No. S095076

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD PENUNURI,

Defendant and Appellant.

LOS ANGELES COUNTY
SUPERIOR COURT

Superior Court Case
No. BA189633

ON AUTOMATIC APPEAL
FROM A JUDGMENT AND SENTENCE OF DEATH

Superior Court of California, County of Los Angeles
The Honorable Robert W. Armstrong, Judge Presiding

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

On October 25, 1999, the Los Angeles County grand jury returned an indictment against appellant and codefendants Joseph Castro, Jr., Arthur Bermudez and Alfredo Tapia.[1] (CT 1:1-9.)[2] Appellant was charged with second

[1] A fourth defendant, Alejandro Delaloza (aka Hondo and/or Snoopy), was tried separately in a jury trial that ended prior to the start of appellant's trial. Delaloza was convicted of robbery of Shawn Kreisher and Randy Cordero (Pen. Code, § 211; counts 1 and 2, respectively), assault with a deadly weapon on David Bellman (Pen. Code, § 245, subd. (a)(1); count 3),

degree robbery of Shawn Kreisher and Randy Cordero (Pen. Code, § 211; counts 1 and 2, respectively), assault with a firearm on Carlos Arias (Pen. Code, § 245, subd. (a)(2); count 3), first degree murder of Brian Molina, Michael Murillo, and Jaime Castillo (Pen. Code, §§ 187, subd. (a), 189; counts 4, 5 and 7, respectively), and conspiracy to commit murder of Jaime Castillo (Pen. Code, § 182, subd. (a)(1); count 6).[3]

The indictment alleged two special circumstances, multiple-murder (Pen. Code, § 190.2, subd. (a)(3); counts 4 & 5) and witness murder (Pen. Code, § 190.2, subd. (a)(10); count 7), and alleged that appellant personally used a

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conspiracy to commit murder of Luke Bissonnette and Carlos Arias (Pen. Code, § 182, subd. (a)(1); count 4), and the first degree murders of Michael Murillo and Brian Molina (Pen. Code, §§ 187, subd. (a), 189; counts 5 and 6, respectively). (CT Supp. VI, pp. 1170-1184.)

[2] References to rules are to the California Rules of Court. "RT" designates the reporter's transcript and "CT" designates the clerk's transcript, in the format "volume:page."

[3] Codefendants Castro, Bermudez, and Tapia were charged with the first degree murder of Jaime Castillo (Pen. Code, §§ 187, subd. (a), 189; count 7) and conspiracy to commit murder of Jaime Castillo (Pen. Code, § 182, subd. (a)(1); count 6). It was alleged in connection with count 7 that Castro was a principal in the offense and at least one principal intentionally and personally discharged and personally used a firearm, proximately causing great bodily injury, within the meaning of Penal Code sections 12022.7 and 12022.53, subdivision (d). The indictment also alleged the special circumstance of witness murder (Pen. Code, § 190.2, subd. (a)(10); count 7) as to each of the codefendants. Finally, codefendant Bermudez was charged with dissuading a witness from testifying (Pen. Code, § 136.1, subd. (c)(1); counts 8, 9, and 10). (CT 1:1-9.)

firearm in the commission of the offenses charged in counts 1 through 5, inclusive (Pen. Code, § 12022.5, subd. (a)(1)). (CT 1:1-9.)

Appellant entered pleas of not guilty to the charges and denied the enhancement allegations. (CT 1:11-12.)

Trial commenced with jury selection on October 30, 2000. (CT 7:1895-1896.) On November 14, 2000, the trial and alternate jurors were impaneled and sworn. (CT 11:3223-3224.)

The jury commenced deliberations on December 11, 2000. (CT 12:3317-3318.) On December 15, 2000, appellant was convicted as charged, except the jury found not true the personal firearm use allegation (Pen. Code, § 12022.5, subd. (a)(1)) in connection with count 1, and of the nine (9) overt acts alleged in connection with count 6 (conspiracy to commit murder of Castillo) the jury found true overt acts 3, 4, 5, 6, and 7.[4] (RT 25:3823-3830, 3833-3834; CT 12:3452-3466.)

On December 18, 2000, a joint penalty phase of the trial began as to appellant and codefendant Castro.[5] (CT 12:3487-3492.) The jury commenced deliberations on December 26, 2000. (CT 12:3504-3505.) The following day the

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[4] Codefendants Castro and Bermudez were convicted as charged, except Bermudez was acquitted of the charges in counts 8, 9, and 10. Codefendant Tapia was acquitted. (RT 25:3823-3834; CT 12:3452-3466.)

[5] The death penalty was not sought against codefendant Bermudez.

jury returned a verdict of death as to appellant only. (RT 30:4511-4513; CT 13:3541-3542.)

On January 25, 2001, appellant filed a motion to set aside the verdicts and for a new trial. (CT 13:3558-3562.) On January 29, 2001, appellant filed an amended motion to set aside the verdicts and for a new trial. (CT 13:3564-3577.)

On January 31, 2001, the trial court denied the motion to set aside the verdicts and for a new trial, and sentenced appellant to death on counts 4, 5, and 7.[6] (RT 31:4527-4536; CT 13:3589-3610.)

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[6] On the noncapital counts and enhancements the trial court sentenced appellant as follows: 1) count 1, one year (one-third the midterm of three years), stayed pursuant to Penal Code section 654; 2) count 2, the upper term of five years, plus ten years for the firearm use enhancement, stayed pursuant to Penal Code section 654; 3) count 3, one year (one-third the midterm of three years), plus sixteen months for the firearm use enhancement, stayed pursuant to Penal Code section 654; and, 4) count 6, 25 years-to-life, stayed pursuant to Penal Code section 654. A restitution fine was imposed and appellant was given custody credit. (CT 13:3589-3610.)

TABLE OF CHARGES & VERDICTS

For ease of reference, appellant provides the following Table of Charges and Verdicts, which includes separately-tried defendant Delaloza:

Charge	Penunuri	Castro	Bermudez	Tapia	Delaloza
Ralphs Parking Lot Incident Robbery, Kreisher & Cordero, 10/23/1997 at approx. 9 p.m.					
Count 1: Robbery (§ 211) of Shawn Kreisher	Guilty; not true firearm use	--	--	--	Guilty; true principal armed
Count 2: Robbery (§ 211) of Randy Cordero	Guilty; true firearm use	--	--	--	Guilty; true principal armed
--	--	--	--	--	Guilty; assault with a deadly weapon on David Bellman (count 3)
Hornell Street Incident Assault with a Firearm, Carlos Arias, 10/24/1997 at approx. 12:30 a.m.					
Count 3: Assault with a firearm (§ 245(a)(2)) on Carlos Arias	Guilty; true firearm use	--	--	--	--
Goodhue Street Incident Murder, Brian Molina and Michael Murillo, 10/24/1997 at approx. 4 a.m.					
Count 4: First degree murder (§§ 187(a), 189) of Brian Molina	Guilty; true firearm use; true PC § 190.2(a)(3)	--	--	--	Guilty (charged as count 6)

Charge	Penunuri	Castro	Bermudez	Tapia	Delaloza
Count 5; First degree murder (§§ 187(a), 189) of Michael Murillo	Guilty; true firearm use; true PC § 190.2(a)(3)	--	--	--	Guilty
--	--	--	--	--	Guilty; *conspiracy to murder Carlos Arias & Luke B.* (charged as count 4)
Conspiracy to Commit Murder and Murder, Jaime Castillo 1/15/1998, 8 a.m. & 7 p.m., body found and identified as Castillo, respectively					
Count 6: Conspiracy to commit murder (§ 182(a)(1)) of Jaime Castillo	Guilty; true overt acts 3, 4, 5, 6 & 7 [overt acts 1, 2, 8 & 9 blank]	Guilty; true overt acts 3, 4, 5, 6 & 7 [overt acts 1, 2, 8 & 9 blank]	Guilty; true overt acts 3, 4, 5, 6 & 7 [overt acts 1, 2, 8 & 9 blank]	NG	--
Count 7: First degree murder (§§ 187(a), 189) of Jaime Castillo	Guilty; true PC § 190.2(a)(10)	Guilty; true PC § 12022.53, subd. (d); true PC § 190.2, subd. (a)(10)	Guilty; true PC § 190.2, subd. (a)(10)	NG	--

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STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Cal. Const., art. VI, § 11, subd. (a); Pen. Code, § 1239, subd. (b).)

STATEMENT OF FACTS

A. GUILT PHASE – THE PROSECUTION'S CASE

The evidence presented by the prosecution at the guilt trial consisted of the following:

1. THE RALPHS PARKING LOT INCIDENT (COUNTS 1 & 2 – ROBBERIES OF SHAWN KREISHER AND RANDY CORDERO, RESPECTIVELY)

On October 23, 1997, at approximately 9:00 p.m., Randy Cordero was driving Shawn Kreisher and David Bellman to the Ralphs market in Whittier. They noticed a white Cadillac with four or five occupants staring at them. While stopped at a traffic light, Kreisher put a hockey mask on his face and looked at the Cadillac. Shortly thereafter, Cordero parked in the Ralphs parking lot and all three exited the vehicle. They started walking towards the entrance and observed the Cadillac parked nearby. Several males got out of the Cadillac and came running towards them. (RT 8:885-888, 9:968-970.)

A physical altercation ensued, during which someone got out of the Cadillac, walked over to Kreisher, and demanded money. The person had a bulge in his pocket, which Kreisher thought might be a gun, and so Kreisher gave

him $40. The person demanded money from Cordero, but was rebuffed when Cordero told him he had none. (RT 8:886-889, 9:977-985.)

As Cordero, Kreisher and David Bellman were attempting to get back to their vehicle, someone from the Cadillac group yelled, "Get his keys. Get his keys." (RT 8:891.) Cordero ran to his trunk and pulled out a baseball bat. (RT 9:980-981, 987-988.) Someone yelled, "Blast 'em" or "Blast his ass." (RT 9:980-981, 987-988.) Someone from the Cadillac group started walking towards the three men, pulled a gun from his jacket, and appeared to cock the gun in order to fire it. (RT 9:981-984.) Cordero, Kreisher, and Bellman fled on foot through the parking lot and to the adjacent intersection, where several police officers were gathered investigating a traffic accident. (RT 9:983-984.)

Two employees of Ralphs observed the incident and recorded the Cadillac's license plate number. The Cadillac was registered to Delaloza. (RT 8:856-863, 9:923-938.)

a. PERCIPIENT WITNESS TESTIMONY

Shawn Kreisher testified that on October 23, 1997, while he and David Bellman were being driven by Randy Cordero to the Ralphs market in Whittier to purchase some beer and cigarettes, he noticed a white Cadillac with four or five occupants "mad dogging" them. (RT 8:875-878.) While stopped at a traffic light, Kreisher, seated in the back seat behind Bellman, put a hockey mask on his

face, turned to the white Cadillac "for the hell of it," and then turned back. (RT 8:879-881.) Cordero went through the light, turned into Ralphs, and parked. (RT 8:881-882.)

Kreisher testified that as the three were walking to the entrance of Ralphs the white Cadillac pulled up about ten feet from the main entrance. (RT 8:882-885.) After the Cadillac came to a stop, four of the occupants got out and came running towards Kreisher, Cordero, and Bellman. The driver stayed in the car. The individuals were asking, "Who's Jason?" (RT 8:885.) One of them confronted Kreisher and asked him if he was Jason. Kreisher recalled that Jason, the main character in the movie *Friday the 13th*, wears a hockey mask. (RT 8:885-886.) The person swung at Kreisher with both hands; Kreisher fought back. (RT 886-887.) The individual then went over to Cordero and began fighting with him. Kreisher could not identify the person in the courtroom. (RT 8:886-888.) The biggest one of the group, wearing a large jacket and baggy pants, and with his left hand in his pocket as if he had a weapon, told Kreisher to give him his money. Kreisher opened his wallet and gave the individual two $20 bills. (RT 8:888-889.)

Kreisher testified that as Cordero, Bellman and he were trying to return to Cordero's car, he heard one member of the Cadillac group yell, "Get his keys." (RT 8:891.) Cordero ran to his trunk and pulled out a baseball bat. (RT 8:891.)

One member of the Cadillac group then yelled, "Blast 'em." (RT 8:892.) Kreisher, Cordero, and Bellman then ran down the street to where they saw several police officers gathered near a fire hydrant. As they were running towards the police officers, Kreisher looked back and saw one of the individuals from the Cadillac group grab a black bag. (RT 8:892-893.) Kreisher did not recognize the bag, but he knew it fell out of Cordero's trunk because it was on the ground in front of the trunk. (RT 8:891-893.)

Kreisher testified that because the incident occurred so long ago he is not sure whether he could recognize the person who took his money. (RT 8:889-890.) A few days after the incident, however, Kreisher identified appellant from a photographic display as the person who took his money. (RT 8:887-889.) Turning to the defendants and squinting, Kreisher identified appellant in court as the person he identified in the photographic display; Kreisher admitted he is supposed to wear prescription glasses, but was not wearing them on either the night of the incident or while testifying in court. (RT 8:897-899, 900-901.) Kreisher testified that People's Exhibit 5, a large black jacket with a hood, is similar to the one worn by the individual that took Kreisher's money. (RT 8:899-900.)

Randy Cordero testified that he and his friends, Kreisher and Bellman, were driving to Ralphs in his silver Hyundai when he saw a white Cadillac to

their right with five guys staring and "giving dirty looks." (RT 9:954-955.) He got a good look at the driver of the Cadillac and had subsequent contact with him after they pulled into the parking lot. (RT 9:955-958.)

Cordero testified that they were about 20 feet from the entrance to Ralphs when the group of five people from the Cadillac confronted them. (RT 9:968-970.) Someone wearing black cotton gloves, and with a knife in his hand, punched Bellman. (RT 9:970-973, 989-993; People's Exh. 9.) Another person approached Kreisher with his hand in his jacket and stated, "Let me see your wallet." (RT 9:977-980.) This person was wearing a long, thick, heavy, and bulky sports coat or jacket that hung down to his knees, which Cordero recognized as People's Exhibit 5. (RT 9:974-977.) The person asked Cordero for money; Cordero told him he had none. (RT 9:984-985.)

Cordero testified that he retrieved a baseball bat from the trunk of his vehicle. A duffle bag containing his clothes fell out of the trunk. He heard someone say, "Blast his ass." Someone removed a handgun, which appeared to be a 9-millimeter gun, and cocked back the firearm's slide piece. (RT 9:980-981, 987-988.) The gunman approached him with the handgun exposed. Cordero "froze" and then ran back "the other way." (RT 9:981-983.) Cordero turned and stated, "He's got a gun. Let's go. Let's run." They ran and contacted the police. (RT 9:983-984.)

Cordero testified that appellant, wearing a long, bulky sports coat or jacket (RT 9:974-977), was the driver of the Cadillac. (RT 9:955-959.) Cordero testified that appellant was the person who took Kreisher's money and approached him for money (RT 977-985), and he also was the person who subsequently displayed a handgun (RT 9:980-988). Cordero testified that Delaloza was the person with the knife, wearing black cotton gloves, that punched Bellman. (RT 9:970-973, 989-993.) Cordero testified that Castro assisted Delaloza in the physical altercation with Bellman. (RT 9:995-996.)

Cordero testified that he gave the police the following description of the gunman: black jacket; heavy set; light complexion, maybe mixed Hispanic and white; bald; about 175 to 180 pounds; and, no facial hair. (RT 9:988-989.)

Cordero did not see anyone take his duffle bag, which was missing when he returned to the vehicle. (RT 9:985-986.) On October 28th, Detective Greg Hamilton showed Cordero some boxer shorts, which he recognized as having been inside the duffle bag when it was taken. (RT 9:985-987.)

Tammy Winters, an employee of Ralphs, was in the parking lot when she observed some males get out of a little gray Hyundai and four other males that were already outside of a large white car. (RT 8:856-858.) Winters was making these observations at night, but there was lighting around the parking area. (RT 8:859-860.) The individuals in the white Cadillac were running towards those in

the Hyundai and started "hitting them and stuff." The occupants of the Hyundai were hitting too. (RT 8:860-863.)

Winters testified that one of the individuals from the Hyundai opened the trunk and got out a bat, after which an individual from the Cadillac said, "Let's get 'em." One of the individuals from the Cadillac, whom she could not describe (RT 8:864-866), had something in the right hip area of his pants, but she never saw it removed. Her observations were made at night; there are lights in the parking lot, but she could not recall whether they were on, although she was able to see the cars. (RT 8:860-864, 872-873.) She recorded the license plate number of the Cadillac and gave it to the police. (RT 8:866-868.)

Steven Rapp, an employee of Ralphs, was in the parking lot escorting Winters to her vehicle. Rapp saw the physical altercation between the two groups. (RT 9:923-932.) He never saw any weapon, such as a handgun or other firearm, being used by anyone involved in the altercation. (RT 9:937-938.)

Jaime Castillo's uncle, Francisco Castillo, testified that on Saturday, October 25, 1997, Jaime showed him a newspaper article from the *Whittier Daily News*, and then proceeded to describe the contents of the article, which related to appellant and Delaloza. As Jaime was describing the article, Francisco noticed that it appeared Jaime had been in a fight of some kind because he had a cut lip and few scratches on his face. The wounds appeared fairly fresh. When he saw

Jaime the morning of the previous day he did not notice Jaime's face, but recalls that Jaime put his head down and walked into the house without speaking to him directly. He asked Jaime how he was injured. Jaime told him that he was injured at the location of the Ralphs parking lot, but he did not say when it occurred. (RT 18:2644-2650.)

Freddie Becerra (aka Clever), testifying under a grant of prosecutorial immunity, stated that as of October 1997 he had been a member of East Side Whittier Cole Street gang for about three years. He identified fellow gang members as appellant, Delaloza, Castillo, Castro, Bermudez, Tapia, and Richard Delaloza (aka Rock; Alejandro Delaloza's brother). He denied being there on the night of October 23, 1997, but previously had been in Delaloza's white Cadillac. (RT 12:1499-1514.)

b. POLICE INVESTIGATION

Officer Jeff Piper testified that he was traveling on Whittier Boulevard when he heard the broadcast of the license plate of a white Cadillac involved in the Ralphs parking lot incident (RT 9:1032-1038) and saw the Cadillac with matching plate. (RT 9:1040-1046.) He pursued the Cadillac to the area of Goodhue Street, but then lost contact. (RT 9:1051-1053.) The white Cadillac was registered to Delaloza at 15058 Carnell Street, Whittier. (RT 9:942, 1045-1047.)

Detective Greg Hamilton spoke with a man by phone who identified himself as Richard Delaloza (Alejandro Delaloza's brother). He never met Richard Delaloza. Richard Delaloza provided him with information regarding two individuals. Based on that information, Hamilton identified Freddie Becerra and Jaime Castillo. He was familiar with Becerra, but was unable to contact him. Richard provided information on Castillo's location. (RT 13:1585, 1589-1594.)

After Detective Hamilton received the information from Richard Delaloza, Hamilton prepared six-pack photographic displays containing the photographs of Becerra and Castillo. He contacted Cordero and showed him the photographs. Cordero was not able to identify anyone from the photographs. (RT 13:1592-1595.)

Detective Mary Hanson testified that Kreisher did not initially identify appellant as the one wearing the big heavy coat, but instead identified someone else from the first lineup that Hanson showed him. (RT 9:1090-1091.) When Kreisher looked at Hanson's second photo lineup, he immediately said, "No, it's not the other guy. It's this guy," and pointed at appellant's photo as the person wearing the big heavy coat. (RT 9:1090-1091.)

Hanson testified that she interviewed Delaloza in the afternoon on October 24th about his involvement in the robbery at the Ralphs parking lot. (RT 13:1746-1747.) After initially denying any involvement, Delaloza stated that he

and three friends went to the Ralphs parking lot so one of them could use the pay telephone. While there, they got into a fistfight with a group of three other people. (RT 13:1747-1750.)

Hanson testified that Delaloza stated that during the fight he went over to assist one of his friends that was being badly beaten. He punched the person in the face, and when he did so the knife that was clipped to his belt fell off and skidded across the pavement. (RT 13:1747-1750.) Delaloza retrieved the knife and went back to the car. He then saw one of the other three people retrieve a baseball bat from the trunk. He stayed in his car as his friends chased after the other group of people. Delaloza described one of his friends as "a big guy," but refused to give any names. (RT 13:1749.) After the three people they were fighting started running away towards the intersection of La Puebla and Whittier, Delaloza's friends returned to their vehicle and they left the area. (RT 13:1747-1750.) Hanson testified that Delaloza first denied taking any property, but then stated they had picked up a bag containing some clothes and CDs. Delaloza stated that his friends may have divided the property, but acknowledged that some items from the bag might be at his home. (RT 13:1750-1753.)

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2. THE HORNELL STREET INCIDENT (COUNT 3 – ASSAULT WITH A FIREARM ON CARLOS ARIAS)

At approximately 12:30 a.m. on October 24, 1997, a few hours after the Ralphs parking lot incident, Luke Bissonnette[7] (aka "Youngster"), a 16-year-old former member of the Cole Street gang, and Carlos Arias were seated inside Luke's car eating some food; the vehicle was inoperable and was parked in the front of Luke's grandfather's house at 15030 Hornell Street in Whittier. (RT 9:1111-1122, 1128-1133, 1138.) After Luke finished eating, he stepped outside to smoke a cigarette, leaving Arias inside the vehicle. (RT 9:1132-1133.)

Luke testified that he saw Delaloza's white Cadillac approach and park next to the curb on the opposite side of the street from his grandfather's house. (RT 9:1132-1134; People's Exh. 3.) Someone exited the passenger side of the two-door vehicle, walked up to within a few feet of Luke, called Luke "Youngster," told Luke he (Luke) was an "East Sider" (i.e., a member of the Eastside Whittier Cole Street gang), and stated, "Get in the car." (RT 9:1133-1138, 10:1156-1157.) Luke, feeling threatened by the unfriendly attitude and the fact that he had stopped hanging around with the Cole Street gang, ran to his grandfather's backyard. (RT 9:1138.) From there he ran back to his house at 15171 Goodhue Street and met Arias on the back patio. (RT 10:1167-1172.)

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[7] For ease of reference, and in order to avoid confusion with other witness with the same surname, Luke Bissonnette is referred to herein as "Luke".

While there, Arias told Luke that he (i.e., Arias) "almost got killed" that night because "Richard Penunuri had pulled out a gun and put it to his head." (RT 10:1181-1182.)[8]

Luke testified that Delaloza was driving the white Cadillac, and that appellant, Jaime Castillo and an unidentified female were inside the vehicle. (RT 9:1136-1137.) Luke testified that appellant was the person who exited the passenger side of the vehicle and approached him. (RT 9:1133-1138, 10:1156-1157.)

Luke testified that he knew several members of the Cole Street gang, including appellant (aka "Dozer"), Delaloza (aka "Hondo") and Castro (aka "Stalker"). (RT 9:1111-1122.) Luke identified all four defendants in court, and identified Delaloza from a photograph. (RT 9:1124-1128.) He testified that he had known appellant for several years. (RT 9:1119-1122.) Luke also knew Jaime Castillo. (RT 9:1124-1125.)

The trial court found Carlos Arias was an unavailable witness. Over defense objection his testimony from Delaloza's trial was read to the jury. (RT 14:1840-1841.) Arias recanted much of his taped statement to the police. (RT

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[8] Although Luke testified that Arias told him that the gunman "pulled out a gun and put it to his head" (RT 10:1181-1182), the ambiguity in the phrase "put it to his head" was resolved when the prosecution presented Arias's tape-recorded statement to the police, wherein Arias stated that the gunman only pointed the gun at him. (CT Supp. Vol. IV-1, pp. 162 [the gunman was "pointing" the gun at him].)

14:1849-1852) Arias told the police that he saw Luke run and then he got out of the car and ran too, but not before seeing that the person – whom he had not seen before but identified as "that guy . . . I guess Dozer or whatever" (CT Supp. Vol. IV-1, p. 160) – was pointing a black gun at him, was wearing a black jacket with a hood, and was chubby. (CT Supp. Vol. IV-1, pp. 160-163 [People's Exh. 74].) Arias, in fear for his own safety, ran and hid in a neighbor's backyard, and then ran back to Luke's house on Goodhue Street. (CT Supp. Vol. IV-1, p. 160.)

3. THE GOODHUE STREET INCIDENT (COUNTS 4 & 5 – MURDERS OF BRIAN MOLINA AND MICHAEL MURILLO, RESPECTIVELY)

a. PERCIPIENT EYEWITNESS TESTIMONY

After running from the person who approached him on Hornell Street (RT 9:1133-1138), Luke went to the back of his grandfather's house, which was located on Hornell Street, and knocked on the sliding glass door. (RT 9:1135-1138.) His mother, Roxanne Bissonnette, was inside. Through the door, he told her that he was with Arias and that Dozer was outside. She would not let him inside the house because Luke's nephew was inside and she did not want any problems. A few moments later, as Luke was hiding in the rear patio area, Luke heard his mother and appellant speaking in the front of the house, but he could not understand their conversation. (RT 9:1142-1143, 10:1162-1163.) At the same time, Luke saw Arias, wearing a white T-shirt, jump the fence into the

backyard of Luke's grandfather's house (where Luke was located). (RT 10:1163-1164.) After the conversation ended, Luke returned to the front of the house; Delaloza's vehicle was gone and everyone had left. (RT 10:1166.) Luke identified People's Exhibit 5 as the dark, heavy jacket that appellant was wearing that night. (RT 10:1159-1160.)

Luke testified that he then ran back to Laraine Martinez's house at 15171 Goodhue Street, where he had been living, arriving there in two minutes. (RT 10:1167-1169, 1187.) He went to the back patio. Arias was there talking with Luke's sister, Laura Bissonnette. Brian Molina and Michael Murillo were asleep on the patio. (RT 10:1168-1172.) Luke did not wake them, nor did he speak with them. (RT 10:1176-1177.) After a few minutes on the patio, Luke, Laura, and Arias went inside, leaving Murillo and Molina asleep on the patio. (RT 10:1180, 1185-1186.) There were a number of other people inside the house, including Laraine Martinez (the owner of the house), Laraine's 19-year-old daughter Monique Martinez, Monique's infant son Eric, and Shane Bissonnette (Luke's brother). (RT 10:1186-1187; see RT 11:1389-1393 [Laraine Martinez's testimony].)

Approximately twenty minutes later, Luke heard about ten gunshots, which sounded like they came from the front of the house. (RT 10:1186-1193.) Luke testified that as he "looked outside [the window], *I seen some figure*

running outside, and my first action [sic] was, "fucking Dozer." (RT 10:1190 [emphasis added].) He then yelled the name "Dozer" because he saw a person running across the street; he saw the jacket and the size of the body. It was dark outside with the only light coming from a streetlight from across the street. (RT 10:1189-1192.) When Luke had contact with appellant on Hornell Street, appellant was wearing a big, bulky jacket. When Luke saw the person on Goodhue Street, the person was wearing what appeared to be the same jacket. (RT 10:1193-1195.) Luke was able to see the person's head, which appeared to be appellant's head. (RT 10:1193-1196.) Appellant and Delaloza had previously visited the Goodhue Street residence, and appellant knew where Luke lived. (RT 10:1081-1083.)

Luke testified that after hearing the gunshots he went to the patio and observed that Murillo had three holes in his sweatshirt jacket and was unresponsive. He told his sister to call 911. (RT 10:1199-1200.) He did not see Molina on the couch, and so he went back inside. Moments later, he heard Molina moaning and found him on the patio on the other side of the tarp, with what appeared to be a gunshot wound above the eye. (RT 10:1200-1201.)

Laraine Martinez testified that she had just started to fall asleep when she heard a noise, "like a back fire," and then she turned around towards the window that faced the backyard and could see "more shooting – or bullets and the flashes

of light." (RT 11:1397.) It was dark in her bedroom and outside the window. (RT 11:1397-1398, 1404 ["it was very dark" in the backyard].) She jumped up, ran outside to the backyard, and then called 911. (RT 11:1400.) While in the kitchen calling 911, she heard Luke and Shane Bissonnette yell the name Dozer. (RT 11:1400-1402.) She knew Dozer to be appellant. (RT 11:1402.)

Arias testified in Delaloza's trial that on the evening of October 23, 1997, he and Luke were together at Taco Bell.[9] (RT 14:1844-1847.) They left and went to Luke's grandfather's house on Hornell Street, and ate in front of the house. (RT 14:1847.) "Some dude" came around the corner. It was too dark for him to describe the person, except that he was tall and skinny, and was wearing a black jacket with a hood that extended slightly below the waist. The person did not do anything, except talk. Luke became scared because he knew this person and so Luke ran. Arias also ran because the person was "taking charge against us." Arias did not see anything in the person's hand. (RT 14:1847-1849.)

Arias initially testified in Delaloza's trial that he did not recall giving a statement to the police, but then testified that he remembered "something like that." (RT 14:1848-1849.) When questioned in detail about his prior tape-recorded statements to the police, Arias generally denied that he made such

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[9] Arias was friends with Luke's brother, Shane Bissonnette. (RT 14:1844-1845.) Arias was not a member of a gang, but was friends with members of the Chivas gang. (RT 14:1903-1904.)

statements (RT 14:1849-1852), and he explicitly stated that he did not see the person pointing a black gun at him. (RT 14:1849-1851.) Arias testified that he probably lied in his statement because he was in shock at the time, and the "detectives were just forcing me to say anything." (RT 14:1855-1856.) Arias admitted lying to the prosecution's investigator about his address and telephone number, stating that he did not want to come to court as he did not even know Delaloza. (RT 14:1841-1844.)

Detective Ray Lugo testified that he interviewed Arias on October 24, 1997, at the Whittier Police Department about the murders of Molina and Murillo. A cassette tape of the interview (People's Exhibit 73) was played to the jury. (RT 14:1916-1917; CT 12:3287; CT Supp. Vol. IV-1, pp. 159-176 [People's Exh. 74, transcript of tape].)

In the interview Arias stated that he was in the car with Luke at Luke's grandfather's house when he fell asleep in the passenger seat. He was waiting for someone to pick him up. (CT Supp. Vol. IV-1, p. 159.) Luke was outside smoking a cigarette. He woke up and saw "I guess Dozer or whatever" charging at Luke. Luke ran to the back of the house. Arias got out of the car, and he and "that guy" ran around the car. Arias took off running, jumped some fences, and hid for about twenty minutes. He went to the backyard of the house on Goodhue Street and saw that Molina and Murillo were asleep in the backyard. He smoked

a cigarette and then he and Luke went inside the house. Twenty minutes later, while inside the house, he heard gunshots. (CT Supp. Vol. IV-1, p. 160.) He ran to the window and saw someone at the end of the street wearing a black, parka-like football jacket with a hood, which was the "same thing that I saw on him at . . . the other house . . . ." (CT Supp. Vol. IV-1, p. 161.) He did not see the person's face. He found Brian [Molina] by the water hose. (CT Supp. Vol. IV-1, p. 161.)

Arias told Detective Lugo that he was "still half asleep" when he saw the person whom he identified as "Dozer." (CT Supp. Vol. IV-1, p. 162.) Arias told Detective Lugo that he identified the person by the name "Dozer" because he (Arias) was subsequently told by Luke that Luke's mother (Roxanne Bissonnette) told Luke that she had seen Dozer later that night. (CT Supp. Vol. IV-1, pp. 166-167.)

Arias stated that he exited the car and "the guy" pointed a black gun at him. (CT Supp. Vol. IV-1, pp. 162, 165.) Arias did not get a good look at the person because it was too dark, but he could see that the person "had a beanie" and was chubby. (CT Supp. Vol. IV-1, p. 162.) Later in the interview, however, Arias clarified that he could not tell if the person was chubby or fat because he was wearing a big jacket that went down to just above the knees. (CT Supp. Vol.

IV-1, pp. 174-175.) The person was 5'9" tall, close to 6" tall. (CT Supp. Vol. IV-1, p. 175.)

Roxanne Bissonnette testified that on October 24th at approximately 2:30 a.m., while spending the night at her father's house on Hornell Street, she heard some loud noises. She looked out the window and saw Delaloza's white Cadillac parked to the left of the neighbor's driveway. (RT 11:1331-1336.) She saw "bodies or heads" going back and forth across the front yard. She opened the front door and saw Delaloza standing approximately 15 feet away on the walkway in front of the porch. (RT 11:1336-1381.)

Roxanne Bissonnette testified that "Dozer," whom she identified as appellant, was standing outside the house next to Delaloza on the same walkway. Appellant was wearing a dark jacket (similar to People's Exh. 5), dark shorts, and white socks. (RT 11:1338-1341.) He asked if she had seen Carlos. Roxanne knew Carlos Arias to be her son's (Shane Bissonnette's) friend. (RT 11:1341-1344.) Appellant stated he needed to talk to "them," and then clarified that he meant Carlos and Luke. (RT 11:1343.) Roxanne warned appellant not to touch Luke. Appellant responded that he would not touch a minor. (RT 11:1344.) Shortly thereafter, Luke knocked at the back door. (RT 11:1346-1348.)

The prosecution also presented the testimony of two neighbors, Matthew Walker and Marjorie Holder, both of whom heard gunshots and then looked

outside and saw a white Cadillac. Walker saw two figures come from the backyard of a residence next to Luke's house and enter a white Cadillac. (RT 10:1309-1312, 1317-1319.) Holder saw a male passenger, wearing dark pants and a white t-shirt, exit a white Cadillac and stand on the corner. (RT 13:1599-1601.) The person stood there for less than two minutes, returned to the passenger compartment of the vehicle, and then the vehicle left the area. (RT 13:1600-1601.)

Alejandro Delaloza provided a taped statement to the police shortly after he was arrested. In the statement, which was played to the jury over defense objection, Delaloza admitted that he was a member of Eastside Whittier Cole Street gang. As to the events relating to the double homicide, Delaloza told the police that he and appellant went to the house on Goodhue Street to talk to Monique Martinez. When they arrived, Delaloza parked around the corner, and appellant went to the house. While Delaloza was sitting in the car, he heard gunshots and saw appellant running. He thought appellant was being fired upon because when he saw appellant running he could still hear gunshots. (RT 12:1443-1444; CT 12:3280-3281 [People's Exh. 37 [audiotape]; CT Supp. IV:109-142 [People's Exh. 38 [transcript].)

Francisco Castillo, Jaime Castillo's uncle, testified that during 1997 and until Castillo's death in 1998 he and Jaime shared a room together at a house in

La Mirada. As he was leaving for work on the morning of Friday, October 24, 1997, at 7:00 a.m., he saw Jaime coming into the house from Francisco's van. (RT 17:2631-2632, 2641-2642.) Francisco discovered appellant sleeping inside the van, and offered him a ride home. (RT 17:2642-2643.) Francisco gave appellant a ride home that morning, which was about a five-minute drive. (RT 17:2631-2638.) Jaime did not stay at the house the previous night (i.e., the night of October 23rd). (RT 17:2641-2642.)

b. RECORDED JAIL CONVERSATIONS BETWEEN APPELLANT AND MARIA PENUNURI

Appellant's mother, Maria Penunuri, testified about the substance of two recorded conversations she had with appellant while he was in county jail – one on July 19, 1998 (People's Exh. 46) and another on August 15, 1998 (People's Exh. 43). (RT 12:1469, 1559-1570.)

After listening to the conversation of August 15, 1998 (see below), she could not recall whether appellant stated that he was at the Ralphs parking lot with Castillo. (RT 12:1558.) She also recalled that it was stated on the tape that she wanted Delaloza to "clean this shit up," but does not recall what she meant. (RT 12:1559.)

After listening to the conversation of July 19, 1998 (see below), she testified that she could not recall whether she passed a note to appellant. (RT 12:1563.) She also denied making any of the statements contained on the tape

(RT 12:1566), and specifically denied that she was trying to manufacture an alibi for appellant. (RT 12:1569.)

The two recorded conversations were played to the jury. (RT 12:1551-1553, 1560-1563; CT Supp. IV, Vol. 1, pp. 143-158.)

In the recorded conversation of August 15, 1998, Maria Penunuri states that "Hondo [Delaloza] better find a way to clean this up too." (CT Supp. IV, Vol. 1, p. 144.) Appellant states that he was telling Delaloza that "all he had to do was just get up there and say . . . you know . . . tell them the truth . . . . [¶] I wasn't with you guys . . . yeah I was with you that night . . . I was with you at Ralph's yeah I was . . . but . . . you had dropped me off . . . after all that . . . . [¶] Cause I didn't wanna be out no more, cause I knew the cops were gonna probably be looking for us . . . ." (CT Supp. IV, Vol. 1, p. 146.) Appellant stated that Castillo was with them at Ralphs that night. (CT Supp. IV, Vol. 1, p. 147.) Appellant stated that Castillo was probably with Delaloza that night "cause look at where he's at . . . he died . . . someone killed him . . . ." (CT Supp. IV, Vol. 1, p. 147.) Appellant also stated, "And then um. . . he [Delaloza] just said I'm tripping, I'm tripping, I'm. . . stupid idiot if you wouldn't of said I was with you in the damn car I probably wouldn't be here I'd probably be here for a stupid robbery . . . ." (CT Supp. IV, Vol. 1, pp. 148-149.) Appellant also states he was

dropped off between 2:50 and 3:00 in the morning. (CT Supp. IV, Vol. 1, pp. 149-150.)

In the recorded conversation of July 19, 1998, Maria Penunuri states that she has "a note I wanted to show . . . ." (CT Supp. IV, Vol. 1, p. 153.) Appellant states their conversation is not recorded; Maria Penunuri responds she does not want to take the chance. (CT Supp. IV, Vol. 1, p. 154.) Maria Penunuri states that a female came to see appellant at 3:00 a.m. (CT Supp. IV, Vol. 1, p. 155.) Appellant and Maria Penunuri then engaged in the following colloquy:

Appellant:	See you at three in the morning?
Maria Penunuri:	Okay.
Appellant:	Alright
Maria Penunuri:	Yeah.
Appellant:	Yeah I'll do that sh...
Maria Penunuri:	Okay cause...
Appellant:	Yeah I'll call (unint)
Maria Penunuri:	But I gotta talk to her first.
Appellant:	Alright
Maria Penunuri:	And... you know... that... so... no... no...
Appellant:	Well let me know you're gonna talk to her, that way I'll tell the investigator too... I was messing around with... so and so... but... I kept it a secret because... she... I'll say she married too.

Maria Penunuri:	Yeah.
Appellant:	I'll say she married too. [¶]
Maria Penunuri:	No but she has a boyfriend too... and then you have a girlfriend and you didn't.
Appellant:	Yeah we were secret, alright, yeah, yeah I know all that.
Maria Penunuri:	See what I mean?
Appellant:	Alright... yeah momma... alright.
Maria Penunuri:	Ya know... I mean people... some... you know Pauline told me to do this a long... from the beginning... but I told dad and dad's all... nah... ya know and then I told Jessie and Eddie and I asked them if they could get someone... and they're like well who?... And I go well any... I go even Aunt Laurie... ya know for her... you are to say she was with you..
Appellant:	Yeah. [CT Supp. IV, Vol. 1, pp. 155-156.]

c. POLICE INVESTIGATION

Murillo and Molina died as the result of multiple gunshot wounds. (RT 11:1372-1373, 13:1619-1622.)

Firearms examiner Richard Catalani testified that all eleven expended casings, and the expended bullets and bullet fragments, recovered at the Goodhue Street location were fired from the same 9-millimeter firearm. (RT 13:1674-1678.) Catalani found eleven expended 9-millimeter casings at the Goodhue Street location, and is of the opinion that a minimum of 11 rounds were fired in

the backyard, which is consistent with a fully loaded semi-automatic pistol with a magazine capacity of 10 (i.e., 10 rounds in the magazine and 1 round in the chamber). (RT 13:1687-1689.) Catalani testified that the casings found at the Goodhue Street location and People's Exhibit 17 that was found at Delaloza's residence were cycled through the same gun. (RT 13:1692-1695.)

The brands of the expended casings found at the Goodhue Street location were not the same; they were Norinco, Winchester, Federal, and GFL. People's Exhibit 16, the box of live rounds found at Delaloza's house, contains a variety of brands. (RT 13:1692-1693, 1695-1698.)

Catalani testified that a comparison of the one live round of 9-millimeter ammunition (Federal type) found at the Goodhue Street location and one of the live rounds from the box of ammunition found at Delaloza's residence "have marks on them which indicate that they have been worked through the action of the same firearm that fired the expended cartridge cases" found at the Goodhue Street location. (RT 13:1685.)

4. CONSPIRACY TO MURDER AND THE MURDER OF JAIME CASTILLO (COUNTS 6 & 7)

a. PERCIPIENT EYEWITNESS TESTIMONY

Jesus Marin, testifying under a grant of immunity, recounted a series of events culminating in Castillo's murder. These events included 1) driving Castro, Bermudez, Tapia, and Castillo to the mountains, 2) watching Castro shoot

Castillo in the back of the head, 3) driving Castro, Bermudez and Tapia back to Whittier, and 4) observing Castro dispose of the gun used to kill Castillo. (RT 14:1954-2104.)

Marin testified that he lived in an apartment in Whittier with his wife, Tracie McGuirk, their two children, and his wife's friend Carmen Miranda. (RT 14:1954-1956; see RT 16:2315-2317 [McGuirk's testimony]; 17:2452-2455 [Miranda's testimony].)

Marin was not a member of the Eastside Whittier Cole Street gang, but associated with its members since 1994 as he knew some of them before they became members of the gang. (RT 14:1957-1959.) Marin knew appellant (aka Dozer), Castillo (aka Cartoon), and codefendants Castro (aka Stalker), Bermudez (aka Droopy), and Tapia (aka Freddie and/or Rascal) to be members of the Eastside Whittier Cole Street gang. (RT 14:1959-1966, 15:1989-1991.)

Marin had known Castro for a number of years and allowed him to live in his detached garage from the end of December 1997 to the beginning of January 1998. (RT 14:1954-1957.) Several members of the gang would come over and hang out in Marin's garage and some, in addition to Castro, would spend the night. Marin worked on weekdays, but would join the group in the garage at night and would party with them, drinking and using drugs. (RT 14:1954-1957, 15:1995-1997, 2001-2007; see RT 16:2322-2323, 2325-2326 [McGuirk].) While

Castro was living in the garage, Miranda and Castro developed a relationship, and Castro began sleeping downstairs in the apartment with Miranda. (RT 15:2007-2009; see RT 16:2315-2318, 2320-2321, 2330-2332 [McGuirk].)

While Castro was living at Marin's apartment, several members of the Cole Street gang, including Bermudez and Tapia, would call the apartment looking for Castro. Beginning in December 1997, appellant would call collect from county jail looking for Castro, Bermudez and Tapia. The caller would identify himself as either "Richard" or "Dozer." Marin accepted the calls because he recognized his voice and they were friends. When appellant would call, he and Marin would talk for a while and then appellant would ask if the "home boys" were there. Appellant never called Marin's apartment prior to Castro moving in. (RT 15:2011-2013, 2016-2017.) Marin does not recall ever receiving calls from Delaloza. (RT 15:2015.)

There were two times when Marin stayed in the room when Castro was speaking with appellant. (RT 15:2022.) On one of those occasions, Marin heard Castro mention the name "Cartoon," which is Castillo's gang moniker, and heard Castro say, "I'll handle it." (RT 15:2023-2025.) Bermudez was present and participated in the telephone call. (RT 15:2024-2027.)

After the phone call, Marin, Castro, Bermudez and Tapia went to the garage. (RT 15:2030.) Castro and Bermudez were agitated and walking around

saying, "It's fucked up ... Cartoon's gonna rat," and they needed to shut him up. (RT 15:2030-2031.) Tapia said that Castillo "wouldn't do that shit and stuff like that." (RT 15:2031.) Castro stated that appellant told him "Cartoon was gonna rat him out, that he was gonna testify against him and tell fucking Cartoon to shut up, keep his mouth shut." (RT 15:2031.)

A day or two later, appellant called and told Marin that his homeboy was going to rat him out. Marin testified on direct examination, in part:

> Q: During that conversation that you had with Richard Penunuri, what, if anything, did he say, one way or the other, that expressed concern about a witness?
>
> A: There he said that his home boy's gonna rat him out, that I guess this guy Cartoon was closer friends with the other guy that he was in the case with and that he was gonna testify on his behalf and that's fucked up to him, to his case.
>
> Q: Did he mention anything about having to do anything about Cartoon, to you?
>
> A: Just "he can't testify. Tell him not to say shit, that that's wrong." [¶]
>
> Q: How long did your conversation take to finish between you and Dozer?
>
> A: We just talked for, like, five, ten minutes.
>
> Q: Other than mentioning his concerns about Cartoon and that cartoon might be testifying for the other people involved in his case, did he mention anything else about his case that was pending at that time?
>
> A: That there was a lot of witnesses, yes, that it wasn't going good for him. [RT 15:2033-2034.]

After these phone calls, there were two to four times when Marin, Castro, Bermudez and Tapia were in the garage and Castillo was discussed. During each of these occasions, a plan to harm Castillo was mentioned. Castro and Bermudez did most of the talking. (RT 15:2035-2036.) They said that Tapia had to do it "or else they were gonna fuck him up, too, so that Freddie had to shut up Jaime." (RT 15:2036.) They were going "to blast" Castillo. (RT 15:2036.)

Marin testified that Castro, Bermudez and Tapia discussed a plan to kill Castillo by driving Castillo to the mountains, on a ruse to party, and shooting him. (RT 15:2036-2052.) Tapia asked Marin to drive, and so Marin agreed to be the driver. (RT 15:2041-2044.) Tapia told Marin that he did not want to kill Castillo. (RT 15:2053-2054.)

In the evening on January 14, 1997, Marin drove Castro, Bermudez, Tapia, and Castillo into the San Gabriel Mountains north of the City of Azusa. (RT 15:2055-2071.) Marin stopped the vehicle off Highway 39 at Mile Marker 22.27, and everyone exited the vehicle. (RT 15:2072-2074.) Castillo pulled out some dope and they started hitting the pipe. (RT 15:2076-2079.) Tapia separated from the group and told Marin that he was not going to shoot Castillo. (RT 15:2081-2083.) Marin returned to the car with Bermudez because Bermudez said he had some weed and wanted to roll a joint. (RT 15:2083-2084.) Looking into the rear-view-mirror, Marin would see Tapia going back up the embankment

towards Castro and Castillo (RT 15:2084-2085.) Bermudez told Marin, "Joe's (i.e., Castro's) gonna do it. Joe's gonna do 'em both. Joe's gonna shoot 'em both." (RT 15:2086.) Tapia was standing in front of Castillo. Castro walked behind Castillo, stretched out his arm, and pulled the trigger. Marin heard a single shot, and saw Castillo drop. (RT 15:2086-2088.)

Tapia and Castro returned to the vehicle and they returned to Marin's apartment. (RT 15:2088-2090.) On the way back, Castro said that he had shot Castillo. (RT 15:2090.) Once back at the garage, Castro removed a gun and started cleaning it. The gun was the same chrome, semi-automatic, .22 or .25 caliber gun that he had seen earlier in the day before the group left for the mountains. (RT 15:2095-2097.) After clearing the gun, Castro placed it on the refrigerator in Marin's apartment. (RT 15:2101-2102.) Marin then told McGuirk that Castillo had been shot. (RT 15:2101-2104.)

Marin received a visit from Bermudez and some other homeboys a couple of weeks after the shooting of Castillo. He is not exactly sure of the date or time, but he was still residing at the apartment. (RT 15:2109-2111.) They threatened Marin and accused him of talking and being a "rat." (RT 15:2111-2116.)

In March 1999, Marin and his family moved out of the apartment because he was scared. (RT 15:2109-2110.) On March 24, 1999, Marin gave a statement to the police about the shooting of Castillo, stating that Castro shot Castillo. (RT

15:2107-2109.) Marin acknowledged testifying under a grant of prosecutorial immunity, after having been relocated from the State of California as a result of speaking to law enforcement regarding the death of Castillo. (RT 15:2126-2127.) Marin understands that the grant of immunity by the prosecution means that he does not expect to face any charges arising out of his involvement in the murder of Castillo. (RT 16:2278-2279.)

McGuirk testified that they received eight to nine telephone calls from appellant (calling from county jail) while she lived at the apartment, but she only personally answered the telephone four or five of those times. (RT 16:2334-2339.) She recalled a telephone call from appellant during which she overheard Castro say that Castillo was going to testify against appellant. (RT 16:2341, 2343-3447.) She also overheard Castro tell appellant not to worry and that he would take care of it. (RT 16:2344.) Both Bermudez and Tapia were present in the living room during the telephone call, although Tapia was not paying attention. (RT 16:2340-2345.) Bermudez responded to Castro's comments by saying, "Got it. Don't worry about it. We'll take care of it." (RT 16:2346.) Bermudez was not speaking into the receiver on this occasion, but on a different occasion he had spoken with appellant on the telephone. (RT 16:2346.) McGuirk also recalled other telephone calls from appellant to her apartment in which she heard Castillo's name mentioned.

McGuirk testified that on January 13 or 14, 1997, Marin, Bermudez, Castro and Tapia congregated in the garage and then left the apartment together in a vehicle. (RT 16:2347-2358.) She recalls the incident and noted it on her calendar because after they returned she found out that Castillo had been killed. (RT 16:2347-2349, 2353-2354.) After leaving the apartment between 11:30 p.m. and midnight, Marin, Castro, Bermudez and Tapia eventually returned to the apartment at between 3:00 a.m. and 4:00 a.m. (RT 16:2358-2359.) Marin entered their bedroom alone and was shaking. Marin provided McGuirk with information as to what had happened that night. She did not understand why it happened and was upset. She and Marin stayed awake for the remainder of the night. (RT 16:2358-2361.)

McGuirk was convicted of the crime of elder abuse, a misdemeanor, on August 12, 1997. (RT 16:2436-2437.)

Miranda testified that she recalled appellant calling the apartment in the first part of January and talking first to McGuirk and then to Castro and Bermudez. Miranda recalled that Castro and Bermudez took the call upstairs in Marin's and McGuirk's bedroom. Miranda sat at the top of the stairs and listened to the conversation. (RT 17:2461-2465.) She heard Castro say, "Oh. You want us to – you want us to get rid of him –." (RT 17:2466; see RT 17:2468.) She then heard Castro say, "Yeah. Me and Artie [Bermudez] will get rid of 'em."

(RT 17:2466; see RT 17:2468.) She heard Bermudez's voice, but could not tell what he said. (RT 17:2466-2467.) She also heard them mention the name Cartoon. (RT 17:2467.)

The next week, between 10:00 p.m. and 11:00 p.m., Miranda saw Marin, Castro, Bermudez and Tapia leave the apartment together in a vehicle. (RT 17:2475.) Before they left, Castro told her they needed to pickup Cartoon. (RT 17:2475.) Castro returned to the apartment the following morning. A few hours later, Castro told her that he shot Castillo. (RT 17:2496.)

b. STIPULATION

The parties stipulated that "the decedent, Jaime Castillo, the individual who is alleged to be the victim with respect to counts 6 and 7 of the indictment, is the same individual who Mr. Luke Bissonnette claimed he saw the evening of October 23rd, 1997, or the early morning hours of October 24th, 1997, who is also the individual depicted in People's [Exhibit] 13, the photograph labeled 'Jaime Castillo'[]." (RT 10:1217.)

c. POLICE INVESTIGATION

Castillo's body was discovered by CalTrans workers in Azusa Canyon on the morning of January 15, 1998. (RT 14:1770-1772, 1814-1818.) Castillo died as a result of a single gunshot wound to the back of the head. (RT 14:1819-1820, 1922.) The bullet, which was found in Castillo's body, was a small-caliber lead

projectile with no jacketing. (RT 14:1929.) Also found within a few feet of Castillo's body was a live.22 caliber shell. (RT 18:2676-2679.)

Telephone records showed that appellant called Marin's apartment from county jail as follows: 1) January 5, 1998, a 31-minute call; 2) January 8, a 5-minute call; 3) January 9, two calls lasting one minute and fifteen minutes, respectively; 4) January 10, a 3-minute call; 5) January 11, a 2-minute call; and, 6) January 15, a 30-minute call. (RT 18:2698-2700, 2711-2723, 2727; People's Exhs. 80 & 92.) Additionally, there was a series of telephone calls from appellant in county jail to Marin's apartment between January 15 and 25. (RT 18:2723-2727.)

d. GANG EXPERT AND RELATED TESTIMONY

Detective Curt Levsen of the Whittier Police Department testified that he is familiar with the East Whittier Cole Street gang, having been raised in Whittier. About ten years ago, the Cole Street gang was formed by individuals living on Cole Road and it migrated south through the city and into the county area. About three years ago, they changed their name to East Side Whittier Cole Street, with Cole Street being a subgroup within the larger East Side Whittier. (RT 18:2779-2780.)

Levsen knows appellant to be a self-admitted member of the East Side Whittier Cole Street gang. Appellant told Levsen that his nickname was 'Oso,'

but Levsen knows that it is not his true moniker. Levsen knows Castro, Bermudez and Tapia, all of whom have previously identified themselves to him as members of the East Side Whittier Cole Street gang. (RT 18:2785:1-2789:14.)

Levsen testified that a member of East Side Whittier Cole Street would display certain hand signs that indicate the gang membership. Throwing up a sign is a form of communication within Hispanic and most street gangs as a way of showing gang affiliation and responsibility in passing by rival gangs or committing crimes. The handwriting on People's Exhibit 77, containing three photographs, says, "East Side" and then "C.E.E.S.T.E." The individuals in the photographs are showing loyalty to the gang by their gestures and hand signs. The hand signs, which show the letter groups "E, A, and W" and "A and C," stand for East Whittier and Cole Street, respectively. The photographs also show three individuals displaying an "X 111," which is the number 13. The number 13 is used by Southern California Hispanic street gangs to show allegiance to the Mexican Mafia. It represents the 13th letter of the alphabet, which is M. It does not show that they are members of the Mexican Mafia, but are under the jurisdictional rule of the Mexican Mafia. They are Surenos in Southern California and pay taxes to the Mexican Mafia (RT 18:2784 [court strikes references to paying taxes to the Mexican Mafia and instructs the jury to disregard that portion]). (RT 18:2782-2784; RT 19:2816-2818 [court tells jury

that testimony about the number 13 and the Mexican Mafia was stricken and should not be considered].)

Appellant's uncle, Ruben Pozo, testified that he was present at the Penunuri residence when appellant was arrested, having lived there for many years. (RT 12:1446-1448.) Pozo knew appellant to be a member of the East Side Whittier Cole Street gang. (RT 12:1447.)

5. THE SEARCH OF DELALOZA'S RESIDENCE AND APPELLANT'S RESIDENCE

On the afternoon of October 24th, Officer Piper executed a search warrant at Delaloza's residence. Piper testified he uncovered, among other things, the following items: 1) a black jacket similar in appearance to People's Exhibit 5; 2) a black long-sleeve sweatshirt with a hood; 3) a dark blue long-sleeve sweatshirt with a hood; 4) a small black knife with a belt clip attachment (People's Exh. 9); 5) a pair of black cotton gloves (People's Exh. 10); 6) a plastic box of 9-millimeter ammunition with some of the bullets missing; 7) keys to the white Cadillac, which was parked in front of the residence; and, 8) some men's briefs and socks, which were inside a trash can. (RT 9:1054-1065, 1069; see RT 13:1586-1587 [Detective Gregory Hamilton's testimony regarding recovery of men's briefs].)

That same day, Piper went to appellant's residence and arrested him inside the house. Piper seized a large black jacket (People's Exh. 5) from inside

appellant's bedroom. (RT 9:1065-1067; see RT 14:1761-1766 [Sergeant Mark Jones' testimony re same].)

While appellant was being arrested, Officer Terence McAllister spoke with appellant's uncle, Ruben Pozo. (RT 13:1719-1720, 1724-1725.) McAllister testified that Pozo told him that appellant did not arrive back at the house that morning until between 7:00 a.m. and 7:30 a.m. (RT 13:1725.) Pozo also testified, but denied telling Officer McAllister that appellant arrived home that morning between 7:00 a.m. and 7:30 a.m. (RT 12:1449-1452.) Pozo testified that he told McAllister that when he woke up that morning at approximately 5:30 a.m. to get ready for work, appellant was present in their shared bedroom. (RT 12:1449.)

Delaloza was arrested later that same day. (RT 9:1063-1064.)

B. GUILT PHASE – THE DEFENSE CASE

Defense counsel presented a defense consisted of the following: 1) showing that the prosecution presented evidence pointing to Delaloza as the likely perpetrator of the Molina and Murillo homicides; 2) impeaching the testimony of key prosecution witnesses; 3) presenting physical evidence supporting appellant's innocence and implicating Delaloza; and, 4) presenting expert eyewitness identification testimony pointing to the misidentification of appellant as the perpetrator of the Molina and Murillo homicides.

Defense counsel presented evidence that Delaloza was the likely perpetrator of the Molina and Murillo homicides. Delaloza was wearing clothing similar to that of the shadowy figure seen by Luke Bissonnette. (RT 9:988-989, 11:1361-1367; 19:2878-2880.) The ammunition found at Delaloza's house matched ballistics evidence from the crime scene. (RT 13:1692-1695.) The duffle bag taken during the robbery at the Ralphs market was found at Delaloza's house. (RT 9:985-987, 9:1054-1065, 13:1586-1587.) A black jacket and two sweatshirts, one with a hood, were found at Delaloza's house, but the prosecution never tested these items for gunshot residue. (RT 19:2873-2878.) The jacket found in appellant's house tested negative for gunshot residue. (RT 19:2832-2833.) Delaloza could have been the shadowy figure running away from the double homicide. (RT 9:988-989, 11:1361-1367; 19:2878-2880.)

With respect to the Goodhue Street incident, the defense presented evidence that Luke's testimony was entirely unreliable because he only saw the person from a distance, in the dark, from behind, and only for couple of seconds, and thus could not identify the person, although he assumed it was Dozer because that was the person he anticipated seeing (having earlier seen Dozer on Hornell Street), as explained by the defense eyewitness identification expert Dr. Pezdak. (RT 10:1059-1066, 19:2850-2852.) Luke's drug use earlier that day would have impaired his ability to observe accurately. (RT 10:1232-1233, 1237-1238.)

Luke stated that the person "might have been wearing shorts." (RT 10:1160.) Roxanne Bissonnette testified that earlier appellant was wearing shorts and white socks. (RT 11:1338-1341.) Appellant is light skinned. (RT 9:989, 10:1245.) If appellant was the gunman, then the witnesses (i.e., Bissonnette and Arias) would have readily noticed his light skin and white socks, but they never mentioned seeing a light-skinned person wearing white socks. (See RT 10:1111-1201, 14:1841-1856; CT Supp. Vol. IV-1, pp. 159-175.)

The defense impeached the testimony of key prosecution witnesses Cordero and Luke Bissonnette. Appellant impeached Cordero's testimony identifying appellant's black jacket with Cordero's own admission that the color of the jacket alone was the only distinctive feature enabling Cordero to identify it three years later as having been worn by appellant. (RT 9:974-977; People's Exh. 5.)

The defense impeached Cordero's testimony with evidence that Cordero admitting lying under oath about the facts of the instant case. Cordero admitted lying in his testimony at the preliminary hearing about not recalling whether Delaloza had a weapon. (RT 9:1005-1008, 1020-1022.) Cordero testified on cross-examination, in part:

Q: Do you know that it's illegal to lie in a court proceeding after you take an oath witness?

A: I know it's illegal.

Q: And you knew it was illegal when you did it, right?

A: At the time of the preliminary hearing?

Q: Right.

A: That's correct.

Q: Okay. And you did it anyway?

A: Yeah. I did it anyways. [RT 9:1021.]

Appellant also impeached Cordero's testimony with evidence that Cordero suffered prior convictions for forgery and attempted strong-arm robbery, and used to associate with members of the Pagans gang in Whittier. (RT 9:996-998.)

Appellant impeached Luke's testimony with evidence that he had previously consumed drugs that might have impaired his ability to accurately perceive the events to which he testified. Luke admitted to having consumed methamphetamine on the afternoon or evening of October 22nd, and further testified that he might have smoked a joint of marijuana on the day of the incident. (RT 10:1232-1233, 1237-1238.)

Appellant impeached Luke's eyewitness identification with evidence that Luke testified at the preliminary hearing that he saw a heavyset person running across the street, but that it was too dark to tell what the person was wearing. (RT 10:1059-1061.) Luke testified that he only saw the person from behind running away, and never saw the person's face. (RT 10:1064-1066.)

Appellant also impeached Luke's testimony with Luke Bissonnette's own admission that although he had earlier identified appellant, Delaloza and Castro as members of the Cole Street gang, he in fact did not really know whether they were members of any gang. (RT 10:1281.)

With respect to counts 4 and 5, appellant presented evidence that no gunshot residue particles were found on the black jacket found in his residence. (RT 19:2832-2833; People's Exh. 5.) Yet, if eleven rounds were fired from a 9-millimeter handgun, a firearm expert would expect gunshot residue to be found on any jacket the shooter was wearing. (RT 19:2840-2841.)

Deborah Anderson, senior criminalist employed by the Los Angeles County Sheriff's Department, testified that in preparation for the gunshot residue test on the black jacket (People's Exh. 5) she sampled the inside and outside surfaces of both sleeves and the inside and outside surface areas of the pockets. (RT 20:2897-2899.) Anderson testified that the more shots fired, and the larger the caliber of the gun, the greater the likelihood of residue being deposited on the gun, hand, or clothing adjacent to the weapon. (RT 20:2906-2907.) Appellant put on the jacket in front of Anderson and the jury, and demonstrated that, "with the hands extended, the jacket sleeves come down past the knuckles, almost to the middle of the fingers." (RT 20:2908-2910.)

Debra Kowal, a criminalist employed by the Los Angeles County Department of Coroner, conducted a gunshot residue test on appellant's black jacket. (RT 19:2827-2829.) Kowal analyzed a sample collected from the black jacket and found no particles of gunshot residue on the sample collected from the jacket. (RT 19:2832-2833.) The magnification was set at about 550x, allowing Kowal to see particles of a submicrometer size; for comparison, one hair is about 150 micrometers. (RT 19:2832-2833.) If a person is wearing a jacket and fires a weapon, then Kowal would expect some kind of gunshot residue to be present. (RT 19:2840-2841.) Indeed, the more times the firearm is discharged, the more gunshot residue Kowal would expect to find. (RT 19:2843.)

Lawrence Baggett, a firearms expert, testified that the firing of eleven rounds from a 9-millimeter pistol should deposit gun shot residue on the hand, which is not visible. (RT 20:2921.) The firing of a 9-millimeter handgun will deposit dirt on the hands of the person firing the handgun, and the handgun itself will get dirty with the firing of only three or four rounds. This is so because the partially burned gunpowder goes forward out of the barrel, but the burned powder residue goes backward onto the gun. If eleven rounds are fired through a 9-millimeter semiautomatic handgun, there will be gunpowder, gunshot residue, soot, and smoke debris from the firing of the weapon, both on the gun and on the hand of the shooter. The residue on the gun will be a visible black residue from

the carbonation. There may be visible debris on the hand. He would also expect to find gunshot residue that is not visible on the hand of the shooter. If the shooter fired eleven shots from such a handgun wearing a black jacket which extended past the knuckles and almost to the middle of the fingers, Baggett would expect a powder residue to be on the fabric of the jacket. (RT 20:2921-2923.)

Appellant produced evidence that a black jacket also was recovered from Delaloza's residence. Officer Jeff Piper of the Whittier Police Department testified that a search of Delaloza's residence uncovered the following items: 1) a bag containing a black sweatshirt, a dark blue jacket, and a black pair of jeans (Defense Exh. K); and, 2) a bag containing a black jacket (Defense Exh. L). (RT 19:2873-2878.) These items were seized based on descriptions of suspects provided to Piper by officers investigating the Ralphs parking lot incident. (RT 19:2876-2878.)

Appellant impeached Luke's eyewitness identification by evidence that Luke did not observe the discharge of the firearm, and only saw the back of a person's head – a person he *assumed* was the gunman – running away from a distance in the night. (RT 10:1059-1061, 1064-1066.) Luke did not see the person in possession of a gun. (RT 10:1064-1066.)

Kathy Pezdak, Ph.D., an eyewitness identification expert, testified about the following hypothetical situation where a witness named Luke encounters appellant on October 1997 and runs away from him: appellant is wearing a black jacket; later that night, while lying on a bed without any sleep, Luke hears a series of gunshots, get up, and peeks out the window; looking across the street, he sees a person for one or two seconds running away; and, because it is dark outside and the only light is from a single streetlight across the street, Luke does not see the person's face and cannot tell what the person is wearing. (RT 19:2849-2851.) Pezdak testified that under these circumstances Luke could not possibly see what the person looked like, and thus it would be very unlikely that he could correctly identify the suspect. (RT 19:2850-2852.)

Pezdak testified that if the witness had an expectation of seeing a particular person, but did not get a good look at the person, then that expectation could result in an erroneous identification. (RT 19:2856.) Pezdak testified on direct examination, in part: "The witness expects to see a person, sees this vague thing out there for one or two seconds, confirms his expectation. Doesn't perceive a particular person, but confirms his expectation in his own mind, and thereafter that's who he claims it was, claims he can recognize, and so forth." (RT 19:2856.)

Pezdak testified on cross-examination, in part, as follows:

Q: What if the clothing that Luke described is consistent with the clothing that Richard was wearing during the first confrontation a few blocks away? Wouldn't that bolster or at least support the subsequent identification?

A: If he actually saw that clothing, but in fact if he said to the police, I – the lighting was so poor I couldn't see what the clothing looked like, but then later reported a heavy black jacket. I would say that's a case where expectation is effecting [sic] perception. You know, if initially a witness said I couldn't tell what the clothing was because it was too dark, but then later said he had on the same dark black jacket, that could be just he remembered the dark jacket from the earlier incident, so over time, his expectations and memory is just being fulfilled by the expectation. But if he literally said I couldn't tell what his clothes was [sic] because it was too dark, I take him at his word.

Q: I see. And were you present when Luke Bissonnette testified in this courtroom?

A: No. I was excluded.

Q: And wouldn't it have been beneficial for you to actually see his demeanor in answering these questions to actually evaluate the degree of certainty in his identification?

A: No. Certainty is not a good reflection of accuracy. A witness has expressed certainty is a [sic] personality characteristic. We know from a number of studies that have been done that witness confidence, witness certainty is not a good indication of whether that witness is likely to be correct or incorrect. So, no. Judging – looking at a witness's demeanor, looking at the presentation style, looking at their confidence or certainty is not a good way to judge whether they really saw the person or not. [RT 19:2868-2869.]

Pezdak testified that in her opinion Luke's eyewitness identification testimony was very unreliable. (RT 19:2872.)

With respect to the Castillo homicide and conspiracy, trial defense counsel argued that there was no evidence to prove the content of appellant's telephone calls to the Marin household. (RT 23:3500-3501.) Marin, McGuirk and Miranda were not credible, and in fact had ample time to assimilate their stories prior to being interviewed by the police. (RT 23:3500-3506.) Further, even if Marin were to be believed, appellant only told him to tell Castillo not to testify; appellant did not say to kill him. (RT 23:3504-3505, 3507.)

C. GUILT PHASE – THE PROSECUTION'S REBUTTAL EVIDENCE

On May 21, 1999, wiretaps were placed on the telephones at the residences of Marin, Castro, Bermudez and Tapia. Wiretaps were also placed on the jail telephones of appellant and Delaloza. The same day, searches were conducted of the residences of Castro, Bermudez and Tapia. (RT 22:3307-3311.)

Several calls were recorded to and from the residence of Bermudez. In three telephone calls recorded from Bermudez's residence on May 21, 1999, Bermudez stated that 1) the police had searched his house, 2) the police were trying to "get him" for Castillo's murder, and 3) "Tony" (i.e., Marin) was "ratting" on him. In a telephone conversation on May 23, 1999, with an unknown individual, Bermudez asked the individual how the police got their information and commented, "You know we can do Tony [Marin] right away." In another telephone call that same day, Bermudez said that he was going to

"jam," meaning that he was going to leave town. In a telephone call on May 26, 1999, Bermudez said that he was sleeping with his shoes on so he could run if the police came for him. (RT 22:3312-3331, 3337-3339.)

Tapia was arrested on May 26, 1999. Castro was arrested on May 27, 1999. (RT 22:3340-3341.) Bermudez called his friend Josh right after Castro was arrested and asked Josh to come get him so he could hide. On May 28, 1999, when Bermudez's mother called him and told him that the police were looking for him, he told her that he was going to leave town and would call her later. Bermudez was arrested later that day at Josh's house. (RT 22:3341-3359.)

D. PENALTY PHASE – THE PROSECUTION'S EVIDENCE

1. ASSAULT WITH A FIREARM ON R.J. UZEL

R.J. Uzel[10] testified that on May 20, 1997, he was in the City of South Whittier (an area close to Goodhue Street) with two people, Debra Recio and a male friend (identified by Recio as Michael Orozco). Recio was driving Uzel's vehicle. She parked in the parking lot of a McDonald's restaurant so that Uzel could use the pay telephone in front of the restaurant. (RT 27:4022-2025.) Uzel and the male friend exited the vehicle. (RT 27:4025.)

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[10] R.J. Uzel also is variously referred to in the record on appeal as either R. Jason Uzel or Jason Uzel. (RT 19:2796, 26:3855, 3862-3863, 27:4006, 4010, 4016.) For ease of reference, and to conform to the name most used by the parties and the court, he will be referred to herein as Jason Uzel.

While using the pay telephone, Uzel was approached by an unknown person. It was dark outside, and Uzel could not identify the age of the person, nor any physical characteristics of significance, including the person's race. (RT 27:4026-4034.) The person did not do anything to Uzel. (RT 27:4030.)

After using the phone, Uzel and his male friend got into Uzel's vehicle. (RT 27:4031.) Recio was already in the car and was in the driver's seat. (RT 27:4024-4025, 4027-4032.) As Recio pulled out of the parking lot bullets came through the window on the passenger side and shattered the glass. (RT 27:4031-4032.) A bullet went through Uzel's leg and skimmed his chest. He did not see where the bullets came from, nor did he see anyone in the immediate area. Recio drove to the Whittier Hospital. Uzel knew of no reason why anyone would shoot at him. (RT 4027-4032.)

Uzel testified that he knows appellant because they went to high school together, but does not know him to have a nickname of any kind, he has never referred to him as Dozer, and he has never confided to anyone it was Dozer who shot him. (RT 27:4038-4044.)

Debra Recio testified that she was with Uzel and Michael Orozco at the McDonald's restaurant on May 20, 1997. (RT 27:4047-4053.) She was driving Uzel's blue Honda. Uzel was using the pay telephone and Orozco was standing nearby. She did not notice anyone approach the two at the pay telephone. A few

people were sitting outside. At one point, Uzel came back, got in the car, and sat down. Orozco got into the back seat. Uzel was then shot. Recio looked to his direction and Uzel was leaning on her. She put the car in reverse and took off. She did not see anyone near the car and does not know who shot Uzel. She took Uzel to Whittier Hospital. Uzel did not say who shot him. Uzel has never told her that Dozer was the person, but that was the word "on the street." (RT 27:4047-4051, 4056-4057.)

Recio's prior testimony was read into the record. She previously stated that a couple of days after the incident when Uzel got out of the hospital "all I remember him it (sic) was Dozer," and he was trying to decide how to get back at the Cole Street gang for shooting at him. (RT 27:4053-4054.) Recio testified that when Uzel got out of the hospital the word on the street was that Dozer shot Uzel, but Uzel never told her that he saw Dozer shoot him. (RT 27:4055.)

Abraham Van Rood testified that he was in his car at the intersection in front of the McDonalds restaurant. He did not observe any particular vehicle, but he heard shots fired and saw the muzzle of the gun, and saw the muzzle flashes in the McDonalds parking lot. He heard two or three shots. He saw a young man in the vicinity who was a holding a gun and shooting at the car. The gunman then ran to a vehicle and got into the passenger seat. He observed the license plate

number and then flagged down an officer and relayed the information. (RT 27:4058-4063.)

Deputy Jeffrey Reiley responded to the call at McDonalds. He spoke with Van Rood and recorded the license plate number given to him. (RT 27:4067-4070.) The vehicle was registered to Diana Hara, 8511 Dalewood Avenue, Pico Rivera. (RT 27:4070-4071.) Bermudez's driver's license shows his address as 8511 Dalewood Avenue, Pico Rivera. (RT 27:4071-4072; People's Exh. 6.)

Deputy Ramon Lascano testified that on May 20th he went to 8511 Dalewood Avenue to check the location for a suspect vehicle involved in an assault with a deadly weapon. He spoke with Hara, and Hara provided unspecified information about the person driving the vehicle that night. (RT 27:4074-4076.)

2. VICTIM IMPACT

With respect to Brian Molina, the prosecution presented the testimony of the following victim impact witnesses: John Molina (father), Brandon Molina (younger brother), John Molina (older brother), Sandy Esparza (aunt), Yolanda Peru (godmother), and Keryn Serna (mother). (RT 26:3899-3934, 3940-3943.)

With respect to Michael Murillo, the prosecution presented the testimony of the following victim impact witnesses: Sarah Teutimez (grandmother), Maria Enriquez (aunt), Jami Murillo (sister), Janice Chamberlin (aunt), Heather

Chamberlin (cousin), Esther Murillo (mother), Sylvia Fuchs (godmother), and Mike Murillo (father). (RT 26:3941-3970, 3976-3984.) The prosecution also played a videotape tribute to the life of Murillo, containing pictures of him with music soundtrack (but no lyrics). (RT 26:3936-3937, 3968-3970; People's Exh. P-3.)

With respect to Jaime Castillo, the prosecution presented the testimony of the following victim impact witnesses: Javier Castillo (father), Linda Castillo (stepmother), David Castillo (younger brother), Luci Castillo (aunt), Maria Novela (aunt), and Juan Castillo (cousin). (RT 27:3981-4005.)

E. PENALTY PHASE – THE DEFENSE EVIDENCE

1. CLINICAL ASSESSMENT OF MENTAL HEALTH ISSUES ADVERSELY AFFECTING APPELLANT

Dr. Cynthia Stout, a forensic examiner with a doctorate in psychology, testified that she examined appellant by conducting a clinical interview, gathering a psychological history, and doing some psychological testing. (RT 28:4211:1-4212:8.) She administered the MMPI-2, which is an objective test that looks at personality structure and functioning. She also gave appellant the Shipley Hartford, which is a screening test for getting an estimate of intelligence. Appellant was given the Hand Test, which is a projective test that looks at underlying issues or underlying structures to a person's personality. (RT 28:4212-4213.)

Dr. Stout testified that there was a discrepancy between what she saw of appellant during his clinical interview and the test results. Appellant was very cooperative. He was a nice, social, and friendly kid, and had natural and normal responses and reactions. Nothing in his history stood out as being contributory or underlying as far as the crimes for which he had been convicted. Stout was surprised when the test results revealed a different picture; she found those results to be reflective of, and very consistent with, excessive use of methamphetamine. (RT 28:4215-4217.)

Appellant's test results indicated a prolonged and intense use of methamphetamine. Appellant had elevations on the scales for paranoia and schizophrenia, which suggests delusions and hallucinations, where one may see something that is not there or believe something that is not based in reality. He had an elevation on the scale for mania, meaning a lot of agitation, energy, restlessness, and irritability. Appellant had been using unbelievable amounts of methamphetamine, together with other substances, for about a two-year period. (RT 28:4218-4220.)

Dr. Stout testified that appellant used about two grams of methamphetamine the night of October 23, 1997, and throughout the night he consumed at least 24 beers and smoked marijuana. With that much methamphetamine, there was certainly a propensity for an outburst of violence.

(RT 28:4244-4247:) Methamphetamine induces violence in people. With chronic use, people become paranoid, feel alienated, and can have hallucinations and delusions. They do not interpret like normal people and are apt to misinterpret social things. They have feelings of persecution and fear, and are always looking over their shoulder. They do not sleep for days or weeks at a time. They do not attend to personal hygiene very well. If a person uses methamphetamine for a long period, it can change the chemistry in the person's body so that it becomes their normal state. It can alter the person's personality through chronic use and from intense situations. (RT 28:4217-4218.)

Dr. James Rosenberg, a medical doctor and psychiatrist, did not evaluate appellant but, instead, testified to educate the jurors on the effects of methamphetamine on the human body and to explain subsequent violent behavior. (RT 28:4253-4254, 4262-4264.) Methamphetamine is a psycho-stimulant that enhances certain chemicals in the brain. (RT 28:4254-4256.) If methamphetamine is abused, it can cause psychological effects and other types of psychiatric effects. When a methamphetamine user is in an intoxicated state, there are symptoms such as elevated mood, feeling grandiose, feeling euphoric, decreased appetite, decreased need for sleep, and being energized. It is similar to what is seen in manic depression or bipolar disorder. Individuals who use methamphetamine heavily or over extended periods can develop more severe

symptoms, even short-term, called psychotic disorders. They could look like someone with paranoid schizophrenia and have false beliefs that people are after them or out to get them; they can have trouble with judgment, impulse control, and aggressiveness. There are also long-term syndromes. Methamphetamine is something that people generally become rapidly addicted to psychologically and physically. (RT 28:4256-4258.)

Long-term effects of methamphetamine use include permanent brain damage. Studies show that neurons, the main brain cells, can be permanently destroyed by methamphetamine use. They are major neurons that control personality, thinking, impulse control, and judgment. The brain damage can lead to a permanent change in personality and the development of psychotic symptoms. The psychotic symptoms can continue for months or years, or be permanent. They can also go away for a while and then come back under marked stress. They can come and go in response to other triggers. Another long-term effect can be frontal lobe brain syndrome. The frontal lobe is the part of the brain that controls judgment, impulse control, and the ability to control aggressive feelings. People who are demented or have brain damage to their frontal lobe from a car accident have problems controlling aggressive tendencies and have a lack of judgment. (RT 28:4260:21-4262:6.)

2. CHARACTER WITNESSES

George Garcia, appellant's cousin and best friend, testified that they were part of a very close family and saw each other almost every weekend. (RT 28:4188-4190.) In October 1997, he and appellant became involved in the drug culture, particularly methamphetamine. Methamphetamine is a demon that eats you up and makes you mean; it makes you do things you would not do in a normal state of mind. (RT 28:4190-4191.) He knew that appellant was using methamphetamine almost every day. Once they did an "eight ball" in one day, which is up to forty or fifty lines. Garcia observed changes in appellant as a result of drug use. Prior to his drug usage, appellant was the "light of the room." He laughed all the time and was very down-to-earth. Appellant was funny and cared for Garcia. (RT 28:4191-4195.) Garcia testified that he is familiar with the effects of methamphetamine because at one time he was a user. Methamphetamine can affect the mind and control a person's actions. It makes you go crazy. Garcia knew appellant used methamphetamine on a daily basis and is pretty sure he was using methamphetamine on October 23 or 24, 1997 because he had come into a large amount prior to that weekend. (RT 28:4195-4200.) Garcia is testifying out of love for appellant. (RT 28:4200-4202.)

Matthew Penunuri, appellant's 11-year-old brother, is very close to appellant. At some point, Matthew saw appellant get involved in gang life and

taking drugs. (RT 28:4205-4206.) Appellant was never mean to him and is not the type of person who would kill someone. (RT 28:4206-4209.)

Lupe Villalba testified that appellant is her sister's grandson. She has known appellant all of his life. She knows him to be a good and loving son that is close to his family. He was a happy kid. He always was kind and respectful, and never exhibited any violence. Appellant had a good relationship with his brother, cousins, nieces, and nephews. The family has come to the trial. Those currently present include appellant's mother, father, younger brother, cousins, uncle, aunt, grandmother, grandfather, and Villalba's sister and sister-in-law, and Villalba's brother-in-law and sister and husband Tommy. (RT 28:4302-4307.) Villalba still loves appellant and wants him to live. (RT 28:4310-4312.)

Rita Garcia, appellant's aunt and mother of George Garcia, testified that appellant is very loving and funny, and he always made them laugh. He is capable of love, and Garcia loves her son just as she loves appellant. (RT 29:4385:22 - 4387:6.) Appellant was always respectful to Garcia. (RT 29:4392-4394.)

Frances Martinez, appellant's great grandmother, knows appellant as a very nice boy. He respects her and never did anything to her. He is kind and shows compassion and a heart. Martinez feels there is hope for appellant and would like to see him live. (RT 29:4395-4398.)

Josi Penunuri, appellant's grandmother, testified that appellant is a wonderful boy. She loves her grandson a lot and does not want to lose him. (RT 29:4401 - 4403.)

Maria Penunuri, appellant's mother, testified that she and appellant's father dated for five years before appellant was born, but they were not married at the time. She and appellant have a special bond. Until appellant was 14 years old, they were very deeply involved in religion. (RT 29:4404-4406.) Appellant is full of life, always laughing and joking around. (RT 29:4407-4408.) He is a very protective big brother to his brother and cousins, always showing them a lot of love. (RT 29:4408-4409.) She does not believe him capable of committing the crimes of which he has been found guilty, and she believes he is not guilty of those crimes. She was very angry about Delaloza's statement to the police because he did not tell the truth, and that anger showed through on the recorded jail conversations she had with appellant. (RT 29:4409-4412.) Appellant told her in confidence that he was part of the robbery at the Ralphs parking lot in Whittier, and she believed him. He never told her that he used a gun in that robbery, but he told her that he took property that did not belong to him from people in that parking lot. (RT 29:4416-4419.)

Maria Penunuri testified that she manufactured an alibi for the period when the murder occurred because she knew that Delaloza was responsible, not

appellant, and Delaloza was trying to blame appellant. She recalls the recorded conversation where she recommended that Aunt Laurie say that she was with appellant that night. She thinks that all mothers would be there for their children out of desperation for a loved one. (RT 29:4419-4422.) She loves her son and knows that if he lives through this, then he will be in prison for the rest of his life. She hopes that he is still going to be alive. (RT 29:4424.)

/ / /

ARGUMENT

JURY SELECTION

I.

THE TRIAL COURT'S DISMISSAL FOR CAUSE OF PROSPECTIVE JUROR STEVEN METCALF – WHERE METCALF STATED HE COULD FAIRLY AND IMPARTIALLY DECIDE THE CASE AND RETURN A VERDICT FOR EITHER LIFE OR DEATH – REQUIRES REVERSAL OF THE DEATH JUDGMENT FOR A DENIAL OF THE STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, EQUAL PROTECTION, AN IMPARTIAL JURY, AND A FAIR AND RELIABLE PENALTY DETERMINATION (CAL. CONST., ART. I, §§ 7, 15, 16 & 17; U.S. CONST., 5TH, 6TH, 8TH & 14TH AMENDS.)

A. INTRODUCTION, PROCEDURAL BACKGROUND AND SUMMARY OF ARGUMENT

The trial court began hearing challenges for cause on November 7, 2000, after all prospective jurors had completed a 16-page jury questionnaire, and after dismissal of certain prospective jurors by stipulation. (RT 6:428-431, 444-451.)

Prospective Juror Steven Metcalf was in the third group of nineteen prospective jurors called on the afternoon of November 8th. (RT 7:713; CT Supp. V, Vol. 3, p. 662.) As explained in subsection C, *post*, Metcalf's jury questionnaire revealed that Metcalf was a middle-aged Caucasian male, married with two children, and employed as a pastor at the La Verne Heights Presbyterian Church. (CT 8:2170-2171.) He had previously served as a foreman on a jury that reached a verdict in an armed robbery case. (CT 8:2177.) His religion does not advocate the abolition of the death penalty. (See CT 8:2181-2182 [does not

belong to such a group].) He could apply the law regardless of his personal views. (CT 8:2180, 2181.) Although his current view of the death penalty was "in flux – away from its use . . ." (CT 8:2181), he would *not* "automatically vote for life imprisonment without the possibility of parole and under no circumstances vote for a verdict of death." (CT 8:2181.)

During oral voir dire, he gave a single response to a general question from the trial judge, stating "I should probably include myself, your honor" (RT 7:722), to the judge's question to the panel whether anyone "could under no circumstances; no matter what the evidence was; no matter what the factors in aggravation were, ever vote for a penalty of death[.]" (RT 7:721-722.) During subsequent questioning by trial defense counsel, *Metcalf did not respond* when counsel inquired of the panel whether anyone would say, "[M]y mind is closed; I can't under any circumstances even consider as an alternative the death penalty, period." (RT 7:733.)

The prosecutor's subsequent challenge for cause against Metcalf was granted without objection by trial defense counsel[11] (RT 7:752), and without individual voir dire of Metcalf. (Cf. RT 713-752.)

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[11] *People v. Cleveland* (2004) 32 Cal.4th 704, 734-735 ["failure to object does not forfeit the right to raise the issue on appeal, although it does suggest counsel concurred in the assessment that the juror was excusable"].

Metcalf's responses to the jury questionnaire revealed that his view of the death penalty was "in flux" but that he could follow the law as stated by the judge and that he would *not* "automatically vote for life imprisonment without the possibility of parole and under no circumstances vote for a verdict of death." (CT 8:2181-2182.) His response to the court's general inquiry of the panel, "I should probably include myself, your honor" (RT 7:722), suggested the need for further questioning of Metcalf.[12] Yet, moments later trial defense counsel explained to the panel that merely feeling stress over having to potentially make such a weighty decision whether someone lives or dies makes the person "a good juror." (RT 7:732.) Counsel explained that "[t]hese are some of the heaviest and most important decisions that you will ever be asked to make. And we expect you to deal with it on that basis." (RT 7:732.) Counsel then stated:

> What becomes a negative is if you say my mind is closed; I can't under any circumstances even consider as an alternative the death penalty, period. Or my mind is closed; I don't care what comes before me, if I convict him of murder, eye for an eye, they're gonna die. That rigidity, that not being open to being involved in the process is what makes you unfit to serve as a juror in this case.

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[12] It also suggested, as explained below, that the prosecutor failed to meet its burden of demonstrating to the trial court that the *Witt* standard was satisfied when striking Metcalf. (*People v. Stewart* (2004) 33 Cal.4th 425, 445 [moving party bears the burden of demonstrating to the trial court that the *Witt* standard is satisfied as to each of the challenged jurors]; *Wainwright v. Witt, supra*, 469 U.S. at p. 423.)

> So, with that in mind, I'm going to ask you now is there anybody here who feels that they really shouldn't be a juror in this case? [RT 7:733.]

Several jurors responded (RT 7:733-734), *but Metcalf did not*, indicating that after thinking things through, and consistent with the statements made in his questionnaire, Metcalf could fairly decide the case and was not so rigid as to be precluded from returning a verdict of death.

As explained below, Metcalf affirmed that he would follow the law during the penalty phase and could return a verdict of death, and that his beliefs about capital punishment, including his religious beliefs, would not prevent or substantially impair his ability to return a verdict of death in this case. The trial court's implicit finding of substantial impairment, which was made without the benefit of any individual voir dire of Metcalf, is not supported by substantial evidence, thereby requiring reversal of the death judgment. (Cf. *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841]; *People v. Ochoa* (2001) 26 Cal.4th 398, 431.)

B. THE TRIAL COURT'S IMPLICIT FINDING OF SUBSTANTIAL IMPAIRMENT IS NOT ENTITLED TO DEFERENCE BECAUSE METCALF WAS NOT MEANINGFULLY EXAMINED ON VOIR DIRE AND THE TRIAL COURT'S RESOLUTION, IF ANY, OF CONFLICTS ON THE QUESTION OF JUROR BIAS IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The trial court summarily dismissed Metcalf on the prosecutor's motion to excuse for cause, without any individual oral voir dire of Metcalf to assess his

demeanor and attitude, and without making any findings or stating any reasons for the dismissal. (RT 7:713-752.) The trial court thus made no explicit finding of bias or substantial impairment.

Appellant recognizes that granting a motion to excuse for cause constitutes an implicit finding of bias, warranting some degree of deference by the reviewing court. (*People v. Stewart, supra*, 33 Cal.4th at p. 451; *Uttecht v. Brown* (2007) 551 U.S. 1, 7-9 [127 S.Ct. 2218, 167 L.Ed.2d 1014].) Yet, the trial court's resolution of conflicts on the question of juror bias is binding on this Court, and thus due some deference, *only where supported by substantial evidence.* (*People v. Hamilton* (2009) 45 Cal.4th 863, 889-890; *People v. Martinez* (2009) 47 Cal.4th 399, 427 ["The trial court's resolution of conflicts on the question of juror bias is binding on the reviewing court if supported by substantial evidence."].)

No deference is due here because by summarily dismissing Metcalf without engaging him in individual voir dire the trial court utterly failed to resolve any conflicts on the question of juror bias. The record in this case of no individual voir dire – and no attempt to resolve any perceived conflicts on the question of juror bias – stands in stark contrast to those cases where careful voir dire warranted deference. (Cf. *Uttecht v. Brown, supra*, 551 U.S. at p. 11 [before deciding a contested challenge for cause, the trial judge gave each party a chance

to argue its position and recall the potential juror for additional questions, and then the trial judge gave "careful and measured explanations"]; *People v. Martinez, supra*, 47 Cal.4th at pp. 429-430 [affirming trial court's dismissal of Prospective Juror B.S. based on the "extensive transcript documenting the voir dire of B.S.", noting that the trial court "supervised a diligent and thoughtful voir dire" (quoting *Uttecht v. Brown, supra*, 551 U.S. at p. 20), and took pains to state and apply the correct standard and to explain the overall impression it received from the entire voir dire of B.S.]; *People v. Wilson* (2008) 44 Cal.4th 758, 780 [faced with a conflict in the juror's responses, the trial court pursued the matter further, producing what it viewed reasonably under the circumstances as an anti-death penalty "epiphany"].)

Nor could Metcalf's demeanor and attitude reasonably support the trial court's ruling because the trial court failed to engage Metcalf in voir dire, thereby revealing that the trial court did not critically examine Metcalf's demeanor and attitude. (Cf. *People v. Hamilton, supra*, 45 Cal.4th at pp. 809-891 [demeanor and attitude revealed on the record by trial court's questioning of prospective juror and juror's answers to the court's questions]; *Wainwright v. Witt, supra*, 469 U.S. at p. 428 [the "manner of the juror *while testifying* is oftentimes more indicative of the real character of his opinion than his words"].)

Accordingly, the trial court's resolution, if any, of conflicts on the question of juror bias is not entitled to deference because it is not supported by substantial evidence.

C. METCALF'S RESPONSES TO THE JURY QUESTIONNAIRE, AND HIS SINGLE UNEXPLORED RESPONSE DURING ORAL VOIR DIRE, REVEAL THAT HE COULD FAIRLY AND IMPARTIALLY DECIDE THE CASE AND RETURN A VERDICT FOR EITHER LIFE OR DEATH

Metcalf was well qualified to serve as a juror in a capital murder trial. Metcalf's jury questionnaire, which the trial judge previously stated he had read (RT 6:428 [read all jury questionnaires]), revealed that Metcalf was a middle-aged Caucasian male, married with two children. (CT 8:2170.) He was employed as a pastor at the La Verne Heights Presbyterian Church, where he had worked for seven years. (RT 8:2171.) He described his political views as consistent with that of a moderate Democrat. (CT 8:2173.) He enjoyed, among other things, hiking, backpacking, reading, and sports. (RT 8:2174.) Two or three years earlier he served as the foreperson on a jury involving the charge of armed robbery, wherein the jury reached a verdict. (CT 8:2177.)

In the section of the questionnaire entitled *General Bias* (CT 8:2179-2180), Metcalf affirmed his positive views of the trial and jury system. (CT 8:2179.) Responding to question 101 about his feelings in connection with judging the conduct of another, he wrote, "I take it with great seriousness and must admit to some fear and trembling concerning the responsibility." (CT

8:2179.) In response to question 104 about sitting as a juror in this case, he wrote, "Potentially sitting in judgment on the lives of others that could lead to such extreme consequences feels very hard." (CT 8:2179.) When asked in question 114 about being able to "follow the court's instructions on the law regardless of whether you personally agree with the law as given to you by the court[,]" he checked the "yes" box, affirming his ability to do so, and candidly added, "I can only try and hope to do what is right." (CT 8:2180.)

In the section of the questionnaire entitled *Death Penalty* (CT 8:2181-2183), Metcalf affirmed that he does *not* belong to any group that advocates the abolition of the death penalty. (CT 8:2181-2182.) Although describing his current views of the death penalty as being "in flux – away from its use as presently practiced in this country" (CT 8:2181), Metcalf unequivocally stated in response to question 128 that he could "set aside" his "own personal feelings regarding what the law ought to be and follow the law as the court explains it . . . ." (CT 8:2181.) In response to question 130,[13] "Do you entertain such a

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[13] As the trial court noted, question 130 omitted any check box for a "yes" or "no" answer. (RT 6:428-429.) The trial court stated, in part, "[T]here was not a 'yes' or 'no' box underneath it, and many of the jurors wrote in their answer, a few yeses, mostly noes. But a lot of people understandably left that blank because there wasn't any place for them to check like in the other places. They had to write it in. So I think we'll have to inquire. Generally you can tell from the context of the questionnaires that their answers would have been no to that question in almost all of the cases, but, nevertheless, that's something we're going to have to look into." (RT 6:428-429.)

conscientious opinion concerning the death penalty that you would automatically in every case vote for a verdict of life imprisonment without the possibility of parole and under no circumstances vote for a verdict of death?," Metcalf responded, "I don't think so." (CT 8:2181.) Metcalf thus affirmed that he would follow the law during the penalty phase and could return a verdict of death, and that his beliefs about capital punishment, and his religious beliefs, would not prevent or substantially impair his ability to return a verdict of death in this case. (Cf. *Wainwright v. Witt, supra*, 469 U.S. at p. 424; *People v. Ochoa, supra*, 26 Cal.4th at p. 431.)

During general voir dire, and after giving some general instructions, the trial judge asked:

> So, preliminarily, is there any one of the group of you who at this time feel that should the case get to that place, that you could under no circumstances; no matter what the evidence was; no matter what the factors in aggravation were, ever vote for a penalty of death?
>
> Let's see. We have jurors number in the first alternate position, juror number 7 and 8, and in the back row and juror number 4. Acosta, Vanessa. [RT 7:721-722.]

Metcalf then stated, "I should probably include myself, your honor" (RT 7:722), to which the court responded, "All right." (RT 7:722.)

The trial court gave some additional general instructions (RT 7:722-726), and then appellant's trial defense counsel conducted individual voir dire of

several of the prospective jurors. (RT 7:726-729.) Thereafter, appellant's trial defense counsel explained to the prospective jurors that they were looking for jurors that could be fair to both sides. (RT 7:729-730.) Trial defense counsel stated, in part:

> This is an inquiry for cause. If we find cause to dismiss you, it doesn't mean there's anything wrong with you as a person. It means that because of accumulation of your life experiences or who you are or what you believe in or any of the things that make you an individual, renders you in our opinions incapable of being neutral and fair to both sides in this case. [RT 7:730.]

Trial defense counsel continued:

> I know a bunch of you raised your hands in the beginning, and I didn't get any names down. But let me -- before I ask you to raise your hands again, let me give you a little more of what I'm after here. [¶]
>
> The second aspect of the case, if it gets that far, is what's the punishment. How should the accused be punished.
>
> As the judge has explained to you, there's two choices: life without the possibility of parole it's called L-WOP, and it means go to prison and you stay there, period. It doesn't change. You die in prison -- versus you go to prison and you're executed some time in the future. [RT 7:731-732.]

Trial defense counsel also correctly explained the law that simply because a juror finds the process to be difficult does not mean that the juror would not be a good juror to hear the case. Defense counsel stated, in part:

> *So the fact that you're now grappling with this thing, oh, my goodness, you know, this is really heavy decisions; these are really heavy judgments that I have to deal with, makes you a good juror.*

> That makes you exactly the type of person we all want. No one wants this case dealt with cavalierly or lightly. This is major, major, major stuff. These are some of the heaviest and most important decisions that you will ever be asked to make. And we expect you to deal with it on that basis.
>
> So the fact that you're hesitant or the fact that you're uncomfortable or the fact that you're not -- you know, oh, my goodness, the death penalty is involved in this, is not a negative. It's a positive.
>
> *What becomes a negative is if you say my mind is closed; I can't under any circumstances even consider as an alternative the death penalty, period. Or my mind is closed; I don't care what comes before me, if I convict him of murder, eye for an eye, they're gonna die. That rigidity, that not being open to being involved in the process is what makes you unfit to serve as a juror in this case. So, with that in mind, I'm going to ask you now is there anybody here who feels that they really shouldn't be a juror in this case*? [RT 7:732-733 (emphasis added).]

Prospective Juror Metcalf never raised his hand in response to this question, thereby revealing that he could keep an open mind and return a verdict of either life or death. (See RT 7:733-738.) Instead, Prospective Jurors Jackson, Martin, Peralta, Acosta, Lord, Lopez, Duncan, and Enos raised their hands and were acknowledged by defense counsel. (RT 7:733-734.) After a short discussion with Enos, Jackson, and Martin (RT 7:734-735), Prospective Juror Williamson stated that he was "against the death penalty." (RT 7:735.) Defense counsel then questioned Lopez, Duncan, Peralta, Acosta and Lord. (RT 7:736-738.) No other prospective jurors, including Metcalf, indicated that they could not fairly decide the case and, if appropriate, return a death verdict. (See RT

7:733-738.) Additional oral voir dire was conducted of Prospective Jurors Garza, Bosnyak, Loerasacks, Jackson, and Martin. (RT 7:738-750.)

The prosecutor then moved to excuse Prospective Juror Metcalf for cause. (RT 7:752.) The prosecutor did so without asking any questions of Metcalf during voir dire; nor had the trial judge examined Metcalf. (See RT 713-752.) The court granted the motion and dismissed Metcalf. (RT 7:752.) Trial defense counsel did not object to the dismissal, but also did not affirmatively express approval thereof. (RT 7:752.)

Metcalf's responses to the jury questionnaire, and his single unexplored response during oral voir dire, reveal that he could fairly and impartially decide the case and return a verdict for either life or death. (CT 8:2169-2184; RT 7:713-752.)

D. THE TRIAL COURT'S IMPLICIT FINDING OF SUBSTANTIAL IMPAIRMENT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, THEREBY REQUIRING REVERSAL OF THE DEATH JUDGMENT

The state and federal Constitutions guarantee a criminal defendant the right to due process, equal protection, trial by an impartial jury drawn from a representative cross-section of the community, and a fair and reliable penalty determination. (*Wainwright v. Witt, supra*, 469 U.S. at p. 424; *People v. Wilson, supra*, 44 Cal.4th at p. 778; Cal. Const., art. I, §§ 7, 15, 16 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.)

An accused's right to a fair and impartial jury drawn from a representative cross-section of the community is guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as article I, section 16, of the California Constitution. (*Morgan v. Illinois* (1992) 504 U.S. 719, 727 [112 S.Ct. 2222, 119 L.Ed.2d 492]; *People v. Fauber* (1992) 2 Cal.4th 792, 816.) In a capital case, "the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 522-522, fn. 20 [88 S.Ct. 1170, 20 L.Ed.2d 776].) Thus, "[i]t is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that the are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176 [106 S.Ct. 1758, 90 L.Ed.2d 137].)

In effect, when those opposed to capital punishment are excluded from the venire, the State "crosse[s] the line of neutrality," "produce[s] a jury uncommonly willing to condemn a man to die," and violates the Sixth and Fourteenth Amendments. (*Witherspoon v. Illinois, supra*, 469 U.S. at pp. 520-521.) "[A] sentence of death cannot be carried out if the jury imposing or recommending it was chosen by excluding veniremen for cause simply because

they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Id.* at p. 522 [fn. omitted].)

As the United States Supreme Court has made clear, a prospective juror's personal views concerning the death penalty do not necessarily afford a basis for excusing the juror for bias.

> . . . . Because "[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State," . . . [it follows that] "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty." [*Uttecht v. Brown, supra*, 551 U.S. at p. 6, citing *Witherspoon v. Illinois, supra*, 391 U.S. at pp. 522-523, fn. 21.]

A juror may be excused for cause if the juror's views about capital punishment would prevent or substantially impair that juror's ability to return a verdict of death in the case before the juror. (*Wainwright v. Witt, supra*, 469 U.S. at p. 424; *People v. Ochoa, supra*, 26 Cal.4th at p. 431.) Reviewing for abuse of discretion (*People v. Abilez* (2007) 41 Cal.4th 472, 497-498), the trial court's dismissal of a juror for cause is affirmed if "fairly supported" by the record. (*People v. Cunningham* (2001) 25 Cal.4th 926, 975.)

The moving party bears "the burden of demonstrating to the trial court that the [*Witt*] standard [is] satisfied as to each of the challenged jurors." (*People v. Stewart, supra*, 33 Cal.4th at p. 445.) "As with any other trial situation where an adversary wishes to exclude a juror because of bias, . . . it is the adversary

seeking exclusion who must demonstrate through questioning that the potential juror lacks impartiality . . . . It is then the trial judge's duty to determine whether the challenge is proper." (*Wainwright v. Witt, supra*, 469 U.S. at p. 423.)

A trial court abuses its discretion if its ruling exceeds the bounds of reason (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478), is arbitrary and capricious, or is rendered without knowledge and consideration of "all the material facts in evidence ... together also with the legal principles essential to an informed, intelligent and just decision." (*In re Cortez* (1971) 6 Cal.3d 78, 85-86.)

Moreover, a trial court must apply the *Witt* standard in an even-handed and impartial manner. (Cf. *People v. Champion* (1995) 9 Cal.4th 879, 908-909 [holding that "trial courts should be evenhanded in their questions to prospective jurors during the 'death qualification' portion of the voir dire . . . ."].) A court's application of the *Witt* standard in an arbitrary, capricious, or partial manner does not comport with the essence of fairness guaranteed by due process of law. (Cf. *Gray v. Klauser* (9th Cir. 2001) 282 F.3d 633, 645-648, 651 [and authorities cited therein, holding that a trial court's unjustified or uneven application of legal standard in a way that favors the prosecution over the defense violates due process].)

Prospective Juror Metcalf did not express a view concerning capital punishment that warranted his exclusion from the jury. His answers to the jury

questionnaire revealed that his current view of the death penalty was "in flux – away from its use . . ." (CT 8:2181), but he would *not* "automatically vote for life imprisonment without the possibility of parole and under no circumstances vote for a verdict of death." (CT 8:2181.) When asked in question 133, "Over the last 10 years, have your views on the death penalty changed?[,]" Metcalf checked the box marked "Yes," and wrote, "Less likely to be in favor." (CT 8:2182.) In other words, Metcalf was not entirely against the death penalty, and he certainly could apply the law as stated by the judge and return a death verdict, if warranted by the facts.

> . . . *[W]e must keep in mind that a prospective juror who is [even] firmly opposed to the death penalty is not disqualified from serving on a capital jury.* "[N]ot all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." [*People v. Martinez, supra*, 47 Cal.4th at p. 427, citing *Lockhart v. McCree, supra*, 476 U.S. at p. 176.]

Metcalf was *not* firmly opposed to the death penalty (CT 8:2181-2182), but even if he had been that would not have been a basis to exclude him from appellant's jury. (*People v. Martinez, supra*, 47 Cal.4th at p. 427.)

The critical issue is whether the juror can apply the law and perform his duties as a juror in accordance with his oath without substantial impairment from his personal views on capital punishment. (*Ibid.*)

> "A juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would *actually preclude him from engaging in the weighing process and returning a capital verdict.*" [*Ibid.* (emphasis added), citing *People v. Stewart, supra*, 33 Cal.4th at p. 446; see *People v. Kaurish* (1990) 52 Cal.3d 648, 699.]

The critical question of Metcalf on this issue – i.e., whether his views would actually preclude him from engaging in the weighing process and returning a capital verdict – is question 130 on the jury questionnaire, which states: "Do you entertain such a conscientious opinion concerning the death penalty that you would automatically in every case vote for a verdict of life imprisonment without the possibility of parole and under no circumstances vote for a verdict of death?" (CT 8:2182.) Metcalf responded, "I don't think so." (CT 8:2182.) Combining the question and the response, Metcalf's response would read, "I do not think that I entertain such a conscientious opinion concerning the death penalty that [I] . . . would automatically in every case vote for a verdict of life imprisonment without the possibility of parole and under no circumstances vote for a verdict of death." This is a clear statement of Metcalf's mental state, showing that he could apply the law, set-aside his views leaning against the death penalty, and return a verdict of death.

This clear statement of Metcalf's mental state – showing an ability to return a verdict of death – was not impeached during oral voir dire. Although

Metcalf stated that he "should probably" be included in the group of people that could not return a verdict of death (RT 7:722), the use of the word *probably* shows that his response was not absolute, and thus could not be relied upon as an adequate basis for exclusion of Metcalf based on an inability to return a death verdict, especially in view of his unequivocal response to this very question in the jury questionnaire.

Moreover, moments after making the "probably" statement to the trial judge, Metcalf implicitly reaffirmed his ability to return a verdict of death by remaining silent when trial defense counsel explained this very matter and requested that jurors identify themselves if they felt they could not serve according to the rules. (RT 7:721-723 [several jurors identify themselves as not being able to apply the law, but Metcalf remains silent].)

The decision of the United States Supreme Court in *Adams v. Texas* (1980) 448 U.S. 38 [100 S.Ct. 2521, 65 L.Ed.2d 581] is instructive, and reveals that the trial court's dismissal of Metcalf is contrary thereto.

In *Adams*, the United States Supreme Court held that the exclusion of prospective jurors on the ground that they were unwilling or unable to take a statutory oath that a mandatory penalty of death or life imprisonment would not "affect" their deliberations on any issue of fact contravened the Sixth and Fourteenth Amendments. (*Id.* at p. 40.) The state has a legitimate interest in

obtaining jurors who will be impartial on the question of guilt and will make the discretionary judgments entrusted to them without conscious distortion or bias, despite their conscientious scruples against the death penalty. Nevertheless, the Texas trial court erred by excluding prospective jurors who could not or would not state under oath (as required by Texas Penal Code section 12.31(b)) that the mandatory penalty of death or imprisonment for life (on conviction of a capital felony) would not affect their deliberations on any issue of fact. (*Id.* at pp. 48-50.) Justice White, writing for an 8-1 majority, observed that the state cannot require as a condition of service as a juror in a capital case, a statement that the juror does not feel any burden of rendering judgment on another human being. (*Id.* at p. 50.)

Although here the trial court did not state its reasons for dismissing Metcalf, presumably the court was concerned about Metcalf's statements expressing a heavy burden in rendering judgment on another human being. Metcalf stated in response to question 104 about sitting as a juror in this case, "Potentially sitting in judgment on the lives of others that could lead to such extreme consequences *feels very hard*." (CT 8:2179 emphasis added].) Metcalf further stated in response to question 122 about the things that he would want to know about the defendant before deciding between death and life, "At this point I cannot honestly say. The possibility of being involved with making such a

decision *feels staggering at the moment.*" (CT 8:2181 [emphasis added].) Reliance by the trial court on these statements as a basis for dismissal would contravene the rule set forth in *Adams v. Texas, supra*, 448 U.S. at p. 50, prohibiting exclusion of a juror from a capital case on the basis of the burden felt in rendering judgment on another human being.

Adams v. Texas, supra, 448 U.S. 38 remains good law today, and its teaching, thirty years hence, still rings true:

> [N]either nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. . . . Nor in our view would the Constitution permit the exclusion of jurors from the penalty phase . . . if they aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced beyond a reasonable doubt, but not otherwise, yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would deprive the appellant of the impartial jury to which he or she is entitled under the law. [*Id.* at p. 50.]

In *Adams v. Texas, supra*, the trial court excluded jurors whose only "fault" was "to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected." (*Ibid.*) Metcalf stated he could set aside his personal views and apply the law to return a death

verdict, if appropriate. Thus, the trial court's unstated reasons for dismissing Metcalf may well have included Metcalf's statements reflecting the heavy burden he would feel in rendering judgment on another human being. Yet, this is precisely the litmus test that was repudiated in *Adams v. Texas, supra*, 448 U.S. at pp. 48, 50.

This Court's decision in *People v. Heard* (2003) 31 Cal.4th 946 also is instructive, and fully supports reversal of the death judgment. In *People v. Heard, supra*, this Court reversed the death judgment finding that the trial court erred in excusing a prospective juror for cause based upon his views concerning the death penalty. (*Id.* at p. 959.) There, Juror H.'s responses to the questions posed on voir dire indicated he was prepared to follow the law. (*Id.* at pp. 959-960.) This Court recognized that, to the extent that the prospective juror's responses were less than definitive, any vagueness reasonably must have been viewed as a product of the ambiguity of the question itself. (*Id.* at p. 967.)

Like Juror H. in *People v. Heard, supra*, Metcalf's questionnaire showed that he was prepared to follow the law and the trial court's instructions. (CT 8:2182; *People v. Heard, supra*, 31 Cal.4th at p. 959 [Juror H. affirmed he would neither vote automatically for life without parole or death, no matter what the evidence showed].) Juror H. denied that he would be reluctant to get to penalty phase, but answered "no" to the question, "Would you decide the case based

upon the evidence without fear of having to reach the next stages?" (*Id.* at p. 960.)

In this case, as discussed above, Metcalf stated that "sitting in judgment on the lives of others that could lead to such extreme consequences feels very hard" (CT 8:2179), and the "possibility of being involved with making such a decision feels staggering at the moment" (CT 8:2181). In terms of the heavy moral burden of imposing judgment on another human being, Metcalf's responses to the jury questionnaire share some similarity to those of Juror H. in *People v. Heard, supra*, although the statements by Metcalf make a stronger case for reversal. There, the trial court engaged in the following colloquy, in part:

The Court:	Do you think if there were past psychological factors that they would weigh heavily enough that you probably wouldn't impose the death penalty?
Prospective Juror H.:	Yes, I think they might. [*Id.* at p. 961.]

Significantly, in *People v. Heard, supra*, unlike this case, the trial court posed the following three follow-up questions, and both parties posed their own additional questions, as follows, in part:

The Court:	You think they might auger toward life without possibility of parole?
Prospective Juror H.:	Yes.
The Court:	Are you absolutely committed to that position?
Prospective Juror H.:	Yes.

The Court:	Are you saying if there were psychological, without naming what they might be, you would automatically vote for life without possibility of parole?
Prospective Juror H.:	Without naming them, I don't think so. [*Id.* at p. 961.]

The record of Prospective Juror H. in *People v. Heard, supra*, is similar to the instant case in several respects. First, Metcalf's questionnaire responses qualified him to serve in this case. He affirmed that he could apply the law, set-aside his views leaning against the death penalty, and return a verdict of death. (CT 8:2179-2182; *People v. Heard, supra*, 31 Cal.4th at p. 964 [noting that Prospective Juror H.'s questionnaire response that life without parole was a "worse" punishment than death, given without benefit of the trial court's explanation of governing legal principles, did not provide an adequate basis to support excusal for cause].)

Second, there was nothing in Prospective Juror H's responses that would support a finding that his views would prevent or substantially impair performance of his duties as a juror. In particular, the circumstance that the existence of psychological factors might influence Prospective Juror H.'s penalty determination did not suggest he could not properly exercise the role that California law assigns to jurors in a death penalty case. (*People v. Heard, supra*, 31 Cal.4th at p. 965.) Similarly, as discussed above, Metcalf's unequivocal statement in his jury questionnaire that he could return a verdict of death (CT

8:2182) was not impeached during oral voir dire. Although Metcalf stated that he "should probably" be included in the group of people that could not return a verdict of death (RT 7:722), the use of the word *probably* shows that his response was not absolute, and thus could not be relied upon as an adequate basis for exclusion without follow-up questions. Moments later Metcalf implicitly reaffirmed his ability to return a verdict of death by remaining silent when trial defense counsel explained this very matter and asked for jurors to identify themselves if they felt they could not serve according to the rules. (RT 7:721-723.) Further, Metcalf's responses that sitting in judgment "feels very hard" (CT 8:2179) and "feels staggering at the moment" (CT 8:2181) did not suggest that he would not properly be exercising the role that California law assigns to jurors at the guilt or penalty phase in a death penalty case. (Cf. *Adams v. Texas, supra*, 448 U.S. at p. 49; *People v. Heard, supra*, 31 Cal.4th at p. 965.)

Third, in contrast to several questions asked of Prospective Juror H. during oral voir dire, here the trial court entirely failed to question Metcalf during oral voir dire, and the court failed to follow up on Metcalf's response that he "should probably" be included in the group of people that could not return a verdict of death. (RT 7:722.) In *Heard*, this Court observed that when even the slightest reason to doubt arises the trial court should follow up with additional questions to resolve its uncertainty. (Cf. *People v. Heard, supra*, 31 Cal.4th at p. 967, fn. 9

[advising trial courts to follow up on ambiguous answers to make a complete record of the basis for a cause challenge]; cf. *People v. Wilson, supra*, 44 Cal.4th at p. 777 [affirming exclusion of juror where trial court asked a significant question, absent in this case: "do you think you'd be tempted or would you refuse to find the appellant guilty of first degree murder just to stop yourself from having to go any further?"]; *People v. Avila* (2006) 38 Cal.4th 491, 528, fn. 23 [same result; trial court posed a significant question, absent in this case: "do you honestly think that you could set aside your personal feelings and follow the law as the Court explains it to you, even if you had strong feelings to the contrary?"].) What was true in *People v. Heard, supra*, rings especially true here: "to the extent H.'s responses were less than definitive, such vagueness reasonably must be viewed as a product of the trial court's own unclear inquiries." (*People v. Heard, supra*, 31 Cal.4th at p. 967.)

As Justice Kennedy observed,

> The need to defer to the trial court's ability to perceive jurors' demeanor does *not* foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses *no basis* for a finding of *substantial impairment.* [*Uttecht v. Brown, supra*, 551 U.S. at p. 19 (emphasis added).]

The record in the instant case – a questionnaire affirming Metcalf's ability to follow the law and return a death verdict (CT 8:2181-2182), a single answer to a question by the court during group voir dire (RT 7:722), and Metcalf's implicit

affirmation of an ability to return a verdict of death by remaining silent when trial defense counsel requested that jurors identify themselves if they could not following the law and return a death verdict (RT 7:721-723) – discloses no basis for a finding of substantial impairment. The trial court thus exceeded its discretion in excusing Metcalf, thereby requiring reversal of the death judgment. (Cf. *People v. Heard, supra*, 31 Cal.4th at p. 966; *Ross v. Oklahoma* (1988) 487 U.S. 81, 88 [108 S.Ct. 2273,101 L.Ed.2d 80].

/ / /

GUILT PHASE

II.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A FINDING THAT APPELLANT WAS A PRINCIPAL IN THE MURDERS OF BRIAN MOLINA AND MICHAEL MURILLO, THEREBY REQUIRING REVERSAL OF THE CONVICTIONS IN COUNTS 4 AND 5 FOR A DENIAL OF THE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR AND RELIABLE JURY TRIAL (CAL. CONST., ART. I, §§ 7, 15 & 17; U.S. CONST., 5TH, 6TH, 8TH & 14TH AMENDS.)

A. INTRODUCTION

Appellant was found guilty in counts 4 and 5 of the first degree murders of Brian Molina and Michael Murillo (Pen. Code, §§ 187, subd. (a), 189). (CT 12:3455-3456; RT 25:3825-3827.) As explained below, there is insufficient evidence, which is reasonable, credible, and of solid value, to sustain the requisite finding that appellant was a principal in the commission of these offenses.

B. STANDARD OF REVIEW

Faced with a challenge to the sufficiency of the evidence, the court reviews "the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, *evidence which is reasonable, credible, and of solid value* – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578 [emphasis added]; *People* v. *Samuel* (1981) 29 Cal.3d 489, 505 [evidence relied upon must be "reasonable in nature, credible and of

solid value"].) "The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence." (*People v. Rodriguez, supra*, 20 Cal.4th at p. 11.) "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." (*Ibid.*, citing *People v. Stanley* (1995) 10 Cal.4th 764, 792-793.)

> In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." [Citation omitted.] The court does not, however, limit its review to the evidence favorable to the respondent. As *People v. Bassett, supra*, 69 Cal.2d 122, explained, "our task . . . is twofold. First, we must resolve the issue in the light of the whole record – i.e., the entire picture of the defendant put before the jury – and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements . . . is substantial; it is not enough for the respondent simply to point to 'some' evidence supporting the finding, for 'Not every surface conflict of evidence remains substantial in the light of other facts.' [*People v. Johnson, supra*, 26 Cal.3d at pp. 576-577 (citation omitted).]

The federal standard of review, under principles of federal due process, entails a determination of whether, upon review of the entire record in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia*

(1979) 443 U.S. 307, 317-320 [99 S.Ct. 2781, 61 L.Ed.2d 560].) The requisite qualitative nature of the evidence is that which is sufficient to permit the trier of fact to reach a "subjective state of near certitude of the guilt of the accused . . . ." (*Id.* at p. 315.)

"'Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises the possibility, and this is not a sufficient basis for an inference of fact.'" (*People v. Reyes* (1974) 12 Cal.3d 486, 500, citing *People v. Redmond* (1969) 71 Cal.2d 745, 755.) Nor can "substantial evidence" be based on speculation:

> We may speculate about any number of scenarios that may have occurred on the morning in question. 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* (1988) 46 Cal.3d 1, 21 (citations omitted).]

In capital cases it is well recognized that heightened verdict reliability is required at both the guilt and penalty phases of trial. (*Beck v. Alabama* (1980) 447 U.S. 625, 627-646 [100 S.Ct. 2382, 65 L.Ed.2d 392]; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422 [115 S.Ct. 1555, 131 L.Ed.2d 490]; *Burger v. Kemp* (1987) 483 U.S. 76, 785 [107 S.Ct. 3114, 97 L.Ed.2d 638]; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342 [113 S.Ct. 2112, 124 L.Ed.2d 306].)

Moreover, even in non-capital cases, a conviction that is based on unreliable and/or untrustworthy evidence violates the constitutional guarantee of due process. (Cf. *White v. Illinois* (1992) 502 U.S. 346, 363-364 [112 S.Ct. 736, 116 L.Ed.2d 848] ["Reliability is . . . a due process concern"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [94 S.Ct. 1868, 40 L.Ed.2d 431] [due process "cannot tolerate" convictions based on false evidence]; *Thompson v. City of Louisville* (1960) 362 U.S. 199, 204 [80 S.Ct. 624, 4 L.Ed.2d 654].)

A conviction unsupported by substantial evidence denies a defendant due process of law. (*Jackson v. Virginia, supra*, 443 U.S. at p. 318; *People* v. *Bean* (1988) 46 Cal.3d 919, 932.)

C. THERE IS INSUFFICIENT EVIDENCE, WHICH IS REASONABLE, CREDIBLE, AND OF SOLID VALUE, TO SUSTAIN A FINDING THAT APPELLANT KILLED MOLINA AND MURILLO (COUNTS 4 & 5, RESPECTIVELY)

It is axiomatic that to be convicted of first degree murder the defendant must have either directly perpetrated the murder or he must have been proven to be vicariously liable for the murder. (*People v. Matlock* (1959) 51 Cal.2d 682, 685 [where the person actually performs or actively assists in performing an overt act resulting in death, his act constitutes murder]; *Taylor v. Superior Court* (1970) 3 Cal.3d 578, 582-583 [vicarious liability of aider and abettor].)

The prosecution proceeded on the theory that appellant was the direct perpetrator of the murders of Molina and Murillo, not that he had aided and

abetted another person in the commission of the offenses. (RT 22:3411-3412.) Nor did the court instruct on aiding and abetting liability in connection with counts 4 and 5. (RT 24:3729-3794.)

The prosecution's case against appellant rested principally on a purported motive to kill, and on the testimony of Luke Bissonnette, Roxanne Bissonnette, Matthew Walker, and Marjorie Holder, and the prior statements of Alejandro Delaloza and Carlos Arias. (*Ante*, Statement of Facts, § A.3.) The prosecution sought to prove that a few hours after the Ralphs parking lot incident (counts 1 & 2), and an hour after the assault on Carlos Arias (count 3) and intimidation of Luke (related to count 3), appellant committed a double homicide shooting, intending to kill Arias and Luke, both of whom had disrespected appellant by running away from him on Hornell Street, but instead mistakenly shooting Brian Molina (count 4) and Michael Murillo (count 5). (RT 22:3411-3415.)

At approximately 4:00 a.m. on October 24, 1997, Molina and Murillo were shot and killed while sleeping on the rear patio of Laraine Martinez's residence at 15171 Goodhue Street. The prosecution presented evidence that sometime prior to the shooting appellant was seen by Luke and Roxanne Bissonnette in the vicinity of a nearby residence on Hornell Street (RT 11:1336-1341; CT Supp. Vol. IV-1, pp. 160, 162, 165), and then at the time of the shooting he was purportedly seen by Luke and Alejandro Delaloza at the

location of the shooting (RT 10:1189-1192, 12:1443-1444; CT Supp. IV:109-142).

The States's evidence amounted to the following: Luke testified that earlier that morning on Hornell Street he saw Delaloza's white Cadillac approach and park next to the curb on the opposite side of the street. (RT 9:1132-1134; People's Exh. 3.) Delaloza was driving, and appellant, Jaime Castillo and an unidentified female were inside the vehicle. (RT 9:1136-1137.) Appellant exited the vehicle and told Luke to get inside the car. (RT 9:1133-1138, 10:1156-1157.) Appellant was wearing a dark, heavy jacket identified as People's Exhibit 5. (RT 9:1133-1138, 10:1159-1160.) Luke testified that approximately twenty-two minutes later, after returning to Laraine Martinez's residence, he heard about ten gunshots. (RT 10:1186-1193.) From inside the house he looked out the window and saw a figure wearing a big, bulky jacket running outside, and thought "fucking Dozer" (i.e., appellant). He then yelled the name "Dozer." (RT 10:1189-1192.)

Roxanne Bissonnette testified that on October 24th at approximately 2:30 a.m. she was inside her father's house on Hornell Street and saw Delaloza's white Cadillac parked to the left of the neighbor's driveway. (RT 11:1331-1336.) She opened the front door and saw both Delaloza and appellant standing nearby. (RT 11:1336-1341.) Appellant was wearing a dark jacket (consistent with

People's Exh. 5), dark shorts and white socks. (RT 11:1338-1341.) Appellant asked her if she had seen Carlos Arias and Luke. (RT 11:1341- 1344, 1343.)

The prosecution presented the testimony of two neighbors who heard gunshots and looked outside. One neighbor, Matthew Walker, saw two figures come from the backyard of the house next to Luke's house and enter a white Cadillac. (RT 10:1309-1312, 1317-1319.) Another neighbor, Marjorie Holder, looked out her window after she heard the shots and saw a male passenger, wearing dark pants and a white t-shirt, get out of a white Cadillac and stand on the corner. (RT 13:1599-1601.) The person stood there for less than two minutes and then got back into the vehicle before it left the area. (RT 13:1601.)

The prosecution also presented Alejandro Delaloza's tape-recorded statement to the police, which was made on October 24, 1997 after his arrest.[14] (RT 12:1443-1444; CT 12:3280-3281 [People's Exh. 37 [audiotape]; CT Supp. IV:109-142 [People's Exh. 38 [transcript].)

Delaloza stated that he and appellant went to the house on Goodhue Street to talk to Monique Martinez (Laraine Martinez's daughter). When they arrived, Delaloza parked around the corner and appellant went to the house. While

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[14] Delaloza's testimonial out-of-court statements made during police interrogation were entirely inadmissible, however, as a violation of appellant's constitutional rights to due process, confrontation, and a reliable penalty determination (Cal. Const., art. I, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.). (*Post*, § X.)

Delaloza was sitting in the car, he heard gunshots and saw appellant running. He thought appellant was being shot at because when appellant was running he could still hear shots being fired. (RT 12:1443-1444; CT Supp. IV:109-142.)

As explained below, the evidence is insufficient as a matter of law to sustain a finding that appellant perpetrated the killings because 1) the testimony of the prosecution witnesses as to the identity of the shooter was unreliable and 2) there is substantial physical evidence pointing to appellant's innocence and implicating Delaloza as the likely perpetrator of the Molina and Murillo homicides.

Luke's purported identification of appellant was entirely unreliable. He consumed drugs earlier that day, impairing his ability to accurately observe the events. (RT 10:1232-1233, 1237-1238.) He admitted that after the shots were fired he looked out through the window and only saw the person for a couple of seconds. (RT 10:1059-1066.) He did not view the person's face, but instead only caught a glimpse of the person from behind in the distance. (RT 10:1059-1066.) It was too dark to tell what the person was wearing, and thus Luke could not identify the person, although he *assumed* it was appellant because he had seen appellant earlier. (RT 10:1059-1066.)[15]

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[15] Appellant also impeached Luke's testimony with an admission that although he had earlier identified appellant, Delaloza and Castro as members of the Cole Street gang, Luke did not in fact know whether they were members of any gang. (RT 10:1281.)

Bissonnette's assumption that it was appellant running away from the scene is consistent with an erroneous identification based on an expectation of seeing a particular person, as explained by the defense eyewitness identification expert Dr. Kathy Pezdak, Ph.D. (RT 19:2850-2852.) Dr. Pezdak, an eyewitness identification expert, testified about a hypothetical situation where a witness named Luke encounters appellant, and then runs away. Appellant was wearing a black jacket. Later that night while lying on a bed without any sleep, Luke hears a series of gunshots. He gets up and peeks out the window. Looking across the street, he sees a person for one or two seconds running away. But because it is dark outside and the only illumination is from a single streetlight across the street, he does not see the person's face and he cannot tell what the person is wearing. (RT 19:2849-2851.) Dr. Pezdak testified that under these circumstances Luke could not possibly see what the person looked like, and thus it would be very unlikely that he could correctly identify the suspect. (RT 19:2850-2852.)

Dr. Pezdak testified that if the witness had an expectation of seeing a particular person, but did not get a good look at the person, then that expectation could result in an erroneous identification. (RT 19:2856.) Dr. Pezdak testified on direct examination, in part: "The witness expects to see a person, sees this vague thing out there for one or two seconds, confirms his expectation. Doesn't

perceive a particular person, but confirms his expectation in his own mind, and thereafter that's who he claims it was, claims he can recognize, and so forth." (RT 19:2856.)

Dr. Pezdak testified on cross-examination, in part, as follows:

Q: What if the clothing that Luke described is consistent with the clothing that Richard was wearing during the first confrontation a few blocks away? Wouldn't that bolster or at least support the subsequent identification?

A: If he actually saw that clothing, but in fact if he said to the police, I – the lighting was so poor I couldn't see what the clothing looked like, but then later reported a heavy black jacket. I would say that's a case where expectation is effecting [sic] perception. You know, if initially a witness said I couldn't tell what the clothing was because it was too dark, but then later said he had on the same dark black jacket, that could be just he remembered the dark jacket from the earlier incident, so over time, his expectations and memory is [sic] just being fulfilled by the expectation. But if he literally said I couldn't tell what his clothes was [sic] because it was too dark, I take him at his word.

Q: I see. And were you present when Luke Bissonnette testified in this courtroom?

A: No. I was excluded.

Q: And wouldn't it have been beneficial for you to actually see his demeanor in answering these questions to actually evaluate the degree of certainty in his identification?

A: No. Certainty is not a good reflection of accuracy. A witness has expressed certainty is a [sic] personality characteristic. We know from a number of studies that have been done that witness confidence, witness certainty is not a good indication of whether that witness is likely to be correct or incorrect. So, no. Judging – looking at a witness's demeanor, looking at the presentation style,

> looking at their confidence or certainty is not a good way to judge whether they really saw the person or not. [RT 19:2868-2869.]

Dr. Pezdak testified that in her opinion Luke's eyewitness identification testimony was very unreliable. (RT 19:2872.)

"Erroneous identification of criminal suspects has long been recognized by commentators as a crucial problem in the administration of justice." (Levine & Tapp, *The Psychology of Criminal Identification: The Gap From Wade to Kirby* (1973) 121 U.Pa.L.Rev. 1079, 1081.) Numerous examples of misidentification have been extensively documented and the problems of eyewitness identification are well chronicled in the legal and psychological literature. Over three decades ago, the United States Supreme Court stated, "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." (*United States v. Wade* (1967) 388 U.S. 218, 228 [87 S.Ct. 1926, 18 L.Ed.2d 1149].) The United States Supreme Court also noted "the high incidence of miscarriage of justice" caused by such mistaken identifications, and warned that "the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest." (*Id.* at pp. 228-229.) As Justice Marshall pointed out in his dissent in *Manson v. Brathwaite* (1977) 432 U.S. 98, 125 [97 S.Ct. 2243, 53 L.Ed.2d 140] in referring to several additions to the literature: "Studies since *Wade* have only reinforced the validity

of its assessment of the dangers of identification testimony." (*Id.* at p. 125.) Subsequently, this Court observed:

> The rule that the testimony of a single witness is sufficient to prove identity (see Evid. Code, § 411) is premised in part on the assumption that an eyewitness identification is generally reliable. Yet Judge Hufstedler has declared that premise to be "at best, highly dubious, given the extensive empirical evidence that eyewitness identifications are not reliable." (*United States v. Smith* (9th Cir. 1977) 563 F.2d 1361, 1365 (conc. opn.).) And with his characteristic vigor, Chief Judge Bazelon has called on the courts to face up to the reliability problems of eyewitness identification, to inform themselves of the results of scientific studies of those problems, and to allow juries access to that information in aid of their factfinding tasks. (*United States v. Brown* (D.C. Cir. 1972) 461 F.2d 134, 145-146, fn. 1 (conc. & dis. opn.).) [*People v. McDonald* (1984) 37 Cal.3d 351, 364.]

The qualified, inconclusive eyewitness identification made by Luke, suggesting that appellant was the shooter, was thus too unreliable to sustain convictions for first degree murder in a capital case because it fails to meet the substantial evidence test set forth above and it fails to meet the heightened verdict reliability requirement at the guilt phase of a capital trial. The most that can be said from reviewing the testimony of Luke is that he *suspected* that appellant might be the shooter; but with only a fleeting glimpse of the back of the shooter in the distance at night, he could not be certain of the identification. The jury could not reasonably infer from Luke's testimony that appellant perpetrated the killings. (Cf. *People v. Morris*, *supra*, 46 Cal.3d at p. 21 ["A reasonable inference . . . 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 the evidence rather than . . . a mere speculation as to probabilities without evidence."].)

Further, Roxanne Bissonnette's testimony identified appellant earlier that morning – well before the shooting – and thus did not establish that appellant was the shooter. (RT 11:1336-1341.) Indeed, her testimony about appellant wearing white socks (RT 11:1338-1341) stands in stark contrast to the omission of such an identifying feature in Luke's testimony. (RT 10:1111-1201.) The testimony of the two neighbors, Walker and Holder, identified Delaloza's white Cadillac at the scene, but they did not identify the shooter. (RT 10:1309-1312, 1317-1319, 13:1599-1601.)

Delaloza's statement to the police, which placed appellant at the scene, did not identify appellant as the shooter. (RT 12:1443-1444; CT Supp. IV:109-142.) Delaloza's statement also is unreliable because Delaloza's white Cadillac was at the scene of the shooting, and thus Delaloza had a motive to fabricate and shift blame to another for the shooting.

Moreover, the physical evidence revealed that Delaloza was the likely perpetrator of the Molina and Murillo homicides. Delaloza was wearing clothing similar to that of the shadowy figure seen by Luke, and thus could have been the shadowy figure running away from the double homicide. (RT 9:988-989,

11:1361-1367; 19:2878-2880.) A black jacket and two sweatshirts, both with hoods, were found at Delaloza's residence, but the prosecution never tested these items for gunshot residue. (RT 19:2873-2878.) The 9-millimeter ammunition found at Delaloza's residence matched the 9-millimeter ammunition from the crime scene. (RT 13:1692-1695.)

Prosecution firearm examiner Richard Catalani testified on cross-examination that the 9-millimeter bullet recovered from Delaloza's residence and the 9-millimeter shell casings found at the Goodhue Street location had been cycled through the same firearm. (RT 13:1693-1695.)

Appellant presented evidence that no gunshot residue particles were found on the black jacket found in his residence. (RT 19:2832-2833; People's Exh. 5.) Yet, if eleven rounds were fired from a 9-millimeter handgun, a firearm expert would expect gunshot residue to be found on any jacket the shooter was wearing. (RT 19:2840-2841.)

Deborah Anderson, senior criminalist employed by the Los Angeles County Sheriff's Department, testified that in preparation for the gunshot residue test on the black jacket (People's Exh. 5) she sampled the inside and outside surfaces of both sleeves and the inside and outside surface areas of the pockets. (RT 20:2897-2899.) Anderson testified that the more shots fired, and the larger the caliber of the gun, the greater the likelihood of residue being deposited on the

gun, hand, or clothing adjacent to the weapon. (RT 20:2906-2907.) Appellant put on the jacket in front of Anderson and the jury, and demonstrated that, "with the hands extended, the jacket sleeves come down past the knuckles, almost to the middle of the fingers." (RT 20:2908-2910.)

Debra Kowal, a criminalist employed by the Los Angeles County Department of Coroner, conducted a gunshot residue test on appellant's black jacket. (RT 19:2827-2829.) Kowal analyzed a sample collected from the black jacket and found no particles of gunshot residue on the sample collected from the jacket. (RT 19:2832-2833.) The magnification was set at about 550x, allowing Kowal to see particles of a submicrometer size; for comparison, one hair is about 150 micrometers. (RT 19:2832-2833.) If a person is wearing a jacket and fires a weapon, then Kowal would expect some kind of gunshot residue to be present. (RT 19:2840-2841.) Indeed, the more times the firearm is discharged, the more gunshot residue Kowal would expect to find. (RT 19:2843.)

Lawrence Baggett, a firearms expert, testified that the firing of eleven rounds from a 9-millimeter pistol should deposit gun shot residue on the hand, which is not visible. (RT 20:2921.) The firing of a 9-millimeter handgun will deposit dirt on the hands of the person firing the handgun, and the handgun itself will get dirty with the firing of only three or four rounds. This is so because the partially burned gunpowder goes forward out of the barrel, but the burned

powder residue goes backward onto the gun. If eleven rounds are fired through a 9-millimeter semiautomatic handgun, there will be gunpowder, gunshot residue, soot, and smoke debris from the firing of the weapon, both on the gun and on the hand of the shooter. The residue on the gun will be a visible black residue from the carbonation. There may be visible debris on the hand. He would also expect to find gunshot residue that is not visible on the hand of the shooter. If the shooter fired eleven shots from such a handgun wearing a black jacket which extended past the knuckles and almost to the middle of the fingers, Baggett would expect a powder residue to be on the fabric of the jacket. (RT 20:2921-2923.)

Accordingly, the evidence does no more than raise a suspicion of appellant's involvement, which alone is insufficient to sustain appellant's conviction for the murders of Molina and Murillo. (Cf. *People v. Reyes* (1974) 12 Cal.3d 486, 500 ["Evidence which raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction."]; *People v. Trevino* (1985) 39 Cal.3d 667, 698-699.)

Reversal of appellant's convictions in counts 4 and 5 is required. (Cf. *Jackson v. Virginia, supra*, 443 U.S. at p. 318 [a conviction unsupported by substantial evidence denies a defendant due process of law]; *People* v. *Bean*, *supra*, 46 Cal.3d at p. 932.)

III.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN FINDINGS IN CONNECTION WITH THE CONVICTION FOR CONSPIRACY TO COMMIT MURDER OF JAIME CASTILLO (COUNT 6) THAT APPELLANT AGREED OR CONSPIRED TO COMMIT MURDER AND THAT HE HAD THE SPECIFIC INTENT TO KILL CASTILLO, THEREBY REQUIRING REVERSAL OF THE CONVICTION IN COUNT 6 FOR A DENIAL OF THE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR AND RELIABLE JURY TRIAL (CAL. CONST., ART. I, §§ 7, 15 & 17; U.S. CONST., 5TH, 6TH, 8TH & 14TH AMENDS.)

A. INTRODUCTION

Appellant was found guilty in count 6 of conspiracy to commit murder of Jaime Castillo, on or between January 1, 1998 and January 15, 1998, a violation of Penal Code section 182, subdivision (a)(1). (CT 12:3457-3458; RT 25:3827-3828.) As explained below, there is insufficient evidence, which is reasonable, credible, and of solid value, to sustain findings that appellant agreed or conspired to commit murder and that he had the specific intent to kill Castillo.

B. STANDARD OF REVIEW

The standard of review in assessing a claim of insufficiency of the evidence, the heightened verdict reliability requirement in a capital trial, and the California and federal constitutional violations that result from a conviction unsupported by the requisite evidence at trial, as here, are set forth in section II.B., *ante*, and incorporated herein. (Cf. *People v. Johnson, supra*, 26 Cal.3d at

p. 578; *Beck v. Alabama, supra*, 447 U.S. at pp. 627-646; *White v. Illinois, supra*, 502 U.S. at pp. 363-364; *Jackson v. Virginia, supra*, 443 U.S. at pp. 317-320.)

C. THERE IS INSUFFICIENT EVIDENCE, WHICH IS REASONABLE, CREDIBLE, AND OF SOLID VALUE, TO SUSTAIN THE FINDINGS THAT APPELLANT AGREED OR CONSPIRED TO COMMIT MURDER AND THAT HE HAD THE SPECIFIC INTENT TO KILL CASTILLO

A conspiracy consists of two or more persons conspiring to commit any crime. (Pen. Code, § 182.) The defendant and another person must have the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act by one or more of the parties to the agreement in furtherance of the conspiracy. (Pen. Code, § 184; *People v. Russo* (2001) 25 Cal.4th 1124, 1131; RT 24:3762-3769, 3777-3778.)

The trial court instructed on conspiracy to commit murder only, with the target offense being "the murder of Jamie Castillo." (RT 24:3766.) The trial court did *not* instruct the jury on any other conspiracy (e.g., conspiracy to commit witness intimidation), nor did it instruct on any other target offense (e.g., witness intimidation). Accordingly, the natural and probable consequences doctrine is not relevant to the analysis whether appellant committed the charged offense of conspiracy to commit murder of Castillo. (*People v. Cortez* (1998) 18 Cal.4th 1223, 1238-1239 [the court has a sua sponte duty to instruct on the elements of the offense alleged to be the target of the conspiracy].)

A conviction for conspiracy to commit murder requires a finding of *dual specific intents*, i.e., the intent to agree and the intent to kill. (*People v. Cortez*, *supra*, 18 Cal.4th at pp. 1238-1239; *People v. Jurado* (2006) 38 Cal.4th 72, 120 ["'A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act "by one or more of the parties to such agreement" in furtherance of the conspiracy'"].) The requirement of dual specific intents makes the mental state for conspiracy to murder identical to premeditation and deliberation as used in Penal Code section 189. (*People v. Cortez, supra*, 18 Cal.4th at pp. 1238-1239.)

In other words, the law on conspiracy to commit murder requires that the defendant "intend to agree" and that the *defendant himself* (not merely two or more other conspirators) "intend to kill." (*Ibid.*) A conspiracy to commit murder may exist if, among other things, "at least two" of the participants intended to kill. (*People v. Swain* (1996) 12 Cal.4th 593, 613.) But for defendant to be guilty of the crime of conspiring to commit murder, he had to have been one of the participants who harbored the specific intent to kill. (*People v. Morante* (1999) 20 Cal.4th 403, 416 ["[a] conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to

commit an offense, as well as the specific intent to commit the elements of that offense"].) Accordingly, if appellant only intended a conspiracy to intimidate and never harbored the specific intent that Castillo be killed, he could not be convicted of conspiracy to commit murder. (Cf. *People v. Cortez, supra*, 18 Cal.4th at pp. 1238-1239; *People v. Jurado, supra*, 38 Cal.4th at p. 123; *People v. Swain* (1996) 12 Cal.4th 593, 600; *People v. Petznick* (2003) 114 Cal.App.4th 663, 680-681 ["for defendant to be guilty of the crime of conspiracy to commit murder, he had to have been one of the participants who harbored the specific intent to kill"].)

Moreover, statements of coconspirators cannot be considered against the defendant unless and until the prosecution has proven by "independent evidence" that "the person against whom it was offered was *participating in the conspiracy before or during that time* . . . ." (RT 24:3768-3769 [emphasis added]; CT 12:3404; CALJIC No. 6.24.) In other words, the jury was required to make the preliminary finding whether appellant joined the conspiracy to murder Castillo before it could consider statements of coconspirators against him, and only then could it consider the statements of coconspirators made *at or after the time that appellant joined the conspiracy*. (Cf. *People v. Prieto* (2003) 30 Cal.4th 226, 251, fn. 10; *In re Hardy* (2007) 41 Cal.4th 977, 995-996; Evid. Code, § 1223.)

Here, although there was evidence appellant was concerned Castillo might provide some unspecified testimony against him (RT 15:2033-2034), the evidence is woefully insufficient to sustain a finding that appellant agreed or conspired to commit murder and that he had the specific intent to kill Castillo.

The prosecution presented evidence that on January 15, 1998, while appellant was incarcerated in county jail on charges relating to the murders of Molina (count 4) and Murillo (count 5), Jesus Marin drove Castillo and codefendants Castro, Bermudez and Tapia to the San Gabriel Mountains, where Castro killed Castillo by shooting him in the back of the head. (RT 15:2070-2074, 2086-2088, 2090.) The prosecution sought to link appellant to a conspiracy to kill Castillo by attempting to show that 1) appellant was concerned that Castillo would provide testimony against him in the case involving Molina and Murillo and 2) appellant solicited the murder of Castillo through a series of telephone calls he initiated from county jail. (RT 18:2698-2700, 2711-2723, 2727; People's Exhs. 80 & 92.)

Prosecution witnesses Marin, McGuirk (Marin's wife), and Miranda (McGuirk's friend) testified to a number of telephone calls that appellant placed to Marin's apartment where appellant spoke with, at various times, Marin and codefendants Castro, Bermudez and Tapia. (RT 15:2023-2044, 16:2334-2368.) Yet none of the telephone calls established the necessary intents.

Marin testified that in December 1997, appellant called Marin's apartment and spoke with codefendants Castro and Bermudez. During the conversation Castro mentioned Castillo and said, "I'll handle it." (RT 15:2023-2025.) After the conversation, Castro stated appellant told him "Cartoon [i.e., Castillo] was gonna rat him out, that he was gonna testify against him and *tell fucking Cartoon to shut up, keep his mouth shut.*" (RT 15:2031 [emphasis added].) A day or two later, appellant called and told Marin that Castillo was "gonna rat him out" (RT 15:2033) and that Marin should tell Castillo "*not to say shit*, that that's wrong." (RT 15:2034 [emphasis added].)

Although evidence that appellant told Castro and Marin to tell Castillo to be quiet might be sufficient to sustain a finding of conspiracy to commit witness intimidation (Pen. Code, §§ 182, subd. (a)(1), 136.1, subd. (c)), a conspiratorial agreement to intimidate a witness is insufficient as a matter of law to sustain a conviction for conspiracy to commit murder. (*People v. Morante, supra*, 20 Cal.4th at p. 416 [for the defendant to be guilty of the crime of conspiring to commit murder, he had to have been one of the participants who harbored the specific intent to kill].)

The conversations identified above evidence neither an agreement to kill nor an intent to kill, and thus are insufficient to sustain appellant's conviction for conspiracy to commit murder. (Cf. *People v. Jurado, supra*, 38 Cal.4th at p. 123

["{T}he crime of conspiracy requires dual specific intents: a specific intent to agree to commit the target offense, and a specific intent to commit that offense"].)

Nor did the rest of the State's evidence established that appellant had the necessary intents. Marin testified that after these phone calls there were several conversations between Castro, Bermudez and Tapia in which a plan to harm Castillo was mentioned. (RT 15:2035-2036.) In one conversation there was mention that Tapia would "blast" Castillo. (RT 15:2036.) Marin then testified that Castro, Bermudez and Tapia discussed a plan to kill Castillo by driving Castillo to the mountains and shooting him. (RT 15:2036-2052.) Tapia asked Marin to drive, and so Marin agreed to be the driver. (RT 15:2041-2044.) Appellant did not participate in any of these conversations. (RT 2035-2044.)

Nor did the prosecution present evidence that appellant was even aware of these conversations between Castro, Bermudez and Tapia. Any purported plan to kill Castillo thus could not be attributed to appellant. (Cf. *People v. Long* (1907) 7 Cal.App. 27, 33 ["Conspiracies cannot be established by suspicions. There must be some evidence. Mere association does not make a conspiracy. There must be evidence of some participation or interest in the commission of the offense."]; *People v. Prevost* (1998) 60 Cal.App.4th 1382, 1400 [while mere association cannot establish a conspiracy, *evidence of participation* with the

evidence of the association may support an inference of a conspiracy to commit the offense].)

McGuirk testified she received several telephone calls from appellant at the apartment. (RT 16:2334-2339.) During one call Castro stated that Castillo was going to testify against appellant and that appellant should not worry about it as Castro would take care of it. (RT 16:2341, 2343-2347.) Castro's statement that he would take care of it is consistent with appellant's earlier request to tell Castillo to be quiet. (See RT 15:2034.) McGuirk did *not* testify that appellant stated an intent to harm Castillo, nor did she testify that Castro mentioned harming Castillo. (See RT 16:2341-3447.) The conversation neither suggests, nor gives rise to a reasonable inference of, an agreement to kill or an intent to kill, and thus is insufficient to sustain appellant's conviction for conspiracy to commit murder. (Cf. *People v. Jurado, supra*, 38 Cal.4th at p. 123.)

Miranda testified that in early January 1998, approximately one week before Castillo was killed, she was at Marin's apartment when appellant called from county jail and spoke with Castro and Bermudez. (RT 17:2461-2467, 2475, 2496.) She heard either Castro or Bermudez mention Castillo's name. (RT 17:2467.) She heard Castro say, "Oh. You want us to – you want us to get rid of him –." (RT 17:2466.) She then heard Castro say, "Yeah. Me and Artie [Bermudez] will get rid of 'em." (RT 17:2466; see RT 17:2468.) However,

when the prosecutor asked Miranda to recount the precise substance of the conversation, she clarified her previous testimony, stating,

> Um, I heard that, "Oh. He's gonna testify against you in your case? Oh. Don't worry. We're gonna get rid of him. Me and Artie's gonna get rid of him." [RT 17:2468.]

The prosecutor then asked, "Did you hear anything that sounded like the voice of Artie reacting to what Joe [Castro] was saying regarding Cartoon [i.e., Castillo]?" (RT 17:2468.) Miranda responded, "Just laughing." (RT 17:2468.) In other words, Miranda only overheard Castro telling appellant they were "gonna get rid of him." She did not overhear Castro stating that appellant requested that they get rid of him. Nor did Miranda testify to any statement that might have suggested appellant's response, if any, to Castro's statement. Miranda thus did not overhear any statement from which it could be inferred that appellant solicited a killing or that appellant intended a killing. Accordingly, the conversation neither suggests, nor gives rise to a reasonable inference of, an agreement to kill or an intent to kill, and thus it is insufficient to sustain appellant's conviction for conspiracy to commit murder. (Cf. *People v. Jurado, supra*, 38 Cal.4th at p. 123.)

In *United States v. Sacerio* (5th Cir. 1992) 952 F.2d 860, for example, the defendant agreed to drive a car for a friend from Miami to New Orleans. (*Id.* at p. 862.) He was stopped in Mississippi and, after consenting to a search of the

car, two kilos of cocaine were discovered hidden in the car. (*Ibid.*) In the meantime, the defendant had requested a friend to come out and help him. (*Ibid.*) When the room was searched where the defendant and his friend were staying, additional cocaine was found. (*Ibid.*) The Fifth Circuit Court of Appeals held that the evidence did not support the defendant's (or his friend's) conviction for conspiracy to possess the cocaine in the car. (*Id.* at pp. 865-866.) The court stated, "Although some of the circumstances are suspicious, mere suspicion cannot support a verdict of guilty." (*Id.* at p. 863.)

The insubstantial evidence of appellant's intent in the instant case – where the prosecution was required to prove beyond a reasonable doubt that appellant had the specific intent to commit murder as the object of the conspiracy and that he had the specific intent to kill – stands in stark contrast to cases finding sufficient evidence of a criminal attempt (which also require a finding of a specific intent to commit an offense), which have emphasized the clear nature of the evidence of defendant's criminal intent. (Cf. *People v. Parrish* (1948) 87 Cal.App.2d 853, 855-856; *People v. Bonner* (2000) 80 Cal.App.4th 759, 764.)

For example, in *People v. Parrish, supra*, 87 Cal.App.2d 853, the court found substantial evidence to support the defendant's conviction for attempted murder of his wife. (*Id.* at p. 855-856.) The defendant engaged an associate to help kill his wife. (*Id.* at p. 855.) They went to the wife's house. (*Ibid.*) The

defendant had a loaded gun and listened outside a window to make sure she was home. (*Ibid.*) The defendant sent his associate into the house with instructions to choke his wife, and then let the defendant into the house so he could kill her. (*Ibid.*) The associate was a police informant. (*Ibid.*) Officers arrived before the defendant could get into the house. (*Ibid.*) The appellate court found that the defendant's conduct outside the house, along with his clear intent, was sufficient to constitute an attempt. (*Id.* at pp. 855-856 [defendant's intent to kill was revealed in his out-of-court statement that he intended to kill his wife].)

In *People v. Bonner, supra*, 80 Cal.App.4th 759, the defendant was convicted of two counts of attempted robbery, with the victims being a hotel manager and his assistant. (*Id.* at p. 764.) The defendant had formerly worked at the hotel, and knew that the manager and assistant routinely took a large deposit of hotel receipts to the bank on Monday at the beginning of each month, using an elevator to get to the manager's car in the hotel garage. (*Id.* at p. 761.) The defendant went to a laundry room on the garage level on the first Monday of the month, wearing a mask and carrying a pistol. However, he was discovered by other employees and fled from the scene before coming into contact with the intended victims. (*Id.* at pp. 761-762.) The appellate court rejected the defendant's argument that since he never came into actual contact with the victims there was insufficient evidence of attempted robbery. (*Id.* at p. 764, fn.

3.) "It was [the defendant's] clear intention to rob [the manager and assistant manager]. He made detailed preparations for the crime, went armed to the scene, placed a mask over his face, waited in hiding moments before his victim's approach, and gave up the enterprise only when discovered by other hotel employees. The evidence was sufficient to convict appellant of attempted robbery. [Citations.]" (*Id.* at p. 764, fn. 3.)

In contrast to the clear nature of the defendant's criminal intent shown in *People v. Parrish, supra*, 87 Cal.App.2d 853 and *People v. Bonner, supra*, 80 Cal.App.4th 759, the prosecution's evidence showed only that appellant intended that Castillo be told not to talk (RT 15:2034), an intent perhaps sufficient to support a conspiracy to intimidate a witness, but entirely insufficient to support an agreement to kill and a specific intent to kill. (Cf. *People v. Ford* (1983) 145 Cal.App.3d 985, 990; Pen. Code, § 136.1.)

Moreover, although Castro stated an intent to kill Castillo (RT 15:2036-2052), there is no credible evidence that appellant agreed with Castro to the killing and harbored the specific intent to kill Castillo. The jury thus could not reasonably infer, *absent speculation*, that appellant formed the requisite dual specific intents. (Cf. *People v. Morris, supra*, 46 Cal.3d at p. 21 ["A reasonable inference . . . 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 the evidence rather than . . . a mere speculation as to probabilities without evidence."]; *People v. Reyes, supra*, 12 Cal.3d at p. 500; *People v. Trevino* (1985) 39 Cal.3d 667, 698-699.)

Further demonstrating the insufficiency of the evidence is the jury's failure to return a true finding on several of the overt acts alleged in connection with the charge of conspiracy to commit murder. The prosecution alleged nine overt acts. (CT 12:3457-3458.) The jury returned true findings on only five of the overt acts (Nos. 3 through 7, inclusive), *none of which referred to conduct by appellant.* (CT 12:3457-3458; RT 25:3828-3830.)

Although a finding of only one overt act is sufficient (provided there is evidence of the requisite dual specific intents), and indeed committing murder in furtherance of a conspiracy to commit murder satisfies the overt act requirement,[16] the failure of the jury to return a true finding on the first overt act is particularly telling. The first charged overt act – and the only one to refer to conduct by appellant – states, "that on and between January 1, 1998 and January 14, 1998, Richard Penunuri, Joe Castro, Arthur Bermudez, and Alfredo Tapia, discussed a plan to murder Jaime Castillo . . . ." (CT 12:3457.) The jury did *not* find this overt act true (CT 12:3457; see RT 25:3828), thus revealing a failure of the prosecution to prove the truth of the overt act by unanimous verdict. The

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[16] *People v. Jurado, supra*, 38 Cal.4th at pp. 121-122.

jury's failure to return a true finding on the first charged overt act – which alleged that appellant, Castro, Bermudez, and Tapia, *discussed a plan to murder* Jaime Castillo – is consistent with the prosecution's failure, as shown above, to adduce evidence that appellant discussed a plan to kill Castillo, which further reveals that the evidence is woefully insufficient to sustain a finding that appellant entered into a conspiratorial agreement to kill and/or that he had the specific intent to kill.

Appellant's conviction in count 6 must be reversed. (Cf. *Jackson v. Virginia, supra*, 443 U.S. at p. 318 [a conviction unsupported by substantial evidence denies a defendant due process of law]; *People* v. *Bean, supra*, 46 Cal.3d at p. 932.)

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IV.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A FINDING THAT APPELLANT EITHER PERPETRATED THE KILLING OF JAIME CASTILLO, AIDED AND ABETTED THE KILLING, OR ENTERED INTO A CONSPIRATORIAL AGREEMENT TO KILL, THEREBY REQUIRING REVERSAL OF THE CONVICTION FOR MURDER IN COUNT 7 FOR A DENIAL OF THE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR AND RELIABLE JURY TRIAL (CAL. CONST., ART. I, §§ 7, 15 & 17; U.S. CONST., 5TH, 6TH, 8TH & 14TH AMENDS.)

A. INTRODUCTION

Appellant was found guilty of the first degree murder of Jaime Castillo (Pen. Code, §§ 187, subd. (a), 189; count 7). (CT 12:3459; RT 25:3833-3834.) As explained below, there is insufficient evidence, which is reasonable, credible, and of solid value, to sustain the finding that appellant either directly perpetrated the killing, aided and abetted the killing that was perpetrated by codefendant Castro, or that he joined in a conspiratorial agreement to kill with the specific intent to kill Castillo.

B. STANDARD OF REVIEW

The standard of review in assessing a claim of insufficiency of the evidence, the heightened verdict reliability requirement in a capital trial, and the California and federal constitutional violations that result from a conviction unsupported by the requisite evidence at trial, as here, are set forth in section II.B., *ante*, and incorporated herein. (Cf. *People v. Johnson, supra*, 26 Cal.3d at

p. 578; *Beck v. Alabama, supra*, 447 U.S. at pp. 627-646; *White v. Illinois, supra*, 502 U.S. at pp. 363-364; *Jackson v. Virginia, supra*, 443 U.S. at pp. 317-320.)

C. THERE IS INSUFFICIENT EVIDENCE, WHICH IS REASONABLE, CREDIBLE, AND OF SOLID VALUE, TO SUSTAIN A FINDING THAT APPELLANT PERPETRATED THE KILLING OF CASTILLO, THAT HE IS VICARIOUSLY LIABLE FOR THE KILLING, OR THAT HE ENTERED INTO A CONSPIRATORIAL AGREEMENT WITH THE SPECIFIC INTENT TO KILL CASTILLO

It is axiomatic that to be convicted of murder the defendant must have either actually perpetrated the murder (i.e., an unlawful killing with either express or implied malice) (*People v. Matlock* (1959) 51 Cal.2d 682, 685 [where person actually performs or actively assists in performing overt act resulting in death, his act constitutes murder]), or he must be vicariously responsible for the murder (*Taylor v. Superior Court* (1970) 3 Cal.3d 578, 582-583), or he must have entered into a conspiratorial agreement with the specific intent that the victim be killed (*People v. Morante, supra*, 20 Cal.4th at p. 416).

The jury was instructed on express malice murder, aiding and abetting, and conspiracy to commit murder. (RT 24:3756-3757 [aiding and abetting], 3774-3775 [express malice murder], 3777-3780 [conspiracy to commit murder].)

Appellant was incarcerated in county jail when Castillo was killed, and thus the evidence showed that he did not actually perpetrate the killing. (RT 9:1065-1067, 22:3439-3440.) The prosecution sought to hold appellant liable for the killing, however, on either of two theories: aiding and abetting and conspiracy

to commit murder. (RT 22:3432-3428, 3436-3441, 24:3703-3711, 3720-3721, 3756-3757.) As explained in section III., *ante*, which is incorporated herein by reference, the evidence is insufficient as a matter of law to sustain a finding of conspiracy to commit murder of Castillo (count 6). Accordingly, the focus of this argument is on the insufficiency of the evidence to sustain a finding of aiding and abetting liability.

The prosecution presented evidence that on January 15, 1998, while appellant was incarcerated in county jail, Jesus Marin drove Castillo and codefendants Castro, Bermudez and Tapia to the San Gabriel Mountains, where Castro killed Castillo by shooting him in the back of the head. (RT 15:2070-2074, 2086-2088, 2090.) The prosecution sought to prove that appellant was vicariously liable for the killing by attempting to show that 1) appellant was concerned that Castillo would provide evidence against him in the case involving Molina and Murillo and 2) appellant solicited the murder of Castillo through a series of telephone calls he initiated from county jail. (RT 18:2698-2700, 2711-2723, 2727; People's Exhs. 80 & 92.)

As explained below, the evidence is insufficient as a matter of law to sustain a finding of murder based on a theory that appellant aided and abetted the killing of Castillo. The jury was instructed, in part, as follows:

> A person aids and abets the commission of a crime if he, *with knowledge of the unlawful purpose of the perpetrator* and with

> the intent or purpose of committing or encouraging or facilitating the commission of the crime by act or advice, aids, promotes, encourages, or instigates the commission of a crime. [RT 24:3756 (emphasis added).]

"All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed." (Pen. Code, § 31; see *People v. Mendoza* (1998) 18 Cal.4th 1114, 1122-1123; *People v. Prettyman* (1996) 14 Cal.4th 248, 259-260.) Thus, a person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts. (*Ibid.*)

> It is important to bear in mind that an aider and abettor's liability for criminal conduct is of two kinds. First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also "for any other offense that was a 'natural and probable consequence' of the crime aided and abetted." [*People v. McCoy* (2001) 25 Cal.4th 1111, 1117, citing *People v. Prettyman, supra*, 14 Cal.4th at p. 260.]

In connection with aiding and abetting liability the trial court did *not* instruct the jury on the natural and probable consequences doctrine. The jury was only instructed on an aider and abettor's guilt of the intended crime.[17] (RT

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[17] The jury was instructed, in part: "A person aids and abets the commission of a crime if he, with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing or encouraging or facilitating the commission of the crime by act or advice, aids, promotes, encourages, or instigates the commission of a crime." (RT 24:3756; CT

24:3756-3757.) Accordingly, only an aider and abettor's guilt of the intended crime is relevant here.

"[A]n aider and abettor [must] act 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. Beeman* (1984) 35 Cal.3d 547, 560; *People v. Lee* (2003) 31 Cal.4th 613, 623-624.) Knowledge, therefore, is an essential element and must be proven. (*People v. Coria* (1999) 21 Cal.4th 868, 871-872.)

> When the crime at issue requires a specific intent, in order to be guilty as an aider and abettor the person "must share the specific intent of the [direct] perpetrator," that is to say, the person must "know[] the full extent of the [direct] perpetrator's criminal purpose and [must] give[] aid or encouragement with the intent or purpose of facilitating the [direct] perpetrator's commission of the crime." [*People v. Lee, supra*, 31 Cal.4th at p. 624, citing *People v. Beeman, supra*, 35 Cal.3d at p. 560.]

Accordingly, since the crime of murder as charged here required the specific intent to kill, to be guilty of murder on a theory of aiding and abetting the prosecution was required to prove beyond a reasonable doubt that appellant gave aid or encouragement with knowledge of the direct perpetrator's intent to kill and with the purpose of facilitating the direct perpetrator's accomplishment of the intended killing. (Cf. *ibid.*) In other words, the prosecution was required to prove that appellant harbored the specific intent to kill. (Cf. *ibid.*)

12:3384.)

Here, just as there was no credible, reliable evidence to support an inference that appellant agreed with codefendants Castro, Bermudez and/or Tapia to kill Castillo, the evidence also is insufficient as a matter of law to show that appellant aided and abetted them with the specific intent to kill Castillo. (*Ante*, § III.)

The prosecution's case against appellant, which was based on circumstantial evidence, rested on the testimony of prosecution witnesses Marin, McGuirk and Miranda recounting portions of several telephone conversations that were initiated by appellant from county jail. (*Ante*, Statement of Facts, § A.4.; RT 18:2698-2700, 2711-2723, 2727; People's Exhs. 80 & 92.)

Marin testified that during the period of time two or three weeks prior to the killing, appellant called Marin's apartment several times and spoke with various people, including codefendants Castro, Bermudez and Tapia. Marin recounted one conversation in which appellant called and the telephone was passed to Castro. He overheard Castro say, "I'll handle it." (RT 15:2023-2025.) After the conversation, Castro told Marin that appellant said that Castillo was "gonna rat" on him and that Castro should "tell . . . [Castillo] to shut up, keep his mouth shut." (RT 15:2031.) A couple days later, Marin received a call from appellant and was told essentially the same thing: i.e., to tell Castillo to not say anything. (RT 15:2033-2034].) As explained in section III.C, *ante*, there was no

testimony that in any of these conversations appellant suggested harming Castillo. Indeed, Marin testified that the plan to harm and/or kill Castillo was only mentioned during later conversations he overheard at the apartment between Castro, Bermudez and Tapia, none of which involved appellant. (RT 15:2035-2044.)

McGuirk testified that she also received several telephone calls from appellant at the apartment. (RT 16:2334-2339.) She recounted one conversation in which appellant called and the telephone was passed to Castro. She overheard Castro say that Castillo was going to testify against appellant and that appellant should not worry about it as Castro would take care of it. (RT 16:2341, 2343-3447.) Yet there was no testimony that during this conversation either appellant and/or Castro intended to harm Castillo. (*Ante*, § III.C.) Indeed, as appellant had asked Castro to talk to Castillo (RT 15:2031), the only reasonable inference is that Castro was telling appellant that he would "take care of it" by talking to Castillo.

Miranda testified that she was at the apartment and overheard Castro speaking on the telephone with appellant. (RT 17:2461-2467, 2475, 2496.) She, like Marin and McGuirk, was not actually privy to the call, but merely overheard some of what Castro was saying to appellant. Although she initially testified on direct examination to hearing Castro say, "Oh. You want us to – you want us to

get rid of him –" (RT 17:2466), moments later she clarified that she had actually heard Castro state, "Oh. He's gonna testify against you in your case? Oh. Don't worry. We're gonna get rid of him. Me and Artie's gonna get rid of him." (RT 17:2468.) In other words, Miranda only overheard Castro telling appellant they were "gonna get rid of him." She did *not* overhear Castro stating that appellant requested that they get rid of him. Nor did Miranda testify to any statement that might have suggested appellant's response, if any, to Castro's statement. Miranda thus did not overhear any statement from which it could be inferred that appellant solicited and/or encouraged a killing or that appellant intended a killing.

> A reasonable inference . . . 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 the evidence rather than . . . a mere speculation as to probabilities without evidence. [*People v. Morris*, *supra*, 46 Cal.3d at p. 21.]

Indeed, "[e]vidence which raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction." (*People v. Reyes* (1974) 12 Cal.3d 486, 500.) "[A]ll reasonable inferences must be drawn in support of the judgment. This rule, however, does not permit us to go beyond inference and into the realm of speculation in order to find support for the judgment. A finding . . . which is merely the product of conjecture and surmise may not be affirmed." (*People v. Rowland* (1982) 134 Cal.App.3d 1, 8-9; see *People v. Trevino* (1985) 39 Cal.3d 667, 698-699.)

Appellant's murder conviction in count 7 must be reversed for insufficient evidence that appellant participated in the commission of the offense, aided and abetted the offense, and/or entered into a conspiratorial agreement to kill Castillo. (Cf. *Jackson v. Virginia, supra*, 443 U.S. at p. 318 [a conviction unsupported by substantial evidence denies a defendant due process of law]; *People* v. *Bean*, *supra*, 46 Cal.3d at p. 932.)

/ / /

V.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE TRUE FINDING ON THE WITNESS-KILLING SPECIAL CIRCUMSTANCE, REQUIRING REVERSAL THEREOF AND REVERSAL OF THE DEATH JUDGMENT AS A DENIAL OF THE CONSTITUTIONAL RIGHTS TO TRIAL BY JURY AND DUE PROCESS, AND A VIOLATION OF THE CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT (CAL. CONST., ART. I, §§ 7, 15 & 17; U.S. CONST., 5TH, 6TH, 8TH & 14TH AMENDS.)

A. INTRODUCTION

The jury found true the witness-killing special circumstance (Pen. Code, § 190.2, subd. (a)(10)) in connection with the killing of Jamie Castillo in count 7. (CT 12:3459; RT 25:3834.) As explained below, there is insufficient evidence, which is reasonable, credible, and of solid value, to sustain a finding that appellant either directly perpetrated the killing, that he aided and abetted the killing that was perpetrated by codefendant Castro, or that he joined in a conspiratorial agreement to kill Castillo. Accordingly, the true finding on the witness-killing special circumstance must be set aside.

As explained below in subsection D., the invalid witness-killing special circumstance renders appellant's sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process because none of the other sentencing factors enabled the jury to give aggravating weight to the same facts and circumstances as the invalid sentencing factor. (Cf. *Brown v. Sanders* (2006) 546 U.S. 212, 220 [126 S.Ct. 884, 163 L.Ed.2d 723].)

B. STANDARD OF REVIEW

The standard of review in assessing a claim of insufficiency of the evidence, the heightened verdict reliability requirement in a capital trial, and the California and federal constitutional violations that result from a conviction unsupported by the requisite evidence at trial, as here, are set forth in section II.B., *ante*, and incorporated herein. (Cf. *People v. Johnson, supra*, 26 Cal.3d at p. 578; *Beck v. Alabama, supra*, 447 U.S. at pp. 627-646; *White v. Illinois, supra*, 502 U.S. at pp. 363-364; *Jackson v. Virginia, supra*, 443 U.S. at pp. 317-320.)

C. THERE IS INSUFFICIENT EVIDENCE, WHICH IS REASONABLE, CREDIBLE, AND OF SOLID VALUE, TO SUSTAIN A FINDING THAT APPELLANT PERPETRATED THE KILLING OF CASTILLO, THAT HE IS VICARIOUSLY LIABLE FOR THE KILLING, OR THAT HE ENTERED INTO A CONSPIRATORIAL AGREEMENT TO KILL CASTILLO, AND THUS THERE IS NO SUBSTANTIAL EVIDENCE THAT APPELLANT PHYSICALLY AIDED OR COMMITTED THE ACT CAUSING CASTILLO'S DEATH

The witness-killing special circumstance consists of the following elements: (1) a victim who witnessed a crime; (2) was intentionally killed; and (3) the purpose of the killing was either to prevent the victim from testifying about the crime he or she had witnessed or was in retaliation for testimony given; and (4) the killing was separate from the commission or attempted commission of the crime witnessed. (*People v. Garrison* (1989) 47 Cal.3d 746, 792; Pen. Code, § 190.2, subd. (a)(10); RT 24:3783-3788; CT 12:3420-3421.)

"The special circumstance requires that the defendant physically aid or commit the act causing death and that the killing be intentional, deliberate, and premeditated." (*People v. Ledesma* (2006) 39 Cal.4th 641, 726.)

As explained in sections III. & IV., *ante*, which are incorporated herein by reference, the evidence is insufficient as a matter of law to sustain a finding that appellant perpetrated the killing of Castillo, that he is vicariously liable for the killing, or that he entered into a conspiratorial agreement to kill Castillo. Accordingly, there is no substantial evidence that appellant physically aided or committed the act causing the death of Castillo, a necessary element of the witness-killing special circumstance. (Cf. *People v. Ledesma, supra*, 39 Cal.4th at p. 726.)

Reversal of the true finding on the witness-killing special circumstance is required. (Cf. *Jackson v. Virginia, supra*, 443 U.S. at p. 318 [a conviction unsupported by substantial evidence denies a defendant due process of law]; *People* v. *Bean*, *supra*, 46 Cal.3d at p. 932.)

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D. THE DEATH JUDGMENT MUST BE REVERSED BECAUSE THE JURY'S USE OF THE INVALID SENTENCING FACTOR – THE WITNESS-KILLING SPECIAL CIRCUMSTANCE – RENDERED THE SENTENCE UNCONSTITUTIONAL BY REASON OF ITS ADDING AN IMPROPER ELEMENT TO THE AGGRAVATION SCALE IN THE WEIGHING PROCESS AND NO OTHER SENTENCING FACTOR ENABLED THE JURY TO GIVE AGGRAVATING WEIGHT TO THE SAME FACTS AND CIRCUMSTANCES AS THE INVALID SENTENCING FACTOR

In *Brown v. Sanders, supra*, 546 U.S. 212, the United States Supreme Court articulated the following standard for determining prejudice when an aggravating factor is reversed:

> 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 (emphasis in original).]

The high court held that this test is *not* an inquiry based solely on the admissibility of the underlying evidence because "[i]f the presence of the invalid sentencing factor allowed the sentencer to consider evidence that would not otherwise have been before it, due process would mandate reversal without regard to the rule we apply here." (*Id.* at pp. 220-221.)

The issue that the high court confronted in *Brown v. Sanders, supra*, was "the skewing that could result from the jury's considering as aggravation properly admitted evidence that should not have weighed in favor of the death penalty." (*Id.* at p. 221.) As the high court explained, "such skewing will occur, and give rise to constitutional error, only where the jury could not have given aggravating

weight to the same facts and circumstances under the rubric of some other, valid sentencing factor." (*Ibid.*)

In *Brown v. Sanders, supra*, in connection with a home-invasion robbery where defendant and his companion invaded a home where they bound and blindfolded the male inhabitant and his girlfriend, at the penalty phase of the capital trial the jury found true four special circumstances (robbery-murder, burglary-murder, witness-killing, and "heinous, atrocious, or cruel" murder), each of which independently rendered him eligible for the death penalty. (*Id.* at p. 214, 223-224.) The jury then weighed a list of sentencing factors, including the circumstances of the crime, and sentenced defendant to death. (*Ibid.*) On appeal, this Court declared two of the special circumstances invalid (burglary-murder and "heinous, atrocious, or cruel" murder). (*Id.* at pp. 214-215, 223.) The burglary-murder special circumstance was set aside under the merger doctrine because the instructions permitted the jury to find a burglary (and thus the burglary- murder special circumstance) based on defendant's intent to commit assault, which was an element of homicide. (*Id.* at p. 223.) The "heinous, atrocious, or cruel" murder special circumstance was set aside because it was unconstitutionally vague. (*Id.* at p. 223.) This Court upheld the death judgment, however, because 1) the jury properly considered the two remaining special circumstances (eligibility factors) and 2) the facts and circumstances admissible to establish the

"heinous, atrocious, or cruel" murder and burglary-murder special circumstances were also properly adduced as aggravating facts bearing upon the "circumstances of the crime" sentencing factor. (*Id.* at pp. 214-215, 223.) Following reversal by the Ninth Circuit Court of Appeals, the high court reversed, stating:

> . . . [T]he jury's consideration of the invalid eligibility factors in the weighing process did not produce constitutional error because *all of the facts and circumstances admissible to establish the "heinous, atrocious, or cruel" and burglary-murder eligibility factors were also properly adduced as aggravating facts bearing upon the "circumstances of the crime" sentencing factor. They were properly considered whether or not they bore upon the invalidated eligibility factors.* [*Id.* at p. 224 (emphasis added).]

Here, the jury found true two special circumstances (witness-killing and multiple-murder). (CT 12:3456, 3459; RT 25:3826-3827, 3834.) For purposes of this argument (see, *post*, § VI. [invalid multiple-murder special circumstance]), although the invalid witness-killing special circumstance still leaves one eligibility factor (i.e., the multiple-murder special circumstance), reversal of the death judgment is required because the facts and circumstances admissible to establish the witness-killing special circumstances (i.e., among other things, that appellant was responsible for the murder of Castillo) were *not* properly adduced as aggravating facts bearing on any other sentencing factor. (Cf. *Brown v. Sanders, supra*, 546 U.S. at p. 220 [invalidated sentencing factor renders sentence unconstitutional "*unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances"].)

The witness-killing special circumstance must be set aside because the evidence is insufficient as a matter of law to sustain a finding that appellant perpetrated the killing of Castillo, that he is vicariously liable for the killing, or that he entered into a conspiratorial agreement to kill Castillo. (*Ante*, §§ III. & IV.) When the witness-killing special circumstance is removed from consideration, so too are the facts and circumstances admitted at trial in support thereof (i.e., that appellant perpetrated the intentional killing of Castillo, a victim who witnessed a crime), including the penalty phase aggravation evidence relating to the killing of Castillo and the victim impact evidence admitted in connection therewith. (See, *ante*, Statement of Facts, § A.4. & D.1.) Accordingly, the invalid sentencing factor renders appellant's sentence unconstitutional, in violation of due process, because none of the other sentencing factors enables the sentencer to give aggravating weight to *the same facts and circumstances*. (Cf. *Brown v. Sanders, supra*, 546 U.S. at p. 220.)

The witness-killing special circumstance must be set aside and the death judgment reversed.

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VI.

THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE TRUE FINDING ON THE MULTIPLE-MURDER SPECIAL CIRCUMSTANCE, REQUIRING REVERSAL THEREOF AND REVERSAL OF THE DEATH JUDGMENT AS A DENIAL OF THE CONSTITUTIONAL RIGHTS TO TRIAL BY JURY AND DUE PROCESS, AND A VIOLATION OF THE CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT (CAL. CONST., ART. I, §§ 7, 15 & 17; U.S. CONST., 5TH, 6TH, 8TH & 14TH AMENDS.)

A. INTRODUCTION

The jury found true the multiple-murder special circumstance (Pen. Code, § 190.2, subd. (a)(3)) in connection with the killings of Brian Molina and Michael Murillo in counts 4 and 5, respectively. (RT 25:3826-3827; CT 12:3456.) As explained below, there is insufficient evidence, which is reasonable, credible, and of solid value, to sustain the finding that appellant was a principal in the commission of either offense. Accordingly, the true finding on the multiple-murder special circumstance must be set aside.

As explained below in subsection D., the invalid multiple-murder special circumstance renders appellant's sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process because none of the other sentencing factors enabled the jury to give aggravating weight to the same facts and circumstances as the invalid sentencing factor. (Cf. *Brown v. Sanders, supra*, 546 U.S. at p. 220.)

B. STANDARD OF REVIEW

The standard of review in assessing a claim of insufficiency of the evidence, the heightened verdict reliability requirement in a capital trial, and the California and federal constitutional violations that result from a conviction unsupported by the requisite evidence at trial, as here, are set forth in section II.B., *ante*, and incorporated herein. (Cf. *People v. Johnson, supra*, 26 Cal.3d at p. 578; *Beck v. Alabama, supra*, 447 U.S. at pp. 627-646; *White v. Illinois, supra*, 502 U.S. at pp. 363-364; *Jackson v. Virginia, supra*, 443 U.S. at pp. 317-320.)

C. THERE IS INSUFFICIENT EVIDENCE, WHICH IS REASONABLE, CREDIBLE, AND OF SOLID VALUE, TO SUSTAIN A FINDING THAT APPELLANT PERPETRATED THE KILLING OF EITHER MOLINA OR MURILLO

The multiple-murder special circumstance requires a finding that appellant has been convicted of murder in the first degree and also has been convicted of at least one additional count of murder in the same proceeding. (*People v. Marshall* (1997) 13 Cal.4th 799, 852; Pen. Code, § 190.2, subd. (a)(3); RT 24:3783-3788.)

As explained in section II., *ante*, which is incorporated herein by reference, the evidence is insufficient as a matter of law to sustain a finding that appellant was a principal in the commission of either the murder of Molina (count 4) or the murder of Murillo (count 5). With the reversal of appellant's convictions in counts 4 and 5, there remains no substantial evidence that

appellant stands convicted of murder in the first degree and also has been convicted of at least one additional count of murder in the same proceeding.

Reversal of the true finding on the multiple-murder special circumstance is required. (Cf. *Jackson v. Virginia, supra*, 443 U.S. at p. 318 [a conviction unsupported by substantial evidence denies a defendant due process of law]; *People* v. *Bean*, *supra*, 46 Cal.3d at p. 932.)

D. THE DEATH JUDGMENT MUST BE REVERSED BECAUSE THE JURY'S USE OF THE INVALID SENTENCING FACTOR – THE MULTIPLE-MURDER SPECIAL CIRCUMSTANCE – RENDERED THE SENTENCE UNCONSTITUTIONAL BY REASON OF ITS ADDING AN IMPROPER ELEMENT TO THE AGGRAVATION SCALE IN THE WEIGHING PROCESS AND NO OTHER SENTENCING FACTOR ENABLED THE JURY TO GIVE AGGRAVATING WEIGHT TO THE SAME FACTS AND CIRCUMSTANCES OF THE INVALID SENTENCING FACTOR

The standard for determining prejudice when an aggravating factor is reversed and the federal due process violation arising therefrom are set forth in section V.D., *ante*, and incorporated herein. (Cf. *Brown v. Sanders, supra*, 546 U.S. at p. 220.)

Here, the jury found true two special circumstances (witness-killing and multiple-murder). (CT 12:3456, 3459; RT 25:3826-3827, 3834.) For purposes of this argument (see, *ante*, § V. [invalid witness-killing special circumstance]), although the invalid multiple-murder special circumstance still leaves one eligibility factor (i.e., the witness-killing special circumstance), reversal of the death judgment is required because the facts and circumstances admissible to

establish the multiple-murder special circumstances (i.e., that appellant was responsible for the murders of Molina and Murillo) were *not* properly adduced as aggravating facts bearing on any other sentencing factor. (Cf. *Brown v. Sanders, supra*, 546 U.S. at p. 220 [invalidated sentencing factor renders sentence unconstitutional "*unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances"].)

The multiple-murder special circumstance must be set aside because the evidence is insufficient as a matter of law to sustain a finding that appellant was a principal in the commission of either the murder of Molina (count 4) or the murder of Murillo (count 5). (*Ante*, § II.) When the multiple-murder special circumstance is removed from consideration, so too are the facts and circumstances admitted at trial in support thereof (i.e., that appellant perpetrated the intentional killing of Molina and Murillo, and that appellant stands convicted of murder in the first degree (i.e., Castillo) and also has been convicted of at least one additional count of murder in the same proceeding), including the penalty phase aggravation evidence relating to the killings of Molina and Murillo and the victim impact evidence admitted in connection therewith. (See, *ante*, Statement of Facts, § A.3. & D.1.) Accordingly, the invalid sentencing factor renders appellant's sentence unconstitutional, in violation of due process, because none of the other sentencing factors enables the sentencer to give aggravating weight

to *the same facts and circumstances.* (Cf. *Brown v. Sanders, supra*, 546 U.S. at p. 220.)

The multiple-murder special circumstance must be set aside and the death judgment reversed.

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VII.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION FOR ASSAULT WITH A FIREARM ON CARLOS ARIAS (COUNT 3) BECAUSE MERELY POINTING AN UNLOADED GUN AT SOMEONE – WITHOUT ANY EVIDENCE OF A VERBAL OR PHYSICAL THREAT TO DISCHARGE THE GUN AND WITHOUT ANY ATTEMPT TO ACTUALLY FIRE THE GUN – CONSTITUTES MISDEMEANOR BRANDISHING, NOT ASSAULT WITH A FIREARM, THEREBY REQUIRING REVERSAL OF THE CONVICTION FOR A DENIAL OF THE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR AND RELIABLE JURY TRIAL (CAL. CONST., ART. I, §§ 7, 15 & 17; U.S. CONST., 5TH, 6TH, 8TH & 14TH AMENDS.)

A. INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant was found guilty in count 3 of assault with a firearm on Carlos Arias, a violation of Penal Code section 245, subdivision (a)(2). (CT 12:3454; RT 25:3825.) The prosecution argued that the offense was shown by evidence that appellant pointed a gun at Arias, thereby placing him "in apprehension of being shot." (RT 22:3399.) The prosecution further argued that sufficient evidence the gun was loaded was shown by the fact that "the same gunman" fired the shots an hour later that killed Molina and Murillo. (RT 22:3400-3401.)

Appellant's conviction must be reversed because the evidence is insufficient as a matter of law to sustain the requisite finding that the gun was loaded. The record shows that while Arias was at the Hornell Street location a gun was pointed at him. (RT 10:1181-1182 ["pulled out a gun and put it to his head"]; CT Supp. Vol. IV-1, pp. 162 [pointed a gun].) The gun was not discharged. (RT 22:3399-3401; CT Supp. Vol. IV-1, pp. 161-163.) Nor did the

prosecution present evidence that the gunman's finger was on the trigger, or that the gunman attempted to fire the gun. (RT 22:3399-3401; CT Supp. Vol. IV-1, pp. 161-163.) Moreover, there were no verbal threats accompanying the display of the gun. (RT 22:3399-3401; CT Supp. Vol. IV-1, pp. 161-163.) Accordingly, there was no evidence, nor reasonable inference therefrom, that the gun was loaded.

Merely pointing a gun at another, without any attempt to actually fire the gun or without evidence that the gun was loaded, constitutes misdemeanor brandishing, not assault with a firearm. (Cf. *People v. Rodriguez* (1999) 20 Cal.4th 1, 11, fn. 3; *People v. Wolcott* (1983) 34 Cal.3d 92, 99; *People v. Sylva* (1904) 143 Cal. 62, 64.)

B. STANDARD OF REVIEW

The standard of review in assessing a claim of insufficiency of the evidence, the heightened verdict reliability requirement in a capital trial, and the California and federal constitutional violations that result from a conviction unsupported by the requisite evidence at trial, as here, are set forth in section II.B., *ante*, and incorporated herein. (Cf. *People v. Johnson, supra*, 26 Cal.3d at p. 578; *Beck v. Alabama, supra*, 447 U.S. at pp. 627-646; *White v. Illinois, supra*, 502 U.S. at pp. 363-364; *Jackson v. Virginia, supra*, 443 U.S. at pp. 317-320.)

C. THERE IS INSUFFICIENT EVIDENCE WHICH IS REASONABLE, CREDIBLE, AND OF SOLID VALUE TO SUSTAIN THE FINDING THAT APPELLANT COMMITTED AN ASSAULT WITH A FIREARM IN COUNT 3

Assault is defined by statute as "an unlawful attempt, *coupled with a present ability*, to commit a violent injury on the person of another." (Pen. Code, § 240 (emphasis added); see *People v. Williams* (2001) 26 Cal.4th 779, 784.) Assault (and thus assault with a firearm) is a general intent crime. (*People v. Chance* (2008) 44 Cal.4th 1164, 1170.) Nonetheless, assault requires an *intent* to commit a "violent act" which is "likely" to result in a touching of the victim. (*People v. Colantuono* (1994) 7 Cal.4th 206, 218, fn. 10.)

A conviction for assault may not be grounded upon an intent merely to frighten (*People v. Wolcott, supra*, 34 Cal.3d at p. 99) or upon mere recklessness (*People v. Brown* (1989) 212 Cal.App.3d 1409, 1419). The prosecution must prove the intent to apply physical force beyond a reasonable doubt. (*People v. Garcia* (1984) 159 Cal.App.3d 781, 787.)

> Thus a person who recklessly exhibits a weapon in a threatening manner which accidentally discharges injuring another does not commit an assault with a deadly weapon, but would be guilty of . . . [brandishing (Penal Code § 417)]. [*People v. Rocha, supra*, 3 Cal.3d at p. 898, fn 5.][18]

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[18] Brandishing a firearm (Pen. Code, § 417) is not a lesser included offense of assault with a deadly weapon. (*People v. Escarcega* (1974) 43 Cal.App.3d 391, 396.)

(Cf. *People v. Carmen* (1951) 36 Cal.2d 768, 775-76, disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12 [disapproving cases which held that mere reckless conduct alone can constitute assault]; *McGee v. United States* (D.C. 1987) 533 A.2d 1268, 1270 [where only attempted-battery assault is charged, the defendant's mere "brandishing" of a gun is not sufficient to prove the required intent to commit a battery].)

In *People v. Wilcott* (1983) 34 Cal.3d 92, this Court explained how the California law of assault differs from the common law definition.

> Penal Code section 240 defines assault as "[an] unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." So defined, assault under California law departs from the common law definition in two crucial respects. First, under the California definition "a conviction for assault may not be grounded upon intent only to frighten." [Citations omitted.] Second, to constitute an assault, the defendant must not only intend to commit a battery (*People v. Rocha* (1971) 3 Cal.3d 893, 899 . . .); he must also have the present ability to do so. [*People v. Wilcott, supra*, 34 Cal.3d at p. 99.]

The purpose behind the present ability requirement of assault is to show that the defendant has gone beyond the steps required for attempt. (*People v. Valdez* (1985) 175 Cal.App.3d 103, 112.) It constitutes "the actus reus of assault." (*People v. Chance, supra*, 44 Cal.4th at p. 1172.) This means that the defendant must have come closer to inflicting injury than required in order to satisfy the elements of an attempt. (*People v. Valdez, supra*, 175 Cal.App.3d at p. 112.) "[W]hen a defendant equips and positions himself to carry out a battery, he

has the 'present ability' required by section 240 if he is capable of inflicting injury on the given occasion, even if some steps remain to be taken . . . ." (*People v. Chance, supra*, 44 Cal.4th at p. 1172.) The present ability requirement of assault is met "[o]nce a defendant has attained the *means and location to strike immediately* . . . ." (*People v. Valdez, supra*, 175 Cal.App.3d at p. 113 [emphasis added].)

When addressing whether a defendant has the means to strike immediately, "courts have held [that] attempting to shoot someone with an unloaded gun does not constitute the crime of assault because the perpetrator lacks the 'present ability' to inflict injury." (*People v. Valdez, supra*, 175 Cal.App.3d at p. 111, citing *People v. Sylva, supra*, 143 Cal. at p. 64; *People v. Rodriguez, supra*, 20 Cal.4th at p. 11, fn. 3 ["A long line of California decisions holds that an assault is not committed by a person's merely pointing an (unloaded) gun in a threatening manner at another person"]; *People v. Lochtefeld* (2000) 77 Cal.App.4th 533, 542 & fn. 10 [applying rule that an assault cannot be committed by merely pointing an unloaded firearm at a victim]; *People v. Miceli* (2002) 104 Cal.App.4th 256, 269.)

Here, there was no testimony that the gun was loaded when the gunman pointed it at Arias. (RT 10:1181-1182, 22:3399-3401; CT Supp. Vol. IV-1, pp. 161-163.) The prosecution presented evidence that when Arias saw Luke

running from the gunman, Arias exited the vehicle and ran too, but saw the person point a gun at him. (RT 10:1181-1182; CT Supp. Vol. IV-1, pp. 161-163.) The evidence shows that the gunman did not actually place the gun against Arias's head or touch him with the gun but, rather, merely pointed the gun at Arias. (RT 10:1181-1182; CT Supp. Vol. IV-1, pp. 162 [the gunman was "pointing" the gun at him].)

In his statement to the police Arias stated,[19] in pertinent part as shown in the transcript of the taped statement:

> I fell asleep ... on the ... in the passenger seat ... Luke was outside smoking a cigarette ... an when I woke up ... I seen ... um ... that guy ... I guess Dozer or whatever ... tellin (unint) like ... charging like Luke ... so Luke runs into the back of the house ... the beige house of his grandpa's house ... so I get outta the car ... so I run around the car ... while that guy goes around ... arounda the car so ... like go in circles,.. so I jus take off ... ta left ... ta the left side of the house ... an after that I jus hop a couple fences . . . . [CT Supp. Vol. IV-1, p. 160 (grammatical errors in original).]

Arias further stated that he heard the person ask Luke, "[W]hose [sic] with you, whose [sic] with you?" (CT Supp. Vol. IV-1, p. 162.) Luke did not respond, but just "took off . . . ." (CT Supp. Vol. IV-1, p. 162.) Arias exited the vehicle. (CT Supp. Vol. IV-1, p. 162.) Arias was then asked by the detective

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[19] Arias's testimonial statements to the police, and the entirely of the evidence on the charge of assault with a firearm (Pen. Code, § 245), were admitted in violation of appellant's rights to confrontation, due process, effective assistance of counsel, and a fair and reliable jury trial (Cal. Const., art. I, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.). (*Post*, Argument, § IX.)

during the police interview, "He point (sic) something at you?" (CT Supp. Vol. IV-1, p. 162.) Arias responded, "Yeah . . . he was pointing it." (CT Supp. Vol. IV-1, p. 162.) Arias clarified that the person was pointing a gun. (CT Supp. Vol. IV-1, p. 162.)

For well over a century this Court has held that an assault is *not* committed by merely pointing an unloaded gun in a threatening manner at another person. (*People v. Fain* (1983) 34 Cal.3d 350, 357, fn. 6; *People v. Sylva, supra*, 143 Cal. at p. 64.)

Appellant recognizes that a defendant's statement and behavior while making an armed threat against a victim may support a jury's finding that the firearm used to make the threat was loaded. (Cf. *People v. Rodriguez, supra,* 20 Cal.4th at pp. 12-13; *People v. Lochtefeld, supra*, 77 Cal.App.4th at pp. 536, 541-542 [defendant's act of pointing a gun at officers, *with his finger on the trigger*, was an implied assertion the gun was charged; Lochtefeld's own words and actions, in both verbally threatening and in displaying and aiming the gun at others, fully supported the jury's determination the gun was sufficiently operable]; *People v. Mearse* (1949) 93 Cal.App.2d 834, 836-838 [evidence sufficient gun was loaded where, inter alia, the defendant commanded the victim to halt, *or he would shoot*].)

In *People v. Montgomery* (1911) 15 Cal.App. 315, for example, the defendant was enraged when he left a fight; upon his return he pointed a gun at the victim and said, "'*I have got you now* . . . .'" (*Id.* at p. 317 [emphasis added].) The appellate court held that even though there was no direct evidence that the gun was loaded, and despite the fact that the defendant testified that the gun was not loaded, the jury could reasonably reject the defendant's testimony and find that the gun was loaded. (*Id.* at p. 318.) In contrast to *Montgomery*, where the verbal threat implied that the gun was loaded, there was no evidence here that pointing the firearm at Arias was accompanied by a verbal threat of implied use.

In *People v. Daniels* (1993) 18 Cal.App.4th 1046, the evidence supported a conviction for assault with a firearm where the defendant pointed his gun at everyone in the room *and instructed them to break.* (*Id.* at p. 1049-1050.) Defendant argued that an assault is an unlawful attempt to commit a battery, and the evidence only showed that he pointed his gun at the victims, not that he attempted to shoot them. (*Ibid.*) However, the appellate court reasoned that a threatened act may amount to an assault even though the threat is conditioned or qualified. The defendant pointed his gun at everyone in the living room and told them to break. The jury reasonably could have construed this conduct as a conditional threat constituting an assault because the defendant would have fired if the victims did not do as ordered. (*Id.* at p. 1051.) In contrast to *Daniels*,

where there was evidence of a verbal conditional threat of implied use of the gun, there was no evidence here that pointing the firearm at Arias was accompanied by a verbal threat of implied use.

Finally, in *People v. Schwartz* (1992) 2 Cal.App.4th 1319, the evidence supported a conviction for assault with a firearm where the defendant pointed a gun at several victims and verbally threatened them. (*Id.* at p. 1324.) Defendant ordered the employees to lay down while pointing the gun randomly towards them. The defendant cocked the gun, and then told the victims that their safety was dependent on their cooperation. (*Id.* at p. 1321.) In contrast to *Schwartz*, the gunman nether cocked the gun nor verbally threatened Arias.

Moreover, the manner in which the handgun was used (i.e., pointing it at Arias) was *not* "likely" to result in the infliction of serious bodily injury. Indeed, the evidence shows that despite ample opportunity to fire the handgun and strike Arias, or attempt to strike him, the gunman did not do so. The gunman also did not make a verbal threat to fire the handgun at Arias. The evidence thus is susceptible to only one inference and conclusion – i.e., the gunman was merely attempting to frighten Arias by displaying the handgun.

Accordingly, the evidence is insufficient as a matter of law to support appellant's conviction for assault with a firearm in count 3 because merely pointing the handgun at Arias is not a violent act likely to result in a touching.

(Cf. *People v. Rodriguez, supra,* 20 Cal.4th at pp. 10-11 [absent evidence a defendant tried to use the gun as a club or bludgeon, the defendant cannot be convicted of assault with an unloaded firearm; this is so because the People must prove the defendant had the present ability to inflict violent injury].)

Reversal of appellant's conviction for assault with a firearm in count 3 is warranted for lack of substantial evidence. (Cf. *Jackson v. Virginia, supra*, 443 U.S. at p. 318 [a conviction unsupported by substantial evidence denies a defendant due process of law]; *People* v. *Bean*, *supra*, 46 Cal.3d at p. 932.)

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VIII.

THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AFTER THE PROSECUTOR ELICITED INADMISSIBLE TESTIMONY FROM DETECTIVE CURT LEVSEN THAT APPELLANT WAS ACTING UNDER THE JURISDICTION OF THE MEXICAN MAFIA, THAT HE SHOWED ALLEGIANCE TO THE MEXICAN MAFIA, AND THAT HE PAID TAXES TO THE MEXICAN MAFIA BECAUSE THE HIGHLY INFLAMMATORY AND POISONOUS NATURE OF SUCH INADMISSIBLE TESTIMONY WAS INCURABLE BY ADMONITION, REQUIRING REVERSAL OF APPELLANT'S CONVICTIONS AND DEATH JUDGMENT FOR A VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR AND RELIABLE JURY TRIAL (CAL. CONST., ART. I, §§ 7, 15 & 17; U.S. CONST., 5TH, 6TH, 8TH & 14TH AMENDS.)

A. INTRODUCTION AND PROCEDURAL BACKGROUND

During trial on December 1, 2000, the prosecution stated an intent to present the expert testimony of Detective Curt Levsen on defendants' gang affiliation, including testimony explaining the nature of certain hand signs displayed by defendants in photographs obtained during an investigation of the case. (CT 3:666-683; RT 18:2750-2756.)

The prosecutor argued, in part:

> Your honor, what I'm primarily interested in is a general explanation to the jury as to what some of these symbols or signs that Mr. Marin, even Luke Bissonnette even mentioned about these individuals throwing signs. I want the expert to be able to explain to the jury the significance of that, that they're identifying themselves as a group. A very cohesive group. A criminal street gang. [RT 18:2750.]

After codefendant Bermudez's counsel stated the evidence was cumulative of other testimony and was simply "overkill" under Evidence Code 352 (RT 18:2750), the trial court initially agreed, stating:

> I understand your point, but going back to what Mr. Araujo's point about overkill, we have established from a number of witnesses that each of the defendants was a member of the Cole Street East Side gang. And as far as throwing signs are concerned, those have been interpreted even. That what is he doing? He's making an E. He's making a C. So these signs that they make with their fingers are signs in which they boast or announce or whatever their gang membership. And I don't see how a gang expert is going to add anything to what the jury already knows or to further the case. [RT 18:2751.]

After further argument by counsel, the trial court reiterated its concern about the potential reversible error that could arise from such testimony:

> This is what my concern is, Mr. Camacho [i.e., the prosecutor]. We've been in trial now, this is our 11th day of actual trial. And in my opinion, you tried a very clean case up to this time. I think that the evidence has been admissible, and you've created enough fact situation for you to appropriately argue this to the jury.
>
> Now, if we go beyond the line here and muddy the water at this time -- and I rule in this court not with my eye on the Supreme Court, but in a capital case, I can't help but glance that way occasionally. *And I just feel that there's so much chance of reversible error creeping in with a person expressing these kinds of opinions which might have an undue influence on the jury, more so than others.*
>
> Because going back to the questionnaires that the jury have, there's a general disapproval of gangs. We have that built in. We knew that when we sat the jury. And I don't know the I can't recite the individual questionnaires of the jurors that are sitting here, but I

think that as I recall reading the majority of the juror's questionnaires there was a disapproval of gangs. And there wasn't anyone who felt favorably of them certainly. [RT 18:2758-2759 (emphasis added).]

Nonetheless, the trial court ruled that Detective Levsen could testify in a limited manner about the defendants' gang affiliation and the nature of the gang signs shown in certain photographs. (RT 18:2759-2760.)

In the afternoon on December 1, 2000, Detective Levsen testified on direct examination that appellant, Castro, Bermudez and Tapia were members of the East Side Whittier Cole Street gang. (RT 18:2785:1-2789:14.) He testified that members of the East Side Whittier Cole Street gang, as well as members of other gangs, use hand signs as a form of communication and to show gang affiliation. (RT 18:2782-2783.)

The prosecutor then engaged Levsen in the following colloquy regarding the significance of certain hand signs contained in the photograph in the upper left-hand corner of People's Exhibit 77:

Q: Look at the individuals in that photograph. Do you see anything significant about their gestures or their hand signs that enables you to form an opinion whether or not they're showing any type of loyalty to a particular gang?

A: Actually, it appears to me they're showing loyalty to two areas here. Up here we have an E, a W, and a C, which is East Whittier, C for Cole Street, which is the clique within the larger gang.
Down below we have these three in connection with each other throwing a X 111, which is for the number 13.

Q: *What's the significance of displaying a Roman numeral of 13?*

A: *13 is the number that is used by Southern California Hispanic Street gangs to show their allegiance to the Mexican Mafia, because 13 is the -- represents the 13th letter of the alphabet, which is M, which is their way of showing their allegiance to the Mexican Mafia.*

Not saying these individuals are members of that Mexican Mafia, but just *they're under the jurisdictional rule of the Mexican Mafia. In other words, they are Surenos in Southern California, and they pay taxes to the Mexican Mafia.* [RT 18:2783-2784 (emphasis added).]

Appellant's trial defense counsel immediately objected on the grounds of lack of foundation, moved to strike the testimony, and moved for a mistrial. (RT 18:2784.) The trial court overruled the objections, except that it struck the testimony about paying taxes to the Mexican Mafia and instructed the jury to disregard that portion of the testimony. (RT 18:2784.)

Following the conclusion of Levsen's testimony, appellant renewed his motion for mistrial, stating that incurable harm was caused by the prosecution's testimony linking appellant to the Mexican Mafia, which counsel likened to a "nuclear bomb" exploding midtrial. (RT 18:2792-2793.) The trial court again denied the motion, and then adjourned the proceedings to December 4, 2000. (RT 2795.)

On December 4, 2000, trial defense counsel filed a written motion for mistrial. (RT 19:2799; CT 12:3299-3306.) The motion argued the prosecutor engaged in egregious, prejudicial misconduct by failing to inform the defense of

an intent to introduced evidence regarding the Mexican Mafia and by eliciting evidence of appellant's purported affiliation with the Mexican Mafia, where such evidence was irrelevant and highly prejudicial, and where it would have been excluded by the trial court if advance notice had been given. (CT 12:3299-3306.) The motion further argued that the testimony caused incurable harm and denied appellant the right to a fair trial. (CT 12:3305.)

At a hearing on the motion that same day, the prosecutor argued that the defense was on notice of the possibility of such testimony because evidence relating to the Mexican Mafia was elicited from Levsen during the trial of Delaloza in 1999. (RT 19:2801-2802.) Trial defense counsel stated that although he was not aware of such testimony in Delaloza's trial, the issue was one of relevance in this trial. (RT 19:2802.)

The trial court agreed, explicitly stating that if the court had been given advance notice of an intent by the prosecutor to elicit testimony about the Mexican Mafia it would have excluded the evidence. (RT 19:2802.) Nonetheless, the court denied the motion for mistrial, but stated that it would strike all references to "Mafia." (RT 19:2806-2807.) The prosecutor argued that the defendants were not prejudiced by the testimony about the Mexican Mafia. (RT 19:2807.) The trial court agreed, but stated that the testimony regarding the Mexican Mafia was entirely inappropriate and irrelevant. (RT 19:2807-2808.)

The court denied the motion for mistrial and stated that it would extend its previous ruling to strike all references to "Mafia." (RT 19:2806-2807.) After the hearing, the court instructed the jury to disregard all references to the Mexican Mafia (RT 19:2816-2817), stating, in part, "So any reference to Mexican Mafia or dues paying or anything of that nature is stricken and is not to be regarded by you in any way." (RT 19:2817; see CT 12:3350 [jury instruction on stricken evidence]; RT 24:3735 [jury instruction on stricken evidence].)

As explained below, this is a case where the admonition failed to cure the prejudice appellant suffered by being associated with the Mexican Mafia because of the nature of the charges (conspiracy to commit murder and murder and the witness-killing special circumstance) and because after the admonition the trial jurors expressed concerned for their personal safety (RT 31:4518-4519). (*Post*, § VIII.C.)

B. THE PROSECUTOR COMMITTED MISCONDUCT BY DELIBERATELY ELICITING INADMISSIBLE TESTIMONY DURING DIRECT EXAMINATION OF DETECTIVE LEVSEN LINKING APPELLANT TO THE MEXICAN MAFIA

Every defendant has a right to a fair trial. (Cal. Const., art. I, §§ , 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.) "Prosecutors . . . are held to an elevated standard of conduct." (*People v. Hill* (1998) 17 Cal.4th 800, 819) "'A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests,

and in exercising the sovereign power, of the state.'" (*Id.* at p. 820, citing *People v. Kelley* (1977) 75 Cal.App.3d 672, 690.) As the United States Supreme Court has explained, the duty of a prosecutor in this regard is to ensure that justice is done, not to secure convictions. (*Berger v. United States* (1934) 295 U.S. 78, 88 [55 S.Ct. 629, 79 L.Ed. 1314]; *In re Ferguson* (1971) 5 Cal.3d 525, 531.)

> The prosecutor has the duty to see that the witness volunteers no statement that would be inadmissible and especially careful to guard against statements that would also be prejudicial.

(*People v. Bentley* (1955) 131 Cal.App.2d 687, 690, disapproved on another point in *People v. White* (1958) 50 Cal.2d 428, 431; *People v. Cabrellis* (1967) 251 Cal.App.2d 681, 688 [a "prosecutor is under a duty to guard against inadmissible statements from his witnesses and guilty of misconduct when he violates that duty"].)

Prosecutorial misconduct violates the federal Constitution where the misconduct so infects the trial with unfairness as to make the resulting conviction a denial of due process. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144].)

Under California law, a prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, requiring reversal, even when those actions do not result in a fundamentally unfair trial. (*People v. Friend* (2009) 47 Cal.4th 1, 29.) "A finding of misconduct does not require a

determination that the prosecutor acted in bad faith or with wrongful intent." (*People v. Kennedy* (2005) 36 Cal.4th 595, 618 [citation omitted].)[20]

The prosecutor elicited testimony during direct examination of Detective Levsen that appellant was acting under the jurisdiction of the Mexican Mafia, that he showed allegiance to the Mexican Mafia, and that he paid taxes to the Mexican Mafia. (RT 18:2782-2784.) The prosecutor did so *deliberately and with full knowledge that Detective Levsen would link appellant to the Mexican Mafia.* (See RT 19:2801-2802 [prosecutor argues that the defense was on notice of the possibility of such testimony because evidence relating to the Mexican Mafia was elicited by the prosecution from Levsen during the trial of Delaloza the prior year, and all parties to the instant case had a copy of the transcript of the Delaloza trial].)

The Mexican Mafia is one of the oldest and most powerful and violent prison gangs in the United States.[21] (Cf. *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1128-1129; *United States v. Shryock* (9th Cir. 2003) 342 F.3d 948,

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[20] The de novo standard of review applies to this claim because the material facts concerning appellant's prosecutorial misconduct claim are undisputed. (Cf. *People v. Camarillo* (2000) 84 Cal.App.4th 1386, 1389.)

[21] The brutal force of the Mexican Mafia subculture received wide-spread notoriety in 1992 with the release of the film *American Me*, a biographical crime drama film depicting 30 years of Chicano gang life in Los Angeles. (*American Me*, Wikipedia, The Free Encyclopedia, http://en.wikipedia.org/wiki/American_Me [as of October 27, 2011].)

961.) As this Court stated in *Alvarado v. Superior Court, supra*, 23 Cal.4th 1121, the trial court in that case found, among other things:

> (2) *The Mexican Mafia is well-known for retaliatory acts against . . . informants and government witnesses, including murder.* [¶] Information disclosed in camera documented 12 incidents of murder or attempted murder at the county jail of inmates between 1988 through 1991 which were committed by or at the direction of the Mexican Mafia. The additional five murders linked to the Mexican Mafia during this period of time were committed on persons who were not incarcerated. [¶] The Mexican Mafia is believed to have ordered the murders of witnesses in protective custody and incarcerated in other states . . . . [¶]
>
> (4) . . . *[T]he danger the Mexican Mafia poses to government witnesses is extreme. In camera, a witness stated that the Mexican Mafia has ordered so many hits and there are so many witnesses in protective custody that we cannot adequately protect them all.* [*Id.* at pp. 1128-1129 (emphasis added).]

Here, after the prosecutor elicited testimony during direct examination of Detective Levsen about appellant's allegiance to the Mexican Mafia, the trial court ruled that the testimony was entirely inadmissible because it was irrelevant and not support by substantial evidence. (RT 19:2802, 2807-2808.) The court stated, in part:

> . . . I don't think that there's – there's any reason for us to believe that any of these defendants were paying taxes or dues to any overall criminal organization, such as the Mexican Mafia. And I don't believe they were subjected to the orders, and the evidence doesn't support that sort of thing. I mean, all the evidence you adduced in this case is a local issue. It refers to Cole Street. And loyalty to Cole Street. And members in Cole Street. So as far as

any umbrella organization is concerned, I don't think that it's the evidence justifies it. [RT 19:2807-2808.]

The prosecutor engaged in misconduct when he deliberately elicited inadmissible testimony from Detective Levsen linking appellant to the Mexican Mafia because a prosecutor has the duty to see that his or her witnesses volunteer no statement that would be inadmissible, and must be especially careful to guard against statements that would be prejudicial. (*People v. Schiers* (1971) 19 Cal.App.3d 102, 113-114.) This includes a duty to warn the witness against volunteering inadmissible statements. (Cf. *People v. Warren* (1988) 45 Cal.3d 471, 482-483; *People v. Cabrellis* (1967) 251 Cal.App.2d 681, 688 ["A prosecutor is under a duty to guard against inadmissible statements from his witnesses and guilty of misconduct when he violates that duty"]; *People v. Figuieredo* (1955) 130 Cal.App.2d 498, 505-506 ["references by the officer to San Quentin deprived defendant of a fair trial"].)

Here, in addition to breaching his duty to ensure that the witness volunteers no statement that would be inadmissible (i.e., by telling the witness prior to taking the stand to avoid mentioning certain subjects during testimony), the prosecutor deliberately elicited the inadmissible testimony from Detective Levsen by asking him, "What's the significance of displaying a Roman numeral of 13?" (RT 18:2784), knowing that the answer would be about the Mexican

Mafia (RT 19:2801-2802). Accordingly, the record establishes that the prosecutor actively sought to introduce inadmissible and prejudicial testimony.

> "The deliberate asking of questions calling for inadmissible evidence and prejudicial answers is misconduct." [*People v. Bell* (1989) 49 Cal.3d 502, 532, quoting *People v. Fusaro* (1971) 18 Cal.App.3d 877, 886.]

The evidence further reveals that the prosecutor used deceptive and/or reprehensible methods to persuade the jury. The testimony blind-sided both the defense and the trial judge. During an Evidence Code section 402 hearing immediately preceding the testimony, wherein the prosecutor explained the relevance of Detective Levsen's proposed testimony, the prosecutor never told the judge or defense counsel that he intended to elicit from Levsen a purported connection between appellant and the Mexican Mafia. (RT 18:2750-2760.) The prosecutor knew that his questions of Levsen would elicit testimony about the Mexican Mafia because he specifically asked a question calling for such a response and he admitted to being aware of such testimony by Levsen in the previous trial of Delaloza. (RT 18:2784, 19:2801-2802; CT Supp. Vol. VI-5, pp. 945, 949-951.)

> When a prosecutor intentionally asks questions, the answers of which he [or she] knows are inadmissible, the prosecutor is guilty of bad faith attempts to improperly persuade the court or jury.

(*People v. Parsons* (1984) 156 Cal.App.3d 1165, 1170; Cf. *People v. Mazoros* (1977) 76 Cal.App.3d 32, 48; *People v. Bonin* (1988) 46 Cal.3d 659, 689 ["It is, of course, misconduct for a prosecutor to 'intentionally elicit inadmissible testimony.'"].)[22]

C. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL BECAUSE THE ADMONITION WAS WOEFULLY INSUFFICIENT TO CURE THE HARM THAT APPELLANT SUFFERED FROM TESTIMONY LINKING HIM TO THE MEXICAN MAFIA (TESTIMONY THAT IMPROPERLY SUGGESTED HIS DANGEROUSNESS TO THE JURY), THEREBY DEPRIVING APPELLANT OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED BY THE STATE AND FEDERAL CONSTITUTIONS

Although the court sustained appellant's objection to Detective Levsen's testimony about the Mexican Mafia and admonished the jury to disregard references thereto (RT 18:2782-2784; RT 19:2816-2818), the admonition failed to cure the prejudice that appellant suffered by being associated with the Mexican Mafia, thereby depriving appellant of the due process right to a fundamentally fair trial. (Cf. *Darden v. Wainwright, supra*, 477 U.S. at p. 181.)

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[22] Although not an issue here because of the prosecutor's deliberate move to place before the jury inadmissible and prejudicial testimony, a claim of prosecutorial misconduct is not even defeated by a showing of the prosecutor's subjective good faith; nor need a defendant show that the prosecutor acted in bad faith or with appreciation for wrongfulness of his conduct. (*People v. Price* (1991) 1 Cal.4th 324, 447.) "'What is crucial to a claim of prosecutorial misconduct is not good faith *vel non* of the prosecutor, but potential injury to the defendant.'" (*People v. Ashmus* (1991) 54 Cal.3d 932, 976, citing *People v. Benson* (1990) 52 Cal.3d 754, 795.)

The words "Mexican Mafia" conjure immediate fear among those that hear them spoken because the Mexican Mafia is not only one of the most notorious and dangerous gangs, but the Mexican Mafia is well-known for retaliatory conduct, including the murder of prosecution witnesses. (Cf. *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1128-1129.)

In a case such as this where the jurors expressed concerned for their personal safety after hearing the improper testimony (RT 31:4518-4519), and especially considering the nature of the charges (conspiracy to commit murder and murder, and the witness-killing special circumstance), it would defy reason to hold that the jurors in this case could each disregard Detective Levsen's testimony about the Mexican Mafia and successfully prevent the memory of his testimony from entering into their deliberative process. (Cf. *People v. Albertson* (1944) 23 Cal.2d 550, 577 ["It does not reflect in any degree upon the intelligence, integrity, or the honesty or purpose of the juror that matters of a prejudicial character find a permanent lodgment in his mind, which will, inadvertently and unconsciously, enter into and affect his verdict."].)

Moreover, even without prosecutorial misconduct, a witness's volunteered statement can provide the basis for a mistrial where, as here, it constitutes incurable prejudice. (Cf. *People v. Williams* (1997) 16 Cal.4th 153, 211 [witness's volunteered statement can trigger mistrial when it causes incurable

prejudice]; *People v. Wharton* (1991) 53 Cal.3d 522, 565 [same].) If testimony considered by a jury renders a trial unfair, the court must declare a mistrial. (*People v. Jenkins* (2000) 22 Cal.4th 900, 985-986.) "Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) A trial court's ruling on a motion for mistrial is reviewed for abuse of discretion. (*People v. Valdez* (2004) 32 Cal.4th 73, 128.) "Such a motion should only be granted when a defendant's 'chances of receiving a fair trial have been irreparably damaged.'" (*Ibid.* [citation omitted].)

The trial court concluded that Detective Levsen's testimony linking appellant to the Mexican Mafia was entirely inappropriate and irrelevant, and would have been excluded if the prosecutor had given advance notice, but the court ultimately stated that appellant was not prejudiced by the testimony. (RT 19:2807-2808.) The court's conclusion was unreasonable, amounting to an abuse of discretion, because the testimony was irrelevant and extremely inflammatory, and thus irreparably damaged appellant's chances of receiving a fair trial, especially in view of the nature of the charges (conspiracy to commit murder and murder, and the witness-killing special circumstance) and the weakness of the evidence on the murder charges and the witness-killing special circumstance

allegation (*ante*, §§ II., III., IV. & V.). The testimony was highly prejudicial in the penalty phase of the trial too because it communicated to the jury that appellant would be a dangerous prisoner if imprisoned for life without the possibility of parole.

The extremely prejudicial impact of testimony linking appellant to the Mexican Mafia cannot be gainsaid. The Mexican Mafia is a notorious and highly dangerous prison gang. (Cf. *Alvarado v. Superior Court, supra*, 23 Cal.4th at pp. 1128-1129.) As this Court noted in *Alvarado v. Superior Court, supra*, 23 Cal.4th 1121, the trial court in that case found that "the Mexican Mafia [is] . . . a notorious prison gang" that "is well-known for retaliatory acts against . . . informants and government witnesses, including murder." (*Id.* at p. 1128.) "The Mexican Mafia is believed to have ordered the murders of witnesses in protective custody and incarcerated in other states . . . ." (*Id.* at pp. 1228-1129.) "The Mexican Mafia has an excellent intelligence network which includes sources in several public agencies and is able to obtain confidential information." (*Id.* at p. 1129.) "Penetration [by] the Mexican Mafia of penal institutions is so extensive that one in camera witness described the organization as having 'de facto control' over all penal institutions in California." (*Ibid.*) The trial court in that case also found that "the danger the Mexican Mafia poses to government witnesses is extreme. In camera, a witness stated that the Mexican Mafia has ordered so

many hits and there are so many witnesses in protective custody that we cannot adequately protect them all." (*Ibid.*)

The testimony was sensational as the Mexican Mafia is a feared prison gang and Detective Levsen linked appellant and his codefendants to the Mexican Mafia in very specific detail, charging that 1) appellant was acting under the jurisdiction of the Mexican Mafia, 2) appellant was showing allegiance to the Mexican Mafia, and 3) appellant paid taxes to the Mexican Mafia. (RT 18:2783-2784.) The trial court thus abused its discretion in denying the defense motion for a mistrial because the testimony left the jury with the inescapable image of appellant's association with the Mexican Mafia, which suggested his extreme dangerousness to the jury.

In addition, absent Detective Levsen's testimony linking appellant to the Mexican Mafia, and in view of the weakness of the evidence on the murder charges and the witness-killing special circumstance allegation (*ante*, §§ II., III., IV. & V.), the jury likely would not have returned a unanimous verdict on the murder charges and the witness-killing special circumstance allegation.

Although recognizing that generally jurors are presumed to follow curative instructions (*People v. Smith* (2007) 40 Cal.4th 483, 517), our courts have unhesitatingly reversed convictions where, as here, inadmissible and prejudicial evidence could not be cured by a cautionary instruction. (*People v. Naverrette*

(2010) 181 Cal.App.4th 828, 833-834 [police officer's blurting out prejudicial statement not cured by admonition to disregard testimony]; *People v. Allen* (1978) 77 Cal.App.3d 924, 934-935; *People v. Schiers* (1971) 19 Cal.App.3d 102, 107-108 [the admission and subsequent striking of evidence relating to a lie detector test was so prejudicial that defendant was denied a fair trial]; *People v. Ozuna* (1963) 213 Cal.App.2d 338, 342 [reversible error, and admonition insufficient, when the defendant was called an "ex-convict"]; *People v. Figuieredo, supra*, 130 Cal.App.2d at pp. 505-506; *People v. Gomez* (1957) 152 Cal.App.2d 139, 144-145 [reversible error, despite the trial court's striking of evidence of the defendant's juvenile prior conviction and instruction that the jury disregard it]; *People v. Johnson* (1981) 121 Cal.App.3d 94, 103; *People v. Brophy* (1954) 122 Cal.App.2d 638, 651-652.)

In *People v. Allen, supra*, 77 Cal.App.3d 924, for example, the Court of Appeal held that the trial court erred in failing to grant defendant's motion for a mistrial after a rebuttal witness in his trial for robbery testified that defendant was "on parole." (*Id.* at p. 934.) Although the trial court admonished the jury to disregard the statement regarding defendant's parole status, the Court of Appeal reversed the conviction in view of the closeness of the case, holding that "it is reasonably probable that a result more favorable to appellant would have been

reached had the prejudicial information of appellant's parole status not been divulged to the jury." (*Id.* at p. 935.)

Similarly, the appellate courts have found reversible, incurable error in *People v. Ozuna, supra*, 213 Cal.App.2d at p. 342, where the defendant was called an "ex-convict" and in, among other cases cited above, *People v. Figuieredo, supra*, 130 Cal.App.2d at pp. 505-506, where a witness stated that defendant "did time" in San Quentin.

The belief that a limiting instruction or admonition to a jury could possibly cure the prejudicial effect of the testimony linking appellant to the Mexican Mafia is entirely unrealistic. (Cf. *People v. Gibson* (1976) 56 Cal.App.3d 119, 130.) In the face of such devastating testimony, jurors simply do not have the ability to abide by an admonition where the case is disputed and improper evidence of gang involvement has been introduced over objection.

> It does not reflect in any degree upon the intelligence, integrity, or the honesty or purpose of the juror that matters of a prejudicial character find a permanent lodgment in his mind, which will, inadvertently and unconsciously, enter into and affect his verdict. [*People v. Albertson, supra*, 23 Cal.2d at p. 577.]

The inflammatory nature of the testimony linking appellant to the Mexican Mafia certainly had an emotional effect on the minds of the jurors. Powerful words such as "Mexican Mafia," and the images and associations they conjure, participate actively in forming human judgments. In any trial, such words are

particularly decisive. No admonition could cure the emotional impact of these words in the minds of the jurors.

> The jury has heard the bell ring, the Court can tell them, "You didn't hear any bell," and they know, "We didn't hear any bell," and they can talk about it and say, no, they didn't hear any bell, but they also know they heard the bell. [*People v. Burgener* (1990) 223 Cal.App.3d 427, 432.]

As Judge Jerome Frank wrote, some comments are of "such a character that no one can say that the judge's warnings effectively removed their poisonous consequences. Indeed, as experienced trial lawyers have often observed, merely to raise an objection to such testimony – and more, to have the judge tell the jury to ignore it – often serves but to rub it in." (*United States v. Grayson* (2d Cir. 1948) 166 F.2d 863, 871 [concurring in reversal]; see *United States v. Davenport* (9th Cir.1985) 753 F.2d 1460, 1464 ["A limiting instruction would be ineffective in preventing an unjustified innuendo from coming to the attention of the jury."]; *Donnelly v. DeChristoforo, supra*, 416 U.S. at p. 644 ["some occurrences at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect"].)

This was a close case, as evidenced by the insufficiency of the evidence to sustain appellant's convictions in counts 4, 5, 6, and 7, and the special circumstance true findings of multiple-murder and witness-killing. (*Ante*, §§ II., III., IV., V. & VI.) Considering the highly inflammatory nature of the testimony

about the Mexican Mafia, and the fact that the charges involved multiple murders (counts 4, 5, and 7), including conspiracy to commit murder involving a purported witness to a crime (count 6), the trial court's admonition to disregard the testimony could not possibly have cured the prejudicial impact of the jury hearing this evidence.

Moreover, the jury expressed fear that the defendants might learn of their identity (see RT 31:4518-4519), reinforcing the fact that testimony about the Mexican Mafia, which suggested appellant's dangerousness to the jury, could not be set aside by the jury.

The misconduct here echoes that in *People v. Bentley, supra*, 131 Cal.App.2d 687. There, the defendant stood trial for lewd acts against a minor. (*Id.* at p. 688.) The investigating officer testified that he questioned the defendant one week after the alleged offense, but the defendant denied touching the child. The officer then volunteered in the jury's presence that he "went on to question [the defendant] about activities he had been involved in . . . when he had been a suspect in another case," which he also denied. (*People v. Bentley, supra*, 131 Cal.App.2d at p. 689.) The trial court granted the defendant's motion to strike the volunteered statement and instructed the jury to disregard it, but the court denied the defendant's motion for mistrial. (*Id.* at pp. 690-691.) On appeal following his conviction, the appellate court reversed, stating:

> It is obvious from the record that the *police officer deliberately made the statement about defendant being a suspect in another case in 1942 with the idea in mind of prejudicing defendant.* There can be no doubt that the statement was highly prejudicial. *The district attorney knew, or should have known, the testimony the officer was going to give and should have warned him not to make the statement.* . . . The court struck out the objectionable statement of the officer but the damage had been done and could not have been cured by the court's admonition. *The mere direction that the testimony should be disregarded was no antidote for the poison that had been injected into the minds of the jurors.* [*Id.* at p. 690 (emphasis added).]

Accordingly, it is reasonably probable that the effect of the prosecutor's misconduct caused an erroneous result, especially where, as here, the testimony constitutes incurable prejudice, irreparably damaging appellant's chances of receiving a fair trial.

Reversal of appellant's convictions and death judgment is required.

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IX.

THE TRIAL COURT'S ADMISSION OF OUT-OF-COURT STATEMENTS AND PRIOR TESTIMONY OF NONTESTIFYING WITNESS CARLOS ARIAS – IDENTIFYING APPELLANT AS THE PERSON WHO ASSAULTED HIM WITH A FIREARM AN HOUR PRIOR TO THE HOMICIDES OF MOLINA AND MURILLO – REQUIRES REVERSAL OF APPELLANT'S CONVICTIONS IN COUNTS 3, 4 AND 5 FOR A VIOLATION OF STATE EVIDENTIARY RULES AND THE STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO CONFRONTATION, DUE PROCESS, EFFECTIVE ASSISTANCE OF COUNSEL, AND A FAIR AND RELIABLE JURY TRIAL (CAL. CONST., ART. I, §§ 7, 15 & 17; U.S. CONST., 5TH, 6TH, 8TH & 14TH AMENDS.)

A. INTRODUCTION AND PROCEDURAL BACKGROUND

Appellant was convicted in count 3 of assault with a firearm on Carlos Arias (Pen. Code, § 245, subd. (a)(2)), and in counts 4 and 5 with the first degree murders of Brian Molina and Michael Murillo (Pen. Code, §§ 187, subd. (a), 189), respectively. (CT 12:3454-3456; RT 25:3825-3827.) The prosecution sought to prove these charges, in material part, with prior testimony and out-of-court statements of Carlos Arias, whom the trial court found was an unavailable witness. (*Ante*, Statement of Facts, §§ A.2. & A.3.)

The trial court admitted the following three categories of out-of-court statements and/or prior testimony:

1) nontestimonial out-of-court statements that Arias purportedly made to Luke Bissonnette (RT 10:1181-1182);

2) prior testimony that Arias gave in the trial of Alejandro Delaloza (RT 12:1532-1533, 14:1840-1907); and,

3) testimonial out-of-court statements that Arias made to the police in a tape-recorded interview on October 24, 1997 (RT 14:1912-1917).

In connection with the first category (Arias's nontestimonial out-of-court statements purportedly made to Luke Bissonnette), Luke testified that after seeing appellant on Hornell Street he ran to the house at 15171 Goodhue Street, where he met Arias on the back patio. (RT 10:1167-1172.) Luke testified, over defense hearsay objection, that Arias told him that he (Arias) "almost got killed" that night because "Richard Penunuri had pulled out a gun and put it to his head." (RT 10:1181-1182.) The trial court admitted the statements as an "excited or spontaneous utterance." (RT 10:1181; see RT 10:1182.)

In connection with the second category (Arias's prior testimony in the Delaloza trial), the entire testimony was read into the record (RT 14:1840-1907), over defense objection that Arias was not subject to "cross-examination" by appellant's counsel and thus the prior testimony presented a "confrontation" problem. (RT 12:1532-1533; see RT 14:1806.) In that testimony, Arias recanted much of his original taped statement to the police, including the statement about a person pointing a black handgun at him (RT 14:1855-1856) and the statement about the gunman's jacket (RT 14:1870-1875, 1879-1880). The court admitted the testimony on the grounds that it was prior sworn testimony of an unavailable and essential witness. (RT 1:192-193, 12:1532-1533, 1535-1538, 14:1806.)

In connection with the third category (Arias's testimonial out-of-court statements made to the police in a tape-recorded interview), the court admitted, over defense hearsay objection (RT 14:1910), the tape-recorded statement and an 18-page transcript of the statement. (RT 14:1912-1917; People's Exh. 73 [audiotape of statement]; People's Exh. 74, CT Supp. Vol. IV-1, pp. 159-174 [transcript of statement].) Arias told the police that after Luke ran he (Arias) exited the vehicle and ran too, but not before seeing that the person – whom he had not seen before but identified as "that guy . . . I guess Dozer or whatever" (CT Supp. Vol. IV-1, p. 160) – was pointing a black gun at him, was wearing a black jacket with a hood, and was chubby. (CT Supp. Vol. IV-1, pp. 160-163 [People's Exh. 74].) Arias, in fear for his own safety, ran and hid in Luke's grandfather's backyard, before running back to Luke's house on Goodhue Street. (CT Supp. Vol. IV-1, p. 160.) The court admitted Arias's out-of-court statement to the police as a prior inconsistent statement, on the theory that it was inconsistent with Arias's prior testimony at the Delaloza trial, which testimony was read into the record. (RT 14:1910-1911.)

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B. THE ISSUES RAISED HEREIN HAVE BEEN PRESERVED FOR APPEAL; IF THIS COURT FINDS THAT ANY OF THE ISSUES HAVE BEEN FORFEITED BY FAILURE TO ADEQUATELY OBJECT IN THE TRIAL COURT, THEN APPELLANT WAS DEPRIVED OF THE STATE AND FEDERAL CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL (CAL. CONST., ART. I, §§ 15 & 17; U.S. CONST., 6TH, 8TH & 14TH AMENDS.)

As explained below, the trial court's admission of Arias's out-of-court statements purportedly made to Luke violated the state hearsay rule and deprived appellant of a fundamentally fair trial as guaranteed by the state and federal constitutional rights to due process. (*Post*, §§ IX.D. & IX.F.) The trial court's admission of Arias's testimonial out-of-court statements to the police and prior testimony at the Delaloza trial violated the state hearsay rule, deprived appellant of the state and federal constitutional rights to confrontation, and deprived appellant of a fundamentally fair trial as guaranteed by the state and federal constitutional rights to due process. (*Post*, §§ IX.C., IX.D. & IX.E.)

Each of the issues raised herein have been preserved for appellate review. (Cf. *People v. Scott* (1978) 21 Cal.3d 284, 290 [objection is sufficient if the record shows the trial judge understood the issue presented]; *Hormel v. Haverling* (1941) 312 U.S. 552, 557 [61 S.Ct. 719, 85 L.Ed. 1037] ["Orderly rules of procedure do not require sacrifice of the rules of fundamental justice"].)

Moreover, to the extent constitutional issues are raised in this appeal, they are not waived by inadequate objection. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118, 133; *People v. Coddington* (2000) 23 Cal.4th 529, 632.)

If this Court finds that any of the issues have been forfeited by failure of trial defense counsel to adequately object, then appellant was deprived of the state and federal constitutional right to the effective assistance of counsel (Cal. Const., art. I, §§ 15 & 17; U.S. Const., 6th, 8th & 14th Amends.).

Under both the Sixth and Fourteenth Amendments to the federal Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 684- 685 [80 L.Ed.2d 674, 104 S.Ct. 2052]; *People v. Pope* (1979) 23 Cal.3d 412, 422 [discussing both state and federal constitutional rights].) The ultimate purpose of this right is to protect the defendant's fundamental right to a trial that is both fair in its conduct and reliable in its result. To comply with constitutional standards counsel must perform as would a "reasonably competent" attorney "acting as his diligent conscientious advocate." (*United States v. De Coster* (D.C. Cir. 1973) 487 F.2d 1197, 1202; accord, *People v. Pope, supra,* 23 Cal.3d at p. 423.) In other words, counsel should undertake those actions that a reasonably competent attorney would undertake and before counsel undertakes to act at all he must make a rational and informed

decision on strategy and tactics founded on adequate investigation and preparation. (Cf. *In re Hall* (1981) 30 Cal.3d 408, 426; *People v. Frierson* (1979) 25 Cal.3d 142, 166.) It is constitutionally required that counsel make "all significant decisions in the exercise of reasonable professional judgment." (*Strickland v. Washington, supra,* 466 U.S. at pp. 690-691.)

To establish ineffective assistance of counsel, appellant must demonstrate that (1) counsel's representation was deficient in falling below an objective standard of reasonableness, and (2) counsel's deficient representation prejudiced appellant, i.e., there is a reasonable probability that the result would have been more favorable to appellant absent counsel's omission. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 688, 694.) This standard has been described as "a significant, but something less than 50 percent, likelihood of a more favorable ruling." (*People v. Howard* (1987) 190 Cal.App.3d 41, 48.)

Appellant recognizes that defense counsel's actions are often justified on the basis of strategic choice. (*People v. Pope, supra*, 23 Cal.3d at p. 426.) However, even "defense strategies may be so ill-chosen that they may render counsel's overall representation constitutionally defective." (*United States v. Tucker* (9th Cir. 1983) 716 F.2d 576, 586.)

> Defense strategy and tactics which lawyers of ordinary training and skill in the criminal law would not consider competent deny a criminal defendant the effective assistance of counsel, if some other action would have better protected a defendant and was

> reasonably foreseeable as such before trial. [*Beasley v. United States* (6th Cir. 1974) 491 F.2d 687, 696, cited with approval in *United States v. Tucker, supra*, 716 F.2d at p. 586.]

If the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance "unless counsel was asked for an explanation and failed to provide one, *or unless there simply could be no satisfactory explanation*." (*People v. Pope, supra*, 23 Cal.3d at p. 426 [emphasis added]; *People v. Majors* (1998) 18 Cal.4th 385, 403 ["the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission"].)

Here, there could be no satisfactory explanation or rational strategic reason for counsel's failure to explicitly raise each of the objections identified above because counsel raised several objections to admission of Arias's prior testimony and out-of-court statements (RT 12:1532-1533, 14:1806, 1910), thereby revealing counsel's intent and purpose to exclude the prior testimony and out-of-court statements. Under these circumstances, any failure to preserve these issues for appeal would amount to the ineffective assistance of counsel. (See *People v. Lewis* (1990) 50 Cal.3d 262, 282 [this Court considers otherwise forfeited "claim on the merits to forestall an effectiveness of counsel contention"]; *People v. Stratton* (1998) 205 Cal.App.3d 87, 93.)

Defense counsel's deficient representation prejudiced appellant because admission of Arias's prior testimony and out-of-court statements strongly and directly linked appellant to the assault with a firearm on Arias (count 3) and to the killings of Molina and Murillo (counts 4 & 5, respectively). (See *post*, § IX.G.) Reversal of appellant's convictions in counts 3, 4 and 5 thus is warranted on the ground appellant was denied the state and federal constitutional rights to effective assistance of counsel.

C. THE ADMISSION OF ARIAS'S TESTIMONIAL OUT-OF-COURT STATEMENTS MADE DURING A POLICE INTERVIEW AND HIS PRIOR TESTIMONY AT THE DELALOZA TRIAL DEPRIVED APPELLANT OF THE CONSTITUTIONAL RIGHT TO CONFRONTATION (CAL. CONST., ART. I, §§ 7, 15 & 17; U.S. CONST., 5TH, 6TH, 8TH & 14TH AMENDS.)

The Confrontation Clause of the Sixth Amendment mandates that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) A defendant's right to confront witnesses who testify against him with searing and comprehensive cross-examination is one of the fundamental hallmarks of our criminal justice system. (*Maryland v. Craig* (1990) 497 U.S. 836, 846 [110 S.Ct. 3157, 111 L.Ed.2d 666].) "'[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, . . . to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth

Amendment's guarantee of due process of law.' [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 538; Cal. Const., art. I, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.)

In *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], the United States Supreme Court interpreted the clause to prohibit the admission of out-of-court testimonial statements of a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. (*Id.* at pp. 53-54.) *Crawford* departed from the approach endorsed by *Ohio v. Roberts* (1980) 448 U.S. 56, 66, which conditioned the admissibility of hearsay evidence on whether it fell under a "firmly rooted hearsay exception" or demonstrated reliability by showing "particularized guarantees of trustworthiness." The Court rejected "[t]he framework [as] so unpredictable that it fails to provide meaningful protection from even core confrontation violations." (*Crawford v. Washington, supra*, 541 U.S. at p. 63.) "Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." (*Id.* at p. 61.)

Crawford set out to determine the original meaning of the provision as intended by its framers. Using a historical lens, the high court ultimately found that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte

examinations as evidence against the accused." (*Crawford v. Washington, supra*, 541 U.S. at p. 50 [italics omitted].) The straight-forward requirements for admissibility of testimonial hearsay set forth in Crawford – unavailability and prior opportunity to cross examine – "reflect more accurately the original understanding of the [Confrontation] Clause." (*Id.* at p. 60.) "[T]he Clause's ultimate goal is to ensure reliability of evidence . . . but that reliability [must] be assessed in a particular manner: by testing in the crucible of cross-examination." (*Id.* at p. 61.)

The hallmark of the new standard under *Crawford* is that it applies only to testimonial statements because such statements cause the declarant to be a witness within the meaning of the Confrontation Clause. (*Crawford v. Washington, supra*, 541 U.S. at p. 51.) Therefore, the first step in any Confrontation Clause analysis is to determine whether the out-of-court statement at issue is testimonial. *Crawford* tendered a few examples of the "core class of 'testimonial' statements," including extrajudicial statements "'contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, confessions,'" or "'similar pretrial statements that declarants would reasonably expect to be used prosecutorially,'" but chose not to carve out an explicit definition. (*Id.* at pp. 51-52.)

Two years later in *Davis v. Washington* (2006) 547 U.S. 813 the Court further defined "testimonial." In the context of statements made to law enforcement, the Court held that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Id.* at p. 822.) Thus, the Court looked to the circumstances surrounding the statement's conception to determine whether they implicated the right to confrontation. The Court reasoned that a statement describing contemporaneous events as they were actually happening is nontestimonial because the declarant's primary purpose is not to prove a fact relevant to a past crime, but rather to assist law enforcement in an ongoing emergency. (*Id.* at p. 827.) In contrast, a statement "solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator" is sufficiently akin to testimony, i.e., "'"[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact,"'" to warrant Sixth Amendment scrutiny. (*Id.* at p. 826.)

Arias's prior testimony at the Delaloza trial, which was admitted for the truth of the matter asserted (RT 12:1532-1533, 14:1840-1907; CT 12:3362), is testimonial under *Crawford* because it is "prior testimony." (*Crawford v. Washington, supra*, 541 U.S. at pp. 51-52.) Arias's out-of-court statements to the police, which were admitted for the truth of the matter asserted (RT 10:1181-1182, 14:1912-1917), are testimonial under *Davis v. Washington* because the statements were made under circumstances objectively indicating that the primary purpose of the interrogation was to establish or prove past events potentially relevant to later criminal prosecution (i.e., the statements were made during a formal police interview at the police station). (*Davis v. Washington, supra*, 547 U.S. at p. 822; see *Crawford v. Washington, supra*, 541 U.S. at p. 53, fn.4 [a "recorded statement, knowingly given in response to structured police questioning, qualifies {as a testimonial statement} under any conceivable definition."].)

Appellant was not a party to the Delaloza trial where Arias's former testimony was given, and he did not otherwise have the opportunity to cross-examine Arias. (RT 12:1532-1533.) Accordingly, appellant was denied the state and federal constitutional rights to confrontation (Cal. Const., art. I, §§ 7, 15 & 17; U.S. Const., 6th, 8th & 14th Amends.) when the trial court admitted Arias's prior testimony and out-of-court statements to the police because appellant was

given no prior opportunity to cross-examine Arias. (Cf. *Crawford v. Washington, supra*, 541 U.S. at pp. 53-54.)

D. THE ADMISSION OF ARIAS'S OUT-OF-COURT STATEMENTS AND PRIOR TESTIMONY DEPRIVED APPELLANT OF THE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR AND RELIABLE JURY TRIAL (CAL. CONST., ART. I, §§ 7, 15 & 17; U.S. CONST., 5TH, 6TH, 8TH & 14TH AMENDS.)

The trial court's admission of Arias's out-of-court statements to Luke and to the police, and the admission of Arias's prior testimony in the Delaloza trial, deprived appellant of the due process right to a fundamentally fair trial because the statements and testimony violated state evidentiary rules against admission of hearsay, violated the Confrontation Clause, and rendered the trial fundamentally unfair. (Cal. Const., art. I, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.)

"[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, . . . to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." (*Pointer v. Texas* (1965) 380 U.S. 400, 405 [13 L.Ed.2d 923, 85 S.Ct. 1065]; see *People v. Brown* (2003) 31 Cal.4th 518, 538.)

The deprivation of appellant's state court rights (here, the statutory rules on admission of hearsay), as set forth above, also gives rise to a violation of

appellant's right to due process under the Fourteenth Amendment to the federal Constitution. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175] [arbitrary deprivation of a state-created liberty interest violates due process]; *Hewitt v. Helms* (1983) 459 U.S. 460, 466 [103 S.Ct. 864, 74 L.Ed.2d 675] [liberty interests protected by the Due Process Clause arise from two sources, the Due Process Clause itself and the laws of the States]; *Walker v. Deeds* (9th Cir. 1995) 50 F.3d 670, 673 [sentencing court's failure to comply with state statute requiring a finding that habitual offender status is "just and proper" violated due process]; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 ["The failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state."]; *Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 456.)

Moreover, the state court's erroneous application of state law (here, the statutory rules on admission of hearsay) rendered appellant's trial fundamentally unfair, and thus denied appellant due process under the federal Constitution. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 [116 L.Ed.2d 385, 112 S.Ct. 475]; *Donnelly v. DeChristoforo, supra*, 416 U.S. at p. 643; *Ortiz v. Stewart* (9th Cir. 1998) 149 F.3d 923, 934.)

Further, even correct applications of state law by state courts may violate the Due Process Clause:

> While adherence to state evidentiary rules suggests that the trial was conducted in a procedurally fair manner, it is certainly possible to have a fair trial even when state standards are violated; conversely, state procedural rules and evidentiary rules may countenance processes that do not comport with fundamental fairness. The issue . . . is whether the state proceedings satisfied due process. [*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 919.]

State court procedural or evidentiary rulings can violate federal law "either by infringing upon a specific federal constitutional or statutory provision or by depriving the defendant of the fundamentally fair trial guaranteed by due process." (*Walters v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1357.) As the United States Supreme Court stated many decades ago:

> Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property. [*Brinegar v. United States* (1949) 338 U.S. 160, 174 [93 L.Ed.2d 1879, 69 S.Ct. 1602].]

The hearsay statements at issue here recounted in graphic detail a purported assault with a firearm on Arias (count 3), and the statements provided details about appellant that the prosecutor used to convince the jury that appellant perpetrated the killing of Molina and Murillo (counts 4 & 5, respectively). (RT 10:1181-1182.)

Luke testified that when Arias arrived back at Luke's house, Arias stated that "he almost got killed . . . ." (RT 10:1181.) When asked to clarify, Luke testified, "He [Arias] said that Richard Penunuri had pulled out a gun and put it to his head." (RT 10:1182.) As explained in Argument IX.F., *post*, these statements were not properly admitted for any nonhearsay purpose, and because they were made upon reflection the statements did not qualify under the spontaneous declaration exception to the hearsay rule. (*Post*,§ IX.F; *People v. Poggi* (1988) 45 Cal.3d 306, 318.)

In his tape-recorded statement to the police, Arias stated that appellant, who was wearing a black jacket with a hood, pointed a gun at him. (CT Supp. Vol. IV-1, pp. 160-161.) These details of an encounter between appellant and Arias, where appellant purportedly pointed a gun at Arias an hour before the double homicide, were not provided by any other witness. Moreover, Arias's statement to the police corroborated his statement to Luke, and provided information about appellant's clothing that was used to identify appellant as the gunman that killed Molina and Murillo. (*Post*, § IX.G.)

The erroneous admission of Arias's hearsay statements thus deprived appellant of the due process right to a fundamentally fair trial by lowering the prosecution's burden of proof on counts 3, 4 and 5 and denying appellant the

right to a trial based on competent evidence and proof beyond a reasonable doubt. (Cf. *Jackson v. Virginia, supra*, 443 U.S. at pp. 317-320.)

E. ARIAS'S PRIOR TESTIMONY IN THE DELALOZA TRIAL AND HIS OUT-OF-COURT STATEMENTS TO THE POLICE WERE NOT PROPERLY OFFERED FOR ANY NONHEARSAY PURPOSE

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) The hearsay rule presumes hearsay statements are inadmissible because they are not made under oath, are not subject to cross-examination, and the jury does not have the opportunity to view the declarant's demeanor as the statement is made. (*People v. Duarte* (2000) 24 Cal.4th 603, 610; *People v. Ortiz* (1995) 38 Cal.App.4th 377, 387 [hearsay statements are inadmissible "when they are offered to prove the truth of the matter asserted"].) Accordingly, "[u]nless it falls within an exception to the general rule, hearsay is not admissible." (*People v. Duarte, supra*, 24 Cal.4th at p. 610.)

After finding that Arias's was an unavailable witness, the trial court admitted Arias's prior testimony and his testimonial out-of-court statements to the police on the grounds that his prior testimony was sworn testimony and that his out-of-court statements to the police were prior inconsistent statements. (RT 1:192-193, 12:1532-1533, 1535-1538, 14:1806, 1910-1911.)

Admission of both the prior testimony and the out-of-court statements to the police violated the hearsay rule because they were statements made other than by a witness while testifying at appellant's trial and were offered to prove the truth of the matter stated.[23] (Cf. Evid. Code, § 1200, subd. (a); *People v. Lewis* (2008) 43 Cal.4th 415, 497-498.) No exception to the hearsay rule applies.

With respect to prior sworn testimony, Evidence Code section 1291 provides, in relevant part, that "[e]vidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness," and "[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." (Evid. Code, § 1291, subd. (a)(2).) Evidence Code section 1291 is inapplicable here because appellant was not a party to the Delaloza trial where the testimony was given and he did not have the right and opportunity to cross-examine Arias. (RT 12:1532-1533.)

The only exception to the hearsay rule mentioned by the trial court in support of its ruling was the exception for prior inconsistent statements. (RT

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[23] Although admission of evidence over a hearsay objection is normally reviewed for an abuse of discretion (*People v. Martinez* (2000) 22 Cal.4th 106, 120), because the admission of Arias's statements and prior testimony implicate the constitutional right to confrontation, the trial court's ruling is independently reviewed. (*People v. Seijas* (2005) 36 Cal.4th 291, 304; also see *Crawford* v. *Washington*, *supra*, 541 U.S. at p. 61.)

14:1910-1911.) Evidence Code section 1235 provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Prior inconsistent statements are admissible under this provision to prove their substance as well as to impeach the declarant. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 55, fn. 4.)

Evidence Code section 770 provides: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or (b) The witness has not been excused from giving further testimony in the action." Pursuant to sections 1235 and 770, a witness's prior statement is admissible where it is inconsistent with that person's present testimony and he or she is given an opportunity to explain or deny the prior statement. (Evid. Code, §§ 770, subd. (a), 1235; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 78.)

Here, the prerequisites for admissibility of Arias's prior statements are not met. First, under section 770, subdivision (a), Arias was not present at the hearing, and thus during trial the defense did not have the opportunity to have Arias "explain or . . . deny the statement[s]." (Evid. Code, § 770, subd. (a).)

Second, under section 770, subdivision (b), Arias was excused from giving any testimony in the action because the court had found Arias unavailable. Accordingly, the statements do not meet the statutory requirements for prior inconsistent statements.

F. ARIAS'S OUT-OF-COURT STATEMENTS TO LUKE BISSONNETTE WERE NOT PROPERLY OFFERED FOR ANY NONHEARSAY PURPOSE

In *Crawford v. Washington, supra*, 541 U.S. 36, the United States Supreme Court "recognized that if the statement in issue is nontestimonial, the rules of evidence, including hearsay rules, apply. (*Id.* at p. 68.) *Crawford* stated: 'Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . .'" (*Ibid.*.) Thus, state courts may consider 'reliability factors beyond prior opportunity for cross-examination when the hearsay statement at issue was not testimonial. [Citation.]' (*Id.* at p. 57 [124 S.Ct. at p. 1368].)" (*People v. Cervantes* (2004) 118 Cal.App.4th 162, 173.) Thus, if the statements at issue in this case were nontestimonial, the reviewing court considers whether they were properly admitted consistent with the hearsay rules of evidence. (*Ibid.*)

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) The hearsay rule presumes hearsay statements are inadmissible because they are not made under oath, are not subject

to cross-examination, and the jury does not have the opportunity to view the declarant's demeanor as the statement is made. (*People v. Duarte, supra*, 24 Cal.4th at p. 610; *People v. Ortiz, supra*, 38 Cal.App.4th at p. 387 [hearsay statements are inadmissible "when they are offered to prove the truth of the matter asserted"].) Accordingly, "[u]nless it falls within an exception to the general rule, hearsay is not admissible." (*People v. Duarte, supra*, 24 Cal.4th at p. 610.)

Admission of the out-of-court statements violated the hearsay rule because they were statements made other than by a witness while testifying at appellant's trial and were offered to prove the truth of the matter stated. (Cf. Evid. Code, § 1200, subd. (a); *People v. Lewis, supra*, 43 Cal.4th at pp. 497-498.) No exception to the hearsay rule applies.

The trial court admitted Arias's out-of-court statements to Luke over defense hearsay objection under the "excited or spontaneous utterance" exception to the hearsay rule.[24] (RT 10:1181; see RT 10:1182.) Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made

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[24] Admission of evidence over a hearsay objection is reviewed for an abuse of discretion. (*People v. Martinez, supra*, 22 Cal.4th at p. 120.)

spontaneously while the declarant was under the stress of excitement caused by such perception."

"'To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.'" (*People v. Poggi, supra*, 45 Cal.3d at p. 318, citing *Showalter v. Western Pacific R.R. Co.* (1940) 16 Cal.2d 460, 468.)

Here, Arias's out-of-court statements to Luke were *not* spontaneous but, instead, were made upon reflection. Luke testified that after seeing appellant on Hornell Street he ran to the house at 15171 Goodhue Street, where he met Arias on the back patio. (RT 10:1167-1172.) At least twenty minutes elapsed between the time that Arias saw Luke on Hornell Street and then saw him again on the back patio on Goodhue Street, according to Arias's statement to the police. (CT Supp. Vol. IV-1, pp. 160.) When Luke first arrived there, however, he saw his sister Laura speaking with Arias. (RT 10:1167.) Luke testified on direct examination, in part:

Q: And when you ran to Goodhue Street and actually arrived on the property, what happened at that point?

A: I went through the side gate to the side of the house. And then when I approached to the patio in the Goodhue House, *I seen my sister and Carlos [Arias] talking*, and then I seen where Bryon [sic] and Mike were still sleeping. [RT 10:1167 (emphasis added).]

Luke then testified that his sister Laura, Arias, and he stayed on the patio for about twenty minutes before going inside the house. (RT 10:1176-1177, 1180.) Luke testified that Arias looked "[e]xhausted from running. Really tired. Still breathing heavy." (RT 10:1180.) Sometime during that 20-minute period of time Arias stated that he "almost got killed" that night because "Richard Penunuri had pulled out a gun and put it to his head." (RT 10:1181-1182.)

The trial court's finding that Arias's statement qualified as a spontaneous declaration is not supported by substantial evidence. Instead of being a spontaneous statement made at the scene of the event, Arias made the statement sometime after leaving the scene of the event on Hornell Street and arriving at the back patio of the house on Goodhue Street twenty minutes later. (CT Supp. Vol. IV-1, pp. 160.) Luke testified that when he arrived at the back patio of the house on Goodhue Street Arias was already there speaking with Luke's sister, Laura. (RT 10:1167, 1180.) Luke, Arias and Laura were on the back patio for an additional twenty minutes, and it is unclear from the record precisely when

during that second 20-minutes period of time the statement was made. (RT 10:1176-1177, 1180-1182.)

The evidence thus reveals that the statement was made after Arias had left the area where the event occurred, after he had reached a place of safety at a new location where other people were present, and after he was seen speaking with another person (i.e. Laura). Under these circumstances, and notwithstanding that Arias was still breathing heavily, Arias's statements were made when he had the opportunity to reflect. The statements were thus the product of "processing information in a deliberative manner." (Cf. *People v. Gutierrez* (2000) 78 Cal.App.4th 170, 181.)

Accordingly, admission of the statements was an abuse of discretion because there is no substantial evidence to support the implied finding[25] that the statements were admissible as spontaneous declarations under Evidence Code section 1240.

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[25] "A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute." (Evid. Code, § 402, subd. (c); see *People v. Pinholster* (1992) 1 Cal.4th 865, 935.)

G. THE JURY'S CONSIDERATION OF ARIAS'S OUT-OF-COURT STATEMENTS AND PRIOR TESTIMONY REQUIRES REVERSAL OF APPELLANT'S CONVICTIONS IN COUNTS 3, 4 AND 5 BECAUSE THE PROSECUTION WILL BE UNABLE TO PROVE BEYOND A REASONABLE DOUBT THAT THE EVIDENCE DID NOT CONTRIBUTE TO THE JUDGMENT

The admission of hearsay statements require reversal for state law error if there is a reasonable probability of a result more favorable to the defendant in the absence of the error. (Cf. *People v. Watson* (1959) 46 Cal.2d 818, 836 [reversal of conviction only if there is a reasonable probability of a result more favorable to the defendant in the absence of the error]; *People v. Duarte*, *supra*, 24 Cal.4th at pp. 618-619 [*Watson* standard applicable to state law error].)

Under *Watson*, a 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 [emphasis in original].) Thus, prejudice must be found under *Watson* whenever the defendant can "'undermine confidence'" in the result achieved at trial. (*Ibid.*) In applying the *Watson* test, it is important to note that an evenly balanced case is one which the defendant is entitled to win. Indeed, *Watson* itself so provides: "But the fact that there exists at least such an equal balance of reasonable probabilities necessarily means that the court is of the opinion 'that it is reasonably probable that a result more favorable to the appealing party would

have been reached in the absence of the error.'" (*People v. Watson, supra*, 46 Cal.2d at p. 837.)

The Confrontation Clause violations identified above, as well as state trial error giving rise to the deprivation of a federal constitutional right (here the rights to due process and confrontation), are evaluated under *Chapman* harmless error analysis. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824]; see *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326 [*Chapman* asks whether the prosecution has "prove[d] beyond a reasonable doubt that the error . . . did not contribute to" the verdict].) Under the *Chapman* test, the People bear the burden to establish "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California, supra*, 386 U.S. at p. 24; see also *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 [106 S.Ct. 1431, 89 L.Ed.2d 674].) The appropriate inquiry is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [124 L.Ed.2d 182, 113 S.Ct. 2078]; *People v. Sakarias* (2000) 22 Cal.4th 596, 625 ["We may affirm the jury's verdicts despite the error if, but only if, it appears beyond a reasonable doubt that the error did not contribute to the particular verdict at issue."]).

Reversal is warranted because under either standard the error arising from Arias's out-of-court statement and prior testimony – recounting an assault on him with a firearm by appellant only an hour prior to the killing of Molina and Murillo, and directly linking appellant to the killing of Molina and Murillo – cannot be said to be harmless. (*People v. Watson, supra*, 46 Cal.2d 818, 836; *Chapman v. California, supra*, 386 U.S. 18, 24.)

Assault with a firearm, as charged in count 3, requires a finding, supported by substantial evidence, that appellant pointed a loaded firearm at Arias. (Cf. *People v. Rodriguez* (1999) 20 Cal.4th 1, 11, fn. 3 ["A long line of California decisions holds that an assault is not committed by a person's merely pointing an (unloaded) gun in a threatening manner at another person"].)

The prosecution adduced evidence that appellant pointed a firearm at Arias, but only through the out-of-court statements and prior testimony of Arias. (CT Supp. Vol. IV-1, pp. 160-163 [People's Exh. 74]; *ante*, Statement of Facts, §§ A.2. & A.3.) The only other eyewitness to the Hornell Street incident was Luke, but Luke left the area prior to the purported assault on Arias, and thus Luke did not testify to an assault on Arias. (RT 9:1133-1138, 10:1156-1157.) Luke did not observe appellant in possession of a gun. (RT 9:1111-1138, 10:1156-1157.) Accordingly, Arias's out-of-court statements and prior testimony directly

contributed to the verdict on count 3. (See also *ante*, § VII. [insufficient evidence to sustain the verdict on count 3].)

First degree murder, as charged in counts 4 and 5 (Molina and Murillo, respectively), requires a finding, supported by substantial evidence, that appellant either directly perpetrated the murder or is vicariously responsible for the murder. (*People v. Matlock, supra*, 51 Cal.2d at p. 685; *Taylor v. Superior Court, supra*, 3 Cal.3d at pp. 582-583.) The prosecution proceeded on the theory that appellant was the direct perpetrator of the murders of Molina and Murillo, not that he had aided and abetted another person in the commission of the offenses. (RT 22:3411-3412.)

Through Arias's out-of-court statements and prior testimony, the prosecution adduced evidence directly linking appellant to the killings of Molina and Murillo. On Hornell Street, approximately one hour before the double homicide, Arias identified a person by the name of "Dozer" (i.e., appellant) as the person who chased Luke and then pointed a gun at him. (CT Supp. Vol. IV-1, pp. 160-163 [People's Exh. 74]; RT 10:1181-1182, 14:1855-1856.) Arias identified the gunman as being chubby and wearing a large black jacket with a hood. (CT Supp. Vol. IV-1, pp. 160-163; RT 14:1870-1875, 1879-1880.)

Finally, approximately an hour later when Arias was inside the Goodhue Street residence, Arias heard gunshots. (CT Supp. Vol. IV-1, pp. 171.) He

looked outside the bedroom window and saw someone running. (CT Supp. Vol. IV-1, pp. 171-172.) Arias identified the person as wearing the same jacket with hood as the Hornell Street gunman was wearing. (CT Supp. Vol. IV-1, pp. 160-161, 172.) Accordingly, the prosecution will be unable to prove beyond a reasonable doubt that Arias's out-of-court statements and prior testimony did not contribute to the verdicts on counts 4 and 5 because Arias's statements and prior testimony directly linked appellant to the double homicide. (See also *ante*, § II. [insufficient evidence to sustain the verdicts on counts 4 and 5].)

Properly understood, the *Chapman* standard for constitutional error makes it very difficult for the prosecution to demonstrate that the error was harmless. To understand what the *Chapman* test truly means, it is instructive to review the facts in *Chapman*. Although the facts were not fully recited by the Court, they can be found in the antecedent opinion of this Court in *People v. Teale* (1965) 63 Cal.2d 178. Early in the morning on October 18, 1962, Chapman, Teale and Adcox were seen outside the bar where Adcox was employed as a bartender. Later that morning, Adcox' body was found in a remote area. He had been shot in the head three times. Adcox was killed with .22 caliber bullets. Chapman had purchased a .22 caliber weapon six days earlier. In close vicinity to the body, the police found a check which had been signed by Chapman. Blood found in the defendants' car was the same type as that of Adcox. Hairs matching those of

Adcox were found in the car along with fibers from his shoes. The government also presented that Teale stated that he and Chapman had robbed and killed Adcox. Chapman gave a false statement to the police that she was in San Francisco at the time of the killing. The statement was proven false by the fact that Chapman had registered at a Woodland motel shortly after Adcox was killed. At trial, neither defendant testified. The prosecutor repeatedly argued to the jury the silence of the defendants could be used against them. On this record, the Court found reversible error, stating that

> absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts. Under these circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions. [*Chapman v. California*, *supra*, 386 U.S. at p. 26.]

The reversal of the convictions when viewed in light of the strength of the government's case (which included a confession, evidence of opportunity to commit the crime, incriminating forensic evidence, and evidence of consciousness of guilt), leads to the inescapable conclusion the high court intended that it would be very difficult for the government to show that a federal constitutional error was harmless. *Chapman* contemplates an inquiry into the impact which the particular error has had on the instant jury. This is true regardless of the weight of the evidence because *Chapman*

> instructs the reviewing court to consider not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. . . . Harmless-error review looks, we have said, to the basis on which "the jury actually rested its verdict." [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. [*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.]

As the foregoing quotation reveals, the relative strength or weakness of the government's evidence does not necessarily render the error harmless. To the contrary, if the government has committed a fundamental constitutional error bearing a substantial impact, then reversal is compelled. This is so since it is the government's burden to show the guilty verdict "was surely unattributable to the error." (*Id.* at p. 279; accord *People v. Quartermain* (1997) 16 Cal.4th 600, 621.)

Accordingly, regardless of the strength or weakness of the prosecution's case, a particular error may require reversal in light of its power to influence the jury. (*United States v. Harrison* (9th Cir. 1994) 34 F.3d 886, 892 [review for harmless error requires not only an evaluation of the remaining incriminating evidence in the record but also "the most perceptive reflections as to the probabilities of the effect of error on a reasonable trier of fact"].) This sentiment also was held by Justice Harlan:

> Finally, if I were persuaded that the admission of the gun was 'harmless error,' I would vote to affirm, and if I were persuaded that it was arguably harmless error, I would vote to

> remand the case for state consideration of the point. But the question cannot be whether, in the view of this Court, the defendant actually committed the crimes charged, so that the error was 'harmless' in the sense that petitioner got what he deserved. The question is whether the error was such that it cannot be said that petitioner's guilt was adjudicated on the basis of constitutionally admissible evidence, which means, in this case, whether the properly admissible evidence was such that the improper admission of the gun could not have affected the result. [*Bumper v. North Carolina* (1968) 391 U.S. 543, 553 (conc. opn. of Harlan, J.).]

Chapman and it progeny thus require a close and careful assessment of the actual impact which an error has had on the jury's deliberative process. The appellate court must be ever mindful the government bears a heavy burden of persuasion in showing the error did not affect the jury. In this regard, the United States Supreme Court has made the difficulty of the government's task quite clear: the guilty verdict must have been "*surely* unattributable to the error." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279 (emphasis added).)

The prejudicial effect of the error was exacerbated by the prosecution's closing argument to the jury. In connection with count 3 (assault with a firearm on Arias), the prosecutor argued, in part:

> . . . . *Carlos Arias was in this car, and he's the one that actually told the Sheriff's Department – which is in his testimony from the Delaloza trial – that Dozer was the one that approached him and pulled out the gun and pointed it at him and that's why he ran himself.*
>
> What has happened at that point?

Dozer, Richard Penunuri has committed the crime of assault with a firearm because he placed Carlos Arias in apprehension of being shot. [RT 22:3399 (emphasis added).]

In connection with counts 4 and 5 (first degree murder of Molina and Murillo), the prosecutor argued, in part:

What happened at Goodhue Street?

Well, we know for a fact that before Richard Penunuri even appeared in the white Cadillac, by virtue of our aerial diagram, People's 24, before Mr. – the white Cadillac appears and initially parks south of the Goodhue Street location, we know that Luke Bissonnette and *Carlos Arias had already run from Hornell Street to Goodhue Street, because they're trying to avoid Dozer that night.*

And they flee on foot and eventually meet in the backyard of Goodhue Street. And this is where they come into contact with Michael Murillo and Bryon [sic] Molina and Luke's sister, Laura Bissonnette. And it's the early morning hours now. It's dark outside. *And, matter of fact, it was in this patio area where Carlos reaffirmed to Luke – and it came into evidence in this case what had just happened to him – that Dozer had pulled a gun on him. And this is, again, Carlos Arias before he was even thinking about becoming a witness or a victim in a criminal court case, he's telling Luke at the time it happened what exactly happened to him. Carlos being a victim of the assault with a firearm at the hands of Dozer,* and they're trying to avoid this man that night. [RT 3404-3405 (emphasis added).] [¶]

We know [from Arias's statements and prior testimony] he pulled the weapon out on Hornell Street, so he was angry at that time. [RT 22:3419.] [¶]

. . . Carlos Arias, whose testimony was read to you, also said that it was Dozer leaving the house [on Goodhue Street]. [RT 22:3432.]

In closing rebuttal argument, the prosecutor argued, in part:

> Evidently Mr. Bernstein [i.e., trial defense counsel] conceded the Hornell Street confrontation when he got up here and told you that his client pointed the gun at the head of Carlos Arias at Hornell Street. And this is, of course, after Luke had already run away. This is important because again it keeps that weapon in possession of Dozer throughout the chain of events which happened that particular night. [RT 24:3687.] [¶]
>
> Remember on Hornell Street Dozer was looking for Carlos and Luke. Dozer produces his gun at Carlos. And that's why these boys flee.
>
> These two boys, Carlos and Luke, were pretty agile young men. They were able to jump fences and escape that particular attack.
>
> Dozer knew that and he was aware of that. So look at the way they planned the Goodhue Street hit when they went to look for Carlos and Luke that night a few blocks away. [RT 24:3699.]

In connection with a prosecutor's closing argument to the jury, our courts have recognized what logic dictates – i.e., the prosecutor's reliance in closing argument on erroneously admitted evidence is a strong indication of prejudice. (See e.g., *People v. Guzman* (1988) 45 Cal.3d 915, 963 [finding no *Boyd* error but noting it was significant that "the prosecution made no effort to capitalize on the testimony."]; *People v. Roder* (1983) 33 Cal.3d 491, 505 [error not harmless under *Chapman* because, in part, "the prosecutor relied on the [erroneous] presumption in his closing argument"]; *People v. Martinez* (1986) 188 Cal.App.3d 19, 26 [error not harmless under *Chapman* based, in part, on

prosecutor's closing argument]; *People v. Frazier* (2001) 89 Cal.App.4th 30, 39 ["reasonable doubt [under *Chapman*] is reinforced here by the prosecutor's use of the propensity instruction in closing argument"]; *People v. Younger* (2000) 84 Cal.App.4th 1360, 1384 ["Our conclusion that there is such reasonable doubt is reinforced by the prosecutor's use of the instruction in her closing arguments."]; *People v. James* (2000) 81 Cal.App.4th 1343, 1364, fn. 10 [closing argument cannot cure error in instruction but may exacerbate it]; *People v. Brady* (1987) 190 Cal.App.3d 124, 138 ["argument of the district attorney, if anything, compounded the defect"]; *People v. Rhodes* (2005) 129 Cal.App.4th 1339, 1347-1348 [convictions reversed based on instructional error, in part, because "the district attorney's closing argument exacerbated the court's instructional error."]; *Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 396 [effect of counsel's argument exacerbated instructional error]; *Depetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, 1063 [prosecutor's reliance on error in closing argument is indicative of prejudice].)

The fact that the prosecutor used the out-of-court statements and prior testimony in explicitly urging the jury to return a conviction on counts 3, 4 and 5 is particularly telling because it reveals that the prosecution cannot prove beyond a reasonable doubt that the out-of-court statements and prior testimony did not contribute to the verdicts. This is so because *Chapman* requires an analysis of

the impact of the error on appellant's jury; the appropriate inquiry is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279 [emphasis added].) As argued by the prosecution, Arias's out-of-court statements and prior testimony – whether considered individually or cumulatively – were material evidence used by the prosecution in support of the verdicts. (RT 22:3399, 3404-3405, 3419, 3432, 24:3687.)

Finally, the record reveals that both the trial judge and the jury considered Arias to be an *essential* prosecution witness. When considering the prosecution's motion to admit Arias's out-of-court statements and prior testimony, the trial court explicitly stated that Arias was "an essential witness . . . ." (RT 12:1537.) The jury too considered Arias to be an essential witness because during guilt phase deliberations the jury requested readback of Arias's prior testimony in the Delaloza trial. (RT 25:3802-3803; CT 12:3332.)

The jury foreperson sent the following note to the judge:

> Would like the Carlos Arias testimony from the De La Loza [sic] trial read back." [CT 12:332.]

On Tuesday, December 12, 2000, Arias's entire prior testimony in the Delaloza trial was read back to the jury. (RT 25:3808-3809.) Later that same week, the jury returned guilty verdicts on counts 3, 4 and 5. (CT 12:3452-3466.)

A request for readback of trial testimony, as here, is an indication that the case was close. (Cf. *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 490 [when considering the prejudicial nature of the error, "we consider whether the jury asked for a rereading of the erroneous instruction or of related evidence"]; *People v. Williams* (1971) 22 Cal.App.3d 34, 38-40 [request for read back of critical testimony]; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 [request for review of evidence, such as read back of testimony, is an indicator that the case was close and any error a tipper of the scales].)

Accordingly, the prosecution will be unable to prove beyond a reasonable doubt that the guilty verdicts in counts 3, 4 and 5 were surely unattributable to the error in the admission of any of Arias's out-of-court statements and/or prior testimony. (Cf. *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) Appellant's convictions in counts 3, 4 and 5 must be reversed.

/ / /

X.

THE TRIAL COURT'S ADMISSION OF TESTIMONIAL OUT-OF-COURT STATEMENTS OF NONTESTIFYING WITNESS ALEJANDRO DELALOZA MADE DURING POLICE INTERROGATION – IMPLICATING APPELLANT IN THE RALPHS PARKING LOT INCIDENT AND THE DOUBLE HOMICIDE OF MOLINA AND MURILLO – REQUIRES REVERSAL OF APPELLANT'S CONVICTIONS IN COUNTS 1, 2, 4 AND 5 FOR A VIOLATION OF STATE EVIDENTIARY RULES AND THE STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO CONFRONTATION, DUE PROCESS, EFFECTIVE ASSISTANCE OF COUNSEL, AND A FAIR AND RELIABLE JURY TRIAL (CAL. CONST., ART. I, §§ 7, 15 & 17; U.S. CONST., 5TH, 6TH, 8TH & 14TH AMENDS.)

A. INTRODUCTION AND PROCEDURAL BACKGROUND

The prosecutor attempted to call Alejandro Delaloza as a witness during its case-in-chief, but Delaloza refused to testify and the court, based thereon, found him to be unavailable. (RT 12:1425, 1428-1430; CT 12:3280-3281.)

The prosecutor then moved to play an audiotape of Delaloza's interrogation by the Los Angeles County Sheriff's Department relating to the double homicide on Goodhue Street (counts 4 & 5), which interrogation occurred at the Whittier Police Department on October 24, 1997, a few hours after Delaloza's arrest that day in connection with the Ralphs parking lot incident. (RT 12:1427; CT 12:3280-3281 [People's Exh. 37 [audiotape]; CT Supp. IV:109-142 [People's Exh. 38 [transcript].) The prosecution sought admission of the audiotape of Delaloza's interrogation on the ground that it was "a statement against his penal interests." (RT 12:1427.)

Trial defense counsel objected to admission of the audiotape (and the transcript thereof) on the grounds of hearsay and that the statements were exculpatory (and thus not against his penal interest). (RT 12:1432-1433.) Defense counsel further stated that if Delaloza actually testified, then counsel would have the opportunity to "cross-examine him . . . ." (RT 12:1434.) Appellant joined in the subsequent objection by codefendant Tapia's defense counsel based on "lack of confrontation . . . ." (RT 12:1440.)

The trial court overruled the defense objections, ruling that Delaloza's statements were inculpatory and thus admissible. (RT 12:1436, 1440.)

The audiotape of Delaloza's entire interrogation was played to the jury. At the same time each of the jurors was given a personal copy of the transcript of the audiotape. (RT 12:1435, 1444; People's Exhs. 37 [audiotape] & 38 [transcript].)

In the audiotape, Delaloza admitted he was a member of Eastside Whittier Cole Street gang. As to the double homicide, Delaloza stated he and appellant went to the house on Goodhue Street to talk to Monique Martinez. When they arrived, Delaloza parked around the corner, and appellant went to the house. While Delaloza was sitting in the car he heard gunshots and saw appellant running. He thought appellant was being shot at because when he saw appellant running he could still hear shots being fired. (RT 12:1443-1444; CT 12:3280-

3281 [People's Exh. 37 [audiotape]; CT Supp. IV:109-142 [People's Exh. 38 [transcript].)

Shortly after the audiotape was played, appellant renewed his objection to admission of the statement on the ground of a violation of his "confrontation rights." (RT 12:1459-1460.) The motion was denied. (RT 12:1461.)

Later during the prosecution's case-in-chief, the prosecutor moved to call Detective Mary Hanson to testify about statements Delaloza made to her during an interrogation relating to the Ralphs parking lot incident (counts 1 & 2). (RT 13:1740, 1742.) The interrogation occurred at the Whittier Police Department on October 24, 1997, shortly after Delaloza's arrest that day but a few hours prior to the interrogation by the Los Angeles County Sheriff's Department described above. (RT 13:1742, 1747.)

Trial defense counsel objected to Hanson's testimony recounting Delaloza's statements to her on grounds of a violation of the hearsay rule and *Aranda-Bruton*.[26] (RT 13:1742.) Counsel argued that Delaloza's statements were exculpatory, and thus not against his penal interest, and that admission of

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[26] *People v. Aranda* (1965) 63 Cal.2d 518, superseded by constitutional amendment as stated by *People v. Fletcher* (1996) 13 Cal.4th 451, 465 [Proposition 8 abrogated *Aranda* to the extent it excludes more evidence than does *Bruton*]; *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476].

Delaloza's statements would deny appellant the opportunity to cross-examine Delaloza. (RT 13:1743.)

The trial court overruled the defense objections, stating only that Delaloza's statements were admissible because he was an unavailable witness. (RT 13:1743-1744.)

Detective Hanson testified that in the afternoon on October 24, 1997, she interviewed Delaloza about his involvement in the robbery at the Ralphs parking lot. (RT 13:1746-1747.) After initially denying involvement, Delaloza stated that he and three friends went to the Ralphs parking lot so one of them could use the pay telephone. While there, they got into a fistfight with a group of three people. During the fight Delaloza went over to assist one of his friends that was being badly beaten; he punched the person in the face, and when he did so the knife that was clipped to his belt fell off and skidded across the pavement. (RT 13:1747-1750.)

Delaloza stated that he retrieved the knife and went back to the car. He then saw one of the other three people retrieve a baseball bat out of the trunk. He stayed in his car as his friends chased after the other group of people. Delaloza described one of his friends as "a big guy," but refused to give any names. (RT 13:1749.) After the three people they were fighting ran towards the intersection

of La Puebla and Whittier, his friends returned to the vehicle and they left the area. (RT 13:1747-1750.)

Hanson testified that Delaloza first denied taking any property, but then stated that they had picked up a bag containing some clothing and CDs. Delaloza stated that his friends may have divided the property, but that there possibly were some items from the bag at his home. (RT 13:1750-1753.)

Before the close of evidence, appellant renewed his motion for mistrial based on the admission of Delaloza's statements as a violation of the right of confrontation, citing *Lilly v. Virginia* (1999) 527 U.S. 116, and, alternatively, moved that the statements be stricken and the jury admonished to disregard them. (RT 21:3199-3209, 3288-3290.) The motion was denied. (RT 21:3209, 3290.)

As explained below, the trial court's admission of Delaloza's out-of-court statements made during police interrogation at the Whittier Police Department violated the state hearsay rule and deprived appellant of the state and federal constitutional rights of confrontation and due process (the right to a fundamentally fair trial). (*Post*, §§ X.C., X.D. & X.E.) To the extent that some and/or all of these issues were forfeited by defense counsel's failure to make timely and specific objections on the grounds set forth herein, appellant was deprived of the state and federal constitutional right to the effective assistance of counsel. (*Post*, § X.B.)

B. THE ISSUES RAISED HEREIN HAVE BEEN PRESERVED FOR APPEAL; IF THIS COURT FINDS THAT ANY OF THE ISSUES HAVE BEEN FORFEITED BY FAILURE TO ADEQUATELY OBJECT IN THE TRIAL COURT, THEN APPELLANT WAS DEPRIVED OF THE STATE AND FEDERAL CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL (CAL. CONST., ART. I, §§ 15 & 17; U.S. CONST., 6TH, 8TH & 14TH AMENDS.)

As explained above in section X.A., *ante*, trial defense counsel objected to the admission of Delaloza's tape-recorded statements to the Los Angeles County Sheriff's Department relating to the double homicide on Goodhue Street (counts 4 & 5) on the grounds of a violation of the hearsay rule and confrontation, and on the ground of a denial of cross-examination. (RT 12:1434, 1440, 1449-1461, 21:3288.) Defense counsel also objected to Detective Hanson's testimony recounting Delaloza's statements to her on grounds of a violation of the hearsay rule and *Aranda-Bruton*, and a denial of the opportunity to cross-examine Delaloza. (RT 13:1742-1743.) Finally, defense counsel also cited the United States Supreme Court's decision in *Lilly v. Virginia*, *supra*, 527 U.S. 116, thereby further raising the Sixth Amendment confrontation issue. (RT 21:3199-3209, 3288-3290.)

Each of the issues raised herein have been preserved for appellate review. (Cf. *People v. Scott, supra*, 21 Cal.3d at p. 290 [objection is sufficient if the record shows the trial judge understood the issue presented]; *Hormel v. Haverling, supra*, 312 U.S. at p. 557 ["Orderly rules of procedure do not require

sacrifice of the rules of fundamental justice"]; *People v. Williams, supra*, 9 Cal.App.3d at p. 570.) Moreover, to the extent constitutional issues are raised in this appeal, they are not waived by inadequate objection. (See *People v. Yeoman, supra*, 31 Cal.4th at pp. 117-118, 133; *People v. Coddington, supra*, 23 Cal.4th at p. 632.)

If this Court finds that any of the issues have been forfeited by failure of trial defense counsel to adequately object, then appellant was deprived of the state and federal constitutional right to the effective assistance of counsel (Cal. Const., art. I, §§ 15 & 17; U.S. Const., 6th, 8th & 14th Amends.).

Incorporating herein by reference section IX.B., *ante*, defense counsel's failure to timely make each of the objections identified herein deprived appellant of the constitutional right to effective assistance of counsel (Cal. Const., art. I, §§ 15 & 17; U.S. Const., 6th, 8th & 14th Amends.; *Strickland v. Washington, supra*, 466 U.S. at pp. 684- 685; *People v. Pope, supra*, 23 Cal.3d at p. 422) because a timely and specific objection is necessary to preserve the claims. (Evid. Code, § 353; *People v. Morris, supra*, 53 Cal.3d at p. 206.)

Although defense counsel's actions are often justified on the basis of strategic choice (*People v. Pope, supra*, 23 Cal.3d at p. 426), here there could be no rational strategic reason for counsel's failure to explicitly raise each of the objections identified herein because counsel did raise some objections to

admission of Delaloza's out-of-court statements (RT 12:1434, 1440, 17:1743), thereby revealing counsel's intent to exclude the out-of-court statements. (Cf. *People v. Pope, supra*, 23 Cal.3d at p. 426 ["an appellate court will reject the claim of ineffective assistance . . . unless there simply could be no satisfactory explanation"]; *People v. Majors, supra*, 18 Cal.4th at p. 403 ["the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission"].) Under these circumstances, any failure to preserve these issues for appeal would amount to the ineffective assistance of counsel. (See *People v. Lewis, supra*, 50 Cal.3d at p. 282 [this Court considers otherwise forfeited "claim on the merits to forestall an effectiveness of counsel contention"]; *People v. Stratton, supra*, 205 Cal.App.3d at p. 93.)

Defense counsel's deficient representation prejudiced appellant because admission of Delaloza's out-of-court statements strongly and directly linked appellant to the robbery of Kreisher and Cordero (counts 1 & 2, respectively) and to the killing of Molina and Murillo (counts 4 & 5, respectively). (See *post*, § X.F.) Reversal of appellant's convictions in counts 1, 2, 4 and 5 thus is warranted on the ground appellant was denied the state and federal constitutional rights to effective assistance of counsel.

/ / /

C. THE ADMISSION OF DELALOZA'S TESTIMONIAL OUT-OF-COURT STATEMENTS MADE DURING POLICE INTERROGATION DEPRIVED APPELLANT OF THE CONSTITUTIONAL RIGHT TO CONFRONTATION (CAL. CONST., ART. I, §§ 7, 15 & 17; U.S. CONST., 5TH, 6TH, 8TH & 14TH AMENDS.)

In *Crawford v. Washington, supra*, 541 U.S. 36, the United States Supreme Court held that the admission of testimonial hearsay in a criminal trial is a violation of the confrontation clause unless the witness is unavailable at trial and the defendant had a prior opportunity for cross-examination. (*Id.* at p. 59.) *Crawford* declined to define the term "testimonial," but gave examples of testimonial statements. *Crawford* listed as testimonial, among other things, "statements taken by police officers in the course of interrogations . . . ." (*Id.* at p. 52.)

Both sets of out-of-court statements made by Delaloza – i.e., the statements made to Detective Hanson relating to the Ralphs parking lot incident (counts 1 & 2) and the tape-recorded statements made to detectives from the Los Angeles County Sheriff's Department relating to the double homicide on Goodhue Street (counts 4 & 5) – were statements taken by police officers in the course of interrogations at the Whittier Police Department. (RT 13:1742, 1747; CT Supp. IV:109-110.) Accordingly, both sets of out-of-court statements, which were admitted at trial for the truth of the matter asserted (*ante*, § X.A.), were testimonial statements. (Cf. *Crawford v. Washington, supra*, 541 U.S. at pp. 52-66.)

Delaloza did not testify at trial and appellant did not have the opportunity to cross-examine him. (RT 12:1434, 1440.) Appellant thus was denied the state and federal constitutional rights to confrontation (Cal. Const., art. I, §§ 7, 15 & 17; U.S. Const., 6th, 8th & 14th Amends.) when the trial court admitted Delaloza's out-of-court statements to the police because appellant was given no prior opportunity to cross-examine Delaloza. (Cf. *Crawford v. Washington, supra*, 541 U.S. at pp. 53-54.)

D. THE ADMISSION OF DELALOZA'S OUT-OF-COURT STATEMENTS DEPRIVED APPELLANT OF THE CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR AND RELIABLE JURY TRIAL (CAL. CONST., ART. I, §§ 7, 15 & 17; U.S. CONST., 5TH, 6TH, 8TH & 14TH AMENDS.)

The trial court's admission of Delaloza's out-of-court statements to the police deprived appellant of the due process right to a fundamentally fair trial because the statements violated state evidentiary rules against admission of hearsay, violated the Confrontation Clause, and rendered the trial fundamentally unfair. (Cal. Const., art. I, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends..)

Appellant incorporates by reference the legal authorities and arguments set forth in section IX.D., *ante*, as though fully set forth herein. (Cf. *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346 [arbitrary deprivation of a state-created liberty interest violates due process]; *Hewitt v. Helms, supra*, 459 U.S. at p. 466 [liberty interests protected by the Due Process Clause arise from two sources, the

Due Process Clause itself and the laws of the States]; *Pointer v. Texas, supra*, 380 U.S. at p. 405; *People v. Brown, supra,* 31 Cal.4th at p. 538; *Estelle v. McGuire, supra*, 502 U.S. at p. 72 [state law errors that render a trial fundamentally unfair violate the Due Process Clause]; *Donnelly v. DeChristoforo, supra*, 416 U.S. at p. 643.)

The hearsay statements at issue here strongly and directly linked appellant to the robbery of Kreisher and Cordero (counts 1 & 2, respectively) and to the killing of Molina and Murillo (counts 4 & 5, respectively). (See *post*, § X.F.) The erroneous admission of Delaloza's hearsay statements thus deprived appellant of the due process right to a fundamentally fair trial by lowering the prosecution's burden of proof on counts 1, 2, 4 and 5 and denying appellant the right to a trial based on competent evidence and proof beyond a reasonable doubt. (Cf. *Jackson v. Virginia, supra*, 443 U.S. at pp. 317-320.)

E. DELALOZA'S OUT-OF-COURT STATEMENTS TO THE POLICE WERE NOT PROPERLY OFFERED FOR ANY NONHEARSAY PURPOSE

As explained above in section X.A., *ante*, hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Hearsay statements are inadmissible unless they fall within an exception to the general rule. (*People v. Duarte, supra*, 24 Cal.4th at p. 610.)

After finding that Delaloza's was an unavailable witness, the trial court admitted Delaloza's out-of-court statements to the police on the ground that his statement were against his penal interest. (RT 12:1431-1436, 1440.)

Admission of the out-of-court statements to the police violated the hearsay rule because the statements did not qualify as a declaration against penal interest and the statements did not fall within a firmly rooted exception to the hearsay rule because they lacked sufficient trustworthiness.[27] (See Evid. Code, § 1230; *Lee v. Illinois* (1986) 476 U.S. 530, 541 [90 L.Ed.2d 514, 106 S.Ct. 2056]; *Lilly v. Virginia, supra*, 527 U.S. at pp. 133-134 [plurality opn. of Stevens, J.].) No exception to the hearsay rule applies.

Evidence Code section 1230 sets forth the declaration against interest exception to the hearsay rule as follows, "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making

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[27] Although admission of evidence over a hearsay objection is normally reviewed for an abuse of discretion (*People v. Martinez, supra*, 22 Cal.4th at p. 120), because the admission of Delaloza's statements and prior testimony implicate the constitutional right to confrontation, the trial court's ruling is independently reviewed. (*People v. Seijas, supra*, 36 Cal.4th at p. 304; also see *Crawford* v. *Washington, supra*, 541 U.S. at p. 61.)

him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

> With respect to the penal interest exception, the proponent of the evidence "must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character." A court may not, applying this hearsay exception, find a declarant's statement sufficiently reliable for admission "*solely because* it incorporates an admission of criminal culpability." As the high court reasoned in interpreting the analogous exception to the federal hearsay rule, "[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory nature. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." Whether a statement is self-inculpatory or not can only be determined by viewing the statement in context. [¶] In view of these concerns, this court "long ago determined that "the hearsay exception should not apply to collateral assertions within declarations against penal interest." . . . . [W]e have declared [Evidence Code] section 1230's exception to the hearsay rule "inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant." [*People v. Lawley* (2002) 27 Cal.4th 102, 153 (citations omitted; emphasis in original).]

Delaloza's out-of-court statements made during police interrogation do not qualify as a statement against penal interest under Evidence Code section 1230 because the statements were exculpatory. In the taped statement relating to the double homicide, Delaloza entirely denied culpability for the killing of Molina and/or Murillo (counts 4 & 5, respectively), and deflected blame for the killings

by asserting that appellant was running away from the Goodhue Street residence as he heard the gunshots being fired. (CT 12:3280-3281 [People's Exh. 37 [audiotape]; CT Supp. IV:109-142 [People's Exh. 38 [transcript].)

In the statements to Detective Hanson relating to the robbery at Ralphs parking lot, Delaloza described a mutual altercation between a group of people (RT 13:1746-1753), and then stated that after the other people left the area some friends may have divided the property that was left behind (RT 13:1750-1753). Delaloza deflected blame for the robbery of Kreisher and Cordero (counts 1 & 2, respectively) as his statement to Detective Hanson described a non-forcible taking of abandoned property. (Cf. *People v. Duarte, supra*, 24 Cal.4th at pp. 610-611.) Thus, the statements were not inculpatory.

In *In re Sakarias* (2005) 35 Cal.4th 140, for example, in connection with this Court's review a referee's report on a claim of prosecutorial misconduct that in the separate trials of codefendants the prosecutor presented factual theories inconsistent, prosecutor Steve Ipsen testified at the referee hearing that "he would have liked to introduce Sakarias's confession, which implicated Waidla equally, in Waidla's trial, but [he did not do so because he] assumed it would be subject to a successful objection." (*Id.* at p. 154.) Prosecutor Ipsen testified, in part:

> "My understanding of the law at the time and still today, is that when I'm prosecuting Mr. Waidla and charging him with murder, I can't use the statement of his accomplice against him." At trial before a judge he knew to be highly experienced in criminal

> law, "[i]f I had tried to get in evidence, which everyone knows is inadmissible and is wrong, I'd look like an idiot to say I'd like to offer the codefendant's statement." [*Ibid.*]

The referee, accepting the prosecutor's statement, found that the Sakarias's confession would have been inadmissible under *People v. Aranda, supra*, 63 Cal.2d 518 and *Bruton v. United States, supra*, 391 U.S. 123. (*In re Sakarias, supra*, 35 Cal.4th at p. 154.) This Court then held that the prosecutor "could have reasonably assumed that most or all of Sakarias's confession would be inadmissible in Waidla's trial" because only the "specifically disserving" portion of a declaration against penal interest is admissible. (*Id.* at pp. 154-155.) The Court stated:

> Though the *Aranda/Bruton* rule of exclusion applies only to statements of jointly tried codefendants (*People v. Brown* (2003) 31 Cal.4th 518, 537), Ipsen could have reasonably assumed that most or all of Sakarias's confession would be inadmissible in Waidla's trial. Under California's hearsay exception for declarations against penal interest (Evid. Code, § 1230), admissibility is limited to the "'specifically disserving'" portions of the statement. (*People v. Duarte* (2000) 24 Cal.4th 603, 612; *People v. Leach* (1975) 15 Cal.3d 419, 441.) *Thus, Sakarias's statements* that Waidla had initiated the attack on Viivi Piirisild, struck Viivi with the hatchet as she pleaded for him to stop, called for Sakarias to assist, and later directed him to strike Viivi with the hatchet in the bedroom (see *Sakarias, supra*, 22 Cal.4th at p. 613) *could well have been held inadmissible as attempts to deflect culpability away from the declarant.* (See *People v. Duarte, supra*, at pp. 612-613; see also *id.* at p. 626 (conc. opn. of Baxter, J.) [6th Amend. confrontation clause "may most often prohibit the use against an accused of directly incriminating statements against him that were made by a nontestifying accomplice while in police

custody"].) [*In re Sakarias, supra*, 35 Cal.4th at pp. 154-155 (emphasis added).]

Moreover, statements of a nontestifying accomplice typically lack such trustworthiness and are especially suspect "'[d]ue to [the accomplice's] strong motivation to implicate the defendant and to exonerate himself . . . .'" (*Lee v. Illinois, supra*, 476 U.S. a p. 541 [citation omitted]; see also *Lilly v. Virginia, supra*, 527 U.S. at pp. 133-134 (plurality opn. of Stevens, J.) [confession by a nontestifying accomplice that inculpates the defendant does not fall within a firmly rooted exception to the hearsay rule]; *People v. Schmaus* (2003) 109 Cal.App.4th 846, 856-857.) There is a "basic understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." (*Lee v. Illinois, supra*, 476 U.S. at p. 541.)

Under the totality of the circumstances, Delaloza's statements lack sufficient reliability and trustworthiness, and thus do not fall within a firmly rooted exception to the hearsay rule, because they were made during police interrogation, they largely exonerated Delaloza himself, and they implicated appellant in both the robbery of Kreisher and Cordero (counts 1 & 2, respectively) and the killing of Molina and/or Murillo (counts 4 & 5, respectively). (Cf. *Lee v. Illinois, supra*, 476 U.S. a p. 541 [citation omitted]; see

also *Lilly v. Virginia, supra*, 527 U.S. at pp. 133-134 (plurality opn. of Stevens, J.).)[28]

F. THE JURY'S CONSIDERATION OF DELALOZA'S OUT-OF-COURT STATEMENTS REQUIRES REVERSAL OF APPELLANT'S CONVICTIONS IN COUNTS 1, 2, 4 AND 5 BECAUSE THE PROSECUTION WILL BE UNABLE TO PROVE BEYOND A REASONABLE DOUBT THAT THE EVIDENCE DID NOT CONTRIBUTE TO THE JUDGMENT

Although hearsay statements requires reversal for state law error under *People v. Watson, supra*, 46 Cal.2d at p. 836, the Confrontation Clause violations identified above, as well as state trial error giving rise to the deprivation of a federal constitutional right (here the rights to due process and confrontation), are evaluated under *Chapman* harmless error analysis. (*Chapman v. California, supra*, 386 U.S. at p. 24; *Sullivan v. Louisiana, supra*, 508 U.S. at p. 279.)

Chapman and it progeny require a close and careful assessment of the actual impact which an error has had on the jury's deliberative process. The appellate court must be ever mindful the government bears a heavy burden of persuasion in showing the error did not affect the jury. In this regard, the United States Supreme Court has made the difficulty of the government's task quite clear: the guilty verdict must have been "*surely* unattributable to the error." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279 (emphasis added).)

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[28] On appeal, de novo review is conducted to determine whether the trustworthiness test has been satisfied. (*Lilly v. Virginia, supra*, 527 U.S. at pp. 136-137 [plurality opn. of Stevens, J.].)

In connection with counts 1 and 2 (robbery of Kreisher and Cordero, respectively), appellant was severely prejudiced by admission of Detective Hanson's testimony recounting statements made by Delaloza's during his interrogation at the Whittier Police Department. Delaloza's statements to Detective Hanson referred to his friends being engaged in an altercation in the Ralphs parking lot, one of which he referred to as "a big guy." (RT 13:1749.) As the prosecutor acknowledged when seeking admission of the statement, the reference to "a big guy" implicated appellant in the robberies. (RT 13:1742.) The prosecutor argued, in part:

> [Delaloza] [m]ade admissions to Detective Mary Hanson that he was, in fact, involved in the Whittier robbery and he actually used a knife and that *his friend, who he described as a big guy, was the one who confronted the guy that eventually ran and got the bat. Statements to that effect which implicate Penunuri in the Whittier robbery.* [RT 13:1742 (emphasis added).]

The description provided by Delaloza served to corroborate the unreliable identification of appellant by eyewitnesses Kreisher (RT 8:887-889, 9:1090-1091) and Cordero (9:974-985, 988-989), and thus directly contributed to the verdict on counts 1 and 2. Kreisher's identification of appellant was unreliable because when first shown a photographic array by Detective Hanson he identified someone else, *not appellant*, but subsequently changed his mind and instead identified appellant. (RT 9:1090-1091.)

Cordero's identification of appellant also was unreliable because he described appellant as being "about 175 to 180 pounds" (RT 9:988-989), whereas appellant was in fact a substantially larger man, weighing 250 pounds (RT 9:1067-1068, 19:2819; CT 13:3633; CT Supp. Vol. IV-7, p. 1519; People's Exh. 21). Cordero's testimony also was impeached with the following evidence: 1) he lied at the preliminary hearing in this case (RT 9:1005-1008, 1020-1022); 2) he only learned of appellant's name the following day when he returned to Ralphs and spoke with an employee (RT 9:1013-1014); 3) he used to associate with members of the Pagans gang in Whittier (RT 9:997-998); and 4) he suffered prior felony convictions for forgery and attempted strong-arm robbery (RT 9:996-998).

In connection with counts 4 and 5 (first degree murder of Molina and Murillo, respectively), appellant was severely prejudiced by admission of Delaloza's taped interrogation. First degree murder requires a finding, supported by substantial evidence, that appellant either directly perpetrated the murder or is vicariously responsible for the murder. (*People v. Matlock*, *supra*, 51 Cal.2d at p. 685; *Taylor v. Superior Court, supra*, 3 Cal.3d at pp. 582-583.) The prosecution proceeded on the theory that appellant was the direct perpetrator of the murders of Molina and Murillo, not that he had aided and abetted another person in the commission of the offenses. (RT 22:3411-3412.) In his taped interrogation, Delaloza placed appellant at the scene of the killings at the precise time that the

gunshots were being fired. (RT 12:1443-1444; CT 12:3280-3281 [People's Exh. 37 [audiotape]; CT Supp. IV:109-142 [People's Exh. 38 [transcript].)

Delaloza stated,[29] in pertinent part as shown in the transcript of the taped statement:

D:[30] Okay so in your own words... explain... because we're now on tape... which... what happened.

H:[31] Okay...

D: Take your time... take your time.

H: I drove up to... where one of my homies used ta stay at... I drove up there ta go talk ta his girlfriend... to ask questions about em... an we went an I stopped... an one of... one of my other home boys got outta the car...

D: Uh huh.

H: He... he got out... my home boy... *my, home boy got out...* he went... he went inside to go talk to em... *I heard gun shots... so I started up the car... an I... I... took off cause I didn't know... if he was getting shot or not...* jumped in the car an we left... *I took him home...* an I didn't know he didn't come out with a gun or nothing... he didn't leave with a gun... so... if... if there is a gun... I... I would'n... I would'n... know what ya know what the murder weapon is cause... I did not see him had I seen him... I wouldn't a let him go in there...

D: And did... your home boy didn't you mention that you'd... left out uh... a... a... at uh... there at that address on Goodhew?... *What's his*

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29 Grammatical errors in original.

30 Deputy sheriff.

31 Alejandro Delaloza, aka Hondo Delaloza.

name?... The... the person that went... to that residence?... An then came back after you heard the gun shots?

H: *What I heard (unint) getting shot at my home boy Dozer he was getting shot at...* that's what I thought so I took off.

D: Okay... so it... was it just you... an Dozer that were in the car?

H: Yeah.

D: What kinda car do you drive?

H: I drive a Cadillac Coupe De Ville.

D: What color is it?

H: White. [CT Supp. IV:111-112.] [¶]

D: We're gonna show you a photograph... of an individual... who we know as... Dozer... to go... whose true name is Richard... Penu... nuri... Is this the same individual that you know as... Dozer?

H: *Yeah that's my home boy Dozer right there.*

D: Okay... [¶] Also known as Richard...

H: Uh my home boy I thought he was getting shot at that's why I... left... wh... when I heard the gun shots so I left an...

D: Richard...

H: *He jus came... he jus came running out like he was shot at.*

D: Okay... this individual is known as what (unint)?

[H]: Uh... Richard Penunuri...

D: Spell that?

[H]: Uh... last name of P-E-N-U-N-U-R-I first name of Richard and on this photograph here it says... Richard Penunuri... the third. [CT Supp. IV:113 (emphasis added).]

Delaloza then identified himself and appellant as members of the Cole Street gang. (CT Supp. IV:114.) Delaloza also stated that he (Delaloza) did not "know he [i.e., appellant] was gonna go in an[d] do that [i.e., shoot somebody] . . . ." (CT Supp. IV:119.) Delaloza stated,[32] in pertinent part as shown in the transcript of the taped statement:

D: *How many guns shots did you hear? [¶] A lotta-gun shots*?

H: *Yeah.*

D: *And then... you saw... Dozer...*

H: *Uh huh.*

D: Run out... towards the car?

H: *Yeah... he ran out...*

D: Towards the car?

H: *I didn't know what the fool happened, what happened (unint)... he jus jamed...* he... he...

D: What'd he say to you?

H: *He said lets go man* (unint) right there... cause there's been people goin there before... that... that... that want... that wanna get us... an look for us right there... so... so I jus... oh my god they musta (unint) us I'm not taking you home...

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[32] Grammatical errors in original.

D: Were you upset with him?

H: Not... really cause I didn't know what was goin on at the time.

D: *You mentioned earlier that you were upset with him.*

H: Yeah I was upset with em because... cause something that happened prior to that.

D: *Were you upset with him because... uh... he went inside that house*?

H: *No cause I asked em... I... I asked em... I was (unint) after I found out what... after I found out what happened, an you guys tell me... but... but... cause I didn't know he was gonna go in an do that...* but... [¶]

D: *When did he... when he well got in the car you were mad at him weren't you*?

H: *Yeah... cause I didn't know what happened...*

D: And were you mad at him because he...

H: *I was mad because he... cause he... cause he... he... cause I didn't know... I... I don't know if he... he provoked a fight in there or what an they shot at him an I always tell em ya know don't provoke no fights with nobody... so that's why I was ya know... I'm always mad when I... when I see someone ya know running... an I hear gun shots ya know like that... gets you little more mad.*

D: *Did you ask him... if he shot anybody*?

H: *Nah...* I don't think he did I... like I said he didn't have a gun... when he left the car he didn't have a gun I didn't see no gun on em an when he came back he wasn't running with no gun. [CT Supp. IV:118-120 (emphasis added).]

Delaloza's statements directly and unequivocally implicated appellant in the shooting that resulted in the death of Molina and Murillo (counts 4 & 5,

respectively). Accordingly, the prosecution will be unable to prove beyond a reasonable doubt that Delaloza's out-of-court statements did not contribute to the verdicts on counts 4 and 5 because Delaloza's statements directly linked appellant to the double homicide.

This was a close case as shown by the unreliable identifications and impeachment of prosecution witnesses relating to counts 1 and 2 (robbery of Kreisher and Cordero, respectively) (*ante*, Guilt Phase – The Defense Case, § B) and as shown by the lack of substantial evidence to support appellant's convictions in counts 4 and 5 (murder of Molina and Murillo, respectively) (*ante*, § II.).

The powerfully incriminating nature of Delaloza's out-of-court statements also is revealed in the fact that the jury was told that Delaloza was tried for the murders of Molina and Murillo before a separate jury, and that he was convicted of those murders by a jury. (RT 12:1442.) The trial court instructed the jury, in part:

> This is what our situation is relative to the testimony of this witness, Delaloza.
>
> Mr. Delaloza was charged with the double murder that occurred in October of 1997 and was tried in another department of the superior court and was found guilty and has been sentenced in that matter. That case is now up on appeal.
>
> We don't know what the jury decided in that case as to reason, whether they convicted him as a principal, as an

> accomplice, as an aider and abettor. But at least, for our purposes, he would be an accomplice. [RT 12:1442.]

This case is thus analogous to the situation involving admission of an out-of-court confession of one defendant that incriminates not only that defendant but another defendant jointly charged. In that situation, involving the *Aranda-Bruton* rule, the United States Supreme Court has held what common sense dictates – i.e., that "jurors cannot be expected to ignore one defendant's confession that is 'powerfully incriminating' as to a second defendant when determining the latter's guilt . . . ." (*Bruton v. United States, supra*, 391 U.S. at pp. 126-137; *People v. Brown* (2003) 31 Cal.4th 518, 537.)

> A jury's belief that a defendant may have confessed eviscerates the presumption of innocence. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 311 . . . [confession may be " devastating to a defendant"] (Rehnquist, C.J. conc.).) "If the jury believes that a defendant has admitted the crime, it doubtless will be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case." (*Id.* at p. 313, 111 S.Ct. 1246 (Kennedy, J. conc.) "Incriminating statements from defendants own tongue are most persuasive evidence of his guilt . . . ." (*People v. Matteson* (1964) 61 Cal.2d 466, 470 . . . .) *Indeed, the condemning power of a confession is so strong that even a non-testifying co-defendant's statement that implicates the defendant must be sanitized to remove references to the defendant in order to avoid the co-defendant's statement from spilling over onto the defendant.* (*Bruton v. U.S.* (1968) 391 U.S. 123, ...) *Our legal system requires sanitization of a co-defendant's statement because courts accept that jurors cannot be expected to wipe from their minds knowledge that a co-defendant has confessed even when a trial court instructs them to do so. . . . .* [*People v. Naverrette, supra*, 181 Cal.App.4th at pp. 834-835 (emphasis added).]

Moreover, the significance of Delaloza's taped interrogation was highlighted when the trial court permitted each juror to maintain a personal copy of the transcript of the interrogation during the length of the trial. When the audiotape of Delaloza's interrogation was played to the jury (People's Exh. 37), each juror was given a personal copy of the transcript of the audiotape (People's Exh. 38), which the court subsequently permitted the jurors to keep with their notebooks during the remainder of the trial. (RT 12:1435, 1444.)

The prosecution will be unable to prove beyond a reasonable doubt that the guilty verdicts in counts 1, 2, 4 and 5 were surely unattributable to the error in admitting Delaloza's testimonial out-of-court statements made during police interrogation. (Cf. *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.)

Appellant's convictions in counts 1, 2, 4 and 5 must be reversed.

/ / /

XI.

THE TRIAL COURT PREJUDICIALLY ERRED BY FAILING TO INSTRUCT THE JURY ON THE RULES RELATING TO ACCOMPLICE TESTIMONY WITH RESPECT TO THE TESTIMONIAL STATEMENTS OF ALEJANDRO DELALOZA, THEREBY LOWERING THE PROSECUTION'S BURDEN TO PROVE EACH ELEMENT OF THE OFFENSES CHARGED IN COUNTS 1, 2, 4 AND 5 WITH COMPETENT EVIDENCE BEYOND A REASONABLE DOUBT, AND DEPRIVING APPELLANT OF THE CONSTITUTIONAL RIGHTS TO TRIAL BY JURY AND DUE PROCESS (CAL. CONST., ART. I, §§ 7, 15, 16 & 17; U.S. CONST. 5TH, 6th, 8TH & 14TH AMENDS.)

A. INTRODUCTION AND PROCEDURAL BACKGROUND

In a separate jury trial that concluded prior to the start of appellant's trial, Alejandro Delaloza was convicted of, among other things, robbery of Shawn Kreisher and Randy Cordero (Pen. Code, § 211) and the first degree murders of Michael Murillo and Brian Molina (Pen. Code, §§ 187, subd. (a), 189). (CT Supp. VI, pp. 1172-1184.)

In appellant's trial, the trial court admitted an audiotape of Delaloza's interrogation by the Los Angeles County Sheriff's Department relating to the double homicide on Goodhue Street (counts 4 & 5), which interrogation occurred at the Whittier Police Department on October 24, 1997, a few hours after Delaloza's arrest that day in connection with the Ralphs parking lot incident. (RT 12:1427; CT 12:3280-3281 [People's Exh. 37 [audiotape]; CT Supp. IV:109-142 [People's Exh. 38 [transcript].)

The trial court also admitted Detective Mary Hanson's testimony about statements Delaloza made to her during an interrogation relating to the Ralphs parking lot incident (counts 1 & 2), which interrogation occurred at the Whittier Police Department on October 24, 1997, shortly after Delaloza's arrest that day but a few hours prior to the interrogation by the Los Angeles County Sheriff's Department described above. (RT 13:1740, 1742, 1747.)

When the trial court instructed the jury following argument of counsel, the court omitted any instruction on accomplice testimony relating to Delaloza, either in connection with counts 1 and 2 (the Ralphs parking lot robberies) or counts 4 and 5 (the murders of Molina and Murillo, respectively). (RT 24:3729-3794; CT 12:3342-3435.)

The trial court did instruct on accomplice testimony relating to Jesus Marin – instructing that "[i]f the crime of conspiracy to commit murder in the murder of Jaime Castillo was committed by anyone, the witness Jesus Marin was an accomplice as a matter of law" (24:3759) – but these instructions were expressly limited to "a person [like Marin] who is subject to prosecution for the identical offense charged in count[s] 6 and 7 [relating to Castillo] against the defendants on trial by reason of aiding and abetting or being a member of a criminal conspiracy." (RT 24:3757.) Delaloza was not subject to prosecution for any offense relating to Castillo. (RT 12:1477; CT Supp. VI, pp. 1172-1184.)

Immediately before the audiotape of Delaloza's interrogation was played to the jury, the court commented to the jury:

> This is what our situation is relative to the testimony of this witness, Delaloza.
>
> Mr. Delaloza was charged with the double murder that occurred in October of 1997 and was tried in another department of the superior court and was found guilty and has been sentenced in that matter. That case is now up on appeal.
>
> We don't know what the jury decided in that case as to reason, whether they convicted him as a principal, as an accomplice, as an aider and abettor. But at least, for our purposes, he would be an accomplice.
>
> When an accomplice testifies, whether by live testimony or by testimony in writing, that testimony must be corroborated. It doesn't require evidence that's beyond a reasonable doubt to corroborate. The corroboration can be evidence that is only slight. But there has to be some corroboration of an accomplice. Because – on the theory that an accomplice's testimony is inherently improbable or inherently improbable from his standpoint – I shouldn't say improbable. I should say untrustworthy – because of the fact that he has his own axe to grind by testifying in the matter and, therefore, his testimony must be corroborated by other evidence.
>
> You'll be instructed fully on this matter.
>
> I anticipate there will be another witness who has been referred to in this trial who has been granted immunity in this case, and he will testify, and the same rules will apply to him. Because, obviously, it will appear from his testimony that he was an accomplice – an accomplice and an aider and abettor, or whatever. That's for the jury to decide what the position of each of these parties were.

> But at this time the court is going to allow the tape to be played. And it's up to the jury to weigh this evidence with all other evidence to give it what weight the jury feels it's entitled to. [RT 12:1442-1443.]

However, the court never again instructed the jury on the rules relating to accomplice testimony with respect to the testimonial statements of Alejandro Delaloza. Although the trial court gave accomplice instructions in connection with Marin, those instructions were expressly limited to Marin and the Castillo murder. (RT 24:3757, 3759.)

When instructing the jury at the close of the evidence, the court erroneously omitted the requisite accomplice instructions in connection with Delaloza, both in connection with his status in connection with the Ralphs parking lot robberies of Kreisher and Cordero (counts 1 & 2, respectively) and in connection with his status in connection with the murders of Molina and Murillo (counts 4 & 5, respectively). (Cf. RT 24:3729-3794.) The packet of written jury instructions taken into the jury deliberation room also omitted the requisite accomplice instructions in connection with Delaloza. (CT 12:3342-3435.)

Moreover, the court's comments to the jury immediately prior to playing the audiotape of Delaloza's interrogation did not cure the error. The court initially stated Delaloza was an accomplice in connection with counts 4 and 5, but then abandoned that position, stating, "That's for the jury to decide what the position of each of these parties were." (RT 12:1443.) The court's comments

failed to instruct that Delaloza was an accomplice as a matter of law in connection with counts 1, 2, 4 and 5 (CALJIC No. 3.16). The court's comments also omitted the requirement that the testimony of an accomplice be viewed with "care and caution" (CALJIC No. 3.18). (RT 12:1442-1443.) The court omitted any mention of counts 1 and 2, and the requirement that Delaloza is an accomplice as a matter of law in connection with his testimonial statements to Detective Hanson about the Ralphs parking lot robberies.

Finally, the court stated, "You'll be instructed fully on this matter." (RT 12:1442.) Yet, when the court instructed on accomplice testimony, the court stated, "*An accomplice is a person who is subject to prosecution for the identical offense charged in count[s] 6 and 7* against the defendants on trial by reason of aiding and abetting or being a member of a criminal conspiracy." (RT 24:3757 [emphasis added].) This instruction excluded Delaloza as an accomplice because Delaloza's testimonial statements related only to counts 1, 2, 4 and 5, *not* to counts 6 and 7.

The instructional error was compounded by the following instruction, which permitted the jury to base its verdict solely on Delaloza's testimony:

> You should give the uncorroborated testimony of a single witness whatever weight you think it deserves.
>
> *Testimony by one witness which you believe concerning any fact whose testimony about that fact does not require corroboration is sufficient for the proof of that fact.* You should carefully review

all the evidence upon which the proof of the fact depends. [RT 24:3746.]

If the trial court had properly instructed the jury on the rules applying to Delaloza's testimony, then it is reasonably probable that the jury would have found his testimonial statements implicating appellant in the Ralphs parking lot robberies (counts 1 & 2) and the murder of Molina and Murillo (counts 4 & 5, respectively) too *unreliable* to support a verdict on proof beyond a reasonable doubt.[33] Absent Delaloza's testimonial statements, it is reasonably probable that the jury would have acquitted appellant of the offenses charged in counts 1, 2, 4 and 5.

B. THE TRIAL COURT IS REQUIRED TO CORRECTLY INSTRUCT THE JURY SUA SPONTE ON THE GENERAL PRINCIPLES OF LAW RELEVANT TO THE ISSUES RAISED BY THE EVIDENCE, AND AN ERROR IN FAILING TO DO SO IS REVIEWED ON APPEAL DESPITE DEFENSE COUNSEL'S ACTIONS

The issue is properly raised on appeal despite the fact that trial defense counsel did not object to the trial court's instructions on accomplice testimony. (RT 24:3729-3794.)

In every criminal case, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence. (Pen.

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[33] An accomplice is inherently untrustworthy because, among other things, he or she may try to shift blame to the defendant in an effort to minimize his or her own culpability. (Cf. *People v. Tobias* (2001) 25 Cal.4th 327, 331; *People v. Coffey* (1911) 161 Cal.433, 438.)

Code, § 1259; *People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Wickersham* (1982) 32 Cal.3d 307, 323, disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 200-201.)

The trial court has a sua sponte duty to correctly instruct the jury, and its instructions and comments to the jury are properly reviewed on appeal without objection below. (Pen. Code, § 1259;[34] *People v. Brown* (2003) 31 Cal.4th 518, 539; *People v. Roehler* (1985) 167 Cal.App.3d 353, 394-395 ["Appellate courts review the instructions to a jury regardless of objection because to do otherwise would reduce litigation to a hypertechnical game of some sort."].)

The sua sponte obligation to correctly instruct "reflect[s] concern both for the rights of persons accused of crimes and for the overall administration of justice." (*People v. Wickersham, supra*, 32 Cal.3d at p. 324; *People v. Carpenter* (1997) 15 Cal.4th 312, 380-381 [defendant may challenge on appeal the preponderance of the evidence standard for other crimes evidence without objection]; *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1291 [court may review lying in wait murder instruction without objection at trial].)

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[34] Penal Code section 1259 provides in part: "The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

C. THE TRIAL COURT WAS REQUIRED TO SUA SPONTE INSTRUCT THE JURY THAT DELALOZA WAS AN ACCOMPLICE AS A MATTER OF LAW IN CONNECTION WITH COUNTS 1, 2, 4 AND 5 (CALJIC NO. 3.16), THAT HIS TESTIMONIAL STATEMENTS MUST BE CORROBORATED (CALJIC NO. 3.11), AND THAT HIS TESTIMONIAL STATEMENTS MUST BE VIEWED WITH "CARE AND CAUTION" (CALJIC NO. 3.18)

This Court has long held that it is the duty of the trial court to give, on its own motion, instructions on the pertinent principles of law regarding accomplice testimony

> whenever the testimony given upon the trial is sufficient to warrant the conclusion upon the part of the jury that a witness implicating a defendant was an accomplice . . . . [*People v. Bevins* (1960) 54 Cal.2d 71, 76, quoting from *People v. Warren* (1940) 16 Cal.2d 103, 118.]

An accomplice is one who is "liable to prosecution for the identical offense charged against the defendant ...." (Pen. Code, § 1111.) "Whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103.)

The Legislature has deemed accomplice testimony so untrustworthy that it falls within the category of evidence that is insufficient as a matter of law to support a conviction. (*People v. Najera* (2008) 43 Cal.4th 1132, 1137.) The distrust with which accomplice testimony is viewed finds its roots in English common law. (*People v. Tobias, supra*, 25 Cal.4th at p. 331.) The rationale

generally stated is that an accomplice who testifies against a defendant does so either to obtain favor from the prosecutor or with the motive to place the responsibility for the crime on the defendant by minimizing any involvement the witness may have had in the crime. (*Ibid.*) This rationale explains the long-standing requirement that when the prosecution calls an accomplice to testify, the jury must be informed that the testimony should be viewed with distrust. (*People v. Guiuan* (1998) 18 Cal.4th 558, 565.) Accordingly, Judicial Council of California Criminal Jury Instructions, former CALJIC Nos. 3.11, 3.12, 3.13, and 3.18, inform the jury that the testimony of an accomplice testifying for the prosecution must be corroborated and should be viewed with caution. (Cf. *People v. Zapien* (1993) 4 Cal.4th 929, 982.)

There can be no dispute that Delaloza – whose testimonial statements made during custodial interrogation implicated him in the Ralphs parking lot robberies of Kreisher and Cordero (counts 1 & 2, respectively) and the murders of Molina and Murillo (counts 4 & 5, respectively), and who was convicted as a principal of those identical charges in a jury trial that concluded prior to the start of appellant's trial – was an accomplice to the robberies and murders as a matter of law. (Cf. *People v. Lewis* (2001) 26 Cal.4th 334, 368-369 [accomplice is person liable to prosecution for the identical offense charged against the defendant and who has guilty knowledge and intent with regard to the crime].)

Moreover, although Delaloza did not testify at trial, the trial court admitted his testimonial statements for the truth of the matter asserted, and as a substitute for trial testimony, instructing the jury that the statements should be considered with equal weight as the testimony of a trial witness. (RT 24:3742; CT 12:3362.) The court instructed, in part:

> Testimony given by a witness at a prior proceeding who was unavailable at this trial has been read to you from the reporter's transcript of that proceeding.
>
> You must consider that testimony as if it had been given before you in this trial. [RT 24:3742.]

Accordingly, Delaloza's statements were the functional equivalent of trial testimony and, as such, were subject to instruction on the rules regarding accomplice testimony.

When instructing the jury following the close of evidence, the trial court entirely failed to instruct the jury with respect to accomplice testimony relating to the testimonial statements made by Delaloza. Instead, the court only instructed on accomplice testimony in connection with Marin's testimony about the Castillo homicide. (RT 24:3759-3760.)

Specifically, the court did *not* instruct, as was required, that Delaloza was an accomplice as a matter of law (CALJIC No. 3.16), it did *not* instruct, as was required, that Delaloza's testimonial statements must be corroborated (CALJIC No. 3.11), and it did *not* instruct, as was required, that Delaloza's testimonial

statements must be viewed with care and caution (CALJIC No. 3.18). (Cf. *People v. Najera, supra*, 43 Cal.4th at p. 1137 [because accomplice testimony is insufficient to support a conviction, the jury must be instructed to ensure it does not rely solely on accomplice testimony]; *People v. Tobias, supra*, 25 Cal.4th at p. 331 [if there is sufficient evidence to find a witness was an accomplice to the crime, the trial court has a sua sponte obligation to instruct the jury appropriately]; *People v. Santo* (1954) 43 Cal.2d 319, 326]; *People v. Zapien, supra*, 4 Cal.4th at p. 982; *People v. Williams* (1988) 45 Cal.3d 1268, 1313-1314.)

As noted in the introductory section above, prior to playing the audiotape of Delaloza's interrogation the court commented to the jury about Delaloza's statements. (RT 12:1442-1443.) Yet, as explained above, these comments could not substitute for correct instructions on accomplice testimony because

1) the court's comments failed to instruct that Delaloza was an accomplice as a matter of law in connection with counts 1, 2, 4 and 5 (CALJIC No. 3.16),

2) the court's comments erroneously permitted the jury to determine – by some unspecified means – "what the position of each of these parties were" (RT 12:1443) (i.e., whether or not Delaloza was an accomplice),

3) the court's comments failed to instruct that Delaloza's statements must be corroborated (CALJIC No. 3.11; Pen. Code, § 1111), and

4) the court's comments failed to instruct that Delaloza's statements must viewed with "care and caution" (CALJIC No. 3.18).

Moreover, the court's instructions on accomplice testimony at the conclusion of the presentation of evidence explicitly limited the definition of "accomplice" to "*a person who is subject to prosecution for the identical offense charged in count[s] 6 and 7* . . . [,]" thereby excluding Delaloza from the definition of an "accomplice" because Delaloza was never subject to prosecution for the identical offenses charged in counts 6 and 7. (RT 24:3757 [emphasis added]; cf. *People v. Carey* (2007) 41 Cal.4th 109, 130 [court assumes jurors followed instructions].)

D. THE INSTRUCTIONAL ERROR DENIED APPELLANT THE CONSTITUTIONAL RIGHTS OF JURY TRIAL AND DUE PROCESS, AND RESULTED IN PREJUDICIAL ERROR REQUIRING REVERSAL OF APPELLANT'S CONVICTIONS IN COUNTS 1, 2, 4 AND 5, BECAUSE THE DETERMINATION OF APPELLANT'S GUILT WAS BASED MATERIALLY ON DELALOZA'S TESTIMONIAL STATEMENTS

Applying state law, this Court has held that error in failing to give accomplice instructions warrants reversal if it is reasonably probable the outcome would have been more favorable to the defendant absent the error. (*People v. Lawley* (2002) 27 Cal.4th 102, 161; *People v. Lewis, supra*, 26 Cal.4th at p. 371.)

The purpose of the cautionary admonition for accomplice testimony is to advise the jury that because an accomplice "may tailor the truth to his or her own self-serving mold," the jury should not "accept the words of an accomplice at

face value, with any presumption of truthfulness and candor, or upon the same standard as that applied to other witnesses." (*People v. Gordon* (1973) 10 Cal.3d 460, 471, disapproved on another point in *People v. Ward* (2005) 36 Cal.4th 186, 212.) Error arising from the failure to include the cautionary admonition may be harmless if the jury was apprised of this requirement through other means. (Cf. *People v. Lewis, supra*, 26 Cal.4th at p. 371.)

In view of the important nature of Delaloza's testimonial statements in this case in relation to counts 1, 2, 4 and 5, the court's failure to instruct the jury on accomplice testimony as to Delaloza resulted in a violation of federal due process. (Cf. *United States v. Bernard* (9th Cir. 1980) 625 F.2d 854, 857-858; see also *Yates v. Evatt* (1991) 500 U.S. 391, 403-404 [111 S.Ct. 1884, 114 L.Ed.2d 432] [an instructional error may be found to be harmless where it is shown beyond a reasonable doubt that the error was "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record"]; *United States v. Miller* (9th Cir. 1976) 546 F2d 320, 324 [conviction reversed: trial judge, in responding to the jury's request to rehear the instructions on credibility of witnesses, omitted a crucial instruction on distrust of accomplice testimony]; *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346 [arbitrary deprivation of a state-created liberty interest violates due process]; *Hewitt v. Helms, supra*, 459 U.S. at p. 466 [liberty interests protected by the Due Process Clause arise

from two sources, the Due Process Clause itself and the laws of the States]; *Fetterly v. Paskett, supra*, 997 F.2d at p. 1300 ["The failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state."].)

Even if the trial court's instructions on accomplice testimony are viewed as ambiguous (i.e., because the court initially indicated that Delaloza was an accomplice), there is a reasonable likelihood that the jurors applied the instructions in a way that lessened the prosecution's burden of proof on counts 1, 2, 4 and 5 (and thus violated federal due process) because 1) the court abandoned its initial statement about Delaloza being an accomplice (RT 12:1443), 2) the court instructed on accomplice testimony with reference to Marin only, and with reference to charges for which Delaloza had no criminal culpability (RT 24:3742, 3759-3760), and 3) the court instructed that the verdict could be based on the testimony of a single witness (i.e., Delaloza) (RT 24:3746). (Cf. *Boyde v. California* (1990) 494 U.S. 370, 381-381 [110 S.Ct. 1190, 108 L.Ed.2d 316]; *Calderon v. Coleman* (1998) 525 U.S. 141, 145-146 [119 S.Ct. 500, 142 L.Ed.2d 521] ["reasonable likelihood" test applies to determine whether ambiguous instruction caused constitutional error].)

Moreover, where the trial court fails to instruct the jury to make a factual determination necessary for guilt – as here with respect to the factual

determinations necessary for proper consideration of Delaloza's testimony as an accomplice – the error results in a deprivation of both due process and the Sixth Amendment right to jury trial. (Cf. *In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368]; *People v. Tewksbury* (1976) 15 Cal.3d 953, 967 [accomplice "testimony has been legislatively determined never to be sufficiently trustworthy to establish guilt beyond a reasonable doubt unless corroborated"].)

The standard of prejudice for the deprivation of a federal constitutional right, as here, is the *Chapman* harmless error analysis, which requires reversal of appellant's convictions unless the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24; see *People v. Sengpadychith, supra*, 26 Cal.4th at p. 326 [*Chapman* asks whether the prosecution has "prove[d] beyond a reasonable doubt that the error . . . did not contribute to" the verdict].)

Under this test, the appropriate inquiry is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279; *People v. Sakarias, supra*, 22 Cal.4th at p. 625 ["We may affirm the jury's verdicts despite the error if, but only if, it appears beyond a reasonable doubt that the error did not contribute to the particular verdict at issue."]).

Delaloza's testimonial statements were not sufficiently corroborated. (Cf. *People v. Cook* (2006) 39 Cal.4th 566, 601 [failure to instruct regarding accomplice corroboration requirement harmless when there is ample evidence of corroboration].) *The corroborating evidence must tend to connect the defendant with an element of the crime in such a way as to satisfy the jury that the accomplice is telling the truth*; however, the evidence may be slight, entirely circumstantial, and entitled to little consideration when standing alone. (*People v. Zapien, supra*, 4 Cal.4th at p. 982; *People v. Lewis, supra*, 26 Cal.4th at p. 370.)

In connection with the Ralphs parking lot robberies (counts 1 & 2), the testimony of prosecution witnesses Kreisher and Cordero does not provide sufficient corroboration of Delaloza's statements identifying appellant. Kreisher's identification of appellant was suspect because when first shown a photographic array by Detective Hanson he identified someone else, *not appellant*, but subsequently changed his mind and instead identified appellant. (RT 9:1090-1091.) Cordero's identification of appellant was suspect too because he described appellant as being "about 175 to 180 pounds" (RT 9:988-989), whereas appellant was in fact a substantially larger man, weighing 250 pounds. (RT 19:2819; People's Exh. 21.) Cordero's testimony also was impeached with evidence that he lied at the preliminary hearing in this case (RT 9:1005-1008,

1020-1022), that he only learned of appellant's name the following day when he returned to Ralphs and spoke with an employee (RT 9:1013-1014), and that he suffered prior felony convictions for forgery and attempted strong-arm robbery, and used to associate with members of the Pagans gang in Whittier (RT 9:996-998). Accordingly, the evidence lacks sufficient corroboration because it does *not* connect appellant with an element of the crime in such a way as to suggest that Delaloza was telling the truth.

In connection with the murders of Molina and Murillo (counts 4 & 5, respectively), and as explained in section II., *ante*, the evidence is insufficient as a matter of law to sustain the requisite finding that appellant was a principal in the commission of either offense.

Moreover, the testimony of prosecution witnesses Luke Bissonnette, Roxanne Bissonnette, Walker, and Holder does not provide sufficient corroboration of Delaloza's statements about appellant running from the Goodhue Street house at the time of the shooting. Luke's testimony was unreliable. He consumed drugs earlier that day that would have impaired his ability to accurately observe the events. (RT 10:1232-1233, 1237-1238.) He acknowledged that he did not see the gunman's face, but only looked out of the window after the shots were fired and saw a person for a couple of seconds in the distance from behind. (RT 10:1059-1066.) He admitted that it was too dark to

tell what the person was wearing, and thus he could not identify the person, although he *assumed* it was appellant because he had seen him an hour earlier on Hornell Street. (RT 10:1059-1066.) Dr. Kathy Pezdak, Ph.D., testified that Luke could not have accurately identified someone under the circumstances described by him (i.e., in the dark, at a distance, and from behind), but explained the phenomenon where an erroneous identification occurs when the witness has an expectation of seeing a particular person. (RT 19:2850-2852, 2856, 2872.)

Roxanne Bissonnette's testimony identified appellant earlier that morning – well before the shooting – and thus does not provide corroboration of Delaloza's statements about appellant running from the Goodhue Street house at the time of the shooting. (RT 11:1336-1341.) The testimony of the two neighbors, Walker and Holder, identified Delaloza's white Cadillac at the scene, but since they did not identify the gunman their statements too fail to provide sufficient corroboration of Delaloza's statements about appellant running from the Goodhue Street house at the time of the shooting. (RT 10:1309-1312, 1317-1319, 13:1599-1601.) Accordingly, the evidence lacks sufficient corroboration because it does *not* connect appellant with an element of the crime in such a way as to suggest that Delaloza was telling the truth.

Further, Delaloza's testimonial statements were very important to the prosecutor in securing convictions against appellant, especially on the Molina and

Murillo murder charges (counts 4 & 5), as the prosecutor repeatedly emphasized Delaloza's statements during closing summation. (RT 22:3403-3404, 22:3420, 22:3432, 22:3434, 24:3695; see *Yates v. Evatt, supra*, 500 U.S. at pp. 403-404 [an instructional error may be found to be harmless where it is shown beyond a reasonable doubt that the error was "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record"].)

The prosecutor argued, in pertinent part:

> *He [i.e., Delaloza] was the person who had custody and control of the vehicle that night.* He was probably the driver that night. And he was the one -- it was his car. *I mean, so he's the one elected to be the driver that night.*
>
> *And this helps support why Hondo [i.e., Delaloza] eventually was convicted for the Goodhue Street murders in a separate case as an accomplice, as an aider and abettor to Richard Penunuri, under that law.*
>
> Remember that little example on our aiding and abetting instruction. If you're even the getaway driver and you're assisting someone in committing a crime, you become just as liable as though you personally commit the crime yourself.
>
> *Hondo's the driver of the Cadillac; he's the getaway man; he's the wheel man, as we call it. And that makes him an accomplice for these subsequent crimes that Mr. Penunuri performed.* [RT 22:3403-3404 (emphasis added).]

The prosecutor also argued, in pertinent part:

> And at that point in time Richard [Penunuri] – well, look, what we have is that point in time -- we look at our exhibits -- Hondo [i.e., Delaloza] didn't park in the driveway of Goodhue Street. And we know there was adequate space for him to park in

the driveway, because we have the photographs. There was only one car in the driveway that night. And yet they park around the block and in a spot just adjacent to Matt Walker's location.

Now, why, if you're just going to visit your home boys [as Delaloza told the police in his taped statement], would you park in such a fashion away from the residence?

The reason the vehicle parked at that location, on our aerial diagram, is because these guys were up to no good. This is additional evidence to establish that Richard Penunuri had started to formulate thoughts as to what he's going to do once he gets there and once he finds the targets that he's seeking: because of their conduct. [RT 22:3420 (emphasis added).]

The prosecutor also argued, in pertinent part:

But Carlos Arias, whose testimony was read to you, also said that it was Dozer leaving the house.

And we're getting perspectives from a lot of people. Coupled with the fact that we know that Dozer was the only guy armed that night from the Ralph's parking lot in Whittier to Hornell Street, he was still armed with a firearm, the only person ever identified, and now suddenly we're supposed to believe that the person who did the killing on Goodhue Street was someone other than Dozer? That was also wearing a big, heavy-type jacket? *Could have been Hondo? Could have been Alejandro Delaloza*?

Not likely, because Alejandro Delaloza, through his statement, said that he parked near the Goodhue Street house; Dozer's the one that got out of the car; Dozer's the one that went into the backyard; that's when he heard gunfire, and all of a sudden Dozer appears. He did not see Dozer with a gun, but Dozer gets back inside the car, and they flee. That's pretty much what Alejandro Delaloza had to say. [RT 22:3432 (emphasis added).]

The prosecutor also argued, in pertinent part:

> See, *Hondo told law enforcement – and maybe he was stupid when he did so. And he's suffering the consequences as a result as we speak. But he told them what they were up to that night.* . . . . [RT 22:3434 (emphasis added).]

Finally, the prosecutor argued in rebuttal, in pertinent part:

> The black jacket at Hondo's house. Sure a black jacket was found, but it in no way compares to the black jacket that was described by the witnesses that Richard Penunuri was wearing that particular night. The big, heavy thing. The black jacket that was found at Hondo's house, we don't even know who owns that jacket or if Hondo even wore it.
>
> *If you look at Hondo's own statement to law enforcement when he implicated Penunuri in that crime [involving the murder of Molina and Murillo – counts 4 and 5]*, he was describing the clothing he was wearing that night as simply being a sweatshirt, not a jacket of any kind. [RT 24:3695 (emphasis added).]

Notwithstanding the prosecutor's argument, the defense presented substantial evidence pointing to appellant's innocence and suggesting that Delaloza was the likely perpetrator of the Molina and Murillo homicides. Delaloza was wearing clothing similar to that of the shadowy figure seen by Luke Bissonnette. (RT 9:988-989, 11:1361-1367; 19:2878-2880.) Ammunition found at Delaloza's house matched ballistics evidence from the crime scene. (RT 13:1692-1695.) The duffle bag taken during the robbery at the Ralphs market was found at Delaloza's house. (RT 9:985-987, 9:1054-1065, 13:1586-1587.) A black jacket and two sweatshirts, one with a hood, were found at Delaloza's

house, but the prosecution never tested these items for gunshot residue. (RT 19:2873-2878.) The jacket found in appellant's house tested negative for gunshot residue. (RT 19:2832-2833.)

Justice Kennard, in a concurring opinion in *People v. Guiuan, supra,* 18 Cal.4th at pp. 571-575, explained why jurors should view accomplice testimony with skepticism. Accomplices are rarely persons of integrity whose veracity is above suspicion. An accomplice's participation in the charged offense is itself evidence of bad moral character. Further, special caution is warranted when considering accomplice testimony because an accomplice's first hand knowledge of the details allows for the construction of plausible falsehoods not easily disproved. An accomplice can easily manipulate the details of the events surrounding the crime without blatant discrepancies. (*Ibid.*)

There can be no showing that the jurors understood that they should view Delaloza's testimonial statements with caution. Although the jury was instructed that in evaluating a witness's credibility it could consider a number of factors (RT 23:3601-3602, 24:3754-3755; CT 12:3362-3363, 3381-3382), because Delaloza did not testify at appellant's trial the jury was not able to assess his demeanor – a matter relevant to assessing credibility. (Evid. Code, § 780; *In re Bolden* (2009) 46 Cal.4th 216, 224 [observation of "demeanor of testifying witnesses . . . [gives one] an advantage in assessing their credibility . . . ."];

People v. Dykes (2009) 46 Cal.4th 731, 768 [demeanor is relevant to credibility of statements]; Rice v. Collins (2006) 546 U.S. 333, 343 [126 S.Ct. 969, 163 L.Ed.2d 824] (Breyer, J., concurring.) ["factors that underlie credibility: demeanor, context, and atmosphere."].)

Delaloza also was not subject to cross-examination, and thus when assessing the reliability of Delaloza's testimonial statements the jury was deprived of material information typically developed through cross-examination, including whether Delaloza was influenced by bias or prejudice or a personal interest in how the case is decided, whether Delaloza had been convicted of a felony, and whether Delaloza deliberately lied concerning the case. (Cf. *Crawford v. Washington, supra*, 541 U.S. at p. 61 [The Confrontation Clause commands that reliability be assessed in a particular manner: by testing in the crucible of cross-examination].)

The Sixth Amendment's Confrontation Clause ensures the right of criminal defendants to explore the "possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." (*Davis v. Alaska* (1974) 415 U.S. 308, 316 [94 S.Ct. 1105, 39 L.Ed.2d 347]; see also *Delaware v. Van Arsdall, supra*, 475 U.S. at p. 678.) Thus, the United States Supreme Court has recognized that "exposure of a witness' motivation in testifying is a proper and important function of the

constitutionally protected right of cross-examination." (*Davis v. Alaska, supra*, 415 U.S. at pp. 316-317.) The same is true under article 1, section 15 of the California Constitution. (*In re Anthony P.* (1985) 167 Cal.App.3d 502, 513.)

The United States Supreme Court has observed that the "[d]ischarge of the jury's responsibility for drawing appropriate conclusions from the testimony depend[s] on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria." (*Bollenbach v. United States* (1946) 326 U.S. 607, 612 [66 S.Ct. 402, 90 L.Ed.350] [involving a court's erroneous charge to the jury in answer to a jury's question].) Nor is the outcome to be left to the discerning eye of the reviewing court. "In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however, justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." (*Id.* at p. 615.)

> A jury . . . is not an unguided missile free according to its own muse to do as it pleases. To accomplish its constitutionally-mandated purpose, a jury must be properly instructed as to the relevant law and as to its function in the fact-finding process, and it must assiduously follow these instructions. [*McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833, 836.]

Here, the prosecution will be unable to prove beyond a reasonable doubt that the trial court's failure to properly instruct the jury did not contribute to the verdict. The prosecutor's repeated reliance during closing summation on Delaloza's statements reveals that the verdicts were heavily influenced by Delaloza's statements implicating appellant. (RT 22:3403-3404, 22:3420, 22:3432, 22:3434, 24:3695; see *Yates v. Evatt, supra*, 500 U.S. at pp. 403-404 [an instructional error may be found to be harmless where it is shown beyond a reasonable doubt that the error was "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record"].) It cannot be said, therefore, that the omission of the accomplice instructions as to Delaloza did not contribute to the guilty verdicts. (Cf. *Sullivan v. Louisiana, supra*, 508 U.S. at p. 279.)

Appellant's convictions in counts 1, 2, 4 and 5 must be reversed for instructional error.

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XII.

REVERSAL OF APPELLANT'S CONVICTIONS IS REQUIRED BECAUSE THE TRIAL JUDGE'S REMARKS IN THE PRESENCE OF THE JURY – VOUCHING FOR THE TRUTH OF THE PROSECUTION'S EVIDENCE AND INTERPRETING THE EVIDENCE IN A MANNER FAVORABLE TO THE PROSECUTION – DENIED APPELLANT THE RIGHTS TO A FAIR TRIAL AND AN IMPARTIAL JURY (CAL. CONST., ART. I, §§ 7, 15, 16 & 17; U.S. CONST., 5TH, 6TH, 8TH & 14TH AMENDS.)

A. INTRODUCTION AND PROCEDURAL BACKGROUND

Compounding the error identified in the previous argument where the trial judge failed to instruct the jury to view Delaloza's testimony with caution (*ante*, § XI.), as explained below, the trial judge remarked in the presence of the jury that he believed that Delaloza was the getaway driver in connection with the Molina and Murillo homicides, thereby suggesting that appellant was the shooter. (RT 12:1433-1435.)

Outside the presence of the jury, prosecutor Camacho called Alejandro Delaloza as a witness in his case-in-chief. Delaloza was in lockup, having been separately tried, convicted, and sentenced for, among other things, the Ralphs parking lot robberies of Kreisher and Cordero and the first-degree murders of Molina and Murillo. (RT 12:1425.) As the trial judge explained,

> Mr. Camacho has called Mr. Delaloza to the stand.
>
> Mr. Delaloza has previously been convicted in this case, as you all know, and has been sentenced. He has no privilege; however, he is adamant that he will not come into the courtroom.

> He will not. And if he is brought into the courtroom forcibly, he will not testify. Now, that's his position.
>
> Rather than have some sort of a circus in front of the jury, what I was going to suggest is that I could simply bring him into the court, order him to testify, and, if he refuses to testify, then simply say, all right, he's in contempt; as long as he is in contempt, he will lose any good time credits that he has. [RT 12:1425-1426.]

After a discussion of the fact that Delaloza's attorney was not present, and had not been notified of the hearing, and the fact that his appeal was pending and thus he had a valid privilege against self-incrimination (12:1426-1428, 1430, 1442), the judge examined Delaloza about whether he would agree to testify. (RT 12:1428-1430.) Delaloza said he would refuse to testify based on "his right to remain silent." (RT 12:1429.) Delaloza also stated he would refuse even to be sworn as a witness. (RT 12:1429.)

The judge then called the jury into the courtroom and, in anticipation of the playing of the audiotape of Delaloza's interrogation by the Los Angeles County Sheriff's Department relating to the double homicide on Goodhue Street (counts 4 & 5), told the jury that Delaloza had been brought into the courtroom in custody and had refused to be sworn as a witness. (RT 12:1431.) The judge told the jury:

> Ladies and gentlemen, I'm sorry for this delay in the proceedings, but what was involved here was a witness who is in custody was to be brought into the court to testify. *And that witness was unwilling to even come into the court, and, once he came into the court, he refused to testify or to be sworn or to have any part in*

> *the proceedings. The name of that witness was Mr. Delaloza.* He has been referred to as Hondo in these proceedings. [RT 12:1431 (emphasis added).]

The judge then invited comment by counsel on the issue of Delaloza's refusal to testify and the playing of the audiotape of his interrogation stating, "Counsel, did you have anything further on the subject?" (RT 12:1431.) Defense counsel stated he did have something further, but inquired, "Do you want me to have this discussion with the court in front of the jury or at the side bar?" (RT 12:1431.) The judge refused counsel's suggestion for a side bar conference outside the presence of the jury and instructed counsel to make his comments in the presence of the jury, stating, "You can state your position right now." (RT 12:1431.)

Defense counsel explained that Delaloza's statements made during interrogation were inadmissible because they were not against his penal interest as the statements shifted blame to appellant and disavowed personal responsibility. (RT 12:1432-1433.) Defense counsel also explained that he would make an offer of proof "in open court or at side bar" that "Hondo [Delaloza], in fact, is the shooter . . . ." (RT 12:1433.)

The judge invited comments by the prosecutor, also in the presence of the jury. (RT 12:1433.) The prosecutor stated:

> Your honor, thus far the People's case has pointed to three individuals occupying that white Cadillac at the time of fleeing the

> Goodhue Scene. We have three individuals accounted for based upon the witnesses that we've presented thus far. Mr. Penunuri, being occupant number 1, observed leaving the Goodhue property running across the street; two additional persons observed immediately after the shooting entering the Cadillac to drive toward Mr. Penunuri's position. That being, circumstantially, Jaime Castillo and Alejandro Delaloza.
>
> What [defense counsel] Mr. Bernstein is forgetting to mention is the fact that the keys to the white Cadillac were found in Mr. Delaloza's property the following day, *meaning that he's the individual who had control over that Cadillac that night, him being the driver* –[.] [RT 12:1433 (emphasis added).]

The judge, vouching for the prosecutor's statement about Delaloza being the driver of the Cadillac on the night of the murders of Molina and Murillo, and implicitly suggesting that appellant was the shooter, replied, "*I think that's inherent in his statement that he made [to the police].*" (RT 12:1433 [emphasis added].) The prosecutor immediately agreed stating, "Absolutely. Given the fact that the circumstantial evidence is that he [i.e., Delaloza] was the wheel man, in other words, the getaway driver from the double murder scene, certainly imposes criminal liability upon him." (RT 12:1434.)

The judge then engaged the attorneys in the following colloquy, which also was in the presence the jury:

The Court: All right. That's enough, I think, at this point.

Mr. Camacho: Very well.

The Court: *Mr. Bernstein, if this witness were called to the stand and had willingly testified, I would not stop him in his testimony if he testified exactly as he's testified in this statement.*

Mr. Bernstein: I would have a chance to cross-examine him, under those circumstances.

The Court: Well, you'd have -- that's right. You'd have a chance to cross-examine him, but –

Mr. Bernstein: The position of the law is, is that because the statement is judicially found to be inherently trustworthy because of the circumstances, in effect, an admission: I did it, something of that nature, declaration against penal interest, the cross-examination is not necessary because the statement is so inherently truthful.

In this case the statement is exculpatory. It's I didn't do it; I didn't have anything to do with it.

The Court: No. Wait. Wait. Don't go that far: I didn't have anything to do with it. *That doesn't make sense. He was there. He was the driver of the car. He admits that.* So –

All right. I've heard all that I need to hear on the record at this point. [RT 12:1434-1435 (emphasis added).]

The prosecutor marked for identification the audiotape of Delaloza's interrogation and a transcript of the interrogation, and requested permission to distribute copies of the transcript to the jurors that each juror could have a personal copy and read along while the tape was played, which permission was subsequently granted. (RT 12:1435, 1443.) However, prior to the tape being played, the judge stated, in the presence of the jury:

> *Based on the cursory reading of this [transcript], I disagree with Mr. Bernstein's position that this is an exculpatory statement. There are admissions in this statement that he actually drove to the*

location; that he drove away from the location and, therefore, was part and parcel of what was going on [in connection with the double homicide], it could be contended.

Whether or not the statement is exculpatory or incriminating I think is a question of fact to be determined by the jury.

So the objection to the tape and the transcription is overruled. [RT 12:1436 (emphasis added).]

The judge held a side bar conference (RT 12:1437-1441), and then told the jury, in part:

This is what our situation is relative to the testimony of this witness, Delaloza.

Mr. Delaloza was charged with the double murder that occurred in October of 1997 and was tried in another department of the superior court and was found guilty and has been sentenced in that matter. That case is now up on appeal.

We don't know what the jury decided in that case as to reason, whether they convicted him as a principal, as an accomplice, as an aider and abettor. But at least, for our purposes, he would be an accomplice. [¶]

But at this time the court is going to allow the tape to be played. And it's up to the jury to weigh this evidence with all other evidence to give it what weight the jury feels it's entitled to.

So would you pass out the copies of the transcript, please. [RT 12:1442-1443 (emphasis added).]

The audiotape of Delaloza's interrogation was played to the jury, and a transcript of the interrogation was provided to each juror to read along while the tape was being played. (RT 12:1443-1444; People's Exhs. 37 & 38.) Thereafter,

the judge permitted the jurors to keep their copies of the transcript with them in court stating, "The jurors may keep their copies of the transcript with your notebooks. Don't take them home with you. When you leave here, leave the transcript with your notebooks." (RT 12:1444.)

B. THE EXCUSABLE FAILURE OF TRIAL DEFENSE COUNSEL TO OBJECT TO THE JUDICIAL MISCONDUCT AND, ALTERNATIVELY, INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO RAISE TIMELY AND SPECIFIC OBJECTIONS TO EACH INSTANCE OF MISCONDUCT AS DESCRIBED BELOW, WARRANTS REVERSAL OF APPELLANT'S CONVICTIONS FOR A VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL (CAL. CONST., ART. I, §§ 7, 15 & 17; U.S. CONST., 5TH, 6TH, 8TH & 14TH AMENDS.)

Trial defense counsel did not object to the proceedings identified above or to the trial court's comments to the jury. (RT 12:1425-1444.)

Appellant recognizes that as "a general rule, judicial misconduct claims are not preserved for appellate review if no objections were made on those grounds at trial. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237.) "However, a defendant's failure to object does not preclude review 'when an objection and an admonition could not cure the prejudice caused by' such misconduct, or when objecting would be futile." (*Ibid.*, citing *People v. Terry* (1970) 2 Cal.3d 362, 398.)

Any attempt to object should be excused because the record reveals that the judge made a determined effort to engage counsel – in the presence of the jury – in a discussion on the admissibility of the audiotape of Delaloza's

interrogation. Immediately after Delaloza refused to be sworn as a witness, the judge convened the jury, apologized to them for the delay, and stated that Delaloza "was unwilling to even come into the court, and, once he came into the court, he refused to testify or to be sworn or to have any part in the proceedings." (RT 12:1431.) The court then invited comment by counsel, also in the presence of the jury. (RT 12:1431.) When defense counsel stated he did have something further to discuss, the court mandated that he make his statement in the presence of the jury. The court told counsel, in the presence of the jury, "You can state your position right now." (RT 12:1431.) After defense counsel stated his position, the court engaged the prosecutor and defense counsel in further discussions in the presence of the jury, wherein the judge made objectionable comments, as set forth herein, vouching for the truth of the prosecution's evidence and interpreting the evidence for the jury in a manner favorable to the prosecution. (RT 12:1433-1443.)

In view of the judge's insistence that the matter be discussed in the presence of the jury, it would be unfair to require defense counsel to choose between provoking the judge into making further negative statements (by objecting to "judicial misconduct" in the presence of the jury) and therefore poisoning the jury against his client or, alternatively, giving up his client's ability to argue misconduct on appeal. (Cf. *People v. Sturm, supra*, 37 Cal.4th at p.

1237.) Accordingly, the failure to object should not preclude review because the record reveals that any attempt by counsel to object to the court's procedure and comments "would have been futile and counterproductive to his client." (*Ibid.*, citing *People v. Hill, supra*, 17 Cal.4th at p. 821.)

Alternatively, and incorporating herein by reference section IX.B., *ante*, if this Court finds that defense counsel forfeited the issue by failing to timely make each of the objections identified herein, then appellant was deprived of the constitutional right to effective assistance of counsel (Cal. Const., art. I, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.; *Strickland v. Washington, supra*, 466 U.S. at pp. 684- 685; *People v. Pope, supra*, 23 Cal.3d at p. 422) because generally judicial misconduct claims are not preserved for appellate review if no objections were made on those grounds at trial. (*People v. Sturm, supra*, 37 Cal.4th at p. 1237.)

Although defense counsel's actions are often justified on the basis of strategic choice (*People v. Pope, supra*, 23 Cal.3d at p. 426), here there could be no rational strategic reason for counsel's failure to explicitly raise each of the objections identified herein because the judge's procedure and comments to the jury were objectionable, prejudicial judicial misconduct under established law. (Cf. *Ibid.* ["an appellate court will reject the claim of ineffective assistance . . . unless there simply could be no satisfactory explanation"].)

Defense counsel's deficient representation prejudiced appellant because, as explained below, the judicial misconduct described rendered appellant's trial fundamentally unfair. Reversal of appellant's convictions thus is warranted on the ground appellant was denied the state and federal constitutional rights to effective assistance of counsel.

C. THE TRIAL JUDGE ENGAGED IN PREJUDICIAL MISCONDUCT BY HOLDING AN EVIDENCE CODE SECTION 402 HEARING IN THE PRESENCE OF THE JURY, BY VOUCHING FOR THE TRUTH OF THE PROSECUTION'S EVIDENCE, BY INTERPRETING THE EVIDENCE FOR THE JURY IN A MANNER FAVORABLE TO THE PROSECUTION (AND THUS USURPING THE JURY'S ESSENTIAL FACT-FINDING FUNCTION), AND BY CREATING THE IMPRESSION THAT HE WAS ALLYING HIMSELF WITH THE PROSECUTION, THEREBY REQUIRING REVERSAL OF APPELLANT'S CONVICTIONS FOR A DENIAL OF THE RIGHTS TO A FAIR TRIAL AND AN IMPARTIAL JURY (CAL. CONST., ART. I, §§ 7, 15, 16 & 17; U.S. CONST., 5TH, 6TH, 8TH & 14TH AMENDS.)

Every criminal defendants has a fundamental right to a fair trial and an impartial jury. (Cal. Const., art. I, §§ 7, 15, 16 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.) Due process requires judges to protect the defendant's right to a fair and impartial trial by conducting the proceedings without bias. (*Bracy v. Gramley* (1997) 520 U.S. 899, 904-905 [the floor established by the Due Process Clause requires a fair trial in a fair tribunal before an unbiased judge].)

An accused's Sixth Amendment right to an impartial jury hinges on the trial judge's fairness. To this end, the California Code of Judicial Ethics requires judges to treat all parties with patience and courtesy, and perform their duties without bias. (Cal. Code Jud. Ethics, canon 3B(4) & (5).) Jurors expect no less,

and "rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials." (*People v. Sturm, supra*, 37 Cal.4th at p. 1233.) Because judges can easily influence the decisions of jurors, the court must avoid "even the appearance" of favoring the prosecution or the defense. (*United States v. Sheldon* (5th Cir. 1976) 544 F.2d 213, 218.) Consequently, when trial is by jury, a "fair trial in a fair tribunal" requires the judge to refrain from conduct that can prejudice the jury. (Cf. *Turner v. Louisiana* (1965) 379 U.S. 466, 472-473 [85 S.Ct. 546, 13 L.Ed.2d 424]; *In re Murchison* (1955) 349 U.S. 133, 136 [75 S.Ct. 623, 99 L.Ed. 942].)

> The Sixth Amendment encompasses additional guarantees implicit in the nature of trial by an impartial jury; namely that the jury's verdict be based upon the evidence adduced at trial, uninfluenced by extrajudicial evidence or communications or by improper association with the witnesses, parties, counsel or other persons. (*Turner v. Louisiana, supra*, 379 U.S. at pp. 472-473 . . .; *People v. Tidwell* (1970) 3 Cal.3d 62, 74 . . . .) "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." [*People v. Sanders* (1988) 203 Cal.App.3d 1510, 1513, citing *Turner v. Louisiana, supra*, 379 U.S. at pp. 472-473.]

The judge's comments "must be accurate, temperate, nonargumentative, and scrupulously fair." (*Id.* at p. 1232.) It may not "create the impression that it is allying itself with the prosecution." (*Id.* at p. 1233.) "Trial judges 'should be exceedingly discreet in what they say and do in the presence of a jury lest they

seem to lean toward or lend their influence to one side or the other.'" (*Id.* at p. 1237.) In *Sturm*, "the trial judge's conduct ... constituted misconduct" because "in the presence of the jury ... he ... conveyed the impression that he favored the prosecution." (*Id.* at p. 1238; cf. *United States v. Young* (1985) 470 U.S. 1, 18-19 [105 S.Ct. 1038, 84 L.Ed.2d 1] [prosecutorial vouching "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence."].)

It is not just the appearance of bias expressed in the presence of the jury that is a problem, however. A judge makes many rulings out of the presence of the jury, rulings often deferred to if within the court's discretion. "Due Process clearly requires" that those rulings be made by "a judge with no actual bias against" the defendant (*Bracy v. Gramley* (1997) 520 U.S. 899, 905) – i.e., one who is "impartial and disinterested" (*Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 242 [100 S.Ct. 1610, 64 L.Ed.2d 182]).[35]

"This requirement of neutrality ... safeguards [one of] the two central concerns of procedural due process, the prevention of unjustified or mistaken

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[35] Accord, *Rose v. Clark* (1986) 478 U.S. 570, 577 [106 S.Ct. 3101, 92 L.Ed.2d 460] ["The State of course must provide a trial before an impartial judge"]; *People v. Kipp* (2001) 26 Cal.4th 1100, 1140 ["Under the due process clause of the federal Constitution, [a] defendant is entitled to an impartial trial judge"]; *Cooper v. Superior Court In and For Los Angeles County* (1961) 55 Cal.2d 291, 301 ["The judge's function as presiding officer is preeminently to act impartially"].)

deprivations...." It is the cornerstone of the "guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law...." (*Marshall v. Jerrico, Inc., supra*, 446 U.S. at p. 242.) "Without th[at] ... basic protection ..., a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.... Adjudication by [a] biased judge ... necessarily render[s] a trial fundamentally unfair." (*Rose v. Clark* (1986) 478 U.S. 570, 577-578.)

In an initial hearing outside the presence of the jury, the judge found that Delaloza was an unavailable witness and granted the prosecution's request to play an audiotape of his interrogation by police. (RT 12:1430-1431.)

Then, in the presence of the jury, the judge committed misconduct by commenting to the jury that Delaloza had been brought into the courtroom outside their presence and refused to testify and/or take part in the proceedings. (RT 12:1431.) The judge stated, in part, "I'm sorry for this delay in the proceedings, but what was involved here was a witness who is in custody was to be brought into the court to testify. And that witness was unwilling to even come into the court, and, once he came into the court, he refused to testify or to be sworn or to have any part in the proceedings. The name of that witness was Mr. Delaloza. He has been referred to as Hondo in these proceedings." (RT 12:1431.) This comment encouraged the jury to speculate as to the reason that

Delaloza refused to participate, leaving to their imagination that Delaloza had something to hide, or that he was fearful for his safety, perhaps because of some untold threats by appellant.

The judge then elicited comments by counsel, telling defense counsel, "You can state your position right now." (RT 12:1431.) By engaging defense counsel in an Evidence Code section 402[36] hearing in the presence of the jury, and then ultimately discussing the evidence and overruling defense counsel's objections in the presence of the jury (RT 1431-1444), the judge created the strong impression that he was allying himself with the prosecution. The judge also created the strong impression that Delaloza's statements to the police, which the jury was about to hear, contained damaging admissions. And, as more fully explained below, the procedure reasonably suggested to the jury the truth of Delaloza's statements to the police.

The judge and the jury then heard argument from the prosecutor on the admissibility of Delaloza's statements to the police. (RT 12:1433.) The prosecutor concluded by criticizing defense counsel for "forgetting to mention" that the "keys to the white Cadillac were found in Mr. Delaloza's property the following day, meaning that he's the individual who had control over that Cadillac that night, him being the driver - - [.]" (RT 12:1433.)

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[36] Section 402 provides, in part, that hearings on the admissibility of evidence are held "out of the presence or hearing of the jury . . . ."

Seizing on the prosecutor's interpretation of the evidence that Delaloza was the driver of the Cadillac, the judge replied, "I think that's inherent in his statement that he made [to the police]." (RT 12:1433.) This was an improper comment on the evidence because it supported and vouched for the prosecution's theory that Delaloza was the driver of the vehicle in connection with the double homicide (and thus, by implication, that appellant was the gunman). (Cf. *People v. Coddington, supra*, 23 Cal.4th at pp. 615-616 [finding a reasonable likelihood that a juror might have inferred from the court's comments that the court had vouched for the witness's credibility].)

The comment was improper in a more general sense, moreover, because by supporting the prosecution's argument on the evidence the comment revealed to the jury that the judge was allying himself with the prosecution. (Cf. *People v. Cole* (1952) 113 Cal.App.2d 253, 261 ["jurors are eager to find and quick to follow any supposed hint of the judge as to how they should decide the case"].) The comment also was improper because Delaloza's statement to the police had not yet been admitted into evidence, and thus the court was commenting on facts not in evidence. (*People v. Hill, supra*, 17 Cal.4th at pp. 827-828 [improper to argue facts not in evidence].) Although the statement would soon be heard by the jury, the judge's comments had the improper effect of shaping the jury's view of the evidence in favor of the prosecution even before that evidence was presented.

Immediately after the court's comment that inherent in the statement was the fact that Delaloza was the driver of the Cadillac, the prosecutor affirmed the judge, stating, "Absolutely. . . . He was the wheel man, in other words, the getaway driver from the double murder scene . . . ." (RT 12:1434.) Lest anything be left to the jury's own determination, the judge stated, "Mr. Bernstein, if this witness were called to the stand and had willingly testified, I would not stop him in his testimony if he testified exactly as he's testified in this statement. [¶] That doesn't make sense [Mr. Bernstein]. *He was there. He was the driver of the car.* He admits that. . . . ." (RT 12:1434-1435 [emphasis added].) These comments again implicitly suggest that appellant (i.e., the other person) was the shooter.

> A California trial court may comment on the evidence, including the credibility of witnesses, so long as its remarks are accurate, temperate, and "scrupulously fair." . . . . Of course, the court may not express its views on the ultimate issue of guilt or innocence or otherwise "usurp the jury's exclusive function as the arbiter of questions of fact and the credibility of witnesses." [*People v. Melton* (1988) 44 Cal.3d 713, 735 [citations omitted).]

The judge's comment about not stopping Delaloza from giving live testimony consistent with the statement to the police improperly favored the prosecution by signaling to the jury the court's approval of Delaloza's statement. The comment, "He was there. He was the driver of the car. He admits that" (RT 12:1435), is an improper comment on the evidence favoring the prosecution and

usurping the jury's fact-finding function. (*People v. Coddington, supra*, 23 Cal.4th at pp. 615-616.) Moreover, in view of the fact that the jury had not yet even heard the audiotape of Delaloza's interrogation, the force of the judge's comments was compounded by the jury's inability to analyze those comments in context. Finally, the comment that defense counsel's argument "doesn't make sense" (RT 12:1434) suggests both the judge's view of the evidence favoring the prosecution and reveals to the jury that the judge was allying himself with the prosecution. (Cf. *People v. Cole, supra*, 113 Cal.App.2d at p. 261 ["jurors are eager to find and quick to follow any supposed hint of the judge as to how they should decide the case"].)

Prior to the tape being played, the judge reaffirmed to the jury his view of the evidence, and his disagreement on defense counsel's theory of the evidence, stating, in part, "Based on the cursory reading of this [transcript], I disagree with Mr. Bernstein's position that this is an exculpatory statement. There are admissions in this statement that he actually drove to the location; that he drove away from the location and, therefore, was part and parcel of what was going on [in connection with the double homicide], it could be contended." (RT 12:1436.) As with the statements in the preceding paragraph, the judge committed misconduct by 1) commenting on the evidence in a manner favorable to the prosecution, 2) creating the impression that he was allying himself with the

prosecution, 3) conveying that impression that he felt that Delaloza's statements to the police were in fact true, and thus usurping the essential fact-finding function of the jury.

Moments before the audiotape was played, the judge told the jury that Delaloza was previously tried by a jury for the "double murder" at issue in this case, was convicted by the jury, was sentenced, and has a pending appeal in the case. (RT 12:1442-1443.) These comments were improper. (*People v. Young* (1978) 85 Cal.App.3d 594, 601-602 [improper to inform jury of disposition of accomplice's case]; cf. *People v. Malone* (1988) 47 Cal.3d 1, 53-54; *Hudson v. North Carolina* (1960) 363 U.S. 697, 702-703 [80 S.Ct 1314, 4 L.Ed.2d 934] [the guilty plea of a codefendant cannot be used as substantive evidence to prove the guilt of a defendant]; *People v. Leonard* (1983) 34 Cal.3d 183, 188-189.)

As this Court stated in *Leonard* when reversing the defendant's convictions for prejudicial error in admission of a coarrestee's guilty plea:

> The prejudicial effect of Johnson's guilty plea, however, is clearly substantial and far outweighs any probative value the evidence might have [as a declaration against penal interest]. *That some time after the robbery defendant was stopped and arrested with another man who then pleaded guilty to the commission of a robbery earlier in the evening invites an inference of guilt by association* -- particularly when much of the prosecution testimony at trial was illustrated with diagrams that referred to the assailants as "L" and "J." [*Id.* at p. 188 (emphasis added).]

"Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused." (*Glasser v. United States* (1942) 315 U.S. 60, 71 [62 S.Ct. 457, 86 L.Ed. 680].) Defendants, consequently,

> especially defendants facing death – have a right under the Due Process Clause to a ... judge who takes seriously his responsibility to conduct fair proceedings, a judge who looks out for the rights of even the most undeserving defendants. [*Bracy v. Schomig* (7th Cir. 2002) 286 F.3d 406, 419 (en banc).]

It appears that the trial judge held the extraordinary – and highly inappropriate – Evidence Code section 402 hearing described above *in the presence of the jury* because he was upset at Delaloza for what the judge may have perceived as Delaloza's conduct in flaunting the judicial system by refusing to take the witness stand and even be sworn as a witness. (RT 12:1425-1429.) The judge's frustration with Delaloza became evident even before he was examined by the court on the issue whether he would testify in this case. Outside the presence of the jury, when the prosecutor announced that Delaloza was the next witness, the prosecutor stated that Delaloza's attorney was not present, although she had been told to be present.[37] (RT 12:1425.) The judge immediately responded that Delaloza had no "privilege" and thus they would proceed without his attorney. (RT 12:1425.) The judge was incorrect as Delaloza did have a privilege against self-incrimination as his appeal was

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[37] Subsequently, the prosecutor and court acknowledged that Delaloza's attorney was never told of the hearing. (RT 12:1428.)

pending.[38] The judge then noted that Delaloza was refusing to come into the courtroom, but that the judge would have him forcibly brought forth and would order him to testify. If he refused to testify, the judge stated he would hold him in contempt, which would cause Delaloza to lose good time credits against his sentence. (RT 12:1425-1427.) Ultimately, the judge examined Delaloza from somewhere inside the courtroom, without Delaloza's attorney being present, and Delaloza refused to take the witness stand (RT 12:1428-1430), which the judge told Delaloza was a "right you don't have." (RT 12:1429.)

Nonetheless, the judge has to rise to the level demanded by the Constitution no matter how any party or witness acts. Even if it is "contemptuous conduct by a party or attorney that ... provoke[s] a trial judge", if the upshot is that "he cannot 'hold the balance nice, clear, and true between the state and the accused' [citation]", then he may not preside. (*Taylor v. Hayes* (1974) 418 U.S. 488, 501 [94 S.Ct. 2697, 41 L.Ed.2d 897] [reversing where judge became "embroiled in a running controversy with petitioner"].) Although the record reveals that the judge's misconduct may have arisen because he was frustrated

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[38] A criminal defendant may assert the right against self-incrimination until such time as there can be no further adverse consequences from testifying, which is, at a minimum, after he is sentenced and either the time for appeal from the conviction has run or his timely appeal is resolved. (*People v. Fonseca* (1995) 36 Cal.App.4th 631, 633; *In re Courtney S.* (1982) 130 Cal.App.3d 567, 573; see also *People v. Lopez* (1999) 71 Cal.App.4th 1550, 1554; *In re Robert E.* (2000) 77 Cal.App.4th 557, 560.)

with Delaloza's conduct, the record shows that appellant and trial defense counsel were respectful to the judge at all times. (RT 12:1425-1444.)

The above actions by the trial court require reversal of appellant's convictions for a denial of the rights to a fair jury trial and due process. (Cal. Const., art. I, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.) The standard of prejudice for the deprivation of a federal constitutional right, as here, is the *Chapman* harmless error analysis, which requires reversal of appellant's convictions unless the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24; see *People v. Sturm, supra*, 37 Cal.4th at pp. 1244 [assessing judicial misconduct].) Under this test, the appropriate inquiry is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279; *People v. Sakarias* (2000) 22 Cal.4th 596, 625 ["We may affirm the jury's verdicts despite the error if, but only if, it appears beyond a reasonable doubt that the error did not contribute to the particular verdict at issue."].)

Unquestionably, "the [trial] judge has a duty to be impartial, courteous and patient . . . and its violation may be so serious as to constitute reversible error." (5 Witkin & Epstein, *Cal. Criminal Law* (2d ed. 1989) § 2891, p. 3530; see

People v. Burnett (1993) 12 Cal.App.4th 469, 475.) "A judge's comments are evaluated 'on a case-by-case basis, noting whether the peculiar content and circumstances of the court's remarks deprived the accused of his right to trial by jury.' [Citation.] 'The propriety and prejudicial effect of a particular comment are judged both by its content and by the circumstances in which it was made.'" (*People v. Sanders* (1995) 11 Cal.4th 475, 531-532 [citations omitted].)

As explained above, instead of merely having the prosecutor present the audiotape of Delaloza's interrogation, the judge engaged in prejudicial misconduct by repeatedly making inappropriate comments to the jury on events that occurred in court but outside their presence, conducting a hearing on the admissibility of evidence in the presence of the jury, improperly commenting on the evidence, and creating the impression that he was allying himself with the prosecution. (Cf. *People v. Sturm, supra*, 37 Cal.4th at pp. 1243-1244 [reversing death judgment based on the cumulative effect trial court's improper comments].)

The judge's comments vouched for Delaloza's statements to the police, which statements formed a material part of the prosecution's evidence on the double homicide, which then provided the purported motive for appellant to conspire to kill Castillo. (*Ante*, Statement of Facts, §§ A.3. & A.4.) In his taped interrogation, Delaloza identified himself as the driver of the Cadillac, and he placed appellant at the scene of the killings at the precise time that the gunshots

were being fired. (RT 12:1443-1444; CT 12:3280-3281 [People's Exh. 37 [audiotape]; CT Supp. IV:109-142 [People's Exh. 38 [transcript].) He identified appellant as wearing a large "black . . . parka type jacket." (CT Supp. IV:133.)

Moreover, Delaloza shifted the blame to appellant, stating he was unaware whether appellant had a gun, he was unaware there would be a shooting, and when appellant came running back to the Cadillac (at the time of the shooting) Delaloza was upset with appellant about the shooting. (CT Supp. IV:109-126.) Moreover, Delaloza provided a motive to harm Luke (one of the purported targets of the double homicide): Luke used to hangout with appellant and Delaloza, but then stopped doing so after he (Luke) stole something from one of Delaloza's "buddies" while that person was in jail, and thus Luke was afraid that Delaloza was "gonna go beat em up or something . . . ." (CT Supp. IV:127.)

In *People v. Mahoney* (1927) 201 Cal. 618, in the context of a prosecution for involuntary manslaughter based upon a charge that defendant built a grandstand negligently or unlawfully, which collapsed and killed a person, the trial judge made numerous remarks, disparaged a defense expert witness in the jury's presence, and questioned defense witnesses in a manner that demonstrated a clear bias for the prosecution. (*Id.* at pp. 621-623.) For example, the trial judge remarked, "'Now, that question . . . you know is not a proper question. I am willing to allow a lot for ignorance, but some questions pass the bounds, and that

is one of them.'" (*Id.* at p. 624.) The judge also commented that counsel's objection was "idiotic" and had not "a scintilla of sense." (*Id.* at p. 625.) Finding reversible error in the unfairness of the judge, this Court held:

> When, as in this case, the trial court persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge, and in other ways discredits the cause of the defense, it has transcended so far beyond the pale of judicial fairness as to render a new trial necessary. . . . . The fact that a record shows a defendant to be guilty of a crime does not necessarily determine that there has been no miscarriage of justice. In this case the defendant did not have the fair trial guaranteed to him by law and the constitution. [*Id.* at p. 627.]

As the appellate court in *People v. Zammora* (1944) 66 Cal.App.2d 166, recognized, "jurors watch courts closely, and place great reliance on what a trial judge says and does. They are quick to perceive a leaning of the court. *Every remark dropped by the judge, every act done by him during the progress of the trial is the subject of comment and conclusion by the jurors, and invariably they will arrive at a conclusion based thereon as to what the court thinks about the case.*" (*Id.* at p. 210 [emphasis added].)

The repeated instances of judicial misconduct in the presence of the jury conveyed to the jury a distinct partiality in favor of the prosecution and in the truth of Delaloza's statements to the police. That partiality may have influenced the jury to return a verdict in favor of the prosecution when a fair trial might have

yielded either a defense verdict or a hung jury. In view of the cumulative effect of the judicial misconduct, the prosecution will be unable to prove beyond a reasonable doubt that the guilty verdicts actually rendered in this trial were surely unattributable to the error. (Cf. *Sullivan v. Louisiana, supra*, 508 U.S. at p. 279; *People v. Sturm, supra*, 37 Cal.4th at pp. 1243-1244; see generally, *Taylor v. Kentucky, supra*, 436 U.S. at p. 487, and fn. 15.) Appellant's convictions must therefore be reversed.

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XIII.

THE TRIAL COURT'S INSTRUCTIONS TO THE GUILT-PHASE JURY IN THE LANGUAGE OF CALJIC NO. 17.41.1 – THE DISAPPROVED "JUROR SNITCH" INSTRUCTION – REQUIRES REVERSAL OF APPELLANT'S CONVICTIONS FOR A DENIAL OF THE FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR AND RELIABLE JURY TRIAL (U.S. CONST., 5TH, 6TH, 8TH & 14TH AMENDS.)

The trial court instructed the jury in the language of CALJIC No. 17.41.1,[39] the disapproved juror snitch instruction requiring jurors to report each other for perceived misconduct during deliberations. (RT 24:3733; CT 12:3347.) The trial court admonished the jurors as follows:

> The integrity of a trial requires that jurors at all times during deliberations conduct themselves as required by these instructions; accordingly, should it occur that a juror refuses to deliberate or expresses an intention to disregard the law or decide the case based on penalty or punishment in this phase of the case or any other improper basis, it's the obligation of the other jurors to immediately advise the court of that situation. [RT 23:3733.]

This Court reviewed CALJIC No. 17.41.1 and found that it did not violate a defendant's Sixth Amendment right to a jury trial because the constitutional right does not require "absolute and impenetrable secrecy for jury deliberations in the face of an allegation of juror misconduct," or "constitute[] an absolute bar to

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[39] At the time of appellant's trial, CALJIC NO. 17.41.1 provided: "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."

jury instructions that might induce jurors to reveal some element of their deliberations." (*People v. Engelman* (2002) 28 Cal.4th 436, 443.) Nonetheless, this Court exercised its supervisory power and directed that CALJIC No. 17.41.1 not be given in future trials due to the potential to lead members of the jury to "shed the secrecy of deliberations" and to "draw the court unnecessarily into delicate and potentially coercive exploration of the subject matter of deliberations." (*Id.* at p. 447.)

The trial court's instruction to the jury during voir dire deprived appellant of his rights to a jury trial and due process by chilling jury deliberations because the instruction invades the secrecy of jury deliberations and chills free and open debate, especially by jurors who hold a minority view. Private and secret deliberations are essential features of the jury trial guaranteed by the Sixth Amendment. (*United States v. Brown* (D.C. Cir. 1987) 823 F.2d 591, 596.) The instruction here pointedly told each juror that s/he is not guaranteed privacy or secrecy. At any time, the deliberations might be interrupted and a fellow juror may repeat his/her words to the judge and allege some impropriety, real or imagined, which the fellow juror believed occurred in the jury room. The jurors are not only threatened with exposure, they are also left to wonder what consequences will follow exposure. This uncertainty will likely cause jurors to forego independence of mind, conceal concerns they may have about the state's

evidence, and hurry toward consensus. In short, the instruction assures the jurors that their words might be used against them, and that candor in the jury room might be punished. The instruction, therefore, chills speech and free discourse in a forum where "free and uninhibited discourse" is most needed. (*Attridge v. Cencorp.* (2nd Cir. 1987) 836 F.2d 113, 116.) The instruction virtually assures "the destruction of all frankness and freedom of discussion" in the jury room. (*McDonald v. Pless* (1915) 238 U.S. 264, 268.)

United States v. Thomas (2nd Cir. 1997) 116 F.3d 606 is an exegesis on the importance of jury secrecy and freedom of speech in the jury room. There, a juror, unsolicited by any instruction, told the judge that another juror had expressed an intention to disregard the law read to them. The judge interviewed the jurors singly in chambers, and then discharged the accused juror. The defendants were convicted. On appeal, they complained about the discharge of the juror, and the court reversed the convictions. Although the court agreed that a juror who intends to disregard or "nullify" applicable law is subject to dismissal, it decided that the possibility of jury nullification is a "lesser evil" than "broad-ranging judicial inquisitions into the thought processes of jurors." (*Id.* at p. 623.) The *Thomas* court stated the general rule that:

> 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. [*Id.* at p. 618.]

Moreover, "Juror privacy is a prerequisite of free debate, without which the decision-making process would be crippled." (*United States v. Symington* (9th Cir. 1999) 195 F.3d 1080, 1086 (citation omitted).) Free jury discourse is so important that, as a matter of policy, post-verdict inquiry into the deliberative process is highly disfavored. (Cf., e.g., *United States v. Marques* (9th Cir. 1979) 600 F.2d 742, 747.)

The Supreme Court of the United States has recognized that the jury retains the power to render a not-guilty verdict even where acquittal is inconsistent with the law given by the court. (Cf. *Dunn v. United States* (1932) 284 U.S. 390, 393-394.) The court also noted that when a jury renders a verdict at odds with what the court would have rendered, it is usually because the jurors are serving the very purpose for which they were called to serve. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 157 [88 S.Ct. 1444, 20 L.Ed.2d 491].) Indeed, "the jury's fundamental function is not only to guard against official departures from the rules of law, but on proper occasions themselves to depart from unjust rules or their application." (Kadish & Kadish, *Discretion to Disobey: A Study of Lawful Departures from Legal Rules*, p. 53 (1973).)

Accordingly, the chilling effect that the instruction necessarily had on jury deliberations – stifling free expression during the deliberative process – deprived

appellant of his federal constitutional rights to due process and a fair and reliable jury trial (U.S. Const., 5th, 6th, 8th & 14th Amends.), thereby warranting reversal of his convictions.

/ / /

XIV.

THE CUMULATIVE EFFECT OF THE GUILT PHASE ERRORS REQUIRES REVERSAL OF APPELLANT'S CONVICTIONS FOR A DENIAL OF THE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR AND RELIABLE JURY TRIAL (CAL. CONST., ART. I, §§ 7, 15, 16 & 17; U.S. CONST., 5TH, 6TH, 8TH & 14TH AMENDS.)

Appellant's convictions should be reversed due to the cumulative prejudice caused by numerous errors, separately identified in Arguments II through XIII, inclusive, *ante*, which operated together, and in any combination of two or more, to deny appellant the due process right to a fundamentally fair and reliable trial.

"The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair." (*Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 298, 302-303 [93 S.Ct. 1038, 35 L.Ed.2d 297] [combined effect of individual errors "denied [Chambers] a trial in accord with traditional and fundamental standards of due process" and "deprived Chambers of a fair trial"]; see *Montana v. Egelhoff* (1996) 518 U.S. 37, 53 [116 S.Ct. 2013, 135 L.Ed.2d 361] [*Chambers* held that "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation"]; *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn.15 ["{T}he cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness . . . ."].)

"[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. [Citations.]." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) Thus, even in a case with strong government evidence, reversal is appropriate when "the sheer number of . . . legal errors raises the strong possibility the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone." (*Id.* at p. 845; see also *Gerlaugh v. Stewart* (9th Cir. 1997) 129 F.3d 1027, 1043; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476.)

In a close case which turns on the credibility of witnesses, as here, anything which tends to discredit the defense witnesses in the eyes of the jury or to bolster the story told by the prosecution witness, "requires close scrutiny when determining the prejudicial nature of any error." (*People v. Briggs* (1962) 58 Cal.2d 385, 404; see also *United States v. Carroll* (6th Cir. 1994) 26 F.3d 1380, 1384 [curative instruction not sufficient where conflicting testimony was virtually the only evidence]; *United States v. Simtob* (9th Cir. 1990) 901 F.2d 799, 806 [improper vouching for a key witness' credibility by the prosecutor in a close case]; *People v. Taylor, supra,* 180 Cal.App.3d at p. 626 [error requires reversal in "close case where credibility was the key issue"].)

> In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant. [*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.]

When a case is close, a small degree of error in the lower court should, on appeal, be considered enough to have influenced the jury to wrongfully convict the appellant. (*People v. Wagner* (1975) 13 Cal.3d 612, 621; *People v. Collins* (1968) 68 Cal.2d 319, 332.) "Where a trial court commits an evidentiary error, the error is not necessarily rendered harmless by the fact there was other, cumulative evidence properly admitted." (*Parle v. Runnels, supra*, 505 F.3d at p. 928; see (1973), *Krulewitch v. United States* (1949) 336 U.S. 440, 444-445 [69 S.Ct. 716, 93 L.Ed. 790] [holding that, in a close case, erroneously admitted evidence – even if cumulative of other evidence – can "tip[ ] the scales" against the defendant]; *Hawkins v. United States* (1954) 358 U.S. 74, 80 [concluding that erroneously admitted evidence, "though in part cumulative," may have "tip[ped] the scales against petitioner on the close and vital issue of his [state of mind]"].)

Here, there is a substantial record of serious errors that cumulatively violated appellant's due process rights under *Chambers v. Mississippi, supra*, 410 U.S. 284. Against the backdrop of woefully insufficient evidence to sustain appellants convictions in counts 4, 5, 6 and 7, and the true findings on the witness-killing and multiple-murder special circumstances (Arguments II through VI, inclusive, *ante*), the jury heard the inadmissible testimony Detective Levsen that appellant was acting under the jurisdiction of the Mexican Mafia, that he

showed allegiance to the Mexican Mafia, and that he paid taxes to the Mexican Mafia. (*Ante*, § VIII.)

What ensued was a trial of hearsay and innuendo, built upon a foundation of prejudicial, inadmissible evidence, including the erroneous admission out-of-court statements and prior testimony of nontestifying witness Carlos Arias (*ante*, § IX.) and the erroneous admission of testimonial out-of-court statements of nontestifying witness Alejandro Delaloza (*ante*, § X.).

The erroneous admission of testimonial out-of-court statements of nontestifying witness Delaloza was compounded by the trial judge's prejudicial failure to instruct the jury to view Delaloza's testimony with care and caution. (*Ante*, § XI.) These errors were further compounded by the trial judge's remarks in the presence of the jury that he believed that Delaloza was the getaway driver in connection with the Molina and Murillo homicides (counts 4 & 5), thereby suggesting that appellant was the shooter, and thus depriving appellant of the due process right to fundamentally fair trial. (*Ante*, § XII.)

In view of the substantial record of the cumulative errors described above, the prosecution cannot prove beyond a reasonable doubt that there is no "reasonable possibility that [the combination and cumulative impact of the guilt phase errors in this case] might have contributed to [appellant's] conviction."

(*Chapman v. California, supra,* 386 U.S. at p. 24.) Appellant's convictions should be reversed.

/ / /

PENALTY PHASE AND SENTENCING

XV.

APPELLANT'S EXCLUSION FROM TRIAL DURING THE PENALTY PHASE CLOSING ARGUMENTS PURPORTEDLY RELATING TO CODEFENDANT CASTRO, WHICH INCLUDED ARGUMENT BY THE PROSECUTOR AND COUNSEL FOR CODEFENDANT CASTRO IMPLICATING APPELLANT, AND APPELLANT'S EXCLUSION DURING THE TRIAL COURT'S INSTRUCTIONS TO THE JURY PURPORTEDLY RELATING TO CODEFENDANT CASTRO, ALL OF WHICH OCCURRED DURING PENALTY PHASE DELIBERATIONS – A CRITICAL STAGE OF THE CRIMINAL PROCEEDINGS – VIOLATED STATE STATUTORY RULES AND THE STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO CONFRONTATION, DUE PROCESS, JURY TRIAL, AND A RELIABLE PENALTY DETERMINATION (CAL. CONST., ART. I, §§ 7, 15 & 17; U.S. CONST., 5TH, 6TH, 8TH & 14TH AMENDS.), THEREBY REQUIRING REVERSAL OF THE DEATH JUDGMENT

A. INTRODUCTION AND PROCEDURAL BACKGROUND

Appellant and codefendant Castro received a joint penalty trial through close of evidence. (CT 12:3487-3492.) After the close of evidence on Thursday, December 21, 2000, in the presence of counsel and both defendants, the court declared a recess until the following Tuesday, December 26th, for closing arguments of counsel and jury instructions. (RT 29:4425-4426.)

When the joint trial resumed on Tuesday morning, counsel and appellant were present, but due to an administrative problem codefendant Castro was not present. (RT 30:4429.) Instead of delaying the proceedings, the court told the jury that they would proceed as to appellant only, and that when codefendant Castro arrived they would "proceed with his portion of the trial." (RT 30:4430.)

In the presence of appellant and counsel for all parties, the prosecutor and appellant's defense counsel gave closing arguments, and the court instructed the jury. (RT 30:4431-4469.) The jury began deliberating penalty as to appellant at 10:53 a.m. on Tuesday, December 26th. (RT 30:4469.)

Shortly after the jury began deliberating, and outside the presence of the jury, the court stated, in part:

> Oh, for the record, what I propose to do since Mr. Castro has now returned, or has been brought to court and is now present, and is ready to go, is to have him come in at 1:30, and then have the argument as to him, and Mr. Penunuri will not be present unless, of course, there's a question or a verdict as to Mr. Penunuri.
>
> Mr. Bernstein [i.e., appellant's trial defense counsel], you are certainly welcome to stay at the counsel table as Mr. Corona [i.e., codefendant Castro's trial defense counsel] was present during your argument. But I don't propose to have your client present during the Castro argument. [RT 30:4470.]

Appellant's trial defense counsel responded, "Thank you, your honor." (RT 30:4470.) The court never informed appellant of his right to personal presence, nor did appellant make an oral or written waiver of his right to personal presence. (RT 30:4470-4472.)

In the afternoon, outside of appellant's presence but in the presence of his counsel, the court interrupted the jury's deliberations, stating:

> We are interrupting your deliberations to hear the arguments of counsel as to Mr. Castro. Mr. Castro was not present this morning because of some administrative difficulties, but he's now before the court with his counsel.

> And Mr. Camacho, you may address the jury on your position as to penalty with Mr. Castro only. Except as is necessary in your argument, with no further references made to Mr. Penunuri. [RT 30:4472.]

In appellant's absence, but in the presence of all other parties and counsel, the prosecutor and codefendant Castro's defense counsel gave closing arguments, and the court instructed the jury. (RT 30:4472-4510; CT 12:3505.) At 3:05 p.m., the jury retired for further deliberations as to appellant, and to start deliberations as to codefendant Castro. (RT 30:4510.) The following day, December 27th, at 12:10 p.m., the jury returned simultaneous verdicts of death for appellant and life for Castro. (RT 30:4511-4514; CT 13:3541, 3543-3544.)

As explained below, the prosecution will be unable to prove that the error in excluding appellant from these proceedings was harmless beyond a reasonable doubt because the prosecutor and Castro's defense counsel repeatedly made inculpatory statements about appellant, and appellant's absence reasonably showed a lack of interest in the proceedings at a critical stage, suggesting that as between the two defendants appellant should receive the harsher sentence.

B. STANDARD OF REVIEW

The "independent or de novo standard of review [applies] to a trial court's exclusion of a criminal defendant from . . . trial proceedings . . . ." (*People v. Virgil* (2011) 51 Cal.4th 1210, 1235.)

C. APPELLANT WAS DENIED THE STATE AND FEDERAL CONSTITUTIONAL RIGHTS, AND THE STATE STATUTORY RIGHT, TO BE PRESENT AT ALL CRITICAL STAGES OF THE CRIMINAL PROCEEDINGS

A defendant has a fundamental right to be present at every stage of the trial. (*Illinois v. Allen* (1970) 397 U.S. 337, 338 [90 S.Ct. 1057, 25 L.Ed.2d 353].) The right of presence derives from the Confrontation Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. (*United States v. Gagnon* (1985) (per curiam) 470 U.S. 522, 526 [105 S.Ct. 1482, 84 L.Ed.2d 486].)

The Sixth Amendment to the United States Constitution guarantees to every criminal defendant the right to be confronted with the witnesses against him. From this, the Supreme Court has inferred a right of physical presence in the courtroom. (*Lewis v. United States* (1892) 146 U.S. 370.) The constitutional right extends to all phases of a criminal trial proper (*Pointer v. Texas* (1965) 380 U.S. 400), particularly when evidence is adduced. (*United States v. Gagnon*, *supra*, 470 U.S. 522.) Indeed, "[o]ne of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." (*Illinois v. Allen, supra*, 397 U.S. at p. 338; accord *United States v. Gagnon, supra*, 470 U.S. at p. 526; see also *Lewis v. United States*, *supra*, 146 U.S. at p. 372 ["A leading principle that pervades the entire

law of criminal procedure is that, after indictment, nothing shall be done in the absence of the prisoner"].)

Moreover, "[t]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." (*United States v. Gagnon, supra*, 470 U.S. at p. 526 (internal quotation omitted); see *United States v. McCoy* (7th Cir. 1993) 8 F.3d 495, 497.)

The fundamental right of every defendant to be present at the trial proceedings also is guaranteed by our California Constitution. (*People v. (Sergio) Ochoa* (2001) 26 Cal.4th 398, 433-434; Cal. Const. art. I, §§ 7, 15 & 17.)

A statutory right to be present is created in Penal Code section 997, subdivision (b)(1), which provides that "the accused shall be present . . . during those portions of the trial when evidence is taken before the trier of fact . . . [and] at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present . . . ." Furthermore, section 1043, subdivision (a), recites in part that "[e]xcept as otherwise provided in this section, the defendant in a felony case shall be personally present at the trial."

Further, in view of the heightened verdict reliability requirement in the penalty phase of a capital trial, appellant's exclusion from the trial proceedings

identified above deprived him of the constitutional rights to a reliable penalty determination. (See *Beck v. Alabama, supra*, 447 U.S. at pp. 627-646; see also *Kyles v. Whitley, supra*, 514 U.S. at p. 422; *Burger v. Kemp, supra*, 483 U.S. at p. 785; *Gilmore v. Taylor, supra*, 508 U.S. at p. 342; Cal. Const., art. I, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.)

The oral proceedings identified above occurred during trial – a critical stage of the criminal proceedings. (*Herring v. New York* (1975) 422 U.S. 853, 857-858 [95 S.Ct. 2550, 45 L.Ed.2d 593] [closing argument is a critical stage of the proceedings]; *People v. Wright* (1990) 52 Cal.3d 367, 402; *People v. Dagnino* (1978) 80 Cal.App.3d 981, 985-988 [jury instruction is a critical stage of the proceedings].)

The proceedings took place in appellant's absence and, as discussed below, with no valid waiver of appellant's right to personal presence, and thus violated his constitutional and statutory rights to be personally present at all critical stages of the proceedings. (Cal. Const., art. I, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.; Pen. Code, §§ 977, subd. (b), 1043, 1138.)

D. APPELLANT DID NOT WAIVE THE RIGHT TO PERSONAL PRESENCE AT TRIAL

Although defense counsel did not object when the court stated that appellant would not be "present during the Castro argument" (RT 30:4470), the trial court never informed appellant of his right to personal presence. (RT

30:4470-4472.) The trial court never obtained either an oral or written waiver from appellant of the right to be personally present during counsels' arguments to the jury and during the trial court's instructions to the jury. (RT 30:4470-4472.)

In addition to the requirement of a written waiver (*People v. Johnson* (1993) 6 Cal.4th 1, 18; Pen. Code, § 977, subd. (b)(1)), the constitution requires that the waiver of a capital defendant's right to be present during trial must be knowing and intelligent. (*People v. Robertson* (1989) 48 Cal.3d 18, 60-61.) A trial court's failure to even inform a defendant of his right to personal presence, as here, necessarily precludes a finding on appeal that the defendant knowingly and intelligently waived that right. (Cf. *Moran v. Burbine* (1986) 475 U.S. 412, 421 [106 S.Ct. 1135, 89 L.Ed.2d 410] [a waiver is knowing and intelligent if it is "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."].)

Nor can waiver be inferred from appellant's silence. The high court has never discerned an implied waiver or forfeiture of a fundamental constitutional right from mere silence. Our courts "indulge in every reasonable presumption against waiver" (*Aetna Ins. Co. v. Kennedy* (1937) 301 U.S. 389, 393 [57 S.Ct. 809, 81 L.Ed. 1177]) and thus have refused to infer waiver of fundamental constitutional rights from inaction. (*Barker v. Wingo* (1972) 407 U.S. 514, 525-526 [presuming waiver of a fundamental constitutional right from inaction is

impermissible]; *Camley v. Cochran* (1962) 369 U.S. 506, 516 [82 S.Ct. 884, 8 L.Ed.2d 70 ["Presuming waiver [of Sixth Amendment rights] from a silent record is impermissible."].)

Accordingly, appellant did not waive the right to personal presence during the trial proceedings, including the right to be personally present during counsels' arguments to the jury and during the trial court's instructions to the jury.

E. REVERSAL OF THE DEATH JUDGMENT IS REQUIRED BECAUSE THE PROSECUTION WILL BE UNABLE TO PROVE THAT THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT

The violation of appellant's right to be present at all critical stages of the criminal proceedings, including proceedings relating to penalty, amounting to federal constitutional error, requires reversal of the death judgment unless it can be demonstrated that the error is harmless beyond a reasonable doubt. (*People v. Robertson, supra*, 48 Cal.3d at p. 62; see *Chapman v. California, supra*, 386 U.S. at pp. 20-21.) State law error at the penalty phase of a capital case requires reversal when there is a "reasonable (i.e., realistic) possibility" the error affected the verdict (*People v. Brown* (1988) 46 Cal.3d 432, 447-448), which is "'the same, in substance and effect,' as the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California, supra*, 386 U.S. at p. 24 . . . ." (*People v. Cowan* (2010) 50 Cal.4th 401, 491.)

The prosecution will be unable to prove that the exclusion of appellant from the trial proceedings identified above in the afternoon of December 26, 2000 was harmless beyond a reasonable doubt. The proceedings occurred during the midst of penalty phase deliberations, a critical stage of the criminal proceedings. (*People v. Rubalcava* (1988) 200 Cal.App.3d 295, 299 [jury deliberation is a critical stage of criminal proceedings].)

Moreover, although the focus of the closing argument was purportedly on the penalty as to Castro only (RT 30:4472), the prosecution's theory was that Castro killed Castillo at the behest of appellant in order to silence Castillo, a purported witness to the double homicide of Murillo and Molina. (*Ante*, Statement of Facts, § A.4.) Accordingly, the prosecutor's closing argument as to Castro necessarily implicated appellant.

The prosecutor began his argument by telling the jury that a witness killing (of which both appellant and Castro stood convicted) is among the most "horrific styles of murders that you see . . . ." (RT 30:4473.) The prosecutor then told the jury that Castillo was killed because of the "double homicide" (RT 30:4473) – i.e., the killings of Molina and Murillo for which only appellant, and not Castro, was convicted.

The prosecutor argued to the jury that the death penalty was the most severe punishment because there is still enjoyment in living life in prison – i.e.,

watching television, etc., which is "something that Michael [Murillo], Bryan [Molina], and even Jaime [Castillo] will never get to enjoy . . . ." (RT 30:4474.) This argument was more aggravating as to appellant than Castro because only appellant was found guilty of all three murders; Castro was never even charged with the murders of Murillo and Molina. Further, immediately upon making this argument, the prosecutor explicitly called for a verdict of death as to appellant. The prosecutor argued, in part:

> That's why the *death penalty is really the most severe punishment* of the two choices. *That's why these defendants deserve that* because they shouldn't be treated, like I mentioned before, on the same level as an Arthur Bermudez or an Alejandro Delaloza who are in life in prison for the rest of their life. But those individuals were not the trigger man in these respective cases.
>
> *We have the defendants who are in fact the trigger men. The defendants* who have a past coming into this case that also shows why *they're the type of person that deserves the death penalty* as opposed to life imprisonment without parole. [RT 30:4474-4475 (emphasis added).]

The prosecutor then mentioned appellant by name several times, arguing as follows: 1) "Castro . . . became the person calling the shots after Richard Penunuri was locked up"; 2) the killing of Castillo was "for the benefit of Richard Penunuri in order to protect Richard Penunuri of double murder [of Murillo and Molina"; 3) the killing was "to benefit Dozer"; and, 4) the killing was "to protect another gang member, Richard Penunuri . . . ." (RT 30:4475-4477.) The prosecutor reminded the jurors that appellant alone had been "found

criminally liable" for the double murder of Murillo and Molina, labeling the murders as "horrific crimes." (RT 30:4476.)

The prosecutor also argued that death verdicts for both appellant and Castro were warranted despite the fact that the defense showed baby pictures of the two. The prosecutor argued, in part:

> So the bottom line, ladies and gentlemen, is that I'm sure [Castro's defense counsel] Mr. Corona is going to get up here and go through in detail, if you will, whatever factors in mitigation he feels that have been produced and proven for his client. But again, I'm going to even challenge him to point out one, or even combine them all, and explain to you why they outweigh the factors in aggravation in this case as to why Jaime Castillo was killed. And I just don't think anybody on this earth is able to do that. And let alone Mr. Corona.
>
> *He may show you the baby pictures of Joe Castro, as was done with Richard Penunuri*, and that's fine, that's proper procedure in a penalty argument. But the thing is, ladies and gentlemen, *we're not asking you to put to death a child or toddler or a baby, that type of thing. Because these men, they're no longer those children. Those children in those photos, like I mentioned before, just shadows of the past. They no longer exist. Those individuals no longer exist. Those individuals grew up.* And like any of us, when we become an adult you have to face the consequences of your own decisions and your own actions. And *no matter what attempts they have made in this case to minimize their conduct, or perhaps explain it away or justify it, it just cannot be done, no matter what factors in mitigation they have produced. They just don't outweigh what we have in aggravation.* That's, yeah, that ultimate punishment needs to be imposed even on a person named Joe Castro.
>
> And understanding Joe Castro is just convicted of one murder, that's fine. *A lot of difference from Richard Penunuri convicted of two. Or three, as a matter of fact.* But the fact is the

> reason Joe Castro killed Jaime Castillo cannot be forgotten. I mean, it was to protect an individual from being found guilty of a double murder, and not for some minimal type of case like a drug offense or a theft offense. . . . . [RT 30:4480-4481 (emphasis added).]

Castro's trial defense counsel, Amador Corona, also argued in a manner that implicated appellant and encouraged the jury to further consider the aggravating nature of appellant's actions, especially when compared to Castro's conduct. Corona argued that Castillo was not only a potential witnesses to the double homicide, but he was an accomplice to the homicides perpetrated by appellant. (RT 30:4484-4485.) Corona argued, in part, that "not only was Jaime Castillo a witness, but he was also an accomplice to the double murders that Mr. Penunuri and Hondo [Delaloza] have been on trial for." (RT 30:4485.) Corona argued that after being arrested for Castillo's murder, Castro showed compassion and remorse by asking his mother to "light a candle in church for Jaime Castillo" (RT 30:4493) – i.e., something appellant never did.

Following argument of counsel, the trial court instructed the jury, initially stating that "these are the jury instructions that apply to Mr. Castro." (RT 30:4498.) The court then qualified the statement, however, instructing the jury as follows: "And you will as I read these, I'm sure, hear some repetition. *This entire package will be submitted for your use in your deliberations, which will include instructions applicable as to both defendants.* (RT 30:4498 [emphasis added].)

The court's instructions to the jury repeatedly referred to "each defendant" and used the plural "defendants" several times, thereby explicitly referencing appellant. (RT 30:4499-4500, 4509.) For example, the court instructed that the "defendants in this case have been found guilty of murders of the first degree. . . . . Under the law of this state, you must now determine which of these penalties [death or life] shall be imposed on each defendant." (RT 30:4499.)

The court used the phrase "each defendant" and the plural "defendants" several more times (RT 30:4499-4500), and then continued instructing as to both defendants, stating, "In determining which penalty is to be imposed on each defendant, you should consider all of the evidence which has been received during any part of the trial of this case, except as you may hereafter be instructed." (RT 30:4500.) The court continued, "It is now your duty to determine which of two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on each defendant. After having heard all the evidence, and having heard and considered the arguments of counsel, you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed." (RT 30:4508.)

Finally, the court's concluding instruction made explicit that the court was instructing as to both appellant and Castro. The court stated, "In this case you

must decide separately the question of penalty as to each of the defendants. If you cannot agree upon the penalties to be inflicted upon both defendants, but you do agree on the penalty as to one of them, you must render a verdict on the one to which you do agree. You shall now retire to deliberate on the penalties." (RT 30:4509-4510.)

Accordingly, in appellant's absence, and in the midst of jury deliberations, the court read a set of instructions to the jury that were directly applicable to appellant, and which called upon the jury to deliberate and reach a verdict of either death or life as to appellant. (RT 30:4498-4510.) The prosecution will be unable to prove that the error in excluding appellant from these proceedings was harmless beyond a reasonable doubt because both the prosecutor and Castro's defense counsel repeatedly made inculpatory statements about appellant, the court's instructions directly related to appellant, and appellant's absence reasonably showed a lack of interest in the proceedings at a critical stage, suggesting that as between the two defendants appellant should receive the harsher sentence.

Appellant was further prejudiced because his absence from these proceedings denied him the opportunity to participate in critical stages of the trial, which necessarily deprived him of the ability to communicate with his counsel about the substance of the closing arguments of counsel and the court's

instructions to the jury. The proceedings did not involve mundane matters relating to, for example, scheduling, but instead involved argument of counsel advocating a death verdict against appellant and the court's instructions on the law permitting the jury to return a death verdict.

Appellant's absence during these critical stages of the criminal proceedings also denied him the right to exert a psychological influence upon the jury. In *United States v. Canady* (2nd Cir. 1997) 126 F.3d 352, for example, in the context of a bench trial where the district court reserved decision on the case and subsequently mailed the verdict to the defendant, the Second Circuit remanded for reading of the verdict in open court in the presence of the defendant. The court held that failure of the district court to announce its verdict in open court violated defendant's right to be present at all stages of his criminal proceedings. (*Id.* at p. 359.) Significantly, the court also rejected the government's position that defendant's presence at the return of the verdict would serve no useful purpose. The court emphasized that several courts have pointed to the fact that the defendant's mere presence exerts a "psychological influence" on the jury and the judge; and that the announcement of the decision to convict or acquit "is neither 'of little significance' nor 'trivial'; it is the focal point of the entire criminal trial. . . . 'While the benefits of a public trial are frequently intangible,

difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real'." (*Id.* at p. 364.)

Similarly, in *Larson v. Tansy* (10th Cir. 1990) 911 F.2d 392, 394, the Tenth Circuit held that a defendant's absence from the delivery of the jury instructions, closing arguments, and the rendition of the verdict, violated his due process rights. The court observed that the defendant's absence "deprived [him] of his due process right to exert a psychological influence upon the jury, completely aside from any assistance he might have provided to his counsel." (*Id.* at p. 396. fn. 5; see also *Wade v. United States* (D.C. Cir. 1971) 441 F.2d 1046, 1049-1050 [under similar circumstances, finding violation of Fed.R.Crim.P. 43, and recognizing the role played by the defendant in exerting psychological influence over the jury].)

This was a close case on the issue of penalty as evidenced by, among other things, the mitigation evidence which showed that appellant suffered from chronic methamphetamine use, which contributed to the conduct at issue in this case because chronic methamphetamine can induce violence, paranoia, alienation, hallucinations, and delusions. (*Ante*, Statement of Facts, § E.1.)

Appellant also presented good character evidence (*ante*, Statement of Facts, § E.2) in support of a life sentence, showing that that appellant's conduct

was induced by chronic drug use and that appellant is a good and caring person with redeeming qualities. (*Ante*, Statement of Facts, § E.2.)

Accordingly, the prosecution will be unable to sustain its burden of proving that the error in excluding appellant from these proceedings was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at pp. 20-21; *People v. Cowan, supra*, 50 Cal.4th at p. 491 [State law error at the penalty phase of a capital case requires reversal when there is a "reasonable possibility" the error affected the verdict, which is the same in substance and effect as the federal *Chapman* standard].)

Reversal of the death judgment is required.

/ / /

XVI.

THE PENALTY INSTRUCTIONS AND THE TRIAL PROCESS – WHEREBY CLOSING ARGUMENTS OF COUNSEL AND JURY INSTRUCTIONS PURPORTEDLY RELATING TO CASTRO WERE GIVEN IN APPELLANT'S ABSENCE AND IN THE MIDST OF PENALTY PHASE DELIBERATIONS – DENIED APPELLANT THE CONSTITUTIONAL RIGHT TO AN INDIVIDUALIZED SENTENCING DETERMINATION (U.S. CONST., 5th, 6th, 8TH & 14TH AMENDS.), THEREBY REQUIRING REVERSAL OF THE DEATH JUDGMENT

A. INTRODUCTION AND SUMMARY OF ARGUMENT

The trial court's instructions and the trial process, whereby the jury was interrupted in the midst of deliberations on appellant's sentence to hear further argument urging them to return a verdict of death against appellant and either death or life as to codefendant Castro, deprived appellant of the constitutional right to an individualized sentencing determination guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The trial court deprived appellant of an individualized sentencing determination when it instructed the jury, in part, "*So what you decide against one person should not be carried over into the decision of the other person, unless you feel it is appropriate.*" (RT 29:4426 [emphasis added]; *People v. Lewis* (2008) 43 Cal.4th 415, 461.) The instruction impermissibly invited the jurors to compare the relative culpability of appellant and codefendant Castro

when jointly deciding penalty as to each defendant. (Cf. *Lockett v. Ohio* (1978) 438 U.S. 586, 605-606 [98 S.Ct. 2954, 57 L.Ed.2d 973] (plur. opn. by Burger, C.J.).)

Although the court subsequently instructed the jury to separately decide the penalty as to each defendant (RT 30:4429-4430, 4469, 4509-4510), the subsequent instructions did not cure the error because the jury was never told that the initial instruction was erroneous.

Further, the process employed by the trial court – whereby closing arguments of counsel and jury instructions purportedly relating to Castro were given in appellant's absence and in the midst of penalty phase deliberations (RT 30:4472-4510; CT 12:3505) – prevented the jury from making an individualized sentencing determination. In the midst of deliberations on appellant's sentence, the jury was summoned into the courtroom and heard argument 1) from the prosecutor urging them to return a verdict of death against appellant and 2) from Castro's defense counsel implicating appellant and encouraging them consider the aggravating nature of appellant's actions, especially when compared to Castro's conduct. (RT 30:4484-4485, 4493.)

Appellant was severely prejudiced by the comparison to codefendant Castro because their relative culpability weighed heavily against appellant. Appellant stood convicted of three death-eligible homicides, whereas

codefendant Castro stood convicted of a single homicide, which, according to the prosecution's theory, was committed at the behest of appellant.

B. FACTUAL AND PROCEDURAL BACKGROUND

After the close the appellant's case in mitigation on December 21, 2000, but prior to closing arguments, the trial court instructed the jury:

> Again, you're reminded as you think about it at this time, and I'm urging you again not to decide the case, but you must bear in mind that in order for a decision to be reached in this case, all 12 jurors must agree. And you must also realize that there are two separate people here, and that each of them is entitled to a trial as if he were the only person. *So what you decide against one person should not be carried over into the decision of the other person, unless you feel it is appropriate*.
>
> So – but you must give each one an individual trial. But that's – I'll instruct you more fully on that. The instructions that I'll give you on Tuesday are very brief compared to the almost hundred pages that we had before. Be like six or seven pages of instructions. Because these simply deal with this one issue of what the appropriate punishment should be. [RT 29:4425-4426 (emphasis added).]

The court declared a recess until the following Tuesday, December 26, 2000. (RT 29:4425.) When trial resumed the following Tuesday, codefendant Castro did not appear in court, apparently due to an administrative problem. (RT 30:4429.) The court told the jury that they would proceed as to appellant, and that "each of the defendants is to be tried as though he were the only defendant. And that your verdict should be rendered against one defendant without regard to what verdicts you rendered as to other defendants." (RT 30:4429-4430.)

The prosecutor and appellant's defense counsel gave their closing argument (RT 30:4431-4460), and the jury was instructed, in part, that "you must decide separately the question of penalty as to each defendant." (RT 30:4469.) Late in the morning on December 26, 2000, the jury began deliberating penalty as to appellant only. (RT 30:4469-4470.)

In the afternoon, and in appellant's absence, the court interrupted the jury's deliberations for further proceedings, which included closing arguments by the prosecutor and Castro's trial defense counsel and further instructions. (RT 30:4472-4510; CT 12:3505.) The court instructed the jury, in part, that "you must decide separately the question of penalty as to each of the defendants. If you cannot agree upon the penalties to be inflicted upon both defendants, but you do agree on the penalty as to one of them, you must render a verdict on the one to which you do agree." (RT 30:4509-4510.)

At 3:05 p.m. that afternoon, the jury retired for further deliberations as to appellant and to start deliberations as to codefendant Castro. (RT 30:4510.) At 12:10 p.m. the following day, the jury simultaneously returned verdicts of death for appellant and life for Castro. (RT 30:4511-4514; CT 13:3541, 3543-3544.)

/ / /

C. APPELLANT WAS PREJUDICIALLY DEPRIVED OF THE CONSTITUTIONAL RIGHT TO AN INDIVIDUALIZED SENTENCING DETERMINATION

For more than 70 years the United States Supreme Court has recognized that the concept of individualized sentencing is central to our system of justice. In determining sentences, the Supreme Court declared, "justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." (*Pennsylvania ex rel. Sullivan v. Ashe* (1937) 302 U.S. 51, 55 [58 S.Ct. 59, 82 L.Ed.2d 43].)

And for decades, the Supreme Court has emphasized that in capital cases individualized sentencing takes on especially weighty significance; indeed, it is constitutionally required. "[I]n capital cases," the Court declared, "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304 [96 S.Ct. 2978, 49 L.Ed.2d 944].) This constitutional requirement is mandated because "the penalty of death is qualitatively different" from any other sentence, *id.* at p. 305, "unique in its severity and irrevocability." (*Gregg v. Georgia* (1976) 428 U.S. 153, 187 [96 S.Ct. 2909, 49 L.Ed.2d 859].)

On the basis of these longstanding principles, the Supreme Court held in *Lockett v. Ohio, supra*, 438 U.S. 586 that a capital defendant has the right to an "individualized consideration of mitigating factors" from a sentencing jury. (*Id.* at p. 606.) "Given that the imposition of death by public authority is so profoundly different from all other penalties," the Court noted, "we cannot avoid the conclusion that an individualized decision is essential in capital cases. *The need for treating each defendant with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.*" (*Id.* at p. 605 [emphasis added].) "The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence." (*Id.*)

Thus, in *Lockett*, the Court held that a sentencing jury must give "independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation." (*Id.*) Since *Lockett*, the Court has consistently reiterated that core principle. (See, e.g., *Hitchcock v. Dugger* (1987) 481 U.S. 393, 398-399 [107 S.Ct. 1821, 95 L.Ed.2d 347]; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4 [106 S.Ct. 1669, 90 L.Ed.2d 1]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110-117 [102 S.Ct. 869, 71 L.Ed.2d 1]; see

also *Johnson v. Texas* (1993) 509 U.S. 350, 361 [113 S.Ct. 2658, 125 L.Ed.2d 290] ["[W]e have not altered [*Lockett*'s] central requirement."].)

These cases "firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future." (*Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 246 [127 S.Ct. 1654, 167 L.Ed.2d 585].) To meet these constitutional imperatives, "it is not enough simply to allow the defendant to present mitigating evidence to the sentencer." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319 [109 S.Ct. 2934, 106 L.Ed.2d 256], abrogated on other grounds by *Atkins v. Virginia* (2002) 536 U.S. 304 [122 S.Ct. 2242, 153 L.Ed.2d 335].) Rather, "[t]he sentencer must also be able to consider and give effect to that evidence in imposing the sentence." (*Id.*) In other words, to protect a capital defendant's right to an individualized sentencing determination, the jury must be free to make "a reasoned *moral* response to the defendant's background, character, and crime." (*Id.* [internal quotation omitted].) Accordingly, a sentencing proceeding will violate the Eighth Amendment when it is conducted in such a way that a juror cannot "consider fully" a defendant's evidence or "give that evidence meaningful, mitigating effect." (*Abdul-Kabir v. Quarterman*, *supra*, 550 U.S. at p. 260.)

Applying these longstanding principles, the trial court's instructions deprived appellant of his right to an individualized sentencing determination. First, the trial court erroneously instructed the jury when it told them, "*So what you decide against one person should not be carried over into the decision of the other person, unless you feel it is appropriate.*" (RT 29:4426 [emphasis added]; *People v. Lewis, supra*, 43 Cal.4th at p. 461.) The instruction impermissibly invited the jurors to compare the relative culpability of appellant and codefendant Castro when jointly deciding penalty as to each defendant.[40] (Cf. *Lockett v. Ohio, supra*, 438 U.S. at pp. 605-606.) A comparison of the relative culpability between appellant and codefendant Castro weighed heavily against appellant because appellant was convicted of three death-eligible homicides, whereas codefendant Castro was convicted of a single homicide that, according to the prosecution's theory, was committed at the behest of appellant.

Appellant recognizes that the trial court subsequently instructed the jury to separately decide the penalty as to each defendant. (RT 30:4429-4430, 4469, 4509-4510.) This Court has held that such an instruction, which requires the jury to "decide separately the question of the penalty as to each of the defendants[,]" is "adequate to ensure individualized sentencing in joint penalty trials." (*People*

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[40] The trial court has a sua sponte duty to correctly instruct the jury, and thus the instructional error is cognizable on appeal despite the lack of an objection by trial defense counsel. (Pen. Code, § 1259; *People v. Breverman, supra*, 19 Cal.4th at p. 154.)

v. Lewis, supra, 43 Cal.4th at p. 461; *People v. Taylor* (2001) 26 Cal.4th 1155, 1173-1174.) Yet, neither *People v. Lewis, supra*, 43 Cal.4th 415 nor *People v. Taylor, supra*, 26 Cal.4th 1155 involved the specific factual issue presented here – i.e., where the trial court first "opened the door" and invited the jury to perform a comparative analysis of the penalty as between the two defendants and then never corrected the error by telling the jury that the instruction was erroneous.

Moreover, in view of the court's initial instruction – i.e., "what you decide against one person should not be carried over into the decision of the other person, unless you feel it is appropriate" (RT 29:4426) – the subsequent instructions to "decide separately the question of penalty as to each defendant" (RT 30:4469, 4509-4510) did not preclude the jury from making a comparative analysis prior to returning separate verdicts as to each defendant. In other words, the jury did not return a joint verdict, and thus to that extent it did "decide separately the question of penalty as to each defendant." Nonetheless, while rendering separate verdicts against each defendant, the jury was permitted, pursuant the court's initial instruction, to make a relative comparison between the defendants, if it felt such a comparison was "appropriate." (RT 29:4426.)

Second, the process employed by the trial court – whereby closing arguments of counsel and jury instructions purportedly relating to Castro were given in appellant's absence and in the midst of penalty phase deliberations –

prevented the jury from making an individualized sentencing determination. In an extraordinary turn of events, the trial court interrupted the jury as it was deliberating penalty as to appellant and proceeded with the joint trial, but excluded appellant therefrom. (RT 30:4472-4473.) The prosecutor and counsel for Castro presented penalty-phase arguments to the jury, which although purportedly limited to Castro made repeated references to aggravating facts as to appellant, thereby impeaching the closing argument made by appellant's trial defense counsel and undermining appellant's case in mitigation for a life sentence. (RT 30:4472-4510; CT 12:3505.)

For example, the prosecutor argued that Castillo was killed at the behest of appellant because of the "double homicide" killings committed by appellant. (RT 30:4473.) In referring to the "double homicide" killings of Murillo and Molina, the prosecutor used the names of the victims and recounted the joys of life that Murillo and Molina had been deprived because of appellant's actions. (RT 30:4474.) Appellant, not Castro, had been convicted of the murders of Murillo and Molina. (RT 25:3834-3836.)

The prosecutor then explicitly called upon the jury to return a death verdict against appellant. (RT 30:4474-4475, 4480-4481.) By interrupting the penalty phase deliberations and permitting the prosecutor to argue for a verdict of death against appellant, while under the guise of arguing for a verdict against Castro,

the court, by its actions, implicitly encouraged the jury to compare the relative culpability of each defendant. (See *People v. Lucas* (1995) 12 Cal.4th 415, 498 [punishment imposed on accomplice bears "no relevance to the jury's properly guided function at the penalty phase"], citing *People v. Belmontes* (1988) 45 Cal.3d 744, 811 and *Lockett v. Ohio, supra*, 438 U.S. at p. 604 .)

Castro's counsel also argued in a manner that implicated appellant and encouraged the jury to further consider the aggravating nature of appellant's actions, especially when compared to Castro's conduct. (RT 30:4484-4485, 4493.) By permitting counsel to compare and contrast Castro's conduct with appellant's conduct, the trial court was again implicitly encouraging the jury to compare the relative culpability of each defendant.

Following argument of counsel, the trial court instructed the jury, cautioning that "these are the jury instructions that apply to Mr. Castro." (RT 30:4498.) Yet, the instructions repeatedly referred to "each defendant" and used the plural "defendants" several times, thereby explicitly referencing appellant. (RT 30:4499-4500, 4508-4510.) The court concluded by instructing the jury that they "shall now retire to deliberate on the penalties [as to each defendant]." (RT 30:4510.) Despite the initial words of caution, the court by its actions in repeatedly referring to both defendants during the reading of the instructions

implicitly encouraged the jury to compare the relative culpability of each defendant.

Moreover, instead of permitting the jury to finish the penalty-phase deliberations as to appellant, which already were in mid-course, the trial court required the jury to continue with those deliberations and at the same time start deliberating the penalty as to Castro. (RT 30:4510-4511.) By initially splitting the deliberations, and then subsequently combining the deliberations of the defendants, the court by its actions implicitly encouraged the jury to compare the relative culpability of each defendant.

Finally, the jury returned their verdicts against appellant and Castro at the same time, assigning a verdict of death for appellant and life for Castro, suggesting that the jury compared the relative culpability of each defendant and determined that for three murders appellant should die and for one murder Castro should live. (Cf. *People v. Letner* (2010) 50 Cal.4th 99, 135 ["Moreover, in light of the circumstance that the jury reached a death verdict as to both defendants, we discern even less of a possibility that the jury improperly assigned culpability based upon one defendant's attempt to mitigate the seriousness of his own actions by shifting accountability to his codefendant."].)

In view of the substantial disparity in the relative culpability between appellant and Castro, which was detrimental to appellant, and in view of the case

in mitigation, consisting of evidence that appellant's conduct was induced by chronic drug addiction and that appellant is a good and caring person with redeeming qualities (*ante*, Statement of Facts, §§ E.1. & E.2.), the prosecution will be unable to prove that the errors described above – depriving appellant of the constitutional right to an individualized sentencing determination – were harmless beyond a reasonable doubt. (See *People v. Robertson, supra*, 48 Cal.3d at p. 62 [federal constitutional error requires reversal of the death judgment unless it can be demonstrated that the error is harmless beyond a reasonable doubt]; see *Chapman v. California, supra*, 386 U.S. at pp. 20-21; *People v. Cowan, supra*, 50 Cal.4th at p. 491.)

Reversal of the death judgment is required.

/ / /

XVII.

THE TESTIMONY OF PROSECUTION PENALTY PHASE WITNESSES JAVIER CASTILLO AND LINDA CASTILLO THAT APPELLANT SHOULD BE SENTENCED TO DEATH VIOLATED STATE EVIDENTIARY RULES AND THE STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, EFFECTIVE ASSISTANCE OF COUNSEL, AND A RELIABLE PENALTY DETERMINATION (CAL. CONST., ART. I, §§ 7, 15 & 17; U.S. CONST., 5TH, 6TH, 8TH & 14TH AMENDS.), THEREBY REQUIRING REVERSAL OF THE DEATH JUDGMENT

A. INTRODUCTION, PROCEDURAL BACKGROUND AND SUMMARY OF ARGUMENT

During the prosecution's penalty phase case-in-chief, the trial court held a hearing outside the presence of the jury in which it ruled that the prosecutor was permitted to elicit opinions of victims' family members as to the appropriate sentence, including the opinion that appellant should be sentenced to death. (RT 26:3905-3907.)

The hearing arose after the prosecutor posed the following question on direct examination to John Molina (Brian Molina's father): "And in your own mind, and in your heart, *what do you feel is the appropriate penalty for this jury to impose upon Richard Penunuri*? . . . ." (RT 26:3904 [emphasis added].) Molina responded, "That's not for me to say." (RT 26:3904.)

After Molina was excused, and outside the presence of the jury, trial defense counsel objected to the prosecutor's attempt to elicit opinions of victims'

family members that appellant should be sentenced to death. (RT 26:3905-3906.) Defense counsel stated, in part:

> I was disturbed by [prosecutor] Mr. Camacho asking this witness, Mr. Molina, as to, you know, what he wants to have done with Mr. Penunuri as far as life or death is concerned. And I was going to object, and I didn't because that I (sic) just sensed Mr. Molina was going to do the right thing. The difficulty is that he's asking a question that asks for vengeance. When someone says, you know, I want revenge, I want vengeance, whatever, it's a question that asks for improper – [RT 26:3905.]

The court asked the prosecutor for a reply, to which the prosecutor responded, in part, ". . . I think it's well within my right to get an impression from these witnesses as to what they think the appropriate penalty would be, if they're willing to answer that question." (RT 26:3905.) The court ultimately agreed with the prosecutor, ruling as follows:

> If I were to sustain your position I would have to preclude you from asking any of the defense witnesses why they feel life should be spared. So if someone says I feel the appropriate penalty is death, then the follow-up question is why do you feel that way. And if he says, revenge, why then obviously that's an inappropriate answer. I think it could be held against that witness. But I think the jury would hold it against them. So, I think you have to be careful in phrasing your questions, but I do think he's entitled to ask what their opinion is, so objection is overruled. [RT 26:3906-3907.]

Thereafter, the prosecutor elicited testimony from Javier Castillo and Linda Castillo (Jaime Castillo's father and stepmother, respectively) that appellant should be sentenced to death. (RT 27:3984, 3990) Apparently in view

of the court's ruling permitting John Molina's testimony as to the appropriate sentence for appellant, trial defense counsel did not renew the objection. (RT 27:3984, 3900.)

On direct examination, the prosecutor asked Javier Castillo, "Other than what you have told us today, is there anything else that you feel that this jury should know in evaluating a penalty for the killer of your son Jaime Castillo?" (RT 27:3984.) Javier Castillo responded:

> *I have no objection on the [death] penalty that they are seeking.* I don't have no [sic] objection at all. I don't believe -- *I believe that these individuals are especially Mr. Penunuri, he became very influential when he was in the jail house and being such [sic] influential, he gave the order to kill my son. And I don't think he should be given that same opportunity [for life imprisonment] to do the same thing again.* . . . . [RT 27:3984 (emphasis added).]

The prosecutor then elicited testimony from Linda Castillo that appellant should be sentenced to death. Linda Castillo testified on direct examination, in part:

> *I am for the death penalty. I want these people to be killed in [sic] lethal injection.* But it's a shame that the penalty takes so long and the system lets these people take advantage of the time they have. So, to me, it does not matter. If you guys get the penalty, it's good. But it's a shame that the system takes so long to be able to kill these people. They might be in for life, anyway." [RT 27:3990 [emphasis added.]

As explained below, it is improper for the victim's family to express their opinion regarding the proper verdict. (*Booth v. Maryland* (1987) 482 U.S. 496,

508-509, overruled in part by *Payne v. Tennessee* (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 115 L.Ed.2d 720]; *People v. Smith* (2003) 30 Cal.4th 581, 622.) The testimony of Javier Castillo and Linda Castillo that appellant should be sentenced to death violated Penal Code section 190.3, factor (a) and deprived appellant of the state and federal constitutional rights to due process and a reliable penalty determination (Cal. Const., art. I, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.). To the extent that trial defense counsel's objection to testimony about the appropriate sentence was insufficient to preserve the claims raised herein, appellant was deprived of the state and federal constitutional right to effective assistance of counsel (Cal. Const., art. I, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.).

The testimony of Javier Castillo and Linda Castillo that appellant should be sentenced to death was prejudicial because the witnesses testified to the ultimate issue in the case – i.e. whether appellant should be sentenced to death. The testimony encouraged the jurors to substitute their own opinions for those of the victims – i.e., those who suffered the most from the crimes. The prosecution thus will be unable to carry its burden of proving beyond a reasonable doubt that the error in admitting the opinion testimony of Javier Castillo and Linda Castillo was harmless beyond a reasonable doubt, thereby requiring reversal of the death judgment.

B. THE ISSUES RAISED HEREIN HAVE BEEN PRESERVED FOR APPEAL; IF THIS COURT FINDS THAT ANY OF THE ISSUES HAVE BEEN FORFEITED BY FAILURE TO ADEQUATELY OBJECT IN THE TRIAL COURT, THEN APPELLANT WAS DEPRIVED OF THE STATE AND FEDERAL CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL (CAL. CONST., ART. I, §§ 15 & 17; U.S. CONST., 6TH, 8TH & 14TH AMENDS.)

Each of the issues raised herein have been preserved for appellate review because it is not necessary "to renew an objection already overruled in the same trial . . . ." (*People v. Clark* (1990) 50 Cal.3d 583, 623.) This Court has long held that

> "[w]here a party has once formally taken exception to a certain line or character of evidence, he is not required to renew the objection at each recurrence thereafter of the objectionable matter arising at each examination of other witnesses; and his silence will not debar him from having the exception reviewed." [*People v. Antick* (1975) 15 Cal.3d 79, 95, citing *Green v. Southern Pac. Co.* (1898) 122 Cal. 563, 565.]

Moreover, no further objection was required to preserve the issues for appellate review because regardless of the nature and scope of the possible objections, the trial court made an affirmative ruling permitting the prosecutor to elicit opinions of victims' family members as to the appropriate sentence, including the opinion that appellant should be sentenced to death. (RT 26:3905-3907.) The record thus shows that the trial judge understood the issue presented. (Cf. *People v. Cowan, supra*, 50 Cal.4th at p. 485 ["When defendant objected to Turner's testimony on the ground that it 'goes beyond the victim impact,' he used

a well-recognized term commonly understood as referring to the United States Supreme Court's Eighth and Fourteenth Amendment jurisprudence regarding the permissible scope of victim testimony at the penalty phase of a capital case"]; *People v. Scott, supra*, 21 Cal.3d at p. 290 [objection is sufficient if the record shows the trial judge understood the issue presented]; *Hormel v. Haverling, supra*, 312 U.S. at p. 557 ["Orderly rules of procedure do not require sacrifice of the rules of fundamental justice"].)

If this Court finds that any of the issues have been forfeited by failure of trial defense counsel to adequately object, then appellant was deprived of the state and federal constitutional right to the effective assistance of counsel (Cal. Const., art. I, §§ 15 & 17; U.S. Const., 6th, 8th & 14th Amends.).

Incorporating herein by reference section IX.B., *ante*, defense counsel's failure to timely make each of the objections identified herein deprived appellant of the constitutional right to effective assistance of counsel (Cal. Const., art. I, §§ 15 & 17; U.S. Const., 6th, 8th & 14th Amends.; *Strickland v. Washington, supra*, 466 U.S. at pp. 684-685; *People v. Pope, supra*, 23 Cal.3d at p. 422) because a timely and specific objection is necessary to preserve the claims. (Evid. Code, § 353; *People v. Morris, supra*, 53 Cal.3d at p. 206.)

Although defense counsel's actions are often justified on the basis of strategic choice (*People v. Pope, supra*, 23 Cal.3d at p. 426), here there could be

no rational strategic reason for counsel's failure to timely and explicitly raise each of the objections identified herein because defense counsel objected when the prosecutor first tried to elicit an opinion from John Molina as to the appropriate sentence (RT 26:3904-3907), thereby revealing counsel's intent to exclude testimony of victims' family members as to the appropriate sentence. (Cf. *People v. Pope, supra*, 23 Cal.3d at p. 426 ["an appellate court will reject the claim of ineffective assistance . . . unless there simply could be no satisfactory explanation"]; *People v. Majors, supra*, 18 Cal.4th at p. 403 ["the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission"].) Under these circumstances, any failure to preserve these issues for appeal would amount to the ineffective assistance of counsel. (See *People v. Lewis, supra*, 50 Cal.3d at p. 282 [this Court considers otherwise forfeited "claim on the merits to forestall an effectiveness of counsel contention"]; *People v. Stratton, supra*, 205 Cal.App.3d at p. 93.)

Defense counsel's deficient representation prejudiced appellant because admission of the testimony of Javier Castillo and Linda Castillo that appellant should be sentenced to death deprived appellant of the right to a fundamentally fair and reliable penalty determination. (See *post*, § XVII.C.) Accordingly, reversal of the death judgment is warranted on the ground appellant was denied the state and federal constitutional rights to effective assistance of counsel.

C. THE TESTIMONY OF PROSECUTION PENALTY PHASE WITNESSES JAVIER CASTILLO AND LINDA CASTILLO THAT APPELLANT SHOULD BE SENTENCED TO DEATH PREJUDICIALLY VIOLATED STATE EVIDENTIARY RULES AND THE STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A RELIABLE PENALTY DETERMINATION, REQUIRING REVERSAL OF THE DEATH JUDGMENT

The United States Supreme Court has long held that it is improper for the victim's family to express their opinion regarding the proper verdict, and such testimony violates a defendant's constitutional rights to due process and a reliable penalty determination. (*Booth v. Maryland, supra*, 482 U.S. at pp. 508-509, overruled in part by *Payne v. Tennessee, supra*, 501 U.S. at p. 825 [111 S.Ct. 2597, 115 L.Ed.2d 720]; U.S. Const., 5th, 8th & 14th Amends.) Although *Booth* was overruled in part, the high court left intact its holding that "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." (*Payne v. Tennessee, supra*, 501 U.S. at p. 830, fn. 2.)

This Court has held that "[i]t is clear that the *prosecution* may not elicit the views of a victim or victim's family as to the proper punishment." (*People v. Smith, supra*, 30 Cal.4th at p. 622 [italics in original].) "The views of a crime victim . . . regarding the proper punishment has no bearing on the defendant's character or record or any circumstance of the offense." (*Ibid.*; *Skipper v. South Carolina, supra*, 476 U.S. at p. 4.)

Victim-impact testimony as to the proper punishment violates Penal Code section 190.3, factor (a) and deprives a defendant of the constitutional rights to due process and a reliable penalty determination where, as here, it is "so unduly prejudicial" that it renders the trial "fundamentally unfair." (*Payne v. Tennessee, supra*, 501 U.S. at p. 825; see *People v. Burney* (2009) 47 Cal.4th 203, 258; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1056-1057; *People v. Pollock* (2004) 32 Cal.4th 1153, 1180 [victim-impact evidence may "not include characterizations or opinions about the crime, the defendant, or the appropriate punishment, by the victims' family members or friends, and such testimony is not permitted."]; Cal. Const., art. I, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.; see *People v. Cowan, supra*, 50 Cal.4th at p. 484 [applying the *Chapman* federal harmless error standard when determining whether inadmissible victim-impact testimony requires reversal of the death judgment].)

Admission of the testimony of key victim-impact witnesses Javier Castillo and Linda Castillo that appellant should be sentenced to death rendered appellant's penalty trial fundamentally unfair, and cannot be proven by the prosecution to be harmless beyond a reasonable doubt.

Javier Castillo testified that he was Jaime Castillo's father. (RT 27:3982.) When the prosecution asked about the "penalty for the killer of your son" (RT 27:3984), he testified that he had no objection to the death penalty, especially as

to appellant because appellant "became very influential when he was in the jail house and being such [sic] influential, he gave the order to kill my son." (RT 27:3984.) Javier Castillo further testified that appellant "should [not] be given that same opportunity to do the same thing again." (RT 27:3984.)

As Javier Castillo's testimony explicitly suggested, a sentence of life in prison would give appellant an "opportunity to do the same thing again" (RT 27:3984) – i.e., order the killing of a person by someone outside prison. A sentence to death would deny appellant that opportunity. Javier Castillo's testimony prejudicially suggested appellant's future dangerousness by highlighting that if sentenced to life in prison appellant would be a continuing threat to society. (Cf. *People v. Murtishaw* (1981) 29 Cal.3d 733, 767-768 [holding that because a jury may place undue emphasis on the opinion that a capital defendant poses a danger in prison, and because predictions of future violent conduct are unreliable and frequently erroneous, the People may not offer such evidence at the penalty phase of the trial].)

Javier Castillo's testimony that appellant should be sentenced to death was testimony as to the ultimate issue in the case, which reasonably encouraged the jurors to substitute his opinion for their own opinions. (Cf. *People v. Brown* (1981) 116 Cal.App.3d 820, 828 ["'to receive it {i.e., testimony on the ultimate issue} would tend to suggest that the judge and jury may shift responsibility for

decision to the witnesses'"]; *People v. Arguello* (1966) 244 Cal.App.2d 413, 417-419, cert. den.,386 U.S. 968, 18 L.Ed.2d 121, 87 S.Ct. 1052.)

Linda Castillo testified that she was Jaime Castillo's stepmother. (RT 27:3986.) When the prosecution asked what she "would like to say to this jury to help them evaluate the punishment for Jaime's killer" (RT 27:3990), she testified, "I am for the death penalty. *I want these people to be killed in [sic] lethal injection.*" (RT 27:3990 [emphasis added].) This was strong, direct testimony that Linda Castillo would not be satisfied unless the jury returned a sentence of death. The testimony reinforced to the jury that Jaime Castillo's father and stepmother both desired a death sentence for appellant and felt that such a sentence would be appropriate in this case.

Linda Castillo's testimony also reinforced Javier Castillo's testimony that a death sentence was "especially [appropriate] as to appellant" because appellant "gave the order to kill my son." (RT 27:3984.) The jury's verdict of death for appellant and life for codefendant Castro (i.e., the one that actually shot and killed Castillo) is consistent with the jury having followed Javier Castillo's recommendation that death was especially appropriate for appellant.

The jury in a capital case is charged with making the weighty determination whether "the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of

life without parole." (*People v. Tate* (2010) 49 Cal.4th 635, 706; CALJIC No. 8.88; CT 13:3529-3540.) The opinions of the victim's family that death is the appropriate penalty can play no part in that determination. (*Booth v. Maryland, supra*, 482 U.S. at pp. 508-509, overruled in part by *Payne v. Tennessee, supra*, 501 U.S. at p. 825; *People v. Smith, supra*, 30 Cal.4th at p. 622.) Yet, with the testimony of Javier Castillo and Linda Castillo, the jury was repeatedly encouraged to return a death verdict for appellant based on the opinions of the victims' family, rendering the penalty trial fundamentally unfair.

This was a close case on the issue of penalty as evidenced by, among other things, the mitigation evidence which showed that appellant suffered from chronic methamphetamine use, which contributed to the conduct at issue in this case because chronic methamphetamine can induce violence, paranoia, alienation, hallucinations, and delusions. (*Ante*, Statement of Facts, § E.1.)

Appellant also presented good character evidence, which included the testimony of several witnesses. (*Ante*, Statement of Facts, § E.2.) Their testimony supported of a life sentence because it showed that appellant's conduct was induced by chronic drug addiction and that appellant is a good and caring person with redeeming qualities. (*Ante*, Statement of Facts, § E.2.)

Reversal of the death judgment is required because the prosecution will be unable to prove beyond a reasonable doubt that the erroneous admission of the

testimony of Javier Castillo and Linda Castillo about the family's desire for the death penalty was harmless beyond a reasonable doubt. (See *People v. Robertson, supra*, 48 Cal.3d at p. 62 [federal constitutional error requires reversal of the death judgment unless it can be demonstrated that the error is harmless beyond a reasonable doubt]; see *Chapman v. California, supra*, 386 U.S. at pp. 20-21; *People v. Cowan, supra*, 50 Cal.4th at p. 491.)

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XVIII.

ADMISSION OF EVIDENCE IN AGGRAVATION OF A PURPORTED ASSAULT WITH A FIREARM ON JASON UZEL REQUIRES REVERSAL OF THE DEATH JUDGMENT FOR A VIOLATION OF APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A RELIABLE PENALTY DETERMINATION (CAL. CONST., ART. I, §§ 7, 15 & 17; U.S. CONST., 5TH, 6th, 8TH & 14TH AMENDS.) BECAUSE THE EVIDENCE IS WOEFULLY INSUFFICIENT TO SUSTAIN A FINDING THAT APPELLANT PERPETRATED THE ASSAULT

A. INTRODUCTION AND PROCEDURAL BACKGROUND

The prosecution introduced evidence in aggravation that on May 20, 1997 someone committed an assault with a firearm on R.J. Uzel (Pen. Code, § 245, subd. (a)(2)) by shooting him in the leg and chest as he was seated in his vehicle. (*Ante*, Statement of Facts, § D.1.)

The evidence consisted of the eyewitness testimony of R.J. Uzel, Debra Recio, and Abraham Van Rood. The prosecution also introduced evidence that the gunman fled the scene in a vehicle registered to one Diana Hara, whose address is the same as that which appears on codefendant Bermudez's driver's license. (RT 27:4032-4071.)

As shown below, the evidence is woefully insufficient to sustain a finding that appellant perpetrated the assault. Uzel never identified the assailant. (RT 27:4032-4045.) Recio did not see who fired the shots, although she testified that a few days after the shooting the speculative "word on the street" was that Dozer from Cole Street was involved. (RT 27:4047-4056.) Van Rood saw a "young

man" firing the shots, but was unable to identify the shooter. He saw the shooter departing the scene in a vehicle that was subsequently identified as being registered to Hara at the same addressed used by codefendant Bermudez. (RT 27:4057-4071.)

Admission of this entirely speculative evidence that appellant perpetrated an the assault with a firearm on Uzel – *the only prior criminal conduct introduced in aggravation in support of a death verdict* – denied appellant due process and a reliable penalty determination, thereby requiring reversal of the death judgment. (Post, § XVIII.C.)

B. THE EVIDENCE IS WOEFULLY INSUFFICIENT TO SUSTAIN A FINDING THAT APPELLANT PERPETRATED AN ASSAULT WITH A FIREARM ON UZEL

Faced with a challenge to the sufficiency of the evidence, the issue is whether there is "substantial evidence – that is, *evidence which is reasonable, credible, and of solid value* – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson, supra*, 26 Cal.3d at p. 578 [emphasis added]; *People* v. *Samuel, supra*, 29 Cal.3d at p. 505 [evidence relied upon must be "reasonable in nature, credible and of solid value"].)

The requisite qualitative nature of the evidence is that which is sufficient to permit the trier of fact to reach a "subjective state of near certitude of the guilt

of the accused . . . ." (*Jackson v. Virginia, supra*, 443 U.S. at p. 315.) "'Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises the possibility, and this is not a sufficient basis for an inference of fact.'" (*People v. Reyes*, *supra*, 12 Cal.3d at p. 500, citing *People v. Redmond*, *supra*, 71 Cal.2d at p. 755.) Nor can substantial evidence be based on speculation. (*People v. Morris*, *supra*, 46 Cal.3d at p. 21.)

Uzel testified that while using a pay telephone in front of the McDonald's restaurant in South Whittier in the evening on May 20th, someone approached him. (RT 27:4032, 4028-4029.) Uzel was unable to identify the person because it was dark outside. (RT 27:4029.) Uzel testified on direct examination, in part:

Q: . . . . As were you speaking to this individual on the phone, did you notice another vehicle in the area?

A. Yeah.

Q: And what was it about this vehicle which drew your attention to it?

A: Nothing really, just it passed by in front of me, just pulled in [to the parking lot]. [RT 27:4027.] [¶]

Q: All right, sir. While you were talking on the telephone, did anyone other than your friend approach you?

A: Yeah.

Q: And when this person approached you, can you tell us whether or not you recognized the person?

A: No, I didn't.

Q: Was this person a male or a female?

A: A male.

Q: Was this person approximately your age at the time, or older, younger?

A: I don't remember.

Q: Was there anything significant about the way this person looked which enables you to describe that person for us?

A: No.

Q: Other than just a male, was this person Caucasian, African-American, Hispanic

A: I'm not sure because it was dark.

Q: I see.

A: Like 8:00 o'clock at night, so I couldn't really tell. [RT 27:4028-4029.]

Uzel testified that he did not know the person and had never seen him before. (RT 27:4030.) There was no altercation at that moment. (RT 27:4030.)

Uzel returned to his vehicle, which was being driven by Recio, and entered the front passenger seat. (RT 27:4030-4031.) As the vehicle was leaving the area shots were fired. A bullet came through the window of the vehicle, went through Uzel's leg, and skimmed his chest. (RT 27:4031-4032.) Uzel did not

see the gunman, nor did he see anyone else in the immediate area when the shots were fired. (RT 27:4032-4033.)

After being shot, Recio drove Uzel directly to the hospital. (RT 27:4033.) Uzel testified on direct examination, in part:

Q: Between the time, well, from between the location of the McDonald's restaurant where you were hit; correct?

A: Yes.

Q: And the time you arrived to the Whittier hospital, did you say anything to Debbie [Recio] or your friend in the back [i.e., identified by Recio as Michael Orozco]?

A: No. Just that I was shot.

Q: Did you explain to them in any way, shape, or form who had shot you?

A: No. [RT 27:4034.]

Uzel was interviewed by two police officers at the hospital, but did not have any information about the identity of the person who shot him. (RT 27:4039, 4042.) Uzel testified on direct examination, in part:

Q: And the reason you didn't really want to talk to them, as you say, is because you wanted no part of that investigation?

A: No. Because I didn't know what happened. Being part of an investigation doesn't matter to me, but I don't know what happened,

Q: I see. And you certainly, well, did you at least tell these detectives that you wouldn't go to court to testify at all against anyone regarding this shooting?

A: Well, no. If I don't know what happened or who did it or anything at all, why do I need to take my time out of work? [RT 27:4042.]

Uzel also testified that he knew appellant from high school, but he never told anyone, including Recio, that appellant had shot him. (RT 27:4044.) Uzel testified that if appellant had shot him, then he would have identified appellant as the shooter. (RT 27:4045.) Uzel testified on cross-examination, in part:

Q: And when you're being driven from this McDonald's to the Whittier hospital, you're pretty upset at getting shot, weren't you?

A: Yeah.

Q: And if Mr. Penunuri had shot you, you would have said Richard Penunuri shot me, wouldn't you?

A: Yeah.

Q: You didn't say that, did you.

A: No, I didn't.

Q: Okay. And when the police came to the hospital, if Richard Penunuri had shot you you (sic) would have told them, too, wouldn't you.

A: Yes.

Q: You didn't tell the police that either, did?

A: No.

Q: Why not?

A: Because I didn't know who shot me. [RT 27:4045.]

Debra Recio testified that she parked Uzel's vehicle and stayed in the driver's seat while Uzel was using the pay telephone. A third friend, Michael Orozco, was with them and was standing near Uzel when he was using the telephone. (RT 27:4047-4053.) Recio did not notice anyone approach Uzel while he was using the telephone. (RT 27:4049.)

Recio testified that Uzel and Orozco returned to the vehicle, and then Uzel was shot by an unknown person. (RT 27:4050.) Recio testified on direct examination, in part:

Q: After the two individuals [Uzel and Orozco] had entered the car, did you remain the driver?

A: Mm-hmm, yes.

Q: And at that point in time did something happen to Mr. Uzel?

A: Yeah. He got shot.

Q: When he got shot, did you look towards his direction to -- out of concern for your own or his safety?

A: Yeah.

Q: And when you looked towards his direction, what did you see?

A: I can't I just -- I saw him, he was like leaning on me, and I got put in reverse, and took off.

Q: Did you see anyone near the vehicle at the time Jason was shot?

A: No.

Q: Or Mr. Uzel was shot?

A: No.

Q: Where did you take Mr. Uzel?

A: To the hospital. Whittier hospital. [RT 27:4050.]

Recio further testified that Uzel never told her that he had been shot by appellant, although there was speculation "on the street" that appellant was responsible for the shooting. (RT 27:4050-4051.) Recio testified on direct examination, in part:

Q: From the point you left the parking lot to the point you arrived to the hospital, did Mr. Uzel say anything to you with respect to the identity of the person who shot him?

A: No, he did not.

Q: At some point in time did Mr. Uzel confide in you and tell you who it was who had shot him?

A: No, he didn't.

Q: Up to and including this moment in time, has Mr. Uzel ever informed you that Dozer was the person who had shot him?

A: Not him himself, that's just what was said out on the street. [RT 27:4050-4051.]

The prosecution then sought to impeach Recio and Uzel with sworn testimony that Recio gave earlier that afternoon outside the presence of the jury in an Evidence Code section 402 hearing. (RT 27:4051.) Recio testified on direct examination, in part:

Q: Miss Recio, do you recall being sworn in to testify as a witness earlier this afternoon?

A: Yes, I did.

Q: And this was outside the presence of the jury; correct?

A: Yes, it was.

Q: And did you also relay certain information to us during that hearing with respect to what, if anything, Mr. Uzel had told you regarding who had shot him?

A: A couple days after he got out of the hospital, and I said Mike. No, I did not say that. It was R.J. I said a couple days. You asked me a couple days after when he got out of the hospital if he ever confided in me, and I said it was out on the street that what was said that it was Dozer. I don't know who Dozer was or anything. [RT 27:4051.]

The following prior testimony of Recio was then read into the record in the presence of the jury:

Q: Did Jason Uzel ever provide you information as to who shot him?

A: Jason?

Q: R.J.

A: R.J. Yeah.

Q: And when did that happen?

A: When he came home from the hospital.

Q: When he came home from the hospital was that the next day after the shooting?

A: I can't -- it was -- I think it was a couple days. I mean, it happened so long ago, I think he was in there for a couple days.

Q: And when he eventually got out of the hospital and told you this information, do you recall exactly what he said?

A: Not exactly. I just know that all, like I said, it happened so long ago, all I remember him it (sic) was Dozer, and he was trying (sic) they were trying to figure out how they could get back at Cole Street for shooting at them, vice versa. [RT 27:4053-4054 (internal quotation marks omitted).]

On cross-examination, however, Recio made clear, as she had testified to on direct examination, that the word "on the street" was that Dozer had shot Uzel, but Uzel never told her that he had first-hand knowledge of the identity of the shooter. Recio testified on cross-examination as follows:

Q: Miss Recio, you heard the readback.

A: Yes.

Q: Okay. So is there an inconsistency in what you're telling us, or is this consistent with what we just heard, we have it distorted?

A: Well, I just -- when he got out of the hospital, it was out on the street that Dozer, whoever Dozer was, from Cole Street had did it (sic). R.J. did not come straight out, it was Dozer, which is who it was, I know who it was.

Q: So basically what he -- what you testified to that's been read back in court?

A: Mm-hmm.

Q: Is in effect gossip from the street?

A: Yeah. Like I said, what they -- they meaning one gang to another.

Q: And you've not heard anything from R.J. where he's telling you who shot him?

A: No.

Q: From his own personal knowledge.

A: No. [RT 27:4055.]

On redirect examination Recio testified that shortly after the incident she gave a statement to Detective Rudy Ortega. (RT 27:4056.) She testified that she "told him exactly what I told you and everyone else." (RT 27:4056.) Recio reiterated, "*All I can go by is what was said on the street. I don't know who Dozer was. Who did it. Or nothing. That's all I know is that's what was out on the street.* If you can buy what was out on the street, then what was said. I never saw him. I still don't even know who Dozer is." (RT 27:4056 [emphasis added].)

Abraham Van Rood testified he saw a young man in vicinity of the McDonald's parking holding a gun and shooting at a vehicle. After the shooting, the gunman got into the passenger side of another vehicle. (RT 27:4058-4063.) The vehicle that the gunman got into was registered to Diana Hara, 8511 Dalewood Avenue, Pico Rivera (RT 27:4070-4071), which is the same address as shown on codefendant Bermudez's driver's license (RT 27:4071-4072; People's Exh. 6).

The record does *not* support a solid, credible inference that appellant was the shooter. Uzel testified that he was never able to identify his assailant. (RT 27:4032-4045.) Uzel's testimony was consistent with what he told the police at the hospital shortly after the shooting. (RT 27:4039, 4042.)

Recio also was unable to identify the shooter. (RT 27:4047-4056.) She testified that while she was driving Uzel to the hospital, and then while at the hospital, Uzel never stated that appellant was involved in the shooting. (RT 27:4050-4051.) However, she testified that the word "on the street" was that Dozer was involved. (RT 27:4051.) Recio testified for the prosecution on direct examination, in part:

> Q: Up to and including this moment in time, *has Mr. Uzel ever informed you that Dozer was the person who had shot him*?
>
> A: *Not him himself, that's just what was said out on the street.* [RT 27:4051 (emphasis added).]

This is entirely speculative testimony because it is based on rumor, not first-hand factual knowledge. (Cf. *People v. Daniels* (1991) 52 Cal.3d 815, 861-862 [affirming trial court's exclusion of testimony of defense witness that was based on rumor and speculation, not personal knowledge].)

Although inferences may constitute substantial evidence in support of a judgment, they must be the probable outcome of logic applied to direct evidence; mere speculative possibilities or conjecture are infirm. (*Kuhn v. Department of*

General Services (1994) 22 Cal.App.4th 1627, 1633; *Louis & Diederich, Inc. v. Cambridge European Imports, Inc.* (1987) 189 Cal.App.3d 1574, 1584-1585; *People v. Berti* (1960) 178 Cal.App.2d 872, 876.) "A legal inference cannot flow from the nonexistence of a fact; it can be drawn only from a fact actually established." (*Eramdjian v. Interstate Bakery Corp.* (1957) 153 Cal.App.2d 590, 602; accord, *People v. Stein* (1979) 94 Cal.App.3d 235, 239.) Disbelieving a witness does not entitle a trier of fact to infer the opposite of the testimony. (*People v. Drolet* (1973) 30 Cal.App.3d 207, 217; *People v. Samarjian* (1966) 240 Cal.App.2d 13, 18 ["The People must prevail on their own evidence, not on a vacuum created by rejection of a defense"].)

Even in the readback of Recio's 402 testimony, which was admitted in an attempt to impeach Uzel's testimony that he never told Recio that appellant was involved, Recio never stated that Uzel told her that he saw appellant fire the shots. Recio testified that after Uzel returned home from the hospital "all I remember him it (sic) was Dozer, and he was trying (sic) they were trying to figure out how they could get back at Cole Street for shooting at them, vice versa." (RT 27:4054.) This is consistent with Recio's testimony on both direct and cross-examination that the word "on the street" was Dozer shot Uzel, but Uzel never told her that he had first-hand knowledge of the identity of the

shooter, nor did he tell her that appellant was involved in the shooting. (RT 27:4050-4051, 4055.)

> . . . . If the existence of an essential fact upon which a party relies is left in doubt or uncertainty, the party upon whom the burden rests to establish that fact should suffer, and not his adversary. (*Patterson v. San Francisco etc. Ry. Co.*, 147 Cal. 178 [81 P. 531].) A judgment cannot be based on guesses or conjectures. (*Puckhaber v. Southern Pac. Co.*, 132 Cal. 363 [64 P. 480].)

(*Reese v. Smith* (1937) 9 Cal.2d 324, 328.) Accordingly, Recio's testimony does not support a solid, credible inference that appellant was the shooter.

C. THE JURY'S CONSIDERATION OF THE ASSAULT WITH A FIREARM ON UZEL REQUIRES REVERSAL OF THE DEATH JUDGMENT FOR A VIOLATION OF APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A RELIABLE PENALTY DETERMINATION (CAL. CONST., ART. I, §§ 7, 15 & 17; U.S. CONST., 5TH, 6TH, 8TH & 14TH AMENDS.) BECAUSE IT CANNOT BE PROVED BEYOND A REASONABLE DOUBT THAT THE EVIDENCE DID NOT CONTRIBUTE TO THE DEATH VERDICT

The California statutory scheme allows, in aggravation, consideration of "the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence . . . ." (Pen. Code, § 190.3.) The requisite "criminal activity" must amount to conduct that violates a penal statute. (*People v. Boyd* (1985) 38 Cal.3d 762, 772.) The jury may not rely on evidence of such uncharged crimes of violence as an aggravating factor unless

the crimes are proved beyond a reasonable doubt. (*People v. Robertson* (1982) 33 Cal.3d 21, 53-54.)

A judgment unsupported by substantial evidence denies a defendant due process of law. (Cf. *Jackson v. Virginia, supra*, 443 U.S. at p. 318; *White v. Illinois, supra*, 502 U.S. at pp. 363-364 ["Reliability is . . . a due process concern"]; *Donnelly v. DeChristoforo, supra*, 416 U.S. at p. 646 [due process "cannot tolerate" convictions based on false evidence]; *People* v. *Bean, supra*, 46 Cal.3d at p. 932; Cal. Const., art. I, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.)

In capital cases it is well recognized that heightened verdict reliability is required at both the guilt and penalty phases of trial. (*Beck v. Alabama, supra*, 447 U.S. at pp. 627-646; see also *Kyles v. Whitley, supra*, 514 U.S. at p. 422; *Burger v. Kemp, supra*, 483 U.S. at p. 785; *Gilmore v. Taylor, supra*, 508 U.S. at p. 342; Cal. Const., art. I, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.)

The standard of prejudice for the deprivation of a federal constitutional right, as here, is the *Chapman* harmless error analysis, which requires reversal unless the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24; see *People v. Sengpadychith, supra*, 26 Cal.4th at p. 326 [*Chapman* asks whether the prosecution has "prove[d] beyond a reasonable doubt that the error ... did not contribute to" the verdict].)

State law error in admitting or excluding evidence at the penalty phase of a capital trial is reversible if there is a reasonable possibility it affected the verdict. (*People v. Lancaster* (2007) 41 Cal.4th 50, 94; *People v. Jackson* (1996) 13 Cal.4th 1164, 1232.) This standard is the same, in substance and effect, as the harmless beyond a reasonable doubt standard of *Chapman v. California, supra*, 386 U.S. at p. 24. (*People v. Ochoa* (1998) 19 Cal.4th 353, 479.)

Evidence of an assault with a firearm on Uzel formed a material part of the prosecution's case in aggravation. (*Ante*, Statement of Facts, § D.1.) During closing summation, the prosecution urged the jury to return a death verdict based in part on evidence of an assault with a firearm on Uzel. (RT 30:4443-4444.) The prosecutor argued, in part:

> . . . . With respect to the other criminal activity that Dozer was involved in? Well, that's why you heard from Mr. Uzel. That's why you heard from Debbie Recio.
>
> You know, you really do, even as a prosecutor, you wish that it would have just ended, all his crime spree would have just ended with the guilt phase evidence, but it didn't in this case. Dozer even two months before the Whittier murders actually tried to kill, injure, and even, well, kill and injure Jason Uzel at that McDonald's parking lot on May 20th, 1997. That kind of tells you what kind of person Dozer was. Or still is, for that matter.
>
> And the reason he shot Jason Uzel? Because, as Jason Uzel reported to law enforcement, after the crime was committed upon him, that Dozer walked up to him and yelled at him what (sic) he was using the telephone, that this is Whittier.

> What does that tell us from a gangster point of view? That he's protecting his territory, he is protecting his neighborhood, that he's telling people who do not belong in this neighborhood that they shouldn't be around. They should not have infiltrated his area. That's what Dozer is. That's what the motive is behind the shooting of Jason Uzel.
>
> Jason was in the wrong place at the wrong time. He was in the wrong neighborhood. *And Dozer just didn't shoot Jason once, he shot him multiple times when he was confined in a car with no visible means of escape.* And fortunately Jason survived his wounds and was not hit to the point that, you know, his life was in jeopardy. *But the bottom line is a person who is capable just out of anger and hate proceeded for a boy being in the wrong neighborhood to actually walk up to that individual and shoot him multiple times from merely point blank range. Tells you what type of character Dozer really has. And again, this is a significant factor in aggravation, which can not be overcome by anything in mitigation that we've already heard.* . . . . [RT 30:4443-4444 (emphasis added).]

As the prosecutor pointedly told the jury, the assault with a firearm on Uzel "is a significant factor in aggravation, which can not be overcome by anything in mitigation that we've already heard." (RT 30:4444.)

In connection with a prosecutor's closing argument to the jury, this Court, and other courts, have recognized what logic dictates – i.e., the prosecutor's reliance in closing argument on erroneously admitted evidence is a strong indication of prejudice. (See e.g., *People v. Guzman* (1988) 45 Cal.3d 915, 963 [finding no *Boyd* error but noting it was significant that "the prosecution made no effort to capitalize on the testimony"]; *People v. Roder* (1983) 33 Cal.3d 491, 505 [error not harmless under *Chapman* because, in part, "the prosecutor relied on the

[erroneous] presumption in his closing argument"]; *People v. Martinez* (1986) 188 Cal.App.3d 19, 26 [error not harmless under *Chapman* based, in part, on prosecutor's closing argument]; *People v. Frazier* (2001) 89 Cal.App.4th 30, 39 ["reasonable doubt [under *Chapman*] is reinforced here by the prosecutor's use of the propensity instruction in closing argument"]; *People v. Younger* (2000) 84 Cal.App.4th 1360, 1384 ["Our conclusion that there is such reasonable doubt is reinforced by the prosecutor's use of the instruction in her closing arguments."]; *People v. Brady* (1987) 190 Cal.App.3d 124, 138 ["argument of the district attorney, if anything, compounded the defect"]; *Depetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, 1063 [prosecutor's reliance on error in closing argument is indicative of prejudice].)

It is thus likely that the jury viewed the evidence as did the prosecutor, and attributed the assault with a firearm on Uzel as a significant factor in aggravation warranting a sentence of death, especially because it was the only instance of prior criminal conduct admitted in aggravation.

In view of the fact that the prosecution viewed the assault with a firearm on Uzel as a significant factor in aggravation warranting a sentence of death, and in view of the case in mitigation, consisting of evidence that appellant's conduct was induced by chronic drug addiction and that appellant is a good and caring person with redeeming qualities (*ante*, Statement of Facts, §§ E.1. & E.2.), the

prosecution cannot now prove beyond a reasonable doubt that the evidence of the assault with a firearm on Uzel did not contribute to the death verdict. (See *People v. Robertson, supra*, 48 Cal.3d at p. 62 [federal constitutional error requires reversal of the death judgment unless it can be demonstrated that the error is harmless beyond a reasonable doubt]; see *Chapman v. California, supra*, 386 U.S. at pp. 20-21; *Arizona v. Fulminante, supra,* 499 U.S. at p. 296; *People v. Cowan, supra*, 50 Cal.4th at p. 491.)

Reversal of the death judgment is required.

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XIX.

IN VIEW OF THE ADMISSION OF PRIOR VIOLENT CRIMES EVIDENCE IN AGGRAVATION, THE TRIAL COURT'S INSTRUCTION THAT THE PROSECUTION BEARS NO BURDEN OF PROOF AT THE PENALTY PHASE, AND THE FAILURE TO DEFINE REASONABLE DOUBT, VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO JURY TRIAL, DUE PROCESS, AND A RELIABLE PENALTY DETERMINATION (CAL. CONST., ART. I, §§ 7, 15 & 17; U.S. CONST., 5TH, 6TH, 8TH & 14TH AMENDS.), THEREBY REQUIRING REVERSAL OF THE DEATH JUDGMENT

A. INTRODUCTION AND PROCEDURAL BACKGROUND

The prosecution introduced evidence in aggravation that in 1997 appellant purportedly committed the offense of assault with a firearm on Jason Uzel. (*Ante*, Statement of Facts, § D.1.) The evidence was admitted pursuant to Penal Code section 190.3, factor (b), which provides that in determining penalty the trier of fact shall take into account "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence."

At the conclusion of the penalty phase evidence, but prior to closing argument of counsel, the trial court instructed the jury as follows: "The People do not have a burden of proof at this stage of the proceeding." (RT 30:4430.)

Following closing argument, the trial court instructed the jury using the 1996 version of CALJIC No. 8.84.1 in pertinent part as follows:

> You will now be instructed as to all of the law that applies to the penalty phase of this trial.

> You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. *Disregard all other instructions given to you in other phases of this trial.* [RT 30:4462 [emphasis added]; CT 13:3525.]

The trial court also instructed the jury, as pertinent here, in the language of CALJIC No. 8.84, the introductory penalty phase instruction; No. 8.85, the list of aggravating and mitigating factors for the jury's consideration; No. 8.87, requiring proof of other criminal activity beyond a reasonable doubt; No. 8.88, the penalty phase concluding instruction; No. 9.00, defining the offense of assault; and No. 9.02, defining the offense of assault with a firearm. (RT 30:4462-4469; CT 13:3526-3540.)

Contrary to the recommendation in the Use Note to CALJIC No. 8.84.1, however, the trial court did not instruct the jury with CALJIC No. 2.90, defining reasonable doubt.

B. THE TRIAL COURT HAS A SUA SPONTE DUTY TO CORRECTLY INSTRUCT THE JURY ON THE PROSECUTION'S BURDEN

The trial court has a sua sponte duty to correctly instruct the jury, and its instructions and comments to the jury are properly reviewed on appeal without

objection below. (Pen. Code, § 1259;[41] *People v. Brown* (2003) 31 Cal.4th 518, 539.)[42]

C. STANDARD OF REVIEW

The standard of review for a claim that a sentencing instruction is ambiguous is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*Estelle v. McGuire, supra*, 502 U.S. at p. 72 quoting *Boyde v. California, supra*, 494 U.S. at p. 380.)

D. THE TRIAL COURT ERRED BY INSTRUCTING THE PENALTY PHASE JURY THAT THE PROSECUTION BEARS NO BURDEN OF PROOF AND BY OMITTING AN INSTRUCTION DEFINING REASONABLE DOUBT

When prior violent crimes evidence is admitted in aggravation under factor (b) of section 190.3, the prosecution bears the burden of proof, and a juror may not consider the evidence unless the juror is satisfied that the prosecution has proven each element of the prior offense beyond a reason reasonable doubt. (See *People v. Boyd* (1985) 38 Cal.3d 762, 776-777.)

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[41] Section 1259 provides in part: "The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

[42] Trial defense counsel did not object to the instructions given to the jury.

In such a case, as here, the jury must be instructed that the prosecution alone bears the burden of proving the prior offense beyond a reasonable doubt. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 208 ["There is no need to instruct the jury at the penalty phase (1) regarding a burden of proof, except as to section 190.3, factors (b) and (c) . . ."]; *People v. Jennings* (2010) 50 Cal.4th 616, 689 ["{E}xcept for prior violent crimes evidence and prior felony convictions under section 190.3, factors (b) and (c), the court need not instruct regarding a burden of proof, or instruct that there is no burden of proof at the penalty phase."].)

Moreover, when prior violent crimes evidence is admitted in aggravation, the trial court errs by failing to define "reasonable doubt" during penalty phase instructions. (*People v. Cowan, supra*, 50 Cal.4th at p. 494.) "'[I]f a trial court instructs the jury at the penalty phase not to refer to instructions given at the guilt phase, it later must provide the jury with those instructions applicable to the evaluation of evidence at the penalty phase,' including CALJIC No. 2.90." (*Ibid.*, citing *People v. Lewis* (2008) 43 Cal.4th 415, 535.)

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E. REVERSAL OF THE DEATH JUDGMENT IS REQUIRED BECAUSE IT IS REASONABLY LIKELY THAT THE JURY APPLIED THE INSTRUCTIONS IN A WAY THAT DEPRIVED APPELLANT OF A PROPERLY GUIDED, INDIVIDUALIZED SENTENCING HEARING; MOREOVER, THE PROSECUTION WILL BE UNABLE TO PROVE THAT THE INSTRUCTIONAL ERRORS WERE HARMLESS BEYOND A REASONABLE DOUBT

Although the court instructed with CALJIC No. 8.87, requiring proof of other criminal activity beyond a reasonable doubt (CT 13:3531-3533), the court's overriding instruction was unequivocal: "The People do not have a burden of proof at this stage of the proceeding." (RT 30:4430.) Considering the court's explicit and unequivocal instruction that the prosecution bore no burden of proof at the penalty phase of the trial, combined with the court's failure to define reasonable doubt, appellant was deprived of a properly guided, individualized sentencing hearing.

In a capital case, the court must clearly and explicitly instruct the jury about prior violent crimes evidence and the prosecution's burden of proof. "The jury must receive clear instructions which . . . 'guide[] and focus[] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender.'" (*Spivey v Zant* (5th Cir. 1981) 661 F. 2d 464, 471, quoting *Jurek v Texas* (1976) 428 U.S. 262, 274 [96 S.Ct. 2950, 49 L.Ed.2d 929], cert. denied, 458 U.S. 111 (1982).)

Moreover, when the trial court fails to instruct the jury to make a necessary factual determination – as here with respect to prior violent crimes

evidence admitted in aggravation under factor (b) of section 190.3 – the error results in a deprivation of both due process and the Sixth Amendment right to jury trial. (Cf. *In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368]; U.S. Const. 5th, 6th, & 14th Amends.) Prejudicial error at the penalty phase of a capital case results in a deprivation of the right to a reliable penalty determination. (Cf. *Woodson v. North Carolina, supra*, 428 U.S. at p. 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879 [103 S.Ct. 2733, 77 L.Ed.2d 235]; *Payne v. Tennessee, supra*, 501 U.S. at p. 825-830; U.S. Const. 8th & 14th Amends.)

The standard of prejudice for the deprivation of a federal constitutional right is the *Chapman* harmless error analysis, which requires reversal of appellant's convictions unless the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24; see *People v. Sengpadychith, supra*, 26 Cal.4th at p. 326 [*Chapman* asks whether the prosecution has "prove[d] beyond a reasonable doubt that the error ... did not contribute to" the verdict].)

State law error at the penalty phase of a capital case requires reversal when there is a "reasonable (i.e., realistic) possibility" the error affected the verdict (*People v. Brown, supra*, 46 Cal.3d at pp. 447-448), which is "'the same, in substance and effect,' as the harmless-beyond-a-reasonable-doubt standard of

Chapman v. California, supra, 386 U.S. at p. 24 . . . ." (*People v. Cowan, supra*, 50 Cal.4th at p. 491.)

The prosecution will be unable to prove that the instructional errors were harmless beyond a reasonable doubt because 1) the prior violent crimes evidence relating to the assault with a firearm on Uzel was the *only prior criminal conduct admitted in aggravation* and 2) there is substantial evidence that the prosecution failed to prove the offense of assault with a firearm beyond a reasonable doubt. (*Ante*, § XVIII [insufficient evidence that appellant perpetrated an assault with a firearm on Uzel].)

Preliminarily, the instant case is distinguishable from *People v. Cowan, supra*, 50 Cal.4th 401, finding harmless error in the trial court's failure to redefine "reasonable doubt" during penalty phase instructions because the jurors had been given the appropriate instruction during the guilt phase. (*Id.* at p. 494.) Although appellant's jury was instructed with CALJIC. No. 2.90 (defining reasonable doubt) during the guilt phase (RT 24:3752-3753; CT 12:3379), here, in contrast to *People v. Cowan, supra*, the trial court explicitly instructed the jury that "*[t]he People do not have a burden of proof at this stage of the proceeding.*" (RT 30:4430 [emphasis added].)

The only prior criminal conduct admitted in aggravation was a purported assault with a firearm on Uzel, committed in May 1997, which the prosecution failed to prove with solid, credible evidence. (RT 27:4022-2024.)

As shown above, and as explained in Argument XVIII.B, *ante*, the evidence was woefully insufficient to prove beyond a reasonable doubt that appellant perpetrated an assault with a firearm upon Uzel. (*Ante*, § XVIII.B; cf. *People* v. *Samuel, supra*, 29 Cal.3d at p. 505 [evidence relied upon must be "reasonable in nature, credible and of solid value"].)

As explained in Argument XVIII.C, *ante*, the evidence of an assault with a firearm on Uzel formed a material part of the prosecution's case in aggravation. (*Ante*, § XVIII.C.) As the prosecutor pointedly told the jury, the assault with a firearm on Uzel "is a *significant factor in aggravation* . . . ." (RT 30:4444 [emphasis added].)

It is thus likely that the jury viewed the evidence as did the prosecutor, and attributed the assault with a firearm on Uzel as a significant factor in aggravation warranting a sentence of death, especially because it was the only instance of prior criminal conduct. (Cf. *Yates v. Evatt, supra*, 500 U.S. at pp. 403-404 [an instructional error may be found to be harmless where it is shown beyond a reasonable doubt that the error was "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record"]; *People v.*

James (2000) 81 Cal.App.4th 1343, 1364, fn. 10 [closing argument cannot cure error in instruction but may exacerbate it]; *People v. Rhodes* (2005) 129 Cal.App.4th 1339, 1347-1348 [convictions reversed based on instructional error, in part, because "the district attorney's closing argument exacerbated the court's instructional error."]; *Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 396 [effect of counsel's argument exacerbated instructional error].)

Juror comprehension of the sentencing instruction is a federal constitutional guarantee. (See *Boyde v. California, supra*, 494 U.S. at p. 380.) If the jury had been properly instructed on the prosecution's burden of proof, then it is reasonably likely that the jurors would have found that the prosecution had not carried its burden of proof on the issue whether appellant committed the offense of assault with a firearm on Uzel, thereby requiring reversal of the death judgment. (Cf. *Estelle v. McGuire, supra*, 502 U.S. at p. 72.)

In view of the fact that the instructional errors deprived appellant of a fair trial on the issue whether the prosecution had proven beyond a reasonable doubt the prior violent crimes evidence relating to the assault with a firearm on Uzel, and in view of the case in mitigation, consisting of evidence that appellant's conduct was induced by chronic drug addiction and that appellant is a good and caring person with redeeming qualities (*ante*, Statement of Facts, §§ E.1. & E.2.), the prosecution will be unable to prove beyond a reasonable doubt that the

instructional errors did not contribute to the verdict. (Cf. *Sullivan v. Louisiana, supra*, 508 U.S. at p. 279; see *People v. Robertson, supra*, 48 Cal.3d at p. 62 [federal constitutional error requires reversal of the death judgment unless it can be demonstrated that the error is harmless beyond a reasonable doubt]; see *Chapman v. California, supra*, 386 U.S. at pp. 20-21; *People v. Cowan, supra*, 50 Cal.4th at p. 491.)

Reversal of the death judgment is required.

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XX.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE FEDERAL CONSTITUTION (U.S. CONST., 5TH, 6TH, 8TH & 14TH AMENDS.)

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the high court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6.)[43] See also,

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[43] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, " is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (548 U.S. at

Pulley v. Harris (1984) 465 U.S. 37, 51 [104 S.Ct. 871, 79 L.Ed.2d 29] [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the

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p. 178.)

imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

A. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.2 IS IMPERMISSIBLY BROAD

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)"

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make *all* murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained twenty-six special circumstances[44] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section

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[44] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now thirty-three.

190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (Cf. *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The high court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.[45] (See Section E. of this Argument, *post*).

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[45] In a habeas petition to be filed after the completion of appellate briefing, appellant intends to present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant intends to present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing

B. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.3(A) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[46] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon

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schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346], and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

[46] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3.

the defendant's having sought to conceal evidence three weeks after the crime,[47] or having had a "hatred of religion,"[48] or threatened witnesses after his arrest,[49] or disposed of the victim's body in a manner that precluded its recovery.[50] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (Cf., e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.) Relevant "victims" include "the victim's friends, coworkers, and the community" (*People v. Ervine* (2009) 47 Cal.4th 745, 858), the harm they describe may properly "encompass[] the spectrum of human responses" (*ibid.*), and such evidence may dominate the penalty proceedings (*People v. Dykes* (2009) 46 Cal.4th 731, 782-783).

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750]), it has been used in ways so arbitrary and

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[47] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, *cert. den.*, 494 U.S. 1038 (1990).

[48] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S.Ct. 3040 (1992).

[49] *People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S.Ct. 498.

[50] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn. 35, *cert. den.* 496 U.S. 931 (1990).

contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa*, *supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [108 S.Ct. 1853, 100 L.Ed.2d 372] [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any

meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY DETERMINATION OF EACH FACTUAL PREREQUISITE TO A SENTENCE OF DEATH; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (Pen. Code, § 190.2) or in its sentencing guidelines (Pen. Code, § 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death

is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death.

1. APPELLANT'S DEATH VERDICT WAS NOT PREMISED ON FINDINGS BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY THAT ONE OR MORE AGGRAVATING FACTORS EXISTED AND THAT THESE FACTORS OUTWEIGHED MITIGATING FACTORS; HIS CONSTITUTIONAL RIGHT TO JURY DETERMINATION BEYOND A REASONABLE DOUBT OF ALL FACTS ESSENTIAL TO THE IMPOSITION OF A DEATH PENALTY WAS THEREBY VIOLATED

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this pronouncement has been squarely rejected by the decisions in *Apprendi v.*

New Jersey (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 553], *Blakely v. Washington* (2004) 542 U.S. 296 [542 S.Ct. 296, 159 L.Ed.2d 403], and *Cunningham v. California* (2007) 459 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (Id. at p. 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639 [110 S.Ct. 3047, 111 L.Ed.2d 511]) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Id.* at p. 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. *Any* factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what

nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at p. 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The high court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 313.)

In reaching this holding, the high court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220 [543 S.Ct. 220, 160 L.Ed.2d

621], the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *(United States v. Booker, supra,* 543 U.S. at 244.)

In *Cunningham,* the high court rejected this Court's interpretation of *Apprendi,* and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled-out by the legislature. *(Cunningham v. California, supra,* Section III.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

a. IN THE WAKE OF *APPRENDI, RING, BLAKELY,* AND *CUNNINGHAM,* ANY JURY FINDING NECESSARY TO THE IMPOSITION OF DEATH MUST BE FOUND TRUE BEYOND A REASONABLE DOUBT

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a

defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[51] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury (RT 50:5915-5916), "an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88; emphasis added.)

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[51] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[52] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[53]

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41;

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[52] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.* at p. 460)

[53] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

People v. Dickey (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham*.[54] In *Cunningham* the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (Id. pp. 6-7.) That was the end of the matter: *Black's*

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[54] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black*, 35 Cal.4th at 1253; *Cunningham, supra,* at p.8.)

interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." *(Cunningham, supra*, p. 13.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.* at p. 14.)

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line"). [*Cunningham, supra,* at p. 13.]

In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.*

In its effort to resist the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.)

This holding is simply wrong. As section 190, subd. (a)[55] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether

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[55] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, at p. 6.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The U.S. Supreme Court squarely rejected it:

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151. [*Ring*, 124 S.Ct. at 2431.]

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring, supra*, 530 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that

the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC No. 8.88 (7th ed., 2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 530 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 542 U.S. at p. 328 [emphasis in original].) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

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b. WHETHER AGGRAVATING FACTORS OUTWEIGH MITIGATING FACTORS IS A FACTUAL QUESTION THAT MUST BE RESOLVED BEYOND A REASONABLE DOUBT

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (Cf. *State v. Ring, supra*, 65 P.3d 915, 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *State v. Ring* (Az. 2003) 65 P.3d 915; *Woldt v. People* (Colo. 2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.[56])

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 [118 S.Ct. 2246, 141

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[56] See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death).

L.Ed.2d 615] ["the death penalty is unique in its severity and its finality"].)[57] As the high court stated in *Ring*, *supra*, 122 S.Ct. at pp. 2432, 2443:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

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[57] In *Monge*, the high court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* (1982) 455 U.S. 745, 755 rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).)

2. THE DUE PROCESS AND THE CRUEL AND UNUSUAL PUNISHMENT CLAUSES OF THE STATE AND FEDERAL CONSTITUTION REQUIRE THAT THE JURY IN A CAPITAL CASE BE INSTRUCTED THAT THEY MAY IMPOSE A SENTENCE OF DEATH ONLY IF THEY ARE PERSUADED BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING FACTORS EXIST AND OUTWEIGH THE MITIGATING FACTORS AND THAT DEATH IS THE APPROPRIATE PENALTY

a. FACTUAL DETERMINATIONS

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship*, *supra*, 397 U.S. at p. 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the

applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. IMPOSITION OF LIFE OR DEATH

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 745, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (Cf. *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky*, *supra*, the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself." [455 U.S. at p. 755.]

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson*, *supra*, 428 U.S. at p. 305.) The only risk of error

suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the high court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

3. CALIFORNIA LAW VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY FAILING TO REQUIRE THAT THE JURY BASE ANY DEATH SENTENCE ON WRITTEN FINDINGS REGARDING AGGRAVATING FACTORS

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and

Eighth Amendment rights to meaningful appellate review. (*California v. Brown*, *supra*, 479 U.S. at p. 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (Cf. *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with

the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.)[58] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan, supra,* 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra;* Section D, *post*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (Cf. *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias* (2006) 39

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[58] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

Cal.4th 1, 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, *ante*.)

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (Cf. *Kansas v. Marsh, supra* [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

4. CALIFORNIA'S DEATH PENALTY STATUTE AS INTERPRETED BY THE CALIFORNIA SUPREME COURT FORBIDS INTER-CASE PROPORTIONALITY REVIEW, THEREBY GUARANTEEING ARBITRARY, DISCRIMINATORY, OR DISPROPORTIONATE IMPOSITIONS OF THE DEATH PENALTY

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris*, *supra*, 465 U.S. at p. 51 (emphasis added), the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review*."

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and

expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can *not be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See Section A of this Argument, *ante*.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (Cf., e.g., *People v. Marshall*

(1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

5. THE PROSECUTION MAY NOT RELY IN THE PENALTY PHASE ON UNADJUDICATED CRIMINAL ACTIVITY; FURTHER, EVEN IF IT WERE CONSTITUTIONALLY PERMISSIBLE FOR THE PROSECUTOR TO DO SO, SUCH ALLEGED CRIMINAL ACTIVITY COULD NOT CONSTITUTIONALLY SERVE AS A FACTOR IN AGGRAVATION UNLESS FOUND TO BE TRUE BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (Cf., e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [108 S.Ct. 1981, 100 L.Ed.2d 575]; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented extensive evidence that appellant committed an assault with a firearm on Uzel. (*Ante*, Statement of Facts, § D.1.) Moreover, a considerable portion of the prosecution's closing argument was devoted to arguing this alleged offense. (RT 30:4443-4444.)

The U.S. Supreme Court's recent decisions in *United States v. Booker*, *supra*, *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally

permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

6. THE USE OF RESTRICTIVE ADJECTIVES IN THE LIST OF POTENTIAL MITIGATING FACTORS IMPERMISSIBLY ACTED AS BARRIERS TO CONSIDERATION OF MITIGATION BY APPELLANT'S JURY

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio, supra*, 438 U.S. 586; RT 30:4463-4464, 4501 [jury instructions].)

7. THE FAILURE TO INSTRUCT THAT STATUTORY MITIGATING FACTORS WERE RELEVANT SOLELY AS POTENTIAL MITIGATORS PRECLUDED A FAIR, RELIABLE, AND EVENHANDED ADMINISTRATION OF THE CAPITAL SANCTION

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing

factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304; *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft*, *supra*, 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, "*no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors.*" (*People v. Arias, supra,*

13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.) [*People v. Morrison* (2004) 34 Cal.4th 698, 730 (emphasis added).]

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, 32 Cal.4th at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (Cf., e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)[59]

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) – and thereby violated appellant's Fourteenth

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[59] See also *People v. Cruz* (2008) 44 Cal.4th 636, 681-682 [noting appellant's claim that "a portion of one juror's notes, made part of the augmented clerk's transcript on appeal, reflects that the juror did 'aggravate [ ] his sentence upon the basis of what were, as a matter of state law, mitigating factors, and did so believing that the State – as represented by the trial court [through the giving of CALJIC No. 8.85] – had identified them as potentially aggravating factors supporting a sentence of death'"; no ruling on merits of claim because the notes "cannot serve to impeach the jury's verdict"].

Amendment right to due process. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].

The likelihood that the jury in appellant's case would have been misled as to the potential significance of the "whether or not" sentencing factors was heightened by the prosecutor's misleading and erroneous statements during penalty phase closing argument, which highlighted the absence in appellant's case of most of these factors. (RT 30:4431-4449.) It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances

because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings*, *supra*, 455 U.S. at p. 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

D. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS

As noted in the preceding arguments, the high court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (Cf., e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest

protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees apply with greater force, the scrutiny of the challenged classification is more strict, and any purported justification by the State of the discrepant treatment is even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[60] as in *Snow*,[61] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary

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[60] "As explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.*" (*Prieto*, *supra*, 30 Cal.4th at p. 275; emphasis added.)

[61] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 3; emphasis added.)

decision to impose one prison sentence rather than another. (Cf. also, *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge makes a sentencing choice in a non-capital case, the court's "reasons ... must be stated orally on the record." California Rules of Court, rule 4.42(e). The cited rule went into effect on Jan. 1, 2008, when a new discretionary DSL scheme replaced the one at issue in *Cunningham, supra*. The pre-2008 version of Rule 4.42(e), for example, also required the court to give "a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Further, this Court has conceded that, from 2004 (when *Blakely* was decided) until Jan. 1, 2008, when the DSL scheme was made discretionary), the Sixth Amendment -- pursuant to *Cunningham* – required that, in non-capital cases, findings of aggravating circumstances supporting imposition of the upper term be made beyond a reasonable doubt by a unanimous jury. (Cf. *In re Gomez* (2009) 45 Cal.4th 650.) Moreover, both *Blakely* and *Ring* applied *Apprendi* to

statutes in existence before *Apprendi* was decided (2000). At the very least, *Apprendi* is applicable to cases not yet final at the time it was decided.

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, *ante*.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Section C.3, *ante*.) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[62] (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (Cf., e.g., *Mills*

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[62] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at p. 609.)

v. Maryland, *supra*, 486 U.S. at p. 374; *Myers v. Ylst*, *supra*, 897 F.2d at p. 421; *Ring v. Arizona*, *supra*.)

E. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (Cf., e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, as of January 1, 2010, the only countries in the world that have not abolished the death penalty in law or fact are in Asia and Africa – with the exception of the United States. (Amnesty International, "Death Sentences and Executions, 2009 – "Appendix I: Abolitionist and Retentionist Countries as of 31 December 2009" (publ. March 1, 2010) (found at www.amnesty.org).

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot, supra*, 159 U.S. at p. 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra*, 536 U.S. at p. 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for

substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (Cf. *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[63] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399 [106 S.Ct. 2595, 91 L.Ed.2d 335]; *Atkins v. Virginia*, *supra*.)

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[63] See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

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XXI.

THE ERRORS IN THIS CASE IN BOTH THE GUILT AND PENALTY PHASES OF TRIAL, INDIVIDUALLY AND CUMULATIVELY, OR IN ANY COMBINATION THEREOF, REQUIRE REVERSAL OF THE DEATH JUDGMENT FOR A VIOLATION OF THE STATE AND FEDERAL CONSTITUTION (CAL. CONST., ART. I, §§ 7, 15 & 17; U.S. CONST., 5TH, 6TH, 8TH & 14TH AMENDS.)

The death judgment must be evaluated in light of the cumulative effect of the multiple errors occurring at both the guilt and penalty phases of his trial. (*Taylor v. Kentucky, supra,* 436 U.S. 478, 487, fn. 15; *People v. Hill, supra,* 17 Cal.4th 800, 844-845; *Phillips v. Woodford, supra,* 267 F.3d 966, 985, citing *Mak v. Blodgett, supra,* 970 F.2d 614, 622.)

"The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair." (*Parle v. Runnels, supra,* 505 F.3d at p. 927, citing *Chambers v. Mississippi, supra*, 410 U.S. at pp. 298, 302-303 [combined effect of individual errors "denied [Chambers] a trial in accord with traditional and fundamental standards of due process" and "deprived Chambers of a fair trial"]; see also *Montana v. Egelhoff, supra*, 518 U.S. at p. 53[stating that *Chambers* held that "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation"); *Taylor v. Kentucky, supra*, 436 U.S. at p. 487, fn.15 ["{T}he cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness . . . ."].)

The death judgment must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644.) This Court has recognized that evidence that may otherwise not have affected the guilt determination can have a prejudicial impact on the penalty trial. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432,466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584,605,609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

Here, there is a substantial record of serious errors that individually and cumulatively, or in any combination, violated appellant's due process rights under *Chambers v. Mississippi, supra*, 410 U.S. 284 and require reversal of the death judgment. The numerous and substantial errors identified above in the jury selection and guilt phases of the trial, as set forth in Arguments I through XIII, inclusive, including the cumulative effect of the errors in the guilt phase of trial (Argument XIV), which arguments are incorporated herein by reference, deprived appellant of a fair and reliable penalty determination. (Cf. *Woodson v. North Carolina, supra*, 428 U.S. at p. 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879 [103 S.Ct. 2733, 77 L.Ed.2d 235]; *Payne v. Tennessee, supra*, 501 U.S. at p.

825-830; Cal. Const., art. I, §§ 7, 15 & 17; U.S. Const. 5th, 6th, 8th & 14th Amends.)

The penalty phase jury instructions and the trial process – whereby closing arguments of counsel and jury instructions purportedly relating to codefendant Castro were given in appellant's absence and in the midst of penalty phase deliberations – prevented the jury from making an individualized sentencing determination guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, thereby requiring reversal of the death judgment. (*Ante*, § XVI.)

Appellant was excluded from trial during the penalty phase closing arguments purportedly relating to codefendant Castro, which included argument by the prosecutor and counsel for codefendant Castro implicating appellant, a critical stage of the criminal proceedings (Cal. Const., art. I, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.). (*Ante*, § XV.)

The testimony of prosecution penalty phase witnesses Javier Castillo and Linda Castillo that appellant should be sentenced to death violated state evidentiary rules and the state and federal constitutional rights to due process, effective assistance of counsel, and a reliable penalty determination (Cal. Const., art. I, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.), thereby requiring reversal of the death judgment. (*Ante*, § XVII.)

Admission of evidence in aggravation of a purported assault with a firearm on Jason Uzel requires reversal of the death judgment for a violation of appellant's state and federal constitutional rights to due process and a reliable penalty determination (Cal. Const., art. I, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.) because the evidence is woefully insufficient to sustain a finding that appellant perpetrated the assault. (*Ante*, § XVIII.)

The error in admitting evidence in aggravation of a purported assault with a firearm on Jason Uzel where, as here, the evidence was insufficient as a matter of law to sustain a finding that appellant perpetrated the assault, was compounded by the trial court's instruction that the prosecution bears no burden of proof at the penalty phase, and the failure to define reasonable doubt, which violated appellant's state and federal constitutional rights to jury trial, due process, and a reliable penalty determination (Cal. Const., art. I, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.), thereby requiring reversal of the death judgment. (*Ante*, § XIX.)

Thus, even if the Court were to hold that not one of the errors was prejudicial by itself, the cumulative effect of these errors sufficiently undermines confidence in the integrity of the penalty proceedings in this case. These numerous constitutional violations compounded one another, and created a pervasive pattern of unfairness that violated appellant's Fifth, Sixth, Eighth and

Fourteenth Amendment rights by resulting in a penalty trial that was fundamentally flawed and a death sentence that is unreliable.

As shown above, this was a close case on the issue of penalty as evidenced by, among other things, the mitigation evidence which showed that appellant suffered from chronic methamphetamine use, which contributed to the conduct at issue in this case because chronic methamphetamine can induce violence, paranoia, alienation, hallucinations, and delusions. (*Ante*, Statement of Facts, § E.1.)

Appellant also presented good character evidence, which included the testimony of several witnesses. (*Ante*, Statement of Facts, § E.2.) Their testimony supported of a life sentence because it showed that appellant's conduct was induced by chronic drug addiction and that appellant is a good and caring person with redeeming qualities. (*Ante*, Statement of Facts, § E.2.)

It simply cannot be said that the combined effect of the errors detailed above had "no effect" on at least one of the jurors who determined that appellant should die by execution. (Cf. *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341 [105 S.Ct. 2633, 86 L.Ed.2d 231].) Appellant's death sentence must be reversed due to the cumulative effect of the numerous errors in this case.

/ / /

CONCLUSION

For the reasons set forth above, appellant Richard Penunuri respectfully requests reversal of his convictions and the judgment of death.

Respectfully submitted,

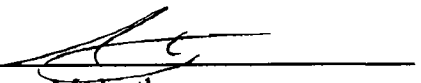
Dated: 11-21-11 By: 

Stephen M. Lathrop
Attorney for Defendant and Appellant
RICHARD PENUNURI

CERTIFICATE OF COMPLIANCE (CRC 8.630(b)(1)(A))

I hereby certify under penalty of perjury under the laws of the State of California that there are 101,912 words in this brief.

Respectfully submitted,

Dated: 11-21-11 By: 

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RICHARD PENUNURI

PROOF OF SERVICE

STATE OF CALIFORNIA]
]ss.
COUNTY OF LOS ANGELES]

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 904 Silver Spur Road #430, Rolling Hills Estates, CA 90274. On November 21, 2011, I served the following document(s) described as **APPELLANT'S OPENING BRIEF** on the interested party(ies) in this action by placing _ the original or X a true copy thereof enclosed, in (a) sealed envelope(s), addressed as follows:

Sarah Farhat Deputy Attorney General 300 South Spring St., Ste 1702 Los Angeles, CA 90013	Mike Lasher California Appellate Project 101 Second Street, Suite 600 San Francisco, CA 94105-3647
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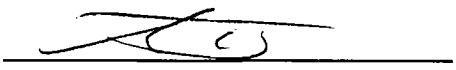
I am readily familiar with the firm's practice for collection and processing of correspondence and other materials for mailing with the United States Postal Service. On this date, I sealed the envelope(s) containing the above materials and placed the envelope(s) for collection and mailing on this date at the address above following our office's ordinary business practices. The envelope(s) will be deposited with the United States Postal Service on this date, in the ordinary course of business. I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this Proof of Service was executed on November 21, 2011, at Rolling Hills Estates, California.

Stephen M. Lathrop
Printed Name



Signature