not sufficiently reliable under the Eighth and Fourteenth Amendments as long as the defendant "was fully afforded the protections of the procedures constitutionally required to ensure reliability in the factfinding process." (*People v. Dennis, supra*, 17 Cal.4th at p. 526.)

Because Oscar's testimony thwarted any reasoned evaluation of his truthfulness by the jury, the procedures in this case cannot be deemed constitutionally adequate. (*Ford v. Wainwright, supra*, 477 U.S. at p. 411; *Spaziano v. Florida* (1986) 468 U.S. 399, 456.) Allowing Oscar's testimony at the instant trial thus qualifies as federal, as well as state, constitutional error and cannot be found harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Oscar's near-total failure of recall, hence, near-total immunity from impeachment, was among the principal differences between the instant trial and the two prior trials

which resulted in deadlocked juries. In the previous two trials, Oscar, at times claimed lack of recollection, but gave a sufficient number of factual answers to disclose to the jury that he was a fundamentally unreliable witness who could not distinguish true memories from his own fantasies and confabulations, or from the suggestions of others. In light of this telling comparison, the error in admitting Oscar's testimony at the instant trial cannot be found harmless under either the applicable federal or the state standards for determining prejudice. (*Ibid*; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1135, fn. 13, citing *People v. Watson* (1956) 46 Cal.2d 818, 836 [reasonably probable error affected the result]; *People v. Partida* (2005) 37 Cal.4th 428, 439.) On this record, it is fairly certain that Oscar's identification of appellant affected the verdict. Accordingly, the error is prejudicial and the entire judgment must be reversed.

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III

THE ERRONEOUS ADMISSION OF THE UNDULY AND IRREPARABLY SUGGESTIVE SINGLE-PHOTO LINEUP AND IN-COURT IDENTIFICATIONS VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND A RELIABLE VERDICT REQUIRING REVERSAL OF THE JUDGMENT

A. Introduction

The case against appellant rested largely on the unreliable eyewitness identification of Oscar Hernandez. In August 1997, Oscar was a very imaginative and impressionable five year old. August 4, 1997, was a Sunday and there may have been a party at Oscar's house or at the park that day. Later that evening, his mother went out with someone ("some other boy," according to Oscar), and Oscar was left at home with his sister, Lorena. He went to sleep in his mother's bed. At about 4:30 a.m., he was awakened by "firecracker" noises and saw his mother come into the bedroom followed by a man. The room was dark. Oscar pulled up the covers and peeped out. His mother was injured and trying to use the telephone. The man had a gun and "tried to wake" his mother. The man then left. Oscar also tried to, but could not, wake his mother or his sister. He then ran to his aunt, Rosa Chandi's, house to get help. Not long after, friends and family members, including Oscar's brother Victor, gathered at Chandi's house.

When first interviewed by the police, Oscar gave no description of the man in the room. When interviewed a few hours later, Oscar said only that it was the man who bought him ice cream with a whisp on his chin. Still later that morning, Oscar was shown a single booking photograph of appellant, whom he identified as "Juan," after his brother Victor supplied the name. On the strength of this identification, appellant was arrested. His

arrest photo was placed in a six-pack lineup, which was shown to Oscar. Oscar selected appellant's photo. The next day, Oscar was taken to a live lineup where he again selected appellant, who was the only person in jail clothes.

Oscar initially failed to identify appellant at the first trial, identified him at the second trial, and had to be led to identify him at the instant trial. Testimony regarding the prior showup and photo spread identifications was admitted only at the instant trial.

The single-photo showup was inherently suggestive, especially when presented to a vulnerable, traumatized five-year-old child. All of Oscar's subsequent identifications were tainted by the initial showup, and none were otherwise reliable. Oscar's age, the conditions of his brief encounter with the man he saw in his mother's bedroom the night she was killed, his exposure to outside influences, and his own propensity to fabricate cast irrefutable doubt on the reliability of both his in-court and out-of-court identifications.

After a series of inconsistent rulings at the first and second trials, the trial court was persuaded by the prosecution to admit Oscar's unreliable in-court and photo identifications at the instant trial. In eventually yielding to the prosecutor's arguments, the court committed constitutional error which denied appellant his rights to due process, a fair trial and a reliable penalty verdict as guaranteed by the Sixth, Eighth and Fourteenth Amendments of the United States Constitution and the parallel state constitutional provisions. (U.S. Const., Amends. 6th, 8th, 14th; Cal. Const., article I, §§ 15, 17.) Accordingly, the judgment must be reversed.

B. Procedural/Factual Background

1. In Limine Hearing

Before the first trial, appellant moved to exclude Oscar's in-court and pretrial identifications of appellant based on a single- photo showup, followed by successive photo and live lineups. Appellant argued that the pretrial identification procedures were unduly suggestive and unreliable and, therefore, violated due process. (3CT 759-765.) The trial court held a hearing to determine the admissibility of Oscar's out-of-court and prospective in-court identifications of appellant. The court initially ruled that the single-photo showup was suggestive and unnecessary but that Oscar's in-court identification of appellant would be admissible as independent of police investigatory procedures and statements. The court, however, precluded the prosecution from presenting evidence of Oscar's identification of appellant in the six-person photographic line up or the live lineup. (6CT 1345.) These rulings were modified at each of the ensuing trials.

a. Appellant's Single Booking Photo

Detective Kroutil testified that he obtained appellant's booking photo through a registration check on the license plate of appellant's pickup. (6RT 1170-1172.) Kroutil had received information that morning from Detective Dempsie regarding the description of a vehicle and the first name "Juan" and a location near a drive-in. (6RT 1171.) Officer Dempsie had located a vehicle that matched the description; the registration came back to Juan Sanchez. (*Ibid.*) Kroutil then obtained a booking photo of

appellant from 1996. (*Ibid.*; see Peo. Exh. 1.)[34] The photo showed a man with a very thick mustache which extended well below his lips, but no other facial hair, holding a placard (booking identification card) which stated "Porterville Police Department," Juan Sanchez, PPD# and the date. (Peo. Exh. 1; 6RT 1173.) Kroutil lined out appellant's name, but left the other information intact. (6RT 1186-1187.) He showed this single photo to Oscar at around 9:00 a.m. on the morning of the crimes. (6RT 1172.) Oscar said the photo was "Juan." Kroutil asked Oscar if he had seen Juan lately, and Oscar said "he had seen him that morning while his mom was bleeding." (6RT 1173.) Kroutil did not ask Oscar anything more about Juan at that time. (*Ibid.*) In his report, Kroutil stated he thought that Oscar had heard the name "Juan" from his brother Victor. (6RT 1173-1174.)

b. The Six-Man Photo Lineup

Officer Dempsie interviewed Oscar twice on the morning of August 4. During the first interview, Oscar described the person in his mother's room, whose name he did not know, as the man who had bought him ice cream who had a whisp on his chin. (6RT 1238.) Later that morning, after the single- photo showup, Dempsie showed Oscar Peo. Exh. 2, a six-man photo lineup.[35] (6RT 1228.) Before showing Oscar the photo spread, Dempsie had Oscar recite the events of the night, which Oscar had already begun to embellish, and to again describe the man in his mother's bedroom.

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[34] The same booking photo was admitted at the second trial as People's Exhibit 25 and at the third trial as People's Exhibit 75. (41RT 8859; 64RT 13223.)

[35] The photo lineup had been assembled by Officer Robert Blankenship using a photo he had taken of appellant at the Porterville Police Station after appellant had been arrested. (6RT 1228; 37RT 8042; 64RT 13229.)

(13CT 3509-3510.) Dempsie asked Oscar to tell him again what the man looked like and when Oscar only volunteered that the man had combed back hair, Dempsie asked, "[d]oes the man have a mustache or beard or anything like that?" (13CT 3512.) Dempsie again asked about facial hair and repeatedly gestured to his own face and thick, bushy mustache. (Peo. Exh. 100: 5:49-6:04; 6RT 1254.) Dempsie then set up the showing of the photo lineup and asked Oscar the following:

> Q. He's got whisker right here? If you saw pictures of him, would, would you know if it was him or not? If I showed you some pictures? Think so? Would you know if you saw him again?
>
> A. Uh huh. . . .
>
> . . . .
>
> Q.: Can you look at these pictures and tell me if, if the guy who bought you ice cream and the guy that you saw in your house, is he in those pictures?
>
> A. Mmm, I think it's, ah, him.
>
> Q. That's him? That's the guy that was, was in your mother's house?
>
> A. Yeah.

(13CT 3512-3513.)

Dempsie testified that Oscar picked the photo labeled number 1273, which was appellant's arrest photo. (6RT 1229-1230; 10RT 1993.) Dempsie testified that the photo of appellant in the six-pack accurately depicted his appearance at the time. (6RT 1230.) The lineup consisted of six male Hispanics with goatees. (2CT 313.) Each of the men also had mustaches, but appellant's was the thickest and looked exactly like the

mustache in the single booking photo. (Peo. Exh. No. 2.)[36] Appellant was wearing a red shirt in the lineup. (6RT 1260.) After viewing the lineup, Oscar for the first time described both appellant and later "Michael," who he said was also in his mother's room, as wearing as wearing red shirts the night of the shootings. (6RT 1259, 1261.)

c. The Six-Man Live Lineup

Two days later, on August 6, Dempsie arranged for Oscar to view a live lineup which included appellant and five other men. (6RT 1270, 1272-1273.) When asked if he saw the gentleman that he had seen at his house, Oscar pointed to appellant. (10RT 1987.)

d. The In Limine Rulings

On March 11, 1999, the court heard argument regarding the admissibility of the identification evidence. The court correctly framed the question in relation to the single photo identification as, first, whether the showup was unduly suggestive and, second, whether it was necessitated by some emergency. (10RT 1986-1987.) Further, with respect to the live lineup, People's Exhibit No. 11, the court observed that " Mr. Sanchez is . . . the only one in striped jail pants. He's the only one . . . wearing a red shirt. . . . Mr. Sanchez clearly stands out in the photograph is the bottom line." (10RT 1987.)

Appellant argued that the single booking photo was the first taint, after which every subsequent identification was tainted by the first showing. (10RT 1988.) Oscar's identification was further compromised by the

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[36] The six-person photo lineup was admitted in the second trial as People's Exhibit No. 27 and in the instant trial as People's Exhibit No. 76. (41RT 8859; 64RT 13232.)

suggestive nature of the live lineup for the reasons acknowledged by the court. (*Ibid.*) Appellant further argued:

> The minor at the time he was shown the single photograph had not identified Juan [appellant] from his own independent memory. He had mentioned some – a man who brought him ice cream, but there was no clear indication that – that would have called for a single photographic lineup at that point irreparably contaminated Oscar Hernandez's ability to properly identify anyone that he might have seen, and I would move that the court exclude his identifications one, and two and three and also to preclude him from further identifying Juan Sanchez in court because he has been irreparably contaminated.

(10RT 1988)

The prosecutor countered that even if the single-photo showup were unduly suggestive, the identification had an independent origin because Oscar had previously described the person in his mother's house as the man who bought him ice cream and had described his facial hair, i.e., the whisp on his chin. (10RT 1988-1989.)

The trial court ruled from the bench that, based on the totality of the circumstances, Oscar's identification of appellant from People's Exhibit No. 1, the single- photo showup, "had an independent origin, and the procedure was not so suggestive as to give rise to a substantial likelihood of misidentification." (10RT 1991.)

The court found that People's Exhibit No. 2, the six-man photo lineup, was not unduly suggestive. It also found by "clear and convincing evidence" that the identification had an independent origin "even though the [photo] lineup, itself, was not unduly suggestive." (10RT 1994.)

The prosecutor withdrew People's Exhibit No. 11, the photo of the six-man live lineup and stated that she would not use it at trial. (10RT 1996

[Peo. Exh. 11 withdrawn].) The photo of the live lineup, in fact, was not admitted at any of the trials.

On March 29, 1999, the trial court modified its ruling in writing, stating in relevant part: . . .

> 2) Any in court testimony by Oscar Hernandez on August 4, 1997, he previously identified the perpetrator as the man in Plaintiff's Exhibit 1 as the perpetrator is not inadmissible on the basis of impermissible taint.
>
> The court agrees with Mr. Sanchez there was no compelling reason to present Oscar with the photograph of a single person. The identification procedure was impermissibly suggestive. [Citation.] However, based upon the evidence presented and considering the totality of the circumstances, the court finds by clear and convincing evidence such testimony would be independent of conversations of other family members and of police investigatory procedures and statements.
>
> 3) The subsequent photographic line up and the live line ups were impermissibly suggestive. The prosecution is precluded from presenting evidence of Oscar's identification of defendant in the six-person photographic line up or the live lineup.

(6CT 1345.)

2. The First Trial

Prior to opening statements, the prosecutor sought clarification of the court's rulings regarding Oscar's prior photo identifications of appellant – specifically, People's Exhibit No. 2, the six-person photo lineup. (16RT 3316-3317.) The court compared its oral statements with its subsequent written ruling. (16RT 3317.) The court then stated:

> And . . . my written ruling of March 29th stands. . . . I was influenced by the . . . impermissive and suggestive nature of the single-person lineup shown to Oscar. So I retract the

> finding that I made on the record, and stand by my written ruling in that respect. [(16RT 3317-3318.)]
>
> . . . .
>
> I was troubled by the single photograph showup to Oscar. There was no compelling need to do that. That shouldn't have been handled that way. Oscar should have been shown a lineup at that point. He wasn't.
>
> And given the totality of the circumstances, any identification made in that single photograph, that doesn't come in, and nothing after that comes in, either.

(16RT 3319.)

The prosecutor then queried: "So you're saying all photographs shown to Oscar do not come in? The court responded: "That's right." (16RT 3319.) Pursuant to the ruling, no evidence regarding the photo identifications, nor the photos themselves, was admitted at the first trial.

Subsequently, appellant moved, in hindsight, to strike Oscar's identification of appellant during the in limine hearing on the ground that it was tainted by the three previous photo and live line ups, and that Oscar was rehearsed regarding appellant's identification. (19RT 3947-3948.) The court gave another confusing account of its earlier rulings stating:

> I'd like to make something else clear that wasn't really clear the other day. As to the single photograph show, I – I did find and I did mean to find that by clear and convincing evidence that his identification of that single . . . showup was independent of the conversations of family members and police and investigatory procedures and statements.

(19RT 3950.) In the end, neither the single booking photo nor the photo lineup was admitted at appellant's first trial. (25RT 5301-5302.)

3. The Second Trial

On June 19, 1999, during the second trial, the court again issued rulings on appellant's renewed in limine motions, including the motion to exclude the pretrial identification of appellant, stating:

> After having considered the proffered evidence, the court adopts as its ruling and findings the Rulings Relating to Pre Trial Identifications of Defendant by Oscar Hernandez issued March 29, 1999. [¶] The court has reconsidered its exclusionary sanction imposed in the first trial relating to the identification made by Oscar Hernandez when shown the single photograph. The showing of the single photograph was the direct result of Oscar's prior untainted identification of the man who bought him ice cream with the "whisp." The sanction was inappropriate in view of the court's finding by clear and convincing evidence Oscar's identification was independent of conversations of other family members, statements of the police, and police investigatory procedures and was, instead, the product of his own independent perception and recollection. [¶] If the prosecution meets the criteria of Evidence Code section 1238,[37] the defense is, of course, allowed to argue the weight of the evidence. Exclusion is not sanctioned. [Citations.]

(8CT 1946.)

The court continued to exclude the six-man photo lineup and the six-man live lineup. When Oscar was asked by the prosecutor whether Juan was in the courtroom today, he said, "Yeah . . .Right on the table" wearing "a striped shirt." (34RT 7490-7491.)

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[37] Evidence Code section 1238 conditions the admissibility of a witness's out-of-court identification on the witness's testimony that the identification was made at a time when the crime was fresh in the witness's mind and that the identification was a true reflection of the witness's opinion at the time. (See Argument IV, *post.*)

When Detective Blankenship later began to testify to his part in compiling the six-person photo lineup, appellant moved for a mistrial and the court's rulings concerning the photo identifications were revisited. (37RT 8042-8044, 8068-8077.) Ultimately, no testimony was presented regarding the showup and the photo lineup because the prosecutor had not elicited from Oscar the foundation required by section 1238. (37RT 8077.) Nevertheless, the photo exhibits themselves were admitted into evidence without any foundational testimony. (See 41RT 8859.)

4. The Instant Trial

During the instant trial, the court reiterated "all the prior rulings" it had previously made and stated that if there was any inconsistency in a ruling between the first and second trial, then its "most recent ruling is [its] ruling on the issue." (48RT 10108-10110.)

During opening statements, the prosecutor told the jury that Oscar had identified appellant's photo from a single photo and in a photo lineup. (52RT 11030-11031.) When first mentioned, appellant objected at side bar that Oscar's identification based on the photo had not been admitted in the two prior trials. (52RT 11026-11027.) Appellant further objected to the photo as unduly suggestive, and renewed the motion to exclude the six-man photo lineup and the six-man live lineup shown to Oscar by Detective Dempsie. (52RT 11027-11029; see also Argument IV, *post*, [objection to admission of prior photo identifications on hearsay grounds].) The prosecutor stated that he intended to adhere to the court's ruling excluding the live lineup. (52RT 11028.) He believed, however, that the court had previously ruled that the single photo and photo lineup identifications were admissible. (52RT 11029.) Appellant disagreed.

The court first said it did not recall its rulings, then said it recalled making a finding that the single photo was not unduly suggestive. It further stated that it was going to admonish the jury that statements of counsel are not evidence and expressed confidence the jury would decide the case on the evidence. (52RT 11027-11029.)

On redirect examination, the prosecutor showed Oscar People's Exhibit Nos. 75 (the 1996 booking photo) and 76 (the six-pack). (60RT 12211-12212, 12215.) When shown the photo lineup, Oscar wanted to know "who are these people right here." (60RT 12212.) When asked whether he remembered being shown the booking photo, Oscar said he did not remember the photo or being asked questions about the photos. (60RT 12213, 12215 [no recollection of being shown the photo lineup].)

After Oscar continued to answer every question with "I don't remember," the prosecutor asked him, "Do you see the man sitting over there in the white shirt? and "Did you see him at your mom's house the day she was killed?" (60RT 12216.) Oscar answered "yes" to both questions. (*Ibid.*) The court denied appellant's objection that the prosecutor's pointing to appellant was improper and unduly suggestive. (60RT 12217.) The following colloquy between the prosecutor and Oscar ensued:

Q. Where is it that you saw the man in the white shirt?

A. I don't remember.

Q. Okay. You said you remember seeing him. Why is it that you remember seeing him?

A. I don't remember; all right?

Q. That's okay. That's okay. If you don't remember him being in your mom's room, that's fine, but if you do, then we need to know if that was –

A. I don't remember.

Q. Okay. A minute ago you said that you remembered him – that you knew him. Why is that?

A. Could you say that one more time?

Q. A minute ago you said you knew him, and why is that?

A. I forgot.

Q. You've forgotten in a minute?

A. Yes.

Q. You'd like to go home right now?

A. What?

Q. Would you like to go home right now?

A. Yeah.

Q. Okay.

. . . .

Q. . . . why it is that you remember him a day or two ago?

A. I don't remember.

Q. Not a day or two ago, a few minutes ago.

. . . .

A. Is this a cinchy one?

Q. . . . why is it you know the man in the white shirt?

A. He bought me ice cream.

Q. He did? When did he buy you ice cream?

A. I don't remember.

Q. Okay. Did you tell people he bought you ice cream the day your mom was killed?

A. No.

(60RT 12218-12220.)

On re-cross examination, Oscar was asked about, but did not remember, his testimony at the first trial when he failed to identify appellant in the courtroom. (60RT 12227.) In addition, when shown a photo of Marcos Pena (Def. Exh. Q), Oscar stated that he had seen him in his mother's house the night she died. (60RT 12227-12228; 64RT 13029.)

Prior to the prosecutor's calling Officers Kroutil and Dempsie, appellant renewed his hearsay objections to the admission of the photo identification evidence. (62RT 12785.) The court agreed that the prosecutor had not established the foundation for admission of the evidence under section 1238, but queried whether, among the "33 plus exceptions to the hearsay rule," another exception might apply. (62RT 12786.)

At the follow-up hearing, appellant also restated his objections that the single-person showup was unduly suggestive and had contaminated the six-person lineup, which was itself suggestive because, among other reasons, appellant was the only one wearing a red jumpsuit. (64RT 13027.) The court first addressed Oscar's statements to Dempsie and reiterated its earlier ruling that the statements describing the man in his mother's bedroom as having a "whisp" and having bought Oscar ice cream were admissible under the spontaneous declaration exception of Evidence Code section 1240. (8CT 1941; 64RT 13027.)

With respect to Oscar's identification of appellant from the single-photo showup by Kroutil, the prosecutor argued that the evidence was admissible as a prior consistent statement under Evidence Code section 1236 or as a spontaneous declaration under section 1240. (64RT 13028-13029.) The prosecutor proffered that the prior consistent statement exception applied because appellant elicited from Oscar that he had previously failed to identify appellant in court and that the person in

Defense Exhibit Q, Marcos Pena, was present in the house the morning Oscar's mother died. (64RT 13029.) Appellant acknowledged that he had tried to impeach Oscar's in-court identification, but argued that the prior identification did not meet the additional requirement set out in Evidence Code section 791. (64RT 13030-13031.)

The trial court ruled that Oscar's statements to Kroutil – without distinguishing the photo identification from Oscar's other statements – were admissible as prior consistent statements under sections 1236 and 791, subdivision (a), also as past recollection recorded under section 1237, and as spontaneous declarations under section 1240. (64RT 13039-13040.) The court also admitted the prior identification from the six-person photo lineup as a prior consistent statement. (See 64RT 13027,13150.) During Dempsie's testimony regarding the photo lineup, appellant reasserted his objections to both the single-photo showup and photo lineup identification evidence. (64RT 13230.) The court responded that it understood that appellant had already objected and did not waive any objection by not renewing it. (64RT 13230-13231.)

The propriety of the court's admission of the photo identification evidence under exceptions to the hearsay rule are addressed in related Argument IV, *post.* Appellant's constitutional challenges to the admissibility of both Oscar's in-court and out-of-court identifications, which trump state rules of evidence, are presented herein.

This Court reviews deferentially a trial court's findings of historical fact, especially those that turn on credibility determinations, a trial court's ruling as to whether a pretrial identification procedure is unduly suggestive is reviewed independently by the Court. (*People v. Alexander* (2010) 49 Cal.4th 846, 902; *People v. Gonzalez* (2006) 38 Cal.4th 932, 943.)

Appellant submits that both the single-photo showup and six-photo lineup were unduly suggestive and utterly lacking in the indicia of independent source or reliability required to overcome the taint. Accordingly, Oscar's in-court and out-of-court identifications of appellant should have been excluded.

C. The Admission of Evidence Derived From a Suggestive Identification Procedure Violates Due Process Where The Procedure Was Conducive to Irreparable Misidentification and The Evidence Is Unreliable Under The Totality Of The Circumstances

As the United States Supreme Court has long recognized, "the vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." (*United States v. Wade* (1967) 388 U.S. 218, 228-229 [noting "the high incidence of miscarriage of justice" caused by such mistaken identification].) Federal courts of appeal have echoed and amplified these warnings. (See, e.g., *Jackson v. Fogg* (2nd Cir. 1978) 589 F.2d 108, 112; *United States v. Russell* (6th Cir. 1976) 532 F.2d 1063, 1066; *United States v. Smith* (9th Cir. 1977) 563 F.2d 1361, 1365 (conc. opn. Hufstedler, J.) [finding "highly dubious" the assumption that eyewitness identification is generally reliable "given the extensive empirical evidence that eyewitness identifications are not reliable"].)

More recent research has convincingly shown that eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined. For example, in a study conducted by the United States Department of Justice of 28 wrongful convictions, it determined that 85% of the erroneous convictions "were based primarily on the

misidentification of the defendant by a witness. (Citations omitted.)"[38] (*State v. Dubose* (Wis. 2005) [collecting studies confirming that "eyewitness testimony is often "hopelessly unreliable"].)

The instant case is among the latest in the annals of dubious convictions based on unreliable, constitutionally-defective eyewitness identification evidence. Here, the erroneous admission at the instant trial of Oscar's tainted in-court identification of appellant, bolstered by the unduly suggestive and unreliable pretrial identifications, violated appellant's right to due process and a fair and reliable trial, and resulted in a miscarriage of justice.

In a series of decisions, the United States Supreme Court has recognized "a due process check on the admission of eyewitness identification" testimony when police-arranged circumstances lead a witness to identify a particular person. (*Perry v. New Hampshire* (2012) _U.S. _, 132 S.Ct. 716, 717, 724 [citations omitted].) These decisions were synthesized in *Neil v. Biggers* (1972) 409 U.S. 188 (*Biggers*) and *Manson v. Brathwaite* (1977) 432 U.S. 98 (*Manson*), which set out the basic approach to determining whether or when the due process clause requires suppression of an eyewitness identification tainted by police suggestion. (*Perry*, *supra*, 132 S.Ct. at p. 724.) The high court emphasized first that due process concerns arise only when law enforcement officers use an

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[38] In light of these compelling studies, state and federal courts are now recognizing that their "current approach to eyewitness identification has significant flaws." (See, e.g., *United States v. Greene* (4th Cir. 2013) 704 F.3d 298, 305, fn. 3; *Young v. Conway* (2d Cir. 2013) 715 F.3d 79, 80-82 and fn. 2; *State v. Almaraz* (Idaho 2013) 301 P.3d 242, 251-253, and fn. 2; *State v. Lawson* (Or. 2012) 291 P.3d 673, 769-789; *State v. Henderson* (N.J. 2011) 27 A.3d 872.)

identification procedure that is both suggestive and unnecessary. (*Manson*, *supra*, 432 U.S. at p. 107; *Biggers*, *supra*, 409 U.S. at p. 198.)

As explained in *Biggers*:

> Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.

(*Biggers*, *supra*, 409 U.S. at p.198.)

However, even when the police use such a procedure, exclusion of the identification is not automatic; rather, the due process clause requires courts to assess, on a case-by-case basis, whether improper police conduct created a "substantial likelihood of misidentification." (*Biggers*, *supra*, 409 U.S. at p. 201.) Or, as the high court explained in *Manson*, *supra*, "reliability [of the eyewitness identification] is the linchpin" of that evaluation. (*Manson*, *supra*, 432 U.S. at p. 114.) Thus, where the "indicators of [a witness's] ability to make an accurate identification" are "outweighed by the corrupting effect" of police suggestion, the identification should be suppressed. (*Ibid.*)

In the face of a due process challenge to the admissibility of eyewitness identification evidence, California courts have followed the legal framework set forth in *Biggers*, *supra*, 409 U.S. 188, and *Manson*, *supra*, 432 U.S. 98. (See, e.g., *People v. Cunningham* (2001) 25 Cal.4th 926, 989; *People v. Gordon* (1990) 50 Cal.3d 1223, 1242.)

In *People v. Gordon, supra,* 50 Cal.3d at p. 1242, this Court coined the term "constitutional reliability," to describe the type of scrutiny that the trial court — rather than the jury — must provide when proffered eyewitness testimony is challenged on federal constitutional grounds. Constitutional reliability depends on (1) whether the identification

procedure was unduly suggestive and unnecessary, and if it was, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances. (*Ibid.*, citing *Manson, supra*, 432 U.S. at pp. 104-107.)

When a defendant challenges the fairness of a pretrial identification, the defendant has the initial burden to show the police procedures were suggestive or unfair. (*People v. Ochoa* (1998) 19 Cal.3d 353, 412; *People v. Cooks* (1983) 141 Cal.App.3d 224, 305.) If the defendant shows that some part of the procedure was suggestive, the burden then shifts to the prosecution to show by clear and convincing evidence[39] that the identification is nevertheless reliable standing on its own – i.e., that it has independent reliability. (See *Shirley v. Yates* (E.D. Calif. 2013) 950 F.Supp.2d 1141, 1145; *People v. Cooks, supra*, 141 Cal.App.3d at p. 306, and cases cited therein.)

In determining independent reliability, the courts consider the following non-exhaustive factors: (1) the opportunity of the witness to view the suspect at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness' prior description of the perpetrator; (4) the level of certainty demonstrated at the time of the identification; and (5) the time between the crime and the identification. (*People* v. *Cunningham, supra,* 25 Cal.4th at p. 989, citing *Manson, supra,* 432 U.S. at p. 114, and *Biggers, supra,* 409 U.S. at pp. 199-200.)

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[39] In California, "clear and convincing evidence" has been defined as evidence that is "'clear, explicit, and unequivocal'; that is 'so clear as to leave no substantial doubt'; and is 'sufficiently strong to demand the unhesitating assent of every reasonable mind.'" (*In re Michael B.* (1983) 149 Cal.App.3d 1073, 1087, quoting *People v. Martin* (1970) 2 Cal.3d 822, 833, fn. 14.)

There are three identification procedures at issue here: (1) the single photo showup; (2) the six-photo lineup; and (3) Oscar's in-court identification.[40] Appellant submits that the initial single-photo showup was both suggestive and unnecessary, irreparably tainting each subsequent identification, that the photo lineup was suggestive in its own right and that Oscar's in-court identification had no independent reliable source. After a series of vacillating rulings, the court ultimately admitted all three inherently and constitutionally unreliable identifications. In so doing, the court compromised the reliability of the jury's verdicts – which were based on the deceptively probative force of the identifications – and denied appellant his rights to a fair trial and due process of law. (*Shirley v. Yates*, *supra*, 950 F.Supp.2d at p. 1145 [as Judge Koszinski observed, "[g]uarding against the effects of suggestive identification is critical to conducting a fair trial"].) Appellant's convictions and the judgment of death must be set aside, therefore.

D. The Identification Procedures Used By The Police Were Unduly Suggestive, Unnecessary and Unreliable Under The Totality Of The Circumstances

In *Simmons v. United States* (1968) 390 U.S. 377 (*Simmons*), the high court first outlined some of the reasons photo identifications may be unreliable:

> It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err

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[40] Although the identification of appellant in the live lineup was excluded at all three trials as unduly suggestive (6CT 1345; 10RT 1996; 52RT 11028 [withdrawn by prosecution]), it remains relevant in assessing whether Oscar's in-court identifications of appellant were independent of the identification procedures and sufficiently reliable to overcome the cumulative taint of those procedures.

> in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. . . . This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons in which the photograph of a single individual recurs or is in some way emphasized.

(*Id.* at p. 384.)

The suggestiveness of the photo displays here is readily apparent, as the trial court recognized on more than one occasion. (See 6CT 1345; 19RT 3950-3951.) Nothing could be more suggestive, less necessary or more conducive to an unreliable identification than a police officer showing an impressionable, traumatized five-year-old child a single, booking photo of the prime suspect – "Juan." The resulting likely misidentification was then reinforced with a photo lineup and a live lineup, within a short period of time, constructed by officers convinced that appellant was "the man," and where appellant clearly stood out from the other so-called fillers. The only reliability factor the prosecutor proffered and the court ever considered was Oscar's prior identification of the man with a whisp on his chin who bought him ice cream. (10RT 1988-1989; 8CT 1946; see *Manson, supra,* 432 U.S. at pp. 113-114.) However, a review of the totality of the circumstances, as commanded by the high court, establishes that Oscar's serial identifications of appellant lacked "sufficient aspects of reliability" to overcome the irreparable "corrupting effect of the suggestive identification[s] [themselves]." (*Manson, supra,* 432 U.S. at pp. 106, 114; cf. *Israel v. Odom* (7th Cir. 1975) 521 F.2d 1370, 1373 ["We have no doubt that the pretrial identification procedures utilized by the police in this case contained elements of suggestiveness, and the fact that those procedures

were consecutively applied increased the possible danger of misidentification"].)

1. The Single-Photo Showup Was Unduly Suggestive, Unnecessary and Unreliable

The high court has consistently questioned the use of a single photograph for pretrial identification, and has encouraged the use of a reasonable photographic display. (See *Manson*, *supra*, 432 U.S. at p. 117 [use of display of reasonable number of persons would have been better than single photograph]; *Simmons*, *supra*, 390 U.S. at p. 383 [same].) Federal and state courts of appeal have also recognized that the display of a single photograph is unduly suggestive. (*United States v. Johnson* (4th Cir. 1997) 114 F.3d 435, 441-442; *United States v. Washington* (D.C.Cir. 1994) 12 F.3d 1128, 1134; *Israel v. Odom*, *supra*, 521 F.2d at p. 1373 ["It is well established that the display of [the suspect] alone [is] the most suggestive and therefore the most objectionable method of pre-trial identification." (Internal citations omitted)].)

Nonetheless, courts have sanctioned single-person showups when necessitated by emergency circumstances. For example, in *Stovall v. Denno* (1967) 388 U.S. 293, the high court rejected a due process challenge to a showup of a suspect in a hospital room, finding that the procedure was "imperative" and a police station lineup "out of the question" where the surviving witness was critically wounded and no one knew how long she might live. (*Id.* at p. 302.) In contrast here, as the trial court acknowledged, "there was no compelling reason to present Oscar with the photograph of a single person. The identification procedure was impermissibly suggestive." (6CT 1435; see *Bryant v. Commonwealth* (Va. App. 1990) 393 S.E.2d 216,

218-219 [finding that the display of only the defendant's photographs to a child of eight was unduly suggestive and unnecessary].)

In *Manson, supra*, which also involved a photo showup, the court upheld the admission of the pretrial identification where the indications of reliability were strong, particularly the fact that the witness was a trained, on-duty police officer. (432 U.S. at pp. 114-116.) Oscar, by comparison, was a demonstrably suggestible and unreliable witness whose likely confusion of the man who bought him ice cream with the man in his mother's bedroom was reinforced by his brother Victor and the booking photo showup of "Juan." As such, the standard reliability criteria must here be assessed in light of Oscar's suggestibility and his tendency to fantasize, confabulate and confuse persons and events. (See Arguments I and II, *ante*.)

As noted, the only circumstance expressly considered by the trial court was the initial description Oscar gave to Officer Dempsie. Even assuming this description had not already been influenced by the chatter of all the people gathered at Chandi's house, the description, as well as the ensuing photo identification, was still unreliable under the totality of relevant factors.

First, Oscar had very little opportunity to view the person in the room with his mother. His sister was shot in her bedroom and his mother in the hallway. Oscar did not witness either shooting. Oscar was asleep in his mother's bed when he was awakened by what he described as firecrackers. (2CT 311; 6RT 1196.) When he awoke he saw his mother running into the room. (2CT 311; 6RT 1195.) He saw her grab for the telephone. (2CT 311; 6RT 1195.) He also saw a man in the room. (2CT 311; 6RT 1195.) But Oscar also said that he was only "peeking," then covered his head with

the covers and could not see.[41] (35RT 7679-7680.) At other times, Oscar said he was under the bed. (16RT 3419-3420.) Oscar also testified that when he got up and checked the other bedrooms "it was too dark" and he could not turn on the lights.[42] (35RT 7685.) Detective Kroutil testified that the only lights that were on in the house were in Oscar's sister's bedroom, the stove light in the kitchen, and the vanity light in the master bathroom. (32RT 7143-7144.) Kroutil testified that the master bathroom was separated by a wall from the bedroom and the vanity light in the bathroom was not "real bright." (32RT 7167-7170.) Michael Martinez testified that it was still dark in Reyes's bedroom when he went to her house after sunrise to see if he could help her. (33RT 7327-7329.)

Strikingly, Oscar, in his original description, failed to mention either that the man had a very large mustache or that he was armed with a gun, two features that would have been far more visible than the tiny "whisp" Oscar evidently recalled from his encounter with appellant a day earlier.

Thus, even under a basic, commonsense evaluation of the reliability factors, Oscar's identification of appellant is shaky at best. It fares even worse when current scientific studies of eyewitness identification are considered. The results of a number of such studies were summarized in *State v. Henderson* (N.J. 2011) 27 A.3d 872 (*Henderson*).) Apropos of this case, studies have shown that factors (referred to as "estimator variables")

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[41] Oscar's adoptive mother, Nancy Fennell, testified that Oscar was prescribed glasses in 1998 after his vision was tested at his school. (60RT 12263.)

[42] The prosecution asked the trial court to take judicial notice of the fact that the National Almanac for 1997 indicated that sunrise on August 4, 1997, occurred at 6:06 a.m. (64RT 13161-13162; 65RT 13292 [no defense objection to judicial notice].)

such as stress, weapon focus, brief duration of contact, poor lighting conditions, witness's youth, so-called "own-age bias" and exposure to other information or influence affect the accuracy of identifications (*Id.* at pp. 904-909; see also *People v. McDonald* (1984) 37 Cal.3d 351, 369 [acknowledging that scholarly research has uncovered a set of psychological principles concerning eyewitness identification that had become widely-accepted in the scientific community].)

High levels of stress, contrary to popular belief, can diminish an eyewitness's ability to recall and make an accurate identification. (*Henderson, supra,* 27 A.3d at p. 904, citing Kenneth A. Deffenbacher, et al., *A Meta–Analytic Review of the Effects of High Stress on Eyewitness Memory* (2004) 28 Law & Hum. Behav. 687, 687, 699 [meta-analysis of 63 studies showing that "high levels of stress negatively impact both accuracy of eyewitness identification as well as accuracy of recall of crime-related details"].) This is true even under the best viewing conditions; hardly the conditions here. (*Ibid.*)

It is difficult to fathom the intense distress of Oscar waking up in his mother's bed and seeing her fleeing into the bedroom wounded and bleeding. Apart from the disorienting effects of the stress itself, there is the strong likelihood that Oscar's attention would have been riveted by his mother's terrifying condition or that he would have followed the equally natural instinct to hide from the situation, as he said he did. (See, e.g., 35RT 7679-7680 [peeking from under the covers].)

When a visible weapon is used during a crime, it can distract the witness and also draw his or her attention away from the culprit. Such "weapon focus" has been shown to impair a witness's ability to make a reliable identification and describe the culprit if the crime is of short

duration. (*Henderson*, *supra*, 27 A.3d at p. 905, and studies cited therein.) Oscar, in fact, testified that the first thing he saw when he awoke was a gun. (35RT 7676.) Even then, his description of the gun was fantastical, and his statement that he also saw the man with a knife hardly credible as the evidence showed the knife had been left in his sister's room. (13CT 3511; 6RT 1252.)

Research has shown that children are more likely to make inaccurate identifications than adults, and of special relevance here, that "[s]howups in particular 'are signficantly more suggestive or leading with children.'" (*Henderson*, *supra*, 27 A.3d at p. 906, citing Jennifer E. Dysart & R.C.L. Lindsay, *Show-up Identifications: Suggestive Technique or Reliable Method* (2007) in 2 The Handbook of Eyewitness Psychology: Memory for People 137, 147.)

Of further relevance here, studies have confirmed, as commonsense would suggest, that "co-witness information has a particularly strong influence on eyewitness memory, whether encountered through co-witness discussion or indirectly through a third party." (John S. Shaw, III et al., *Co–Witness Information Can Have Immediate Effects on Eyewitness Memory Reports* (1997) 21 Law & Hum. Behav. 503, 503, 516; see also Rachel Zajac & Nicola Henderson, *Don't It Make My Brown Eyes Blue: Co–Witness Misinformation About a Target's Appearance Can Impair Target–Absent Lineup Performance* (2009) 17 Memory 266, 275 ["[P]articipants who were [wrongly] told by the [co-witness] that the accomplice had blue eyes were significantly more likely than control participants to provide this information when asked to give a verbal description"]). Not too surprisingly, it has also been found that "witnesses who were previously acquainted with their co-witness (as a friend or

romantic partner) were significantly more likely to incorporate information obtained solely from their co-witness into their own accounts." (Lorraine Hope et al., "*With a Little Help from My Friends . . .*": *The Role of Co–Witness Relationship in Susceptibility to Misinformation* (2008) 127 Acta Psychologica 481.)

Here, there is little doubt that, rather than reflecting his independent recollection, Oscar's identification of the booking photo as "Juan" was the cumulative product of conversations among Victor, Oscar and the police. Victor arrived at Chandi's house after Oscar had initially spoken to the police, but had not identified the man in the room by name. (5RT 795-796.) Victor spoke with his aunt and his cousins and then with Oscar, who was in the kitchen eating breakfast; Victor told Oscar what had happened. (34RT 7634-7635.) After that, Victor spoke to the police who told him that Oscar had identified the man who bought him ice cream, but did not know his name. (5RT 797; 64RT 13117.) Victor identified the man as "Juan." (5RT 798.) Victor later relayed that information to Oscar or Oscar overheard it, cementing the questionable association between the man who bought Oscar ice cream and the man in his mother's room. (5RT 803-804; 6RT 1173-1174; 64RT 13221.)

In short, most of the variables that have been shown to undermine the accuracy of eyewitness identification were both present and known to the trial court in this case: Oscar was a highly suggestible and imaginative five-year-old who awoke in the dark to a horrific scene involving his struggling and wounded mother and a man holding a gun who then quickly fled. From the time he ran to his aunt's house and for the rest of the investigation, Oscar was exposed to the opinions, suggestions and speculation of family members and assorted others he encountered, in

addition to the suggestive identification procedures repeatedly employed by the police.[43] As against this array of variables negatively impacting the accuracy of Oscar's identification, the only factor supporting reliability is the relative closeness in time, at least a few hours, between the encounter and Oscar's original description to Dempsey.

This single factor hardly outweighs the score of facts undermining confidence in Oscar's accuracy, much less meets the applicable clear and convincing evidence standard. Indeed, two hours is more than enough time for Oscar's normal tendencies toward confabulation and psychological avoidance, well-described by Dr. Streeter and Wanda Newton, and on full display during Oscar's testimony at all three trials, to have affected his description of the man in his mother's bedroom – someone he saw only

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[43] One example of Oscar's exposure to outside influences is disclosed in the following cross-examination of Oscar:

Q. Remember, you were waiting for the police to come . . . [a]nd ask you what happened?

A. Yeah.

Q. Did you remember there being a lot of people there? . . .

A. Just a few.

Q. Were they talking about what happened at your mom's house?

A. Yeah.

Q. And were they talking about who they thought might have done it?

A. Yeah.

Q. Were you listening?

A. Yeah.

(16RT 3455-3456.)

briefly in the dark whom he may not have recognized or even known. In fact, it did not take long, only until the second Dempsie interview that morning, for Oscar to start populating the room with people he knew and still later with possibly imagined people.

Plainly, the court did not consider all of the available information regarding the fallibility of eyewitness identification or it surely would have excluded both the prior and in-court identifications. Indeed, at one point, the court did exclude the out-of-court identifications, but then changed its ruling with no change in the proffered information. Studies aside, a proper weighing of the long-accepted reliability factors against the extraordinary suggestiveness of the photo showup, established that both the out-of-court and the in-court identifications were too unreliable to overcome the taint of even this single suggestive identification procedure. Accordingly, none of the identifications should have been admitted.

2. The Photo Lineup Was Tainted By The Single-Photo Showup and Was Cumulatively Suggestive

A pretrial identification procedure is unfair if it suggests in advance the identity of the suspect – that is, whether anything causes the suspect to "stand out" from the others in a way that would suggest the witness should select the suspect. (*People v. Cunningham, supra,* 25 Cal. 4th at p. 990, citing *People v. Carpenter* (1997) 15 Cal.4th 312, 367; *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052.) Here, within a few hours of the suggestive showup, Oscar was shown a six-person photo lineup using appellant's post-arrest photo from that morning. True, all the men in the six-pack were Hispanic; all had facial hair; but only appellant was wearing a bright red shirt and only he had the same mustache as in the photo showup. (2CT 313; compare Peo. Exhs. 75 and 76.) Although the police

did not use the same photo in the show up and lineup, both were arrest photos taken only a year and a half apart; appellant's was the only photo in the array that matched the showup photo, and Oscar was shown the photo spread only a few hours after he had been shown the single booking photo. (Cf. *People v. Yeoman* (2003) 31 Cal.4th 93, 124; see also *Henderson, supra*, 27 A.3d at p. 900 [the rate of selecting an innocent person in a photo array more than doubles when the witness has seen that photo in a previous lineup].) In sum, the photo lineup identification was not independent of the earlier showup and the array itself was unduly suggestive.

Further, the police techniques used in conducting the photo lineup were irregular and conducive to misidentification. Bearing in mind that Oscar was a highly impressionable five-year-old, it is significant that no steps were taken to insulate him from Detective Dempsie's influence and preconception of appellant's guilt. After all, it was Dempsie's interviews with Oscar and Victor that led directly to appellant's arrest. Because of his prior contact with Oscar, Dempsie had the ability to gain Oscar's trust and influence the outcome of the lineup process, and he had the incentive to strengthen his part of the investigation. The result was a demonstrably suggestive interaction between Dempsie and Oscar that exemplified the risks of "non-blind" identification procedures.

The administration of the test by a "non-blind" administrator – that is, a person who knows who the suspect is and his place in the lineup – can lead to the so-called "experimenter expectancy effect" and skew the results of the lineup.[44] Researchers have described this effect as "the tendency for

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[44] An identification may be unreliable if the lineup procedure is not administered in double-blind or blind fashion. Double-blind administrators (continued...)

experimenters to obtain results they expect . . . because they have helped shape that response." (Rosenthal & Rubin, *Interpersonal Expectancy Effects: The First 345 Studies* (1978) 3 Behav. & Brain Sci. 377, 377.) This phenomenon has been recognized for many years, both by researchers and the courts. (See, e.g., *Moore v. Illinois* (1977) 434 U.S. 220, 224 ["Persons who conduct the identification procedure may suggest, intentionally or unintentionally, that they expect the witness to identify the accused"].) As *Henderson, supra,* found, the consequences of a non-blind lineup procedure can affect the reliability of a lineup because even the best-intentioned, non-blind administrator can act in a way that inadvertently sways an eyewitness trying to identify a suspect.[45] (27 A.3d at p. 897; *State v. Lawson* ["*Lawson*"] (Or. 2012) 291 P.3d 673, 686 ["Ideally, all identification procedures should be conducted by a "blind" administrator"].)

Here, the police were quickly convinced that appellant was "the man," but had only Oscar's original description and the suggestive photo showup identification to connect appellant to the crime. Oscar's initial description of the man he saw in his mother's room had been short on physical detail – i.e., that it was the man who bought him ice cream and had

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[44](...continued)
do not know who the actual suspect is; blind administrators are aware of that information but shield themselves from knowing where the suspect is located in the lineup or photo array. (*Henderson, supra*, 27 A.3d at p. 896.)

[45] R. M. Haw & R. P. Fisher, *Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy* (2004) 89 J. Applied Psychol. 1106, 1107; see also S. E. Clark et al., *Lineup Administrator Influences on Eyewitness Identification Decisions* (2009) 15 J. Experimental Psychol.: Applied 63, 66-73.

a whisp.[46] It was Victor who supplied the name "Juan" for the man who bought the ice cream on Saturday.[47] And it was the single booking photo that supplied appellant's most striking feature – a huge mustache – which Oscar had never mentioned.

In light of the gaps in Oscar's initial description, Dempsie had a vested, albeit professional, interest in solidifying Oscar's identification of the man in the room as "Juan," the man who bought him ice cream. Dempsie did so by engaging Oscar in a pre-identification interview that strongly reinforced this chain of associations. Dempsie knew that appellant's arrest photo, taken at the Porterville Police station that morning, was in the lineup and he led Oscar to that selection. (65RT 13277.)

In place of the limited interaction and fairly standard, neutral admonition generally given,[48] Dempsie reprised the events of the night and

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[46] Oscar testified at trial that he did not know what the word "whisp" meant. (16RT 3451; 34RT 7550-7551.)

[47] But Victor had not been at home most of Sunday when, according to Oscar, there was a party at the house, the people at the party went to the park, someone bought Oscar chocolate ice cream, their mother went out with "some other boy,"nor when the shootings occurred. (13CT 3514-3516.) Victor testified that the ice cream appellant gave Oscar was white and strawberry, "like red jelly stuff." (5RT 798.)

[48] The California Commission on the Fair Administration of Justice, *Final Report* (2008), available at www.ccfaj.org/documents/CCFAJFinalReport.pdf [after a four-year study, the Commissioners, including the California Attorney General and the Chief of the Los Angeles Police Department) recommended, inter alia, that "[a]ll witnesses should be instructed that a suspect may or may not be in a photo spread, lineup or show-up. . . ."] A review of the case law establishes that the recommended admonition is commonly given to lineup witnesses. (See, e.g., *People v. Thomas* (2012) 54 Cal.4th 908, 930; *People v. Yeoman* (2003) 31 Cal.4th

(continued...)

the description of the man in the room with Oscar before showing him the six-pack:

Q. Tell me again what Juan looks like. Is he a big guy?

A. Huh?

Q. Is he big?

A. Yeah.

Q. Okay. And his hair goes back?

A. Yeah. (Inaudible)

Q. [gesturing] Does he have any hair on his face?

A. On his face?

Q. [gesturing] Yeah, on his face, right here. Does he have a mustache or beard or anything like that?

A. A mustache right here.

Q. [gesturing] he has a mustache right here?

A. Yeah, he gots whiskers right here.

Q [gesturing]: He's got whisker right here? If you saw pictures of him, would, would you know if it was him or not? If I showed you some pictures? Think so? Would you know if you saw him again?

A. Uh huh.

Q. Has he been to your house before? How many times has he been to your house?

A. Three months.

Q. For three months? Did he buy you ice cream one time?

A. (Inaudible)

Q. When did he buy you ice cream?

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[48](...continued)
93, 124; *People v. Perkins* (1986) 184 Cal.App.3d 583, 585.)

A. Last night.

Q. Last night he bought you ice cream? What kind of ice cream did you have?

A. Mmm, he buy me chocolate (inaudible)

Q. You had chocolate ice cream? Was Juan a, a friend of your mom's?

A. Yeah.

Q. *Can you look at these picture and tell me if, if the guy that bought you ice cream and the guy that you saw in your house, is he in those pictures?*

A. Mmm, I think it's, ah, him.

Q. That's him? That's the guy that was in your house?

A. Yeah.

Q. Are you sure?

A. It was him.

(13CT 3512-3513, italics added; Peo. Exh. 100: 5:49-6:04].)

At every step, Dempsie reinforced Oscar's association of the man who bought him ice cream with the man in the house, rehearsed Oscar's physical description of the man, adding the mustache, thereby inevitably steering Oscar toward selecting appellant from the photo spread. In short, the identification procedure here was carried out to serve Dempsie's investigative agenda, rather than to obtain a reliable, independent identification from Oscar.[49]

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[49] Indeed as the interview progressed toward the photo display, Oscar's evolving embellishments and fabrications regarding what he observed could only have heightened Dempsie's interest in securing Oscar's re-identification of appellant. (See e.g., 13CT 3511[describing big gun by stretching out arms and saying man went home and got smaller gun].)

In *Oliva v. Hedgepeth* (C.D. Cal. 2009) 600 F.Supp.2d 1067, the district court held that the petitioner was entitled to habeas relief where his attorney had failed to file a motion to suppress a suggestive identification procedure. The court found the procedure defective in several ways, including the failure to admonish the witness that the lineup might or might not contain a photograph of the suspect and the questioning by a detective who knew which photo was the petitioner's. (*Id.* at pp. 1080-1081.) The witness in *Oliva* was a six-year-old girl. The detective claimed that he did not admonish her because "she would not have understood the mature language in the standard admonition." (*Id.* at p. 1080.) The court rejected that explanation, noting, that as such an admonition is extremely important to avoid suggestiveness in the presentation of a photo lineup to an adult witness, it is "even more critical to avoid suggestiveness in the presentation of a photographic lineup to a six-year-old child." (*Ibid.*)

A similar convergence of suggestive circumstances – an invested lineup administrator, who failed to give a neutral admonition and validated the witness' prior identification – undermine any confidence in the outcome of the photo display here. The trial court was correct when it excluded evidence of Oscar's identification of appellant in the six-man photographic lineup, and erred when it reversed its ruling at the third trial. (6CT 1345.)

3. Oscar's In-Court Identification Was Not Reliable and Independent Of The Suggestive Identification Procedures

Where, as demonstrated above, successive identification procedures impermissibly steered Oscar to focus on and select appellant's photo, the admissibility of his in-court identification of appellant depends on "whether, under the 'totality of the circumstances' the identification is

reliable. . . ." (*Oliva v. Hedgepeth*, *supra*, 600 F.Supp.2d at p. 081, citing *Biggers, supra*, 409 U.S. at p. 199.)

Some of the relevant factors have already been discussed in connection with the photo showup, including Oscar's limited opportunity to observe the man in the bedroom and the sparseness of his original physical description of that man. The one factor on the other side of the balance, tilting in favor of reliability, was the shortness of time between the encounter and the identification. But the weight of this factor is undercut by the suggestiveness of the photo showup and its closeness in time to the photo lineup identification.

Moreover, the most critical factor in this case is one which was not even considered, because not present, in *Biggers* or *Manson* – namely, that Oscar was very young, and Oscar's age "counsels against a finding of reliability." (*Haliym v. Mitchell* (6th Cir. 2007) 492 F.3d 680, 707 [citing *Arizona v. Youngblood* (1988) 488 U.S. 51, 72, fn. 8 (dis. opn. of Blackmun, J.), citing Cohen & Harnick, *The Susceptibility of Child Witnesses to Suggestion* (1980) 4 Law & Hum. Behav. 201]; see also *Bryant v. Commonwealth*, *supra*, 393 S.E.2d 216, pp. 218-219.)

Nevertheless, in *Haliym v. Mitchell*, *supra*, the court could not conclude that the testimony of a seven-year-old was unreliable where the child had a good opportunity to view the suspect during the commission of the crime, was able to provide verifiable details about what occurred and was acquainted with the suspect from four previous encounters and knew his nickname. (492 F.3d at pp. 705-706.) The court also relied on the relative closeness in time between the murder and the witness's identification of the defendant and the witness's confidence in that identification, with the reservation that "the suggestiveness of the lineup

belies any certainty demonstrated by [the witness] because the procedure itself suggested a clear result."[50] (*Id.* at p. 705.)

In *Oliva v. Hedgepeth, supra*, by comparison, the court concluded that a six-year- old witness's identification was unreliable and that the totality of circumstances did not overcome the taint of a suggestive photo lineup. (600 F.Supp.2d at p. 1083.) In reaching this conclusion, the court weighed the child's age, her fleeting opportunity to view the suspect and inconclusive prior description of him against the relatively short period of time between the shooting and the lineup procedure, as well as the witness's certainty of her prior identification at trial. However, with respect to the witness's level of confidence, the court found this proved little concerning the reliability of the identification, given the patent suggestiveness of the identification procedures and the fact that the witness could not identify anyone in the courtroom as the perpetrator. (*Id.* at p. 1083.)

The present case more closely resembles *Oliva* than *Haliym*. Indeed, the indicators of unreliability are much stronger here than in either of those cases. First, Oscar, at five years old, was younger than the children in *Oliva* and *Haliym*, and at an earlier developmental and cognitive stage. (See

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[50] In *Haliym v. Mitchell, supra*, the court noted that "empirical evidence on eyewitness identification undercuts the hypothesis that there is a strong correlation between certainty and accuracy. (See, e.g., Edward Stein, *The Admissibility of Eyewitness Testimony About Cognitive Science Research on Eyewitness Identification* (2003) 2 L. Probability & Risk 295, 296, and studies cited therein; see also *Brodes v. State* (2005) 279 Ga. 435, 614 S.E.2d 766, 771 [holding that jury instruction that jurors may consider the level of certainty of the witness identification was erroneous in light of scientific evidence suggesting that such a correlation is weak].)

25RT 5336-5341.) Further, Oscar's level of confidence when he made the identifications, as in *Oliva* and *Haliym,* was belied by the suggestiveness of the procedures. (*Haliym v. Mitchell, supra*, at p. 705.) And, unlike in *Oliva,* where the witness expressed certainty at trial that she had identified the right person in the photo array, here, the prosecutor was unable to meet the minimal reliability criteria of Evidence Code section 1238 because Oscar would not affirm the correctness of his earlier identifications; he claimed not even to remember the photo displays. (60RT 12211-12215.) To the extent Oscar's testimony provided any insight into his level of certainty, it undercut it. (Cf. *Manson, supra*, 432 U.S. at p. 115 [high level of certainty where witness testified that "[t]hat there is no question whatsoever" about the identification]; *Thigpen v. Cory* (6th Cir. 1986) [low level of certainty where witness stated that he was "pretty sure" that the defendant was the robber].) Oscar had initially failed to identify appellant at the first trial and was unable to identify him at the third trial without being overtly led by the prosecutor. (60RT 12216; 16RT 3358; cf. *Oliva v. Hedgepeth, supra*, 600 F.Supp.2d at p. 1083 [fact that witness could not identify anyone in the courtroom cast doubt on the reliability of her expressions of certainty and the reliability of her identification].)

Furthermore, this case presents another factor, not present in the other cases – Oscar's suggestibility and inability to distinguish the truth from his own fantasies and confabulations – which weighs decisively against any faith in the reliability of his identifications. (See Arguments I and II, *ante.)* In sum, based on the totality of these factors, the only reasonable conclusion is that Oscar's identifications were the result of suggestive procedures and were not otherwise reliable. The trial court therefore erred twice: first in admitting Oscar's manufactured in-court

identification and then in admitting the unduly suggestive out-of-court identifications to bolster it. These errors, moreover, violated appellant's rights to due process, a fair trial and a constitutional death sentence because the identifications were demonstrably unreliable. (U.S. Const., Amends. 6th, 8th, and 14th)

E. The Error In Admitting The Unreliable Identification Evidence Was Prejudicial and Requires Reversal Of The Judgment

The trial court's rulings admitting Oscar's in-court and out-of-court identifications at the instant trial were extremely prejudicial. It has been long recognized that eyewitness identification evidence has tremendous influence on juries:

> The persuasive effect of eyewitness identification testimony has been remarked upon by lawyers and commentators for decades. In his dissent in *Watkins*,[51] Justice Brennan explained that he believed that jurors should know nothing about eyewitness identifications subject to suppression because of "[t]he powerful impact" that much eyewitness identification evidence has on juries. Justice Brennan quoted Professor Elizabeth Loftus's seminal work, Eyewitness Testimony: "All the evidence points rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'"

(O'Toole and Shay, *Manson v. Braithwaite Revisited: Towards a New Rule of Decision For Due Process Challenges to Eyewitness Identification Procedures* (2006) 41 Val. U. L. Rev. 109, 135.) In fact, there is something more convincing – hence more prejudicial – than an in-court identification of a defendant – an in-court identification bolstered by the testimony of

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[51] *Watkins v. Sowders* (1981) 449 U.S. 341.

police detectives regarding previous identifications. The point was not lost on the prosecutor.

The prosecutor could not rely on Oscar's testimony because Oscar claimed an almost complete lack of recall regarding the night his mother and sister died. Oscar also could not remember the pretrial interviews or identifications and had to be led to his identification of appellant at trial. As such, the importance of the prior identifications to the prosecution's case cannot be overstated. As noted in Arguments I and II, *ante*, the prosecutor acknowledged that his only purpose for putting Oscar on the stand was to lay the foundation for the prior identifications. (See 59RT 11976 [the prosecutor stating, "My purpose for putting him on the stand was *solely* to establish a 1238 prior I.D. situation," italics added].)

Consequently, although the prosecutor opened his summation with appellant's confession, much of his remaining argument focused on Oscar's pretrial statements and identifications:

> So Oscar sees the photograph and he says that's Juan. That's the man who was in my mother's house this morning. My mother was bleeding when I saw that man.
>
> . . . .
>
> The defendant is arrested. Booking photo is prepared. Here it is, this is how Juan looked, the defendant on that morning. . . .
>
> So they place a photograph with the defendant, they put together a photo lineup. . . .Got the defendant. Don't put names on it, they put numbers. 1273.
>
> Oscar looks at these photos. He doesn't look at 1271 and say that's him; doesn't look at 1272 and say that's him; doesn't look at 1274 and say that's him; doesn't look at 1275, say that's him; doesn't look at 1341 and say that's him.

> No, he looks at these photographs, you watched it, you watched the video. He looks at these photographs. That's him. Are you sure? I'm sure, that's him.

(76RT 15161-15162.)

And again,

> Then showed him the pictures. Can you look at these pictures and tell me if – if the guy that bought you ice cream and the guy you saw in your house, is he in those pictures? Hm, I think it's, ah, him. That's him? That's the guy that was in your house? Yeah. Are you sure? It was him.

(76RT (76RT 15156-15164.)

The prosecutor needed the prior identifications because the other evidence of appellant's guilt was far from compelling, as demonstrated by the two earlier hung juries. (See Leslie Shea Riggsbee, *United States v. Burgos*: *Balanced Blasting for Deadlocked Juries* (1996) 74 N.C. L. Rev. 2036, 2054 [noting that hung juries typically occur in close cases].) Notably, the prior photo identifications were excluded at the first trial and, although the photos themselves were inadvertently admitted, there was no testimony regarding the identifications at the second trial.

There were no eyewitnesses to the shootings and no physical evidence linking appellant to the crimes. Thus, in the absence of the prior identifications, the prosecution's case would have stood or fallen based on the strength of Oscar's in-court identification of appellant and appellant's confession, which had failed to secure convictions in the two earlier trials. Oscar's identification of appellant only after the prosecutor pointed to him and asked if Oscar had seen him at his mother's house the day she was killed was weak, especially in light of Oscar's professed memory failure. (See 60RT 12218 [within a minute of making the in-court identification,

Oscar testified that he did not remember where he saw the man or who he was].)

Similarly, the probative value of appellant's confession was weakened by the lack of detail beyond that learned from previous interrogations and factual inaccuracies where no detail had been provided by the police.[52] (See 72RT 14623-14624 [expert testimony that strongest form of corroboration of a confession is information not known to the police because it rules out contamination during the interrogation].)

For all of the reasons discussed above, respondent cannot meet its burden of proving beyond a reasonable doubt that appellant's convictions were unattributable to the erroneous admission of Oscar's suggestive and unreliable identification of appellant. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [*Chapman* inquiry is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error].) The People similarly cannot prove that the jury's death verdict was unattributable to that error or that the verdict was constitutionally reliable where two prior hung juries had effectively expressed lingering doubt

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[52] Appellant's statement lacked details beyond that (1) he had entered Reyes's house through the door, (2) shot Reyes and Lorena two or three times with a .22 caliber gun, and (3) left. (13CT 3359, 3363-3365, 3369.) Some of what appellant said had been relayed to him by either Detective Shear or Lieutenant Garay (see Argument VII, *post*), and some of what he said was flatly contradicted by the evidence. For example, appellant said the gun used was a .22 caliber, when it was a nine millimeter luger, and he said he shot each victim two to three times, when only three bullets were fired. (13RT 3456; see 58RT 11828.)

concerning defendant's guilt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Brown* (1988) 46 Cal.3d 432, 447.)

Accordingly, reversal of the entire judgment is required.

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IV

THE TRIAL COURT ERRONEOUSLY ALLOWED POLICE OFFICERS TO TESTIFY ABOUT HEARSAY STATEMENTS MADE BY OSCAR HERNANDEZ ON THE MORNING OF THE CRIMES

A. Relevant Facts

Oscar Hernandez was an immature and impressionable five-year- old boy the day his mother and sister were killed. He had gone to sleep in his mother's bedroom, and probably woke to the sound of gunshots. (17RT 3625.) He saw that his mother and sister had been injured and ran to the house of his aunt, Rosa Chandi, to get help. (*Ibid.*) Chandi took Oscar back to his house after which they returned to her house to call the police. (32RT 7215, 7221.) Family members at the Chandi house questioned Oscar about what had happened and discussed likely suspects, but Oscar did not identify the person he saw in his house at that time. (16RT 3455-3456 [Oscar's testimony]; 33RT 7382 [Michelle Chandi's testimony]; 34RT 7635 [Oscar's brother's testimony].)

Detective Ty Lewis was the first police officer to interview Oscar. During that interview, Oscar provided only a general description of what had happened. He told Lewis that he had been sleeping on the floor, but woke when he heard a man's voice, and saw a man standing in the room. Oscar did not otherwise identify the man. (61RT 12375.)

Oscar was then questioned by Sergeant Chris Dempsie. By this time, Oscar had been at his aunt's house for nearly two hours. (1CT 114; 33RT 7456; 62RT 12514.) Oscar told Dempsie that he had been sleeping in his mother's bed and woke to a firecracker-like sound. He stated that the man in his mother's room was the person who had previously bought him ice cream and that he had a whisp on his chin. (33RT 7449.)

Later that same morning, Oscar was interviewed by Detective Eric Kroutil. By this time, Oscar was able to come up with a name for the man he saw in the bedroom. Kroutil showed Oscar a single booking photo of appellant, and Oscar identified the person in the photo as "Juan," the man he had seen in his mother's room. Kroutil knew that Oscar had not previously been able to provide a name to Dempsie, and believed that Oscar had obtained this information after listening to his brother Victor being interviewed. (2CT 349-350 [police report].)

At trial, Oscar had little memory about the day his mother and sister were killed. He initially recalled that he spoke to some people about what had happened and said that he had told them the truth, but he did not remember speaking to the police or being shown any photographs. He could not remember what he told the police, or any of the statements that he made that day. (59RT 11970-11971; 60RT 12213-12214.)

Over appellant's hearsay objections, the trial court allowed all three officers to testify about Oscar's statements that were given to them the day of the crime. The trial court found that Oscar's answers to the police questioning were admissible as spontaneous statements under Evidence Code section 1240. (64RT 13027-13028; 64RT 13040.) It also found that Kroutil's testimony about Oscar's identification of appellant from the single-photo showup was admissible as a prior consistent statement (Evid. Code, § 1236) and as past recollection recorded (Evid. Code, § 1237). (64RT 13040.)

The trial court erred by admitting the officers' testimony concerning Oscar's hearsay statements, and the error requires reversal because it violated appellant's rights to due process, a fair trial, and a reliable penalty

verdict. (U.S. Const., Amends. 8th & 14th; Cal.. Const., art. I, §§ 7, 15, 17.)

B. The Trial Court Erred in Admitting Oscar's Statements as Spontaneous Declarations

At the time of the instant trial, Oscar remembered very little, if anything, about what had occurred at his house the night his mother and sister died. He could not remember, for example, if he saw anyone in the house after his mother was killed (59RT 12002), or even if he was in the room at the time his mother came in (60RT12189). Consequently, the prosecutor offered to fill in the gaps in Oscar's memory with the testimony of the three officers who questioned Oscar on the morning of the crimes.

Appellant objected that Oscar's statements during these interviews were unreliable hearsay. (60RT 12163.) The trial court found that all of Oscar's statements to the three officers were spontaneous declarations under Evidence Code section 1240.[53] (61RT 12372 [Lewis]; 64RT 13027 [Dempsie]; 64RT 13040 [Kroutil].)

1. The Legal Standard

Evidence Code section 1240 provides:

> 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 the excitement caused by such perception.

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[53] Because Oscar did not identify appellant to Officer Lewis, appellant does not challenge on appeal the admissibility of the statement given to Lewis.

For a statement to be admissible under this section, "(1) there must be some occurrence startling enough to produce . . . nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it." (*People v. Washington* (1969) 71 Cal.2d 1170, 1176.)

The term "spontaneous" in Evidence Code section 1240 contemplates actions "undertaken without deliberation or reflection." (*People v. Farmer* (1989) 47 Cal.3d 888, 903.) The hearsay exception under this section is grounded on the recognition "that in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief." (*Ibid.*) "The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is thus not the nature of the statement but the mental state of the speaker." (*Ibid.*) In making this determination, various factors, including the nature of the utterance, how long it was made after the startling event, and whether the speaker blurted it out, "may be important, but solely as an indicator of the mental state of the declarant." (*Id.* at pp. 903–904.)

In *People v. Farmer, supra*, 47 Cal.3d 888, the victim described the shooting to both a police dispatcher and the officer who arrived at the scene. He had been shot three times in the mouth and stomach. Although he was conscious and able to talk on the telephone, he was bleeding and under the stress of the shooting. The officer questioned him, but the victim

was in great pain, so he had to stop from time to time. (*Id.* at pp. 901-902.) This Court had no doubt that the declarant was "excited, or perhaps more accurately, distraught and in severe pain." (*Id.* at p. 904.) Although this Court acknowledged that a declarant's answers to extensive questioning is rarely found to be spontaneous, the victim had "so little opportunity and incentive to deliberate" that "under these unusual circumstances" the hearsay exception applied. (*Ibid.*)

In contrast, this Court has found error in admitting statements when the declarant was questioned after there had been some time for deliberation, and the nature of the statements did not show that they were spontaneous. For example, in *People v. Lynch* (2010) 50 Cal.4th 693, the defendant was charged, inter alia, with the murder of Anna Constantin. Anna's daughter, Vickie, found her mother badly beaten. Vickie questioned her mother about the attack, both on the way to the hospital and at the hospital. Anna died from her injuries. At trial, the trial court admitted Anna's statements to her daughter as spontaneous declarations. (*Id.* at pp. 747-751.) This Court noted that Anna's statements were given in response to questioning. The statements were made an hour or two after Anna had been assaulted. There was no evidence that she was excited or frightened in such a way that precluded deliberation. Under these circumstances, this Court found that Anna's statements had been erroneously admitted as spontaneous declarations. (*Id.* at p. 754; see also *People v. Loy* (2011) 52 Cal.4th 46, 66 [assuming error when it was not clear that the declarant's "reflective powers were still in abeyance and that she had no time to contrive or misrepresent"].)

As demonstrated below, under the standard of review enunciated in *Farmer* and *Lynch*, Oscar's statements to the officers do not qualify as spontaneous declarations under Evidence Code section 1240.

2. Oscar's Statements to Sergeant Dempsie

Sergeant Dempsie testified that Oscar told him that he had been sleeping in his mother's bed and was awakened by what sounded like firecrackers. He saw his mother. She was bleeding and tried to reach for the telephone but fell backwards on the floor. Oscar said that there was a man in his mother's bedroom, the one who had bought him ice cream. Oscar gestured to his chin and stated that the man had a whisp on his chin. (33RT 7449 [second trial]; 2CT 311 [police report].)

At the first two trials, appellant objected to the admission of Oscar's statement to Dempsie. The trial court issued the following written ruling that Oscar's statement to Dempsie was admissible as a spontaneous declaration:

> The court finds Oscar was essentially in a state of shock when he met with Lewis. A time later, at the point of contact with Dempsie and during the conversation with Dempsie, Oscar was manifestly experiencing grief emotions directly tied to the startling event. As to the objection before the court, given the totality of circumstances, Oscar provided the information about the man with a "whisp" who gave him ice cream while Oscar was under the stress of excitement and while his reflective powers were still in abeyance. The court specifically finds Oscar's statements to Detective Dempsie a little more than an hour after seeing his mother fall to the floor were made while Oscar was stilI under the influence and dominated by what he had experienced and observed. The court further finds Oscar's statements to the officers in his aunt's home are coupled with an indicia of reliability and are not tainted by conversations with others or by the way he was interviewed.

(8CT 1941.) The trial court reaffirmed this ruling in the instant trial. (64RT 13027.)

The trial court erred in finding that Oscar's statement to Dempsie was made only "a little more than an hour after seeing his mother fall to the floor." Oscar arrived at Chandi's house at around 5:30 a.m. (6RT 1041 [in limine hearing]; 62RT 12512-12153.) Officer Lewis conducted preliminary interviews at the Chandi house, talking to Oscar last, and finishing the interviews around 7:00 a.m. (33RT 7411, 7422 [second trial].) Sergeant Dempsie stated that he began to question Oscar some time between 7:00 and 7:30 a.m, after Lewis had left Chandi's house. (1CT 114 [preliminary hearing]; 2CT 309 [according to his report, Lewis returned to the crime scene from Chandi's house at about 7:16 a.m.]; 33RT 7445, 7456 [second trial].) It follows that Dempsie conducted his questioning more than 90 minutes after Oscar arrived at Chandi's house.

By the time Dempsie questioned him, Oscar had also been taken back to the crime scene by Chandi. (32RT 7215 [first trial].) Oscar believed that he had told her everything that he knew at that time. (59RT 11985.) Chandi's daughter, Michelle, also questioned Oscar about what had happened. (33RT 7382 [second trial]). Oscar's brother Victor also spoke with him and discussed what had occurred. (34RT 7620, 7635 [second trial].) Oscar was aware that his family had been discussing the case and that they had talked about likely suspects. (16RT 3455-3456 [first trial].) Oscar and other family members were also interviewed by Lewis, who asked specific questions in order to identify a possible suspect. (5RT 875-877 [in limine hearing]; 33RT 7411 [second trial testimony].)

Oscar did not provide a description to anyone until he was questioned by Dempsie. Indeed, he told Officer Lewis only that he had

been sleeping on the floor, but woke when he heard a man's voice, and saw a man standing in the room. He did not otherwise identify the person he said he saw. (61RT 12375.)

The additional details that Oscar provided after the Lewis interview indicate that he had thought about the incident and/or obtained additional information from others. Contrary to what Oscar told Lewis, he told Dempsie that he had been sleeping in his mother's bed. For the very first time Oscar described hair on the man's chin and, according to Dempsie, referred to it as a whisp – although Oscar later testified that he did not even know what the word "whisp" meant. (16RT 3451 [first trial]; 34RT 7550-7551 [second trial].)

Under these circumstances, it cannot be said that Oscar's ability to deliberate and reflect were still in abeyance by the time he was interviewed by Dempsie. There is no doubt that Oscar was emotional during the questioning, but emotion does not mean that there was necessarily no deliberation, reflection or parroting of things other people said. Over the course of the morning, Oscar was exposed to information about the crime through members of his family and others gathered at Chandi's house. Further, Oscar did not blurt out the statements at issue, but was questioned repeatedly to extract the information. He provided new details in response to questioning and learned things as others were being questioned in his presence. These factors indicate reflection, deliberation and likely suggestion. The trial court therefore erred in finding that Oscar's answers during the interview were spontaneous statements. (*People v. Lynch*, *supra*, 50 Cal.4th at p. 754.)

3. Oscar's Statements to Detective Kroutil

Oscar was contacted by Detective Kroutil around 9:00 a.m, approximately three-and-a-half hours after Oscar first went to Chandi's house. (6RT 1172 [in limine hearing]; 2CT 349 [police report].) Kroutil told Oscar that he was going to show him a picture of somebody to see if Oscar knew him. Kroutil showed Oscar appellant's booking photo and asked him if he knew that person. Oscar said the man in the photo was "Juan." When Kroutil asked Oscar whether he had seen Juan lately, Oscar told him that Juan was the man he had seen in the house that morning when his mother was bleeding. (2CT 349-350 [police report].) Kroutil knew that Oscar had not previously provided appellant's name, and believed that Oscar had learned appellant's name from someone in Chandi's house.[54] (2CT 350 [police report]; 6RT 1184-1185[in limine hearing].)

The trial court found that the questioning occurred within three hours of the most shocking event that anyone could imagine. It believed that Kroutil's questions were clear and not suggestive. (64RT 13039.) It allowed this testimony to be introduced, in part, as a spontaneous statement under Evidence Code section 1240. (64RT 13040.)

There is no doubt that by the time Kroutil interviewed him, Oscar had heard additional details from others, and that he had been subjected to repeated questioning and discussion about the crime. As the morning progressed, Oscar's description of the man he said he saw in his mother's

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[54] Oscar's brother Victor was also interviewed by the police. Oscar was in close proximity to Victor when the interview took place. (34RT 7637-7638.) Oscar therefore could have easily overheard Victor talk about Juan. (34RT 7623.) Also, at some point after Victor talked to the police, Victor told Oscar about "Juan." (5RT 803-804.)

bedroom became more detailed to the point where Kroutil believed that Oscar had obtained information from other family members. That Oscar could eventually link the photograph to a name indicated that his statements to Kroutil were no longer "the instinctive and uninhibited expression of [his] actual impressions and belief." (*People v. Farmer*, *supra*, 47 Cal.3d at pp. 901-904.) Moreover, nothing in Kroutil's police report or his testimony at an earlier in limine hearing indicated that Oscar was under emotional stress. Indeed, Kroutil testified that he was able to make "small talk" with Oscar before he questioned him. (6RT 1185 [in limine hearing].) Again, the trial court erred in finding that Oscar's statements to Kroutil were spontaneous declarations under Evidence Code section 1240.

C. The Trial Court Erred In Admitting Oscar's Statements to Kroutil as a Prior Consistent Statements

At trial, Oscar identified appellant as the man he saw at his mother's house on the day she was killed. (60RT 12216.) On cross-examination, Oscar was asked whether he remembered his testimony in the second trial, where he failed to identify appellant:

Q. Oscar, on April the 5th, 1999, were you asked a question, "Is that person in the courtroom today, the person who came in?" Do you remember what your answer was?

A. I don't remember.

Q. Page 3358, line 12, you said no, and line 13, you were asked, "You don't see him here today?" And then you shook your head. Remember that, shook your head no?

A. Could you say that one more time?

Q. You were asked you don't see him here today in April, April the 5th, 1999; remember that?

A. I don't remember.

Q. And you shook your head no; you remember that?

A. I don't remember.

(60RT 12226-1227.)

Thereafter, the prosecutor sought to introduce the testimony of Detective Kroutil to establish that during his interview with Oscar the morning after the crime, Oscar identified a single photograph of appellant. The trial court found, in part, that Oscar's answers during the interview with Kroutil were prior consistent statements under Evidence Code sections 791, subdivision (a), and 1236. (64RT 13040.)

Evidence Code section 1236 provides:

> Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with section 791.

Evidence Code section 791 provides:

> Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:
>
> (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or
>
> (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.

In *People v. Smith* (2003) 30 Cal.4th 581, this Court has explained:

> A prior statement consistent with a witness's trial testimony is admissible only if either (1) a prior *in*consistent statement was

> admitted and the consistent statement predated the inconsistent statement, or (2) an express or implied charge is made that the testimony is recently fabricated or influenced by bias or other improper motive, and the consistent statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.

(*Id.* at p. 630, italics in original.)

Under its terms, Evidence Code section 791, subdivision (a), requires that an inconsistent statement be admitted into evidence before a prior consistent statement may be used to bolster a witness's testimony. (See *People v. Cook* (2007) 40 Cal.4th 1334, 1357 [prior consistent statement inadmissible unless inconsistent statement was introduced into evidence].) Actual admission of an inconsistent statement therefore is an essential foundation for this section to apply, and one of the key factors that distinguish subdivision (a) from subdivision (b). This Court must apply the clear wording of the statutory language. (*People v. DePaul* (1982) 137 Cal.App.3d 409, 414 [clear language of statute must be followed]; see *United States v. Salerno* (1992) 505 U.S. 317, 321 [lawmakers made careful judgment about what hearsay may come into evidence and courts must enforce the words that were enacted].)

Here, Oscar stated that he did not remember testifying that he was unable to identify appellant in court. (60RT 12226-12227.) Although defense counsel referred to his testimony, she did not introduce his prior testimony into evidence. Testimony that Oscar did not remember his previous testimony was not substantive evidence of the underlying statement. (*People v. Sam* (1969) 71 Cal.2d 194, 210.) Because the prior inconsistent statement was never admitted into evidence, the testimony did

not meet the required statutory foundation under Evidence Code section 791, subdivision (a).

Although the trial court made its finding under subdivision (a), the statement also would not have qualified under subdivision (b). Under the latter section, a prior consistent statement could only have been introduced if there had been an express or implied charge that Oscar's testimony was "recently fabricated or is influenced by bias or other improper motive." (Evid. Code, § 791. subd. (b).) Under this section, the timing of the consistent statement is critical. A prior consistent statement must be made *before* any motive for fabrication arose. (*People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1303 [statements admissible only if made before the time that the defendant asserted a motive to fabricate had arisen]; *People v. Coleman* (1969) 71 Cal.2d 1159, 1166 [incumbent on prosecution to show that the statements were made before an improper motive was alleged to have arisen].)

Defense counsel did not contend that Oscar's identification at the instant trial was a recent fabrication, but that his statements were uniformly unreliable and tainted because of his exposure to other family members, police questioning and the suggestive nature of the photographs themselves. (64RT 13034, see Arguments II and III, *ante*.) That Oscar initially failed to identify appellant in the first trial was not a charge that he fabricated his testimony in the instant trial, but rather was meant to show the inherent unreliability of all of his identifications. Accordingly, the "motive to fabricate," such as it was, occurred the day of the crime when Oscar was exposed to statements and suggestive questioning that undermined the reliability of all his identifications of appellant.

As discussed above, it is clear that Oscar's identification developed over several hours after his initial interview with Officer Lewis. In the meantime, family members questioned Oscar about the crime and discussed likely suspects. (See 16RT 3455-3456 [Oscar's testimony during first trial].) Oscar then went on to provide additional details to Sergeant Dempsie. By the time he was shown the suggestive booking photograph (see Argument III, *ante*), it was unclear what Oscar was remembering and what he was simply recounting from the information and speculation that he had acquired from others. Indeed, Detective Kroutil believed that Oscar was able to provide him with appellant's name only because Oscar learned it from other family members. (2CT 350 [police report]; 6RT 1184-1185[in limine hearing].) Oscar would have tried his best to identify the person who shot his mother and sister, and would have naturally relied on his family to help him make an identification. As such, the point of questioning Oscar regarding his earlier failure to identify appellant was not to charge him with recent fabrication, but rather to underscore the fact that Oscar was not a consistent or reliable witness.

In short, the court erred in admitting Oscar's prior identification of appellant because the evidence did not fit within the narrow exception for prior consistent statements set forth in Evidence code sections 1236 and 791.

D. Oscar's Statements to Detective Kroutil Were Not Admissible as Past Recollection Recorded

The trial court also found that Detective Kroutil's testimony about Oscar's prior identification was admissible as past recollection recorded under Evidence Code section 1237. (64RT13040, 13053.)

Evidence Code section 1237 provides:

> (a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which:
>
> (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;
>
> (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made; and
>
> (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and
>
> (4) Is offered after the writing is authenticated as an accurate record of the statement.
>
> (b) The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party.

The trial court erred in admitting the prior identification because Oscar could not remember, much less vouch for the truthfulness of what he had said previously. (See, e.g., *People v. Simmons* (1981) 123 Cal.App.3d 677.)

In *People v. Simmons*, *supra*, the court held it was error to admit a witness's prior statements to the police where the witness had suffered a serious injury that resulted in amnesia and the witness could not remember the statements that he had made to the police or the surrounding circumstances. The most he could say was that he had no reason to lie when the statement was prepared – but as the reviewing court noted, it

could have also been said that he had no reason to tell the truth. (*Id.* at pp. 682-683.) The reviewing court explained that the Legislature relied upon the declarant's ability to swear to the truth of the statement. "The motive behind section 1237 is to allow previously recorded statements into evidence where the trustworthiness of the contents of those statements is attested to by the maker, subject to the test of cross-examination." (*Id.* at p. 682.) It emphasized that this section "makes only a narrow exception to the hearsay rule consistent with trustworthiness." (*Ibid.*) Accordingly, it found that the statement did not meet the foundational requirements that Evidence Code section 1237 imposes. (*Id.* at p. 683.)

By comparison, in *People v. Cowan* (2010) 50 Cal.4th 401, this Court found that the trial court did not abuse its discretion in admitting a witness's prior statements under Evidence Code section 1237 where the witness repeatedly testified that he told the truth to the best of his ability. (*Id.* at p. 466.) In upholding the decision of the trial court, this Court noted that the witness was thoroughly cross-examined about his multiple motives and opportunity to lie, and that the "jury no doubt considered all of these factors in deciding the weight to be accorded to the [witness's] statement." (*Id.* at p. 467.) The present case is essentially indistinguishable from *People v. Simmons*, *supra*, 123 Cal.App. 3d 677, in lacking any meaningful attestation to the truthfulness of the prior identification, and readily

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distinguishable from *Cowan*, by dint of Oscar's insulation from thorough cross-examination and impeachment.[55] (See Argument V, *post*.)

Oscar initially testified that he did not remember police officers questioning him or showing him pictures, but that he remembered "talking to some people" about what happened, and that he told the truth that day. (59RT 11970.) On cross-examination, Oscar said that he not did not remember who he spoke with on the day of the crime, but remembered talking to police officers. (59RT 11979; 60RT 12138.) He did not remember what he told the officers. (See, e.g., 59RT 11981-11982 [not remembering making statements to officers], 11991 [did not recall describing a man to a police officer], 11993-11994 [not remembering telling officers about how many men he saw in room],11995 [did not recall telling officer that he saw weapons], 11997 [did not remember telling officers that a number of people had been in the house the night before the crime], 12000 [did not remember telling officers that others were in the room before his mother died], 12001 [did not remember telling officers about clothing worn by someone in the house], 12002 [did not remember telling officer about a whisp]; 60RT 12213-12214 [did not remember being shown photograph and being asked questions about it].)

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[55] Although couched somewhat differently, both Evidence Code section 1237, the general hearsay exception for prior recorded statements, and section 1238, the specific exception for prior identifications, require the witness's attestation to the truth of the prior statement or identification. It is therefore significant in assessing whether the attestation requirement was met for section 1237 that the prosecutor was unable to meet that requirement for admission of the prior identification under section 1238. (62RT 12786.) Appellant is unaware of any decision by this Court discussing the relationship between these two hearsay exceptions.

Without the ability to recall if he spoke with the police, if he saw the photograph at issue, or anything else about his interviews with the police, Oscar had no way of knowing if he told the truth or if the information he provided to the officers were matters that he had witnessed or things that he had learned throughout the morning when speaking to others or from overhearing others speak. Thus, his statements did not meet the foundational requirements of Evidence Code section 1237, subdivision (a)(3). (*People v. Simmons*, *supra*, 123 Cal.App.3d at pp 682-683.) Therefore, the trial court abused its discretion in admitting Oscar's statements under that section.

E. The Error In Admitting Oscar's Prior Statements Was Prejudicial and Requires Reversal Of The Judgment

In Arguments I-III, *ante*, appellant demonstrated the substantial prejudice resulting from the court's erroneous rulings, first, in failing to exclude, or strike, Oscar's testimony for lack of testimonial competency and personal knowledge, and then, in allowing the prosecutor to bolster that testimony with suggestive prior identifications. This argument builds on the preceding arguments, addressing the erroneous admission of the prior identification evidence based on complementary hearsay and reliability considerations. Although each of these arguments differs in focus, the overall prejudice is the same: the jury here was allowed to convict appellant based on inherently untrustworthy identification evidence in a case where there still was no forensic or other reliable evidence tying appellant to the charged crimes. Two previous juries, who had heard Oscar's testimony but not the bolstering out-of-court identification evidence, had been unable to reach a verdict. For this reason, as well as the detailed prejudice analysis set forth in Arguments I-III, *ante*, fully incorporated herein by reference,

reversal of the judgment is required under the both the state law and federal constitutional standards of review. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 24.)

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V

THE TRIAL COURT'S ERRONEOUS RESTRICTION OF APPELLANT'S RIGHT TO IMPEACH OSCAR HERNANDEZ REQUIRES REVERSAL OF THE JUDGMENT

A. Introduction

After his mother and sister were killed, five-year-old Oscar Hernandez made a number of statements to police officers and several lay witnesses. He identified appellant as the man who gave him ice cream and as being in his mother's room when she died. However, as previously noted, many of Oscar's successive statements were inconsistent, and at times contradictory, fantastical, and incredible. (See Arguments I & II, *ante*.)

Two years later, when Oscar was seven, he testified at appellant's serial trials. At each trial, Oscar's identification of appellant was admitted into evidence. At the first two trials, which resulted in hung juries, Oscar was thoroughly cross-examined and impeached with his prior conflicting statements and testimony.

At the instant trial, the court changed several of its earlier rulings and severely restricted defense counsel's ability to impeach Oscar's testimony. The jury that convicted appellant was therefore not provided with all of the information concerning Oscar's reliability and credibility that had been considered by the two prior juries.

The trial court's rulings excluding the critical impeachment evidence were erroneous under California law, and violated appellant's state and federal rights to confront and cross-examine witnesses, to present a complete defense, and to a reliable guilt verdict in a capital case. The errors were undeniably prejudicial under any harmless error standard.

Although it is true that the instant jurors heard evidence that appellant confessed to the crimes, the first two juries were equally aware of that evidence and still found that the prosecution had failed to prove its case beyond a reasonable doubt. A major difference between the first two trials and the instant trial is the restriction of appellant's ability to cross-examine Oscar to impeach his credibility as a witness. It follows that the court's erroneous limitation of appellant's ability to impeach Oscar contributed to the different outcome at the instant trial, and the judgment must therefore be reversed.

B. Factual Background

At the instant trial, the prosecutor's direct examination of Oscar was brief. He asked Oscar whether he remembered the day his mother died, and Oscar replied, "I don't really know." (59RT 11967.) When the prosecutor asked whether Oscar knew the difference between the truth and a lie, Oscar responded, "Hm – " The prosecutor followed up that question by asking Oscar the following two questions: "If I said I was wearing a blue shirt would that be the truth or would that be a lie?," and Oscar said that would be a lie. And, "If I said I was wearing a tie with elephants on it, would that be a truth or would that be a lie?," and Oscar said that would be the truth. (59RT 11969.)[56] Oscar was then asked about the day of the crime, and he responded that he did not remember it "that well." He remembered talking to people and said that he told them the truth. That concluded the prosecutor's direct examination of Oscar. (59RT 11970.) On cross-examination, Oscar again stated that he had told the police the truth, but could not recall what he had said to them. (59RT 11978, 11988, 11991,

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[56] See footnote 18, *ante*.

11994-11997, 12001-12002.) He did remember some events after he ran to his aunt Chandi's house. (59RT 11983-11984, 11988, 60RT 12194.)

On redirect examination, Oscar identified appellant as having been at his mother's house the day she died. (60RT 12216.) He did not remember, however, the photographs that were shown to him by the police that day, and could not identify anyone in those photographs. (60RT 12213.) And after identifying appellant in court, Oscar could not remember where he had seen him. (60RT 12218.) On re-cross examination, Oscar did not recall shaking his head "no" when asked to identify appellant at the first trial; he did recall seeing the man in Defense Exhibit Q (Marcos Pena) in his mother's house the night she died. (60RT 12226-12228.)

The court admitted Oscar's statements to law enforcement on the morning of August 4, including his identifications of appellant from the single-photo show-up and the six-person photo lineup. (61RT 12372; 64RT 13027, 13040.) But the court excluded Oscar's prior statements to investigators and others in which he placed other persons at his house when the crimes occurred. Specifically, the court excluded the following proffered impeachment evidence which had been admitted at the earlier trials.

1. Statements Made to Montejano and Spencer In Idaho On November 4, 1997

On November 4, 1997, three months after the crimes, district attorney investigators Wayne Spencer and Michael Montejano traveled to Idaho to interview Oscar. The interview was tape-recorded. (2CT 511 et seq. [transcript of interview].)

During the first and second trials, the trial court allowed Spencer to testify regarding his November 4 interview of Oscar. Spencer testified that

Oscar told him that the person he had seen with a gun hit him in the back. He said that this person got a hammer and hit him in the stomach and back and pulled his shirt. Oscar said he was hurt everywhere. Oscar said that the man ran around and broke everything including a clock and toys. Oscar said that he hid under the bed. Oscar told Spencer that he was tied up with a rope, and the man gave him medicine to drink but Oscar did not drink it. Oscar also told Spencer that the man broke a window, hit a door with the hammer, hit his sister on the head and stomach, and there was blood on the hat and hands of this man.[57] (22RT 4847-4851 [first trial]; 42RT 9057-9080 [second trial].)

At the instant trial, the trial court ruled that if Oscar did not recall a prior statement, then that statement was not admissible as a prior inconsistent statement. (59RT 12003-12004.) Defense counsel objected, and argued that if Oscar answered that he did not recall making certain statements to Spencer and Montejano, she was entitled to read those statements because they were not hearsay, but if deemed to be hearsay, they came within one of the hearsay exceptions set forth in the Evidence Code, namely, sections 1235 (prior inconsistent statements), 1236 (prior consistent statements) and/or 1237 (past recollection recorded). (59RT 12032-12035; 60RT 12156; 61RT 12396-12402, 12405-12406, 12403.) The trial court rejected each of these bases, concluding that Oscar's prior statements were hearsay, and inadmissible as prior inconsistent statements because a failure to recall does not establish inconsistency. It further concluded that the statements were inadmissible under section 1237 because they were

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[57] These statements were uncorroborated, or contradicted by the evidence and common sense.

unreliable and probably not fresh. (59RT 12019-12023, 12035-12037; 60RT 12126-12127, 12151-12156, 12158.) The court did allow the defense to attempt to refresh Oscar's recollection regarding the November 4 interview by having him listen to the tape-recording. (59RT 12177.) Although Oscar's specific recollection was not refreshed, he agreed that his memory was better when he spoke to Spencer on November 4 and that he told the truth. (60RT 12031.)

2. Oscar's Statements to His Father

During the second trial, the court, over the prosecution's hearsay and relevancy objections, admitted statements Oscar made to his biological father during a car trip to Idaho. (40RT 8607). The court concluded that this evidence was proffered for a nonhearsay purpose and that it was relevant to the defense expert's opinion regarding Oscar's mental state. (40RT 8608-8609.) Oscar's father testified that a few weeks after the crimes, Oscar told him that three men had entered the house the night his mother and sister were killed, cut the telephone cord and manhandled Lorena and Reyes. The men gave them beer and soon Lorena was "face up" with two men while the third was with Reyes. Oscar's mother hid him under the bed. Oscar ran to where the blood was and started to move his mother. He then ran and told the neighbors. (40RT 8612.)

Oscar told his father that his sister was in a room and his mother was running all over. Oscar also told him the names of these men: he recalled Juan and Marcos but could not recall the name of the third man. (40RT 8613.) Oscar's father also testified that Oscar did not tell him that any of these men had bought him ice cream. (40RT 8614-8615.) Oscar told him that they heard firecrackers and his mother grabbed him and tucked him under the bed. (40RT 8615.) At the instant trial, however, the court

reversed its prior rulings and precluded the defense from introducing any statements beyond that Oscar had said that three men were in the house and he said their names were Marcos, Juan and maybe Michael. (66RT 13489-13491.) Defense counsel argued, to no avail, that,

> I believe it violates my client's constitutional rights . . . not to be able to elicit from this gentleman the conduct that he – that was reported to be going on at the time he [Oscar] identified the three persons, three – men in his mother's house the night she died.

(66RT 13490; 13445-13447 [ruling Oscar's statements to father inadmissible hearsay.)

Defense counsel also argued that the statements were admissible not for the truth, but "to demonstrate to the jury [Oscar's] mental condition shortly after the death of his mother and his sister," which, defense counsel argued, was relevant to his mental condition at the time of his earlier statements to law enforcement. They were also offered to demonstrate the lack of reliability of Oscar's earlier statements, and to show that he did not perceive accurately what happened to him the day of the crimes. (66RT 13448.) Defense counsel stated:

> If we cannot put this evidence on, the jury cannot then accurately determine reliability in this case, and reliability and credibility are the main issues in this trial since there does not appear to be any substantial physical evidence of any kind that points directly to Juan Sanchez as the perpetrator of this crime.

(66RT 13449-13450.) The issue was revisited several days later, but the trial court did not change its ruling excluding this evidence. (67RT 13657-13658.)

3. Oscar's Testimony

Oscar testified at all three trials. At the second trial, Oscar was repeatedly confronted with his testimony from the first trial. Defense counsel read into the record those portions of the prior testimony that were used for impeachment. (E.g., 34RT 7517, 7518, 7519, 7529, 7531, 7535, 7537, 7538, 7539, 7548, 7549, 7550, 7551, 7572, 7577, 7581, 7582, 7589, 7591.) This list is far from complete, but shows that a key component of defense counsel's cross-examination of Oscar was the use of his prior testimony.

At the instant trial, the trial court changed its prior rulings regarding appellant's ability to cross-examine and impeach Oscar with his prior testimony. The court ruled that Oscar could not be impeached with prior statements, including testimony, if his current testimony was that he could not remember and he was not being evasive. (59RT 12003-12004.) The defense argued that under the right to cross-examination, a failure to recall is an "impeachment statement," and that, insofar as Oscar could not read, the prior statements would have to be read to him. (59RT 12013.) The discussion between the court and counsel then focused on whether Oscar's prior testimony and statements were admissible under Evidence Code section 1237, as past recollection recorded. (59RT 12014-12021.) Ultimately, the trial court ruled that Oscar's prior testimony was inadmissible, but that it could be used to refresh his recollection. (59RT 12023.) The defense was allowed to ask Oscar several questions about his prior testimony to which he answered, "I don't remember." (59RT 12029-12031.) After Oscar testified, defense counsel reiterated her position concerning the admissibility of Oscar's prior statements:

> [I]t's my contention that Oscar with his I don't recall is unavailable as a witness and that his prior sworn testimony should be admissible, his prior sworn testimony that is inconsistent with any statements that he made August the 4th, 1997, should also be admissible, and then I would argue that his prior inconsistent statements, anyway, should be admissible under 1237, his prior sworn testimony.

(64RT 13155-13156.) The trial court affirmed its ruling that the evidence was inadmissible hearsay. The following day the trial court noted "a renewed defense request to read in the prior testimony of Oscar," and stated: "I believe I made those findings before, and if I did not, if it isn't clear or even if I did, I'm going to make it again or state it, and this is that that testimony is not admissible in this trial as the evidence stands at this point." (66RT 13442.)

The issue was raised yet again the next day. Defense counsel argued that the prior testimony was admissible as prior inconsistent statements or as prior testimony under Evidence Code sections 1291 (former testimony) and 240 (unavailable as a witness), and *People v. Alcala* (1992) 4 Cal.4th 742, 779-780 [prior trial testimony admissible where witness's professed memory loss rendered her unavailable], but the trial court concluded that Oscar was not "unavailable" for that purpose. (67RT 13655-13657.)

At the close of the guilt phase, defense counsel was allowed to reopen her case and read two brief passages from Oscar's prior testimony that were inconsistent with his testimony at the instant trial. (75RT 15051-15052.)

4. Oscar's Inability Or Unwillingness to Recall

At the instant trial, the prosecutor began his direct examination by asking Oscar whether he recalled the day his mother died, and Oscar responded, "Um, I don't really know." (59RT 11967.) When asked again,

he responded: "Um, not that well." (59RT 11970.) On cross-examination, he testified that he wanted to "skip" questions. (E.g., 59RT 11994; 60RT 12145.) He did not recall his testimony in the prior trials (e.g., 59RT 12002-12003, 12030), his statements to law enforcement (e.g. 59RT 11996-11997, 12002; 60RT 12140), or (for the most part) the day his mother died (e.g., 60RT 12197, 12208-12210, 12214-12216). Even after the defense attempted to refresh Oscar's recollection by having him listen to his tape-recorded interview in Idaho, he could not recall it. (60RT 12186, 12198.) He made clear that he did not want to testify, that he just wanted to go home, and that he would do anything to get home as soon as possible. (See 60RT 12206, 12210, 12211, 12219.) Basically, his independent recall was limited to events occurring after he went to Rosa Chandi's house. (59RT 11979.)

C. The Right to Challenge The Credibility Of a Witness Is Very Broad and Encompasses Both The Witness's Willingness and Capacity to Tell The Truth

An accused in a criminal case is guaranteed by the Sixth Amendment and the due process clause of the Fourteenth Amendment a "meaningful opportunity to present a complete defense." (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.) The right to present a defense includes the right to present the defendant's version of the facts, to have the jurors consider evidence that might influence the guilt decision, and to confront and challenge the prosecution's version of the facts. (*Washington v. Texas* (1967) 388 U.S. 14, 19; *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56; *In re Martin* (1987) 44 Cal.3d 1, 30.)

The right to confront one's accusers (U.S. Const., Amends. 6 & 14; Cal. Const., art. I, § 15) secures an opportunity for cross-examination. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678; *California v. Green*

(1970) 399 U.S. 149, 158 [describing cross-examination as the "greatest legal engine ever invented for the discovery truth"]; *Pointer v. Texas* (1965) 380 U.S. 400, 405.)

Cross-examination consists primarily of the impeachment of witnesses, the process of "challenging or impugning the credibility of a witness." (*People* v. Sam (1969) 71 Cal.2d 194, 208; see also *Olden v. Kentucky* (1988) 488 U.S. 227, 231.) It is "the principal means by which the believability of a witness and the truth of his testimony are tested." (*Davis v. Alaska* (1974) 415 U.S. 308, 316.)

A denial of the right to cross-examine the prosecution's witnesses need not be wholesale to establish constitutional error. (See *Smith v. Illinois* (1968) 390 U.S. 129, 131.) A violation of the confrontation clause occurs when it is shown that the accused "was prohibited from engaging in otherwise appropriate cross-examination designed to [impeach] the witness, and thereby, 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" (*Delaware v. Van Arsdall, supra*, 475 U.S. at p. 680, quoting *Davis v. Alaska, supra*, 415 U.S. at p. 318.) In other words, a confrontation violation occurs where "although some cross-examination of a prosecution witness was allowed, the trial court did not permit defense counsel to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." (*United States v. Gutierrez de Lopez* (10th Cir. 2014) 761 F.3d 1123, 1139-1140.)

In California, the right to confrontation is also guaranteed by statute (Pen. Code, § 686), and this Court interprets the state and federal right to confrontation to be one and the same (see *People v. D'Arcy* (2010) 48

Cal.4th 257, 290, fn. 18). The right to confrontation is also embodied in the state's definition of relevant evidence which includes evidence having any tendency in reason to prove or disprove the "credibility of a witness or hearsay declarant[.]" (Evid. Code, § 210.) That standard is "very broad." (*People v. Salcido* (2008) 44 Cal.4th 93, 147; see also Cal. Const., art. I, § 28, subd. (d) ["relevant evidence shall not be excluded in any criminal proceeding"].) Challenging the credibility of a witness is not limited to invidious factors such as bias, motive or bad character. Credibility has two components: "First, the willingness to tell the truth, and second, the capacity to testify truthfully." (Myers, *The Child Witness: Techniques For Direct Examination, Cross-Examination, And Impeachment* (1987) 18 Pac. L.J. 801, 911.) Evidence Code Section 780, which comprises a lengthy, non-exclusive list of credibility factors, mirrors Evidence Code section 210 by providing that the jury, in determining the credibility of a witness, may consider "any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony[.]"

Generally, the application of the ordinary rules of evidence do not violate the right to present a defense. (*Holmes v. South Carolina* (2006) 547 U.S. 319, 324; *People v. Edwards* (2013) 57 Cal.4th 658, 728.) But the application of such rules must not be "arbitrary" or "disproportionate to the purposes they are designed to serve." (*Holmes, supra*, 547 U.S. at p. 324; *United States v. Scheffer* (1998) 523 U.S. 303, 308, quoting *Rock v. Arkansas* (1987) 483 U.S. 44, 55-56.) Further, a limitation on cross-examination that is based on a mistaken application of state evidentiary rules is unsupported by a legitimate state justification and is arbitrary. (See *United States v. Lopez-Alvarez* (9th Cir. 1992) 970 F.2d 583, 588.) Even when evidence is excluded on the basis of a valid application of

state evidentiary rules, due process may be violated if the evidence is sufficiently reliable and crucial to the defense. (*Ibid.*; see also *Green v. Georgia* (1979) 442 U.S. 95, 97; *Chambers* v. Mississippi (1973) 410 U.S. 284, 302.)

Finally, it is not a trial court's function to prevent the jury from determining the credibility of a percipient witness. (See *Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1011-1013.) The jurors alone determine the value of evidence addressed to the credibility of a witness, and must be instructed that they are the exclusive judges of the credibility of witnesses. (Pen. Code, § 1127; Evid. Code, §§ 312 & 780; see *People v. Jackson* (2014) 58 Cal.4th 724, 749.) Of course, in order to perform this duty accurately and reliably, the jurors must be provided with all of the evidence that is material to the credibility determination. (Cf. *Giglio v. United States* (1972) 405 U.S. 150, 153-154 [prosecution duty to disclose credibility evidence because "reliability of a given witness may well be determinative of guilt or innocence"].)

In the instant case, the court's excessive restriction of appellant's examination and other impeachment of Oscar, who was the prosecution's only "eyewitness," denied appellant his rights to confront and cross-examine witnesses, to present a complete defense and to a fair trial by depriving the jury of crucial information necessary to assess Oscar's credibility and to reach a reliable verdict.

D. The Trial Court Misapplied The Law In Restricting Impeachment Of Oscar

Oscar's credibility as a witness was in issue. (See Evid. Code, § 210 [relevant evidence includes evidence relating to the "credibility of a witness or hearsay declarant"]; *United States v. Green* (3d Cir. 2010) 617 F.3d 233,

251 [defense placed witness credibility in issue].) However, when the defense attempted to impeach Oscar's credibility, it was met with his repeated inability, or unwillingness, to recall events on the day his mother and sister were killed. He testified that he could not recall prior statements made the day of the crime, or three months thereafter. He could not recall his testimony at the two prior trials. He often could not recall his then-current testimony, given only minutes before. Nevertheless, Oscar vouched for the truthfulness of his prior statements to the police and of his prior testimony. (59RT 11970, 12030; 60RT 12140, 12224.) At all three trials, moreover, Oscar swore to tell the truth. (See 4RT 524-526; 16RT 3350; 34RT 7475; 59RT 11967.) Accordingly, Oscar's capacity to tell the truth – as a historical fact, not as a matter of law – was a proper subject for cross-examination and impeachment.

1. The Proffered Impeachment Evidence Was Admissible as Nonhearsay

Under Evidence Code section 780, the defense had the right to present evidence tending to show that Oscar had neither the willingness nor the capacity to testify truthfully. The statute sets forth examples of evidence relevant to credibility, several of which are applicable in this case:

> (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies;
>
> (d) The extent of his opportunity to perceive any matter about which he testifies;
>
> . . . .
>
> (h) A statement made by him that is inconsistent with any part of his testimony at the hearing; and
>
> (i) The existence or nonexistence of any fact testified to by him.

(§ 780; see also *People v. Verdugo* (2010) 50 Cal.4th 263, 292 [witness's emotional instability can be relevant to credibility if it affects ability to perceive, recall or describe events].)

When a child witness is involved, the ability to perceive, understand, recall or communicate an event are vital areas for evaluating the credibility of the testimony and for impeachment. Penal Code section 1127f recognizes this fact:

> In any criminal trial or proceeding in which a child 10 years of age or younger testifies as a witness, upon the request of a party, the court shall instruct the jury, as follows:
>
> In evaluating the testimony of a child you should consider all of the factors surrounding the child's testimony, including the age of the child and any evidence regarding the child's level of cognitive development. Although, because of age and level of cognitive development, a child may perform differently as a witness from an adult, that does not mean that a child is any more or less credible a witness than an adult. You should not discount or distrust the testimony of a child solely because he or she is a child.

Thus, as argued by defense counsel, the jury had a right to know that Oscar's prior performance as a witness, both in court and out, showed that he had no conception of a duty to tell the truth. (See Argument I, *ante*.) The defense thus sought to introduce Oscar's prior statements and testimony not for the truth of the matters asserted therein, but rather as circumstantial evidence of Oscar's lack of credibility and reliability as a witness. (Evid. Code, § 1200 [defining hearsay]; see *People v. Chism* (2014) 58 Cal.4th 1266, 1291-1292 [discussing the jury's assessment of a witness's credibility and evidence admissible for that nonhearsay purpose]; *People v. Bryant* (2014) 60 Cal.4th 335, 422; *People v. Guerra* (2006) 37 Cal.4th 1067, 1142, overruled on another ground in *People v. Rundle*

(2008) 43 Cal.4th 76, 151 [evidence properly admitted for the nonhearsay purpose of assessing the witness's credibility]; *People v. Archer* (2000) 82 Cal.App.4th 1380, 1391-1392 [evidence offered for impeachment not hearsay].)

For instance, many of Oscar's prior statements, including his testimony under oath, were inherently or demonstrably false. (See Argument I, *ante*.) As regards his statements to Spencer and Montejano in Idaho, no one believed that the perpetrator had choked Oscar, tied him up, hit him in the stomach with a hammer or physically harmed him in any way; no one believed that the perpetrator broke any windows or stole any money; nor that his brother Victor was in the bedroom with Oscar; and the brothers ran away together; nor that there " some . . . worms" coming out of his sister's body. (22RT 4847-4851 [first trial]; 42RT 9057-9080 [second trial]; 13CT 3493 [transcript of interview].) Yet Oscar vouched for their truth. (59RT 12031.) Hence, these statements were not offered for their accuracy (i.e., that worms did or did not come out of Lorena's body), but to show Oscar's chronic unreliability and lack of essential competency as a witness. As such, the statements were not hearsay, but rather admissible, relevant evidence under Evidence Code section 780. The trial court erred in keeping this information from appellant's jury.

2. Oscar's Prior Statements and Testimony Were Inconsistent With His Testimony at The Instant Trial

"A statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in Evidence Code sections 1235 and 770." (*People v. Chism* (2014) 58 Cal.4th 1266, 1294.) In this case, the trial court refused to permit the defense to introduce Oscar's prior

statements and testimony based on its belief that a witness's inability to recall prior testimony is not inconsistent with that testimony. As a general matter, the court was correct. (See, e.g., *People v. Coffman* (2004) 34 Cal.4th 1, 78; *People v. Sam,*, *supra*, 71 Cal.2d 194, 210.) However, the rule is not applied mechanically. This Court has repeatedly held that the test for the admission of prior inconsistent statements is inconsistency in effect, rather than contradiction in express terms. (*People v. Chism* (2014) 58 Cal.4th 1266, 1295; *People v. Hovarter* (2008) 44 Cal.4th 983, 1008.) The test for determining inconsistency is whether the statement has any tendency to contradict or disprove the witness's trial testimony or any inference to be deduced from it. (*People v. Cowan* (2010) 50 Cal.4th 401, 502.) In other words, inconsistency may be implied as well as express. (*People v. Green* (1971) 3 Cal.3d 981, 986-989.) Further, a prior statement can also be deemed inconsistent when the witness is found to be evasive at trial, although claiming a lack of memory. (*People v. Ervin* (2000) 22 Cal.4th 48, 84-85.) Oscar's prior statements were admissible under Evidence Code section 1235 under both theories because they tended to effectively contradict his testimony regarding the identity of the man in the house and were otherwise inconsistent because his profession of memory loss was willful, though not malicious.

In *People v. Hovarter*, *supra*, 44 Cal.4th at pp. 1008-1009, this Court upheld the admission of a prior statement made by a sexual assault victim as inconsistent with her testimony that she did not recall the particular statement – namely, whether the defendant had specifically said "he had done it before." The Court concluded that, even absent a finding whether the witness's lack of memory was a deliberate evasion, "the prior statement was sufficiently inconsistent *in effect* to qualify as a prior inconsistent

statement." (*Id.* at p. 1008, italics in original, citing *People v. Fierro* (1991) 1 Cal.4th 173, 221-222.) The Court explained:

> "Generally it is true that the testimony of a witness indicating that he or she does not remember an event is not inconsistent with a prior statement describing the event. [Citation.] 'But justice will not be promoted by a ritualistic invocation of this rule of evidence. Inconsistency in effect, rather than contradiction in express terms, is the test for admitting the witness'[s] prior statement [citation], and the same principle governs the case of the forgetful witness.'"

(*People v. Hovarter*, *supra*, 44 Cal.4th at p. 1008, citing *People v. Fierro*, *supra*, 1 Cal.4th at p. 221.)

That principle guides the analysis here. In this case, the evidence that Oscar's professed lack of recall was volitional is compelling. First, Oscar had displayed substantially greater, though imperfect, recall at the earlier trials, which had preceded each other and the third trial by only several months. Second, his pattern of responses, as the prosecutor experienced, showed deliberate avoidance rather than genuine memory loss. For example, after identifying appellant as being present in his mother's house, Oscar responded "I don't remember" to every follow-up question on the subject, prompting the prosecutor to query Oscar:

Q. A minute ago you said you knew him [appellant] and why is that?

A. I forgot

Q. You've forgotten in a minute?

A. Yes.

Q. . . . Would you like to go home right now?

A. Yeah.

(60RT 12218-12219; see also Argument I, *ante*.)

Oscar's pattern of behavior, moreover, was entirely consistent with his counselor Wanda Newton's observation that, since she met him, Oscar had a habit of saying he did not remember "when he wanted to avoid answering something." (26RT 5634 [agreeing that Oscar's failure to remember was willful and possibly defiant at times].) The court's understandably sympathetic and protective finding that Oscar was not evasive is thus thoroughly belied by the record. In short, because Oscar's supposed memory loss was not a true case of memory loss, his prior statements and testimony fell within the exception for implied prior inconsistent statements.

But even if Oscar's profession of memory loss were genuine, the proffered prior statements were admissible as sufficiently inconsistent in effect, if not expressly, with Oscar's testimony and the inference the prosecutor urged the jury to draw – that appellant was the sole perpetrator and the only person Oscar saw in his mother's house the night she was killed. In contrast, Oscar's prior statements and testimony suggested that he may have seen as many as four or five people in the house or, more to the point, that he had no idea whom he actually saw.

While appellant would not go so far as to describe the court's application of the hearsay rule as, in this Court's words, "ritualistic," overly technical and one-sided may be more apt descriptions. On the one hand, the court liberally construed Evidence Code section 1236, the exception for prior consistent statements, allowing the prosecutor to significantly bolster Oscar's questionable in-court identification of appellant, notwithstanding that Oscar did not remember any of these prior statements or identifications. While on the other, the court strictly and erroneously applied Evidence Code section 1235, withholding from the jury vital information, known to

the two prior juries, that effectively countered the conclusion that Oscar reliably identified appellant at any time. As a result of these disparate rulings, the court compounded its error in excluding evidence essential to the defense and to the jury's fair determination of guilt.

3. Oscar's Former Testimony Was Admissible Under Evidence Code Sections 1291 and 240

The trial court also erred in failing to admit Oscar's prior testimony under Evidence Code section 1291, which provides that under certain circumstances, prior testimony by an unavailable witness is admissible despite the general rule excluding hearsay evidence. (*People v. Williams* (2008) 43 Cal.4th 584, 610; *People v. Mayfield* (1997) 14 Cal.4th 668, 742.)

Evidence Code Section 1291 requires that the witness be "unavailable" within the meaning of Evidence Code section 240; but, as held by this Court in *People v. Reed* (1996) 13 Cal.4th 217:

> California courts have not interpreted Evidence Code sections 240 and 1291 so strictly as to preclude unlisted variants of unavailability. Rather, courts have given the statutes a realistic construction consistent with their purpose, i.e., to ensure that certain types of hearsay, including former testimony, are admitted only when no preferable version of the evidence, in the form of live testimony, is legally and physically available.

(*People v. Reed, supra*, 13 Cal.4th at pp. 226-227.)

Substantial trauma suffered by a child can render the child unavailable as a witness (*People v. Winslow* (2004) 123 Cal.App.4th 464, 472-473), as can loss of memory (see *People v. Alcala* (1992) 4 Cal.4th 742, 778-779), or a refusal to testify (*People v. Smith* (2003) 30 Cal.4th 581, 623-624).

In *People v. Alcala, supra*, 4 Cal.4th 742, this Court affirmed the trial court's ruling admitting a witness's prior trial testimony at a retrial

where the witness professed a total inability to recall relevant events due to a posttraumatic stress disorder. (*Id.* at p. 776.) This Court adopted the trial court's reasoning that: "The unusual situation presented here, in which a witness who testifies in considerable detail at one trial but – ostensibly due to the onset of memory loss – claims a complete inability to recall relevant events at retrial is . . . 'unavailable' to testify under Evidence Code section 240, subdivision (a)(3)." (*Id.* at p. 778, citing *People v. Rojas* (1975) 15 Cal.3d 540, 552.) This situation permits a trial court finding that the witness suffers from a "mental infirmity," which this Court has defined as "a defect of personality or weakness of the will." (4 Cal.4th at p. 779, citing *Rojas, supra,* 15 Cal.3d at p. 551.)

Similarly, if Oscar's near-total memory loss were genuine, as the trial court found, then it was unquestionably due to the trauma of the witnessed crime which, as in *Alcala, supra,* had led to a diagnosis of posttraumatic stress disorder. (6RT 1135.) Based on the breadth of his memory loss and its traumatic origins, Oscar therefore was unavailable under the reasoning set forth by this Court in *Alcala.*

Appellant recognizes that *People v. Alcala, supra,* did not address the question whether or under what circumstances a claim of partial memory loss would render a witness unavailable. (4 Cal.4th at p. 783.) both the asserted memory loss was very targeted, *People v. Hawthorne* (1992) 4 Cal.4th 43, 55 (partial memory loss as to police statements at photo-identification procedure), and *People v. Price* (1991) 1 Cal.4th 324, 415 (same basic story but weak on some details). Here, by contrast, Oscar professed to remember almost nothing of the critical events that preceded his going to Rosa Chandi's house.

Accordingly, his prior testimony was admissible under Evidence Code section 1291 and the trial court erred in concluding otherwise.

4. Oscar's Prior Statements Were Admissible Under Evidence Code Section 1237

Finally, with respect to the admissibility of Oscar's prior statements under Evidence Code section 1237, as past recollection recorded, the trial court erred on two points. First, the fact that his statements to law enforcement occurred two or three months after his mother and sister were killed does not make his statements not fresh. For example, in *People v. Cowan*, *supra*, 50 Cal.4th 401, a prosecution witness's statements made to law enforcement three months after the charged crime were admitted under Evidence Code section 1237. In response to the defendant's argument that the statements were not made at a time when the facts recorded were fresh, this Court concluded: "Defendant points to no authority for the proposition that such a lapse of time between the events recorded and the time of the recording renders a past statement inadmissible under Evidence Code section 1237, and we are aware of none." (*Id.* at p. 466.)

Second, with respect to the reliability of Oscar's statements, he testified that his memory was good when he made the statements in Idaho, and that he told the truth. (60RT 12140-12148.) That testimony is sufficient to establish the foundational requirement of reliability under Evidence Code section 1237. (See *People v. Cowan*, *supra*, 50 Cal.4th at p. 466; *People v. Cummings* (1993) 4 Cal.4th 1233, 1293-1294 [statement admissible under section 1237 despite witness's delusions and drug problems at time of trial, where witness had sufficient recall of the events surrounding the statement that the trial court could conclude it was

reliable].) Accordingly, the foundational requirements for the admission of Oscar's prior statements were sufficiently met here.

In sum, the trial court abused its discretion in excluding critical impeachment evidence based on misconceptions as to the scope and purpose of Evidence Code sections 780, 1235, 1291 and 1237. (See *In re Charlisse C.* (2008) 45 Cal.4th 145, 159; *Bisno v. Douglas Emmett Realty Fund 1988* (2009) 174 Cal.App.4th 1534, 1550 [a ruling premised upon an error of law necessarily constitutes an abuse of discretion].)

E. The Trial Court's Error Denied Appellant His Rights to Confront Witnesses and Present a Defense, to Due Process and to a Fair Trial

A trial court's limitation on cross-examination pertaining to the credibility of a witness may violate the confrontation clause if a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted. (*People v. Quartermain* (1997) 16 Cal.4th 600, 623-624.) Further, a rule of evidence may infringe upon a defendant's right to present a complete defense where it does not rationally serve the purpose for which the rule was designed. (See *Holmes v. South Carolina*, *supra*, 547 U.S. at p. 331 [rule violated defendant's right to present a complete defense when it did not rationally serve purpose such rules designed to further].) Both these rights were abridged here by the court's erroneous exclusion of critical impeachment evidence under an application of the rules that defeated their purpose.

The inconclusive outcomes of appellant's first two trials, where appellant's juries were presented with Oscar's prior statements and the testimony excluded by the court in the instant case, strongly suggest that the instant jury would have formed a far less favorable view of Oscar's

reliability as a witness – most importantly, in his identifications of appellant –had Oscar's capacity to perceive, recall and recount the truth been fully and effectively challenged. Indeed, the same conclusion follows even without the comparison to the earlier trials because there was no way a jury could fairly evaluate Oscar's credibility without being made aware of his continuing fabrications during law enforcement interviews and under oath at trial. As such, this is that rare case where the trial court's erroneous exclusion of credibility evidence violated appellant's rights under the confrontation clause.

Appellant was also deprived of his right to present a complete defense where the court interposed its own assessment of the reliability of the content of the proffered statements and testimony as grounds for their exclusion, despite Oscar's repeated ratification of their truthfulness and the unchallenged accuracy of the recorded police interviews and prior testimony.

More importantly, the court's unduly restrictive view of impeachment, at least when proffered by appellant, fundamentally disserved the purpose of Evidence Code section 780 and the truth-finding function of the jury by denying the jury evidence that was vital to its credibility determination. (Cf. *Holmes v. South Carolina*, *supra*, 547 U.S. at p. 331 [court's prejudging strength of the prosecution's case "arbitrary" in the sense that it did not rationally serve purpose of third-party guilt rules].) Accordingly, the court's erroneous limitation on Oscar's cross-examination and the introduction of other impeachment evidence resulted in a denial of appellant's constitutional rights to due process, confrontation of witnesses and a meaningful opportunity to present a complete defense.

Moreover, even if the trial court's evidentiary rulings had been correct under state law, evidence excluded on the basis of a valid application of an evidentiary rule may violate due process and the Sixth Amendment if the evidence is sufficiently reliable and crucial to the defense. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *Green v. Georgia* (1979) 442 U.S. 95, 97 [due process violated by exclusion of hearsay testimony that "was highly relevant to a critical issue" and "substantial reasons existed to assume its reliability"]; *People v. Cunningham* (2001) 25 Cal.4th 926, 998.) Here, it cannot be gainsaid that Oscar's credibility was relevant to the defense. (See Evid. Code, § 210 ["'relevant evidence' . . . includ[es] evidence relevant to the credibility of a witness"]; § 780 [nonexclusive catalog of those matters that "have a tendency in reason to the defense to affect the credibility of a witness"].) Nor can the accuracy of the statements to law enforcement and the prior testimony be questioned. (See McCormick on Evidence (7th Ed. 2013) § 301, at p. 482 [cross-examination, oath, the solemnity of the occasion and the accuracy of modern methods of recordation give former testimony a high degree of reliability]; Code Civ. Proc., § 273 [reporter's transcript is "prima facie evidence of that testimony and proceedings"]; see also Evid. Code, § 1350 [admissibility of a tape-recorded statement made to law enforcement].)

Here, Oscar was the person who identified appellant. Most of the defense efforts were directed toward preventing Oscar from testifying in the first instance and, when those efforts failed, attacking his credibility once he took the stand. Thus, whether the court's exclusionary rulings were technically correct, appellant's right to due process, and attendant trial rights were violated because the proffered impeachment evidence was

reliable and crucial to his defense. (*United States v. Lopez-Alvarez* (9th Cir. 1992) 970 F.2d 583, 588.)

Finally, as this Court recognized in *People v. Cromer* (2001) 24 Cal.4th 889, where the application of a hearsay rule impacts an important constitutional right, the deferential abuse of discretion standard is inappropriate; instead the standard is the independent review test. (*Id.* at pp. 901, 905 [because prior testimony exception implicates the right to confrontation, showing of unavailability reviewed independently and found insufficient].) Here, because the court's rulings impaired appellant's fundamental trial rights, as demonstrated above, independent review is the appropriate standard. Applying that standard establishes that the trial court's predicate findings regarding availability, reliability and relevance were not sufficiently supported by the settled facts or the law. Accordingly, the court committed an error – indeed several errors – of constitutional magnitude.

F. The Erroneous Exclusion Of Vital Impeachment Evidence Was Prejudicial and Requires Reversal Of The Judgment

As has long been observed, the jury's estimate of the reliability of a given witness may well be determinative of guilt or innocence. (*Napue v. Illinois* (1959) 360 U.S. 264, 269.) Rarely has this observation been more apposite than in this case. The arguments of the parties confirm that the reliability of Oscar's identification of appellant was the key to the case – the more so because appellant's confession reflected no independent knowledge of the facts of the crime and there was no physical evidence tying appellant to the crime scene.

The opening statements focused primarily upon Oscar's statements and credibility. The prosecutor began his opening statement with one of

Oscar's versions of the events (52RT 11023-11024), and continued through Oscar's statements to law enforcement, and his identification of appellant (52RT 11025, 11030-11031). Defense counsel's focus was the same. (52RT 11049-11051.) In particular, the defense promised the jury it would hear evidence that,

> [Oscar] was interviewed November the 4th in Idaho . . ., but in Idaho . . . he was interviewed by D.A. Investigator Spencer and Montejano, gave certain statements there as to what he believed had happened, and he's given statements to Lola, one of his relatives, and he's given statements to his – natural father in Idaho, and you'll see how those statements reflected on – on his reliability. His stories will go from one man to four to five – five men, and he will have assorted names that he may or may not remember who they are, where they come from – from some source and I ask you to patiently evaluate this child when you see him, pay attention to his numerous statements and weigh – weigh what he says before you decide this case.

(52RT 11051.)

The two closing arguments continued to focus the jury's attention on Oscar – less so his testimony at the instant trial than the prior statements the court admitted in its stead. The prosecutor carefully reviewed Oscar's statements that benefitted his case (76RT 15156-15159, 15160-15164), and sought to rebut the defense's attack on Oscar's credibility (76RT 15304, 15327-15328). Oscar was a continual focus of defense counsel's closing argument, and in his rebuttal the prosecutor argued that the jury could convict appellant based solely on Oscar's testimony and statements. (76RT 15227, 15234, 15235, 15239, 15240, 15243, 15244, 15247, 15248, 15249, 15250, 15251, 15252, 15259, 15260, 15291, 15292, 15304-15305, 15327-15328.)

Two juries considered the evidence, including appellant's confession, and could not conclude that the prosecution proved its case beyond a reasonable doubt. A major difference among the three trials was defense counsel's ability to vigorously cross-examine and impeach Oscar's testimony. Thus, it cannot be held, even under the heightened standard applicable to state law error, that the insulation of Oscar's testimony from meaningful impeachment did not contribute to the changed verdict at the third trial. (Compare *People v. Zambrano*, *supra*, 41 Cal.4th at p. 1135, fn. 13, citing *People v. Watson* (1956) 46 Cal.2d 818, 836 [whether it is reasonably probable the error affected the trial result], with *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [whether guilty verdict is surely unattributable to error].)

Indeed, the prejudice resulting from the erroneous exclusion of the impeachment evidence was magnified because it resulted in the equivalent restriction of Dr. Susan Streeter's expert testimony. (70RT 14202-14203; see Argument VI, *post.*) Apart from the fact that Dr. Streeter's testimony at the prior trials had encompassed the precise evidence later deemed "incompetent hearsay," this characterization of the proffered impeachment at the third trial was categorically wrong. The evidence upon which Dr. Streeter had based her opinions included recordings of interviews and prior testimony whose reliability is presumed. Hence, the jury was doubly deprived of credibility information essential to a fair outcome.

Furthermore, the court's error cast defense counsel's credibility, hence appellant's, in a bad light. It is generally acknowledged that '[p]romising a particular type of testimony creates an expectation in the minds of jurors, and when defense counsel without explanation fails to keep that promise, the jury may well infer that the testimony would have been

adverse to the client and may also question the attorney's credibility." (*United States v. ex rel. Hampton v. Leibach* (7th Cir. 2003) 347 F.3d 219, 259; *Ouber v. Guarino* (1st Cir. 2002) 293 F.3d 19, 27 ["A broken promise of this magnitude taints both the lawyer who vouchsafed it and the client on whose behalf it was made"]; *Madrigal v. Yates* (C.D. Cal. 2009) 662 F.Supp.2d 1162, 1183-1184; *Williams v. Woodford* (E.D. Cal. 2012) 859 F.Supp.2d 1154 [the "jury will draw negative inferences from the unexplained absence of . . . promised testimony, and these inferences will fill the gap that might otherwise exist in the prosecution's case"].)

Here, defense counsel's opening statement created an expectation in the minds of the jurors that they would hear testimony regarding Oscar's fantastical stories to several named witnesses – stories which were heard by appellant's two prior juries. But the jurors at the instant trial never heard any of these stories because the court erroneously excluded the promised testimony. (See 52RT 11051.) True the jury heard that Oscar had said that other people were in the house the night his mother and sister were killed, but none of the evidence fulfilled defense counsel's promise to present the incredible stories Oscar had told regarding the four or five assorted people Oscar had, at different times, placed in his mother's bedroom. As a result, the jury could have inferred a degree of reliability in Oscar's identification of appellant that was wholly unjustified.

The evidence of appellant's guilt at all three trials was essentially the same – Oscar's identification and appellant's confession. It therefore should not have been the case that the prosecutor gained an unmerited advantage – unrelated to the strength of the evidence – because Oscar came to profess a near-complete memory loss at the instant trial. But that is what the court's erroneous rulings accomplished in allowing the prosecutor to

bolster Oscar's identification with his prior statements and identifications of appellant while shielding all of this evidence from meaningful impeachment. Accordingly, whether tested under the state's reasonable probability standard or the federal beyond-a-reasonable-doubt standard, the conclusion is the same: the court's erroneous restriction of cross-examination and impeachment of the prosecution's principal witness was prejudicial and requires reversal of appellant's convictions and the judgment of death.

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VI

THE TRIAL COURT PREJUDICIALLY ERRED BY UNDULY RESTRICTING THE TESTIMONY OF DEFENSE EXPERT DR. SUSAN STREETER WITH RESPECT TO FACTORS BEARING ON OSCAR'S COMPETENCY AND RELIABILITY AS A WITNESS

A. Introduction

Dr. Susan Streeter was called by the defense as an expert witness on the cognitive developmental level of five- to seven-year-old children generally, and on factors which may impair the ability of such a child to accurately and reliably perceive and recount an event. In preparation for her testimony, Dr. Streeter had reviewed the following: "four, five separate days of [Oscar's trial] testimony"; Wanda Newton's testimony; over 40 police reports; at least four out-of-court statements by Oscar; a report by Chris Cline; testimony of Nancy Fennell; testimony of Jose Hernandez; Wanda Newton's progress notes from November 4, 1997, through September 29, 1999; a number of court documents filed with Tulare County; Oscar's school records; several Tulare County District Attorney reports; and, a report from Behavioral Health in Idaho. (71RT 14344-14345.)

Defense counsel represented to the court that Dr. Streeter was prepared to testify that she had found indications that Oscar was incompetent, in the testimonial sense, and did not know the difference between the truth and a lie at the time he spoke to police on August 4, 1997. Dr. Streeter also would opine that Oscar's reliability was affected by his age and by a variety of sources of "taint." In order to do so, Dr. Streeter had to state what she relied on in reaching her opinions, namely, Oscar's statements and his demeanor and responses as a trial witness. Defense

counsel emphasized that Oscar's statements were not being offered for the truth with respect to his mental state, but as the basis for Dr. Streeter's opinion. (70RT 14192.)

The trial court ruled that it would not allow Dr. Streeter to testify about specific evidence indicating that factors bearing on Oscar's reliability were present. The court's ruling, which effectively stripped Dr. Streeter's expert testimony of its explanatory force, was error and denied appellant his constitutional rights to present a complete defense, to due process and a fair trial, to trial by jury, to a reliable determination of the capital charges against him, and to a fair and reliable capital sentencing determination. (U.S. Const., Amends. 6, 8 & 14; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

B. The Trial Court's Broad Discretion to Exclude Or Limit Expert Testimony Is Subject to The Defendant's Constitutional Right to Present a Defense

A criminal defendant's due process and Sixth Amendment right to present a defense under the federal Constitution includes the right to present all relevant and material evidence favorable to his or her defense theory. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *Washington v. Texas*, *supra*, 388 U.S. at p. 23; *People v. Jennings* (1991) 53 Cal.3d 334, 372; *People v. Babbitt* (1988) 45 Cal.3d 660, 684; accord, Cal. Const., art. I, § 15.) Further, where, as here, the excluded evidence is crucial to the defense and bears directly on the defendant's legal and moral culpability, the erroneous exclusion of the evidence not only undermines the defendant's Sixth and Fourteenth Amendment right to present a defense, but also precludes the reliability required by the Eighth and Fourteenth Amendments for a conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638), and deprives the defendant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment (*Johnson v.*

Mississippi (1988) 486 U.S. 578, 584-585; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304).

As a general rule, however, trial courts have wide discretion to admit or exclude expert testimony, and a reviewing court may not interfere with that discretion unless it is clearly abused. (*People v. Bui* (2001) 86 Cal.App.4th 1187, 1196, citing *People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) Nevertheless, that discretion is not absolute, as this Court has recognized in various contexts where it has held that trial courts committed reversible error in excluding expert testimony. (See, e.g., *People v. McDonald* (1984) 37 Cal.3d 351, 373, and cases cited therein; *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1169.) This discretion is especially limited when its exercise hampers the ability of the defense to present evidence. (*People v. Cooper* (1991) 53 Cal.3d 771, 816.)

The statutory rules governing admissibility of expert testimony are set forth in Evidence Code sections 720 and 801. Section 720, subdivision (a), provides in pertinent part that "[a] person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." Indeed, "[e]xpert evidence, i.e., the testimony of a person with special knowledge [citation] has become increasingly important in modern litigation. [Citations.]" (1 Witkin, Cal. Evidence (5th ed. 2012) § 26, p. 637.)

Evidence Code section 801, subdivision (a), provides that expert opinion testimony is admissible so long as it relates to "a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." "'The decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of the

inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' [Citations.]" (*People v. Hernandez* (1977) 70 Cal.App.3d 271, 280.) Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact. (Evid. Code, § 805.)

This Court has explained that, "[g]enerally, an expert may render opinion testimony on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth.' [Citation omitted.]" (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) However, such a hypothetical question must be rooted in facts shown by the evidence. (*Ibid.*; see also 3 Witkin, Cal. Evidence (5th ed. 2012) § 208, p. 309 ["[t]he traditional method of taking the opinion evidence of an expert is the hypothetical question"].)

Even matter that is ordinarily inadmissible can form the proper basis for an expert's opinion testimony. (Evid. Code, § 801, subd. (b); see also *People v. Gardeley*, *supra*, 14 Cal.4th at p. 618, and authorities cited therein.) Although the opinion testimony may be based on hearsay, the expert may generally not testify to the content of the hearsay. (*Continental Airlines v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 414.) However, this Court has recognized that reliable hearsay evidence may be introduced where required by an expert's need to consider extrajudicial matters, and a jury's need for information sufficient to evaluate an expert opinion, and disputes in this area must generally be left to the trial court's sound judgment. (*People v. Montiel* (1993) 5 Cal.4th 877, 919, citing

People v. Nicolaus (1991) 54 Cal.3d 551, 582.) "Most often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth." (*People v. Montiel*, *supra*, 5 Cal.4th at p. 919, citing *People v. Coleman*, *supra*, 38 Cal.3d at p. 92.)

Evidence Code section 802 provides:

> A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based.

Citing section 802, among other authorities, Witkin explains that "[a]n expert is always entitled to give the reasons for his or her opinion, and undue restriction of the answer may be serious error." (3 Witkin, Cal. Evidence (5th ed. 2012) § 213, p. 314.) Evidence Code section 803 provides that

> The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such case, the witness may, if there remains a proper basis for his opinion, then state his opinion after excluding from consideration the matter determined to be improper.

Applying these well-established principles to the trial court's restriction of Dr. Streeter's testimony makes clear that its ruling was an abuse of discretion.

C. The Trial Court Abused Its Discretion By Unduly Restricting The Scope Of Dr. Streeter's Testimony

Oscar's credibility as a witness was in issue. (See Evid. Code, § 210 ["relevant evidence" includes evidence relating to the "credibility of a witness or hearsay declarant"]; *United States v. Green* (3d Cir. 2010) 617 F.3d 233, 251 [defense placed witness credibility in issue].) Under Evidence Code section 780, the defense had the right to present the jurors with evidence relevant to Oscar's credibility, including "the extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies," any prior inconsistent statements that he made, and his emotional state. (Evid. Code, § 780; *People v. Verdugo* (2010) 50 Cal.4th 263, 292 [witness's emotional instability can be relevant to credibility if it affects ability to perceive, recall or describe the events].)

Here, the trial court permitted Dr. Streeter to testify generally about the psychological development of five- to seven-year-old children, including general factors bearing on the reliability of statements made by children in that age range. (70RT 14197-14199.) However, the trial court unduly restricted her testimony in several respects: (1) defense counsel could employ hypothetical questions only if she had a good faith belief that evidence could be admitted to support the facts contained therein (70RT 14196); (2) Dr. Streeter was barred from testifying about Oscar's prior statements and testimony; and (3) Dr. Streeter was barred from rendering an opinion as to Oscar's reliability and competency. (70RT 14196-14199, 14202-14204.) As demonstrated below, the trial court's analysis was flawed in several critical respects.

1. The Trial Court Improperly Barred Consideration Of Oscar's Prior Statements and Testimony On The Ground That They Constituted Incompetent Hearsay

Although the trial court permitted Dr. Streeter to list the records she had reviewed in preparation for her testimony (71RT 14337-14340. 14344-14345), it barred her from testifying to the contents of those records on the ground that it was "incompetent hearsay." (70RT 14202-14203.) The trial court's ruling was error for several reasons, most importantly, that the records and observations that formed the basis for Dr. Streeter's opinions were not hearsay.

First, Oscar's prior statements and testimony were admissible as prior inconsistent statements within the meaning of Evidence Code section 1235; his prior testimony was admissible under Evidence Code section 1291, regarding former testimony offered against a party to a former proceeding; and, some of his statements were also admissible as past recollections recorded within the meaning of Evidence Code section 1237, and all fell within the broad credibility criteria of Evidence Code section 780. (See Argument V, *ante*.)

Second, even assuming Oscar's prior statements and testimony constituted inadmissible hearsay, the trial court apparently misinterpreted decisions of this Court to categorically preclude an expert from testifying to inadmissible hearsay on direct examination. (70RT 14202-14203.) As the trial court noted (*ibid.*), this Court has stated that on direct examination an expert "may not testify as to the details [of what he or she relied upon in forming an opinion] if they are otherwise inadmissible." (*People v. Coleman* (1985)38 Cal.3d 69, 92.) However, this Court has also recognized that hearsay problems ordinarily will be cured by an instruction

that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth. (*Ibid.*; accord, *People v. Montiel*, *supra*, 5 Cal.4th at p. 919.) Indeed, this Court subsequently made clear that "the plurality opinion in *People v. Coleman*, *supra*, 38 Cal.3d 69, 90–92 . . ., does not stand for the proposition that on direct examination an expert may *never* testify to extrajudicial statements when he gives 'the reasons for his opinion and the matter . . . upon which it is based' (Evid. Code, § 802)." (*People v. Mickey* (1991) 54 Cal.3d 612, 689, italics in original.)

For example, in *Gardeley*, this Court held that the trial court had properly permitted a gang expert to relate during direct examination hearsay statements by the victim of an alleged gang attack as well as hearsay concerning other attacks by the same gang. (*People v. Gardeley*, *supra*, 14 Cal.4th at pp. 619-620.) In so holding, this Court relied on (1) Evidence Code section 801, which provides that expert testimony may be premised on inadmissible material so long as it is reliable and of a type that is reasonably relied upon by experts in the expert's particular field, and (2) Evidence Code section 802, which allows an expert witness to "state on direct examination the reasons for his opinion and the matter . . . upon which it is based." (*Id.* at p. 618; accord, *People v. Valdez*, *supra*, 58 Cal.App.4th at pp. 510-511 ["[u]nder *Gardeley*, we find it well within the trial court's discretion to permit [the prosecution's gang expert] to relate in detail the large amount of hearsay upon which he relied"].) This basis evidence is not admitted for the truth, but to allow the jury to evaluate the expert opinion. (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 619; see also *People v. Hill* (2011) 191 Cal.App.4th 1104, 1127-1129 [discussing *Gardeley*].)

Thus, the logic of *Gardeley* weighed in favor of allowing Dr. Streeter to describe specific materials she reviewed in order to state the reasons for her opinions. (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 618; see 70RT 14293 [trial court quoting from *Gardeley*].) The materials Dr. Streeter relied upon – including Oscar's prior testimony, police reports, school records, and mental health records (71RT 14344-14345) – are of a type that are reasonably relied upon by psychologists testifying as experts in criminal cases. (See, e.g., *People v. Pearson* (2013) 56 Cal.4th 393, 435 [defense psychologist relied on reports by other experts]; *People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1324-1325 [court erred in preventing defense psychologist from testifying that he relied on defendant's statement to a parole office psychologist]; see also *People v. Stoll* (1989) 49 Cal.3d 1136, 1154 ["[n]o precise legal rules dictate the proper basis for an expert's journey into a patient's mind to make judgments about his behavior].)

Moreover, Oscar's prior statements and testimony were sufficiently "reliable" for purposes of Evidence code section 801. (See, e.g., *People v. Hill, supra,* 191 Cal.App.4th at pp. 1127-1129.) That is, Dr. Streeter would not have relied on Oscar's statements alone, but surely would have relied on other sources of information, including her own experience and training, to render her opinions. (See *People v. Valadez* (2013) 220 Cal.App.4th 16, 29 [hearsay evidence found to be sufficiently reliable because gang expert did not rely on individual gang sources alone or simply recite statements by others, but fit the information into all the other sources and his own experience to render his opinion]; *People v. Hill*, *supra*, 191 Cal.App.4th at pp. 1124-1125 [hearsay evidence found to be sufficiently reliable where "[t]he officers did not simply recite what they had been told, but instead

provided foundational testimony for their opinions which was sufficiently corroborated by other competent evidence, both physical and testimonial"].)

Under these circumstances, the trial court abused its discretion in rejecting defense counsel's request that Oscar's prior statements and testimony be considered by the jury not for the truth, but as the basis of Dr. Streeter's opinion. (70RT 14192, 14196-14197, 14200, 14202.) The jury's use of that evidence could have been guided by an appropriate limiting instruction. (*People v. Montiel, supra*, 5 Cal.4th at p. 919, citing *People v. Coleman, supra*, 38 Cal.3d at p. 92.) This is particularly so because the proffered evidence was not irrelevant or so prejudicial as to require its exclusion under Evidence Code section 352. (Compare *People v. Coleman, supra*, 38 Cal.3d at p. 93 [in light of great potential for prejudice arising from accusatory statements "from the grave," trial court abused its discretion by permitting extensive questioning of the expert witnesses on the contents of the letters in which the homicide victim, defendant's wife, claimed that he had previously threatened her with violence].)

Without specific examples drawn from Oscar's prior statements and testimony, the jury likely would have given little credence to Dr. Streeter's expert testimony. As defense counsel stated, Dr. Streeter could not "render any opinion about . . . [Oscar's] unreliability unless she can refer to statements that he's made in the past." (70RT 14196-14197.) Thus, in contrast to appellant's first and second trials, there was little if any evidence before the jurors to which they could tie Dr. Streeter's expert opinions regarding Oscar's reliability. For instance, in the absence of examples from Newton's counseling records, Dr. Streeter's testimony regarding "taint" flowing from the influence of adult authority figures necessarily remained purely theoretical. (25RT 5343-5375, 5390-5400, 5408-5423, 5426-5446

[first trial]; 42RT 9130-9134, 9139-9143, 9145-9148, 9152-9156, 9160-9161, 9178-9182 [second trial].)

The force of Dr. Streeter's expert testimony was further undermined because the defense could not use Oscar's prior statements and testimony in the form of hypothetical questions. (70RT 14196-14197.) Again in contrast to the first and second trials (25RT 5363-5364, 5377-5378, 5381-5383, 5394-5396, 5408-5411, 5431-5444; 42RT 9131-9135, 9139-9143, 9145-9148, 9160-9161), Dr. Streeter was unable to draw from Oscar's prior statements and testimony to explain the basis of her opinions. (Compare *People v. Gardeley*, *supra*, 14 Cal.4th at p. 619 [admitting gang expert's opinion based in part upon inadmissible hearsay that the charged assault was "gang-related activity"].)

Although Dr. Streeter was able to explain that the reliability of a child's perception and ability to recount an event may be affected by factors such as fluid thinking, confabulation, suggestibility, a desire to please authority figures, and the use of inappropriate counseling methods, she was unable to relate those general observations to the evidence in this case. As a result, the jury likely disregarded her testimony, concluding that there was little, if any, evidence indicating that those factors were in fact present in this case. (See 6CT 1506 [CALJIC No. 2.80, regarding expert testimony, instructed the jury in pertinent part that "an opinion is only as good as the facts and reasons on which it is based"].) Accordingly, the trial court abused its discretion in precluding the use of Oscar's prior statements and testimony.

2. The Trial Court Improperly Barred Consideration Of Oscar's Prior Statements and Testimony On The Ground That The Issues Of Oscar's "Competency" and Reliability Were For The Jury

The trial court also precluded Dr. Streeter from testifying about Oscar's prior statements and testimony on the ground that the issue of his "competency" and reliability were for the jury, relying on *People v. Page* (1991) 2 Cal.App.4th 161. (70RT 14197-14199.) The court abused its discretion in so ruling.

In particular, the trial court's reliance upon *People v. Page*, *supra*, 2 Cal.App.4th 161, was misplaced. In that case, Page called a professor of psychology, who testified concerning factors which can lead a person to give an inaccurate statement in an interrogation setting. (*Id.* at p. 179.) The court limited the expert to general statements regarding factors that can lead a person to give inaccurate statements in an interrogation setting, but did not permit testimony regarding (1) the particular evidence in Page's taped statements which indicated that those factors were present in his case, or (2) the reliability of Page's confession. (*Id.* at pp. 179, 183.)

On appeal, the court rejected Page's contention that the limitation of expert testimony violated his right to present a complete defense on the ground that he had an opportunity to present other evidence of the circumstances of the interrogation. (*People v. Page*, *supra*, 2 Cal.App.4th at pp. 184-188.) The court further held that California law did not compel admission of the prohibited testimony, since once the jury was educated concerning the relevant factors, it was as qualified as the expert to apply them to the defendant. (*Id.* at pp. 188-189.) Finally, even if the trial court abused its discretion in limiting the expert's testimony, the abuse was found

harmless in light of evidence corroborating Page's confession, defense counsel's closing argument specifically relating the expert's factors to Page, and the trial court's charge to the jury that it had prevented the expert from applying his factors to Page. (*Id.* at pp. 189-190.)

As noted by defense counsel below (70RT 14199), *Page* is distinguishable because the trial court in that case permitted Page and the prosecutor to "thoroughly explore" the physical and psychological environment in which the confession was obtained. (*People v. Page*, *supra*, 2 Cal.App.4th at pp. 184-188.) Among other things, the jury learned that: Page was questioned by two police sergeants, both of whom were thoroughly cross-examined on the method of interrogation; the police lied to Page to extract his confession; the officers made him feel guilty; Page took and failed a polygraph exam; and, Page had only recently learned of the victim's death. The jury also knew Page's educational level and physical condition. With respect to the physical circumstances of the interrogation, the jury knew through testimony and pictures the size and layout of the interrogation room, how long the interrogation sessions lasted, when Page ate, when he drank water, and used the restroom or the telephone. (*Id.* at pp. 185-186.)

Here, appellant's jury had little or no evidence upon which to tie Dr. Streeter's testimony regarding the factors bearing upon the reliability of a child's perception and ability to relate an event. Thus, in contrast to *Page*, and contrary to the trial court's position (70RT 14197-14199), its restrictions did not "merely affect[] the way the defense could link the theories presented by the expert to the evidence at trial." (70RT 14197.) Instead, it effectively cut out the evidentiary basis for Dr. Streeter's

opinions, leaving the defense with little if anything to present the jury as support for its theory. (See 6CT 1506 [CALJIC No. 2.80].)

Moreover, insofar as the trial court viewed Oscar's reliability as an ultimate issue for the jury, as defense counsel pointed out (70RT 14203-14204), Evidence Code section 805 expressly permits expert opinion testimony which "embraces the ultimate issue to be decided by a trier of fact." As one court has pointed out, "[i]t is neither unusual nor impermissible for an expert to testify to an ultimate issue." (*People v. Doss* (1992) 4 Cal.App.4th 1585, 1596 [holding that the trial court properly allowed prosecution expert to opine that under the facts of the hypothetical posed to him, drugs were possessed for the purpose of illegal street sales].) Indeed, this Court long ago made clear that:

> There is no hard and fast rule that the expert cannot be asked a question that coincides with the ultimate issue in the case. "We think the true rule is that admissibility depends on the nature of the issue and the circumstances of the case, there being a large element of judicial discretion involved. . . . Oftentimes an opinion may be received on a simple ultimate issue, even when it is the sole one, as for example where the issue is the value of an article, or the sanity of a person; because it cannot be further simplified and cannot be fully tried without hearing opinions from those in better position to form them than the jury can be placed in."

(*People v. Wilson* (1944) 25 Cal.2d 341, 349; see also *People v. Xue Vang* (2011) 52 Cal.4th 1038, 1054 (conc. opn. of Werdegar, J.) [quoting *Wilson*].)

Accordingly, even assuming the trial court properly barred Dr. Streeter from directly stating her opinion as to whether Oscar was a competent or reliable witness, it should have allowed her to discuss his prior statements and testimony for the purpose of explaining why she had

concluded that factors bearing on his reliability were at play in this case. Absent such evidence, the court was flatly wrong in concluding that the "factual issues in the case were ones that the jurors could answer as easily as the experts." (70RT 14197.) Therefore, the court also abused its discretion in limiting Dr. Streeter's expert opinion on the ground that her opinions encompassed matters that were properly for the jury.

D. The Trial Court's Error Was Prejudicial

The error in restricting Dr. Streeter's testimony magnified the errors and resulting prejudice demonstrated in Arguments I-V, *ante*, which collectively denied the jury information necessary to fairly evaluate the reliability of Oscar's identification of appellant, shielding Oscar from meaningful impeachment while bolstering his credibility with inadmissible – constitutionally-barred – hearsay. The prejudice analysis set forth in the preceding arguments is referenced and incorporated herein. Suffice it to add only that, in view of the two prior hung juries, which had the full benefit of Dr. Streeter's expertise. it cannot be held that the erroneous restriction of her testimony at the instant trial did not contribute to the outcome of this case. (See *People v. Zambrano* (2007) 41 Cal.4th 1082, 1135, fn. 13 [reasonably probable state law error adversely affected the result in the case]; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [guilty verdict actually rendered not surely unattributable to the federal constitutional error].)

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VII

APPELLANT'S CONFESSION WAS OBTAINED IN VIOLATION OF *MIRANDA* AND THE FIFTH AMENDMENT WHERE POLICE IGNORED APPELLANT'S INVOCATION OF HIS RIGHT TO REMAIN SILENT AND WHERE HIS CONFESSION WAS OBTAINED THROUGH THE COERCIVE PRESSURES OF SUCCESSIVE INTERROGATIONS

A. Introduction

Following his arrest, appellant was interrogated about the homicides by at least four, possibly five, police officers over the course of three days. Because appellant validly invoked his right to remain silent during the audio-taped interrogation on August 5, 1997, all questioning thereafter should have ceased, including the subsequent interrogation that ultimately yielded appellant's confession. (*Miranda v. Arizona* (1966) 384 U.S. 436; *Edwards v. Arizona* (1981) 451 U.S. 477.) Appellant's confession itself was obtained by means of improper psychological coercion, and the undisputed violation of appellant's right, as a Mexican national, to consular notification, under Article 36 of the Vienna Convention on Consular Relations ("Vienna Convention") and Penal Code section 834c, further warrant a finding that appellant's confession was involuntary. (*Colorado v. Connolly* (1986) 479 U.S. 157, *Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, 350.)

Appellant argues here that his confession was admitted at trial in violation of his Fifth Amendment privilege against self-incrimination and right to due process; his Sixth Amendment right to a fair trial and his Eighth Amendment right to heightened reliability in a capital case; his Fourteenth Amendment right to due process; his analogous state constitutional rights and his rights under Article 36 of the Vienna Convention and Penal Code

section 834c. Reversal of his conviction, special circumstance findings and judgment of death is therefore required.

B. Factual and Procedural Background

Before trial appellant filed a motion challenging the admissibility of his confession under *Miranda v. Arizona*, *supra*, 384 U.S. 436, and based on the violation of his right to consular notification. (3CT 779-796 [exhibits omitted].) The prosecution filed an opposition. (4CT 954-960.) Following an evidentiary hearing the court denied appellant's motion to suppress his confession on all grounds raised by the defense. (6CT 1342-1343.)

1. The Police Interrogations[58]

Appellant was arrested at his home on August 4, 1997, at about 11:00 a.m., and taken to the Porterville police station, where Sergeant Eric Kroutil interviewed him for about an hour. (2CT 407-409, 417; 8RT 1628-1630; 9RT 1771; 37RT 8042.) Kroutil testified that he read appellant his *Miranda* rights, printed on the cover of his notebook, and that appellant then agreed to talk to him. (8RT 628-1630.) Kroutil did not tape record the interview; he wanted to "talk to [appellant] a little bit first" and "get some basics facts down first so the interview on a tape recorder would go more smoothly." (8RT 1648-1649.) Appellant was transported back to jail that evening. (8RT 1630-1631.)

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[58] What follows was established at the hearing on appellant's motion to suppress his statements to the police.

The following day, Detective Steven Shear interviewed appellant and administered a "Voice Stress Analyzer (VSA)" test,[59] again at the Porterville police station, beginning at about 9:00 a.m. (8RT 1521.) The interview and VSA test were audio taped from start to finish, according to Shear. (*Ibid.*) Shear acknowledged that he did not read appellant his *Miranda* rights, but recalled having secured appellant's agreement that he had previously been admonished. (8RT 1535-1536.) The audio tape confirms that appellant acknowledged having been questioned the day before "about [his] friends getting killed," and that he agreed to answer Shear's questions about "the same type of stuff." (Court's Exh. 8 at pp. 2-4).

Shear testified that he told appellant about some of the evidence law enforcement officers had garnered regarding the crime. (8RT 1557-1558.) He informed appellant, among other things, that the victims had been shot (Court's Exh. 8 at p. 38), that a knife appellant's wife had bought was found at the crime scene (*id.* at pp. 20, 22-23, 38-39), that neighbors had seen appellant at the victims' house the night before the homicides (*id.* at pp. 12, 40), that appellant's friend Hector Hernandez had told the police about appellant's whereabouts the night of the homicides and about their homosexual relationship (*id.* at p. 16), and that a little boy named Oscar had said that the man he saw in the house the morning his mother was killed was the man who had bought him ice cream (*id.* at pp. 33-35). Shear questioned appellant extensively about his relationship with Hernandez, telling him that "his sexual interests" were "the kinds of things that are

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[59] The trial court granted defense counsel's motion to exclude any reference to the VSA test. (10RT 2097-2098.)

gonna come out." (Court's Exh. 8 at pp 13-16.) He also questioned appellant about the knife found at the scene. (*Id.* at pp. 17-20.)

Shear repeatedly told appellant that the detectives who were investigating the homicides believed that appellant "did it," and that he was lying to them about his whereabouts at the time of the crime. (E.g., Court's Exh. 8 at pp. 6, 9,11.) He described the "lie detector" machine, urged appellant not to lie and told appellant he knew he was in fact lying. (*Id.* at pp. 1-2, 7, 11, 15.) Shear surmised appellant must be nervous: "You, you can't tell me that you're not nervous about this. You'd be inhuman. [¶] You're not afraid, you don't care if people think you did it? You don't care if the police think you did this crime?" (*Id.* at p. 7.) When appellant said, "Well, yes but . . . ," Shear said, "Well that's what I'm asking you. Doesn't that scare you?" (*Ibid.*) Again appellant agreed he was frightened: "Oh, yes sir. Yes sir." (*Ibid.*) On learning appellant was only 33 years old Shear told appellant he "had a long time yet to live." (*Id.* at p. 8.) When he said appellant needed to he honest "with those who love and care about you" appellant said, "Yes, I love my family very much." (*Ibid.*)

Shear confirmed that about 30 to 45 minutes into the interview appellant "got upset and told [him] he didn't want to answer any more questions and wanted to get on with the test, or words to that effect." (8RT 1545; see also 8RT 1586.) The tape confirms that the following exchange occurred betwen appellant and Shear:

> [Appellant]: I don't wanna say nothing no more and I told you that, that that's the truth.
>
> [Shear]: So you just wanna take that test?
>
> [Appellant]: Yes sir.
>
> [Shear]: Okay.

> [Appellant]: And I'm gonna, ah, okay, I'll go back to jail and do it and wait for court of course. I want you to find proof . . . .

(Court's Exh. 8 at p. 21, ellipsis in original.) Shear continued questioning appellant about the homicides, again asking him about the knife, about whether he had been in Reyes's house the night of the homicides, about Hector Hernandez, and about Oscar. (Court's Exh. 8 at pp. 21-40.) Shear admitted that he became "accusatorial" in his questioning and that appellant asked for an interpreter. (8RT 1547; Court's Exh. 8 at p. 37.) Alice Jaramillo, a Spanish-speaking law enforcement officer, joined them shortly before Shear began the VSA test and periodically translated things Shear said, in narrative form, rather than as simultaneous translation. (*Id.* at pp. 39-45, 52-55, 59-60.)

Shear then reviewed with appellant the questions he would be asking on the VSA test and explained how the test would be administered. Appellant found this confusing. For example, when Shear told appellant he was to deliberately lie, for testing purposes, when asked about the color of his jail-issued jumpsuit – i.e., to respond "No" when asked whether his red jumpsuit was in fact red – appellant insisted that he did not want to lie. (Court's Exh. 8 at pp. 41-42.) Shear also had to repeat some of the questions on the VSA test because appellant initially did not understand that he was to respond only "Yes" or "No," not "Yes, sir" or "No, sir." (*Id.* at pp 48-49.) Appellant denied involvement in the homicides. (*Id.* at pp. 46, 49.) After disconnecting appellant from the VSA machine Shear questioned appellant further about the knife. (*Id.* at pp. 52-60.) He again accused appellant of lying, told him the "machine" had revealed he was

lying, and said, "You know you did it, you know you did it. . . . ." (*Id.* at pp. 55, 56, 57.)[60]

Appellant testified that he did not remember much of what occurred when he was interviewed by Shear; he found it difficult to understand what was happening because Shear spoke fast and in English. (7RT 1380, 1426-1427.) He mistrusted the interpreter who was eventually provided because she was part of law enforcement. (7RT 1378.) Appellant testified that, after turning off the tape recorder, Shear called him "a fucking liar." (7RT 1429-1430, 1433.)

After the Shear interview and VSA test, Sergeants Kroutil and Chris Dempsie drove appellant back to the jail, in Visalia. (8RT 1639-1640.) According to appellant, en route they questioned him about a stolen car and told him they had found a bloody sandal at the crime scene. (7RT 1383-1384.) Kroutil acknowledged that en route he asked appellant about "the test" and possibly "about the knife some more." (8RT 1641.)

The next day, appellant was questioned again, first by Detective Steven Ward and then by Sergeant Ernie Garay. (9RT 1755-1758, 1797.) Ward had executed the search warrant at appellant's house, placed appellant under arrest, talked to several other people in the house, interviewed neighbors, took photos and assisted in directing evidence collection. (9RT 1771.) Ward's interrogation, again conducted at the Porterville police department, was not recorded, because it was "common practice not to tape-

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[60] At the conclusion of the interview an individual not identified on the tape or in the transcript is quoted as saying to another unidentified individual: "Sorry to keep interrupting. You guys wanna come out. He's denying it again but he wants to talk to you about this knife. He's got, he says his knife like that got lost." (Court's Exh. 8 at p. 60.)

record preliminary . . . interviews; to get your stories straight and once they're straight, to go into a formal interview because, um, when people go to transcribe these tapes, it's just – if you're not prepared with your questions and – it just creates problems later on." (9RT 1786.) Ward explained that by "get your stories straight" he meant "being on the right path" in the questioning and "building a rapport" with the suspect. (9RT 1786-1787.) Ward testified that the interview lasted about half an hour and that Sergeant Dempsie was present. (9RT 1756-1757.) Ward testified that he advised appellant of his *Miranda* rights and that appellant appeared to understand them, but later he acknowledged that he was not sure whether he or Dempsie gave the *Miranda* admonitions. (9RT 1758, 1777.) Ward did not speak Spanish; his interrogation was conducted in English. (9RT 1759, 1781.)

According to Ward, appellant said he had consumed a lot of beer the night before the homicides; "that he was very drunk and that he had done a lot of methamphetamine and was very loaded on, quote, unquote, 'crank' . . . ." (9RT 1781-1782.) To Ward it seemed appellant was "setting the stage to give himself a . . . reason to have committed the crime, um, by not knowing what his actions were or being insane at the time or something . . . ." (9RT 1781.) Ward acknowledged he got upset when he was "pulled from the lead interviewer position and [Sergeant] Garay was put in," because he thought he was close to getting a confession from appellant. (*Ibid.*)

Appellant testified that Ward accused him of being "the one," called him a "cold blooded killer," threatened him with lethal injection and said, "If you don't tell me the truth, then I'm going to put you in a cell with a

crazy man crazier then you so he can kill you." (7RT 1391, see also 1460, 1462.) Ward denied threatening appellant. (9RT 1758.)

Sergeant Garay took over the interrogation from Detective Ward, at about 12:30 p.m. (9RT 1797.) Garay had also participated in appellant's arrest. (9RT 1795-1796.) He did not tape record "the first portion" of his interview because "[i]t was a . . . a practice way [*sic*] of doing an interview, get a feel for – for how he's gonna answer, what he's gonna say, how I'm gonna say it." (9RT 1846.) Garay testified that he read appellant the *Miranda* advisements in Spanish. (9RT 1798-1799.) He said he spoke Spanish well, but not fluently. (9RT 1848.)

According to Garay, when he asked appellant what happened, appellant sighed and said something in Spanish equivalent to, "I'm screwed." (9RT 1850.) Asked what happened to Reyes and her daughter, appellant gave contradictory answers: "He goes well – he says I had that gun and I shot 'em, and then he says well, I didn't – no, I didn't shoot 'em. [¶] So it was a case of going back and forth. He would make a statement, contradict himself and go back and forth." (9RT 1851.) Garay testified that appellant then agreed that they would "go over the statement again, and this time it's going to be recorded." (*Ibid.*)

Garay began the video-taped portion of the interrogation at 2:20 p.m. (9RT 1809.) After again reading appellant his *Miranda* rights in Spanish, he conducted the rest of the interrogation in English and Spanish. (13CT 3443-3445; 9RT 1798.) According to Garay, on the video appellant repeated the confession he had previously given to him. (9RT 1862.)

When Garay asked appellant, during the video-taped portion of the interrogation, what happened Monday morning at "Manda's" house, appellant said he went inside, through the front door, which was unlocked;

he was looking for Reyes because she owed him money and had been calling him names and insulting him. (13CT 3446-3449.) Asked what happened when he saw Reyes appellant responded, "I just shot." (13CT 3450.) He did not know whether the shots hit her; he just shot, two or three times. (*Ibid.*) Asked about "the other girl," appellant again said, "I just shot." (13CT 3451.) Again, he said he did not know whether the shots he fired hit her; he said he shot her about two times to three times. (13CT 3451-3452.) Appellant said the gun he used was "a .22." (13CT 3457.) Appellant then left by the front door; he saw no one else in the house. (13CT 3452-3453.) He drove away in his truck, tossed the gun out the window into a field and then went straight home. (13CT 3453-3456, 3458.)

Appellant also told Garay that he was "like blacked out, that [he] didn't know what [he] was doing." (13CT 3447, see also 3477.) He got scared, felt faint and almost passed out. (13CT 3462.) He said "everything happened suddenly . . . ." (13CT 3451.) He repeatedly answered questions by saying he did not remember; he only "somewhat, more or less" remembered shooting. (13CT 3454; see also, e.g., 3448, 3449, 3451, 3469, 3471, 3474-3475.) Asked whether he had seen any blood at the house, appellant said no; he just fired the gun and left. (13CT 3459.) He added:

> That's all I can tell you. Because I also want to take care of this. I want to get out of this hole that I'm in, so that also, you can help me. Because I was crazy, I was, like, I don't know, frustrated. Like I'm telling you. That word. Already, already tired, you know. From a week and a half. A lot, a lot.

(*Id.* at pp. 3459-3460.)

When Garay told appellant a knife had been found at the house, appellant explained that he and his wife had lost a knife, and denied bringing a knife to Reyes's house. (13CT 3460-3461.) Asked why he shot

Lorena he said she had a knife in her hand and he was afraid she was going to kill him. (13CT 3469-3471, 3472.) Appellant later said he did not know whether Lorena had a knife; that he "d[id]n't know how to explain it." (13CT 3473, 3474.)

Appellant repeatedly denied cutting or tearing Lorena's underpants (13CT 3462), and adamantly denied having sex with her or touching her in any way, even when Garay told appellant his fingerprints had been found on Lorena's body (13CT 3475, 3476, 3477-3478, 3481-3482). Appellant admitted having sexual relationships with other women, besides his wife, and said this was all the more reason he would not need or want to have sex with a young woman like Lorena. (13CT 3479-3481.) Appellant also denied ever having had sex with Reyes, or fighting with her or touching her that night. (13CT 3465, 3484-3485.)

At trial, appellant testified that when Garay first entered the room he began the interrogation by saying they had all the proof and evidence they needed to put him in jail. (7RT 1394.) When appellant said, "show it to me," Garay told him that would not be necessary until appellant went to court. (7RT 1397.) Garay threatened that if he did not confess, "they are going to be taking your family." (7RT 1398.) When Garay offered him a cigarette he accepted it, even though he did not smoke, so he could "get out of that room." (7RT 1402, 1449-1450.) When they returned, appellant told Garay, "yes, I did it, and I did it with a .22." (7RT 1403.) Appellant testified that his confession was false; he was upset and frightened, fearing they would put him in a cell with a dangerous "crazy person" and take his family away if he did not confess: "Because of all the threats that they had made to me, I no longer knew what to tell them, and yes, I was afraid at that moment that yes, that they were going to be taking my family away."

(*Ibid.*) Appellant explained further why he confessed falsely: "I was just tired, all the pressure on me. I didn't know what – I didn't know what else to do. I told them so they could leave me at peace." (7RT 1451.) He acknowledged using "his own words," but reiterated that he was innocent: "I recognize that mistake. I recognize the error, but I do not acknowledge the fact that I did that crime because I have never used a gun in my life. Thank you." (7RT 1458.) Garay denied threatening appellant. (9RT 1806-1807.)

2. The Trial Court's Rulings

On March 29, 1999, the court issued a written ruling denying appellant's suppression motion. The court ruled that appellant's confession was not coerced, and that he had not invoked his right to remain silent during Detective Shear's interrogation. (6CT 1342-1343.) On the issue of invocation, the court stated:

> At the point of dispute, Mr. Sanchez did not state he wanted to be silent. He did not indicate a refusal to talk about the case. By implication, he indicated impatience with Shear's pre-test interrogation and clearly stated he wanted to proceed to the test portion of the interview. Mr. Sanchez's insistence that Shear[ ] proceed with testing him by the ''machine'' does not equate to an invocation of his right of silence.

(*Id.* at p. 1343, citations omitted.) In its March 29, 1999, order the court also denied appellant's motion to suppress his confession for violation of the right to consular notification under the Vienna Convention. (*Id.* at p. 1342.)

At the start of the instant trial, the court adopted these prior rulings. (9CT 2313, 2316; 48RT 10109-10110.)

3. Relevant Evidence Introduced and Argument Regarding Appellant's Confession

Lieutenant Garay testified at the instant trial that appellant confessed during the first, unrecorded portion of his interrogation (53RT 11163) and then he essentially repeated his confession during the video-taped phase. (53RT 11183). The video tape itself was played for the jury. (53RT 11210, People's Exh. 14.)[61] A transcript of the video, in English, was provided to the jurors. (13CT 3443-3487; Court's Exhs. 1-3.)

Appellant acknowledged having confessed to the killings, but explained that he did so only because he had been threatened and pressured, and so that the police officers interrogating him would leave him in peace. (66RT 13602, 13604; 67RT 13745; 68RT 13874.) He denied shooting Reyes or Lorena, having sexually assaulted Lorena, having gone to Reyes's house the morning they were killed, and owning a weapon. (71RT 14469)

Defense expert Richard Ofshe, Ph.D., a social psychologist, described how the misuse of police interrogation tactics, including threats, coercion and ploys to produce hopelessness, can result in false confessions. (72RT 14581, 14588, 14590-14593, 14596-14600, 14614-14624 [ploys and motivators], 14625-14629 [contaminated post-arrest narrative], 14631-

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[61] On April 14, 1999, during appellant's first trial, the court ruled that appellant had invoked his right to remain silent during Lieutenant Garay's video-taped interrogation when, after he had confessed to shooting Reyesand Lorena but had denied any sexual contact with Lorena, he said, "I don't want to talk anymore Garay. No more." (13CT 3399; 22RT 4592-4595.) The portion of the interrogation following this invocation was suppressed. (13CT 3399-3415.) The prosecutor did not challenge the propriety of the *Miranda* ruling, but at the third trial, sought and gained admission of the previously excluded statements as impeachment evidence. (See 67RT 13664-13665, 13667-13671.)

14633, 14652-14653 [physical versus psychological coercion], 14690-14691 [collateral misstatements].)

Over defense counsel's objection (75RT 14925-14926 [voir dire], 14927-14929 [objection], 14930-14945 [further voir dire] 14936-14937 [further objection and ruling), Joseph Buckley, an employee of a private firm in the business of assisting law enforcement agencies, private companies, attorneys and others with criminal investigations and interviews (75RT 14946-14948), testified in rebuttal regarding police interrogation techniques and resulting confessions, including coerced and false confessions (75RT 14968-14970, 14973-14975, 14977-14980, 14982-14985, 14991-15000, 15006-15010, 15026-15034).

The prosecutor began his closing argument by stressing that appellant's confession was sufficient to establish his guilt: "This is all we had to show you, this with the defendant's confession is enough. This is it. We didn't have to do any more evidence. This was all we had to show you." (76RT 15155.) The prosecutor played the video of Garay's interrogation, and using sarcasm, argued that it dispelled any notion that appellant had been threatened or coerced into falsely confessing. (76RT 15188-15191.)

C. Appellant's Confession Was Obtained In Violation Of His Right To Remain Silent

1. A Custodial Interrogation Must Cease When a Suspect Invokes His Right To Remain Silent

In *Miranda v. Arizona*, *supra*, 384 U.S. 436 the high court established that not only must warnings be given before custodial questioning begins; once warnings are given, "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to

remain silent, the interrogation must cease." (*Id.* at pp. 473-474; *Berghius v. Thompkins* (2010) 560 U.S. 370, 387-388 ["Any waiver, express or implied, may be contradicted by an invocation at any time. If the right to counsel or the right to remain silent is invoked at any point during questioning, further interrogation must cease"].) A sufficiently clear invocation of the right to remain silent must be "scrupulously honored." (*Michigan v. Mosley* (*Mosley*) (1975) 423 U.S. 96, 104.)

An invocation of the right to remain silent must be sufficiently unambiguous "that a reasonable police officer under the circumstances would understand the statement" to be an invocation of the *Miranda* right. (*Davis v. United States* (2013) 512 U.S. 452, 459; *People v. Williams* (2010) 49 Cal.4th 405, 428.) Still as the high court noted in *Davis*, "a suspect need not speak with the discrimination of an Oxford don." (512 U.S. at p. 459 [internal quotation marks and citation omitted].) Consequently, a suspect seeking to invoke his right to remain silent need not "provide any statement more explicit or more technically-worded than 'I have nothing to say'" (*Arnold v. Runnels* (9th Cir. 2005) 421 F.3d 859, 865) or "I plead the Fifth" (*Anderson v. Terhune* (9th Cir. 2008) 516 F.3d 781, 787 (en banc)).

In reviewing a ruling on a motion to suppress a confession, this Court conducts an independent review of the trial court's determination of whether the defendant invoked his *Miranda* rights and relies upon the trial court's determination of disputed facts if supported by substantial evidence. (*People v. Williams*, *supra*, 49 Cal.4th at p. 425; *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1125.)

2. The Police Ignored Appellant's Unequivocal and Unambiguous Invocation Of His Right To Remain Silent

The record in this case establishes a *Miranda* violation. Appellant unambiguously and unequivocally invoked his right to remain silent by telling Detective Shear, "*I don't wanna say nothing no more* and I told you that, that that's the truth." (Peo. Exh. 8 at p. 21, italics added.) When Shear asked, "So you *just* wanna take *the test*?" appellant said yes. (*Ibid.*, italics added.)

"The right to silence is not an all or nothing proposition. A suspect may remain selectively silent by answering some questions and then refusing to answer. (*Hurd v. Terhune* (9th Cir. 2010) 619 F.3d 1080, 1087, citing *Miranda v. Arizona*, *supra*, 384 U.S. at p. 445 [error under *Miranda* to admit evidence of defendant's refusal, during police custodial interrogation, to reenact alleged shooting]; *Arnold v. Runnels*, *supra*, 421 F.3d at p. 864 [defendant "clearly and unequivocally invoked his *Miranda* rights selectively, with respect to a tape-recorded interrogation]; *Connecticut v. Barrett* (1987) 479 U.S. 523, 529 [holding suspect can selectively invoke *Miranda* rights as to written statement, but waive them as to oral interrogation].) Consistent with his insistence on terminating the interrogation, appellant added that after taking the test he wanted to go back to the jail and "wait for court." (Peo. Exh. 8 at p. 21; see *People v. Smith* (1995) 31 Cal.App.4th 1185, 1190 [suspect invoked right to remain silent by replying, through sign language interpreter, "I don't really [want to talk]. I prefer to go to court and see what happens."].)

Appellant's invocation was unconditional – he was not expressing a reluctance to discuss a particular topic or an unwillingness to answer certain questions; he used no qualifying words such as "maybe" or "I think." (Cf.

Arnold v. Runnels, *supra*, 421 F.3d at p. 866.) Rather, he clearly asserted that he did not want to say "*nothing no more*." A reasonable officer would have understood that appellant was invoking his right to remain silent. Indeed, as Shear testified, "*he didn't want to answer any more questions* and wanted to get on with the test, or words to that effect." (8RT 1545, italics added.)

Appellant's request was not "scrupulously honored"; the interrogation did not "promptly cease." (*Michigan v. Mosley*, *supra*, 423 U.S. at pp. 104, 97.) The interrogation continued without a pause. As a consequence, appellant could only have concluded that the police had no intention of respecting any invocation of his rights.

After saying "Okay," Shear immediately resumed questioning appellant about the homicides, beginning with, "Okay, well let me . . . let me ask you this Juan. What do you consider to be truth?," and "Well, let me ask you this, okay. This knife was in the house. What if your prints come on this knife? Wo, would you consider that proof? (*Sic*)." (Peo. Exh. 8 at p. 21.) When appellant hesitated, Shear asked him whether the questions were making him tense. (*Ibid.*) As noted above, he continued to question appellant at length about the knife (*id.* at pp. 21-27), about Hector (*id.* at pp. 27-32), and about Oscar (*id.* at pp. 33-35) before turning to the VSA test, at which point Officer Jamarillo entered the room in response to appellant's request for an interpreter (*Id.* at p. 37). After administering the VSA, Shear resumed his interrogation once more, ignoring appellant's request not to say anything more, and again accused appellant of lying and of having committed murder. (*Id.* at pp. 55-57.) And after Shear was done questioning him, appellant was subjected to more questioning when he was transported back to jail. (7RT 1378-1379, 1426-1427, 1429-1430, 1433.)

Interrogation resumed the next day. Detectives Ward and Dempsie initiated the interrogation, which was continued by Lieutenant Garay until appellant's confession was finally extracted. Ward believed that he or Dempsie had advised appellant of his *Miranda* rights. (9RT 1777.) The admonition and interview were not tape recorded. (9RT 1775.)

Garay relieved Ward and Dempsie at about 12:30 p.m. (9RT 1797; 2CT 340.) According to Garay, Ward told him that appellant had been *Mirandized.* (2CT 340.) Garay then proceeded to interrogate appellant for about two hours with the tape recorder off. (9RT 1486.) At about 2:20 p.m., Garay began tape recording what was said. (9RT 1809; 2CT 340.) For the recording, Garay re-advised appellant of his *Miranda* rights. (13CT 3443-3444.) Appellant responded, "I'll tell you what you want." (See 13CT 3444.)

One of the main purposes of *Miranda* is to prevent police from badgering a suspect into making incriminating statements against his will. (*Miranda v. Arizona*, *supra*, 384 U.S. at p. 474 ["Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked"].) Badgering is precisely what happened here. Because appellant had invoked his right to remain silent, all further interrogation should have ceased and he should have been taken back to jail, as he had requested, to await, undisturbed, his first court appearance and the appointment of counsel. Instead, he was sent the clearest possible message that his expressed wishes would be ignored, that "further objection [would be] futile and confession (true or not) [was] the only way to end his interrogation." (*Davis v. United States*, *supra*, 512 U.S. at pp. 472-473

(conc. opn. of Souter, J.).) As such, the police did not remotely, much less scrupulously, honor appellant's right to remain silent.

In *Mosley*, *supra*, the high court rejected a reading of *Miranda* as a "per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent." (423 U.S. at pp. 102-103.) In that case, the defendant had been arrested in the early afternoon in connection with a series of robberies. He was then interviewed by a robbery detective in the Breaking and Entering Bureau of the Police Department. After having read and signed the Department's *Miranda* notification certificate, the defendant said he did not want to answer questions about the robberies. The detective promptly ceased all questioning. (*Mosley*, *supra*, 423 U.S. at p. 97.) Later that evening, a detective from the homicide bureau brought the defendant to the bureau's office to inquire about a fatal shooting unrelated to the robberies about which the defendant had been questioned earlier. The homicide detective carefully advised the defendant of his *Miranda* rights, explained the warnings to him and had the defendant sign the waiver form. The interrogation lasted about 15 minutes, at which point the defendant implicated himself in the homicide. (*Mosley*, *supra*, 423 U.S. at p. 98.)

The high court held there was no *Miranda* violation because:

> This is not a case . . . where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue interrogation upon request or persisting in repeated efforts to wear down his resistance and make him change his mind. In contrast to such practices, the police here immediately ceased the interrogation, resumed questioning after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the

second interrogation to a crime that had not been the subject of the earlier interrogation.

(*Mosely, supra*, 423 U.S. at pp. 105-106.)

In contrast to *Mosely*, this is a case where the police failed to honor appellant's invocation of his right to remain silent; they never ceased questioning him and attempting to wear down his resistance during successive periods of prolonged interrogation regarding the same crime. Under these circumstances, Garay's on-tape *Miranda* warnings, after nearly two hours of off-tape threats or cajoling, were nothing more than a "mere textual formula to be recited on the way to eliciting a confession."[62] (See *McMillan v. State* (Ala.Crim.App. 2010) 139 So.3d 184, 197, quoting *United States v. Rondon* (S.D.N.Y. 1985) 614 F.Supp. 667, 670 "[the ritualistic reading of the *Miranda* warnings will not always, without exception, sufficiently apprise an accused of his rights. The *Miranda* warnings are not to be treated as 'a mere textual formality to be recited on the way to eliciting a confession'"].)

Consequently, it cannot be held here that the police "scrupulously honored" appellant's unambiguous invocation of his right to cut off all questioning regarding the shootings. The trial court thus erred in denying appellant's motion to suppress appellant's statements to Garay. The statements were inadmissible, moreover, not only in the prosecution's case-in-chief but also as impeachment of appellant's testimony.

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[62] Garay also *Mirandized* appellant at the beginning of the unrecorded interrogation before engaging in one and a half to two hours wearing down appellant's resistence and then taping the rehearsed confession.

Appellant recognizes that *Miranda* bars the prosecution from making use of post-invocation statements in its case-in-chief, but may not bar their use to impeach the defendant's credibility should his testimony be in conflict with his earlier statements. (*Harris v. New York* (1971) 401 U.S. 222, 224-226.) However, where the defendant's trial testimony has been induced by the erroneous admission of a confession as part of the prosecution's case, his testimony is tainted by the same illegality that rendered the confession itself inadmissible. (*Lujan v. Garcia* (9th Cir. 2013) 734 F.3d 917, 925-926 ["The Fifth Amendment's privilege against compulsory self-incrimination is not waived when a defendant's testimony is impelled by the need to counter his own out-of-court confession that was illegally obtained by law enforcement and improperly admitted by the government in its case-in-chief"], citing *Harrison v. United States* (1968) 392 U.S. 219, 221-224; Cf. *Lujan v. Garcia, supra*, 734 F.3d at p. 930 [where prosecution used inadmissible confession in its case in chief, compelling the defendant to testify in rebuttal, use of that testimony on retrial precluded].)

Here, where appellant's testimony focused almost entirely on his reasons for confessing to crimes he did not commit, his decision to testify clearly was induced by the erroneous admission of the illegal confession in the prosecution's case. As such, the use of his statements to impeach his testimony only served to compound the court's underlying error.

D. Appellant's Confession Was Involuntary Because It Was Elicited By Psychological Threats and Coercion and In Violation Of His Right To Consular Notification

An involuntary confession is inadmissible under the due process clause of the Fourteenth Amendment and article I, sections 7 and 15 of the

California Constitution. (*Jackson v. Denno* (1964) 378 U.S. 368, 385-386; *People v. Benson* (1990) 52 Cal.3d 754, 778.) A confession is involuntary, under federal and state law, if it is "extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence . . . ." (*People v. Benson, supra*, 52 Cal.3d at p. 778, citations omitted.) A confession is involuntary if the threat or promise is a motivating factor in the defendant's decision to confess. (*People v. Vasila* (1995) 38 Cal.App.4th 865, 874; *People v. Flores* (1983) 144 Cal.App.3d 459, 470.)

To determine whether a confession is voluntary the reviewing court examines the entire record below (*Davis v. North Carolina* (1966) 384 U.S. 737, 741) and considers the totality of the circumstances (*Withrow v. Williams* (1993) 507 U.S. 680, 693-694; *People v. Williams* (1997) 16 Cal.4th 635, 660). The prosecutor has the burden to establish by a preponderance of the evidence that a confession is voluntary. (*People v. Williams, supra,* 16 Cal.4th at p. 659, citation omitted.) "[T]he trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review." (*People v. Massie* (1998) 19 Cal.4th 550, 576, citations omitted.)

Generally, three broad factors are assessed when considering the voluntariness of a statement – the conditions of the interrogation, the characteristics of the defendant and the conduct of law enforcement. (*Colorado v. Connelly, supra*, 479 U.S. at p. 167; *Ashcraft v. Tennessee* (1945) 322 U.S. 143, 153.) Abusive police activity such as improper interrogation tactics involving intimidation and threats will render a confession involuntary. (*Colorado v. Connolly, supra*, 479 U.S. at p. 170.)

However, the Ninth Circuit recently clarified that the inquiry is not simply whether the police used coercive tactics, but whether, "under the particular circumstances of the case, the confession is unlikely to have been the product of a free and rational will." (*United States v. Preston* (9th Cir. 2014) 731 F.3d 1008, 1019-1020 (en banc), citations omitted [reversing *Derrick v. Peterson* (9th Cir. 1991) 924 F.2d 813, 818, in which a panel had held that the defendant's individual characteristics were relevant to a due process analysis only if the court first found coercive police conduct].) The court stressed that both the characteristics of the accused and the circumstances of the interrogation are to be considered, and that the voluntariness inquiry is not limited to cases where the police conduct was "inherently coercive." (*Id.* at p. 1016, citations omitted.) Therefore, a suspect's individual characteristics must be given independent consideration, along with the conduct of the police, in assessing whether his or her confession was voluntary. Here appellant's characteristics, the conduct of the law enforcement officers interrogating him and the extent of the interrogations together dictate a finding that appellant's confession was coerced and involuntary.

The record establishes that appellant sporadically attended school in Mexico, up to only a few months of the third-grade (23RT 5093; 66RT 13605), and was a native Spanish speaker with a sufficiently limited understanding of English to necessitate the use of an interpreter at trial. (23RT 5093-5094; see also 1CT 14 [preliminary hearing].) Yet, he was repeatedly interrogated in English, including by Detective Shear for much of the interrogation he conducted. That he was known by the police officers questioning him to have had a homosexual relationship – a topic that in fact

had no legitimate place in any of the interrogations[63] – rendered him vulnerable to harassment and embarrassment. (E.g., Court's Exh. 8 at pp. 13-16.)

Further, appellant was interrogated four times over the course of three days, in custody, at the Porterville police station. Detective Shear persisted in questioning appellant even after he had said he did not want to answer any more questions. (See *People v. Montano* (1991) 226 Cal.App.3d 914, 935, citing *Miranda v. Arizona*, *supra*, 384 U.S. at p. 474 [disrespect of the right is indicative of coercion: "Without the right to cut off questioning, the setting of the in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked."].) Detective Ward then threatened him with physical harm (7RT 1391, 1460, 1462; 66RT 13597-13598),[64] and

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[63] See Arguments VIII and IX, *post*.

[64] As noted previously, Ward denied threatening appellant. (9RT 1758.) However, his interrogation of appellant was not recorded, and Ward's credibility is diminished by his own questionable conduct. Ward left the Porterville Police Department due to allegations that he: (1) failed to turn in drug evidence which could have included money; (2) destroyed drug evidence; (3) lost evidence in 81 cases; (4) made many significant mistakes in his reports; and (5) submitted the wrong evidence to the property room. (2RT 395-396; 7RT 1356-1357; 8RT 1475-1486.) He was investigated and interviewed by Garay. Interestingly, Ward was concerned that Garay had not recorded his interview, and maintained that Garay's written report did not accurately state what he had said. (2RT 397-398.)

Sergeant Garay threatened to take his family away (7RT 1398; 66RT 13602).[65]

Preying on a suspect's emotional attachment to family, as Lieutenant Garay did, has repeatedly been recognized as quintessentially coercive. In *Lynum v. Illinois* (1963) 372 U.S. 528, 534, the high court held a confession obtained by threats that the defendant's financial aid for herself and her children would be cut off and that her children would be taken from her was coerced. (See also *Haynes v. State of Washington* (1963) 373 U.S. 503, 512-514 [confession involuntary and inadmissible where defendant, in custody, was told he could not communicate with his wife until he had signed a written confession]; *United States v. Tingle* (9th Cir. 1981) 658 F.2d 1332, 1336 [confession obtained by threatening the defendant that she would not see her child for a long time, warning her about the possible length of her incarceration, and reminding her that "she had a lot to lose," was coerced].

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[65] Although Garay denied ever threatening appellant (9RT 1806-1807), his credibility, like that of Ward, was placed in doubt by the investigation conducted by Police Captain Robert Leppert into Garay's misconduct. Captain Leppert testified that based on reports by Officers Bill Marler and Jay Clark, he investigated allegations of misconduct by Lieutenant Garay arising from his visiting a subordinate deputy, Becky Swartzlander, at her house while he was on duty. It was determined that Garay parked his car in her garage and was seen backing out of it when he was needed at another location. Captain Leppert testified that during the interrogation Garay admitted he had also gone to Deputy Swartzlander's house on other occasions without signing out. Eight allegations were lodged against Garay, and Captain Leppert recommended all of them be sustained. (7RT 1319-1325.) As a result, Garay was demoted to patrol officer. (7RT 1330.)

The denial of appellant's right, under the Vienna Convention and Penal Code section 834c, to consular notification is another circumstance warranting a finding that his confession was involuntary.[66]

It was undisputed below that appellant is a Mexican national and that none of the interrogating officers ever advised him of his right to consular notification. (1CT 160-161, 201, 238-239; 9RT 1820; 10RT 1915.) Indeed, the trial court acknowledged that "the evidence is uncontroverted that [appellant] was not advised by anyone involved in the law enforcement

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[66] Article 36, subdivision (b)(1), of the Vienna Convention on Consular Relations provides:

> If [a detained foreign national] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of the State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

Penal Code section 834c, subdivision (a)(1), provides:

> In accordance with federal law and the provisions of this section, every peace officer, upon arrest and booking or detention for more than two hours of a known or suspected foreign national, shall advise the foreign national that he or she has a right to communicate with an official from the consulate of his or her country, except as provided in subdivision (d) [listing countries, not including Mexico, here notification is mandatory]. If the foreign national chooses to exercise that right, the peace officer shall notify the pertinent official in his or her agency or department of the arrest or detention and that the foreign national wants his or her consulate notified.

investigation of this case of the rights articulated in Article 36 of the Vienna Convention . . . ." (10RT 2032-2033.)

The United States Supreme Court has long recognized that foreign nationals are especially susceptible to making involuntary statements. (*Miranda v. Arizona*, *supra*, 384 U.S. at p. 457 [potentiality for compulsion is "forcefully apparent" in a case where the suspect was an "indigent Mexican defendant"].) Although the Supreme Court has held that suppression of a defendant's statements to law enforcement is not an available remedy for an Article 36 violation, the high court has recognized that such a violation can be relevant to determining the admissibility of a defendants statements, "as part of a broader challenge to the voluntariness of his statements to the police." (*Sanchez-Llamas v. Oregon*, *supra*, 548 U.S. at p. 350.) The denial of appellant's right to be notified that he could consult with a representative of the Mexican government is thus another factor in the totality of circumstances that should have led the trial court to conclude that appellant's confession was involuntary. (Cf. *United States v. Amano* (9th Cir. 2000) 229 F.3d 801, 804-805 [incorporating violation of consular treaty obligations into the "totality of the circumstances" analysis when assessing the voluntariness of a *Miranda* waiver by a foreign national].)

E. The Erroneous Admission Of Appellant's Confession Was Prejudicial

"A confession is like no other evidence. Indeed, the defendant's own confession is probably the most provocative and damaging evidence that can be admitted against him." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 296.) This Court has recognized that an improperly admitted confession "is much more likely to affect the outcome of the trial than are

other categories of evidence, and thus is much more likely to be prejudicial. . . ." (*People v. Cahill* (1993) 5 Cal.4th 478, 503.)

Thus, the failure to suppress a defendant's confession or admission is reversible error unless the prosecution can show that the admission of the defendant's statement is harmless beyond a reasonable doubt. (*Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 306-312; *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Cahill*, *supra*, 5 Cal.4th at pp. 509-510.) The question for resolution is "not whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." (*Fahy v. Connecticut* (1963) 375 U.S. 85, 87.) Put another way, the court must look to "the basis on which the jury *actually rested* its verdict. [Citation.] The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, italics in original.)

Here the erroneous admission of appellant's confession to shooting the victims was highly prejudicial. Without appellant's damaging confession, the evidence that appellant committed the crimes in this case was far from overwhelming, as reflected by the fact that the first and second trials resulted in hung juries. (See Bateman, *Blast It All: Allen Charges and the Dangers of Playing with Dynamite* (2010) 32 U. Haw. L. Rev. 323, 340 [citing research demonstrating that close cases create most hung juries].) That is why the prosecutor opened his summation with: "[T]his is all we had to show you . . . the defendant's confession is enough. This is it. We didn't have to do any more evidence" – because there was no physical

evidence directly tying appellant to the homicides and the prosecution's witnesses, particularly Oscar Hernandez, were demonstrably unreliable.[67]

Further, absent the unlawful admission of his confession and in light of the paucity of reliable evidence of guilt, appellant had no reason to testify because he had a viable alibi defense that was independent of his testimony. Consequently, neither use of the confession – as evidence in the prosecution's case-in-chief or as impeachment – can be considered in the harmless error determination. (*People v. Spenser* (1967) 66 Cal.2d 158, 163-164 [in determining effect of the defendant's extrajudicial confession upon the outcome of the trial, the Court considered that it contributed to the verdict by inducing the defendant to testify].) Thus, given the weakness of the rest of the prosecution's evidence, and its emphasis both at trial and in argument on the importance of appellant's confession as evidence of his guilt, there is no possibility that the erroneous admission of the confession did not contribute to the verdicts at both the guilt and penalty trials. (Cf. *Kyles v. Whitley* (1995) 514 U.S. 419, 444 ["The likely damage is best understood by taking the word of the prosecutor . . . during closing arguments. . . ."]; *People v. Roder* (1983) 33 Cal.3d 491, 505 [error not harmless where the prosecutor relied on it in his closing argument]; *Ghent v. Woodford* (9th Cir. 2002) 279 F.3d 1121, 1131 [the prosecutor's "actions demonstrate just how critical the State believed the erroneously admitted evidence to be"].) Accordingly, the judgment of conviction and death must be set aside.

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[67] And the prosecutor left the jury with the argument that "[p]eople don't confess to murder . . . when they're not guilty of it." (76RT 15328.)

VIII

THE TRIAL COURT COMMITTED REVERSIBLE ERROR, WHEN IT PERMITTED THE PROSECUTION TO ELICIT EVIDENCE OF APPELLANT'S HOMOSEXUAL RELATIONSHIP WITH PROSECUTION WITNESS HECTOR HERNANDEZ BECAUSE ITS PREJUDICIAL EFFECT SUBSTANTIALLY OUTWEIGHED ANY PROBATIVE VALUE IT MIGHT HAVE

A. Introduction

Appellant's defense at all three trials was that he was at home in bed sleeping when the victims were killed. His alibi witnesses were at all times his wife and son. He never claimed that his friend Hector Hernandez was his alibi witness.[68] Rather, he told the police and testified at trial that he had been at Hernandez's house much earlier that night, which Hernandez had repeatedly confirmed.

At each of appellant's three guilt phase trials, the prosecution called Hernandez to testify regarding appellant's visit to his house on the night of August 3, that appellant had left his house sober and that appellant had not shown up to take Hernandez to or pick him up from work on August 4.

Nevertheless, at all three trials, the prosecutor sought to elicit from Hernandez, called as a prosecution witness, that he and appellant had a longstanding consensual homosexual relationship. At the first two trials, the trial court excluded the evidence of homosexuality under Evidence Code section 352, reasoning, correctly, that any possible probative value this evidence possessed was substantially outweighed by the potential for prejudice in a case where appellant was charged with having sodomized one

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[68] More than one witness at trial had the surname of Hernandez. However, unless otherwise specified, every reference to Hernandez in this argument is to Hector Hernandez.

of the victims. (2RT 264-275; 27RT 5971.) However, at the instant trial, the court reversed its earlier ruling and allowed the evidence of homosexuality based initially on the prosecutor's misrepresentation that he had uncovered a witness, Margarita Ruiz, who would testify that Hernandez told her appellant had been at his house the morning of August 4 and that he had confessed to the crimes.

In fact, there was no evidence Ruiz or Hernandez ever said anything of the sort. But the court still allowed the prosecutor to repeatedly raise the specter of appellant's "homosexuality" in confronting Hernandez and then appellant, and through appellant's statements to police officers Shear and Garay.

The evidence of appellant's consensual homosexual relationship with Hernandez had, at most, marginal relevance, but, as defense counsel accurately forecasted and the court initially recognized, enormous potential for mischief and prejudice. It was the proverbial "shooting a flea with an elephant gun." (See *Hoover v. Ronwin* (1984) 466 U.S. 558, 588.)

In admitting this highly inflammatory evidence – and doing so mid-trial without any notice having been given by the prosecutor pretrial of his intention to seek the admission of this evidence so as to allow adequate voir dire of the jury on the subject of homosexuality – the trial court abused its discretion and violated appellant's rights to due process, a fair trial and a reliable verdict. (U.S. Const., Amends. 6th & 14th; Cal. Const., art. I, § 15.)

B. Factual Background

From the beginning of the case, the issue of whether the prosecution would be allowed to question Hernandez about his homosexual relationship with appellant was hotly contested. During the pretrial proceedings before

the first trial, defense counsel moved to preclude such questioning, arguing that the topic was irrelevant and unduly prejudicial insofar as the jury would likely misuse such evidence as proof that appellant was a bisexual deviant and harbored a propensity to commit sodomy. (3CT 766-777, 770-771, 773.) In response, the prosecutor maintained that the evidence was admissible because it was relevant to show Hernandez's "bias and credibility and whatnot" (2RT 265), and claimed that appellant had used Hernandez as an alibi during police interrogation preceding appellant's alleged confessions to the murders (2RT 269). The prosecutor's argument was misleading and unpersuasive when first made, and nothing of consequence changed between the court's ruling excluding the evidence at the earlier trials and the instant trial.

1. Hernandez's Pretrial Statement

On August 4, 1997, after interviewing appellant at the police station and being informed that he had been at Hector Hernandez's house at about 8 p.m. on August 3, had left to run some errands for Hernandez, returned to Hernandez's house at about 10 p.m. and left for home at about 11:30 p.m. (2CT 351), Detective Eric Kroutil then interviewed Hernandez. (2CT 344, 353-354.) Hernandez confirmed that appellant had come to his home at about 8 p.m. on August 3, left almost immediately to purchase some items for him, returned to his house sometime after 10 p.m. and left again at about 11:30 p.m., asking Hernandez for $10.00 and offering to pick him up from work. (2CT 353.)

Hernandez volunteered that appellant was seeing three other women besides his wife. (2CT 353.) When asked to describe his relationship with appellant, Hernandez stated that they had known each other for about eight to ten years and that the relationship had been sexual for the past six years.

(2CT 354.) Hernandez elaborated that sometimes he and appellant were very sexual, but sometimes went for a while without having sex. (*Ibid.*) Hernandez believed the last time he and appellant had sex was July 15. (*Ibid.*)

2. Relevant Proceedings at The First Guilt Phase Trial

As mentioned previously, defense counsel filed and litigated a pretrial motion to preclude the prosecutor from questioning Hernandez about his consensual homosexual relationship with appellant. (3CT 766-777; 2RT 264-275.) The crux of defense counsel's argument was that such evidence ought to be excluded under Evidence Code section 352 because its probative value was substantially outweighed by the high likelihood of undue prejudice, especially so in a case where one of the two homicides charged was alleged to have involved sodomy. Defense counsel explained, "Your honor, it's my opinion that in Tulare County, which has sometimes been characterized as the bible belt, that there could be a significant hostility and overreaction to any type of relationship between two men that's other than friends." (2RT 266-267.)

In response, the prosecutor contended that she should be allowed to question Hernandez about his homosexual relationship because it was relevant to his bias and credibility. In rejecting the prosecutor's theory of relevancy, the court noted, apropos of all three trials,

> Well, the bottom line, what I'm hearing from you is that you're proffering Mr. Hernandez as a credible person to impeach Mr. Sanchez. . . . And if that's the case, to throw in oh, by the way, they are lovers that – there seems to be an inconsistency in your – your approach.

(2RT 271.) Consequently, and upon being informed by defense counsel – without contradiction by the prosecutor – that Hernandez's testimony

related to spending time with appellant during the evening hours of Sunday, August 3, 1997, many hours before the murders were committed, which was sometime between 4:30-5:30 a.m., the trial court ruled as follows:

> Based upon what's been presented to me, I would exclude the sexual nature of their relationship because there is a prejudice *inherent to it*, and the probative value of that does not seem at this point, based upon what has been presented to me, to outweigh the undue prejudice that is *inherent* in this situation.

(2RT 272-273, italics added.) Moreover, defense counsel sought and received assurances from the trial court that the prosecutor could not use appellant's sexual relationship with Hernandez to attempt to prove that appellant sodomized Lorena. (2RT 274-275.)

At the first trial, Hernandez was called as a prosecution witness.[69] As of the time of his testimony, he had known appellant for about 10 years, and considered him a friend. (21RT 4550-4551.) In 1997, and prior to the time of appellant's arrest in this case, appellant frequently came to his home to help him with errands and household chores, and Hernandez visited appellant at his home as well. (21RT 4551.)

Hernandez testified that the night before the murders, August 3, appellant had come to his house at two different times. Appellant first arrived there before 8 p.m., at which time Hernandez asked him to run some errands; these consisted of buying gas for Hector's lawn mower, cigarettes for Hernandez's mother, and a lightbulb for the license plate fixture on appellant's truck. (21RT 4553, 4557-4558.) Appellant then returned to Hernandez's house at about 10 p.m. The two men shared a beer, and talked

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[69] Hernandez's entire testimony amounts to 11 pages of the reporter's transcript. (21RT4550-4560.)

for about an hour. At about 11:30 p.m., appellant left; appellant was not intoxicated at that time. (21RT 4554-4555.)

In August of 1997, Hernandez was not permitted to drive, so appellant sometimes drove him to and from work. On this Sunday, Hernandez arranged for his brother to drive him to work, at 6 a.m., and for appellant to pick him up after work the next day, at 1 p.m. (21RT 4552, 4556.)

3. Relevant Proceedings at The Second Guilt Phase Trial

The first guilt phase trial ended in a deadlock and a mistrial was declared. (27RT 5966, 5971.) Before the second trial, the parties revisited the in limine motions filed before the first trial, including the motion to preclude the admission of the homosexual relationship between Hernandez and appellant. The court reaffirmed its prior rulings. (7CT 1831.) As at the first trial, the prosecution called Hernandez to testify, and his testimony did not differ in any material respect from his previous testimony. (38RT 8324-8332.)

Hernandez explained that appellant was often present at Hernandez's home in the summer of 1997, as appellant was remodeling Hernandez's garage. Appellant would be present "probably three times out of the week," spending most of each day doing remodeling work. (38RT 8331-8332.)

4. Relevant Proceedings at The Instant Trial

Prior to the instant trial, the case was assigned to a new prosecutor, Deputy District Attorney David Alavezos. On September 1, 1999, the trial court addressed the parties' in limine motions filed prior to the first trial. Defense counsel requested that the trial court reaffirm its prior rulings. (48RT 10103.) The newly assigned prosecutor, however, announced his

interest in reopening the admissibility of "[Evidence Code section] 1101(b)" evidence of appellant's sexual proclivities with both women and men, specifically referring to appellant's admission of homosexual activity with Hernandez. (48RT 10105.) The trial court ruled that if the prosecution wished to challenge the court's earlier ruling on this motion, it would have to submit its opposition in writing and allow defense counsel an opportunity to respond; the prosecutor agreed to do so. (48RT 10106-10107.) The prosecutor never filed a written motion.

During the prosecution's case-in-chief, almost a month later, prior to Detective Shear's testimony on September 27, 1999, the prosecutor requested a sidebar conference to address the scope of permissible inquiry on direct examination of Shear regarding appellant's admission of a homosexual relationship during his interrogation on August 5, 1997. (54RT 11304-11305.)

The prosecutor requested that he be allowed to question Shear as to two alleged inconsistencies during appellant's police station interview with Shear. The first such area involved appellant's statements about details of his prior arrests, and the second area involved appellant's initial denial – and then minimization – of having engaged in any homosexual conduct with Hernandez, until Shear confronted him with Hernandez's statement to the contrary.[70] (54RT 11302-11305.) The prosecutor contended that inquiry into these areas would demonstrate a pattern of "repeated steps of dishonesty" employed by appellant during police interrogation. (54RT 11304.)

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[70] Shear was particularly curious as to whether appellant considered himself a homosexual or a bisexual. (62RT 12594-12595)

The prosecutor then expanded his request for a reconsideration of the trial court's ruling precluding the introduction of evidence of the homosexual relationship between appellant and Hernandez by claiming there was a nexus between appellant's dishonesty about the relationship and the fact that Hernandez had made inconsistent statements about his contacts with appellant on the morning of the murders. (54RT 11305-11306.)

The prosecutor represented to the trial court that he had been informed by his investigating officer of recent statements wherein Hernandez had stated that appellant was the person who was supposed to have driven Hernandez to work on the morning of the murders, and "it's possible [Hernandez] thinks he possibly or potentially remembers the defendant being at his house shortly after five o'clock in the morning on the 4th – I'm sorry, the – yes, the 4th of August, 1997." (54RT 11306.) Furthermore, the prosecutor represented to the trial court that he was prepared to call a witness, Margarita Ruiz,[71] who would testify that Hernandez had told her a few days after the murders that appellant had come by his house and "told him what happened during the course of the murders or what he had done."[72] (54RT11306.) The trial court deferred ruling on on the prosecutor's request until it heard Hernandez's testimony. (54RT 11307-11308.)

On September 28, 1999, the day following this colloquy, the prosecutor called Hernandez as a witness. When questioned about appellant's visits to his home on Saturday evening, August 3, 1997,

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[71] Ruiz was referred to at trial by her nickname, Maggie.

[72] This would prove to be a serious misrepresentation to the court. (55RT 11357-11358, 11361-11369.)

Hernandez's testimony mirrored the account of events given in his initial statement and at the two earlier guilt phase trials. (55RT 11306-11311.) It differed in one respect, favorable to the prosecution's case, in that Hernandez now recalled that appellant was to give him a ride to work on Monday morning, August 4, "close to six o'clock." (55RT 11311-11312, 11317.) When the prosecutor asked Hernandez if appellant arrived that morning, Hernandez replied: "No, not that I know of." (55RT 11318.) As a result of appellant's failure to appear, Hernandez ended up calling his brother, Eddie Hernandez, and getting a ride to work from him. (55RT 11318-11319.)

When asked if he recalled telling investigators that appellant "might" have come by his house that morning, Hernandez replied that he recalled the conversation with the investigators, but he did not remember whether appellant came by that morning. (55RT 11318, 11321-11323.) Hernandez recalled having a conversation with Maggie Ruiz, but he denied telling her that appellant had come by his house a little after 5 a.m. on Monday morning or that appellant had been with him all night until the early morning hours. (55RT 11322-11323, 11340-11341.) Hernandez also testified that he did not see appellant that morning, hear his truck, or see his bicycle. (55RT 11341.) Hernandez was then excused from the witness stand, subject to recall.

The prosecutor then called Maggie Ruiz to testify. Ruiz recounted that she spoke to Hernandez "shortly after the murders," and Hernandez told her that appellant had been at his house "around 5 a.m." on August 4. (55RT 11349-11350.) According to Ruiz, Hernandez said nothing more about the topic, other than he and appellant had shared a beer in his truck. Hernandez explained to her that he did not believe that appellant could have

committed the murders because he was at his house when the crimes were supposed to have been committed. (55RT 11361-11362.) The prosecutor did not try to impeach Ruiz with her purported prior statement to investigators, nor call the investigators to contradict her testimony.

On October 6, 1999, the prosecutor renewed his request to recall Hernandez in order to establish his bias in favor of appellant by asking him about the homosexual relationship between them. (61RT 12481-12483.) According to the prosecutor, Hernandez had previously stated that he had a clear memory of the events on the night before the murders as well as what happened the next morning between 5:00 and 5:30 a.m. and after 6 a.m., but not for the half hour between 5:30 and 6:00 a.m. (61RT 12482.) The prosecutor then argued that because Hernandez claimed a poor memory – albeit a memory failure that was arguably favorable to the prosecution – he was entitled to show Hernandez's bias in favor of appellant. (61RT 12482-12483.)

Defense counsel reiterated the objections that she had made to the introduction of such evidence at the previous two trials, arguing that evidence of a consensual homosexual relationship between appellant and Hernandez was both irrelevant and inflammatory:

> [Hernandez] has no motive to lie, and his previous relationship with [appellant] would be irrelevant, and it's irrelevant, anyway, but his friendship has already been – been put forward to the – to the jury which would create as much bias as any other type of relationship as far as I can see, but the prejudice of the homosexual relationship would be highly inflammatory in this community, and I believe that was the reason it was – the relationship, the identity has never been permitted to be broadcast to the jury. It's because it's going to cause a prejudice to this case that would be far outweighed by any of its probative value [*sic*].

(61RT 12483-12484.)

In response, the prosecutor contended that there was a significant difference, in terms of measuring the extent of a witness's bias, between simple friendship and a sexual relationship. (61RT 12485.) Defense counsel responded that if Hernandez was currently testifying with a bias in favor of appellant, he would not have disputed but instead affirmed Ruiz's claim that he had told her right after the murders that appellant had been with him from Sunday evening until 5 a.m., as that would have provided appellant with an alibi.[73] (61RT 112486.)

5. The Trial Court's Ruling

At the instant trial, the trial court reversed its rulings from the two previous trials and allowed Hernandez to be questioned about his sexual relationship with appellant. Specifically, the trial court ruled:

> There is certainly a legitimate concern about potential undue prejudice, and I recognize that. However, I agree that this is a critical – that the veracity of Mr. Hernandez is a critical issue in this case. It certainly makes a great deal of difference whether or not Mr. Sanchez's wife, who has provided an alibi that he was asleep at the time the murders occurred, whether or not that is true, or whether or not he was active and about in the community of Porterville at or about the time of the homicide. There are also other reasonable inferences that can be drawn depending upon what the fact finder finds to be the situation. There is a material difference between a friendship, even a close friendship, and an intimate relationship, particularly an intimate relationship wherein the person whose veracity is at issue has expressed a love for the principal at

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[73] In any event, the prosecutor could not seriously contend that appellant was with Hernandez at the same time he was committing the capital crimes he was charged with, and defense counsel never presented such an alibi, nor did appellant rely on such an alibi during police interrogation.

> issue. [¶] I've carefully weighed and considered the probative value of the degree of affection that Mr. Hernandez has expressed – or Mr. Sanchez against the potential undue prejudice, and I find the probative value outweighs the potential for prejudice.

(61RT 12486-12487.) The trial court concluded its ruling by stating that it would give a cautionary jury instruction regarding the evidence of homosexuality.[74] (61RT 12487.) Defense counsel requested a limiting instruction as well, reiterating her concern that the jury would inevitably conflate any consensual sodomy associated with appellant's homosexual relationship with Hernandez and appellant's propensity to engage in forcible sodomy. (61RT12487-12488.) The court agreed that the defense could propose such an instruction and an appropriate limiting instruction on propensity would be given. (61RT 12489-12491.)

Hernandez was recalled to the witness stand the next day, for the sole purpose of providing testimony about his sexual relationship with appellant. Hernandez told the jury that he had been involved in a sexual relationship with appellant for about five years, that they were sexually intimate on more than one occasion, and that he had been in love with appellant. (62RT 12579-12582.) On cross-examination, Hernandez stated that he did not really know how he currently felt about appellant. While he still loved him, and they remained friends, he would not lie for him. (62RT 12582-12583.) Hernandez reaffirmed the truthfulness of his present testimony about his encounters with appellant around the time of the murders; Hernandez maintained that appellant had not been with him after he left his home the night of August 3. They did not spend the night

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[74] The cautionary and limiting instructions that followed the trial court's rulings will be described in the immediately following subsection.

together, nor was appellant with him at 5 a.m. on the following day. (62RT 12583-12584.)

In the end, Hernandez gave no testimony favorable to the defense and the prosecution presented no independent evidence that appellant was at Hernandez's house or "active and about the community" in Porterville at the time of the crime.

6. The Cautionary and Limiting Instructions

As soon as possible after the trial court issued its ruling, defense counsel urged the trial court to limit the jury's use of the now admissible evidence of Hernandez's homosexual relationship with appellant to the jury's assessment of Hernandez's credibility only, and that the jury should be instructed that it could not use this evidence as proof of appellant's propensity to commit sodomy. (61RT 12487-12488.) The trial court responded: "Well, I'm certainly happy to do that, and I will do that." (61RT 12488.) However, the trial court's subsequent actions did not fully or adequately convey this limitation.

The first cautionary instruction was given when Hernandez resumed the witness stand on October 7, 1999, after the prosecutor's first question to Hernandez about his homosexual relationship with appellant. Before Hernandez could respond to what the prosecutor acknowledged would be an "uncomfortable" topic, the trial court interjected an admonition:

> All right. Ladies and gentlemen, before we go any further on this issue, I want you to clearly understand something, and there will be a formal jury instruction on this. [¶] This evidence is being introduced for the purpose of showing, if it does, that Mr. Sanchez and Mr. Hernandez were engaged in a consensual sexual relationship and on more than one occasion. [¶] This evidence – the evidence is admitted for a limited purposes [*sic*]. It may be used to judge the credibility

> and believability of Mr. Hernandez when he denied seeing Juan Sanchez on August the 4th, 1977 (*sic*), at about five o'clock in the morning. [¶] It may be used to evaluate the truthfulness of Mr. Sanchez's statements to Detective Shear relating to his relationship with Mr. Hernandez, and it may be used in considering the credibility and believability of Mr. Sanchez's testimony at trial. [¶] It absolutely is not being introduced for any other purpose unless I direct you otherwise. [¶] Now, ladies and gentlemen, we did not voir dire you on this issue. Obviously, consensual adult sexual relationships are not illegal in our society. As a matter of fact, there are constitutional protections in place that recognize that. [¶] If any of you cannot accept this limiting instruction of the court, I – you might be uncomfortable in accepting it, let me know that at this time. However, you are well aware of your oath and responsibilities as jurors. [¶] In that respect then, if any of you have any difficulty in accepting the court's admonition in this respect, you are under an absolute duty to, at an appropriate time that's comfortable for you, to let the bailiff know that there's a matter that you need to discuss with me, and we'll talk about it. But if this bothers you, again, you're under an absolute duty to let us know, no exceptions. And this shall be done – the bailiff shall be notified if this is an issue for you no later then ten o'clock tomorrow morning. Thank you very much.

(62RT 12580-12581.) Hernandez then testified about his homosexual relationship with appellant, in advance of the time frame provided by the trial court for jurors to report whether they might be unable to heed the admonition.[75]

Once Hernandez left the witness stand, the prosecutor recalled Detective Shear and examined him on the topic of appellant's statements regarding his homosexual relationship with Hernandez during Shear's interrogation of appellant on August 5, 1997. This questioning of Shear

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[75] There is no record of any juror approaching the bailiff.

exceeded the limitations that had been placed by the court just moments before.[76] (62RT 12592-12595.) Shear testified that during that interrogation, he had asked appellant about the nature of his relationship with Hernandez. Appellant told Shear that he and Hernandez were close friends. Shear asked appellant if he was either gay or bisexual, and appellant initially denied such sexual orientations. Shear then showed appellant Hernandez's statement to Porterville detectives that he had a longstanding homosexual relationship with appellant. Appellant then conceded to Shear that he had "once" engaged in a homosexual act with Hernandez. (62RT 12594-12595.)

When Shear left the witness stand, defense counsel requested and received a sidebar conference. Outside the jury's presence, the trial court addressed defense counsel: "Now that I'm thinking about it, was – do you have any problem with the limiting instruction I gave, counsel?" (62RT 12596.) Defense counsel responded: "Did you leave out the part that it wasn't supposed to be used, propensity, or did I miss that?" The trial court acknowledged that it had intentionally omitted such a limitation. (62RT 12596-12597.) It explained its reasoning:

> No, I didn't skirt around it. I intentionally left it out because – sexual relationships between two adults is not bad character. That's why instead of saying bad character and using – giving it a negative connotation, I gave it a positive connotation by reminding the jurors that it's constitutionally protected.

(62RT 12597.) Defense counsel objected to the trial court's faulty phrasing of the limiting instruction, arguing that when the court instructed the jury

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[76] The error in admitting Shear's testimony on the subject of appellant's homosexual relationship will be further addressed in Argument IX, *post.*

that it *could* use the evidence to assess credibility, the jury would not understand it *could not* use the evidence to show that appellant was predisposed to commit sodomy unless it was specifically instructed in that fashion. As defense counsel put it, "I think you're going to mislead them because they don't understand the fine points of law." (62RT 12597-12598.)

In its response to defense counsel's argument, the trial court made clear that it believed the jurors could properly consider the evidence of Hernandez's consensual homosexual relationship with appellant for a far broader purpose than Hernandez's bias. Indeed, the court suggested that the evidence could be used by the jury to infer a general propensity to commit sodomy:

> Well, what occurs to me is that if the jury believes Mr. Hernandez, it could also be considered for the – I mean, some adults practice sodomy, sodomy in other adults are averse to sodomy. *It certainly suggests that Mr. Sanchez is not averse to sodomy.* So it's – there is some probative value to it, separate and apart from the concerns that are provided in Evidence Code Section 1101(b). [¶] *So it does have probative value in that respect.*

(62RT 12598, italics added.) Defense counsel reiterated her objection that the trial court's rulings admitting the evidence, as well as its flawed limiting instructions, were repeatedly "contaminating" the case in a "very prejudicial" fashion. She argued that for the trial court to instruct the jury in a fashion that allowed them to consider evidence of consensual sexual conduct like sodomy as having any probative value on the issue of whether forcible sodomy occurred would be the equivalent of saying that because a man has sex with a woman, he is a rapist. (62RT 12599.) The trial court disagreed with defense counsel's analysis, and expressed confidence that

the jury would properly understand and apply the limiting instruction. The trial court reminded defense counsel that it would allow her to present a formal written instruction at the conclusion of the case; at that time the court would deliver a "complete and final admonition." (62RT 12599-12600.)

The trial court's next "limiting" instruction was delivered during the prosecutor's cross-examination of appellant on October 20, 1999. The trial court addressed the jurors as follows:

> All right. Ladies and gentlemen, before we begin, there – there was evidence introduced yesterday again on the consensual sexual relationship between Mr. Sanchez and Hernandez. [¶] I just want to remind you I've already given you a limited [*sic*] instruction on the use of that evidence, and I just want to remind you at this point again that it is being offered for a limited purpose of, among other – excuse me, the limited purpose of judging the credibility of Mr. Hector Hernandez. It may be used in considering the truthfulness of Mr. Sanchez's testimony in court. It may be used to consider the truthfulness of Mr. Sanchez's testimony relating to his whereabouts on the morning in question, and as I believe I already mentioned, it may be used in judging Mr. Sanchez's credibility. It is admitted for those limited purposes. . . . [¶] And I think it goes without saying, that you're not permitted to consider that evidence for any other purpose than one that the court has instructed you may consider, and you will get a formal jury instruction on this at the time of jury instructions.

(67RT 13672-13674.) On cross-examination, appellant did not deny having a homosexual relationship with Hernandez, but claimed that it was not as long-lasting or extensive as the police interrogators told him that Hernandez had described to them. Appellant admitted, albeit reluctantly, that he had

lied during his interrogation by Detective Shear when he had claimed to have only engaged in one homosexual act with Hernandez. (67RT 13730-13738; see Argument XI, *post.*)

The trial court's final limiting instruction was delivered to the jury before closing arguments on November 1, 1999 (75RT 15071-15072); a written version of the instruction was also given to the jury (10CT 2696). The written instruction[77] received by the jury read as follows:

> Evidence has been introduced for the purpose of showing if it does that the defendant and Hector Hernandez were engaged in a consensual sexual relationship. []
>
> Such evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes including the crimes for which he is now charged. Such evidence if believed, may be considered by you only for the limited purpose of determining if it tends to show the following:
>
> [] The credibility/believability of Mr. Hector Hernandez when he denied seeing Juan Sanchez on August 4, 1997 at 5:00 A.M.
>
> [] The credibility/believability of Juan Sanchez's *statements to police officers and his* testimony at trial.

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[77] This instruction (a modification of CALJIC No. 2.50 – Evidence of Other Crimes) was the trial court's modified version of defense counsel's proposed Special Instruction No. 14. It reflects the trial court's redactions (by white-out) and contains its interlineations in the title and text. The proposed instruction, as originally submitted, was not included in the clerk's transcript. By separate motion, appellant has requested augmentation of the clerk's transcript to include, as required, the unmodified instruction submitted by defense counsel at the trial court's request. For the convenience of the Court's and the parties, a copy of the requested instruction is attached hereto as "Appendix A."

For the limited purpose for which you may consider this evidence, you must weigh it in the same manner as you do all other evidence in the case.

You are not permitted to consider this evidence for any other purpose. . . . [78]

C. The Trial Court Abused Its Discretion and Committed Reversible Error When It Allowed The Prosecutor To Question Witnesses About Appellant's Homosexual Relationship With Hernandez, and Instructed The Jury That It Could Consider Evidence Of Such Homosexual Relationship For Multiple Purposes In Addition To Showing Hernandez's Bias

Throughout history, "there have been powerful voices to condemn homosexual conduct as immoral." (*Lawrence v. Texas* (2003) 539 U.S. 558, 571.) "[I]t would be naive to believe that prejudice against homosexuals is a thing of the past." (*People v. Garcia* (2014) 229 Cal.App.4th 302, 315 (*Garcia*) [citing statement made in summer of 2014 by a candidate for state office in Oklahoma advocating that it would be justifiable to execute homosexuals by stoning because "[t]hat was done in the Old Testament under a law that came directly from God."].)[79] Ignoring

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[78] The italicized portions of the written instruction reflect the handwritten interlineations of the trial court, whereas the brackets in boldface reflect the trial court's redactions of text in defense counsel's original proposed Instruction No. 14.

[79] In 2008, Proposition 8, the ban on gay marriage, won by 52.2% of the vote statewide; in Tulare County, it won by 75.4%. (See www.latimes.com/ local/ la-2008election-california-results-htmlstory.html.) More recently in 2013, the City Counsel of Porterville voted to oust the Mayor of Porterville and rescind a proclamation by the Mayor declaring June 2013 as "LGBT [Lesbian, Gay, Bisexual and Transgender] Pride Month," after a public hearing in which a number of attendees expressed the view that homosexuality was an abomination and perversion and those

(continued...)

the persistence of anti-homosexual prejudice, which if anything was stronger in 1999, the trial court allowed the prosecution, over strenuous defense objection, to repeatedly introduce evidence that appellant had a homosexual relationship with a prosecution witness even though the relationship had no logical bearing on appellant's guilt of the charged crimes, was inflammatory and calculated to appeal to the prejudices of the jury, and placed appellant in the intolerable position of having this "shameful" relationship revealed to his family and the community during his capital murder trial. The trial court manifestly abused its discretion in admitting this evidence.

1. The Evidence that Hernandez Had a Longstanding Homosexual Relationship Was Irrelevant To Any Issue Bearing On Appellant's Guilt

"Under the rules of evidence, the introduction of irrelevant evidence is strictly prohibited." (*Garcia*, *supra*, 229 Cal.App.4th at p. 316; Evid. Code, § 350.) In *Garcia*, the court reversed the defendant's conviction for sexually abusing a minor as a result of the prosecutor's evidence and argument about the defendant's homosexuality, evidence the court found to be irrelevant "to any issue in this case." (*Garcia*, *supra*, 229 Cal.App.4th at pp. 304-305.) As the *Garcia* court noted, in cases where the nature of the

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[79](...continued)
who engaged in such "disgusting behavior" should be prosecuted and put to death, citing the bible. (July 16, 2103 Minutes of City Council Meeting,< http://vimeo.com/70465952 >; see also Alternate Currents, *Hate Institutionalized - Porterville Council Plan Vote to Rescind LGBT Pride Month Proclamation*, Visalia Times-Delta (June 14, 2013) <http://blogs.visaliatimesdelta.com/alternatingcurrents/2013/06/14/hate-institutionalized-porterville-council-plan-vote-to-rescind-lgbt-pride-month-proclamation/>.)

charges alone is sufficient itself to inflame the mind of the average person, the tendency of jurors to make unwarranted assumptions about the perpetrator's sexual orientation "underscores the need for 'rigorous insistence upon observance of the rules of the admission of evidence and conduct of the trial' in cases like this one . . ." (*Id.* at p. 316, quoting *People v. Giani* (1956) 145 Cal.App.2d 539, 546-547.) Likewise here, the injection of appellant's sexuality into this already inflammatory case was the opposite of the rigorous observance of the rules of evidence demanded by the courts.

The fact that Hernandez and appellant had a consensual homosexual relationship was not relevant because it had no logical bearing on whether appellant was guilty of sexually assaulting Lorena and then shooting her and Reyes. Admission of irrelevant evidence constitutes error. (Evid. Code, § 350; *People v. Poggi* (1988) 45 Cal.3d 306, 323 ["[T]he court has no discretion to admit irrelevant evidence"].)

As defense counsel consistently and correctly pointed out, the evidence of homosexuality was inadmissible for any purpose advanced by the prosecutor. Indeed, to a large extent, the prosecution's proffered theories of relevancy depended on misstatements of the evidence, which the court uncritically accepted. At both the first trial and the instant trial, the respective prosecutors asserted the evidence was admissible because appellant "uses" Hernandez as an alibi (2RT 265, 269 [in limine motions]) and Hernandez was appellant's "friend and purported alibi" (48RT 10105 [instant trial]).

There was, in fact, no evidence presented at any of the three trials that appellant had used Hernandez as his alibi. The alibi defense that appellant actually advanced at trial made no reference whatsoever to

Hernandez, either directly or indirectly, and would have conflicted with any alibi offered by Hernandez. Appellant's defense, supported by his family, was that he was in bed in his own house when the crimes were perpetrated. (See 56RT 11500-11506 [Mary Lucio], 70RT 14228-14234 [Henry Lucio].)

Nevertheless, the court, as reflected in its instructions, admitted the homosexuality evidence for three purposes: to judge (1) Hernandez's credibility when he denied seeing appellant on August 4 at about 5 a.m.; (2) the truthfulness of appellant's statements to Detective Shear relating to the homosexual relationship; and (3) without any limitation, the credibility and believability of Sanchez's testimony. (62RT 12580-12581.)

As the court observed in *Garcia*, *supra*,

> . . . [w]e do not believe the evidence of appellant's sexual orientation was relevant to her prosecution. Period. Whether designed to show appellant's intent, motive or why she would select A.G. as a victim, the evidence standing alone, simply did not hold up in terms of facilitating the jury's understanding of the case or "having any tendency in reason" to prove a disputed fact "of consequence to the determination of the action."

(229 Cal.App.4th at p. 313, 314 [person's sexual orientation has no bearing on propensity to commit sex crimes, citing Evidence Code section 210].)

The same analysis applies here. None of the purposes for which the court admitted the homosexuality evidence had any reasonable tendency to prove a fact that was of actual consequence to the determination of appellant's guilt or innocence.

a. Hernandez's Credibility and Bias

As to the first purpose, there was no credibility or bias issue, except that contrived by the prosecution in misstating the evidence. Hernandez was called as a prosecution witness at all three trials to account for

appellant's whereabouts many hours before the charged crimes and to show that appellant had promised, but failed, to give Hernandez a ride to or from work the next morning. Hernandez's testimony was favorable to the prosecution because it supported the inference that appellant failed to fulfill his promise to give Hernandez a ride to work because he was committing the charged crimes. Hernandez's testimony was supported by another prosecution witness, his brother, Eddie Hernandez, who testified that Hernandez had called him at about 5 or 5:10 on the morning of August 4 for a ride to work. (62RT 12752.) Eddie Hernandez got ready, had a cup of coffee, and left to pick up his brother. (*Ibid.*) The prosecutor never asked Eddie Hernandez whether he saw appellant or his truck at his brother's house, undoubtedly because the answer was "no."

The decision to admit the homosexuality evidence was based initially on the prosecution's misrepresentation of Maggie Ruiz's interview statement. Instead of testifying as the prosecutor proffered, that Hernandez told her appellant came to his house the morning of the crimes and more-or-less confessed, Ruiz testified that Hernandez had vouched for appellant's innocence. (55RT 11361.) Of course, Hernandez denied having made any such statement, and his account of his contacts with appellant on August 3 and 4 had been consistent throughout. In short, there was no inconsistency or conflict in Hernandez's testimony such as would result from a bias so strong that only a homosexual relationship could explain it. On this record, it is difficult to comprehend how the court could possibly have admitted the irrelevant and inflammatory homosexuality evidence.

The Montana Supreme Court's decision in *City of Kalispell v. Miller* (Mont. 2010) 230 P.3d 792 is instructive on this point. In *Miller*, the defendant was convicted of obstructing a peace officer by making an

untruthful report for the benefit of her lesbian partner, Benware. (*Kalispell, supra,* 230 P.3d at p. 793.) The trial court admitted the evidence of the couple's intimate relationship for context and motive. (*Id.* at p. 794.) The Montana Supreme Court reversed Miller's conviction, reasoning that:

> Miller's sexual orientation and the existence of an intimate relationship with Benware was not probative or relevant evidence vis-a-vis the crime with which Miller was charged. As Miller suggested before trial, if the State was concerned that the jury understand Miller's motive for calling [the police department], it could have simply explained that the two women were good friends.

(*Id.* at p. 795.)

That was the sound approach adopted by the trial court at the first two trials in this case – excluding any reference to homosexuality, but admitting evidence of a close personal relationship between Hernandez and appellant. No change in the evidence at the instant trial rendered the homosexuality evidence a jot more relevant than it had been at the earlier trials. If anything, Hernandez's testimony here was even more favorable to the prosecution than his prior testimony. Indeed, the court had it right at the outset when it remarked on the inconsistency between the prosecution's holding Hernandez out as a credible witness to impeach appellant – which Hernandez did to a modest degree – but then seeking to impugn his credibility based on the homosexual relationship. (2RT 271.) Inconsistency aside, at bottom, Hernandez's supposed "bias" had no probative value in determining appellant's whereabouts in the early morning hours of August 4 – i.e., whether he was at home sleeping or at Reyes's house. Accordingly, it was an abuse of discretion to repeatedly inject appellant's homosexual relationship into the trial.

b. Appellant's Statements to Shear Regarding His Homosexual Relationship with Hernandez

The rules of evidence do not allow for improper impeachment on collateral matters. (*People v. Paniagua* (2012) 209 Cal.App.4th 499, 519-20 [finding reversible error where trial court allowed jury to hear evidence on collateral matters with no obvious purpose other than to impugn and degrade defendant]; *People v. Milner* (1988) 45 Cal.3d 227, 240 [noting risk that jury will make improper use of collateral evidence, in which case it should be excluded]; *People v. Thompson* (1988) 45 Cal.3d 86, 110; *People v. Lavergne* (1971) 4 Cal.3d 735, 742 .) Appellant's homosexual relationship with Hernandez was wholly collateral, irrelevant to the issue of appellant's innocence or guilt, and of negligible, if any probative value with respect to appellant's credibility. (See Argument IX, *post.*)

Courts have recognized that, for most of the history of this country, gay persons did not identify themselves as such because being gay resulted in significant discrimination – homosexuality was "unspeakable." (See, e.g., *SmithKline Beecham Corp. v. Abbott Laboratories* (9th Cir. 2014) 740 F.2d 471, 485 [noting that being "out" about one's sexuality is a relatively recent phenomenon].] Hence, no negative inference regarding appellant's honesty could legitimately be drawn from his lack of candor about a homosexual relationship either when being interrogated by Shear and Garay – who were accusing him of committing sodomy and murder – or in a courtroom full of people, including his family. Insofar as the jury was allowed to draw an inference of dishonesty from appellant's denial of a homosexual relationship, the court erred and the jury was seriously misinstructed.

c. Without Limitation, The Credibility and Believability Of Appellant's Testimony

Again, due to historical and residual discriminatory attitudes towards homosexuals, appellant's denial or minimization of his homosexual relationship with Hernandez was irrelevant to his credibility and believability on any truly relevant subject. Therefore, to have admitted the evidence and allowed the jury to consider it in evaluating appellant's truthfulness in proclaiming his innocence was a most serious error, one which will be discussed in greater detail in Argument IX, *post*.

2. The Evidence Of The Consensual Homosexual Relationship Between Appellant and Hernandez Was Unduly Prejudicial In Violation Of Evidence Code Section 352

As demonstrated above, appellant's homosexual relationship with Hernandez had negligible, if any, probative value while its potential for prejudice was substantial, as the court had repeatedly acknowledged. (See *People v. Holloway* (2004) 33 Cal.4th 96, 133-134 [upholding limitation of impeachment regarding victim's homosexuality, as trial court's knowledge of "the jurors and the community from which they were drawn" made reasonable its fear the evidence might be misused by one or more jurors].)[80]

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[80] See also, Sexual Orientation Fairness Subcomm., Judicial Council of Cal., *Sexual Orientation Fairness in California Courts* 25-26 (2001), *available at* http:// www.courtinfo.ca.gov/programs/access/documents/report.pdf (reporting the results of a study finding that "56 percent of gay and lesbian court users in a contact in which sexual orientation became an issue reported observing or experiencing a range of negative experiences. Specifically, 36 percent heard negative comments about someone else; 29 percent heard negative remarks arising from a case; 23 percent heard negative comments about themselves; 26 percent experienced or heard ridicule, snickering, or jokes about lesbians and/or gay men; and 25 percent (continued...)

The admission of this evidence was a patent abuse of discretion under Evidence Code section 352.

Irrespective of the context, courts throughout the United States have recognized the prejudice and hostility toward homosexuality which still exists in many communities. (See, e.g., *Lawrence v. Texas*, *supra*, 539 U.S. at p. 571 [noting historical and near universal condemnation of homosexuality as immoral by "powerful voices" within society]; *United States v. Gillespie* (9th Cir. 1988) 852 F.2d 475, 479 ["Evidence of homosexuality is extremely prejudicial"]; *Cohn v. Papke* (9th Cir. 1981) [introduction of evidence of homosexuality creates a "clear potential that the jury may have been unfairly influenced by whatever biases and stereotypes they might hold with regard to homosexuals"]; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1249 [holding that defense's effort in portraying witness as a person to whom the jury should accord less respect or believability because of his homosexuality improper as an attempt to cater to the possibility of popular prejudice]; *People v. Peters* (1972) 23 Cal.App.3d 522, 533 [same]; *Garcia*, *supra*, 229 Cal.App.4th at p. 315 [recognizing naivete of belief that prejudice against homosexuals is a thing of the past]; *State v. Chase* (Or.Ct.App. 1980) 613 P.2d 1104, 1105-1106 [homosexuality is a "highly inflammatory subject"]; *Blakeney v. Texas* (Tex.App.1995) 911 S.W.2d 508, 516 [evidence of homosexuality, because it is considered improper, immoral, and highly offensive by segments of the population, is "inherently inflammatory"].)

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[80](...continued)
heard other negative remarks.").

As aptly cautioned by the Montana Supreme Court:

> While the Trial Court and the District Court equated homosexuality and heterosexuality for purposes of legal analysis, we conclude it was prejudicial error to do so under the circumstances presented here. Society does not yet view homosexuality or bisexuality in the same manner as it views heterosexuality. Because there remains strong potential that a juror will be prejudiced against a homosexual or bisexual individual, courts must safeguard against such potential prejudice.

(*City of Kalispell v. Miller*, *supra*, 230 P.3d at p. 794.)

In the instant case, rather than safeguarding appellant against the potential prejudice inherent in the evidence of his homosexual activities, the court exposed him to the maximum damage by allowing the prosecutor to repeatedly call the jury's attention to the subject. The jury first had to hear about the relationship through Hernandez, then through Shear and yet again from appellant himself, including the repetition of his statements to Shear and his taped statements to Garay the next day. Any reasonable jury would have concluded from this repetition and the emphasis placed on the nature and details of the relationship, that this was very important evidence, and would have been tempted to assume that appellant's homosexual relationship with Hernandez necessarily involved acts of sodomy, or as the court described it – a non-aversion to sodomy – and hence that appellant had the capacity and predisposition to commit the sexual assault and consequent murders in this case. (See 62RT 12598.)

It would be difficult to conceive of a more prejudicial or illegitimate chain of inferences in any case, but here, where the only distinguishing and perhaps most repugnant feature of the crime was the sodomy or attempted

sodomy of Lorena, admitting the homosexuality evidence and licensing the inevitable "propensity" inferences was a manifest abuse of discretion.

D. The Trial Court's Limiting Instructions Did Not Mitigate The Prejudice Caused By Its Rulings

Some evidence has "so great a potential to unfairly prejudice the defendant that the courts have long recognized that a limiting instruction will be insufficient to prevent improper use." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1120; *People v. Coleman* (1985) 38 Cal.3d 69, 93, citing *Shepard v. United States* (1933) 290 U.S. 96, 104; *People v. Milner*, *supra*, 45 Cal.3d at p. 240; *People of Territory of Guam v. Shymanovitz* (9th Cir. 1998) 157 F.3d 1154, 1161.) Evidence of homosexuality fits within that category. (*United States v. Gillespie*, *supra*, 852 F.2d at p. 479.) "Some references are so prejudicial that it is difficult for curative instructions to resuscitate fairness." (*Rojas v. Richardson* (5th Cir. 1983) 703 F.2d 186, 192.)

As defense counsel pointed out, once a jury heard evidence that appellant was in a homosexual relationship – suggesting that he engaged in sodomy – the risk was irreparable that one or more jurors would infer on that basis that appellant was predisposed to commit the act of sodomy or attempted sodomy charged in the case. (2RT 267.) Acknowledging some risk, the trial court gave the jury three different limiting instructions. None were nor could be presumed to be effective to cure the prejudice. (61RT 12488.)

The first such instruction was given when Hernandez was recalled to the stand to be questioned regarding the sexual relationship. (62RT 12579-12581.) The instruction admonished the jury that the evidence of the relationship could be used to judge Hernandez's credibility when he denied

seeing appellant at about 5 a.m. on August 4, and to evaluate the truthfulness of appellant's statements to Detective Shear regarding the relationship and the truthfulness of appellant's testimony – without limitation – at trial. (62RT 12580.)

The court acknowledged that the jury had not been voir dired on the issue. The court then advised the jury that consensual adult sexual relationships are not illegal and are constitutionally protected. (62RT 12581.) The court stated that if any juror could not accept the limiting instruction, he or she had until 10:00 the next morning to let the bailiff know. However, the prosecutor was allowed to immediately proceed with the examination of Hernandez on the subject of the homosexual relationship before the time for considering the subject and contacting the bailiff had passed.

Appellant objected that the instruction had omitted the essential limitation that the jury could not use the relationship as propensity [to commit sodomy, in particular] evidence. (62RT 12596.) The court responded that it had intentionally left out the propensity limitation and had included instead that there are constitutional protections for consensual sexual relationships. (62RT 12597.) Furthermore, the court thought that propensity was a fair inference because "some adults practice sodomy . . . other adults are averse to sodomy." (62RT 12598.) Based on the court's explanation, as well as the plain language of the instruction, there was, at that point, no meaningful limitation on the jury's ability – indeed, likely inclination – to misuse the homosexuality evidence for propensity to commit the charged sex crime.

The next time the trial court gave a limiting instruction to the jury was during the prosecutor's cross-examination of appellant. (67RT 13672-

13674.) Although couched as a reminder, the instruction actually expanded the purposes for which the homosexuality evidence could be used, and again omitted any prohibition against the use of appellant's sexual practices as dispositional evidence. Instead of limiting the use, as before, to Hernandez's credibility in denying appellant was with him at about 5:00 a.m. on August 4, the instruction specified that the evidence could now also be used to assess the truthfulness of appellant's testimony as to his whereabouts – sleeping at home – on the morning of the crime, indeed, as to his credibility without any limitation. (67RT 13673.) There was nothing in the instruction that remotely informed the jury that it could not use appellant's willingness to engage in homosexual acts in evaluating his credibility when he denied sexually assaulting Lorena and then killing her and Reyes.

The trial court gave its final instruction when the case was submitted to the jury. (10CT 2696; 75RT 15070-15072.) This instruction was the trial court's modification of a proposed instruction that the court had requested from defense counsel. (Appendix A.)

Defense counsel's proposed instruction was a modification of CALJIC No. 2.50, the pattern instruction addressing other-crimes evidence. In relevant part, it stated that (1) evidence had been introduced for the purpose of showing that appellant and Hernandez had been engaged in a consensual sexual relationship on more than one occasion; (2) such evidence could not be considered by the jurors to prove that appellant was a person of bad character or that he had a disposition to commit crimes, including the charged crimes in this case; (3) the relationship could only be used to judge Hernandez's credibility when he denied seeing appellant on August 4, 1997, at 5:00 a.m.; and (4) the number of occasions that appellant

and Hernandez engaged in consensual sexual conduct could only be used in considering appellant's testimony at trial. (Appendix A.)

The trial court modified the proposed instruction to read that the evidence had been introduced to prove the existence of a consensual sexual relationship between appellant and Hernandez and that the evidence of the relationship could be used – without limitation – to assess appellant's credibility when he made statements to police officers as well as his testimony at trial. (10CT 2696.) As modified, the instruction was even more expansive and less remedial than the earlier versions.

Whereas the proposed instruction, a concession to the court's prior rulings, limited the use of the relationship to specific statements or testimony given by Hernandez and appellant, the modification allowed the *fact* of the relationship to be used to assess appellant's credibility with respect to all his statements and testimony – including his denial of guilt. In other words, the modified instruction did nothing to prevent the prejudicial chain of inferences that because appellant engaged in homosexual acts, he was not credible or worthy of belief and hence guilty of the charged crimes. (See *People v. DeSantis* (1992) 2 Cal.4th 1198, 1249 [portraying witness as a person to whom jury should accord less respect or believability because of his homosexuality improper attempt to cater to popular prejudice].)

In principle, as defense counsel had correctly argued, the evidence of appellant's homosexual relationship was so inflammatory, and so devoid of legitimate probative purpose, that no instruction would be sufficiently curative. (See *United States v. Gillespie*, *supra*, 852 F.2d at p. 479.) Here, moreover, the limiting instructions actually given the jury did nothing to mitigate the prejudice.

But even assuming those instructions had some potential remedial benefit, this is not a case where the Court can rely on the presumption that the jury followed the instructions because, as the trial court acknowledged, these jurors had not been voir dired regarding their attitudes toward homosexuality and how those attitudes might affect their view of the evidence or disposition of the case.

Voir dire aside, it is patently unfair for a trial court to change its rulings in the middle of trial. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1194 [unfair to change "the rules of the game" in the middle of a contest]; see also *People v. Richard W.* (1979) 91 Cal.App.3d 960, 979 [changing rules midtrial "would not be tolerated by youngsters playing sandlot ball and certainly does not comport with basic principles of fairness . . ."].) It is difficult to conceive of a less fair reversal than the court's mid-trial admission of inflammatory evidence of a homosexual relationship which had been purposefully excluded at the two prior trials.

Here, defense counsel must have been surprised by the changed ruling in the middle of the instant trial and, consequently, had conducted no voir dire of the jury in justified reliance on the court's previous rulings. Thus, neither counsel nor the court had the incentive or the opportunity during jury selection to probe prospective jurors' attitudes toward homosexuality and whether those with anti-homosexual prejudices could set them aside and be fair.

Without adequate voir dire the trial court cannot fulfill its responsibility to remove prospective jurors who will be unable to impartially follow its instructions. (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188; *United States v. Baldwin* (9th Cir. 1979) 607 F.2d 1295, 1298 [no reasonable assurances prejudice would be discovered by limited

voir dire];cf. *People v. Chapman* (1993) 15 Cal.App.4th 136, 141 [finding reversible error in eliminating defense opportunity to determine whether jurors could be fair and impartial if they learned defendant was a convicted felon].)

Ordinarily, sensitive subjects and potential biases, such as the ones at issue here, are explored and exposed during voir dire, and especially so in a capital case where the accused's life is at stake. (*People v. Chapman, supra*, 15 Cal.App.4th at p. 141 [voir dire on defendant's prior conviction]; *Ristiano v. Ross* (1976) 424 U.S. 589, 595 [voir dire on race]; *United States v. Barber* (4th Cir. 1996) 80 F.3d 964, 968 [constitutional guarantee of trial by impartial jury requires voir dire when prejudice threatens fairness of the process or the result, to eliminate that prejudice]; *People v. Cash* (2002) 28 Cal.4th 703, 720-721 [case-specific factual voir dire required in capital cases where relevant to death qualification].) Expecting jurors to self-report a disqualifying bias is unrealistic as empirical research has revealed. (See, e.g., Jones, *Judge –Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor* (1987) 11 Law and Human Behavior 131-146; Broeder, *Voir Dire Examination: An Empirical Study* (1965) 38 So.Cal.L.Rev. 503-528.)

In the instant case, the court's belated inquiry of the jury was not an adequate substitute for meaningful pretrial voir dire and offered not the slightest assurance that jurors' prejudices toward homosexuals, their sexual practices or their morality would be disclosed. The inquiry lacked the formality and solemnity of voir dire, and came when jurors had already invested considerable time and effort performing their duties at the trial – some knowing it was a retrial. Indeed, the court may have defeated the

purpose of the inquiry by allowing the homosexuality evidence before the time for jurors to respond had elapsed.

In short, even if the trial court's limiting instructions had some curative potential, their efficacy cannot be presumed when the jurors' attitudes toward homosexuality were unexplored and completely unknown. Even leaving aside the real possibility that one or more of appellant's jurors could not have followed any limiting instructions because of anti-homosexual prejudice, the instructions actually given would not have prevented even an unbiased juror from inferring that appellant's presumed affinity for sodomy made it more likely that he was the perpetrator of the sex crime, and, as expressly permitted by the instructions, that appellant's lack of candor about his relationship with Hernandez made his protestations of innocence less credible. Neither inference is fair or permissible; neither was foreclosed by the court's instructions. Indeed, no instruction could have cured the inflammatory impact of repeatedly informing the jury that appellant had engaged in homosexual sex practices.

E. The Admission Of Evidence Of Appellant's Homosexual Relationship Violated Due Process and Was Prejudicial

Due process and the interests of fairness dictate that a defendant be judged by what he did, not who he is – "[n]othing less will do." (*Garcia*, *supra*, 229 Cal.Ap.4th at p. 318 [finding a due process violation and reversing defendant's conviction of sexually abusing a minor where irrelevant evidence and argument regarding defendant's sexuality were allowed].) Here, it cannot be said that appellant's conviction was based solely on the evidence of what he did, and not to some degree on the evidence of his homosexuality – as behavior if not identity – that was admitted only at the instant trial.

The first two trials, where this inflammatory evidence was excluded, resulted in hung juries. The relevant evidence of appellant's guilt was not substantially different at the instant trial than at the two earlier trials. Much of what the prosecutor proffered as new probative evidence at the instant trial did not eventuate when the witnesses took the stand. (See, e.g., 57RT 11796-11797 [Raul Madrid denied seeing appellant with nine millimeter weapon]; 63RT 12863 [Michael Smith could not testify that knife found at appellant's house was a mate to the knife found at crime]; 55RT 11361[Maggie Ruiz testified that Hernandez told her appellant was innocent]; 74RT 14836 [Lola Ortiz denied being present when appellant made alleged threatening statement]; 74RT 14845, 14851-14852 [Margaretta Zepeda and Maria Alicia Palomares testified that Ortiz never told them she was present when alleged threatening statement made].) So that, in the end, the prosecutor's case at the instant trial was based on Oscar's identifications and appellant's confession – the same evidence the two prior juries had found insufficient for conviction.

As such, it cannot be said that the inflammatory evidence of appellant's homosexual relationship with Hernandez did not contribute to the verdict under either the federal beyond-a-reasonable doubt or the state reasonable-probability test for reversible error. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1135, fn. 13 [reasonable probability error adversely affected outcome]; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [beyond a reasonable doubt that the error did not contribute to the verdict].) Moreover, although there was no direct mention of homosexuality at the penalty phase, the normative nature of the penalty decision would have given jurors even greater leeway than at the guilt phase in bringing their views of the morality of homosexual conduct to bear on the determination

of the appropriate penalty. In short, the prejudicial impact of the homosexuality evidence at both phases of appellant's trial cannot be overstated, and the verdicts and judgment of death must be set aside.

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IX

THE CROSS-EXAMINATION AND IMPEACHMENT OF APPELLANT ABOUT HIS HOMOSEXUAL RELATIONSHIP WITH HECTOR HERNANDEZ, INCLUDING POST-INVOCATION STATEMENTS SUPPRESSED BY THE COURT, VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS, A FAIR TRIAL AND HIS *MIRANDA* RIGHTS UNDER *HARRIS v. NEW YORK*

A. Introduction

As demonstrated in Argument VIII, *ante*, the trial court erred in reversing its prior rulings and admitting evidence of appellant's consensual homosexual relationship with Hector Hernandez at the instant trial. That argument, however, focused more narrowly on the improper admission of the homosexuality evidence to impeach Hernandez's testimony which had, in fact, been favorable to the prosecution. This argument addresses the court's compounding of that error by also admitting the homosexuality evidence through the testimony of Detective Shear and then in appellant's cross-examination, and allowing it to be used to impeach the credibility of all of appellant's statements and testimony.

Trial courts are tasked with exercising their broad discretion "to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*People v. Pearson* (2014) 56 Cal.4th 793, 843, quoting *People v. Sapp* (2003) 31 Cal.4th 240, 289.) It is difficult to conceive of a line of cross-examination less probative or more needlessly oppressive and humiliating than pressing a witness on the exact number of times he engaged in homosexual acts. Yet, that is what the court allowed the prosecutor to do, not to contradict appellant's testimony at trial, but solely to show that appellant had not been candid about the nature of his homosexual relationship with Hernandez when Detective Shear and

Lieutenant Garay probed his sexuality. Moreover, the court allowed appellant's statements to Garay to be used notwithstanding that they had previously been excluded for a violation of *Miranda*'s command that, upon an invocation of the right to remain silent at any point during the questioning, further questioning must cease. (*Miranda v. Arizona* (1966) 384 U.S. 436, 445; see also *Berghius v. Thompkins* (2010) 560 U.S. 370, 387-388; cf. Argument VII, *ante*.)

In *Harris v. New York* (1971) 401 U.S. 222, the high court recognized a narrow exception – impeachment of a defendant's perjurious testimony – to the general rule that statements obtained in violation of *Miranda* may not be used against a defendant at trial. As explained below, the trial court's admission of appellant's inconsistent statements regarding the frequency of his sexual relations with Hernandez did not come within the *Harris* exception. Because the trial court applied the wrong legal standard, its ruling constitutes an abuse of discretion. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733 ["An abuse of discretion is shown where the trial court applies the wrong legal standard"].) More fundamentally, because the trial court allowed inflammatory, collateral impeachment, its ruling denied appellant his rights to due process and a fair trial under the federal and state Constitutions. (U.S. Const., Amends. 6th, 8th, 14th; Cal. Const., article I, §§ 15, 17.) Accordingly, appellant's convictions and the judgment of death must be reversed.

B. Factual Background

During appellant's first trial, the court ruled that appellant had invoked his right to remain silent during Garay's videotaped interrogation on August 6, 1999, when, after he had confessed to shooting Reyes and

Lorena, appellant said, "I don't want to talk anymore Garay. No more." (22RT 4592-4595; 13CT 3399.) The portion of this interrogation following the invocation was ordered suppressed.[81] Included in the suppressed portion were appellant's statements first denying he ever had sex with Hernandez, then admitting to having had sex with him once or twice. (13CT 3401-3405, 3406.)

At the instant trial, the court adopted its earlier rulings, and the prosecutor did not ask the court to reconsider its ruling suppressing appellant's post-invocation statements. (9CT 2313-2314, 2316; 48RT 10107 ["And in general, the People would be submitting on previous motions filed, testimony and arguments"].) However, the prosecutor indicated that he wished to reopen the Evidence Code section 1101, subdivision (b), motion, "specifically [appellant's] statements to a couple of – in front of a couple of witnesses to Ermanda about his desire for sexual activity, and then also [appellant's] admissions of – of such activities with – I believe it's Hector – believe it's Hector Rodriguez [*sic*], his friend and purported alibi." (48RT 10105.) The court directed the prosecutor to file a noticed, written motion if he wished to challenge the earlier rulings on the subject. (48RT 10106.) No written motion was filed.

Instead, in the middle of his case-in-chief, the prosecutor moved orally and without notice for admission of evidence concerning appellant's homosexual relationship with Hernandez for the purpose, among other things, of impeaching appellant's credibility. (54RT 11301-11305.) The court ultimately allowed the prosecutor to use the evidence to cross-

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[81] The transcript of the entire interrogation appears in 13CT 3357-3415; appellant's invocation is at 13CT 3399.

examine Hernandez, and also allowed Shear to testify to appellant's responses to Shear's questions regarding appellant's homosexual relationship with Hernandez. (61RT 12487, 12489-12491.)

As discussed in Argument VIII, *ante*, the prosecutor then cross-examined Hernandez regarding the duration of his relationship with appellant and whether the "sexual nature of the relationship occurred on more than one occasion." (62RT 12581-12582.) After Hernandez was excused, Shear returned to the stand and testified that appellant had initially, when asked, described his relationship with Hernandez as "very good" or "close" friends. (62RT 12594.) Shear next asked appellant whether he was gay or bisexual; appellant denied he was either. (62RT 12595.) Shear then *confronted* appellant with the information that there had been a homosexual relationship; appellant *admitted* that he had a sexual episode with Hernandez on only one occasion.[82] (*Ibid.*)

Consistent with these efforts, sustained by the court's rulings, to inject appellant's homosexual relationship with Hernandez into the case, the prosecutor sought to impeach appellant with his previously suppressed statements to Garay regarding appellant's sexual contacts with Hernandez, or more precisely, the inconsistencies between appellant's successive statements to Shear and Garay. (66RT 13633.)

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[82] Shear's exact words were: "[T]hen I confronted him with had a [*sic*] information , and it was at that point that he admitted that he had a sexual episode with Hector. . . ." (62RT 12595.) The obvious connotations of words such as "confronted," and "admitted," in the context of the criminal trial is that the subject of the confrontation/admission is criminal in nature, not the constitutionally-protected private conduct that was being disclosed to the jury.

On direct examination, appellant testified that on the evening of August 3, 1997, he visited his friend Hernandez, arriving around 7:30 or 8:30 p.m. (66RT 13566.) He left to do some errands for Hernandez and himself. He returned and visited with Hernandez, leaving at about 10:30 or 11:00 p.m. and returning home for the night. (66RT 13567-13570.) He was not asked and did not volunteer any information about the nature of his relationship with Hernandez, or about what he told Garay about that relationship.

During his cross-examination of appellant, however, the prosecutor questioned him about his statements to Shear on August 5, 1997, regarding his relationship with Hernandez:

Q. Detective Shear asked you if you were bisexual, didn't he?

A. I'm not too sure.

Q. Should we play or would you rather we read it?

A. Whichever. (Witness reading.) I don't I understand that one. It's there but I really don't understand that word.

Q. Did you say I don't understand that word?

. . . .

[A]. No, but I said no. I told him it wasn't like that.

[Q]. Then Detective Shear told you Hector says he's been having an affair with you for a number of years, didn't he?

A. I believe so.

Q. And at that point you said oh, only one time; correct?

A. One – one, two or three times, perhaps, but not an affair, not a love affair like you're implying.

Q. You said only one time, didn't you?

A. With that – with that times that should have been sufficient for the question that he asked me.

Q. You said only one time, didn't you?

. . . .

A. At that moment, yes, exactly so.

Q. That was a lie; correct?

A. If that's the way it is there, I think so.

(66RT 13631-13632.)

At that point, the prosecutor approached the bench and advised the court that he wished

> to go into the fact that he lied about it to Detective Garay when he made his statement about not having any sexual relationship with Hector to Detective Garay. It was after the time the court made the cutoff. He did not ask for an attorney. All the court ruled is he invoked his right and wished to remain silent. *Now that he's testifying, at this point we can go beyond.*
>
> What I seek to elicit is his statement to Detective Garay that, in fact, he did not, and then when he talked to Garay, then he goes one time and then a little bit later, two times, and I'm seeking to impeach him in that fashion.

(66RT 13632-13633; italics added.) In response to the court's question about what exactly he was seeking to impeach, the prosecutor responded "[his] veracity . . . . He lied to Garay and he did so after admitting, and he goes back to lying. Lying seems to be the most comfortable communication for him and that's what I'm seeking to demonstrate to the jury." (66RT 13633.) The court then asked the prosecutor what appellant had said during his testimony that was inconsistent with the statements to Garay, and the prosecutor candidly responded, "*It's not a consistency* [*sic*]. *It goes merely to show he has lied in this case in the past when asked direct questions.*" (*Ibid.*, italics added.) The court then directed the prosecutor to show him

"some authority that that's within the purview of impeachment and *Miranda*." (66RT 13633-13634.)

The next day the parties returned to the issue outside the jury's presence. The prosecutor stated he had a case "downstairs which cites U.S. Supreme Court case. Unfortunately, I did not grab it when I grabbed my cart. U.S. Supreme Court case is *Harris*." (67RT 13664.) The court responded: "I have read *Harris* but I haven't read it for probably four or five years . . . [s]o you'll need to bring whatever you seek to bring to my attention." (67RT 13664-13665.) The prosecutor agreed to do so. (67RT 13665.)

Three transcript pages later, without any break in the proceedings or any indication that the court had been given or reviewed a copy of *Harris*, the court returned to the issue, asking the prosecutor to refresh his recollection about how it had come up the day before. (67RT 13668.) The prosecutor stated:

> The issue that it came up in is that the defendant initially denied the relationship with Hector or having any bisexual relationship, admits a relationship with Hernandez but says it's only one time to Shear. Then when talking to Detective Garay . . . and this after the cut-off [when appellant invoked his right to remain silent], he is questioned again about that scenario. . . and he says I've never had sex with Hector, and he's pressed again about that, and he says no, why I'm gonna have sex with a man if I have a woman.
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> . . . .
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> Then a little bit later, he says well I'm gonna tell you . And he says one time. And then the officer says how many times? He says only once. And they ask him again how many times and then he says that I can remember, two times.

(67RT 13668-13669.) Based on this offer of proof, the court found the statements "admissible under *Harris*." (67RT 13669.) Defense counsel

then lodged a section 352 objection, arguing that the point had already been made that appellant "had not been fully upfront" about his relationship with Hernandez, and that his continued denial of the relationship was "very collateral impeachment." (67RT 13669.)

The prosecutor responded:

> I think it's very relevant that he is denying yet again on the day that he's making his confession because on the day he's making his confession, counsel seeks to argue that his confession is tainted because he obviously cannot come up with true factors related to the murders, and that's because he doesn't know about the murders, and that's why he's unable to come up with these and that shows that he's an innocent person who's falsely confessing.
>
> However, at the same time that he's being asked about that and not coming up with what is factually accurate with the murder scene, he's also being asked about his relationship – or he has been asked about his relationship with Hector, certainly a subject that he would have intimate knowledge about, and he's not coming up with the truth, either, until pressed. And so it's very relevant.

(67RT 13670.) While recognizing that it was the type of evidence that could cause undue prejudice in the absence of a limiting instruction, "given the nature of the issues in this case, particularly the issue relating to the confession, Mr. Sanchez's . . . the testimony of Mr. Hector Hernandez and his veracity and the other limited purposes for which it's – has been offered previously," the court found that the probative value of this evidence outweighed any undue prejudicial effect. (67RT 13670-13671.)

When the cross-examination of appellant resumed, the court instructed the jury to consider "evidence of the consensual relationship" between appellant and Hernandez for three "limited" purposes: Hernandez's credibility, the truthfulness of appellant's testimony in court,

and the truthfulness of his testimony about his whereabouts at the time the offenses occurred. (67RT 13672-13673.)[83]

Appellant admitted he had a sexual relationship with Hernandez, but disagreed that "it was for five years," the way Hernandez had said it. (67RT 13730.) The prosecutor then questioned appellant extensively about what he told Garay regarding that relationship, focusing on appellant's statement that he had sex with Hernandez only once, and obtaining appellant's admission that "only one time" was not true. (67RT 13730-13738.)

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[83] The instruction given by the court read as follows:

> All right. Ladies and gentlemen, before we begin, there – there was evidence introduced yesterday again on the consensual relationship between Mr. Sanchez and Hector Hernandez. [¶] I just wanted to remind you I've already given you a limited instruction on the use of that evidence, and I just want to remind you at this point that it is being offered for a limited purpose of, among other – excuse me, the limited purpose of judging the credibility of Mr. Hector Hernandez. It may be used in considering the truthfulness of Mr. Sanchez's testimony in court. It may be used to consider the truthfulness of Mr. Sanchez's testimony relating to his whereabouts on the morning in question, and as I believe I already mentioned, it may be used in judging Mr. Sanchez's credibility. It is admitted for those limited purposes. . . . [¶] And I think this goes without saying, that you're not permitted to consider that evidence for any other purpose than one that the court has instructed you may consider, and you will get a formal jury instruction at the time of jury instructions.

(67RT 13672-13674.)

C. The Cross-Examination Of Appellant Concerning The Inflammatory, Collateral Matter Of The Frequency Of His Sexual Activities with Hernandez Was Error

Once a defendant takes the stand and testifies to the circumstances of the charged offenses, the prosecutor, on cross-examination, is permitted to explore the circumstances in much greater detail.[84] (*People v. Mayfield* (1997) 14 Cal.4th 668, 754.) Further, a defendant who takes the stand may be impeached to the same extent as any other witness. (*People v. Knighton* (1967) 250 Cal.App.2d 221, 226-227 [affirming that a defendant who testifies on his own behalf may be impeached by proof of a prior felony conviction].) However, no witness may be cross-examined as to irrelevant or immaterial matters. (Evid. Code, § 350; Pen. Code, § 1044 [duty of the trial court to control proceedings to limit evidence and argument to relevant and material matters]; *People v. Gloria* (1975) 47 Cal.App.3d 1, 4.) As a corollary and equally long-standing rule, a witness cannot be impeached on a collateral statement first made by him on cross-examination. (*People v. Whitholt* (1926) 77 Cal.App. 587, 589 [treatise and cases cited therein]; *People v. Lavergne* (1971) 4 Cal.3d 735, 744 [prosecutor cannot elicit otherwise irrelevant testimony on cross-examination merely for the purpose of contradicting it].) Finally, it is the duty of the trial court to control cross-

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[84] It should be noted that unlike the cross-examination of an ordinary witness, which may at the court's discretion exceed the scope of the direct examination, the cross-examination of a testifying defendant is more circumscribed because a defendant may never be cross-examined beyond the scope of direct. (Evid. Code, §§ 773, 772, subd. (d).) The basis of this limitation is the constitutional privilege against self-incrimination, as exceeding the scope of direct examination would amount to forcing the defendant to become a prosecution witness. (*People v. James* (1976) 56 Cal.App.3d 876, 887.)

examination "to protect the witness from undue harassment and embarrassment." (Evid. Code, § 765, subd. (a).)

Contrary to these established principles, the trial court's rulings here exposed appellant to the most embarrassing, harassing and patently irrelevant public scrutiny of his homosexual activities with Hernandez. As though it were not enough that the jury had already heard Hernandez's cross-examination, Shear's recitation and appellant's admission regarding the relationship, the court allowed the prosecutor to repeatedly press appellant regarding the exact number of times he and Hernandez had sex, to make the point:

> Q. Did you tell Detective Garay after admitting one time and after he asked how many times, did you later admit there were two times?
>
> A. Yes, a few times could be more – could it be five times even though it's not down, not written down.
>
> Q. So when you said one time, that was not true?
>
> A. It wasn't true of the sex that I had had. I'm not saying no, that I didn't have sex with him.
>
> Q. When you said you had sex with him one time to Detective Shear, that was not true; correct? . . . .
>
> A. Well, no.

(67RT 13736-13738.)

The point made – that appellant did not want to broadcast the extent of his homosexual activities to the police or the community – is irrelevant to any disputed issue in the case, including appellant's credibility.

The decision of the court of appeal in *Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011 (*Winfred D.*) is instructive. There, in a personal injury action, the court reversed a judgment in favor of

defendant Michelin because the trial court had erred in allowing the defense to introduce evidence of the plaintiff's extramarital affairs to show that the cause of the accident was not defective tires, but rather that the defendant was overloading the vehicle due to the financial strain of supporting two families. The defense argued, inter alia, that because the plaintiff had made contradictory and inconsistent statements about his extramarital relationships and his illegitimate children during pretrial depositions, it should be allowed to impeach him with evidence concerning those relationships. (*Winfred D., supra*, 165 Cal.App.4th at p. 1014.)

The court of appeal found that the trial court had abused its discretion by admitting the evidence, and that such an error resulted in a miscarriage of justice requiring reversal. (*Winfred D., supra*, 165 Cal.App.4th at pp. 1027, 1029.) The court reasoned that the evidence about the plaintiff's extramarital affairs was irrelevant to the substantive issue in the case, i.e., the cause of the accident. And to the extent the evidence was relevant to his credibility, it should have been excluded under Evidence Code section 352 because it was more prejudicial than probative. (*Id.* at p. 1029.)

The same reasoning applies with even greater force here. It was uncontested that the number of times appellant had sexual relations with Hernandez was collateral to any issue bearing on guilt or innocence, and that it was beyond the scope of appellant's direct examination. Indeed, here, unlike in *Winfred D., supra*, 165 Cal.App.4th 1101, the prosecutor proffered no theory of substantive relevance or materiality.[85] Rather, as in

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[85] While the prosecutor contended at the outset that his purpose for seeking admission of this evidence was to suggest that appellant had an

(continued...)

Winfred D., the prosecutor defaulted to that most generic of relevancy categories – credibility.

However, as the court should have recognized – even as to credibility – the incremental probative value of appellant's denial that he was bisexual and his minimizing the number of times he had engaged in homosexual acts was negligible. At the point the prosecutor chose to confront appellant with these embarrassing subjects, the jury had already been shown the videotape of appellant's confession (53RT 11213; Peo. Exh. 14), and heard extensive, detailed testimony regarding appellant's statements to both Garay and Shear. (See [Garay] 52RT 11162-11180; 53RT 11216; [Shear] 54RT 11296-11301, 11322-11326 [appellant's prior drug arrest]; 11326-11332 [appellant's contacts with Reyes and Hector Hernandez on August 3, 1997]; 11332-11341 [the knife]; 11341-11346 [Oscar], 11349 [rape of Lorena]; 62RT 12592-12595 [homosexual relationship with Hector Hernandez].) Thus, even if one's homosexual proclivities or sexual practices were not such sensitive, private subjects, grilling appellant about his sexual identity and activities was cumulative and superfluous, at best, to assessing his credibility.

But, of course, reluctance to disclose the extent of one's homosexual activities is not a legitimate gauge of general credibility when it is only very recently that homosexuals have been able or willing to "come out" about their sexual identity. (See *SmithKline Beecham Corp. v. Abbott Laboratories*, *supra*, 740 F.2d 471, 485; Argument VIII, *ante*.) That the

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[85](...continued)
indiscriminate "desire for sexual activity," he did not overtly proffer this impermissible "propensity" theory of guilt later in the trial. (48RT 10105.)

court was persuaded otherwise, and allowed the jury to use appellant's homosexual relations against him, defies history and commonsense.

As this Court has stressed, a trial court's obligation in balancing the dangers of prejudice, confusion and undue time consumption when considering collateral impeachment evidence "is particularly delicate and critical where what is at stake is a criminal defendant's liberty" – here, more critically, appellant's life. (*People v. Lavergne*, *supra*, 4 Cal.3d at p. 744.) The trial court plainly failed to fulfill this obligation.

The court substantially overvalued the relevancy of appellant's homosexual acts to any issue in the case, and correspondingly underestimated the potential prejudice of admitting this evidence for any purpose. Further, as demonstrated in Argument VIII, *ante*, and below, the court's faith in the curative power of its limiting instructions was misplaced. In sum, in allowing the prosecutor to attack appellant based on his denial of bisexuality and his lack of candor regarding the number of times he had sex with Hernandez was a manifest abuse of discretion.

D. The Cross-Examination About Appellant's Post-Invocation Statements to Garay About His Sexual Relationship With Hernandez Violated *Miranda*

In *Harris v. New York*, *supra*, the high court carved out an exception to the general rule that statements taken in violation of *Miranda* may not be admitted at trial. Harris's testimony in his own behalf "contrasted sharply" with what he told the police following his arrest. (*Harris*, *supra*, 401 U.S. at p. 225.) Charged with selling heroin to an undercover police officer on two occasions, Harris admitted at trial that he knew the undercover officer who testified against him, but denied making the first sale, and claimed that the second sale was of baking powder intended to defraud the purchaser. (*Id.* at p. 223.) Although the prosecution conceded that Harris's postarrest

statements were inadmissible under *Miranda*, the court allowed cross-examination of Harris about those statements, which addressed matters directly bearing on the charged offenses and at "complete variance" with his trial testimony: he had told the police that on the first occasion, he "acted as the undercover police officer's agent in obtaining the narcotics and . . . [on the second occasion] obtained the narcotics from an unknown person outside a bar and then sold them to the undercover agent in a bar." (*People v. Harris* (N.Y.Ct.App. 1969) 250 N.E.2d 349, 350; *People v. Harris* (N.Y.A.D. 1969) 298 N.Y.S.2d 245, 247.) The trial court instructed the jury that the statements "could be considered only in passing on petitioner's credibility and not as evidence of guilt." (*Harris*, *supra*, 401 U.S. at p. 223.)

Affirming the New York Court of Appeals, the high court held that Harris's credibility as a witness was properly impeached. The court relied upon its earlier holding in *Walder v. United States* (1954) 347 U.S. 62, permitting the prosecution to introduce illegally seized heroin to undermine Walder's testimony that he had never possessed narcotics. (*Harris*, *supra*, 401 U.S. at pp. 224-225, citing *Walder v. United States*, *supra*, 347 U.S. at pp. 63-64.) In *Walder*, the court had held that while "a defendant must be free to deny all the elements of the case against him without thereby giving leave to the government to introduce by way of rebuttal evidence illegally secured by it," there was "hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." (347 U.S. at p. 65.) Applying that rationale, the *Harris* court concluded that the defendant could not use the "shield provided by *Miranda*" to prevent impeachment of perjured testimony bearing directly on the crimes charged. (*Harris, supra,* 401 U.S.

at p. 226; accord, *Oregon v. Hass* (1975) 420 U.S. 714, 715 [statements made after defendant requested but was denied an opportunity to telephone a lawyer admissible solely for impeachment after defendant took the stand and "testified contrarily to the inculpatory information" he gave to police]; *Michigan v. Harvey* (1990) 494 U.S. 344, 351 [*Harris* exception applies where defendant's trial testimony about the facts of the offense contradicted his statements to the police about the offense].)

In *James v. Illinois* (1990) 493 U.S. 307, in declining to extend the *Harris* exception to witnesses other than a defendant, the high court reaffirmed the narrow scope of the exception adopted in *Harris* and *Walder*:

> The previously recognized exception penalizes defendants for committing perjury by allowing the prosecution to expose their perjury through impeachment using illegally seized evidence. . . . But the exception leaves defendants free to testify on their own behalf; they can offer probative and exculpatory evidence without opening the door to impeachment by carefully avoiding any statements that directly contradict the suppressed evidence.

(*Id.* at p. 313.)

None of these cases approved the admission of an illegally obtained statement for collateral impeachment of testimony elicited for the first time on cross-examination and having no relevance to issues of guilt or innocence. Thus, under a proper reading of *Harris*, the prosecutor here could only have impeached appellant with his previously excluded statement to Garay if that statement contradicted perjured testimony by appellant on direct examination bearing on the charged offenses. That did not occur here, and the prosecutor did not contend otherwise. Appellant made no statements on direct examination regarding his sexual relationship with Hernandez. Indeed, when asked to specify what testimony of appellant's he was trying to impeach with the excluded statements, the

prosecutor answered – nonresponsively – "his veracity." (66RT 13633.) The prosecutor could point to no inconsistency in appellant's testimony – let alone the perjury expressly demanded by *Harris* and its progeny. (*Ibid.*) Yet, the court admitted the excluded statement to Garay, patently misapplying *Harris*. In sum, the court not only abused its discretion in admitting the previously suppressed statement, it also violated appellant's *Miranda* rights.

E. The Error Was Prejudicial and Requires Reversal Of Appellant's Convictions, The Rape Special Circumstance and The Judgment Of Death

Although the court gave multiple limiting instructions, including one at the time of the improper cross-examination, the error in allowing appellant to be impeached regarding his sexual identity and the number of times he engaged in homosexual acts was irreparably prejudicial. The impeachment fell within the category of evidence courts have recognized as so unfairly prejudicial that a limiting instruction cannot prevent improper use. (*People v. Anderson*, *supra*, 43 Cal.3d at p. 1120; Argument VIII, *ante* [cases cited therein].)

Indeed, in the course of aggressively seeking admission of the homosexuality evidence, the prosecutor suggested several impermissible ways to use it.[86] (See *Ghent v. Woodford* (9th Cir. 2002) 279 F.3d 1121, 1131 [the prosecutor's "actions demonstrate just how critical the State

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[86] Appellant focuses on specific improper uses of the homosexuality evidence. However, the record does not foreclose the real possibility that one or more of appellant's jurors had such strong negative beliefs regarding homosexual relationships that they could not have been fair and unbiased in determining appellant's guilt once they learned of his sexual behavior with Hernandez.

believed the erroneously admitted evidence to be"].) The prosecutor's first proffer was that the homosexuality evidence was relevant to show appellant's "desire for sexual activity," including, it could be inferred, sodomy. (48RT 10105.) His last proffer was that appellant's not telling the truth about his relationship with Hernandez on the same day he made his confession could be used to defeat the inference that his confession was false because he did not know or misstated what had occurred. (67RT 13670.) The projected counter-inference was that since appellant had intimate knowledge of the details of his homosexual acts with Hernandez and did not tell the truth, he similarly lied about the "intimate" details of the crime.

The trial court did not address the first proffer because it was premature. The court accepted the prosecutor's last proffer and licensed the inference in its limiting instructions. Thus, as the prosecutor proposed, the court agreed and the instructions allowed, the jury could have concluded that appellant's confession to the shootings was true but his denial of the sex crimes false based on, in effect, a propensity to lie about sex and, on that basis, convicted him of all the charged crimes.

Appellant recognizes, of course, that by choosing to testify, he placed his credibility in issue. That being said, no fair, reliable or logical assessment of credibility can be based on a suspect's reluctance to disclose a homosexual relationship to the police under any circumstances, least of all while being interrogated for a double murder and the sexual assault of a minor.

Furthermore, notwithstanding what the limiting instructions expressly stated or intended, because the prosecutor was allowed to focus on the number of times appellant engaged in homosexual sex, not merely

the existence of the relationship, the cross-examination reinforced the natural temptation of jurors to infer that appellant had an excessive, abnormal or indiscriminate "desire for sexual activity," hence, a propensity to commit sex crimes.

As noted in the preceding argument, the court gave three separate, somewhat different limiting instructions regarding the homosexuality evidence. All three instructions were shown to be inadequate in Argument VIII, *ante*. Those discussions are referenced and incorporated, but not repeated, herein. It merits repeating, however, that because the jury was not screened pretrial for disqualifying beliefs or convictions concerning homosexual acts and those who engage in them, the general inference that jurors follow instructions is not warranted in this case. As such, given the inflammatory nature of the homosexuality evidence, its unnecessary repetition and the deficiencies in the limiting instructions, it cannot be said that the error in admitting the evidence was harmless under any standard of prejudice review.

That there were two prior hung juries is in itself compelling evidence of prejudice. Those juries also heard appellant's confession, his testimony and the prosecutor's vigorous cross-examination, but were properly spared the inflammatory evidence regarding appellant's sexual relationship with Hernandez. Apart from the homosexuality evidence, the substantive proof of guilt at the instant trial was not significantly different than that at the earlier trials. There still was no forensic evidence connecting appellant to the crime scene. Further, the most damaging evidence the prosecutor promised to present, for example, witnesses seeing a nine millimeter weapon in appellant's possession or hearing him threaten to harm Lorena, were denied by the witnesses when they took the stand.

In the end, as his closing argument reflects, the prosecutor's case at the instant trial still rose or fell on the reliability of Oscar's identifications and appellant's confession, which two prior juries had found insufficient for conviction. (See 76RT 15155-15156 [confession], 15156-15164 [Oscar], 15164-15170 [confession], 15173, 15174-15182 [confession], 15184-15185 [confession], 15187-15189 [confession]15191-15195 [confession and credibility], 15327-15328.) Thus, it simply is not possible to conclude that the admission of the homosexuality evidence did not contribute to the jury's eventual verdict. (Compare *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [beyond a reasonable doubt that the error did not contribute to the verdict] with *People v. Zambrano, supra*, 41 Cal.4th at p. 1135, fn. 13 [reasonable probability error adversely affected outcome].)

Because the admission of this evidence through Hernandez, Shear and the cross-examination of appellant denied appellant his rights to due process and a fair trial, as well as his Fifth Amendment rights under *Miranda*, the *Chapman* beyond-a-reasonable-doubt standard of harmless error is appropriate and reversal of the entire judgment is required. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

But even if the state's reasonably-probable standard were applied, appellant's convictions and the judgment would still have to be set aside because of the strong likelihood that, without the homosexuality evidence, this jury, like the prior juries, would have failed to convict.

The prejudice of admitting the evidence, moreover, was magnified with respect to the murder and special circumstance allegations as to Lorena. (See Pen. Code, § 190.2, subd. (a)(17)) [rape by instrument].) There was no evidence appellant ever had more than a fleeting contact with Lorena, nor that he had any motive whatsoever to do her harm. Surely,

when faced with this critical evidentiary gap, the likelihood that some jurors considered appellant's "desire for sexual activity" as proof of his motivation and guilt is strong.

Finally, because of the potential prejudicial spill-over of this evidence to the penalty phase, without any limitations on its use, a reasonable doubt exists as to the reliability and propriety of the death verdicts. (*People v. Boyce* (2014) 59 Cal.4th 672, 714 [state harmless error test at capital penalty trial, i.e., reasonable possibility the error affected the verdict, effectively same as *Chapman* harmless-beyond-a-reasonable doubt standard].) Consequently, reversal of the death judgment is appropriate on this ground, and as a consequence of the reversal of appellant's convictions.

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THE ADMISSION OF GENERIC GUN EVIDENCE WAS INADMISSIBLE UNDER EVIDENCE CODE SECTIONS 1101 SUBSECTIONS (a) AND (b), AND UNDULY PREJUDICIAL UNDER EVIDENCE CODE SECTION 352

Prior to the first and second trials, defense counsel moved under Evidence Code sections 1101, subdivision (b), and 352, and on relevancy grounds, to exclude Catherine Barrera's testimony that appellant allegedly told her he possessed a firearm sometime before the murders. (22RT 4595-4598, 4696-4698; 39RT 8375-8376.) The trial court denied defense counsel's motion, ruling that appellant's alleged statement was admissible, relevant and not unduly prejudicial. (22RT 4598, 4602, 4698; 39RT 8376.) Defense counsel also moved to exclude similar testimony by a new witness at the instant trial, Alonzo Perez. The trial court again denied the motion. (55RT 11140-11142.)

Catherine Barrera testified at the instant trial that during the time appellant lived with her in the summer of 1997, about two months before the murders, he told her that he owned a gun. He did not say what kind it was and she never saw a gun.[87] (62RT 12645-12648.)

Alonzo Perez testified at the instant trial that the day before the murders he went to the dump with appellant in appellant's truck. (57RT 11659.) On the way to the dump, appellant allegedly told Perez that he had a gun at his home. (57RT 11660.) Perez, however, was unable to identify appellant in court, although he said that he had known appellant for about three years. (57RT 11655-11657.)

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[87] Barrera's testimony at the instant trial was the same as her testimony at the first (22RT 4694-4699) and second trials (39RT 8375-8380).

The murder weapon in this case was most likely a Luger nine millimeter semiautomatic handgun (58RT 111829-11831), not a .22 caliber weapon that appellant told Detective Garay he had used to shoot the victims (54RT 11241.). No gun was found in the search of appellant's home. (55RT 11386.) Officers saw, but did not seize, some small caliber ammunition, possibly for a .22 handgun or a shotgun. (55RT 11386-11387.) Because the prosecution did not and could not claim that the gun referenced by either Berrera or Perez was the murder weapon, the admission of their testimony was prejudicial error.

A. Appellant's Alleged Statements to Berrera Or Perez Regarding Possession Of a Gun Were Inadmissible Propensity Evidence

Evidence Code section 1101, subdivision (a), provides, in pertinent part, that "evidence of a person's character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion." Evidence Code section 1101, subdivision (b), however, permits the admission of evidence that a person committed a crime or other bad act where relevant to prove a relevant fact "other than [the defendant's] disposition to commit such an act." The admission of Berrera's and Perez's testimony was error under both sections.

Evidence of possession of a weapon not used in the crime charged against a defendant is inadmissible because it "leads logically only to an inference that defendant is the kind of person who surrounds himself with deadly weapons – a fact of no relevant consequence to determination of the guilt or innocence of the defendant." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1055 [holding that evidence defendant previously possessed another gun similar to the murder weapon was inadmissible propensity evidence under section 1101, subdivisions (a) and (b)]; *People v. Riser* (1956) 47

Ca1.2d 566, 577 [where prosecution relied on specific weapon, error to admit evidence of other weapons found in defendant's possession a few weeks after the homicides]; *People v. Henderson* (1976) 58 Cal.App.3d 349.)

Just so here, the evidence of the alleged prior gun possession had no relevance except as prohibited propensity evidence – i.e., that appellant was the type of person who possessed weapons and was thus disposed to violence. Accordingly, Berrera's and Perez's testimony should have been excluded as irrelevant, where its only measurable probative value was as prohibited propensity evidence. (See *People v. Thompson* (1980) 27 Cal.3d 303, 318, fn. 20 [evidence is probative only if it is material, relevant and necessary].)

B. The Gun Evidence Should Have Been Excluded Under Evidence Code Section 352

Evidence Code section 352 provides that the "court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues or misleading the jury."

Neither Barrera nor Perez ever saw a gun of any type or caliber in appellant's possession. As such, their testimony attributing to appellant alleged admissions of generic gun possession was without the slightest probative value in determining whether appellant was the person who attempted to rape Lorena and then shot both Lorena and her mother with a nine millimeter semiautomatic weapon.

Further, because it is settled, as noted above, that evidence of a defendant's possession of a different weapon than that used in the charged crime is inadmissible propensity evidence, its exclusion is necessarily also

required for undue prejudice under Evidence Code section 352. Prejudice for purposes of section 352 means evidence that tends to evoke an emotional bias against the defendant (*People v. Crew* (2003) 31 Cal.4th 822, 842) or that may be misused by the jury (*People v. Filson* (1994) 22 Cal.App. 4th 1841, 1851). Here, evidence of the alleged prior possession of a weapon within weeks or days of the crime could well have evoked in the jurors a bias against appellant and a completely unfounded inference that he possessed the weapon used to shoot the victims. As such, its prejudicial effect substantially outweighed any minimal relevance the evidence might have had.

It has been observed,

> . . . that when the foundation of an alleged section 352 error is that the erroneously admitted evidence was more prejudicial than probative, a due process analysis would virtually duplicate the 352 analysis. It has been noted, '[a] careful weighing of prejudice against probative value under [Evidence Code section 353] is essential to protect a defendant's due process right to a fundamentally fair trial.' [Citations.]

(*People v. Partida* (2004) 16 Cal.Rptr.3d 777, 784, superceded by *People v. Partida* (2005) 37 Cal.4th 428, 432 [accepting the court of appeal's conclusion that the trial court erred in overruling certain trial objections under Evidence Code section 352 and concluding that such error rises to level of due process violation if it renders trial fundamentally unfair].) Here, had the trial court carefully weighed the prejudicial effect of admitting the gun evidence against its probative value as required by Evidence Code section 352, it would not have admitted such minimally

relevant but demonstrably prejudicial other gun evidence.[88] In sum, the evidence should have been excluded, and its admission was an abuse of discretion and a violation of appellant's due process rights.

C. The Erroneous Admission Of The Gun Evidence Was Not Harmless, Requiring Reversal Of The Guilt Verdicts and Death Sentence

Ordinarily, state court error in admitting evidence is subject to the *Watson* test for harmless error (*People v. Watson* (1956) 46 Cal.2d 818, 836), that is, whether it is reasonably probable the error affected the trial result. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1135, fn. 13.) The erroneous admission of evidence under state law results in a federal due process violation if it makes the trial fundamentally unfair. (*People v. Partida, supra*, 37 Cal.4th at p. 439.) Federal constitutional error will not be found harmless unless the state can show beyond a reasonable doubt that the error did not contribute to the verdict. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) The erroneous admission of the gun evidence in this case was prejudicial under the state law standard. But even if this stricter standard were not met, the erroneous admission of the gun evidence was clearly prejudicial under the federal harmless error standard

There were significant gaps in the prosecution's proof, chief among them was the complete absence of any physical evidence tying appellant to the crime. Appellant's confession did not fill this gap since he misidentified the weapon used in the shootings as a .22 caliber gun,

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[88] Although the line of cases rejecting other gun evidence was not specifically cited to the court, the apposite objections were made and the logic underlying those decisions should have been self-evident.

consistent with the shells found in his house. Appellant had no prior convictions involving a weapon or violence of any kind.

The prosecution's efforts to connect appellant to the knife found at the scene came to little when its expert conceded on cross-examination that the knife found at the crime scene and the supposedly "matching" knife seized from appellant's home were significantly different. (63RT 12867-12902.)

The prosecution's attempt to connect appellant to the murder weapon, a nine millimeter weapon, fell equally short. For the first time at the instant trial, the prosecution called Raul Madrid, Ermanda Reyes's brother-in-law, expecting him to testify that he had returned a nine millimeter handgun to appellant about a week before the shootings. (57RT 11793-1179.) Instead, Madrid testified that he did not know appellant and never gave him a nine millimeter handgun. (57RT 11794-11797.) Further, he denied ever telling Ermanda Reyes's brother, Camareno [*sic*] Reyes, any such story.[89] (57RT 11797-11798.)

As a result, lacking the hoped-for evidence linking appellant to the type of gun used in the crime, the prosecutor simply resorted to innuendo and impermissible propensity evidence through the testimony of Barrera and Perez. But the very deficiencies in the prosecution's proof, which this evidence sought to cure, establish that its erroneous admission very likely contributed to appellant's convictions of the murder charges. Accordingly, reversal of the judgment of conviction and sentence of death is required

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[89] Camareno (Camerino) Reyes was yet another new witness at the instant trial who, as the victim's brother, had a strong bias against appellant. (See 62RT 12603.)

because the state cannot show beyond a reasonable doubt that the error did not contribute to the verdict.

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XI

THE TRIAL COURT ABROGATED ITS DUTY TO ENSURE APPELLANT RECEIVED A FAIR TRIAL AND DUE PROCESS OF LAW WHEN IT PERMITTED THE PROSECUTION TO IMPLY THAT MOTIVE EVIDENCE EXISTED TYING APPELLANT TO THE KILLING OF ERMANDA REYES WITHOUT REQUIRING A SHOWING THAT ANY WITNESS POSSESSED PERSONAL KNOWLEDGE OF SUCH A MOTIVE

The prosecution sought to show that appellant told Ermanda Reyes that if she did not pay him money that she owed him then her daughter would have to pay; subject matter that might be relevant to a motive to commit the charged crimes. Believing that the prosecution would be unable to legitimately place this evidence before the jury via the testimony of any witness who had personal knowledge of such a statement, the defense objected early and often to the prosecutor's attempts to probe this area. Yet, rather than hold a hearing out of the jury's presence to determine whether the prosecution could legitimately introduce this evidence, the trial court permitted the prosecution to repeatedly place this concept before the jury in questions to a series of witnesses, none of whom possessed personal knowledge such a statement had been made. The trial court's failure to conduct the necessary preliminary screening prior to letting the prosecution place this concept before the jury neglected its obligations under state law and resulted in a violation of appellant's rights to due process and a reliable guilt and penalty trial under the state and federal Constitutions. (U.S. Const., Amends. 5th, 8th, 14th; Cal. Const., article I, §§ 15, 17.)

A. Factual Background

The question of whether appellant had threatened Reyes was initially brought to the court's attention when the defense indicated it intended to

call Lola Ortiz as a witness for the purpose of establishing that she had never seen appellant at Reyes's home. (65RT 13426-13428.) The prosecutor responded by asserting that if that evidence was adduced, he intended to call two witnesses – Margaretta Zepeda and Maria Alicia Palomares – who would state that Ortiz told them she had been present at Reyes's house when appellant threatened Reyes. (65RT 13428-13429; 66RT 13472.) The defense alerted the court that Ortiz would deny she had been present at any such conversation and requested that the prosecutor make an offer of proof in that regard. (65RT 13430.)

The trial court then held a hearing regarding the entirety of Ortiz's proposed testimony, and appellant once again objected to any attempt by the prosecutor to adduce testimony from Ortiz regarding a purported threat by appellant toward Reyes. (66RT 13471-13473.) More specifically, defense counsel alerted the court to the fact that Ortiz had specifically told her that Ortiz had not been present during any threat and that she had heard about appellant's supposed threat from Reyes. (*Ibid.*) Once again, the prosecutor asserted that two witnesses had told his investigators that Ortiz told them she had been present at Reyes's house when appellant threatened her. (66RT 13472-13474.) The prosecutor conceded, however, that Ortiz had not confirmed this. (66RT 13473.) Defense counsel then objected that any testimony about this subject would constitute hearsay, would be more prejudicial than probative, and requested that Ortiz be examined on this subject "in limine" before being permitted to testify about it. (66RT 13474-13475.) Both parties and the court seemed to agree this was an appropriate

approach and that Ortiz should not refer to Reyes as being the source of any hearsay information.[90] (66RT 13476.)

The prosecution next broached the subject of appellant threatening Reyes during its cross-examination of him. (67RT 13784.) Defense counsel objected to pursuing this topic on the basis that there was no evidence to provide a foundation for the question; nor would the prosecution be able to develop any such evidence. (67RT 13784-13786.) In response, the prosecutor advised the court that if appellant denied making any threats he intended to call Lola Ortiz to ask her if she was present when appellant made the threat, and if she denied being present, he would present two witnesses who would testify that she told them she was present when the threat was made. (67RT 13786-13789.) The trial court permitted the question and stated it would give a special jury instruction if the prosecutor did not "tie [the evidence] up." (67RT 13791-13792.) Following that ruling, the prosecutor asked appellant if he had a conversation with Reyes – in the presence of Ortiz – wherein he asked her for payment for fixing her car and told her that either she would pay him or her daughter would pay. Appellant denied having such a conversation. (67RT 13792.) After this answer, the trial court admonished the jury that questions were not evidence and unless there was some other evidence relating to the incident they should assume the incident did not occur. (67RT 13793.)

This subject matter arose again when the prosecutor indicated an intention to call Ortiz as a rebuttal witness for the purpose of impeaching

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[90] Ortiz testified for the defense, but was not asked by either party about any purported statement appellant may have made to Reyes. She did, however, testify that she had never seen appellant at Reyes's house. (70RT 14274-14275.)

appellant's denial that he made the statement. Defense counsel objected that it was improper rebuttal; that Ortiz would deny having heard the statement; and that following this procedure was more prejudicial than probative under Evidence Code section 352. The trial court overruled the defense objections and permitted the prosecution to call Ortiz as a rebuttal witness. (72RT 14522-14524.) Upon being called, Ortiz denied being present at a time when appellant and Reyes had any discussion about Reyes owing appellant any money; denied hearing appellant tell Reyes that if she did not pay her daughter would pay; and denied reporting such a conversation to Zepeda and Palomares. (74RT 14836.) Following this testimony, the court admonished the jury that the questions of counsel are not testimony; that the statements of the witness constituted testimony. (74RT 14836-14837.)

Immediately following Ortiz's unequivocal denials, the prosecution called Zepeda as a witness. She testified that Ortiz never told her she was present at a time when appellant "[said] some things to Ermanda [Reyes]." (74RT 14845.) She said that Ortiz told her things that she had been told by Reyes. (74RT14846.) In other words, Zepeda was the recipient of double hearsay. Once this became clear, the trial court issued another admonition to the jury to disregard the testimony. (74RT 14848.)

In his final attempt to place actual testimony before the jury rather than inferences arising from improper questioning, the prosecutor called Palomares as a witness. The prosecutor asked her if Ortiz told her that she was present when appellant made certain statements, and she said Ortiz had not said that to her. (74RT 14851-14852.) At this point, for the first time, the trial court ordered the jury out of the courtroom so that the witness could be fully questioned to ascertain whether the prosecution was capable

of laying a foundation for the elicitation of legitimate testimony. (RT74:14852-14853.) During this questioning, Palomares said that Ortiz told Zepeda and herself that she heard appellant went to Reyes's home and demanded money that was owed to him; that Reyes had refused to pay the money; and that appellant said that if she did not pay the money her daughter would pay. (74RT 14853-14854.) She said she did not know how Ortiz knew these things and never told anyone that Ortiz was personally present to hear such a conversation. (74RT 14854.)

The trial court found that all of the rebuttal evidence was presented without a proper foundation, but denied a defense motion for mistrial. (74RT 14864-14865.) The court admonished the jury that the evidence presented by Ortiz, Zepeda, and Palomares was unreliable, and neither the testimony nor the questions asked of them were to be considered by the jury. The court then polled the jurors and each of them said they could follow that admonition. (74RT 14866-14871.)

B. The Trial Court Failed to Fulfill Its Duty to Ensure That Incriminatory Information Would Not Be Placed Before the Jury Unless That Information Could Be Said to Be Based On a Witness's Personal Knowledge

The trial court serves an essential role in ensuring that a defendant receives a fair trial. "[T]he trial court is the gatekeeper of the evidence to which the jury is exposed." (*People v. Deane* (2009) 174 Cal.App.4th 186, 199; see *People v. Cottone* (2013) 57 Cal.4th 269, 284 [trial court performs threshold screening function to shield jury from evidence so factually weak as to undermine its relevance].) Nowhere is this gatekeeper function more significant than when it comes to ensuring that the jury only hear testimony that is based upon a witness's personal knowledge. The California Evidence Code is clear that other than in situations involving an expert

witness, the testimony of a witness about a particular matter is inadmissible unless the witness has personal knowledge of the matter. (Evid. Code, § 702, subd. (a).)

The Evidence Code is also particularly specific about the manner in which the trial court is to determine whether this foundational requirement is met. Whenever a party objects to testimony on the ground that the witness lacks personal knowledge, the trial court must require a showing of personal knowledge before the witness may testify. (Evid. Code, § 702, subd. (a).) As this Court has noted, this means that "'proof of personal knowledge must be shown *first*, once a party has made an objection that the proffered witness lacks personal knowledge of the facts to which he proposes to testify.'" (*People v. Daniels* (1991) 52 Cal.3d 815, 862, quoting Jefferson, Cal. Evidence Benchbook (1st ed. 1972) § 26.3, pp. 354-355, original italics.)

This concept is reinforced further by Evidence Code section 403, which generally permits a trial court to conditionally admit evidence for which a preliminary fact must be proven, subject to the preliminary fact being supplied later in the trial. An exception to the general rule, however, applies to the personal knowledge requirement. Provisional admission may not take place when personal knowledge is the preliminary fact to be proven. (Evid. Code, § 403, subd. (b).)

Both the statutory and decisional law of this state firmly establish two distinct principles relating to the presentation of evidence: (1) a witness, other than an expert, may only present testimony about which the witness has personal knowledge; and (2) when an issue is raised as to personal knowledge, such knowledge must be demonstrated before the

witness is permitted to testify before the jury. Here, both of these firmly established principles were violated.

There is no doubt that testimony impeaching appellant about whether he made the disputed statement needed to be based on the personal knowledge of someone that the statement was made by appellant. In this case, the only "someone" ever proffered to fill that role was Lola Ortiz. (72RT 14522-14523.) As recounted above, Ortiz denied ever hearing the statement at issue. The prosecution then attempted to impeach Ortiz with witnesses who would say that she told them she heard the statement – a further attempt to demonstrate personal knowledge from someone that appellant had made the statement, albeit one step removed because it was being done via impeachment. Even this failed, however, when neither of the two witnesses could testify that Ortiz averred any personal knowledge of such a statement being made by the defendant.

The situation in this case is virtually identical to the fact situation addressed by the court of appeal in *People v. Valencia* (2012) 146 Cal.App.4th 92. In *Valencia*, witness L. purportedly made a statement to witness C. that the defendant had been molesting the victim over a long period of time. Witness C. testified to this statement, but witness L. stated she never saw any abuse over a period of time and did not learn of any abuse until the day it was reported. (*Id.* at pp. 102-103.) The court of appeal held that the "rationale for requiring a hearsay declarant to have personal knowledge when the declarant's statement is admitted for its truth is identical to the rationale for requiring a witness to have personal knowledge of the subject matter of the witness's testimony." (*Id.* at p. 103.) Consequently, since there was no evidence that L. possessed personal

knowledge regarding the hearsay statement related by C., it was error to admit it. (*Id.* at p. 104.)

The analysis applicable to the facts of *Valencia* is also applicable in this case. In short, the prosecution had to produce some evidence that Ortiz had personal knowledge of a statement by appellant which revealed a motive for committing the crime or no evidence regarding such a statement would be admissible. Thus, the concept of "personal knowledge" was squarely before the trial court as it related to this crucial issue.

The factual development of the issue should not have come as a surprise to the trial court. Prior to Ortiz being called as a rebuttal witness, defense counsel objected on the basis that the prosecution would not be able to show she had personal knowledge of appellant having made a statement reflective of motive. This objection was initially noted prior to the defense calling Ortiz as its own witness regarding other matters. (65RT 13426-13430; 66RT 13471-13476.) The objection was raised again when the prosecutor sought to impeach appellant with the supposed threat (67RT 13784-13786), and raised yet again when the prosecution called Ortiz as a rebuttal witness (72RT 14522-14523). At none of these junctures did the trial court fulfill its obligation to hold a hearing to resolve this issue. Rather, the trial court did exactly what the law prohibits, it deferred the issue to the jury. Ultimately, in overruling defense counsel's objections, the trial court stated that "what the truth is, the finder of fact is there to examine." (72RT 14524.) As discussed above, that is incorrect. The trial court has a preliminary responsibility to determine whether there is a basis for a finding of personal knowledge; the trial court may not simply defer that responsibility to the jurors.

It appears that after three witnesses – appellant, Ortiz, and Zepeda – contradicted the prosecutor's proffer, the trial court realized that the procedure it was following was not correct. When Palomares was called as the final witness to try and salvage the prosecution's efforts and to lay a foundation for this line of questioning, the trial court finally said it did not want the attempt to lay a foundation done in the presence of the jury. (74RT 14853.) As we know, that attempt failed as well and no foundation was ever laid regarding this evidence.

The law requires that whenever an issue of personal knowledge is raised, the proponent of the evidence must make a showing of such personal knowledge prior to the witness testifying before the jury. (*People v. Anderson* (2001) 25 Cal.4th 543, 575.) An objection regarding personal knowledge was made here and the trial court failed to adhere to this requirement. This failure caused appellant's jury to be subjected to highly prejudicial inferences that damning evidence existed supplying a motive for appellant to commit this offense. The trial court failed in its gatekeeper function and failed to ensure that state procedural rules were followed in a manner that would protect appellant from being tried by innuendo rather than evidence.

In addition to the trial court's error constituting a violation of applicable state law, the consequence of the error resulted in a violation of appellant's right to a fair trial and due process of law. The due process clause makes reliability "the linchpin in determining admissibility" of evidence. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 114.) The admission of unreliable evidence violates a defendant's due process right to a fair trial under the Fourteenth Amendment. (See *Jackson v. Denno* (1964) 378 U.S. 368, 385-386; *United States v. Wade* (1967) 388 U.S. 218, 230.) Further,

"fact finding procedures aspire to a heightened standard of reliability" in capital proceedings. (*Ford v. Wainwright* (1986) 477 U.S. 399, 411; *Beck v. Alabama* (1980) 447 U.S. 625, 638.) Since the trial court specifically told the jury that they had heard unreliable testimony (74RT 14867), the resultant consequence of the trial court's failure to follow the applicable state procedures was a violation of appellant's right to due process of law.

C. The Trial Court's Instructions To The Jury Did Not Cure The Error Arising From The Failure To Resolve This Issue Prior To Permitting These Witnesses To Testify

The trial court gave an instruction to the jury each time the prosecution failed to show that appellant made a statement reflecting a motive to kill Reyes or her daughter. Then, following the prosecution's ultimate failure in this regard, the court gave an overarching instruction in an attempt to cover all of the rebuttal witnesses. None of these instructions cured the error involved here.

After appellant denied making any type of statement related to motive, the trial court told the jury that questions were not evidence and that "unless there [was] some other evidence relating to it, that's it. It didn't happen. You're not to speculate otherwise." (67RT 13793.)

After Ortiz testified that she was never present at Reyes's house when appellant made a statement relating to motive, and that she never reported any conversation to Zepeda in the presence of Palomares, the trial court advised the jury that the questions of counsel did not constitute evidence and only the testimony of the witness constituted evidence. (74RT 14836-14837.)

After Zepeda testified that Ortiz did not tell her that she was present and heard appellant make statements to Reyes (74RT 14845), but that she had told an investigator that Ortiz had been told something by Reyes

relating to something that appellant said (74RT 14846), the court gave the jury the following admonition:

> All right. Ladies and gentlemen, there's been reference in the testimony about something that Ermanda purportedly said to somebody else was reported to somebody else, that's hearsay. That's totally unreliable. So that part of this witness's testimony is stricken. You shall disregard it.
>
> Do you understand that? Do you all understand how important that is? This case is not going to be decided in any way by inadmissible hearsay.
>
> Some hearsay is admissible under the law, but some is so unreliable it does not come in, and this is exactly that type of unreliable hearsay. It's stricken. You shall disregard it in its entirety.

(74RT 14848.)

Finally, after Palomares testified that Ortiz did not tell her she was present when appellant made certain statements (74RT 14851-14852), the trial court told the jurors that it was striking all of the rebuttal evidence of Ortiz, Zepeda, and Palomares, and that they should disregard it (74RT 14866-14867). Specifically, the court said:

> You are to entirely and totally disregard it. It is unreliable and shall not be considered by you in any way whatsoever. You're to strike it from your mind right now, totally.
>
> And I'm not only talking about the testimony, obviously. By striking testimony, that means that the questions of counsel are out, as well, because questions of counsel, as you well know, as I've previously admonished you many times, are not evidence. So there's absolutely nothing to consider relating to the testimony of those three witnesses.

(74RT 14867.)

The plethora of instructions the trial court delivered to the jury did not cure the error the court committed by failing to require the prosecution

to demonstrate that this evidence, in some form, met the test of personal knowledge. In some respects, it probably confused the jurors more than it aided them.

The difficulty in instructing away the kind of harm that emanates from this type of situation is the essence of why both the Evidence Code and court decisions require that personal knowledge be demonstrated prior to evidence being placed before the jury when an issue is made about whether such a foundation exists for the proffered testimony. The personal knowledge requirement is of such primacy, and the harm inherent in letting the jury hear evidence that does not emanate from personal knowledge is so prejudicial, that it stands apart from other evidence in the way it is treated. If a simple instruction would suffice to cure any error in requiring personal knowledge, then there would not be any need to make a distinction between this type of objection and any other objection. This type of evidence fits the description that "if you throw a skunk into the jury box, you can't instruct the jury not to smell it." (*Dunn v. United States* (5th Cir. 1962) 307 F.2d 883, 886.)

These general principles are especially applicable here because of the type of innuendo that the prosecutor was placing before the jury with his questions. A prosecutor is required to establish guilt by use of admissible evidence, not by relying on aspersions or innuendo which is based on inadmissible evidence. (*United States v. Schindler* (9th Cir. 1980) 614 F.2d 227, 228; see *Goldsmith v. Witkowski* (4th Cir. 1992) 481 F.2d 697, 704 [state cannot present through back door what it failed to present through appropriate evidence].)

Even were it possible to remove the taint of the jury being exposed to the inference that appellant had a motive to commit the crimes at issue, the

instructions here did not accomplish this task. The initial instruction relating to a rebuttal witness concerned Ortiz's testimony. As regards her testimony, the trial court did not actually strike it, but merely advised the jurors that questions were not evidence; it was the answers that were evidence. (74RT 14836-14837.) Consequently, the only instruction actually striking her testimony was the omnibus instruction given after Palomares's testimony.

As to Zepeda, the trial court ordered the jury to disregard "reference in the testimony about something that Reyes purportedly said to somebody else was reported to somebody else, that's hearsay." (74RT 14848.) One assumes that the trial court was trying to instruct the jury to disregard Zepeda's testimony that Ortiz told her that she had been told by Reyes something appellant had said to Reyes. Rather than explicitly directing the jury to this precise testimony, however, the trial court gave an instruction that was ambiguous at best and hopelessly confusing at worst.

It was not until the instruction following Palomares's testimony that the trial court ordered all of the rebuttal evidence to be stricken. In doing so, however, it told the jury that the rebuttal evidence should be disregarded because it was unreliable and therefore should not be considered by the jurors at all. (74RT 14867.) Given the fact that the sum of the evidence provided by the three witnesses was that no one possessed personal knowledge that appellant had ever made a statement to Reyes indicative of motive, the court effectively told the jury that evidence showing this absence of a motive was unreliable evidence. In other words, rather than explicitly telling the jurors that there was an absence of personal knowledge by any witness that any statement relating to motive had been made by appellant, the jurors were instructed that the testimony demonstrating that

fact should be disregarded because it was unreliable. Thus, the instruction had the opposite effect of the curative purpose it should have served.

Even if the instructions were merely ambiguous, there is a reasonable likelihood the jury would have construed them in a manner that violated appellant's rights. (See *People v. Whisenhunt* (2008) 44 Cal.4th 174, 214.) The concept at issue here is a defendant's right to be convicted by use of testimony that has some anchor in the personal knowledge of the witness providing the evidence. There is certainly a reasonable likelihood that the jury would have construed the court's final instruction in the manner related immediately above, which fails to convey the sanctity of the principle the personal knowledge requirement of the Evidence Code was designed to protect.[91]

D. The Trial Court's Error Permitted The Prosecution to Place Harmful Innuendo Before The Jury Which Prejudiced Appellant and Resulted In a Denial Of His Right to a Fair Trial and Due Process Of Law

The trial court failed to follow the requisite procedures to ensure that the jury was exposed only to reliable evidence. The result was that the jurors were subjected to improper innuendo which conveyed to them that appellant had a motive for killing and had, in fact, threatened the victims in this case. The taint resulting from this action was not removed by the attempted curative instructions supplied by the trial court. The only

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[91] The fact that there was ambiguity in the court's instructions is demonstrated by a juror's question as to whether it was permissible to use "what happened as far as weighing Lola Ortiz's credibility on prior testimony." (74RT 14870.) The court instructed the juror not to do so, but the question itself indicates the jurors were struggling with how to apply the instructions.

question remaining is whether appellant was prejudiced by these events. He was.

The jury received an instruction that while motive was not an element of the offense, the existence of a motive could tend to establish the defendant's guilt. (10CT 2697 ["Requested by People"]; 75RT 15072-15073; CALJIC No. 2.51.) Common sense tells us that a juror is going to be influenced by a showing that a defendant had a motive to commit the crime at issue. The court of appeal has recognized that where there is no direct evidence of the identity of the perpetrator, as is the case here, evidence of motive is always a proper subject for proof, and the fact of motive is particularly material. (*People v. Daniels* (1971) 16 Cal.App.3d 36, 46.) Further, evidence showing quarrels, antagonism, or enmity between an accused and the victim of a violent offense proves motive to commit the offense, and "evidence of threats of violence by an accused against the victim of an offense of violence is proof of identity of the offender." (*Ibid.*; accord, *People v. San Nicolas* (2004) 34 Cal.4th 614, 668.)

This Court has noted that it is proper to admit evidence tending to establish prior quarrels between a defendant and decedent, as well as the making of threats by the defendant, to show any motive the defendant may have harbored. (*People v. San Nicolas*, *supra*, 34 Cal.4th at p. 668.) Thus, where evidence of motive is available, the prosecution will want to introduce it to give coherence to its theory of the case. (See *People v. Bunyard* (1988) 45 Cal.3d 1189, 1236 [describing importance of motive in criminal prosecutions]; *People v. Rubio* (1946) 75 Cal.App.2d 697, 708 [discussing central importance of motive where evidence of guilt circumstantial].)

Here, the prosecution tried to give coherence to its case by presenting inadmissible evidence of motive to the jury. Ultimately, the trial court ruled that the evidence could not be considered, but due to its failure to follow the required preliminary procedures – procedures prescribed by both the Legislature and the courts in order to avoid exactly this type of situation – the jury heard the substance of the motive evidence anyway. This was presented to the jurors via the prosecutor's questions and Zepeda's statement that Reyes told Ortiz about the statements appellant made to her.

That the production of motive evidence was important to the prosecution is shown by the extraordinary effort the prosecution took to try and place this evidence before the jury. (See *Ghent v. Woodford* (9th Cir. 2002) 279 F.3d 1121, 1131 [the prosecutor's "actions demonstrate just how critical the State believed the erroneously admitted evidence to be"].) After appellant denied making the purported threatening statement, the prosecution did not let the issue rest but called Ortiz to show that appellant made such a statement in her presence. After Ortiz denied hearing such a statement from appellant, the prosecution called Zepeda and Palomares to impeach her testimony. After Zepeda testified that Reyes was the source of the reported statement, the prosecution called Palomares, who, of course, also denied hearing Ortiz state that she heard appellant make any statement. Still desperate to get the purported statement before the jury, the prosecutor sought to call his investigator, Camarillo, as a witness to impeach Zepeda and Palomares. (74RT 14863.) The court refused. (*Ibid.*) The prosecutor only ceased this parade of witnesses when he ran out of people to call to the witness stand and the trial court recognized the damage that had been done.

The use by innuendo of this inadmissible evidence constitutes constitutional error that cannot be found harmless beyond a reasonable

doubt. (*Chapman v. California* (1967) 386 U.S. 18, 23.) Conducting a trial by trying to place unreliable evidence before the jury so that the jury is left with the unmistakable impression that the defendant has made statements indicating a motive to commit the crime is manifestly prejudicial and violates a defendant's state and federal constitutional rights to due process and the right to a fundamentally fair trial and penalty phase under the Fifth, Eighth and Fourteenth Amendments to the federal Constitution. (*Beck v. Alabama* (1980) 447 U.S. 625, 637; *Spaziano v. Florida* (1984) 468 U.S. 447, 456; *Gardner v. Florida* (1977) 430 U.S. 349, 358.).

Appellant's rights were also violated under article I, sections 1, 7, 13, 15, 16 and 17 of the California Constitution. The significance of motive evidence has been clearly acknowledged by courts in this state. Given the dispute at trial over whether appellant was the perpetrator, it is reasonably probable that a result more favorable to appellant would have been reached if the trial court had followed the proper procedure and denied the prosecution the opportunity to taint the trial by presenting this inadmissible evidence before the jury. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The importance of this evidence to the prosecution is shown by the sheer number of witnesses called to prove the motive, amply demonstrating the significance attached to motive evidence by the prosecution. Harm is also demonstrated by the fact that the prosecution chose to magnify the significance of this evidence by dramatically presenting it in rebuttal, rather than properly presenting it during its case-in-chief. (See *People v. Thompson* (1980) 27 Cal.3d 303, 330; *People v. Mayfield* (1997) 14 Cal.4th 668, 761; see also Argument XII, *post.*)

Under both the state and federal standards, appellant is entitled to a reversal of his convictions and sentence.

XII

THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT BY PRESENTING INADMISSIBLE, UNRELIABLE AND HIGHLY INFLAMMATORY HEARSAY EVIDENCE OF AN ALLEGED STATEMENT BY APPELLANT INDICATING A MOTIVE FOR THE MURDERS. THE COURT'S ADMONITIONS FAILED TO CURE THE PREJUDICE AND REVERSAL IS REQUIRED

A. Introduction

The prosecutor committed prejudicial misconduct by insinuating through his questioning that shortly before the murders appellant had demanded money from Ermanda Reyes and told her that if she did not pay him, her daughter, Lorena, would pay. The prosecutor lacked a good faith basis for believing he could prove the purported statement through admissible evidence and failed to admonish his witnesses to prevent the disclosure of inadmissible hearsay or its source, which the trial court had expressly excluded.

Although the trial court ultimately struck the evidence and repeatedly instructed the jury to disregard it (74RT 14866-14867; 75RT 15057), this devastatingly prejudicial bell could not be un-rung. (See Argument XI, *ante*.) Appellant's demand for payment of Reyes and his statement of intent to exact payment from her daughter if she did not pay was nothing short of an evidentiary bombshell. No admonition, no matter how strongly worded, could have negated the effect this inadmissible, inflammatory, unreliable and highly prejudicial evidence had on the minds of the jurors. As a result of the prosecutor's misconduct, appellant's jury was irrevocably tainted, and appellant's rights to due process and a reliable guilt and penalty trial under the state and federal Constitutions were violated. (U.S. Const.,

Amends. 5th, 8th, 14th; Cal. Const., article I, §§ 15, 17.) The entire judgment must therefore be reversed.

B. The Relevant Facts

At the first two trials, the prosecutor called Lola Ortiz as a witness in her case-in-chief, eliciting from Ortiz that in the months preceding the murders, she had seen appellant and Reyes talking to each other on only two occasions. One time was at a gas station called Applegate's; the other was in front of Ortiz's own house. Ortiz indicated that on both occasions Reyes and appellant acted "normal." (18RT 3874-3900; 39RT 8477-8527.) At the second trial, Ortiz testified that she had never seen appellant at Reyes's house. (39RT 8509.)

At the guilt phase of the instant trial, the prosecutor informed the court and defense counsel that he would not be calling Lola Ortiz as a witness in his case-in-chief. (63RT 12815.) Defense counsel subsequently indicated that she would therefore call Ortiz as a defense witness (65RT 13426), and a hearing followed regarding the nature and admissibility of the testimony to be elicited from Ortiz. At that hearing, the prosecutor asserted that Ortiz was "not a percipient witness to anything, so everything she testifies to is hearsay that she's heard from somebody else." (65RT 13427.) Nevertheless, after defense counsel stated that she intended to elicit from Ortiz that she had never seen appellant at Reyes's house (65RT 13427-13428), the prosecutor stated:

> [I]f [Ortiz is] gonna get up there and testify about never seeing the defendant before or something of that nature, then I would probably have to ask her about her statements to witnesses that we discovered of the defense, Maggie Ruiz [*sic*] who's already testified, and there's another woman, I can't think of her name right now, where Isabel Soto [*sic*] told both of them that she was present about a week and a half

> before the murders.[92] It's my understanding she's denying this now, but they both independently told officers that she told each of them at the same time that she was present when the defendant was – had a conversation with Ermanda about a week and a half before the murders, Ermanda needed money and when the victim Ermanda said I'm not going to give it to you because you haven't fixed the car, that he then said well, you're gonna pay me or your daughter will. . . . Now, that's pretty relevant evidence. The problem is Lola is all over the place, and – but if she gets up there and says she hadn't seen the defendant with Ermanda or something like that, of course, I'll have to bring that in.

(65RT 13428-13429.) Defense counsel objected and requested an offer of proof, asserting that whenever Ortiz claimed to know anything, it eventually became clear that the source was Reyes and was therefore inadmissible hearsay. (65RT 13430.)

The following day, the court held a further hearing at which defense counsel again asserted that Ortiz had not heard appellant make the purported demand for payment. (66RT 13471-13472.) The prosecutor responded that Margaretta Zepeda and Maria Alicia Palomares told his investigators that Ortiz had told them that shortly before the murders she was at Reyes's house when appellant came to the house and asked Reyes to be paid for work he had done on Reyes's car. Reyes told him her car was running worse than it had before he repaired it and that she would pay him when he fixed it. Appellant reportedly responded that if she did not pay

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[92] In naming Maggie Ruiz as one of the individuals who had heard Ortiz make the statement at issue, the prosecutor clearly misspoke. There is no indication in the record that Ruiz professed to have any knowledge in this regard. The two witnesses Ortiz had told about appellant's demand were Margaretta Zepeda and Maria Alicia Palomares. (See, e.g., 75RT 14858.) It is also clear that in referring to "Isabel Soto," the prosecutor intended to refer to Lola Ortiz.

him, her daughter would pay. (66RT 13472-13474.) The prosecutor conceded that Ortiz had not confirmed this. (66RT 13473.) Defense counsel objected that the evidence was hearsay and more prejudicial than probative pursuant to Evidence Code section 352. (66RT 13474.) Defense counsel requested that Ortiz be examined on this subject in limine and argued that if the evidenced showed that Ortiz had not heard appellant make the purported statement, evidence that she had learned of appellant's statements from Reyes should be excluded. (66RT 13475.)

Defense counsel:	I think [Ortiz will] testify that she never said that [she was present when appellant made the purported demand], but I don't want her to then testify I heard it from Ermanda [Reyes]. If she's going to be impeached, that's one thing, but that the source is identified and the statements coming in as Ermanda's statements is objectionable, hearsay, highly inflammatory and 352.
The Court:	All right. That seems appropriate.
	. . . .
Prosecutor:	I think the witness is counsel's witness and perhaps she could instruct her not to say who the source was if there's a source other than being present.
Defense counsel:	I won't seek to elicit that, but I don't want the D.A. to.
The Court:	That's fair.
Prosecutor:	I won't elicit the source.

(66RT 13476.)

Appellant was called as a witness and testified in his own defense. On cross-examination, over defense counsel's strenuous objection that Ortiz had not heard appellant make the statement and that Zepeda and Palomares

were unreliable (67RT 13785-13792), the prosecutor confronted appellant with his alleged statement.

> Q: Were you at Lola Ortiz's house approximately a week to a week and a half before Ermanda and Lorena were murdered, having a conversation with Ermanda in the presence of Lola; during the conversation, were you asking for money for payment for fixing Ermanda's vehicle?
>
> A: No. I absolutely do not know of her – of what you're talking about.
>
> Q: And did –
>
> A: I never went to that lady's house, no.
>
> Q: When – did you tell Ermanda when she told you no, she wasn't going to pay you till the car was fixed that either she was going to pay or her daughter was going to pay?
>
> A: How could I when I never had any conversation of anything like that? I don't know what you're talking about, absolutely not.

(67RT 13792.)

Following appellant's testimony, Lola Ortiz was called as a witness and testified for the defense. (70RT 14272-14304.) Defense counsel elicited from Ortiz that she had never seen appellant at Reyes's house (70RT 14274-14275); the prosecutor did not cross-examine Ortiz regarding her alleged statement to the contrary made to Zepeda and Palomares.

After the close of the defense case, the prosecutor called Ortiz to testify in its case in rebuttal. Ortiz repeatedly denied that she and appellant were ever present at Reyes's house at the same time, and denied ever telling anyone she was there. (74RT 14828, 14831, 14834.) Nevertheless, over defense counsel's strenuous objection, the following exchange occurred:

> Q: When the defendant was with Ermanda, speaking to Ermanda, you were present, did you hear the defendant tell Ermanda

that he wanted to be paid for some work he had done on her car?

A: No.

Q: When you were present during the time the defendant was speaking with Ermanda, did Ermanda tell the defendant that if he ever fixed her car, she would pay him?

A: No.

Q: During this same conversation following Ermanda's statement, did the defendant tell Ermanda that if she didn't pay him, her daughter would pay him?

A: No.

Q: Did you report this conversation to Margaretta Zepeda at a time that Alicia Palomares was also present?

A: No.

(74RT 14836.) The prosecutor then called Margaretta Zepeda and, again over defense objection, asked Zepeda if Ortiz had spoken to her about hearing appellant make "certain statements" to Reyes. Zepeda answered in the affirmative. (74RT 14841.) Over appellant's objection that Zepeda's testimony was hearsay, inherently unreliable, more prejudicial than probative and nothing other than gossip (74RT 14843-14844), the prosecutor continued:

Q: Let's see, the conversation that I'm asking you about with Lola would have referred to a time when Lola heard Juan Sanchez make certain statements to Ermanda. . . . Did she tell you she was present and heard Juan Sanchez say some things to Ermanda?

A: No.

. . . .

Q: Was there a time that you spoke to some investigators while Maria Alicia Palomares was at your house?

A: Oh, yes, I did say that.

Q: Okay. Now, did you talk to them about what Lola had told you that she heard Juan say?

A: No, she did not hear. She was told by Ermanda.

(74RT 14844-14845, 14846.)

The prosecutor then called Palomares, who also denied that Ortiz had said she was present when appellant made "certain statements." (74RT 14851-14852.) Out of the presence of the jury, Palomares confirmed that Ortiz had said that appellant had argued with Reyes about money and angrily demanded that she pay him. Palomares stated that she did not know how Ortiz had obtained this information, and she denied that she had ever told investigators from the district attorney's office that Ortiz had been present for the conversation between appellant and Reyes. (74RT 14853-14854.)

Defense counsel moved for a mistrial on the ground that the prosecutor had committed misconduct by knowingly presenting unreliable evidence with the goal of prejudicing the jury. (74RT 14857.) The prosecutor claimed "based on the reports that I have here and speaking with my investigator that these witnesses would testify that Lola Ortiz had told them that she was present during the course of the conversation." (74RT 14857.) He then called his investigator, Florencio Camarillo, to the witness stand. Camarillo confirmed that he had spoken to Zepeda and Palomares and read his report of that interview into the record:

> Lola told [Zepeda and Palomares] the defendant Juan Sanchez had gone over to victim's residence in the evening to be paid for some mechanical work he'd done on her car. She told him [*sic*] that Ermanda told him – told defendant that her car was running worse than before he worked on it. Ermanda supposedly told Defendant Sanchez that if he would fix her

car, then she would pay him. Defendant Sanchez told – then told Ermanda that if she didn't pay him, her daughter would pay him.

(74RT 14861.) When asked whether Lola had told them she was personally present for this conversation, Camarillo testified that he "assumed" that was what Lola had said, and he stated, "that's how I received it." (*Ibid.*) He further stated that after he spoke to Zepeda and Palomares, he told the prosecutor orally about that conversation:

Q: And did that include that they had said that Lola was present at the time that – that she overheard this conversation with Ermanda and Juan?

A: That's how I understood it, yes.

(74RT 14862.) The trial court ruled that the evidence presented in rebuttal was without foundation, but denied appellant's mistrial motion, finding that there had been no "intentional conduct by the prosecutor to bring inadmissible evidence in court," and that the prosecutor had "a good faith, although apparently mistaken, belief that these two witnesses would impeach – the last two witnesses would impeach Lola Ortiz if she'd denied the conversation." (74RT 14865.) The court then instructed the jurors that all the rebuttal evidence had been stricken, was totally unreliable, that they should disregard it and strike it from their notes and their minds. (74RT 14866 -14871.)

The following day, defense counsel renewed the motion for a mistrial, arguing that the prosecutor committed misconduct by failing to admonish Ortiz not to mention that Reyes was the source of the hearsay, and eliciting that evidence in front of the jury. (75RT 15036-15038.) The prosecutor stated:

> I think I was quite clear with the witness, and I'm not sure it was Lola who testified to that, but I think I was clear with the witness that I was speaking of a time that Lola was present and not any other time. I certainly didn't seek to elicit any other time. Quite frankly, I – I'm still uncertain as to whether the witnesses were being truthful in their testimony on Friday or whether they had agreed to change it. I don't know. I wish – had I have known what happened, I wouldn't have put anyone on the stand. . . . I did not specifically instruct her. I did not speak to her about her testimony and, in fact, I don't believe she was the one who said that.

(75RT 15038-15039.) The trial court denied the mistrial motion and again stated there was no misconduct. (75RT 15039.) The court had admonished the jury that the evidence presented by Ortiz, Zepeda, and Palomares was unreliable, and neither their testimony nor the questions asked of them were to be considered by the jury. The court had then polled the jurors and each of them said they could follow that admonition. (74RT 14866-14870.)

C. The Prosecutor Lacked a Good Faith Belief That He Had Admissible Evidence Of Appellant's Statement to Reyes Demanding Payment and Stating That If She Did Not Pay Him, Her Daughter Would Pay

It is misconduct for a prosecutor to "ask questions which clearly suggest[] the existence of facts which would have been harmful to defendant, in the absence of a good faith belief by the prosecutor that the questions would be answered in the affirmative, or with a belief on his part that the facts could be proved . . . if their existence should be denied.' [Citation]." (*People v. Perez* (1962) 58 Cal.2d 229, 241; accord, e.g., *People v. Young* (2005) 34 Cal.4th 1149, 1186; *People v. Bolden* (2002) 29 Cal.4th 515, 562; see also, A.B.A. Standards for Criminal Justice, § 3-5.7(d) (3d. ed 1993) ["A prosecutor should not ask a question which implies the existence of a factual predicate for which a good faith belief is

lacking"].) A prosecutor may not interrogate a witness "solely for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given." (*People v. Wagner* (1975) 13 Cal.3d 612, 619; accord, *People v. Young*, *supra*, 34 Cal.4th at p. 1186; *People v. Visciotti* (1992) 2 Cal.4th 1, 52.)

Here, the prosecutor lacked a good faith belief that he could prove that appellant had made the statement at issue because he had no evidence that Ortiz had personal knowledge of that statement. In fact, all indications were that she had heard about the statement, if at all, from Reyes after the fact. The prosecutor conceded that Ortiz would deny that she had been present when the purported statement was made. (65RT 13428; 66RT 13473.) He was also clearly aware that at both of appellant's prior trials, Ortiz had testified for the prosecution that she observed only two conversations between appellant and Reyes, both of which were "normal" in tone. (18RT 3874-3900; 39RT 8477-8527.) In fact, Ortiz had testified that she had never seen appellant at Reyes's house, where the purported disagreement over money was supposed to have occurred. (39RT 8509.) Indeed, the record indicates that the prosecutor subjectively believed that Ortiz had not in fact been present at the time. Even after the prosecutor had put Zepeda and Palomares on his witness list (see 49RT 10326-10331), he himself asserted that Ortiz was "not a percipient witness to anything, so everything she testifies to is hearsay that she's heard from somebody else." (65RT 13427.)

Although the prosecutor contended that Zepeda and Palomares would testify that Ortiz had told them she was present at the time of the alleged dispute (65RT 13428-13; 66RT 13472-13474), he had no

affirmative indication that they would in fact do so. He had received both a written and an oral report from his investigator, Florencio Camarillo, regarding his interviews of Zepeda and Palomares. (74RT 14861-14862.) Camarillo's written report indicated that Ortiz had told her two friends that appellant had gone to Reyes's residence to be paid for some mechanical work that he had done on her car, and theat when Reyes told defendant that she would not pay him, appellant told Reyes if she did not pay, her daughter would pay him. (74RT 14861.) Although Camarillo testified that his report indicated that Ortiz was present when appellant made that statement (see 74RT 14860), in fact, the report said no such thing; it gave absolutely no indication of how Ortiz knew of this exchange (see 74RT 14861).

Nor did Camarillo's oral report provide the prosecutor with a separate good faith basis for believing that either Zepeda or Palomares would say Ortiz had claimed to have been personally present for the conversation. (74RT 14862.) When asked under oath whether Zepeda or Palomares had stated Ortiz had told them she was present for the alleged dispute between appellant and Reyes, Camarillo responded, "Well, the way she was telling me that's what I assumed that she was present" (74RT 14861), and "that's how I received it" (*ibid*). When asked if he had reported to the prosecutor that Zepeda and Palomares had told him Ortiz was present at the time of the conversation between appellant and Reyes, Camarillo responded, "that's how I understood it." (74RT 14862.)

Camarillo's carefully worded answers and his unwillingness to answer "yes" to any of the foregoing questions indicated that neither Zepeda nor Palomares had ever said that Ortiz was – or claimed to have been – present. (See 74RT 14861-14862.) Camarillo's oral report to the prosecutor was therefore certainly also lacking in any affirmative indication

that Ortiz had in fact told Zepeda and Palomares that she had been present for the alleged dispute between appellant and Reyes. At most, Camarillo may have provided the prosecutor with a *hope* that Camarillo's assumption was accurate, but without some affirmative indication from either Palomares or Zepeda, it was equally possible – and arguably a more reasonable inference – that Ortiz had simply been gossiping with them, repeating for her friends what Reyes had allegedly told her, and had not claimed to have been present for the alleged conversation between appellant and Reyes.

Evidence that shortly before the murders, appellant had demanded payment from Reyes and told her he would exact payment from her daughter if she did not pay would have been extremely probative of guilt, as it would have established that appellant had a motive for killing both victims. Evidence of motive "completes the prosecution's theory of the case by explaining the purpose of and reason for the defendant's actions," and "provides the jury with a framework within which to analyze the defendant's purported actions." (*Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1173, as amended (Jan. 22, 2002), overruled on other grounds by *Payton v. Woodford* (9th Cir. 2002) 299 F.3d 815.) Had the prosecutor been able to establish through solid, admissible evidence that appellant had made the statements at issue, that evidence would undoubtedly have been a centerpiece of his case for guilt. Here, by contrast, although Ortiz had been called as a prosecution witness at appellant's prior two trials, the prosecutor chose not to call her in his case-in-chief. Instead, he chose to first raise the specter of appellant's purported statement in his cross-examination of appellant. His choice of strategy strongly suggests that he realized he was

unlikely to be able to establish the requisite foundation for the statement's admission, but he wanted to get the evidence before the jury regardless.

Based on the above-described record, the prosecutor lacked a basis for believing in good faith that he would be able to establish that Ortiz had personally heard appellant's demand for payment from Reyes or appellant's threat to exact payment from her daughter if she did not pay. Given his obligation to establish Ortiz's personal knowledge of appellant's purported statement before presenting it to the jury, Ortiz's sworn testimony consistently indicating that she had not in fact heard that statement, defense counsel's repeated and strenuous objections asserting the same, the ambiguity of the information that the prosecutor had received from Camarillo concerning Ortiz's personal knowledge, the explosive effect that appellant's purported statement to Reyes would inevitably have if presented to the jury, it cannot be said that he was acting in good faith when he proceeded to insinuate through questioning that appellant had made the statement at issue. As shown below, the fact that he failed to contact and admonish his rebuttal witnesses before they testified confirms that he was not operating in good faith and that he sought to present the evidence to the jury regardless of its admissibility.

D. The Prosecutor Committed Misconduct By Failing to Admonish Ortiz, Zepeda and Palomares Before Calling Them to The Witness Stand

A prosecutor who has reason to believe that a witness may refer to inadmissible evidence in his testimony commits misconduct when he fails to admonish the witness in advance of his testimony to refrain from mentioning the inadmissible evidence. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1406.) "'A prosecutor has the duty to guard against statements by his witnesses containing inadmissible evidence. [Citations.]

If the prosecutor believes a witness may give an inadmissible answer during his examination, he must warn the witness to refrain from making such a statement. [Citation.]'" (*Ibid.*, quoting *People v. Warren* (1988) 45 Cal.3d 471, 481, internal citations omitted in original.)

Before the jury had heard any hint of appellant's purported demand for payment, defense counsel repeatedly asserted, and the prosecutor conceded, that Ortiz would testify that she had not been present for the alleged dispute between appellant and Reyes over money, and that she had only heard about it from Reyes. (65RT 13430; 66RT13471-13475.) Over defense counsel's strenuous objection, the trial court ruled that the prosecutor had a sufficient basis for questioning Ortiz about appellant's purported statement. Defense counsel then argued that if Ortiz should deny having heard the statement, any evidence that Reyes had been the source of her information should be excluded as it was not only inadmissible hearsay, but highly inflammatory and more prejudicial than probative, and the trial court agreed. (66RT 13476.) The prosecutor noted that Ortiz was appellant's witness and suggested that defense counsel "instruct her not to say who the source was if there's a source other than being present." (*Ibid.*) Defense counsel responded, "I won't seek to elicit that, but I don't want the D.A. to." (*Ibid.*) The prosecutor stated, "I won't elicit the source." (*Ibid.*)

The prosecutor had strong reason to believe that not only Ortiz, but also Zepeda and Palomares, his purported impeachment witnesses, might testify that Ortiz had learned about appellant's statement from Reyes. As set forth above, the information that investigator Camarillo had provided was at best highly ambiguous concerning what, if anything, Zepeda and Palomares would say about how Ortiz knew of appellant's alleged statement. (See section B, *ante*.) In light of the fact that Ortiz had never

told the prosecution or its agents that she was present when appellant made this statement and that she had testified repeatedly under oath that she had never seen appellant at Reyes's house where the dispute between appellant and Reyes allegedly occurred, together with the prosecutor's own admission that Ortiz had no first-hand information about anything, the prosecutor had ample reason to doubt that Ortiz had actually told Zepeda and Palomares that she was present at the time of appellant's alleged statement. There was also ample reason to suspect that Zepeda and Palomares might testify that Ortiz had only heard about appellant's statement from Reyes. Given the trial court's ruling and the prosecutor's own promise not to elicit the source of Ortiz's information if it was other than her own observation, the prosecutor was duty bound to admonish Zepeda and Palomares, as well as Ortiz, accordingly. The prosecutor clearly did not do so.

As defense counsel predicted, when the prosecutor asked Ortiz about appellant's purported statement, she denied being present. Although Ortiz did not testify that she had heard about appellant's statement from Reyes, Zepeda did, testifying that Ortiz did not hear appellant make the purported statement at issue, but rather she "was told by Ermanda." (74RT 14846.) When the prosecutor asked Palomares what she had told investigators about how Ortiz knew of appellant's dispute with Reyes over money, she responded, albeit out of the jury's presence: "I do not know whether Ermanda told or she heard it. I never asked her." (74RT 14854.)

The fact that both Zepeda and Palomares unhesitatingly offered up the excluded information indicates that the prosecutor had not admonished them. In response to appellant's subsequent motion for mistrial, the prosecutor expressly stated that he had not spoken to Ortiz before her

testimony.[93] (75RT 15039.) Had he admonished Zepeda or Palomares, he would certainly have so indicated, as his failure to do so was in fact the subject of defense counsel's motion. He did not do so, and the following statement confirms that he believed he could control his witnesses sufficiently by limiting the scope of his direct examination:

> I think I was quite clear with the witness, and I'm not sure it was Lola who testified to that, but I think I was clear with the witness that I was speaking of a time that Lola was present and not any other time I certainly didn't seek to elicit any other time. Quite frankly, I – I'm still uncertain as to whether the witnesses were being truthful in their testimony on Friday or whether they had agreed to change it. I don't know. I wish – had I have known what happened, I wouldn't have put anyone on the stand.

(75RT 15038-15039.)

Had the prosecutor fulfilled his duty to admonish Zepeda and Palomares, they would have told him that Ortiz had not said that she had been present at the time of appellant's alleged statement. He would have then refrained from even attempting to put the inadmissible hearsay evidence of appellant's statement before the jury. His decision to not contact them insulated him from that information, and shielded him from knowing with certainty that his witnesses would not establish the foundation required for appellant's alleged statement to be admissible. As a result, the jury was led to believe not only that Ortiz had heard that appellant had made the damning statement but also that she had heard that

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[93] Defense counsel mistakenly asserted that it was Ortiz who had disclosed that she had learned of appellant's purported statement from Reyes. (75RT 15037-14038.) In fact, it was Zepeda.

directly from Reyes, a fact that the trial court had properly ruled was inadmissible, inflammatory, and extremely prejudicial.

The fact that the prosecutor admonished none of his witnesses including Ortiz herself indicates that he was not acting in good faith, that he knew appellant's alleged statement might well be inadmissible hearsay, but he chose a strategy that would allow him to put appellant's alleged statement in front of the jury regardless of its inadmissibility. However, whether he acted in good or bad faith is irrelevant to the analysis. (*People v. Bolton* (1979) 23 Cal.3d 208, 213-214. "[E]mphasis on intentionality is misplaced. '[I]njury to appellant is nonetheless an injury because it was committed inadvertently rather than intentionally.'" (*Ibid.*, quoting *Note, The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case* (1954) 54 Colum. L.Rev. 946, 975.) As this Court has observed, "the term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error." (*People v. Hill* (1997) 17 Cal.4th 800, 823, fn.1.)

E. The Prosecutor's Misconduct Violated Appellant's Right to Confrontation and a Fair Trial; The Trial Court's Admonitions Failed to Cure The Error and Reversal Is Required

Whether the prosecutor's error results from affirmative misconduct or omission, the error may deprive a criminal defendant of the guarantee of fundamental fairness and thereby violate the due process clause of the Fifth and Fourteenth Amendments. (*Darden v. Wainwright* (1986) 477 U.S. 168, 178-179; *Donnelly v. DeChrisoforo* (1974) 416 U.S. 637, 743.) Under California law, a prosecutor who uses deceptive or reprehensible methods to persuade either the court or the jury has committed misconduct even if

such action does not render the trial fundamentally unfair. (*People v. Young*, *supra*, 34 Cal.4th at p. 1196; *People v. Morales* (2001) 25 Cal.4th 34, 44.)

This Court has recognized that even an immediate admonition will not cure the prejudicial effect of inadmissible evidence that appellant threatened to kill the victim; evidence of "a type that would leave an inerasable impression on the jury." (*People v. Lambright* (1964) 61 Cal.2d 482, 486; cf. *Thomas v. Hubbard*, *supra*, 273 F.3d at pp. 1175-1176 [despite limiting instruction that they were not admitted for their truth, inadmissible hearsay evidence tending to establish that defendant and victim fought on the day of the crime and therefore defendant had a motive for killing violated confrontation clause and were so prejudicial that reversal was required].) Indeed, the trial court's admonition striking the evidence, with the prosecutor's assent, showed a belated appreciation of its harmful impact – especially when heard at the end of the trial.

Rebuttal evidence is restricted "to prevent a party from unduly magnifying certain evidence by dramatically introducing it late in the trial." (*People v. Carter* (1957) 48 Cal.2d 737, 753-754; Pen. Code, § 1093.) Thus, it has been said that the main purpose of the statute is to prevent gamesmanship and sandbagging. "[T]he governing consideration is fairness." (5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 546, pp. 782-783.) Here, the prosecutor took a calculated risk in delaying introduction of the evidence until rebuttal when it would have the greatest impact on appellant's jury. Should the evidence prove inadmissible, the damage would be irreparable where there was little other proof of motive as to Reyes and none as to Lorena.

The only other possible source of motive was appellant's confession.[94] Appellant told Garay that he was looking for Reyes because she owed him money and had been calling him names and insulting him. (13CT 3446-3449.) He did not say, however, that this was the reason he shot her or Lorena. (13CT 3450, 3451 [when asked what happened, appellant responded, "I just shot her" referring to both Reyes and Lorena]) Later, appellant said, but then retracted, that Lorena had a knife in her hand. (13CT 3469-3471, 3472, 3473, 3475.) Appellant denied having sex with Lorena or touching her; he had no explanation for what happened. (13CT 3474-3475, 3476, 3477-3478, 3481-3482; 13RT 3385, 3554.) In short, because neither appellant's confession nor any other evidence supplied a motive for the charged crimes, the evidence of the purported threats inevitably filled that gap.

Appellant does not doubt that the jurors, when polled, sincerely believed they could strike the damaging evidence from their minds, but on this record, their assurances were not realistic. (See *People v. Anderson*, *supra*, 43 Cal.3d at p. 1120 [recognizing that some evidence is so prejudicial that a curative instruction will not prevent its improper use].) In this case, which rested on an identification made by a five year old and a confession that included more denials than admissions and significant factual mistakes, few, if any, of the jurors in this case could have completely ignored the "unerasable" evidence – from the victim's own lips

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[94] Other than a 10-year-old drug offense, there was no evidence presented of any prior bad act committed by appellant involving weapons, sexual violence, or nonconsensual sex from which an inference of common motive, plan, intent or propensity could have been inferred. (See Evid. Code, §§ 1101, subd. (b), and 1109.)

– that appellant had threatened her and her daughter. The standard of prejudice to be applied here matters little. Under either the state law or the federal constitutional standard of review, the prosecutor's misconduct in presenting inadmissible, inflammatory hearsay to the jury was prejudicial and requires reversal of the entire judgment. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133; *People v. Crew* (2003) 31 Cal.4th 822, 839 [state law error: reasonable probability more favorable result without the misconduct]; *Chapman v. California* (1967) 386 U.S. 18, 24 [federal constitutional error: harmless beyond a reasonable doubt].)

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XIII

THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT DURING HIS GUILT PHASE CLOSING ARGUMENT

A. The Prosecutor Committed Misconduct By Inviting The Jury to Imagine Reyes's Last Thoughts

It is well settled that "an appeal to the jury to view the crime through the eyes of the victim is misconduct at the guilt phase of trial; an appeal for sympathy for the victim is out of place during an objective determination of guilt." *(People v. Arias* (1996) 13 Cal.4th 92, 160; *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, revd. on other grounds, *Stansbury v. California* (1994) 511 U.S. 318); *People v. Fields* (1985) 35 Cal.3d 328, 362; see also *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250 [misconduct to ask jury to suppose crime had happened to their children]; *People v. Kipp* (2001) 26 Cal.4th 1100, 1129-1130 [invitation to the jury to reflect on what the victim has lost through her death is improper at the guilt phase of the trial].)

In his closing argument at the guilt phase, the prosecutor argued that appellant shot and killed Lorena while her mother watched, and that Reyes died wondering if her youngest child, Oscar, would be killed too. He provided the jury with the following imagined narration of Reyes's thoughts in the final moments of her life:

> [Reyes's neighbor] heard two shots, a pause of four or five seconds and then the last shot, and that's where Ermanda got killed, outside her daughter's door, watching, most likely, her daughter dying. She had one other child in the house, and she gets to her bedroom where that child is and she gets on the phone. The defendant goes in there and she's not even able to call the police. She died not knowing if her youngest was gonna make it, but knowing her oldest hadn't.

(76RT 15201.) Out of the jury's presence, defense counsel objected that the argument was misconduct and requested the court to admonish the prosecutor not to attempt to inflame the jury with the thought processes of the victim while dying. (76RT 15203.) The trial court found that in isolation the argument was not inflammatory, but noted that it would watch to see if the prosecutor made additional similar remarks, which would then cross over the line and be improper. (76RT 15204.)[95] The court seriously underestimated the prejudicial impact of the prosecutor's improper appeal to sympathy for the victim.

The prosecutor's argument here closely resembles the prosecutor's argument at issue in *People v. Stansbury*, *supra*, 4 Cal.4th 1017, in which the prosecutor urged the jury to "[t]hink what she [the victim] must have been thinking in her last moments of consciousness . . . Think of how she must have begged or pleaded or cried." (*Id.* at p. 1057) This Court found that the statements were directed at arousing the passions of the jury and were out of place during the objective determination of guilt. (*Ibid.*)

Further, by claiming to speak for one of the victims, the prosecutor improperly argued matters outside the record, and became an unsworn witness, presenting information to the jury that appellant had no way to

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[95] The court ruled as follows:

> If there's a pattern that is established, then the court will deal with it appropriately. There is a line between what is argument and inflaming. I'm not ruling the prosecutor has reached the point of inflammatory argument. Defense has put her concern on record, and the court will continue to listen to the argument and, if there's a further objection, I'll consider it.

(76RT 15203-15204.)

challenge by way of cross-examination. (*People v. Hill* (1997) 17 Cal.4th 800, 827-828; *People v. Bell* (1989) 49 Cal.3d 502, 539; *People v. Gaines* (1997) 54 Cal.App.4th 821, 825; *United States v. Beckman* (8th Cir. 2000) 222 F.3d 512, 527; *United States v. White* (7th Cir. 2000) 222 F.3d 363, 370.) "When this tactic is achieved in the guise of closing argument, the defendant is denied Sixth Amendment rights to confrontation and cross-examination." (*People v. Gaines*, *supra*, 54 Cal.App.4th at p. 825; see also *People v. Harris* (1989) 47 Cal.3d 1047, 1083 ["If a prosecutor's argument refers to extrajudicial statements not admitted at trial, the defendant may be denied his right under the Sixth Amendment to confrontation and cross-examination, thus requiring reversal of the judgment unless the court is satisfied beyond a reasonable doubt that the misconduct did not affect the verdict."]; *People v. Bolton* (1979) 23 Cal.3d 208, 213, 215, fn. 4 [same].)

B. Reversal Is Required

In order to reverse on the basis of prosecutorial misconduct under state law, it must be shown that "had the prosecutor refrained from the misconduct, [it is] reasonably probable that a result more favorable to the defendant would have occurred." (*People v. Strickland* (1974) 11 Cal.3d 946, 955.) In assessing a claim of prosecutorial misconduct, the reviewing court independently examines the record to determine whether there is a "reasonable likelihood" the jury misapplied the prosecutor's remarks during closing argument in violation of the federal or California Constitutions. (See *People v. Clair* (1992) 2 Cal.4th 629, 662-663.) When, as here, the claim of misconduct focuses upon statements made by the prosecutor during closing argument, "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of

remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; see also *People v. Smithey* (1999) 20 Cal.4th 936, 960; *People v. Benson* (1990) 52 Cal.3d 754, 793.)

Here, by inviting the jurors, especially those who had children, to imagine themselves inside Reyes's mind, the prosecutor intentionally and deliberately appealed to the jury's sympathy for her. As it is reasonably probable that the verdict would have been more favorable to defendant without the misconduct (cf. *People v. Martinez* (2010) 47 Cal.4th 911, 956), prejudice is established under both the state and, a fortiori, federal constitutional standards of review (*Chapman v. California* (1967) 386 U.S. 18, 24 [misconduct harmless beyond a reasonable doubt]). Accordingly, reversal of the entire judgment is required.

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XIV

THE EVIDENCE WAS INSUFFICIENT UNDER PENAL CODE SECTION 190.3, FACTOR (b), TO SHOW THAT APPELLANT COMMITTED AN UNLAWFUL BATTERY WHEN HE TAPPED HIS STEPDAUGHTER'S HEAD

A. Introduction

Over defense objection, the prosecutor was permitted at the penalty phase to present evidence that at some unspecified time in the past, appellant tapped his stepdaughter, Tammy Lucio, on the head while disciplining her. (77RT 15441-15443, 15506-15507.) The evidence was admitted under Penal Code section 190.3, factor (b), as an alleged violation of Penal Code section 242, battery, and the jury was instructed accordingly.[96] (79RT 15861, 15863.) At the close of the evidence, appellant renewed his objection based on the insufficiency of the evidence adduced by the prosecutor. (79RT 15756.)

The court first erred by admitting the evidence and then by allowing the jury to consider it as an aggravating factor because appellant's disciplining his stepdaughter by tapping her on the head was neither unlawful nor a crime. Moreover, even assuming arguendo that it could have been a crime, insufficient evidence was presented of any physical contact involving force or violence to qualify as factor (b) evidence.

The erroneous admission of this evidence and its submission to the jury violated appellant's state and federal constitutional rights to due

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[96] The jury was instructed, in pertinent part:

> Every person who willfully uses any force or violence upon the person of another is guilty of the crime of battery in violation of Penal Code section 242.

(79RT 15863.)

process and a fair and reliable penalty determination (U.S. Const., Amends. 8th & 14th; Cal. Const., art. I, §§ 7, 15 & 17), and reversal of his death sentence is required (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Brown* (1988) 46 Cal.3d 432, 447).

B. Appellant's Alleged Discipline Of His Stepdaughter Was Not a Crime

Section 190.3, factor (b), permits the prosecution to introduce evidence, during the penalty phase of a capital case, of other "criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." However, to be admissible, "[e]vidence of other criminal activity introduced in the penalty phase under section 190.3, factor (b), must demonstrate 'the commission of an actual crime, specifically, the violation of a penal statute.'" (*People v. Jurado* (2006) 38 Cal.4th 72, 136, quoting *People v. Phillips* (1985) 41 Cal.3d 29, 72.) Further, any prior crime offered in aggravation must be proved beyond a reasonable doubt. (*People v. Robertson* (1982) 33 Cal.3d 21, 53-55.) Here, appellant committed no crime in disciplining his stepdaughter.

Tammy testified that appellant was her stepfather, that he never hit her, and that, at most, tapped her on the head very gently when disciplining her. (77RT 15506, 15509, 15514-15515.) She described her relationship with appellant as good, but she also described him as overprotective when it came to boys. (77RT 15506, 15509, 15511.) Tammy denied telling prosecution investigator Wayne Spencer that the tap was a "striking blow"; these were his words, not hers. (77RT 15506, 15514.) Spencer did not testify and no tape recording of his interview of Tammy was played for the

jury. Hence, there was no evidence of any crime, much less one involving force or violence, presented to the jury at the penalty phase.

It is well-established that a parent has a right to reasonably discipline by punishing a child and may administer reasonable punishment without being liable for a battery.[97] (*People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1050 [and cases cited therein].) The difference between legitimate discipline of a child and battery or child abuse is one of degree. Generally, corporal punishment falls within the parameters of a parent's right to discipline unless it is not warranted by the circumstances, i.e., not necessary, or when such punishment, although warranted, was excessive. (*Ibid.*, citing *People v. Curtiss* (1931)116 Cal.App. Supp. 771, 780.) Based on these principles, neither the prosecutor's proffer to the trial court, nor certainly the evidence before the jury, established that appellant's discipline of Tammy was unnecessary, excessive or in any way exceeded the limits of protected parental discipline. In short, no crime of battery was committed.

This evidence should have been excluded at the outset, and once erroneously admitted, should have been stricken as insufficient as a matter of law to establish a crime or the unlawful use of force or violence. This Court has recognized that the admission of section 190.3, factor (b), evidence may be challenged on the grounds that no crime was committed or for insufficiency of the evidence. (Compare *People v. Monteil* (1993) 5 Cal.4th 877, 915 [insufficient evidence] with *People v. Bramit* (2009) 45

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[97] Decisions regarding child rearing, care and education have recognized these actions as being entitled to protection as fundamental rights of personal liberty under the federal Constitution. (See *Whalen v. Roe* (1977) 429 U.S. 589, 599-600; see also *People v. Privitera* (1979) 23 Cal.3d 697, 702.)

Cal.4th 1221, 1239 [no crime as a matter of law].) Under either view, it was error to permit the jury to consider appellant's disciplining of his stepdaughter as an aggravating factor.

C. The Error Was Prejudicial

Evidence of unadjudicated acts of violence are admissible at a penalty trial because they tend "to show defendant's propensity for violence." (*People v. Balderas* (1985) 41 Cal.3d 144, 202.) The purpose of the statutory exclusion of non-violent unadjudicated conduct is to prevent the jury from hearing evidence of conduct which, although criminal, is not of a type which should influence a life or death decision. (*People v. Boyd* (1985) 38 Cal.3d 762, 776.)

In this case, the jury heard evidence of conduct which was not a crime, but rather prejudicial innuendo that appellant committed violent acts against young women, including his own stepdaughter. The prosecutor sought to impeach Tammy, his own witness, and then to discredit all the "Lucio" witnesses as biased in favor of appellant. (See 79RT 15884.) As such, it is not inconceivable that at least one juror may have been swayed by the prosecutor's argument and the erroneously admitted evidence of the alleged battery of Tammy in determining that death was the appropriate penalty. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136- 137 [any error which may have reasonably led one juror to impose the death penalty is substantial and prejudicial].) This possibility suffices for reversal under both the state's reasonable-possibility standard and the federal *Chapman* standard applicable to penalty phase error. (*People v. Brown*, *supra*, 48 Cal.3d at p. 467 ["the reasonable possibility standard . . . finds a familiar expression in the beyond-a-reasonable-doubt test of *Chapman v. California* (1967) 386 U.S. 18, 24"].) Here, because the prosecution cannot show

beyond a reasonable doubt that the erroneous admission of the alleged violent propensity evidence did not contribute to the death verdict, appellant's death sentence must be reversed.

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XV

REVERSAL OF THE JUDGMENT OF CONVICTION AND THE SENTENCE OF DEATH IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT COLLECTIVELY UNDERMINED THE FUNDAMENTAL FAIRNESS OF APPELLANT'S TRIAL AND THE RELIABILITY OF THE RESULTING DEATH JUDGMENT

Appellant's first two trials ended in hung juries, the second splitting 10-2 in favor of acquittal. (48RT 10088.) The instant trial, by contrast, resulted in guilty verdicts and a judgment of death even though the evidence of guilt was not substantially different than that at the two earlier trials. At all three trials, the prosecution's case was heavily dependent on Oscar's identification of appellant and appellant's confession. No physical evidence connected appellant to the crime scene. The differences between the instant trial and the two earlier trials were attributable to erroneous rulings by the trial court which unfairly skewed the case in the prosecution's favor.

In Arguments I-VI, *ante*, appellant challenges the series of rulings by the trial court that combined to insulate Oscar from a fair evaluation of his reliability as a witness. After his performance at the first two trials and his global professions of memory loss at the instant trial, Oscar's testimony, if not excluded at the outset, should have been stricken because he lacked testimonial capacity and personal knowledge, as required by Evidence Code sections 701 and 702. (Arguments I and II, *ante*.) Moreover, neither his in-court nor prior identifications of appellant should have been admitted as they were the product of suggestive identification procedures and, if not constitutionally barred, were inadmissible hearsay because they were inherently unreliable. (Arguments III and IV, *ante*.) Notably, neither of the two prior hung juries heard the out-of-court identification evidence

admitted at the instant trial. On the other hand, the two prior juries were presented with extensive evidence, both through cross-examination of Oscar and the testimony of other witnesses, that cast substantial doubt on Oscar's reliability. Most of this evidence was withheld from the jury at the instant trial because the court ruled incorrectly that it was inadmissible hearsay. (Arguments V and VI, *ante*.) As a result of these erroneous rulings, the prosecutor was able to improperly bolster Oscar's credibility while the defense was prevented from effectively challenging it.

In addition, as set forth in Arguments VII-IX, *ante*, the trial was further tilted to the prosecution's advantage by the court's erroneous rulings admitting appellant's unreliable confession and allowing the prosecutor to introduce irrelevant, inflammatory evidence of appellant's homosexual relationship with Hector Hernandez. Appellant vehemently denied sexually assaulting Lorena; there was no physical evidence linking him to this crime; and there was no evidence whatsoever that appellant had a history of sex crimes or any propensity to commit such crimes. But as a result of the erroneous rulings, the prosecutor was able to stigmatize appellant as a sexual deviant and inflame the jury against him.

In the same vein, as set forth in Arguments XI and XII, *ante*, the trial court erred and sanctioned prosecutorial misconduct in allowing the prosecutor to inject inadmissible hearsay of an alleged motive and purported threats to the victims where there was little other evidence of motive before the jury. Based on these errors, limiting instructions notwithstanding, one or more of appellant's jurors could have voted for conviction because they could not rid their minds of the innuendo that appellant threatened to harm both victims or the belief that his promiscuity, especially his homosexual activities, predisposed him to commit sex crimes.

The cumulative effect of the errors asserted in Arguments I-XIV, *ante*, and Argument XVI, *post*,[98] undermine confidence in the fairness of the trial and the reliability of the resulting death judgment. (See *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 298 ["The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair"]; *People v. Hill* (1998) 17 Cal.4th 800, 844-848 [reversing entire judgment in capital case due to cumulative error].) Unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt, reversal is required. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

Here, the combined effect of the court's errors so infected the guilt and penalty phases of appellant's trial as to cast serious doubt on the fairness and the reliability of the resulting murder verdicts, special circumstance findings and judgment of death. Accordingly, under *Chapman* and its progeny, reversal of the entire judgment is required.

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[98] In Argument XVI, *post*, appellant argues that California's death penalty statute, as interpreted by this Court and applied at appellant's trial, violates the federal Constitution.

XVI

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should this Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, Penal Code section 190.2 contained 21 special circumstances.

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application Of Section 190.3, Subdivision (a) Violated Appellant's Constitutional Rights

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 11CT 2849-2850; 79RT 15858-15859.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 7494, disapproved on other grounds in *People v. Black* (2014) 58 Cal.4th 912, 919-920 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. *(People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Appellant urges the court to reconsider this holding.

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C. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth The Appropriate Burden of Proof

1. Appellant's Death Sentence Is Unconstitutional Because It Is Not Premised On Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (CALJIC Nos. 8.85, 8.86 & 8.87; *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence.

Blakely v. Washington (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604-605, and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478 require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 11CT 2876-2877; 79RT 15868-15870.) Because these additional findings were required before the jury could impose the death sentence, *Blakely*, *Ring*, and *Apprendi* require that each of these findings be made

beyond a reasonable doubt. The trial court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson, supra*, 25 Cal.4th at p. 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). The Court has rejected the argument that *Blakely*, *Ring* and *Apprendi* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Blakely*, *Ring* and *Apprendi*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected appellant's claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair, supra,* 36 Cal.4th at p. 753.) Appellant requests that the Court reconsider this holding.

2. Some Burden Of Proof Is Required, Or The Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88 fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's Death Verdict Was Not Premised On Unanimous Jury Findings

a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Nonetheless, this Court has "held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona*, *supra*, 536 U.S. 584. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal Constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated Criminal Activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was

instructed that unanimity was not required. (CALJIC No. 8.87; 11CT 2855; 79RT 15862.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson*, *supra*, 25 Cal.4th at pp. 584-585.) Here, the prosecution presented evidence regarding unadjudicated criminal activity allegedly committed by appellant, and the jury was instructed that each juror could decide for him or herself whether appellant had committed the alleged crime. (CALJIC No. 8.87; 11CT 2855; 79RT 15862.)

The United States Supreme Court's decisions in *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward*.

4. The Instructions Caused The Penalty Determination to Turn On an Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (11CT 2877; 79RT 15870.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright, supra*, 486 U.S. at p. 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

5. The Instructions Failed to Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence Of Life Without The Possibility Of Parole

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal

Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when a life without the possibility of parole verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

6. The Penalty Jury Should Be Instructed On The Presumption Of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of*

Life: A Starting Point for Due Process Analysis of Capital Sentencing (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law, his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner, and his right to the equal protection of the laws. (U.S. Const., Amends. 8th & 14th.)

In *People v. Arias*, *supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing to Require That The Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.)

This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the court to reconsider its decisions on the necessity of written findings.

E. The Instructions to The Jury On Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights

1. The Use Of Restrictive Adjectives In The List Of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; [Pen. Code, § 190.3, factors (d) and (g)]) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland, supra*, 486 U.S. at p. 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Appellant is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

2. The Failure To Delete Inapplicable Sentencing Factors

Some of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. (See 11CT 2821 [Def. Penalty Phase Jury Instr. No. 24 requesting deletion of factors (d) [whether or not offense committed when defendant under influence extreme mental or emotional disturbance]; (e) [whether or not victim was a participant in defendant's homicidal conduct or consented to homicidal act]; (f) [whether defendant reasonably believed the circumstances morally justified or extenuated his conduct]; (g) [whether defendant acted under extreme duress or domination of another person]; and (h) [whether at time of offense defendant's to appreciate criminality of conduct or to conform conduct to law impaired by

mental disease, defect or intoxication]. The trial court failed to omit those factors from the jury instructions, likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. (11CT 2821.) Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

F. The Prohibition Against Intercase Proportionality Review Guarantees Arbitrary and Disproportionate Impositions Of The Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., intercase proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct intercase proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges this Court to reconsider its failure to require intercase proportionality review in capital cases.

G. California's Capital Sentencing Scheme Violates The Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rules 4.421 and 4.423.) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that this Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider.

H. California's Use Of The Death Penalty as a Regular Form Of Punishment Falls Short Of International Norms

This Court has repeatedly rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency." (*Trop v. Dulles* (1958) 356 U.S. 86, 101; see also *People v. Cook, supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the court to reconsider its previous decisions.

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CONCLUSION

For the reasons set forth above, the entire judgment must be reversed.

DATED: December 19, 2014

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

NINA WILDER
Supervising Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(b)(2))

I, Nina Wilder, am the attorney assigned to represent appellant in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is approximately 95,418 words in length.

DATED: December 19, 2014

NINA WILDER

APPENDIX A

DEFENDANT'S PROPOSED JURY INSTRUCTION NO_____[CALJIC 2.50 MODIFIED]
PRIOR CONDUCT BETWEEN MR. SANCHEZ AND MR. HERNANDEZ

EVIDENCE HAS BEEN INTRODUCED FOR THE PURPOSE OF SHOWING IF IT DOES THAT THE DEFENDANT AND HECTOR HERNANDEZ WERE ENGAGED IN A CONSENSUAL SEXUAL RELATIONSHIP ON MORE THAN ONE OCCASION.

SUCH EVIDENCE , IF BELIEVED, MAY NOT BE CONSIDERED BY YOU TO PROVE THAT DEFENDANT IS A PERSON OF BAD CHARACTER OR THAT HE HAS A DISPOSITION TO COMMIT CRIMES INCLUDING THE CRIMES FOR WHICH HE IS NOW CHARGED. SUCH EVIDENCE IF BELIEVED, MAY BE CONSIDERED BY YOU ONLY FOR THE LIMITED PURPOSE OF DETERMINING IF IT TENDS TO SHOW THE FOLLOWING:

THE RELATIONSHIP MAY ONLY BE USED TO JUDGE THE CREDIBILITY/ BELIEVABILITY OF MR. HECTOR HERNANDEZ WHEN HE DENIED SEEING JUAN SANCHEZ ON AUGUST 4, 1997 AT 5:OO A.M.

THE NUMBER OF OCCASIONS THAT THE PARTIES ENGAGED IN ANY CONSENSUAL SEXUAL CONDUCT, MAY BE USED ONLY IN CONSIDERING THE CREDIBILITY/ BELIEVABILITY OF JUAN SANCHEZ'S TESTIMONY AT TRIAL.

FOR THE LIMITED PURPOSE FOR WHICH YOU MAY CONSIDER THIS EVIDENCE , YOU MUST WEIGH IT IN THE SAME MANNER AS YOU DO ALL OTHER EVIDENCE IN THE CASE.

YOU ARE NOT PERMITTED TO CONSIDER THIS EVIDENCE FOR ANY OTHER PURPOSE.

GIVEN_____ MODIFIED_____ REFUSED_____

DECLARATION OF SERVICE BY MAIL

People v. Juan Sanchez

Cal. Supreme Ct. Case No. S087569
Superior Ct. Case No. CR-40863

I, the undersigned, declare as follows:

I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 1111 Broadway, 10th Floor, Oakland, California, 94607. I served a copy of the following document(s):

APPELLANT'S OPENING BRIEF

by enclosing it in envelopes and

/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
/X/ placing the envelopes for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelopes were addressed and mailed on **December 19, 2014,** as follows:

Juan Sanchez, P-75273
(Appellant)
To be personally served on December 23, 2014

Office of the Attorney General
Kathleen A. McKenna
2550 Mariposa Mall, Rm. 5090
Fresno, CA 93721

Habeas Corpus Resource Center
303 Second Street, Suite 400, South
San Francisco, CA 94107

California Appellate Project
101 Second St. Suite 600
San Francisco, CA 94105

Sr. Death Penalty Appellate Clerk,
Tulare County Clerk's Office, Room 303
221 S. Mooney Blvd.
Visalia, CA 93291

Tulare County Public Defender
County Civic Center
Courthouse, Room G-35
Visalia, CA 93291

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on December 19, 2014, at Oakland, California.

TAMARA REUS

COPY

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Attorneys for Appellant

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JUAN SANCHEZ, Defendant and Appellant.	No. S087569 (Tulare County Superior Ct. No. CR-40863)

SUPPLEMENTAL DECLARATION OF SERVICE

SUPPLEMENTAL DECLARATION OF SERVICE

Re: *People v. Juan Sanchez* Cal. Supreme Ct. No. S087569
(Tulare County Case No. CR-40863)

I, Nina Wilder, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, Suite 1000, Oakland, California, 94607; that I hand delivered a copy of the following:

APPELLANT'S OPENING BRIEF

to the appellant, Juan Sanchez, at San Quentin State Prison:

Pursuant to Policy 4 of the Supreme Court Policies Regarding Cases Arising from Judgments of Death, the above-described document was hand delivered on December 23, 2014.

I declare under penalty of perjury that the foregoing is true and correct. Signed on December 23, 2014, at Oakland, California.

DECLARANT