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SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

People of the State of California,	)	
	)	
Plaintiff and Respondent,	)	
	)	No. S087773
v.	)	
	)	
Ruben Perez Gomez,	)	
	)	
Defendant and Appellant.	)	Superior Court No BA156930
	)	
	)	

APPELLANT'S OPENING BRIEF

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DEATH PENALTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

State Constitution

Federal Constitution

State Statutes

Federal Statute

State Rules of Court

Other Authorities

Introduction

Ruben Gomez was sentenced to death for the unrelated homicides of Rajandra Patel and Raul Luna after a trial in which scant evidence of his guilt of either of those crimes was produced. His death sentences, and the convictions on which they were based, can be explained only by the swirling cloud of impermissible factors that were allowed to enter the picture before the jurors deliberating on these charges, eclipsing the evidentiary gaps in the Patel and Luna cases and then, at the penalty phase, obscuring lingering doubts. Erroneous instructions given by the trial court, which in several instances charted its own course in delivering instructions — in one instance declaring its intent to be a "pioneer" — further biased the jurors' consideration of witness credibility and of whether Gomez's guilt had been proven beyond a reasonable doubt.

* * *

Rajandra Patel's body was found on a freeway on-ramp in May, 1997. His car was found two days later, its interior burned. No physical evidence linked Ruben Gomez to the crime; the prosecution's case that he committed it consisted solely of testimony by Witness #3, a drug dealer's wife, who had pawned jewelry belonging to Patel in Las Vegas, and by Witness #1, a drug addict who lived in the apartment where Gomez had

been sleeping, and who either had schizophrenia or had feigned its symptoms for years in order to collect government benefits.

Raul Luna was found shot outside his home in June, 1997; a live 12-gauge shotgun cartridge lay near his body. Shortly before the shooting, Luna's brother had heard rustling and whispering near the bushes outside their home, suggesting the involvement of two people. No evidence at all identified Gomez as the shooter in this case — nor was there any evidence at all regarding the mens rea or motive of the other individual present at the time of the crime.

Jurors considering whether Gomez's guilt of the Patel and Luna murders had been proven beyond a reasonable doubt went to the jury room to deliberate after a trial that spanned more than two months and put before them not only evidence on the Patel and Luna incidents, but evidence relating to other charges — which should have been tried separately — and even evidence that, while highly prejudicial, bore no relation to *any* of the charges. The jurors heard evidence that Gomez shot another man, Jesus Escareno, in the head. They heard evidence that Gomez participated in a home invasion robbery. They heard evidence that Gomez was housed in a disciplinary unit in the Los Angeles County Jail and that he had delayed the trial by refusing to come to court on the first day of testimony about the

homicides, repeatedly stating "fuck court" — and they were instructed that they could consider this evidence as tending to show his consciousness of guilt. They heard evidence of Gomez's guilt in the shotgun deaths of Robert Dunton and Robert Acosta, which was comparatively stronger than that presented regarding the Patel and Luna killings.

And they heard evidence that caused at least one juror to fear for her own safety: extensive expert testimony about the history and workings of the Mexican Mafia prison gang, which Gomez's co-defendant Arthur Grajeda was associated with, and at whose behest Gomez had allegedly acted in killing Dunton and Acosta. The jurors heard testimony that the Mexican Mafia, or "Eme," extends its power outside prison walls by fostering terror; that it demands that members and associates do all within their power to obstruct law enforcement efforts against its members; that it kills witnesses; that the Los Angeles County Jail, where Gomez was housed, is the center of its activities; that within the prisons, the gang enlists "soldiers" to engage in criminal activity on behalf of its full-fledged members; and that it demands loyalty above all ties to church and family, requiring brothers to kill brothers.

More, in several instances, the trial court deviated from standard jury instructions, hampering and distorting the jurors' ability to determine

witness credibility. It virtually commanded jurors to take notes, at the expense of their observation of the witnesses' demeanor, telling jurors it would be "very discouraged when I sit back and see jurors just sitting there with their notes in their laps and they're looking at the witnesses." (8RT 1300.) It primed jurors to view the prosecution witnesses, many of whom were subject to prosecution for various crimes (including, in one case, a murder with which Gomez was charged) as less culpable parties, who had been given leniency by the prosecution in exchange for their testimony, in order to prosecute the more culpable actual killer. And it instructed jurors, contrary to law, that if they found that Gomez refused to come to court, they could consider that as a circumstance tending to prove his consciousness of guilt.

All these impermissible factors and erroneous instructions not only prejudiced Gomez with respect to the jury's consideration of the Patel and Luna homicides, as to which the evidence was, at best, shaky, but also as to its consideration of the Dunton and Acosta double homicide, with respect to which the evidence that the murders were deliberate and premeditated was wanting.

At the penalty phase, the prosecution presented evidence of a 1991 robbery conviction and a series of incidents of violence in prison and in the

Los Angeles County Jail, and defense counsel urged the jury to sentence Gomez to life without parole, so that he could be incapacitated within the walls of the Pelican Bay Special Housing Unit.

The jurors — knowing that the prosecution had selected Gomez alone, and not co-defendant Grajeda, to face the death penalty — sentenced Gomez to death for the Patel and Luna murders, and to life without parole for the Dunton and Acosta murders. Neither these sentences, nor Gomez's convictions, can stand.

STATEMENT OF APPEALABILITY

This is an automatic appeal. (See Pen. Code § 1239(b).)

STATEMENT OF THE CASE

On June 23, 1998, in Los Angeles County, Ruben Perez Gomez was held to answer, after a preliminary hearing, on a 13-count felony complaint. (2CT 401.) Gomez would eventually be convicted on six of those counts and sentenced to death on two of them.

The 13 counts in the June, 1998 complaint alleged crimes occurring during six unrelated incidents: (1) the February 1, robbery and murder of Socorro Jose Valle (count 1, murder of Valle, Pen. Code § 187(a), with the allegation that the murder was committed during the commission of robbery, Pen. Code § 190.2(a)(17); count 2, second degree robbery of Valle, Pen. Code § 211); (2) two robberies occurring on February 25, 1997 (count 3, second degree robbery of Salcedo, Pen. Code § 211; count 4, second degree robbery of Smith, Pen. Code § 211); (3) the May 26, 1997 robbery, kidnaping, and killing of Rajandra Patel (count 5, murder of Patel, Pen. Code § 187(a), with the allegation that the murder was committed during a robbery and kidnaping, Pen. Code § 190.2(a)(17); count 6, second degree robbery of Patel, Pen. Code § 211; count 7, kidnaping of Patel, Pen. Code §

207(a)); (4) the June 9, 1997 robbery and killing of Jesus Escareno (count 8, murder of Escareno, Pen. Code § 187(a), with the allegation that the murder was committed during the commission of robbery, Pen. Code § 190.2(a)(17); count 9, second degree robbery of Escareno, Pen. Code § 211); (5) the June 10, 1997 homicide of Raul Luna (count 10, murder of Luna, Pen. Code § 187(a); count 11, second degree robbery of Luna, Pen. Code § 211); and (6) the July 1, 1997 double homicide of Robert Acosta and Robert Dunton (count 12, murder of Dunton, Pen. Code § 187(a); count 13, murder of Acosta, Pen. Code § 187(a)). (1CT 21-35.) Personal use of a firearm allegations pursuant to Penal Code section 1203.06(a)(1) and 12022.5(a)(1) were charged with respect to counts 3 through 13. (1CT 24, 29.)

The complaint jointly charged Gomez's co-defendant, Arthur Grajeda, with the July 1, 1997 double homicide. (1CT 21-35; 2CT 401.) The prosecution sought the death penalty against Gomez, but not against Grajeda. (1RT 7-8.)

Before trial, the prosecution dropped the two counts relating to the robbery and murder of Valle (1RT 21), and by information filed July 7, 1998, it charged the remaining counts (2RT 406-412). During trial, it moved to dismiss one of the February 25, 1997 robbery charges (count 2),

and the court dismissed it. (11RT 1752-1753.)

Count 1 charged the February 25, 1997 second degree robbery (Pen. Code § 211) of Xavier Salcedo. (2CT 407, 408-409.)

Count 3 charged the murder of Rajandra Patel (Pen. Code § 187(a); in connection with that count the prosecution charged the special circumstances of murder while engaged in robbery and murder while engaged in kidnaping (Pen. Code § 190.2(a)(17)). Counts 4 and 5 charged the second degree robbery (Pen. Code § 211) and kidnaping (Pen. Code § 207(a)) of Patel, respectively. (2CT 407-409.)

Count 6 charged the murder of Jesus Escareno (Pen. Code § 187(a); in connection with that count the prosecution charged the special circumstance of murder while engaged in robbery (Pen. Code § 190.2(a)(17)). (2CT 409.) Count 7 charged the second degree robbery (Pen. Code § 211) of Escareno. (2CT 409, 411.)

Count 8 charged the murder (Pen. Code § 187(a)) of Raul Luna. (2CT 410.) Initially, no special circumstance was alleged in connection with this count, although during deliberations, at the court's suggestion, the information was amended by interlineation to charge the special circumstance of murder during the commission of a robbery (Pen. Code § 190.2(a)(17)). (2CT 410; see 29RT 4314-4315.) Count 9 charged the

second degree robbery (Pen. Code § 211) of Raul Luna. (2CT 410.)

The murders (Pen. Code § 187(a)) of Robert Acosta and Robert Dunton were charged as counts 10 and 11. (2CT 410-411.) Both Gomez and Grajeda were charged with a multiple-murder special circumstance (Pen. Code § 190.2(a)(3)). (2CT 411.)

In connection with each count, the prosecution charged, under Penal Code sections 1203.06(a)(1) and 12022.5(a)(1), that Gomez had personally used a firearm. (2CT 408-409, 411.) Grajeda was charged with personal use of a firearm as well, in connection with counts 10 and 11. (2CT 411.)

After a trial of over two months, and eight days of deliberation, the jury found Gomez guilty of the robbery of Xavier Salcedo, and found the associated firearm allegation true. (3CT 836; 29RT 4343-4344.)

The jury convicted Gomez of the robbery, kidnaping, and first degree murder of Rajandra Patel and found the associated firearm allegations and special circumstances true. (29RT 4344-4347; 3CT 837-839.)

The jurors deadlocked on counts 6 and 7, relating to the murder of Jesus Escareno; after trial, the court dismissed these counts. (29RT 4338-4440; 32RT 4661.)

The jury convicted Gomez of the first degree murder of Raul Luna,

but found the associated firearm allegation and robbery special circumstance not true and acquitted him of the robbery of Raul Luna. (3CT 840-841; 29RT 4339, 4348-4349.)

The jury found Gomez and Grajeda guilty of the first degree murder of Robert Dunton; they found Gomez guilty of first degree murder and Grajeda guilty of second degree murder in the killing of Robert Acosta. (3CT 842-843; 29RT 4349-4351; 4SCT 737-738.) With respect to this double homicide, they found the firearm allegations true as to Gomez and not true as to Grajeda. (3CT 842-843; 29RT 4349-4353; 4SCT 737-738.) The jurors found the multiple-murder special circumstance true as to both Gomez and Grajeda. (3CT 844; 29RT 4353; 4SCT 741.)

After a brief penalty phase (30RT 4388-4481; 31RT 4501-4617), and two days of deliberation, the jury sentenced Gomez to death for the murders of Raul Luna and Rajandra Patel, and to life without parole for the murders of Robert Dunton and Robert Acosta. (13CT 3423-3429, 3449-3452.)

STATEMENT OF FACTS

The Salcedo Robbery

On February 25, 1997, three men knocked on the back door of the

Wilmington home of Xavier Salcedo[1] and his girlfriend Silvia.[2] (8RT 1381-1384.) Salcedo told them to go around to the front, and they did. (8RT 1383.) Two of the men came in; a third stood in the doorway, which was left open. (8RT 1384.) Salcedo was asked to sit on the couch, and one of the men, Ruben Gomez, sat next to him. (8RT 1384-1385.) The other man stood by the television, about four feet from Salcedo; he had his hand in his pocket and Salcedo thought he had a gun but he was not sure. (8RT 1387-1388, 1395-1396.) Gomez took a gun from his waistband, pointed it at Salcedo's stomach, and demanded his jewelry; Salcedo gave it to Gomez. (8RT 1388-1389.) Gomez told Salcedo to shut the bedroom door so that they could talk. (8RT 1390.) When Salcedo went to the bedroom to shut the door, he told Silvia he was being robbed. (8RT 1390.) She called 911. (8RT 1340.)

After Salcedo returned to the living room, Gomez asked Salcedo for money; Salcedo asked Gomez how much he wanted and Gomez said "whatever you got." (8RT 1391.) Gomez still had the gun pointed at

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[1] Salcedo's true name was Alfonso Elizarraraz. (8RT 1337.) Salcedo died of cancer before Gomez's trial began in 1999; his preliminary hearing testimony was read to the jury. (8RT1343, 1379-1471.)

[2] Xavier and Silvia Salcedo married before the trial in this case (8RT 1336-1337); her last name before marriage is unknown. To avoid confusion, she is referred to here by her first name.

Salcedo's stomach. (8RT 1391.) Salcedo went to the bedroom and retrieved $5,000, about half of what he had hidden in his bedroom closet. (8RT 1392, 1447-1448.) When Salcedo got the money, he handed Silvia, who was under the bed, a gun. (8RT 1392.) Gomez was waiting in the hallway. (8RT 1393.)

After he gave Gomez the money, Salcedo asked for his jewelry back, because his parents had given it to him. (8RT 1397-1398.) Gomez handed Salcedo his gun and asked Salcedo if he wanted to shoot him. (8RT 1398.) Salcedo handed it back and said that he didn't want any problems. (8RT 1398.) Gomez returned Salcedo's jewelry, which was worth about $10,000. (8RT 1356-1358, 1398.)

The men left and Salcedo went to the bedroom, where he told Silvia, "just grab the kids and let's go." (8RT 1401.) As Salcedo and Silvia were getting the children, who had been sleeping in another room, the three men returned and pounded on the door, threatening to shoot through the walls. (8RT 1401.) Silvia made a second 911 call. (8RT 1402.) Within minutes, police arrived. (8RT 1358, 1405.)

The Patel Homicide

Early in the morning of May 26, 1997, a body, later identified as that

of Rajandra Patel, was found alongside the northbound on-ramp to the Terminal Island freeway. (9RT 1476-1478, 1486-1487.) Blood was found on the ground at a point about 75 feet north of where the body lay. (9RT 1479-1481.) One .40 caliber cartridge case lay about 90 feet from the body; two others lay three or four feet from the body. (9RT 1481-1482.) Patel had been shot in the back of the head and there were two major stab wounds, one in the chest and one on the left side of the neck. (9RT 1524.) The causes of death were the gunshot wound, a contact wound, and the stab wound to the chest. (9RT 1524.)

Patel's car, a white Toyota Camry, was found on May 28, 1997, in an alley behind 648 West First Street in San Pedro. (12RT 1878-1879; see 12RT 1871.) The car's interior was completely burned. (12RT 1880.)

Various personal items that did not belong to Patel, including a flashlight, were found in the trunk. (9RT 1497.) An expert lifted fingerprints from the flashlight; none matched Gomez. (9RT 1497.) Other items found in the trunk were not traceable to Gomez. (9RT 1499-1500.) No prints identifiable to Gomez were found on the car itself. (9RT 1496-1497.)

Blood stains found in the trunk were DNA tested, and a serologist concluded that the DNA could have come from Patel or anyone else with

the same combination of genetic markers; one in 60,000 people chosen at random would be expected to have those markers. (12RT 1886-1887, 1909-1911.)

Eight casts of shoe and boot impressions at the scene where Patel's body was found were compared to boots Gomez always wore; they did not match. (12RT 1865-1868; 24RT 3617.)

On July 2, 1997, Witness #3 was taken to the police station, along with her husband, after a substantial amount of rock cocaine was found in their house. (12RT 1928-1931.) Police found a pawn slip, dated June 5, 1997, in her purse and asked her what she had pawned. (12RT 1921-1922, 1928.) She told them she had pawned a watch and bracelet her husband had received in exchange for drugs. (12RT 1920-1922; see 12RT 1926-1927.) The jewelry, she said, had been brought to her house by Ruben Gomez sometime in late May, 1997. (12RT 1916-1917.)

When Gomez brought the jewelry over, Witness #3 told her husband she thought the jewelry was fake, but Gomez said, "Yes, it is real. It's from this Mexican man I have in the trunk of the car I just killed." (12RT 1918-1919, 1926-1927, 1937-1938.) Witness #3 looked out her window and saw a white car that looked like a Camry or Lexus. (12RT 1919, 1938-1939.)

The jewelry pawned by Witness #3 was identified by Sunjal Patel as

having belonged to his father, Rajandra Patel. (12RT 1872-1873.)

Witness #1 was a drug addict, and either a person who suffered the symptoms of schizophrenia or someone who had feigned the symptoms for years in order to collect mental health benefits. (22RT 3219-3231; 23RT 3364-3373; 24RT 3465-3482.) He lived in a small bedroom in the apartment of Robert Dunton, a San Pedro drug dealer; he first met Ruben Gomez when Gomez began staying on-and-off on the living-room couch in that same apartment sometime in March, April, May, or June of 1997. (19RT 2922; 22RT 3219-3230.)

Witness #1 testified that near the time he first met Gomez, Gomez asked him to burn a car. (19RT 2931.) Witness #1 agreed to do this, as a favor to Gomez, because "he and I was pretty tight for a while." (19RT 2933-2934.) Witness #1 took the car to an alley; he used two bottles of rubbing alcohol and lit a rag to burn the car, a small white car he thought was a Honda. (19RT 2932-2933.) Witness #1 also testified that, at some point, he was taken — he did not say who took him — to a freeway entrance near a "Spires" sign to look for keys to the white car. (19RT 2938; 22RT 3257-3258.) Witness #1 believed the car was a "murder car" because he heard Gomez talking about the car's owner, and Gomez "told me to check the trunk good to make sure there wasn't no blood in it." (19RT

2938-2939.) On redirect, he testified that he learned from Robert Dunton that Gomez had "put a hit" on him for not burning the car completely; Dunton told him Gomez was worried about his fingerprints. (24RT 3549.)

Witness #1 believed the car was related to a watch and bracelet Gomez and another man, "Little Diablo," had brought to Dunton's house a few days earlier and to a telephone also brought to Dunton's house.[3] (19RT 2938; 22RT 3230-3232, 3251-3254.) He identified Patel's jewelry as having been brought to Dunton's house by Gomez one or two days before Witness #1 burned the car. (19RT 2939.) On redirect, Witness #1 added that about three or four days before he burned the white car, Gomez said, about the owner of that car, "'I hated to kill that guy because he had balls.' And he said, 'If you going to do it, go ahead and shoot me, mother fucker.'" (24RT 3539.)

The spent cartridges found near Patel's body were matched to a .40 caliber Smith and Wesson semiautomatic pistol recovered from the Wilmington home of a person named Angel Rodriguez. (12RT 1944-1948; see 14RT 2134-2143.) Witness #1 testified that Ruben Gomez had that gun "when he first started coming around the house." (20RT 3004.)

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[3] "Little Diablo" was never identified.

The Escareno Homicide[4]

On June 9, 1997, around 8:00 a.m., the maintenance director at the Park Plaza Shopping Center on Western Avenue found a body, later identified as that of Jesus Escareno, lying face down near some dumpsters. (13RT 2034-2039; 9RT 1571, 1575, 1578-1579; 13RT 1976-1977, 1980.) Escareno had been killed by a shotgun wound to the head; he had been shot from a distance of one to two feet. (9RT 1546, 1549-1552.) His fingers bore indentations where rings would have been worn. (9RT 1574-1575.) His left front pants pocket was slightly turned out. (9RT 1593.) He wore a pager. (9RT 1593.)

Escareno's car was later found at 449 Oliver Street in San Pedro. (9RT 1572-1573.) There was blood and some brain matter on and near the front passenger seat, and the roof of the car had bumps on it, from pellets that had been shot into the car. (9RT 1581-1582.) Two projectiles consistent with soft shell "double aught" buckshot, typically fired by a 12-gauge shotgun, were found in the car. (15RT 2393-2394.)

The prosecution sought Gomez's conviction for the murder and

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[4] The jury deadlocked on the charges relating to the robbery and murder of Escareno. (29RT 4338-4340.) The evidence presented on those counts is included here because the trial court allowed jurors who believed Gomez guilty of these crimes to consider them at the penalty phase. (31RT 4562-4563.)

robbery of Escareno on the basis of the testimony of Witness #1, who was deemed an accomplice as a matter of law to this killing. (29RT 4136-4137; 3CT 881.)

Witness #1 testified that sometime after he was asked to burn the white car, he was out driving Gomez around and they were looking for someone to rob. (19RT 2940-2941.) Witness #1 acknowledged that he might have told a detective that when he and Gomez drove around town, Gomez always drove, but Witness #1 noted that he was not under oath when he said that. (22RT 3263.) Witness #1 believed the car he was driving was an older gray Ford with a black top, belonging to the father of Gomez's girlfriend Missy. (19 RT 2941-2942.) On cross-examination, however, he stated that he could have been driving a little black pickup truck; he did not remember. (22RT 3265.) According to Witness #1, Gomez carried a shotgun that belonged to Witness #1 and Dunton; they called the gun "Shorty." (19 RT 2942.)

As they were driving, Witness #1 testified, Gomez noticed a man with rings on his fingers. (19RT 2943.) They followed the man; he was driving an old Thunderbird. (19RT 2943.) The man parked his car and they pulled up beside him; Gomez spoke to the man in Spanish; the other man seemed "tipsy" and was laughing. (19RT 2944-2946.) Witness #1 testified

that Gomez shot the man as he sat in his car, and then told Witness #1 to drive the man's car back to San Pedro. (19RT 2947-2948.) Though Witness #1 had testified that he was driving, he testified that after Gomez shot the man, "he [Ruben Gomez] pulled up and I got in the driver's door of the other car." (19RT 2949.) Witness #1 said he then moved the man's body so that he could drive, and drove the car with the body in it a couple of blocks to a hamburger stand, where he removed the man's wallet and walked back to Dunton's house in San Pedro. (19RT 2949-2950.)

When Witness #1 arrived back at Dunton's apartment, he said, Gomez asked him where the man's rings were, and Witness #1 replied that he did not want to take them off a dead man's fingers. (19RT 2951.) Witness #1 gave Gomez about $70 he had taken from Escareno, and Gomez asked if that was all the money. (19RT 2951.) Witness #1 responded that he spent some of it on "a dime of stuff," and Dunton became angry, telling him, "you didn't follow orders." (19RT 2951.)

According to Witness #1, Gomez then instructed him to get the car and drive it back to Dunton's house in San Pedro. (19RT 2952.) Someone drove Witness #1 back to get the car; the man's body and the keys were still in it, and Witness #1 drove it back to an alley near Dunton's house. (19RT 2952.) He went back to Dunton's house and Gomez again asked him where

the jewelry was; when Witness #1 told him it was still on the man's fingers, Gomez told him to go back and get it. (19RT 2953.) Witness #1 retrieved the jewelry and gave it to Gomez, who gave it to Dunton. (19RT 2953.) Gomez told Witness #1 to dispose of the car and the body; Witness #1 drove to Park Plaza and put the body near two dumpsters. (29RT 3001-3002.) He drove the car to an open garage and left it there. (20RT 3002-3003.)

Because Witness #1 was an accomplice to the Escareno homicide (29RT 4338-4340; 3CT 881), the prosecution attempted to provide independent evidence linking Gomez to that killing by introducing a statement Gomez made to detectives on July 2, 1997, after his arrest. (13RT 2042-2044.) The statement was, in the words of Detective Winter, "along the line [sic] we must be very busy because he knew things had gone crazy in the Harbor Area lately. And he talked about a guy up on Western, his head being shot off, a female that had been killed and wrapped and disposed in a dumpster, a couple of guys that were shot and brains were splattered all over the place and that these individuals couldn't be identified. . . . He said that when he had talked about the individuals not being identified, their wallets were missing." (13RT 2044.) The prosecution contended that this statement linked Gomez to the Escareno homicide

because detectives had not released to the press the information that Escareno's wallet had been stolen or that no identification had been found on him. (13RT 2045, 2052; see 25RT 3644.)

The defense introduced news articles from the News Pilot, a newspaper in the San Pedro/Wilmington area. One, dated May 27, 1997, concerned the Patel homicide; it indicated that police were trying to identify the body. (13RT 2052-2053; see Defense Exhibit G.) Another, dated June 10, 1997, recounted the discovery of Escareno's body, with massive trauma from a gunshot to the head, in the shopping center on Western Avenue. (Defense Exhibit M.) This article quoted a detective as saying that items of jewelry were taken from both hands and that robbery appeared to be the motive. (Defense Exhibit M.) It also stated that the man was killed at the shopping center. (Defense Exhibit M.) Another, dated June 18, 1997, concerned the Escareno homicide and recounted the discovery of the car, describing blood and brain matter found in it. (Defense Exhibit L.) Defense exhibits L and M were contained in the detectives' "murder book" for the Escareno homicide. (26RT 3764-3767.)

The Luna Homicide

At 12:06 a.m. on the night of June 9, 1997 (the early morning of June

10), Rudy Luna got home from work and went to bed at his house at 3041 Opal Street, on the corner of Opal and Florwood Avenue in Torrance. (11RT 1698; 13RT 2058-2059.) Lying in bed, he heard a car pull up in front of the house; he then heard a car door opening and closing and the car driving off. (13RT 2059.) A few minutes later, he heard some rustling in the bushes outside; he looked out the window and saw nothing. (13RT 2059.) A few minutes later he heard someone whispering "[t]here's somebody in there, there's somebody in there"; the voice sounded as if it came from near the bushes. (13RT 2059-2060, 2064.) A few minutes later he heard the same voice say "he's here." (13RT 2060.) Then he heard his brother, Raul Luna, say "oh, shit," and he heard a gunshot. (13RT 2060.) Rudy Luna lay down on the bedroom floor. (13RT 2060.) After some time he got up and went outside to find his brother's body. (13RT 2061.)

Raul Luna died from a gunshot wound to the left, rear part of his head; he had been shot at a range of six to twelve inches. (11RT 1702, 1806-1808.) A live 12-gauge shotgun cartridge was found about 15 feet from his body. (11RT 1701-1703.) A baggie containing methamphetamine and an ATM card were also found near the body. (11RT 1710-1711, 1714.)

Luna's cell phone was found, after the Dunton and Acosta killings, at Dunton's house in San Pedro. (11RT 1740-1742; 14RT 2150-2153.)

Phone records established that about an hour after the Luna killing, the phone was used to place calls to cab companies and paging services.[5] (14RT 2153-2160, 2167-2177.) Almost five hours after the Luna homicide, the phone was used to call Dunton's house. (14RT 2160, 2176-2177.) Witness #1 testified that Gomez had brought Luna's phone, a white "brick" phone, into the house. (20RT 3005.) He testified that he first saw the brick phone before he saw the white car he was asked to burn. (22RT 3255.) He also testified that he saw the brick phone after he was asked to burn the white car, and that he may have mixed up two different cell phones (24RT 3539-3541), though he acknowledged testifying that he first saw the white brick phone before he was asked to burn the white car. (24RT 3554-3558.)

Police arriving at the scene noticed a silver and black Oldsmobile parked on Florwood, about 150 to 200 yards from the Luna home. (11RT 1703; 13RT 2080-2083.) Its windows were rolled down; the hood was warm and the tires were wet, as if they had just driven through the water that was in the gutter. (13 RT 2084.) The keys were still in the ignition. (13RT 2084.) A white plastic bag on the rear seat contained live 12-gauge shotgun shells. (11RT 1704.) Thirty-four latent fingerprints were lifted from

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[5] A call was made at 12:14 a.m., around the time of the killing, to (310) 718-9703. (14RT 2159.) The subscriber to that number was never identified.

the car. (13RT 2090.) Ten of the prints, all on the exterior of the car, were identified as having been made by Gomez. (13RT 2092-2094, 2103-2107, 2109.) Other prints on the car were identified as having been made by individuals named Maria Baca and Sandra Ruvalcaba. (13RT 2102-2107.) The car was not registered to Gomez. (11RT 1713.)

Plaster casts of shoe impressions made at the crime scene did not match the boots Gomez always wore. (13RT 2096-2096; 14RT 2146-2149; 24RT 3617.)

Charles Orr, who lived on Opal Street, just east of Florwood, had been at home working on his computer when he heard what sounded like an explosion. (13RT 2070-2071.) He then heard running; looking through his window blinds he saw a "heavy footed" person running by. (13RT 2071.) He could not tell if the person was male or female; the person was "like a shadow." (13RT 2072.) He heard a rattling noise; on cross examination he testified he remembered "the keys and the foot running." (13RT 2071, 2076.) He may have told the police that the person he saw was dark-skinned, possibly Hispanic but not Black. (13RT 2075-2078.) The person was running east, towards Maple Avenue. (13RT 2072.) He could not identify the person he saw. (13RT 2071-2072.)

William Owens, who lived on Hickory Avenue, was outside, across

the street from his house, smoking a cigar, in the early morning hours of June 10, 1997. (14RT 2181-2183.) He heard a gunshot, and about five or ten minutes later, a man ran up to him and asked him for a ride to his girlfriend's house. (14RT 2184.) Shortly afterwards, Owens was interviewed by police and told them that the man he had seen was about 5 feet, 9 or 10 inches, weighing about 180 to 200 pounds. (14RT 2191-2192.) He told the police that the man was Hispanic, that his facial structure seemed Central American, though he had a lighter than usual complexion for a Central American, and that he had a heavy Spanish accent. (14RT 2192-2193.) He estimated that the man was 25 to 30 years old and reported that he wore a white and red nylon jacket, blue denim pants, and white shoes. (15RT 2326.) The man had nothing in his hands. (15RT 2327.) Owens did not mention that the man had any tattoos. (15RT 2327.)

Owens viewed a six-pack photographic lineup, and told a detective that photograph number two, a photograph of Ruben Gomez, "somewhat resembled" the person who had confronted him. (15RT 2325, 2330, 2331.) Detective Lancaster, who showed Owens the six-pack, did not believe Owens had identified Gomez, and thus he did not xerox the six-pack and ask Owens to circle the photograph he had identified. (15RT 2328.) Owens himself testified at trial that while he did not remember how many six-packs

he was shown, he had pointed to one picture and told them there was a "75 to 85 percent" chance that it showed the running man. (14RT 2199-2201.)

At trial, after Owens had encountered Gomez in court three times (including the day of his testimony), Owens for the first time positively identified Gomez as the man he had seen running down the street. (14RT 2201-2204, 2249.)

The Dunton and Acosta Homicides

At 3:46 a.m. on July 1, 1997, Witness #1 called 911 from a business near Robert Dunton's apartment in San Pedro. (20RT 3037-3038, 3064.) He told the operator that he went in the door of Dunton's apartment at 332 O'Farrell and saw two dead bodies, that of his roommate and somebody else. (3CT 785-786.) He said that he checked them; they were dead, and it looked like they had been shot with a shotgun. (3CT 785.) He agreed to meet police behind the residence, and told them that the back door was open. (3CT 785-786.)

Police arrived at 332 O'Farrell and found the bodies of Dunton, also known as "Huero," and Robert Acosta, also known as "Spider." (11RT 1737-1738.) Acosta had been shot in the neck and his body lay in front of the front door. (11RT 1739; 11RT 1810-1811; 25RT 3657-3658.) The

wound was a loose contact wound. (11RT 1812.) A loaded gun was tucked under Acosta's armpit. (11RT 1757-1758, 1778.) Dunton's body was seated on a sofa; he had been shot twice in the body and once in the head. (11RT 1737-1738; 11RT 1821-1825.) Four spent shotgun cartridges were found at the scene. (11RT 1745-1751, 1754-1755.) There was blood on the walls and ceilings. (11RT 1738.)

The parties stipulated that Acosta's blood contained 1.1 micrograms per milliliter of methamphetamine, .10 micrograms per milliliter of amphetamine, and .096 micrograms per milliliter of PCP. (26RT 3769.) Dunton's blood alcohol content was .13 grams percent and his blood was .77 micrograms per milliliter of methamphetamine and .06 micrograms per milliliter of amphetamine. (26RT 3769.)

The parties also stipulated that Manuel Hernandez, a 67-year-old man, lived in the residence next door to Dunton's. (29RT 4292.)[6] He was home during the early morning hours of July 1, 1997. (29RT 4292.) At about 3:15 a.m., he heard what sounded like three gunshots. (29RT 4292.) Hernandez went to the window closest to the Dunton residence and looked out. (29RT 4292.) The Dunton residence was dark. (29RT 4292.)

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[6] This stipulation was presented during deliberations, and the attorneys were given the opportunity to present argument regarding its significance. (29RT 4293-4306.)

Hernandez saw one man come out the back door, with something dark pulled down over his head. (29RT 4292.) The man was between 5 feet, 6 inches tall and 5 feet, 8 inches tall. (29RT 4292.) The man ran down the walkway towards O'Farrell Street. (29RT 4292.) Hernandez then heard a car start nearby. (29RT 4292.)

Afterwards, Hernandez noticed that someone came into the room at 332 O'Farrell and turned on the lights. (29RT 4292-4293.) Hernandez heard someone say, "Oh, my god." (29RT 4293.) He then saw the man leave the Dunton residence by the back door. (29RT 4293.)

The parties further stipulated that Gomez is 6 feet, 2 inches tall, and Grajeda is 5 feet, 8 inches to 5 feet, 10 inches tall. (29RT 4293.)

Witness #1 did not meet police at the house as he had said he probably would. (3CT 785-786; 15RT 2453-2454.) Police interviewed him on July 2, 1997, however. (22RT 3277-3278.) During that interview, he mentioned that he had been hallucinating (Defense Exhibit N [4SCT 809-811]; 21RT 3130; see 22RT 3277-3278; 23RT 3364.) At trial, he testified that he suffered visual and auditory hallucinations, and had been prescribed Stelazine, Thorazine, and Artan to control them. (23RT 3364-3368.) He also testified that he had been institutionalized in a locked ward at one time

as a result of a "faked attempted suicide." (23RT 3370-3372.) He subsequently testified, however, that he had never suffered hallucinations but pretended that he did, and faked the suicide attempt, in order to receive supplemental security income. (24RT 3467-3482.) He testified that he believed he was "entitled to what [he] can get." (24RT 3474.)

In his first few interviews with the police, Witness #1 stated that he was not present when the killings took place. (20RT 3039; 21RT 3126-3132; 22RT 3298, 3302-3303.) He told the police that he and Gomez, who had been staying at Dunton's apartment, sleeping on the couch, on and off for a few weeks, had gone out earlier that night to rob a drug dealer, and that they returned to the apartment to find Dunton and Acosta. (19RT 2929-2930; 23RT 3423-3424.) He told police that he then left to buy food, but that instead of buying food he bought $20 worth of cocaine and smoked it. (23RT 3423-3425; 21RT 3127-3130.) He then returned to the house to find the bodies. (23RT 3423-3425, 21RT 3130.) Detectives did not believe him because he said that he had found the bodies after entering the house through the front door, and Acosta's body had blocked any access through the front door. (25RT 3657-3660.) In another interview, Witness #1 said that when he returned to the house and found the bodies he had entered the apartment though a window, but detectives did not believe that either

because of various items that blocked entrance through that window. (25RT 3659-3660.)

Witness #1 acknowledged telling "probably more than a few" lies (22RT 3302) during the investigation; explaining one lie, he stated: "That's the way it goes if you guys see what the bad guys got and the bad guys see what the good guys got." (22RT 3297.)

At trial, Witness #1 testified that in the evening of June 30, 1997, he and Gomez had gone out and robbed a drug dealer at a junk yard in Wilmington. (20RT 3010-3015.) Afterwards, they returned to Dunton's house, and as they approached the house, Gomez said, "they sent somebody to fuck Huero and Spider up." (20RT 3016.) When they entered the house, Dunton and Acosta were there, along with Arthur Grajeda. (20RT 3016.) Acosta was standing by the door, Dunton was sitting on the couch, and Grajeda was on another couch. (20RT 3016-3017.) Witness #1 asked Gomez for some of the crack they had taken from the drug dealer at the junk yard, and Gomez told him it was gone. (20RT 3019.) Witness #1 "jumped up and [did] some cuss words at him," and headed towards his bedroom. (20RT 3019.) As he passed Acosta, Acosta "back handed" him some crystal methamphetamine, and Witness #1 went to his room to prepare it for use. (20RT 3019-3020.)

When Witness #1 left the room, Gomez was sitting at the dining table and a pump shotgun lay on the table in front of him. (20RT 3018-3019, 3033-3034.) Grajeda was holding a shotgun they called "Shorty," which belonged to Dunton and Witness #1. (20RT 3034.) Witness #1 heard Dunton say "if I got to go, I'm going to go like a man." (20RT 3035.) Grajeda said "You know the rules," and Gomez added "Yeah, forward and backward." (20RT 3035.) Witness #1 then heard Gomez say: "Don't point that at me. I don't like people pointing things at me." (20RT 3035.) Witness #1 assumed Gomez was speaking to Acosta; though he did not see Acosta point the gun at anyone, he had seen Acosta with a gun that night. (24RT 3484-3487.) Witness #1 then heard four shots and then footsteps running, and the sound of someone bumping up against a washing machine near the back door. (20RT 3035.) Witness #1 left through the back door, got on his bike, and went to call 911. (20RT 3036-3038.)

Gomez was arrested at his cousin's home in Long Beach at approximately 3:30 a.m. on July 2, 1997. (21RT 3099-3103.) His cousin, Witness #4, had called the police after Gomez, whom she had not seen in eight years, arrived at her door with a bag and a gun, looking for a place to stay. (21RT 3084-3086.) A shotgun found in Witness #4's house at the time of Gomez's arrest and bearing his fingerprints was matched to the shotgun

shells found at the Dunton and Acosta homicide scene. (11RT 1754-1756; 18RT 2741-2749; 19RT 2859-2863, 2869-2872; 21RT 3099-3100, 3119.) Gomez's fingerprints were also found inside Dunton's apartment. (19RT 2870-2873; 19RT 2819-2827; 17RT 2621-2629.)

Witness #5, Acosta's wife, testified that a few days after Acosta's death, she received a call from Ruben Gomez; he asked her to visit him in the county jail. (16RT 2524.) She visited him, and during their conversation he denied shooting Acosta and Dunton, but told her that he was the last person there when it happened, that he had even kissed Dunton, and that he had left fingerprints all over the house and even on Dunton's face. (16RT 2525.)

Witness #1 testified that a man named "Boxer" had come over to 332 O'Farrell Street, two days in a row, in the days before Dunton and Acosta were killed. The first time he came over he said, "you ain't paying your taxes and they're getting on me because I'm not doing my job." (20RT 3005-3006.) The next day, Boxer, accompanied by his girlfriend and a "protégé," was armed with a machete, and he took a hundred dollars and a pistol that had belonged to Gomez. (20RT 3006-3008.)

After Boxer took the pistol, Gomez called a friend and told the friend he needed a gun as a matter of "life or death." (20RT 3010.) A shotgun,

later identified as the gun used to kill Dunton and Acosta, was delivered, and Witness #1 and Gomez cut about six inches off the barrel and cut the stock off. (20RT 3010.)

Witness #2, Grajeda's girlfriend's uncle, testified in exchange for an agreement that his sentence on a probation violation would be no more than six years and that his testimony would not be used against him unless he committed perjury.[7] (16RT 2577-2583.) On the stand, he first denied and then admitted being a gang member. (17RT 2656-2667; 18RT 2771-2773; 18RT 2784-2786.) He testified that the day before the early morning killings, he had encountered Grajeda at a mutual acquaintance's house; the names Huero and Diablo came up and Grajeda said that Huero and Diablo were not "paying up." (16RT 2588-2595.) Diablo was supposed to be collecting for the Mexican Mafia; "Huero wasn't paying his taxes, Diablo wasn't paying up." (16RT 2594.) Witness #2 identified Gomez as the person who had been referred to as "Diablo." (16RT 2594.) Grajeda wanted to "take care of Diablo." (16RT 2595.)

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[7] The maximum Witness #2 faced was 12 years. (16RT 2577-2583.) Witness #2's brother originally approached the police when Witness #2 was facing a third strike case, though he was acquitted on that case. (16RT 2577-2583; 25RT 3723-3724.) After being acquitted on those charges he was charged with a probation violation based on the same incident, which exposed him to a 12-year sentence, and reached the deal with prosecutors that his sentence would not exceed six years. (17RT 2670-2672.)

Witness #2 drove Grajeda to Dunton's apartment to check it out. (16RT 2597.) When they arrived, Gomez, Dunton, and Witness #1 were there. (16RT 2599-2600.) They all made small talk, and Gomez was nervous. (16RT 2602-2603.) Witness #2 believed another person was in a back room but he does not know who. (16RT 2602.) Witness #2 testified that as they left, Gomez walked out and had a brief conversation with Grajeda. (16RT 2609-2610.) At the same time, Acosta arrived. (16RT 2609-2611.) As Witness #2 drove Grajeda back to their mutual acquaintance's house, Grajeda asked him to drive him back that evening to kill Gomez, and possibly Dunton, because they were not paying their taxes. (16RT 2611-2614.)

Witness #2 testified that he instructed his girlfriend (his wife at the time of trial) that when Grajeda called that evening for a ride to Dunton's, she should tell Grajeda that he was asleep. (16RT 2614-2615.) Witness #2's wife (then girlfriend), Alicia Gandara, testified that her husband gave her these instructions, and that Grajeda called and she complied, telling Grajeda that Witness #2 was asleep and refusing to wake him up. (19RT 2898-2901.)

Witness #2 also testified that he encountered Grajeda some time after the Dunton and Acosta killings and Grajeda told him, in reference to those

killings, "I did it." (16RT 2615-2618.)

Witness #6 testified that after Dunton was killed, Grajeda contacted her and asked her whether the police were looking for him; Grajeda told her he was supposed to go to Dunton's house for a meeting the night Dunton was killed. (21RT 3078-3080, 3082.) Grajeda did not tell her whether or not he had gone to Dunton's house that night. (21RT 3082-3083.)

Finally, the prosecution presented a note, found by Acosta's girlfriend in the pages of a Bible in their bedroom. (16RT 2521-2522.) The note read: "6-30.97 / Tuesday morning /Monday nite 1.20/ Went to meet Shady La Rana/ don't like the/ meeting at Big Huero's/ Robert Acosta/ Spider." (3CT 659.) Eddie Maldonado, the son of Acosta's girlfriend, also testified that around 11:30 p.m. or midnight on the night before the Dunton and Acosta killings, Acosta received a phone call, paced around a little bit, went into the bedroom for a few minutes, and then came out. (16RT 2508-2510.) Maldonado asked him what was the matter, and Acosta said he had to go to a meeting, and left the house. (16RT 2517.)

Grajeda presented the alibi testimony of Imelda Solorzano, a friend of Grajeda's girlfriend Melanie Gandara. (24RT 3569-3570.) Solorzano testified that on the evening of June 30, 1997, she went to Gandara and Grajeda's house after work, at about 8:00 p.m., to help them get ready for a

camping trip. (24RT 3571-3573.) They had dinner and Solorzano stayed until 3:30 a.m. on July 1. (24RT 3573-3575.) Solorzano left the house at some point, around 1:45 a.m., to go to the store to buy beer. (24RT 3576.) Solorzano testified that Grajeda was present the whole time she was at his house. (24RT 3577.)

In support of its theory of the Dunton and Acosta killings, the prosecution introduced extensive gang expert testimony from Leo Duarte and Richard Valdemar. (15RT 2331-2385, 2399-2418, 2429-2434; 20RT 2968-2993.)

In Duarte's opinion, based on observations of Arthur Grajeda over a four-month period while he was at Chino State Prison, Grajeda is a Mexican Mafia associate. (20RT 2985, 2989-2990.) Gang members loyal to the Mexican Mafia identify themselves with tattoos that say "sur," "surenos," "13," or "3-C-E," which stands for "trece." (15RT 2366-2367.) Mexican Mafia members and associates do not always tattoo themselves, as many want to conceal their association. (15RT 2431.) Grajeda has a tattoo identifying himself with the "La Rana" gang. (15RT 2430-2431.) Valdemar viewed Gomez's tattoos and concluded that Gomez is a member of the Ghost Town Locos subset of the East Side Wilmas gang, and Surenos; one of Gomez's tattoos, which says "sur," shows that his alliance

is more with the prison gang. (15RT 2429-2430.) Detective Winter also documented Gomez's tattoos, noting tattoos that said "13," "3-C-E," "sur," "Ghost Town gang," and "G.T.L./ESW." (13RT 2045-2046.) Valdemar opined that one of Gomez's tattoos, which others have interpreted as a "13," was not in fact a "13," but could be the letter "R." (15RT 2442.)

Valdemar testified that the Mexican Mafia (sometimes known as "Eme") is a prison gang that controls Hispanic street gangs in Southern California. (15RT 2432.) It is able to control street gang members because they expect they will at some point be incarcerated in a prison controlled by the Mexican Mafia. (15RT 2364-2365.) Valdemar explained the Mexican Mafia's history and practices, informing jurors that they are accurately depicted in the movie "American Me." (15RT 2361-2365, 2381-2385.)

The Mexican Mafia kills for violations of its rules. (15RT 2365.) One of its primary rules is that those loyal to it are not supposed to cooperate with law enforcement or the legal system in any way. (15RT 2381.) Before retaliating, the Mexican Mafia requires proof, in the form of a police report or a court transcript, showing that a person has cooperated with law enforcement. (15RT 2381-2382.) Witnesses who testify on behalf of law enforcement assume great risk; the Mexican Mafia has a reputation for seeking them out and killing them. (15RT 2384.) It expects perjury to be

committed on its behalf by wives and other relatives of members and associates. (15RT 2384-2385.)

The Mexican Mafia expects members and associates to place loyalty to it above religion, God, family, and friendships. (15RT 2382-2383.) In order to test this loyalty the Mexican Mafia often uses someone close to a victim to approach him or carry out his killing; it has used family members to carry out murders, as depicted in the movie "American Me." (15RT 2383.)

Drug dealers operating in areas controlled by the Mexican Mafia are expected to pay "taxes." (15RT 2378-2379.) In Valdemar's opinion, if a street gang member claiming loyalty to the Mexican Mafia were to rob drug dealers operating in an area the Mexican Mafia controlled, and in particular if he were robbing drug dealers paying taxes to the Mexican Mafia, that street gang member could expect to be killed. (15RT 2369-2371, 2378-2381.) Such a person would have a "green light" placed on him, meaning gang members would be authorized to assault or kill him, and he would be on a particular part of the "green light" list for those singled out for killing. (15RT 2369-2371, 2378-2381.)

A "green light" can be removed if a member of the Mexican Mafia intervenes or if a large sum of money is paid. (15RT 2380-2381.) It can also

be removed by killing someone else on behalf of the Mexican Mafia. (15RT 2381.) A person on the green light list may be told he is in trouble and be given an assignment, called a "suicide run," to kill someone else. (15RT 2381.) If the person on the green light list successfully performs such a killing, the green light may sometimes be removed. (15RT 2381.)

Penalty Phase

The prosecution presented evidence that Gomez had committed and been convicted of a 1991 robbery in Wilmington (30RT 4400-4412) and that he was convicted of assault by a state prisoner and possession of a deadly weapon by a state prisoner (30RT 4430; see 4SCT 768-784 [Prosecution Exhibit 55]; 4SCT 785-802 [Prosecution Exhibit 56].) The officer who arrested Gomez for the 1991 robbery testified that he had "a bewildered look, eyes wide open and . . . had a stare to his look." (30RT 4410.) Gomez was taken to the hospital and doctors reported that he was under the influence of an opiate. (30RT 4411-4412.)

In addition, the prosecution introduced evidence of several jail incidents occurring before and during the trial in this case. Sheriff's Deputy Chad Millan testified that Gomez stabbed him with a jail-made shank, cutting him three times; Millan received nine stitches. (30RT 4435-4445.)

Deputy Timothy Vanderleek testified that in November of 1999, Gomez threw urine at him. (30RT 4454-4457.) Deputy Frank Montoya testified that in December of 1999, Gomez head-butted him and then threatened to kill Montoya and all the other deputies in the jail; the following day, Gomez attempted to slash him with a razor blade attached to a comb and threatened him again. (30RT 4463-4466.) Deputy Keith Holly testified that, after he informed Gomez he would be disciplined for violation of jail rules, Gomez stated that he should have slashed Deputy Montoya's throat, and threatened to kill jail deputies when they took him to court. (30RT 4476.)

The defense presented the testimony of Michael Pickett, a California Department of Corrections administrator. (31RT 4502-4541.) Pickett testified that, if sentenced to life without the possibility of parole, Gomez would most likely be held in the Pelican Bay or Corcoran Security Housing Unit ("SHU"), where he would be confined to a cell for 23 hours a day, and would leave his cell only for exercise in a directly adjacent yard, and, escorted and shackled, for medical purposes, to go to the law library, and for visits. (30RT 4524-2525.) Pickett acknowledged, however, that though Department staff do a "marvelous job" at security, "it's not a perfect world" even in the most highly secured prisons, and homicides do occur there. (30RT 4522-4523; see 30RT 4530-4531.)

On cross-examination, Pickett described a racial riot that had occurred the day before at Pelican Bay, in general population, involving the use of jail-made weapons. (30RT 4528-4529, 4536.) He also testified that there is Mexican Mafia influence in the Security Housing Units; murders and assaults on prison staff have been ordered by prison gang members in Security Housing Units, to be carried out in general population. (30RT 4531-4532.) Shanks have been confiscated from cells in the SHUs. (30RT 4533.) Inmates in the SHU have daily arms-length contact with prison staff; it is fairly common that staff are attacked while delivering meals in the SHUs. (30RT 4534.)

The defense also called Mercedes Sanabria, Gomez's sister. (30RT 4543.) She testified that she and Gomez has seven other siblings, and that he has three children: Coreena, age nine; Richard, age ten; and Ruben, age eleven. (30RT 4543.) Sanabria has taken the children to visit Gomez at the county jail. (30RT 4544.) They love their father; she loves her brother. (30RT 4544-4545.) She realizes that he has been convicted of four murders but, "despite what my brother has done, we are real sorry, but we all love him, and we just don't want him to be executed." (30RT 4545.)

ARGUMENT

I.

THE EVIDENCE WAS INSUFFICIENT TO PROVE MR. GOMEZ'S GUILT OF THE FIRST DEGREE MURDER OF RAUL LUNA

"[E]very crime has two components: (1) an act or omission, sometimes called the actus reus; and (2) a necessary mental state, sometimes called the mens rea." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) The defendant must do something, and he or she must have a certain mental state. The evidence in this case showed neither. *At most*, it showed that Gomez was in the area at the time of the crime, at one time touched a car that may have been linked to the perpetrators, and later possessed the victim's cell phone.

The evidence showed that at least two people were present in Raul Luna's front yard when he was killed. It did not show that Gomez was one of them. But even if it is assumed that Gomez was one of them — an assumption unsupported by the record — there was simply no evidence at all from which it could be concluded that Gomez shot Luna. In fact, as discussed below, the prosecution's evidence, to the extent it could be believed, suggested the opposite. The jury thus properly found the firearm allegation not true.

Similarly, even if it is assumed, again, that Gomez was present with

the unknown killer when that person shot Raul Luna, there was no evidence that Gomez did anything to aid or abet the killing, nor any evidence that he knew of or shared that perpetrator's intent to kill. The evidence was thus insufficient to sustain his conviction for first degree murder.

A. Standard of Review.

A conviction violates due process where a rational jury could not find the defendant guilty beyond a reasonable doubt. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 317-319; *People v. Johnson* (1980) 26 Cal.3d 557, 575-576; see also *In re Winship* (1970) 397 U.S. 358, 364; U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 15.) An appellate court reviewing a sufficiency of the evidence claim must decide whether the evidence of each of the essential elements of the offense was "substantial." (*People v. Johnson, supra,* 26 Cal.3d at p. 578; see *People v. Barnes* (1986) 42 Cal.3d 284, 303-304.) "'[S]ome' evidence" is "not enough." (*People v. Johnson, supra,* 26 Cal.3d at p. 577.)

"'Substantial evidence' means that evidence which, when viewed in light of the entire record, is of solid probative value, maintains its credibility and inspires confidence that the ultimate fact it addresses has been justly determined." (*People v. Conner* (1983) 34 Cal.3d 141, 149, citing *People v. Perry* (1979) 100 Cal.App.3d 251, 259 and *People v. Bassett* (1968) 69

Cal.2d 122, 137-138; see also *People v. Morris* (1988) 46 Cal.3d 1, 19, overruled on other grounds by *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, fn. 5.)

Speculation, of course, "is not evidence, less still substantial evidence." (*People v. Waidla* (2000) 22 Cal.4th 690, 735; see also *People v. Smith* (Ill. 1999) 708 N.E.2d 365, 371 ["It is no help to speculate that the defendant may have killed the victim. No citizen would be safe from prosecution under such a standard."].) Evidence that the defendant "probably" committed the crime is likewise insufficient. (See *Cooper v. McGrath* (N.D. Cal. 2004) 314 F.Supp.2d 967, 998.)

In the context of a capital case, the sufficiency of the evidence must be assessed with painstaking care, to identify lapses in the evidence and resort to speculation and conjecture, for in a capital case, these not only threaten due process, but undermine the reliability of the guilt determination, violating the Eighth Amendment. (See *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Kyles v. Whitley* (1994) 514 U.S. 419, 422; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; but see *People v. Howard* (2010) 51 Cal.4th 15, 34, fn. 10 [rejecting defendant's suggestion that there is a higher standard of appellate review for sufficiency of the evidence claims in capital cases and stating that cases discussing factfinding

proceedings in the trial court are inapplicable to review on appeal].)

B. The Evidence Was Not Sufficient to Support Mr. Gomez's Conviction for the First Degree Murder of Raul Luna.

Raul Luna, a drug dealer, was found shot in the head in his front yard in the early morning of June 10, 1997. (11RT 1700-1702, 1806-1808; 13RT 2057-2058, 2061; 14RT 2152-2153.) A live 12-gauge shotgun cartridge was found about 15 feet from his body; an ATM card and a baggie containing methamphetamine were also found near the body. (11RT 1701-1703, 1710-1711, 1713-1714.) A car was found on a nearby street, 150 to 200 yards from Luna's house; its windows were rolled down, its tires were wet (apparently from water in the gutter), its hood was warm, and the keys were in the ignition; in the back seat lay a bag of 12-gauge shotgun shells. (11RT 1703, 1705-1706; 13RT 2080-2084.)

Shortly before the shooting, Luna's brother Rudy, who was inside the house, had heard a car pull up in front of the house and then drive off after its door opened and closed; he then heard a rustling in the bushes outside and a voice whispering, "There's somebody in there, there's somebody in there." (13RT 2059-2060, 2064.) A few minutes later he heard someone say, "He's here." (13RT 2060.) Immediately before the shooting, Rudy Luna heard his brother say ,"Oh, shit." (13RT 2060.)

A neighbor, Charles Orr, heard what sounded like an explosion

around midnight on the night of the killing. (13RT 2070-2071.) He heard running and looked out the window. (13RT 2071.) He saw somebody running by and heard a rattling noise and the sound of a "heavy footed" person running. (13RT 2071.) The person was "like a shadow"; he could not identify the person. (13RT 2071-2072.) He could not tell if the person was male or female. (13RT 2072.)

None of this evidence, of course, addressed the crucial question of who killed Luna, though as the prosecutor himself argued, the whispering heard by Rudy Luna suggested that two individuals were present. (27RT 3838.) Gomez alone was charged with Luna's murder; the prosecution introduced no evidence regarding any other individual who might have been present at the scene.

No evidence linked Gomez to the shooting. At best, the evidence placed him in the neighborhood, linked him to the car parked 150 to 200 yards from Luna's house, which may have been connected with the killing, and linked him to Luna's cell phone. The evidence consisted only of the following:

- Ten of thirty-four fingerprints lifted from the exterior surface of the driver's side door and window of the car parked 150 to 200 yards from the Luna crime scene, which the prosecutor alleged was connected to crime, were matched to Gomez. (13RT 2090-2094,

2103-2107, 2109.)[8]

Ruben Gomez, however, was not the owner of the car. (11RT 1711-1713.) A radio scanner was found in the car; no prints were lifted from the scanner that matched Gomez. (11RT 1713.) Other prints, including prints on the car's interior, were matched to individuals named Maria Baca, Sandra Ruvalcaba, Anthony Pang (or Payne), and another unidentified man. (11RT 1717-1718, 13RT 2101-2107.) Some prints were apparently not matched to any of the six individuals whose prints were compared with those lifted from the car. (13RT 2101-2107.)

- Almost five hours after the homicide, Luna's cell phone was used to call Robert Dunton's apartment, where Gomez later began to stay; the phone was found in Dunton's apartment a few weeks later; and Witness #1 testified that Gomez brought the phone to Dunton's apartment. (11RT 1740-1742; 14RT 2150-2160, 2167-2177; 20RT 3005.)

Earlier calls made from the phone after Luna's killing were to paging and cab companies, a hotel, and a woman named Marlene Andrews. (14RT 2159-2161, 2170-2177.) None of these calls were identified as having been made by Ruben Gomez. The officer who investigated the calls made to the cab companies did not know whether any cabs were ever dispatched as a result of the calls. (15RT 2329.) No identifiable fingerprints were lifted from the cell phone. (11RT 1714-1715.)

- Witness William Owens, for the first time at trial, after seeing Gomez in court three times, identified him as a man he had seen running away from the direction of Luna's house, seven to nine blocks from the scene, about five or ten minutes after he heard a gunshot. (14RT 2184-2187, 14RT 2202; 4RT 2249; see 28RT 4077; see Prosecution Exh. 46; 27RT 3875 [prosecutor estimates distance of nine blocks].) The man asked Owens for a ride to his girlfriend's house. (14RT 2184.)

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[8] The driver's side window was rolled all the way down. (See Prosecution Exh. 13.)

> Owens believed he heard the gunshot around 1:30 or 1:45 a.m. (14RT 2184.) According to police, he reported hearing a gunshot around 1:00 a.m. (15RT 2323.) Shortly after the crime, Owens had described the man to police as Hispanic, with a thick Spanish accent. (14RT 2192-2193.) At trial, he estimated that the man was 5 feet, 9 or 10 inches. (14RT 2191.) Ruben Gomez is 6 feet, 2 inches. (29RT 4293.) While Owens claimed that he had viewed a photo array and "pointed out one picture and . . . said 75 to 85 percent," the detective who showed Owens the six-pack testified that Owens stated that a photograph of Gomez in a six-pack photo lineup "somewhat resembled" the man he had seen, but that Owens could not identify him to the detective's satisfaction. (14RT 2199-2200; 15RT 2325, 2330-2331.) (The detective did not have Owens circle Gomez's photo; he asks the witness to circle a photo when he feels the witness has made an accurate identification. (15RT 2330.)) No evidence suggested that Gomez had a heavy Spanish accent. After Owens had viewed the photo array, and then, years later, encountered Gomez three times in court, including the morning of his testimony, Owens informed the prosecutor that he could identify Gomez as the man he had seen running down the street. (14RT 2249; see also 14RT 2202.)

This evidence was insufficient to support Gomez's conviction for the first degree murder of Luna. At most, this evidence established that Gomez was seven to nine blocks from the scene near the time of the crime; that Gomez at some time had touched a car that may have been connected to the crime; that Luna's cell phone was used, almost five hours after the killing, to call an apartment where Gomez later began to stay; and that Gomez at some point possessed Luna's cell phone. That is insufficient to sustain a first degree murder conviction. Far from inspiring confidence in the rightness of the verdict (*People v. Conner, supra,* 34 Cal.3d at p. 149), this

scant evidence raises grave suspicion that the verdict was wrong.

1. The Evidence Is Insufficient to Establish That Mr. Gomez Was at the Crime Scene or to Link Him to the Actual Killing of Raul Luna.

Evidence that Gomez at some point touched a car with a possible connection to the crime does not establish that Gomez was ever in Luna's front yard. At most, it shows association with a car that may have been associated with the crime. But, as this Court reasoned in reversing a conviction for insufficiency of the evidence in another case where the evidence included the defendant's fingerprints on a car connected with the crime:

> [A]ssociation with a criminal is not to be equated with connection with the crime. . . . [S]uch a contention asks the jury to speculate on how and why the fingerprints appeared, with no evidence at all on that question. Even if the fact of the fingerprints be deemed to cast suspicion, even grave suspicion, on [a defendant], such is insufficient.

(*People v. Robinson* (1964) 61 Cal.2d 373, 399; see *id.* at pp. 379, 397-399 [evidence, including evidence of defendant's fingerprints in and around passenger seat and door of getaway car, insufficient even as slight evidence necessary to corroborate accomplice].)

As in *Robinson*, there was no evidence here as to when or how the

prints were left on the car.[9] (13RT 2109; see *People v. Robinson, supra,* 61 Cal.2d at pp. 399-400; see *People v. Trevino* (1985) 39 Cal.3d 667, 697 [evidence, consisting of speculative and equivocal identification testimony and a "fingerprint of some unknown vintage" at crime scene, was insufficient as matter of law], overruled on other grounds as recognized in *Williams v. Superior Court* (1989) 49 Cal.3d 736, 750; *People v. Jenkins* (1979) 91 Cal.App.3d 579, 584 ["[T]here is a limit to the mileage that can be obtained from the fingerprint evidence. The only fact directly inferable from the presence of the fingerprints is that sometime, somewhere defendant touched the containers."].) The presence of Gomez's prints on a car parked 150 to 200 yards from the crime scene, even if that car is assumed to be connected with the crime, do not establish that he was one of the two individuals in Luna's front yard at the time of the killing.[10]

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[9] In *Robinson*, this Court noted that because the prosecution's evidence showed that defendant was related to a man who lived in the same building as the car's owner, the evidence that defendant's fingerprints were found on the car was of dubious value. (*People v. Robinson, supra,* 61 Cal.2d at pp. 379, 398-399.) Here, by contrast, the prosecution's evidence did not show who owned the car — though the evidence established that Ruben Gomez did not. (11RT 1713.) The prosecution's failure to introduce any evidence about who owned the car, of course, does not make the evidence against Gomez any stronger.

[10] The record contained no forensic evidence aside from these fingerprints on the car; nothing linked Gomez to the crime scene. (Compare *People v. Hall* (1964) 62 Cal.2d 104, 111 [insubstantial evidence further

(continued...)

William Owens's surprise trial testimony identifying Gomez as a man he had seen running, seven to nine blocks from the scene, five to ten minutes after he heard a gunshot — even if it constituted evidence of Gomez's presence in the neighborhood— does not establish that Gomez was one of the two individuals in Luna's front yard. At most, the identification would show that Gomez was seen in the area, running from the direction of the scene, five to ten minutes after the shooting. Running from the scene of a shooting, of course, does not establish that one is guilty of the shooting, or even that one was present when the shooting took place. (See *Juan H. v. Allen* (9th Cir. 2005) 408 F.3d 1262, 1277 [no rational trier of fact could find criminal culpability in decision of juvenile to run home from scene of shooting].)

And Owens's testimony did not constitute *substantial* evidence — "'evidence which, when viewed in light of the entire record, is of solid probative value, maintains its credibility and inspires confidence that the

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[10](...continued)
undermined by the "absence of evidence that would normally be forthcoming" such as additional forensic evidence or motive].) Police attempted to lift latent fingerprints from the bag and shotgun shells found in the back seat, but did not find any prints. (13RT 2096-2097.) There is no evidence that police attempted to lift prints from the car keys left in the Oldsmobile's ignition (13RT 2084), which could have established who had driven the car most recently. (Compare *People v. Turner* (1994) 8 Cal.4th 137, 154, overruled on other grounds as stated in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

ultimate fact it addresses has been justly determined." (*People v. Conner, supra,* 34 Cal.3d at p. 149.) As this Court and the United States Supreme Court have both recognized, eyewitness identifications are often unreliable. (See *People v. Cardenas* (1982) 31 Cal.3d 897, 908, citing *United States v. Wade* (1967) 388 U.S. 218, 228; see also *Perry v. New Hampshire* (2012) 132 S.Ct. 716, 728.) And William Owens's identification of Ruben Gomez was not a typical eyewitness identification; it had multiple hallmarks of unreliability.

Within a day after the incident, Owens was unable to identify Gomez as the man he encountered running from the direction of the scene, stating only that a photograph of Gomez "somewhat resembled" the person he saw. (15RT 2324-2325, 2327-2328, 2330-2331.) (See *People v. Cardenas, supra,* 31 Cal.3d at p. 909 [in-court identifications were unreliable where witnesses had difficulty in identifying defendant before trial]; see also *People v. Trevino, supra,* 39 Cal.3d at pp. 696-697 [in-court identification was speculative and equivocal where witness misremembered circumstances surrounding her viewing of photo lineups].) Only after seeing Gomez in court three times did Owens identify him as the man he saw. (14RT 2187, 2249.) Owens first revealed to the prosecutor that he believed he could identify Gomez during the lunch break before his afternoon

testimony. (14RT 2203-2204.)

This is not the only reason Owens's identification fails to inspire confidence. At the time of the crime, more than two years before, Owens had provided a description that did not match Gomez, and was not shown to match Gomez's appearance at the time of the crime, in crucial respects.

- Owens estimated the man's height at around 5 feet 9 inches or 5 feet 10 inches and his weight at 180 to 200 pounds. (14RT 2191-2192.) Gomez is 6 feet, 2 inches tall. (29RT 4293.) The record contains no evidence of his weight at the time of the crime.

- Owens had described to police a man with a thick Spanish accent (14RT 2192-2193); there was no evidence that Ruben Gomez spoke with a heavy Spanish accent.

- Owens told the police the man had a "fade" crewcut hairstyle and a "trim" mustache. (14RT 2195-2196.) Though Gomez had a mustache at the time of trial (14RT 2195), there was no evidence that Gomez had such a hairstyle or mustache in June, 1997.

- Owens did not see any tattoos on the man's neck or hands, despite that, during the five or six seconds of contact, "all I did I looked at his eyes and hands." (15RT 2206-2207.) Gomez had extensive tattoos, including on his hands. (14RT 2206, 2208; see 13RT 2045-2046.)

(Compare *People v. Trevino, supra,* 39 Cal.3d at p. 696 [in-court identification was speculative and equivocal where witness testified that man at scene was tall and slender and did not have a mustache, and defendant was not slender and did have a mustache at the time].)

Aside from the discrepancy between Owens's recollection of his

viewing of the photo array and the officer's (see 15RT 2325; 14RT 2199-2200), there were additional discrepancies between the description Owens provided police and the description he recalled providing to police. (See 15RT 2326; 14RT 2190, 2193, 2207, 2212 [Owens described the man to police as wearing a white and red nylon jacket, blue denim pants, and white shoes; at trial, he recalled telling the police that the man had a red and blue jacket, and he could not recall what kind of shoes the man was wearing or whether he had said anything to the detective about what kind of shoes the man was wearing];[11] see also 14RT 2190, 2206-2207; 15RT 2327 [Owens testified that he saw the man for only five or ten seconds; he had reported to police that he saw the man for approximately 20 seconds]; see *Kyles v. Whitley, supra,* 514 U.S. at p. 444 [evolution over time of eyewitness description can be fatal to its reliability, citing *Manson v. Brathwaite* (1977) 432 U.S. 98, 114, and *Neil v. Biggers* (1972) 409 U.S. 188, 199].)

Finally, the identification was cross-cultural, and Owens and Gomez did not know one another. (14RT 2189; 4SCT 10 [warrant for William Owens, identifying his race as black];[12] see *People v. Cardenas, supra,* 31

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[11] See footnote 13, below.

[12] Though this document was contained in the superior court file, the trial court refused to include this document in the record on appeal. (See 4SCT 4; see also 4SCT 12.) In a motion to augment the record on appeal,

(continued...)

Cal.3d at p. 908 ["Eyewitness identifications are especially unreliable where the witnesses identify a member of a race or ethnic group other than their own."].)

In sum, there was little, if anything in the record to inspire confidence that Owens had accurately identified Gomez as the man he had seen running on the night of the crime. But even if Owens's identification was of solid probative value — and for the myriad reasons above, it was not — it does not establish that Gomez was one of the two men in Luna's yard when Luna was shot. Indeed, the only evidence bearing on that question consisted of shoe prints that did not match the shoes Gomez was said to have worn.[13]

Nor, finally, did evidence that Luna's cell phone was used to call Dunton's apartment, almost five hours after the killing, or evidence that Gomez at some point possessed Luna's cell phone, do anything to establish that Gomez was in Luna's front yard when Luna was shot, or that he had anything to do with Luna's shooting. None of the calls made on Luna's cell

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[12](...continued)
Gomez asks this Court to take judicial notice of this document.

[13] Witness #1 told a detective that Gomez always wore a pair of hiking boots. (24RT 3617.) A pair of hiking boots belonging to Gomez were booked into evidence upon his arrest. (21RT 3113, 3105.) Gomez's boots were compared to shoe prints on Luna's front lawn, and they did not match. (14RT 2146-2149.)

phone were identified as having been made by Gomez. The officer who investigated the calls to cab companies did not know whether any cabs had been dispatched in response to the calls. (15RT 2329.) There was no evidence presented regarding the identity of Marlene Andrews, an individual whose residence was called using Luna's cell phone. (14RT 2160, 2176.) There was no evidence regarding who made the longest of the calls — to the Holland Hotel at 1:30 a.m. (14RT 2160, 2175-2176.) Speculation that Gomez might have made these calls cannot take the place of evidence. (See, e.g., *People v. Morris, supra,* 46 Cal.3d at pp. 20-21; see also *People v. Alkow* (1950) 97 Cal.App.2d 797, 802.)

Even if Witness #1's testimony is taken to establish that Gomez is the person who brought Luna's cell phone to Dunton's apartment, and that he did so some time after Luna's killing,[14] courts have consistently

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[14] Witness #1's testimony that Gomez brought the phone into Dunton's apartment was, to say the least, imprecise and contradictory. On direct examination, he testified that Gomez had brought Luna's phone, a white "brick" cell phone, into Dunton's house. (20RT 3005.) On cross-examination, he stated that he first saw the brick phone *before* he was asked to burn a white car (which, assuming that Witness #1 referred to the burning of Rajandra Patel's Toyota Camry, would have been in late May of 1997, well before Luna was killed.) (22RT 3251-3255; see 11RT 1699-1700 [date of Luna's death]; 9RT 1476 [date of Patel's death].)

Witness #1 also testified that he saw the brick phone *after* he was asked to burn the white car, and that he may have mixed up the large white "brick" phone with a newer, thinner black cellular phone. (24RT 3539-

(continued...)

emphasized that unexplained possession of recently stolen property is insufficient in and of itself to support a guilty verdict for a theft-related offense. (See *People v. Barker* (2001) 91 Cal.App.4th 1166, 1174; see also *People v. Mendoza* (2000) 24 Cal.4th 130, 175-176.)

The leap from possession of recently stolen property to *murder* is even greater, and is all the more unwarranted. Even with slight corroborating evidence, conscious possession of recently stolen property is not sufficient to support a murder conviction. (*People v. Barker, supra,* 91 Cal.App.4th at p. 1176.) As this Court has explained: "'Proof a defendant was in conscious possession of recently stolen property simply does not lead

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[14](...continued)
3541, 3554-3558.)

Witness #1's contradictory testimony on the timing was not insignificant, as any possession of Luna's cell phone *before* his killing would have had no probative value at all with respect to the killing. More, while Luna's father testified that the cell phone in question was Luna's, Luna Sr. did not live with Raul Luna, and no testimony established that Luna possessed the cell phone up until the time of his death. (14RT 2151-2153.) And more, the evidence showed that Rudy Luna, Raul Luna's brother, personally knew Gomez (13RT 2064), thus providing a connection that could explain why Gomez might have had Luna's cell phone before he was killed. (See *Turner v. McKaskle* (5th Cir. 1983) 721 F.2d 999, 1002-1003 [evidence, including evidence of possession of recently stolen property, was insufficient where defendant knew victim, and the jury could not properly have inferred from presence of victim's belongings in defendant's car that defendant murdered victim to get them; jury could not even infer that defendant had stolen the items, as there was no evidence they were stolen as opposed to given away; even if items were stolen, someone else may have stolen them].)

naturally and logically to the conclusion the defendant committed' a rape or murder." (*People v. Prieto* (2003) 30 Cal.4th 226, 249, quoting *People v. Barker, supra,* 91 Cal.App.4th at p. 1176; see also *Turner v. McKaskle, supra,* 721 F.2d at pp. 1002-1003 [evidence that defendant admitted being with the victim on the day of the murder, was present near the scene of the crime and left the state the day after the murder, and possessed some of the victim's personal belongings was insufficient to sustain murder conviction].) Thus, even if it is assumed that Gomez had Luna's cell phone after he was killed, there is no evidence to suggest Gomez obtained the phone by killing Luna, and the law does not permit the unsupported inference that he did.

* * *

There is no evidence in this record placing Gomez at the scene of the crime or linking him to the actual killing of Raul Luna. (See *People v. Trevino, supra,* 39 Cal.3d at pp. 696-697 [where evidence included defendant's fingerprint at scene, but did not establish that defendant was at the scene at the time of the crime, it was insufficient]; see also *Cooper v. McGrath, supra,* 314 F.Supp.2d at pp. 996-997 ["no properly admitted evidence put [defendant] at the scene of the murder. That gap in evidence would have caused any rational trier of fact to find that [defendant's] guilt

was not proven beyond a reasonable doubt"].)

In *People v. Blakeslee*, the evidence showed defendant was at the crime scene five to ten minutes before the crime, and five to ten minutes after; the Court of Appeal found it insufficient, noting that it showed "[a]t most . . . opportunity": "No one witnessed the shooting, no one placed defendant in the apartment at the time of the shooting, no one saw defendant with a weapon, and no one identified defendant with any particular weapon." (*People v. Blakeslee* (1969) 2 Cal.App.3d 831, 837-838.) Here, of course, the evidence did not show even that much: a highly suspect identification, if credited, provided some evidence that Gomez was seven to nine blocks away, five to ten minutes after the crime, but nothing established that Gomez was in Luna's yard at any time.

As in *Hall,* "[e]very attempt to connect defendant with the details of the killing failed." (*People v. Hall, supra,* 62 Cal.2d at p. 112.) At most, this evidence casts suspicion on Gomez. But suspicion, even grave suspicion, is not enough. (See, e.g., *People v. Robinson, supra,* 61 Cal.2d at p. 399.) We can speculate that Gomez was one of the individuals in Luna's front yard — or we can speculate that he was a third, or fourth person in the area at the time. There is no evidence either way, and speculation cannot take its place. (See, e.g., *People v. Waidla, supra,* 22 Cal.4th at p. 735.) As this Court

explained in *People v. Morris*:

> We may *speculate* about any number of scenarios that may have occurred . . . . A reasonable inference, however, 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.

(*People v. Morris, supra,* 46 Cal.3d at p. 21, original italics; see also *Juan H. v. Allen, supra,* 408 F.3d at p. 1279.)

2. Even If it Is Assumed That Mr. Gomez Was One of the Individuals in the Lunas' Front Yard at the Time of the Shooting, the Jury Properly Found That He Did Not Shoot Mr. Luna and There Was No Evidence at All to Support a Conviction on an Aiding and Abetting Theory.

The sounds and whispers Rudy Luna overheard suggested that at least two individuals were in the Lunas' front yard when they confronted Raul Luna. Even if speculation could take the place of evidence, and it is assumed that Gomez was one of those two individuals, there was *no evidence at all* that Gomez shot Luna.[15] The jury thus properly found the firearm allegation not true. (29RT 4348; 3CT 840.)

Because there was no substantial evidence — indeed, no evidence at

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[15] In fact, the prosecution's evidence, if it shows anything, suggested that Gomez did not shoot Luna. William Owens, who had seen a man running, seven to nine blocks from the scene, told police and testified that the man he saw had nothing in his hands; he did not see the man carrying a shotgun. (14RT 2196-2197; 15RT 2327.)

all — from which the jury could conclude that Gomez was the actual shooter of Raul Luna, he could properly be convicted of first degree murder only if the jurors found that he aided and abetted the shooter, "shar[ing] [his] murderous intent," and personally premeditating and deliberating. (*People v. McCoy, supra,* 25 Cal.4th at pp. 1118-1119.)

First, there is no evidence whatsoever from which the jury could conclude that Gomez "contemplated the murder . . . much less premeditated and deliberated it." (*People v. Roberts* (1992) 2 Cal.4th 271, 320.) Thus, "[o]n that ground, the first degree murder conviction cannot stand . . . ." (*Ibid.*)[16]

The evidence was insufficient to sustain any murder conviction, however. Gomez was properly acquitted of the robbery of Raul Luna, and the robbery special circumstance was properly found not true, as the evidence could not support a conviction for robbery or the robbery special circumstance. (See 29RT 4348-4349; see also 3CT 840-841.) The evidence was therefore likewise insufficient to support a murder conviction on a felony-murder theory. (See *People v. Morris, supra,* 46 Cal.3d at pp. 19-

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[16] If Gomez's conviction for the first degree murder of Raul Luna is upheld based on an interpretation of state law that fails to maintain a meaningful distinction between first and second degree intentional murder, then state law violates due process, for the reasons set forth below in Argument III.

22.)

Even if it is assumed that Gomez possessed Luna's cell phone at some time after his death,[17] as in *Morris*, there was an "absence of any substantial evidence" that a taking of Luna's cell phone "was accomplished either before or during the killing by means of force or fear." (*Id.* at p. 21.) More, there was no evidence whatsoever of a "logical nexus, beyond mere coincidence of time and place, between the felony the parties were committing or attempting to commit and the act resulting in death" — a requirement where a nonkiller is prosecuted under a felony-murder theory. (*People v. Cavitt* (2004) 33 Cal.4th 187, 201.)

More fundamentally, even if it is assumed that Gomez was present at the scene, there was no evidence at all shedding any light whatsoever on what Gomez may have done, or what his mental state was. The principle that a defendant must both "do something [the actus reus] *and* have a certain mental state [the mens rea]" applies to aiding and abetting liability as well as direct liability. (*People v. McCoy, supra,* 25 Cal.4th at p. 1117, original italics.) In order to find a defendant guilty as an aider and abettor, the prosecution must show that the defendant "by act or advice, aid[ed], promote[d], encourage[d] or instigate[d] the commission of the crime,"

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[17] As set forth above, no substantial evidence supported such an assumption.

"with knowledge of the unlawful purpose of the perpetrator . . . and with the intent or purpose of committing, facilitating or encouraging commission of the crime." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164, citing *People v. Beeman* (1984) 35 Cal.3d 547, 561; see also *People v. McCoy, supra,* 25 Cal.4th at p. 1118.)

The prosecution must establish intent with respect to the specific offense the defendant is alleged to have aided and abetted; intent may not be established based upon "the . . . generalized belief that the defendant intended to assist and/or encourage unspecified 'nefarious' conduct." (*Juan H. v. Allen, supra,* 408 F.3d at p. 1276, quoting *People v. Prettyman* (1996) 14 Cal.4th 248, 268.)

Even if it were assumed that Gomez was in Luna's front yard with the shooter, there was no evidence at all that he committed any act or gave any advice to aid, promote, encourage or instigate the shooter in the commission of the crime. There was no evidence at all, anywhere in the record, of anything Gomez said or did in connection with the killing of Raul Luna.

Nor was there any evidence at all that Gomez had "knowledge of the criminal purpose" of the unknown perpetrator or "the intent or purpose of committing, facilitating or encouraging the commission of the crime."

(*People v. Cooper, supra,* 53 Cal.3d at p. 1164; see *Juan H. v. Allen, supra,* 408 F.3d at p. 1276 ["An aider and abettor must share in the principal's criminal purpose or intent . . . 'In general neither presence at the scene of a crime nor knowledge of, but failure to prevent it, is sufficient to establish aiding and abetting its commission.'"], quoting *People v. Campbell* (1994) 25 Cal.App.4th 402, 409; see *Newman v. Metrish* (6th Cir. 2008) 543 F.3d 793, 796-797.)

There was simply no evidence from which the jury could conclude that the non-shooter present at the scene at the time of the crime, even if it were proven to be Gomez, did anything at all "'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.'" (*People v. McCoy, supra,* 25 Cal.4th at p. 1118, original italics, quoting *People v. Beeman, supra,* 35 Cal.3d at p. 560; see *Juan H. v. Allen, supra,* 408 F.3d at p. 1276; see also *Piatkowski v. Bett* (7th Cir. 2001) 256 F.3d 687, 692 [mere presence at scene not sufficient to sustain conviction on conspiracy theory]; *Newman v. Metrish, supra,* 543 F.3d at pp. 796-797; *People v. Durham* (1969) 70 Cal.2d 171, 181.)

That other individual, even if it were shown to be Gomez, may well have accompanied the shooter intending to confront Luna, or surprise him,

or purchase drugs from him. That is speculation, of course; but it would equally be speculation to posit that the other individual intended that Luna be killed. There is simply no evidence on this crucial element, and again, speculation cannot take its place. (See, e.g., *People v. Waidla, supra,* 22 Cal.4th at p. 735; *People v. Morris, supra,* 46 Cal.3d at p. 21.)

Juan H. v. Allen is instructive. There, the Ninth Circuit, applying the additional layer of deference mandated in federal habeas review but not applicable here, concluded that the evidence was insufficient to sustain the delinquency petition charging habeas petitioner Juan H. with first degree murder. (*Juan H. v. Allen, supra*, 408 F.3d at pp. 1274-1277.) Juan H. was shown to have been at the scene, standing behind his brother when his brother shot the victim; he was shown to have had a prior altercation with the victim; he ran from the scene; and he gave a police a false alibi for the time of the shooting. (*Ibid.*) The court nonetheless found the evidence of aiding and abetting insufficient, as there was no evidence that Juan H. intended to aid and abet the killing. (*Id.* at pp. 1266-1267, 1278-1279.) Here, where there was no evidence of motive,[18] any conclusion that Gomez

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[18] The record is devoid of any motive. (*People v. Hall, supra,* 62 Cal.2d at p. 112 [in reversing for insufficiency, in addition to weak evidence of guilt, court notes that there was no evidence of motive]; compare *People v. Snow* (2003) 30 Cal.4th 43, 66-68 [distinguishing *People v. Trevino, supra,* 39 Cal.3d 667, because evidence of Snow's motive was

(continued...)

did anything to aid or abet the shooting or intended that Luna be killed would be even more speculative.

The Ninth Circuit explained its conclusion in *Juan H.* in language that applies equally to this case:

> [T]he record does not reflect any evidence that [defendant] intended, through his actions, to assist [the shooter] in committing first-degree murder. [Defendant] did not do or say anything before, during or after the shootings from which a reasonable factfinder could infer an intent or purpose to aid and abet in the murder . . . .
>
> Speculation and conjecture cannot take the place of reasonable inferences and evidence — whether direct or circumstantial — that [defendant] — through both guilty mind and guilty act — acted in consort with [the shooter] . . . [I]t is only speculation that supports a conclusion that [defendant] knew that [the perpetrator] planned to commit the first-degree murder[] . . . , and that [defendant] took some action intended to encourage or facilitate [the perpetrator] in

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[18](...continued)
"strong"; Snow "had a virtually unique combination of motive and opportunity" *and* "was connected by other circumstantial evidence . . . to the crime"]; *House v. Bell* (2006) 547 U.S. 518, 540 ["From beginning to end the case is about who committed the crime. When identity is in question, motive is key."].) Prior to trial, the prosecution conceded that it did not believe that robbery was the motive; the prosecutor agreed with the court's assessment that the charged robbery of Raul Luna was "distinct" from the homicide. (1RT 21-23; see also 1RT 78-80.) The robbery special circumstance was then added to the information during deliberations, over defense objection, despite the prosecutor's earlier statement that he did not believe it was true. (29RT 4314.)

Though the prosecution then argued in summation that the motive was "simple greed" (27RT 3846), its argument was belied by its own concessions before trial and the lack of any evidence to support it.

> completing the killing[]. Such a lack of evidence violates the Fourteenth Amendment guarantee that an accused must go free unless and until the prosecution presents evidence that proves guilt beyond a reasonable doubt.

(*Juan H. v. Allen, supra,* 408 F.3d at pp. 1278-1279; see also *In re Michael T.* (1978) 84 Cal.App.3d 907, 910, 911 [evidence insufficient to support a determination that juvenile was guilty of murder where it showed only that the juvenile was present near the scene and had made statements apparently acknowledging involvement]; *Piatkowski v. Bett, supra,* 256 F.3d at pp. 692-693 [evidence insufficient to support guilt of conspiracy to murder where it showed only that defendant was at scene of crime].)

United States v. Andrews (9th Cir. 1996) 75 F.3d 552 is instructive as well. In that case, the Ninth Circuit found evidence of aiding and abetting insufficient where, although defendant had just shot and killed one individual, there was no evidence that he shared his co-defendant's intent to kill another person seconds later. (*Id.* at pp. 554-556.) The court's explanation, again, applies equally here:

> While mere presence at the scene is insufficient to support a conviction of aiding and abetting, [citation], the jury can infer intent from circumstantial evidence. [Citation.] We have been unable, however, to find in the record circumstantial evidence of the requisite intent on [defendant's] part. The evidence shows that [defendant], along with [others], accompanied [his co-defendant] to the scene of the crime. There is no evidence that [defendant] shared [his co-defendant's] intent to hurt [the victim].

(*Id.* at pp. 555-556.) Here, similarly, the record is devoid of any evidence — circumstantial or otherwise — that Gomez shared the shooter's intent to kill Raul Luna.

3. Conclusion.

No rational jury, without resort to speculation and conjecture, could conclude beyond a reasonable doubt — reaching the requisite state of near certitude (*Jackson v. Virginia, supra,* 443 U.S. at p. 315) — that Gomez killed Raul Luna or aided and abetted the killing of Raul Luna.

As in *People v. Hall*, "[e]very attempt to connect defendant with the details of the killing fails." (*People v. Hall, supra,* 62 Cal.2d at p. 112.)

One could speculate as to any number of scenarios that might have occurred. (*People v. Morris, supra,* 46 Cal.3d at p. 21.) Even if it is assumed that Ruben Gomez was in the neighborhood around the time of the crime — an unwarranted assumption in light of the weak evidence of Owens's last-minute identification, and the unknown vintage of the fingerprints on a car parked 150 to 200 yards from the Lunas' house — he may or may not have been the other individual present in the Luna's yard with the shooter at the time of Luna's killing; he may or may not have been a third person who traveled to the neighborhood with the two individuals who were in Luna's front yard. If he was the other individual present in the

front yard, he may or may not have shared the killer's intent; he may or may not have merely intended to surprise Luna, or confront him, or scare him, or purchase drugs from him. But none of these scenarios rests on anything more than speculation and conjecture.

Speculation, of course, is not enough. (See, e.g., *People v. Morris, supra,* 46 Cal.3d at p. 21; *People v. Waidla, supra,* 22 Cal.4th at p. 735; *Juan H. v. Allen, supra,* 408 F.3d at pp. 1277-1278.) Because the case against Gomez rested on no more than that, his conviction for the murder of Raul Luna must be reversed.

C. The Trial Court Erred in Denying Mr. Gomez's Penal Code Section 1118.1 Motion.

After the prosecution rested, counsel for Gomez moved to dismiss the count charging Gomez with the killing of Raul Luna. (25RT 3651.) The court denied the motion. (25RT 3651.) For all the reasons set forth above, the trial court erred in denying Gomez's motion. (See *People v. Stevens* (2007) 41 Cal.4th 182, 200 [standard applied to section 1118.1 motion is the same as standard applied by an appellate court reviewing sufficiency of the evidence].)[19]

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[19] It does not appear that any significant evidence relevant to the Luna case was introduced after the trial court denied defense counsel's motion to dismiss, although there was some testimony relating to Witness #1's general credibility (see 25RT 3689-3691) and the Luna homicide was

(continued...)

D. Mr. Gomez's Death Sentences Must Be Reversed.

In addition to Gomez's conviction and death sentence for Luna's murder, his death sentence for the murder of Rajandra Patel must be reversed as well. As argued below, in Argument II, the evidence of Gomez's guilt in the Patel case was also insufficient, thus rendering the conviction and death sentence for that murder invalid. But even should this Court reject that argument, the death sentence for Patel's murder must be reversed.

The error here — Gomez's conviction for Luna's murder and the jury's consideration of that murder in deciding his sentence for killing Patel — violated Gomez's right to due process and to be free of cruel and unusual punishment, and was not harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24; U.S. Const., 8th & 14th Amends.; see also *People v. Brown* (1988) 46 Cal.3d 432, 447-449; *People v. Gonzalez* (2006) 38 Cal.4th 932, 961; *People v. Prince* (2007) 40 Cal.4th 1179, 1299-1300.) The prosecution cannot prove beyond a reasonable doubt that this error did not contribute to Gomez's death sentence in the Patel case.

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[19](...continued)
mentioned briefly (see 25RT 3722). Thus, essentially the same evidence is at issue with respect to the sufficiency question and the correctness of the court's denial of Gomez's Penal Code section 1118.1 motion.

Raul Luna was a person the jurors (erroneously) believed Gomez guilty of murdering. His parents' presence in the courtroom was so palpable that defense counsel felt compelled to note it in his guilt phase summation, remarking that Luna's death was particularly sad. (27RT 3927-3928; see 14RT 2242-2244.) Removing the Luna killing from the case would have markedly altered the picture facing the penalty phase jurors. In state law terms, there is a reasonable possibility that, with the Luna homicide removed from the case, at least one juror would have declined to impose the death penalty for the Patel murder. (See *People v. Brown, supra,* 46 Cal.3d at p. 448; *People v. Hernandez* (2003) 30 Cal.4th 835, 877 [reversing death sentence where error skewed jury's consideration of prosecution's most important aggravating evidence, evidence of another murder, and where evidence of stabbing defendant had been acquitted of was erroneously put before penalty phase jurors].)

The inquiry is not whether, in a sentencing proceeding that occurred without the error, a death sentence "would surely have been rendered," but whether the death sentence for Patel's murder "actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, original italics.) The death sentence for Patel's murder was not "surely unattributable" to the error in placing the murder of another

person, within weeks of the Patel murder, before the jurors deciding Gomez's sentence in the Patel case.

Unlike in *People v. Roberts*, *supra,* 2 Cal.4th at pp. 327-329, the conviction at issue (of Luna's murder) is *not* one for which the jury, by virtue of a life without parole verdict, evidently attached a lesser "moral significance." The jurors sentenced Gomez to death for Luna's murder despite the fact that they found he did not shoot him and despite the insufficiency of the evidence of Gomez's guilt. With the Luna murder removed from the case, at least one juror might well have viewed the Patel case differently.

More, even if this Court were to conclude that the Patel conviction were supported by sufficient evidence, that evidence was far from overwhelming. (See Argument II, below.) The prosecution cannot show beyond a reasonable doubt that placing the Luna crime before the penalty phase jurors did not affect the verdict by overcoming one or more jurors' lingering doubts about Gomez's conviction in the Patel case, in which there was no physical evidence, but only the testimony of two unreliable witnesses. (See Argument II.B.2., below; see *People v. Gay* (2008) 42 Cal.4th 1195, 1226 [lingering doubt defense at penalty phase could have particular potency where no physical evidence linked defendant to the

killing].)

This Court thus must reverse Gomez's conviction and sentence for the murder of Raul Luna, and his death sentence for the murder of Rajandra Patel.

II.

THE EVIDENCE WAS INSUFFICIENT TO PROVE MR. GOMEZ'S GUILT OF THE KIDNAPING, ROBBERY, AND MURDER OF RAJANDRA PATEL

Ruben Gomez was convicted of the first degree murder of Rajandra Patel, as well as the second degree robbery and kidnaping of Patel. (3CT 837-839.) The only evidence linking Gomez to these crimes was the testimony of two witnesses, Witness #1 and Witness #3.

Witness #1 was a heroin addict who lied to the jury and who may have been a schizophrenic who suffered hallucinations — or merely someone who feigned a mental disorder to collect government benefits, depending on which portion of his sworn testimony is true (if any) and which is false. This witness was so thoroughly discredited that no rational juror could put any stock in his testimony.

Witness #3 was a drug dealer's wife who came to the attention of the police when she and her husband were taken to the police station after a large amount of cocaine was found in their bedroom; she implicated Ruben Gomez when police asked about a pawn receipt, found in her possession, for Patel's jewelry.

The evidence supplied by these two witnesses, taken together, was not sufficient to permit rational jurors to conclude beyond a reasonable

doubt that Gomez kidnaped, robbed, and murdered Patel. They contradicted each other regarding their claims that Gomez possessed Patel's jewelry, such that it was physically impossible for both witnesses' claims to be true. Witness #3 offered evidence of a statement by Gomez which not only contradicted Witness #1's testimony, but also was suggestive of unreliability, irrelevance, or even fabrication, as it purported to relate to the killing of a Mexican man. And Witness #1, on the stand, proved himself so lacking in honesty and reliability that no rational juror could credit any unsupported testimony of his.

A. Standard of Review.

A conviction violates due process where rational jurors could not find the defendant guilty beyond a reasonable doubt. (See *Jackson v. Virginia, supra,* 443 U.S. at pp. 317-319; *People v. Johnson, supra,* 26 Cal.3d at pp. 575-576; see also *In re Winship, supra,* 397 U.S. at p. 364; U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15.)

"'[S]ome' evidence" is not enough. (*People v. Johnson, supra,* 26 Cal.3d at p. 577.) The evidence must be substantial. "'Substantial evidence' means that evidence which, when viewed in light of the entire record, is of solid probative value, maintains its credibility and inspires confidence that the ultimate fact it addresses has been justly determined." (*People v.*

Conner, *supra,* 34 Cal.3d at p. 149.)

To be sure, the assessment of credibility properly rests with the trier of fact and the appellate role in this domain is limited. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The factfinder's determination of witness credibility may only be upset where the witness's testimony is "physically impossible or inherently improbable . . . ." (E.g. *People v. Young* (2005) 34 Cal.4th 1149, 1181; *People v. Thompson* (2010) 49 Cal.4th 79, 124-125; see also *People v. Ozene* (1972) 27 Cal.App.3d 905, 910 [appellate court may find incredible, as a matter of law, testimony apparently credited by the factfinder where it is physically impossible or "such as to shock the moral sense of the court" — where the testimony is "inherently improbable and such inherent improbability . . . plainly appear[s]"], questioned on another ground by *People v. Gainer* (1977) 19 Cal.3d 835, 844; see also *People v. Coontz* (1953) 119 Cal.App.2d 276, 280; *People v. Lang* (1974) 11 Cal.3d 134, 139-140 [Court of Appeal might have concluded that alleged assaults "were physically impossible" and prosecution witnesses' testimony "demonstrably false"].)

In *People v. Smith,* in reversing a conviction for insufficiency of the evidence, the Illinois Supreme Court explained that it while credibility is "within the province of the trier of fact . . . .we will reverse a conviction

where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." (*People v. Smith, supra,* 708 N.E.2d at p. 370 [evidence insufficient where state witness's testimony was contradicted in important respects by testimony of more reliable state witnesses, and was in other respects not credible].)

The Eighth Circuit has explained that "we must reverse a conviction if no reasonable person could believe the incriminating testimony." (*United States v. Watson* (8th Cir. 1991) 952 F.2d 982, 988, citing *Jackson v. Virginia, supra,* 443 U.S. at pp. 318-319.) And the Eleventh Circuit has interpreted *Jackson*'s rationality requirement to allow appellate courts to disregard testimony that is "'so inherently incredible, so contrary to the teachings of human experience, so completely at odds with ordinary common sense, that no reasonable person would believe it beyond a reasonable doubt.' [Citation]." (*Wilcox v. Ford* (11th Cir. 1987) 813 F.2d 1140, 1146.)

At bottom, the constitutional question before an appellate court assessing sufficiency of the evidence is whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia, supra,* 443 U.S. at p. 318, original italics.) This "familiar standard gives full play to the responsibility of the trier of

fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. . . . [T]he factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution." (*Id.* at p. 319, original italics.) The question, of course, is not whether the appellate court believes prosecution witnesses are credible or is convinced beyond a reasonable doubt of guilt; rather, the question is whether "*any* rational trier of fact" could have been so persuaded. (*People v. Hernandez*, *supra,* 30 Cal.4th at p. 861, original italics.) Though the standard defers to the factfinder's role in judging credibility, some evidence may be so patently incredible as to warrant the conclusion that no rational juror could put stock in it.

Where the evidence "is so lacking in substantiality as to truth or credibility that it falls far short of that quantum of verity, reasonableness and substantiality required by law in criminal cases to satisfy the reason and judgment of those bound to act conscientiously upon it as to the existence of guilt beyond a reasonable doubt and to a moral certainty . . . [i]t must . . . be regarded as amounting to no evidence at all, as a matter of law . . . ." (*People v. Bodkin* (1961) 196 Cal.App.2d 412, 416-417.)

Where a life is at stake, it is all the more crucial that the evidence of

guilt "[be] of solid probative value, maintain[] its credibility and inspire[] confidence that the ultimate fact it addresses has been justly determined." (*People v. Conner*, *supra,* 34 Cal.3d at p. 149.) In Eighth and Fourteenth Amendment terms, "the need for the most reliable possible determination of guilt . . . is paramount . . . ." (*People v. Jones* (1998) 17 Cal.4th 279, 321 (Mosk, J., concurring); see also *Beck v. Alabama*, *supra,* 447 U.S. at p. 638; but see *People v. Howard, supra,* 51 Cal.4th at p. 34, fn. 10.) This Court cannot, and should not, permit Gomez to be executed on the basis of testimony by patently unreliable witnesses.

B. The Evidence Was Insufficient to Prove Mr. Gomez's Guilt of the Kidnaping, Robbery, and Murder of Rajandra Patel.

The physical evidence in the Patel case clearly showed that Patel had been killed; it did not, however, in any respect, show that Gomez was involved in the killing.

Early in the morning of May 26, 1997, Rajandra Patel's body was found alongside the northbound on-ramp to the Terminal Island freeway. (9RT 1476-1478, 1486-1487.) Blood was found on the shoulder area of the ramp, between the body and a point about 75 feet north. (9RT 1479-1481.) One .40 caliber cartridge case lay about 90 feet from the body; another a few feet closer to the body than that; and another three or four feet from the body. (9RT 1479-1482.) Patel had been shot in the back of the head and

there were two major stab wounds, one in the chest and one on the left side of the neck. (9RT 1522-1524.) Patel also had some smaller stab wounds on the face and chin. (9RT 1529-1530.)

Patel's car, a white Toyota Camry, was found two days later in an alley in San Pedro. (12RT 1878-1879; see 12RT 1870-1872.) The car's interior was completely burned. (12RT 1880.) Blood stains found in the trunk contained DNA consistent with Patel's; one in 60,000 people chosen at random would be expected to share the same DNA characteristics. (12RT 1886-1889, 1904-1911.)

Jewelry belonging to Patel was pawned in Las Vegas on June 5, 1997. (13RT 1970-1974, 12 RT 1873.) On June 8, 1997, a gun which, according to the firearms examiner, matched casings at the crime scene, was recovered from the home of a person named Angel Rodriguez in Wilmington. (12RT 1944-1948; 14RT 2137-2143.)[20]

The only evidence connecting Gomez to the crimes against Patel, however, was the highly unreliable testimony of Witnesses #1 and #3.

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[20] Though the officer who retrieved the gun from Rodriguez referred to him with masculine pronouns (12RT 1948), the chief investigator in the Patel homicide apparently believed Angel Rodriguez was a woman, affirming on direct examination that he had attempted to locate Angel Rodriguez but had been unable to locate "her." (12RT 1859-1860.)

1. No Forensic or Eyewitness Evidence Linked Mr. Gomez to the Patel Killing.

No physical or forensic evidence linked Gomez to the Patel killing, despite the fingerprint testing of Patel's car and multiple items found in it, including a flashlight that did not belong to Patel. (9RT 1495-1500;[21] see *Cooper v. McGrath*, *supra,* 314 F. Supp.2d at pp. 996-998 [granting habeas corpus petition for insufficiency of evidence and emphasizing lack of forensic and eyewitness evidence]; see also *People v. Hall*, *supra,* 62 Cal.2d at pp. 111-112; *People v. Blakeslee*, *supra,* 2 Cal.App.3d at pp. 839-840.) And no eyewitness saw the kidnaping, killing, or robbery.

The weapon used to stab Patel was not produced. Angel Rodriguez, who gave police a pistol, which, according to firearms examiner Anthony Paul, matched cartridges at the Patel crime scene (12RT 1944-1948; see 14RT 2137-2143), did not testify at trial and there was no evidence whatsoever about who he or she was or whether he or she had any connection to Ruben Gomez. The prosecution was reduced to arguing that the fact that the pistol was recovered in the Harbor Area somehow implicated Ruben Gomez in the killing. (27RT 3826-3827.) Of course,

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[21] In addition, casts of shoe and boot impressions at the scene where Patel's body was found did not match boots taken from Gomez (12 RT 1865-1868), boots which Gomez always wore, according to Witness #1 (24 RT 3617).

because the crime itself took place in the Harbor Area, the fact that the pistol used to commit it was found there bore no probative value at all.

While Witness #1 testified that he had seen Gomez with the pistol used to kill Patel "when he first started coming around [Dunton's] house" (20RT 3004), the record contains no explanation of how Witness #1 identified the weapon, such as any reference to distinctive characteristics it bore.[22]

2. The Testimonial Evidence Purportedly Establishing Mr. Gomez's Guilt Was Insufficient.

No evidence at all, other than Gomez's purported statements to two witnesses — Witness #1 and Witness #3 — linked him to the crimes against Rajandra Patel.[23]

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[22] Witness #1 testified that some time before the killing of Jesus Escareno (see Argument XVIII, Statement of Facts, pp. 17-21), Gomez told him he threw the gun in a dumpster, and when he went back to retrieve it, it was not there; he did not say when Gomez told him this or when the incident had happened. (24RT 3538-3539.)

[23] The prosecution attempted to shore up its weak evidence against Gomez in the cases involving Rajandra Patel by referring to a statement Gomez made to Detective Winter, which, it claimed, revealed knowledge of the Patel case not released to the press — that the victim could not be identified because his wallet was missing. (27RT 3826-3827.) Despite the prosecution's summation argument, there was no evidence that Patel had a wallet, let alone that it was missing. The only evidence relating to this issue was the evidence that Patel could not be identified — which was, in any event, the subject of a newspaper article introduced by the defense. (See Defense Exhibit G; see also 9RT 1498-1499.) More, the prosecutor failed to

(continued...)

a. Witness #1

Witness #1 was incredible as a matter of law. He had been a heroin user for 40 years and, at the time of the events he testified about, he was using heroin and crack on a daily basis, and sometimes methamphetamine as well. (22RT 3221-3227, 3282-3285.) He admitted to working as a doorman for Robert Dunton, a crack dealer; working for a heroin dealer he would not name; and committing "quite a bit" of robberies, mostly using knives. (22RT 3221, 3226, 3273-3275; 22RT 3315-3320; 24RT 3508-3509.) He either suffered from schizophrenia or for years feigned its symptoms in order to collect government disability benefits. (23RT 3364-3373; 24RT 3466-3480.) And he was an accomplice to murder. (29RT 4134-4137 [accomplice instruction]; 19RT 2911-2912; 19RT 2943-2950.)

Witness #1's testimony demonstrated beyond dispute that he had little regard for the truth and that he was willing to lie — and that he did lie, on the stand, as well as outside court. The following colloquies[24] illustrate

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[23](...continued)
identify how Gomez's statement related at all to the killing of Patel, except that it had taken place in the Harbor Area, and Gomez had commented that "things had gone crazy there in the Harbor Area lately." (13RT 2044.) None of the vague references to the circumstances of the killings Gomez described fit with the circumstances in the Patel case. (13RT 2042.)

[24] Although some of these colloquies related to counts other than those involving Rajandra Patel, they nonetheless serve to illustrate Witness
(continued...)

his attitude towards truth and his oath as a witness:

- Q. You didn't tell Detective Winter [that] Diablo always drove?
  A. I might have, but I wasn't under oath then.
  * * *
  Q Okay. So that makes a difference, right?
  A. To me it does. (22RT 3263.)

- Q. . . . Did you tell Detective Winter that Boxer took the 12-gauge?
  A. Is that when I was being videotaped?
  Q. I don't believe so, and it wasn't under oath.
  A. No, I didn't say it. * * * And if it's on the tape, I didn't [sic] say it. (22RT 3288.)

- Q. . . . Do you recall telling the police [contrary to your trial testimony] when they asked you who was there when you got back from the junk yard, you only told them Spider [Acosta] and Huero [Dunton].
  A. That's the way it goes if you guys see what the bad guys got and the bad guys see what the good guys got. (22RT 3297.)

- Q. . . . So that was a lie?
  A. It was a lie on my part.
  Q. Okay. Prior to your discovering the two dead bodies in the house, did you return to the house, crawl through the front window of the living room and find the bodies?
  A. That was another lie on my part.
  Q. Okay. I assume you told a couple of lies in this investigation, right?
  A. Probably more than a few. (22RT 3302.)

- Q Did you ever say that to the detectives?

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[24](...continued)
#1's attitude towards the oath he took when he took the stand in Gomez's trial.

A No, I didn't.
Q Or –
A I could have.
Q If you said it to the detectives –
A I could.
Q You could have, but you weren't under oath then, correct?
A That wasn't the truth. (22RT 3306.)

- Q Well, from 1981 through 1997, were you collecting SSI?
A Yup.
Q Were you entitled to it any of that time?
A You're entitled to what you can get.
Q I'm sorry. I didn't –
A You're entitled to what you can get.
Q Even if you have to lie to get it?
A Yeah. (24RT 3473-3474.)

Witness #1 not only lied in the course of the investigation, however; despite his purported distinction between lying to police and lying under oath, he lied on the stand. On the morning of Wednesday, January 26, 2000, Witness #1 testified that he took Thorazine, Stelazine, and Artan for "hearing voices" and hallucinating, though he sometimes still hallucinated, in spite of the medicine. (23RT 3364-3365.) He said that in late June, 1997, he had not taken his medication for some time — it "could have been a month . . . ." (23RT 3366.) He testified that while he received social security disability ("SSI"), it was "not particularly" because of the hallucinations, though his disability was a mental health disability. (23RT 3369.) He admitted having been placed in a locked ward in the 1980s

because he was a danger to himself; he told the jurors he had "faked attempted suicide" to get into the facility. (23RT 3370-3372.)

The following day, Witness #1 admitted that he had told the attorneys, outside the jurors' presence, that he never got hallucinations, and had invented them in order to collect social security for a mental disability. (24RT 3467, 3477-3478.)[25] He testified that had told the doctors that he "hallucinate[d] and . . . hear[d] voices and my blood runs backwards" in order to get social security benefits, knowing he was not entitled to them. (24RT 3471-3472.) He nonetheless opined that he was now entitled to social security benefits for mental disability "because I can't hold a job on account of my criminal record," explaining, "You're entitled to what you can get." (24RT 3473.)[26]

Regarding the Patel case, Witness #1 testified that near the time he

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[25] After the lunch break on Wednesday, January 26, 2000, on voir dire outside the jury's presence, Witness #1 had testified that he had never hallucinated but told doctors that he did to "play[] that nut game, because that's a sure way of getting your SSI check." (23RT 3398.)

[26] Aside from his admitted dishonesty, Witness #1 was unable or unwilling to pinpoint dates and times and unable to identify other circumstances related to the crimes he purported to describe, such as whether a car or a truck was involved. (22RT 3228-3230; 22RT 3230-3233 [#1 testifying that Gomez and "Little Diablo" brought Patel's jewelry to Dunton's apartment in an older, black and gray Ford]; 22RT 3253-3258 [#1 testifying that the vehicle at issue could have been a gray car or a little black pickup truck].)

first met Gomez, Gomez asked him to burn a white car; though he thought the car was a Honda, he identified Patel's Toyota Camry as the car he was asked to burn. (19RT 2931-2934; see 12RT 1870-1872.) Witness #1 burned the car and left it in an alley. (19RT 2933.) Witness #1 testified that Gomez "told [him] to check the trunk good to make sure there wasn't no blood in it." (19RT 2938-2939.) He also testified that the car had been started with a socket and ratchet; he was taken to the freeway at some point, by an unspecified person, to look for the car's keys. (19RT 2938; 22RT 3257-3258.) On redirect, Witness #1 added that Dunton told him that Gomez had put "a hit" on him (Witness #1) for not burning the white car completely; Witness #1 heard from Dunton that Gomez was worried about his fingerprints. (24RT 3549.)[27]

Witness #1 believed the car was related to a watch and bracelet Gomez and another man, "Little Diablo," had brought to Dunton's house a few days earlier and to a telephone also brought to Dunton's house.[28] (19RT 2938; 22RT 3230-3232, 3251-3254.) While there was no evidence regarding any phone possessed by or stolen from Patel, Witness #1 identified Patel's jewelry as the jewelry in question. (19RT 2939.) On

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[27] This testimony regarding Dunton's statements to Witness #1 was, of course, patent hearsay.

[28] "Little Diablo" was never identified.

redirect examination, Witness #1 testified that Gomez said, regarding Patel: "'I hated to kill that guy because he had balls.' And he said, 'If you going to do it, go ahead and shoot me, mother fucker.'" (24RT 3539.)

b. Witness #3

After a substantial amount of cocaine was found in their house, Witness #3 and her husband were taken to the Harbor Division police station at 11:30 a.m. on July 2, 1997, the same day Ruben Gomez had been arrested at around 3:00 a.m. at his cousin's house in Long Beach and taken to the same police station. (12RT 1928-1931; 13RT 1972-1973; 21RT 3099-3102.) Police found a pawn slip, dated June 5, 1997, in Witness #3's purse and, after determining that it referred to Patel's jewelry,[29] asked her how she obtained it. (12RT 1928.) She told Detective LaBarbera, the investigating officer in the Patel homicide, that Ruben Gomez, a good friend of her husband, brought it to their house and exchanged it for drugs in late May, 1997. (12RT 1913-1917, 1920-1922; see 12RT 1926-1927, 1934-1935.)

Witness #3 testified that when Gomez brought the jewelry over, she told her husband she thought the jewelry was fake, but Gomez said, "Yes, it

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[29] The jewelry pawned by Witness #3 was identified at trial by Sunjal Patel as having belonged to his father, Rajandra Patel. (12RT 1872-1873.)

is real. It's from this Mexican man I have in the trunk of the car I just killed." (12RT 1918-1919, 1926-1927, 1937-1938.) Witness #3 stated that she looked out her window and saw, in the driveway, a white car that looked like a Camry or Lexus. (12RT 1919, 1939.)

c. The Testimony of Witness #1 and Witness #3 Was Insufficient to Sustain Mr. Gomez's Conviction for the Robbery, Kidnaping, and Murder of Rajandra Patel.

The testimony of Witness #1 and Witness #3 — the only evidence linking Gomez to these crimes — is insufficient to sustain his convictions. Insofar as Witness #1 testified that he burned Patel's car and abandoned it in a San Pedro alley, and insofar as Witness #3 testified that she pawned Rajandra Patel's jewelry in Las Vegas, these witnesses were corroborated by reliable, independent evidence. But no independent or reliable evidence corroborated either witness insofar as they implicated Gomez in the crimes against Patel. More, each witness was contradicted by the other, such that it was physically impossible — or, at least, inherently improbable — that both witness's stories implicating Gomez in the crimes were true.

First, the two witnesses contradicted each other in significant respects regarding Gomez's possession of Patel's jewelry, such that both witnesses could not be telling the truth. Witness #3 testified that Gomez came to her house at nighttime, and exchanged Patel's jewelry for drugs,

claiming that the jewelry belonged to a "Mexican man I have in the trunk of the car I just killed." (12RT 1918-1919, 1926-1927, 1937-1938.) Patel was last seen by his family at 9:00 p.m. on May 25, 1997. (12RT 1870-1872.) His body was found before dawn the following day, on a freeway on-ramp. (9RT 1476-1478.) Thus, if Witness #3's testimony is truthful and accurate, Ruben Gomez possessed Patel's jewelry at most, from after 9:00 p.m. on May 25, to sometime before 5:00 a.m. the following day.

Witness #1, however, testified that Gomez and "Little Diablo" brought Patel's jewelry to Dunton's house and left it there, and that "the jewelry was tried to sell it to one of [Dunton's] connections, but it never materialized . . . . [a]nd then all of a sudden the jewelry disappeared." (22RT 3256-3257.) Though he initially stated that Gomez and "Little Diablo" could have brought the jewelry over in the morning or at night, he later testified that it was during the daytime. (22RT 3231-3232, 3253, 3256.) He testified that the jewelry was still at Dunton's house the day after Gomez and "Little Diablo" brought it there. (22RT 3257; see also 24RT 3529.)

If Witness #3's testimony is truthful and accurate, then Witness #1's testimony about the jewelry cannot be; it is not possible that Gomez sold the jewelry to Witness #3's husband on the night Patel was killed and also

brought the jewelry to Dunton's house and left it there overnight.

The evidence linking Gomez to the kidnaping and actual killing of Patel consisted solely of the alleged statements Gomez made to Witness #1 and Witness #3. As for the kidnaping, while the presence of blood in the trunk and the location of Patel's body suggest that he may have been moved before he was killed, only Witness #3's testimony provides any evidence at all that Gomez was involved in such possible movement.[30] And that testimony — repeating an alleged statement by Gomez that the jewelry was "from this Mexican man I have in the trunk of the car I just killed" (12RT 1918-1919) — if taken as true, itself suggests that no kidnaping occurred, as Gomez claimed he had already killed a person in his trunk. More, the alleged statement itself suggests some degree of fabrication, or, at the very least, unreliability, as there was no evidence that Patel was Mexican.

Aside from this statement — which was contradicted by other evidence and, given the reference to a Mexican man, of dubious reliability and relevance — the only evidence linking Gomez to the murder was

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[30] Witness #1's testimony that Gomez asked him to make sure the trunk had no blood in it (19RT 2938-2939) and his hearsay testimony that he had heard Gomez was worried about his fingerprints on the car (24RT 3549) establishes, if believed, at most, that Gomez was an accessory after the fact to a kidnaping and killing. Witness #1's claim that Gomez admitted killing Patel, is addressed below. Even if it were entitled to any credibility, it did not constitute any evidence at all that Gomez kidnaped Patel.

Witness #1's claim that Gomez admitted killing Patel.

In light of the fact that Witness #1 received thirty dollars a day from the government during trial (19RT 2910-2912) — adding up to a greater monthly amount than the $640 monthly social security benefit he had admitted lying to obtain (22RT 3227-3228) — his attitude towards deceiving the government to collect benefits precludes any rational factfinder from placing stock in his testimony. Witness #1 was so incredible that the prosecution was forced to acknowledge his lack of credibility, arguing that he "is not a credible man, he's not an honest man," but that "a liar can tell the truth." (27RT 3834-3836.)

The prosecution's argument, given Witness #1's patent disregard for the judicial process, begs the question of how any rational triers of fact could arrive, beyond all reasonable doubt, at any conclusions about when Witness #1 was telling the truth and when he was not. Simply put, Witness #1 lied so blatantly and so often that there was no way for a rational juror to determine when he was lying and when he was telling the truth. Witness #1 apparently believed that lying to police is to be expected because "[t]hat's the way it goes if you guys see what the bad guys got and the bad guys see what the good guys got." (22RT 3297.) Witness #1's view of the police interview process strongly suggests that Witness #1 attempted to tailor his

statements to tell police what he thought they wanted to hear in order to get what he believed he was entitled to. (24RT 3472-3474.)

As the trial court itself put it, Witness #1 was "a rather interesting person, but if all that existed was his testimony, the two of you [defendants] are going to walk out of here. If that's the essence of what it is, it's gone. There is nothing there." (25RT 3630.) Aside from this "nothing," evidence that Gomez killed Patel boiled down to the alleged statement about killing a Mexican man, made to another unreliable witness.

The law views out-of-court statements with caution (*People v. Ford* (1964) 60 Cal.2d 772, 800, overruled in part on another ground in *People v. Satchell* (1971) 6 Cal.3d 28; see also *People v. Frye* (1998) 18 Cal.4th 18 Cal.4th 894, 959, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22) — even where they are not testified to by a witness who knowingly resides with a drug dealer and has a motive to lie to explain away her own, and her husband's possession of stolen property, and a witness for whom lying to obtain benefits was a way of life. Where they are testified to by such witnesses, out-of-court statements hardly constitute the solid, confidence-inspiring evidence required to uphold a first degree murder conviction and death sentence. And where such witnesses contradict each other, and where their testimony implicating the defendant is not

corroborated by any physical evidence whatsoever, the evidence they provide is even less solid and substantial.

Because no rational jury, on the basis of the evidence presented, could have concluded beyond a reasonable doubt — reaching the requisite state of near certitude — that Gomez committed the crimes against Rajandra Patel, reversal is required. (*Jackson v. Virginia, supra,* 443 U.S. at p. 315.)

C. Reversal of Mr. Gomez's Death Sentences Is Required.

Because the evidence was insufficient, Gomez's convictions for the kidnaping, robbery, and murder of Rajandra Patel, the associated special circumstances, and the death sentence for Patel's murder must be reversed.

Gomez's death sentence for the murder of Raul Luna must be reversed as well, even should this Court find the evidence sufficient to sustain Gomez's conviction for Luna's murder. The jury's erroneous conviction of Gomez for the crimes against Patel and their consideration of those convictions at the penalty phase violated Gomez's right to due process and his right to be free of cruel and unusual punishment, and cannot be proven harmless beyond a reasonable doubt. (See *Chapman v. California, supra,* 386 U.S. at p. 24; U.S. Const., 8th & 14th Amends.; see also *People v. Brown, supra,* 46 Cal.3d at p. 447-449; *People v. Gonzalez, supra,* 38

Cal.4th at p. 961.)

As with the murder of Patel, even if this Court should deem the evidence of Gomez's guilt in Luna's killing sufficient, it was less than thin. Removing the Patel crimes from the picture before the jury considering Gomez's sentence for the Luna murder would have altered it considerably. The prosecution cannot show beyond a reasonable doubt that the jury's erroneous conviction of Gomez for the Patel crimes and its consideration of those crimes at the penalty phase did not contribute to the death sentence in the Luna case. (*Sullivan v. Louisiana*, *supra,* 508 U.S. at p. 279; see Argument I.D., above.)

III.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT MR. GOMEZ'S FIRST DEGREE MURDER CONVICTIONS FOR THE DEATHS OF ROBERT ACOSTA AND ROBERT DUNTON

In light of the entire record, the evidence that the murders of Robert Acosta and Robert Dunton were premeditated and deliberate was insufficient. Gomez's first degree murder convictions for these killings must therefore be reversed.

A. Standard of Review and Applicable Law.

A conviction violates due process where rational jurors could not find the defendant guilty beyond a reasonable doubt. (See *Jackson v. Virginia, supra,* 443 U.S. at pp. 317-319; *People v. Johnson, supra,* 26 Cal.3d at pp. 575-576; see also *In re Winship, supra,* 397 U.S. at p. 364; U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15.) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia, supra,* 443 U.S. at p. 323.)

In addressing a due process challenge to the sufficiency of the evidence to support a conviction, the appellate court reviews the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence. (*People v. Johnson, supra,* 26 Cal.3d at p.

578.) "'Substantial evidence' means that evidence which, when viewed in light of the entire record, is of solid probative value, maintains its credibility and inspires confidence that the ultimate fact it addresses has been justly determined." (*People v. Conner*, *supra,* 34 Cal.3d at p. 149.) "'[S]ome' evidence" is not enough. (*People v. Johnson, supra,* 26 Cal.3d at p. 577.)

This Court has cautioned that, in reviewing a first degree murder conviction, a court may not conclude that a reasonable juror properly could have inferred premeditation and deliberation in reliance on "highly ambiguous" evidence. (*People v. Anderson* (1968) 70 Cal.2d 15, 31.) Rather, the court must be able to point to a "*reasonable foundation* for [such] an inference . . . ." (*Id.* at p. 25, original italics.) "'Mere conjecture, surmise, or suspicion is not the equivalent of reasonable inference and does not constitute proof.' [Citation.]." (*Id.* at p. 24; accord *People v. Velasquez* (1980) 26 Cal.3d 425, 435, vacated and remanded on other grounds by *California v. Velasquez* (1980) 448 U.S. 903, and overruled on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 636.) If a juror had to rely on "speculation, supposition, surmise, conjecture, or guess work" to make a finding, the finding would be constitutionally inadequate. (*People v. Morris*, *supra,* 46 Cal.3d at p. 21.)

The Penal Code embodies a legislative presumption that a murder is

of the second degree. A defendant can only be convicted of deliberate and premeditated murder if the prosecution overcomes the presumption by proof beyond a reasonable doubt. (*People v. Anderson, supra,* 70 Cal.2d at p. 25.) The mens rea of second degree murder is malice. (Pen. Code §§ 187-188.) This Court has thus repeatedly held that "the legislative classification of murder into two degrees would be meaningless if 'deliberation' and 'premeditation' were construed as requiring no more reflection than may be involved in the mere formation of a specific intent to kill." (*People v. Anderson, supra,* 70 Cal.2d at p. 26; see also *People v. Koontz* (2002) 27 Cal.4th 1041, 1080; *People v. Wolff* (1964) 61 Cal.2d 795, 821, abrogated on other grounds, see Pen. Code § 189.) One who formulates in his mind a specific intent to kill and then acts on it has committed a second degree murder. Intentional first degree murder requires something more: "the intent to kill must be the result of deliberate premeditation." (*People v. Sanchez* (1864) 24 Cal. 17, 30.)

Maintaining a clear distinction between the states of mind necessary for conviction of first and second degree intentional murder is not simply a matter of logic or statutory construction. It is a requisite of due process. (See *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-109 [due process requires clarity in penal statutes]; see also *Polk v. Sandoval* (9th

Cir. 2007) 503 F.3d 903, 906, 909; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 157-159 [blurring of distinction between mens rea necessary for implied malice murder and involuntary manslaughter violates due process]; U.S. Const., 14th Amend.) Such clarity is necessary so that a jury's verdict choices — and the punishment that hinges on those choices — are based on reason and are not the result of arbitrary decisionmaking. (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428; *Maynard v. Cartwright* (1988) 486 U.S. 356, 362; U.S. Const., 8th & 14th Amends.)

"[T]he Legislature meant to give the words 'deliberate' and 'premeditate' . . . their common, well-known dictionary meaning." (*People v. Bender* (1945) 27 Cal.2d 164, 183, overruled on other grounds as stated in *People v. Lasko* (2000) 23 Cal.4th 101, 110.) As used in section 189, therefore:

> "[D]eliberate" (as an adjective) means "formed, arrived at, or determined upon as a result of careful thought and weighing of considerations; as, a *deliberate* judgment or plan; carried on coolly and steadily, esp. according to a preconceived design; . . . Given to weighing facts and arguments with a view to a choice or decision; careful in considering the consequences of a step; . . . Slow in action; unhurried; . . . Characterized by reflection; dispassionate; not rash."
>
> The verb "deliberate" means "to weigh in the mind; to consider the reasons for and against, . . . ponder; as, to *deliberate* a question . . . to weigh the arguments for and against a proposed course of action." . . . "Deliberation means

careful consideration and examination of the reasons for and against a choice or measure." [Citation.]

(*People v. Thomas* (1944) 25 Cal.2d 880, 898-899, original italics.)[31]

"The verb 'premeditate' means 'To think on, and revolve in the mind, beforehand; to contrive and design previously.'" (*Ibid.*; see *People v. Velasquez, supra,* 26 Cal.3d at p. 435; *People v. Anderson, supra,* 70 Cal.2d at p. 26 [no indication legislature intended to depart from dictionary meanings]; *People v. Mayfield* (1997) 14 Cal.4th 668, 767; see CALJIC No. 8.20.)

Under this Court's precedent, premeditation and deliberation "can occur in a brief interval. The test is not time, but reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly." (*People v. Solomon* (2010) 49 Cal.4th 792, 812 [citations and internal quotation marks omitted]; see also *People v. Nelson* (2011) 51 Cal.4th 198, 213.)

Considerable case law has been devoted to identifying the sort of

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[31] *Thomas* also included within the definition of "deliberate" as a verb, the following: "to consider maturely; reflect upon . . . ." In 1981, Penal Code section 189 was amended to provide: "To prove the killing was 'deliberate and premeditated,' it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act." (See *People v. Smithey* (1999) 20 Cal.4th 936, 978-979 [statute's elimination of need to prove mature and meaningful reflection was a legislative abrogation of *People v. Wolff, supra,* 61 Cal.2d at pp. 819-822].)

evidence that permits a jury to infer the kind of cold-blooded reflection that transforms a crime from second degree murder to first degree murder. In *People v. Koontz*, this Court reiterated the analysis originally set forth in *People v. Anderson*:

> *Anderson* identified three factors commonly present in cases of premeditated murder: "(1) Facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing — what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)."

(*People v. Koontz, supra,* 27 Cal.4th at p. 1081, original italics; *People v. Anderson, supra,* 70 Cal.2d at pp. 26-27.)

The Court has cautioned, however, that the "Anderson factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive." (*People v. Koontz, supra,* 27 Cal.4th at p. 1081; see also *People v. Solomon, supra,* 49 Cal.4th at p. 812.)

Thus, a defendant's post-arrest statements may provide direct evidence of his thought processes at the time of the killing. (*People v. Mayfield, supra,* 14 Cal.4th at p. 768.) More, there may be cases in which the manner of the killing — as in an execution-style slaying — so unequivocally indicates planning and reflection that it can show premeditation and deliberation on its own. (*People v. Hawkins* (1995) 10 Cal.4th 920, 956-957.)

B. The Evidence Was Insufficient to Support a Finding that the Murders of Acosta and Dunton Were Deliberate and Premeditated, Requiring Reversal of Mr. Gomez's First Degree Murder Convictions for these Killings.

In light of the entire record, the evidence that the murders of Robert Acosta and Robert Dunton were deliberate and premeditated was not sufficient. The prosecution's evidence for its theory that Gomez was part of a preexisting plan to kill Dunton for his failure to pay "taxes" to the Mexican Mafia consisted of Witness #2's testimony that as he and Grajeda left Dunton's apartment after their visit on the day of the killings, Grajeda and Gomez had a conversation, which Witness #2 did not overhear. (16RT 2609-2611; see 27RT 3853.) *After* that conversation — the contents of which are entirely unknown in any event, and as to which it would only be pure speculation to conclude that Gomez had agreed to kill Dunton and Acosta — Grajeda told Witness #2 that Dunton and *Gomez* were the intended victims of homicides to be carried out later that night. (16RT

2612-2614.)

The prosecution's evidence provides further support for a conclusion that the killings were not deliberate and premeditated on Gomez's part: Witness #1 testified that as he and Gomez returned to Dunton's apartment on the night of the killings, Gomez commented that "They sent somebody to fuck Huero and Spider up" (20RT 3016), suggesting that while Gomez knew about a plan to harm Dunton and Acosta, his understanding was that it would be carried out by others.[32]

More, Witness #1 told police that after they returned to Dunton's apartment on the night of the killings, Gomez set the shotgun he had carried on the table and rolled primos (marijuana cigarettes with rock cocaine, rolled into dollar bills.) (23RT 3385-3386; see 25RT 3671.) Grajeda, on the other hand, was holding a gun. (20RT 3034.) Setting down a gun and rolling a joint while someone else nearby holds a gun is hardly the behavior of a person who is planning to shoot two people within minutes. (See 20RT

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[32] Witness #1's testimony that before Dunton and Acosta were shot Grajeda stated, "You know the rules," and Gomez added, "Yeah, forward and backward" (20RT 3035-3037) and Dunton stated, "I'll go down like a man" (25RT 3670) does not tend to establish anything other than Gomez's understanding that Dunton was in trouble with Grajeda. Similarly, testimony about Gomez's nervousness and his obtaining a shotgun (16RT 2603, 20RT 3010) suggests no more than that Gomez suspected he might be a victim of an attempt on his life; it does not tend to show one way or the other whether Gomez was aware of any plan that he was to kill Dunton.

3034-3035 [Witness #1 testifies that about a minute and a half or two minutes passed between the time he went to his bedroom and the time he heard the shots, long enough only for the conversation in which concluded with Gomez's statement, "Don't point that at me. I don't like people pointing things at me."].) A green leafy substance was found on the dining table at Dunton's apartment (11RT 1749), suggesting that Gomez was interrupted in the process of rolling joints and abandoned the drugs in a hurry after the shooting.

Finally, according to Witness #1, when he left the room where the killings occurred, Grajeda was holding a shotgun,[33] and immediately prior to the shooting, Gomez said, "Don't point that at me. I don't like people pointing things at me." (20RT 3034-3037.)[34]

The only evidence of "planning activity" suggested that there was a preexisting plan to kill *Gomez* (as well as Dunton and perhaps Acosta) — not that Gomez harbored a preexisting plan to kill Acosta and Dunton. The

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[33] The jury found the firearm allegations untrue as to Grajeda. (29RT 4351-4353.)

[34] Witness #1 testified that Gomez had nothing in his hands, though a gun lay on the table in front of him. (20RT 3034.) Witness #1 testified that he had assumed that Gomez directed the statement "don't point that at me" towards Robert Acosta, who #1 had seen with a gun that day. (24RT 3485-3487.) Police officers who went to the crime scene, however, testified that when the coroner first examined Acosta's body, his gun was tucked in his armpit, under his jacket. (11RT 1757-1758.)

prosecution's theory of motive — that Gomez killed Acosta and Dunton at Grajeda's behest, to expunge a "green light" — is not evidence, much less the type of motive evidence that can support a finding of premeditation and deliberation. As set forth above, there is no evidence that Gomez was aware of any such green light, and thus no supportable inference that the killing was therefore the result of pre-existing reflection. (See *People v. Koontz, supra,* 27 Cal.4th at p. 1081.) Finally, the nature of the killings was not "so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design.'" (*Ibid.*) Indeed, Gomez's statement "don't point that at me," made immediately before the shooting, according to the only witness to overhear these events (20RT 3034-3037), suggests that the shootings were not pondered or considered, but rather a rash and uncalculated reaction to a firearm being aimed at him.

In sum, no rational jury could have concluded, in light of this, at best, "highly ambiguous" evidence (*People v. Anderson, supra,* 70 Cal.2d at p. 31) that premeditation and deliberation — a clear, deliberate intent to kill that "must have been formed upon preexisting reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation," as the jury was instructed (3CT 883; 29RT 4147-4148) — was proven beyond a reasonable doubt. Reversal of Gomez's first degree

murder convictions for the killings of Acosta and Dunton is required.

C. To the Extent that State Law Fails to Maintain Any Meaningful Distinction Between First and Second Degree Murder, It Violates Due Process.

In *Solomon*, this Court rejected the defendant's argument that California law violated due process by eliminating any meaningful distinction between first and second degree murder, holding: "Contrary to defendant's suggestion, a killing resulting from preexisting reflection, of any duration, is readily distinguishable from a killing based on unconsidered or rash impulse." (*People v. Solomon, supra,* 49 Cal.4th at pp. 813-814.) For purposes of further review in federal court, Gomez contends that to the extent that state law, and in particular, any decision affirming his first degree murder convictions for the deaths of Acosta and Dunton, recognizes instantaneous or near instantaneous premeditation and deliberation or otherwise fails to maintain a meaningful distinction between first and second degree murder, it violates due process. (See also Mounts, *Premeditation and Deliberation in California: Returning to a Distinction Without a Difference,* U.S.F. L. Rev. (Winter, 2002), pp. 327-328; U.S. Const, 14th Amend.; *Grayned v. City of Rockford, supra,* 408 U.S. at pp. 108-109.)

IV.

THE TRIAL COURT UNCONSTITUTIONALLY FORECLOSED THE POSSIBILITY OF SELF-REPRESENTATION, TELLING MR. GOMEZ HIS DECISION TO PROCEED WITH COUNSEL WAS "FINAL"

A. Factual Background.

On February 23, 1999, Gomez asked to represent himself. (1RT 100.) The court warned him, "[Y]ou can't go back and forth on this. If you want to represent yourself, that's fine. That's going to cause a delay in the proceedings, and you just can't keep switching back and forth between being represented by counsel and representing yourself." (1RT 101.)

After Gomez filled out a questionnaire regarding his desire to represent himself (1RT 101-103), and the court questioned him about it, the court found he was making a knowing and intelligent waiver of his right to counsel and granted the request (1RT 103-107). It relieved the Alternate Public Defender, which had been representing Gomez, and began to make arrangements for the transfer of discovery materials. (1RT 107-112.)

On February 26, 1999, Gomez appeared with his former counsel from the Alternate Public Defender and with Daniel Nardoni, who had been tentatively appointed as advisory counsel. (1RT 113.) Arrangements were made for transfer of the discovery to Nardoni. (1RT 113-114.)

At the next court appearance, on March 10, 1999, Nardoni told the

court Gomez wanted to relinquish his pro se status and be represented by Nardoni. (1RT 118.) The following colloquy ensued:

COURT Is that what you want to do, Mr. Gomez?

MR. GOMEZ Yes.

COURT I told you before you can't switch back and forth.

MR. GOMEZ I know that.

COURT *I'm going to hold you to this kind of a change.* I think it's a good change for you. I think you're doing the right thing. *All I'm saying is I'm not going to let you bounce back and forth.* You have a right to represent yourself, I recognize that and gave that to you, and as of this moment you do represent yourself.

And it's better for you and it's better for me as well to have an attorney who knows the rules and will effectively represent you to do that for you.

So at this point you understand that if I'm going to change back, this is a final change.

MR. GOMEZ I understand that, yeah.

COURT And that's what you want to do?

MR. GOMEZ Yes, Sir.

COURT Okay. Mr. Nardoni is appointed then . . . .

(1RT 118-119 [emphasis added].)

Jury selection began eight months later, on November 15, 1999. (2RT 289.)

B. The Trial Court Erred In Unequivocally Ruling Out the Possibility of Self-Representation.

The federal Constitution guarantees criminal defendants the right to self-representation. (U.S. Const. 6th & 14th Amends.; *Faretta v. California* (1975) 422 U.S. 806, 836.)[35]

When "'a motion to proceed *pro se* is timely interposed, a trial court must permit a defendant to represent himself upon ascertaining that he has voluntarily and intelligently elected to do so, irrespective of how unwise such a choice might appear to be.'" (*People v. Dent* (2003) 30 Cal.4th 213, 217, quoting *People v. Windham* (1977) 19 Cal.3d 121, 128; see also *United States v. Hernandez* (9th Cir. 2000) 203 F.3d 614, 620-621; *United States v. Farias* (9th Cir. 2010) 618 F.3d 1049, 1052; *People v. White* (1992) 9 Cal.App.4th 1062, 1071, 1076.) The court may not simply peremptorily deny the request. (See *People v. Dent, supra,* 30 Cal.4th at pp. 219-222.)

Neither may the court, by its refusal to consider a *Faretta* request, "foreclose[] any realistic possibility defendant would perceive self-representation as an available option." (*People v. Dent, supra,* 30 Cal.4th at pp. 219, 221.) In *People v. Dent*, after defense counsel stated "[t]he other

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[35] In *Indiana v. Edwards* (2008) 554 U.S. 164, 167, the Supreme Court held that a state may insist that a defendant who is mentally competent to stand trial, but not mentally competent to represent himself, may be represented by counsel. Neither the state nor the court indicated that there was any issue regarding Gomez's mental competence.

alternative that [defendant] proposes to the court is that he proceed in pro. per. He thinks he would be more inclined to get a fair trial that way than he would with –" (*Id.* at p. 217.) The court interjected: "I am not going to let him proceed pro. per.," and clarified, "[n]ot in a death penalty murder trial." (*Ibid.*) This Court found it unnecessary even to decide whether Dent had made an unequivocal self-representation request, "because . . . the trial court's response was not only legally erroneous but also unequivocal, and foreclosed any realistic possibility defendant would perceive self-representation as an available option." (*Id.* at p. 219.)

The court here similarly made a legally erroneous preemptive denial of any request for self-representation. While the trial court in *Dent* foreclosed the right by indicating it would not allow its exercise in a capital case, the trial court here foreclosed the right by indicating it would not allow its exercise because Gomez had once asserted the right and then requested the appointment of counsel. Neither is an adequate reason to deny the right. A timely *Faretta* request — one made within a reasonable time before trial begins — *must* be granted, after ascertaining that the defendant "has voluntarily and intelligently elected to do so, irrespective of how unwise such a choice might appear to be." (*People v. Windham, supra,* 19 Cal.3d 121, 127-128; see *People v. Jenkins* (2000) 22 Cal.4th 900, 959 [a

criminal defendant has "a federal constitutional, unconditional right of self-representation," which may be invoked by unequivocal assertion of the right "within a reasonable time prior to the commencement of trial"].)

The trial court has discretion to deny a request only when it is untimely. When exercising its discretion in ruling on *untimely* requests, the trial court may consider factors such as "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion." (*People v. Windham, supra,* 19 Cal.3d at p. 128.) The trial court has no discretion to deny a timely request.

The fact that a defendant has once exercised the right of self-representation and then invoked the right to counsel cannot constitutionally be deemed to foreclose any further exercise of the right of self-representation, if it is timely invoked. (See *Williams v. Bartlett* (2d Cir. 1994) 44 F.3d 95, 100 [a defendant's "pre-trial decision to proceed with counsel does not constitute an absolute waiver of his right to represent himself"]; *People v. Carlisle* (2001) 86 Cal.App.4th 1382, 1385-1390 [where defendant made one *Faretta* request prior to preliminary hearing, but then acceded to counsel's representation during the preliminary hearing,

trial court erred in rejecting subsequent *Faretta* requests].)

This Court affirmed that principle in *People v. Lancaster* (2007) 41 Cal.4th 50, 61-70. This Court held that the trial court's remark that the defendant's decision to be represented by counsel (after defendant had exercised and abandoned his *Faretta* right several times) had to be "'permanent'" was "precipitous" but not reversible. (*Id.* at p. 69-70.) As this Court noted, "[t]rial was not imminent, and a renewed and timely *Faretta* motion would have been entitled to the court's full consideration." (*Id.* at p. 69, citing *People v. Dent, supra,* 30 Cal.4th at pp. 221-222.)

The court's statement in *Lancaster* constituted only a "slight" impropriety, however, because the defendant had exercised and abandoned his *Faretta* right several times and because "the court did not entirely foreclose the possibility of defendant's future self-representation; it told him it would make a decision on any renewed application, though the request would probably not be viewed with favor." (*People v. Lancaster, supra,* 41 Cal.4th at pp. 69-70.) In the circumstances, where the defendant had "intermittent[ly]" represented himself, causing difficulty for the trial court, its attempt to discourage further vacillation was understandable. (*Id.* at p. 70.)

Here, by contrast, Gomez had not "repeated[ly] alternat[ed]" (*People*

v. Lancaster, supra, 41 Cal.4th at pp. 69-70) between representation by counsel and self-representation. (1RT 101-118.)[36] More crucially, in this

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[36] In the *Lancaster* case, as set forth in this Court's opinion (*People v. Lancaster, supra,* 41 Cal.4th at pp. 61-66), defendant's first request to represent himself was granted on May 23, 1996 (*id.* at p. 61). On June 6, he reaffirmed his desire to represent himself but then, in the course of the same hearing, moved for appointment of counsel. (*Ibid.*) On June 13, defendant requested appointment of co-counsel. (*Ibid.*) On June 25, defendant stated he wished to remain in pro. per. (*Ibid.*) On July 23, defendant appeared with private counsel who told the court defendant sought his representation but had not paid him. (*Id.* at p. 62.) On August 6, private counsel assisted defendant with the arraignment. (*Ibid.*) On August 9, defendant requested appointment of counsel, because he could not afford to hire the private attorney. (*Ibid.*) On September 10, a new attorney appeared with defendant as appointed and standby counsel, stating that he expected that defendant would eventually abandon his pro se status, but that he wished to retain it for the time being. (*Id.* at p. 63.) On October 16, defendant reaffirmed his desire to represent himself. (*Ibid.*) On November 26, defendant told the court he had found another attorney – the private attorney he had previously appeared with – to act as standby counsel. (*Ibid.*) He then stated that that attorney would "take over this case." (*Ibid.*) That attorney appeared for pretrial hearings over a period of six months. (*Ibid.*) In July of 1997, that attorney told the court he might not be ready for trial in September. (*Id.* at p. 64.) That attorney eventually withdrew in November of 1997, and on December 1, 1997, the court reappointed the public defender. (*Id.* at p. 65.) On December 3, 1997, the court granted another *Faretta* request. (*Ibid.*) On January 22, 1998, defendant sought to relinquish his right to self-representation. (*Id.* at p. 66.) It was then that the court warned him that his decision had to be permanent, as any future requests would be "a decision for the court to make, and it probably would not be in your favor." (*Id.* at p. 69.)

The extensive back-and-forth regarding counsel issues in *Lancaster* was a far cry from the circumstances here, where Gomez had made one (unsuccessful) *Marsden* motion before a different judicial officer (1CT 226), and a single invocation of right of self-representation, which he then relinquished. (1RT 100-118.)

case, the trial court did not merely "discourage" future requests; it did not, as it did in *Lancaster*, merely tell the defendant that future requests would be viewed with disfavor. Instead, it told him, unequivocally, that if he wished to be represented by counsel, "I'm going to hold you to this kind of a change. . . . All I'm saying is I'm not going to let you bounce back and forth. . . . So at this point you understand that if I'm going to change back, this is a final change." (1RT 118-119.) As in *Dent*, the trial court "erred by unequivocally ruling out the possibility of self-representation." (*People v. Lancaster, supra,* 41 Cal.4th at p. 69, citing *People v. Dent, supra,* 30 Cal.4th at p. 219.)[37]

People v. Valdez, in which this Court noted that "it is generally improper for a trial court to categorically state 'I wouldn't let you go pro. per. in this case' in response to a defendant's first mention of the possibility of self-representation," is also distinguishable. (*People v. Valdez* (2004) 32 Cal.4th 73, 100.) In *Valdez*, the Court found, the record did not support the inference that the defendant did not renew his request because he believed it

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[37] (See also *United States v. Lorick* (4th Cir. 1985) 753 F.2d 1295, 1299 [even if defendant waived right of self-representation by inviting participation of counsel during pretrial proceedings, he "expressly and unambiguously renewed his request to proceed pro se at trial" and trial court erred in denying request; defendant's subsequent apparent acquiescence was not a waiver where "at the outset of [the] trial the trial court had unmistakably indicated its intention not to recognize the claimed right from that point on"].)

would be futile, for the case was subsequently transferred to a different judge, before whom Valdez could have made a *Faretta* request. (*Ibid.*) More, Valdez made a *Marsden* motion before the new judge, but never indicated he wished to represent himself. (*Ibid.*) Finally, Valdez made an untimely *Faretta* request on the day of trial, underscoring his understanding that he could, if he wished, request to represent himself. (*Id.* at pp. 100-101.)

No such circumstances were present in this case: the case remained before the same trial judge who had told Gomez that his decision to accept counsel was "final"; and Gomez never made another *Faretta* or *Marsden* request.

The court erred; its ruling was as much error as if it had stated, upon the initial appointment of counsel in the case, that the defendant's acceptance of counsel had to be "final," foreclosing any future self-representation requests.

C. Reversal is Required.

Deprivation of the right of self-representation cannot be harmless and is reversible per se. As the Supreme Court put it in *McKaskle v. Wiggins*,

> Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome

> unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless.

(*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177 n.8; see *People v. Dent*, *supra,* 30 Cal.4th at p. 222; *People v. White*, *supra,* 9 Cal.App.4th at p. 1076.) The right was not respected here; Gomez's right to represent himself was unequivocally, preemptively denied, violating his Sixth and Fourteenth Amendment rights. (U.S. Const., 6th & 14th Amends.; see also Cal. Const., art. I, §§ 7, 15.) Reversal is required.

V.

THE TRIAL COURT ERRED WHEN IT REFUSED TO SEVER THE PATEL AND LUNA HOMICIDE CASES FROM EACH OTHER AND FROM THE O'FARRELL STREET DOUBLE HOMICIDE, THE ESCARENO HOMICIDE, AND THE SALCEDO ROBBERY, VIOLATING MR. GOMEZ'S CONSTITUTIONAL RIGHTS

When Gomez's jurors retired to deliberate on February 3, 2000, at the conclusion of a trial that had spanned three months, the first of the four homicide incidents facing them was the Patel case. (3CT 837-839.) Fresh in their minds was the evidence that had been presented over the better part of January, 2000: the fingerprints and eyewitness (or ear witness) evidence linking Gomez to the shootings of Robert Dunton and Robert Acosta (11RT 1754-1756; 18RT 2741-2747; 19RT 2869-2872; 21RT 2859-2863, 3099-3100, 3119), as well as the gang expert evidence, which had spanned three court days and which the prosecutor read at length from in his closing argument (27RT 3840-3846, 28RT 4080-4087), identifying Gomez as a street gang member loyal to the Mexican Mafia and his co-defendant as a Mexican Mafia associate. Also before them was Witness #1's gruesome testimony purporting to describe the shooting of Jesus Escareno (19RT 2940-2950), and the testimony of Silvia Salcedo, who identified Ruben Gomez as one of three men who had committed a bizarre home invasion robbery that apparently frightened her family so profoundly that they moved

the next day (8RT 1335-1365).

None of this, of course, was relevant to the Patel case — or to the Luna case. Yet all of it entered into the picture before the jurors deliberating on the very real questions of Gomez's guilt or innocence of the Patel and Luna crimes.

It is elementary that "the guilt or innocence of the accused must be established by evidence relevant to the particular offense being tried, not by showing that the defendant has engaged in other acts of wrongdoing. [Citation.]" (*United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1321.) Equally obvious is the harm that ensues when this principle is not carefully defended and jurors hear evidence of crimes other than the one for which the defendant is being tried. Indeed, the harm flowing from evidence of other crimes is "too well known to require much restatement." (*People v. Smallwood* (1986) 42 Cal.3d 415, 428, disagreed with on other grounds by *People v. Bean* (1988) 46 Cal.3d 919, 939 fn. 8.)

These principles come to bear when a trial court is faced with a motion to sever counts, or when this Court is faced with the task of reviewing denial of such a motion, for the Court's "principal concern lies in the danger that the jury . . . would aggregate all of the evidence [of distinct counts], though presented separately in relation to each charge . . . ."

(*Williams v. Superior Court, supra,* 36 Cal.3d at p. 453, superseded by statute as stated in *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1228-1229, fn. 19.) That danger intensifies where, as here, the evidence on one or more counts is relatively weak. (*Ibid.*) And the danger of improper cumulation of the evidence on distinct counts is further exacerbated by evidence of gang membership, which not only inflames jurors because it evokes the "highly publicized phenomenon of gang warfare in Southern California" but also because it suggests criminal propensity. (*Ibid.*)

To imagine that Gomez's jurors were able to successfully avoid those dangers and compartmentalize the evidence in this case — when they were not specifically instructed to do so, and when the prosecutor's argument, as discussed below, in fact urged them not to — would be to invest them with "a superhuman ability to control their emotions and intellects [citation]" and the capability not only to perform a "mental gymnastic which is beyond, not only their powers, but anybody's else [citation]" (*Bruton v. United States* (1968) 391 U.S. 123, 132 fn. 8), but also, remarkably, to somehow intuit that they were to attempt that mental gymnastic. To allow the convictions and death sentences to stand on the basis of such fantasy would be to flout not only state law, but due process, the right to a fair trial, the requirement that the process by which the state

condemns people to die be reliable, and the protection against cruel and unusual punishment. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.)

A. The Defense Motion to Sever Counts and the Trial Court's Ruling.

Prior to trial, Gomez moved for severance of counts, arguing that the Salcedo robbery, the Patel homicide, and the Luna homicide should be tried separately from each other and separately from the Escareno homicide and the Dunton and Acosta double homicide. (2CT 472-482.) He conceded that the Escareno homicide and the Dunton and Acosta homicides could properly be tried together. (2CT 476; see 1RT 70.) He argued, however, that the Patel and Luna cases should be severed because the evidence of Gomez's guilt of those charges was weak, with the identity of the perpetrators being a "major issue," while Gomez would be implicated by an eyewitness (or ear witness) who knew him in both the Escareno and the Dunton and Acosta cases. (2CT 476-478.) He further argued that the Dunton and Acosta homicide case would involve highly prejudicial evidence about the Mexican Mafia, and that joining all five homicide counts together was prejudicial because of the sheer number of crimes. (2CT 478.) Finally, he noted that the capital nature of the case militated against joinder and that the Luna case, if tried alone, would not be a capital

case unless Gomez had been first convicted of one of the other homicides. (2CT 480-481.)

The prosecution opposed the motion. It articulated no theory that would allow the evidence of the Patel or Luna crimes to be admissible in a trial of the Dunton and Acosta and Escareno homicides, or vice versa, and no theory that would allow for the cross-admissibility of the evidence of the Patel and Luna cases in relation to each other. (2CT 552-559; 1RT 74-92.) It emphasized that cross-admissibility was not necessary to jointly try multiple offenses. (2CT 552A-553, 555.)

The prosecution argued that "extreme" disparity between weak and strong cases, or inflammatory and non-inflammatory offenses, would have to be shown before severance would be required. (2CT 559.) It argued that the Luna and Patel cases were not significantly weaker than the others. (2CT 447-559.)

In support of that argument, the prosecution sought to supplement the evidence presented at the preliminary hearing with an additional offer of proof. (2CT 557-559.) Though the prosecutor never introduced this evidence at trial, it represented that it intended to prove that Gomez had a motive to kill Luna because sometime before Luna's killing, Luna had taken a gun from Gomez, and that Gomez had unsuccessfully attempted to

kill Luna before Luna was killed. (2CT 557-558.) It further represented that it would prove that Gomez admitted to police that he knew Anthony Payne, the owner of the car found near the Luna crime scene; that he admitted that he once had possession of the car; and that he told police that shot cartridges at the scene "might have my prints on them, but I wasn't the trigger man." (2CT 558.) The prosecution also proffered a statement Gomez allegedly made to Witness #5, which would have allowed for the inference that Gomez had shot several people on different occasions and come home covered with blood. (2CT 559.)

But when, during argument on the motion, defense counsel argued that there was no admissible evidence concerning any alleged motive for Gomez to kill Luna, the prosecution appeared to concede as much. (1RT 77-80.) Moreover, *none* of the proffered evidence detailed above was eventually produced at trial.[38]

Nonetheless, the court did not find that the evidence on any one

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[38] Only one of the items in the prosecution's offer of proof of evidence that had not been presented at the preliminary hearing was eventually presented at trial: that Luna's cell phone was found in Dunton's apartment after Dunton was killed, and that Witness #1 would identify Gomez as the person who brought the cell phone to Dunton's house. (2CT 558-559.)

The record provides no explanation as to why the prosecution did not produce the evidence it had included in its offer of proof.

count was significantly stronger than that on any others. (1RT 81.) Despite the prosecutor's apparent acknowledgment that Gomez's alleged motive to kill Luna was not based on admissible evidence (1RT 77-80), the court found the proffer "convincingly" explained that the Luna and Patel cases were not "much weaker" than the others. (1RT 81-82.)

The court denied the motion to sever. (1RT 92.) It explained:

> Those counts are tied closely together in time and to some extent in location. They're also tied together in the manner in which the executions took place, at least in large part. Very often [a] shotgun is used. Let's see, as to Mr. Patel, I think that was a .40 caliber pistol that was used. ¶ The items stolen are similar, jewelry, money, of course. . . . . [W]itness . . . No. 1, . . . is a witness in count – the murder in count 6 and count 10. Count 8 and 10 are tied together, as I've indicated before, in my view with the cell phone call at the residence where Mr. Gomez was at least a part-time resident. ¶ It just seems to me that they're tied together all of them. Count 3 is the one that seems less directly tied to the other three. It's a homicide incident, one of which was a double homicide. That also involved the use of the cars, which was true with one of the other counts. We've got car prints in count 8, but that's not what I'm thinking about.
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> * * *
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> So I'm left with the only concern that I really have, which is numbers, and they are so well tied together that I think they should be tried together. So the motions to sever . . . are denied.

(1RT 91-92.)

B. Applicable Law.

Penal Code section 954 allows a joint trial of "two or more different offenses connected together in their commission . . . or two or more different offenses of the same class of crimes or offenses." Here, defense counsel conceded that the counts were properly charged together under Penal Code section 954. (1RT 73.)

Whether they were properly charged together, however, is only the beginning of the inquiry, for the trial court has discretion to sever counts "in the interests of justice and for good cause shown . . . ." (Pen. Code § 954.) The discretion to deny severance, of course, must yield to constitutional requirements; "the joinder laws must never be used to deny a criminal defendant's fundamental right to due process and a fair trial." (*Williams v. Superior Court, supra,* 36 Cal.3d at p. 448; see U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15.)

The factors a trial court must consider in ruling on a severance motion, and which the appellate courts consider in reviewing such rulings, are clear and well-established:

> (1) Whether the evidence of each charged crime is cross-admissible as to the other charged crimes. The inquiry here is whether, "had the severance motion been granted, . . . the evidence pertinent to one case [would] have been admissible in the other under the rules of evidence which limit the use of character evidence or other prior similar acts to prove conduct

. . . ." (*Williams v. Superior Court, supra,* 36 Cal.3d at p. 448.)

(2) Whether some of the charges are particularly inflammatory, involving, for example, gang evidence. (*Id.* at pp. 452-453.)

(3) Whether a weak case has been joined with a strong case or with another weak case, so that the spillover effect might well alter the outcome of some or all of the charges. (*Id.* at pp. 453-454.)

(4) Whether joinder turns the matter into a capital case. (*Id.* at p. 454.)

(See also *People v. Ochoa* (2001) 26 Cal.4th 398, 423,[39] quoting *People v. Kraft* (2000) 23 Cal.4th 978, 1030; *Alcala v. Superior Court, supra,* 43 Cal.4th at pp. 1220-1221.)

Analysis of cross-admissibility comes first, for "[i]f the evidence underlying the charges in question would be cross-admissible, that factor alone is normally sufficient to dispel any suggestion of prejudice . . . ." (*People v. Soper* (2009) 45 Cal.4th 759, 774-775.) On the other hand, though there is "'a high risk of undue prejudice whenever . . . joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible' [citation]" (*Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1084), the

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[39] *Ochoa* has been abrogated on other grounds as stated in *People v. Prieto, supra,* 30 Cal.4th at p. 263, fn. 14.

absence of cross-admissibility does not automatically require severance. (*People v. Smallwood, supra,* 42 Cal.3d at p. 429).

When a trial court refuses to sever in the face of a clear showing that substantial prejudice will ensue from a joint trial, it abuses its discretion. (*Williams v. Superior Court, supra,* 36 Cal.3d at p. 452; see *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1243-1244.)

Further, this Court has recognized that severance may be constitutionally required "if joinder of the offenses would be so prejudicial that it would deny a defendant a fair trial." (*People v. Musselwhite, supra,* 17 Cal.4th at pp. 1243-1244, citing *Williams v. Superior Court, supra,* 36 Cal.3d at p. 447.)

And, even if a trial court's denial of a motion to sever was correct at the time it was made, reversal is required if joinder "result[ed] in prejudice so great as to deny [defendant] his Fifth Amendment right to a fair trial." (*Bean v. Calderon, supra,* 163 F.3d at p. 1084, citing *United States v. Lane* (1986) 474 U.S. 438, 446 fn. 8.) In evaluating whether joinder has created such prejudice, federal courts have "acknowledged . . . 'a high risk of undue prejudice whenever . . . joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible.'" (*Bean v. Calderon, supra,* 163 F.3d at pp.

1084-1085, quoting *United States v. Lewis*, *supra,* 787 F.2d at p. 1322.)

A reviewing court thus views two "snapshots" of the case — one taken at the time of the trial court's ruling on the motion to sever, and the other taken at the conclusion of the trial. In both instances, it must apply careful and individualized, case-specific scrutiny. (*People v. Smallwood, supra,* 42 Cal.3d at p. 426; *People v. Musselwhite*, *supra,* 17 Cal.4th at p. 1244 [in capital case, reviewing court must consider joined cases separately and together to assess whether joinder might tend to produce a conviction not obtainable in a separate trial].)

Here, either "snapshot," viewed from any angle, with or without the benefit of hindsight, shows that the trial court's refusal to sever in the unique — and highly prejudicial — constellation of circumstances of this case was error requiring reversal.

C. The Trial Court Abused Its Discretion in Refusing to Sever the Patel and Luna Homicides from the Escareno and Dunton and Acosta Homicides and from Each Other.

1. The Evidence of the Patel and Luna Homicides Would Not Have Been Admissible in a Separate Trial of the Dunton and Acosta and Escareno Homicides and the Salcedo Robbery, or Vice Versa, and Evidence of the Patel Homicide Would Not Have Been Admissible in a Trial of the Luna Case, or Vice Versa.

The trial court's denial of the motion to sever is reviewed "'in light of the showings *then* made and the facts *then* known.'" (*People v.*

Musselwhite, supra, 17 Cal.4th at p. 1244, original italics.) When the trial court ruled on Gomez's motion to sever counts, the prosecution had made no attempt to show that evidence of the Patel or Luna homicides would have been admissible in a separate trial of the Salcedo, Escareno and Dunton and Acosta cases, or vice-versa. Nor had it made any attempt to show that the Patel and Luna homicides would each have been admissible in trials of the other. Instead, it emphasized that cross-admissibility is not the "sine qua non" of joined trials. (See 2CT 552A-556.)

While the prosecution did, in its attempt to defeat severance by arguing that the evidence in the Luna case was not weak, offer to prove that "[t]he same gauge shotgun was used to kill Escareno, Dunton, Acosta and Luna" (2CT 558), it offered no theory under which such evidence would be admissible in a trial of the Luna homicide alone — let alone any theory under which that evidence would be admissible in the Patel case. Evidence that the same gauge shotgun was used in each of several crimes is patently insufficient to justify cross-admissibility to prove identity.

This Court has explained that

> [t]o be admissible as modus operandi evidence there must be common marks which, considered singly or in combination, support the strong inference that defendant committed both crimes. [Citation.] These common marks must be distinctive rather than ordinary aspects of any such category of crime. They must be sufficiently distinctive that they bear

> defendant's unique "signature." Reaching a conclusion that offenses are signature crimes requires a comparison of the degree of distinctiveness of shared marks with the common or minimally distinctive aspects of each crime. [citations.]

(*People v. Bean, supra,* 46 Cal.3d at pp. 936-937.)

The fact that four of the victims in this case were shot in the head, and four with a shotgun (though, except for Dunton and Acosta, the victims of the double homicide, there was no evidence they were shot with the same weapon), hardly constituted a unique "signature." Glaring differences between the homicides in these cases also undermine any contention that they were cross-admissible to show "modus operandi," and thus, identity.

- The Luna homicide, according to the prosecution's evidence, was an apparently motiveless killing of a drug dealer in his front yard. Though the prosecution later, at the court's suggestion, amended the information to add a robbery special circumstance, it had stated before trial that, though it believed Luna's cell phone was taken, it did not believe that the taking of the cell phone was the motive for the killing. (1RT 21-23, 78-80; see 29RT 4314.)

- In the Patel case, according to the evidence at the preliminary hearing, the victim was both stabbed and shot with a .40 caliber handgun; no shotgun was used; his body was left on a freeway on-ramp and his Toyota Camry was abandoned elsewhere, burned; the homicide was accompanied by a kidnaping, auto theft, and robbery of jewelry; the apparent motive was robbery. (1CT 227-244; see 2CT 408-409.)

- The O'Farrell street double homicide, according to the prosecution's evidence and theory of the case, took place in a home; the prosecution's theory was that the motive was gang-

related, that Dunton was killed for failing to pay taxes to the Mexican Mafia, and that Acosta, his bodyguard, was killed along with him. (1RT 23; see 2CT 326-368.)

- The evidence at the preliminary hearing regarding the Escareno case was that the victim was shot as he sat in his car, in furtherance of a robbery of his wallet and jewelry, and that his body and car, which unlike Patel's car, was not burned, were abandoned elsewhere. (1CT 255-281.)[40]

In *Bean*, the similarities between the two crimes at issue — they occurred in the same neighborhood, three days apart; they both involved entry into the victim's home, blunt trauma to the head, and an obvious theft motive — were far greater than the similarities among the crimes at issue here, and yet the similarities in *Bean* were not sufficiently unique to render evidence of each of the crimes cross-admissible on the issue of identity in a trial of the other. (*People v. Bean, supra,* 46 Cal.3d at pp. 937-938.)

If this similarity of location, timing, means of inflicting injury, and motive was not sufficient to warrant the inference that the same individual committed both crimes, then a Torrance killing of a drug dealer with no apparent motive is hardly sufficiently similar to a San Pedro gang-related double homicide, a Wilmington drive-by killing and robbery of a stranger, or a kidnap and robbery murder in which the victim was left alongside the freeway and his burned car found elsewhere. The mere fact that four of the

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[40] The jurors deadlocked on the charges relating to Jesus Escareno. (29RT 4338-4340.)

victims were killed by shotgun wounds to the head, in different municipalities south of Los Angeles, in June, 1997, cannot suffice to "support a strong inference" of identity.

Indeed, in *People v. Balderas* (1985) 41 Cal.3d 144, a case that involved two homicides with "certain similarities" – "the proximity in time, the commandeering of vehicles, the use of a shotgun, and the partial or complete disrobing of the victims (presumably to hinder them in seeking aid)," this Court was "not certain that [the two homicides] share[d] marks so distinct in number and significance that they logically tend to isolate the same person as the perpetrator of both." (*Id.* at p. 172.) Here, of course, there were even fewer similarities — and there were stark differences, as noted above. No rational person could conclude that the use of a shotgun in crimes committed within a month of each other "logically tend[s] to isolate the same person as the perpetrator" of each of them. (*Ibid.*)[41] Unfortunately,

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[41] Cases in which this Court has found sufficient similarity to warrant the admission of other crimes to show identity, by contrast, involve much more distinct and numerous common marks, and/or much greater geographic proximity. (See, e.g., *People v. Scott* (2011) 52 Cal.4th 452, 471-473 [rape burglaries occurred at night, in the same area, over a four month period; rapist in each case had a genetic profile defendant shared with only 8% of the population; perpetrator told victims to clean themselves after the rape; souvenirs of the crimes were found in defendant's room]; *People v. Lynch* (2010) 50 Cal.4th 693, 737-738 [all victims were elderly Caucasian women who were attacked in their homes; three of the victims lived in corner homes and another had regular access to her daughter's

(continued...)

the use of shotguns is common.[42]

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[41](...continued)
corner house; all of the victims suffered blunt trauma to the head and were robbed, or robbery was attempted; four were attacked during the day, and the jury could have inferred that the fifth attack occurred during the day as well; defendant was identified at or near the victim's house in each incident], abrogated on other grounds by *People v. McKinnon, supra,* 42 Cal.4th 610, 637-638; *People v. Rogers* (2006) 39 Cal.4th 826, 852 [common marks included that both victims were prostitutes last seen alive on Union Avenue in Bakersfield; both suffered multiple gunshot wounds to the torso; both were killed with the same weapon, which belonged to defendant; both bodies were dumped in the same canal, in rural areas about seven miles from each other]; *People v. Gray* (2005) 37 Cal.4th 168, 203 [in both crimes, among other common features, victim was attacked in her home, victim's hands were tied behind her back and her ankles were tied together; the assailant wrapped a towel around the victim's head and left candy wrappers and personal property at the scene; and the assailant ransacked the bedroom and took money]; *People v. Catlin* (2001) 26 Cal.4th 81, 111-112 [each victim was a close female relative of defendant; in each case defendant stood to gain financially from the victim's death; evidence suggested each victim died of poisoning by paraquat, a relatively rare type of poisoning]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1316-1317 [victims were young white females who died as a result of ligature strangulation, were tied up, were killed within nine days of each other, were present at or near the desert near the time of death, were acquainted with the defendant, were induced to accompany him believing that defendant would photograph them to help with their modeling ambitions]; *People v. Miller* (1990) 50 Cal.3d 954, 988-989 [twelve marks of similarity, including that all the victims were gay; all but one crime occurred in West Hollywood; all attacks occurred around midnight, shortly after victims had left gay bars; all victims were struck on the head; offers of marijuana or use of marijuana was present in a number of the crimes].)

[42] (See, e.g., *People v. Clark* (2011) 52 Cal.4th 856, 888, fn. 5; *People v. Thomas* (2011) 52 Cal.4th 336, 346; *People v. Verdugo* (2010) 50 Cal.4th 263, 269-270; *People v. Alexander* (2010) 49 Cal.4th 846, 857-858; *People v. Lewis* (2008) 43 Cal.4th 415, 433; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 978; *People v. Huggins* (2006) 38 Cal.4th 175, 194-
(continued...)

The trial court, in ruling on the motion, did not indicate any reliance on a belief that evidence of the Patel and Luna homicides would be cross-admissible with respect to each other or with respect to the other cases. (See *People v. Smallwood*, *supra,* 42 Cal.3d at pp. 427-428.) While it remarked that shotguns were used in the homicides (except for Patel), the trial court did not express any belief that that fact rendered the homicides cross-admissible, and, in any event, as set forth above, such a belief would have been unsupportable. And while the trial court noted that the cases were "tied together" by evidence that Luna's cell phone was used to call Dunton's apartment, four and a half hours after the killing (1RT 91-92; see 2RT 322), this single item of evidence did not establish that evidence of the Dunton and Acosta *homicides* — let alone the Escareno and Patel homicides and the Salcedo robbery — would be admissible in a separate trial of the Luna charges alone, or vice versa.

Nor did the fact that Luna's cell phone was eventually found in

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[42](...continued)
195; *People v. Garcia* (2005) 36 Cal.4th 777, 782; *People v. Samuels* (2005) 36 Cal.4th 96, 102; *People v. Jones* (2003) 30 Cal.4th 1084, 1097; *People v. Reynoso* (2003) 31 Cal.4th 903, 908; *People v. Hernandez*, *supra,* 30 Cal.4th at p. 848; *People v. Sapp* (2003) 31 Cal.4th 240, 252; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1106; *People v. Ochoa*, *supra,* 26 Cal.4th at p. 417; *People v. Silva* (2001) 25 Cal.4th 345, 351; *In re Hamilton* (1999) 20 Cal.4th 273, 280; *People v. Frye* (1998) 18 Cal.4th 894, 931; *People v. Castillo* (1997) 16 Cal.4th 1009, 1012.)

Dunton's apartment (2CT 319, 328) render evidence of the Dunton and Acosta *homicides* admissible in a trial of the Luna case, or vice versa. *People v. Geier* (2007) 41 Cal.4th 555, is distinguishable. In that case, Geier was identified through DNA evidence as the perpetrator of a rape murder, and a gun taken from the victim's apartment was later used in an attempted murder. (*Id.* at pp. 576-577.) This Court reasoned that evidence that Geier later used the gun taken from the murder victim's apartment would be admissible to prove his identity as the perpetrator of the murder. (*Ibid.*) In this case, even if evidence that Luna's cell phone turned up in Dunton's apartment, where Gomez sometimes stayed, would be admissible in the Luna case, nothing at all tied Luna's cell phone to the Dunton and Acosta killing. Nor did the extensive Mexican Mafia evidence presented regarding the Dunton and Acosta killing have any legitimate connection to either Luna's killing, or his cell phone.[43]

Nor would evidence regarding Luna's killing be admissible in the Dunton and Acosta killing, as the presence of Luna's cell phone did nothing to link Gomez to the Dunton and Acosta killing. The presence of an item allegedly taken from a homicide victim in Dunton's apartment had nothing to do with whether Gomez killed Dunton and Acosta.

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[43] *People v. Johnson* (1988) 47 Cal.3d 576, 590-591, which involved a fact pattern similar to *Geier*, is, like *Geier,* distinguishable from this case.

Finally, none of the evidence in the Luna case would have been admissible in a separate trial of the Patel case, or vice versa.

Thus, apparently, as in *Smallwood,* "[t]he prosecutor did not contend that any legitimate evidentiary purpose would be served by joinder, nor did the trial court base its ruling on the assumption that [each] offense would be admitted in a separate trial of the other[s]." (*People v. Smallwood, supra,* 42 Cal.3d at pp. 427-428.)

2. The Dunton and Acosta and Escareno Charges Were Particularly Inflammatory.

This was not a case in which the crimes were "similar in nature and equally egregious." (*People v. Soper, supra,* 45 Cal.4th at p. 780.) As defense counsel argued at trial, the Dunton and Acosta homicide case was particularly inflammatory because it would involve testimony about the Mexican Mafia. (2CT 478.) Even where two joined cases *both* involve evidence of gang membership, this Court has found that that factor "might indeed have a very prejudicial, if not inflammatory effect on the jury in a joint trial. The implication that gangs were involved and the allegation that petitioner is a gang member might very well lead a jury to cumulate the evidence and conclude that petitioner must have participated in some way in the murders or, alternatively, that involvement in one shooting necessarily implies involvement in the other." (*Williams v. Superior Court, supra,* 36

Cal.3d at pp. 453; see also *People v. Hartsch* (2010) 49 Cal.4th 472, 492-495 [noting that trial court told prosecutor it would sever a gang-related count from other charges unless prosecutor agreed not to use gang evidence].)

Here, of course, juries trying the Patel and Luna cases separately would have heard *no evidence at all* of gang membership; but a jury deciding those cases together with the Dunton and Acosta double homicide would hear testimony about the Mexican Mafia — labeled by the prosecutor as "the gang of all gangs." (31RT 4572.) Even where *relevant*, gang evidence is to be treated with extreme caution because of its potentially "highly inflammatory impact." (*People v. Champion* (1995) 9 Cal.4th 879, 922, overruled on other grounds as stated in *People v. Combs* (2004) 34 Cal.4th 821, 860 and disapproved on other grounds as stated in *People v. Ray* (1996) 9 Cal.4th 879, 949 [concurring opn. of George, C.J., joined by a majority of the justices]; see *People v. Cardenas, supra,* 31 Cal.3d at pp. 905-906; *Kennedy v. Lockyer* (9th Cir. 2004) 379 F.3d 1041, 1055; *People v. Ayala* (2000) 23 Cal.4th 225, 276-277 [trial court excluded any mention of the Mexican Mafia because it would be "unduly prejudicial" and court made diligent efforts to avoid such references]; *People v. Albarran* (2007) 149 Cal.App.4th 214, 230-231 & fn. 15.)

Evidence of gang membership not only suggests criminal propensity but evokes prejudices and preconceptions fostered by widespread publicity about phenomena and events that bear no relevance to the defendant's guilt of the charged crime. (*Williams v. Superior Court, supra,* 36 Cal.3d at p. 453.) Here, the gang evidence bore *no relevance at all* to the Patel and Luna cases and joinder of these cases with the Dunton and Acosta homicide added nothing but prejudice in this regard.

Indeed, in the context of opposing the motion to sever defendants made by co-defendant Grajeda, the prosecution itself opined that the Dunton and Acosta homicides, because of the Mexican Mafia connection, were "much more grievous and much more aggravated" than the others. (1RT 22-23.)

The Escareno case too, as defense counsel argued below, involved particularly gruesome and inflammatory evidence regarding the condition and handling of Escareno's body after he was shot. (2CT 478.) As presented at the preliminary hearing, Escareno's body was found face-down near some dumpsters, with part of his skull missing, exposing his brain; there was blood and brain matter on his suit. (1CT 247-258.) Blood, bone, and brain matter were found in the passenger seat of his car. (1CT 264.)

Witness #1 told police that after Gomez shot Escareno in the head as

he sat in his parked car, he instructed Witness #1 to get in Escareno's car and drive it; Witness #1 did so with some difficulty because one of Escareno's feet was in the driver's side floorboard area and the other was behind the steering wheel, but he managed to push the body over towards the passenger side so that he could drive. (See 1CT 273-280.) Even the magistrate presiding over the preliminary hearing — certainly more accustomed to hearing the details of homicide investigations than the average potential juror — expressed surprise and incredulity when presented with further testimony regarding the transportation of the body from the crime scene to a hamburger stand, back to Dunton's apartment, and then to the location where the body was abandoned by a dumpster. (1CT 273-280; see 1CT 277 ["I just want to know if I am hearing what I am hearing, that's all."].) While Patel and Luna of course suffered the gunshot wounds that caused their deaths, and Patel suffered stab wounds as well, neither case featured the gruesome details of those in the Escareno case.

In sum, trying the cases together would expose jurors considering the Patel and Luna cases to inflammatory evidence they never would have otherwise heard, and evidence about the Mexican Mafia that otherwise would have played no part.

3. The Luna and Patel Cases Were Much Weaker than the Salcedo Robbery and the Escareno and Dunton and Acosta Homicide Cases.

a. The Evidence Implicating Mr. Gomez in the Luna and Patel Crimes Was Much Weaker than the Evidence Implicating Him in the Other Cases.

At the time of the motion to sever, evidence implicating Gomez in the Patel homicide consisted solely of evidence that Patel had a white car and statements by Witness #3, who spoke to police at the Harbor Division Station when she and her husband were being detained by narcotics detectives. She told police that Gomez had sold jewelry, confirmed to be Patel's, to her husband and that Gomez had stated that he had killed the jewelry's owner and had him in the trunk of a white car parked outside her house. (1CT 237-245.)[44] She told police that Gomez had a nine-millimeter or .45 caliber, semiautomatic, chrome handgun. (1CT 239.)

The evidence before the court implicating Gomez in the Luna homicide consisted only of (1) Gomez's fingerprints (among the

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[44] In its opposition to Gomez's motion to sever, the prosecution contended that the evidence showed that Gomez told Witness #1 to burn Patel's car; Witness #1 did so; and when Patel's car was recovered there was human blood found in the trunk. (2CT 557.) Even if this information, which was not presented at the preliminary hearing, could properly be considered in weighing the strength of the evidence in the Patel case, the sum of the evidence against Gomez remained weak — far weaker, by comparison, than evidence of Gomez's involvement in the Dunton and Acosta homicides.

fingerprints of others) on a car found 150 to 200 yards from the crime scene; the car's hood was still warm when police arrived at the scene; and (2) evidence that Luna's cell phone was used to call the apartment of Robert Dunton, where Gomez sometimes stayed, four and a half hours after the killing, and evidence suggesting that the phone was found there after Dunton was killed. (2CT 315-322, 2CT 328.) Luna's phone had been used to make several other calls before the call to Dunton's apartment; there was no evidence tracing any of the calls to Gomez. (2CT 322; see 1RT 70.)

By contrast, fingerprints on the weapon which, according to a firearms examiner, was used to kill Dunton and Acosta — which was found after Gomez's arrest at his cousin's house, where he had arrived the day after the homicides, seeking a place to hide — and statements by Witness #1, who was present (though in a different room) at the time of the killings, implicated Gomez in that double homicide. (2CT 335-342, 347-357.) Witness #1 also provided eyewitness evidence that Gomez shot Jesus Escareno. (1CT 268-274.) Finally, the preliminary hearing suggested that there would be eyewitness testimony implicating Gomez in an armed home invasion robbery in which the victim (Salcedo) feared that he and his wife and children would be shot. (1CT 202-209.)

While circumstantial evidence is inherently neither stronger or

weaker than direct evidence (see *People v. Mendoza*, *supra,* 24 Cal.4th at p. 162), the circumstantial evidence here, in the Luna and Patel cases, was exceedingly weak. (Indeed, the evidence in the Luna and Patel cases, as argued in Arguments I and II, as ultimately presented at trial, was insufficient.)

The evidence in the Luna case in no way linked Gomez to Luna's killing. The presence of his fingerprints on a car near the scene — along with, presumably, the prints of other individuals, as only 10 of 34 prints were matched to Gomez (2CT 317-318) — establishes at most that he at one time touched a car that may have had some relation to the homicide. In the sufficiency context, this Court has found such evidence far from compelling, to say the least. (See *People v. Robinson*, *supra,* 61 Cal.2d at pp. 379, 397-399.)

The cell phone evidence similarly provided no link to the actual killing of Raul Luna; the fact that it was used to call an apartment where Gomez sometimes stayed and that it was eventually found there provides only a weak connection even to the cell phone itself, as two other people lived in the apartment — which belonged to a drug dealer — and at least one person other than Gomez sometimes stayed there. (2CT 315-322, 328-329, 348; see 1RT 23.) The risk that the jurors would supply the missing

links with evidence of Gomez's guilt of the Dunton and Acosta and Escareno homicides, evidence of his gang membership, and evidence of his guilt in the Salcedo robbery — or that this evidence would cause them to overlook the missing links in the first place — loomed over the joint trial. (See, e.g., *Williams v. Superior Court, supra,* 36 Cal.3d at pp. 453-454; *Coleman v. Superior Court* (1981) 116 Cal.App.3d 129, 138.)

The evidence in the Patel case similarly paled in comparison to the fingerprints and eyewitness (or ear witness) testimony in the Dunton and Acosta and Escareno cases. Statements by one witness, Witness #3, detained with her husband when he was arrested on a drug charge, after she was questioned about a pawn slip found in her possession (1CT 237-243), hardly rest on an evidentiary par with fingerprints found on a homicide weapon, or eyewitness testimony, even by an accomplice (1CT 268-274; 2CT 335-342). Again, the risk that the jurors would find Witness #3's testimony true beyond a reasonable doubt because they were confident of Gomez's guilt in other cases was patent. (See *Coleman v. Superior Court, supra,* 116 Cal.App.3d at p. 138 ["If a juror has a reasonable and appropriate doubt about the identity of the murderer [in a primarily circumstantial case], the juror may find it difficult to maintain that doubt in the face of direct evidence concerning repulsive crimes . . . ."].)

More, joint trial of the Luna and Patel cases — both characterized by weak evidence — risked conviction based on spillover prejudice. (*Williams v. Superior Court, supra,* 36 Cal.3d at pp. 453-454.)

b. In Determining Whether the Trial Court Abused Its Discretion in Denying the Motion to Sever, This Court Should Not Consider Evidence that Was Not Ultimately Presented at Trial.

The prosecution's attempt to supplement the evidence before the court at the time of the ruling on the motion to sever with an offer of proof cannot justify the trial court's conclusion that the evidence on the Luna case was not significantly weaker than the evidence in the Dunton and Acosta and Escareno cases. (2CT 557-559, 1RT 81-82.) A trial court deciding a motion to sever rules on the basis of "the showings then made and the facts then known" (*People v. Johnson, supra,* 47 Cal.3d at p. 588); accordingly, this Court reviews denial of a severance motion by examining "the record before the trial court when it ruled." (*People v. Price* (1991) 1 Cal.4th 324, 388.)

But bald statements about evidence the prosecution intends to produce at trial should have no place in the analysis. This Court cannot and should not countenance a rule that would allow prosecutors, with impunity, to defeat a severance motion by shoring up weak cases with offers to prove

evidence that either is not admissible or does not exist in the first place.[45] (See *People v. Arias, supra,* 13 Cal.4th at p. 128 & fn. 9 [rejecting defendant's claim that pretrial evidence, as opposed to prosecutor's representations, did not support theory of cross-admissibility, because the trial court made clear it was also considering evidence presented in hearings on other pretrial motions, and noting that defendant suffered no prejudice from court's consideration of pretrial representations because they were later fulfilled]; *People v. Balderas, supra,* 41 Cal.3d at pp. 176-177 [rejecting argument that trial court never truly exercised discretion in ruling on severance because prosecutor falsely stated that from half to three quarters of the prosecution witnesses were common to both cases; noting that this was a minor element of the trial and several of the most important witnesses were common to both cases]; *People v. Bradford, supra,* 15 Cal.4th at p. 1316 [noting that trial court found cross-admissibility "based upon the record of the preliminary hearing as well as the evidence presented at the hearing on the motion to suppress"]; *People v. Bean, supra,* 46 Cal.3d

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[45] The fact that, with only one exception, the prosecution failed to put on evidence at trial of any of the items in its offer of proof, cannot of course be used to determine the correctness of the trial court's ruling here. It does, however, illustrate the problem with allowing trial courts to stray from the evidentiary record before them in ruling on motions to sever, and the prejudice that ensues where those representations are not fulfilled. (See *People v. Arias* (1996) 13 Cal.4th 92, 128 & fn. 9.)

at pp. 936, 939 & fn. 9 [suggesting that motion to sever is to be decided based on evidence by noting that if prosecution fails to present evidence at the preliminary hearing or at a hearing on a motion to sever, and its failure to do so makes the case appear relatively weak, prosecution runs the risk of severance]; cf. *People v. Memro* (1995) 11 Cal.4th 786, 849 [noting that trial court had emphasized that prosecution did not have to present its entire case to defeat severance; its offer of proof was enough].)

In any event, even if a trial court's consideration of offers of proof might in some cases be appropriate, the prosecution seems to have conceded that it did not have admissible evidence regarding a motive on Gomez's part to kill Luna — the chief item it had listed in its offer of proof. (2CT 557, 1RT 80.) That concession naturally poses the question whether the remainder of the offer of proof consisted of admissible evidence, and renders the trial court's reliance on the prosecution's offer of proof unreasonable.

Finally, in *People v. Ruiz*, this Court suggested that even if evidence that turned out to be inadmissible was considered by the trial court in ruling on a motion to sever, this Court would not consider it in determining whether the trial court abused its discretion. (See *People v. Ruiz* (1988) 44 Cal.3d 589, 606 [inadmissible hearsay will not be considered in determining

whether court abused discretion in denying severance motion].) Here, the prosecution conceded that some of the evidence was inadmissible, and with one exception, the remainder was not presented at all. If inadmissible evidence cannot be considered in reviewing a denial of severance, then neither can a proffer of evidence that the prosecution never even attempted to admit, either at the preliminary hearing or subsequently at trial.

4. The Patel, Escareno, and Dunton and Acosta Cases Were Charged as Capital Cases, While the Luna Case Was Not.

This Court's severance analysis takes into account whether a noncapital case has been joined with a capital case.[46] Though the prosecution later acceded to the court's suggestion that a robbery special circumstance be added to the Luna case, before trial it had told the court that it did not charge the robbery special circumstance in that case because it believed the robbery and homicide were distinct. (1RT 21-23; 1RT 79-80; 29RT 4314.) Thus, the Luna case was not, at the time of the motion to sever, a capital case.

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[46] In *Alcala v. Superior Court*, *supra,* 43 Cal.4th 1205, 1229, this Court recently disavowed the notion that heightened scrutiny should be applied to severance decisions in capital cases, noting that an amendment to Penal Code section 790(b) specifically provided for joinder in capital cases, thus making clear that heightened scrutiny was no longer required. (*Id.* at p. 1225, fn. 19; but see *People v. Thomas*, *supra,* 52 Cal.4th at p. 350 [noting, without disapproval, that trial court applied highest degree of scrutiny to severance issue in a capital case].)

The prosecution correctly asserted below that a joint trial would not necessarily create a capital case of the Luna homicide, because if the cases were severed, the prosecution might not try the Luna case first. (2CT 554.) Tried separately, however, the Luna case could only have been charged as a capital case, however, if Gomez were first convicted of another first or second degree murder. (See Pen. Code § 190.2(a)(2).) More, given the weaknesses in the other cases — particularly the Patel case and the Escareno case, as evidenced by the jury's deadlock in the latter — it was not at all a foregone conclusion that Gomez would be convicted of another first or second degree murder before he faced trial in the Luna killing. Finally, even if Gomez were first convicted of another first or second degree murder, that conviction would not be admissible at the guilt phase of a subsequent capital trial on the Luna charges; the special circumstance would be tried separately. (Pen. Code § 190.1.) This case presents a set of circumstances quite different from those in *Alcala*, where this Court found that the trial court did not abuse its discretion in denying severance where all five of the homicide cases carried their own special circumstances allegations. (*Alcala v. Superior Court, supra,* 43 Cal.4th at pp. 1228-1229.)[47]

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[47] In addition, *Alcala*, unlike this case, presented the very problem
(continued...)

In any event, at the least, the fact that some of the cases were capital can hardly be said to weigh *against* severance, as the risks inherent in joint trials — of unwarranted or otherwise unobtainable convictions — are precisely the type of risk the Eighth Amendment does not tolerate in capital cases. (*Beck v. Alabama, supra,* 447 U.S. at pp. 637-638.)

5. The Trial Court Abused Its Discretion in Denying Severance.

To be sure, the absence of cross-admissibility does not by itself establish prejudice. (*Williams v. Superior Court, supra,* 36 Cal.3d at p. 451.) But when, as here, the absence of cross-admissibility is combined with weak evidence on the counts to be severed, and inflammatory gang evidence and much stronger evidence of guilt on the other counts, as well as more graphic and gruesome testimony on those other counts, the prejudice could not be any more clear or substantial.

In fact, the only factor weighing against severance was the "judicial economy" factor that is weighed in *every* case. (*People v. Bean, supra,* 46

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[47](...continued)
that the 1998 amendment to Penal Code section 790(b) sought to address — the problem of a serial killer such as the "Night Stalker" or "Freeway Killer" who committed murders in different counties. (*Alcala v. Superior Court, supra,* 43 Cal.4th at pp. 1215, fn. 7.)

More, aside from the fact that all five of the counts in *Alcala* were capital, the crimes evinced a "common scheme or plan" and were "similar in nature and equally gruesome." (*Id.* at pp. 1225- 1227.)

Cal.3d at p. 936; *Williams v. Superior Court, supra,* 36 Cal.3d at pp. 451-452; *People v. Earle* (2009) 172 Cal.App.4th 372, 407-408.) While this factor must be considered, manifestly, it alone cannot appropriately defeat a motion to sever when all the other factors weigh in favor of severance. (*Williams v. Superior Court, supra,* 36 Cal.3d at pp. 451-452 ["Quite simply, the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial."]; *People v. Soper, supra,* 45 Cal.4th at p. 781; *People v. Earle, supra,* 172 Cal.App.4th at p. 408; see also *Bean v. Calderon, supra,* 163 F.3d at p. 1086.) If that were the case, severance would never be required, and the only question would be whether the cases were properly joined in the first instance under Penal Code section 954.[48] Yet this Court has made clear that that is not the case. (See *Williams v. Superior Court, supra,* 36 Cal.3d at pp. 447-448.)

The abuse of discretion standard, of course, is deferential, but it is not toothless. (See *People v. Williams* (1998) 17 Cal.4th 148, 162 [abuse of discretion standard "is not empty"]; *People v. Jacobs* (2007) 156 Cal.App.4th 728, 735-738.)

If refusal to sever were proper here, it "would never be improper."

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[48] As set forth above, Penal Code section 954 allows a joint trial of "two or more different offenses connected together in their commission . . . or two or more different offenses of the same class of crimes or offenses."

(*Bean v. Calderon, supra,* 163 F.3d at p. 1086.) If a trial court may properly deny a defendant's motion to sever non-gang related homicide cases characterized by singularly weak evidence of guilt from a Mexican Mafia-related double homicide in which defendant's fingerprints have been lifted from the homicide weapon and another homicide in which a purported eyewitness would testify that the defendant shot part of the victim's head off for no apparent reason, and then directed that his body be driven around in his blood and brain-splattered car, it would no longer be an "overstate[ment]" to say that "the difficulty of showing prejudice from denial of severance is so great that the courts almost invariably reject the claim of abuse of discretion." (*Williams v. Superior Court, supra,* 36 Cal.3d at pp. 447-448.)

Gomez has shown prejudice in every relevant respect; the trial court here abused its discretion.

6. In the Alternative, Even if the Court Did Not Err In Refusing to Sever the Patel and Luna Cases From Each Other, It Nonetheless Erred In Refusing to Sever these Cases from the Dunton and Acosta Double Homicide.

Even if, *arguendo*, the trial court did not err in refusing to sever the Patel and Luna cases — both of which were characterized by weak evidence — from one another, the court nonetheless, for all the reasons set forth above, abused its discretion in refusing to sever these non-gang related

cases from the Escareno case and from the Dunton and Acosta double homicide case, which was characterized not only by relatively stronger evidence, but highly inflammatory evidence involving the Mexican Mafia, for the reasons stated above.

D. Reversal is Required.

"[T]he appropriate review of a post-verdict appeal of a severance ruling requires examination of the evidence produced at trial to determine whether joinder was prejudicial." (*People v. Smallwood, supra,* 42 Cal.4th at p. 431, fn. 11, citing *People v. Turner* (1984) 37 Cal.3d 302, 312.) Here, the full record of the trial leaves no doubt that placing the Salcedo, Dunton and Acosta, and Escareno cases before the jury considering Gomez's guilt of the Patel and Luna murders (as well as placing the Patel case before the jury considering the Luna case, and vice versa) was highly prejudicial, and that there is a reasonable probability that had the cases been severed (or even had the Patel and Luna cases been tried together, but severed from the Escareno and Dunton and Acosta cases), the result would have been different, particularly in the Patel and Luna cases.

The evidence at trial was not appreciably stronger than it had been at the time of the motion to sever. In the Luna case, as noted above, with only one exception, the additional evidence the prosecution had offered to prove

did not materialize. (See Argument V.C.3.b, above.) The jury was thus left with the evidence of Gomez's fingerprints on the car near the scene (13RT 2092-2094, 2103-2107, 2109); the evidence that Luna's cell phone was used, four and a half hours after the killing, to call Dunton's apartment, where Gomez at some point began to stay, and that it was eventually found in Dunton's apartment (11RT 1740-1742; 14RT 2150-2160, 2167-2177); and Witness #1's confused testimony that Gomez at some point brought Luna's cell phone to Dunton's apartment (11RT 1740-1742, 14RT 2151-2153, 2167-2177, 20RT 3005, 22RT 3252-3255, 24RT 3539-3541, 3554-3558.) In addition, a man who had seen a man running from the direction of the crime scene, seven to nine blocks away — who was unable to identify Gomez at the time — identified him at trial, after seeing Gomez in court several times, as the running man. (14RT 2187, 2249.) This evidence did not significantly strengthen the case against Gomez, for the law itself identifies many of the factors attending this identification as suspect, and the witness's testimony, in any event, did not establish Gomez's presence at the scene at the time of the crime. (See Argument I.B., above.)

In any event, the evidence at trial, while suggesting that there were two people in the vicinity immediately before Luna was shot, included nothing from which it could be inferred that Gomez was the shooter. (And,

in fact, the jury properly rejected the firearm allegation associated with the Luna case. (See 29RT 4348; 3CT 840.)) Indeed, to the extent that William Owens's identification was to be credited at all, the evidence suggested the opposite, as the running man he saw did not have a shotgun. (14RT 2196-2197, 15RT 2327.) No evidence at all was produced as to the mental state of any person, other than, possibly, the shooter (whose mental state could be inferred only, if at all, from the nature of the shooting). (See Argument I.B.2., above.)

In the Patel case, the testimony of Witness #3, the drug dealer's wife who stated that Gomez had sold Patel's jewelry to her husband and had told them he had the jewelry's deceased owner in the trunk of a car parked outside their house was supplemented at trial by Witness #1's testimony that Gomez had asked him to burn Patel's white car and that Gomez had admitted killing the white car's owner. (19RT 2931-2934, 2937-2938, 24RT 3539.) Witness #1, however, was beset by a host of credibility problems, which indisputably weakened the force of his testimony. (See Argument II.B.2.a., above.) And as with the Luna case, the additional evidence presented at trial also suggested the involvement of more than one person in the crime, as Witness #1 testified that Gomez and another man, "Little Diablo," brought Patel's jewelry into the house. (22RT 3230-3232.)

This Court has identified that factor — present in both the Luna and Patel cases — as significant in analyzing the prejudice fostered by joint trials: "[A]lthough it is apparent that more than one assailant was involved in both killings, only petitioner will be standing trial in front of the jury. The absence of other known suspected participants coupled with the evidence of two seemingly senseless, gang-related shootings could indeed produce an over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts." (*Williams v. Superior Court, supra,* 36 Cal.3d at p. 453 [citations and internal quotation marks omitted].)

Jurors deciding Gomez's guilt in each of these two far from open-and-shut cases heard not only the weak evidence of the other case, but stronger, eyewitness evidence of Gomez's involvement in a home invasion robbery, including testimony by the victim's wife, who was present, along with their three children, at the time (8RT 1335-1365), and Witness #1's description of an uncharged robbery he and Gomez had committed after driving a stolen pickup truck to the "third world," a junk yard and storage area for containers from container ships, inhabited by drug dealers. (20RT 3011-3016.)[49]

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[49] Even the Patel and Luna cases had been tried together, had the (continued...)

The evidence in the Dunton and Acosta and Escareno cases, moreover, was as strong as it had appeared it would be at the preliminary hearing — and as inflammatory, if not more so. Although the jury deadlocked on the charges relating to Escareno's killing and robbery (29RT 433-4340), the evidence provided by Witness #1 — to the extent any jurors believed it — was powerful, graphic, and inflammatory: Witness #1 told the jury that he and Gomez were driving around looking for someone to rob; that Gomez noticed a man with many rings on his fingers; that they followed him for a while and eventually pulled up their car next to his; and that after talking and laughing with him for a short time Gomez drew up a shotgun and shot him. (19RT 2940-2947.) Witness #1 further testified that, largely at Gomez's direction, he drove Escareno's body around in his blood and brain-splattered car and removed his wallet and his jewelry, and then left the body by some dumpsters at a shopping center and parked the car elsewhere. (19RT 2948-2954, 20RT 2999-3003.)

Gomez was implicated in the Dunton and Acosta killing by evidence that his fingerprints were found on the shotgun that, according to a firearms examiner, matched bullet evidence at the scene of the killings (a shotgun

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[49](...continued)
court severed them from the Escareno and Dunton and Acosta cases, there is a reasonable probability that there would have been a more favorable result for Gomez, for the reasons set forth above.

found in his cousin's home when he was arrested there after she had reported to police that he had arrived on her doorstep with a shotgun), and Witness #1's testimony about what he had seen and overheard just before the shooting. (11RT 1754-1756; 21RT 3119; 18RT 2741-2747; 21RT 3099-3100; 19RT 2869-2872; 20RT 3016-3021, 3033-3038.)

Last, but far from least, the Mexican Mafia evidence which defense counsel had warned would "alone [be] extremely prejudicial" (2CT 478) turned out to be just so. Jurors considering whether Gomez was the person responsible for the non-gang-related killings of Patel and Luna heard far-reaching testimony about the inner workings of the Mexican Mafia. Gang expert Richard Valdemar told the jury, among other things, that at the Los Angeles County Jail, he had observed gang members commit "just about every crime that you can imagine that's committed on the outside . . . assaults, battery, murder, the making of contraband weapons, the transportation, sales and use of narcotics, robbery, extortion, and rape" (14RT 2220); and that members of "hard core gangs" created most of the problems in the county jail system, and that the problems could be minimized by isolating those individuals in special units (15RT 2346-2347).

Valdemar recounted the history of the Mexican Mafia, telling jurors that the movie "American Me" "fairly accurately" depicts that history.

(15RT 2361-2363.) He told the jury that the Mexican Mafia controls most of the prison and jail systems in California, and that it kills to enforce its rules and regulations, such as the requirement that drug dealers pay it taxes. (15RT 2364-2365, 2369.) At Mexican Mafia meetings that Valdemar had surveilled, committing murders "was primarily the subject of most of the conversations." (15RT 2354.)

Valdemar told jurors that the Mafia expects members, associates, and street gang members loyal to it not to cooperate with law enforcement or the courts in any way; the penalty for such cooperation is death. (15RT 2381-2382.) The Mexican Mafia has a reputation for seeking out witnesses and killing them. (15RT 2384.) Members and associates are supposed to place loyalty to "Eme" above religion, God, families, and friendships; the Mexican Mafia often uses individuals close to a victim to approach or commit a killing. (15RT 2383.) Valdemar testified that the Mafia has used family members to carry out retaliatory murders on its behalf, adding that this practice was depicted in the movie "American Me." (15RT 2383.)

Valdemar told jurors that "Eme" wives and relatives commit perjury; over objection, he added that he has had personal experience with such cases. (15RT 2384.) He added that "Eme expects that loyal gang members would use any means possible to delay, obstruct or reverse any kind of a

criminal prosecution against its members." (15RT 2385.)

The testimony was so chilling that it prompted a juror to ask the court if jurors were at any risk. (15RT 2386; 3SCT 591.) Indeed, at the conclusion of the guilt phase, the jury as a whole sent a note evincing concern for their safety, and the trial judge himself opined that he could not tell them "there's nothing wrong, there's no reason to be concerned. . . . They might well be concerned that there's some danger that they're in . . . ." (29RT 4335.)

Reviewing courts "must analyze realistically the prejudice which flows from joinder in light of all the circumstances of the individual case." (*People v. Smallwood, supra,* 42 Cal.3d at p. 425.) Realistically, of course, it would have been hard to for the jurors to banish the extensive and frightening gang evidence in this case to a separate region of their minds as they contemplated whether Gomez was guilty of the non-gang-related killings.

More, the prosecution's arguments and the court's instructions increased the danger that the jurors would find themselves unable to compartmentalize the evidence on each incident. While the prosecution had failed to make any argument for cross-admissibility when the motion to sever was before the trial court, it nonetheless lumped the cases together in

its summations. It argued:

- the prosecutor's belief that "by the time I'm finished reviewing the evidence and sum up and the time you finish deliberating, you will conclude that the — you will find irresistible the conclusion that the box holding the evidence of these defendants' guilt is overflowing and that the box holding the evidence of their innocence is empty." (26RT 3803-3804.)

- that "unless you believe in an unbelievable coincidence, unbelievable coincidences . . . unless you believe in an unbelievable conspiracy, which would have to involve at least a dozen of our witnesses, including many of whom do not know each other, then the answer is plain as the nose on your face as to who committed these murders." (27RT 3826.)

- that because of the evidence the jury had heard regarding the lifestyle of Gomez, Witness #1, Grajeda, and Witness #2 (the latter two involved only in the Dunton and Acosta homicide incident) the jury could conclude that Gomez was not the type of person to read his morning newspaper with a cup of coffee — thus, according to the prosecution, showing that he could only have learned about the Escareno homicide by committing it. (27RT 3837-3838.)

- that Gomez was guilty of the Luna killing because "a shotgun was used as the murder weapon. It's the same gauge as the one used, the 12-gauge shotgun is the one used in the Escareno, the Dunton and Acosta murders. And it's the same gauge, although not the same shotgun, that was used – that Ruben Gomez was arrested with." (27RT 3838.)

- that the female witnesses — including Witness #3, who testified *only* as to the Patel case — risked their lives by testifying, as shown by the gang experts' testimony, thus encouraging jurors to consider the gang experts' testimony in relation to the entire case. (27RT 3883.)

- "What the defense lawyers have put forth is what I call the

defense of the two C's, coincidence or conspiracy. ¶ In other words, if – that all this evidence that we have and that we presented, all of it that points to guilt, all of it that points to guilt is just a coincidence. They're just unbelievable coincidences, just incredible coincidences. ¶ But if you don't believe that then it's a conspiracy. That all of these witnesses, many of whom do not even know each other, got together and decided to frame these two defendants." (28RT 4073-4074.)

- that "[i]t's just a coincidence that Escareno was shot in the head just as were Patel, Luna and Dunton. ¶ It's just a coincidence that Escareno was shot with a 12-gauge shotgun just as were Luna, Dunton and Acosta." (28RT 4075.)

- that "you look at all the evidence together. You look at all the evidence together. We're not asking you to believe that these people between them are responsible for five murders on the testimony just of (Witness No. 1), we're not asking you to believe it just on the testimony of (Witness No. 2). . . . You look at all the evidence together. I mean is William Owens lying? Is Orr lying . . . ? Are all these people lying? They all got together and decided to frame these two defendants? Of course not. That's silly. There's nobody in this courtroom that believes that." (28RT 4078-4079.)

- that it "has to be an incredible coincidence for these people to be innocent, or it has to be a conspiracy, they all lied. (Witness No. 5) lied, (Witness No. 6) lied[,] (Witness No. 4) lied, William Owens lied, they all lied. It's got to be one or the other, or these two fellows are guilty." (28RT 4091.)

The "coincidence or conspiracy" theme in particular, invoked in many of these arguments, encouraged the jury to aggregate the evidence, appealing to the jurors' natural inclination to believe that "with so much smoke there must be fire." (*United States v. Foutz* (4th Cir. 1976) 540 F.2d 733, 739.) More, the prosecutor's "box" metaphor improperly urged the

jury to package the evidence on all the counts together. The arguments that Gomez was guilty of the Escareno and Luna homicides because, as in the Dunton and Acosta cases, the victims were killed by shotgun wounds to the head, improperly urged conviction on the theory that evidence of each count provided identity evidence on the other counts — a legal theory that the prosecutor made no effort to establish, and that, in any event, was insupportable, as set forth above. (See subsection C.1., above.)

The trial court's instructions further failed to provide any safeguard against jurors aggregating the evidence. While it instructed jurors that "[e]ach Count charges a distinct crime" and that they "must decide each Count separately" (3CT 890; 29RT 4165), as in *Bean v. Calderon*, it failed to "specifically admonish the jurors that they could not consider *evidence* of one set of offenses as evidence establishing the other." (*Bean v. Calderon*, *supra,* 163 F.3d at p. 1084 [emphasis added]; compare *Herring v. Meachum* (2d Cir. 1993) 11 F.3d 374, 378 [finding no showing of actual prejudice in part because jury was instructed "on three separate occasions that evidence of one murder was not to be used to determine petitioner's guilt with respect to the other"].) To be sure, often, as a witness took the stand, the court asked the prosecutor to identify which counts the testimony related to. (E.g., 15RT 2391-2393; 16RT 2518.) The jurors were never specifically

told, however, that they could not consider evidence on one count in determining Gomez's guilt of the others. (See *People v. Soper, supra,* 45 Cal.4th at pp. 783-784 [absence of limiting instruction is a fact in assessing whether resulting trial was unfair].)[50]

More, the length and complexity of the trial contributed to the danger that the jurors would be unable to compartmentalize the evidence. Federal courts have repeatedly noted that the prejudice ensuing from joint trials may

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[50] In *People v. Thomas, supra,* 52 Cal.4th at p. 352, this Court rejected the defendant's contention that the trial court should have instructed the jury that the evidence in one case was not admissible to prove guilt in the other, and vice versa. The Court stated that the jury "received proper instruction. The point was addressed by CALJIC No. 17.02 . . ." (*Ibid.*) First, unlike Thomas, Gomez does not contend in this direct appeal that the trial court should have sua sponte instructed jurors that the evidence in each case was not admissible to prove the other cases. Rather, Gomez contends that the absence of an instruction specifically informing jurors that they could not consider *evidence* on one case in determining guilt in the others compounded the prejudice of the joint trial. Gomez respectfully contends that a specific admonishment that evidence on one count is not to be considered in deciding the other is different than an instruction that each count is to be decided separately — without reference to what evidence could be considered in deciding each count. (See *Bean v. Calderon, supra,* 163 F.3d at p. 1084 [referring to court's failure to give jurors a specific admonishment that they could not consider evidence of one set of offenses as evidence establishing the other].) Indeed, in this case, jurors would have clearly understood that the instruction that each *count* was to be decided separately did not mean that evidence on one count could not be considered in determining guilt on any other count — for each incident charged in this case was reflected in more than one count. (E.g., counts 6 and 7 charged the Escareno crimes; counts 10 and 11 charged the Dunton and Acosta double homicide.) The missing instruction here, thus, was any instruction that evidence relating to each incident or case could not be considered in determining Gomez's guilt in the other cases.

be minimal where the trial is short, the issues are simple, and evidence on each case is presented in sequence. (See, e.g., *United States v. Johnson* (9th Cir. 1987) 820 F.2d 1065, 1071; see also *Lucero v. Kerby* (10th Cir. 1998) 133 F.3d 1299, 1316.) Such was not the case here. In this trial that spanned three months, the sets of charges were not presented seriatim. Instead, while the order of witnesses was not entirely straightforward, the prosecution, generally, first called police witnesses regarding each of the crime scenes, then presented medical examiner testimony for each of the cases, and then various other witnesses, culminating in the testimony of Witness #1. (See, e.g., 9RT 1476-1477 [Patel crime scene]; 9RT 1517, 1522, 1542 [Patel and Escareno autopsies]; 9RT 1569-1574 [Escareno crime scene]; 11RT 1695 [Luna crime scene]; 11RT 1727-1729 [Dunton and Acosta crime scene]; 11RT 1801 [Luna and Dunton and Acosta autopsies]; 12RT 1870-1873 [identification of Patel's jewelry].) In summation, again, the prosecutor did not address the cases in sequence but jumped back and forth among them. (See, e.g., 26RT 3811-3815, 27RT 3825-3846.)

Furthermore, as this Court found in *Smallwood,* rejecting the "cure by verdict" theory a commentator had criticized,[51] "the error in denying

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[51] (See Note, *Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure* (1965) 74 Yale L.J. 553, 555 [criticizing theory that acquittal on one count establishes that jury

(continued...)

severance cannot be saved by the fact" of the jury deadlock in the Escareno case. (*People v. Smallwood, supra,* 42 Cal.3d at p. 433.) As in *Smallwood,* "[a]lthough it could be argued that the mistrial [on one set of charges] demonstrates that the jury was able to distinguish" among the various charges, there are equally persuasive explanations. (*Ibid.* [noting verdict could have reflected compromise].) The verdict may have represented a compromise, or the jurors may have simply concluded that after having convicted Gomez of four first degree murders, it did not matter if they could agree on the fifth. (See 29RT 4338 [jury had reached verdicts on other charges when it declared deadlock on the Escareno counts].)

More specifically, Witness #1's accomplice testimony in the Escareno case was not corroborated (see Argument XVIII, below); in that light, the fact that half of the jurors nonetheless voted to convict him does not show that refusal to sever was not prejudicial. Rather, it is reasonably likely that those jurors voted to convict despite the patent inadequacy of the asserted corroboration because of the spillover effect of the other charges. And it is also reasonably probable that the "weight of the [multiple]

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[51](...continued)
compartmentalized evidence; assumption that the jury's verdict was in accord with the weight of the evidence is unwarranted, and "ignores the possibility that, had there been no prejudice from the joinder, the defendant might have been acquitted on all counts"].)

accusations was a major factor in [defendant's] conviction[s]" of the Patel and Luna crimes. (*People v. Smallwood, supra,* 42 Cal.3d at p. 432.) This is not a case where, for example, the jury, faced with two counts, one strong and one weak, deadlocked or acquitted on the weaker count, thus suggesting that the jury was able to compartmentalize the evidence and that its verdict was entirely in accord with the weight of the evidence, and that the defendant suffered no prejudice because he was not convicted in any count on which he would have had any chance of a more favorable verdict in a separate trial. (See *Joint and Single Trials, supra,* 74 Yale L.J. at p. 555.) Here, instead, even if the jury deadlock in the Escareno case were to suggest that Gomez suffered no prejudice with respect to that case,[52] it does not suggest that Gomez suffered no prejudice with respect to the Patel and Luna cases. This Court, of course, must analyze each case separately in reviewing severance. (See *Williams v. Superior Court, supra,* 36 Cal.3d at p. 454.)

Indeed, to the extent that *some* of the jurors voted to acquit Gomez of the Escareno crimes because they found Witness #1's accomplice

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[52] It did not, of course, as six jurors evidently would have found Gomez guilty of that crime despite the accomplice corroboration requirement, and jurors who believed Gomez guilty of that crime were permitted to consider it at the penalty phase. (See Arguments XVIII and XIX, below.)

testimony not to be corroborated — as opposed to not credible — the evidence of this killing was all the more prejudicial. This Court has noted that evidence of uncharged crimes may be more prejudicial than evidence of jointly tried crimes because the defendant may have "escaped . . . punishment" for the uncharged crimes; in the case of the Escareno homicide, however, the same risk of prejudice applies to this jointly charged crime, as any juror who believed that Gomez was guilty of the killing but had escaped conviction because of the accomplice corroboration requirement may be "tempt[ed] . . . to condemn" him in the other cases. (*Frank v. Superior Court* (1989) 48 Cal.3d 632, 639-640.)

Gomez's acquittal of the Luna robbery and the robbery special circumstance likewise hardly demonstrates that the jury successfully compartmentalized the evidence on the various incidents. The robbery special circumstance was added to the information during deliberations, over defense objection, after the trial court noted that despite the fact that it had instructed the jurors in accordance with such an allegation, it had not been charged. (29RT 4314.) The prosecutor confirmed the court's view that this reflected an oversight when in fact, prior to trial, the court had twice inquired of the prosecutor why it had not been charged, and the prosecutor had explained that he did not believe that the special circumstance was true.

(29RT 4314; see 1RT 21-22, 1RT 79-80.) This special circumstance never should have been part of the case to begin with; that the jurors did not find true a special circumstance that the prosecutor himself apparently did not believe true hardly demonstrates that they successfully compartmentalized the evidence of the various homicide incidents. Indeed, to the extent the prosecutor and court may have simply forgotten that he did not believe the special circumstance was true, the whole episode illustrates the risk that a trial of multiple, unrelated counts will simply overwhelm jurors, causing them to forget evidentiary gaps they had previously noted.

That the jurors acquitted Gomez of the robbery of Luna is similarly unremarkable. (29RT 4348; 3CT 840-841.) Their apparent belief, suggested by a jury note (4SCT 729), that if Luna's cell phone was taken, it was taken as an afterthought does not demonstrate an ability to compartmentalize evidence about five homicides and forbear from drawing the impermissible conclusion that Gomez had a propensity to kill.

The Luna verdicts, if anything, suggest that the jurors convicted Gomez of first degree murder despite the weak evidence and lack of any evidence at all as to the mental state of the non-shooter. (See Argument I, above.) Simply put, where a prosecutor has overreached to begin with, jury deadlock or even acquittal on counts for which the evidence is grossly

insufficient will hardly show that the jury has been able to successfully compartmentalize the evidence with respect to all the charges.

"Reasonable probability" "does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*. [Citations.]" (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, original italics, citing, *inter alia*, *People v. Watson* (1956) 46 Cal.2d 818, 837.) Given the weakness of the evidence in the Patel and Luna cases, there is a "reasonable chance, more than an abstract possibility" that if those cases were tried separately, in trials in which the evidence on each count was made to stand or fall on its own, without gang evidence or evidence of Gomez's guilt on other charges, at least one juror would have found a reasonable doubt about Gomez's guilt in one or both of those cases, and the result would have been different. Reversal of the judgment is required. (See *People v. Smallwood, supra,* 42 Cal.3d at p. 433 [reversing judgment for error in denying severance, though judgment included conviction on only one count].)[53] At a minimum, reversal of the Patel and Luna cases is required.

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[53] This Court has not explicitly addressed whether error in denying severance in a multiple count case requires reversal of the entire judgment or reversal only of the counts characterized by much weaker evidence and susceptible to prejudice from otherwise inadmissible, inflammatory evidence. In *Bean v. Calderon, supra,* 163 F.3d 1073, applying a stringent standard of harmless error review not applicable here, the Ninth Circuit concluded that reversal was required only in the weaker case that had been

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And even *if* this Court were to conclude that there is no reasonable chance that, had the trial court not erred in refusing to sever, the result at the guilt phase would have been different, Gomez's death sentences for the Luna and Patel murders must be reversed, as the error bore on the penalty phase. There is, at the very least a "reasonable possibility" that, had the trial court not erred, the result at the guilt phase in at least one of those cases would have been different — thus, of course, foreclosing the possibility of one or both of the death sentences and seriously altering the penalty phase picture before a jury weighing punishment for any remaining convictions. (See *People v. Brown, supra,* 46 Cal.3d at pp. 447-449; *People v. Prince, supra,* 40 Cal.4th at pp. 1299-1300 [addressing claim that prejudice of guilt phase error spilled over to penalty phase and noting that for such purposes the *Brown* "reasonable possibility" standard is the same as *Chapman* harmless beyond a "reasonable doubt" test].)

The erroneous refusal to sever further demands reversal of the death sentences because it undermined Gomez's right to a reliable guilt

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[53](...continued)
prejudiced by joinder with the stronger case. (*Id.* at p. 1086, applying *Brecht v. Abrahamson* (1993) 507 U.S. 619, 637, standard and concluding that severance error had no "substantial and injurious effect or influence in determining the jury's verdict" with regard to case supported by strong evidence.)

determination, risking, as it did, unwarranted convictions in cases marked by weak evidence. (See *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358 [opinion of Stevens, J.]; see U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, & 17.)

More, at the penalty phase in this case, the error in refusing to sever counts synergistically combined with the court's refusal to sever defendants (see Argument VI, below) — whether or not that in and of itself was error. The jurors then, knowing that the prosecution had singled out Gomez in seeking the death penalty (29RT 4355), could fairly assume that Grajeda would receive a life sentence,[54] and may well have concluded that the prosecutor had been judicious in seeking punishment for the two men, and sentenced Gomez accordingly.

E. Even if the Court Did Not Err When It Refused to Sever, the Joint Trial Violated Mr. Gomez's Constitutional Rights to Due Process and a Fair Trial, Requiring Reversal.

Even if a trial court's severance ruling was correct at the time it was made, a reviewing court must reverse the judgment if "defendant shows that

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[54] The jury questionnaire filled out by all prospective jurors, for example, told jurors that "[i]f you find the defendant guilty and the special circumstances to be true, then there will be a second phase of the trial to determine whether the penalty will be (1) death or (2) life in prison without the possibility of parole." (E.g. 5CT 1315.) The jurors, having been asked to determine the truth of a multiple-murder special circumstance as to Grajeda, would be entitled to assume that he would receive life without parole.

joinder actually resulted in 'gross unfairness' amounting to a denial of due process." (*People v. Mendoza, supra,* 24 Cal.4th at p. 162, quoting *People v. Arias, supra,* 13 Cal.4th at p. 127.) As the Supreme Court has put it, refusal to sever rises to the level of a constitutional violation "if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." (*United States v. Lane, supra,* 474 U.S. at p. 446 & fn. 8 [addressing joinder of defendants and stating generally that refusal to sever may be a constitutional violation]; see U.S. Const., 5th, 6th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, & 16.)

In evaluating whether joinder has created such prejudice, federal courts have "acknowledged . . . 'a high risk of undue prejudice whenever . . . joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible,'" as well as the prejudice that inheres when there is a substantial disparity in the strength of the evidence between cases that have been joined. (*Bean v. Calderon, supra,* 163 F.3d at pp. 1084-1085, quoting *United States v. Lewis, supra,* 787 F.2d at p. 1322.) As demonstrated above, the evidence in these cases was not cross-admissible, and there was a substantial disparity in the strength of the evidence. While the Dunton and Acosta and Escareno cases involved an eyewitness (or, in the case of

Dunton and Acosta, an ear witness) who knew Gomez, and the prosecution introduced fingerprint and firearms comparison evidence implicating Gomez in the Dunton and Acosta homicides, no eyewitness testified to Gomez's involvement in the Patel case, and the eyewitness identification of Gomez as having been in the neighborhood shortly after the Luna shooting suffered serious flaws. (See Argument I, above; *People v. Earle, supra,* 172 Cal.App.4th at pp. 401-407 [trial court abused its discretion in refusing to sever strong case with positive identification from weak case in which the victim's identification suffered myriad problems].)

Inflammatory evidence of gang involvement — which "will almost always be prejudicial and will constitute reversible error" (*Kennedy v. Lockyer, supra,* 379 F.3d at p. 1055) — further prejudiced the jury's consideration of the Patel and Luna cases, in which evidence that Gomez was a gang member with allegiance to the Mexican Mafia had no legitimate role.

Federal courts have also assigned significance to the length and complexity of a joint trial, concluding, in many cases, that joinder in a short trial, with evidence on each incident presented separately, is less likely to be prejudicial. (*Lucero v. Kerby, supra,* 133 F.3d at p. 1316 [nothing in record indicated jurors would be unable to compartmentalize evidence where

three-day trial was "not unduly long or complex" and issues were relatively simple].) This, as set forth above, was no such trial.

Finally, federal courts have further looked to the prosecution's arguments, the trial court's instructions, and any affirmative evidence that the jury was able to assess the evidence on each incident separately. (*Bean v. Calderon, supra,* 163 F.3d at pp. 1084-1086.) As demonstrated in greater detail above, each of these factors additionally supports a finding that joinder here prejudiced Gomez's right to due process and a fair trial: the prosecution's arguments urged the jury to cumulate the evidence, and the trial court's instructions failed to caution them not to do so. (See subsection D., above.)

As this Court has recognized (see *People v. Smallwood, supra,* 42 Cal.3d at pp. 430-433), any presumption created by an acquittal or deadlock must yield to a case-specific determination whether the defendant received a fair trial. In *Park v. California*, for example, the Ninth Circuit examined the acquittals in detail, noting that the jurors acquitted the defendant on some of the counts supported by strong evidence — not the effect one would expect if a set of strong counts prejudiced the consideration of a set of weaker counts. (See *Park v. California* (9th Cir. 2000) 202 F.3d 1146, 1150.) That is not the case here. As set forth at greater length above, the

jury's deadlock on the Escareno charges and its acquittal of Gomez of the robbery of Raul Luna and the associated special circumstance — charges so weak that the prosecutor himself did not believe in the truth of the special circumstance (1RT 21-22, 79-80; but see 29RT 4314) — does not "save[]" the error in denying severance. (*People v. Smallwood, supra,* 42 Cal.3d at p. 433; see pp. 163-168, above.)

In light of the other factors relevant to the due process determination — the prosecution's arguments, the court's instructions, the length of the trial, the disparity in the strength of the evidence in the different sets of charges, the lack of cross-admissibility, and interweaving of the evidence on the various sets of charges — it cannot be concluded that the jurors successfully compartmentalized the evidence. (See *Bean v. Calderon, supra,* 163 F.3d at pp. 1084-1085 [emphasizing that prosecutor encouraged jurors to consider sets of charges in concert; that instructions did not specifically admonish jurors that they could not consider evidence of one set of offenses as establishing the other; that there is a high risk of undue prejudice whenever jointly tried charges are not cross-admissible; and that a substantial disparity in the strength of the evidence between two cases tainted jurors' consideration of weaker case]; *People v. Earle, supra,* 172 Cal.App.4th at pp. 409-410.)

Thus, regardless of whether the trial court erred at the time it ruled on Gomez's motion to sever counts, the resulting trial and the ensuing sentencing proceeding were unconstitutionally, fundamentally unfair, and for all the reasons set forth here and in subsection D., above, this fundamental unfairness cannot be proven harmless beyond a reasonable doubt with respect to the verdicts and sentences. (*Chapman v. California, supra,* 386 U.S. at p. 24; U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 17.) For all the reasons set forth above, Gomez's due process rights were violated by the refusal to sever the Patel and Luna cases from the Escareno and Dunton and Acosta cases, as well as by the refusal to separate the Patel and Luna cases from one another. The prosecution cannot prove that the verdicts, particularly in the Patel and Luna cases, were "surely unattributable to" this error. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279.)

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Much is expected of jurors in capital trials. But we should not expect of them the type of superhuman mental and emotional gymnastics that would be required to separate the evidence of each set of charges they were to determine in this case — to banish the Mexican Mafia evidence from their mind as they considered whether Gomez had killed Patel or Luna and

to forget, as they considered whether doubts about Gomez's guilt in the Luna and Patel cases were reasonable, that Witness #1 had implicated him in a double homicide and that police had identified his fingerprints on the weapon used in the double homicide. The danger that their understandable inability to do so resulted in guilt and penalty verdicts that otherwise would have been different is too great to allow the judgment here to stand. The judgment should be reversed; at a minimum, reversal of the convictions and sentences in the Patel and Luna cases, in which Gomez was most egregiously prejudiced, is required.

VI.

THE TRIAL COURT'S REFUSAL TO SEVER MR. GOMEZ'S TRIAL FROM THAT OF HIS CO-DEFENDANT REQUIRES REVERSAL

Prior to trial, Gomez moved to sever his trial from that of Arthur Grajeda, who was charged with him in the double homicide of Robert Dunton and Robert Acosta. (2CT 531-551.) In moving to sever, Gomez noted, among other grounds, that Grajeda would likely seek to cast blame on him for the double homicide for which they were jointly charged. (2CT 538.) Gomez further noted that while he was charged in five homicides occurring in four separate incidents, Grajeda was charged in only two homicides occurring in one incident. Thus, he contended, there would be a "built-in windfall to Grajeda in keeping these cases together . . . ." (2CT 538.) The windfall for Grajeda, he argued, would result in an unfair penalty for him; keeping the cases together would "prejudice Mr. Gomez tremendously." (2CT 538.)

The trial court denied the motion to sever, noting, "[I]t's obvious that in my view that the defendants should be tried together on counts 10 and 11 . . . ." (1RT 90; see 1RT 92.)[55] The denial of the motion and ensuing joint trial violated Gomez's rights to due process and to a fair trial, his rights to a

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[55] The trial court had earlier denied Grajeda's motion to sever, without prejudice. (1RT 30.)

reliable guilt and penalty determination, and his right to be free from cruel and unusual punishment. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.)

While Penal Code section 1098 expresses a legislative preference for joint trials, the trial court has discretion to grant severance. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40.) Severance may be warranted, for example, on grounds of "prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, [or] conflicting defenses . . . ." (*Ibid.*) Severance may also be required where "'there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'" (*Id.*, quoting *Zafiro v. United States* (1993) 506 U.S. 534, 539.) The trial court's denial of a severance motion is subject to review for abuse of discretion. (*Id.* at p. 41.) Regardless of state law governing severance, however, a joint trial violates the federal Constitution if it results in prejudice so great as to deny a defendant his right to a fair trial. (See *United States v. Lane*, *supra,* 474 U.S. at p. 446 fn. 8; *Grisby v. Blodgett* (9th Cir. 1997) 130 F.3d 365, 370.)

The trial court's refusal to sever denied Gomez his right to a fair trial. Counsel's fear that Gomez would be prejudiced by the joint trial was

realized. During the guilt phase, Grajeda sought to shift blame for the Dunton and Acosta double homicide to Gomez alone, suggesting that the crime was not related to the Mexican Mafia, with which he was associated, but reflected the actions of a "violent, paranoid and drug crazed" murderer — a thinly veiled reference to Gomez, who, counsel for Grajeda argued by way of cross-examining a witness, had "murdered before." (28RT 3988; see 22RT 3318 [cross examination of Witness #1 by counsel for Grajeda]; see also 15RT 2407-2418.) This defense was not only antagonistic, but improperly suggested Gomez's guilt on a propensity theory. Jurors were thus confronted with not just a prosecutor arguing Gomez's guilt of the crimes with which he was charged, but with counsel for his co-defendant, who labeled him a murderer. (22RT 3316-3318; see also 28RT 3988.)

Gomez acknowledges that the Supreme Court has stated that "[m]utually antagonistic defenses are not prejudicial *per se*." (*Zafiro v. United States*, *supra,* 506 U.S. at p. 538; see also *People v. Tafoya* (2007) 42 Cal.4th 147, 162 ["[a]ntagonistic defenses do not *per se* require severance, even if the defendants are hostile or attempt to cast blame on each other"]; see also *People v. Carasi* (2008) 44 Cal.4th 1263, 1297-1298 [suggesting that no constitutional error arises from a refusal to sever in a case involving inconsistent defenses unless the co-defendant's defense

"could have so tainted defendant as to have caused the jury to convict him solely on that ground"]; *People v. Letner* (2010) 50 Cal.4th 99, 150.)

In this case, however, Grajeda's attempt to shift the blame to Gomez combined with other factors to unfairly advantage Grajeda and disadvantage Gomez.

That Grajeda believed himself better off in a joint trial with Gomez (illustrating the "windfall" for Grajeda that Gomez's counsel had warned of, see 2CT 538) is apparent from Grajeda's failure to immediately move for a mistrial when his lead counsel was hospitalized for surgery, and his apparent reluctance in eventually doing so. (See 20RT 2956-2957; 22RT 3201-3204.)[56] Indeed, even the court apparently believed that Grajeda was better off in a joint trial, even though it was before a death-qualified jury. When the possibility of granting a mistrial as to Grajeda came up, the trial court itself opined that Grajeda would be better off continuing the joint trial with Gomez, telling him that his attorneys had selected a very good jury "that is very likely to go your way, especially given the fact that you were the lesser of the two as participants . . . ." (See 19RT 2811.)

Any such advantage to a "lesser" participant, of course, is bound to

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[56] Grajeda's remaining attorney filed a motion for a mistrial, noting that he thought Grajeda would oppose it. (22RT 3201-3202.) After some discussion in court, Grajeda decided he wanted to move for a mistrial. (22RT 3203.) The court denied the motion. (22RT 3216.)

work to the disadvantage of a "greater" participant, and indeed the very existence of such advantages and disadvantages undermines the principle of individual guilt. (See *People v. Chambers* (1964) 231 Cal.App.2d 23, 28-29 [rejecting doctrine of guilt by association and noting that "personal guilt . . . is a fundamental principle of American jurisprudence, inhabiting a central place in the concept of due process"], citing *Uphaus v. Wyman* (1959) 360 U.S. 72, 79.)

The prejudice at the penalty phase was even starker. There, the jurors who had found Grajeda guilty of two murders and Gomez guilty of four were charged only with determining whether Gomez would live or die. Unlike in *People v. Box* (2000) 23 Cal.4th 1153, 1196,[57] where the jury was aware that the co-defendant was ineligible for the death penalty because of his age, the jury here was informed — by the court — that Grajeda did not face death because the prosecution did not seek it against him. (29RT 4355; see also 4RT 607 [instruction during voir dire].)[58] The jurors thus knew that

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[57] *Box* has been disapproved on other grounds by *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10.

[58] In *People v. Tafoya, supra,* 42 Cal.4th at p. 163, this Court rejected the defendant's argument that the joint trial was unfair because the trial court told jurors during voir dire that the prosecution was seeking death only against Tafoya's codefendant. The Court deemed Tafoya's argument forfeited because Tafoya had not raised it in his severance motion. (*Ibid.*)

(continued...)

the prosecution had singled out Gomez alone as deserving of death. (See *Kindler v. Horn* (D. Pa. 2003) 291 F.Supp.2d 323, 362-363 [granting habeas relief based on prosecutor's argument that his office urged the death penalty for defendant Kindler, but would "present both sides" regarding his co-defendant's sentence], affirmed in part and reversed in part, *Kindler v. Horn* (3d Cir. 2011) 642 F.3d 398.) Nowhere in their penalty phase instructions were the jurors told that they could not consider the fact that the prosecutor sought death for Gomez.

Indeed, to the extent that jurors were encouraged to consider evidence from the guilt phase of the trial as well as the penalty phase (see 13CT 3440; 31RT 4595), they may well have deemed it appropriate to consider Gomez's culpability in comparison with Grajeda's or credited the prosecutor with having already appropriately distinguished between the codefendant who should receive a life without parole sentence and the defendant who deserved death.

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[58](...continued)

Tafoya rejected, on the merits, the argument that a capital defendant was prejudiced by a joint trial with a noncapital defendant, finding no prejudice in Tafoya's case and noting authority for the proposition that capital and noncapital defendants can be tried together. (*People v. Tafoya, supra,* 42 Cal.4th at pp. 163-164.)

Likely assuming that Grajeda would receive a life sentence,[59] and aware that the prosecution had sought the death penalty against Gomez alone, the jurors may well have wondered how to else to punish Gomez, if not with death sentences, for the additional murders they had found that he alone committed. The risk that jurors engaged in a comparative — as opposed to individual — assessment of punishment cannot be tolerated in a capital case, where the Eighth Amendment demands a "heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.' [Citation.]" (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 323; see *Lockett v. Ohio* (1978) 438 U.S. 586, 605.)

The trial court's refusal to sever the trials of the two defendants — both alone, and in combination with the trial court's refusal to sever the Patel and Luna counts from Gomez's trial on the double homicide (see Argument V, above) — violated Gomez's rights to due process, a fair trial, and a reliable determination of his guilt and of the sentence he should receive. The prosecution cannot prove the error harmless beyond a reasonable doubt (*Chapman v. California, supra,* 386 U.S. at p. 24); it cannot prove, in this case, that the verdicts were "surely unattributable to" this error. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279; see also *People*

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[59] See footnote 53, above.

v. Brown, supra, 46 Cal.3d at pp. 447-449; *People v. Prince, supra,* 40 Cal.4th at pp. 1299-1300; *People v. Gonzalez, supra,* 38 Cal.4th at p. 961.)

Reversal is required.

VII.

THE TRIAL COURT ERRONEOUSLY REQUIRED THE PRESENTATION OF EVIDENCE REGARDING MR. GOMEZ'S REFUSAL TO COME TO COURT ONE MORNING, ERRONEOUSLY INSTRUCTED THE JURORS THAT THEY COULD CONSIDER THE REFUSAL TO COME TO COURT AS EVIDENCE OF A CONSCIOUSNESS OF GUILT, AND FAILED TO PERFORM THE ROLE OF A NEUTRAL ARBITER; THESE ERRORS VIOLATED MR. GOMEZ'S RIGHTS UNDER CALIFORNIA LAW AND THE STATE AND FEDERAL CONSTITUTIONS

On December 14, 1999, the second day of trial, Gomez refused to come to court, resulting in a 38-minute delay in starting trial. (9RT 1473-1474; see 12RT 1850-1851, 1857.) Incidents like this, while no doubt trying to all affected, unfortunately are not uncommon. (See *People v. Concepcion* (2008) 45 Cal.4th 77, 83-84 [delay is always disruptive to some degree]; see, e.g., *People v. Price*, *supra,* 1 Cal.4th at p. 405; *People v. Medina* (1995) 11 Cal.4th 694, 736; *People v. Gutierrez* (2003) 29 Cal.4th 1196, 1199.)

What distinguishes this case from the many other cases in which similar incidents have occurred, however, is the trial court's reaction to this 38-minute delay. First, it informed the jurors that it was frustrated by the delay, and told them they may later learn the reason for it. (9RT 1475.) Then, after defense counsel moved for a mistrial on the basis of this comment to the jurors, the court "respond[ed] to the challenge" by

expressing its intention to call witnesses from the jail to testify before the jury about Gomez's refusal to come to court, as evidence of a consciousness of guilt. (9RT 1507, 10RT 1609-1610.)

The prosecution ultimately agreed to call the witness, Deputy John Ganarial,[60] who testified not only that Gomez had refused to come to court, but about the obscenities Gomez had uttered at the time and the security measures taken in housing and transporting him. (12RT 1841-1850.) The court instructed the jurors that they could consider the evidence of Gomez's refusal to come to court as tending to prove a consciousness of guilt. (3CT 876; 29RT 4124.)

The trial court's reaction to this incident, and to defense counsel's motion for a mistrial, constituted evidentiary and instructional error, violating Gomez's rights under state law and under the state and federal Constitutions.

A. Facts.

1. The Delayed Start to Court Proceedings on December 14, 1999.

On the second day of guilt phase testimony — the first day of

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[60] The prosecution agreed to call the witness after defense counsel objected that the court's calling of a witness to provide consciousness of guilt evidence would be unduly prejudicial. (10RT 1666-1668.) It did not, however, offer any legal argument to support the court's decision to put Deputy Ganarial's testimony before the jury. (10RT 1660, 1669.)

testimony about the homicides — the court began the proceedings by noting that they were beginning half an hour late because Gomez had refused to come out of his cell. (9RT 1473.) The court ordered a cell extraction, and then Gomez decided to come out. (9RT 1473.) The court told the attorneys: "At some point this is probably information that's going to go to the jury. They buzzed us twice, ... so I assume that they're irritated . . . . I'm not sure what the options are, but it does seem to me that at least it will come out eventually in the penalty phase." (9RT 1473-1474.)

In the presence of the jury, the court then stated:

> The reason for the delay may well be presented to you later during the trial. If you're frustrated by it, you're no less frustrated than I was. We'll do our best to be on time, and I appreciate the fact that you were on time.

(9RT 1475.)

Testimony about the homicide of Rajandra Patel then began, with a detective describing the crime scene. (9RT 1475-1505.)

2. Counsel's Mistrial Motion and the Court's Response.

At the next jury break, counsel for Gomez moved for a mistrial on the grounds that the trial court had "informed the jury that the reason for the delay may be brought out in trial at some later time," and had implied that one of the defendants was the cause. Defense counsel contended that the incident would not be admissible unless, perhaps, Gomez were to testify.

(9RT 1507.)

The court responded that the incident would be admissible "[t]o show a consciousness of guilt." (9RT 1508.) Counsel noted that though it was arguable that the incident might be admissible at the penalty phase, the information should not have been put before the jury at that point: "You know, I'm not trying to be obstinate with you, but . . . I do think it was something stated by the court that should not have been stated to the jury at this time." (9RT 1508.)

The court countered: "I disagree, and that's why I said it, and I intend to do even more than that if this happens again. I can call my own witnesses. It does show a consciousness of guilt. . . . so the jury will find out about it one way or the other through evidence . . . ." (9RT 1508.)

Defense counsel requested an Evidence Code section 402 hearing prior to the presentation of any evidence on the subject to the jury, and the court responded: "On what subject? On what? . . . On whether he refused? . . . When I have to issue an order of extraction, we know pretty well it's a refusal. As I said, what the jury would get is evidence on the subject, not my statement about what I've been informed about. But your motion for mistrial is denied." (9RT 1509.)

3. The Trial Court's Argument that Mr. Gomez's Action Showed Consciousness of Guilt.

The following day, the court informed counsel that it had prepared an analysis of the law that applied to Gomez's refusal to come to court. (10RT 1604-1606.) It again noted that it could call its own witnesses, and that it would not "put[] the onus on the prosecution, unless they're willing to do that." (10RT 1605.) The court, citing a case addressing escape as evidence of consciousness of guilt,[61] argued that the refusal to come to court showed a consciousness of guilt, "so I intend to pursue it. I have found witnesses who can testify to the difficulty on Tuesday, and I intend to offer that to the jury to explain not only why there was a delay of 40 minutes in the trial, but more importantly I think it goes to consciousness of guilt." (10RT 1605.)

Counsel for Gomez asked to be permitted to respond at a later time; he requested that the court reconsider its legal analysis, noting that absence from trial had a different significance when the defendant was in custody. (10RT 1606-1607.) The court responded that the point is "refusal to be in court. Someone who is guilty and feels that he's going to be found guilty has a reason not to come to court to allow that proceeding. . . . You may have another solution to this, but I don't plan to let it go. I don't plan to let

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[61] (*People v. Vargas* (1975) 53 Cal.App.3d 516, 530.)

either defendant play with the court and the jury and say I'm going to come when I'm ready . . . I've ordered them to be extracted, both of them from their jail cell and brought forcefully to court, if necessary, and I want the jury to know that's what's necessary." (10RT 1607.)

The court granted counsel the opportunity to cite authority on the issue, but noted, "I was here until 8 o'clock last night doing research on the computer trying to find a case exactly in point, and I didn't find one. So I'm going to be a pioneer. It won't be the first time." (10RT 1608.) The court then noted that it had been a "pioneer" in "jail[ing] a female attorney after a trial on contempt charges. Everybody said it couldn't be done, I did it and it stuck, and the U.S. Supreme Court decision affirming what I did in summary judgment, . . . exactly what I did was appropriate. I'm going to do the same thing again, if necessary. I'm not going to let this go. I'm not going to let the defendants control the court." (10RT 1608.)[62]

Defense counsel, perhaps chastened by the reference to the jailing of an attorney on contempt charges, then responded: "I understand your thought, and I'm not in disagreement with that approach as far as either of these men regarding the court. Please understand one thing, I am not arguing with you." (10RT 1608.) The court replied: "Well, you are arguing.

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[62] The court evidently was referring to *Pounders v. Watson* (1997) 521 U.S. 982.

I'll give you that opportunity. . . . All I'm saying is that you challenged me, and I'm responding to the challenge . . . . [Y]ou did move for a mistrial making it a major issue. I intended at the beginning, because I didn't check it out with you in advance, to do something about this. This is what I'm doing." (10RT 1609-1610.)

Defense counsel inquired whether the court intended to tell jurors that an innocent person would not absent himself from court. The court stated that it had not yet crafted an instruction but that the issue was similar to flight, and that it would tell the jury that the weight and significance of the evidence was for it to decide. (10RT 1611-1612.)

4. The Trial Court's Proffer of Deputy Ganarial's Testimony and Further Argument on Its Admissibility.

Outside the presence of the jury, the court called Deputy Ganarial. (10RT 1630-1631.) Ganarial testified that Gomez was a K-10 inmate; at 5:50 a.m. on the morning of December 14, 1999, he told Gomez to get ready for court. (10RT 1632-1633.) Gomez responded, "Fuck court." (10RT 1632.) He responded the same way when Ganarial contacted him again at 6:15 and at 7:30 a.m. (10RT 1633.) Around 8:00 Gomez got ready for court, saying, "They bring me back whenever they want, I'll go to court whenever I want . . . ." (10RT 1634.)

On cross-examination, Ganarial testified that Gomez did not try to

escape. (10RT 1638, 1642.) He also testified that after Gomez initially responded, "fuck court," he "basically . . . said, 'if you want to go to court get ready. If not, do whatever you want.'" (10RT 1640.)

After Ganarial was excused, the court stated that its intention "is the same as before." (10RT 1650-1651.) Counsel for Gomez again noted that the authority the court relied on addressed flight, and that Gomez's absence did not entail "the idea of avoiding being tried, avoiding prosecution . . . ." (10RT 1655; see 10RT 1652-1660.) Counsel explained that under California Supreme Court precedent, a flight instruction cannot be given without evidence that the purpose of the flight is to avoid arrest or prosecution. (10RT 1655-1656.)

Counsel conceded that Gomez's actions were defiant and disruptive, "[b]ut because somebody is not respectful to the court, respectful to the prosecution, respectful to the jury, I don't believe is tantamount to saying I'm guilty, I'm trying to avoid the whole trial." (10RT 1656.) Counsel continued, "[Y]ou may not like it, I may not like it, none of us like it, but let's focus on the legal theory of consciousness of guilt, and gosh, I'm not trying to —" The court interrupted: "Why don't you deal with his comment at the time, 'Fuck court.' . . . What does that mean? Does that mean I'm an innocent man, let's go to court, I want to exonerate myself?" (10RT 1658.)

Counsel responded that the comment meant that Gomez didn't "give a darn," and again distinguished the cases dealing with a defendant's flight to avoid being prosecuted. (10RT 1659-1660.)

The court adhered to its earlier decision, noting that its only reluctance was that Ganarial's testimony would show that Gomez was in custody. (10RT 1660.) Defense counsel further objected to the evidence under Evidence Code section 352. (10RT 1661-1663.) The court said it had already analyzed the issue under Evidence Code section 352 and had concluded that the evidence was admissible. (10RT 1664-1665.) The court then reiterated that "primary thing is consciousness of guilt," but "[i]f nothing else, this prevents a defendant who is charged with a capital case from constantly holding up the trial." (10RT 1665-1666.)

Finally, after defense counsel objected that this evidence would be particularly prejudicial if elicited from a witness called by the trial judge himself, the prosecutor volunteered to offer the evidence. (10RT 1667.) The court agreed, noting that it had not wanted to interfere "with either side," but simply to expose to the jury something that is "uniquely appropriate to the court's control." (10RT 1667.)

5. Deputy Ganarial's Testimony Before the Jury.

On January 4, 2000, the second day after a two-week recess, the

prosecutor called Deputy Ganarial to testify before the jury. (12RT 1841-1842.) Ganarial told the jurors that he was a deputy sheriff at the Men's Central Jail, assigned to a module for "K-10 inmates for discipline," where Gomez was housed. (12RT 1842.) He recounted the procedure for getting inmates ready for court: After they are fed through slots in their cell door (12RT 1843, 1846-1847), inmates going to court are waist-chained; they come out of their cells one at a time, and are walked downstairs by the "movement team" to wait in line to be escorted to court. (12RT 1843-1844.)

On the morning of December 14th, after trying to wake Gomez up twice, Ganarial succeeded in waking him up by yelling into his cell. (12RT 1844-1847.) Gomez responded, "fuck court." (12RT 1847.) When Ganarial went back again, Gomez said "fuck court" again. (12RT 1848.) Gomez refused to go to court again at 8:30. (12RT 1849.)

Ganarial contacted the court bailiff, and subsequently an extraction order was issued, requiring a team of deputies to forcibly remove the defendant from his cell. (12RT 1849-1850.) About 15 or 20 minutes after he was told there was an extraction order, Gomez told Ganarial he would go to court, and he did. (12RT 1850.)

The parties stipulated that on December 14th, the parties had been instructed to begin trial at 10:30 a.m. (12RT 1851.)

At a sidebar, defense counsel moved to strike the testimony "as being irrelevant to the charges for what Mr. Gomez is presently on trial," and the trial court denied the motion "[b]ased on the earlier discussions we had about the relevance of the testimony." (12RT 1854.) The court then presented the parties with a draft instruction regarding consciousness of guilt. (12RT 1854.)

At the prosecutor's request, before the jury, the court then took judicial notice of the fact that the court session on Tuesday, December 14, 1999, had begun at 11:08 a.m. (12RT 1857.)

6. The Trial Court's Instruction to the Jury.

During its final instructions, the court instructed the jurors as follows:

> If you find that defendant Gomez voluntarily absented himself from this trial by refusing to come to court, you may consider that as a circumstance tending to prove a consciousness of guilt. That conduct, however, is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

(3CT 876; 29RT 4124.)

B. Mr. Gomez's Refusal to Come to Court Was Not Relevant or Admissible to Show Consciousness of Guilt and the Trial Court Erred in Insisting on the Presentation of Evidence About It and Instructing Jurors That They Could Consider The Evidence As Tending to Prove His Consciousness of Guilt.

1. The Evidence That Mr. Gomez Refused to Come to Court Was Not Relevant to Show Consciousness of Guilt.

As counsel argued, Gomez's refusal to come to court was not relevant to show consciousness of guilt. (See Evid. Code § 350 [only relevant evidence is admissible; Evid. Code § 210 [relevant evidence is evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to determination of the case].)

This Court has repeatedly held that flight from the scene of a crime, escape or attempted escape from custody, attempts to suppress evidence or prevent its presentation at trial, and false and misleading statements by a defendant may manifest a consciousness of guilt. (See, e.g., *People v. Crandell* (1988) 46 Cal.3d 833, 869-870 [flight], abrogated on other grounds, *People v. Crayton* (2002) 28 Cal.4th 346, 364-365; *People v. Jurado* (2006) 38 Cal.4th 72, 126 [same]; *People v. Farnham* (2002) 28 Cal.4th 107, 152 [threatening to resist order for production of hair and blood samples]; *People v. Ramirez* (2006) 39 Cal.4th 398, 456 [refusal to remove sunglasses to allow witness identification]; *People v. Terry* (1970) 2 Cal.3d 362, 395 [escape], overruled on other grounds as stated in *People v.*

Carpenter (1997) 15 Cal.4th 312, 381-382.)

These matters have one thing in common: a purpose to avoid being observed or arrested, to prevent the production or presentation of incriminating evidence, or to avoid punishment.[63] Refusal, by a defendant in custody, to come to court does not share this characteristic; it cannot be explained by a desire to prevent prosecution or punishment.[64] That is particularly the case here, where Gomez knew that he could be forcibly extracted from his cell and brought to court if he refused to come on his own. (See 1RT 196-198 [court noted that Grajeda had refused to leave his cell and court had ordered him forcibly extracted].)

Indeed, far from including an in-custody defendant's voluntary absence from court, or his refusal to come to court, among those

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[63] The trial court's example of a defendant who refused a court order to stand up in order that a witness could judge his height (10RT 1667-1668) shares this characteristic.

Similarly, *People v. Sherren* (1979) 89 Cal.App.3d 752, 762-764, cited by the trial court at 27RT 3960, involved an out of custody defendant who had twice failed to appear for a pretrial hearing. An out-of-custody defendant's failure to appear may well reveal an intent to avoid prosecution or punishment.

[64] Rather, it might be better explained, as defense counsel suggested, as manifesting an intent to sleep late, or to be defiant or disrespectful. (10RT 1656; see also 10RT 1634 [Deputy Ganarial's testimony during the proffer outside the jury's presence, that when he asked Gomez to get ready for court, he stated: "They bring me back whenever they want, I'll go to court whenever I want."].)

circumstances permitting an inference of consciousness of guilt, this Court has made clear that such absence is not a proper matter for the jury to consider.

In *People v. Sully* (1991) 53 Cal.3d 1195, this Court, addressing a case in which a defendant had voluntarily absented himself from the penalty phase of his case, concluded that "[a]n instruction to disregard defendant's absence would have been proper on defendant's timely request." (*Id.* at p. 1241.) *Sully* establishes that evidence of a defendant's refusal to be present in court is not relevant. If an instruction to disregard the matter would be proper in a case where a defendant walked out of the courtroom, so that jurors witnessed his refusal to be in court, then it can hardly be proper to bring the defendant's refusal to be in court before the jury, in a case where they would not otherwise be aware of it. (See *People v. Sully, supra,* 53 Cal.3d at pp. 1238, 1241.)

In *People v. Medina* (1995) 11 Cal.4th 694, this Court, reaffirming *Sully,* made clear that its conclusions apply to the guilt phase of a capital trial as well. In *Medina*, this Court concluded that the trial court's admonishment, given to each juror individually during voir dire, that jurors were not to draw adverse inferences from the defendant's absence, was sufficient, and again noted that in the absence of a request, the trial court

need not instruct the jury regarding a defendant's absence from the trial. (*Id.* at pp. 735, 739-740.)

Additional cases from this Court and others are in accord. (See *People v. Lewis* (1983) 144 Cal.App.3d 267, 280-282 [where trial court questioned jury panel as to whether defendant's absence would affect them, and each juror indicated it would not, trial court did not err in failing to instruct jurors, sua sponte, to disregard his absence]; *People v. Gutierrez, supra,* 29 Cal.4th at p. 1200 [court admonished jury not to consider or speculate about defendant's absence]; *People v. Dickey* (2005) 35 Cal.4th 884, 924 [court instructed jurors not to consider defendant's penalty phase absence in deliberations]; *People v. Majors* (1998) 18 Cal.4th 385, 414 [court admonished jurors not to draw any inferences from defendant's absence from penalty phase]; *People v. Young, supra,* 34 Cal.4th at p. 1214 [jury admonished not to speculate about defendant's penalty phase absence or infer anything from it]; *People v. Pigage* (2003) 112 Cal.App.4th 1359, 1366, 1370, 1374-1375 & fn. 5 [trial court did not abuse discretion in concluding that *out-of-custody* defendant's absence from trial was not to be considered by jury]; *People v. Arias, supra,* 13 Cal.4th at pp. 144-148 [court twice admonished jurors to ignore defendant's "acts or antics" which included and culminated in a request to be excused from the courtroom];

see also *Taylor v. United States* (1973) 414 U.S. 17, 17-18 [where out-of-custody defendant failed to appear after trial had begun, "[t]hroughout the remainder of the trial, the court admonished the jury that no inference of guilt could be drawn from [defendant's] absence"].)

By contrast, no case supports the trial court's opposite conclusion — that a criminal defendant's decision not to come to court bears on his guilt.[65]

Equally irrelevant — and irrelevant, even, to the court's consciousness of guilt theory — were the additional details revealed by Ganarial's testimony: that Gomez was in a disciplinary unit in the jail; that inmates in his unit were fed through slots in their cell; and that they were waist-chained and handled by a "movement team" when going to court. (12RT 1841-1847.) The trial court, of course, has no discretion to admit irrelevant evidence. (Evid. Code § 350; *People v. Cowan* (2010) 50 Cal.4th 401, 482.)

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[65] The court also suggested that the evidence would be relevant to explain the delay in starting the court day. (10RT 1605.) It was not. That delay was not a material issue in the case; it bore no conceivable relation to Gomez's guilt or innocence. Indeed, the court day began later than scheduled on other occasions, as well, and there was no suggestion that evidence needed to be presented about the reasons for those delays. (See, e.g., 11RT 1694-1695, 16RT 2504, 22RT 3181-3182.) Indeed, on the day Deputy Ganarial testified before the jury, there was a delay in beginning trial, and the trial court told jurors: "Again delay this morning not due to anyone's fault in the court. Lack of communication getting everyone necessary here at the same time, so we're working on trying to prevent that." (12RT 1840.)

2. Even if There Were Any Probative Value in the Evidence that Mr. Gomez Refused to Come to Court, It Was Substantially Outweighed by Its Undue Prejudicial Effect

Even if there were any probative value in an in-custody defendant's refusal to come to court, that probative value would be substantially outweighed by the substantial danger of undue prejudice. (Evid. Code § 352.) "Undue prejudice" refers to matters that inflame the jury and distract them from their true task. As this Court wrote in *People v. Scheid* (1997) 16 Cal.4th 1, 19: "[T]he 'prejudice' referred to in Evidence Code section 352 . . . characteriz[es] evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues. [Citation.]"

Ganarial's testimony fits this description: While having little if anything to do with the very real question of Gomez's guilt or innocence of the crimes with which he was charged, it was precisely the type of testimony that "uniquely tends to evoke an emotional bias against a party as an individual." (*Ibid.*) As the trial court had recognized at the time, jurors were likely already frustrated by the delay in starting the trial. (9RT 1475.) Ganarial's testimony not only served to direct the jurors' frustration (a frustration the court had validated by telling jurors it shared) at Gomez personally, but gave jurors reasons to view Gomez as dangerous and hostile.

As the court itself noted, the testimony also would necessarily reveal that Gomez was in custody. (10RT 1660.) While jurors might certainly have suspected that on their own, presentation of the testimony only served to solidify that impression, much in the way that a defendant's being required to stand trial in jail clothes would. (See *People v. Taylor* (1982) 31 Cal.3d 488, 494-497; see also *Estelle v. Williams* (1976) 425 U.S. 501, 504-505.) Here, of course, the testimony went well beyond the mere fact that Gomez was in custody; Ganarial told the jury that he was in a disciplinary unit in the jail, was fed through a slot in his cell, and was waist-chained and handled by a "movement team" when going to court. (12RT 1841-1847.)

The testimony also included Ganarial's accounts of Gomez's obscenities, directed at court. While the trial court apparently believed the obscenities themselves revealed a consciousness of guilt (10RT 1658; see also 10RT 1663), these expletives carried much more in the way of prejudice than probative value.

The trial court answered defense counsel's argument that the evidence was akin to improper and prejudicial character evidence by drawing an analogy to a defendant who killed a witness during trial, before the jurors, and commenting, "[t]he same thing here. He did this. This is his own action. He's responsible for his own actions . . . ." (10RT 1665.) That

analogy was not apt. The principle that individuals are responsible for their own actions would serve to license admission of any bad acts a defendant had ever committed — which is not the law.

Deputy Ganarial's testimony bore all the hallmarks of prejudice: it had little, if anything, to do with the 1997 crimes Gomez was charged with; it was likely to evoke an emotional response personally directed at Gomez — frustration or worse, anger; and it painted a picture of someone who was dangerous and hostile. All this substantially outweighed any probative value in an in-custody defendant's refusal to come to court — for there is none, as this Court's cases well establish. The evidence should have been excluded under Evidence Code section 352 as well as on the grounds that it was irrelevant.

3. The Evidence Violated the Bar on Introduction of Character Evidence.

As defense counsel contended below, the evidence violated the bar on introduction of character evidence. (Evid. Code § 1101.) The only logical relevance of this evidence was to portray Gomez as a dangerous and hostile individual. (See *People v. Fritz* (2007) 153 Cal.App.4th 949, 958-959 [asserted consciousness of guilt evidence was improper under Evid. Code § 1101]; see also *People v. Avitia* (2005) 127 Cal.App.4th 185, 192-194.)

4. The Trial Court Abused Its Discretion In Causing the Presentation of the Evidence of Mr. Gomez's Refusal to Come to Court.

While rulings on relevance and Evidence Code section 352 rulings are subject to the trial court's discretion, the court's discretion must be "neither arbitrary or capricious, but . . . an impartial discretion, guided and controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not impede or defeat the ends of substantial justice. [Citations.]." (*People v. Stone* (1999) 75 Cal.App.4th 707, 716.) It must be "grounded in reasoned judgment and guided by legal principles and legal policies appropriate to the particular matter at issue. [Citations.]" (*Ibid.*, quoting *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.)

Exercises of discretion are reviewed for abuse; though the standard is deferential, "it is not empty." (*People v. Williams*, *supra,* 17 Cal.4th at p. 162.) The standard "asks in substance whether the ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts. [Citations.]." (*Ibid.*)

"[S]ound discretion 'is compatible only with decisions 'controlled by sound principles of law . . . free from partiality, not swayed by sympathy or warped by prejudice . . . .'" (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998,

quoting *People v. Bolton* (1979) 23 Cal.3d 208, 216.) But a trial court's decision need not be irrational to constitute an abuse of discretion. (See *People v. Jacobs*, *supra,* 156 Cal.App.4th at p. 737 ["'Although irrationality is beyond the legal pale it does not mark the legal boundaries which fence in discretion.' [Citation.]"].)

The trial court, of course, has no discretion to admit irrelevant evidence (*People v. Cowan, supra,* 50 Cal.4th at p. 482) or apply an incorrect legal standard (*In re Charlisse C.* (2008) 45 Cal.4th 145, 160-161).

The trial court's ruling here was an abuse of discretion. Rather than evincing impartial discretion, the circumstances suggest the trial court was motivated in large part by anger at Gomez's affront to the court and his attorney's subsequent mistrial motion, and frustration at the delay caused by Gomez's conduct. (See 9RT 1475 ["If you're frustrated by it, you're no less frustrated than I was."]; 10RT 1607 ["You may have another solution to this, but I don't plan to let it go. I don't plan to let either defendant play with the court and the jury and say I'm going to come when I'm ready, and if I'm not ready I'm not going to come at all. That's not going to be a choice either of them has."]; 10RT 1608 ["I'm not going to let this go. I'm not going to let the defendants control the court."]; 10RT 1609-1610

["[Y]ou challenged me, and I'm responding to the challenge . . . . You did move for a mistrial making it a major issue."]; 10RT 1613 ["I am tired of issuing orders of extraction in this case. . . . I don't allow a defendant to tell me he's not going to come to court . . . ."]; 10RT 1665-1666 ["If nothing else, this prevents a defendant who is charged with a capital case from constantly holding up the trial."].)

The trial court, rather than being a neutral arbiter, was in fact the proponent of the testimony — testimony it had previously telegraphed its belief in when it told jurors: "[t]he reason for the delay may well be presented to you later during the trial." (9RT 1475.) The trial court then floated a theory of admissibility, and researched that theory — and when its extensive research failed to reveal support for its position, the court nonetheless reiterated its firm belief in the theory and declared its intent to be a "pioneer." (9RT 1507-1508, 10RT 1608.) "Pioneer[ing]" is incompatible with a trial court's sound exercise of discretion under the law as it exists. The trial court has no discretion to test the waters with a new legal theory — particular one, like the court's here, which flouts existing law.

And the trial court's ruling, in any event, was beyond pioneering — it was ungrounded in any "reasoned judgment" or "fixed legal principles"

(*People v. Stone*, *supra,* 75 Cal.App.4th at p. 716) and lay "outside the bounds of reason under the applicable law" (*People v. Williams*, *supra,* 17 Cal.4th at p. 162) which, as set forth above, limits consciousness of guilt evidence to situations evincing a desire to escape apprehension, conviction, or punishment, and, more specifically, holds that a custodial defendant's absence is not a matter for jurors to consider.

5. The Trial Court Erred in Instructing the Jurors That They Could Consider Mr. Gomez's Refusal to Come to Court as Evidence Showing a Consciousness of Guilt.

As set forth above, this Court's case law establishes that a defendant's voluntary absence from court, rather than being a matter legitimately probative of guilt and proper for the jury to consider, is something the jurors must, on request, be told to disregard. (See *People v. Sully*, *supra,* 53 Cal.3d at p. 1241; *People v. Medina*, *supra,* 11 Cal.4th at p. 740; see also additional authorities cited in subsection B.1., above.) The trial court's instruction was to the opposite effect. "Even if the court has no sua sponte duty to instruct on a particular legal point," however, "when it does choose to instruct, it must do so correctly." (*People v. Castillo*, *supra,* 16 Cal.4th at p. 1015.) The trial court's instruction here was error.

C. The Admission of the Evidence Regarding Mr. Gomez's Refusal to Come to Court and the Court's Instruction That Jurors Could Consider It as Consciousness of Guilt Evidence Violated Mr. Gomez's Constitutional Rights.

The court's insistence on the presentation of Ganarial's testimony and its instruction that it could be considered as showing Gomez's consciousness of guilt violated not only state law, but the federal Constitution. It diminished the proof beyond a reasonable doubt standard, violating Gomez's rights to a fair trial, to the presumption of innocence, to a properly instructed jury, to counsel, to due process of law, to a reliable determination of his guilt and sentence, and to be free of cruel and unusual punishment. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; see also Cal. Const., art. I, §§ 7, 15, 16, & 17; see *People v. Gutierrez* (2009) 45 Cal.4th 789, 809; see also *People v. Boyer* (2006) 38 Cal.4th 412, 441 & fn. 17; *People v. Partida* (2005) 37 Cal.4th 428, 433-439; *People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6; *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

Permissive inferences — such as the inference of consciousness of guilt authorized by the court's instruction here — diminish the prosecution's burden of proof beyond a reasonable doubt where "there is no rational way the trier could make the connection permitted by the inference." (*County Court of Ulster v. Allen* (1979) 442 U.S. 140, 157, 165.) In this situation, there is a risk that "an explanation of the permissible

inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination." (*Id.* at p. 157.)

Thus, as this Court put it in analyzing the standard California flight instruction, "[t]he due process clauses of the federal Constitution (U.S. Const., 5th & 14th Amends.) require a relationship between the permissively inferred fact and the proven fact on which it depends." (*People v. Mendoza, supra,* 24 Cal.4th at p. 180.) The standard for evaluating this "relationship" has been variously described as "rational connection," "more likely than not," and "reasonable doubt." (*Ibid.*) A permissive inference violates the due process clause when "the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." (*Ibid.*, quoting *County Court of Ulster v. Allen, supra,* 442 U.S. at pp. 157-163.)

The inference of consciousness of guilt authorized by the court's instruction does not meet this test, regardless of how the test is articulated. Reason and common sense do not justify the inference that, because an in-custody defendant has refused to come to court, he knows himself to be guilty: reason provides no logical link, and common sense suggests that many inherently more likely inferences can be drawn from a jail inmate's

refusal to leave his cell to come to court. This Court's cases recognize as much; as set forth at length above, they provide that upon request, the trial court should instruct the jury to disregard a defendant's absence from court. The court's instruction thus violated due process.

The court's evidentiary and instructional errors also violated due process by rendering Gomez's trial fundamentally unfair. (*People v. Partida, supra,* 37 Cal.4th at p. 439, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 70; *Spencer v. Texas* (1967) 385 U.S. 554, 563-564; *People v. Falsetta* (1999) 21 Cal.4th 903, 913; *Duncan v. Henry* (1995) 513 U.S. 364, 366; see also *Lisenba v. California* (1941) 314 U.S. 219, 236 ["The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false."]; U.S. Const., 14th Amend.)

The evidence here lacked any legitimate probative value, serving only to unfairly prejudice Gomez in the jury's eyes. When there are no permissible inferences to be drawn from the evidence, and it is of "such quality as necessarily prevents a fair trial," due process is violated. (See *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920.) Such evidence violates due process when it "is material in the sense of a crucial, critical, highly significant factor." (*Snowden v. Singletary* (11th Cir. 1998) 135 F.3d

732, 737.)

The evidence at issue here was of "such quality as necessarily prevents a fair trial" (*Jammal v. Van de Kamp, supra,* 926 F.2d at p. 920), as it lent itself to two powerful, and equally impermissible inferences. The first impermissible adverse inference, consciousness of guilt, was suggested by the court itself in its instruction to the jury. Consciousness of guilt can be a critical factor. (See *People v. Benavides* (2005) 35 Cal.4th 69, 100 [consciousness of guilt evidence can be highly incriminating, quoting *People v. Underwood* (1964) 61 Cal.2d 113, 121]; see also *Standen v. Whitley* (9th Cir. 1993) 994 F.2d 1417, 1418, 1422-1423 [error in admitting defendant's earlier guilty plea and instructing jury that it could be considered as evidence of guilt violated due process].) It was especially significant here because the evidence of Gomez's guilt, in the Luna and Patel cases in particular, was exceedingly weak. (See Arguments I & II, above.)

And though Gomez's refusal to come to court was not, as demonstrated above, probative of a consciousness of guilt, the trial court nonetheless told jurors it could be. As the Supreme Court has put it, a trial judge's "lightest word or intimation is received with deference, and may prove controlling." (*Quercia v. United States* (1933) 289 U.S. 466, 470.)

More, this area is one in which jurors are even more likely than usual to defer to the trial judge. After all, if the judge, who surely has daily experience with defendants' attitudes towards coming to court and with defendants' guilt or innocence, tells jurors that refusal to come to court can be evidence of a consciousness of guilt, then who are the jurors to disagree?

Other equally impermissible and prejudicial inferences flowed from Ganarial's inflammatory testimony regarding the conditions in which Gomez was held and his refusal to come to court on the morning of December 14, 1999. Ganarial told jurors he ran a module housing "K-10 inmates for discipline," and that Gomez was one of the inmates in his module. (12RT 1842-1843.) He told jurors that such inmates are fed through a slot. (12RT 1843, 1846-1847.) He detailed the security procedures for escorting them to court: they come out of their cells one at a time; they are waist-chained; and then brought downstairs by the "movement team." (12RT 1843-1844.) He told jurors that on the morning of December 14, 1999, he made multiple attempts to get Gomez to get ready for court, and Gomez responded two or three times by saying "Fuck court." (12RT 1847-1848.) He recounted for jurors how he communicated to the court's bailiff that Gomez was refusing to come to court, and how an extraction order was issued, which meant the jail would have to assemble a

team of deputies to forcibly remove him from his cell. (12RT 1849-1850.)

Because the trial court failed to give any instruction limiting the jurors' use of this evidence, this testimony further allowed for the inferences that Gomez was dangerous and hostile. None of this testimony aided jurors in the actual task before them — deciding Gomez's guilt or innocence of the charged crimes — but all of it provided a picture of a prisoner who was especially dangerous (because he was in a disciplinary unit within the jail and had to be fed through a slot and had to be waist-chained in order to be brought to court), likely guilty, and hostile to the proceedings jurors were a part of.

Consciousness of guilt is a powerful concept. Likewise, evidence about security procedures employed in housing, feeding, and transporting an inmate provide an "unmistakable indication[] of the need to separate [him] from the community at large," in other words, a "sign that he is particularly dangerous [and] culpable." (*Holbrook v. Flynn* (1986) 475 U.S. 560, 569.) To introduce highly inflammatory evidence painting a picture of a dangerous man with a bad attitude, and then to put the court's stamp of approval on the adverse inference that that evidence shows a consciousness of guilt, renders a trial fundamentally unfair.

Finally, yet another factor contributed to the due process violation

here: the trial court's comments to the jurors foretelling the production of the evidence, which ensured that jurors would view the evidence not only as important, but as the truth. The court telegraphed its belief that Ganarial's testimony would be true and accurate, when it told jurors that "the reason" for the delay in starting court on December 14, 1999 might be presented to them later in the trial. (9RT 1475.) Its comment at the time of the delayed start not only credited, in advance, Ganarial's testimony, but validated jurors' feelings of frustration or anger about the delay, which could only have been exacerbated — and trained upon Gomez — by Ganarial's testimony. (See 9RT 1475 [court addressing jurors: "If you're frustrated by [the delay], you're no less frustrated than I was."]; 20RT 3032 [court notes that jury is a "difficult jury" and delays cause problems with them].)[66]

The presentation of Deputy Ganarial's testimony and the court's associated comments and jury instruction not only rendered Gomez's trial fundamentally unfair and violated his federal constitutional right to due

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[66] The court made matters worse when, on other occasions when court was delayed it told jurors the various reasons for the delays. (See, e.g., 11RT 1694-1695; 16RT 2504, 22RT 3181-3182.) Indeed, on the morning Ganarial testified, there was a delay in starting court, and the court told jurors that the delay was "not due to anyone's fault in the court. Lack of communication getting everyone necessary here at the same time, so we're working on trying to prevent that." (12RT 1840.) By negative implication, of course, the earlier delay they were about to hear Ganarial's testimony about was someone's fault.

process of law, but also violated Gomez's right to a reliable determination of guilt in this capital trial. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17; *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638.)

Finally, the trial court's error violated Gomez's due process liberty interest in the state's adherence to its own rule that a criminal defendant's absence from trial is not a matter for the jury to consider. (See subsection B.1., above; see *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; U.S. Const., 14th Amend.; *People v. Webster* (1991) 54 Cal.3d 411, 439.)

D. The Trial Court Improperly Assumed the Role of an Advocate Against Mr. Gomez And Used Its Power to Call Witnesses and Instruct the Jury to Punish Mr. Gomez For His Disrespect to the Court, to Deter Similar Conduct, and to Punish Gomez and Counsel For Counsel's Mistrial Motion, Violating Mr. Gomez's Right to Due Process and His Right to Counsel.

The trial court also erred by assuming the role of an advocate and improperly using its power to call witnesses and to instruct the jury on the law in an effort to punish Gomez for his disrespect to the court. While the prosecutor ultimately called Deputy Ganarial and conducted his direct examination, the court made clear that, given its power under Evidence Code section 775, Ganarial's testimony would be presented to the jury one way or the other. (See, e.g., 9RT 1508; 10RT 1605; 10RT 1667-1668; 27RT 3960 [trial court stating: "I'm the one that fostered the testimony about Mr. Gomez'[s] refusal to come to court that day"].) Indeed, the court apparently

determined that the jury might hear about it — and so informed the jury — before counsel had a chance to argue that the matter was irrelevant. (9RT 1473-1474 ["it does seem to me that at least it will come out eventually in the penalty phase"]; 9RT 1475 [court informing jurors: "The reason for the delay may well be presented to you later during the trial."].) Only after counsel moved for a mistrial did the court state that the matter was relevant to show consciousness of guilt. "Decide first, defend later is not an axiom of constitutional law." (*Bradley v. Henry* (9th Cir. 2007) 510 F.3d 1093, 1098, amended on denial of rehearing, *Bradley v. Henry* (9th Cir. 2008) 518 F.3d 657.)

A fair and neutral arbiter is fundamental to due process. (See *People v. Harris* (2005) 37 Cal.4th 310, 346, citing *Withrow v. Larkin* (1975) 421 U.S. 35, 46.) Judges must be scrupulously fair; they must not adopt the role of advocates making the case against a criminal defendant. "Every defendant . . . is entitled to a fair trial on the facts and not a trial on the temper or whimsies of the judge who sits in his case." (*People v. Mahoney* (1927) 201 Cal. 618, 626 [adopting opinion of Court of Appeal]; see also *People v. Campbell* (1958) 162 Cal.App.2d 776, 787 ["Judges have been admonished time and time again of their duty to maintain a strictly judicial attitude and to refrain from comment or other conduct which borders upon

advocacy."].)

While Evidence Code section 775 indisputably grants trial courts the power to call witnesses, it goes without saying that such power must be exercised impartially, with an eye toward clarifying testimony, or the like, in support of the search for truth. (See *People v. Hawkins*, *supra,* 10 Cal.4th at p. 948 ["Evidence Code section 775, which is a codification of case law, 'confers upon the trial judge the power, discretion and affirmative duty . . . [to] participate in the examination of witnesses whenever he believes that he may fairly aid in eliciting the truth, in preventing misunderstanding, in clarifying the testimony or covering omissions, in allowing a witness his right of explanation, and in eliciting facts material to a just determination of the cause.'"],[67] quoting *People v. Carlucci* (1979) 23 Cal.3d 249, 256; see also *People v. Monterroso* (2004) 34 Cal.4th 743, 782 [questions posed by judge under Evid. Code § 775 were "for purposes of clarification, not advocacy"]; *McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 533 [power to call witnesses must be impartially exercised; courts should undertake examination of witnesses only when it appears that relevant and material testimony will not be elicited by counsel], overruled on other grounds by *Spruance v. Commission on Judicial Qualifications*

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[67] *Hawkins* has been limited on other grounds by *People v. Lasko* (2000) 23 Cal.4th 101, 110.

(1975) 13 Cal.3d 778, 799, fn. 18 and *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 325.)

And no provision grants trial courts the power to call witnesses, rule on the admissibility of evidence, or craft jury instructions in order to punish a criminal defendant for an affront to the dignity of the court or deter future, similar affronts.

Yet several of the trial court's comments on the record leave the troubling impression that its determination to present the jurors with Ganarial's testimony and to instruct them that the refusal to come to court could show consciousness of guilt was borne less from the desire to "fairly aid in eliciting the truth" (*People v. Hawkins, supra,* 10 Cal.4th at p. 948) regarding the 1997 crimes Gomez was charged with, and more from a desire to punish Gomez for his actions on December 14, 1999. (See 10RT 1607 [addressing defense counsel: "You may have another solution to this, but I don't plan to let it go. I don't plan to let either defendant play with the court and the jury and say I'm going to come when I'm ready, and if I'm not ready I'm not going to come at all. That's not going to be a choice either of them has."]; 10RT 1608 ["I'm not going to let this go. I'm not going to let the defendants control this court."]; 10RT 1613 ["I am tired of issuing orders of extraction in this case. . . . I don't allow a defendant to tell me he's

not going to come to court . . . ."]; 10RT 1665-1666 ["If nothing else, this prevents a defendant who is charged with a capital case from constantly holding up the trial."]; see 9RT 1475 ["If you're frustrated by it, you're no less frustrated than I was."].)

An additional comment — "[Y]ou challenged me, and I'm responding to the challenge . . . . [Y]ou did move for a mistrial making it a major issue" (10RT 1609-1610) — suggested that the court may have believed the extent of its response warranted because defense counsel had moved for a mistrial after the court told the jurors they might find out the reason for the delay in starting court. This was not only unbefitting a neutral arbiter, but it also violated Gomez's right to counsel by punishing him for his attorney's having moved for a mistrial. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.)

The trial court's determination to be a "pioneer," blazing its own trail outside the familiar terrain of consciousness of guilt evidence — while drawing an analogy to its having held an attorney in summary contempt (10RT 1608) — befit an advocate more than a neutral arbiter. It was incompatible with the level of care and discretion required of trial courts exercising the power to call witnesses (see *People v. Bowman* (1966) 240 Cal.App.2d 358, 382 [power to examine witnesses should be exercised with

discretion and in such a way as not to prejudice the rights of either party]) and created, at the very least, an appearance of impropriety (see *Offutt v. United States* (1954) 348 U.S. 11, 14 ["justice must satisfy the appearance of justice"].)

As acknowledged at the outset, incidents such as the one portrayed in Ganarial's testimony test the patience of all involved. That said, the court's actions here were improper; they were not only contrary to law but appeared to stem at least in part from pique. Gomez was entitled to a fair trial in which his guilt would be determined on the basis of relevant evidence and legitimate inferences — and in which the admission of evidence and the drawing of inferences would be guided solely by the law. He did not receive that. The court was correct, of course, that a criminal defendant cannot be permitted to control a courtroom. (See *Illinois v. Allen* (1970) 397 U.S. 337, 343-347.) It erred, however, in using evidence and jury instruction to attempt to control Gomez.[68] These errors violated not only state law but federal due process. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 15.) More, to the extent the court's statements suggested it believed its

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[68] As the court itself understood, it was not without recourse. Earlier in the trial, and indeed in the course of the incident at issue, the court issued extraction orders. (See 1RT 196-198; 9RT 1473.) Later during the trial, it issued a standing "extraction order" to ensure that if Gomez did not voluntarily leave his cell to go to court, he would be forcibly extracted. (See 10RT 1611; see also 1RT 196-198 [extraction order for Grajeda].)

rulings warranted as a response to defense counsel's motion for a mistrial, the court's actions violated Gomez's right to counsel. (See U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15.)

E. Reversal is Required.

These errors require reversal. The prosecution cannot meet its burden of showing, beyond a reasonable doubt, that the constitutional violations did not contribute to the verdicts and the death sentences. (*Chapman v. California, supra,* 386 U.S. at p. 24.) "The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered" (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279) — though in this case the prosecution could not even meet that standard. Rather, the question is whether the guilty verdicts "actually rendered in *this* trial [were] surely unattributable to the error." (*Ibid.,* original italics.) The prosecution cannot prove that beyond a reasonable doubt.

The cases were close, with guilt phase deliberations spanning eight days, and producing a deadlock in one of the homicide cases. The evidence against Gomez in two of the homicide cases was exceedingly thin, and, aside from law enforcement, most of the prosecution's chief witnesses were beset with serious credibility problems. (See generally Arguments I & II, above.)

The *only* evidence of Gomez's involvement in the Patel killing consisted of testimony by two highly suspect witnesses — one, an admitted liar who told jurors he was "entitled to what [he could] get" even if he had to lie to get it (24RT 3473-3474), and another, the wife of a drug dealer who was arrested and found to have in her possession a pawn slip for Patel's jewelry. (12RT 1928-1931; 13RT 1972-1973.) The prosecution cannot show beyond a reasonable doubt that Gomez's conviction — resting as it did on the contradictory and dubious testimony of these witnesses — was surely unattributable to the court's evidentiary and instructional error. (See Argument II, above.)

In the Luna case, the evidence was even weaker still, with the prosecution's case, *at its best*, showing that Gomez was near the scene of the crime, at one time touched a car that may have been linked to the perpetrators, and later possessed the victim's cell phone. (See Argument I.B., and I.B.1., above.) The jury appropriately found that Gomez had not shot Luna, leaving his role in the killing — if he had any role at all — a matter of pure speculation, ungrounded in any evidence at all. (See Argument I.B.2., above.) As set forth in detail in Argument I, above, there was simply no evidence from which jurors could conclude that Gomez had the necessary mental state of an accomplice, even if they found that he was

in Luna's front yard when the unknown shooter killed Luna. (See Argument I.B.2., above.) The prosecution cannot show beyond a reasonable doubt that the conviction in the Luna case was surely unattributable to the court's having erroneously told jurors that they could infer that Gomez, because he refused to come to court one day, knew himself to be guilty.

Nor can the prosecution prove beyond a reasonable doubt that the errors did not affect the verdicts in the O'Farrell Street killings. The prosecution's main witnesses both suffered serious credibility problems — indeed, the prosecution conceded that Witness #1 was "not a credible man" and that Witness #2 was not a "public spirited person" and would not have testified had he not been facing prosecution in another case. (See 27RT 3834-3836, 3849-3850.) A mistrial, or an inability to agree as to whether the killings were first or second degree murder, were not out of the realm of possibility[69]; in light of the entire record, the evidence of premeditation and deliberation was, if sufficient, nonetheless thin. (See Argument III, above.)[70]

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[69] The jurors convicted co-defendant Grajeda only of second degree murder in the killing of Robert Acosta. (4SCT 738.)

[70] More, though a shotgun found in Gomez's cousin's house when he was arrested was linked to spent shells found at the scene (11RT 1754-1756 21RT 3119; 18RT 2741-2747; 21RT 3099-3100; 19RT 2869-2872), the defense contested the fingerprint evidence obtained from that weapon and

(continued...)

In these circumstances, the trial court's injection of this evidence and instruction going directly to the idea that Gomez was guilty in his own mind cannot have been harmless beyond a reasonable doubt. Deputy Ganarial's testimony painted a picture of a hostile, dangerous, and out-of-control prisoner. The court compounded the prejudice by suggesting and allowing the further inference that Gomez had engaged in such behavior — which occurred just as the evidence on the Patel homicide (the first homicide case) was beginning — because he knew himself to be guilty.

This error, by its nature, provided an all-purpose rejoinder — suggested and sanctioned by the court itself — to jurors' doubts about Gomez's guilt. How better to resolve such doubts — whatever their nature — than to follow the judge's suggestion that Gomez himself knew he was guilty and behaved accordingly?

Even under the state law "reasonable probability" standard, reversal would be required. The phrase "reasonable probability" in the context of prejudicial error "does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*. [Citations.]" (*College Hospital Inc. v. Superior Court, supra,* 8 Cal.4th at p. 715, original italics,

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[70](...continued)
raised questions about whether Gomez was the shooter. (21RT 3105-3109; 27RT 3946-3950.)

citing, inter alia, *People v. Watson*, *supra,* 46 Cal.2d at p. 837.) There is a reasonable chance, to say the least, that in the absence of these errors at least one juror would have found, and maintained, a reasonable doubt as to Gomez's guilt, and the results would have been different. A mistrial, of course, is a more favorable result for the defendant than a conviction. (*People v. Soojian* (2010) 190 Cal.App.4th 491, 520-524; *People v. Bowers* (2001) 87 Cal.App.4th 722, 736.) Thus, the error was not harmless if there is a reasonable chance that in the absence of the error at least one juror would have come to a different conclusion about Gomez's guilt.

Gomez's death sentences for the murders of Patel and Luna must be reversed, for there is a reasonable possibility that they would not have been returned in the absence of these errors (*People v. Brown*, *supra,* 46 Cal.3d at pp. 447-449), which invited jurors to assuage any lingering doubts about Gomez's guilt with the thought that if Gomez himself knew he was guilty, he must be. (See *People v. Gay*, *supra,* 42 Cal.4th at p. 1226 [lingering doubt has particular potency where physical evidence is lacking and eyewitness testimony is contradictory].)

VIII.

THE TRIAL COURT'S ERRONEOUS ADMISSION OF HIGHLY INFLAMMATORY EXPERT TESTIMONY ABOUT THE MEXICAN MAFIA, WHICH RENDERED JURORS FEARFUL FOR THEIR OWN SAFETY, DEPRIVED MR. GOMEZ OF HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL

Chilling testimony about ruthless and violent crimes committed by the Mexican Mafia cast a shadow over Gomez's trial, prompting a note from one juror inquiring whether the jurors were at risk and another note from the jury as a group evincing similar concern. Some gang-related evidence was arguably relevant to the O'Farrell Street double homicide. But the expert testimony about the history of the Mexican Mafia and about shocking crimes committed on its behalf — both generally and in specific cases unrelated to this case or either defendant in this case in any way — ranged far beyond any proper purpose, serving only to instill fear. The trial court erred in overruling counsels' objections to this testimony, violating Gomez's constitutional rights and rendering his trial fundamentally unfair.

A. Procedural Background and the Gang Expert Testimony.

Before opening statements, and again before gang expert Richard Valdemar took the stand, the trial court ruled that evidence regarding the Mexican Mafia would be admissible to demonstrate motive in connection with counts 10 and 11, the O'Farrell Street double homicide. (8RT 1282-

1287; 14RT 2125.) The prosecution's theory of the case was that Robert Dunton was killed for failure to pay "taxes" to the Mexican Mafia. (8RT 1282-1287; 14RT 2115-2116, 2122-2125.)

Valdemar's testimony, however, ranged far beyond what arguably would have been relevant to demonstrate motive for the Dunton killing. The trial court overruled defense objections to Valdemar's testimony about the history of the Mexican Mafia and numerous unrelated crimes that had been committed on its behalf and by members of "hardcore gangs" generally. It allowed, over defense objection,[71]

> • testimony that "just about every crime that you can imagine that's committed on the outside in some way was committed [by gang members] on the inside of the jail facility. That

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[71] Each of the items of evidence listed below came in over the objection of either counsel for Gomez or counsel for his codefendant. In the instances in which counsel for Grajeda objected, any further objection by counsel for Gomez would have been futile, as the trial court overruled the objection. (*People v. Gamache* (2010) 48 Cal.4th 347, 373 [claim is preserved where codefendant's counsel objected and trial court overruled objection before defendant had a chance to join; it would have been futile to make the same objection that had been rejected]; *People v. Hill* (1998) 17 Cal.4th 800, 820-821; *People v. Pitts* (1990) 223 Cal.App.3d 606, 693; *People v. Carrillo* (2004) 119 Cal.App.4th 94, 101; see also *People v. McKinnon, supra*, 52 Cal.4th at pp. 653-654 [reviewing admissibility of gang evidence where further objection to gang evidence would have been futile].) While this Court should resolve any close and difficult preservation questions in favor of the defendant (*People v. Ayala, supra,* 23 Cal.4th at p. 273), should this Court nonetheless conclude that counsel failed to preserve any of these issues for review, Gomez believes such ineffective assistance of counsel would be more appropriately addressed in habeas corpus proceedings (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267).

would be assaults, battery, murder, the making of contraband weapons, the transportation, sales and use of narcotics, robbery, extortion and rape" (14RT 2220; see 14RT 2220-2221), and that while most of the inmates were not a problem in the jail, "a small minority, normally members of hard core gangs were creating much of the problems that we were experiencing, so by isolating these people and placing them in special units, we eliminated a lot of the assaults that were going on." (15RT 2346-2347).

- testimony that at Mexican Mafia meetings Valdemar had surveilled, murder "was primarily the subject of most of the conversations." (15RT 2353-2354.)

- detailed testimony about the creation of the Mexican Mafia in 1956 by a gang member from Hawaiian Gardens, Luis Flores, known as "Huero Buff." (15RT 2361-2362.) Valdemar further explained that by attempting to disband the gang in its early years by sending its members out to different prisons, the Department of Corrections unwittingly allowed the gang to spread its influence, a phenomenon which was "fairly accurately" depicted in the film "American Me." (15RT 2362-2363.)[72]

- testimony that the Mexican Mafia in "several instances" has used family members to carry out retaliatory murders, once ordering a man to kill his brother, as depicted in the movie "American Me." (15RT 2383-2384.)

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[72] Counsel for Gomez implicitly seconded Grajeda's objection to testimony about the history of the Mexican Mafia on the grounds that it was irrelevant and inflammatory. (15RT 2356, 2358, 2359.) Even if he had not, as set forth above, further objection would have been futile. As set forth above, while this Court should resolve any close and difficult preservation questions in favor of the defendant (*People v. Ayala*, *supra,* 23 Cal.4th at p. 273), should this Court nonetheless conclude that counsel failed to preserve any of these issues for review, Gomez believes such ineffective assistance of counsel would be more appropriately addressed in habeas corpus proceedings (*People v. Mendoza Tello*, *supra,* 15 Cal.4th at pp. 266-267).

> • testimony about the Mexican Mafia's enlisting of individuals to commit perjury on behalf of its associates or members, about a particular Baldwin Park shooting in which "a father identified a Mexican Mafia suspect and the son testified to the contrary," and the Mexican Mafia's expectation that "loyal gang members would use any means possible to delay, obstruct or reverse any kind of a criminal prosecution against its members." (15RT 2384-2385; see 14RT 2231-2232.)

During a break in Valdemar's direct testimony, immediately following Valdemar's testimony that the Mexican Mafia expected loyal gang members to use "any means possible" to hinder prosecution of Mafia crimes, Juror 10 sent the court a note: "Judge, I have a question! What about jury members. Are we at risk?" (15RT 2386-2387; 3SCT 591.) The court told the jury that a juror had sent out a note, and the answer to the question was "no." (15RT 2391.)

The prosecutor then concluded Valdemar's direct examination by eliciting his opinion that the Mexican Mafia

> foster[s] a feeling of terror among the communities in which they operate, and especially among street gang members, and their reputation for violence and murder causes gang members to comply with their wishes.

(15RT 2400.)

As guilt phase deliberations concluded, the jury sent a note to the court, signed by the foreperson, stating that the jurors were "concerned about possible harassment or problems after we are dismissed once the

verdicts are read." (4SCT 746.) The court resisted counsel's requests to tell jurors there was nothing to worry about:

> I can't tell them that they can't be concerned. . . . . I cannot falsely tell them that there's no reason to be concerned. * * * They're concerned about harassment and other problems that they mentioned in the note. And they orally added to one of the bailiffs, I think, they were concerned about the next phase, if we get into that. . . . . They've now expressed as a unit, as a body, the concern for themselves, and I can't say, listen, people, you're crazy, there's nothing wrong, there is no reason to be concerned. We've been talking about some things here that not everyone is acquainted with like the Mexican Mafia. They might well be concerned that there's some danger that they're in because of that.

(29RT 4332, 4335.)

The court ultimately told the jurors "I don't think you should be concerned about [any problems], but we are going to change the procedures so you feel more at ease . . . . the Bailiffs will . . . brief you on the new procedures that will be instituted so that you don't feel any concern about any problems that might arise after the verdicts." (29RT 4343.)

Jurors were then instructed as to new procedures (29RT 4343, 4364-4367), and the trial resumed the following week to determine whether Gomez should be sentenced to death.

B. The Trial Court Abused Its Discretion in Allowing Highly Inflammatory Gang Evidence.

1. Applicable Law.

Gang evidence evokes an emotional bias against the defendant, precisely the type of bias that distracts jurors from, rather than focusing them on, the material issues in the case, and precisely the kind of bias Evidence Code section 352 is designed to protect against. (See *People v. Killebrew* (2002) 103 Cal.App.4th 644, 650, disapproved on other grounds, *People v. Vang* (2011) 52 Cal.4th 1038, 1047-1048; see *People v. Cox* (1991) 53 Cal.3d 618, 660 [court condemned introduction of gang evidence where only tangentially relevant, given its inflammatory impact], disapproved on other grounds, *People v. Doolin*, *supra,* 45 Cal.4th at p. 421, fn. 22].)

Evidence about organized crime, prison gangs, or the Mexican Mafia, in particular, evokes intense fear, and is thus uniquely capable of distracting jurors from the relevant issues. (See *People v. Ayala*, *supra,* 23 Cal.4th at pp. 276-277 [trial court excluded any mention of the Mexican Mafia because it would be "extremely prejudicial" and court made diligent efforts to avoid such references]; *People v. Memory* (2010) 182 Cal.App.4th 835, 862 ["'Legions of cases and other legal authorities have recognized the prejudicial effect of gang evidence upon jurors. [Citations.]'"], quoting

People v. Albarran, supra, 149 Cal.App.4th at p. 231, fn. 17; see also *People v. Albarran, supra,* 149 Cal.App.4th at p. 230 & fn. 15.) It evokes "the highly publicized phenomenon of gang warfare in Southern California . . . thereby raising the spectre of prejudice far beyond the facts of the actual case." (*Williams v. Superior Court, supra,* 36 Cal.3d at p. 453; see also *People v. Cardenas, supra,* 31 Cal.3d at p. 905 ["In Southern California, Chicano youth gangs have received widespread media publicity for their purported criminal activities."].)

Gang-related evidence is a particularly prejudicial form of bad character evidence because, in addition to the risk of conviction on an improper propensity theory (*id.* at pp. 905-906), it also carries the risk that the defendant will be convicted on a "guilt by association" theory that runs counter to fundamental principles of justice. (*Kennedy v. Lockyer, supra,* 379 F.3d at pp. 1055-1056.)

Where expert gang evidence includes evidence of a gang's criminal activities unrelated to the charges the defendant faces, it is particularly inflammatory. As the Court of Appeal has put it, such evidence is inflammatory and has a "tendency to imply criminal disposition, or actual culpability." (*People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345.) It violates the right of "every defendant . . . to be tried based on evidence

tying him to the specific crime charged, and not on general facts accumulated by law enforcement." (*Ibid.*)

Some gang evidence, to be sure, may have probative value where the crime is alleged to be gang-related and the gang evidence is offered to prove motive. (*People v. Williams* (1997) 16 Cal.4th 153, 193.) But even where gang evidence is relevant, courts must scrutinize it carefully because of its inflammatory impact. (*Ibid.*; see also *Kennedy v. Lockyer, supra,* 379 F.3d at pp. 1055-1056 ["[E]vidence relating to gang involvement will almost always be prejudicial and will constitute reversible error."].)

Finally, the exercise of discretion to admit or exclude evidence under Evidence Code section 352 should favor the defendant in cases of doubt, because in comparing prejudice and probative value, the balance "is particularly delicate and critical where what is at stake is a criminal defendant's liberty." (*People v. Lavergne* (1971) 4 Cal.3d 735, 744.) It is all the more delicate and critical, of course, where not only the defendant's liberty, but his life, is at stake. (See, e.g., *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638 [reliability of guilt determination is crucial in a capital case; death must be imposed on the basis of reason rather than caprice or emotion].)

2. The Trial Court Abused Its Discretion In Permitting Testimony About the History of the Mexican Mafia, About Crimes Committed By "Hardcore" Gang Members in Jail, and About Other Cases of Ruthless Retaliatory Crimes Committed on Behalf of the Mexican Mafia.

The testimony the trial court allowed over defense objection involved a litany of crimes committed by "hardcore gang" members and, more specifically, by the Mexican Mafia. None of these other crimes were in any way connected to either of the defendants. All of this testimony was substantially more inflammatory than it was probative or relevant with respect to whether Gomez and Grajeda killed Dunton and Acosta. Even if this evidence had some minimal probative value, that probative value was far outweighed by the risk that jurors would be so horrified and fearful that they would be unable to assess the evidence for any probative value with respect to the case.

Testimony about rape and murder and a laundry list of other crimes committed by gang members in jail (14RT 2220) was, to say the least, unnecessary to establish Valdemar's expertise, the asserted purpose for its presentation, and, as counsel argued, it bore no relation to the ultimate expert opinion being sought. More, it was particularly prejudicial in this case because, as counsel noted, the jury had been informed that Gomez was in the county jail. (14RT 2221.) In fact, they had been informed that he was

in a disciplinary module, further exacerbating the prejudice by suggesting that he may have engaged in some of these crimes in jail. (See 12RT 1842.) As counsel noted, this testimony served as a form of improper character evidence, linking Gomez by virtue of his gang status and the fact that he was in the county jail to seemingly unlimited criminal activities in the jail — as Valdemar told the jury, "just about every crime that you can imagine that's committed on the outside." (14RT 2220.)

Valdemar's testimony that murder was the primary topic of conversation in Mexican Mafia meetings he surveilled was similarly irrelevant, as counsel for Gomez argued (15RT 2353-2354) — as there was no suggestion that either Grajeda or Gomez was present at any of those meetings. This testimony served only to create an atmosphere of fear and foster the improper inference that because Gomez was a member of a street gang subservient to the Mexican Mafia, he must have committed murder.

Testimony about the history of the Mexican Mafia and its penchant for using family members to carry out retaliatory murders — which in both cases veered into an incorporation by reference of a movie (15RT 2362-2363, 2383-2384) — was irrelevant; it bore shock value, not probative value. The prosecution contended that such detail was necessary to establish the "longevity" and "strength" of the Mexican Mafia, in order to explain, in

turn, why "a Hispanic street member like Gomez would kill . . . people that we might consider [he was] at least friendly with. I don't know what they considered themselves to be, but for all intents and purposes they appeared to be friendly." (15RT 2357.)

This evidence was not "necessary to furnish the jury a context" for the prosecution theory. (See *People v. Roberts*, *supra,* 2 Cal.4th at p. 299.) It was hardly necessary to delve into the history of the Mexican Mafia and its roots in a youth facility starting in 1956, in order to establish why an individual would commit a gang-related killing. Nor was this history any more necessary or even relevant to show why an individual would kill someone he "appeared" to be "friendly" with. Testimony that a man had once killed his brother at the Mexican Mafia's behest similarly was not relevant to Gomez's guilt, except insofar as it lent itself to improper inferences. (See *People v. Bojorquez*, *supra,* 104 Cal.App.4th at p. 345 [reversing for inflammatory gang testimony including testimony about gang retaliation against witnesses unconnected to the defendant].)

The willingness of those close to Mexican Mafia members and associates to perjure themselves, and the specific instance of a Baldwin Park case in which a father identified a Mexican Mafia suspect and his son testified to the contrary, were also irrelevant, as counsel contended. (15RT

2384.) This testimony had nothing to do with the killing of Dunton and Acosta and served primarily to impermissibly blunt the effect of any testimony the defendants might offer.

Credibility is not a proper subject for expert witnesses. (*People v. Smith* (2003) 30 Cal.4th 581, 628 [credibility not generally a subject of expert testimony]; *United States v. Call* (10th Cir. 1997) 129 F.3d 1402, 1406 [same]; *Snowden v. Singletary, supra,* 135 F.3d at pp. 737-739 [reversing for due process denial of fundamental fairness where expert testified that in 99.5% of cases children tell the truth about abuse]; see also *Mach v. Stewart* (9th Cir. 1998) 137 F.3d 630, 631-634 [reversal where venireperson, a social worker with child services, stated in presence of jury panel that in her experience, children did not lie about being sexually abused].)[73]

As the Court of Appeal has put it, addressing the admissibility of testimony, by a sociologist, that prison inmates sometimes lie and give false

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[73] Allowing an expert to opine on the credibility of a particular group of potential witnesses is different from allowing a defense witness to be impeached with evidence of his membership, along with the defendant, in a group that required its members to commit perjury on behalf of other members of the group. The latter has been approved under the Federal Rules of Evidence. (*United States v. Abel* (1984) 469 U.S. 45, 46, 52.) More, in this case, the expert's opinion tarnished the credibility of anyone associated with the defense, even if that individual were not himself shown to have any association with the Mexican Mafia or any gang.

testimony in exchange for leniency: "Evidence of a generalized tendency of some groups of witnesses to lie, unrelated to the credibility of the specific witnesses in issue, is irrelevant and not the subject of legitimate scientific evidence from expert witnesses." (*People v. Johnson* (1993) 19 Cal.App.4th 778, 785, 786-791.)

Gomez acknowledges that in *People v. Hernandez* (2006) 38 Cal.4th 932, 947, this Court held that expert testimony that a witness had never known a gang member "to lie about a fellow gang member making him a rat or a snitch" was admissible, as it did not involve the expert's testimony about the credibility of any particular witness. He contends, respectfully, that it was wrongly decided, and that, as set forth in *Snowden v. Singletary*, *supra,* 135 F.3d at p. 739, when an expert invades the jury's province as the sole judge of witness credibility, by opining on the credibility of a class of witnesses, not only has evidentiary error occurred, but fundamental fairness and due process are violated.

Finally, Valdemar's opinion that "Eme expects that loyal gang members would use any means possible to delay, obstruct or reverse any kind of a criminal prosecution against its members" (15RT 2385) was particularly irrelevant, as counsel contended, and prejudicial. It encouraged jurors to automatically discount the entire defense as part of the Mexican

Mafia's dishonesty and allowed for speculation leading to the inference that jurors were at risk. (Indeed, it was during the break immediately following the elicitation of this testimony that Juror 10 sent the court a note revealing her concern in this regard. (15RT 2386; see 3SCT 591.))

Even if some measure of relevant gang expert testimony were admissible to demonstrate motive, the evidentiary "overkill" threatened to overwhelm the jurors with fear, obscuring evidentiary gaps in the cases against Gomez. In *People v. Albarran*, the Court of Appeal reversed a conviction, holding that even if evidence of defendant's gang membership and some evidence concerning gang behavior were relevant to motive and intent, additional evidence of threats to kill police officers, descriptions of the criminal activities of other gang members, and reference to the Mexican Mafia had little or no bearing on guilt and "approached being classified as overkill." (*People v. Albarran, supra,* 149 Cal.App.4th at p. 228.) Here, as in *Albarran*, the evidence at issue "was so extraordinarily prejudicial and of such little relevance that it raised the distinct potential to sway the jury to convict regardless of [defendant's] actual guilt." (*Ibid.*; see also *People v. Bojorquez, supra,* 104 Cal.App.4th at pp. 343-345 [although court did not abuse its discretion in admitting some gang evidence, "profuse" additional inflammatory and irrelevant gang testimony warranted reversal].)

And, as defense counsel pointed out, the gang evidence bore no relevance at all to the other charges Gomez faced. As to those cases, it was entirely irrelevant. (See *People v. Avitia, supra,* 127 Cal.App.4th at p. 193 [reversing conviction where gang evidence, though quite limited, was irrelevant to charge and highly inflammatory]; see also *People v. Pinholster* (1992) 1 Cal.4th 865, 942 ["Absent some connection between the prison gang and proof of the charged offenses, of course, a prosecutor's references to prison gangs is irrelevant and prejudicial"], disapproved on other grounds, *People v. Williams* (2010) 49 Cal.4th 405, 459.)

It is hardly surprising that, after being told about the Mexican Mafia's policy of obstructing the legal system in any way and the willingness and apparent ability of gang members to commit murder even in jail, a juror turned from concern with the evidence as it bore on the defendants' guilt or innocence to the evidence as it bore on the jurors' own personal safety. (15RT 2386-2387; 3SCT 491.) And it is hardly surprising that the jury as a whole later addressed the court with similar concerns. (29RT 4332, 4335; 4SCT 746.)

That the gang evidence presented here regarding crimes committed by hardcore gang members in jail, brutal retaliatory murders, and the Mafia's expectation that gang members use "any means possible" (15RT

2384-2385) to hinder prosecution allowed jurors to infer (legitimately, according to the trial court) that they were somehow at risk — without a shred of evidence of actual risk to jurors in this case or even any other case involving the Mexican Mafia — shows that its inflammatory effect far surpassed any probative value. The trial court erred in allowing this evidence.

C. The Court's Errors in Allowing the Inflammatory Gang Expert Testimony Violated Mr. Gomez's Constitutional Rights.

The gang expert testimony detailed above — which the court allowed to stray into horrifying and irrelevant detail about crimes committed by gang members in jail and the Mexican Mafia's penchant for enlisting family members to carry out murders — rendered Gomez's trial fundamentally unfair, violating his constitutional rights to a fair trial and due process of law. (See *People v. Partida*, *supra,* 37 Cal.4th at p. 439, citing *Estelle v. McGuire*, *supra,* 502 U.S. at p. 70; *Spencer v. Texas, supra,* 385 U.S. at pp. 563-564; *People v. Falsetta*, *supra,* 21 Cal.4th at p. 913; *Duncan v. Henry*, *supra,* 513 U.S. at p. 366; see also *Lisenba v. California*, *supra,* 314 U.S. at p. 236; U.S. Const., 14th Amend.; see also *Jammal v. Van de Kamp, supra,* 926 F.2d at pp. 919-920; *People v. Albarran, supra,* 149 Cal.App.4th at p. 228 [gang evidence that "approached . . . overkill" violated due process].)

The expert opinion that the Mexican Mafia would use "any means possible to delay, obstruct or reverse any kind of a criminal prosecution against its members" (15RT 2385) in particular served to undermine the very purpose of a trial — to determine the defendant's guilt or innocence in accordance with legal standards. After all, if the Mexican Mafia would use "any means possible" to thwart prosecution, then how could anything the defense said or did be trusted? And would such means include violence against innocent individuals? Jurors? Given the testimony about the brutal lengths to which Mafia-associated individuals had gone in other instances — a man who killed his brother on Mexican Mafia orders (15RT 2383-2384) — such speculation, though lacking any basis in the facts of this case, would hardly seem farfetched. This testimony invited — and indeed, may well have produced — fear-inducing speculation about what "any means possible" would entail: it directly preceded the break during which a juror sent a note to the court evincing concern for jurors' safety.

Jurors focused on their own safety are necessarily focusing on matters other than the factual questions before them and are necessarily speculating — with no basis in fact — about acts the defendants might commit or direct. The court's view that jurors in fact did have reason to be concerned shows the truly inflammatory nature of the evidence.

The gang testimony rendered Gomez's trial all the more fundamentally unfair with respect to the counts which had no connection to gang activity or the Mexican Mafia. It would be nothing short of fundamentally unfair, of course, to introduce such testimony in a case in which it was totally irrelevant; it was no less fundamentally unfair with regard to Gomez's trial on the killings of Rajandra Patel and Raul Luna, in which no gang involvement was alleged and with respect to which the gang evidence was totally irrelevant. (See *Estelle v. McGuire*, *supra,* 502 U.S. at p. 70; *Spencer v. Texas, supra,* 385 U.S. at pp. 563-564; *Duncan v. Henry*, *supra,* 513 U.S. at p. 366; see also *Lisenba v. California*, *supra,* 314 U.S. at p. 236; U.S. Const., 14th Amend.; see also *Jammal v. Van de Kamp, supra,* 926 F.2d at p. 919.)

The erroneously admitted gang expert testimony rendered Gomez's trial on the O'Farrell street homicides fundamentally unfair as well. The testimony went well beyond what may have been properly admitted to demonstrate motive, detailing horrendous crimes entirely unconnected to either of the defendants in this case and prejudicially suggesting guilt by association.

The testimony lightened the prosecution's burden of proof, permitting the jury to find Gomez guilty based on criminal propensity. (*In*

re Winship, supra, 397 U.S. at p. 364; *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524; U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 15, & 16.) It also infringed on the right to confront witnesses and the right to present a defense, insofar as it implied that any action taken by the defendants was part of the Mexican Mafia's policy of thwarting law enforcement and the judicial process in any way. (U.S. Const., 6th & 14th Amends.)

The testimony also violated Gomez's due process rights by arbitrarily depriving him of a liberty interest, created by Evidence Code sections 352 and 1101, not to have his guilt determined by inflammatory propensity evidence. (*Hicks v. Oklahoma, supra,* 447 U.S. at pp. 346-347; U.S. Const., 14th Amend.)

Finally, the admission of this evidence violated Gomez's right to a reliable determination at all stages of a capital case. (See, e.g., *Lockett v. Ohio, supra,* 438 U.S. at pp. 603-605; *Beck v. Alabama, supra,* 447 U.S. at p. 638; U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, & 17.)

D. The Gang Expert Testimony Was Not Harmless; Reversal is Required.

The prosecution cannot show beyond a reasonable doubt that the federal constitutional errors did not affect the verdicts. (See *Chapman v. California, supra,* 386 U.S. at p. 24.) Given the demonstrable effect on the

jurors, it cannot be concluded beyond a reasonable doubt that the verdicts in this case — particularly those in the Luna and Patel cases, as to which the evidence was patently weak, and as to which the gang evidence was entirely irrelevant and served only as a distraction and a source of fear — were "surely unattributable to the error." (*Sullivan v. Louisiana*, *supra,* 508 U.S. at p. 279; see also *People v. Albarran, supra,* 149 Cal.App.4th at p. 232 & fn. 18 [reversing for erroneous admission of gang evidence under *Chapman*]; see Arguments I, II, V.D., VII.E., above.)

Even under the state-law standard, the erroneously admitted gang testimony was not harmless. The prosecutor dwelled at length on the gang testimony in his summation. He emphasized that Valdemar's testimony about the Mafia's inner workings was "undisputed." (27RT 3840.) He featured Valdemar's statement that "Eme expects that loyal gang members would use any means possible" to thwart or obstruct criminal prosecutions and emphasized the Mafia's terroristic methods. (27RT 3845.) Finally, near the end of his opening summation, the prosecution improperly invoked Valdemar's testimony in support of an argument that the women who testified — including Witness #3, whose testimony related only to the non-gang-related Patel crimes — were "scared": "[T]hey have kids, they're scared. They came into court here to testify, and as we know from the

testimony of Duarte to some extent but Richard Valdemar to a great extent, that they risked their lives by coming into court here to testify against these two men. And they've done so because it's the right thing to do, and to that extent I think we have to respect them for doing it." (27RT 3883.)

The trial court's failure to give any limiting instruction whatsoever with respect to the gang evidence — limiting its consideration to the O'Farrell Street killings, limiting its consideration to motive, and cautioning jurors not to use the gang evidence as evidence of bad character or criminal propensity — permitted its unrestricted use.[74] The absence of any limiting instruction increases the likelihood that jurors will misuse the evidence "as character trait or propensity evidence" and "use such evidence to punish a defendant because he is a person of bad character, rather than focusing upon the question of what happened on the occasion of the charged offense." (*People v. Gibson* (1976) 56 Cal.App.3d 119, 128-129.)

As set forth at length in Arguments I and II, above, the evidence against Gomez in the Luna and Patel cases was far from overwhelming. It is, to say the least, reasonably probable that the verdicts in those cases —

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[74] The trial court's request that the prosecution, as it called each witness, state which counts the testimony related to (see, e.g., 8RT 1300), and the prosecution's compliance with this request when Valdemar took the stand (14RT 2213), did not serve as instruction to the jury that they could not consider the gang evidence in determining Gomez's guilt of the other homicides he was charged with.

neither of which had any connection whatsoever to any gang, let alone the Mexican Mafia — would have been different had the prosecution not been allowed to generate such an atmosphere of fear with the entirely irrelevant but highly inflammatory Mexican Mafia evidence. (See *People v. Cardenas, supra,* 31 Cal.3d at pp. 905-909 [erroneous admission of gang evidence and narcotics addiction evidence not harmless where case involved suspect eyewitness identification].)

It is reasonably probable, as well, that the verdicts in the O'Farrell Street killings would have been different had the court limited Valdemar's testimony by sustaining counsels' objections. The prosecution's main witnesses both suffered serious credibility problems — indeed, the prosecution conceded that Witness #1 was "not a credible man, . . . not an honest man" and that Witness #2 was not a "public spirited person" and would not have testified had he not been facing prosecution in another case. (See 27RT 3834-3835, 3849-3851.)

In the absence of this inflammatory evidence, it is reasonably probable that the Dunton and Acosta cases would have resulted in a mistrial, or an inability to agree as to whether the killings were first or second degree murder. In light of the entire record, the prosecution's evidence of premeditation and deliberation was at best thin. (See Argument

III.)[75]

There is a reasonable probability — more than an abstract possibility — that had the prosecutor not reached the point of "overkill" with Valdemar's fear-inducing testimony about the Mexican Mafia, the result would have been different, with at least one juror finding that premeditation and deliberation on Gomez's part was not shown. (*College Hospital Inc. v. Superior Court*, *supra,* 8 Cal.4th at p. 715, citing, *inter alia*, *People v. Watson*, *supra,* 46 Cal.2d 818, 837; see also *People v. Bowers*, *supra,* 87 Cal.App.4th at p. 736 [mistrial is a more favorable result for the defendant than a conviction]; *People v. Soojian, supra,* 190 Cal.App.4th at pp. 520-524.)

At a minimum, Gomez's death sentences must be reversed, for there is a reasonable possibility that they would not have been returned in the absence of this erroneously admitted evidence. (*People v. Brown*, *supra,* 46 Cal.3d at p. 447.) The jurors' note to the court as the guilt phase verdicts were returned suggests that the frightening gang evidence and their resulting concern for their own safety was very much on their minds as they

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[75] More, though a shotgun found in Gomez's cousin's house when he was arrested was linked to spent shells found at the scene (11RT 1754-1755; 21RT 3119; 18RT 2741-2747; 21RT 3099-3100; 19RT 2869-2872), the defense contested the fingerprint evidence obtained from that weapon and raised questions about whether Gomez was the shooter. (21RT 3105-3109; 27RT 3946-3950.)

entered the next phase of the case, in which they were to decide whether Gomez should live or die. (29RT 4335 [court noting that juror told bailiff jurors were concerned "about the next phase"].) There is a reasonable possibility that in the absence of the errors, their decision about whether Gomez was to live or die would have been different.

Reversal is required.

IX.

THE TRIAL COURT'S ADMISSION OF A NOTE LEFT BY ROBERT ACOSTA IN THE PAGES OF A BIBLE VIOLATED *CRAWFORD V. WASHINGTON*

Five days after Robert Acosta's death, his wife found, in a Bible in her dresser drawer, a note in her husband's handwriting. (16RT 2521.) The note read:

> 6-30. 97
> Tuesday morning
> Monday nite 1.20
> Went to meet
> Shady La Rana
> don't like the
> meeting at Big Hueros
> Robert Acosta
> Spider

(3CT 672.)[76] The trial court admitted this note over defense objection. (3CT 653-660; see 8RT 1257-1269.)

In summation, the prosecution argued that the note was "almost – the testimony of Robert Acosta from his grave." (27RT 3851.) Presenting a blow-up of the note, the prosecutor argued that it proved that Acosta went to Dunton's apartment on the night of the killings to discuss Mexican Mafia business with Arthur Grajeda, thus helping to establish that the killings

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[76] "Shady La Rana" was Arthur Grajeda, Gomez's co-defendant. (16RT 2608-2609.) "Big Huero" was Robert Dunton. (19RT 2922.) "Spider" was Robert Acosta. (19RT 2922-2933.)

were Mafia-related. (27RT 3851-3852.)

The court's admission of this note violated *Crawford v. Washington* (2004) 541 U.S. 36, which established that the Sixth Amendment Confrontation Clause bars testimonial hearsay unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine that declarant.

Because Acosta's note was a crucial piece of evidence placing Grajeda, a Mexican Mafia associate, at the scene of the crime and supporting the prosecutor's theory that the killings of Dunton and Acosta were linked to the Mexican Mafia, its admission was not harmless beyond a reasonable doubt.

A. This Issue Is Reviewable.

Counsel did not object on the grounds that the note violated the Sixth Amendment right to confrontation. (See 8RT 1257-1269.) (Counsel and counsel for Grajeda argued that the note was hearsay that was not admissible under Evidence Code section 1250; that the note was inadmissible under Evidence Code section 352; that the note was "very very suspicious" as its tone did not comport with how one usually would write a letter to one's spouse; and that it could not be authenticated. (8RT 1258, 1261; see also 3CT 653-658.))

This claim is reviewable on appeal, nonetheless, as the United States Supreme Court decisions upon which it is based, *Crawford v. Washington, supra,* 541 U.S. 36, and *Giles v. California* (2008) 128 S.Ct. 2678, were not decided by the United States Supreme Court until four and eight years, respectively, after the 2000 trial in this case.[77] Before *Crawford*, the trial court's conclusion that the note was admissible under Evidence Code section 1250[78] (8RT 1265-1266) rendered any further Confrontation Clause objection futile. (See *People v. Majors* (1998) 18 Cal.4th 385, 403-405 [statements that were properly admitted under the well-recognized state of mind exception to the hearsay rule would not constitute Confrontation Clause violation]; see also *Ohio v. Roberts* (1980) 448 U.S. 56, 66 [admissibility of hearsay under Confrontation Clause turns on whether the statement fell within a firmly rooted hearsay exception or bore particularized guarantees of trustworthiness], abrogated by *Crawford v. Washington, supra,* 541 U.S. at pp. 60-69; *People v. Saffold* (2005) 127

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[77] United States Supreme Court decisions announcing new rules apply to cases pending on direct review. (*Griffith v. Kentucky* (1987) 479 U.S. 314, 322; *Whorton v. Bockting* (2007) 549 U.S. 406, 416-417; see also *Ponce v. Felker* (9th Cir. 2010) 606 F.3d 596, 604 [*Giles* announced a new rule].)

[78] Evidence Code section 1250 allows statements of a declarant's then-existing state of mind when offered to prove the declarant's state of mind or to explain his or her conduct.

Cal.App.4th 979, 984; see also *People v. Birks* (1998) 19 Cal.4th 108, 116 fn. 6.)

B. Acosta's Note Was Inadmissible Under *Crawford.*

Crawford bars testimonial hearsay from criminal prosecutions unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. (*Crawford v. Washington, supra,* 541 U.S. at pp. 68-69.) It is indisputable that Acosta was unavailable at the time of trial; it is also indisputable that the defendants lacked any prior opportunity to cross-examine him.

Acosta's note was also indisputably testimonial. While there are "[v]arious formulations of [the] core class of 'testimonial' statements," they "share a common nucleus." (*Crawford v. Washington, supra,* 541 U.S. at pp. 51-52.) That common nucleus lies in the reasonable expectation that the statement would later be used in court. (*Ibid.* [formulations of testimonial statements include: "*ex parte* in-court testimony or its functional equivalent — that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or *similar pretrial statements that declarants would reasonably expect to be used prosecutorially*"] [italics added]; see also *Melendez-Diaz v. Massachusetts*

(2009) 129 S.Ct. 2527, 2531.)[79]

That Acosta left the note in a Bible, placed a date and time on the note, and signed his full name as well as his gang moniker, suggested such an expectation. (Acosta's wife testified that he had never signed a note to her with his full name before. (16RT 2522-2523.)) In fact, that was the basis on which the prosecutor argued its admission: "the formal nature of the note is exactly what I would expect it to be from a man who is leaving a note for his wife to find and to show the authorities when he's on his way to a meeting where he knows or believes he's going to be killed." (8RT 1263-1264.)

More, the prosecutor, at trial, presented the note as testimonial:

> Then there's the almost — the testimony of Robert Acosta from his grave. It's the note. The note's in evidence, the actual note's in evidence. I had this blowup made so that you could read it.
>
> Dated June 30, 1997, it says, "Tuesday morning, Monday night, 1:20. Went to meet Shady, La Rana, don't like the meeting at Big Huero's."
>
> "Robert Acosta, Spider."

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[79] Such an expectation is inherent in the production of "'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,'" one of the formulations of the category of testimonial statements identified in *Crawford.* (*Crawford v. Washington, supra,* 541 U.S. at pp. 51-52, quoting *White v. Illinois* (1992) 502 U.S. 346, 365 [Thomas, J., joined by Scalia, J., concurring in part and concurring in the judgment].)

> A very formal note, not the kind of note that a husband would normally leave for his wife. But it's the kind of note that if one of us was going someplace, God forbid, and we thought we might not come back from that meeting, we might write it to whom it may concern and leave it with a minister or leave it with a confidante, and that's exactly what Robert Acosta is doing, what Spider is doing with this note.
>
> * * *
>
> From his grave, and why does he sign it, "Robert Acosta, Spider?" Because he's no guarantee – he wants that note identified, he wants the author of that note to be identified, whether it's found by someone who knows his handwriting or not. That's what he wants. . . .

(27RT 3851-3852.)

Thus, the admission of Acosta's note violated Gomez's right to confront the witnesses against him under the Sixth and Fourteenth Amendments. (*Pointer v. Texas* (1965) 380 U.S. 400, 403 [Sixth Amendment is incorporated in Fourteenth Amendment]; U.S. Const., 6th & 14th Amends.; see also Cal. Const., art. I, §§ 7, 15.)[80]

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[80] The admission of the note cannot be upheld on the grounds that Gomez forfeited his Confrontation Clause rights by killing Acosta. In *Giles v. California, supra,* 128 S.Ct. 2678, the Supreme Court held that unconfronted testimony may not be admitted based on a judicial finding that defendant committed a wrongful act that rendered the witness unavailable, without a finding that defendant committed the act for the purpose of preventing testimony. The prosecution, below, never suggested that the note was admissible because Gomez killed Acosta for the purpose of preventing his testimony; the court did not admit the note on this basis; and, finally, there was no evidence to support such a conclusion.

C. Reversal of Mr. Gomez's Convictions for the First Degree Murders of Robert Dunton and Robert Acosta, and of his Death Sentences for the Murders of Raul Luna and Rajandra Patel, is Required.

As counsel for Grajeda argued in moving to dismiss, at the conclusion of the prosecution's case, aside from the testimony of unreliable witnesses — chiefly, Witness #1, who gave police contradictory statements regarding Grajeda's presence at the scene of the crime[81] — Acosta's note was the only evidence placing Grajeda at the scene of the crime. (25RT 3631.)[82] Without the note, Witness #1's testimony about Grajeda's presence

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[81] Witness #2, another witness whose credibility was in serious question — because he first denied, then admitted being a gang member (17RT 2654-2656, 2658-2665, 2708, 2771, 2784), and because he testified in exchange for leniency in sentencing (16RT 2578-2583) — told jurors that he drove Grajeda over to Dunton's house on the day before the murders, and that Grajeda asked him to drive him back that night to kill Gomez and Dunton. (16RT 2596-2604, 2612-2614.) Witness #2 instructed his girlfriend (now wife), Alicia Gandara, that when Grajeda called, she should tell him Witness #2 was asleep. (16RT 2614-2616.) Gandara testified that a person who identified himself as Shady called that evening, and that she did as instructed. (19RT 2895-2902.)

Witness #2 also testified that Grajeda later told him "I did it," referring to the killings of Dunton and Acosta. (16RT 2618.)

[82] Eddie Maldonado, Acosta's stepson, testified that Acosta received a telephone call around 11:30 or 12:00 on the night of June 30, 1997; after talking on the phone for a few minutes, Acosta paced back and forth and then went into his bedroom for a few minutes. As he came out of the bedroom and headed out the door, Maldonado asked him what was wrong; Acosta said he had to go to a meeting. (16RT 2509-2510, 2517.) Maldonado's testimony did not refer to Grajeda. In any event, in admitting

(continued...)

and his statement at the time of the crime would have lacked corroboration, further undermining the prosecution's theory of the case — that Grajeda ordered Gomez, who had been placed on a "green light" list, to kill Dunton and Acosta on behalf of the Mexican Mafia, in order to remove his name from the list — and undermining the prosecutor's case that the murders were deliberate and premeditated.

More, as set forth above, to the extent it is credited, Witness #1's testimony describing the scene before the shooting and his testimony that immediately before the shooting, Gomez said, "Don't point that at me. I don't like people pointing things at me" (20RT 3035) calls into question whether there was any clear, deliberate intent to kill that must have been formed upon preexisting reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation. (See Argument III, above.)

In these circumstances, the prosecution cannot show that the error in admitting Acosta's note was harmless beyond a reasonable doubt, as is required for this federal constitutional error. (*Chapman v. California, supra,* 386 U.S. at p. 24.) "The inquiry . . . is not whether, in a trial that occurred

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[82](...continued)
Maldonado's testimony about Acosta's statement, the trial court indicated that, though admissibility was a close question, it would admit it because it would be "consistent with the note." (16RT 2514.)

without the error, a guilty verdict would surely have been rendered . . . ." (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279.) Rather, the question is whether the first degree murder verdicts "actually rendered in *this* trial [were] surely unattributable to the error." (*Ibid.,* original italics.)

The note was powerful evidence — testimony from the grave, as the prosecutor argued. (27RT 3851-3852.) The prosecution cannot prove beyond a reasonable doubt that the guilty verdicts — and the findings that the murders were first degree[83] — on counts 10 and 11 were surely unattributable to this seemingly solid piece of physical evidence, communicating a victim's last intentions and apprehensions, and providing the most convincing proof in the entire case that Arthur Grajeda, a Mexican Mafia associate — and thus the Mexican Mafia itself — was involved in the crime. The prosecution cannot prove beyond a reasonable doubt that this note did not contribute to a conclusion, on the jury's part, that the murders were Mexican Mafia-ordered killings and thus were deliberate and premeditated. Reversal of Gomez's convictions for the first degree murders of Dunton and Acosta is required.

Reversal of Gomez's death sentences for the Luna and Patel murders

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[83] Grajeda was convicted only of second degree murder on count 11, which charged the killing of Robert Acosta. The personal use of a firearm allegations were found untrue as to Grajeda. (29RT 4352-4353.)

is required as well. This guilt phase error violated Gomez's right to reliable guilt and penalty phase determinations in this capital case. (U.S. Const, 8th & 14th Amends.; *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638; Cal. Const., art. I, §§ 7, 15, & 17.) Though Gomez was not sentenced to death for the Dunton and Acosta murders, these murders were before the jury at the penalty phase, where the jury was allowed to consider all the evidence received in either phase of the trial in determining the appropriate sentence. The erroneously admitted evidence of the note may well have muted jurors' doubts about whether the Dunton and Acosta killings were gang-related, and about whether Gomez's involvement with the Mexican Mafia was well enough established. As noted above, the note the jurors sent to the court as they were returning verdicts in the guilt phase suggested that the gang evidence was still very much on their minds. (See 29RT 433, 4335; 4SCT 746.) The prosecution cannot prove beyond a reasonable doubt that this evidence did not influence the jurors' penalty phase decisionmaking. (See *Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Brown, supra,* 46 Cal.3d at pp. 447-449.)

X.

THE TRIAL COURT'S IMPROPER AND UNCONSTITUTIONAL INSTRUCTIONS EFFECTIVELY REQUIRED JURORS TO TAKE NOTES AND STERNLY DISCOURAGED READBACK OF TESTIMONY — IN FACT, PROHIBITING IT IN THE FIRST TWO DAYS OF DELIBERATIONS

Countless jury verdicts are upheld because of the time-honored principle that credibility of witnesses is exclusively a matter for the jury, and appellate courts are ill-suited to second-guess determinations made by the jurors who sat through the trial and had the benefit of being able to see the witnesses testify, assessing their demeanor face to face. (See, e.g., *People v. Hamilton* (1873) 46 Cal. 540, 543.)

The trial court's instructions here called that principle into question, as they elevated the importance of juror notetaking over observation of the witnesses, with the trial court at one point going so far as to tell jurors, as the trial was about to begin, that it would be "very discouraged" to "see jurors just sitting their with their notes in their laps and they're looking at the witnesses, and I realize it's all going by and it won't be recorded in your memories because you aren't trying to take those notes." (8RT 1300.) The court would be "infuriate[d]," it also told them, if jurors requested readbacks early in deliberations, which would indicate that jurors did not "do their job in recording the information" they would need to decide the

case. (8RT 1298.) These erroneous instructions interfered with the jury's unique and exclusive responsibility and power to evaluate the credibility of witnesses, violating a host of state law principles and federal and state constitutional rights, and requiring reversal.

A. The Court's Instructions Regarding Notetaking and Readbacks.

On the morning trial began, the trial court instructed jurors extensively regarding notetaking:[84]

> . . . [F]irst thing you did when you came in was pick up your note pads from underneath the seat cushions.
>
> Let me talk about that first. *It's very very important that you take notes during this trial.* Those are for your own personal use, not to prove to somebody else that what you wrote down was accurate but to refresh your own recollections of what goes on during the trial.
>
> You can take notes of any aspect of the case. If you take notes during the opening statement or the final arguments, understand that that is not evidence in the case. . .
>
> *But if you do not take notes, you will not remember what went on during the trial, and the thing that infuriates me the most about jurors is when they first go in to deliberations and the first hour or two I get a note sent out saying we want a reread of the testimony of, and then I get a list of witnesses, which indicates to me the jurors didn't do their job in recording the information that you need to remember at the end of this trial.*
>
> As I've indicated, it will be some weeks before the

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[84] Because the very extensiveness of these instructions is at issue, they are quoted at length below.

case is given to you in the guilt phase. You've got to be able to remember the testimony, and *that means you should write down the names of witnesses, dates, times, places, things that are said and done.*

The offenses in his this [sic] case are alleged to have occurred on four different dates or five different dates, ... You've got to try to keep all of this organized in your minds.

And I've given this speech many many times to jurors, and I sit back and watch 90 percent of them *not taking enough notes* thinking, oh, well, somebody else will remind me or I will remember everything because this is so unusual, I'm going to remember everything that happens. I know the judge is wrong.

I've been here 15 years. I know I'm right. You will not remember if you don't take notes.

The one caution about that is not to take so many notes that you're not watching and listening as the evidence is being presented. A witness that looks uncomfortable to you may be uncomfortable because that witness isn't telling the truth. So you should watch the witness while they're testifying as well.

Don't have your head buried in your notes all the time taking notes, but *take a lot of notes* to remind yourselves of what happened during the trial. *If you don't, you'll have to rely on other people to refresh your memory, and you shouldn't do that.* It should be your own memory that you can recall the things that are important to you.

* * *

The main thing is I'm going to be very discouraged when I sit back and see jurors just sitting there with their notes in their laps and they're looking at the witnesses, and I realize it's all going by and it won't be recorded in your memories because you aren't trying to take those notes.

You've got to try to remember the evidence that's being presented. I'll tell you honestly at the end of this trial, you will not have been given the information that you need to know what will be the key to you to make decisions in this case.

We cannot predict to you the things that are going to make a difference to you in advance. The attorneys will try to do that. It may seem very obvious, but at the end of the trial so often what happens is the key to the answer that you are asked to give will be something that occurred earlier and nobody flagged it, nobody put up a red flag saying, listen, people, this is important. That's for you to do.

You've got to pay attention to everything, understanding it may be something minor at the end of the trial that's really important to you *and you didn't record it, so you're going to be asking what happened.*

So take notes. Understand they're for your own personal use. . . .

I'm only saying this because I'm so exhausted with saying this so many times to jurors and they don't take notes. So many of them don't take any notes at all, and that's a big mistake.

* * *

Let me mention to you, you can take notes as I said of the opening statements you're about to hear, but understand what you're about to hear is not evidence in the case . . . .

And . . . let me mention too *I think notes are so important I take mine on a computer. . . . I am not playing a video game, I'm taking notes. I take so many that I don't remember taking them. It came from me and it happened during the trial, so I know I took the notes, and I think you'll find the same thing if you take a lot of notes. Very important.*

(8RT 1297-1301, 1308 [emphasis added].)

After its final guilt phase instructions, delivered on a Thursday morning, the court told jurors:

> The final final comment is on read back of testimony. You may find that that's necessary, but I would not want to hear from you today or tomorrow that you think you've discussed everything and there's a dispute about what the witness actually said.
>
> *You've got notes from the trial that you've taken. Those should refresh your personal recollections.* As you generally discuss the evidence, that should refresh your recollections. If after a day or two you still have a disagreement as to what the witness actually said, then . . . tell us what you need to have.
>
> . . . [B]e specific as to what you'd like to have read back to you if that happens, and then any read back will start then on Monday. . . .

(29RT 4176-4177.)

The trial court refused the prosecution's request to instruct jurors with CALJIC No. 1.05, the cautionary instruction regarding notetaking. (3CT 856.)[85]

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[85] CALJIC No. 1.05, which the trial court refused to give, reads in part as follows:

> [A word of caution: You may take notes; however, you should not permit note-taking to distract you from the ongoing proceedings. Remember you are the judges of the believability of witnesses.]

(continued...)

Jurors deliberated briefly on Thursday morning, February 3, 2000, and on Thursday afternoon; for half a day on Friday, February 4, 2000; and resumed deliberations after the weekend on Monday, February 7, 2000. (3CT 809-815.) During deliberations, jurors requested only a single readback of testimony, which the court called "very very brief," on Tuesday, February 8, 2000. (29RT 4285.) After that, they resumed deliberations, which spanned an additional four days; they reached a verdict shortly before noon on February 15, 2000. (3CT 818-823, 845-855.)

B. The Court Erroneously and Unconstitutionally Insisted That Jurors Take Notes, Telling Them It Would be "Discouraged" to See Them "Looking At The Witnesses" Without Taking Notes.

The trial court's extensive instruction insisting on notetaking was

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[85](...continued)

> Notes are only an aid to memory and should not take precedence over recollection. A juror who does not take notes should rely on his or her own recollection of the evidence and not be influenced by the fact that other jurors do take notes. Notes are for the note-taker's own personal use in refreshing his or her recollection of the evidence.
>
> Finally, should any discrepancy exist between a juror's recollection of the evidence and a juror's notes, or between one juror's recollection and that of another, you may request that the reporter read back the relevant testimony which must prevail.

This Court has upheld CALJIC No. 17.48, which was later rephrased and incorporated into CALJIC Nos. 0.50 and 1.05. (*People v. Solomon*, *supra,* 49 Cal.4th at pp. 822-823.)

error. It impermissibly impaired and interfered with the jury's factfinding and exclusive power to determine credibility; it violated Penal Code section 1138; and it deprived Gomez of the right to due process, a fair trial, the right to present a defense, the right to counsel, the right to a jury trial, the right to confront the witnesses against him, and a reliable verdict in this capital case. (U.S. Const., 5th, 6th, 8th, and 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.)

The trial court erred by insisting that jurors take notes — "a lot of notes" — to the detriment of their responsibility to observe the witnesses and power to assess their credibility. To be sure, notetaking can be valuable to jurors attempting to sort through testimony that has been presented to them, particularly in long trials such as this one, and California law expressly permits it. (See Pen. Code § 1137.)

Several dangers, however, inhere in notetaking: it may distract jurors, affecting their ability to listen to testimony, observe witnesses, and judge their credibility; notes may be inaccurate or incomplete; notes may take precedence over jurors' recollections and impressions of the testimony; and jurors who do not take notes may rely on the notes of those who did. (See *People v. Whitt* (1984) 36 Cal.3d 724, 746-747, quoting *People v. DiLuca* (N.Y. App. Div. 1982) 448 N.Y.S.2d 730, 734 [summarizing

dangers of notetaking]; *United States v. Maclean* (3d Cir. 1978) 578 F.2d 64, 66 [also summarizing dangers of notetaking]; see also *Price v. State* (Tex. Crim. App. 1994) 887 S.W.2d 949, 951-955.)

For this reason, this Court stated that "the better practice" is to provide jurors with a cautionary instruction regarding notetaking. (*People v. Whitt, supra,* 36 Cal.3d at p. 747.) In *Whitt,* the trial court had warned jurors: "[b]e careful as to the amount of notes that you take. I'd rather that you observe the witness, observe the demeanor of that witness, listen to how that person testifies rather than taking copious notes . . . . [If] you do not recall exactly as to what a witness might have said or you disagree, for instance, during the deliberation [sic] as to what a witness may have said, we can reread that transcript back by that witness back to you. Remember that aspect of it." (*People v. Whitt, supra,* 36 Cal.3d at pp. 747-748.) While this Court found that a more complete instruction would have been preferable, it found that the *Whitt* court's instruction adequately warned jurors of the dangers of notetaking. (*Ibid.*)

Since *Whitt*, this Court has made clear that although it is the "better practice" to give a cautionary instruction on notetaking, the trial court is not required to do so sua sponte. (See, e.g., *People v. Morris* (1991) 53 Cal.3d 152, 214-215, overruled on other grounds in *People v. Stansbury* (1995) 9

Cal.4th 824, 830, fn. 1; *People v. Marquez* (1992) 1 Cal.4th 553, 578.) "Even if the court has no sua sponte duty to instruct on a particular legal point," however, "when it does choose to instruct, it must do so correctly." (*People v. Castillo*, *supra,* 16 Cal.4th at p. 1015.) More, even without objection, "a defendant may challenge on appeal an instruction that affects 'the substantial rights of the defendant . . . .'" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 505-506 [defendant may challenge instruction regarding readback on appeal, even in the absence of objection]; see Pen. Code § 1259.)

Gomez's substantial rights were compromised by the court's erroneous instructions on notetaking, which not only eschewed the "better practice" of adequately cautioning jurors on the dangers of notetaking, but took the opposite tack, warning jurors extensively of the dangers of *not* taking notes. Indeed, the court effectively required jurors to take notes, telling them that recording the testimony in notes was part of their "job," and elevating its importance over that of the jurors' unique responsibility to observe witness demeanor and assess credibility. (8RT 1298; see 8RT 1297-1301, 1308.)

The court's insistence on notetaking was error. (See *People v. Silbertson* (1985) 41 Cal.3d 296, 303-304 [instruction that bailiff's

distribution of notepads "doesn't mean that you have to take notes, but some people do like to take notes" was "sufficient to inform the jurors that they did not have to take or rely upon their own notes"]; see also, e.g., *People v. Martinez* (Colo. Ct. App. 1981) 652 P.2d 174, 176 [court instructed jury that there was no requirement that they take notes]; *Kelley v. State* (Fla. 1986) 486 So.2d 578, 583 [court informed jurors that notetaking was optional]; *State v. Williams* (Ohio Ct. App. 1992) 80 Ohio App.3d 648, 652-654 [court told jurors "I want to emphasize that none of you are required to take notes"]; *Commonwealth v. St. Germain* (Mass. 1980) 381 Mass. 256, 266 [court carefully explained that no juror was required to take notes]; *Price v. State*, *supra,* 887 S.W.2d at pp. 950, 954 [trial court should, as it did, instruct jurors that notetaking is not required].)

The trial court's repeated exhortation to "take a lot of notes" made matters worse. (8RT 1299; see also 8RT 1308; compare *People v. Whitt, supra,* 36 Cal.3d at pp. 747-748 [court told jurors to "[be] careful as to the amount of notes that you take"]; see also *Commonwealth v. St. Germain, supra,* 381 Mass. at pp. 265-270 [court cautioned jurors that they should keep notes "brief" so as to be able to carefully assess each witness's credibility by observing the manner in which he testified]; *Price v. State, supra,* 887 S.W.2d at p. 954 [jurors should be instructed to "take notes

sparingly"].)

The court proclaimed it "kn[e]w [it was] right" based on fifteen years of experience on the bench, and evidently itself found it helpful to take such copious notes that it did not remember taking them. (8RT 1299, 1308 ["I take so many [notes] that I don't remember taking them. It came from me and it happened during the trial, so I know I took the notes, and I think you'll find the same thing if you take a lot of notes. Very important."].)

It cannot be assumed, however, that every person's mind works the same way. (Compare *Commonwealth v. St. Germain, supra,* 381 Mass. at p. 266 [trial court carefully explained that no juror was required to take notes, indicating that "some persons 'remember things more accurately by listening'"]; *id.* at pp. 267-268, fn. 21 [quoting instruction suggested by commentator, that "[n]o juror, of course, is required to take notes, and some may feel that the taking of notes is not helpful because it may be a distraction and may interfere with one's hearing and evaluation of all of the evidence"]; *United States v. Maclean, supra,* 578 F.2d at p. 66 ["the value of notetaking will vary . . . according to the abilities and desires of the jurors"]; *State v. Williams, supra,* 80 Ohio App.3d at p. 653 [court instructed jurors they should not take notes if it might distract their

attention, but should if they believe it might better focus their attention].)

Nor can it be assumed that everyone on the jury had enough literacy or experience with notetaking to take accurate and useful notes. (See *People v. Silbertson*, *supra,* 41 Cal.3d at p. 303 [court appropriately warned jurors "[y]ou must bear in mind, though, that I assume that you are not professional notetakers, and if there is any question as to what was actually said the court reporter, of course, can give that information to you"]; compare *Price v. State*, *supra*, 887 S.W.2d at p. 954 ["If notetaking is to be allowed, the parties should be permitted to question the venire as to their ability to read, write or take notes."], citing *State v. Triplett* (W.Va. 1992) 421 S.E.2d 511, 519-520.)

The court's instructions failed to communicate the caveat implicit in the standard notetaking instruction the court refused to give — that notes may conflict with recollection, and that in such a case jurors should resort to readback, which "must prevail." (CALJIC No. 1.05.) Rather, in informing jurors that they must take notes because they "will not remember if you don't take notes" (8RT 1299), the court essentially informed jurors that notes were superior to recollection.

Finally, it cannot be assumed that everyone is capable of taking "a lot of notes," as the court urged (8RT 1299, 1308), while still paying

attention to the witnesses' demeanor. (Compare *Price v. State*, *supra,* 887 S.W.2d at p. 950 [trial court's instruction on notetaking, approved by appellate court, stated that "[i]f you don't want to use the notebooks, you don't have to. Sometimes taking notes actually impedes one's ability to follow the testimony. If that's the case with you, simply put the notebooks aside and do not use them at all"]; *People v. Whitt, supra,* 36 Cal.3d at pp. 747-748.)

Only in an aside during its extensive lecture on the necessity of taking notes did the court acknowledge "one caution": "The one caution about that is not to take so many notes that you're not watching and listening as the evidence is being presented. A witness that looks uncomfortable to you may be uncomfortable because that witness isn't telling the truth. So you should watch the witness while they're testifying as well. Don't have your head buried in your notes all the time taking notes, but take a lot of notes to remind yourselves of what happened during the trial." (8RT 1299.) This "caution" was hardly adequate, for the admonition that jurors "should watch" the witnesses was presented as a secondary consideration; jurors should take "a lot of notes," merely avoiding "hav[ing] [their] head[s] buried in [their] notes all the time." (8RT 1299.)

And, in any event, the trial court virtually undid any benefit to this

caution later, when it told jurors:

> The main thing is *I'm going to be very discouraged when I sit back and see jurors just sitting there with their notes in their laps and they're looking at the witnesses,* and I realize it's all going by and it won't be recorded in your memories because you aren't trying to take those notes.

(8RT 1300 [emphasis added].) The court's message was clear: observation of the witnesses was not as important as notetaking; jurors must take notes as part of their "job" (8RT 1298); "just . . . looking at the witnesses" was improper, and the court would be disappointed with them if they did not take notes and "infuriated" if they requested too many readbacks. (8RT 1298, 1300.)

The court's insistence on notetaking also elevated the content of the witnesses' testimony over the crucial questions of whether it was true, accurate, and credible. The court's exhortation that "[y]ou've got to be able to remember the testimony, and that means you should write down names of witnesses, dates, times, places, things that are said and done" (8RT 1298) assumed the truth and accuracy of the testimony, urging jurors to memorialize it in notes, while crucial aspects of the witnesses' demeanor and attitude might well pass jurors by. The court's description of its own notetaking practices exacerbated this problem: "I take so many that I don't remember taking them. It came from me and it happened during the trial, so

I know I took the notes, and I think you'll find the same thing if you take a lot of notes. Very important." (8RT 1308.)

A juror's failure to take in exactly what a witness said, of course, can be remedied by readback — disfavored by this trial court (see 8RT 1298; see also 29RT 4176-4177) — but a juror's failure to register an impression of whether a witness was telling the truth, was lying, or was mistaken cannot be remedied in any way. (Compare *People v. Whitt, supra,* 36 Cal.3d at pp. 747-748 ["I'd rather that you observe the witness, observe the demeanor of that witness, listen to how that person testifies rather than taking copious notes . . . [If] you do not recall exactly as to what a witness might have said or you disagree, for instance . . . we can reread that transcript back . . . ."].)

The trial court's instruction violated California law — which, while not requiring a *sua sponte* instruction on the dangers of notetaking, nonetheless recognizes those dangers and cannot support an insistence on notetaking that enhances those very dangers. (See *People v. Whitt, supra,* 36 Cal.3d at pp. 746-748.)

The instruction also violated Gomez's constitutional rights to due process of law, his right to a jury trial, his right to a fair trial, his right to confront the witnesses against him, his right to counsel, his right to present

a defense, and his right to a reliable determination of guilt.

One of the jury's central functions, of course, is to assess the credibility of witnesses. (See *United States v. Scheffer* (1998) 523 U.S. 303, 312-313 ["A fundamental premise of our criminal trial system is that 'the *jury* is the lie detector' [citation]"], original italics.) By interfering with that function, the trial court infringed Gomez's right to a jury trial and his right to a reliable determination of guilt. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.)

And "observation of demeanor by the trier of fact" is a crucial element of the right of confrontation. (*Maryland v. Craig* (1990) 497 U.S. 836, 846; see *Dutton v. Evans* (1970) 400 U.S. 74, 89 (plurality opinion) ["[T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the [testimony]"].) The trial court's interference with the jury's assessment of credibility thus also compromised Gomez's Sixth Amendment right to confrontation. (See also Cal. Const., art. I, § 15.)

C. The Court's Instruction Also Violated Gomez's Right to A Unanimous Jury Verdict.

Finally, while the judge did tell jurors that notes would be for their own "personal use" (8RT 1298, 1301), it did not forbid jurors whose notes

may have turned out to be inadequate from relying on the notes of others. While the court did tell jurors they "shouldn't" rely on the memories of others, it implied that they would be forced to do so if their notes turned out to be inadequate: "If you don't, *you'll have to rely on other people to refresh your memory*, and you shouldn't do that. It should be your own memory that you can recall the things that are important to you." (8RT 1299 [emphasis added];[86] compare, e.g., *People v. Whitt*, *supra,* 36 Cal.3d at pp. 747-748 [court instructed jurors that if "you do not recall exactly as to what a witness might have said or you disagree, for instance . . . we can reread that transcript . . . back to you. Remember that aspect of it."]; see *People v. Butler* (1975) 47 Cal.App.3d 273, 281 [where readback was refused, noting risk that "one or more of the jurors, in agreeing to the verdicts, may have been caused by the court's rebuff to blend a degree of speculation or surmise into that part of the testimony that they had heard and understood, or — even more costly to the judicial process — may have surrendered their independent judgment to those who professed better hearing and

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[86] Under the conditions the court set, jurors who lacked an independent recollection would indeed have to rely on others, at least in the first two days of deliberations, when the court essentially prohibited readbacks. (See 29RT 4176-4177; 8RT 1298; see Subsection D., below.)

memory"].)[87]

By implying that jurors who did not take adequate notes would have to rely on those who had (see 8RT 1299), the trial court violated Gomez's right to a unanimous jury verdict. (Cal. Const. art. I, §§ 7, 15, 16; *People v. Superior Court of Orange County* (1967) 67 Cal.2d 929, 932 [state constitutional guarantee]; but cf. *People v. Solomon, supra,* 49 Cal.4th at p. 823 [noting that Pen. Code § 1137 may appear to contemplate the "free exchange of notes among jurors"]; see *id.* at p. 824 [approving the instruction that "if you should have a conflict in the jury room . . . as to what testimony was on a particular issue, you can use the notes to refresh your memory; but if that conflict is a difficult one to resolve, don't say, well, my notes say this and therefore it's so"]; *Ballew v. Georgia* (1978) 435 U.S. 223, 243; p. 314, below; U.S. Const., 14th Amend.)

More, jurors who took notes so assiduously that they failed to observe the witnesses as they testified would be forced to rely on those jurors — if there were any — who had observed the witnesses, with no readback possible to cure the harm. For the same reasons, this also violated

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[87] In *People v. Hillhouse, supra,* this Court questioned whether *Butler* and *People v. Litteral* (1978) 79 Cal.App.3d 790, 796-797, properly allowed the defendant to assert the jury's right to readback. (*People v. Hillhouse, supra,* 27 Cal.4th at p. 505.) The Court went on to note, however, that on appeal, a defendant may assert that the court erred in *instructing* the jury regarding readback. (*Ibid.*)

Gomez's right to a unanimous jury verdict.

D. The Court Erroneously and Unconstitutionally Told Jurors It Would Be "Infuriated" By Requests For Readback Early In Deliberations and Effectively Prohibited Any Readback of Testimony During the First Two Days of Deliberations.

The trial court also erred in discouraging readbacks of testimony — first, by informing jurors before trial began that the thing that "infuriates" it most about jurors is when they request readbacks early in deliberations (12RT 1298), and then by altering the standard instruction on readbacks by removing the instruction that jurors have the right to readback of testimony (29RT 4166-4167; see 3CT 890-891)[88] and informing jurors, as they began deliberations on a Thursday, that there would be no readback until, at the earliest, the following Monday (29RT 4176-4177).

Penal Code section 1138 grants jurors the right to have testimony

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[88] The standard instruction CALJIC No. 17.43 informs jurors that they have the right to readback of testimony:

> If there is any disagreement as to the actual testimony, you have the right, if you choose, to request a readback by the reporter. You may request a partial or total readback, but any readback should be a fair presentation of that evidence. If an readback of testimony is requested, the reporter will delete objections, rulings, and sidebar conferences so that you will hear only the evidence that was actually presented.
>
> Please understand that counsel must first be contacted, and it may take time to provide a . . . [readback]. Continue deliberating until you are called back into the courtroom.

read back:

> After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, . . . the information required must be given . . . .

Case law supports the trial court's ability to caution jurors that readbacks take time. (See, e.g., *People v. Anjell* (1979) 100 Cal.App.3d 189, 203, disapproved on other grounds, *People v. Mason* (1991) 52 Cal.3d 909, 942-943.) But nothing allows the court to refuse to provide a readback. (See *People v. Henderson* (1935) 4 Cal.2d 188, 193-194 [reversing where trial court failed to have read back all the testimony jurors had requested]; *People v. York* (1969) 272 Cal.App.2d 464, 465-466 [due process violated where bailiff told jurors that transcript of testimony they requested was not available]; *People v. Litteral*, *supra,* 79 Cal.App.3d at p. 793 [reversing where court told jurors: "The reporter who took all of the testimony in the case is ill today, and there's just no way we can do it. . . . You will just have to rely on your memories. . . . there is just no way I can get the testimony for you"]; see also *People v. Burgener* (2003) 29 Cal.4th 833, 880 ["[A]ny juror may request a readback of testimony," though "request may not be used solely to vex or annoy the other jurors or to delay the proceedings"]; *People v. Anjell*, *supra,* 100 Cal.App.3d at p. 203 [no error where court told jurors of time involved for readback but "did not attempt to discourage a

reading, and in fact emphasized that the jurors were 'entitled' to have the testimony reread if they felt it was needed"]; see also *People v. Solomon*, *supra,* 49 Cal.4th at pp. 824-825 [CALJIC No. 17.48 did not discourage readback; court assured jurors that "there wouldn't be any problem rereading any testimony to you should you need that done" and "it's not going to be any serious problem for us to read back any testimony that you may need during the course of your deliberations"].)

The trial court's instructions violated Penal Code section 1138. This Court has explained that "[a]lthough the primary concern of section 1138 is the *jury*'s right to be apprised of the evidence, a violation of the statutory mandate implicates a defendant's right to a fair trial conducted 'substantially [in] accord[ance with] law.'" (*People v. Frye*, *supra,* 18 Cal.4th at p. 1007, original italics, quoting *People v. Weatherford* (1945) 27 Cal.2d 401, 420.)[89]

It was for the jurors — not the court — to determine whether there was a disagreement that required resolution by means of a readback. And there is no reason why such a disagreement would be any less likely to arise during the first few days of deliberations than later.

The error, both alone and in conjunction with the court's insistence

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[89] *People v. Frye, supra,* 18 Cal.4th 894, has been disapproved on other grounds by *People v. Doolin*, *supra,* 45 Cal.4th at p. 421, fn. 22.

on notetaking, violated Gomez's constitutional right to due process of law, his right to a jury trial, his right to confront the witnesses against him, his right to counsel, his right to present a defense, his right to a reliable determination of guilt, and his right to a unanimous verdict. To be sure, some courts have held that the refusal to allow readback does not amount to a federal constitutional violation — absent a showing of prejudice. (See, e.g., *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 819 [no federal constitutional error when trial court asked jury "not to abuse the right to have the court reporter read back testimony"], overruled on other grounds by *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677, 685.) This case is different, as the court's instructions to the jurors interfered with the jury's assessment of credibility — as jurors afraid to "infuriate" the judge by requesting readback were prone to focus on their notes at the expense of their evaluation of the witnesses' demeanor — and thus infringed Gomez's right to a jury trial, to a reliable determination of guilt, to confrontation, and to a fair trial and to due process of law. (*Taylor v. Illinois* (1988) 484 U.S. 400, 430 fn. 5; U.S. Const., 5th, 6th, 8th, & 14th Amends.; *Maryland v. Craig*, *supra,* 497 U.S. at p. 846; see *Dutton v. Evans*, *supra,* 400 U.S. at p. 89 (plurality opinion); see also Cal. Const., art. I, §§ 7, 15, 16, & 17.)

Finally, by discouraging readback — and effectively foreclosing it

in the first few days of deliberations — the court forced jurors who did not take adequate notes to rely on those who had, or to resort to speculation, thus violating Gomez's right to a jury trial, to a reliable determination of guilt or innocence, to a unanimous jury verdict, and to a fair trial and to due process of law. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17; *People v. Superior Court of Orange County, supra,* 67 Cal.2d at p. 932; *People v. Waidla, supra,* 22 Cal.4th at p. 735 [speculation is not evidence].) Though the court had told jurors they "shouldn't do that," it implied they would have to if they did not take enough notes (8RT 1299), and indeed, in the first days of deliberation it left them no other option. (29RT 4176-4177.)

E. Reversal is Required.

Harmless error analysis does not apply; the errors here are of the type that "def[ies] analysis by 'harmless-error' standards" because they permeated the trial. (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 148-149 & fn. 4.) When the effect of an error is "difficult[] [to] assess[]" (*ibid.*), "difficult to prove" (*Waller v. Georgia* (1984) 467 U.S. 39, 49, fn. 9), or "cannot be ascertained" (*Vasquez v. Hillery* (1986) 474 U.S. 254, 263), the error is structural. (*United States v. Gonzalez-Lopez, supra,* 548 U.S. at pp. 148-149 & fn. 4.)

Beyond the assumption that jurors follow the trial court's instructions — an assumption this Court makes routinely (see, e.g., *People v. Bonin* (1988) 46 Cal.3d 659, 699,[90] citing *Delli Paoli v. United States* (1957) 352 U.S. 232, 242, overruled on other grounds in *Bruton v. United States, supra,* 391 U.S. at pp. 126-137 — and beyond the fact that jurors here did heed the court's exhortation to take notes,[91] it is difficult to assess the extent to which the jurors were hindered in their ability to judge the witness's credibility or were forced to rely on fellow jurors' notes or even mere speculation. Nonetheless, there is a clear risk that jurors keen on pleasing the judge by studiously recording the proceedings in notes (or appearing to do so) — or at least not "discourag[ing]" him by "just sitting there with their notes in their laps and . . . looking at the witnesses" (8RT

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[90] *Bonin* was overruled on other grounds in *People v. Hill, supra,* 17 Cal.4th at p. 823 & fn. 1.

[91] As noted above, the court referred to the notes jurors had taken in informing them that readback would not be provided in the first two days of deliberations. (29RT 4176-4177; 29RT 4167 [court addresses jurors: "During the course of the trial you have been attentive and many of you have taken notes."]; see also 26RT 3804 [prosecutor addressing jurors during summation: "And let me say to you, because I see some of you writing, that his honor will be instructing you with regard to the law, and . . . you will have the written jury instructions in the jury room. So you don't need to write down the instructions and you don't need to write down the law. You will have that with you in the jury room in written form, and it might be better for you instead of trying to write down the law . . . it might be better if you just listened."]; 28RT 3976.)

1300) — may well have missed seeing a witness's eyes dart nervously, his body shift in the chair uncomfortably, or her mouth take on a slight smirk — to name just a few of the nonverbal cues jurors rely upon in doing what is uniquely their job.

And jurors loathe to "infuriate[]" the judge by requesting readbacks early in deliberations may choose to resolve disagreements in ways "costly to the judicial process": They may have "blend[ed] a degree of speculation or surmise into that part of the testimony that they had heard and understood," or even worse, "may have surrendered their independent judgment to those who professed better hearing and memory" (*People v. Butler*, *supra,* 47 Cal.App.3d at p. 281) — or better notes.

Because of this potentially grave harm — which cannot be ascertained or proven — the errors should be deemed structural, and this Court should reverse.

Even should this Court conclude that harmless error analysis applies, the prosecution cannot meet its burden of proving the constitutional errors at issue here, individually or cumulatively, harmless beyond a reasonable doubt (*Chapman v. California*, *supra,* 386 U.S. at pp. 24-26), given the court's instruction, the fact that jurors followed it (26RT 3804; 29RT 4167; 29RT 4176-4177), and the circumstances of this case.

The notetaking instructions, as set forth above, compromised the jurors' ability to judge witness credibility — an essential task in this trial, where many of the prosecution's important witnesses were beset by serious credibility questions. (See, e.g. 22RT 3219-3228; 23RT 3364-3373; 24RT 3465-3476 [Witness #1 was a heroin addict and either a schizophrenic or someone who defrauded the government by claiming to be schizophrenic]; 17RT 2657-2667; 18RT 2769-2774; 18RT 2784-2786; 16RT 2577-2583 [though he initially denied it in his sworn testimony, Witness #2 later acknowledged he was a gang member; he testified in exchange for an agreement that his sentence in another case would be no more than six years]; 12RT 1920-1922, 1926-1931 [Witness #3 was a drug dealer's wife who pawned stolen jewelry in Las Vegas].)

Whether these witnesses — particularly Witness #1 and Witness #3, who provided the only testimony implicating Gomez in the crimes against Rajandra Patel (see Argument II.B.2., above) — were telling the truth was the crucial issue in this case, and the court's error here went to the heart of the jurors' ability to determine it reliably.

Another prosecution witness, William Owens, provided surprise trial testimony identifying Gomez for the first time as a man he had seen running near the scene of the Luna homicide. (14RT 2187, 2204; 14RT 2191-2204;

see 14RT 2162.) Assessment of Owens' demeanor — and not merely what he said — would have been crucial to whether jurors credited his identification, yet the court's errors here elevated rote recording of what he said over careful observation of his demeanor and attitude.

Aside from the credibility problems that beset the prosecution's witnesses, the record also shows that "some" or "many" of the jurors did take notes. (See 29RT 4167 [court instructing "many of you have taken notes"], 3CT 890-891, 29RT 4176-4177 [court instruction: "[y]ou've got notes from the trial that you've taken"]; 26RT 3804 [prosecutor remarking that some of the jurors are taking notes during closing argument].)[92]

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[92] *People v. Thompson* (1988) 45 Cal.3d 86, 120, and *People v. Ghent* (1987) 43 Cal.3d 739, 758, in which the court failed to give a cautionary instruction about notetaking, are distinguishable. In *Thompson*, unlike in this case, the jury "exercised its prerogative to request that substantial amounts of testimony . . . be reread." (*People v. Thompson, supra,* 45 Cal.3d at p. 120.) In *Ghent*, jurors were reminded by counsel to request readback in case of any discrepancy — in contrast to the court's stern warning about doing so in this case. (See *People v. Ghent, supra,* 43 Cal.3d at p. 758.)

Most important, however, the nature of the error in those cases was different. Failure to give a cautionary instruction, at issue in *Thompson* and *Ghent*, of course, is quite a different matter from affirmatively insisting that jurors do that which requires caution. In *Thompson*, there was no indication that "jurors appeared not to be paying attention to proceedings as they took notes on certain portions of testimony." (*People v. Thompson, supra,* 45 Cal.3d at p. 120.) Here, by contrast, the trial court's instructions themselves — which, unlike the mere failure to caution jurors in *Thompson*, explicitly condemned the idea of jurors "just sitting there with their notes in their laps

(continued...)

Finally, though the trial spanned three months and more than 50 witnesses testified, several taking the stand more than once, the jurors requested only one very brief readback. (29RT 4285.) That readback, significantly, related to the Escareno homicide, on which the jury deadlocked. (29RT 4307-4308; 29RT 4339.) Again, though it is impossible to know whether jurors not so roundly discouraged from seeking readbacks would have sought more of them, it is hardly unlikely in a case of this length and complexity. (Compare, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 596-597, 633 [in case involving two murder counts, jury requested three readbacks]; see also *People v. Cox* (2003) 30 Cal.4th 916, 926, 968-969 [in case involving three murder counts, jury requested readback that consumed two days], disapproved on other grounds in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.)

Given these circumstances, and given that adherence to the court's instructions would be highly likely to impair jurors' assessment of witness credibility and to skew deliberations, the prosecution cannot show that the verdicts in this case — particularly the Patel and Luna cases, which were

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[92](...continued)
and they're looking at the witnesses" (8RT 1300) — along with the presumption that jurors follow the court's instructions, provide an indications of prejudice, bolstered by the other circumstances of the case, discussed above.

characterized by singularly weak evidence (see Arguments I & II, above) — were "surely unattributable to" the errors at issue here, individually or in combination. (*Sullivan v. Louisiana*, *supra,* 508 U.S. at p. 279.)

Even under the *Watson* standard, reversal is required. There is a "reasonable chance, more than an abstract possibility," that in the absence of this error, the result in this case would have been different. (*College Hospital Inc. v. Superior Court*, *supra,* 8 Cal.4th at p. 715, citing, inter alia, *People v. Watson*, *supra,* 46 Cal.2d at p. 837.)

As the Supreme Court has put it, a trial judge's "lightest word or intimation is received with deference, and may prove controlling." (*Quercia v. United States, supra,* 289 U.S. at p. 470.) Its more heavy-handed words are all the more likely to influence jurors. By all indications, the judge's exhortations did influence the jurors here. Because those exhortations threatened to undermine the jurors' foremost and most crucial responsibility and power in a trial — to observe witnesses and judge their credibility — and because the credibility of the prosecution's witnesses was both seriously in doubt and crucial to the outcome, it is reasonably probable that in the absence of this error, the result would have been more favorable to Gomez. (*College Hospital Inc. v. Superior Court*, *supra,* 8 Cal.4th at p. 715, citing, inter alia, *People v. Watson*, *supra,* 46 Cal.2d at p. 837; see also

People v. Bowers, *supra,* 87 Cal.App.4th at p. 736 [mistrial is more favorable result than conviction]; *People v. Soojian, supra,* 190 Cal.App.4th at pp. 520-524.)

Finally, at the very least, Gomez's death sentences must be reversed, for the errors seriously compromised the reliability of both the guilt and penalty phase determinations, in violation of the Eighth Amendment and its state constitutional counterpart. There is a reasonable possibility (*People v. Hamilton* (2009) 45 Cal.4th 863, 917; *People v. Brown, supra,* 46 Cal.3d at pp. 447-449), to say the least, that the court's errors hampered jurors' assessment of credibility and affected the verdicts.

XI.

THE TRIAL COURT ERRONEOUSLY AND UNCONSTITUTIONALLY INSTRUCTED JURORS DURING VOIR DIRE REGARDING THE EXCHANGE OF TESTIMONY FOR LENIENCY, EFFECTIVELY TELLING JURORS THAT PROSECUTION WITNESSES WERE LESSER PARTICIPANTS IN THE CHARGED CRIMES AND THAT THE DEFENDANTS WERE THE "GREATER CULPRITS"

During voir dire, the trial court, in its explanation of the prosecution practice of exchanging leniency for testimony, identified prosecution witnesses as lesser "culprit[s]," in comparison with the defendant, the "greater culprit, the person that's done greater wrong . . . the killer . . . ." (6RT 951.) This error prejudiced the jurors' consideration of the cases against Gomez, which relied heavily on the testimony of a prosecution witness who was an accomplice as a matter of law to one of the charged murders and an accessory after the fact to another, but who had not been charged with any crime (19RT 2909-2913; 19RT 2931-2934; see 12RT 1870-1872), as well as on the testimony of other assorted witnesses potentially subject to prosecution, yet not prosecuted, for various crimes. (E.g., 16RT 2577-2583.)

A. The Court's Instructions During Voir Dire.

The jury questionnaire asked: "How do you feel about the situation in which the prosecution decides not to prosecute one person in exchange

for that person's testimony against another person?" (E.g., 4CT 915.) During voir dire, the court addressed several prospective jurors, including at least two jurors who eventually sat, regarding questionnaire answers that indicated some discomfort with the idea. All of the jurors who eventually sat heard at least one version of the court's explanation of the prosecution's exchange of testimony for leniency, which referred to a hypothetical in which the prosecution (which the court often referred to as "we"), lacking sufficient evidence to convict a bank robber who had killed during the course of the robbery, decided not to prosecute a lesser participant in the robbery in order to obtain that lesser participant's testimony. The court's scenario effectively told jurors that a prosecution witness who has obtained leniency is necessarily less culpable, while the individual being prosecuted — despite an acknowledged insufficiency of evidence, necessitating the need for the testimony of the allegedly less culpable participant — was the "greater culprit," "the killer." (6RT 950-951.)

The court's extended colloquy with the juror who became Juror 11 is illustrative:

> COURT Okay. Page 12, and this was without an explanation of the situation where the prosecution grants immunity of some kind, either a lesser penalty or total immunity to a witness who is involved in a crime in order to get somebody else — testimony against somebody else.

You said part of the justice system, you don't like it or understand it.

Did it make some sense to you as I explained the bank robbery situation, where law enforcement is more concerned with the guy that went in and killed someone than the man that was standing outside as a lookout so they give some kind of immunity, maybe total immunity to the guy outside in order to add to the evidence against the person inside so they get the greater culprit, the person that's done greater wrong?

Any problem with that concept?

PROSPECTIVE JUROR No. After you've explained it, I understand it much better.

COURT It would be bad if we did it the other way around.

PROSPECTIVE JUROR Oh, yeah.

COURT Grant immunity to the killer to get the guy outside who didn't do it.

PROSPECTIVE JUROR Right.

(6RT 950-951; see also, e.g., 5RT 775-776, 5RT 834-835.)

In a later colloquy with a prospective alternate juror, in the presence of all the sworn jurors (7RT 1088-1089), the trial court then went even further, not merely "explain[ing]" the process of exchanging testimony for leniency, but taking issue with the prospective juror's statement that he thought it was unfair:

COURT Page 12, a question that you didn't answer about the prosecution granting leniency of some sort, immunity

totally or a lesser sentence to one person in order to get that individual's testimony against another participant in the same crime.

The example I gave to you, of course, that the other jurors haven't heard out in the audience is two individuals decide to rob a bank. One stands as a guard outside, a lookout to see if the police are coming to warn the man that goes inside. He goes in to rob the bank, and in the process kills one of the tellers, so he's charged and actually both are liable for bank robbery and murder.

But the prosecution doesn't have enough evidence to prosecute the person that went in to identify that person. There's some evidence but not enough to proceed to trial, but they do have evidence on the person that stood as lookout.

They decide to grant some immunity to that person, a lesser sentence or maybe total immunity in order to get that person's testimony to add to what they've got to find out who the killer was, who the person that pulled the trigger was inside the bank.

Do you have any problem with that kind of a concept, granting immunity to one to get somebody who is more involved?

PROSPECTIVE ALTERNATE I don't think it's fair, but no, I don't.

COURT What's unfair about it? In the situation I gave, obviously if we gave immunity to the guy that went into the bank and killed somebody in order to get the lookout, that wouldn't sound right.

But this is the other way around. The man outside is a lookout. Maybe he even told the guy that went in don't even take a loaded gun, I don't want to

be involved in anything that sounds like a murder. I know I'm responsible, but do not take a gun in.

So he does everything he can to prevent that guy going into the bank and killing somebody, yet it happens anyway. He's still responsible.

Do you see a problem with granting immunity to that man in order to get some evidence against the other person?

PROSPECTIVE ALTERNATE In that case, no.

COURT In the other case, in the former case then what was unfair about it that you felt?

PROSPECTIVE ALTERNATE Because I felt that both, I mean in any part you're still — he's still part of the crime.

COURT True. But the point is that there is insufficient evidence to establish who the person is that went in to the bank and did the killing, so the choice is we'll prosecute the guy that was the lookout and let the other guy go because we can't prosecute him or give that person some immunity in order to get the testimony that's necessary to establish who it was that actually did the killing. Physically did the killing.

Does that sound right to you or still wrong?

PROSPECTIVE ALTERNATE Yes.

(7RT 1096-1098.)

B. The Trial Court's Explanation of Prosecution Testimony Obtained By Leniency Violated Gomez's Rights Under State Law and the Federal Constitution.

The trial court's explanation to the jurors regarding prosecution

witnesses who have been granted leniency, or who have not been prosecuted at all, improperly informed jurors that the prosecution would only grant leniency to the less culpable party involved in a crime — that it would always accurately identify the less culpable parties and the real "killer[s]" and prosecute and forbear from prosecuting accordingly. As the court told Juror 11: "It would be bad if we did it the other way around . . . Grant immunity to the killer to get the guy outside who didn't do it." (6RT 951.) The implication — only clearer and more prejudicial because of the court's use of "we" — was that it was not done the "other way around" — that the prosecution would not prosecute a less culpable party using testimony from a more culpable party. As the court stated again in comments made in the presence of all the seated jurors, "*obviously* if we gave immunity to the guy that went into the bank and killed somebody in order to get the lookout, that wouldn't sound right. But this is the other way around." (7RT 1096-1098 [emphasis added].)[93]

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[93] The "hypothetical" nature of the court's comments does not render them any less improper, for the hypothetical was meant to illustrate precisely the erroneous, and prejudicial point: that leniency would only be granted to less culpable parties, in order to prosecute the more culpable.

Indeed, the court later, in colloquy with the attorneys, acknowledged making that assumption in this case. (See 8RT 1274 ["I assume [Witness #1 is] less involved than they are. That was the hypothetical I gave the jurors about the lookout outside the bank versus the one that went in and killed

(continued...)

In this argument with the prospective alternate juror, the court made clear that it believed the exchange of testimony for leniency was not, as the juror thought, unfair, precisely because, while there might be "insufficient evidence," the prosecution nonetheless knew who the actual killer was, and thus made the choice to give an accomplice witness leniency in order to avoid "let[ting] [a guilty person] go because we can't prosecute him . . . ." (7RT 1098.) Of course, there might be "insufficient evidence" to establish that someone was the actual killer because he was not, in fact, the actual killer. The court's comments, however, did not admit of this possibility, instead communicating that jurors should trust the prosecution to accurately and fairly distinguish the more culpable from the less culpable, and supplement insufficient evidence with testimony obtained in exchange for leniency in order to put the real killer on trial.

The very question jurors are supposed to answer at the end of a trial, however, is whether the defendant was the real "killer" — and whether the testimony of prosecution witnesses involved in the homicide truthfully and accurately implicated the defendant, or instead constituted an attempt to shift blame. (See *People v. Guiuan* (1998) 18 Cal.4th 558, 571-572

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[93](...continued)
somebody . . . ."].)

(Kennard, J., concurring) [accomplices have a "powerful built-in motive to aid the prosecution in convicting a defendant, *regardless of the defendant's actual guilt or level of culpability*, in the hope or expectation that the prosecution will reward the accomplices' assistance with immunity or leniency"], italics added; see also *Williamson v. United States* (1994) 512 U.S. 594, 607-608 (Ginsburg, J., concurring) ["A person arrested in incriminating circumstances has a strong incentive to shift blame or downplay his own role in comparison with that of others, in hopes of receiving a shorter sentence and leniency in exchange for cooperation"].) The trial court's comments here essentially answered the question of who the real "killer" was — before the trial even started: The prosecution witnesses who would incriminate the defendants would be the "less culpable" parties, the defendants the more culpable parties; it would not be done the other way around.

Guilt-assuming hypotheticals are improper, and they violate due process and undermine the presumption of innocence when employed by a prosecutor cross-examining a defense character witness. (*United States v. Shwayder* (9th Cir. 2002) 312 F.3d 1109, 1121-1122, amended on denial of rehearing, *United States v. Shwayder* (9th Cir. 2003) 320 F.3d 889; U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15.) When the assumption

of guilt comes from the trial judge, rather than the prosecutor, the damage to the presumption of innocence and the due process violation are all the more acute. As this Court put it long ago:

> "The court should not directly or indirectly assume the guilt of the accused, nor employ equivocal phrases which may leave such an impression. The experience of every lawyer shows the readiness with which a jury frequently catch at intimations of the court, and the great deference which they pay to the opinions and suggestions of the presiding judge, especially in a closely balanced case . . . A word, a look, or a tone may sometimes in such case be of great or even controlling influence. A judge cannot be too cautious in a criminal trial in avoiding all interference with the conclusions of the jury upon the facts; for of this matter under our system they are the exclusive judges." . . . *"Instructions should not directly or indirectly assume or hypothetically suggest the guilt of the defendant."*

(*People v. Matthai* (1902) 135 Cal. 442, 448, italics added, quoting *People v. Williams* (1860) 17 Cal. 142, 147.)

A trial judge's "lightest word or intimation is received with deference, and may prove controlling." (*Quercia v. United States, supra,* 289 U.S. at p. 470.) The court's argumentative exchange with the prospective alternate juror (7RT 1096-1098) was much more than a light intimation. It exacerbated the error, for it not only communicated that the court believed that the prosecution only granted leniency to obtain the testimony of less culpable parties, but also communicated that the judge himself approved of the practice because it was "necessary to establish who

it was that actually did the killing" (7RT 1098), again cementing the idea that the prosecution — and perhaps the judge, who used the term "we" — knew who the killer was, even if the evidence against the killer was insufficient.

The court's statements also constituted improper comment on the evidence. (See *People v. Slaughter* (2002) 27 Cal.4th 1187, 1217-1218; *People v. Sturm* (2006) 37 Cal.4th 1218, 1230-1232; *Quercia v. United States, supra,* 289 U.S. at p. 470; U.S. Const., 8th & 14th Amends.) Article VI, section 10 of the California Constitution provides, in relevant part: "The court may make any comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause." (See also *People v. Slaughter, supra,* 27 Cal.4th at p. 1217.) Any such comment must be "accurate, temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power." (*People v. Slaughter, supra,* 27 Cal.4th at pp. 1217-1218, quoting *People v. Rodriguez* (1986) 42 Cal.3d 730, 766.)

In *People v. Sturm, supra,* 37 Cal.4th at pp. 1230-1232, this Court

held that the trial court erred when, during voir dire, it told jurors that premeditation was a "gimme" and that that issue was "all over and done with." The Attorney General had argued that the trial court's comments did not refer to Sturm's case, but were generic. The Court rejected the Attorney General's argument, noting "[n]either of the trial judge's comments specified that he was speaking in hypothetical terms." (*Id.* at p. 1231.) Here, to be sure, the trial court spoke in hypothetical terms about a bank robbery and murder. The court's comments, however, strongly implied that its hypothetical — in which the prosecution gives a lesser party leniency in exchange for testimony — was the way "we [do] it." (6RT 950-951.) Thus, the court's comment was tantamount to an improper comment on the evidence that would be presented at trial.

The error violated Gomez's constitutional rights. In instructing the jurors, during voir dire, in a manner that assumed the defendants' guilt and impliedly commented on the evidence that would be presented, the court not only undermined the presumption of innocence, but also aligned itself with the prosecution, vouching for its witnesses; usurped the jury's power to determine witness credibility; and reduced the prosecution's burden of proof beyond a reasonable doubt, all in violation of Gomez's right to a fair trial, to an impartial jury, to due process of law, and to a reliable

determination of guilt in a capital case. (See U.S. Const., 5th, 6th, 8th, and 14th Amends.; Cal. Const. art. I, §§ 7, 15, 16, & 17; see *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474 & fn.6; *In re Winship, supra,* 397 U.S. at p. 363; *Yates v. Evatt* (1991) 500 U.S. 391, 400-401, disapproved on other grounds in *Estelle v. McGuire, supra,* 502 U.S. at p. 72, fn. 4; *United States v. Rockwell* (3d Cir. 1986) 781 F.2d 985, 991 [instructions which "improperly invaded the province of the jury to determine the facts and assess the credibility of the witnesses . . . [were] sufficiently misleading to deprive [defendant] of a fair trial"]; *United States v. Stephens* (9th Cir. 1973) 486 F.2d 915, 917 [judicial comment on the evidence may violate right to fair trial]; *Beck v. Alabama, supra,* 447 U.S. at p. 638 .)[94]

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[94] Though counsel did not object to the court's erroneous statements during voir dire, this Court does not deem forfeited any claim of instructional error affecting a defendant's substantial rights. (*People v. Dunkle* (2005) 36 Cal.4th 861, 929, disapproved on other grounds, *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.) This includes instructions during voir dire. (*Id.* at pp. 928-929.) This is not a case where the trial court's explanations during voir dire were given in "shorthand," putting the burden on Gomez to request a fuller explanation. (Compare *People v. Edwards* (1991) 54 Cal.3d 787, 841.) Nor was this a case where the trial court made "comments" to familiarize prospective jurors with a general idea of the nature of the proceedings in a capital case. (*People v. Romero* (2008) 44 Cal.4th 386, 423.) Rather, the court's explanations — more "longhand" than "shorthand" — were erroneous and prejudicial, violating Gomez's substantial rights. (Pen. Code § 1259; see *People v. Johnson* (2004) 115 Cal.App.4th 1169, 1172 [instruction during voir dire that reduced prosecution's burden of proof violated defendant's substantial rights]; see also *People v. Johnson* (2004) 119 Cal.App.4th 976, 984-985;

(continued...)

C. Reversal Is Required.

While erroneous jury instructions given during voir dire may sometimes be deemed harmless because they are supplanted by correct instructions at the end of the trial (see *People v. Dunkle, supra,* 36 Cal.4th at p. 929), no correct instructions ever supplanted the court's erroneous explanation here. The trial court's final instructions did inform jurors that they were the sole judges of credibility, and suggested several factors that might tend to prove or disprove truthfulness; they also stated that the judge had not intended to suggest what jurors should find to be the facts, or that he believed or disbelieved any particular witness. (3CT 874-875, 890; 29RT 4118-4123, 4166.) They also, in the standard language of CALJIC No. 3.18,

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[94](...continued)
see also *People v. Brown* (2003) 31 Cal.4th 518, 539, fn. 7; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1074-1075.) When a trial court chooses to instruct the jurors in an area, it must do so correctly. (*People v. Castillo, supra,* 16 Cal.4th at p. 1015.)

More, even if the instruction is viewed as an implied comment on the evidence, no objection was required. (See *Delzell v. Day* (1950) 36 Cal.2d 349, 351; Cal. Code Civ. Pro. § 647; see also *People v. Slaughter, supra*, 27 Cal.4th at p. 1217 [assuming without deciding that improper comment on the evidence may be raised on appeal despite lack of objection].)

While this Court should resolve any close and difficult preservation questions in favor of the defendant (*People v. Ayala, supra,* 23 Cal.4th at p. 273), should this Court nonetheless conclude that counsel failed to preserve this issue for review, Gomez believes such ineffective assistance of counsel would be more appropriately addressed in habeas corpus proceedings (*People v. Mendoza Tello, supra,* 15 Cal.4th at pp. 266-267).

informed jurors that they should view Witness #1's testimony with "care and caution and in light of all the evidence in the case." (3CT 881; 29RT 4137.)

But nothing in the court's final instructions corrected the erroneous statement that the prosecution only granted leniency to less culpable parties, in order to prosecute more culpable parties. Jurors operating under that assumption might well approach accomplice testimony with care and caution, but they are still operating under an erroneous assumption that unfairly credits the prosecution's witnesses, assumes the guilt of the defendants, and diminishes the prosecution's burden of proof, in violation of the federal constitutional rights to jury trial, and to a fair trial and due process of law. (See U.S. Const., 5th, 6th and 14th Amends.; Cal. Const. art. I, §§ 7, 15, & 16.) And no instruction warned jurors that the testimony of prosecution witnesses who were not identified as accomplices but who nonetheless had some involvement or were potential accessories, had to be viewed with caution.

The prosecution cannot prove this constitutional error harmless beyond a reasonable doubt; it cannot show that the verdicts obtained in this case were "surely unattributable" to the error. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279; see *Chapman v. California, supra,* 386 U.S. at p. 24.)

The prosecution relied heavily on the testimony of Witness #1, an accomplice to the Escareno homicide and, as the prosecution acknowledged, an accessory after the fact to the Patel homicide. (16RT 2564; see 9RT 2909-2913; 19RT 2931-2934; 12RT 1870-1872.) His testimony was unfairly bolstered by the assumption that he was the less culpable party. Defense efforts to suggest that he may have been the actual killer of Jesus Escareno (see, e.g., 22RT 3263-3270; 25RT 3712-3173; 27RT 3921-3923) were undermined by the assumption, made for jurors at the outset of the case, that the prosecution would not grant leniency to an actual killer in order to prosecute an accomplice. The multiple jury questions regarding the consideration of accomplice testimony, and the jury's eventual deadlock on the Escareno charges suggests the closeness of the case in this respect. (29RT 4338-4340; see 4SCT 745.)

While the jury deadlocked on Gomez's guilt of the Escareno crimes, Gomez was nonetheless prejudiced at the penalty phase because jurors who believed him guilty of that murder were allowed to consider it at the penalty phase as evidence weighing in favor of a death sentence. (See Argument XVIII, below.)

The error prejudiced Gomez as to the Patel counts as well. Witness #1, an acknowledged accessory after the fact, admitted burning and

abandoning Patel's car. (19RT 2931-2934; see 12RT 1870-1872; see also 16RT 2563-2565.) One might well wonder whether Witness #1 understated his own involvement in the crime and fabricated the evidence he provided regarding Gomez's involvement. (*People v. Tobias* (2001) 25 Cal.4th 327, 331; see *People v. Guiuan, supra,* 18 Cal.4th at pp. 574-575 (Kennard, J., concurring); *Williamson v. United States, supra,* 512 U.S. at pp. 607-608 (Ginsburg, J., concurring).) Yet jurors told by the court that the prosecution granted leniency only to the less culpable parties involved in a crime, in order to prosecute the more culpable party, would not tend to consider such doubts reasonable.

Witness #3, the only other witness who linked Gomez to the Patel crimes, was a drug dealer's wife who had been arrested with her husband after a large amount of cocaine was found in their bedroom. (12RT 1928-1931; 13RT 1972-1973.) When she was arrested, a pawn slip for Patel's jewelry was found in her purse. (12RT 1928.) Witness #3 admitted pawning Patel's jewelry, telling jurors that her husband had obtained it from Ruben Gomez. (12RT 1913-1914, 1979-1920.) This witness, even if not an accessory after the fact, also had a clear incentive to minimize her own role — and her husband's — in the Patel case. Yet jurors told by the court that the prosecution granted leniency only to less culpable parties, in order to

prosecute the more culpable party, would not tend to consider that witnesses such as Witness #3 might be lying or shading the truth about their own role, or the defendant's, in the charged crimes.

And the prosecution case against Gomez in the O'Farrell Street homicides also rested heavily on the testimony of Witness #1 — as set forth above, an accomplice to one murder and an accessory to another — and of Witness #2, who was, as the prosecution put it, not a "public spirited person" and who would not have testified had he not been facing prosecution in another case. (See 27RT 3849-3851.) The court's instruction unfairly bolstered the testimony of these witnesses and assumed Gomez's guilt.

Indeed, the court's error affected the jurors' consideration of all the charges, for it implied that whether or not a case involved an accomplice or some less culpable party, the prosecution would know who had actually perpetrated a crime, and could be trusted to charge the right person, even if it could not muster sufficient evidence to support the charge. This insidious implication unfairly bolstered the prosecution with respect to all the charges Gomez faced — particularly the Patel and Luna charges, supported by only extremely weak evidence. (See Arguments I & II, above.) The prosecution cannot show beyond a reasonable doubt that this error did not contribute to

the verdicts.

Even should this Court conclude that the error merely implicated state law, there is a reasonable chance that, had the court not erred in its explanation of the exchange of testimony for leniency, and had jurors approached the case with an appropriately neutral attitude towards the prosecution's witnesses, at least one juror would have found reasonable doubt as to whether prosecution witnesses had inaccurately or untruthfully implicated Gomez to minimize their own role, and the result would have been different. (*College Hospital Inc. v. Superior Court*, *supra,* 8 Cal.4th at p. 715, citing, *inter alia*, *People v. Watson*, *supra,* 46 Cal.2d at p. 837; see also *People v. Soojian, supra,* 190 Cal.App.4th at pp. 520-524; *People v. Bowers*, *supra,* 87 Cal.App.4th at p. 736 [mistrial is a more favorable result for the defendant than a conviction].)

Finally, there is a reasonable possibility, to say the least, that in the absence of this error, the sentence would have been different. (*People v. Hamilton*, *supra,* 45 Cal.4th at p. 917; *People v. Brown*, *supra,* 46 Cal.3d 432, 447-449; see *Chapman v. California*, *supra,* 386 U.S. at p. 24.) Without this error, jurors might well have acquitted Gomez of the Escareno crimes, precluding their consideration by any jurors at the penalty phase, and leading to a different penalty phase result. (See Argument XVIII,

below.) More, as set forth above, the error affected the verdict on the Patel murder, for which Gomez was sentenced to death. Priming jurors to see Gomez as the more culpable party because the prosecution had deemed him the real killer, the instruction may well have blunted any lingering doubts about whether the prosecution had accused the right person — in any of the counts Gomez faced and on which the jury deliberated as to his sentence.

Reversal is required.

XII.

THE CALJIC INSTRUCTIONS DEFINING THE PROCESS BY WHICH JURORS REACH A VERDICT ON THE LESSER OFFENSE OF SECOND DEGREE MURDER, AND THE COURT'S FAILURE TO INSTRUCT THE JURY WITH CALJIC NO. 17.11, UNCONSTITUTIONALLY SKEWED THE JURORS' DELIBERATIONS TOWARD FIRST DEGREE MURDER, REQUIRING REVERSAL

The trial court instructed Gomez's jurors that if they agreed that Gomez committed homicide, they must "unanimously" agree that there was a reasonable doubt about the degree of murder before giving Gomez the benefit of that doubt. (29RT 4151-4152; 3CT 885 (CALJIC No. 8.71, prior to fall 2011 revision.)) The trial court's instruction was as follows:

> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give the defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree.

(29RT 4151-4152; 3CT 885.) If the jury did not unanimously agree that it had a reasonable doubt as to whether the murder was first or second degree, then, under this instruction, the jury need not give the defendant the benefit of that doubt. A juror who believed that Gomez was guilty of some murder, but not necessarily first degree murder, would also believe that first degree murder applied in the face of any disagreement. In other words, first degree

murder was the default verdict under this instruction — applying unless the jurors *unanimously* agreed that they had a reasonable doubt about the degree of murder. This instruction skewed the jury's deliberations toward first degree murder and lowered the prosecution's burden of proof in violation of Gomez's rights to due process and trial by jury. (U.S. Const., 5th, 6th, & 14th Amends.; Cal. Const., art I, §§ 7, 15, & 16.)

In *People v. Moore* (2011) 51 Cal.4th 386, 409-412, this Court addressed a claim that CALJIC No. 8.71 violated the defendant's due process and jury trial rights by suggesting that jurors must return a first degree murder verdict unless they *unanimously* doubted whether it had been proven. (*Id.* at pp. 409-411.) The Court concluded that "the better practice is not to use the 1996 revised version[] of CALJIC [No.] 8.71 . . . as the instruction[] carr[ies] at least some potential for confusing jurors about the role of their individual judgments in deciding between first and second degree murder . . . ." (*Id.* at pp. 411-412.) The Court explained: "[I]nserting this language into CALJIC [No.] 8.71 . . . which address[es] the role of reasonable doubt in choosing between greater and lesser homicide offenses, was unnecessary . . . ." (*Id.* at p. 412.)

Penal Code section 1097 provides that if there is a reasonable doubt about the degree of the crime a defendant has committed, he or she may be

convicted only of the lowest degree. Under this principle, if the prosecution proved a murder had been committed but a juror has doubt about the degree of the offense, that juror must vote for the lesser offense.

Previous versions of the CALJIC instructions told jurors to give a defendant the benefit of the doubt without reference to whether they unanimously agreed. (See CALJIC No. 8.71, 5th ed., 1988.)[95] This was in keeping with this Court's long-standing rule that jurors must be instructed that "if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense." (*People v. Dewberry* (1959) 51 Cal.2d 548, 555.) The 1996 revision significantly changed this by instructing jurors to vote for a lesser degree or offense only if they unanimously agreed. In other words, under the revised instruction given here, before jurors give a defendant the benefit of the doubt, they must first unanimously agree that there is a reasonable doubt. If some, but not all, jurors believed there was a reasonable doubt about the degree of murder, the instruction directs them to first degree murder.

The court's failure to give CALJIC No. 17.11 both compounded the

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[95] CALJIC No. 8.71 formerly provided: "If you are convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but you have a reasonable doubt whether such murder was of the first or second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree." (See *People v. Moore, supra,* 51 Cal.4th at p. 409, fn. 7.)

problem and itself constituted error. CALJIC No. 17.11 provides, "[i]f you find the defendant guilty of the crime of _____, but have a reasonable doubt as to whether it is of the first or second degree, you must find [him][her] guilty of that crime in the second degree." The instruction must be given sua sponte when the crime has separate degrees. (See CALJIC No. 17.11, Use Note, citing *People v. Dewberry, supra,* 51 Cal.2d at pp. 555-557; see also *People v. Aikin* (1971) 19 Cal.App.3d 685, 703-704 [sua sponte instruction], disapproved on another ground in *People v. Lines* (1975) 13 Cal.3d 500, 512-513.) CALJIC No. 17.11 would have provided the jury with clear language similar to the previous versions of CALJIC No. 8.71.

The instructions here — the delivery of CALJIC No. 8.71 and the failure to give CALJIC No. 17.11 — violated due process and lightened the prosecution's burden of proof. Without direction on what to do in the case of non-unanimous doubt, the jury will likely fail to give full effect to the reasonable doubt standard, resolving its doubts in favor of conviction. (*Keeble v. United States* (1973) 412 U.S. 205, 212-213; U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15.)[96] Indeed, the lack of clear direction

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[96] In *United States v. Jackson* (9th Cir. 1984) 726 F.2d 1466, there was overwhelming evidence that the defendant had committed a crime, but a rational jury may have had a doubt about the nature of the offense. The trial court instructed the jury that if it unanimously found the defendant to be not guilty of the crime charged, then it should determine the defendant's

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in this case reasonably may be taken to have distorted the factfinding process. (*Cool v. United States* (1972) 409 U.S. 100, 104 [instruction that reduces burden of proof is "plainly inconsistent with the constitutionally rooted presumption of innocence"].) Accordingly, it resulted in the kind of juror confusion that implicates constitutional standards. (See *Smith v. Texas* (2007) 550 U.S. 297, 316 [recognizing that instructions can create "jury-confusion error"]; *Mullaney v. Wilbur* (1975) 421 U.S. 684, 698-700 [safeguards of due process apply to determination of whether defendant is guilty of murder or manslaughter].)[97]

The instructions also violated Gomez's right to a unanimous verdict.

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[96](...continued)
guilt or innocence of the lesser offense. (*Id.* at p. 1469, fn. 1.) The *Jackson* court, reversing, recognized that if jurors were unable to reach a unanimous verdict on any charge, in theory the result would be a mistrial. (*Id.* at p. 1470.) "Practically, however," the court explained, "in this case the risk was substantial that jurors harboring a doubt as to defendant's guilt of the greater offense but at the same time convinced that defendant had committed some offense might wrongly yield to the majority and vote to convict of the greater offense rather than not convict defendant of any offense at all." (*Ibid.*)

[97] *Mullaney v. Wilbur* noted that the defendant's interests in the reasonable doubt standard were implicated more in *Wilbur* than in *Winship:* in *Winship*, petitioner faced an 18-month sentence, with a potential extension of four and a half years, while in *Wilbur* the defendant faced a differential in sentencing ranging from a nominal fine to a mandatory life sentence. (*Mullaney v. Wilbur, supra,* 421 U.S. at p. 700; see *In re Winship, supra,* 397 U.S. at p. 360.) Here, of course, a second degree murder conviction, rather than a first degree murder conviction, would have precluded the death penalty for the Luna, Dunton and Acosta killings.

The state Constitution protects a criminal defendant's entitlement to "a verdict in which all 12 jurors concur, beyond a reasonable doubt, as to each count charged.'" (*People v. Jenkins* (1994) 29 Cal.App.4th 287, 298; *People v. Traugott* (2010) 184 Cal.App.4th 492, 499-500; *People v. Collins* (1976) 17 Cal.3d 687, 692-693; Cal. Const., art. I, § 16.)

Though this right is embodied in the state Constitution, Gomez has a federal due process right to this state-created liberty interest. (See *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; U.S. Const., 14th Amend.) And, while the federal Constitution does not require unanimity in a 12-person jury, it certainly would not tolerate a verdict supported by fewer than six jurors. (See *Ballew v. Georgia, supra,* 435 U.S. at p. 243 [Sixth and Fourteenth Amendments prohibit trial by jury of fewer than six]; *Burch v. Louisiana, supra,* 441 U.S. at pp. 138-139 [conviction by only five members of a six-person jury violates jury trial guarantee].) Here, because the instruction allowed for conviction of first degree murder even if only a minority of jurors believed it proven beyond a reasonable doubt, the instruction violated the federal Constitution as well.

In *Moore,* this Court noted two Court of Appeal cases which had addressed the former version CALJIC No. 8.71,[98] *People v. Pescador*

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[98] CALJIC No. 8.71 was revised in the fall of 2011 in response to (continued...)

(2004) 119 Cal.App.4th 252, and *People v. Gunder* (2007) 151 Cal.App.4th 412. (*People v. Moore, supra,* 51 Cal.4th at pp. 410-411.) In *Pescador*, the trial court had also given CALJIC No. 17.11, which told jurors, without any unanimity requirement, that if they had a reasonable doubt as to the degree of murder proven, they had to find the defendant guilty of only second degree murder. (*People v. Moore, supra,* 51 Cal.4th at p. 411; *People v. Pescador, supra,* 119 Cal.App.4th at p. 257.) And in both *Gunder* and *Pescador,* the trial court had additionally instructed the jury with CALJIC No. 17.40, which instructed jurors not to decide "any question in a particular way because a majority of the jurors, or any of them, favor that decision." (*People v. Moore, supra,* 51 Cal.4th at p. 411; *People v. Pescador, supra,* 119 Cal.App.4th at p. 257; *People v. Gunder, supra,* 151 Cal.App.4th at p. 425 & fn. 10.)

Gomez's jury, unlike Pescador's, was not instructed with CALJIC No. 17.11. Although Gomez's jury was instructed with CALJIC No. 17.40 (29RT 4169; 3CT 891), Gomez respectfully submits that the *Gunder* court was incorrect in concluding that, given CALJIC No. 17.40, it was not reasonably likely that jurors interpreted CALJIC No. 8.71 to require unanimous agreement that there was a doubt as to defendant's guilt of first

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[98](...continued)
Moore.

degree murder before the defendant could be convicted of second degree murder. (See *People v. Gunder, supra,* 151 Cal.App.4th at pp. 424-425.) CALJIC No. 17.40 does not dispel the error in CALJIC No. 8.71. It informs jurors that "[t]he People and the defendant are entitled to the individual opinion of each juror"; it also encourages jurors to "reach[] a verdict if you can do so." (29RT 4169; 3CT 891.) It instructs jurors that "[e]ach of you must decide the case for yourself, but should do so only after an open-minded discussion of the evidence and instructions with the other jurors." (29RT 4169; 3CT 891.) But CALJIC No. 17.40 says nothing specific about the jury's determination of the degree of murder, and it says nothing to contradict CALJIC No. 8.71's implication that the defendant only receives the benefit of reasonable doubt as to degree if the jury unanimously agrees on the existence of that doubt.

The specific, of course, prevails over the general. (*People v. Stewart* (1983) 145 Cal.App.3d 967, 975.) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is *specific* and the supposedly curative instruction is *general.* [Citation.]." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395, original italics.) Nothing in CALJIC No. 17.40, nor in the instructions as a whole dispelled the specific, and erroneous direction in CALJIC No. 8.71.

The court's supplemental instruction did not serve to clarify the erroneous instruction. The court told the jurors that they "need only unanimously agree on whether it is murder in the first degree or murder in the second degree." (29RT 4246.) Even if understood by the jurors — the court, after delivering the instruction, commented, "I've got some frowns there . . . Okay. If that answers your question" — this instruction said nothing about reasonable doubt, and said nothing to cure the implication that the jurors must unanimously maintain a reasonable doubt as to defendant's guilt to convict him of second degree murder.[99]

These errors affected the fundamental framework of Gomez's trial, requiring reversal. (*Arizona v. Fulminante* (1991) 499 US. 279, 309-310.) In *Sullivan v. Louisiana, supra,* 508 U.S. 275, the trial court erroneously instructed the jury on the definition of reasonable doubt. The Court explained that there are certain errors that defy traditional harmless error review. These are errors that cannot be measured by weighing the strength

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[99] CALJIC No. 8.74, likewise, informed jurors that they had to agree unanimously whether defendant was guilty of first degree murder or second degree murder, but said nothing about reasonable doubt, and said nothing to cure the implication that the jurors must unanimously maintain a reasonable doubt as to defendant's guilt of first degree murder to convict him of second degree murder. CALJIC No. 8.71 "explains the process jurors must go through to determine the degree of murder." (*People v. Pescador, supra,* 119 Cal.App.4th at p. 256.) Once jurors have gone through that process, CALJIC No. 8.74 requires no further consideration of reasonable doubt.

of the evidence. "[W]here the instructional error consists of a misdescription of the burden of proof . . . [a] reviewing court can only engage in pure speculation — its view of what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant guilty.'" (*Id.* at p. 281, quoting *Rose v. Clark* (1986) 478 U.S. 570, 578.) Thus, a deprivation of an important right "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" (*Sullivan v. Louisiana, supra,* 508 U.S. at pp. 281-282.) Here, as in *Sullivan*, harmless error analysis would require this Court to speculate about the verdict. This Court should therefore find that the error was structural and requires reversal.

Even assuming harmless error applies, this error was not harmless beyond a reasonable doubt. *Moore* ultimately concluded that the Court did not need, in that case, to determine whether *Gunder* was correct that the possibility of confusion is adequately dispelled by CALJIC No. 17.40, because in Moore's case any error was harmless because the jury had found felony-murder special circumstances true. (*People v. Moore, supra,* 51 Cal.4th at p. 412.)

Here, however, the error was not harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Neither the first

degree murder verdict in the Luna case, nor the first degree murder verdicts in the Dunton and Acosta cases could have rested on a felony-murder theory.

As set forth above in Argument I.B.2., with respect to the killing of Raul Luna, there was a lack of any evidence at all as to Gomez's mental state at the time of the crime — even if Gomez was proven to be one of the individuals in Luna's yard at the time of the killing. One or more jurors might easily have had a reasonable doubt as to whether the first degree murder of Raul Luna was proven.

With respect to the Dunton and Acosta killings, in light of the entire record, the evidence of premeditation and deliberation was thin, and the prosecution cannot show beyond a reasonable doubt that one or more jurors could not have harbored doubts about whether the killings were premeditated. (See Argument III.)

This Court must reverse not only the first degree murder convictions for the killings of Luna, Dunton, and Acosta, but the death sentence imposed for the murder of Rajandra Patel, as well. The prosecution cannot prove this error harmless beyond a reasonable doubt with respect to the death sentences; it cannot show beyond a reasonable doubt that the additional weight of three first degree murder convictions did not tip the

scales towards death. (See *Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Prince, supra,* 40 Cal.4th at p. 1299.)

XIII.

THE TRIAL COURT'S INSTRUCTION OF THE JURY WITH CALJIC NO. 17.41.1 VIOLATED MR. GOMEZ'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The trial court instructed Gomez's jury with CALJIC No. 17.41.1, delivered as follows:

> The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation.

(3CT 891; 29RT 4168-4169.) It repeated the instruction again at the penalty phase, omitting the language regarding decision on the basis of penalty or punishment. (13CT 3447; 31RT 4613.)

In *People v. Engelman* (2002) 28 Cal.4th 436, 441, 449, a noncapital case, this Court disapproved CALJIC No. 17.41.1, holding that it should not be given. This Court also concluded, however, that it did not violate Engelman's rights under the federal Constitution to a jury trial and to due process of law, nor did it violate the state constitutional right to a unanimous verdict. (*People v. Engelman, supra,* 28 Cal.4th at pp. 442-445.)

Gomez respectfully submits that in this case, the instruction did violate his rights under the Sixth and Fourteenth Amendments; he therefore

raises the issue here in order to ask this Court to reconsider its decision in *Engelman* and to preserve the error for review in federal court if necessary. He recognizes that the Court has previously declined to reconsider *Engelman.* (See *People v. McKinnon, supra,* 52 Cal.4th at p. 681; *People v. Wilson* (2008) 44 Cal.4th 758, 805-806; see also *People v. Romero, supra,* 44 Cal.4th at p. 419.)

In addition, Gomez contends that the instruction violated his rights under the Eighth Amendment to reliable guilt and penalty phase verdicts, an issue not presented in *Engelman.*[100]

A. This Court Should Reconsider Its Decision in *People v. Engelman.*

The right to a jury trial is a fundamental constitutional right. The

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[100] In *People v. Brady* (2010) 50 Cal.4th 547, 587, this Court rejected, without discussion, a claim that the defendant's constitutional rights were violated by delivery of 17.41.1 at the penalty phase. (*Id.* at p. 587.)

In *People v. Brown* (2004) 33 Cal.4th 382, 393, a capital case, this Court addressed a claim that CALJIC No. 17.41.1 violated the rights to jury trial, to due process, and a unanimous verdict, and declined to revisit *Engelman. Brown* also addressed the oblique incorporation of CALJIC No. 17.41.1 by reference at the penalty phase of a capital case, rejecting defendant's argument that the instruction would have pressured jurors disinclined to impose death "to go along with the majority . . . or risk being reported to the court." (*Id.* at p. 400.) Gomez's argument, set forth in detail in subsection B., below, is different, and, to the extent necessary, he asks this Court to reconsider *Brown* and *Brady* in light of the arguments he presents below.

Sixth Amendment to the United States Constitution, which protects the right to a jury trial in criminal cases, applies to the states through the Fourteenth Amendment. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149.)

Even before the Sixth Amendment guarantee was applied to the states, the Fourteenth Amendment operated to insure that, when a state did provide a jury trial, the trial would be conducted fairly. (*Turner v. Louisiana* (1965) 379 U.S. 466, 471-472.) If a criminal defendant shows a sufficient risk that the jury has been improperly influenced, the resulting conviction must be reversed. (E.g., *id.* at pp. 473-474 [where two bailiffs who were in charge of the jury had also testified as prosecution witnesses, prejudice inherent in that situation required reversal even though there was no showing that bailiffs discussed the case with the jurors].)

Whether a particular feature of the common-law jury trial right is compelled in state courts as a matter of federal constitutional law depends on "the function that the particular feature performs and its relation to the purposes of the jury trial." (*Williams v. Florida* (1970) 399 U.S. 78, 99-100.)

Thus, for example, the usual size of a jury — 12 people — is not mandated by the federal Constitution because the number is "a historical accident, unnecessary to effect the purposes of the jury system and wholly

without significance 'except to mystics.' [Citation.]" (*Id.* at p. 102.)

The secrecy and sanctity of jury deliberations, and the free exchange of ideas this feature is designed to protect, on the other hand, are far from historical accidents. Rather, as this Court has recognized, this feature is a "'cornerstone'" of the Anglo-American jury system. (*People v. Engelman, supra,* 28 Cal.4th at p. 443; see also *People v. Cleveland* (2001) 25 Cal.4th 466, 475, 481.) The confidentiality, secrecy, and privileged nature of deliberations is an essential prerequisite for the free exchange of ideas in the jury room. "'Juror privacy is a prerequisite of free debate, without which the decisionmaking process would be crippled.'" (*United States v. Symington* (9th Cir. 1999) 195 F.3d 1080, 1086, quoting Note, *Public Disclosures of Jury Deliberations* (1983) 96 Harv. L.Rev. 886, 889; see also *United States v. Antar* (3d Cir. 1994) 38 F.3d 1348, 1367 [conc. opn. of Rosenn, J.] ["[T]he confidentiality of the thought processes of jurors, their privileged exchange of views, and the freedom to be candid in their deliberations are the soul of the jury system. This interaction must be zealously guarded from any impermissible encroachment if the system is to survive."]; see also *Tanner v. United States* (1987) 483 U.S. 107, 127 ["[L]ong-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry."].)

The free and candid exchange of ideas allows the jury to fulfill its purpose of fostering community participation, in the form of the "common-sense judgment" of laypeople with varying viewpoints, to determinations of guilt of innocence. (*Duncan v. Louisiana, supra,* 391 U.S. at pp. 155-156; see *Ballew v. Georgia, supra,* 435 U.S. at p. 229 [jury's purpose of protecting individual from government oppression "is attained by the participation of the community in determinations of guilt and by the application of the common sense of laymen who, as jurors, consider the case"; Sixth Amendment mandates jury of sufficient size to promote group deliberation, to insulate members from outside intimidation, and to provide a representative cross-section of the community].)

Long ago, Justice Cardozo noted that "[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." (*Clark v. United States* (1933) 289 U.S. 1, 13.) This Court recognized as much in *People v. Engelman*:

> As a general rule, no one — including the judge presiding at a trial — has a right to know how a jury, or any individual juror, has deliberated or how a decision was reached by a jury or juror. The secrecy of deliberations is the cornerstone of the modern Anglo-American jury system. . . . Especially troublesome is the danger that such disclosure [upon inquiry by the court] presents to the operation of the deliberative process itself. . . . Juror privacy is a prerequisite of free

> debate, without which the decisionmaking process would be crippled. . . . [P]articipants must feel completely free to dissect the credibility, motivations, and just deserts of other people. Sensitive jurors will not engage in such a dialogue without some assurance that it will never reach a larger audience. . . . The mere suggestion that the views of jurors may be conveyed to the parties and the public . . . understandably may cause anxiety and fear in jurors, and distort the process by which a verdict is reached.

(*People v. Engelman, supra,* 28 Cal.4th at p. 443, quoting *People v. Cleveland, supra,* 25 Cal.4th at pp. 481-482 [other citations and internal quotation marks omitted].)

Thus, just as the Sixth Amendment mandates a jury "of sufficient size to promote group deliberations, to insulate members from outside intimidation, and to provide a representative cross-section of the community" (*Ballew v. Georgia, supra,* 435 U.S. at pp. 229-230), it also requires privacy and confidentiality for deliberations, which similarly promote effective group deliberations that include minority viewpoints. (See also *People v. Oliver* (1987) 196 Cal.App.3d 423, 429 ["[P]rivate, confidential deliberations outside the presence of all nonjurors are an essential feature of the right to an impartial jury trial guaranteed by the Sixth Amendment. An infringement of that essential right therefore constitutes an error of federal constitutional dimension."].)

CALJIC No. 17.41.1 poses a significant threat to the sanctity of jury

deliberations. As this Court recognized in *People v. Engelman*, CALJIC No. 17.41.1

> has the potential to intrude unnecessarily on the deliberative process and affect it adversely — both with respect to the freedom of jurors to express their differing views during deliberations, and the proper receptivity they should accord the views of their fellow jurors. Directing the jury immediately before deliberations begin that jurors are expected to police the reasoning and arguments of their fellow jurors during deliberations, and immediately advise the court if it appears that a fellow juror is deciding the case upon an "improper basis," may curtail or distort deliberations. . . . [I]t is not conducive to the proper functioning of the deliberative process for the trial court to declare — before deliberations begin and before any problem develops — that jurors should oversee the reasoning and decisionmaking process of their fellow jurors and report perceived improprieties in that process to the court.

(*People v. Engelman, supra,* 28 Cal.4th at p. 440.)

The Court concluded, however, that because secrecy is not absolute, and may give way to reasonable inquiry into juror misconduct, CALJIC No. 17.41.1's potential to induce a juror to unnecessarily reveal the content of deliberations, or threaten to do so, does not render it unconstitutional. (*People v. Engelman, supra,* 28 Cal.4th at pp. 443-444.) Gomez respectfully contends that the principle that jury secrecy is not absolute does not warrant the conclusion that this instruction complies with Sixth and Fourteenth Amendment guarantees.

To be sure, as *Engelman* states, refusal to deliberate may constitute

grounds for a juror's discharge, and intrusion into the content of jury deliberations is necessarily attendant to the process of discharging a sitting juror in such circumstances. (*People v. Engelman, supra,* 28 Cal.4th at p. 444.) The vice of CALJIC No. 17.41.1, however, lies not only in its provision for intrusion into jury deliberations in some cases — though it needlessly encourages such intrusion, as this Court recognized in *Engelman* (*id.* at p. 446) — but more fundamentally, in every case, in the change it risks effecting on the deliberative process itself. (See *People v. Engelman, supra,* 28 Cal.4th at pp. 445-449.)

As the Supreme Court has explained:

> "The basic purpose of a trial is the determination of truth," *Tehan v. United States ex rel. Shott, 382 U.S. 406, 416 (1966)*, and it is the jury to whom we have entrusted the responsibility for making this determination in serious criminal cases. Any practice that threatens the jury's ability properly to perform that function poses a similar threat to the truth-determining process itself.

(*Brown v. Louisiana* (1980) 447 U.S. 323, 334.) Thus, the relevant constitutional question, Gomez respectfully maintains, is not whether intrusions into deliberations are sometimes allowed; it is well-established that they are. The question, rather, is whether this state practice "creat[es] a substantial threat to Sixth and Fourteenth Amendment guarantees," and if so, whether any state interest justifies it. (*Ballew v. Georgia, supra,* 435

U.S. at p. 243; see *id.* at p. 231; *Burch v. Louisiana, supra,* 441 U.S. at pp. 138-139 [though state has a substantial interest in reducing time and expense associated with administration of criminal justice, that interest cannot justify nonunanimous verdicts by six-person juries]; see also *Clark v. United States, supra,* 289 U.S. at pp. 13-16 [secrecy of jury deliberations may be invaded only where state interest supports such intrusions and overcomes the "weighty" interest that deliberations be "untrammeled by the fear of embarrassing publicity"].)

This Court in *Engelman* effectively recognized that CALJIC No. 17.41.1 does significantly threaten the proper functioning of the jury. As this Court explained, "the mere suggestion that the views of jurors may be conveyed to the parties and the public" — a suggestion indisputably conveyed by CALJIC No. 17.41.1 — "understandably may cause anxiety and fear in jurors, and distort the process by which a verdict is reached." (*People v. Engelman, supra,* 28 Cal.4th at p. 443, quoting *People v. Cleveland, supra,* 25 Cal.4th at pp. 481-482.) Without juror privacy, "the decisionmaking process would be crippled." (*Ibid.*)

In addressing CALJIC No. 17.41.1 itself, the *Engelman* Court identified the risks that

> • because CALJIC No. 17.41.1 fails to specify what "any other improper basis" for decision might be, members of the

jury provide their own interpretation of what is improper and seek to impose it on others (*id.* at p. 447); or that jurors otherwise "confident of their own good faith and understanding of the evidence and the court's instructions on the law, mistakenly may believe that those individuals who steadfastly disagree with them are refusing to deliberate or are intentionally disregarding the law" (*id.* at p. 446);

- the instruction "could cause jurors to become hypervigilant during deliberations about *perceived* refusals to deliberate or other ill-defined 'improprieties,'" threatening the "free exchange of ideas that lies at the center of the deliberative process" (*id.* at p. 447, original italics); or the risk that "a juror endowed with confidence in his or her own views . . . might rely on CALJIC No. 17.41.1 as a license to scrutinize other jurors for some ill-defined misconduct rather than to remain receptive to the views of others" (*ibid.*);[101]

- that the instruction will be used by a juror or jurors as a "tool for browbeating other jurors" (*id.* at p. 445), or that a juror, without ever communicating with the court, might "place undue pressure on another juror by threatening to accuse that juror in open court of reasoning improperly or not following the court's instructions" (*id.* at p. 446); or that the instruction might be used as a means of "short-circuit[ing] discussions by threatening to call upon the court to arbitrate normal disagreements" (*id.* at p. 447);

- that jurors, particularly those who may not be able to deliberate "well or skillfully" will censor themselves, unwilling to articulate ideas or opinions that might be deemed "improper" (*id.* at p. 446; *id.* at p. 443), thus crippling deliberations and robbing them of the free exchange of ideas from differing viewpoints.

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[101] Put another way, the instruction also unnecessarily burdens jurors with an additional task to perform during deliberations. Jurors are to consider the law and the evidence in order to arrive at a just verdict, and no more. CALJIC No. 17.41.1's requirement that jurors assume an additional task undermines the reliability of their core decision-making function.

All of these vices strike squarely at the very core of the deliberative process — the free and open exchange of ideas among members of a representative cross-section of the community who have come together to attempt to reach a judgment based on lay common sense. (See, e.g., *Ballew v. Georgia, supra,* 435 U.S. at pp. 229-230.) CALJIC No. 17.41.1 — as this Court noted, an instruction given jurors immediately before they withdraw to deliberate, and concerning the process of deliberation itself (*People v. Engelman, supra,* 28 Cal.4th at p. 445) — is a "practice that threatens the jury's ability properly to perform [its] function," and thus "poses a similar threat to the truth-determining process itself." (*Brown v. Louisiana, supra,* 447 U.S. at p. 334; *Clark v. United States, supra,* 289 U.S. at p. 14 [mere charge of juror wrongdoing will not overcome secrecy of juror deliberations].)

And *Engelman*'s holding, based on this Court's supervisory powers, that the instruction should not be given effectively establishes that there is no state interest in instructing juries with CALJIC No. 17.41.1 that justifies the acknowledged risk. (*People v. Engelman, supra,* 28 Cal.4th at p. 448 [other instructions are adequate to guard against jury misconduct]; *id.* at p. 445 [it is "inadvisable and unnecessary" to create the risk of intrusion on the secrecy of deliberations or of an adverse impact on the course of

deliberations]; *id.* at p. 447 [jurors should not "needlessly be *encouraged*" to be on the alert for fellow jurors' failings], original italics.)

Because the instruction poses a significant threat to the proper functioning of the jury, which is not justified by any state interest, it violates the Sixth and Fourteenth Amendments to the United States Constitution and its state constitutional counterparts. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, & 16.)

The instruction also violates due process, which protects rights that are "deeply rooted in this Nation's history and tradition." (*Moore v. City of East Cleveland* (1977) 431 U.S. 494, 503; see *In re Winship, supra,* 397 U.S. at pp. 361-362 [finding reasonable doubt requirement protected by due process because it is firmly entrenched in history and tradition of Anglo-American trial].) The sanctity of jury deliberations, as acknowledged by this Court and as set forth above, is such a deep-rooted right. (*People v. Engelman, supra*, 28 Cal.4th at p. 443, quoting *People v. Cleveland, supra,* 25 Cal.4th at pp. 481-482.)

Finally, the instruction violates the state constitutional right to trial by jury, not only for the reasons stated above, to the extent the state constitutional right is coextensive with the federal constitutional right, but also because it infringes the state constitutional right, in felony cases, to a

jury of 12 persons and to a unanimous verdict. (See Cal. Const., art. I, §§ 7, 15, & 16; *People v. Peters* (1982) 128 Cal.App.3d 75, 89-90; *People v. Collins*, *supra,* 17 Cal.3d at p. 693.) The instruction's potential for use as a tool for browbeating jurors, particularly minority jurors, infringes the right to a unanimous verdict reflecting the individual judgment of each juror. (See *People v. Engelman, supra,* 28 Cal.4th at pp. 445, 447; see also *People v. Gainer* (1977) 19 Cal.3d 835, 848-849.) This state right to a unanimous verdict in turn is protected from arbitrary infringement by the due process clause of the Fourteenth Amendment to the federal Constitution; its violation thus constitutes a due process violation as well. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

For all the reasons stated above, this Court should reconsider its constitutional holding in *People v. Engelman* and hold that CALJIC No. 17.41.1 violates the state and federal Constitutions.

B. The Delivery of CALJIC No. 17.41.1 at the Guilt and Penalty Phases in this Capital Case Violated the Eighth and Fourteenth Amendments.

Even if this Court should decline to revisit *Engelman*, this case presents an additional issue not involved in that case — the delivery of CALJIC No. 17.41.1 at the guilt and penalty phases of a capital trial. In a capital case, CALJIC No. 17.41.1 violates the Eighth and Fourteenth

Amendment rights to reliable determinations of guilt and penalty and the state constitutional counterpart. (See U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, & 17.)

1. Instructing Guilt Phase Jurors in a Capital Trial with CALJIC No. 17.41.1 Violates the Eighth and Fourteenth Amendments.

The Eighth Amendment requires reliability not only in the ultimate determination whether a defendant convicted of murder should live or die, but also in the determination of whether he is guilty or not guilty in the first instance. (*Beck v. Alabama, supra,* 447 U.S. at p. 638 ["To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination."].)

The risk to the integrity of deliberations recognized in *People v. Engelman, supra,* 28 Cal.4th at pp. 440, 445-448, even if tolerable in noncapital cases, cannot be countenanced where life is at stake. As the Supreme Court has repeatedly recognized:

> [T]here is a significant constitutional difference between the death penalty and lesser punishments:
>
> "[D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its

> severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. . . ."

(*Beck v. Alabama, supra,* 447 U.S. at p. 637, quoting *Gardner v. Florida, supra,* 430 U.S. at pp. 357-358 [opinion of Stevens, J.].)

In this light, this Court should not countenance, in a capital case, the myriad threats to the proper functioning of the jury. (See *People v. Engelman, supra,* 28 Cal.4th at p. 440; see subsection A., pp. 329-330, above.) As this Court recognized in *Engelman*, "[j]ury deliberation is a sensitive mechanism that most often simply must — and will — accommodate itself to the resolution of strong differences of opinion." (*People v. Engelman, supra,* 28 Cal.4th at p. 447.) This Court has found that CALJIC No. 17.41.1's tinkering with this "sensitive mechanism" (*id.* at p. 445) is unwarranted in criminal cases in general; in the guilt phase of a capital case, the risks are more than "unnecessary and inadvisable" (*ibid.*) but are unconstitutional.

2. Instructing Penalty Phase Jurors With CALJIC No. 17.41.1 Violates the Eighth and Fourteenth Amendments.

The use of CALJIC No. 17.41.1 at the penalty phase poses an even more serious threat to the defendant's constitutional rights. The instruction is incompatible with the unique role of capital jurors, who serve an all the

more important function of interposing "between the accused and his accuser of the commonsense judgment of a group of laymen." (*Williams v. Florida, supra,* 399 U.S. at p. 100; see *Duncan v. Louisiana, supra,* 391 U.S. at p. 156.) The capital jury "express[es] the conscience of the community on the ultimate question of life or death." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 519.) The jurors' task at the penalty phase is "inherently moral and normative, not factual . . . . [Citation.]" (*People v. Prieto, supra,* 30 Cal.4th at p. 263.) Faced with this weighty moral task, however, capital jurors "are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion." (*Caldwell v. Mississippi, supra,* 472 U.S. at p. 333.)

As this Court has explained:

> [T]he focus of the penalty selection phase of a capital trial is more normative and less factual than the guilt phase. The penalty jury's principal task is the moral endeavor of deciding whether the death sentence should be imposed on a defendant who has already been determined to be "death eligible" as a result of the findings and verdict reached at the guilt phase. In such a penalty selection undertaking, the Eighth Amendment's strictures are less rigid, more open-ended . . . . The gist of defendant's argument — that the trial court's penalty phase instructions failed to guide the jury in reaching a penalty decision, allowing it "complete discretion" — is correct. . . . It is not a mechanical finding of facts that resolves the penalty decision, "but . . . the jury's moral assessment of those facts as they reflect on whether defendant should be put to death . . . . [Citation.]"

(*People v. Musselwhite*, *supra,* 17 Cal.4th at pp. 1267-1268.) In this moral endeavor, a juror must be "free to reject death if [he or she] decides on the basis of *any* constitutionally relevant evidence or observation that it is not the appropriate penalty." (*People v. Brown* (1985) 40 Cal.3d 512, 540, original italics, reversed by *California v. Brown* (1987) 479 U.S. 538.)

In this context, all the risks posed by CALJIC No. 17.41.1, set forth above at pp. 329-330, are particularly acute. Given only partial guidance, and vested with significant discretion, jurors are even more free to decide for themselves what might constitute "any . . . improper basis" for decision. (See *People v. Engelman, supra,* 28 Cal.4th at p. 447 [language referring to "'any other improper basis'" "permits members of the jury to provide their own interpretation of what is improper"].) Permissible exercises of the constitutionally mandated discretion jurors are granted at the penalty phase (as well as the broad discretion afforded by California's statute) may *appear* improper, particularly to jurors more familiar with the less-discretionary determinations of guilt or innocence. The moral and discretionary nature of the decision whether to condemn a person to death heightens the risk of vehement, even harsh disagreements that may be improperly resolved by the threats inherent in CALJIC No. 17.41.1. The risk that a juror may deem another juror's "constitutionally relevant evidence or observation" (*People*

v. Brown, supra, 40 Cal.3d at p. 540) improper, and attempt to cut off discussion or threaten to report the matter to the judge — or the risk that jurors may censor themselves, fearful that their ideas will be deemed improper or reported to the court — are all the more threatening to a defendant's constitutional rights at the penalty phase.

In *People v. Brady, supra,* 50 Cal.4th 547, this Court rejected, without discussion, a claim that the defendant's constitutional rights were violated by delivery of 17.41.1 at the penalty phase. (*Id.* at p. 587.)[102] Previously, in *People v. Brown, supra,* 33 Cal.4th at pp. 400-401, this Court rejected the defendant's claim that the oblique incorporation of CALJIC No. 17.41.1 at the penalty phase, by reference, interfered with the jurors' performance of their task at the penalty phase. Here, of course, the instruction was not merely incorporated by reference; it was delivered again. To the extent this Court, in *Brown,* suggested that the standard instructions cured any error in instructing a penalty phase jury with CALJIC No. 17.41.1, Gomez respectfully disagrees and asks this Court to reconsider. Gomez respectfully asks this Court to reconsider its holding in *Brady* as well. The standard instructions delivered at the penalty phase could not cure the defect in CALJIC No. 17.41.1, for the risk remained that

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[102] *Brady* cited *People v. Wilson, supra,* 44 Cal.4th at pp. 805-806, a case addressing delivery of 17.41.1 at the guilt phase.

deliberations might be affected by jurors' use of the instruction to silence other jurors, or by self-censorship resulting from fear of being reported to the judge.

CALJIC No. 17.41.1's many risks are inconsistent with "the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.' [Citation.]" (*Caldwell v. Mississippi, supra,* 472 U.S. at p. 323.) The risks that led this Court to decide that CALJIC No. 17.41.1 should not be given in a noncapital case are risks that cannot be countenanced at all in cases where life is at stake, where the need for reliability is paramount. The instruction "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty" (*Lockett v. Ohio, supra,* 438 U.S. at p. 605) — because the free exchange of ideas has been chilled, deliberations have been curtailed by the implicit or explicit threat of a report of alleged impropriety to the judge, or an argument for life has been improperly dismissed. "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Ibid.*)

C. Reversal is Required.

The trial court's delivery of CALJIC No. 17.41.1 at the guilt and

penalty phases of Gomez's trial requires reversal of the judgment. The errors are structural, requiring reversal per se. As the Supreme Court has noted, the category of errors deemed structural and requiring reversal without regard to harmless error analysis includes errors with effects that are difficult to assess. (See *United States v. Gonzalez-Lopez, supra,* 548 U.S. at pp. 149-150 & fn. 4.) Errors "'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualif[y] as 'structural error.' [Citation.]" (*Id.* at p. 150.) The effects of CALJIC No. 17.41.1 are unquantifiable because the instruction is, as this Court has recognized, likely to chill the free exchange of ideas in the jury room — a harm that is by its nature hard to assess as it relates to things unsaid. There is simply no way of knowing what arguments for life might have been left unstated in the fear that they were "improper." And to the extent that CALJIC No. 17.41.1's potential harm lies in things said among jurors during deliberations, evidentiary rules render the harm difficult to assess, to say the least.[103]

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[103] In *People v. Molina* (2000) 82 Cal.App.4th 1329, the Court of Appeal held that the erroneous delivery of CALJIC No. 17.41 is subject to harmless error analysis. (*Id.* at pp. 1331-1335.) Gomez respectfully contends that, as set forth in the text above, the United States Supreme Court, since *Molina*, has made clear that harmless error does not apply in circumstances like this. More, Gomez respectfully contends, *Molina* constitutes a mis-application of the *Chapman* standard, which requires the

(continued...)

Even should this Court apply harmless error analysis, the prosecution cannot sustain its burden of proving beyond a reasonable doubt that the errors in delivering CALJIC No. 17.41.1 at the guilt and penalty phases did not contribute to the verdicts obtained. The question is not whether "in a trial that occurred without the error, . . .[the] guilty verdict[s] [and death sentences] surely would have been rendered" (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279) — though in this case the prosecution could not even meet that standard. Rather, the question is whether the verdicts "actually rendered in *this* trial [were] surely unattributable to the error." (*Ibid.*, original italics.) The prosecution cannot prove that beyond a reasonable doubt.

This instruction poses a myriad of risks, all acknowledged by this Court, and all significant enough that this Court has concluded the instruction should not be given. Given the many acknowledged risks this instruction poses — all of which are entirely reasonable, describing entirely

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[103](...continued)
state to prove the error harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) The question is not whether there is any indication that the use of the instruction affected the verdict in any way (see *People v. Molina*, *supra*, 82 Cal.App.4th at pp. 1335-1336), but rather whether the state can prove beyond a reasonable doubt that it did *not* affect the verdict in any way. In any event, *Molina*, a non-capital case, did not address the delivery of CALJIC No. 17.41.1 at the guilt and penalty phases of a capital case.

possible scenarios — the prosecution cannot sustain its burden of showing beyond a reasonable doubt that the errors did not contribute to the verdicts. As set forth at length elsewhere, the evidence supporting the convictions, particularly in the Luna and Patel cases, was at best weak. (See Arguments I & II, above.) The prosecution can offer no basis from which to conclude that this instruction did not contribute to the guilty verdicts.

More, other instructions delivered by the trial court at the outset of trial exacerbated the harm of CALJIC No. 17.41.1. The court discouraged the jury from requesting readbacks, and intimated that jurors who, contrary to the trial court's mandate, did not take notes would have to rely on other jurors — though they "shouldn't do that." (8RT 1299; see 8RT 1297-1301, 1308; see Argument X, above.) The notetaking instruction, combined with CALJIC No. 17.41.1, gave jurors inclined to dominate deliberations and pressure other jurors two effective tools for doing that: the threat to report others who may not have the same understanding of the court's instructions, or the application of the instructions to the facts, and the use of juror notes to overcome other jurors' honest, albeit unrecorded, recollections of the testimony — notes which carried increased and unwarranted sway in the jury room because the trial court had commanded that they be taken and because it had warned that the request of readbacks early in deliberations

would "infuriate[]" it. (8RT 1297-1301, 1308.)

Likewise, there is nothing in this record to support a conclusion that the erroneous delivery of CALJIC No. 17.41.1 at the penalty phase, where the broader discretion granted to the jury only heightened the risks that CALJIC No. 17.41.1 would distort deliberations, did not contribute to the death sentences. Reversal, of the death sentences at a minimum, is required.

XIV.

A SERIES OF GUILT PHASE INSTRUCTIONS IMPERMISSIBLY AND UNCONSTITUTIONALLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship, supra,* 397 U.S. at p. 364; see *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40, disapproved on another ground in *Estelle v. McGuire, supra,* 502 U.S. at p. 72, fn. 4; *People v. Roder* (1983) 33 Cal.3d 491, 497.) The reasonable doubt standard "provides concrete substance for the presumption of innocence — that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law' [citation]" (*In re Winship, supra,* 397 U.S. at p. 363) and at the heart of the right to trial by jury (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 278 ["[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt."].)[104]

Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to allow

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[104] "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia, supra,* 443 U.S. at p. 323.)

conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

The trial court in this case gave a series of standard CALJIC instructions, each of which violated the above principles and enabled the jury to convict Gomez on a lesser standard than is constitutionally required. Gomez acknowledges that this Court has previously rejected similar challenges to the instructions at issue here, but asks this Court to reconsider its prior rulings. (See subsection C., below.)

A. The Instructions on Circumstantial Evidence Undermined the Requirement of Proof Beyond a Reasonable Doubt.

The jury was given two instructions on the meaning of reasonable doubt which discussed the relationship between proof beyond a reasonable doubt and circumstantial evidence, CALJIC No. 2.01 and CALJIC No. 8.83 (3CT 873, 888; see 29RT4114-4116, 4161-4162.) These instructions informed the jury, in essentially identical terms, that if one interpretation of the evidence "appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (3CT 873, see 3CT 888; see also 29RT 4116, 4162.)

This twice-repeated directive was contrary to the due process requirement that the defendant may be convicted only if guilt is proved beyond a reasonable doubt. (*In re Winship, supra*, 397 U.S. at p. 364;

Jackson v. Virginia, supra, 443 U.S. at p. 309.)

These instructions misled the jury into believing that it could find Gomez guilty if he reasonably appeared guilty, even when jurors still entertained a reasonable doubt of his guilt. This is constitutionally defective for at least two reasons. First, telling jurors that their duty was to accept a guilty interpretation of the evidence as long as it "appears to you to be reasonable" is inconsistent with proof beyond a reasonable doubt; it allows a finding of guilt based on a degree of proof below that required by the due process clause. (See *Cage v. Louisiana, supra*, 498 U.S. at pp. 39-40; *In re Winship, supra,* 397 U.S. at p. 364.)

In addition, the instructions required the jury to draw an incriminatory inference when such an inference appeared to be "reasonable." (3CT 873; see 3CT 888; see also 29RT 4116, 4162.) The jurors were told that they "must" accept such an interpretation. Thus, the instruction operated as an impermissible mandatory conclusive presumption of guilt upon a finding that a guilty interpretation of the evidence "appears to be reasonable." (See *Sandstrom v. Montana, supra,* 442 U.S. at pp. 521-524.)

The CALJIC No. 2.01 and CALJIC No. 8.83 instructions also misled the jury by stating that if there are two reasonable interpretations, one

pointing to guilt and the other to innocence (or one pointing to the truth of a special circumstance and the other to its untruth), it must accept the one pointing to innocence (or the one pointing to the untruth of the special circumstance). (3CT 873, 888; 29RT 4116, 4162.) The prosecution's burden of proof beyond a reasonable doubt means that a defendant is not required to put forward any theory of innocence in order to be entitled to an acquittal, or to explain the incriminating evidence; a juror could therefore appropriately conclude from the prosecution's evidence that only incriminatory inferences "appear" to be reasonable, and yet also conclude that a conviction is unwarranted because there were insufficient incriminating inferences to establish guilt beyond a reasonable doubt. This instruction, however, had the effect of reversing the burden of proof, since it required the jury to find Gomez guilty, and to find the special circumstances true, unless he came forward with evidence explaining the incriminatory evidence put forward by the prosecution. Given the prosecution's reliance on circumstantial evidence to prove Gomez's guilt and the special circumstances, the erroneous instructions were prejudicial with regard to guilt, special circumstances, and the death sentences.

The jury was further confused and misled by CALJIC No. 2.01 because it characterized the jury's choice as "guilt" or "innocence." (3CT

873; 29RT 4115.) The use of such terminology undercut the prosecution's burden of proof because the issue is not one of guilt or innocence, but rather whether there is a reasonable doubt as to the prosecution's evidence. This error encouraged the jurors to find Gomez guilty because it had not been proven that he was "innocent."[105]

B. Other Instructions Also Vitiated the Reasonable Doubt Standard.

The trial court gave several other standard instructions that individually and collectively diluted the constitutionally mandated reasonable doubt standard: CALJIC No. 2.21.2, regarding willfully false witnesses (3CT 875; 29RT 4120-4121); CALJIC No. 2.22, regarding weighing conflicting testimony (3CT 875; 29RT 4121-4122); CALJIC No. 2.27, regarding sufficiency of evidence of one witness (3CT 876; 29RT 4122-4123); CALJIC No. 2.51, regarding motive (3CT 876; 29RT 4123); and CALJIC No. 8.20, regarding premeditation and deliberation (3CT 883-

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[105] As one court has stated: "We recognize the semantic difference and appreciate the defense argument. We might even speculate that the instruction will be cleaned up eventually by the CALJIC committee to cure this minor anomaly, for we agree that the language is inapt and potentially misleading in this respect *standing alone*." (*People v. Han* (2000) 78 Cal.App.4th 797, 809; original italics; but see *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1187.) *Han* concluded that there was no harm because the other standard instructions made the law on the point clear enough. (*People v. Han, supra,* 78 Cal.App.4th at p. 809.) For reasons set forth in the text, Gomez disagrees.

884; 29RT 4147-4149). Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. In so doing, the instructions implicitly replaced the "reasonable doubt" standard with a standard more akin to the "preponderance of the evidence" test, thus vitiating the constitutional protections that forbid convicting a capital defendant upon any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *Cage v. Louisiana*, *supra*, 498 U.S. at pp. 39-40; *In re Winship*, *supra*, 397 U.S. at p. 364.)

For example, CALJIC No. 2.21.2 lessened the prosecution's burden of proof. It authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless "from all the evidence you believe the *probability of truth* favors his or her testimony in other particulars." (3CT 875; 29RT 4120-4121; emphasis added.) The instruction lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses by finding only a mere "probability of truth" in their testimony — or even requiring them to credit such witnesses, for the instruction told them they could reject the witnesses' testimony *unless* they believed the probability of truth favored the witnesses' testimony, in which case they presumably were not entitled to reject the witnesses' whole

testimony. (*See People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"].)[106]

This instruction was particularly insidious in this case, where two witnesses openly lied on the stand, each resuming the stand the following day admitting to jurors that they had lied, and where other prosecution witnesses were beset with questions about their credibility.[107] CALJIC No. 2.21.2 in effect told jurors that they could not entirely reject these witnesses' testimony if they found that, though they had lied on the stand, "the probability of truth favor[ed] [their] testimony in other particulars." (3CT 875; 29RT 4120-4121.)

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[106] The court in *Rivers* nevertheless followed *People v. Salas* (1975) 51 Cal.App.3d 151, 155-157, wherein the court found no error in an instruction which arguably encouraged the jury to decide disputed factual issues based on evidence "which appeals to your mind with more *convincing force*" (original italics), because the jury was properly instructed on the general governing principle of reasonable doubt.

[107] Witness #1 told jurors he took drugs for hallucinations, and then later testified that he feigned schizophrenia in order to collect government benefits. (23RT 3364-3373; 24RT 3466-3480.) He also admitted telling "more than a few" lies during the course of the investigation into the homicides at issue in this case. (22RT 3302.) Witness #2 told jurors he was not a gang member; the following day he admitted he was. (16RT 2583-2586; 17RT 2654-2667, 2708; 18RT 2784-2786.) Witness #3 was the wife of a drug dealer who implicated Gomez in the Patel case after a pawn slip for Patel's jewelry was found in her possession. (12RT 1928-1931; 13RT 1972-1973.)

The essential mandate of *Winship* and its progeny — that each specific fact necessary to prove the prosecution's case be proven beyond a reasonable doubt — is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable" or "probably true." (*See Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

Furthermore, the jurors were instructed with CALJIC No. 2.22 as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other.
>
> This means that you must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

(3CT 875; 29RT 4121-4122.)

This instruction informed the jurors, in plain English, that their ultimate concern must be to determine which party has presented evidence that is comparatively more convincing than that presented by the other party. It specifically directed the jury to determine each factual issue in the

case by deciding which group of witnesses, or which version, was more credible or more convincing than the other. In so doing, the instruction replaced the constitutionally mandated standard of "proof beyond a reasonable doubt" with something that is indistinguishable from the lesser "preponderance of the evidence" standard, *i.e.*, "not in the relative number of witnesses, but in the convincing force of the evidence." (3CT 875.) As with CALJIC No. 2.21.2, discussed above, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (*See Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (3CT 876; 29RT 4122-4123), likewise was flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts. The defense is not required to establish or prove any "fact." CALJIC No. 2.27, by telling the jurors that testimony by one witness "concerning any fact" which they believed is "sufficient for the proof of that fact" and that they "should carefully review all the evidence upon which the proof of that fact depends" (3CT 876) —

without qualifying this language to apply only to *prosecution* witnesses — permitted reasonable jurors to conclude that (1) Gomez himself had the burden of convincing them that he was innocent of capital murder, and (2) that this burden was a difficult one to meet. Indeed, this Court has "agree[d] that the instruction's wording could be altered to have a more neutral effect as between prosecution and defense" and "encourage[d] further effort toward the development of an improved instruction." (*People v. Turner* (1990) 50 Cal.3d 668, 697.) This Court's observation does not address the unconstitutional effect of CALJIC No. 2.27, and this Court should find that it violated Gomez's Sixth and Fourteenth Amendment rights to due process and a fair jury trial.

CALJIC No. 2.27 further violated due process by using the "which you believe" language (3CT 876), thereby allowing proof based on mere "belief" that a single witness was telling the truth, rather than the constitutionally required proof beyond a reasonable doubt. For example, the instruction clearly implied to the jurors that if they simply "believe[d]" the testimony by Witness #1 that Gomez admitted killing the owner of a white car, even if they were not convinced of its truth beyond a reasonable doubt, they could find on that basis alone that Gomez admitted the killing. The instruction also erroneously suggested to the jurors that they need not

"carefully review" the testimony of prosecution witnesses when more than one witness testified to a particular fact, thereby likewise unconstitutionally lessening the prosecution's burden of proof. (3CT 876.)

The delivery of CALJIC No. 2.51 also diminished the prosecution's burden of proof as to the murder charges by telling the jury that "[m]otive is not an element of the crime charged and need not be shown." (3CT 876; 29RT 4123.) This instruction conflicted with other instructions regarding criminal intent for finding felony murder (CALJIC No. 8.21; see 3CT 884; 29RT 4149)[108] by improperly suggesting to the jurors that they need not find that Gomez intended to commit robbery in order to convict him of first degree felony murder. (See *People v. Hart* (1999) 20 Cal.4th 546, 608; but see *People v. Snead* (1993) 20 Cal.App.4th 1088, 1098, disapproved on another ground in *People v. Letner, supra,* 50 Cal.4th at p. 181.) Even though a reasonable juror could have understood the contradictory instructions to require such specific intent, there is simply no way of knowing whether any, much less all 12, of the jurors so concluded. (See, e.g., *Francis v. Franklin* (1985) 471 U.S. 307, 322.)

Finally, the instruction defining premeditation and deliberation

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[108] The court instructed that "[t]he specific intent to commit Robbery or Kidnapping . . . must be proved beyond a reasonable doubt." (3CT 884; 29RT 4149-4150.)

misled the jury regarding the prosecution's burden of proof by instructing that deliberation and premeditation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition *precluding* the idea of deliberation . . . ." (CALJIC No. 8.20; 3CT 883; 29RT 4147-4149; emphasis added.) The use of the word "precluding" could be interpreted to require the defendant to absolutely preclude the possibility of premeditation — as opposed to requiring the prosecution to prove premeditation beyond a reasonable doubt. (*See People v. Williams* (1969) 71 Cal.2d 614, 631-632.)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally mandated standard that requires the prosecution to prove each necessary fact of each element of each offense and special circumstances "beyond a reasonable doubt." Taking the instructions together, no reasonable juror could have been expected to understand — in the face of so many instructions permitting conviction upon a lesser showing — that he or she must find Gomez not guilty (and the special circumstances not true) unless every element of first degree murder

(and the special circumstances) was proven by the prosecution beyond a reasonable doubt. The instructions challenged herein violated the constitutional rights set forth in subsection A. of this argument, above.

C. This Court Should Reconsider Its Prior Rulings Upholding the Defective Instructions.

Although each one of the challenged instructions violated Gomez's federal constitutional rights by lessening the prosecution's burden and by operating as a mandatory conclusive presumption of guilt, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Wilson* (2008) 43 Cal.4th 1, 23; *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [addressing false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [addressing circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [addressing CALJIC Nos. 2.01, 2.02, 2.21, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [addressing circumstantial evidence instructions]; *People v. Farley* (2009) 46 Cal.4th 1053, 1122.) While recognizing the shortcomings of some of the instructions, this Court has consistently concluded that the instructions must be viewed as a whole, rather than singly; that the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and should give the defendant the benefit of any reasonable doubt; and that

jurors are not misled when they also are instructed with CALJIC No. 2.90 regarding the presumption of innocence. (See, e.g., *People v. Wilson, supra,* 43 Cal.4th at p. 23.) The Court's analysis is flawed.

First, what this Court has characterized as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings, supra,* 53 Cal.3d at p. 386 [plain meaning of instructions "merely informs the jury to reject unreasonable interpretations of the evidence and to give the defendant the benefit of any reasonable doubt"]; see Subsections A. and B., above.) The question is whether there is a reasonable likelihood that the jury applied the challenged instructions in a way that violates the Constitution (*Estelle v. McGuire, supra,* 502 U.S. at p. 72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale — that the flawed instructions were "saved" by the language of CALJIC No. 2.90 — requires reconsideration. (See *People v. Crittenden, supra,* 9 Cal.4th at p. 144; see also *People v. Wilson, supra,* 43 Cal.4th at p. 23.) An instruction that dilutes the standard of proof beyond a reasonable doubt on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally

Francis v. Franklin, supra, 471 U.S. at p. 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity."]; *People v. Kainzrants*, *supra,* 45 Cal.App.4th at p. 1075 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart*, *supra,* 145 Cal.App.3d at p. 975 [specific jury instructions prevail over general ones].) "'It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is *specific* and the supposedly curative instruction is *general*.'" (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395, quoting 7 Witkin, Cal. Procedure (3d ed. 1985) Trial, § 319, p. 364; original italics.)

Furthermore, nothing in the challenged instructions given in this case explicitly informed the jury that those instructions were qualified by the reasonable doubt instruction.[109] It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions which contain their own independent references to reasonable doubt.

Even assuming that the language of a lawful instruction somehow

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[109] A reasonable doubt instruction also was given in *People v. Roder*, *supra*, 33 Cal.3d 491, but it was not held not to cure the harm created by the impermissible mandatory presumption. (See *id.* at pp. 496, 504-505.)

can cancel out the language of an erroneous one — rather than vice-versa — the principle does not apply in this case. The allegedly curative instruction was overwhelmed by the unconstitutional ones. Gomez's jury heard several separate instructions, each of which contained plain language that was antithetical to the reasonable doubt standard. Yet the charge as a whole contained only one countervailing expression of the reasonable doubt standard: the oft-criticized and confusing language of CALJIC No. 2.90. (3CT 878; 29RT 4129-4130.) This Court has admonished "'that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' [Citation.]" (*People v. Wilson* (1992) 3 Cal.4th 926, 943.) Under this principle, it cannot seriously be maintained that CALJIC No. 2.90 is sufficient, by itself, to serve as a counterweight to the mass of contrary pronouncements given in this case. The effect of the "entire charge" was to misstate and undermine the reasonable doubt standard, eliminating any possibility that a cure could be realized by a single instruction inconsistent with the rest.

D. Reversal Is Required.

Because the erroneous instructions permitted conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery

was a structural error which is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) If the erroneous instructions are viewed only as burden-shifting instructions, the error is reversible unless the prosecution can show that the giving of the instructions was harmless beyond a reasonable doubt. (*Carella v. California* (1989) 491 U.S. 263, 266-267; *Chapman v. California, supra,* 386 U.S. at p. 24.) Here, that showing cannot be made. On the contrary, the evidence of Gomez's guilt — particularly of the crimes against Rajandra Patel and Raul Luna — was, to say the least, weak. (See Arguments I and II, above.) It was also entirely circumstantial, maximizing the harm of the erroneous circumstantial evidence instructions. As set forth in Argument VI.E., above, the prosecution cannot show the error harmless with respect to the O'Farrell Street killings, either, as a mistrial or an inability to agree as to whether the killings were first or second degree murder, was not out of the realm of possibility. (See Arguments III, V.D., VII.E.)

Given the singularly weak evidence in the Patel and Luna cases, and the questions about premeditation raised by the prosecution's own evidence in the O'Farrell Street cases, this dilution of reasonable doubt by the guilt phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (*See Sullivan v. Louisiana*, *supra*, 508 U.S. at pp.

278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra,* 33 Cal.3d at p. 505.) The guilt phase convictions, the special-circumstance findings, and the death sentences must be reversed.

XV.

THE TRIAL COURT'S INSTRUCTION ON KIDNAPING ERRONEOUSLY AND UNCONSTITUTIONALLY TOLD JURORS TO CONSIDER THE TOTALITY OF THE CIRCUMSTANCES IN DETERMINING WHETHER THE MOVEMENT OF THE VICTIM WAS SUBSTANTIAL, REQUIRING REVERSAL

The jury found Gomez guilty of one count of simple kidnaping, found him guilty of murder after having been instructed on a kidnaping theory of felony murder, and found the kidnaping special circumstance allegation to be true. (3CT 837, 839; 29RT 4344-4345, 4347; counts 3 and 5.)

The trial court instructed the jurors with CALJIC No. 9.50 as follows:

> Defendant GOMEZ is accused in Count 5 of having committed the crime of Kidnapping, a violation of section 207, subdivision (a) of the Penal Code.
>
> Every person who unlawfully and with physical force or by any other means of instilling fear, steals or takes, or holds, detains, or arrests another person and carries that person without his consent for a distance that is substantial in character, is guilty of the crime of Kidnapping in violation of Penal Code section 207, subdivision (a).
>
> A movement that is only for a slight or trivial distance is not substantial in character. *In determining whether a distance that is more than slight or trivial is substantial in character, you should consider the totality of the circumstances attending the movement, including, but not limited to, the actual distance moved, or whether the movement increased the risk of harm above that which existed*

prior to the movement, or decreased the likelihood of detection, or increased both the danger inherent in a victim's foreseeable attempt to escape and the attacker's enhanced opportunity to commit additional crimes. If an associated crime is involved, the movement also must be more than that which is incidental to the commission of the other crime.

In order to prove this crime, each of the following elements must be proved:

1. A person was unlawfully moved by the use of physical force, or by any other means of instilling fear.

2. The movement of the other person was without his consent.

3. The movement of the other person in distance was substantial in character.

(3CT 886-887; 29RT 4155-4157 [emphasis added].)

This instruction was error. Gomez was charged with having committed a kidnaping in 1997. For offenses before 1999, the law with respect to asportation is governed by *People v. Caudillo* (1978) 21 Cal.3d 562, 572-575. Under *Caudillo*, "the determining factor in the crime of kidnaping is the actual distance of the victim's movements . . . . [Citation.]" (*Id.* at p. 572; see also *People v. Morgan* (2007) 42 Cal.4th 593, 609.)[110] The "totality of the circumstances," including enhanced danger to the victim and the defendant's motivation to escape detection, were *not* factors to be considered. (*People v. Morgan, supra,* 42 Cal.4th at pp. 609-611; see also

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[110] While *Caudillo* was overruled in 1999 by *People v. Martinez* (1999) 20 Cal.4th 225, 235-238 & fn. 6, *Martinez* explicitly held that it did not apply retroactively. (*Id.* at pp. 238-241; see also *People v. Morgan, supra,* 42 Cal.4th at p. 610.)

People v. Castaneda (2011) 51 Cal.4th 1292, 1319-1320.) The court thus erred when it instructed jurors to consider the totality of the circumstances and the specific circumstances it enumerated.[111]

This error was of constitutional dimension for two reasons. First, jury instructions violate due process where they fail to require the state to prove every element of the offense beyond a reasonable doubt. (*People v. Flood* (1998) 18 Cal.4th 470, 479-480; *Neder v. United States* (1999) 527 U.S. 1, 8; *Middleton v. McNeil* (2004) 541 U.S. 433, 437; U.S. Const, 14th Amend.) The court here misinstructed jurors on an essential element of the crime — movement of a substantial distance — and relieved the prosecution of its burden of proving beyond a reasonable doubt that the actual distance moved was substantial. This misinstruction thus violated Gomez's right to due process.

More, the instruction violated Gomez's right to due process because it constituted an improper application retroactive application of *People v. Martinez, supra,* 20 Cal.4th at pp. 236-241 & fn. 6. An ex post facto law has been defined by the Supreme Court as one "'that makes an action done before the passing of the law, and which was innocent when done, criminal;

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[111] Erroneous jury instructions are reviewable on appeal even in the absence of an objection. (Pen. Code § 1259.) Thus, the defense failure to object is immaterial. The defense concession that a kidnaping occurred (27RT 3903) is immaterial as well.

and punishes such action,' or 'that aggravates a crime, or makes it greater than it was, when committed.' *Calder v. Bull* [1798] 3 Dall. 386, 390, 1 L.Ed. 648. [Footnote omitted.] If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." (*Bouie v. City of Columbia* (1964) 378 U.S. 347, 353-354; see *Rogers v. Tennessee* (2001) 532 U.S. 451, 458-459 [explaining that *Bouie* was firmly rooted in well-established due process principles]; U.S. Const., 14th Amend.)

"If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect.'" (*Bouie v. City of Columbia, supra,* 378 U.S. at p. 354.) Indeed, this Court recognized as much in *People v. Martinez.* (*People v. Martinez, supra,* 20 Cal.4th at pp. 238-241, citing *Bouie v. City of Columbia, supra,* 378 U.S. at pp. 353- 355.) The trial court's retroactive application of *Martinez* violated Gomez's due process rights.

This constitutional error requires reversal unless the prosecution can prove it harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24; see *Sullivan v. Lousiana, supra,* 508 U.S. at p.

279; *Neder v. United States, supra,* 527 U.S. at p. 17; *United States v. Gaudin* (1995) 515 U.S. 506, 510; U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16.)[112] The "actual distance moved" should have been the only factor the jury considered in determining whether Patel had been moved a substantial distance. (*People v. Caudillo, supra,* 21 Cal.3d at p. 572.) The instruction, on the other hand, allowed jurors to consider a host of other factors.

In this case, the evidence of asportation of any distance was shaky, at best. Patel's body was found on a freeway on-ramp, and a trail of blood provided evidence that he was killed there, but there was no evidence as to how he arrived there, or whether he was transported there from anywhere else while alive. (See Argument II.) The prosecutor's theory was that the evidence of Patel's blood in the trunk, and Witness #3's testimony that Gomez told her Patel's jewelry belonged to a "Mexican man I have in the trunk of the car I just killed" (12RT 1918-1919), supported a conclusion that Patel was kidnaped, and moved from Witness #3's house to the freeway

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[112] In *People v. Castaneda,* the Attorney General conceded error in a similar case, and conceded that prejudice had been established under the *Watson* standard. (*People v. Castaneda, supra,* 51 Cal.4th at pp. 1319-1320; see *People v. Watson, supra,* 46 Cal.4th at p. 836.) The Court accepted the concession. (*People v. Castaneda, supra,* 51 Cal.4th at p. 1320.) It was thus unnecessary for the Court to determine whether the *Chapman* standard properly applied to this error.

on-ramp where he was killed. (See 27RT 3831-3834 [prosecutor's summation].)

But jurors may well have harbored doubts about whether Patel was transported, while alive, from Witness #3's house, given the dubious relevance of her report that Gomez had talked about a deceased Mexican man. (12RT 1918-1919.) The evidence of Patel's blood in the trunk of his car (12RT 1886-189, 1904-1911) may show that Patel was at one time in that trunk, but there was no evidence suggesting that the car was moved while Patel was in the trunk. One or more jurors may well have had doubts about whether the actual distance Patel was moved was "substantial," rather than "slight or trivial" — concluding, for example, that evidence showed, at most, that the perpetrators moved, or attempted to move Patel a short distance at the on-ramp — but concluded, under the "totality of the circumstances," that the movement was substantial because of, for example, the increased risk of harm to Patel. The prosecution cannot prove this error harmless beyond a reasonable doubt; more, it is reasonably probable that in the absence of this error, the result would have been more favorable to Gomez. (*People v. Watson, supra,* 46 Cal.4th at p. 836.) Reversal of Gomez's conviction for kidnaping and the kidnaping special circumstance is required.

Gomez's death sentences must be reversed as well. The evidence of guilt in the Patel and Luna cases was far from overwhelming. (See Arguments I and II.) The improper injection of a kidnaping and a kidnaping special circumstance into the jurors' penalty phase decisionmaking threatened to tip the scales towards death. The prosecution cannot prove the error harmless beyond a reasonable doubt, the standard applicable to any penalty phase error. (*People v. Lewis*, *supra,* 43 Cal.4th at p. 527; *Chapman v. California, supra,* 386 U.S. at p. 24.)

XVI.

THE DEFINITION OF SIMPLE KIDNAPING ANNOUNCED BY THIS COURT AT THE TIME OF THE KIDNAPING CHARGED IN THIS CASE WAS UNCONSTITUTIONALLY VAGUE

The possibility that Gomez had kidnaped Patel in violation of subdivision (a) of Penal Code section 207 influenced the jury's decisions at both stages of the trial. At the guilt phase, the jury found Gomez guilty of one count of simple kidnaping, found him guilty of murder after having been instructed on a kidnaping theory of felony murder, and found the kidnaping special circumstance allegation to be true. (3CT 837, 839; 29RT 4344-4345, 4347; counts 3 and 5.) At the penalty phase, the jury was instructed that the kidnaping special circumstance was one of the factors it must consider in deciding whether Gomez should live or die. (13CT 3443.)

Subdivision (a) of Penal Code section 207 provides that, "Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping."[113] Because there was no evidence that Patel was transported across state or county lines, the statutory language applicable to this case is the portion of section 207 that prohibits the

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[113] The statute was the same in 1997, when the kidnaping in this case allegedly occurred. (See *People v. Morgan, supra,* 42 Cal.4th at p. 605.)

forcible movement of a non-consenting victim "into another part of the same county."

Thus, the forcible movement (or "asportation") of the victim "into another part of the same county" was an essential element of the crime of kidnaping charged herein (see *People v. Rayford* (1994) 9 Cal.4th 1, 14; *People v. Camden* (1974) 16 Cal.3d 808, 814) to which the constitutional requirement of specificity discussed hereafter applies. As set forth below, that term, as construed by this Court at the time of the charged crime, was unconstitutionally vague.

Gomez recognizes that this Court has rejected this claim in *People v. Morgan, supra,* 42 Cal.4th at pp. 604-607. He nonetheless asks this Court to revisit the issue.

A. The Constitution Requires Reasonable Specificity in Defining Criminal Conduct.

To satisfy the due process requirements of the state and federal Constitutions (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), penal statutes must provide reasonably precise definitions of the criminal conduct they prohibit. (*Coates v. City of Cincinnati* (1971) 402 U.S. 611, 611-615; *Williams v. Garcetti* (1993) 5 Cal.4th 561, 567.) "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and

differ as to its application violates the first essential of due process of law. [Citation.]" (*Connally v. General Construction Co.* (1926) 269 U.S. 385, 391.)

"Under both [state and federal] Constitutions, due process of law in this context requires two elements: a criminal statute must 'be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt.'" (*Williams v. Garcetti*, *supra*, 5 Cal.4th at p. 567, citing *Kolender v. Lawson* (1983) 461 U.S. 352, 357; other citations and additional internal quotation marks omitted.)

In death penalty cases, additional specificity requirements are imposed by the state and federal Constitutions. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; see *Maynard v. Cartwright*, *supra,* 486 U.S. at pp. 361-363 [the Eighth Amendment imposes stricter requirements than the due process clause of the Fourteenth Amendment]; see also *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, 806 [finding a special circumstance unconstitutionally vague under the due process clauses of the state and federal Constitutions].)

Special circumstances, which determine whether or not a defendant is eligible for the death penalty, must provide both "clear and objective

standards" and "specific and detailed guidance" for the jury. (*Godfrey v. Georgia, supra,* 446 U.S. at p. 428; *People v. Bacigalupo* (1993) 6 Cal.4th 457, 468.) Sentencing factors, which are used to determine whether a death-eligible defendant will actually be sentenced to death, must have a common-sense core meaning that juries can understand. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975.)

B. The Statutory Definition of Kidnaping is Vague.

In determining whether a statute is sufficiently certain to comply with due process and Eighth Amendment standards, the courts "'look first to the language of the statute, then to its legislative history, and finally to California decisions construing the statutory language.' [Citation.]" (*People v. Estrada* (1995) 11 Cal.4th 568, 581.) Therefore, it is necessary to consider both "the relevant and decidedly nonlinear history of the simple kidnapping [and] kidnapping for robbery . . . statutes" (*People v. Rayford, supra*, 9 Cal.4th at p. 14) and the judicial decisions that resulted in the courts "not having an articulable standard for the meaning of" the crucial statutory language at the time of the crime at issue here (*id.* at p. 19, fn. 10).

1. This Court's Interpretation of the Asportation Element in Penal Code Section 207.

The language at issue here – "into another part of the same county" – was added to subdivision (a) of Penal Code section 207 in 1905 in response

to this Court's decision in *Ex parte Keil* (1890) 85 Cal. 309, which held that a forcible movement of 20 miles from San Pedro to Santa Catalina Island, both in Los Angeles County, was not kidnaping within the meaning of the statute as it existed at that time. (*People v. Rayford*, *supra*, 9 Cal.4th at p. 8, fn. 3.) Thus, it is reasonable to assume that the Legislature intended miles-long movements like those involved in *Keil* to constitute simple kidnaping. Beyond that, however, the statute's language and history give no indication of whether movement for inches, feet, or miles is required.

Half a century later, in *Cotton v. Superior Court* (1961) 56 Cal.2d 459, the Court concluded that the Legislature had not intended to allow every assault to be prosecuted as a kidnaping so long as movement over some slight distance was involved. (*Id.* at p. 465.) It ruled that a movement of 15 feet incidental to an assault would not constitute a violation of Penal Code section 207. (*Id.* at pp. 464-465.)

In *People v. Stanworth* (1974) 11 Cal.3d 588, the Court articulated a new test to use in determining what was a sufficient asportation under section 207, and that test was the one that applied at the time of the kidnaping charged herein. According to *Stanworth*, the statutory requirement of movement into another part of the same county "implies that the determining factor in the crime of [simple] kidnaping is the actual

distance of the victim's movements." (*People v. Stanworth*, *supra*, at p. 601.) Relying on prior cases which had held that the distance of the asportation must be more than "slight" or "trivial," the Court in *Stanworth* also held that the distance "must be substantial in character to constitute kidnaping under section 207." (*Ibid.*)

Although *Stanworth*'s reference to "the actual distance of the victim's movements" (*ibid.*) strongly implied a quantitative test for sufficient asportation under Penal Code section 207, this Court refused to fix a specific numerical limit on the distance an unwilling victim could be moved without violating the statute. Noting that "the Legislature did not provide a definition of kidnaping that involves movements of an exact distance" (*People v. Stanworth*, *supra*, 11 Cal.3d at p. 600), the Court stated that "'to define the phrase, "another part of the same county," in terms of a specific number of inches or feet or miles would be open to a charge of arbitrariness'" (*id.* at p. 601, quoting *People v. Daniels* (1969) 71 Cal.2d 1119, 1128-1129).

People v. Caudillo, *supra,* 21 Cal.3d at p. 572, affirmed *Stanworth*'s "substantial distance" test and "made the asportation standard exclusively dependent on the distance involved." (*People v. Martinez*, *supra,* 20 Cal.4th at p. 233.) It specifically rejected the Attorney General's claim that

considerations other than actual distance should be considered in determining whether the movement was substantial. "Neither the incidental nature of the movement, the defendant's motivation to escape detection, nor the possible enhancement of danger to the victim resulting from the movement is a factor to be considered in the determination of substantiality of movement for the offense of [simple] kidnaping." (*People v. Caudillo*, *supra*, 21 Cal.3d at p. 574.) However, *Caudillo* did not specify what actual distance would be sufficient.

Thus, "[a]lthough purportedly no particular distance was controlling, distance nevertheless became the sole criterion for assessing asportation, with only 'more than slight [citation] or "trivial" [citation]' as guidance in assessing when movement was 'substantial in character.' (*People v. Stanworth*, *supra*, 11 Cal.3d at p. 601.)" (*People v. Martinez*, *supra*, 20 Cal.4th at p. 234.)

Martinez changed the rule once more. It overruled *Caudillo* and held that whether the asportation was substantial in character should be determined by considering "the totality of the circumstances," including the scope and nature of the movement, the changed environment, any increased risk of harm to the victim, and whether the movement was merely incidental to an associated crime. (*People v. Martinez*, *supra*, 20 Cal.4th at pp. 235-

240, fn. 6.)[114]

2. The Lack of an Articulable Standard for What Constituted a "Substantial Distance" Under Penal Code Section 207.

As previously noted, under the construction of Penal Code section 207 that applied at the time the kidnaping charged in this case, the actual distance of the victim's movements was the sole criterion for assessing the sufficiency of the asportation, and the requirement that the movement be more than slight or trivial was the only guidance provided by the case law as to whether the movement was substantial in character. (*People v. Martinez*, *supra*, 20 Cal.4th at p. 234.)

However, "substantial" is an inherently subjective term, and what seems substantial to one person may seem moderate or insignificant to another. (Cf. *Connally v. General Construction Co.*, *supra*, 269 U.S. at pp.

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[114] The new test established by *Martinez* does not apply to this case. (*People v. Martinez, supra,* 20 Cal.4th at pp. 238-241; see Argument XV, above.) *Martinez* illustrates, however, the differing constructions to which the crucial phrase "substantial distance" is susceptible. (See *Connally v. General Construction Co.*, *supra*, 269 U.S. at p. 393 ["The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions"].)

As set forth in Argument XV, the trial court erroneously charged the jury using the "totality of the circumstances" language. That error independently requires reversal of the kidnap conviction and the kidnap special circumstance.

394-395 [noting that the terms "locality" and "neighborhood" were "elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles"].)[115] Trial jurors and the intermediate appellate courts have recognized this fundamental uncertainty, and this Court has essentially agreed.

The jurors in *People v. Daniels* (1993) 18 Cal.App.4th 1046, for example, sent the trial court a written request which stated: "[N]eed clarification on what is substantial distance, that is, a distance more than slight or trivial." (*Id.* at p. 1051.) The trial court responded by instructing the jury to use the common, ordinary meaning of the term, prompting the jury to request a dictionary. (*Ibid.*) The next day, the jurors sent the trial court another request which read:

> "It appears we have a hang-up with some people of the jury who interpret kidnapping as taking a person a [ ] few miles in order for him (the defendant) to be charged with kidnapping. We need a clarification on what constitutes kidnapping. Does the distance the victim is taken (miles) and the nature of the route have any bearing on a person being kidnapped? It seems

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[115]Although the word "substantial' has been found sufficiently certain in some contexts (e.g., *People v. Serrano* (1992) 11 Cal.App.4th 1672, 1676 ["substantial likelihood of death"]), it has been found unacceptably ambiguous in others (e.g., *People v. Belous* (1969) 71 Cal.2d 954, 970 ["'substantially or reasonably' necessary to preserve the life of the mother"]; *State v. Liuzza* (La. 1984) 457 So.2d 664, 665-666 ["substantial part of support and maintenance"]; *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391-392 ["substantial history of serious assaultive criminal convictions"]).

we are hung up on the interpretation of the word kidnapping." (*Id.* at pp. 1051-1052.) The jurors were not able to reach a verdict until the trial court erroneously instructed them that a distance of 500 feet was substantial as a matter of law. (*Ibid.*)

The intermediate appellate courts also struggled with the concept of "substantial distance." In *People v. Martinez*, this Court quoted with approval two decisions in which the courts of appeal had expressly stated that the "substantial distance" test applicable to this case did not provide a meaningful standard for the determination of guilt:

> As more than one Court of Appeal has observed, decisions of this court provide scant assistance in determining simple kidnapping asportation: 'The increasing complexity of the law marches on. What [*People v. Stanworth, supra*, 11 Cal.3d 588] and [*People v. Brown* (1974) 11 Cal.3d 784] seem to teach is this: the test of simple kidnaping *is not* (1) whether the movement is incidental to an underlying crime [citation]; (2) whether there is an increase in the risk of harm above that present in an underlying crime [citation]; (3) a mathematical formula [citation]; or (4) the crossing of arbitrary boundaries. [Citation.] Thus we are left to ponder what the movement *is* in simple kidnaping. We are told it "is the actual distance of the victim's movements" and they must be substantial in character [citations] but, of course, it is not a question of mathematical measurement or crossing of arbitrary boundaries. Thus, we are led in circles.' (*People v. Stender* (1975) 47 Cal.App.3d 413, 422 [121 Cal.Rptr. 334].) 'Jury confusion is understandable. Without a frame of reference, "substantial" has little or no meaning. To only say, as [the standard jury instruction] does, that it is "more than slight or trivial" scarcely helps.' (*People v. Daniels* (1993) 18 Cal.App.4th 1046, 1053, fn. 5 [22 Cal.Rptr.2d 877].)"

(*People v. Martinez, supra*, 20 Cal.4th at pp. 234-235, original italics; see also *People v. Rayford, supra*, 9 Cal.4th at p. 14 [also quoting *Daniels*]; *id.* at p. 17, fn. 9 [also quoting *Stender*].)

Another Court of Appeal decision, not cited in *Martinez* and *Rayford*, is in accord. In *People v. Daniels* (1988) 202 Cal.App.3d 671, 673-683, the court focused on the lack of clarity in the standard for asportation under Penal Code section 209, but also noted that "the same confusion occurs when movement of the victim is followed by offenses other than robbery," raising the question whether the movement was sufficient to constitute a kidnaping under subdivision (a) of Penal Code section 207. (*Id.* at p. 679, fn. 8.) "This area of the law," the court declared, "also requires clarification." (*Ibid.*)[116]

Perhaps most significant, this Court itself has recognized the lack of clarity in the definition of simple kidnaping that prevailed at the time of the kidnaping charged in this case. It has twice characterized the "substantial distance" test for asportation under Penal Code section 207 as "less clear"

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[116] The court in *People v. Phillips* (1959) 173 Cal.App.2d 349, 352, concluded that use of a "considerable distance" standard would "import into [Penal Code section 207] a hazardous element of uncertainty." *Phillips* was decided before the "substantial distance" standard was adopted in *Stanworth*, but its criticism of the similar "considerable distance" standard would apply with equal force to the *Stanworth* rule that applied in the instant case.

than the test for asportation under section 209 (*People v. Martinez*, *supra*, 20 Cal.4th at p. 233; *People v. Rayford*, *supra*, 9 Cal.4th at p. 14), even though the section 209 test has itself been criticized as confusing (*People v. Daniels*, *supra*, 202 Cal.App.3d at pp. 673-683).

In addition, this Court has admitted that the "substantial distance" test applicable to this case provided "little guidance" (*People v. Rayford*, *supra*, 9 Cal.4th at p. 14) and "scant assistance" (*People v. Martinez*, *supra*, 20 Cal.4th at p. 234) to those charged with determining whether an asportation was sufficient to constitute a violation of Penal Code section 207. Indeed, in *People v. Rayford*, *supra*, 9 Cal.4th 1, this Court went further and admitted that its prior decisions had left the lower courts with *no* articulable standard for determining the length of asportation necessary to constitute kidnaping. (*Id.* at p. 19, fn. 10.)

In the course of discussing *People v. Bradley* (1993) 15 Cal.App.4th 1144, the *Rayford* court commented:

> It is apparent that *Bradley* reviewed the sufficiency of the evidence of asportation for simple kidnapping on bases arguably inconsistent with *People v. Caudillo*, *supra*, 21 Cal.3d 562. *Perhaps in response to the frustration of not having an articulable standard for the meaning of 'substantial distance,'* we note that other Court of Appeal opinions have also reviewed the sufficiency of the evidence for simple kidnapping on similarly inconsistent bases.

(*People v. Rayford*, *supra*, 9 Cal.4th at p. 19, fn. 10, italics added.) This

absence of "an articulable standard for the meaning of 'substantial distance'" made the definition of simple kidnaping in effect at the time of the crime charged herein unconstitutionally vague.

Moreover, the inconsistent application of the "substantial distance" test noted by *Rayford* is further evidence of constitutional infirmity.[117] (*Connally v. General Construction Co.*, *supra*, 269 U.S. at p. 393.) "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." (*Grayned v. City of Rockford*, *supra,* 408 U.S. at pp. 108-109, fn. omitted.) A test that cannot be uniformly applied, even by appellate courts, will inevitably result in arbitrary and discriminatory application by trial judges and lay juries.

Apparently attempting to forestall a vagueness challenge to its new "substantial distance" standard, the *Stanworth* court quoted from *People v.*

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[117]*Rayford* cited *People v. Bradley*, *supra*, 15 Cal.App.4th 1144, *People v. Daly* (1992) 8 Cal.App.4th 47, and *People v. Williams* (1990) 220 Cal.App.3d 1165, as examples of decisions that had used reasoning arguably inconsistent with the holding of *Caudillo*. Dramatic evidence of inconsistency in result can be found by comparing the decision in *People v. Stender* (1975) 47 Cal.App.3d 413, 423, which held that an asportation of 200 feet was sufficient under the circumstances to establish simple kidnaping in violation of section 207, with the decision in *People v. John* (1983) 149 Cal.App.3d 798, 807-810, which held that an asportation of 465 feet was *not* sufficient. The reasoning of *Stender* was criticized in *Caudillo* for relying on factors other than actual distance. (*People v. Caudillo*, *supra*, 21 Cal.3d at p. 574.)

Daniels, *supra,* 71 Cal.2d at pp. 1128-1129, and declared: "'[Nonetheless] [t]he law is replete with instances in which a person must, at his peril, govern his conduct by such nonmathematical standards as "reasonable," "prudent," "necessary and proper," "substantial," and the like.' (*Daniels*, 71 Cal.2d at pp. 1128-1129.)" (*People v. Stanworth, supra,* 11 Cal.3d at p. 601.) However, the *Stanworth* court ignored an important qualification to the language it quoted from *Daniels*. After noting a variety of situations in which "nonmathematical" standards like "reasonable" and "prudent" were employed, the *Daniels* court stated, "Yet standards of this kind are not impermissively vague, *provided their meaning can be objectively ascertained by reference to common experiences of mankind.*" (*People v. Daniels*, *supra*, 71 Cal.2d at p. 1129 [emphasis added].)

The problem here is that there is nothing in community standards or the "common experiences of mankind" that specifies how far a person must be moved before the length of the asportation can be characterized as "substantial." The standard established by *Stanworth* and *Caudillo* was not a normative test, dependent on how the circumstances of the case were evaluated with reference to personal or community values or the shared experiences of the jurors. Instead, it was a purely numerical test, entirely dependent on the actual distance of the victim's movements, but with no

"bright line" numerical limit to distinguish asportations that were substantial from those that were not. (See *People v. Stanworth*, *supra*, 11 Cal.3d at pp. 600-601.)

Opinions as to how long the actual distance of an asportation must be before it can be characterized as substantial can vary widely. The jury in *People v. Daniels*, *supra*, 18 Cal.App.4th 1046, included some jurors who believed that a movement for a few miles was necessary to constitute kidnaping (*id.* at pp. 1051-1052), whereas the jury in *People v. Daly*, *supra*, 8 Cal.App.4th 47, convicted the defendant of kidnaping for an asportation that measured approximately 40 feet (*id.* at pp. 50-51).

Therefore, the term "substantial distance," as it was construed by this Court in 1994, suffers from the same constitutional infirmity as the term "annoy" at issue in *Coates v. City of Cincinnati*, *supra*, 402 U.S. at p. 612. The statute was "vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." (*Coates v. City of Cincinnati*, *supra*, 402 U.S. at p. 614, citation omitted.)

C. Reversal of the Kidnaping Conviction, the Kidnaping Special Circumstance, and the Death Sentences is Required.

A conviction and special circumstance based on an unconstitutional statute cannot stand. Therefore, because Penal Code section 207, as

construed by this Court at the time of the alleged kidnaping in this case, was unconstitutionally vague (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, & 17), both Gomez's conviction for simple kidnaping and the kidnaping special circumstance must be reversed.

Gomez's death sentences must be reversed as well. The evidence of guilt in the Patel and Luna cases was far from overwhelming. (See Arguments I and II.) The improper injection of a kidnaping and a kidnaping special circumstance into the jurors' penalty phase decisionmaking, particularly in the Patel case, threatened to tip the scales towards death. The prosecution cannot prove the error harmless beyond a reasonable doubt, the standard applicable to any penalty phase error. (*People v. Lewis*, *supra,* 43 Cal.4th at p. 527.)

XVII.

THE PROSECUTOR VIOLATED *GRIFFIN V. CALIFORNIA* WHEN, IN AN EFFORT TO FILL A CRUCIAL EVIDENTIARY GAP IN HIS CASE, HE ARGUED THAT THERE WAS NO EVIDENCE THAT MR. GOMEZ READ CERTAIN NEWSPAPER ARTICLES; REVERSAL IS REQUIRED

The prosecution offered only one item of evidence to attempt to meet its requirement of corroborating the accomplice testimony of Witness #1, implicating Gomez in the killing of Jesus Escareno. (See 25RT 3644-3645; Pen. Code § 1111.) That evidence consisted of Gomez's statement to Detective Winter, which, according to the prosecution, revealed knowledge of the crime that had not been released to the press — the knowledge that Escareno's wallet had been stolen.[118]

The prosecution also offered this statement to shore up its weak evidence against Gomez in the cases involving Rajandra Patel. (See Argument II, above; see fn. 23.) It claimed that Gomez's statement revealed knowledge of the Patel case not released to the press — again, that the

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[118] Detective Winter testified that Gomez "said something along the line we must be very busy because he knew things had gone crazy there in the Harbor Area lately. And he talked about a guy up on Western, his head being shot off. . . . a couple of guys that were shot and brains were splattered all over the place and that these individuals could not be identified. . . . He said that when he had talked about the individuals not being identified, their wallets were missing." (13RT 2044.)

victim's wallet was missing.[119]

There were significant flaws in the prosecution's theory, however. As an initial matter, this statement did *not* reveal any knowledge of the Patel or Escareno crimes not released to the press — as set forth elsewhere in this brief. (See Arguments XVIII & XIX.) More, the defense presented three newspaper articles providing information about the Patel and Escareno homicides, including one article specifically about the inability of the police to identify Patel's body and two stating that Escareno was robbed. (See Defense Exhibits G, L, & M.)

During its opening summation, the prosecution attempted to fix the flaws in its theory that Gomez's statement provided information not released to the press. In support of its argument that Witness #1's testimony about the Escareno homicide was corroborated, the prosecutor asked jurors to recall Detective Winter's testimony that Gomez made remarks about the homicide that included details not released to the press. (27RT 3836.) He

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[119] The prosecutor failed to identify how Gomez's statement related to the killing of Rajandra Patel, except that it had taken place in the Harbor Area, and Gomez had commented that "things had gone crazy there in the Harbor Area lately." (13RT 2044.) None of the vague references to the circumstances of the killings Gomez described fit with the circumstances in the Patel case. (13RT 2044.) More, despite the prosecution's summation argument (27RT 3826-3827), there was no evidence that Patel had a wallet, let alone that it was missing. The only evidence relating to this issue was the evidence that Patel could not be identified — which was the subject of a newspaper article introduced by the defense. (See Defense Exhibit G.)

noted that the defense had only produced three newspaper articles referring to the Escareno and Patel homicides. (27RT 3837.) He argued that the articles "d[id]n't give Ruben Gomez enough information to have told this to Detective Winter, Debra Winter." (27RT 3837.)

But perhaps afraid jurors would conclude that the articles did in fact contain all the information about the homicides in Gomez's statement, the prosecutor then attempted to address this crucial weak link in his case. He continued:

> But there's something even more important, there's something even more important. There is absolutely no evidence that Ruben Gomez saw those articles. There is absolutely no evidence that Ruben Gomez read those articles. There is absolutely no evidence that Ruben Gomez reads any newspaper.
>
> You've heard the lifestyle of these people, Ruben Gomezes, Arthur Grajedas, the (Witness No. 1), the (Witness No. 2). Are these people who keep up with the current events of the world outside of their drug dealing, outside of the world in which they live? Are these people who read their morning newspaper over their morning cup of coffee? Of course not.
>
> And as I say, there's absolutely no evidence that Ruben Gomez read these articles or any articles about these crimes from which he could have learned anything about these crimes, other than what he knew from being there and committing these crimes.

(27RT 3837-3838.)

At the next break, defense counsel moved for a mistrial, arguing that

the prosecutor had improperly commented on Gomez's failure to take the stand: "Basically if somebody reads something, the only person, the only possible witness in all likelihood who can offer or shed light on the fact that he or she read something is the reader himself . . . . And so I think it's a back door way of saying, heck, we didn't hear from Gomez, he didn't take the stand to say he read . . . the articles . . . ." (27RT 3860-3861.)

The court responded that Gomez was not the only person who could have testified that he read the article; there could have been evidence, the court said, that Gomez subscribed to the newspaper, that he avidly read it, or that he had commented to others about reading an article about the homicides. (27RT 3861-3862.) The court denied the mistrial motion. (27RT 3862.)

Defense counsel later asked the court to instruct the prosecutor not to comment any further about Gomez's failure to present evidence that he read the articles about the homicides. (27RT 3868-3869.) The court refused, reiterating that evidence other than Gomez's testimony could have shown that he read the articles, and stating that no *Griffin* error[120] had occurred.[121]

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[120] (*Griffin v. California* (1965) 380 U.S. 609.)

[121] The prosecutor returned to the argument in rebuttal, stating "[t]here is absolutely no evidence that Ruben Gomez reads any newspaper, let alone that he read these three articles. There's no evidence he subscribes

(continued...)

(27RT 3869.)

The prosecutor's comment violated *Griffin v. California, supra,* 380 U.S. 609. *Griffin* forbids prosecutorial comment on a defendant's failure to testify. (*Griffin v. California, supra,* 380 U.S. at pp. 614-615; see also *People v. Hughes* (2002) 27 Cal.4th 287, 371-372; U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, §§ 7, 15.) While *Griffin*'s rule does not extend to "comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses" (*People v. Miller, supra,* 50 Cal.3d at p. 996), it is error, however, "for a prosecutor to state that certain evidence is uncontradicted or unrefuted when that evidence could not be contradicted or refuted by anyone other than the defendant testifying on his or her own behalf" (*People v. Harrison* (2005) 35 Cal.4th 208, 257, quoting *People v. Hughes, supra,* 27 Cal.4th at p. 371; see *People v. Bradford, supra,* 15 Cal.4th at p. 1339.) Simply put, "[t]he prosecutor's argument cannot refer to the absence of evidence that only the defendant's testimony could provide. [Citation.]" (*People v. Brady, supra,* 50 Cal.4th at

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[121](...continued)
to a newspaper, no evidence he customarily buys a newspaper." (28RT 4076.)

Given the trial court's response to defense counsel's requests, any further objection or any other request for relief would have been futile. (See *People v. Hill, supra,* 17 Cal.4th at p. 820.)

pp. 565-566.)

Where the defendant has engaged in conversation with another person, and that person has testified about the conversation, comment that the testimony is unrefuted is *Griffin* error, as the only other person who could testify about the conversation is the defendant. (See *People v. Murtishaw* (1981) 29 Cal.3d 733, 757-758, *id.* at p. 740 [finding *Griffin* error where prosecutor commented that defendant failed to contradict testimony by his brother-in-law about statements defendant had made to him], superseded by statute as stated in *People v. Boyd* (1985) 38 Cal.3d 762, 772; *United States v. Flannery* (1st Cir. 1971) 451 F.2d 880, 881-882 [argument that witness's testimony about private conversations with defendant was "uncontradicted" violated rule that prosecutor may not comment on defendant's failure to take the stand]; *Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 810 & fn. 1 [*Griffin* error where prosecutor argued that, aside from witness who testified about phone call with defendant, only the defendant could tell jurors what the call was about].)

The act of reading a document or article is like a private conversation, except in the case of reading, there is only one person who can testify about it — the reader. In this respect, the prosecutor's argument is unlike an argument that the defendant has not, for example, offered alibi evidence —

which jurors would not naturally expect the defendant himself to do — or the argument that the defendant has not explained the presence of items in an apartment he shared with others. (See *People v. Sanders* (1995) 11 Cal.4th 475, 527-529.)

The only logical witness to testify about whether or not Gomez had read certain newspaper articles, of course, was Gomez himself. The court's reasoning that Gomez could have introduced evidence that he subscribed to the newspaper is not persuasive; as the court and the jury knew, Gomez did not have a fixed address (19RT 2929-2930); it was thus somewhat unreasonable to suggest that he could have provided evidence of a newspaper subscription. Whether Gomez read the articles is a matter that uniquely could be addressed by Gomez himself. The court's additional suggestion that Gomez could have called other witnesses to testify that he avidly read the paper suffers the same problem. The only witness who could testify that Gomez *read* the articles in question was Gomez himself.

The suggestion that Gomez could have called witnesses to testify that he had mentioned reading the articles at issue suffers a different problem: any evidence that Gomez told others he had read the articles would be subject to a hearsay objection, if the defense attempted to introduce it. (Thus, in the authorities addressed above regarding prosecution arguments that the

defendant had not contradicted witness who testified about a conversation with him, it was not suggested that the comments fell outside the *Griffin* rule because the defendant might have mentioned the conversations to others.)[122]

Because Gomez himself was the only logical person who could provide evidence about whether he had read the newspaper articles, the prosecutor's comment ran afoul of *Griffin*.

The *Chapman v. California* standard of harmless error review applies to this federal constitutional error. (*Chapman v. California, supra,* 386 U.S. at p. 24.) The prosecution cannot prove this error harmless beyond a reasonable doubt. (*Ibid.*)[123] The prosecutor's argument here "'serve[d] to fill

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[122] It bears noting that Witness #1 testified that he himself had read an article about the Escareno case in the San Pedro News Pilot. (24RT 3522.) Notwithstanding defense counsel's attempt to suggest, in summation, that Witness #1 had testified that Gomez read the article as well (27RT 3909), there was no such testimony; as set forth above, such testimony, if introduced by the defense, would likely be subject to a hearsay objection.

[123] Ninth Circuit cases state that "[i]n *Anderson v. Nelson*, 390 U.S. 523, 524 . . . (1968) (per curiam), the Court announced that *Griffin* error is reversible only 'in a case where such comment is extensive, where an inference of guilt from silence is stressed to the jury as a basis for conviction, and where there is evidence that could have supported acquittal.'" (*Cook v. Schriro* (9th Cir. 2008) 538 F.3d 1000, 1021; see also, e.g., *Jeffries v. Blodgett* (9th Cir. 1993) 5 F.3d 1180, 1192.) Gomez respectfully contends that these cases have misread the Supreme Court decision. *Anderson v. Nelson* states that "comment on a defendant's failure to testify cannot be labeled harmless error in a case where such comment is extensive, where an inference of guilt from silence is stressed to the jury as

(continued...)

an evidentiary gap in the prosecution's case,' or 'at least touch a live nerve in the defense,'" demonstrating its prejudice. (*People v. Vargas* (1973) 9 Cal.3d 470, 481, quoting *People v. Modesto* (1967) 66 Cal.2d 695, 714.)

Gomez's statement to Detective Winter was the only item of evidence the prosecution offered to corroborate Witness #1's testimony that Gomez killed Jesus Escareno. (See Arguments XVIII & XIX, below.) The prosecutor's improper argument thus filled *the* crucial evidentiary gap in the prosecution's case that Gomez robbed and killed Jesus Escareno: the prosecution contended that Gomez had revealed information only the killer possessed, and when the defense introduced evidence showing that that information had been published in the local newspaper, the prosecution attempted to backfill that gap by telling jurors that what was "even more important" was that there was no evidence Gomez read the newspaper. (27RT 3837.)

Though the jury deadlocked on the charges related to Escareno, those jurors who believed Gomez guilty of those crimes were permitted to consider them at the penalty phase; the error thus was not harmless beyond a reasonable doubt with respect to the death sentences. (See Arguments XVIII

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[123](...continued)
a basis of conviction, and where there is evidence that could have supported acquittal." (*Anderson v. Nelson* (1968) 390 U.S. 523, 523-524.) It does not say that error is prejudicial and requires reversal *only* in such cases.

& XIX, below.)

Gomez was prejudiced with respect to the jury's determination of the other counts at the guilt phase as well. The prosecution also attempted to shore up its weak evidence in the Patel cases with reference to Gomez's statement, arguing that it provided information he could not have, or did not learn from the newspaper. (27RT 3826-3827; 28RT 4075-4076.)[124] The prosecution cannot show beyond a reasonable doubt that the jury's determination in this close case was "surely unattributable" to the prosecution's error in calling attention to Gomez's failure to take the stand. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279.) As set forth at length in Argument II, the evidence linking Gomez to the crimes against Rajandra Patel consisted only of the testimony of two highly unreliable witnesses, who contradicted each other regarding crucial facts, such that it was physically impossible that both witnesses were telling the truth. The prosecution's error here attempted to improve upon this weak case by suggesting that Gomez's statement betrayed knowledge of the crime not gained from reading the newspaper, and that if Gomez had in fact read about the crimes in the newspaper he could have taken the stand and told jurors so himself.

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[124] As set forth in Argument II, fn. 23, above, Gomez contends that the prosecution entirely failed to establish the relevance of the statement to the Patel case. Nonetheless, there remains a reasonable possibility that the jurors were misled by the prosecutor's improper arguments.

And though the prosecution did not argue that Gomez's statement contained information about the Luna case not released to the press, the evidence against Gomez in the Luna case was so weak that it cannot be said that the verdict was "surely unattributable" to this error, which called jurors' attention to Gomez's failure to take the stand. (See Argument I, above.)

With respect to all the charges, improper prosecutorial arguments shifting the burden to the defense ensured that the jurors would consider Gomez's failure to take the stand not merely insofar as he failed to testify regarding the Patel and Escareno cases, but insofar as he failed to present a defense to all of the charges. The prosecutor told jurors:

> A defense attorney does not have to present any defense at all. They're entitled to rely on the state of the prosecution's evidence.
>
> But if you had a defense, if you were a defense attorney and you had a defense, would not you present it? Would you really sit back there and say, look, let's sit back, we're entitled to rely on the state of the prosecution's evidence, we've got this terrific defense, but we're not going to present it.
>
> Let's not kid each other. You wouldn't do that. You'd present your defense, if you were a defense attorney and you had a defense to present, you'd present it.

(28RT 4071; see also 26RT 3803-3804: "[T]he box holding the evidence of these defendants' guilt is overflowing and . . . the box holding the evidence

of their innocence is empty.")[125] These comments encouraged jurors to view the entire case in light of Gomez's failure to present an affirmative defense, increasing the likelihood that the prosecutor's *Griffin* error would prejudicially focus the jurors on Gomez's failure to take the stand.

The prosecution cannot show that the guilty verdicts in this case were "surely unattributable" to the error in calling attention to Gomez's failure to take the stand. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279.) Reversal is required.

Even should this Court conclude that the *Griffin* error prejudiced Gomez only with respect to the Escareno case, reversal of the death sentences would still be required, as those jurors who had been convinced of Gomez's guilt of the Escareno crimes were permitted to consider those crimes at the penalty phase. As set forth at length in Argument XVIII.E., below, the Escareno crimes were the most aggravating evidence relied on at the penalty phase. The gruesome (e.g. 19RT 2940-2950) and sad (e.g. 13RT 1976-1981) evidence about this homicide — the only killing in the case

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[125] Defense counsel's failure to object to these improper comments will necessarily be addressed in Gomez's habeas corpus petition. (*People v. Mendoza Tello, supra,* 15 Cal.4th at pp. 266-267.) Gomez brings them to the court's attention here only because these erroneous comments amplified the prejudice of the *Griffin* error.

described by an eyewitness[126] — can hardly have failed to influence any juror allowed to consider it. Witness #1's highly prejudicial testimony purporting to describe Gomez's shooting of Escareno could easily have served to erase serious lingering doubts about Gomez's guilt or his role in both the Patel and Luna cases, in which no forensic evidence linked him to the killings and no eyewitnesses saw the killings. (See *People v. Gay*, *supra,* 42 Cal.4th at p. 1226 [lingering doubt has particular potency where physical evidence is lacking and eyewitness testimony is contradictory].) The prosecution cannot prove beyond a reasonable doubt that the death sentences were "surely unattributable" to this error, which resulted in jurors' consideration, at the penalty phase, of Escareno's killing.

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[126] Witness #1 offered several different accounts of the Dunton and Acosta homicides, though in none of the accounts did he visually witness the killings. At trial he maintained that he was in the next room and heard the shooting. (See pp. 28-31, above.)

XVIII.

THE TRIAL COURT ERRED IN DENYING MR. GOMEZ'S PENAL CODE SECTION 1118.1 MOTION REGARDING THE ESCARENO CASE, AND EVIDENCE OF MR. GOMEZ'S GUILT OF THE MURDER OF JESUS ESCARENO WAS INSUFFICIENT; THE TRIAL COURT THUS ERRED AND VIOLATED MR. GOMEZ'S CONSTITUTIONAL RIGHTS WHEN IT INSTRUCTED JURORS THAT THOSE WHO BELIEVED MR. GOMEZ GUILTY OF MURDERING JESUS ESCARENO COULD CONSIDER THAT MURDER AT THE PENALTY PHASE

The trial court allowed penalty phase jurors to consider, as factor (b) evidence, a murder for which Gomez was not convicted — and for which no legal conviction could be obtained, because the prosecution's evidence was insufficient. Gomez's death sentences, weighted with the improper consideration of this additional murder — the single most significant aggravating factor in the case — cannot stand.

A. Applicable Law.

A conviction violates due process where a rational jury could not find the defendant guilty beyond a reasonable doubt. (See *Jackson v. Virginia*, *supra,* 443 U.S. at pp. 317-319; *People v. Johnson*, *supra,* 26 Cal.3d at pp. 575-576; see also *In re Winship*, *supra,* 397 U.S. at p. 364; U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 15.) An appellate court reviewing a sufficiency of the evidence claim must decide whether the evidence of each element of the offense was "substantial." (*People v. Johnson, supra,* 26

Cal.3d at p. 578.) "'[S]ome' evidence" is "not enough." (*Id.* at p. 577.)

"'Substantial evidence' means that evidence which, when viewed in light of the entire record, is of solid probative value, maintains its credibility and inspires confidence that the ultimate fact it addresses has been justly determined." (*People v. Conner, supra,* 34 Cal.3d at p. 149.)

A trial court addressing a Penal Code section 1118.1 motion applies the same standard applied by appellate courts addressing the sufficiency of the evidence. (*People v. Stevens, supra,* 41 Cal.4th at p. 200.) Review of a trial court's denial of a section 1118.1 motion is de novo. (*Ibid.*)

"A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." (Pen. Code § 1111.)

Corroborating evidence must "reasonably tend to connect the defendant with the commission of the crime." (*People v. McDermott* (2002) 28 Cal.4th 946, 985-986.) While every fact the accomplice testifies to need not be corroborated, the corroborative evidence must "tend[] to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth . . . ." (*People v.*

Perry (1972) 7 Cal.3d 756, 769, overruled in part on another ground in *People v. Green* (1980) 27 Cal.3d 1, 28.)

The corroborating evidence must connect the defendant to the offense without aid or assistance from the accomplice's testimony. (*People v. Szeto* (1981) 29 Cal.3d. 20, 26-27.) As one early case from this Court explained, the reviewing court must "eliminate from the case the evidence of the accomplice and then examine the evidence of the other witness or witnesses with the view to ascertain if there be *inculpatory* evidence — evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated; if there is no inculpatory evidence, there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him." (*People v. Morton* (1903) 139 Cal. 719, 724-725, original italics.) Jurors are similarly instructed with CALJIC No. 3.12: "In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the crime."

Such corroborating evidence must do more than raise a conjecture or suspicion of guilt. (*People v. Perry, supra,* 7 Cal.3d at p. 769.) If it does not, the evidence is insubstantial as a matter of law. (*People v. Najera* (2008) 43

Cal.4th 1132, 1137, citing *People v. Warren* (1940) 16 Cal.2d 103, 117 [accomplice instructions "deal with the vital question of the sufficiency of the evidence to sustain the conviction under the salutary rule laid down in section 1111 of the Penal Code"]; see also *People v. Riel, supra,* 22 Cal.4th at p. 1190 [Pen. Code § 1111 "relates to the sufficiency, not admissibility, of evidence"].)

B. The Trial Court Erred in Denying Mr. Gomez's Penal Code Section 1118.1 Motion Regarding the Escareno Case; The Evidence of Mr. Gomez's Guilt of the Murder and Robbery of Jesus Escareno Was Insufficient.

Aside from the testimony of Witness #1, an accomplice as a matter of law, the only evidence the prosecution introduced that purportedly connected Gomez with this killing consisted of a statement Gomez made to Detective Winter, in which he referred to a man who had been killed on Western Avenue, where Escareno's body was found. This evidence was not sufficient to connect Gomez with the commission of Escareno's murder. The trial court erred in denying Gomez's Penal Code section 1118.1 motion regarding the Escareno case. More, by itself, Witness #1's testimony was insufficient under both state law and the state and federal Constitutions. (See *Jackson v. Virginia, supra,* 443 U.S. at pp. 317-319; *People v. Johnson, supra,* 26 Cal.3d at pp. 575-576; see also *In re Winship, supra,* 397 U.S. at p. 364; *People v. Barnes, supra,* 42 Cal.3d at pp. 303-304.)

1. The Trial Court Erred In Denying Mr. Gomez's Penal Code Section 1118.1 Motion; Detective Winter's Paraphrase of Mr. Gomez's Statement Did Not Raise More than a Suspicion of Guilt.

After the prosecution rested, counsel for Gomez moved to dismiss the Escareno case. (25RT 3642-3643.) The trial court denied the motion, stating, nonetheless, "it was a good motion to make." (25RT 3650.)

Under the standards set forth above in subsection A., above, establishing a defendant's knowledge that a crime has taken place hardly suffices as corroborating evidence. Yet that is all the prosecution established here. Aside from the testimony of Witness #1, who the prosecution conceded was an accomplice to the Escareno murder (8RT 1274), the only evidence the prosecution proffered as corroboration was a statement Gomez made to police.[127]

As paraphrased by Detective Winter, Gomez made a remark:

> along the line we must be very busy because he knew things had gone crazy there in the Harbor Area lately. And he talked about a guy up on Western, his head being shot off, a female that had been killed and wrapped and disposed in a dumpster, a couple of guys that were shot and brains were splattered all over the place and that these individuals couldn't be identified.

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[127] The prosecution also contended that evidence relating to the other counts connected Gomez to the Escareno crimes. As discussed below, because that evidence was neither admitted nor admissible on the Escareno charges, it could not constitute the requisite corroboration.

(13RT 2044.) Prodded by the prosecutor, Detective Winter added, "He said that when he had talked about the individuals not being identified, their wallets were missing." (13RT 2044.)[128]

This statement, the prosecution contended, along with the fact that police had not released to the press the fact that Escareno's wallet had been stolen, provided the crucial corroborative evidence linking Gomez to the crime. (25RT 3643-3645; 27RT 3835-3838; see 13RT 2045, 2052, 2055-2056 [no wallet was found on Escareno's body]; 13RT 2067 [Escareno's sister testifying that he always carried a wallet].)

This evidence, however, was insufficient to link Gomez to the commission of the crime. The only detail in this statement that could have specifically referred to the Escareno crime was the reference to "a guy up on Western, his head being shot off." (13RT 2044.) (Escareno's body was found at a shopping center on Western Avenue, though the evidence suggested he had not been killed at that location. (See 9RT 1572-1573, 1582-1583; 13RT 2034-2039.)) The prosecution did not contend that the

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[128] Though the prosecutor prodded Winter to add that "when [Gomez] had talked about the individuals not being identified, their wallets were missing," he did not ask Winter to clarify whether Gomez had talked about wallets being missing in reference to all the homicides — including the female in the dumpster and the man shot on Western — or just the last two he had mentioned, the "couple of guys that were shot and brains were splattered all over the place." (13RT 2044.)

information about where Escareno's body was found or the fact that he was shot in the head was not public. Detective Winter, in fact, acknowledged on cross-examination that police had issued a press release about Escareno's killing, and that it was covered in the local paper. (13RT 2047-2048, 2053.)[129] Witness #1, in fact, testified that he had seen an article in the San Pedro News Pilot with a headline that said "neighbors discover gruesome — gruesome something referring to the car." (24RT 3522-3533.)

As Winter paraphrased Gomez's statement, it did not specifically identify the homicide on Western as one in which a wallet was taken. (It was unclear whether the individuals who could not be identified included only the "couple of guys that were shot" or also the previous killings Gomez had mentioned. (See 13RT 2044.))[130]

But even if this paraphrase of Gomez's statement were read to suggest that he had specifically identified the man on Western as a victim who could not be identified because his wallet was missing, the statement

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[129] As set forth below, the defense later introduced into evidence newspaper articles describing the Escareno case. Detective Flamenco acknowledged that these articles were contained in the "murder book" on the Escareno homicide. (26RT 3764-3768.)

[130] The defense introduced a newspaper article (apparently referring to the killing of Rajandra Patel), which stated that police were seeking to identify a man found fatally shot on a freeway on-ramp; the article stated that no identification was found on the body. (Defense Exh. G.)

does not tend to show Gomez had any unique knowledge of the crime. First, the fact that a victim could not be identified is not, by nature, something a perpetrator would have direct and unique knowledge of. A perpetrator may know that he had stolen a victim's wallet, but he would have no way of knowing whether that thwarted the victim's identification. Whether a homicide victim can be identified or not is something particularly known to the police — and known to others only through them.

Second, a person who did know that a homicide victim could not be identified — having somehow gained the information, which by its nature can only originate with law enforcement — would in most cases readily assume that the victim could not be identified because identification was not found with the body. Particularly where the killing was known to be a robbery-killing, one would readily assume that identification was not found because the victim's wallet had been taken. It is common knowledge, of course, that identification is usually carried by men in wallets.

Finally, Witness #1's testimony was that he himself had removed Escareno's wallet at a time when Gomez was not present. While Witness #1 testified that he gave Gomez and Dunton money from Escareno's wallet (after he had first spent some of it to buy heroin), he did not testify that he gave Gomez the wallet or even that he told Gomez he had taken it. (See

19RT 2949-2954 [Witness #1's testimony that after Escareno was shot, Gomez directed him to drive Escareno's car back to San Pedro so that they could remove Escareno's jewelry; Witness #1, alone, drove the car to a hamburger stand and removed Escareno's wallet, stopped and bought a "dime of stuff," and then went to Dunton's house, where he gave Gomez the remaining money from Escareno's wallet]; see also 22RT 3270.)

Thus, the prosecution's proffered corroborative evidence established only that Gomez knew that a man had been shot in the head on Western Avenue — a crime which Detective Winter acknowledged had been reported in the local papers. (13RT 2047, 2053.) Knowledge that a crime has occurred can hardly even be said to raise suspicion of guilt — let alone provide the requisite evidence connecting a defendant to a crime. (*People v. Perry, supra,* 7 Cal.3d at p. 769; *People v. McDermott, supra,* 28 Cal.4th at pp. 985-986.) Gomez's knowledge that a man had been shot in the head on Western Avenue does nothing to connect him to the *commission* of the crime "in such a way as may reasonably satisfy [the] jury" that Witness #1 was telling the truth. (*Ibid.*) Setting Witness #1's testimony aside, this evidence does not tend to connect Gomez to the crime.

Evidence that a defendant was present at the scene of a crime is insufficient to corroborate accomplice testimony. (See *People v. Lloyd*

(1967) 253 Cal.App.2d 236, 241-242; *People v. Valardi* (1966) 240 Cal.App.2d 98, 99; see also *People v. Abilez* (2007) 41 Cal.4th 472, 506.) Evidence that a defendant had the opportunity to commit a crime is likewise not sufficient. (*People v. Robbins* (1915) 171 Cal. 466, 474-476, abrogated on other grounds as stated in *People v. Tobias*, *supra,* 25 Cal.4th at pp. 336-337; *People v. Lloyd, supra*, 253 Cal.App.2d at pp. 241-242; *People v. Boyce* (1980) 110 Cal.App.3d 726, 737.) Evidence that the defendant was aware a crime had occurred is even less compelling and can hardly be said to provide sufficient corroboration.[131] This is particularly the case where, as here, the defendant resides with a person who has admitted being present when the crime was committed. Any details Gomez assertedly knew about the crime might as well have been learned through contact with Witness #1.

In arguing that Witness #1's testimony was sufficiently corroborated, the prosecution relied principally on Detective Winter's paraphrase of Gomez's statement, discussed above. (See 27RT 3835-3838.) In opposing

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[131] Cases in which this Court has found accomplice corroboration sufficient involve more than mere knowledge that a crime has occurred. (See, e.g., *People v. Bunyard* (1988) 45 Cal.3d 1189, 1205-1208 [evidence that defendant had solicited another witness to kill victim sufficed to corroborate accomplice]; *People v. McDermott, supra,* 28 Cal.4th at pp. 985-986 [evidence of motive, evidence that defendant was at crime scene at time of crime, and evidence of 17 phone calls between defendant and accomplice around the time of the murder, was sufficient corroboration].)

the defense Penal Code section 1118.1 motion, however, the prosecution also argued that Witness #1 was corroborated by the fact that the victims of other, jointly tried homicides were also shot in the head (except for Acosta) and were also shot with 12-gauge shotguns (except for Patel), and by the fact that all these killings took place in the Harbor Area within a 37-day period. (25RT 3643-3650.)

Evidence relating to the other counts with which Gomez was charged was neither admitted nor admissible in relation to the Escareno charges, despite the prosecution's argument in opposing the motion to dismiss (25RT 3648) and its improper arguments to the jury urging the cumulation of the evidence. (See Argument V.D., above.) Evidence Code section 1101 provides that "evidence of a person's character or trait of his or her character . . . in the form of . . . evidence of specific instances of his or her conduct . . . is inadmissible to prove his or her conduct on a specified occasion." While there are exceptions to this general rule of exclusion, the prosecutor never argued that any of these exceptions applied. The prosecution never sought to have evidence on each of the homicide counts considered as evidence of a common scheme or plan or as evidence of Gomez's identity as the killer of the other victims.

In any event, as set forth fully in Argument V.C.1., above, the

evidence on each homicide incident was not admissible regarding the other incidents.

Thus, the killings of the other victims could not serve to corroborate Witness #1's testimony about the Escareno crimes, and the court erred in denying Gomez's Penal Code section 1118.1 motion.

2. The Evidence Was Insufficient to Support Any Conviction for the Crimes Against Escareno.

Not only did the trial court err in denying Gomez's Penal Code section 1118.1 motion with respect to the Escareno case, but the evidence was insufficient, at the conclusion of the guilt phase, to support any conviction for the crimes against Escareno. In combination with defense evidence of newspaper articles reporting the Patel and Escareno killings, the prosecution's allegedly corroborative evidence was even more palpably valueless. During the prosecution case, the defense introduced a newspaper article about the Patel case, and during the defense case, it introduced two additional news articles relating to the Escareno crimes.

Defense Exhibit G, dated May 27, 1997, was introduced during the prosecution case. (13RT 2048-2049.) It referred to the discovery of a body on the freeway on-ramp; it stated that police were seeking to identify the man, who was fatally shot, and that no identification was found on the body. (Defense Exhibit G.)

Defense Exhibit M, introduced during the defense case, was dated June 10, 1997, and entitled "Man found slain at SP shopping center"; it described the discovery of Escareno's body, with a gunshot wound causing "massive trauma" to the head, at the Park Plaza Shopping Center on Western Avenue in San Pedro. It also noted that Escareno's car was missing and quoted a detective as saying that Escareno appeared to have been robbed. (Defense Exhibit M.) Defense Exhibit L, dated June 18, 1997, described the discovery of Escareno's car, and stated that its interior was covered with blood and brain matter. It also reported that detectives said that Escareno had been robbed of several inexpensive pieces of jewelry. (Defense Exhibit L.)[132]

These articles provided more information than a person would need to know in order to make the general comments Gomez had made about the recent Harbor Area killings, including Escareno's killing. Particularly because we do not know Gomez's exact words — the only evidence consisted of Detective Winter's testimony that "he talked about a guy up on Western, his head being shot off" (13RT 2044) — it would be an

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[132] This article refuted Winter's testimony that police had not released information about jewelry taken from Escareno. (13RT 2048, 2052.) Indeed, Detective Flamenco acknowledged that Defense Exhibits L and M were contained within detectives' "murder book" on the Escareno homicide. (26RT 3764-3767.)

unwarranted stretch to conclude that his mention of the crime sufficed to connect him to it as a perpetrator.

In *People v. Robinson, supra,* 61 Cal.2d 373, this Court found that *three* items of assertedly corroborative evidence did not suffice, either independently or cumulatively, for the conviction of Charles Drivers, one of the defendants. The corroborating evidence implicating Drivers consisted of Drivers's fingerprints in a car, purchased two days earlier by a man who lived in the same building as Drivers's cousin, and found near the scene of the crime, with its gears jammed so that it could not be driven and a rag obscuring the rear license plate; testimony by police that Drivers gave conflicting and evasive answers when being questioned about where he was on the weekend of the crime; and an alleged adoptive admission. (*Id.* at pp. 397-403.)

Significantly, with respect to the last item, the defendant's alleged adoptive admission, the Court pointed to the fact that detectives had offered five variations of the reply (in one variation, "I am not copping out to nothing, even if my own mother said it") that was said to constitute an adoptive admission, noting: "To assume that the questionable quotation infers an admission of guilt, and thus placing this man's life in jeopardy, would be to go far beyond the rules which require independent proof to

corroborate the testimony of an accomplice." (*People v. Robinson, supra,* 61 Cal.2d at pp. 402-403.)

Here, particularly in light of the newspaper articles the defense introduced, deeming Detective Winter's paraphrase of Gomez's statement to be sufficient independent proof of his guilt would similarly go far beyond the rule requiring independent corroboration. It raises no more than a mere suspicion of guilt — if even that — and, as such, does not suffice. (*Jackson v. Virginia, supra,* 443 U.S. at pp. 317-319; U.S. Const., 14th Amend.)

3. The Accomplice Corroboration Rule Aside, The Trial Court Erred in Denying Gomez's Penal Code Section 1118.1 Motion and the Evidence Was Insufficient Under State Law and the Federal Constitution.

The trial court erred in denying Gomez's Penal Code section 1118.1 motion, because the evidence before the court at that point was insufficient. The evidence of Gomez's guilt of any of the crimes against Escareno was insufficient under state law as explained above — because Penal Code section 1111 and decisions of this Court provide that a conviction cannot rest on the uncorroborated testimony of an accomplice. Due process is violated where, as here, a defendant is arbitrarily deprived of a state-law entitlement. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *Laboa v. Calderon* (9th Cir. 2000) 224 F.3d 972, 979 [state violates due process right to fundamental fairness if it arbitrarily deprives the defendant of a state-law

entitlement].)

In any event, the accomplice corroboration rule aside, at the time of the Penal Code section 1118.1 motion, the evidence was insufficient under both the state and federal constitutional standards, which provide that a conviction must be supported by substantial evidence. Witness #1's uncorroborated testimony was not substantial evidence. (See *People v. Johnson, supra,* 26 Cal.3d at p. 578; *Jackson v. Virginia, supra,* 443 U.S. 307.) Witness #1 does not "inspire[] confidence" (*People v. Conner, supra,* 34 Cal.3d at p. 149.)

As set forth in greater detail in Argument II.B.2.a., above, Witness #1, a heroin addict who received $30 a day from the government during trial (19RT 2910-2912), who admitted repeatedly lying to police (22RT 3263, 3297, 3302, 3306) and lying on the stand (23RT 3364-3372, 24RT 3465-3478), and explained that he was entitled to what he could get, even if he had to lie to get it (24RT 3473-3474),[133] was incredible as a matter of law. His testimony with respect to the Escareno killing (see Statement of Facts, pp. 18-20, above), thus established no more than that he (Witness #1) was present when Escareno was shot.

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[133] Witness #1 made this statement in reference to the $640 monthly social security benefit he had lied to obtain (22RT 3227-3228); the $30 he received from the government during trial in this case added up to a greater monthly amount. (19RT 2911-2912)

Given his history of lying, his open and admitted lying on the stand in this case, and the specific questions raised about his testimony that Gomez shot Escareno as he sat in the passenger seat of a vehicle Escareno drove (Witness #1 could not remember if it was a car or a truck, and at one point indicated that Gomez, whom he had said was the passenger, was driving the car),[134] no rational jury could have found Gomez guilty beyond a reasonable doubt on the basis of Witness #1's testimony. (See *Jackson v. Virginia, supra,* 443 U.S. at pp. 317-319; *People v. Johnson, supra,* 26 Cal.3d at pp. 575-576; U.S. Const., 14th Amend.)

After the defense introduced Exhibits L and M, newspaper articles revealing all one would need to know to make the general remarks Gomez had made about recent Harbor Area crimes, of course, the evidence was all the more insufficient, under both state and federal standards, to support any rational finding, beyond a reasonable doubt, that Gomez had robbed and killed Escareno. (*Jackson v. Virginia, supra,* 443 U.S. at pp. 317-319; U.S. Const., 14th Amend.)

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[134] (See 19RT 2940-2942, 22RT 3263, 3265.)

C. Even if Witness #1's Testimony Were Corroborated by Mr. Gomez's Statement to Detective Winter, the Trial Court Erred in Denying Mr. Gomez's Penal Code Section 1118.1 Motion, and Evidence of Mr. Gomez's Guilt of the Escareno Crimes Was Legally Insufficient.

As noted above, the only evidence of Gomez's guilt of the murder and robbery of Jesus Escareno was the testimony of Witness #1, an accomplice as a matter of law, and Detective Winter's paraphrase of Gomez's statement about killings in the Harbor Area. Even if Detective Winter's testimony could be said to corroborate Witness #1, the sum of the evidence presented against Gomez on these counts was insufficient under both state and federal law. As set forth above, Gomez's statement to Detective Winter established at most his awareness that a crime had occurred. Awareness that a crime has occurred, and the unreliable testimony of an admittedly dishonest purported accomplice, is not the kind of substantial evidence that inspires confidence in the rightness of the verdict and passes constitutional muster. (See *Jackson v. Virginia*, *supra,* 443 U.S. at pp. 317-319; *People v. Johnson, supra,* 26 Cal.3d at pp. 575-576; *People v. Conner, supra,* 34 Cal.3d at p. 149; see also *People v. Robinson, supra,* 61 Cal.2d at pp. 379, 397-399.)

D. Because the Trial Court Erred in Denying the Penal Code Section 1118.1 Motion, and Because the Evidence of Mr. Gomez's Guilt of the Escareno Murder Was Not Sufficient, None of the Jurors Should Have Been Allowed to Consider It At the Penalty Phase.

At the penalty phase, the trial court instructed the jurors that those who believed Gomez guilty of the Escareno murder could consider it as aggravating evidence under factor (b). Prior to summations, the court addressed the jurors as follows, regarding:

> . . . something special about Counts 6 and 7, or 6 in particular, the allegation of the murder of Jesus Escareno. One thing I want to make clear to you in advance is that that is no longer one of the circumstances of the crime.
>
> . . . those jurors who concluded beyond a reasonable doubt that the defendant was guilty of the murder of Mr. Escareno are permitted to consider that as an aggravating factor under factor (b), prior acts of violence. The other jurors that did not find that to be true beyond a reasonable doubt cannot consider that as an aggravating factor.
>
> So as you discuss aggravating and mitigating circumstances, those of you that believe that the evidence established beyond a reasonable doubt that Mr. Gomez murdered Jesus Escareno can consider that as an aggravating factor. You cannot require or insist or suggest that jurors that did not reach that conclusion beyond a reasonable doubt can consider that as an aggravating factor.
>
> . . . those of you who did find beyond a reasonable doubt that Mr. Gomez murdered Jesus Escareno can consider it, those of you who did not find it beyond a reasonable doubt cannot consider it as an aggravating factor.

(31RT 4562-4563.)

In its final instructions, the court instructed the jurors as follows:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of this trial. . . .
>
> * * *
>
> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts:
>
> . . . Murder of Mr. Escareno . . . , which involved the express or implied use of force or violence or the threat of force or violence. Before a juror may consider any criminal acts as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did, in fact, commit the criminal acts. A juror must — may not consider any evidence of any other criminal acts as an aggravating circumstance.
>
> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(31RT 4605, 4609-4610; 13CT 3444-3446.) The court then explained that "as to unadjudicated criminal acts," the defendant is presumed innocent and the reasonable doubt standard applies. (31RT 4610-4611; 13CT 3446.)[135]

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[135] Though defense counsel agreed with the prosecution's argument that jurors who found Gomez's guilt of the Escareno crimes proven could consider them (31RT 4488), and requested that the court make clear that those who did not believe Gomez guilty of killing Escareno beyond a reasonable doubt could *not* consider it (31RT 4489-4490), this error is reviewable on appeal under Penal Code section 1259, as the court's

(continued...)

Because the evidence of Gomez's guilt of the Escareno murder was legally insufficient, and because the trial court erred in denying Gomez's Penal Code section 1118.1 motion, as set forth above, *none* of the jurors should have been allowed to consider this crime. Unless there is sufficient evidence that the defendant committed a crime, the trial court should not permit evidence of that crime to be considered by a penalty phase jury. (See

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[135](...continued)
instructions affected Gomez's substantial rights.

More, the court's instructional error cannot be deemed "invited," as defense counsel manifested no tactical reason — and indeed there could be none — for allowing the court to instruct jurors that they could consider a murder as an aggravating factor if they found it proven. The doctrine of invited error "applies when a defendant, for tactical reasons, makes a request acceded to by the trial court and claims on appeal that the court erred in granting the request. [Citations.]" (*People v. Russell* (2010) 50 Cal.4th 1228, 1250, citing *People v. Wickersham* (1982) 32 Cal.3d 307, 330 [*Wickersham* disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 201] [other citations omitted]; see also *People v. Harris* (2008) 43 Cal.4th 1269, 1299 [invited error does not preclude appellate review if the record fails to show that counsel had a tactical reason for requesting or acquiescing in the instruction]; *People v. Carrera* (1989) 49 Cal.3d 291, 311, fn. 8.) As this Court explained in *Wickersham*, "if defense counsel suggests or accedes to the erroneous instruction because of neglect or mistake we do not find 'invited error'; only if counsel expresses a deliberate tactical purpose in suggesting, resisting, or acceding to an instruction, do we deem it to nullify the trial court's obligation to instruct in the cause. [Citation.]" (*People v. Wickersham, supra,* 32 Cal.3d at p. 332.) Where the record does not reveal that defense counsel had tactical reasons for urging the court to instruct erroneously, the issue is reviewable on appeal. (See also *People v. Moore, supra,* 51 Cal.4th at p. 410 [invited error doctrine does not preclude review if record fails to show counsel had a tactical reason for requesting or acquiescing in instruction].)

People v. Koontz, *supra,* 27 Cal.4th at p. 1088; *People v. Boyer*, *supra,* 38 Cal.4th at p. 481.)

Permitting any of the jurors to consider the Escareno murder was unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution. As the United States Supreme Court made clear in *Brown v. Sanders* (2006) 546 U.S. 212, 220: "An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." (*Id.* at p. 220, footnote omitted, original italics.) More, because the submission to the jury of the Escareno murder as a sentencing factor allowed the jurors to consider "evidence that would not otherwise have been before it" at the penalty phase, due process mandates reversal as well. (*Id.* at pp. 219, 221)

This is not a case, like *People v. Lewis*, *supra,* 43 Cal.4th at p. 520, or *People v. Morgan*, *supra,* 42 Cal.4th at p. 628, in which the submission of an erroneous sentencing factor "'did not alter the universe of [aggravating] facts and circumstances to which the jury could accord . . . weight . . . .'" (*People v. Morgan*, *supra,* 42 Cal.4th at p. 628, citing *People*

v. Bonilla (2007) 41 Cal.4th 313, 334.) Rather, the court's error here significantly altered the universe of aggravating facts before the jurors considering whether Gomez would live or die, skewing the jurors' balancing of aggravating factors in favor of death in violation of the Eighth Amendment. (*Brown v. Sanders, supra,* 546 U.S. at p. 221.)

E. Mr. Gomez's Death Sentences Cannot Stand.

The error here was prejudicial under either the state law "reasonable possibility" standard or the federal constitutional "reasonable doubt" standard. (See *People v. Brown, supra,* 46 Cal.3d at p. 448 [judgment must be reversed if there is a "reasonable possibility" that the jury would have reached a different result if state law error at penalty phase had not occurred]; *Chapman v. California, supra,* 386 U.S. at p. 24 [federal constitutional error requires reversal unless harmless beyond a reasonable doubt]; *People v. Prince, supra,* 40 Cal.4th at pp. 1299-1300.)

There is a reasonable possibility that Gomez would not have been sentenced to death for the Patel and Luna murders — that at least one juror's vote would have been different — if not for the instructions improperly allowing jurors to consider the Escareno murder in aggravation.

As the Supreme Court has explained, "[t]he inquiry . . . is not whether, in a trial that occurred without the error," a verdict against the

defendant "would surely have been rendered" (*Sullivan v. Louisiana*, *supra,* 508 U.S. at p. 279) — though in this case the prosecution could not even meet that standard. Rather, the question is whether the death verdicts "actually rendered in this trial [were] surely unattributable to the error." (*Ibid.*) The prosecution cannot prove that beyond a reasonable doubt.

The Escareno murder was the single most aggravating circumstance relied on at the penalty phase. (See *People v. Hernandez*, *supra,* 30 Cal.4th at p. 877 [where errors may have fatally distorted jury's consideration of the prosecution's most important aggravating evidence, that defendant had committed another murder, reversal of death sentence was required].)

The evidence about the Escareno murder can hardly have failed to influence any juror allowed to consider it: Escareno was a restaurant busboy who went out dancing after work and ended up in the wrong place at the wrong time. (13RT 1976-1981). The photos of Escareno's body and the forensic evidence detailing blood and brain matter in Escareno's car can only have evoked jurors' anger. This homicide was the only killing in the case described by an eyewitness[136] — with Witness #1 testifying that Gomez drove the streets, looking for a victim, and then shot a man in the

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[136] At trial, Witness #1 testified that he was in Dunton's apartment, in a different room, when Dunton and Acosta were killed. (20RT 3019-3021, 3033-3035.)

head after a brief and apparently jovial conversation. (19RT 2941-2953.) Witness #1's highly prejudicial testimony describing Gomez's shooting of Escareno could easily have served to distract from serious lingering doubts about his guilt in both the Patel and Luna cases, which lacked physical evidence linking the defendant to the killing and lacked eyewitnesses to the killings. (See *People v. Gay*, *supra,* 42 Cal.4th at p. 1226 [lingering doubt has particular potency where physical evidence is lacking and eyewitness testimony is contradictory].)

The prosecution took every advantage of the trial court's ruling that jurors who believed Gomez guilty of the Escareno homicide could consider it. He urged jurors to consider the asserted motive for killing Escareno, greed. (31RT 4568.) He included the Escareno murder in summing up his case for death:

> Ask yourself this question: On which side of the scale, death or life without parole, do you put this man's actions in these five murders, these five homicides?

(31RT 4572.)

Sentencing deliberations spanned three court days, with a weekend intervening.[137] The jurors' unanimous agreement that life without parole

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[137] The jurors began deliberating on Gomez's sentence on Thursday, February 24, 2000. They deliberated for approximately half an hour. (31RT 4618 [jury retires at 3:46 p.m.]; 13CT 3423-3425 [jury excused for day at (continued...)

was the appropriate sentence for the murders of Dunton and Acosta (31RT 4627-2628) further suggest that sentencing Gomez to death was not a foregone conclusion.[138] Finally, with regard to the Luna murder in

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[137](...continued)
4:15 p.m.].) The following day, February 25, jurors deliberated from 9:30 a.m. to 2:50 p.m., and after breaking for the weekend they deliberated again on February 28, reaching a verdict at 3:50 p.m. (13CT 3426-3429.)

[138] In *People v. Cowan, supra,* 50 Cal.4th at pp. 487-493, this Court addressed a defendant's argument that the trial court had failed to instruct penalty phase jurors that they were required to apply the reasonable doubt standard of proof if they were to consider evidence of a murder on which the jury had hung at the guilt phase. In *Cowan,* significantly, the jury had not been instructed that it could consider the deadlocked count as factor (b) evidence. (*Id.* at pp. 490-491.) This Court found that even if jurors failed to apply the reasonable doubt standard, there was no realistic possibility that consideration of that murder by those who had not found it proven beyond a reasonable doubt would have caused those jurors to vote for the death penalty. (*Id.* at p. 492.) It noted that when the jury reported deadlock, the prosecutor remarked that the jurors "sounded extremely emphatic" and the court commented that the foreman was "pretty adamant about the jurors having basically taken their relative positions." (*Id.* at p. 492.) The Court finally stated that "the record reflects that the jurors carefully weighed the difference between how [two victims] were murdered in deciding to impose the death penalty for [one] murder and life without possibility of parole for [another]. The difference between the verdicts suggests that even those jurors who believed beyond a reasonable doubt that defendant murdered [the victim regarding which the jury deadlocked] did not use that fact to vote for death." (*Id.* at p. 493.)

This case is different. First, Gomez's argument is that *none* of the jurors should have been permitted to consider the Escareno crimes because the evidence was insufficient to sustain a finding beyond a reasonable doubt that Gomez was guilty of them. Second, there is nothing in the record in this case to suggest that the jury "carefully weighed the difference" between the Dunton and Acosta killings, on the one hand, and the Luna and Patel

(continued...)

particular, the jurors apparently had some hesitation about the death sentence: On the last day of deliberations, they apparently filled out one death verdict form in error, requested a new verdict form, and then filled out another. (13CT 3450, 3454, 1SIICT 32.)

In these circumstances, there is a reasonable possibility that at least one juror's vote would have been different, had jurors been instructed that the Escareno killing was no longer appropriate for their consideration. Reversal of Gomez's death sentences is required.

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[138](...continued)
killings, on the other, in imposing death and life without parole, respectively. Jurors may well have imposed life without parole in the Dunton and Acosta cases out of the sense that it would be unfair to punish Gomez with death for those murders, when co-defendant Grajeda would receive a life sentence.

XIX.

THE TRIAL COURT NOT ONLY ERRED IN FAILING TO INSTRUCT THE PENALTY PHASE JURORS THAT THEY COULD NOT CONSIDER THE MURDER OF JESUS ESCARENO AS AGGRAVATION UNLESS THEY FOUND THAT WITNESS #1'S TESTIMONY WAS CORROBORATED BY INDEPENDENT EVIDENCE LINKING MR. GOMEZ TO THE CRIME, BUT ALSO INSTRUCTED JURORS TO DISREGARD GUILT PHASE INSTRUCTIONS THAT WERE NOT REPEATED AT THE PENALTY PHASE

At the guilt phase, after being given the standard CALJIC instructions on the burden of proof beyond a reasonable doubt, the jurors were instructed that accomplice testimony must be corroborated by independent evidence tending to connect the defendant to the commission of the crime, and that accomplice testimony should be viewed with caution. (3CT 880-881, 29RT 4134-4137 [CALJIC Nos. 3.11, 3.12, and 3.18].)

During guilt deliberations, the jurors submitted three questions regarding these instructions. (4SCT 745.)[139] In answer, the court told the jurors that evidence independent of the accomplice's testimony was required, and that they were to first consider whether they believed the

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[139] The jury asked the trial court to clarify a perceived conflict between CALJIC Nos. 3.12 and 3.18; it asked whether the jury could find the defendant guilty based solely on accomplice testimony if the accomplice is deemed credible, or whether independent evidence is required; and it asked whether the accomplice testimony should be examined in light of all the evidence in the case, or in light of all the evidence in the particular count. (4SCT 745; see 3CT 881.)

accomplice testimony, and then decide if it has been corroborated. (29RT 4320-4322.) It also told them that the term "case" in CALJIC No. 3.18 referred to "everything, any evidence you heard about the accomplice that deals with credibility." (29RT 4322.) The jury deadlocked on the Escareno charges and the court declared a mistrial. (29RT 4329-4330, 4338-4340, 4362.)

At the penalty phase, the trial court told the jurors that those who believed Gomez guilty beyond a reasonable doubt of the Escareno murder could consider it as aggravation. (31RT 4562-4563, 4605, 4609-4610.) In doing so, it not only failed to reiterate the accomplice corroboration requirement or the admonition to view accomplice testimony with caution, but affirmatively told the jurors to disregard guilt phase instructions that were not repeated at the penalty phase (31RT 4594-4595, 4617-4618; 13CT 3440), thus suggesting that any juror who believed Gomez guilty of the Escareno murder could consider it regardless of whether he or she believed Witness #1's testimony had been corroborated.

Thus, even if the evidence *were* sufficient to support a finding that Gomez had murdered Jesus Escareno (and it was not; see Argument XVIII, above), the trial court erred in failing to instruct the penalty phase jurors that before they could consider the murder of Escareno as aggravation, they

had to find that Witness #1's testimony implicating Gomez was corroborated by independent evidence linking Gomez to the crime. Because the assertedly corroborative evidence was, at best, "minimal," as the trial court itself put it (29RT 4330), this error fatally distorted jury's consideration of the Escareno murder — the prosecution's most important aggravating evidence. (See *People v. Hernandez*, *supra,* 30 Cal.4th at p. 877.) Gomez's death sentences, weighted with the improper consideration of this additional murder, cannot stand.

A. The Trial Court Erred in Removing the Accomplice Corroboration Requirement from the Jury's Consideration of the Escareno Murder at the Penalty Phase; The Error Violated Gomez's Constitutional Rights.

The rules requiring that a trial court, sua sponte, instruct the jurors that an accomplice's testimony should be viewed with distrust and that it must be corroborated apply equally at the penalty phase of a capital case. (*People v. Nelson*, *supra,* 51 Cal.4th at pp. 217-218; *People v. Hernandez*, *supra,* 30 Cal.4th at pp. 874; *People v. Mincey* (1992) 2 Cal.4th 408, 460-462.)

Instructing the penalty phase jury regarding the accomplice corroboration requirement was particularly necessary here, because the trial court told the jurors to disregard the guilt phase instructions. (31RT 4594-4595, 4617-4618; 13CT 3440.) As this Court has stated: "[I]f the trial court

tells the jury to disregard the guilt phase instructions, 'it must later provide it with those instructions applicable to the penalty phase.' [Citation]. We reiterate that trial courts should take pains to ensure that penalty phase juries are fully and properly instructed. [Citation]" (*People v. Harris*, *supra,* 43 Cal.4th at p. 1319; see also *People v. Lewis*, *supra,* 43 Cal.4th at p. 535.)

The trial court, in its penalty phase instructions, failed to fulfill its sua sponte duty to instruct regarding the accomplice corroboration requirement; rather, it removed that requirement from the jury's consideration of the Escareno case.

Before the penalty phase summations, the court told jurors, as set forth in detail in Argument XVIII.D., above, that those who "concluded beyond a reasonable doubt," "believe that the evidence established" or "did find beyond a reasonable doubt" that Gomez murdered Escareno, could consider the Escareno murder as aggravation, though it was no longer to be considered as "circumstances of the crime." (31RT 4562-4563.)

In its final instructions, the court began by informing the jury that it would "now be instructed as to all of the law that applies to the penalty phase of this trial" and that it must "[d]isregard all other instructions given to you in the other phases of this trial." (31RT 4594-4595.) It told the jurors again, after delivering the instructions, that they should be guided by the

penalty phase instructions and that it had been necessary to repeat some instructions from the guilt phase because others of the guilt phase instructions no longer applied. (31RT 4617-4618.)[140]

The jurors were not so limited with respect to the facts: the court told them that the facts were to be determined "from the evidence received during the entire trial, unless you are instructed otherwise." (31RT 4595.)

The court then told jurors again that "[i]n determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of this trial." (31RT 4605, 13CT 3444.) It included the Escareno murder in its listing of the factor (b) evidence, telling jurors that they could consider such criminal acts as aggravating circumstances if they were "satisfied beyond a reasonable doubt that the defendant did, in fact, commit the criminal acts." (31RT 4609-4610; see 13CT 3445-3446.) It stated that unanimity was not required, and that "[i]f any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation." (31RT 4610; 13CT 3445-3446.) Finally "as to the unadjudicated acts," the court reiterated the presumption of innocence and the reasonable doubt standard. (31RT 4610-4611; see 13CT 3446.)

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[140] The court repeated, for example, CALJIC No. 2.52, the instruction on flight. (13CT 3443.)

At no time did the court, at the penalty phase, communicate the accomplice corroboration requirement, or the admonition to view accomplice testimony with caution. And, to make matters worse, it did instruct jurors with CALJIC No. 2.27, which told jurors that they "should give the testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends." (31RT 4603; 13CT 3443.)

As this Court has explained:

> [A]ccomplice testimony requires corroboration not because such evidence is factually insufficient to permit a reasonable trier of fact to find the accused guilty beyond a reasonable doubt, but because '[t]he Legislature has determined that because of the reliability questions posed by certain categories of evidence, evidence in those categories by itself is insufficient as a matter of law to support a conviction.' [Citations.] . . . In the absence of an instruction on the legal requirement that an accomplice be corroborated, there is a risk that a jury — especially a jury instructed in accordance with CALJIC No. 2.27 that the testimony of a single witness whose testimony is believed is sufficient for proof of any fact — might convict the defendant without finding the corroboration Penal Code section 1111 requires.

(*People v. Najera, supra,* 43 Cal.4th at pp. 1136-1137.)

The penalty phase instructions here allowed the jurors to consider the Escareno murder without regard to whether Witness #1's testimony was

corroborated — and even affirmatively told them they could convict on the basis of Witness #1's testimony alone, as long as they believed it.[141]

This instructional error violated state law regarding accomplice corroboration and also infringed Gomez's right to a reliable penalty determination, to due process of law, and to fair trial by a properly instructed jury. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 16 & 17.) More, it violated Gomez's state-created liberty interest in the requirement that accomplice testimony be corroborated. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

B. Mr. Gomez's Death Sentences Cannot Stand.

As set forth in detail in Argument XVIII.E., above, under either the state-law "reasonable possibility" standard or the federal constitutional "beyond a reasonable doubt" standard, there is a reasonable possibility that Gomez would not have been sentenced to death for the Patel and Luna murders had the trial court removed the Escareno murder from the jury's

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[141] The trial court in this case, in response to the jury's questions at the guilt phase, had emphasized that the corroboration requirement was a separate requirement to be considered only *after* jurors had decided whether they believed the accomplice testimony — i.e., whether they believed that Gomez had killed Escareno. (29RT 4320-4321.) This supplemental instruction made it more likely that jurors who believed Witness #1's testimony that Gomez killed Escareno would consider that crime at the penalty phase, even though they did not believe Witness #1's testimony was corroborated.

consideration. The court's failure to instruct jurors regarding the accomplice corroboration requirement at the penalty phase was prejudicial under either standard as well, for the same reasons. (See *People v. Brown, supra,* 46 Cal.3d at p. 448 [judgment must be reversed if there is a "reasonable possibility" that the jury would have reached a different result if state law error at penalty phase had not occurred]; *Chapman v. California, supra,* 386 U.S. at p. 24 [federal constitutional error requires reversal unless harmless beyond a reasonable doubt]; *People v. Prince, supra,* 40 Cal.4th at pp. 1299-1300.)

The jury's questions at the guilt phase about accomplice testimony (4SCT 745; 29RT 4320-4322), its failure to reach agreement on the Escareno charges, and its report of an even deadlock (29RT 4338-4440; 32RT 4661) strongly suggests that six jurors, perhaps give or take a few, did not believe the accomplice corroboration requirement was met. Indeed, that was the trial court's interpretation of the jury's reported deadlock on the charges relating to Escareno: "The evidence of corroboration was minimal, and I think it's fairly understandable that some of them don't find that to be sufficient." (29RT 4330.)

With the accomplice corroboration requirement removed, there is, to say the least, a reasonable possibility that one or more jurors improperly

considered that murder at the penalty phase — though they did not find Witness #1's testimony corroborated — and that consideration of this murder affected his or her vote, for all the reasons set forth above in Argument XVIII.E., above.

Reversal of Gomez's death sentences is required.

XX.

THE PROSECUTOR'S ELICITATION, AND THE TRIAL COURT'S ADMISSION, OVER OBJECTION, OF EVIDENCE REGARDING THE ETHNIC BACKGROUND OF TWO JAIL GUARDS MR. GOMEZ WAS CHARGED WITH ASSAULTING, EVIDENCE WHICH THE PROSECUTOR THEN EMPLOYED IN ARGUING FOR DEATH, REQUIRES REVERSAL

In the course of his direct examination of penalty phase witness Chad Millan, a jail guard who testified that Gomez stabbed him, the prosecutor elicited, over defense objection, that Millan's "ancestry" was "Mexican American." (30RT 4449.)[142] After the court approved that inquiry, the prosecutor then elicited the same information from a subsequent penalty phase witness, Frank Montoya, a jail guard who testified that Gomez threatened to kill him, head-butted him, and attempted to slash him with a razor. Montoya was also Mexican-American. (30RT 4467.)

In summation, the prosecutor used this evidence to argue that Gomez

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[142] Defense counsel objected that Millan's background was irrelevant. (30RT 4449.) The court overruled the objection, thus rendering futile any objection to the prosecutor's elicitation of the identical information from Frank Montoya, and his use of this irrelevant evidence in summation. (*People v. Hill, supra,* 17 Cal.4th at pp. 820-821; *People v. Pitts, supra,* 223 Cal.App.3d at p. 693; *People v. Carrillo, supra,* 119 Cal.App.4th at p. 101.) While this Court should resolve any close and difficult preservation questions in favor of Gomez (*People v. Ayala, supra,* 23 Cal.4th at p. 273), should this Court nonetheless conclude that counsel failed to preserve this issue for review, such ineffective assistance of counsel would be more appropriately addressed in habeas corpus proceedings (*People v. Mendoza Tello, supra,* 15 Cal.4th at pp. 266-267).

should be put to death:

> We've shown this man's history of past violence, and we've shown that this man's conduct while in custody is not the result of racial or ethnic conduct, because his conduct, his violent behavior was not directed just at Vanderleek but also against Montoya and Millan, so that has nothing to do with it.

(31RT 4571.)

Defense counsel was correct; the ethnic background of the jail guards who testified that Gomez attacked them was irrelevant. The prosecutor never should have been permitted to elicit evidence of Millan's and Montoya's ethnicity in the first place, much less to urge jurors to consider it as an argument for death. By implication, the prosecutor invited the jurors to consider Gomez's own ethnicity (Mexican-American), as well as Montoya's and Millan's (Mexican-American) and Vanderleek's (which the prosecutor implied was not Mexican-American).

Sentencing jurors may not consider race, a "constitutionally impermissible" matter which is "totally irrelevant to the sentencing process." (*Zant v. Stephens* (1983) 462 U.S. 862, 885; see also *McCleskey v. Kemp* (1987) 481 U.S. 279, 291-292 & fn. 8.) This is beyond question. The Fifth Circuit has explained: "[T]he use of race in sentencing determinations is particularly invidious. . . . And, in capital sentencing, the use of race becomes more offensive still. . . . [A] long line of Supreme Court precedent

admonishes that the guillotine must be as color-blind as is the Constitution." (*United States v. Webster* (5th Cir. 1998) 162 F.3d 308, 356.)

While racial or ethnic animus can constitute aggravating evidence that may be considered in sentencing, and may bear on future dangerousness (*Dawson v. Delaware* (1992) 503 U.S. 159, 166; see also *Barclay v. Florida* (1983) 463 U.S. 939, 949),[143] and while racial animus may make the race of the victim relevant for this limited purpose, the *absence* of racial animus in a case does not entitle the prosecution to elicit the victim's race or ancestry.[144] Indeed, if racial animus is aggravating, the absence of racial animus can hardly be aggravating as well.

The prosecutor's argument invited jurors to consider, as an argument for death, that Gomez attacked individuals of his own ethnic group as well as an individual who was apparently not Mexican-American. By way of illustration, had Gomez attempted to argue, in mitigation, that he attacked only individuals who did not share his ethnic background, he would

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[143] Indeed, one of the special circumstances rendering a defendant eligible for the death penalty in California is that "[t]he victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin." (Pen. Code § 190.2(a)(16).)

[144] "In legal theory, distinctions based upon ancestry are as 'odious' and 'suspect' as those predicated on race; in practical terms, appeals to either threaten the fairness of a trial." (*United States v. Doe* (D.C. Cir. 1990) 903 F.2d 16, 21-22.)

justifiably have been prevented from doing so. The prosecutor's improper argument was simply the converse — that jurors should consider, in support of death, that Gomez attacked individuals who shared his ethnic background, as well as another individual who apparently did not.

The unseemly — and unconstitutional — message is that it would be understandable, or somehow less aggravating, if Gomez had only attacked individuals who were not Mexican-American. Such appeals to the apparent view that it is human nature to favor members of one's own race or ethnic group are improper. (See *State v. Monday* (Wash. 2011) 257 P.3d 551, 555-558 [prosecutor repeatedly invoked an alleged African-American anti-snitch code to discredit witnesses]; *McFarland v. Smith* (2d Cir. 1979) 611 F.2d 414, 416-417 [prosecutor's argument during summation that black police officer, a prosecution witness, was more likely to be truthful when testifying against a black defendant was reversible constitutional error]; *Kelly v. Stone* (9th Cir. 1975) 514 F.2d 18, 19 [reversing denial of habeas corpus petition where district attorney argued "maybe the next time it won't be a little black girl from the other side of the tracks; maybe it will be somebody that you know; maybe it will be somebody that I know"].)[145]

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[145] Justice Scalia, dissenting in *Powers v. Ohio*, in support of an argument that race-based peremptory strikes do not imply "criticism or dishonor" noted the "undeniable reality . . . that all groups tend to have

(continued...)

As the Second Circuit put it in *McFarland*, "To raise the issue of race is to draw the jury's attention to a characteristic that the Constitution generally commands us to ignore. Even a reference that is not derogatory may carry impermissible connotations, or may trigger prejudiced responses in the listeners that the speaker might neither have predicted nor intended." (*McFarland v. Smith, supra,* 611 F.2d at p. 417.) And as the Washington Supreme Court put it in *Monday*: "Not all appeals to racial prejudice are blatant. Perhaps more effective but just as insidious are subtle references. Like wolves in sheep's clothing, a careful word here and there can trigger racial bias. [Citations.]." (*State v. Monday, supra,* 257 P.3d at p. 557.)

The prosecution's elicitation of the ethnic background of Montoya and Millan, and his urging that jurors impose death because Gomez's "violent behavior was not directed just at Vanderleek but also against Montoya and Millan" (31RT 4571) — with its implicit reference to Vanderleek's race, and that of Montoya, Millan, and Gomez as well —

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[145](...continued)
particular sympathies and hostilities — most notably, sympathies towards their own group members." (*Powers v. Ohio* (1991) 499 U.S. 400, 424 [Scalia, J., dissenting].) Regardless of whether or not such sympathies are an "undeniable reality," arguments founded on group membership carry an undeniable resonance. But the Supreme Court rejected Justice Scalia's reasoning: "[T]he assumption that no stigma or dishonor attaches contravenes accepted equal protection principles. . . . We may not accept as a defense to racial discrimination the very stereotype the law condemns." (*Id.* at p. 410.)

violated due process, equal protection, the right to a fair and impartial jury, and the Eighth Amendment right to a reliable sentencing proceeding, as well as their state constitutional counterparts. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17; *Zant v. Stephens, supra,* 462 U.S. at p. 885 [due process prohibits state from attaching "aggravating" label to factors, such as race, that are constitutionally impermissible or totally irrelevant to sentencing]; *Dawson v. Delaware, supra,* 503 U.S. at p. 160; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585 [Eighth Amendment requires reliability in penalty determination; sentencing decision cannot be based upon caprice or irrelevant factors]; *McCleskey v. Kemp, supra,* 481 U.S. at p. 309, fn. 30 [constitution prohibits racially biased prosecutorial arguments]; *Bains v. Cambra* (9th Cir. 2000) 204 F.3d 964, 974 [clearly established federal law holds that prosecutor's invitation to jurors to give in to prejudices violates due process and equal protection, citing *McCleskey v. Kemp, supra,* 481 U.S. at p. 309 fn. 30]; *United States v. Cabrera* (9th Cir. 2000) 222 F.3d 590, 594-597; *Dawson v. State* (Nev. 1987) 734 P.2d 221, 223-224 [reversing death sentence where prosecutor, during closing argument, gratuitously referred to African-American defendant's asserted preference for white women].)

Whether the prosecutor harbored ill intent is not relevant. The crucial

issue in a prosecutorial misconduct claim is not the prosecutor's good faith, but potential injury to the defendant. (*People v. Coddington* (2000) 23 Cal.4th 529, 599-600.)[146] As the Nevada Supreme Court put it in *Dawson v. State, supra,* 734 P.2d at p. 223: "Rather than try to parse the niceties of appellate counsel's attempt to justify the actions of the state's trial counsel in using this kind of material in a death penalty hearing, we unhesitatingly declare such conduct to be prejudicially improper even if there were some logic to it and even if, as claimed, no racial bias was intended to be elicited by the remarks."

The prosecutor's elicitation and use of Millan's and Montoya's ethnic background requires reversal, under the federal constitutional standard for harmless error review (*Chapman v. California, supra,* 386 U.S. at p. 24) or the state law standard for penalty phase error (*People v. Brown, supra,* 46 Cal.3d at pp. 447-449), the functional equivalent of the *Chapman* standard (*People v. Prince, supra,* 40 Cal.4th at pp. 1299-1300). "The inquiry . . . is not whether, in a trial that occurred without the error, [death sentences] would surely have been rendered" (*Sullivan v. Louisiana, supra,*

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[146] *Coddington* has been overruled on other grounds (*Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069 & fn. 13), superseded by statute on other grounds (see *People v. Zamudio* (2008) 43 Cal.4th 327, 355-356; *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1107 & fn. 4, and disapproved on other grounds (*People v. Knoller* (2007) 41 Cal.4th 139, 155-156.)

508 U.S. at p. 279) — though in this case the prosecution could not even meet that standard. Rather, the question is whether the death sentences "actually rendered in *this* trial [were] surely unattributable to the error." (*Ibid.,* original italics.) The prosecution cannot prove that beyond a reasonable doubt.

The prosecution cannot show beyond a reasonable doubt that impermissible reasoning drawn from the prosecutor's argument — for example, reasoning that "he even attacks 'his own'" — did not contribute to the death sentences. Such arguments, though impermissible, have undeniable resonance. (See *Powers v. Ohio*, *supra,* 499 U.S. at p. 424 [Scalia, J., dissenting] [noting "undeniable reality . . . that all groups tend to have particular sympathies and hostilities – most notably, sympathies towards their own group members"].) And in the context of penalty phase deliberations, as the Supreme Court has explained, "the discretion entrusted to the jury at a capital sentencing hearing" "gives greater opportunity for racial prejudice to operate than is present when the jury is restricted to factfinding." (*Turner v. Murray* (1986) 476 U.S. 28, 35-36 & fn.8 .) Compounding the prejudice in this case was the lack of any jury instruction informing jurors that they could not consider such matters as the ethnic background or ancestry of the victims. Indeed, the court's overruling of

defense counsel's objection that Millan's ethnic background was irrelevant effectively told jurors that it *was* relevant to their determination whether Gomez should live or die.

The deliberations and verdicts further suggest that death was not a foregone conclusion, and thus that the error was not harmless beyond a reasonable doubt. Sentencing deliberations spanned three court days, with a weekend intervening. (31RT 4618; 13CT 3423-3425; 31RT 3426-3429.) The jurors' unanimous agreement that life without parole was the appropriate sentence for the murders of Dunton and Acosta (31RT 4627-4628) further suggest a reasonable possibility that in the absence of this error, the result might have been different. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Prince*, *supra,* 40 Cal.4th at pp. 1299-1300.) Finally, with regard to the Luna murder, the jurors apparently had some hesitation about the death sentence. (13CT 3450, 3454, 1SIICT 32 [jurors apparently filled out one death form in error, requested a new verdict form, and then filled out another].)

In these circumstances, given the nature of the error — the injection of an impermissible factor and the appeal to deep-seated prejudices — and the closeness of the case, reversal of the death sentences is required.

XXI.

THE TRIAL COURT ERRONEOUSLY AND UNCONSTITUTIONALLY TOLD JURORS THAT THEY WERE FORBIDDEN TO "REFER TO BIBLICAL REFERENCES," REQUIRING REVERSAL

Gomez's mitigation case consisted of a witness from the Department of Corrections, who testified about the security conditions in which Gomez would likely be held if sentenced to life without parole, and the testimony of his sister, who told jurors that the family loved him and did not want him to be executed. (31RT 4502-4541; 31RT 4543-4545.) Counsel's summation focused to a large extent on the moral decision before the jury. (31RT 4579-4593.) In these circumstances, it was crucial that jurors be permitted to bring to bear, on that moral decision, their personal values, whether religious, philosophical, or secular. (See *People v. Danks* (2004) 32 Cal.4th 269, 311.)

Yet immediately after defense counsel concluded his summation, the court gave an instruction depriving jurors of one common and potentially crucial source of moral reasoning. It told jurors:

> I do want to emphasize again as I've done before that you're not to bring anything to the deliberation process. Jurors are sometimes tempted in this phase of the case to refer to biblical references. Don't bring the bible in, don't refer to those. You'll be guided by your own conscience and the law.

(31RT 4593.)

The court erred. Though the court may well have been correct insofar as it instructed jurors that they could not bring the Bible into the jury room, it went too far in forbidding jurors from even "refer[ring] to biblical references" (31RT 3593), interfering with Gomez's right to a sentencing decision by a jury reflecting the "conscience of the community on the ultimate question of life or death." (*Witherspoon v. Illinois*, *supra,* 391 U.S. at p. 519 [state may not exclude prospective jurors from service on a capital jury merely because they express religious scruples]; *Smith v. Texas* (1940) 311 U.S. 128, 130 [criminal defendants are entitled to be judged by "a body truly representative of the community"]; *Taylor v. Louisiana* (1975) 419 U.S. 522, 530 [making clear that the importance of the "fair cross-section" right derives from the importance of bringing a broad spectrum of juror life experiences to bear]; U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.)

To be sure, references by either party in summation to "religious doctrine, commandments, or biblical passages tending to undermine" the principle that sentence is to be based on the evidence and the court's instructions, is improper (*People v. Sandoval* (1992) 4 Cal.4th 155, 194; *People v. Williams*, *supra,* 49 Cal.4th at pp. 465-467), as may be the reading of Bible passages in the jury room during deliberations (*People v. Lewis*

(2001) 26 Cal.4th 334, 389), or discussing the case with religious leaders during deliberations (*People v. Danks*, *supra,* 32 Cal.4th at p. 307).

On the other hand, however, jurors may read the Bible in the privacy of their homes (*id.* at p. 306; see *Crittenden v. Ayers* (9th Cir. 2010) 624 F.3d 943, 972-973), and jurors may consider their religious beliefs and even refer to those beliefs during deliberations (*People v. Lewis, supra,* 26 Cal.4th at p. 390 ["Given the collective nature of jury deliberations, we do not find it unusual, much less improper, that jurors here may have shared their beliefs with other jurors either through conversations or prayers."]; see also *Fields v. Brown* (9th Cir. 2007) 503 F.3d 755, 780-781). Even in the context of argument by counsel, as this Court explained, "all reference to religion or religious figures" is not ruled out, "so long as the reference does not purport to be a religious law or commandment." (*People v. Sandoval, supra,* 4 Cal.4th at p. 194.)

As this Court has taken pains to note:

> [W]e reiterate that nothing in our opinion is intended to convey that a juror's consideration of personal religious, philosophical, or secular normative values is improper during penalty deliberations. (See *Lewis, supra,* 26 Cal.4th at pp. 389-390 . . . .) As we have repeatedly stated, the task of jurors at the penalty phase is qualitatively different from that at the guilt phase. At the penalty phase, jurors are asked to make a normative determination — one which necessarily includes moral and ethical considerations — designed to reflect community values. [Citations.] "'The court in no way means

> to suggest that jurors cannot rely on their personal faith and deeply-held beliefs when facing the awesome decision of whether to impose the sentence of death on a fellow citizen.'" [Citations.] As one author has noted, "the discretion given to a jury to extend or withhold mercy . . . will never produce a wholly rational, calculated, and logical process' . . . . [D]eterminations of the appropriate punishment involve factors which are not only 'too intangible to write into a statue' but are also too abstract for a jury to rely on independent of their personal values." [Citation.]

(*People v. Danks, supra,* 32 Cal.4th at p. 311.)

The court's instruction violated theses principles, erroneously implying that jurors who, in deliberations, engaged in moral reasoning illustrated by or rooted in Biblical passages would be committing misconduct.

The court's instruction here improperly elevated the philosophical and the secular over the religious, depriving Gomez of the judgment of a jury reflective of the conscience of the community, as brought to bear by the jurors' "personal religious, philosophical, or secular normative values." (*People v. Danks, supra,* 32 Cal.4th at p. 311; *Crittenden v. Ayers, supra,* 624 F.3d at p. 973 [rule that juror's reading of religious text outside jury room established prejudice would be "at the very least, in tension with the Supreme Court's teaching that 'a sentencing jury must be able to give a reasoned moral response to a defendant's mitigating evidence.' [Citation]"].)

It also improperly singled out the Bible alone in this instruction, which was delivered before the court began reading the penalty phase instructions, and which the court told jurors it wanted to "emphasize." (31RT 4593.) Singling out the Bible as a source jurors might be "tempted" to refer to, the court omitted any warning about referring to other sources of moral reasoning — whether secular or offered by another religious tradition. A penalty phase jury instructed to disregard one religious point of view in particular (as expressed in the holy book of that religion), yet not similarly instructed with respect to other outside sources jurors might refer to at home, or quote from memory in the jury room, cannot legitimately reflect the "conscience of the community." (*Witherspoon v. Illinois, supra,* 391 U.S. at p. 519.)

Though it told jurors they were to be guided "by [their] own conscience and the law" (31RT 4593), its concomitant instruction that Biblical references were forbidden left jurors whose consciences were rooted in religious beliefs — specifically, beliefs whose source was the Bible — adrift. (See *People v. Danks, supra,* 32 Cal.4th at p. 311 ["[D]eterminations of the appropriate punishment involve factors . . . too abstract for a jury to rely on independent of their personal values. [Citation.]"].) In instructing jurors that they could not refer to Biblical

references, the court deprived Gomez's jury of a common and potentially crucial source of moral reasoning, and thus, in addition to violating this Court's precedent, violated his Sixth Amendment and due process rights to a penalty determination reflecting the "conscience of the community." (*Witherspoon v. Illinois, supra,* 391 U.S. at p. 519; see U.S. Const., 6th, 8th & 14th Amends.; see also Cal. Const., art. I, §§ 7, 15, 16, & 17; see also Brooks, *Thou Shalt Not Quote the Bible: Determining the Propriety of Attorney Use of Religious Philosophy and Themes in Oral Argument* (1998) 33 Ga. L.Rev. 1113, 1154-1160 [jurors who consider religious-based knowledge and philosophy valid sources of knowledge should be allowed to use that knowledge in reaching a just verdict].)

More, under the Eighth and Fourteenth Amendments, a juror must be "free to reject death if [he or she] decides on the basis of *any* constitutionally relevant evidence or observation that it is not the appropriate penalty." (*People v. Brown, supra,* 40 Cal.3d at p. 540, original italics.) Religious beliefs may legitimately inform a juror's subjective assessment of constitutionally relevant evidence, and may give rise to constitutionally relevant observations weighing in favor of a life without parole sentence. The court's instruction prevented jurors from considering such constitutionally relevant considerations, thus depriving Gomez of his

right to a reliable sentencing proceeding at which the jury is permitted to give full effect to all relevant mitigating considerations. (See U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17; *Lockett v. Ohio*, *supra,* 438 U.S. at p. 604; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112; *Brewer v. Quarterman* (2007) 550 U.S. 286, 289 [jury must be allowed not only to consider mitigating evidence, but to respond to it in a reasoned, moral manner].)

The error cannot be deemed harmless, either under the federal constitutional standard for harmless error review (*Chapman v. California, supra,* 386 U.S. at p. 24) or the state law standard for penalty phase error (*People v. Brown, supra,* 46 Cal.3d at pp. 447-449), the functional equivalent of the *Chapman* standard (*People v. Prince*, *supra,* 40 Cal.4th at pp. 1299-1300). "The inquiry . . . is not whether, in a trial that occurred without the error, [death sentences] would surely have been rendered" (*Sullivan v. Louisiana*, *supra,* 508 U.S. at p. 279) — though in this case the prosecution could not even meet that standard. Rather, the question is whether the death sentences "actually rendered in *this* trial [were] surely unattributable to the error." (*Ibid.,* original italics.) The prosecution cannot prove that beyond a reasonable doubt.

Sentencing deliberations took place over three court days, with a

weekend intervening, indicating that jurors did not consider the question whether Gomez should live or die to be easily answered. (31RT 4618;13CT 3426-3427; 31RT 3426-3429.) The Patel and Luna cases, which resulted in death sentences for Gomez, were both marked by singularly weak evidence at the guilt phase. (See Arguments I and II, above.) And the jury sentenced Gomez to life without parole on two counts. (31RT 4627-4628.)

During the course of these extended deliberations, however, the jurors were prohibited from drawing on Biblical references, even if they considered them an essential source of moral reasoning. This error struck at the heart of the sentencing process, which must produce not merely a factual finding, but a "reasoned, moral response" to the evidence before the jury. (*Brewer v. Quarterman*, *supra,* 550 U.S. at p. 289.)

The instruction was particularly prejudicial in light of a reading with which the prosecutor concluded his penalty phase summation, to the effect that the defendant "usurps the compassion that is justly the victim's. And he will steal his victim's moral constituency along with his life." (31RT 4577-4578.)[147] While jurors were apparently free to refer to this passage, and use

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[147] As noted in *People v. Rowland* (1992) 4 Cal.4th 238, 277-278, fn. 17, the reading was from "The Killing of Bonnie Garland," by Dr. Willard Gatland. This Court, to be sure, has approved the use of this reading in summation. (See *ibid.*; see also *People v. Hines* (1997) 15 Cal.4th 997, 1063.) Gomez is not challenging the use of that passage. Rather, Gomez's (continued...)

it during deliberations to marshal arguments for death, they were not permitted to refer to Biblical teachings, no matter how fundamental those were to the jurors' own conscience and moral reasoning.

More, the court's instruction, delivered immediately after defense counsel's summation, suggested to the jury that counsel had made improper arguments for a life without parole sentence. Defense counsel had begun his summation by telling jurors he felt "inadequate" to the task of arguing for Gomez's life, and suggesting that such matters "perhaps are better argued, are better expressed to you by a priest, a rabbi or a minister or even a philosopher. Instead you have two attorneys." (30RT 4580.) To the extent that defense counsel's words — not improperly — emphasized that the decision before the jurors was not purely factual or legal, and encouraged them to draw on their personal values, secular or religious, the court's

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[147](...continued)
argument here is that the trial court's instructions erroneously forbidding jurors from bringing Biblical teachings or Biblical-based moral reasoning to bear on the penalty decision were rendered particularly prejudicial because there was no concomitant warning not to bring to bear the secular reasoning propounded by the prosecutor.

That defense counsel also made use of secular sources in mounting his argument against death does not mitigate the harm of the court's instruction (see 31RT 4591-4593 [defense summation quoting Terence]), particularly since, as defense counsel acknowledged, he did not have "something fancy to rebut" "that nice quote that puts down mercy or sympathy." (31RT 4593.)

words improperly invalidated those that found root in the Christian Bible.

Finally, the error in the court's instruction was exacerbated by the delivery, at the penalty phase, of CALJIC No. 17.41.1, which, as set forth at length in Argument XIII, directed "that jurors are expected to police the reasoning and arguments of their fellow jurors during deliberations, and immediately advise the court if it appears that a fellow juror is deciding the case upon an 'improper basis.'" (*People v. Engelman*, *supra,* 28 Cal.4th at p. 400.) The combination of these two instructions can only have made jurors more fearful of voicing any arguments that might be rooted in religious or Biblical values or might appear to draw on Biblical stories or passages.

In these circumstances, given the closeness of the case, the jury's apparent struggle with its decision, the stirring passage from a secular work read to the jurors by the prosecutor during summation, and defense counsel's entirely proper suggestion that religious values might help in answering the question before the jurors, the prosecution cannot show beyond a reasonable doubt that the court's error in precluding jurors from considering Biblical references did not contribute to the death sentences. Reversal of the death sentences is required.

XXII.

A SENTENCE OF DEATH SHOULD NOT BE PERMITTED ABSENT A JURY FINDING THAT THE DEFENDANT IS GUILTY BEYOND ALL POSSIBLE DOUBT

The last decade has seen an explosion in exonerations of individuals who have been found guilty beyond a reasonable doubt by juries, and in many cases, sentenced to death. As of 2011, over 250 criminal defendants have been exonerated by DNA evidence; 17 had been sentenced to death, and 80 had been sentenced to life in prison. (See Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong (Harvard Univ. Press, 2011), at p. 5; see also Gross, *Convicting the Innocent* (2008) 4 Ann. Rev. L. Soc. Sci. 173, 175-177.) An additional 111 death-sentenced defendants have been exonerated nationwide in the period since 1973. (Gross, *Convicting the Innocent, supra,* 4 Ann. Rev. L. Soc. Sci. at pp. 175-177.)

Studies estimate the wrongful conviction rate in capital cases at 2.3% or more. (Gross, *Convicting the Innocent, supra,* 4 Ann. Rev. L. Soc. Sci. at pp. 176-177; see also Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate* (2007) 97 J. Crim. L. & Crimonology 761, 779-780 [estimating minimum 3.3%, and maximum 5% error rate in capital rape-murder convictions in the 1980s]; *Kansas v. Marsh* (2006) 548 U.S. 163, 210 [Souter, J., dissenting] [false verdicts are

remarkable in number, and probably disproportionately high in capital cases].)

In 2008, the California Commission on the Fair Administration of Justice issued a final report on the administration of the death penalty in California. While noting that it had learned of no credible evidence that California has executed an innocent person, it identified six California defendants since 1979 who had been sentenced to death, only to be subsequently acquitted or to have murder charges be dismissed for lack of evidence. (California Commission on the Fair Administration of Justice, Report and Recommendations on the Administration of the Death Penalty in California, June 30, 2008, p. 31 & fn. 40 ["California Commission Report"] [describing cases of Ernest Graham, Jerry Bigelow, Patrick Croy, Troy Lee Jones, Oscar Lee Morris, and Lee Perry Farmer].) Thus, the Commission could not "conclude with confidence that the administration of the death penalty in California eliminates the risk that innocent persons might be convicted and sentenced to death." (California Commission Report, p. 30.)

In order to minimize the risk that an innocent person will be executed in California, a jury finding that the defendant is guilty beyond all possible doubt should be required before a death sentence may be imposed.

Gomez acknowledges that this Court has rejected the assertion that evidence of guilt must be stronger in a capital case than in a noncapital case. (See *People v. Lewis* (2009) 46 Cal.4th 1255, 1290 & fn. 23.) Nonetheless, he raises this issue now to urge this Court, in the exercise of its supervisory power over matters of criminal procedure, to establish such a requirement, and in order that he may continue to press the claim in the future, should the need arise.

Requiring that jurors, before they sentence a person to death, certify that they are convinced beyond all possible doubt of the defendant's guilt, would eliminate much of the risk of sentencing an innocent person to death.[148] This Court has recognized that there is a gap between proof beyond a reasonable doubt and proof beyond all possible doubt. (See *People v. Gay, supra,* 42 Cal.4th at pp. 1218-1219; see also *Franklin v. Lynaugh* (1988) 487 U.S. 164, 174; see *id.* at p. 187 [O'Connor, J., concurring] [no Eighth Amendment right to jury consideration of lingering

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[148] Of course, such a requirement cannot entirely eliminate the risk of wrongful conviction. (See Sand & Rose, *Proof Beyond All Possible Doubt: Is there a Need for a Higher Burden of Proof When the Sentence May Be Death?* (2003) 78 Chi.-Kent L.Rev. 1359, 1369 ["'Even in the most extreme case, there will be some possibility that all the witnesses are mistaken, that the defendant has confessed falsely, that photographs are doctored or otherwise misleading, and so forth.' We are neither suggesting that a trial can produce a flawless factual record nor that our proposal will eliminate erroneous death sentences. Our goal is more modest: we seek to reduce the error rate."], footnote omitted.)

doubt at the penalty phase].)

Empirical evidence suggests this gap is variable, and often large. Professor Eric Lillquist has examined a meta-analysis of over fifteen different empirical studies, as well as several additional separate studies, which indicated that experimental subjects viewed beyond a reasonable doubt as equivalent to anywhere from 92% certainty to 51% certainty. (Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability* (2002) 36 U.C. Davis L.Rev. 85, 111-117.) He concluded that empirical evidence provides no support for the idea that the reasonable doubt standard, as applied by jurors, is a "high, fixed standard"; "[t]o the contrary, the evidence strongly suggests that the standard of proof is much lower and that jurors routinely vary the amount of proof needed to convict." (*Id.* at p. 117; see also Newman, *Beyond "Reasonable Doubt"* (1993) 68 N.Y.U. L.Rev. 979, 984-985; see generally *id.* at pp. 981-990.)

In capital cases, this gap between proof beyond a reasonable doubt and proof beyond all possible doubt comes into play in the sentencing determination. Yet the force of this "lingering" or "residual" doubt — even if substantial — may be blunted. As Justice Stevens has put it, a "serious concern" about the death penalty is "that the risk of error in capital cases may be greater than in other cases because the facts are often so disturbing

that the interest in making sure the crime does not go unpunished may overcome residual doubt concerning the identity of the offender." (*Baze v. Rees* (2008) 553 U.S. 35, 84-85 [Stevens, J., concurring in the judgment]; see also *Kansas v. Marsh, supra,* 548 U.S. at p. 210 [Souter, J., dissenting].)[149] Requiring jurors to certify guilt beyond all possible doubt would help to ensure that a high, fixed standard of proof is required before a person may be sentenced to death, and thus minimize the risk of imposing a death sentence after a wrongful conviction. More, such a requirement would be consistent with our system's tiered burden-of-proof standards, with the degree of certainty required corresponding to the nature and significance of the interest at stake. (See Sand & Rose, *Proof Beyond all Possible Doubt,* 78 Chi.-Kent L.Rev. at p. 1367.) As Sand and Rose have put it, "[p]lainly, life is the most fundamental interest ever imperiled by adjudication." (*Ibid.*)

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[149] Thus, instructions such as the one Gomez's jury received, that jurors may consider lingering doubt as a residual factor do not go far enough; they allow jurors to conclude, for example, that serious lingering doubts about Gomez's guilt were outweighed by the aggravating circumstances. (See 13CT 3445 ["It is appropriate for the jury to consider in mitigation any lingering doubt it may have concerning the defendant's guilt. Lingering or residual doubt is that state of the mind between beyond a reasonable doubt and beyond all possible doubt"]; 31RT 4608.)

The Model Penal Code supports such a requirement.[150] And legal commentators have concluded that such a requirement would constitute a significant and desirable step in attempting to reduce the risk that an innocent person will be executed. (See, e.g., Sand & Rose, *Proof Beyond All Possible Doubt*, 78 Chi.-Kent L.Rev. at pp. 1361-1362; Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. Ill. U. L.Rev. at pp. 42-43; Bradley, *A (Genuinely) Modest Proposal Concerning the Death Penalty* (1996) 72 Ind. L.J. 25, 27; Liebman et al. (2002) *A Broken System, Part II: Why There is So Much Error in Capital Cases, and What Can Be Done About It,* p. v [available at www.2law.columbia.edu/broken system2/report.pdf].)

Judge Sand, a federal district judge in New York and an editor of *Modern Federal Jury Instructions*, has proposed a model instruction. His instruction is quoted below:

> Because the death penalty presents a different form of punishment than a life sentence in prison, our system provides

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[150] The Model Penal Code's provision mandates that the trial judge exclude death if the evidence does not foreclose all doubt about guilt; *Apprendi v. New Jersey* and its Supreme Court progeny, however, require that any such finding be made, at least in the first instance, by a jury. (See Model Penal Code, section 210.6; see also Koosed, *Averting Mistaken Executions* (2000) 21 N. Ill. U. L.Rev. 41, 42-43; see generally *Apprendi v. New Jersey* (2000) 530 U.S. 466.)

a further protection to ensure that this penalty is not imposed on a defendant unless you are absolutely certain of his/her guilt. Therefore, before we hear the submissions of the parties for the penalty phase, you must advise us of the strength of your belief that the defendant is, in fact, guilty as you have found.

At the guilt phase, you found that the defendant is guilty of [specify offense] beyond a reasonable doubt. In so finding, you unanimously concluded that the proof was such that a reasonable person would rely and act upon it without hesitation in the most important of his or her own affairs.[151] We now ask whether you also find that defendant's guilt as to this count has been proven beyond all possible doubt. By proof beyond all possible doubt, we mean proof to an absolute certainty. It means that you do not harbor any lingering or residual doubts whatsoever as to the defendant's guilt.

Proof beyond all possible doubt is, therefore, a more rigorous and higher standard than proof beyond a reasonable doubt. As I instructed you, to find proof beyond a reasonable doubt, you must believe that the evidence presented by the government is of such a character that a reasonable person would rely and act upon it without hesitation in the most important matters of his or her own affairs.[152] Yet, proof beyond a reasonable doubt does not mean proof beyond all possible doubt. By contrast, proof beyond all possible doubt is proof of such a convincing nature that you have no doubt whatsoever as to the defendant's guilt.

(Sand & Rose, 78 Chi.-Kent L.Rev. at pp. 1372-1373.)

As Judge Sand has explained, proof beyond all possible doubt is not,

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[151] In California, an appropriate instruction would read ". . . such that you felt an abiding conviction of the truth of the charge." (See CALJIC No. 2.90.)

[152] See footnote 151, above.

and cannot be, an impossible, objective standard. (See Sand & Rose, 78 Chi. Kent L.Rev. at p. 1369 [in arguing for beyond all possible doubt standard, authors "do[] not stray from the collective legal and philosophical wisdom that it is impossible to determine the offense underlying the crime to an objective absolute certainty" but rather seek more modest goal: to reduce the error rate].) While objective absolute certainty is concededly impossible, requiring jurors to take the additional step of certifying guilt beyond all possible doubt would help to minimize the risk of erroneous capital convictions.

This Court has exercised its supervisory power in order to minimize risks that compromise the adjudicative process. (See *People v. Engelman, supra,* 28 Cal. 4th at p. 449 [because CALJIC No. 17.41.1 creates a risk to the proper functioning of jury deliberations, Court directs that it not be given]; *People v. Pena* (2004) 32 Cal.4th 389, 398-399 [because Court of Appeal's oral argument notice form created unnecessary and inadvisable risk of interfering with the right to oral argument, this Court directs Court of Appeal not to use it]; *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80-81 ["In order to minimize the potentially prejudicial effects identified by the Haney study, this court declares, pursuant to its supervisory authority over California criminal procedure, that in future capital cases" death-qualifying

voir dire should be done individually and in sequestration], superseded by statute as stated in *People v. Waidla, supra* 22 Cal.4th at p. 713.)

The risk at issue here is no less real, and certainly no less consequential, than the risks this Court sought to minimize in *Engelman, Pena*, and *Hovey.* This Court should exercise its supervisory power to require a jury certification of guilt beyond all possible doubt, and it should vacate Gomez's sentences in the Luna and Patel cases and remand for a new penalty phase in which death may not be imposed absent such a finding. (See *People v. Pena, supra,* 32 Cal.4th at pp. 403-405 [directing, in exercise of supervisory power, that Court of Appeal not use particular oral argument form, and remanding to Court of Appeal with directions to calendar matter for oral argument and reconsider case in light of that argument].)

* * *

Finally, Gomez contends that the Eighth Amendment requires such a finding. A system that tolerates a significant risk of executing an innocent person conflicts with evolving standards of decency in the United States; our standards of decency require, at the least, that steps be taken to minimize the risk of executing an innocent person. (U.S. Const., 8th & 14th Amends.; see also *Baze v. Rees, supra,* 553 U.S. at pp. 85-86 [Stevens, J.,

concurring]; Cal. Const., art. I, §§ 7, 15, & 17.)

As Justice Souter has put it, addressing, in his dissent in *Kansas v. Marsh*, a state requirement that death be imposed where aggravating and mitigating factors are in equipoise:

> Today, a new body of fact must be accounted for in deciding what, in practical terms, the Eighth Amendment guarantees should tolerate, for the period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests. We cannot face up to these facts and still hold that the guarantee of morally justifiable sentencing is hollow enough to allow maximizing death sentences . . . when, by a State's own standards and a state's own characterization, the case for death is "doubtful."

(*Kansas v. Marsh*, *supra*, 548 U.S. at pp. 207-208 [Souter, J., dissenting].)

In this case, had the jury been required to certify guilt beyond all possible doubt, there is a reasonable possibility, to say the least, that Gomez would not have been sentenced to death for the Luna and Patel murders. (See Arguments I & II, above; see *Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Brown, supra,* 46 Cal.3d at pp. 447-449.) Reversal is required.

XXIII.

BECAUSE THE ROBBERY AND KIDNAPING SPECIAL CIRCUMSTANCES IN THIS CASE PERMITTED THE JURY TO IMPOSE DEATH FOR AN ACCIDENTAL OR UNFORESEEABLE KILLING, THE DEATH PENALTY IS UNCONSTITUTIONAL

The jury found true three distinct special circumstance allegations which made Gomez death eligible in this case. In light of the guilty verdicts in connection with the murder charges in counts 3, 8, 10, and 11, the jury found true a multiple-murder special circumstance allegation. (3CT 844; 29RT 4351.) And, in connection with the count 3 charge, the murder of Rajandra Patel, the jury found true kidnaping and robbery special circumstances. (3CT 837; 29RT 4345.)

As discussed in Argument I, the murder conviction in count 8 (the murder of Raul Luna) must be overturned. The evidence to support that conviction was insufficient. (See Argument I.) And even if this Court should find that it was not, multiple prejudicial errors require reversal of that conviction. (See Arguments IV, V, VI, VII, VIII, X, XI, XII, XIII, & XIV.) And, as discussed in Arguments III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, & XIV, the murder convictions in counts 10 and 11 must be reversed as well.

If the convictions in counts 8, 10, and 11 are reversed, the only remaining murder conviction would be in count 3, which charged Patel's

murder. The multiple-murder special circumstance would no longer support the death sentence. Instead, the only special circumstances remaining to render Gomez death eligible would be the robbery and kidnaping special circumstances attached to the count 3 murder conviction.

Of course, as discussed above, there are several reasons to reverse the count 3 murder conviction — not least, that the evidence to support it was insufficient. (See Argument II.) But even putting these aside, in the circumstances of this case, a death eligibility finding based solely on the robbery and kidnaping special circumstances would be unconstitutional.

As discussed more fully below, where a defendant is the actual killer in a felony-murder case, California law does not require the state to prove any culpable mental state at all in order to render the defendant death-eligible under the state's felony-murder special circumstance allegations. To the contrary, under California law, a felony-murder defendant is death-eligible even if the killing is accidental or unforeseeable. Pursuant to authority from the United States Supreme Court, and courts throughout the country, this is unconstitutional.

Gomez recognizes that this Court has rejected this claim. (See, e.g., *People v. Taylor* (2010) 48 Cal.4th 574, 661; *People v. Young*, *supra,* 34 Cal.4th at p. 1204.) He nonetheless asks this Court to reconsider it for the

reasons set forth below.

A. Under California Law, a Defendant Can Be Convicted of First Degree Felony Murder, and Found Death-Eligible Under California's Felony-Murder Special Circumstance Allegations, If the Killing Is Negligent, Accidental, or Even Wholly Unforeseeable.

Under California law, the state cannot generally obtain a first degree murder conviction without proving that the defendant both premeditated and had the subjective mental state of malice. However, in the case of a killing committed during a robbery or kidnaping, or any other felony listed in Penal Code section 189, the state can convict a defendant of first degree felony murder without proof of any mens rea with regard to the killing. California's first degree felony-murder rule "includes not only [premeditated murders] but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable." (*People v. Dillon* (1983) 34 Cal.3d 441, 477.) This rule is reflected in the standard jury instructions for felony murder, given in this case. (CALJIC No. 8.21; 3CT 884; 29RT 4149.)

Under California law, this strict rule of culpability applies not only to

the question of guilt, but to the question of death-eligibility as well. Thus, a defendant who is the actual killer in a felony murder is eligible for death even if the state does not prove that the defendant had any distinct mens rea as to the killing. (See, e.g., *People v. Earp* (1999) 20 Cal.4th 826, 905, fn. 15 [rejecting defendant's argument that the felony-murder special circumstance could not be applied to one who killed accidentally]; *People v. Musselwhite, supra,* 17 Cal.4th at p. 1264 [rejecting the defendant's argument that to prove a felony-murder special circumstance, the prosecution was required to prove malice].) Moreover, as this Court has long made clear, if a defendant is the actual killer in a felony murder, he is also death eligible under the felony-murder special circumstance. (See *People v. Hayes* (1990) 52 Cal.3d 577, 631-632 [the reach of the special circumstance is as broad as the reach of felony murder].)

In other words, where the defendant is the actual killer, California's felony-murder rule permits a jury to find him guilty of murder even if the killing was negligent, accidental, or wholly unforeseeable. California's felony-murder special circumstances then permit the jury to go further, and find the defendant eligible for death, *without proof that the defendant harbored any culpable mental state as to the murder itself.* As Justice Broussard has noted, under the California scheme "a person can be

executed for an accidental or negligent killing." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1152 [Broussard, J., dissenting].)[153]

This lack of any mens rea requirement for death eligibility stands in sharp contrast to the rule applied where the defendant is *not* the actual killer, but is an aider and abettor. In that situation, California law is clear that a defendant is not eligible for the death penalty unless the state proves a culpable mental state as to the murder — either an intent to kill, or, at least, reckless indifference to human life. (See, e.g., *People v. Anderson, supra,* 43 Cal.3d at p. 1147; Pen. Code § 190.2(d).)

The question then becomes whether such a broad special circumstance — rendering defendants death eligible even where there has been no finding of a culpable mental state as to the actual killer — violates the Eighth Amendment. If the multiple-murder special circumstance is reversed, this becomes a critical question. Gomez turns to that question now.

B. As Applied to an Actual Killer, the Robbery and Kidnaping Special Circumstances Violate the Eighth Amendment Because They Permit Imposition of Death Without Proof of Any Culpable Mens Rea as to the Killing.

In a series of cases beginning with *Gregg v. Georgia* (1976) 428

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[153] *Anderson* has been superseded by statute on another ground as stated in *People v. Letner, supra,* 50 Cal.4th at p. 163 & fn. 20.

U.S. 153, the Supreme Court has recognized that the Eighth Amendment embodies a proportionality principle, and it has applied that principle to hold the death penalty unconstitutional in two general circumstances. First, the Court has held death disproportionate for a particular type of crime. (See *Kennedy v. Louisiana* (2008) 554 U.S. 407, 413 [death penalty disproportionate where victim's life has not been taken]; *Enmund v. Florida* (1982) 458 U.S. 782, 797-801 [death penalty disproportionate for aider and abettor to felony murder].) Second, the Court has held death disproportionate for a particular type of defendant. (See, e.g., *Atkins v. Virginia* (2002) 536 U.S. 304, 318-321 [death penalty disproportionate for mentally retarded defendant]; *Roper v. Simmons* (2005) 543 U.S. 551, 568 [death penalty disproportionate for defendant under 18 years old].) In evaluating whether the death penalty is disproportionate for a particular crime or criminal, the Court has applied a two-part test, asking (1) whether the death penalty comports with contemporary values and (2) whether it can be said to serve one or both of two penological purposes, retribution or deterrence of capital crimes by prospective offenders. (*Gregg v. Georgia, supra,* 428 U.S. at pp. 182-183.)

The Court first addressed the proportionality of the death penalty for felony murder in two cases: *Enmund v. Florida, supra,* 458 U.S. 782 and

Tison v. Arizona (1987) 481 U.S. 137. In *Enmund*, the Court held that the Eighth Amendment barred imposition of the death penalty on an aider and abettor — the "getaway driver" to an armed robbery murder — because he neither took life, attempted to take life, nor intended to take life. (*Enmund v. Florida, supra,* 458 U.S. at pp. 784, 789-793, 797.) In *Tison*, the Court addressed whether proof of "intent to kill" was an Eighth Amendment prerequisite for imposition of the death penalty in connection with an aider and abettor to felony murder. The Court held that it was not, and that the Eighth Amendment would be satisfied by proof that such a defendant had acted with "reckless indifference to human life" and as a "major participa[nt]" in the underlying felony. (*Tison v. Arizona, supra,* 481 U.S. at p. 158.)

Both *Tison* and *Enmund* involved felony-murder defendants who were not actual killers, but only aiders and abettors. The question here is whether *Tison* established a minimum mens rea solely for aiders and abettors, or whether it also established a minimum mens rea requirement also applicable to actual killers. That question was decided in *Hopkins v. Reeves* (1998) 524 U.S. 88.

In *Reeves* defendant was the actual killer in a felony murder. (*Id.* at p. 91.) He contended that the state court had erred in refusing to instruct on

lesser offenses which focused on his mental state: second degree murder and manslaughter. (See *id.* at pp. 92-94.) In defending the trial court's refusal to provide such instructions, the state argued that the lesser offenses were inapplicable because felony murder under Nebraska law did not require any culpable mental state as to the murder itself. (See *id.* at pp. 93-94.) In response, defendant relied on *Enmund* and *Tison* for the proposition that because proof of a more culpable mental state was required by the federal Constitution, the lesser instructions were required. (See *id.* at pp. 99-100.) Although *Hopkins* involved an actual killer (as opposed to an aider and abettor) the Supreme Court made quite clear that the state still had to establish that defendant satisfied the minimum mens rea required under *Enmund* and *Tison* at some point in the case. (*Hopkins v. Reeves, supra,* 524 U.S. at pp. 99-100; see also *Graham v. Collins* (1993) 506 U.S. 461, 501 [Stevens, J., concurring] [stating that an accidental homicide may no longer support a death sentence].)

Lower federal courts considering the issue — both before and after *Reeves* — have read *Tison* to establish a minimum mens rea applicable to all defendants. (See, e.g., *Lear v. Cowan* (7th Cir. 2000) 220 F.3d 825, 838; *Reeves v. Hopkins* (8th Cir. 196) 102 F.3d 977, 984-985, rev'd on other grounds, *Hopkins v. Reeves, supra,* 524 U.S. 88; *Loving v. Hart* (C.A.A.F.

1998) 47 M.J. 438, 443; see also *State v. Middlebrooks* (Tenn. 1992) 840 S.W.2d 317, 345, superseded by statute as stated in *State v. Stout* (Tenn. 2001) 46 S.W.2d 689, 705.)

More, the Supreme Court's two-part test for proportionality dictates that the Eighth Amendment requires a finding of intent to kill or reckless indifference to human life in order to impose the death penalty. In *Atkins v. Virginia*, the Court emphasized that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (*Atkins v. Virginia, supra,* 536 U.S. at p. 312.) An analysis of legislation in the felony murder area confirms the unconstitutionality of a scheme that permits a death sentence for felony murder without any culpable intent as to the murder itself.

Of the death penalty states,[154] there are at most six states — California, Georgia, Maryland, Idaho, Florida, and Mississippi — where a defendant may be death-eligible for felony murder *simpliciter*. That at least 44 states (28 death penalty states and 16 non-death penalty states) and the federal government[155] reject felony murder *simpliciter* as a basis for death eligibility reflects and even stronger "current legislative judgment" than the

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[154] (For a list of death penalty and non-death penalty states, see http://www.deathpenaltyinfo.org/documents/FactSheet.pdf.)

[155] See 18 U.S.C. § 3591(a)(2).

Court found sufficient in *Enmund* (*Enmund v. Florida, supra,* 458 U.S. at pp. 789-791) and *Atkins* (*Atkins v. Virginia, supra,* 536 U.S. at pp. 315-316).[156]

Not only is the imposition of the death penalty on one who has killed negligently or accidentally contrary to evolving standards of decency, it fails to serve either of the penological purposes — retribution and deterrence of capital crimes by prospective offenders — identified by the Supreme Court. With regard to these purposes, "[u]nless the death penalty . . . measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." (*Enmund v. Florida, supra,* 458 U.S. at pp. 798-799.) With respect to retribution, the Court has made clear that retribution must be calibrated to the defendant's culpability, which in turn depends on his mental state with regard to the crime. "It is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.'" (*Ibid.*; see also *Tison v. Arizona, supra,* 481 U.S. at p. 156 ["[T]he more purposeful is the criminal conduct,

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[156] One discussion of this issue lists six states including California which permit a death sentence for felony murder *simpliciter* — California, Florida, Georgia, Idaho, Maryland, and Mississippi. (Shatz, *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study* (2007) 59 Fla. L.Rev. 719, 761-762.)

the more serious is the offense, and therefore, the more severely it ought to be punished."].) Plainly, treating negligent and accidental killers on a par with intentional and recklessly indifferent killers ignores the wide difference in their level of culpability.

Nor does the death penalty for negligent and accidental killings serve any deterrent purpose. As the Supreme Court has recognized, "it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.'" (*Enmund v. Florida, supra,* 458 U.S. at p. 799; accord *Atkins v. Virginia*, *supra,* 536 U.S. at p. 319.) The law simply cannot deter a person from causing a result he never intended and never himself foresaw.

In short, because imposition of the death penalty for felony murder *simpliciter* is contrary to the judgment of the overwhelming majority of states, it does not comport with contemporary values. Because it serves no penological purpose it "is nothing more than the purposeless and needless imposition of pain and suffering." (*Coker v. Georgia* (1977) 433 U.S. 584, 592 [plurality].) Here, the felony-murder special circumstance instructions given to the jury permitted it to find Gomez death eligible without making any finding at all as to whether he harbored a culpable mental state as to the killing. Accordingly, the robbery and kidnaping special circumstances are

unconstitutional as applied in this case to make Gomez eligible for death. If the multiple-murder special circumstance is reversed, the death sentence cannot stand based on the robbery and kidnaping special circumstance.

XXIV.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT MR. GOMEZ'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many features of California's capital-sentencing scheme violate the United States Constitution. This Court consistently has rejected 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.)[157]

In light of this Court's directive in *Schmeck*, Gomez briefly presents the following challenges to urge their reconsideration and to preserve these claims for federal review. Should the Court decide to reconsider any of these claims, Gomez requests the right to present supplemental briefing.[158]

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[157] *Schmeck* has been abrogated on other grounds. (See *People v. McKinnon, supra,* 52 Cal.4th at p. 637.)

[158] The instructional claims of error raised here are cognizable on appeal under Penal Code section 1259, although Gomez did not seek the

(continued...)

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, supra,* 462 U.S. at pp. 877-878.) 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 Gomez, Penal Code section 190.2 contained 21 special circumstances. (See Pen. Code § 190.2(a)(1) through (a)(21).)

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; see *People v. Solomon, supra,* 49 Cal.4th at p. 843.) This Court should reconsider these cases and strike down Penal Code

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[158](...continued)
specific instruction or raise the precise claim asserted here.

section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application Of Section 190.3, Factor (a), Violated Mr. Gomez'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; 13CT 3444; 31RT 4605-4606.) 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 never has applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) Instead, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have

been characterized by prosecutors as "aggravating." As a result, 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 sufficient, by themselves and without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright*, *supra,* 486 U.S. at pp. 363-364; but see *Tuilaepa v. California*, *supra,* 512 U.S. at pp. 975-980 [factor (a) is constitutional].)

Gomez 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, disapproved on other grounds in *People v. Williams*, *supra,* 49 Cal.4th at p. 459; *People v. Brown*, *supra*, 33 Cal.4th at p. 401; *People v. Solomon, supra,* 49 Cal.4th at p. 843.) He urges the Court to reconsider this holding.

C. The Death Penalty Statute And Accompanying Jury Instructions Fail To Set Forth The Appropriate Burden Of Proof.

1. Mr. Gomez's Death Sentence is Unconstitutional Because it is Not Premised on Findings Made Beyond a Reasonable Doubt.

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (CALJIC Nos. 8.86, 8.87; see *People v. Anderson* (2001) 25 Cal.4th 543, 590; 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, Gomez's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (CALJIC No. 8.85; 13CT 3444-3445, 31RT 4605-4608; CALJIC No. 8.88; 13CT 3447-3448, 31RT 4614-4617.) Gomez recognizes that this Court has rejected this claim. (*People v. Solomon, supra,* 49 Cal.4th at pp. 843-844.)

Apprendi v. New Jersey, *supra*, 530 U.S. at p. 490, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604, and *Cunningham v. California* (2007) 549 U.S. 270, 280-282, 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, Gomez'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; 13CT 3447-3448, 31RT 4614-4617; see also CALJIC No. 8.86, 8.87; 13CT 3445-3446; 31RT 4608-4610.) Because these additional findings were required before the jury could impose the death sentence, *Ring, Apprendi, Blakely*, and *Cunningham* require that each of these findings be made beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, abrogated on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 140, and disapproved on other grounds in *People v. Flannel* (1980) 25 Cal.3d 668, 684, fn. 12; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Gomez 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, supra,* 33 Cal.4th at p. 595). The Court has rejected the argument that *Apprendi*, *Blakely*, and *Ring*

impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto*, *supra,* 30 Cal.4th at p. 263.) Gomez urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, Gomez 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 previously has rejected the claim that either Fourteenth Amendment due process 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.) Gomez requests that the Court reconsider this holding.

2. The Statute Unconstitutionally Fails to Require that the Prosecution Bear the Burden of Persuasion at the Penalty Phase.

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code § 520.) Evidence Code section 520

creates a legitimate state expectation as to the way a criminal prosecution will be decided, and therefore Gomez is constitutionally entitled under the Fourteenth Amendment to the burden of proof provided by that statute. (See *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, Gomez's jury should have been instructed that the prosecution had the burden of proof regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (13CT 3444-3448; 31RT 4605-4608, 4614-4617), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards and consequently violate the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the task is largely moral and normative, and thus is unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court also has rejected any instruction on the presumption of life. (*People v. Arias, supra,* 13 Cal.4th at p. 190.) Gomez is entitled to jury instructions that comport

with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

3. Mr. Gomez's Death Verdict Was Not Premised on Unanimous Jury Findings.

Imposing a death sentence violates the Fifth, Sixth, Eighth, and Fourteenth Amendments when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia, supra,* 435 U.S. at pp. 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304-305.)[159] 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; see also *People v. Solomon, supra,* 49 Cal.4th at p. 844.) Gomez asserts that *Prieto* was incorrectly decided, and that application of *Ring*'s reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and

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[159] In this case, the error lies not only in the standard instructions, which failed to require unanimity (or even a majority) with respect to aggravating factors, but also in the court's special instruction regarding the crimes against Escareno, on which the jury had hung at the guilt phase. (31RT 4562-4563; 31RT 4605, 4609-4610; 13CT 3444-3446.)

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, supra,* 11 Cal.4th at pp. 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.

Gomez asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

The failure to require unanimity with respect to aggravating factors stands in stark contrast to the rules applicable in California to noncapital cases. In cases where a criminal defendant has been charged with special allegations that may increase the severity of his sentence, for example, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code §§ 1158, 1158a.) Capital defendants are entitled to more rigorous protections than those afforded noncapital defendants. (*Monge v. California, supra,* 524 U.S. at p. 732; *Harmelin v. Michigan, supra,* 501 U.S. at p. 994; cf. *Ring v. Arizona, supra,* 536 U.S. at p. 589.) To apply the unanimity 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, supra,* 11 Cal.4th at pp. 763-764), violates the equal protection clause of the

Fourteenth Amendment (see, e.g., *Myers v. Ylst, supra,* 897 F.2d at p. 421). For these reasons, Gomez asks this Court to reconsider its previous holdings on this issue. (See *People v. Solomon, supra,* 49 Cal.4th at p. 844.)

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 Gomez hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC No. 8.88; 13CT 3447-3448, 31RT 4616-4617.) 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 pp. 362-364.)

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.) Gomez asks this Court to reconsider that opinion.

5. The Instructions Failed to Inform the Jury that the Central Determination is Whether Death is the Appropriate Punishment.

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at pp. 304-305.) Yet CALJIC No. 8.88 does not make this clear to jurors; rather, it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. (13CT 3447-3448; 31RT 4614-4617.) These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other hand, under California's scheme, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo*, *supra,* 6 Cal.4th at pp. 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Gomez urges this Court to reconsider that ruling.

6. The Instruction Did Not Tell the Jury It Could Impose a Life Sentence Even if Aggravation Outweighed Mitigation.

CALJIC No. 8.88 was also defective because it implied that death was the *only* appropriate sentence if the aggravating evidence was "so substantial in comparison with the mitigating circumstances . . . ." (13CT 3448; 31RT 4616-4617.) However, it is clear under California law that a penalty jury may always return a verdict of life without the possibility of parole, even if the circumstances in aggravation outweigh those in mitigation. (*People v. Brown, supra,* 40 Cal.3d at pp. 538-541.) Thus, the instruction in effect improperly told the jurors they had to choose death if the evidence in aggravation substantially outweighed that in mitigation.

The jury may impose a life sentence if any one factor in mitigation outweighs all of the factors in aggravation; also, the jury may impose a life sentence even if none of the factors in mitigation (even in combination) outweighs the factors in aggravation.

The Court has previously rejected this claim. (*People v. Kipp* (1998) 18 Cal.4th 349, 381; see also *People v. Morgan, supra,* 42 Cal.4th at p. 625.) Gomez urges this Court to reconsider that ruling.

7. 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 *Blystone v. Pennsylvania*, *supra*, 494 U.S. at p. 307.) 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. (13CT 3447-3448; 31RT 4614-4617.) By failing to conform to the mandate of Penal Code section 190.3, the instruction violated Gomez'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.) Gomez submits that this holding conflicts with 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 parole verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon*, *supra*, 412 U.S. at pp. 473-474 & fn. 6.)

8. The Instructions Failed to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances.

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman*, *supra,* 550 U.S. at pp. 291-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio, supra,* 438 U.S. at p. 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at pp. 304-305.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California* (1990) 494 U.S. 370, 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Gomez's jury was told in the guilt phase that unanimity was required in order to acquit Gomez of any charge or special circumstance. (3CT 885, 887, 892; 29RT 4152, 4159-4160, 4171.) In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 441-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland, supra*, 486 U.S. at pp. 374-375.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial, and requires reversal of Gomez's death sentence, since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

9. 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, supra,* 425 U.S. at p. 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, 352-353 & fn. 7; cf. *Delo v. Lashley* (1983) 507 U.S. 272, 278-280.)

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 Gomez's right to due process of law (U.S. Const., 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., 8th & 14th Amends.), and his right to the equal protection of the laws (U.S. Const., 14th Amend.).

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital

cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, California's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing to Require That The Jury Make Written Findings Violates Mr. Gomez's Right To Meaningful Appellate Review.

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), Gomez'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 Gomez 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*, *supra,* 428 U.S. at p. 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Gomez 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 Mr. Gomez's Constitutional Rights.

1. The Instructions Used Restrictive Adjectives in the List of Potential Mitigating Factors.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85(d) & (g); 13CT 3444-3445; 31RT 4606-4607; Pen. Code, § 190.3, factors (d) & (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*, *supra,* 438 U.S. at p. 604.)

Gomez is aware that the Court has rejected this argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

2. The Instructions Failed to Delete Inapplicable Sentencing Factors.

Some of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to Gomez's case. (CALJIC No. 8.85(e) & (i).) The trial court failed to omit those factors from the jury instructions (13CT 3444-3445; 31RT 4606-4607) likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights.

Gomez asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any

inapplicable sentencing factors from the jury's instructions.

3. The Instructions Failed to Inform the Jury Not to Consider the Deterrent Effect or the Cost of the Death Penalty.

The instructions failed to inform the jury not to consider the deterrent or non-deterrent effect of the death penalty or the monetary cost to the state of executing a defendant or maintaining his in prison for life without the possibility of parole. Such factors are wholly irrelevant to a defendant's deathworthiness and risk an arbitrary, capricious and unreliable capital-sentencing decision in violation of the Eighth and Fourteenth Amendments. This Court has held that a trial court does not err in refusing to give such an instruction where "'neither party raise[s] the issue of either the cost or the deterrent effect of the death penalty . . .' [Citation.]." (*People v. Zamudio, supra*, 43 Cal.4th at p. 371.) Gomez asks the Court to reconsider its prior decisions.

F. The Prohibition Against Inter-Case Proportionality Review Guarantees Arbitrary And Disproportionate Impositions Of The Death Penalty.

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Solomon, supra,* 49

Cal.4th at p. 844.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, Gomez urges the Court to reconsider its failure to require inter-case proportionality review in capital cases.

G. California's Capital-Sentencing Scheme Violates The Equal Protection Clause.

The California death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with 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, and the sentencer must articulate reasons justifying the defendant's sentence.[160] (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325-326; Cal. Rules of Court, rule

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[160] More, at the time of Gomez's trial, aggravating and mitigating factors had to be found by the sentencer by a preponderance of the evidence. (See generally *Cunningham v. California, supra,* 549 U.S. at pp. 275-281 [describing noncapital sentencing scheme in existence until *Cunningham* decision].)

4.420, (b) & (e).) 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. Gomez acknowledges that the Court has rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590; *People v. Solomon, supra,* 49 Cal.4th at p. 844), but he asks the Court to reconsider its ruling.

H. California's Use Of The Death Penalty As A Regular Form Of Punishment Conflicts With Evolving Standards of Decency and Falls Short Of International Norms.

This Court has rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Solomon, supra,* 49 Cal.4th at p. 844; *People v. Cook, supra,* 39 Cal.4th at pp. 618-620.) In light of evolving standards of decency, the international community's overwhelming rejection of the death penalty as a regular form of punishment, and the United States Supreme Court's decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons, supra,* 543 U.S. at pp. 555, 560-579), Gomez urges the Court to reconsider its previous decisions.

XXV.

THE CUMULATIVE EFFECT OF THE ERRORS AT THE CRIMINAL TRIAL UNDERMINES THE RELIABILITY OF THE CRIMINAL JUDGMENT, REQUIRING REVERSAL

The errors set forth above in Arguments I through XXIV — individually, cumulatively, and in any combination — undercut confidence in fairness of the trial and the reliability of the jury's first degree murder verdicts, findings of special circumstances and sentence enhancements, and determination that death is the appropriate sentence for Gomez. The errors here — individually, cumulatively, and in any combination — deprived Gomez of his right to due process of law and warrant reversal of the judgment.

The due process clause entitles a criminal defendant to a fair trial. (See *Estes v. Texas* (1965) 381 U.S. 532, 543; U.S. Const. 14th. Amend.; Cal. Const., art. I, §§ 7, 15, 16.) The cumulative effect of trial errors can so prejudice a case that reversal is required. (*People v. Holt* (1984) 37 Cal.3d 436, 458-459, questioned on other grounds in *People v. Triplett* (1993) 16 Cal.App.4th 624, 627-628, and superseded by statute on other grounds as stated in *People v. Muldrow* (1988) 202 Cal.App.3d 636, 644; *People v. Hill, supra,* 17 Cal.4th at pp. 844-848; see *People v. Cardenas, supra,* 31 Cal.3d at p. 907; *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927-928;

Chambers v. Mississippi (1973) 410 U.S. 284, 302-303; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643.)

In *People v. Holt, supra,* 37 Cal.3d at p. 459, this Court reversed a conviction because of the cumulative impact of erroneously admitted evidence and improper impeachment. In this case, similarly, the cumulative effect of all the errors was not harmless beyond a reasonable doubt. (See also *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying harmless beyond a reasonable doubt standard to cumulative errors including federal constitutional violations]; *Lincoln v. Sunn, supra,* 807 F.2d at p. 814, fn. 6; *Cooper v. Sowders* (6th Cir. 1988) 837 F.2d 284, 285-288; see *In re Rodriguez* (1981) 119 Cal.App.3d 457, 470 [applying harmless beyond a reasonable doubt standard to cumulative federal constitutional errors].)

The prosecution cannot show that the verdicts in this trial were surely unattributable to these errors. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279; *Chapman v. California, supra,* 386 U.S. at p. 24.) In any event, the errors here were not harmless under any standard. Without the cumulative effect of these errors, there is a reasonable probability that at least one juror would have harbored a reasonable doubt as to whether the prosecution had proved, beyond a reasonable doubt, the cases against Gomez, and the result would have been different. (See *People v. Watson,*

supra, 46 Cal.2d at p. 836; see also *People v. Bowers, supra,* 87 Cal.App.4th at p. 736 [mistrial is more favorable result than conviction]; *People v. Soojian, supra,* 190 Cal.App.4th at pp. 520-524.)

Per se reversal of all the verdicts is required separately because of the structural errors that occurred, including the trial court's error in unequivocally ruling out the possibility of self-representation. (Argument IV; see also Arguments X, XII, XIII.) Insufficiency of the evidence requires reversal of the convictions. (Arguments I, II, and III.) But even if the *Faretta* error does not require automatic reversal, and even if the court should find the evidence on the Luna and Patel counts sufficient, and evidence sufficient to support the first degree murder verdicts in the Dunton and Acosta cases, both the convictions and death sentences in this case must be reviewed in light of cumulative error. (See *People v. Hayes*, *supra,* 52 Cal.3d at p. 644.)

The cumulative prejudice with regard to Gomez's convictions in the Luna and Patel cases — in which the evidence of his guilt was particularly weak, if not insufficient — is pronounced. The jury considering whether Gomez was guilty beyond a reasonable doubt in the Luna and Patel cases had before it, due to the court's erroneous ruling on Gomez's severance motion, not only the evidence in the case at issue, but evidence in the

Dunton and Acosta double homicide, the Escareno case, and, in the case of Luna, the evidence in the Patel case (and vice versa). (See Argument V; see also Argument VI.) Also before the jurors as they considered guilt in these exceptionally weak cases was highly prejudicial gang expert testimony about the Mexican Mafia — which lacked any connection at all to the Patel and Luna cases. (See Argument VIII.) And, jurors considering these cases were presented with irrelevant and highly prejudicial testimony, from a jail guard, regarding Gomez's refusal to come to court one morning — and were instructed that they could consider this evidence as showing a consciousness of guilt. (See Argument VII.)

Yet more erroneous and prejudicial instructions compromised the jury's fair consideration of Gomez's guilt or innocence in these weak cases. First, before trial began, the court sternly directed jurors to take notes during the trial, telling jurors it would be "very discouraged" to see jurors "looking at the witnesses" and not taking notes (8RT 1300) — seriously compromising the jurors' ability to assess the demeanor and credibility of the prosecution's highly suspect witnesses. (See Argument X.) The court further primed the jury to view these suspect witnesses as less culpable, and Gomez as more culpable, by explaining to jurors, in voir dire, through a hypothetical, that the prosecution, lacking sufficient evidence to convict the

"greater culprit," may offer leniency to lesser culprits in exchange for their testimony. (See Argument XI.) Finally, while these errors prevented the jurors' unbiased and careful evaluation of the prosecution's witnesses, the prosecutor's argument that the defense had produced no evidence that Gomez read certain newspaper articles — error under *Griffin v. California, supra,* 380 U.S. 609 — erroneously and prejudicially drew attention to the fact that Gomez had not taken the stand to dispute the prosecution's evidence on any of the charges and served to undermine a crucial piece of evidence presented by the defense. (See Argument XVII.)

Moreover, all these errors were exacerbated by defects in the court's instructions. (Argument XII, XIII, XIV, XV.)

The jury's fair adjudication of the Dunton and Acosta double homicide was prejudiced, as well, by all the errors discussed above, as well as by the court's erroneous admission, in violation of the Sixth Amendment, of a note written by Robert Acosta shortly before his death. (See Argument IX.) This "testimony from the grave," as the prosecutor put it, provided the most damaging evidence in the entire case that Gomez's co-defendant, Arthur Grajeda, a Mexican Mafia associate — and thus the Mexican Mafia itself — was involved in the crime.

Additional errors at the penalty phase — even if individually not

found to be prejudicial — compounded the prejudicial error at the guilt phase. These penalty phase errors blunted lingering doubts about Gomez's guilt, particularly in the Luna and Patel cases, where the evidence, viewed dispassionately and separately in each case, and without reference to the inflammatory gang testimony, and the testimony, from a jail guard, about Gomez's refusal to come to court, did not warrant conviction, much less a death sentence.

The court, which should have granted Gomez's motion to dismiss the Escareno case for insufficiency of the evidence, instead denied it, and then allowed jurors who believed Gomez guilty in that case to consider it at the penalty phase. (See Argument XVIII.) More, it failed to deliver the crucial accomplice corroboration instruction in the penalty phase (and affirmatively told jurors that guilt phase instructions no longer applied), thus allowing any juror who believed Witness #1's testimony to consider the Escareno murder at the penalty phase, regardless of whether the corroboration requirement had been met. (See Argument XIX.) The Escareno case, which should have been removed from the jury's consideration — or at least subject to the accomplice corroboration requirement — instead constituted the single most aggravating factor before jurors at the penalty phase: the murder of an additional person.

Additional errors compromised the jurors' appropriate consideration of penalty: the court allowed the prosecutor to elicit the ethnic background of two jail guards who told jurors Gomez had attacked him; the prosecutor then made the unseemly and unconstitutional argument, in support of a death sentence, that Gomez had even attacked Mexican-Americans. (See Argument XX.) And while jurors were thus encouraged to consider this constitutionally inappropriate factor, the court, on the heels of defense counsel's summation, which emphasized the moral decision facing the jurors, forbade jurors from "refer[ring] to Biblical references" — unconstitutionally depriving jurors of a potentially helpful source of moral reasoning, and depriving Gomez of a verdict reflecting the "conscience of the community." (See Argument XXI.)

These guilt and penalty phase errors, together, precluded the possibility that the jury reached appropriate verdicts in accordance with the state death penalty statute or the federal constitutional requirements of a fundamentally fair, reliable, non-arbitrary and individualized sentencing determination. Reversal of the death judgment is mandated here because it cannot be shown that these errors, individually, or collectively, did not affect the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v.*

Mississippi, supra, 472 U.S. at p. 341; *Arizona v. Fulminante*, *supra,* 499 U.S. at pp. 301-302; see *People v. Hayes*, *supra,* 52 Cal.3d at p. 644 [court considers prejudice of guilt phase instructional error in assessing penalty phase].)

Accordingly, the combined impact of the various errors in this case requires reversal of Gomez's convictions, true findings of the special circumstances and sentencing enhancements, and death sentences.

CONCLUSION

For the reasons set forth above, Mr. Gomez respectfully requests that this Court reverse the judgment.

Dated: March 9, 2012

Lynne S. Coffin

Laura S. Kelly

WORD COUNT CERTIFICATION

I, Lynne S. Coffin, counsel for Ruben Perez Gomez, certify pursuant to the California Rules of Court that the word count for this document is 117,213 words, excluding the cover, the tables, and this certificate. This document was prepared in Corel Word Perfect, and this is the word count generated by the program for this document.

Executed at Mill Valley, California, on March 9, 2012.

Lynne S. Coffin
Attorney for Ruben Perez Gomez

DECLARATION OF SERVICE

Re: People v. Ruben Perez Gomez, S087773

On March 14, 2012, I served the within

Appellant's Opening Brief

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I declare under penalty of perjury that the foregoing is true and correct.

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