*AUTOMATIC APPEAL*

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

| | |
|---|---|
| **PEOPLE OF THE STATE OF CALIFORNIA,**<br><br>**Plaintiff and Respondent,**<br><br>**v.**<br><br>**ARTURO JUAREZ SUAREZ,**<br><br>**Defendant and Appellant.** | **DEATH PENALTY CASE**<br><br>**NO. S105876**<br><br>**(Napa Co. Super. Ct. No. CR 103779)** |



**AUTOMATIC APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF NAPA**

**The Honorable W. Scott Snowden, Presiding**

# APPELLANT'S OPENING BRIEF

**LISA R. SHORT, SBN 88757**
**MICHAEL R. SNEDEKER, SBN 62842**
**Snedeker, Smith & Short**
**Attorneys at Law**
**PMB 422**
**4110 SE Hawthorne Blvd.**
**Portland, OR 97214-5246**
**Telephone: 503-234-3584**
**Facsimile: 503-232-5469**

**Attorneys for Appellant**
**ARTURO JUAREZ SUAREZ**

*AUTOMATIC APPEAL*

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

| | |
|---|---|
| **PEOPLE OF THE STATE OF CALIFORNIA,**<br><br>**Plaintiff and Respondent,**<br><br>**v.**<br><br>**ARTURO JUAREZ SUAREZ,**<br><br>**Defendant and Appellant.** | **DEATH PENALTY CASE**<br><br>**NO. S105876**<br><br>**(Napa Co. Super. Ct. No. CR 103779)** |

**AUTOMATIC APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF NAPA**

**The Honorable W. Scott Snowden, Presiding**

# APPELLANT'S OPENING BRIEF

**LISA R. SHORT, SBN 88757**
**MICHAEL R. SNEDEKER, SBN 62842**
**Snedeker, Smith & Short**
**Attorneys at Law**
**PMB 422**
**4110 SE Hawthorne Blvd.**
**Portland, OR 97214-5246**
**Telephone: 503-234-3584**
**Facsimile: 503-232-5469**

**Attorneys for Appellant**
**ARTURO JUAREZ SUAREZ**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**CONSTITUTIONS**

**California**

**United States**



**STATUTES**

**California**

**RULES**

**California**



**United States**



**MISCELLANEOUS**

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

| | |
|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ARTURO JUAREZ SUAREZ,<br><br>Defendant and Appellant. | **DEATH PENALTY CASE**<br><br>**NO. S105876**<br><br>(Napa Co. Super. Ct. No. CR 103779) |

# APPELLANT'S OPENING BRIEF

## STATEMENT OF THE CASE

On July 14, 1998, a felony complaint was filed in Placer County Municipal Court Case No. 62-003495, alleging numerous counts against appellant, Arturo Juarez Suarez,[1] based on events of July 12, 1998. (1 CT 9–13.)[2] Appellant was arraigned in municipal court on July 17, 1998, and appointed a public defender. (1 CT 17.) On August 3, 1998, appellant entered a plea of not guilty and denied additional allegations, and the

[1] During trial, the court elected to refer to appellant by the name Juarez, rather than Suarez. (See 19 RT 5600–5602.)

[2] The clerk's transcript in this case will be referred to as CT; the reporter's transcript as RT. Supplemental clerk's transcript volumes will be referred to as SCT. All citations to sections will be to the Penal Code unless otherwise specified.

prosecution declared its intent to seek the death penalty. (1 CT 41.) On January 20, 1999, the preliminary examination commenced. (1 CT 107; 1 RT 60.) On January 21, 1999, appellant was held to answer in superior court on all charges. (1 CT 111, 113; 2 RT 341.)

An information was filed in Placer County Superior Court on February 19, 1999, alleging the following counts and allegations, and special allegations with respect to events that occurred on July 12, 1998.

Count one – murder in violation of section 187, subdivision (a) [Arele[3] M.], with notice that said offense is a serious felony within the meaning of section 1192.7, subdivision (c); count two – murder in violation of section 187, subdivision (a) [Jack M.], with notice that said offense is a serious felony within the meaning of section 1192.7, subdivision (c); count three – murder in violation of section 187, subdivision (a) [Jose Luis Martinez], with notice that said offense is a serious felony within the meaning of section 1192.7, subdivision (c); count four – murder in violation of section 187, subdivision (a) [Juan Manuel Martinez], with notice that said offense is a serious felony within the meaning of section 1192.7, subdivision (c); count five – forcible rape in violation of section 261,

---

[3] The correct spelling of the name is Areli. (See 11 CT 2923; 19 RT 5583–5584.)

subdivision (a)(2) [Yolanda M.], with notice that said offense is a serious felony within the meaning of section 1192.7, subdivision (c); count six – anal or genital penetration by foreign object, force and violence, in violation of section 289, subdivision (a), with notice that said offense is a serious felony within the meaning of section 1192.7, subdivision (c); and count seven – kidnaping for rape in violation of section 209, subdivision (b)(1) [Yolanda M.], with notice that same is a serious felony within the meaning of section 1192.7, subdivision (c).

Additionally, as to counts one, two, and seven, the information alleged the personal use of a deadly and dangerous weapon within the meaning of section 12022, subdivision (b)(1), also causing those alleged offenses to be serious felonies within the meaning of section 1192.7, subdivision (c)(23); and as to counts three and four, the personal use of a firearm within the meaning of section 12022.53, subdivision (d), causing those offenses to become serious felonies pursuant to section 1192.7, subdivision (c)(8).

As to counts five and six, the information charged two allegations: use of a deadly weapon within the meaning of section 12022.3, subdivision (a), also causing those offenses to be serious felonies within the meaning of section 1192.7, subdivision (c)(23); infliction of great bodily injury upon

the victim [Yolanda M.] within the meaning of section 12022.8, causing those offenses to be serious felonies within the meaning of section 1192.7, subdivision (c)(8). Also as to counts five and six, the information charged four special allegations as to sex crimes – aggravated circumstances: kidnap [Yolanda M.] in violation of section 209, subdivision (b)(1) within the meaning of section 667.61, subdivision (e)(1); personal infliction of great bodily injury [Yolanda M.] in violation of section 12022.8, within the meaning of section 667.61, subdivision (e)(3); personal use of a dangerous or deadly weapon in violation of section 12022.3, within the meaning of section 667.61, subdivision (e)(4); and tying or binding [Yolanda M.] within the meaning of section 667.61, subdivision (e)(6). As to count seven, the information further alleged the personal infliction of great bodily injury [Yolanda M.] within the meaning of section 12022.7, subdivision (a), causing that offense to become a serious felony within the meaning of section 1192.7, subdivision (c)(8).

Finally, the information charged 11 special-circumstance allegations as follows: as to counts one through four, multiple murder within the meaning of section 190.2, subdivision (a)(3); as to counts one through four, lying in wait within the meaning of section 190.2, subdivision (a)(15); as to counts three and four, felony murder [robbery], within the meaning of

section 190.2, subdivision (a)(17)(a); and as to counts one and two, felony murder [facilitation of flight after commission of rape], within the meaning of section 190.2, subdivision (a)(17)(c), and felony murder [facilitation of flight after commission of rape by a foreign object], within the meaning of section 190.2, subdivision (a)(17)(k). (1 CT 115–122.)

Appellant was arraigned in superior court on February 23, 1999, pleaded not guilty to all counts and denied all enhancements and special allegations. (1 CT 126; 2 RT 348–349, 352.)

On April 13, 1999, appellant filed a motion to set aside the information under section 995 on April 13, 1999 (1 CT 168), and a non-statutory motion to set aside the information or in the alternative a motion to quash (1 CT 231). The court denied the motions on April 20, 1999. (2 CT 312–314.) Appellant filed a motion to suppress evidence under section 1538.5 on April 19, 1999 (2 CT 388); it was denied on October 27, 1999. (3 CT 655.)

On December 13, 1999, appellant filed an emergency application for a restraining order prohibiting the Placer County District Attorney from further accessing the identity of defense experts based on jail logs, and from contacting any defense expert. (3 CT 669–670.) On January 13, 2000, appellant filed a motion to estop the prosecution from seeking the death

penalty and/or to recuse the Placer County District Attorney's office, based upon the same issue. (3 CT 698.) On February 2, 2000, the court denied appellant's motions but ordered that no information regarding defense expert witnesses be provided to the prosecution. (3 CT 804–805.) A written order to this effect was filed on February 9, 2000. (3 CT 814–817.)

Appellant's motion to change venue was filed on January 21, 2000 (3 CT 717), and granted on March 21, 2000. The case was ordered transferred to Napa County with the proviso that motions regarding suppression of statements under international law, and proportionality of the application of the death penalty, would be heard in Placer County. (3 CT 867.)

On August 23, 2000, appellant filed a motion to suppress statements made to FBI officials after his apprehension, and to preclude the district attorney from seeking the death penalty, based on the government's violation of the Vienna Convention. (4 CT 911.) A demurrer was filed on September 18, 2000, by appellant regarding the allegation of violation of section 12022.53, subdivision (d) as it relates to counts three and four. (4 CT 1118.)

Appellant filed a motion to suppress pretrial statements on December 13, 2000, pursuant to *Miranda*.[4] (5 CT 1386.) Also on that date, appellant filed a renewed motion to estop the prosecution from seeking death and/or to recuse the Placer County District Attorney's office (5 CT 1409); that renewed motion was denied on December 22, 2000. (6 CT 1496.) Appellant's motions based on violation of the Vienna Convention were denied on January 17, 2001, as was his *Miranda* motion. (CT 1649.) On January 26, 2001, appellant filed a motion for discovery in pursuit of his *Murgia*[5] motion (6 CT 1665), which the court denied on January 31, 2001. (6 CT 1786.)

The case was transferred to Napa County Superior Court on February 2, 2001. (7 CT 1900.) The prosecution filed its motions in limine on February 1, 2001 (7 CT 1837), and the defense on February 5, 2001 (7 CT 1901). (See also 7 CT 1969, 1964; 8 CT 2105, 2235.) On February 13, 2001, the trial court denied appellant's motion for continuance. (7 CT 2040.) The court heard argument on the parties' motions in limine on February 14, and 20, 2001, and ruled on February 20, 2001. (7 CT 2077–2082; 8 CT 2102–2104.)

---

[4] *Miranda v. Arizona* (1966) 384 U.S. 436.

[5] *Murgia v. Municipal Court* (1975) 15 Cal.3d 286.

Jury trial commenced on February 21, 2001. (8 CT 2112.) On March 8, 2001, 12 jurors and 3 alternates were sworn. (8 CT 2150–2151.) Opening statements were made on March 12, 2001. (8 CT 2154–2155.) Testimony commenced that same date. (8 CT 2155.)

Appellant renewed his suppression motion and moved for mistrial because of prosecutorial misconduct on March 19, 2001. (8 CT 2192; see 8 CT 2259–2260, 2272, 2296.) The court denied the motion for mistrial on March 20, 2001, as well as the defense request for a special instruction to the jury in regard thereto. (8 CT 2001.)

The jury visited the crime scene on March 22, 2001. (8 CT 2213–2215.)

On April 3, 2001, appellant's renewed suppression motion was denied. (8 CT 2296.) Appellant requested another motion for mistrial on April 9, 2001, in regard to the transcript of the videotape of appellant's July 16, 1998, interrogation, which the court denied. (10 CT 2745; see 11 CT 2763.)

The prosecution rested its case on April 3, 2001. (8 CT 2296; 42 RT 9804.) The defense commenced its case at some point after 10:00 a.m. on the morning of April 9, 2001. Defense counsel briefly examined four

witnesses, and rested its case shortly after conclusion of the noon recess. (10 CT 2746–2747; 45 RT 9941, 9976, 9985.)

On April 10, 2001, the trial court granted appellant's motion for judgment of acquittal pursuant to section 1118.1, as to six special-circumstance allegations contained in the information, as follows: as to counts three and four – two special allegations that the murders were committed while appellant was engaged in the commission of robbery; as to counts one and two – two special allegations that the murders were committed to facilitate flight after the commission of rape and two special allegations that the murder was committed to facilitate flight after the commission of rape with a foreign object. (10 CT 2751; see 11 CT 2764; see also 1 CT 121–122; 46 RT 10129, 10133.) The prosecution did not oppose the granting of the motion as to the robbery-murder special circumstances alleged in counts three and four. (46 RT 10128–10129.)

The prosecution delivered closing argument on April 11, 2001. (11 CT 2764–2765.) On Thursday, April 12, 2001, the defense delivered closing argument, the prosecution gave rebuttal closing argument, and the court instructed the jury. The jury retired for deliberations that afternoon. (11 CT 2787–2788.) Deliberations recommenced the following Monday,

April 16 and continued all day Tuesday, April 17. (11 CT 2853–2855, 2905; see 48 RT 10489–10490, 10501–10502.)[6]

Late morning on Wednesday, April 18, the jury returned guilty verdicts as to counts one through four (first-degree murder), count five (forcible rape), count six (unlawful penetration by a foreign object), and count seven (kidnap to commit rape). (11 CT 2921, 2923, 2930, 2937, 2944, 2951, 2957, 2963; see 51 RT 10565.) It found true the allegations of personal use of a deadly and dangerous weapon as to counts one and two (11 CT 2924, 2931), personal use of a firearm as to counts three and four (11 CT 2938, 2945), and use of a deadly weapon, infliction of great bodily injury, kidnap, and tying and binding as to counts five and six. (11 CT 2952, 2958.) It also found true five special-circumstance allegations: lying in wait as to counts one through four, and multiple murder. (11 CT 2925, 2932, 2939, 2946, 2983.)

The court polled the jury and recorded the verdicts and findings as read. (11 CT 2921.)

---

[6] The jury foreperson made several requests during deliberations for testimony and involving exhibits, as follows: the size of Yolanda's shorts; Kim Marjama's testimony; Detective Stewart's testimony regarding the alleged rape along with her photo book; Kim Marjama's testimony as to the alleged rape; certain portions of the videotape of appellant's confession. (11 CT 2898–2901, 2917–2919.)

On April 23, 2001, appellant filed motions in limine and a motion for continuance of the penalty phase (11 CT 2985, 2987, 3005) which were opposed by the prosecution. (11 CT 3023, 3040.) Appellant withdrew the motion for continuance on May 3, 2001 (12 CT 3071) and the court ruled on motions in limine on May 14, 2001. (12 CT 3076.) The prosecutor filed a supplemental motion in limine on May 14, 2001 (12 CT 3078), upon which the court ruled on May 15, 2001. (12 CT 3111, 3113.)

Penalty phase proceedings began on May 15, 2001. The prosecution made its opening statement, the defense reserved opening statement, and the prosecution presented evidence. (12 CT 3112.) That same day the prosecution rested and the court denied appellant's motion for mistrial based on Yolanda Martinez's testimony. (12 CT 3114.) On May 16, 2001, the defense gave its opening statement and began presentation of evidence. (12 CT 3156.) The defense rested on June 14, 2001. The prosecution presented no rebuttal evidence. (13 CT 3480; 67 RT 12602.)

On June 18, 2001, the parties delivered opening and closing arguments to the jury. (13 CT 3518–3519; 69 RT 12741–12791, 12792–12801, 12804–12812, 12812–12831, 12835–12868.) That afternoon, the court instructed the jury (13 CT 3519; 69 RT 12869–12880), after which the jury retired to deliberate. (13 CT 3519; 69 RT 12883.)

Deliberations continued on June 19 and the morning of June 20, 2001. (13 CT 3549–3556.) Shortly after 10:30 a.m. on June 20, 2001, the jury delivered a verdict of death. (13 CT 3556, 3567; 71 RT 12944–12945.) The court polled each juror as to the verdict read, and each answered in the affirmative. (13 CT 3556–3557; 71 RT 12945–12946.) The court then thanked and excused the jury. (13 CT 3557; 71 RT 12955.)

On October 4, 2001, the court denied the automatic application for modification of the jury's verdict of death. (14 CT 3765–3768.) On November 1, 2001, the court pronounced the judgment of death. (14 CT 3770–3771.) The Commitment Judgment of Death was filed March 8, 2002. (15 CT 3992.) The abstract of judgment for the non-capital convictions was filed on March 15, 2001. (15 CT 4004.)

This appeal is automatic.

## STATEMENT OF FACTS

### A. Guilt Phase

At the time of the events herein, appellant, Arturo Juarez Suarez, was married to Isabel Martinez. They had two young daughters, Liliana and Jessica. (32 RT 8163, 8174; 64 RT 11903–11906.) Isabel had two brothers, Juan Manuel Martinez and Jose Luis Martinez. Isabel, Jose, Juan, and appellant were all from the same town in Mexico—Santa Gertrudis—in the state of Michoacan. (31 RT 8025–8030.) In addition to being his brothers-in-law, Jose and Juan Martinez were longtime friends of appellant. The Martinez brothers are the adult decedents in this case. (32 RT 8137–8138.)

Jose was married to Yolanda Martinez. They had a three-year-old girl, Areli, and a five-year-old boy, Jack, who are the child decedents herein. (32 RT 8137–8138.) Yolanda was the named subject of the sexual assault convictions in this case. At the time of the assaults, she had known appellant for seven years. (31 RT 8024, 8027–8030.)

#### 1. The Two Families

In 1993 or 1994, the two couples—appellant and Isabel, Jose and Yolanda—lived next to each other in an apartment building in Ione, California. The year before, the Martinezes were having financial difficulties and had turned to appellant and Isabel for help in finding a place

to live when Jose lost his job. Appellant helped them obtain the apartment next to his family. (31 RT 8033; 32 RT 8165.)

Yolanda testified that during that time in Ione,[7] appellant made her feel uncomfortable and very angry one time when he came into the apartment when she was cleaning, grabbed her by her waist and pulled her toward him. She told him to let her go and he said he was not going to do anything to her. When appellant let her go, Yolanda slapped him on the face. He told her not to hit him and she told him to leave. She was three or four months pregnant with her first child at the time of this incident. (31 RT 8033–8034.)

On cross-examination, she testified that appellant had approached her from behind and taken her hand. She denied that she was standing on something and that appellant grabbed her and attempted to help her up. She testified that she was very bothered and gave him a correction, a slap. When he grabbed her around her waist, she turned around and he took her by the wrists; she told him to let go and he did. (32 RT 8195–8196.)

Yolanda testified that there was another time in Ione when appellant made her feel uncomfortable by touching her ribs when she was washing

---

[7] There is some discrepancy whether the time period in question is 1992, or 1993–1994 (see 32 RT 8168), but it is tied to the period when both couples lived next door to each other in Ione. (31 RT 8033.)

the dishes. She told him to leave her alone; he told her that she was just nervous, because she had jumped. He then put his hand at the hair line on the back of her neck, and she told him to leave her alone. (31 RT 8034–8035.) Yolanda told her husband, Jose, about this incident. He was upset and it caused problems between them; the problems soon resolved. (31 RT 8036.)

On cross-examination, Yolanda clarified that the latter event took place in Isabel and appellant's kitchen when Yolanda was washing dishes. The three of them were in the kitchen and Isabel was near. Appellant poked Yolanda in the ribs and put his hand on the right side of her neck. She never talked to Isabel about it. Jose was upset with her because the incident caused him to feel jealous. (32 RT 8169–8171.)

Appellant knew the Martinez children and played with them when he would visit. (31 RT 8039–8040.) They were not afraid of him. One time, Yolanda's son went somewhere with appellant and after that time did not want to go with appellant again, though he was always friendly and pleasant to appellant when he came to the house. (31 RT 8040.) Yolanda explained on cross-examination that this situation arose out of a time when appellant and her son went to the store and appellant reprimanded him because he was concerned that he ran into the street. Appellant told her that her son had

run into the street and that appellant had spanked him. Yolanda did not think it was right that the person who was supposed to have the responsibility for the boy—appellant—would let her son run into the street. She brought it up with her son but did not check him over. She did not feel very confident leaving him with appellant after that. (32 RT 8177–8178.)

The Martinezes eventually moved from Ione to Galt, where they lived together with Jose's brother, Juan. Appellant and his family moved some seven or eight months later to Auburn, where appellant went to work at the Parnell Ranch[8] in the early spring of 1995. (31 RT 8036–8037; 32 RT 8175; 33 RT 8376, 8413–8415.) In the fall of 1995, Isabel, Liliana, and Jessica returned to Mexico. (32 RT 8174–8176.) Appellant went with them, and then returned the following spring to the Parnell Ranch. (32 RT 8176.)

After the move from Ione, the Martinezes and appellant maintained their relationship. (31 RT 8036.) They spent time together on holidays and weekends or on appellant's day off. Sometimes the Martinezes would pick up appellant in Auburn and take him to Galt;[9] if appellant had a car, he

---

[8] The Parnell Ranch was located in Auburn at 9990 Mt. Vernon Road. (33 RT 8365–8366.) It was a 160-acre cattle ranch. (33 RT 8366.) Clydesdales and draft horses were also raised on the property. (33 RT 8407.)

[9] The Martinezes were familiar with the area of the Parnell Ranch where appellant resided and with the general location of the fields and ponds, buildings and residences on the property. (31 RT 8041–8042.) When

would visit them in Galt. (31 RT 8037–8038.) Juan Martinez was with them sometimes. (31 RT 8041.)

### 2. The Parnell Ranch

Appellant was a seasonal farm worker on the Parnell Ranch; he was primarily an irrigator but he also fed the horses. (33 RT 8376–8377.) The water on the ranch was turned on April 15 and turned off October 15. (33 RT 8376.) Appellant would arrive sometime before April 15 and stay until sometime in late October. (33 RT 8377; cf. 35 RT 8808–8809.) He worked six days a week, approximately seven hours per day depending on how long it took to get the job done. (33 RT 8378.) He had one day off of his choosing. (33 RT 8377.)

Appellant lived in a single-wide aluminum-colored travel trailer in a clump of oak trees in back of several barns and tack and equipment buildings. The trailer was located near where hogs were kept, just behind the horse and cattle barns and right next to a horse run. The hogs were kept on the edge of the "big barn" which housed horses and hay; show cattle were kept in the "stall" or "show" barn. (29 RT 7677–7679; 30 RT 7780;

---

they went to the Parnell Ranch to pick up appellant, the Martinezes would sometimes have to wait for him until he was through working. They would almost always stay outside his trailer while they were waiting. (31 RT 8042.)

31 RT 8054–8055; 33 RT 8354, 8368, 8374, 8413; 35 RT 8738–8740, 8762.)

Appellant's pay was capped at $1,100 per month. (33 RT 8378.) The Parnells provided him a trailer with paid utilities, and would give him meat from the cattle on the ranch when he needed it. (33 RT 8420.)

Jack R. Parnell,[10] who with his extended family owned and lived on the Parnell Ranch (33 RT 8366; see 35 RT 8732–8735), testified that appellant was always a good worker and knew his job. He was the kind of person who did not have to be looked after or have things shown to him. Parnell "kind of" supervised appellant to make sure he was doing his work, but it was mainly just a working relationship. (33 RT 8379.)

On cross-examination, Jack Parnell elaborated. Appellant had been recommended to Parnell by a friend. (33 RT 8413–8414.) Appellant primarily dealt with sprinklers but occasionally did other odd jobs. (33 RT 8416.) Parnell testified that appellant was always a great worker. Parnell was able to tell appellant once what to do and he would go out and do it; he was always impressed with appellant in that regard. He was the kind of

---

[10] Jack R. Parnell's father and stepmother were Jack and Susan Parnell. (33 RT 8372.) His grandparents were George and Dorothy Parnell. (33 RT 8367.) They all lived on the ranch in various structures. (33 RT 8365–8367.)

person who, when asked to do or shown how to do something one time, seldom ever needed to be asked twice or shown again. He was very intelligent and responsible, could always be counted on to take care of jobs, and was good at the work he was assigned. He also adapted to the work that he was asked to do very well and right away. He did his job and never complained; he was not a complainer or a whiner in any way. He always did things at a good, very steady pace. (33 RT 8416–8418.) Appellant was always even-tempered. He was always right there doing his job. (33 RT 8423.)

Parnell testified further on cross-examination that he and appellant were friendly to each other and appellant was friendly to the other Parnell family members on the ranch. At the end of the day, appellant would retire to his trailer. Parnell never took him into town so he could socialize, although when appellant needed to go to the grocery store, the Parnells would give him a ride. (33 RT 8418–8419.) During the years after 1995 when his family was not with him, appellant was by himself. When Parnell asked him about his family, appellant would always say they were fine. (33 RT 8415–8416.) Occasionally, the Parnells would leave appellant on the ranch by himself to tend to the horses and take care of everything while they were gone. He always did a good job on these occasions, and there

were no problems. Appellant was respectful toward Parnell and respectful toward the property he handled. (33 RT 8419.)

Still on cross-examination, Parnell testified that during the six or seven months that appellant's family lived on the ranch in 1995, Parnell would occasionally chat with them even though Isabel spoke little to no English. The children were friendly; they were a normal functioning family who dressed appropriately and seemed happy. (33 RT 8414–8415.) Parnell knew that appellant was in the process of getting his citizenship "firmed up." (33 RT 8420.)

Parnell testified on direct examination that sometime prior to July 12, 1998, he was a little startled when he saw appellant with a .22 caliber rifle coming from an area that had been built as a target range on the ranch. (33 RT 8403–8404.) However, he acknowledged on cross-examination that it was not uncommon for shooting to occur in that barn area even though he would have preferred if appellant had asked permission to shoot. He was not disturbed by it and confirmed that there was a pigeon problem in the barn and it was not unusual to use a .22 to try to clean up that area. (33 RT 8422.)

Jacob Parnell was Jack Parnell's son. (33 RT 8394.)[11] He was working and living on the ranch on July 12, 1998. (35 RT 8732–8733.) Jake testified on cross-examination that he had known appellant since his first year working on the ranch and had worked with him on chores. (35 RT 8801–8802.) His relationship with appellant was good. Jake testified that appellant was friendly, that he was always even-tempered and mellow, that he never seemed to be upset; he was level-headed and steady and seemed in good spirits. He never got overly excited about his job; he just got his work done. (35 RT 8802–8803.)

### 3. Events in June and Early July 1998

Yolanda testified that in 1998, she and Jose had asked appellant if he would help them in signing papers to buy a house of their own. Yolanda never heard an argument over this matter. (31 RT 8039, 8046.) She testified on cross-examination that she and the family had gone up to the Parnell Ranch on Father's Day in 1998[12] with a 12-pack of beer to ask appellant if he would do them a favor and act as guarantor for their loan so they could purchase a house. Appellant agreed and they were all to get together a few

---

[11] It can be inferred from the record that Jack R. Parnell was known as Randy Parnell. (See 35 RT 8733 [Jacob Parnell's parents were Randy and Julie Parnell]; 33 RT 8394 [Jacob Parnell, or Jake, was Jack R. Parnell's son]; 33 RT 8395 [Jack R. Parnell's wife was Julie].)

[12] Father's Day in 1998 was Sunday, June 21.

weeks later because there were papers that had to be put together so that appellant could act as surety for the purchase. (32 RT 8179–8180.)[13] They were going to get together the weekend of the July 4. (32 RT 8181; see also 32 RT 8180.)[14]

Yolanda testified that on July 4, 1998, her family, Juan Martinez, and a friend named Eduardo went to San Francisco. (31 RT 8044.) The family had left for San Francisco without calling appellant. (31 RT 8048.)[15] When they returned, everyone but Juan went to the park across from the apartment because they had bought some firecrackers for the children. (31 RT 8044.) When they got back home, appellant and a friend, Ernesto,[16] were at the apartment. (31 RT 8044–8045.) Appellant seemed somewhat upset when the Martinezes told him that they were not able to make calls to appellant's

---

[13] Appellant had also previously provided Jose and Yolanda with telephone service after they moved to Galt which they and Juan Martinez used to call relatives and friends in Mexico. (31 RT 8047.) The telephone was in appellant's name, as were telephone company cards that Yolanda and Jose used. (31 RT 8047.)

[14] Yolanda testified on cross-examination that she was aware that appellant was trying to get to the Mexican Consulate to sign documents in an effort to get American citizenship, but that he was not able to get in. She was unsure whether the date that this occurred was a couple of days after Father's Day. (32 RT 8196–8197.)

[15] Yolanda testified on cross-examination that appellant was not part of their plans for that day. (32 RT 8181.)

[16] Her reference is to Ernesto Orozco. (See 40 RT 9503–9504.)

home from their phone; he said that was not true, that he could receive the calls. (31 RT 8048.)

Appellant stayed at the family's apartment that night. (31 RT 8045–8046.) Yolanda testified that she did not observe any argument between appellant and any member of her family that night or the following day. (31 RT 8046.) The Martinezes had plans to pick up appellant at the Parnell Ranch on July 12, 1998, and take him to Galt in connection with his need to contact the Immigration and Naturalization Service. (31 RT 8048–8049.) Appellant was to stay with the family that night, take Jose to work the next day, use the car to keep his appointment, and then they would take him home on July 13. (31 RT 8049–8050.)

Ernesto Orozco had known appellant since they lived in Santa Gertrudis, and became friends with him in the United States in 1993. (40 RT 9503–9504.) He considered himself, in July 1998, a good friend of appellant. (40 RT 9507.) Ernesto was also friends with Jose and Juan Martinez. (40 RT 9505.) On July 4, 1998, Ernesto picked up appellant at the ranch in Auburn to go to Galt.

Before leaving, they talked and drank a beer. Appellant seemed happy; they had not seen each other since January. They talked about animals at the ranch, Ernesto's work and other things. (40 RT 9506–9507.)

When he arrived at the ranch, Ernesto commented to appellant, in effect, how nice the place appeared to be. Appellant commented in return, "You're way off. One can go crazy here by oneself." (40 RT 9530; see 9521–9530; cf. 9508.)

Ernesto and appellant arrived in Galt, and drank beer and talked in the car; the Martinez family, including Juan Martinez, arrived around 7:00 p.m. and the two men went to their house where they drank beer and watched television and talked. (40 RT 9510–9511.) Ernesto and appellant stayed the night at the Martinez home. The next morning, July 5, they ate breakfast and the four men and Yolanda played cards. Ernesto did not observe any difficulties or problems between any of them at any time during the stay. (40 RT 9512–9515.) Ernesto and appellant left around 7:00 p.m. and Ernesto drove him back to Auburn. (40 RT 9515–9516.)

Prior to leaving the Martinez house, Ernesto heard appellant talking to Jose Martinez about their arrangements to see each other the following weekend. (40 RT 9516.) According to Ernesto, appellant did not say anything to him on the way back to Auburn about being threatened by either Jose or Juan or express any animosity or anger toward them; appellant did not tell Ernesto that he was afraid of either of them or that he was having problems with them. (40 RT 9532–9533.)

On cross-examination, Ernesto testified that appellant did tell him that if Ernesto was not working the following Sunday, to drop on by—that he would find them there. (40 RT 9533.)

On or about July 5, 1998, around 8:00 p.m., appellant telephoned Josefina Torres Yanez who lived with her husband and children in Wilmington. (39 RT 9203–9205, 9230–9231.)[17] Josefina had known appellant 15 or 16 years—from when they were growing up in Mexico. She grew up in Zacapu, about 20 minutes by bus from Santa Gertrudis. (39 RT 9204.) She considered herself appellant's friend. (39 RT 9204–9205.)

Josefina testified on cross-examination that when she knew appellant in Mexico, he was a good person, a calm person. (39 RT 9228–9229.) When he was working in the United States, they would converse by phone up to three times a month. (39 RT 9230.) Appellant had told Josefina about problems he was having with his wife, Isabel, and with her family. Appellant said that if he were having trouble with his wife, she would then tell her brothers and they would threaten him. (39 RT 9231–9232.)

Josefina testified on direct examination that her telephone conversation with appellant on or about July 5 was lengthy—at least an

---

[17] Wilmington is a little south and west of Long Beach. (39 RT 9291.)

hour and a half. (39 RT 9219, 9222.) Appellant told Josefina that he was having problems with his brothers-in-law; he did not indicate what sorts of problems. (39 RT 9220–9221.) He expressed unhappiness. He told her he wanted to commit suicide because he had a lot of problems. He did not describe the problems. However, he expressed his belief that he was going to be killed. He said that "if he were to stay here, his in-laws would kill him. And if he went to Mexico, his in-laws would kill him." (39 RT 9221.)

He did not tell her why he thought his brothers-in-law wanted to kill him. (39 RT 9222–9223.) She did not ask him why he thought this because, based on her knowledge and familiarity with him as a person, she knew he was not going to explain. (39 RT 9221–9222.) Josefina told him to think about his parents and his family because they would be the ones who would suffer. (39 RT 9222.) During this telephone conversation appellant did not express any intention of wanting to harm his brothers-in-law. He did not complain that his brothers-in-law were accusing him of seeing other women. (39 RT 9224.)

Josefina did not tell her husband that appellant was intending to commit suicide because the two men had not had many dealings with each other and she didn't think it was necessary. (39 RT 9224–9225.) However,

the day after that phone conversation with appellant, Josefina contacted his sister, Beatriz Calderon. (39 RT 9225–9226, 9250.)

On cross-examination, Josefina testified that during the July 5, 1998, telephone conversation, appellant voiced concern about the problems he was having with his wife and the other Martinez family members. He sounded sad and told Josefina that he was tired of all those problems and planned to commit suicide. Josefina had never before heard him talk like that. During that telephone conversation, as well as since he had been married, he appeared to be a different person than the one she had known. (39 RT 9232.) Appellant expressed to her that killing himself was the only way out of the situation he felt himself in that night. (39 RT 9232–9233.) She was really concerned for him and when she called his sister Beatriz, Josefina told her how worried she was about appellant and asked her to call her brother. (39 RT 9233.)

Josefina further testified on cross-examination that the week following that long conversation with appellant, she noticed a change in appellant's personality: he spoke in a very loud tone of voice (he never used to raise his voice—he was calm); when she asked him something he would answer in a very sharp way as if he didn't want to talk with her. He had never before talked to her like that. (39 RT 9236–9238.)

### 4. July 12, 1998

Jack Parnell testified that appellant was planning on working on Sunday, July 12, and taking off on Monday. The norm was for appellant to take off Sundays. (33 RT 8388.) On July 12, either late morning or early afternoon, Parnell was up in the area of the big barn when he saw appellant walking down the hill. Parnell called appellant's name just to get his attention. Parnell testified that appellant was abrupt; this seemed out of character to Parnell, but he went ahead and asked appellant to do a weed-eating job he had intended to ask him to do. (33 RT 8382–8383.)

The Martinez family along with Juan Martinez drove to Auburn to the Parnell Ranch on Sunday, July 12, 1998, in their 1986 Nissan Maxima, arriving at 4:00 or 4:30. (31 RT 8050–8051.)[18] To get to appellant's trailer, they had to go on a little path that went by the horse barn. (31 RT 8055.) When they arrived at the trailer, they waited for appellant. Eventually Jose walked away to look for him. Yolanda asked her brother-in-law Juan where Jose was going and Juan told her that Jose was going for some soap. (31 RT 8063–8064.)

---

[18] The children were both wearing red t-shirts and beige shorts. (31 RT 8052.)

Yolanda then got soap for washing the car out of appellant's trailer because she and Jose were going to wash the car. The trailer door was open. (31 RT 8063–8064.)[19] When she went back to the car with the soap, she saw Jose and appellant heading back toward the car. That was the first time she saw appellant that day. She did not see where Juan was at this time. (31 RT 8064–8065.)

Before they washed the car, appellant provided Jose with a knife to scrape their car's battery, and then left. Jose opened the hood and with the knife appellant had given him scraped the battery for about 30 to 45 minutes. (31 RT 8065–8066.) Appellant was gone for a good portion of that time. Then the car was started and moved a bit. Yolanda did not see her brother-in-law Juan alive again.[20] (31 RT 8066.)

Appellant returned to where Yolanda and Jose were working on the car and asked Jose to accompany him. (31 RT 8066–8067.) Yolanda did not notice anything different about appellant. The children remained with Yolanda and she finished washing the car by herself. Afterward, she went toward the trailer and was tending to the children. She saw Jose at some

---

[19] On cross-examination, she testified that she felt comfortable going into appellant's house without getting his permission. (32 RT 8182.)

[20] It is unclear whether Juan was present for the scraping of the battery, or whether the last time Yolanda saw him was when he told her Jose had gone to get soap. (See 31 RT 8063–8066.)

distance in one of the fields; he was standing, very pensive, holding onto his chin. (31 RT 8067–8068.) Appellant was with him. (31 RT 8076.)

Appellant returned to the trailer and asked Yolanda for the car keys. He told her he was going to go to the store. She saw a rifle standing in the area. He went inside the trailer and came out wearing a different pair of pants. She gave him the car keys and he asked if she wanted something from the store; she asked for chips and a drink.[21] (31 RT 8070–8072.) Not long thereafter, she and the children took a walk down the road toward the entrance to the ranch for about an hour or hour and a half. (31 RT 8069–8070, 8072–8073.) During the walk and when she returned to the trailer, she was whistling for Jose; he did not come in response to her whistling. (31 RT 8074.)

At 5:00 p.m., Jack Parnell got a very quick glimpse of appellant when they were each driving toward each other and crested a hill on the ranch driveway. Appellant was in the Martinezes' car and Parnell was in a pickup truck. At the crest of the hill, Parnell had to swerve at the last minute to miss appellant. Appellant swerved as well but did not slow down. He was going much faster, according to Parnell, than he normally would drive. (33 RT 8389–8391.)

---

[21] Yolanda drank one beer that day. (32 RT 8184.)

Yolanda testified that appellant returned from the store with the snacks she had requested as well as a 12-pack of beer. He went inside the trailer to get some aluminum foil, left it on a table and asked Yolanda to cut and prepare some pieces of it for deer meat. (31 RT 8075–8078, 8080.) She asked appellant where Jose and Juan were and he told her that they were almost finished cleaning the deer and taking it apart and would be coming soon. (31 RT 8080.) Appellant left right away going to where there was supposedly a deer. (31 RT 8075.)[22]

Yolanda cut the foil and then sat down on a chair outside in the yard area; the children, who had been playing Nintendo that appellant had turned on for them inside the trailer, came outside, too. (31 RT 8080–8081.)

Appellant then arrived with a rope that he put around Yolanda's neck. (31 RT 8082, 8084.) She put both hands at her neck; the rope was

---

[22] Sometime between 7:15 and 7:30 p.m., Jake Parnell was talking on the telephone in the show (stall) barn and saw appellant driving the tractor. The tractor was pulling a little trailer which had two-foot-high plywood rails around each side with an open end. Jake could not see anything in the back of the trailer. (35 RT 8746.) If something had been placed beneath the height of the edges, he would not have been able to see it based on the angle from which he was viewing. (35 RT 8809–8810.) Appellant was coming up on a road and over the top of a steep hill where it disappeared from view. (35 RT 8745–8747.) Jake had never noticed appellant operating the tractor. (35 RT 8750.) Jake testified that a tractor could be driven off-road on the ranch: in the pasture, through gates, and across the culvert bridges that span drainage ditches, up to the fence line. (35 RT 8752–8758.)

choking her. (31 RT 8085.) Appellant was beating and kicking her, and pulling and dragging her with the rope. (31 RT 8086; 32 RT 8116.) She was hit and kicked all over her body but more so on the face. (32 RT 8116.) The children were crying. Her son was yelling not to hit his mother, and her daughter was hugging him. (31 RT 8086–8087.) Appellant shouted at her son to shut up. (32 RT 8115.) Yolanda then lost consciousness. (31 RT 8087, 8088.) She was lapsing in and out of consciousness throughout the assault. (32 RT 8118.)

When she regained consciousness, she was on her back, face up, inside the trailer; her wrists were tied behind her back, her feet were tied with orange rope, and there was something like a chain around her neck. (31 RT 8087–8089; 32 RT 8114, 8117.) Appellant lowered his pants zipper. 31 RT 8088.) He then cut her shorts and her underwear, exposing her private parts. (31 RT 8090.) Her testimony was that appellant then put his penis in her vagina and put his fingers in back, in her anus. (31 RT 8090–8091; 32 RT 8113–8114.) He said, "Since you didn't want to willingly, now you're gonna get fucked up." (31 RT 8091.) While this was happening she was screaming for her husband. (32 RT 8114–8115.)

On cross-examination she confirmed that during the incident she was fading in and out of consciousness. (32 RT 8186–8187.) She acknowledged

that she had difficulty accurately remembering exactly what happened and in what sequence. (32 RT 8188.) She acknowledged that she told Detective Diana Stewart on July 14, 1998, that she could not see appellant. She just saw when he pulled down his pants and when he put his fingers in her, but the rest she did not see. (32 RT 8190–8193.) When asked whether she saw his penis and felt it inside of her, Yolanda stated that she half remembered and half didn't remember; that the only thing she remembered is that he squatted down and put the two fingers in. She stated that she felt like he put his penis in her but she was "seeing very blurry." She testified that she couldn't manage to see.[23]

Appellant got up and left, leaving Yolanda on the bed with the binding around her neck tied to something. She was lapsing in and out of consciousness and did not know how long he was gone. When appellant returned, he told her not to move too much or she would strangle herself.

---

[23] Defense counsel called Detective Stewart during presentation of its case. She testified that during the July 14 interview, Yolanda stated that she was not sure she had seen appellant's penis and was uncertain that she suffered penile penetration during the assault because she was in and out of consciousness. On cross-examination by the prosecutor, Detective Stewart testified that Yolanda stated that she observed appellant unzip and drop his pants, expose his penis, and drop down on top of her; and that although Yolanda said that she did not know for sure if appellant actually inserted his penis, she also said several times during the interview that she believed he did. (45 RT 9947–9948.)

He placed a bandana handkerchief on her mouth and attached it to her head with gray (duct) tape. He turned the radio on loud and left. It had not yet gotten dark outside. Then she lost consciousness again. (32 RT 8116–8120, 8122, 8190.)

She did not know how long she remained there in that condition; at some point she was able to escape by struggling with her hands and feet and untying herself. (32 RT 8120–8121.) She took a knife from the trailer to defend herself and left running. (32 RT 8121–8122.) She did not turn off the radio. It was dark outside. She ran down a road to the house of some elderly people who lived on the ranch; who let her in. (32 RT 8123.)

The first officer on the scene was Placer County Sheriff's Deputy Kurt Walker. (30 RT 7752–7753.) Yolanda appeared badly beaten. (30 RT 7754.) Yolanda said that "Arturo was bad" and asked for help about her children. (32 RT 8124.) Deputy Diane Stewart arrived, and was later joined by dispatcher Virginia Ferral, who translated for Yolanda; Yolanda was then taken to the hospital. (32 RT 8134–8135.)

### 5. The Investigation

#### a. July 12–13, 1998

At approximately 9:15 p.m. on July 12, 1998, a public safety dispatcher with the Placer County Sheriff's Department received a call from

Dorothy Parnell of 9980 Mt. Vernon Road in Auburn, California, reporting that there was a female at her door who was screaming and hysterical. (29 RT 7633–7634, 7637, 7638, 7643, 7647, 7671–7673.) A bilingual senior dispatcher (Virginia Ferral) took over the call and the female, later identified as Yolanda Martinez (29 RT 7687), spoke with her. (29 RT 7649–7650.) Yolanda said that her children were missing; that she had been tied, chained to a bed, beaten, and raped; that her clothes had been cut by "Arturo"; and that her husband was somewhere outside. (19 RT 7650; see RT 7658, 7659, 7686–7687.)

Units were dispatched to the Parnell Ranch. (29 RT 7640, 7643, 7746, 7656, 7673–7674.) Placer County Detective William Summers arrived at the Parnell Ranch about 10:40 p.m. and was told that two children, several adults, and the perpetrator were missing (29 RT 7670), and that Yolanda had been able to cut her bonds with a knife. (29 RT 7683.) Detectives testified that Yolanda was hysterical. Her face and neck were beaten and bloodied and her face was swollen, she had duct tape in her hair and the remains of binding on her right ankle, and she had marks around her arms, and rope marks around her neck, ankles and wrists. (29 RT 7686–7687; 35 RT 8769–8770.) She did not have any pants on. (30 RT 7837.)

By the time Detective Summers arrived at the scene, officers were searching buildings on the ranch. (29 RT 7682.) Detective Summers and Placer County Deputy Sheriff Owens searched a trailer that appellant occupied, located in a clump of trees near two barns, and seized several items. (19 RT 7679, 7691, 7710–7714.) The trailer had been searched previously by other deputies including Officer Walker, who had seized two rifles—a .22 caliber from under the bed, and a .30-06 from on top of the bed. (30 RT 7784, 7780–7785, 7808–7810.) The .22 was loaded and there was ammunition with or attached to the .30-06. (30 RT 7810–7811.)[24] Gold chains belonging to each of the Martinez brothers were found, as were their wallets, which contained one-, five-, and twenty-dollar bills. (32 RT 8128, 8129.)

Officer Walker had been informed that Yolanda's husband and family had been called to the property to help dress out a deer. Around 10:30 p.m., he and other officers headed for an area containing blackberry bushes where he had reason to think there might be deer. (30 RT

[24] Detective Summers subsequently test fired both firearms and he test fired the .22 twice. He testified that the firearms were operable and the .30-06 was considerably louder than the .22. The .22 would hold approximately 15 rounds; upon firing, its shell casing could eject at a range anywhere from approximately four to seven feet. (34 RT 8560–8564.)

7788–7791.) They did not see any obvious opening in the blackberry area nor did they see anybody there. (30 RT 7793.)

Yolanda was examined at the hospital in the early morning hours of July 13, 2001, by nurse practitioner Kim Marjama. (30 RT 7918; 31 RT 7972.) She had swelling, redness, bruises, abrasions,[25] and lacerations on her face, ears, neck, arms, wrists, legs, ankles and torso. (31 RT 7968–7983.) Her genital area had scratches, swelling, redness, bruises, and a divot of four millimeters on her right inner labia. (31 RT 7984–7986, 8008.) There was a fiber or hair inside the opening of the vagina. (31 RT 7987–7989.)[26] Her pelvic injuries were consistent with blunt force trauma, which in turn was consistent with penile and digital penetration. (31 RT 7998.) The divot was a classic indication of digital penetration. (31 RT 7999–8000.)

Vaginal findings were normal; there was no evidence of sperm, live or dead. (31 RT 7990–7992.) No pubic hair combing was taken because the

---

[25] An abrasion is an interruption in the intact surface of the skin, like a scratch. (31 RT 8008.) It is a scraping of the skin with removal of the superficial layers. (35 RT 8658.)

[26] Ms. Marjama testified that she collected the fiber but could not be sure if it had been retained. (31 RT 7988–7989.) It was subsequently determined that this hair was examined at the Department of Justice and found to be an animal hair. (See 40 RT 9353–9354; 9548–9549.) The parties stipulated to the jury that the hair was neither the hair of Yolanda Martinez nor of appellant, nor was it a pubic hair. (41 RT 9564–9565.)

examining nurse overlooked it. (31 RT 7996, 8010.) Yolanda did not receive stitches; she did not have broken bones. (31 RT 8008.)[27]

After it became light the morning of July 13, Yolanda went with the authorities back out to the Parnell Ranch, where she showed authorities where she had last seen her husband. (32 RT 8136–8137.) She saw a piece of broken wood in the yard area in front of the trailer that had not been there the previous day. (32 RT 8137.) Later that day, she learned that Jose, Juan, and her children were deceased. (32 RT 8137.)

On or about 9:45 a.m. on July 13, 1998, a sheriff's deputy found a piece of duct tape with dark hair attached to it in the middle of the field or pasture area about 75 to 100 yards south of the main roadway. (33 RT 8341–8342, 8346.)[28] As a result of this find, a search and rescue dog was utilized. (33 RT 8341, 8345–8347.) There was a set of faint tire tracks leading north from the location of the duct tape toward a barbed wire fence line next to some berry bushes. (33 RT 8347.) Led by the search dog,

---

[27] Yolanda testified that for the next several days, she had physical pain in her hands, wrists, jaw, and other parts of her body; numbness in her hands and wrists; and pain and blood in her ear. (32 RT 8138–8140.)

[28] According to criminalist Ricci Cooksey, the strands of hair on the duct tape were up to eight and a half inches long; many of them were broken without the root, and were hair fragments. They could have come from the head of Areli Martinez and were similar to her hair. They were different from the hair of Yolanda Martinez and from appellant. (41 RT 9554–9559.) The duct tape also contained red cotton fibers. (41 RT 9563.)

sheriff's officers walked about 200 feet along the fence line, opened up a hole in the fence and followed a game trail into the berry thicket. (33 RT 8352–8353.)

There, in a large cluster of blackberry bushes some eight to ten feet high and twenty feet deep, a deputy saw a hollowed out opening about three feet in diameter that had sticks, brush and pieces of dead wood placed in front of it. (33 RT 8354–8355, 8357.) The path leading to the hollowed-out area or opening was worn down to the ground, and the opening was obscured from view of any houses or buildings in the general area. (33 RT 8361, 8363.) At the base of the opening, to the left in the berry bushes, lay a square-nosed or flat-spade type shovel head with blood spatter on the topside front or concave portion of it and the handle broken off. (34 RT 8469–8472; 35 RT 8687; 41 RT 9610–9613.)[29] To the left but a little deeper into the berry bushes lay a full-length, round-nosed shovel with the full handle attached and dirt on the blade. (33 RT 8359; 34 RT 8473–8474; 35 RT 8687–8688.) The round-head shovel handle did not have evidence of blood on it. (41 RT 9630–9631.) There were no blood trails or smears, nor any amounts of blood leading up to the location. (41 RT 9610.)

---

[29] The square-head shovel had red-brown stains on its front and back sides that looked visually consistent with blood that subsequently tested positive for the presence of blood. (41 RT 9613–9619.)

Through the hollowed-out opening in the thicket was a depression within which was what appeared to be a rectangular area with freshly moved dirt on top of it. (33 RT 8357–8358.) There were two decaying logs approximately two feet in diameter and eight feet long, on top of the depression with the disturbed dirt; there were mounds of dirt in the area. (34 RT 8465–8467, 8482–8483.) The vertical height inside the hollowed out area was approximately four feet. (34 RT 8482.)[30]

Four bodies were excavated from this site—two small children and two adult men. The first body uncovered was a male child lying face down. The second was a female child lying face up. (34 RT 8487–8489.) The third was an adult male lying face up. (34 RT 8497–8499.) The fourth was another adult male also lying face up. (34 RT 8500–8501.) The bodies were on top of each other. (34 RT 8504–8505.) The right hand of the young female was clutching a stick, her mouth was open and there was a moist area around the nostrils. (34 RT 8493–8495.) There was red cloth on her arm. (34 RT 8493.)

The grave site was one foot nine inches wide at the northeasterly direction, and one foot eleven inches wide at the southwesterly direction.

---

[30] The site was roughly one quarter mile from appellant's trailer. (33 RT 8355–8356.)

(34 RT 8510.) The length on the north side was five feet six inches; the length on the south side was five feet ten inches. (34 RT 8511.) The depth was three feet two inches on the northeasterly side and two feet eleven inches on the southwesterly side. (34 RT 8510.) The inside walls were cut at 90-degree angles, the cut was smooth and diagonal, and the shape was rectangular. (34 RT 8511–8512.) There was a series of root systems protruding through the side of the grave and there was a blood stain on its floor. (34 RT 8512–8513.)

The dirt in the grave was soft dirt and it was loose; it had recently been disturbed. The dirt at the bottom of the grave was very hard, packed with dirt, and almost as hard as concrete. (41 RT 9560.) One expended .22 cartridge was found at the excavation level of the third and fourth bodies. (34 RT 8509, 8565–8566; 35 RT 8680–8681, 8703.)[31]

---

[31] The pasture area, the area up and across the fencing, and the area into the blackberry bushes was searched for shell casings on July 16 and 17, 1998. No shell casings were found (33 RT 8310–8311.) On those dates the area approaching the entrance to the grave site and the grave site itself were searched and no shell casings were found. (33 RT 8311; see 37 RT 8986–8987.)

### b. The Autopsies

On July 14, 1998, Dr. Donald Henrikson, a forensic pathologist, performed autopsies on the four sets of remains from the grave site. (34 RT 8571–8573.)

The first autopsy was performed on Jack Martinez. (34 RT 8577.) Dr. Henrikson testified that there was moisture in the area of the nose and mouth, and the mouth was completely full of dirt. (34 RT 8575–8576.) There were a number of vegetation fragments including stickers that were adhered to his socks and the shoelaces of the tennis shoes he was wearing. (34 RT 8576.)

As to the external examination, Dr. Henrikson testified that there were indications of blunt force trauma to the entire head including abrasions.[32] (34 RT 8575–8578.) There were marks that appeared to be residue of adhesive tape present over the lower left cheek and mouth area and on both arms and both legs. (34 RT 8579–8580, 8584–8587.) A band line injury across the upper back about seven inches long was found as well as a bruise to the left shoulder, more consistent with a blow by a tubular

---

[32] Dr. Henrikson defined blunt force trauma as a type of injury that occurs as a result of blows from instruments, falls from heights, and motor vehicle accidents. It consists of abrasions, lacerations, bleeding, and fractures. (34 RT 8565.)

instrument like a shovel handle than a shovel head, and scratch-like abrasions and a bruise to the right wrist. (34 RT 8582–8584, 8587.)

Internally, multiple bruises[33] were noted within the soft tissues overlying the front of both shoulders and the left lower anterior chest, and within the soft tissue that separates the skull from the overlying scalp. (34 RT 8588–8591; 35 RT 8675.) The back of the head and the base of the skull showed depressed skull fractures due to impact injury and two linear fractures radiating downward to and at the base of the skull. (34 RT 8591, 8596–8597.) This injury would have been more consistent with a blow from a shovel head. Dr. Henrikson testified that it takes a significant amount of force to produce such skull fractures; they are typically only seen in car accidents, assaults with a blunt instrument or falls from height. (34 RT 8597.)

The horizontal injury to the upper back, shoulder blade area, was consistent with a tubular type of instrument like the handled shovel found at the scene. That injury would have been more consistent with being made with the handle versus the shovel head. (35 RT 8651–8653.) Dr. Henrikson testified that there was nothing about the blunt force injuries to the head that

---

[33] A bruise is a collection of blood within soft tissues; it is the same thing as a hematoma or a contusion, and results from the application of blunt force. (34 RT 8588, 8589, 8606, 8607.)

would enable him to say for certain what type of instrument inflicted them. (34 RT 8599; see 35 RT 8652–8653.) However, the injury to the back of the head involving a large bruise with two scrapes right next to each other would make it more consistent with having been produced by the back of a shovel blade. (35 RT 8653, 8656–8657.)

Regardless of the particular instrument used to produce blunt force to the head and shoulder areas, there were at least eight discrete areas where injuries were inflicted involving the head, and at least one producing the pattern injury involving the area of the back, shoulder area, and base of the neck. (34 RT 8600.) The injuries to the head were not sufficient in and of themselves to cause death. (34 RT 8603.)

The cause of death was asphyxiation due to obstruction of the airway due to aspiration of soil. (34 RT 8601–8602.) Blunt force trauma almost certainly resulted in unconsciousness and contributed to death but was not the cause of death. (34 RT 8602.) The injuries to the brain would not have caused immediate death but it was very probable that they would have caused death without therapeutic intervention. (35 RT 8675.) Death due to asphyxiation would have occurred in a few minutes. (34 RT 8604.)

The next autopsy performed was on Areli Martinez. (34 RT 8604, 8606.) Dr. Henrikson observed vegetation fragments including stickers on

her clothing, particularly on her socks, and a brown-gray twig clutched in her right hand. (34 RT 8605.) Dr. Henrikson noted that Areli had fine black hair up to 10 inches long. (34 RT 8604.)

Dr. Henrikson testified that the external examination showed a number of abrasions and bruises involving the head—including three hairline fractures—trunk, arms, and legs that were less pronounced, less severe and somewhat less extensive than in the case of Jack Martinez, but in many of the same areas. (34 RT 8576–8577, 8605–8607.) There was adhesive tape residue to the front and over the chin and on the left wrist and lower leg. (34 RT 8607–8608, 8610–8611.) Bruising over the back of the neck extending down the back could have been the result of lividity. (34 RT 8608–8609.) There were scratch-like abrasions on the left forearm. (34 RT 8610.)

The cause of death was asphyxiation due to obstruction of the airway due to aspiration of soil. (34 RT 8617.) Cranial and cerebral blunt force trauma likely resulted in unconsciousness and were a significant condition, but were not severe enough to cause immediate death. (34 RT 8617; 35 RT 8673–8675.) Death due to asphyxiation would have occurred in a few minutes. (34 RT 8618.)

The next autopsy was performed on Jose Martinez. (34 RT 8618, 8619.) The most significant injuries were two gunshot wounds involving the head; in addition there was evidence of blunt force trauma in the form of abrasions and bruises that involved the head, trunk, right leg, and both arms. (34 RT 8618.) Several streak-like abrasions and bruises suggested that the body may have been dragged on its back, although they could have been produced in another manner such as a fall. (34 RT 8619; 35 RT 8660.) One gunshot wound was to the back of the head to the left of the midline, and one was in front of the left ear; both were contact wounds[34]—the muzzle or barrel was approximately within an inch of the skin when it discharged. (34 RT 8619–8623.) There were no exit wounds. (34 RT 8623.) Two small-caliber, fragmented projectiles were recovered. (34 RT 8623–8624, 8628.)

The cause of death was two penetrating gunshot wounds of the head. Death would have occurred within a matter of minutes. (34 RT 8625.)

The fourth autopsy was performed on Juan Martinez. (34 RT 8628, 8631.) There were three gunshot wounds to the head and minor blunt force trauma including scratches and bruises to the trunk and both arms. (34 RT

---

[34] A contact wound involves situations where the muzzle is firmly touching the skin as well as where the muzzle is less than an inch away from the surface of the skin, known as a near contact wound. (34 RT 8621.)

8628.) It is difficult to tell what could have inflicted them; they might have been drag marks or might have been from a fall. (35 RT 8660.) The three gunshot wounds involved, respectively, the upper right forehead, the left side of the nose, and the back of the head on the right side; all three were contact wounds. (34 RT 8628, 8630.) There were no exit wounds and the projectiles were intact. (34 RT 8630–8631.) The cause of death was three penetrating gunshot wounds of the head. Death would have occurred within a matter of minutes. (34 RT 8632.)

### 6. Appellant's Flight and His Statements to Pablo Juarez, Josefina Torres Yanez, and Jorge Lucho

On the morning of Monday, July 13, 1998, appellant went to a Long's drug store in Auburn, purchased a cowboy hat and some other items, and used a pay phone outside the store to make calls to various individuals. (35 RT 8811–8818; 38 RT 9085–9086.)

At about 1:30 p.m., appellant's cousin, Pablo Juarez, who lived in Stockton, received a telephone call from appellant, who asked him to pick him up at the Greyhound bus station in Sacramento. (38 RT 9084–9088.) Pablo and his wife did so. (38 RT 9089.) Pablo asked appellant what had happened. At first, appellant did not tell him anything; he just said, "Let's

go." (38 RT 9090.) Sometime later on the drive,[35] appellant said he had been in a fight and had killed Jose and Juan[36] and the children. (38 RT 9091.) Appellant told him that they had gone to the lake to kill ducks; that he had killed Juan with a rifle; that he then went with Jose to buy beer; that after they returned to the ranch, Jose asked to go where Juan was; that he had gone with Jose and after he told Jose that he had killed Juan, he shot and killed Jose. Appellant did not tell Pablo why he had killed them. He told Pablo that after he killed them he put them in a hole and covered them. (38 RT 9092–9093, 9095.)

Appellant also told Pablo that he killed the children. In speaking about the children, appellant said that at one time they wanted to see their father and uncle. Pablo could not remember appellant's comment regarding why he killed the children. (38 RT 9094.) Appellant also told Pablo that he had beaten Yolanda, but did not tell him why. (38 RT 9095.) At one point Pablo asked him for details of how this had happened or why he did it but

---

[35] Pablo testified on cross-examination that some of the conversation about these events took place at Pablo's house over the course of about 20 minutes. (38 RT 9111.) The majority of it occurred in the car but some did take place at the house. (38 RT 9095.)

[36] In his testimony Pablo refers to Juan Manuel Martinez as "Manuel." (38 RT 9091.) For purposes of clarity, the name "Juan" is used instead in this narrative.

appellant did not say anything about why he had done it, or anything like that. (38 RT 9109.)

On cross-examination Pablo testified that appellant, Jose, and Juan got along well together both in Mexico and in the United States. (38 RT 9099–9102.) Pablo had never known appellant to be violent. (38 RT 9106.) Pablo denied telling police officers that appellant told him that he did not rape Yolanda. (38 RT 9111.) He testified that during the discussion in the car, appellant appeared nervous or frightened. (38 RT 9104, see 9113.) In discussing the events at Pablo's house, appellant appeared sad and remorseful. On redirect examination, Pablo said that appellant was pensive, or appeared to be in thought. (38 RT 9112–9113.)

Appellant stayed at Pablo's house for three or four hours and made some phone calls during that time; he left at about 6:30 or 7:00 that evening with three men in a car. (38 RT 9097.)

Around 5:00 a.m. on Tuesday, July 14, appellant arrived at Josefina Torres Yanez's apartment, at 606 Bayview, Apartment 13, in Wilmington where she lived with Jorge Lucho and their two children. Appellant had called Josefina the day before and asked to come to her house because he was having problems at his work. She told appellant that he could come to her house. (39 RT 9212.) He also asked her to call his sister, Beatriz

Calderon, to ask her to call him. (39 RT 9209–9210, 9212.) Josefina called Beatriz two or three times that day, asking if she had called appellant. (39 RT 9211.)

Appellant stayed with Josefina and her family from Tuesday morning until he was arrested on the evening of Wednesday, July 15, 1998. He slept many hours over those days. (32 RT 9216–9219.) His mood and demeanor were pensive, as if he were absent—like he was there but his mind was somewhere else. (39 RT 9219.) Josefina testified on direct examination that she did not hear or overhear appellant say anything to anyone regarding the circumstances that brought him to her house. (39 RT 9218–9219.) He just told her that he had had problems at his work. (39 RT 9217.) Appellant did not discuss with her where he intended to go after leaving her home; he did not say anything about intending to go to Mexico. (39 RT 9217.)

However, on cross-examination Josefina testified that appellant did tell her some things when he showed up at her house on July 14, 1998, and that he appeared sad, anguished, nervous, and very remorseful; he complained of headaches and sleeplessness. (39 RT 9240–9241, 9248.) He waited until her husband[37] left for work before he actually told her what had

---

[37] Jorge Lucho testified that he and Josefina were not married but had lived together for almost 10 years and had two children. (39 RT 9271.)

happened. He said that he had killed his brothers-in-law in self-defense; that he wished he had not had to kill them but that he had to because they were going to kill him. (39 RT 9240–9241.) Appellant told her that he had screwed up. (39 RT 9243–9244.) He said that he did not know why he had killed the two children. They were crying; it was his nerves and desperation. (39 RT 9244.) Josefina acknowledged that she had told a defense investigator that appellant appeared very anguished and was holding back tears. He told her that he didn't understand what happened because he and the little boy were so close. He admitted to Josefina that he hit Yolanda but was "a hundred percent" that he didn't rape her. (39 RT 9245.) Appellant told her that he was nervous when he killed the children. For some eight years before this time, he had been complaining of headaches, nervousness and sleeplessness. (39 RT 9247–9248.)

On redirect examination, Josefina testified that earlier on direct examination she had denied that appellant had made statements to her, because she didn't want problems and that she had told "the other side." The prosecutor then elicited her testimony as to what appellant told her, as follows: he shot the Martinez brothers in self-defense because they were going to shoot him; he killed two children by hitting them with a stick or a shovel because their crying made him nervous—he was already in a

"nervous state"; the children were crying because he was hitting their mother. (39 RT 9251–9256.) Appellant also told Josefina that he had dragged Yolanda by the neck. She did not tell her husband (Jorge Lucho) any of the things appellant told her because he would worry that appellant might do something to them; Josefina was not worried. (39 RT 9257–9258; 9248.)

Jorge Lucho testified that at some time into appellant's stay at Josefina and Jorge's apartment, appellant told him that a very bad incident had occurred at work with two co-workers. Appellant said an argument he had with one of them came to blows; one of them had a shotgun and in defending himself against these two people who were trying to kill him, appellant shot at them and thought he killed them. (39 RT 9275–9276.) He did not tell Jorge what he did after he shot the two men. (39 RT 9276.) Jorge told him that appellant should turn himself in; appellant was quiet about this. (39 RT 9276–9277.)

Appellant seemed to Jorge to be very worried and regretful. (39 RT 9277, 9287.) Jorge did not know appellant very much but in the dealings they had had with each other, appellant was a very courteous, kind and respectful person; nothing had ever happened that was inappropriate. (39 RT 9281.)

### 7. Appellant's Arrest and Statements in Custody

Several telephone numbers were obtained from the pay phone appellant used outside Long's drug store in Auburn. These numbers led to appellant's arrest appellant on Wednesday, July 15, 1998, around 7:30 p.m., at Josefina and Jorge's apartment in Wilmington.[38] (35 RT 8840–8841; 37 RT 8901, 8917–8918, 8867–8978, 8981–8983, 8991, 9002–9004, 9030, 9034.) Appellant was handcuffed and arrested and transported to the Long Beach Police Department by FBI Special Agent Stevens and Detective Robbins. (39 RT 9303, 9306.)

En route, appellant asked Agent Stevens, who spoke fluent Spanish, how they had found him; she told him it was through a phone call. (39 RT 9291, 9310.) Appellant also asked what he was being charged with or why he was being arrested and she told him it was for four murders and the rape of a female. Appellant said that he did not rape the female, or something to that effect. He also mentioned that he would have been leaving the apartment to go to Mexico the following day. (39 RT 9311.) Agent Stevens

---

[38] The FBI in the Sacramento and Los Angeles divisions assisted Placer County investigators in tracing and tracking the different telephone numbers and locating appellant. (37 RT 8976, 8996–8997, 9001, 9005, 9008.) Various agencies were involved in the arrest, including the Los Angeles Police Department, the Long Beach Police Department, the FBI, and a team out of the Wilmington area. (39 RT 9293.)

testified that appellant did not appear to her to be nervous or shocked or even surprised, and his demeanor did not change after they arrived at the police station. (39 RT 9312–9313.)

Agent Stevens testified that sometime after their arrival, she, FBI Special Agent Ferguson and Detective Robbins began to interview appellant after "Mirandizing" him. (39 RT 9313–9314.) Agent Stevens's main role was to act as interpreter. (39 RT 3914.) They did not record the interview in any way. (40 RT 9345–9346.) Appellant was cooperative during the interview, which lasted a little over an hour. (40 RT 9344, 9347.)

They told appellant that they had information about four murders and the rape of a female. (39 RT 3915.) Appellant stated that he did not rape the woman, but that the murders were true. (39 RT 9315–9316.) He said that his brothers-in-law, one of their wives and their two children, had come to his place because arrangements had been made for them to take him to renew some immigration documents. (39 RT 9316.) He had been married for eight years to the men's sister, Maria Isabel Martinez Garcia. (39 RT 9317.) He had worked at the ranch since 1994 or 1995. (39 RT 9318.)

Appellant stated that the family, with whom he spent a lot of his free time and with whom he got along very well, arrived at the ranch at about 6:00 p.m. in a Nissan. (39 RT 9319.) The two brothers-in-law wanted to

speak to him and they walked about 500 feet away from the trailer, and were in a heated discussion. (39 RT 9319.) Appellant was carrying a .22 caliber Remington rifle; he said it was a common thing in that area to carry a rifle. (39 RT 9319–9320.) One of the brothers, Juan, asked him for the rifle and then laid it on the ground. Appellant said that the heated discussion concerned their sister, appellant's wife. They accused him of "going out on" their sister, of womanizing. (39 RT 9320.) He denied it; they continued to accuse him. He asked them how they knew such a thing and they told him that they just knew. (39 RT 9321.) He told the interviewers that he had not done anything or conducted himself in any way that would give anybody the impression that he was womanizing. He was not seeing other women; he did not even go to bars or go out. (39 RT 3921.)

Agent Stevens testified that at this point in the interview, appellant stated he could not remember what happened next. (39 RT 9321–9322.) He remembered that he had beaten the woman but had not raped her. He did not know why he had beaten her; maybe it was because he was nervous. (39 RT 3922.) He described a nervous condition that he had suffered for years ("I had nerves, I had the nerves"), involving inability to sleep and bumps on the back of his neck. Years before he had tried a pill to help but it did nothing. (39 RT 9323–9324.) He stated that he had shot his brothers-in-

law with the rifle and dragged the bodies one at a time to a hole about 100 feet away from where he had killed them.

He said he went back to the trailer, beat the woman, and walked with the children back to the hole. The little girl got tired while they were walking and so he let go of the little boy's hand and picked her up and carried her. Then, he put her down, picked up a piece of wood or a wooden handle of a shovel that was on the ground and hit the boy in the head with it. (39 RT 3925.) The girl did not say anything. He then hit the girl on the head once with the same piece of wood. (39 RT 3926.) He placed their bodies in the same hole where he had placed the other men, and used his hands to put dirt on them; there was not much dirt available. (39 RT 9326.) Then he walked back to the trailer, did not see the woman, saw the police and lights and cars, and ran up a hill in the field. (39 RT 9327.) The time was approximately 8:45 p.m. (39 RT 9328.)

On July 16, 1998, Detectives Bennett and McDonald of the Placer County Sheriff's Department flew appellant back to Placer County and interviewed him. (42 RT 9763–9765.) That interview was interpreted by Frank Valdes and was videotaped. (42 RT 9765.) The videotape was played for the jury. (42 RT 9776.) Appellant stated in this interview that he had dug the hole on Monday or Tuesday prior to July 12, 1998, and that he had

duct-taped the children. (42 RT 9791–9792; see People's Exhs. No. 281 [videotape]; No. 281A [transcript of videotape].)

## B. Penalty Phase

### 1. Prosecution Case

The prosecution called only Yolanda Martinez in the penalty phase. She testified about the impact on her of the crimes and the loss of her family. (56 RT 10984–10999, 11011–11012.) Juan Manuel Martinez was 27 years old at the time he was killed. He had lived with her family for five years and loved the children a great deal. Yolanda loved him like a brother. (56 RT 10985–10987.)

Her husband, Jose Luis Martinez, was 37 years old when he died. They were married in 1991. He wanted to own his own business and buy a house. He sent money to his family in Mexico. (56 RT 10988–10989.)

When she was told that her family was dead, she could not accept what she was being told; she thought it was a lie. It was like a nightmare. She felt her life had no meaning. She felt desperation; she would not accept it. She testified that she could not express the feelings of the emotional impact upon her. (56 RT 10993.) She returned to Galt afterward and many people supported her and helped her move ahead. She felt alone and hopeless. She had to look for work and learn how to drive which was very

hard. Before, she had stayed with the children and was dedicated to them and her husband. (56 RT 10994.)

Areli was three years old when she was killed, and Jack was five years old when he was killed. (56 RT 10995.) They were very affectionate, and were affectionate toward each other. They used to really protect each other. Jack liked to go to school and play outside. Areli stayed with Yolanda when Jack went to school. Areli liked to go the park and play with toys. The children loved each other very much. (56 RT 10996–10997.)

Around 2:00 or 3:00 p.m. on July 12, 1998, before going to the Parnell Ranch, Yolanda made a videotape of the children. The clothes the children were wearing on that tape were the same clothes they were wearing when they went to the ranch. (This videotape was played for the jury as People's Exh. No. 302.) (56 RT 10997–10998.)

Yolanda testified that she felt a lot of pain for not having been able to do anything for her children. She wished she could turn time back and give her life for them. The thing that terrified her most in remembering the day when she was being beaten was having been unable to do anything for them; they were desperate at seeing their mother being beaten and her inability to do anything for them. (56 RT 10999.) What she missed the most was their presence, and everything. (56 RT 10011.)

## 2. Defense Case

Santa Gertrudis (appellant's hometown) is three miles away from the town of Zacapu in Michoacan, Mexico, and right next to the town of La Escondida. (57 RT 11062, 11074; 58 RT 11331.)

Guili Baldo Rodriguez Juante lived and worked as a teacher in the county where Santa Gertrudis is located, and knew appellant. He had seen appellant's father drunk in the street once. He considered himself a friend of appellant and respects and loves him. He testified on cross-examination that he observed no fault on the part of appellant's family and considered them to be respectful. (58 RT 11320–11331.)

Martin Orozco Rodriguez was mayor of Zacapu from 1990 to 1992. He was also appellant's teacher in secondary technical school in La Escondida for three years from 1979 to 1981 and testified about appellant's fine grades. Appellant excelled in sports and carpentry. He did not go to preparatory school because he wanted to leave and provide for his family. Martin remembered that appellant had a family problem and described alcohol and poverty as a common problem in the area. Appellant's father was an aggressive drunk. His drunkenness was different from that of the other fathers in the community. Martin was testifying because he loves appellant very much, and the community does, too, and he wanted to work

out some kind of forgiveness for his friend. (58 RT 11332–11341; 59 RT 11342–11374, 11388–11389.)

On cross-examination, Martin described appellant's mother as a very clean and hard-working woman, a saint. By the time appellant was a young man, he was better cared for. Appellant expressed an interest in going to preparatory school but was unable to do so because of the size of his family, as was typical of people in Santa Gertrudis. Appellant is not the sort of person who would fight. (59 RT 11380–11386, 11389–11392.)

Antonio Ruiz Magana had known appellant for about 15 years. He described appellant as a good person. He had loaned Antonio's family money because they were poor. On cross-examination, Antonio stated that when appellant would have too much to drink he wasn't a bad guy; Antonio would sometimes take him home after he had been drinking too much. When he saw appellant on December 15, 1998, appellant seemed fine. (58 RT 11311–11319.)

Maria Suarez Aguilar is appellant's mother. She testified that she had nine children, excluding Abundio, who died; five children were living in the house when appellant was born. (57 RT 11083–11085.) Her husband, Tomas Juarez Gonzalez, would hit her but not so as to make her bruise or bleed. Appellant would defend her from Tomas. Maria was taken to Mexico

City by one of her sons because of her husband's drinking. She was often unable to keep her children. There were no toilet facilities for her children; they had to go outside, somewhere, to go to the bathroom. They would sometimes go without food; when she provided food it was usually beans and tortillas. (57 RT 11086–11089, 11131.)

One time, when Arturo was young and still in the house, she was beaten and her clothes were torn off by her husband. (57 RT 11090–11091.) Although she believed in divorce, she would not divorce her husband because of the children. (57 RT 11127.)

Appellant was six years old (57 RT 11130; cf. 11090) when he started school, and about nine or ten years old when he started to work. (57 RT 11090.) He would give his mother the money he earned to help buy food. As a child, he had never seen a doctor or a dentist; he was born at home in Santa Gertrudis. When he moved to the United States, he would send back money to his mother and come and visit her. (57 RT 11091–11094, 11128.) Appellant would cry when he saw his mother being hit by his father. (57 RT 11095.) She, too, would cry but would not ask him to stop or say anything. Her husband would curse at appellant, but she testified that the words he would say were too embarrassing to repeat in court. Maria testified that she loved her son. (57 RT 11098.)

The prosecution elicited the following additional testimony on cross-examination: Maria was still married to her husband and had been for about 55 years; the physical abuse began immediately after she married her husband; after appellant moved to the United States, his relationship with his father was fine and there were no problems; the people in Santa Gertrudis are generally poor and generally do not have toilets; during the incident described where her husband tore her clothes, it was her blouse that was torn; appellant continued with school after he started working; when appellant moved to the United States, she lost touch with him; her husband started drinking five years after they were married and had stopped drinking for the last ten years; a midwife assisted in appellant's delivery. (57 RT 11099–11109.)

Appellant's brother, Benjamin Juarez Suarez, testified. He was the oldest child in his family. He described a life of hardship, beatings of his mother by his father, his and his brothers' efforts to stop the beatings, and his father's drinking. (57 RT 11133–11147.) He testified that he loved his brother.

On cross-examination, he expanded on the details of the hardships of his and his family's lives, including a time when his mother and the children moved to Mexico City. He considered his father to be a good father

and when he was in his "right mind" the family did not lack and he provided them with a sense of moral direction. (57 RT 11161–11184.)

Another brother, Isaias Juarez Suarez, testified as to additional family circumstances during appellant's youth. When appellant was a little boy, their father would hit their mother; he would shove, hit, and kick his mother, tear her clothes, and verbally abuse her. When appellant would witness his mother being hit, he would get frightened and sad. After appellant moved to the United States, he would send money to his mother all the time, between $100 and $200 at a time. He also sent money to his wife, and he gave financial assistance to Isaias's son, Benito, and paid for Benito's funeral. (57 RT 11186–11192; 58 RT 11208–11219.) He and appellant used to go hunting rabbits and squirrels for eating. (58 RT 11227; cf. 11226.)

Isaias testified on cross-examination that appellant was a friendly boy. Now everyone in the family gets along well; his father no longer drinks. Arturo returned to Santa Gertrudis from the United States for four months at a time and helped out. When he and the other children saw their father tearing their mother's clothing, they would just feel sad about it; there wasn't anything they could do. (58 RT 11219–11226.)

Another of appellant's brothers, Silviano Juarez Suarez, testified on both direct and cross-examination about his father's drinking and violence. He stated that his father would only hit the children when they had done something wrong; he was more mad when he was not drinking—when he was drinking, he was "happy." Sometimes the children would try to hide their father's liquor from him. His father could hit Silviano for any reason and would become mad if he was asked for money. He would hit Silviano with an open hand but never with a closed fist. Silviano would sometimes try to stop his father from attacking his mother. In Santa Gertrudis, the family all lived in one room. One of his uncles had a lot of money and would sometimes give the family beans for work they would do for him. Silviano left the home when Arturo was still a child. He loves his brother. (58 RT 11232–11258.)

Leonarda Morales is Silviano's wife and appellant's sister-in-law. She, too, testified on both direct and cross-examination about appellant's father's violence and drinking, including a time he threw a glass at appellant's sister, Celia. He would not give his wife anything to eat. Leonarda saw him shout at and push her, although she never saw him strike her. (58 RT 11264–11278.)

Appellant's sister-in-law, Susanna Juarez, Benjamin's wife, testified under examination by both parties as to her father-in-law's violence: he was more abusive than the other fathers in the neighborhood. He would hit and yell randomly just because he felt like it. He liked to drink, was vulgar, and mistreated his wife the most. He attacked Abundio (the oldest brother) with a knife. The other children would get scared of their father. Appellant was affectionate with children. He would always bring back presents from the United States. (58 RT 11279–11307.)

Appellant's sister, Beatriz Calderon, was the youngest of the children. She testified that her father would shout foul words at everyone in the family. He was drunk all the time and would yell vulgarities at appellant all the time as well. She also related that appellant cried a lot when his oldest brother, Abundio, died.[39] Appellant loved Beatriz's daughter a lot. When appellant returned from Mexico in April 1998, he did not appear to be the normal person that Beatriz had known. He seemed sad and moody. Beatriz asked her husband if he knew what was wrong with appellant, but he did not. Beatriz had never seen appellant act the way he did; his behavior was something completely different. After she received the phone call from

---

[39] Abundio died in April 1979, from a swimming pool injury. (59 RT 11419; 60 RT 11516.)

Josefina Torres, she tried to call appellant but he wouldn't answer the phone. (59 RT 11405–11416.)

On cross-examination Beatriz stated that her father would not hit or kick the family. There weren't times when there was no food in the house because her brothers would send money to the parents; appellant had enough to eat. (59 RT 11417–11418.)

Beatriz's husband, Jose Juan Calderon Adame, was a friend of appellant and his brother-in-law. His overall testimony was that when he saw appellant in 1998, he appeared to be sadder and moodier than usual. Jose had never seen appellant behave in such a way; however, he described the difference as small and stated that he did not want to get involved. Jose found out that appellant had called him during July 1998, while Jose was working. Appellant did not call back. (59 RT 11468–11478.)

Celia Juarez is appellant's sister and is eight years older. She testified that there was no food in the house and sometimes the children would go hungry. Their maternal grandmother would sometimes give the family a little pile of tortillas or they would go get food from an uncle or a neighbor. When their father would drink, he would fight mainly with their mother; when he was not drinking, he would fight with the children. Celia described an incident where her father threw a glass at a window after

arguing with her sister, and it struck Celia. Her father did not help remove the glass that was in her back. Appellant was treated the same as everyone else; her father was not particularly abusive toward him. It seemed to Celia that appellant loved his daughters a lot. Celia made a plea for mercy for her brother to the jury before she ended her testimony. (59 RT 11435–11467.)

Daniel Juarez Suarez was another of appellant's brothers. There was a time when appellant was seven years old that he was working carrying wood; the children would also clean the neighbor's pig pens in exchange for fruit. His father drank most of the time and would scream and threaten his mother; he saw one occasion where his father hit her and she was bleeding. His father would hit Daniel with a rope or a stick, and there were several times when Daniel rescued appellant from being abused by their father. It was common to return to Mexico from the United States for Christmas. When appellant returned, he would drink a lot but not to the point of falling down. At one point around 1987, appellant was a mason's assistant and at that time he was still the same sort of person that he was as a child—peaceful and serious. In 1997 and 1998, appellant told Daniel that he was starting to run out of money and needed to come home. Daniel described appellant's demeanor during March 1998 as different. He mentioned having headaches; he had not complained of headaches or back

pain prior to 1997. Appellant appeared to love his children. Daniel testified that he loved appellant. (60 RT 11498–11531.)

Daniel acknowledged on cross-examination that he had not told the truth to two of the prosecution's investigators concerning the abuse that occurred in the family; it was very difficult for him to discuss everything that happened and it was a very embarrassing situation that has not even been discussed among the family. (60 RT 11542–11574.)

Appellant's wife, Maria Isabel Juarez de Martinez, testified on behalf of appellant. She was still married to appellant. She fell in love with him because he was nice to her and her whole family and she could count on him. Around 1991, Isabel came to the United States to join appellant in Ione with their daughter, Liliana. Yolanda Martinez came with them. Appellant was working at a ranch in Ione and they lived in an apartment on the ranch. (60 RT 11613–11634.)

Isabel had their second child, Jessica, in California in 1992. Jose and Yolanda lived with the couple in Ione for about eight months. She and appellant moved to Auburn from Ione because appellant lost his job when the ranch was sold, and his ranch boss recommended him to Randy Parnell in Auburn. Appellant had no friends living in Auburn. (64 RT 11904–11908.)

Appellant and his family were close and loving. Isabel returned to Mexico with the children at some point after she became paralyzed and lost feeling in her body.[40] When appellant would return home from the United States the children would be overjoyed; he would always bring them presents. He sent money to Isabel every three weeks and never denied anything to his daughters. (64 RT 11912–11917.)

Appellant complained of sleeplessness while Isabel was still living in Auburn. He got some medication in 1998. When Arturo was back in Mexico, he would go out with his friends and drink. Isabel would not allow him to take his sleeping medication while he was drinking. (64 RT 11918–11919.)

At some point while appellant was still in Mexico in 1998, Isabel asked him for a separation because of her jealousy. Appellant did not agree to it and the issue was worked out between them when he returned to the United States in April 1998 and never broached again. That was the only time they talked about a separation. Isabel testified that she made no accusations about appellant in May 1998, nor did she, Jose, or Juan pressure

---

[40] Isabel had a difficult pregnancy with Jessica, and she had developed nerve problems involving a lack of feeling in her leg and arm. She received better treatment to control it in Mexico. (64 RT 11939, 11942.)

him to bring her to California more quickly. However, Isabel then testified that there was a conversation between them in May 1998 regarding appellant having affairs. She did not know if Jose Luis knew about this conversation. Jose Luis never voiced concern about her marriage; she never mentioned what was going on in her marriage to her brothers. Jose Luis wanted her and her children to come back to the United States so that they could be together with appellant, not with regard to saving their marriage. She loves her husband and wants him to live. (64 RT 11919–11925.)

Under cross-examination, Isabel testified that appellant's drinking was a source of conflict between them and described the conflicts they experienced and her distrust of appellant. (64 RT 11925–11940.) On redirect examination, however, she testified that her distrust was based on her own insecurity and jealousy. (64 RT 11943.)

Seven additional siblings, relatives, and friends testified about appellant's father's violence and drunkenness, appellant's responsible conduct toward his family, their love for him, and their desire that he live. (See 64 RT 11944–12062.)[41]

---

[41] These witnesses were as follows: Isaias Calderon Adame (brother-in-law) 57 RT 11185 et seq.; Maribel Calderon Mora (sister-in-law) 64 RT 11952 et seq.; Abelardo Rodriguez Solis (neighbor and family friend) 64 RT 11966 et seq.; Miroslava Juarez Suarez (sister) 64 RT 11984 et seq.; Maria Esther Rosales Cervantes (sister-in-law) 64 RT 12001 et seq.; Maria

Appellant's older daughter, Liliana Juarez Martinez, a sixth grader, testified that she loves her father.[42]

In addition to the above witnesses who had personal relationships with appellant, the defense presented testimony concerning appellant's positive institutional conduct and adjustment while confined in both Placer County and Napa County (67 RT 12434–12458), and the nature and conditions of confinement in state prison for life without the possibility of parole (67 RT 12459–12534).

Finally, the defense called Patricia Perez-Arce, a clinical psychologist with post-doctoral training in clinical neuropsychology, who specialized in Latin-American culture. She testified concerning the nature of the Mexican family, and the particularly traditional norms of the State of Michoacan. (67 RT 12535–12543.)

Dr. Perez-Arce understood from her interviews with appellant's family that appellant's father was considered the town drunk, was physically and verbally abusive, and was generally so severely impaired that people could walk up to him on the street and steal whatever he was

---

Juarez Suarez (sister) 64 RT 12018 et seq.; Enrique Rodriguez (friend) 64 RT 12050.

[42] Appellant's younger daughter, Jessica, was identified by Liliana as being present in the courtroom.

carrying. He broke basically every rule that the family and community expected of him as a father and his alcoholism would have affected the social development of his children. That appellant's mother could not perform her role as a mother and was removed to Mexico City is very unusual in Mexican culture. Abundio was a father figure and was uniquely empathic. After he died, the family did not discuss his death; during Dr. Perez-Arce's interviews of the family, they had difficulty containing their grief. (67 RT 12544–12555.)

The sons in appellant's family would have to get up at five or six in the morning to go to work in the fields. The family was extremely poor and lacked food which caused a range of physical ailments and emotional problems. Her interviews with the family revealed that they would get headaches and feel dizzy after three days without food. (67 RT 12556–12558.)

Dr. Perez-Arce also testified about the risks undertaken by Mexican migrant workers. The jobs available for migrant workers are often the lowest jobs and therefore less safe. Given Mexican culture's sense of family and society, being a migrant worker without a supportive community of migrant workers can lead to an acute sense of loneliness. (67 RT 12651–12652, 12598.)

## ARGUMENT

### I. DEATH QUALIFICATION OF THE JURY PREJUDICIALLY VIOLATED APPELLANT'S RIGHTS TO EQUAL PROTECTION AND A REPRESENTATIVE JURY.

"A 'death qualified' jury is one from which prospective jurors have been excluded for cause in light of their inability to set aside their views about the death penalty that would prevent or substantially impair the performance of their duties as jurors in accordance with their instructions and oath." (*Buchanan v. Kentucky* (1987) 483 U.S. 402, 408, fn. 6, internal citations and quotations omitted.) If a juror's ability to perform his or her duties is substantially impaired under this standard, they are subject to dismissal for cause. The trial court committed constitutional error by permitting the death qualification of appellant's jury.

Death qualification resulted in an unconstitutional trial, and creates an unconstitutional death penalty scheme. It violated appellant's rights under state statutory law and his constitutional rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 15, 16, and 17 of the California Constitution, and international law as set forth in treaties, customary law, human rights law, including the International Convention on the Elimination of All Forms of Racial Discrimination, and under the doctrine

of *jus cogens*, in that appellant was denied his right to effective assistance of counsel, his right to equal protection of the laws, due process, a fair trial, and an impartial jury, his right to confrontation, his right to present a defense, his right to freedom from cruel and/or unusual punishment and his right to a reliable guilt and penalty determination in a capital case. The constitutional violation had a substantial and injurious effect on the verdict, and rendered the trial fundamentally unfair.

Death qualification in California is contrary to long-standing jurisprudence that death penalty juries represent the values of the community. This function is crucial to provide information from which the courts discern evolving standards of decency.

Death qualification was first ruled on by the Supreme Court in *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522. Under *Witherspoon*, a juror can be excused for cause if he would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case," or "his attitude toward the death penalty would prevent (him) from making an impartial decision as to the defendant's guilt." (*Id.*) These standards were refined in *Adams v. Texas* (1980) 448 U.S. 38, at 45. They were clarified further in *Wainwright v. Witt*

(1985) 469 U.S. 412, 426, holding it permissible to remove a juror whose ability to perform his duties are "substantially impaired."

The Supreme Court determined that "*Witherspoon* is not grounded in the Eighth Amendment's prohibition against cruel and unusual punishment, but in the Sixth Amendment." (*Witt*, 469 U.S. at p. 423.)

Under the Eighth Amendment, the Supreme Court determines whether a punishment is cruel and unusual, i.e. whether the evolving standards of decency have reached the point where society deems the punishment to be cruel and unusual.

One of the most important functions a jury performs in making a death penalty selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 101.)

*Trop*'s "evolving standards of decency" language is a cornerstone of Eighth Amendment death penalty jurisprudence. The Supreme Court has held repeatedly that one of the best sources of objective information on such evolving standards are verdicts of jurors who have the responsibility of deciding whether to impose the punishment; data reflecting the actions of

sentencing juries, where available, can also afford "'a significant and reliable objective index'" of societal mores. (*Coker v. Georgia* (1977) 433 U.S. 584, 596 (plur. opn.) (quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 181 (joint opn. of Stewart, Powell, and Stevens, JJ.).) Death penalty juries thus serve a crucial role in providing the data needed by the courts to assess evolving standards of decency under the Eighth Amendment.

This Court has held that the only question that a trial court needs to resolve during death qualification in California is "whether any prospective juror has such conscientious or religious scruples about capital punishment, in the abstract, that his views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*People v. Mattson* (1990) 50 Cal.3d 826, 845.) This test focuses on the abstract, conscientious, or religious scruples of prospective jurors, not case-specific considerations. (*People v. Pinholster* (1992) 1 Cal.4th 865, 918.) A scruple is "an ethical consideration or principle that inhibits action." (Merriam-Webster's Collegiate Dictionary (1995) 10th ed.) Accordingly, the "views" that matter here are, ultimately, moral ones. (*Mattson*, 50 Cal.3d at p. 846.)

In capital cases, death qualification revolves around a juror's ability to perform his or her duties under California's death penalty law. Under

section 190.3, a juror's duty at the penalty phase is to "determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole." The jury is required to take into account a number of listed sentencing factors. (Pen. Code, § 190.3, factors (a)–(k).) The jury then determines penalty. The jury is authorized to impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances, the trier of fact shall impose a sentence of confinement instate prison for a term of life without the possibility of parole. (§ 190.3)

According to this Court, a juror's duty at the penalty phase entails three "moral and sympathetic judgments." First, they must determine if evidence exists to support a factor on the list. Second, they must determine whether that factor is aggravating or mitigating based on its moral context. Finally, they must determine the weight of each factor. At each stage, the jury makes moral determinations. A jury's "moral and sympathetic judgment" is not limited to the 190.3 mitigating factors. It must determine "any other 'aspect of (the) defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death," (*People v. Easley* (1983) 34 Cal.3d 858, 879, fn. 10, quoting *Lockett v. Ohio* (1978)

438 U.S. 586 at p. 604), whether or not related to the offense for which he is on trial. (CALJIC No. 8.85.)

This Court has held that, unlike the guilt phase determination, the penalty phase determination in California is "inherently moral and normative, not factual." (*People v. Prieto* (2003) 30 Cal.4th 226, 263, quoting *People v. Rodriguez* (1986) 42 Cal.3d 730, 779; see also *People v. Box* (2000) 23 Cal.4th 1153, 1216.) "A penalty phase jury performs an essentially normative task. As the representative of the community at large, the jury applies its own moral standards to the aggravating and mitigating evidence to determine if death or life is the appropriate penalty for that particular offense and offender." (*People v. Mendoza* (2000) 24 Cal.4th 130, 192.)

In California, neither the legislature nor the electorate has ever enacted a statute for death qualification of penalty phase jurors. The statutes governing jury selection in criminal cases actually forecloses death qualification. California Code of Civil Procedure section 229 states:

> A challenge for implied bias may be taken for one or more of the following causes, and for no other: . . .
> (h) If the offense charged is punishable with death, the entertaining of such conscientious opinions as would preclude the juror finding the defendant guilty; in which case the juror may neither be permitted nor compelled to serve.

(Cal. Code Civ. Proc., § 229, subd. (h).)

In the absence of controlling statutory language, this Court has provided a "judicial gloss" to Code of Civil Procedure section 229, subdivision (h). (See *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 9, fn. 7, 9 [cases cited therein interpret the same language in the old statute, Cal. Code Civ. Proc., § 1074, subd. (8)].) However, this Court's "judicial gloss" is contrary to the statute's express language. It allows the removal of jurors whose views would affect their penalty determination.

A serious underlying problem is posed by the death qualification process. In rejecting the applicability of *Ring v. Arizona* (2002) 536 U.S. 584 [factual findings relevant to penalty must be found beyond reasonable doubt], this Court has maintained that a California death penalty jury does not make a factual determination, like the typical jury alluded to in *Witt*'s traditional test, but instead it makes a broad "moral and normative" determination. (*People v. Prieto* (2003) 30 Cal.4th 226, 263; see also *People v. Snow* (2003) 30 Cal.4th 43.)

Under this standard, potential jurors are removed for cause if their moral views will substantially impair their duty. However, their duty in California is to make a "moral and normative" judgment, and by law, they are required to make "moral and sympathetic" determinations. While the "substantially impaired" test may be proper in the context where the jury

has its typical role of finding facts, according to this Court, that is not the role of a California penalty phase jury.

Juries represent community values. Their penalty verdicts inform the judicial determination of the evolving standards. As this Court has stated: "A penalty jury can speak for the community only insofar as the pool of jurors from which it is drawn represents the full range of relevant community attitudes." (*Hovey*, 28 Cal.3d at p. 73.) Nonetheless, in California, potential jurors are removed from serving on death penalty juries because of their views on the death penalty.

Death qualification, which disqualifies a substantial portion of the community, breaks the essential link between community values and the penal system. By excluding a very substantial number of community members from penalty deliberations,[43] their community values will never be represented in jury sentencing determinations, "the indicators" by which the courts ascertain contemporary standards of decency.

---

[43] According to the Secretary of State's office's final totals, in November 2012, 48 percent of voters, or 5,885,080 people, voted to abolish the death penalty. Even if a significant number of those people could set aside their own views and follow the law, an extraordinarily high number of people remain who will never be allowed to serve on a jury where death is a possible punishment.

Death qualification in California is contrary to long-standing jurisprudence that death penalty juries represent the values of the community and that this function is crucial to provide information from which the courts discern evolving standards of decency. Death qualification results in an unconstitutional death penalty scheme. Based on statute, jury instructions, and this Court's opinions, the current "substantially impairs" test is irrational and violates the Sixth, Eighth and Fourteenth Amendments and international law.

All available empirical evidence indicates that "[C]apital juries do not now fully represent the community; they are more likely to accept prosecution evidence than defense evidence and are more likely to believe in harsh measures for criminals than is the population as a whole." (Smith, *Due Process Education for the Jury: Overcoming the Bias of Death Qualified Juries* (1989) 18 Sw. U. L.Rev. 493, 509 (hereinafter Smith); see also Allen et al., *Impact of Juror Attitudes about the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-analysis* (1998) 22 Law & Hum. Behav. 715, 725 [finding that a death qualified jury is more likely to invoke death penalty].)

Despite these findings, the Supreme Court has continued to uphold the constitutionality of death qualification. These findings rest upon faulty

reasoning and the erroneous rejection of clear empirical evidence. Accordingly, the "constitutional facts" upon which *Lockhart* was based are no longer correct and this Court does not have to defer to the Supreme Court's holding. (Cf. *United States v. Carolene Products* (1938) 304 U.S. 144, 153; *Lockhart v. McCree* (1986) 476 U.S. 162.) This Court should review the new data, as presented here, and reevaluate this issue.

The *Lockhart* opinion has been criticized for its analysis of both the data and the law related to death qualification. (See, e.g., Smith, 18 Sw. U. L.Rev. 493, 528 [The Court's analyses in *Lockhart* was "characterized by unstated premises, fallacious argumentation and assumptions that are unexplained or undefended"]; Thompson, *Death Qualification After Wainwright v. Witt and Lockhart v. McCree* (1989) 13 L. & Hum. Behav. 185, 202 (hereinafter Thompson) [The opinion is "poorly reasoned and unconvincing both in its analysis of the social science evidence and its analysis of the legal issue of jury impartiality."]; Byrne, *Lockhart v. McCree: Conviction-Proneness and the Constitutionality of Death-Qualified Juries* (1986) 36 Cath. U. L.Rev. 287, 318 (hereinafter Byrne) [The opinion was a "fragmented judicial analysis," representing an "uncommon situation where the Court allows financial considerations to

outweigh an individual's fundamental constitutional right to an impartial and representative jury."].)

By any reasonable scientific standard, the high court mishandled the social science data discussed in *Lockhart*. (See generally, Moar, *Death Qualified Juries in Capital Cases: The Supreme Court's Decision in Lockhart v. McCree* (1988) 19 Colum. Hum. Rts. L.Rev. 369, 374 (hereinafter Moar) [detailing criticism of the Court's analysis of the scientific data]; see also Bersoff & Glass, *The Not-So Weisman: The Supreme Court's Continuing Misuse of Social Science Research* (1995) 2 U. Chi. L.Sch., Roundtable 279; and Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology* (1990) 66 Ind L.J. 137.)

Research has shown that a "prosecutor can increase the chances of getting a conviction by putting the defendant's life at issue." (Thompson, 13 Law & Hum. Behav. 199 (*citing* Gross, *Determining the Neutrality of Death-Qualified Juries: Judicial Appraisal of Empirical Data*, (1984) 8 Law & Hum. Behav. 7, 13); Liptak, *Facing a Jury of (Some of) One's Peers*, N.Y. Times (July 20, 2003) Section 4.)

Prosecutors and defense counsel have long known that death qualification skews the jury. Prosecutors use this unconstitutional practice

to their advantage in obtaining conviction-prone juries. (See Garvey, *The Overproduction of Death* (2000) 100 Colum. L.Rev. 2030, 2097 fn.163–164, quoting Rosenberg, *Deadliest D.A.* (1995) N.Y. Times Magazine, at p. 42 (July 16, 1995).) The prosecutors use this voir dire practice to eliminate the segment of the jury pool that is most likely to be critical of police and forensic testimony and most likely to discount the "beyond a reasonable doubt" standard. (*Id.*)

Death qualification skews on race, gender, and religion in jury composition. Numerous studies have shown that "proportionately more blacks than whites and more women than men are against the death penalty." (Moar, 19 Colum. Hum. Rts. L.Rev. 386.) Death qualification "tends to eliminate proportionately more blacks than whites and more women than men from capital juries," impacting two distinctive groups under a fair cross-section analysis. (*Id.* at p. 388.) Death qualification has a "detrimental effect on the representation of blacks and women on capital juries." (*Id.* at p. 396.)

The U.S. Supreme Court has held that "groups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors are not 'distinctive groups' for fair-cross-section purposes." (*Lockhart v. McCree*,

*supra*, 476 U.S. at p. 175.) There is no doubt, however, that African-Americans are a distinctive group. (See *id.*, 476 U.S. at pp. 175–176.)

The *Lockhart* court stated,

> [W]e think it obvious that the concept of "distinctiveness" must be linked to the purposes of the fair-cross-section requirement. In *Taylor*,[44] *supra*, we identified those purposes as (1) "guard[ing] against the exercise of arbitrary power" and ensuring that the "commonsense judgment of the community" will act as "a hedge against the overzealous or mistaken prosecutor," (2) preserving "public confidence in the fairness of the criminal justice system," and (3) implementing our belief that "sharing in the administration of justice is a phase of civic responsibility. (*Id.*, 419 U.S. at pp. 530–531.)"

(*Lockhart*, 476 U.S. at pp. 175–176.)

The high court's jury-representativeness cases have been based on both the fair-cross-section component of the Sixth Amendment and the Equal Protection Clause of the Fourteenth Amendment. (See *Peters v. Kiff* (1972) 407 U.S. 493 [Blacks; equal protection]; *Duren v. Missouri* (1979) 439 U.S. 357 [women; fair cross-section]; *Taylor*, *supra* [same]; and *Castaneda v. Partida* (1977) 430 U.S. 482 [Mexican-Americans; equal protection].) "The wholesale exclusion of these large groups from jury service clearly contravened all three of the aforementioned purposes of the fair-cross-section requirement." (*Lockhart, supra*, 476 U.S. at p. 175.)

---

[44] *Taylor v. Louisiana* (1975) 419 U.S. 522.

In this case, there were several people in the jury pool who found it difficult or impossible to impose the penalty of death in this case. Clifford Solari said that there was no case in which he could envision voting for death. The prosecutor's challenge for cause was granted. (21 RT 5811–5813.) Deborah Brace could not vote for death in this case. The prosecutor's challenge for cause for this reason was granted. (33 RT 6357–6366.) Julie Brown was opposed to the death penalty. The prosecutor's challenge was denied, but the trial court dismissed her on hardship grounds, over the objection of appellant. (23 RT 6566, 6583–6584.) Robert Underwood was excused by the court because of his views towards the death penalty. (27 RT 7333–7334.) Linda Tucker would not vote for the death penalty; the people's challenge for cause on this basis was granted. (23 RT 6432–6436.) The court excused Annemarie Angolini on its own motion; she was opposed to the death penalty. (25 RT 7043–7044.)

In the seminal case of *People v. Wheeler* (1978) 22 Cal.3d 258, this Court wrote,

> As a recent commentator aptly put the point in the context of the case at bar, "It may be argued that the exclusion of jurors on the basis of group membership would be acceptable where it is believed that, for example, blacks are consistently more biased in favor of acquittal than whites. The argument misses the point of the right to an impartial jury under *Taylor*. Blacks

> may, in fact, be more inclined to acquit than whites. The tendency might stem from many factors, including sympathy for the economic or social circumstances of the defendant, a feeling that criminal sanctions are frequently too harshly applied, or simply an understandable suspicion of the operations of government. Whites may also be more inclined to convict, particularly of crimes against a white victim. But these tendencies do not stem from individual biases related to the peculiar facts or the particular party at trial, but from differing attitudes toward the administration of justice and the nature of criminal offenses. The representation on juries of these differences in juror attitudes is precisely what the representative cross-section standard elaborated in *Taylor* is designed to foster." (Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries* (1977) 86 Yale L.J. 1715, 1733, fn. 77.)

(*People v. Wheeler*, *supra*, 22 Cal.3d at p. 576, fn. 17.)

All scientific research on death qualification shows that death qualification results in juries that are more prone to convict. (Moar, 19 Colum. Hum. Rts. L.Rev. 382–383.) Death qualification likely decreases jurors' conscientiousness in their role as a sentencer, increases the likelihood that they will deny responsibility for the defendant's punishment, and increases the likelihood that they will rush to judgment. (See Bowers et al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision Making* (2006) 63 Wash. & Lee L.Rev. 931; see also Eisenberg et al., *The Deadly Paradox of Capital Jurors* (2001) 74 S. Cal. L.Rev. 371; Garvey et al., *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital*

*Cases* (2000) 85 Cornell L.Rev. 627; Bowers & Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing* (1999) 77 Tex. L.Rev. 605; Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?* (1998) 98 Colum. L.Rev. 1538; Hoffman, *Where's the Buck: Juror Misperception of Sentencing Responsibility in Death Penalty Cases* (1995) 70 Ind. L.J. 1137; Bowers et al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing when the Defendant is Black and the Victim is White* (2004) 53 DePaul L.Rev. 1497; and Sandys, *'Cross-Overs'–Capital Jurors who Change their Minds about Punishment: A Litmus Test for Sentencing Guidelines* (1995) 70 Ind. L.J. 1183.)

Death qualified venirepersons are more likely than excludable jurors to endorse aggravating factors over mitigating factors. (See Butler & Moran, *Death Qualification & Evaluations of Aggravating and Mitigating Circumstances* (April 2002) 26:2 Law and Hum. Behav. 175.)

Death qualified juries are biased and impaired in seven different ways:

(1) Prejudgment: Death qualified juries are prone to premature decision making;

(2) Death Bias: death qualified juries are corrupted by the death qualification procedures;

(3) Mitigation Impairment: death qualified juries suffer from a pervasive failure to comprehend and follow instructions regarding mitigation;

(4) Fatal Ignorance: death qualified juries are likely to suffer from the widespread belief that death is mandatory in some cases;

(5) Irresponsibility: death qualified juries are likely to evade responsibility for their sentencing decisions;

(6) Racism: death qualified juries are likely to use the defendant or the victim's race (or both) as a factor in sentencing decisions; and

(7) Early Release Fears: death qualified juries are likely to erroneously believe that life sentences will not result in lengthy incarcerations.

(See Bowers, *The Capital Jury Project: Rationale, Design, and a Preview of Early Findings* (1995) 70 Ind. L.J. 1043.)

In combination, these seven biases completely impede death qualified juries from impartially and objectively evaluating guilt phase evidence and making a moral and normative sentencing determination. Many other verifiable studies proving that death qualified venirepersons

possess a host of other behavioral and attitudinal features, which bias their views of the evidence and proceedings during a capital trial. (See Butler & Moran, *The Impact of Death Qualification, Belief in Just World, Legal Authoritarianism, and Locus of Control on Venireperson's Evaluation of Aggravating and Mitigating Circumstances in Capital Trials* (2007) 25 Behav. Sci. L. 57.)

Some of these features include:

(1) Tendency to place undue stress upon victim impact evidence. (See Butler, *The Role of Death Qualification in Venireperson's Susceptibility to Victim Impact Statements* (2008) 14(2) Psychology, Crime & Law, 133, 135–136);

(2) Tendency to possess higher levels of homophobia, modern racism, and modern sexism. (See Butler, *Death Qualification and Prejudice: The Effect of Implicit Racism, Sexism, and Homophobia on Capital Defendants' Right to Due Process* (2007) 25 Behav. Sci. L. 857, 858);

(3) Tendency to overly trust forensic and scientific evidence even when developed by dubious methodology. (See Butler, *The Role of Death Qualification and Need for Cognition in Venireperson's Evaluations of*

*Expert Scientific Testimony in Capital Trials* (2007) 25 Behav. Sci. Law 561, 562);

(4) Tendency to support harsh punishment for the elderly and physically disabled and have less factual knowledge regarding the need to punish those groups. (See Butler, *Moving beyond Ford, Atkins, and Roper: Jurors' Attitudes Toward the Execution of the Elderly and the Physically Disabled* (2010) 16(8) Psychology, Crime, and Law 631–647);

(5) Finding that death-qualified jurors were more susceptible to the effects of pre-trial publicity. (See Butler, *"He's something less than human": The Impact of Pretrial Publicity on Capital Defendants' Right to Due Process* (2010) 21(4) Fla. Defender 19–24).

The death qualification process in California skews the composition of the jury and fundamentally affects how the evidence is viewed and how the jury will ultimately rule and thereby impacts several fundamental rights. Historical research indicates that the use of death qualified juries controverts the Sixth Amendment's right to jury trial guarantee and "frustrates the founder's understanding as to the role of the criminal jury." (Cohen & Smith, *The Death of Death Qualification* (2008) 59:87 Western Reserve L.Rev. 3.)

The trial court's decision to death qualify appellant's jury violated his Fifth, Sixth, Eighth and Fourteenth Amendment rights and his rights under international law. Death qualification skews the jury so that it is more conviction prone and more prone to inflict death upon capital defendants. Non-capital defendants do not face such skewed juries. This result is unacceptable under the Eighth and Fourteenth Amendments.

The Supreme Court has reversed death sentences because some aspect of the sentencing process has compromised the reliability of the sentencing determination. (See *Johnson v. Mississippi* (1988) 486 U.S. 578; *Caldwell v. Mississippi* (1985) 472 U.S. 320 [jury misled to believe that the appellate court ultimately would decide the appropriateness of the death sentence]; *Eddings v. Oklahoma* (1982) 455 U.S. 104 [mitigation evidence regarding emotional disturbance and troubled family history erroneously excluded from consideration by the jury in making its determination as to the appropriateness of the death sentence].)

> A defendant convicted by (a properly death-qualified) jury in some future case might still attempt to establish that the jury was less than neutral with respect to guilt. If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment maybe vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence—given the possibility of

> accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment.

(*Witherspoon*, 391 U.S. at p. 520, fn. 18.)

Death-qualified jurors are more likely to believe that a defendant's failure to testify is indicative of his guilt, more mistrustful of defense attorneys and less concerned about the danger of erroneous convictions. (*Grigsby v. Mabry* (E.D. Ark. 1983) 569 F.Supp. 1273, 1283, 1293, and 1304.) This pro-prosecution bias is reflected in the greater readiness of death-qualified jurors to convict or to convict on more serious charges. (*Id.* at pp. 1294–1302.) The very process of death qualification—which focuses attention on the death penalty before the trial has even begun—has been found to predispose the jurors that survive it to believe that the defendant is guilty. (*Id.* at pp. 1273, 1302–1305.)

The full exchange of ideas among the jury members is crucial to the trial process. "The desired interaction of a cross-section of the community does not take place within the venire; it is only effectuated by the jury that is selected and sworn to try the issues." (*McCray v. New York* (1983) 461 U.S. 961, 968 (dis. opn. of Marshall, J.).)

The task of ascertaining the level of a defendant's culpability requires a jury to decide not only whether the accused committed the acts alleged but also the extent to which he is morally blameworthy. In capital

cases, where a defendant invariably should be charged with lesser included offenses having factual predicates similar to those of the capital murder charges (see *Beck v. Alabama* (1980) 447 U.S. 625), it may be difficult to classify a particular verdict as "accurate" or "inaccurate." The Supreme Court in *Ballew* went beyond a concern for simple historical accuracy and questioned any jury procedure that systematically operated to the "detriment of . . . the defense." (*Ballew v. Georgia* (1978) 435 U.S. 223, 236.)

The very process of determining whether any potential jurors are excludable for cause under *Witherspoon* predisposes jurors to convict. One study found that exposure to the voir dire needed for death qualification "increased subjects' belief in the guilt of the defendant and their estimate that he would be convicted." (Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process* (1984) 8 Law & Hum. Behav. 121, 128; see *Hovey*, 616 P.2d at p. 1349.) Even if this prejudice to the accused does not constitute an independent due process violation, it should be taken into account in any inquiry into the effects of death qualification. "[The] process effect may function additively to worsen the perspective of an already conviction-prone jury whose composition has been distorted by the outcome of this selection process. . . ." (Haney,

*Examining Death Qualification: Further Analysis of the Process Effect* (1984) 8 Law & Hum. Behav. 133, 151.)

Because death qualification undermines the purposes of the Sixth Amendment right to a jury trial, excluding individuals with views against the death penalty from petit juries also violates the fair cross-section requirement and the Equal Protection Clause. "We think it obvious that the concept of "distinctiveness" must be linked to the (three) purposes of the fair-cross-section requirement." (*Lockhart*, 476 U.S. at p. 174.)

In this case, there were several people in the jury pool who found it difficult or impossible to impose the penalty of death. Clifford Solari said that there was no case in which he could envision voting for death. The prosecutor's challenge for cause was granted. (21 RT 5811–5813.)

Prospective jurors Solari (21 RT 5811 et seq., prosecutor's *Witherspoon/Witt* challenge granted at 21 RT 5813), Brace (23 RT 6357, prosecutor's *Witherspoon/Witt* challenge granted at 23 RT 6366), Brown (23 RT 6555, prosecutor's *Witherspoon/Witt* challenge denied but juror promptly dismissed by court on hardship basis over appellant's objection), Underwood (27 RT 7333, automatic life; juror dismissed by court at 27 RT 7334), Tucker (23 RT 6432, prosecutor's *Witherspoon/Witt* challenge

granted at 23 RT 6436), and Angolini (25 RT 7043, automatic life; juror excused by court at 25 RT 7044) were wrongly excluded by the trial court.

The trial court's systematic exclusion of jurors with reservations about capital punishment denied appellant his federal constitutional rights to due process, equal protection, an impartial jury, a jury drawn from a fair cross-section of the community and a reliable determination of guilt and sentence under the Fifth, Sixth, Eighth and Fourteenth Amendments.

## II. DEATH QUALIFICATION VOIR DIRE VIOLATED THE PROSPECTIVE JURORS' CONSTITUTIONAL RIGHTS AND TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT ON THIS GROUND.

In addition to violating *appellant's* constitutional rights, death qualification in this case violated the *prospective jurors'* rights under state statutory law and his constitutional rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 15, 16, and 17 of the California Constitution, and international law as set forth in treaties, customary law, human rights law, including the International Convention on the Elimination of All Forms of Racial Discrimination, and under the doctrine of *jus cogens*. The constitutional violation had a substantial and injurious effect on the verdict, and rendered appellant's trial fundamentally unfair.

Jury service is a hard-won and cherished right in this country. It provides an opportunity for the "exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life." (*Powers v. Ohio* (1991) 499 U.S. 400, 402.) In *Balzac v. Porto Rico* (1922) 258 U.S. 298, Chief Justice Taft wrote for the Court:

> The jury system postulates a conscious duty of participation in the machinery of justice. . . . One of its greatest benefits is in the security it gives the people that they, as jurors actual or

> possible, being part of the judicial system of the country can prevent its arbitrary use or abuse.

(*Balzac v. Porto Rico* at p. 310, citing *Duncan v. Louisiana* (1968) 391 U.S. 145, 147–148.)

Over 150 years ago, Alexis de Tocqueville observed:

> The institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority (and) invests the people, or that class of citizens, with the direction of society . . . The jury . . . invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society . . . I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look upon it as one of the most efficacious means for the education of the people which society can employ.

(*Democracy in America* (Schocken 1st ed. 1961) pp. 334–337.)

Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people. (See *Green v. United States* (1958) 356 U.S. 165, 215 (dis. opn. of Black, J).) It "affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law." (*Duncan*, *supra*, 391 U.S. at p. 187 (dis. opn. of Harlan, J).) Indeed, with the exception of voting, for most citizens the honor and

privilege of jury duty is their most significant opportunity to participate in the democratic process.

Because of the important nature of this right, it follows that the right is—and should be—well protected. Thus, in deciding the quality of their juries, the State of California must make sure its "classifications have relation to the efficiency of the jurors and are equally administered." (*Brown v. Allen* (1953) 344 U.S. 443, 473.) "[A]ction by a state in arbitrarily depriving a person of the opportunity to serve on a jury is a violation of a right secured by the United States Constitution." (*Bradley v. Judges of the Superior Court for the County of Los Angeles* (C.D. Cal. 1974) 372 F. Supp. 26, 30, citing *Carter v. Greene County*, (1970) 396 U.S. 320.) Thus, the law views the right to serve as a juror as an elevated one and protects citizens from being denied this right improperly.

Yet, in the instant case, each prospective juror who was removed during death qualification, collectively and individually, was improperly deprived of this right in violation of the equal protection and due process clauses of the Fourteenth Amendment. Appellant has standing to assert claims based on the constitutional rights of the prospective jurors. (See *Powers*, *supra*, 499 U.S. at p. 402 and pp. 410–415 ["relying upon well-

established principles of standing," and holding that a criminal defendant has standing to raise the rights of a juror excluded from service].)

California has given its citizens the right to be eligible for jury service in the absence of specified exceptions. This right can be seen repeatedly in the statutes known as the "Trial Jury Selection and Management Act," which governs the selection of jurors in criminal and civil cases. (See Cal. Code Civ. Proc., § 190 et seq., §§ 203 and 204.) Thus, these statutes create a state right for all citizens to be eligible for jury service if these extremely narrow exceptions—lack of qualifications and hardship—are not applicable.

In addition to giving its citizens the right to be eligible for jury service, the California legislature has narrowly proscribed the use of challenges to remove otherwise qualified prospective jurors. (See Code Civ. Proc., § 225, subd. (b)(1)(A–C) and (b)(2); Code Civ. Proc., §§ 228 and 229.) These statutes—viewed in the aggregate—clearly and overwhelmingly emphasize the inclusion of people in the role of jurors and narrowly define a limited set of circumstances where exclusion is proper. Thus, it can be concluded that the citizens of California have a right to be a juror unless these narrow exceptions are present.

In the instant case, prospective jurors Solari (21 RT 5811 et seq., prosecutor's *Witherspoon/Witt* challenge granted at 21 RT 5813), Brace (23 RT 6357, prosecutor's *Witherspoon/Witt* challenge granted at 23 RT 6366), Brown (23 RT 6555, prosecutor's *Witherspoon/Witt* challenge denied but juror promptly dismissed by court on hardship basis over appellant's objection), Underwood (27 RT 7333, automatic life; juror dismissed by court at 27 RT 7334), Tucker (23 RT 6432, prosecutor's *Witherspoon/Witt* challenge granted at 23 RT 6436), and Angolini (25 RT 7043, automatic life; juror excused by court at 25 RT 7044), did not meet any of the narrow exceptions detailed by these statutes. Thus, they had a state right to serve as a juror. They were excluded in violation of these laws.

These errors diminished the right to serve as a juror and also resulted in appellant facing a jury that was skewed against him in every phase of his case in clear violation of California statute, and resulted in a miscarriage of justice. Thus, this violation requires reversal of the jury's guilt verdicts, special circumstance findings and penalty verdict. Moreover, as detailed below, it also gives rise to numerous federal constitutional violations.

Death qualification in California violates the constitutional rights of those jurors who are excluded during death qualification. The State of California has given its citizens the right to serve as jurors. This right is

fundamental. Since death qualification impinges upon a fundamental right and treats people in a disparate manner in the exercise of a fundamental right, this Court must engage in a high level of scrutiny when reviewing its merits under the Fourteenth Amendment. In addition, statewide uniformity is required to insure that such an important right is not distributed unequally. Death qualification in California cannot withstand strict scrutiny and the California Courts have failed to guarantee any uniformity in its application.

In addition, death qualification extinguishes the rights of those excluded without sufficient guarantees of procedural due process. For these reasons, death qualification in California violates the excluded jurors' rights under the Fourteenth Amendment and international law, treaties, norms, and customs.

While the right to serve as a juror is not mentioned explicitly in the Constitution, it is, of course, implicitly protected by the Constitution. Both the federal and California Constitutions explicitly protect the right to a jury trial, which involves an impartial jury chosen from a fair cross-section of the community. This right is fundamental to the American criminal justice system. (See, e.g., *Tennessee v. Lane* (2004) 541 U.S. 509, 523, quoting *Taylor v. Louisiana* (1975) 419 U.S. 522, 530 ["We have held that the Sixth

Amendment guarantees to criminal defendants the right to trial by a jury composed of a fair cross-section of the community, noting that the exclusion of 'identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.'"].)

The purpose of this right is so that each person charged with a criminal offense is judged by their community so as to prevent oppression by the state. Thus, it is implicit that all citizens must have the right to serve as jurors. If only a select group of citizens have the privilege of being jurors then the purpose of the right to an impartial jury trial is completely undermined.

In *People v. Wheeler*, *supra*, 22 Cal.3d at p. 270, this Court "reviewed this line of United States Supreme Court opinions in some detail because (it) fully agree(d) with the views there expressed as to the importance of the representative cross-section rule, particularly in protecting the constitutional right to an impartial jury" under both federal and California law. Thus, under the federal and California Constitutions, courts have acknowledged that it is fundamental to our system of justice that every citizen has the right to serve on the jury because it protects defendants from oppression and guarantees community participation in the system.

In capital cases, the Eighth Amendment's "evolving standards of decency" are informed by actual jurors in capital cases. For this purpose to be served, it is implicit that all citizens must have the right to have their voices heard as part of the diaspora that makes up this society's "evolving standards of decency." Thus, the right to serve as a juror, especially in criminal capital cases, is implicitly protected by the Constitution and must be deemed fundamental. (See also *Lane*, *supra*, 541 U.S. at pp. 533–534 [holding that there is a fundamental constitutional right of access to the courts].)

The State of California discriminates against jurors excluded during death qualification and abrogates their fundamental right to serve as jurors. Thus, the state must justify its actions under strict scrutiny. The state cannot meet this burden. There are, in effect, two interwoven prongs to the strict scrutiny test: the law must serve a "compelling government interest" and it must be "necessary." Death qualification in California at both the guilt and penalty phase fails both of these prongs.

Death qualification in California at both phases is unconstitutional because, even if a right is not deemed fundamental, equal protection requires that the discriminatory classification be "rationally related to a legitimate state interest." (See *New Orleans v. Dukes* (1976) 427 U.S. 297,

303.) Invidious discrimination and wholly arbitrary acts cannot survive this rational basis review under either the equal protection or the due process clause of the Fourteenth Amendment. (*Id.* at pp. 303–304.) Death qualification in California cannot survive the review as it is not rationally related to a legitimate state interest.

In light of the importance of jury service to the citizenry, the single jury rationale does not advance a reasonable and identifiable governmental objective to exclude jurors from the guilt phase. The use of death qualification to dismiss qualified guilt phase jurors in this case violated the prospective jurors rights. Citizens who may have anti-death-penalty beliefs are deprived of their fundamental right to serve as a juror at the guilt phase by a procedure that has no compelling governmental interest and that it is not necessary. Thus, death qualification at the guilt phase in California cannot survive strict scrutiny, and also fails the rational basis test. Thus, death qualification in this case violates the Fourteenth Amendment.

California death penalty law is very specific on the point that at the penalty phase, a jury's duty is to make a "moral and normative" decision. It is completely irrational—on its face—to then exclude prospective jurors from serving as penalty jurors because of their "moral" beliefs. Thus, the only apparent interest for death qualification in this death penalty scheme is

that California does not want the excluded jurors' views to be part of the required normative judgment.

Since appellant's penalty jury was chosen in such an unconstitutional manner, the penalty verdict must be reversed. Since without a valid interest in death qualification at the penalty phase, there can be no valid interest in death qualification at the guilt phase, the guilt verdicts and special circumstance finding must also be reversed. "The touchstone of due process is protection of the individual against arbitrary action of government." (*Wolff v. McDonnell* (1974) 418 U.S. 539, 558, citing *Dent v. West Virginia* (1889) 129 U.S. 114, 123.) Yet, death qualification in California is a totally arbitrary and disparate state action.

In sum, death qualification in California—and as done in this case—violated the prospective jurors' rights in numerous ways. Prospective jurors were excluded in clear violation of state statute. State statute creates a right to serve as a juror. This right is fundamental under the Fourteenth Amendment, triggering strict scrutiny under the equal protection and due process clauses. Death qualification cannot survive this scrutiny, nor can it survive the lesser rational basis review.

Death qualification in California—as seen in this case—lacks any uniform statewide standards that are required when a fundamental right is

involved. Death qualification in California—as seen in this case—deprives its citizens of the right to be a juror without an adequate procedure as required under the procedural due process clause of the Fourteenth Amendment. Due to death qualification, numerous prospective jurors were deprived of their rights to have their "vote" heard in an arbitrary and disparate manner.

For all these reasons, the Fifth, Sixth, Eighth and Fourteenth Amendments, as well as parallel provisions of international law, treaties, norms, and customs, along with California statute, were violated when prospective jurors were dismissed during death qualification, and were collectively and individually deprived of their rights to serve as jurors.

Each of these errors, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the above-stated treaties and covenants of international law that are binding on the United States, individually and/or collectively, was prejudicial.

## III. CHALLENGES TO THE CONSTITUTIONALITY OF DEATH QUALIFICATION OF JURORS ARE COGNIZABLE ON APPEAL.

Counsel for appellant in the trial court did not challenge the constitutionality of the death qualification process as applied to him or to prospective jurors. Nevertheless, appellant is entitled to present these constitutional challenges on appeal. A defendant's failure to object to a ruling or procedure in the trial court does not result in a forfeiture of the defendant's right to pursue the issue on appeal if interposing an objection in the trial court would have been futile. (*People v. Boyette* (2002) 29 Cal.4th 381, 432.) It is futile for a litigant to object to a procedure in the trial court that the trial court is bound to follow under the principle of stare decisis. (*M.T. v. Superior Court* (2009) 178 Cal.App.4th 1170, 1177, citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

## IV. THE JUDGMENT MUST BE REVERSED FOR FAILURE TO AFFORD APPELLANT HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO TRIAL BY A FAIR AND IMPARTIAL JURY.

### A. Introduction

In *Witherspoon v. Illinois* (1968) 391 U.S. 510, the United States Supreme Court held that capital-case prospective jurors may not be excused for cause on the basis of moral or ethical opposition to the death penalty unless those jurors' views would prevent them from judging guilt or innocence, or would cause them to reject the death penalty regardless of the evidence. Excusal is permissible only if such a prospective juror makes this position "unmistakably clear." (391 U.S. at p. 522, fn. 21.)

That standard was amplified in *Wainwright v. Witt* (1985) 469 U.S. 412 (*Witt*), where the court, adopting the standard previously enunciated in *Adams v. Texas* (1980) 448 U.S. 38, 45, held that a prospective juror may be excused if the juror's voir dire responses convey a "definite impression" (469 U.S. at p. 426) that the juror's views "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Id.* at p. 424.) The *Witt* standard applies here. (*People v. Avena* (1996) 13 Cal.4th 394, 412.)

*Witt* requires a trial court to determine "whether the juror's views would prevent or substantially impair performance of his duties as a juror in

accordance with his instructions and his oath." (*Witt, supra*, 469 U.S. at p. 424.) This Court's duty is to "[E]xamine the context surrounding [the juror's] exclusion to determine whether the trial court's decision that [the juror's] beliefs would 'substantially impair the performance of [the juror's] duties . . .' was fairly supported by the record." (*People v. Miranda* (1987) 44 Cal.3d 57, 94, quoting *Darden v. Wainwright* (1986) 477 U.S. 168, 176.)

Errors in failing to excuse a juror for cause when the juror has stated that he or she would automatically vote to impose the death penalty, where sequestered questioning took place, are unlikely to be considered unless a defendant exhausts all peremptory challenges in selecting the jury, and will not be prejudicial unless a juror to whom the defendant objects remains on the panel. (*People v. Manibusan* (2013) 58 Cal.4th 40, 61–62; *People v. Coleman* (1988) 46 Cal.3d 749, 769–771; *Ross v. Oklahoma* (1988) 487 U.S. 81, 89.) However, exclusion for cause of a prospective juror from serving on a capital jury when that juror is in fact qualified to serve is per se reversible error—even when the prosecutor or defendant has unused peremptory challenges. (*People v. Heard* (2003) 31 Cal.4th. 946, 965; *Gray v. Mississippi* (1987) 481 U.S. 648.)

## B. Jury Selection

Voir dire began on February 26, 2001, and was completed on March 7, 2001. (21 RT 5811–27 RT 7445.) Appellant's jury was selected on March 8, 2001. (8 CT 2150–2151, 28 RT 7453 et seq.) Each side was allotted 20 peremptory challenges. There were 69 people in the pool who had passed challenges for cause. (28 RT 7469.) One (Sallee) was dismissed for hardship reasons. After the prosecutor exercised nine peremptory challenges and appellant exercised 10 peremptory challenges, a jury was chosen. (28 RT 7484.)

Three alternate jurors were then selected. Each side was allotted three peremptory challenges. (28 RT 7485–7486.) Appellant used all three of his peremptory challenges. (28 RT 7487–7491.) On May 3, 2001, Alternate No. 1 replaced Juror No. 11 (54 RT 10790) and ultimately voted to impose a death sentence.

## C. Death-Prone Jurors Were Wrongly Retained in the Jury Pool

Appellant was not successful in his cause challenges of 16 prospective jurors: Barbara Thompson, Deanna Harrison, Bedi Amitabh, Patricia Kilgore, Roland Garza, Arlene Phillips, Walt Hoyer, Debra Sirup, Robert Pepi, William Allen, seated juror 100062101, Jowel Sallee, Forrest Murray, William Crowe, Ronald Imlay, and Marion Siegel. These rulings

separately and collectively violated principles set forth in federal and state precedent governing the use of for-cause challenges in capital cases.

### 1. Prospective Juror Barbara Thompson (21 RT 5815)

Ms. Thompson initially stated that she could vote for either death or life without the possibility of parole ("LWOP"). (21 RT 5816.) However, when children were involved as victims, she said that would be very difficult for her, and that if the person was proven to have done it with preparation she would automatically vote for the death penalty. (21 RT 5818.)

After further questioning, appellant challenged her for cause. (21 RT 5123.) The trial court found that in light of its evaluation of the witness's demeanor and presentation, she was not a person who automatically excluded the possibility of life without parole, and denied the motion. (21 RT 5824.)

### 2. Prospective Juror Deanna Harrison (21 RT 5906)

Ms. Harrison described herself as an emotional person who would be affected by photographs. (21 RT 5906.) She had felt a sense of outrage in the past when a defendant was convicted of first-degree murder and not given the death penalty. (21 RT 5907.) She had a discussion with someone in the jury pool who said there should not be a trial in this case; she looked

at the speaker, and said "maybe not." (21 RT 5909.) If the prosecution proved that appellant was guilty, she would automatically vote for death. (21 RT 5909–5911.)

Ms. Harrison told the prosecutor that there may be circumstances presented that would present the possibility of a lesser sentence, but she could not think of what such a circumstance might be. Her answers on the jury questionnaire consistently indicated that she would automatically vote for death under certain circumstances having to do with guilt.

Appellant challenged her for cause. (21 RT 5912.) The trial court relied on her demeanor when she indicated that she would be open to listening to evidence, and denied the challenge. (22 RT 5913–5914.)

### 3. Prospective Juror Amitabh Bedi (21 RT 5958)

Mr. Bedi wrote on his questionnaire that "a person who gets [LWOP] should be executed instead or would be if the legal expense was not as high as it is." When asked to clarify, he said, "we spend several thousands of dollars, I believe about $60,000 a year, to keep that person in prison. So you rot that person's life and you waste huge amount of public monies. So the – so in that case it might be preferable to execute some of the people who are currently getting life in prison." (21 RT 5966.) He also thought that life in prison usually meant 10 to 15 years. (21 RT 5967.)

Mr. Bedi said that in a case like this that death would be the only penalty he would seriously consider—unless the rest of the jury prefers otherwise. (21 RT 5968.) He would compromise his own beliefs in order to reach a verdict. (21 RT 5969.) When asked about possible mitigating circumstances, he did not consider background or childhood experience to be strong enough; it would be something like if a victim caused severe harm to the accused. But, he would consider and listen to such evidence. (21 RT 5971–5972.) Appellant challenged him for cause. (21 RT 5973.) The challenge was denied. (21 RT 5979.)

#### 4. Prospective Juror Patricia Kilgore (21 RT 5983)

Ms. Kilgore was very sensitive to violence, particularly to violence against children. (21 RT 5987.) She was in an emotionally abusive marriage that may prejudice her against the defendant if the facts are like those she experienced. (21 RT 5988–5989.) She was "distraught, tearful, emotional" as she answered questions. (21 RT 5995.)

It would be very difficult for her to consider LWOP in a case where two children were murdered; "children are innocents of this world, and crimes against them, there's no reason for it." (21 RT 5991.) It would be "very hard" for her to keep an open mind or to consider someone's background; "I want to say that I can keep an open mind, but I can't say

that." (21 RT 5991–5992.) After questioning by the court, she indicated that she could listen to all of the facts and weigh them. When asked if she would be able to be fair and impartial, she said she would do her best (21 RT 5993–5994.)

Appellant challenged her for cause. The court did not find that she was disabled from being able to carry out the court's instructions in a penalty phase. (21 RT 5995.) The court added that perfectly impassive jurors are not the ideal: the notion of the murder of children "is about as appalling as you can get. And the fact that people have a strong reaction to that makes them normal in my view." (21 RT 5996.)

### 5. Prospective Juror Roland Garza (21 RT 5999)

Mr. Garza worked for the Public Works Department of Napa County, and had known the judge for more than a decade. He stated in his questionnaire that he thought people who kill children, or who killed more than one person should be automatically killed. He also believed in the religious principle of "an eye or an eye," but said that he could follow the law as instructed. He said in his questionnaire that he would not consider material regarding a defendants background; the only kind of background material that might influence him that he could name was evidence of self-defense. (21 RT 6007–6008.)

Appellant challenged him for cause. (21 RT 6009.) The trial court found that he "didn't have any disposition one way or the other about any of the important issues that are before the case," and denied the motion. (21 RT 6010.)

### 6. Prospective Juror Arlene Phillips (22 RT 6157)

Ms. Phillips favored the death penalty. She said, however, that she could keep an open mind about penalty but was not sure if she could avoid her tendency to form an opinion quickly. (22 RT 6161.) She just couldn't see someone taking another person's life, let alone multiple lives, regardless of what their background might be. (22 RT 6162.) She was not at all sure that she could consider any penalty other than death in a crime like the one at bench. (22 RT 6163–6164.)

She worked as an administrative secretary for the Napa police chief. (21 RT 6164.) That fact would make it a little difficult for her to be fair and impartial, and might prejudice her. (22 RT 6166–6167.) She had a five-year-old grandson, and thought that would make it especially difficult for her to consider evidence in mitigation. (22 RT 6169.)

Appellant challenged her for cause. (22 RT 6170.) The trial court recognized that she wanted out of the case, but that was not a disqualifying characteristic; court found that the fact that she resisted questions designed

to get her to say there was only one real possibility meant that she was not impaired. (22 RT 6172.)

### 7. Prospective Juror Walt Hoyer (22 RT 6271)

Mr. Hoyer was a correctional officer who had worked in San Quentin on Death Row eight months earlier. (22 RT 6273.) He initially said he could consider either LWOP or death, but when given outline of the case, he said he would not consider LWOP. (21 RT 6274.) After being questioned by the prosecutor, he said he really needed to know more about the law, and eventually said that he would consider evidence of personal background. (22 RT 6275, 6277.) He indicated that he would be about as fair a jury as the defendant could get. "But for the defendant, you know, that's not what he's probably looking for, to be honest with you." (21 RT 6278.)

Appellant challenged him for cause. (22 RT 6279.) The challenge was denied. (22 RT 6281.)

### 8. Prospective Juror Debra Strup (23 RT 6341)

Ms. Strup definitely leaned towards the death penalty. (23 RT 6345.) She recognized that it was a more complicated issue now that she was a prospective juror. However, she affirmed in voir dire her questionnaire answers that if a person has been proven beyond a doubt to have killed a

child, killed more than one person, or killed any other human being intentionally, then death is the appropriate punishment—"I guess I have a real problem with having people in jail without parole and the taxpayers paying for it." (23 RT 6347.)

In response to another question about her willingness to sentence the defendant to LWOP, she again said, I have a really, really hard time with paying for someone who really does not show the possibility of becoming productive in society." (23 RT 6349.)

When questioned by the court, Ms. Strup felt she could impose a sentence of life in prison, and she promised that she would follow all instructions about what kinds of evidence may and may not be considered in deciding between penalty choices. (23 RT 6351.)

Appellant challenged Ms. Strup for cause. After argument, the court denied the challenge. (23 RT 6354–6355.)

### 9. Prospective Juror Robert Pepi (23 RT 6383)

Based on what he had read about the case (multiple victims, including two children), Mr. Pepi said that suspension of judgment may be difficult. (23 RT 6384.) He added that he would listen and analyze the information, but "I guess in the back of my mind being the severeness of this murder case I probably would have made up my mind already that it

would be a death penalty." (23 RT 6386.) He later told the prosecutor, "if he had – the person murdered someone, and it was – he was found guilty of that, his previous life would have nothing to do with the decision for me." (23 RT 6386.)

When questioned by the court, he said that "if would be hard for me not to vote for the death penalty. If it was a choice between life in prison without possibility of parole or death penalty I think I'd have to go with the death penalty." (23 RT 6389.)

Mr. Pepi equivocated a bit when the court talked about possible penalty phase evidence, but repeated that "I still believe in an eye for an eye and a tooth for a tooth." (23 RT 6390–6391.) He added that he would try to be fair; it was "not impossible" that he would render some other judgement than death. However, when asked by counsel for appellant if he could "consider background information about the defendant in considering whether or not you would impose a sentence other than death," he replied,

> Well, I think I answered that question before. That I – that I think I said that I wouldn't consider under the circumstances where the murder was cold-blooded. I don't think I could consider what type of person he was before he did I. Is that what you want to know?
>
> Q. Yes. And your answer is still the same?

A. Yes.

(23 RT 6394.)

Appellant challenged him for cause. The court heard him as saying he would reserve final determination until he had heard and evaluated the evidence, and denied the challenge. (23 RT 6398.)

**10. Prospective Juror William Allen (23 RT 6586)**

Mr. Allen was a death penalty supporter. (23 RT 6586.) After the two-phase process was explained to him, counsel for appellant asked him about his answers on the questionnaire. He stated that in light of evidence showing the murder of two minor children, life without possibility of parole would not be an option for him. (23 RT 6392.) He related that it was his "true feeling" that anyone who kills a child should be automatically put to death. (23 RT 6593.)

The trial court then gave him two options: one being that it doesn't matter at all what the evidence in aggravation or mitigation might be, I already know how I'm going to vote, and a second option: "I have to tell you in fairness, I look at it at this point like a death penalty case, but I'm going to listen to the aggravating and mitigating evidence, and it's not impossible that I would vote for life without possibility of parole, but I have to tell you that I think that is unlikely." (23 RT 6599.) Mr. Allen went with

the latter. It was for that reason that appellant's challenge for cause was denied, despite appellant's protestations that the "not impossible" standard was not acceptable. (23 RT 6599, 6603.)

### 11. Seated Juror 100062101

This seated juror stated on her questionnaire that he was a death penalty supporter: "if a person takes a life, his or hers should also be taken. There can be no chance then that a person can get out . . . murder is murder. There is no other kind." (24 RT 6653.) Counsel questioned her about her answers as follows:

> [Y]ou had some strong feelings about who should automatically be put to death, and it said -- the question was, quote, "Do you feel that the State of California should automatically put to death anyone who:" and then you answered yes to "Is convicted of murder;" yes to "Intentionally kills another human being;" yes to "Who murders more than one person;" a yes to someone who "Randomly kills someone for no apparent reason;" and yes to someone who "Kills a child," end of quote. Is that your belief as you sit here today?
>
> A. Yes.

(24 RT 6654.)

The juror then stated that she did not exactly mean that she was automatic on death for every murderer, but she could not think of any type of murder that might warrant a sentence of less than death, because of the possibility that they would be released from prison. (24 RT 6655.) She said

she would be able to consider the LWOP option, but she still thought that people with an LWOP sentence could be released. (24 RT 6655–6656.) Counsel challenged her as substantially impaired. That challenge was denied. (24 RT 6659–6660.)

### 12. Prospective Juror Jowell Sallee (24 RT 6820)

Mr. Sallee told the court he could wait until the penalty phase began to decide on an appropriate penalty, but when the court asked him if the prosecutor succeeded in proving that appellant murdered four people, including two children, he stated, "I've got very strong opinions about children being involved, and I don't think I would wait to the second phase to decide." (24 RT 6824.) He did not believe in "blaming things you do on your childhood"; he had a rough childhood. He also did not believe in life imprisonment, which is "a half-measure." (24 RT 6827–6830.)

When questioned by the prosecutor, he indicated that he could listen to background information. (24 RT 6831.) But, if a guilty verdict was found, he would not vote for life imprisonment. (24 RT 6835.) The trial court posed an alternative similar to that presented to prospective juror Allen:

> If I'm at the penalty phase of the case and I have found that the District Attorney has proven the defendant guilty of four first degree murders, including the murder of two young children, and we start a penalty phase, I will -- I know now

> that my verdict is going to be the death penalty. And I will listen to whatever happens during the penalty phase, but it's not going to change the fact that the death penalty is going to be my vote." That's option one.
> Option two is the same thing has been proven and you're about to go into a penalty phase. "I'm going to listen to and consider the evidence that comes in during the penalty phase and I'm going to discuss the case with the jurors, and only after all that's happened will I make my final decision. But I need to tell you right now that the murder of four people, including the murder of two children, is in my view very, very serious and sounds like a very strong aggravating factor and I'm not able to really think through in my mind what might be a sufficiently mitigating factor to get me to vote for life without parole.
>
> Are you more like the first or more like the second?
>
> A. The second.

(24 RT 6837.)

On the basis of that answer, the trial court denied appellant's challenge for cause. (24 RT 6839–6840.)

### 13. Prospective Juror Forrest Murray (24 RT 6877)

Mr. Murray's wife worked at the Napa County jail where appellant was housed. (24 RT 6880.) He indicated on his questionnaire that the state should automatically put to death anyone who intentionally kills another human being, or who kills a child, or who kills more than one person. (24 RT 6882.) When given a chance to explain his feelings, he said that if there was no remorse whatsoever and guilt was proved beyond a shadow of

a doubt, then the defendant should be put to death. (24 RT 6884.) Mr. Murray did not think he could consider life without possibility of parole. (24 RT 6885, 6886.) The trial court again presented the same alternatives it presented to prospective jurors Allen and Sallee (24 RT 6890), and got the same answer. Therefore, the court denied appellant's challenge for cause. (24 RT 6894.)

### 14. Prospective Juror William Crowe (27 RT 7236)

Mr. Crowe initially told the court that he would be able to consider all evidence presented at a penalty phase before determining which penalty was appropriate. (27 RT 7237–7238.) But on his questionnaire, he had written, "I have said it before. If a person kills I feel they should also die." He later stated that given the facts of this case as summarized by counsel, death would be the only option. (27 RT 7246–7247.) He expressed particularly strong concerns about rape, and said the presence of a rape charge would affect his ability to deliberate: "With my feelings on rape, there's possibility I could not be fair and impartial." (27 RT 7242.)

Appellant challenged him for cause. The court denied the motion, finding that although many answers in the questionnaire would be disqualifying, his overall voir dire answers and demeanor persuaded the court that he was not impaired. (27 RT 7252.)

### 15. Prospective Juror Ronald Imlay (27 RT 7255)

Mr. Imlay indicated to the court that he was a strong death penalty supporter, but he too, indicated that he would be able to "go through the process" before voting for death or LWOP. (27 RT 7256.) Later, when counsel read to him what he had written on his questionnaire ["I strongly favor the death penalty. I would always vote for death in every case where the defendant were convicted of first degree murder and a special circumstance were found true. And I will not seriously weigh and consider aggravating factors."], and asked him if that was his view, he answered, "Yes it is. Actually, my view. But I would still listen to it and, who knows? If there was some circumstances that did arise that could change my mind, then I would vote for it. But, as such, I don't approve of life in prison without parole for these kinds of crimes." (27 RT 7264–7265.)

Mr. Imlay then told the prosecutor that it was possible that he might change his mind and vote for a sentence of less than death if there were a compelling reason, but he did not know what a compelling reason might be. (27 RT 7265–7266.)

Appellant challenged Mr. Imlay for cause. (27 RT 7266.) After argument, the trial court denied the challenge. (27 RT 7269.)

### 16. Prospective Juror Marion Siegel (27 RT 7428)

When asked by the trial court if she could wait to decide on whether the death penalty was appropriate until after hearing all the evidence, she said, "I feel strongly about children being protected, of course. To be honest, that's a real tough call for me." (27 RT 7430.) She indicated on her questionnaire that images of graphic violence might make it hard for her to focus, and expressed concern over being a juror because, she wrote, "I would have to experience – and she underlined experience – the entire extent of the crime, including the killing of the children and their mother." (27 RT 7431–7432.) Appellant's challenge for cause was denied. (27 RT 7433.)

### 17. Conclusion

Thus, numerous persons were allowed to remain on the venire despite having expressed strong pro-death views that would have substantially impaired their ability to follow the court's instructions and their oath. A review of their entire voir dire leaves the "definite impression" that the jurors discussed above were so strongly in favor of the death penalty that their ability to follow the law was substantially impaired within the meaning of *Witt*. Appellant's death sentence must therefore be set aside. (*People v. Coleman*, *supra*, 46 Cal.3d 749.)

### D. Failure of Appellant to Exercise All His Peremptory Challenges Does Not Preclude a Decision on the Merits of His Jury Challenge.

The fact that counsel chose not to exhaust his peremptory challenges does not preclude review of *Witherspoon/Witt* issues. "[T]he existence of unused peremptory challenges strongly indicates defendant's recognition that the selected jury was fair and impartial." (*People v. Davis* (2009) 46 Cal.4th 539, 581.) The rule, however, is not iron-clad. There is nothing in this record to support a belief that appellant was satisfied with his jury.

When the jury was selected, the prosecutor had exercised nine peremptory challenges[45] and the appellant had exercised 10 peremptory challenges, five of whom he had challenged for cause.[46] There were 49 venirepeople left in the audience. Counsel had exercised peremptory challenges to remove five pro-death jurors who should have been removed for cause, leaving one of them on the panel and 10 more in the pool.

Counsel was faced with an intolerable Hobson's choice. If, because of his dissatisfaction with the juror in the box, he continued to exercise his peremptory challenges, he would incur a substantial risk (10/49, or more

---

[45] Burkeholder, Anderson, La Liberte, Edenborough, O'Neill, Marcaurele, Gehb, Rew, Hagler.

[46] Flo, Dejesus, Hoyer, Allen, Phillips, Hogan, Murray, Thompson, Owen, Kesselring.

than one in five) of drawing death-biased jurors remaining in the audience —and perhaps losing a juror or jurors he liked. Should this scenario occur, counsel would be in a worse position. Under these circumstances counsel's choice not to use all of his peremptory challenges could have been a reasonable tactical choice, an effort to protect desirable jurors while seeking to avoid the seating of pro-death jurors who should have been excused. (*People v. James Johnson* (1989) 47 Cal.3d 1194.)

Here, the high number of potential jurors who were substantially impaired remaining in the pool meant that appellant was forced to go to trial with one substantially impaired juror (100062101), lest he lose a favorable juror, and have the next jurors called be as bad or worse than those who sat in judgment on him.

In *Gray v. Mississippi*, *supra*, 481 U.S. 648, the United States Supreme Court refused to uphold a conviction by engaging in speculation as to how unused peremptory challenges might have been exercised had the trial court not erred during jury selection. In *Gray*, the trial court erroneously granted the prosecutor's challenge to prospective juror Bounds based on her opposition to capital punishment. The state argued on appeal that the error was harmless because the prosecutor had additional peremptories that could have been used on the prospective juror if the

challenge for cause had not been erroneously granted. Thus, the state argued that the prospective juror would have been removed from the panel regardless of the error.

The high court rejected this argument:

> The unexercised peremptory argument assumes that the crucial question in the harmless-error analysis is whether a particular prospective juror is excluded from the jury due to the trial court's erroneous ruling. Rather, the relevant inquiry is "whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error" (emphasis in original). *Moore v. Estelle*, 670 F. 2d 56, 58 (CA 5) (specially concurring opinion), *cert. denied* 458 U.S. 111, 73 L. Ed. 2d 1375, 102 S. Ct. 3495 (1982). Due to the nature of trial counsel's on-the-spot decisionmaking during jury selection, the number of peremptory challenges remaining for counsel's use clearly affects his exercise of those challenges. A prosecutor with fewer peremptory challenges in hand may be willing to accept certain jurors whom he would not accept given a larger reserve of peremptories.

(*Gray v. Mississippi*, *supra*, 481 U.S. at pp. 664–665.)

The Court in *Gray* also cited with approval the specially concurring opinion on motion for reconsideration in *Blankenship v. State* (Ga. 1981) 280 S.E. 2d 623, 624 "demonstrating that the unexercised peremptory harmless-error approach is inappropriate because in the jury selection process there are too many variables which may give rise to the non-use of a peremptory challenge.'" (*Gray v. Mississippi*, *supra*, 481 U.S. at 664, fn. 15.)

This dynamic of jury selection was discussed by this Court in *People v. James Johnson, supra*, in language particularly appropriate to appellant's case. In *Johnson,* the Court considered the continued viability of the practice of comparing the stated reasons for *Wheeler*-challenged excusals with similar characteristics of nonmembers of the group who were not challenged by the prosecutor. This Court concluded that the use of a comparison analysis to evaluate the bona fides of the prosecutor's stated reasons for peremptory challenges fails to take into account the variety of factors that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar.

The process of selecting a jury is complex, the Court noted: the particular mix a lawyer seeks sometimes changes as certain jurors are removed or seated in the box. The Court concluded that "the very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror which on paper appears to be substantially similar." (*People v. Johnson, supra*, 47 Cal.3d at pp.1220–1221.)

This recognition of the dynamic and delicate nature of jury selection was reiterated in detail by this Court in *People v. Johnson, supra,* 30 Cal.4th at p. 1313. It illustrates the illogic of equating the non-use of peremptory

challenges with absence of prejudice to the defendant from the trial court's error in failing to grant challenges for cause. Here, as noted, at the time he accepted the 12 jurors in the box, defense counsel was looking out on a venire on which 10 jurors remained who were worse than those in the box. For several reasons, counsel may well have felt that he was better off accepting the 12 jurors in the box, despite his dissatisfaction.

Had the remaining venire not been contaminated with pro-death jurors who should have been excused for cause, counsel might have felt free to continue to exercise peremptory challenges until he arrived at a jury truly to his satisfaction. That he was not in a position to do so because of the trial court's errors, should not in fairness now be used to sanitize that error of prejudice and infer that he was satisfied with the seated jury.

In *People v. Coleman, supra*, 46 Cal.3d 749, 770–771, this Court concluded that California law requires that the defendant must exhaust all peremptory challenges before he or she may complain on appeal of the composition of the jury. See also *People v. Whalen* (2013) 56 Cal.4th 1, 41–42, citing *People v. Crittenden* (1994) 9 Cal.4th 83, 121:

> As a general rule, a party may not complain on appeal of an allegedly erroneous denial of a challenge for cause because the party need not tolerate having the prospective juror serve on the jury; a litigant retains the power to remove the juror by exercising a peremptory challenge. Thus, to preserve this claim for appeal we require, first, that a litigant actually

> exercise a peremptory challenge and remove the prospective juror in question. Next, the litigant must exhaust all of the peremptory challenges allotted by statute and hold none in reserve. Finally, counsel (or defendant, if proceeding pro se) must express to the trial court dissatisfaction with the jury as presently constituted.

(*Whalen*, 56 Cal.4th at pp. 41–42.)

The Court's analysis in *People v. Johnson*, *supra*, 47 Cal.3d at pp. 1220–1221, concerning the dynamic nature of the process of exercising peremptory challenges, however, undermines these rigid views, which assume that had defense counsel been unsatisfied with any of the jurors in the box at the time he accepted the jury, he could have exercised one of his remaining peremptories; it does not discuss or acknowledge the potential strategical dangers of this approach. (46 Cal.3d at p. 771.)

Presumably, the Court's recognition in *Johnson* of "the very dynamics of the jury selection process" (46 Cal.3d at p. 1221), carries with it the understanding that if those prospective jurors remaining in the courtroom—some of whom remain because of the trial court's erroneous failure to excuse them for cause—appear to be worse, the lawyer may elect to accept the jury as constituted in order to avoid exhausting peremptories and being "forced to go to trial with a juror who exhibits an even stronger bias" than those seated. (*Id.* at p. 1220; see also, *Ross v. Oklahoma*, *supra*,

487 U.S. at p. 89 [101 L.Ed.2d at p. 92] (dis. opn. of Marshall, J. joined by Brennan, Blackmun, and Stevens, JJ.).)

Moreover, *Crittenden and Coleman* appear to overlook the high court's directive in *Gray v. Mississippi*, *supra*, that the crucial question is not whether a particular prospective juror is excluded or included due to the trial court's erroneous ruling, but rather "'whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error.'" (481 U.S. at p. 665.) The Court has recently recognized that there may be cases in which it is inappropriate to assume that counsel was satisfied with the jury if peremptory challenges remained. (See *People v. Mills* (2010) 48 Cal.4th 158, 189.)

### E. Errors in Denying Appellant's Challenges for Cause Were Prejudicial.

"To prevail on a claim that the court erroneously denied a challenge for cause, however, the defendant must show '"that the court's rulings affected his right to a fair and impartial jury."'" (*People v. Clark* (2011) 52 Cal.4th 856, 895.) This Court observed in *People v. Guerra* (2006) 37 Cal.4th 1067, 1099, that "because [the defendant] did not challenge any sitting juror for cause, he cannot show the court's rulings affected his right to an impartial jury. [Citations.] Accordingly, even were his argument sound on the merits, defendant would not be entitled to relief." Here, one of

the seated jurors (No. 100062101) had been challenged for cause and should have been dismissed. Appellant was not sentenced by an impartial jury. His conviction and death sentence should therefore be set aside.

### F. Deborah Brace, A Life-Prone Juror, Was Wrongly Excused

Exclusion for cause of a prospective juror from serving on a capital jury when that juror is in fact qualified to serve is per se reversible error—even when the defendant has unused peremptory challenges. (*Gray v. Mississippi*, *supra*; *People v. Riccardi* (2012) 54 Cal.4th 758, 783.)

The prosecutor's challenge for cause of Deborah Brace was opposed by appellant, and granted by the trial court. (23 RT 6366.) Ms. Brace did say that she could not vote for the death penalty in this case. (See 23 RT 6359–6360, 6364.) However, she also indicated that her overriding consideration was the necessity of following the law. See extensive discussion of juror challenges in *People v. Manibusan*, *supra*, 58 Cal.4th at pp. 61–75, especially the following exchange of the trial court with a pro-death juror:

> "The court then asked, 'If I were to tell you the law says you need to consider certain things, would you say I'm not going to consider them, no matter what, Judge?' The prospective juror replied, 'Well, no. If that's the law, then I would consider it. But that's just off the top of my head.' To confirm the prospective juror's position, the court asked, 'Then you

would follow that law?' The prospective juror replied, 'Yeah.'"

(*People v. Manibusan*, *supra*, 58 Cal.4th at p. 68.)

When asked if she could ever find circumstances so aggravating that a death sentence would be appropriate, Ms. Brace replied, "I mean is it my right to be able to vote no? I mean I just couldn't do that. I couldn't in my heart. That's—*I couldn't unless that was the law. Because the law says if the evidence is—if the evidence was there, and that was something I had to do, then I guess I would have to do it.*" (23 RT 6362; emphasis added.) When the trial court questioned her, it presented her with a hypothetical case probing to see if there were any circumstances in which she could vote for death, but did not ever ask her if her repugnance against the death penalty was stronger than her belief that regardless of her own convictions, she had to follow the law. It was reversible error for Ms. Brace, a person whose respect for the law was stronger than her own feelings about the propriety of the death penalty, to be dismissed for cause. This error requires that appellant's convictions and death sentence be set aside. (*Gray v. Mississippi, supra.*)

## V. THE PATTERN OF SHODDY AND INACCURATE INTERPRETIVE AND TRANSLATION ASSISTANCE AND SERVICES VIOLATED APPELLANT'S STATE AND FEDERAL RIGHTS TO A FAIR TRIAL BASED ON RELIABLE EVIDENCE AND TO BE PRESENT AT HIS TRIAL, AND REQUIRE REVERSAL.

Beginning with the use of a non-certified and unsworn witness interpreter during the preliminary examination, and continuing throughout the trial, a pattern of poor, shoddy, incompetent and unreliable interpretive access effectively kept appellant in the dark, and violated his state and federal constitutional rights to due process of law, the right to be present during his trial, the right to confront witnesses against him, and the right to a reliable factfinding process and sentence as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

Article I, section 14 of the California Constitution provides "[a] person unable to understand English who is charged with a crime has a right to an interpreter *throughout the proceedings*." (Emphasis added.) In *People v. Aguilar* (1984) 35 Cal.3d 785, this Court (construing the "throughout the proceedings" language) noted:

> "Interpreters play three different but essential roles in criminal proceedings: '(1) They make the questioning of a non-English-speaking witness possible; (2) they facilitate the non-English-speaking defendant's understanding of the colloquy between the attorneys, the witness, and the judge; and (3) they enable the non-English[-]speaking defendant and his English-speaking attorney to communicate . . . [A]n

> interpreter performing the first service will be called a "witness interpreter," one performing the second service, a "proceedings interpreter," and one performing the third service a "defense interpreter."' (Chang & Araujo, Interpreters for the Defense: Due Process for the Non-English-Speaking Defendant (1975) 63 Cal.L.Rev. 801, 802. . . .) While the three roles are interrelated they are distinct.
>
> "The defendant's right to understand the instructions and rulings of the judge, the questions and objections of defense counsel and the prosecution, as well as the testimony of the witnesses is a continuous one. At moments crucial to the defense-when evidentiary rulings and jury instructions are given by the court, [and] when damaging testimony is being introduced-the non-English-speaking defendant who is denied the assistance of an interpreter, is unable to communicate with the court or with counsel and is unable to understand and participate in the proceedings which hold the key to freedom."

(*Aguilar*, *supra*, 35 Cal.3d at pp. 790–791, fn. omitted.)

It is axiomatic that the Sixth Amendment's guarantee of a right to be confronted with adverse witnesses, *Pointer v. Texas* (1965) 380 U.S. 400, includes the right to cross-examine those witnesses as an "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." (*Id.* at p. 405; see also *Bruton v. United States* (1968) 391 U.S. 123, 128; *Barber v. Page* (1968) 390 U.S. 719, 725; *Douglas v. Alabama* (1965) 380 U.S. 415, 418; *Mattox v. United States* (1895) 156 U.S. 237, 242–243.)

But the right to interpreters is as consequential than the right of confrontation. Considerations of fairness, the integrity of the fact-finding process, and the effectiveness of our adversary system of justice forbid that the state should prosecute a defendant who is not present at his own trial (see, e.g., *Lewis v. United States* (1892) 146 U.S. 370, 372), unless by his conduct he waives that right. (*Illinois v. Allen* (1968) 397 U.S. 337.) And it is equally imperative that every criminal defendant—if the right to be present is to have meaning—possess "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." (*Dusky v. United States* (1962) 362 U.S. 402.) Otherwise, "the adjudication loses its character as a reasoned interaction * * * and becomes an invective against an insensible object." (Note, *Incompetency to Stand Trial* (1969) 81 Harv. L.Rev. 454, 458; see *United States ex rel. Negron v. State of New York* (2d Cir. 1970) 434 F.2d 386, 389.)

Not every alleged impropriety involving interpreters rises to the level of a constitutional violation. (*People v. Superior Court (Almaraz)* (2001) 89 Cal.App.4th 1353, 1357–1360.) Reversal will not be required if the infringement was harmless beyond a reasonable doubt. (*People v. Rodriguez* (1986) 42 Cal.3d 1005, 1010–1014.)

### A. An Unsworn and Uncertified Interpreter Was Used to Interpret for the State at Appellant's Preliminary Hearing.

The court used interpreter Ximena Oliver to interpret for surviving victim Yolanda Martinez during the preliminary examination, based on the prosecutor's representation that Ms. Oliver was a court-certified interpreter. She was not. She had failed the test. The court also failed to swear Ms. Oliver. (1 CT 139, 151, CT 165–204; specifically CT 177 et seq.; see also 1 CT 241 et seq; 2 RT 383 et seq, 2 RT 456, 461, 472, 483; 3 RT 655.)

There were numerous problems identified in Ms. Oliver's translations. (See, e.g., 2 RT 470–471 [counsel quotes interpreter saying effectively that Yolanda does remember having the rope placed around her neck, when her actual testimony in Spanish was that she does *not* remember; Yolanda says that she orients herself where the stalls are, interpreter says she orients herself where the highway is.].)

These errors violated the federal rights identified above, and the *Aguilar* constellation of rights since appellant has a right to the use of a certified, sworn interpreter per *Aguilar* (state constitutional right to separate certified witness interpreter), and California Rules of Court, rule 984.2(d) and (e). No good cause would have excused this requirement.

This issue was presented to the trial court as part of appellant's section 995 motion. (1 CT 168–193.) Prejudice was restricted to the preliminary hearing, and could have been cured by subsequent trial testimony. Even if the trial court had granted appellant's motion to dismiss, the prosecutor could have refiled the case. However, this incident is part of the pattern of poor, shoddy, incompetent and unreliable interpretive access that pervaded the entire trial.

### B. The Trial Court Erred Prejudicially in Failing to Require Appellant's Presence During Proceedings Regarding the Interpretation of Statements Made by Yolanda Martinez at the Preliminary Examination, and in Utilizing Appellant's Separate, Exclusive, Confidential Interpreter as a Witness Interpreter in Regard to Those Statements and to Settle the Record Rather than Appointing a Supplemental Interpreter.

Prior to evening recess of the first day of the preliminary hearing (Jan. 20, 1999), Yolanda Martinez yelled certain things in Spanish from the witness box, at appellant. (1 RT 244.) The court adjourned proceedings and appellant was removed from the courtroom. However, the court returned a few moments later, reopened the courtroom and reconvened proceedings. The court did not require appellant to be returned to the courtroom for those proceedings nor did it appoint a supplemental interpreter to aid in the interpretation of witness's outburst statements. (See 1 CT 138 et seq.) Instead, it asked appellant's interpreter, Teri Bullington, to assist.

Ms. Bullington was also asked to transcribe and translate witness statements/testimony. (See generally 1 CT 138, 165–204, specifically 191–194; 207 et seq., and 241 et seq.; 1 RT 247–249, 254.)

The issues raised by this incident were presented and argued the next day. The trial court recognized that the cluster of issues before it were "unique." (2 RT 548–549.) The court found that appellant had not waived his right to be present, but also found that under the circumstances, he was not prejudiced. (2 RT 547–548.) The court further found that the drafting of Ms. Bullington did not deprive appellant of his right to a dedicated interpreter, and that again, any error did not prejudice appellant. (2 RT 548.)

### C. The Trial Court Erred in Failing to Appoint a "Check Interpreter."

After the trial was moved to Napa County, the issue of interpreters was discussed. Appellant pointed out that there had been numerous problems with translations and interpreting witness testimony, and suggested that a "check" interpreter be appointed, or an interpreter who would check the translation given by the witness interpreter and inform counsel when it was problematic or wrong. The trial court thought that in absence of material mistranslation, that would be too much; the court did agree to allow a small recorder to be place nearby the testifying witnesses. (15 RT 5138 et seq.)

Appellant later formally moved for the appointment of a check interpreter to assist counsel. The trial court denied his motion in the absence of a showing that interpretation was happening in a "materially inaccurate fashion." (18 RT 5509.)

> The ideal time to question the qualifications of an interpreter is before he is permitted to act [citation], although, if the competence of an interpreter becomes an issue after he commences his duties, it can be raised at that time. [Citation.] When a showing is made, at trial, that an interpreter may be biased or his skills deficient, one solution may be appointment of a "check interpreter." [Citation.]

(*People v. Aranda* (1986) 186 Cal.App.3d 230, 237; see also *People v. Phillips* (1910) 12 Cal.App. 760, 773.)

Counsel were in no position themselves to know when translations were full and accurate, and the issue had been a recurring one. The court's ruling was in error.

### D. Pervasive and Repeated Problems with the Audio Equipment in Both Placer and Napa Counties Prejudicially Interfered with Proper Interpretive Assistance by Both Defense and Witness Interpreters.

In Placer County, there was no microphone on either Yolanda Martinez or the witness interpreter. (2 RT 469 et seq.) In Napa County, there were serious problems in hearing Yolanda's testimony; counsel had difficulty in hearing her, and appellant could not her "at all." (32 RT 8099 et seq.)

There were numerous instances of problems in hearing witnesses or counsel both counties; interpreters often could not hear witness testimony. (See, e.g., 2 RT 228, 269, 303, 331, 404, 468 et seq.; 3 RT 638, 655, 729, 740; 4 RT 824, 859, 887, 1017; 5 RT 1084, 1217, 1264, 1275; 6 RT 1434, 1545, 1587; 7 RT 1623, 1690, 1743, 1767; 8 RT 1891, 1907, 2021, 2038, 2156, 2162, 2184, 2227; 9 RT 2203, 2206, 2227; 10 RT 2455, 2481; 11 RT 2784, 2936–2937; 32 RT 8099 et seq.)

### E. Incorrect, Defective and Misleading Witness Interpretation Prejudiced Appellant's Rights to a Fair Trial Under the Federal and State Constitutions

Examples of incorrect and shoddy interpretation of monolingual witnesses are found throughout this record, particularly in Placer County (e.g., 1 RT 233; 2 RT 331, 470–471)—and in the transcript of appellant's interrogation. Accuracy is required to protect the integrity of the proceedings as well as the defendant's rights. When no defense interpreter is available, it is impossible for the non-English speaking defendant to check the accuracy or competency of the witness interpreter's translation. This breakdown effectively precludes the defense from challenging or impeaching the interpretation rendered, because objection regarding accuracy of the interpretation must be made below. (*People v. Reyes* (1976)

62 Cal.App.3d 53, 70.) Moreover, on review, no transcript of the oral proceedings in the translated language exists.

The interpreter (Frank Valdez) during the July 16, 1998, interrogation of appellant was incompetent, unqualified, and improperly used as interpreter for both the interrogators and appellant, in violation of federal and state constitution rights. Furthermore, the transcription of the tape which was provided to the jury contains additional errors, some of which were substantially detrimental to appellant. Errors included failures to translate at all, or failures to accurately translate, including that part of the interrogation where appellant's understanding of his rights was addressed. (12 RT 3065–3078, 3090.)

The tape of appellant's July 16, 1998, interrogation was played for the jury on April 3, 2001. (42 RT 9770, 9776.) When questioning Michael Bennett, deputy with the Placer County Sheriff's Department ("PCSD") who traveled with appellant back from Long Beach to Auburn and who participated in the questioning, the prosecutor elicited from Deputy Bennett some of the errors in the transcription of the taped interview. See, e.g., 42 RT 9786, where Bennett points to a difference between the transcript and the videotape. On page 36, line 18, starting at the last word of line 17, "I would shoot" should be "I can't shoot." Bennett noticed other errors, and

the trial court confirmed that it had found errors when it read the transcript and watched the tape.

Counsel for appellant brought to the court's attention serious problems in the interpretation by Frank Valdes of appellant's interrogation, particularly with the transcription of English to English words, that is, the words that were recorded were not always the words that were transcribed. (43 RT 9826 et seq.) There were three versions of this transcript, identified as Exhibits 281, 281-A and 281-B. (43 RT 9828.) There were errors in every direction, sometimes made by Mr. Valdez in his interpretation, sometimes made in the transcription of correct interpretations. (43 RT 9828–9831.)

On April 9, 2001, appellant moved for a mistrial because of the substantial errors in the transcript of that interview, which was provided to the jury to accompany their viewing of the interrogation. He listed several mistakes, including a couple that the trial court recognized as dangerously wrong and would cast a misplaced air of sadism over appellant's activities. (45 RT 9927–9930.)

The court recognized the gravity of the errors, but found that the errors could be corrected, and that the jury would be warned that the transcript was not evidence. On that basis, appellant's motion for a mistrial

was denied. (45 RT 9933.) The court later told the jury that the transcript was intended to be an aid to the jury in following the tape, but was not itself evidence. (45 RT 9952.)

The trial court's ruling was error. A motion for mistrial should be granted if there is prejudice that cannot be cured by instruction or jury admonition. (*People v. Haskett* (1982) 30 Cal.3d 841; *People v. Jenkins* (2000) 22 Cal.4th 900, 985; *People v. Hines* (1997) 15 Cal.4th 997, 1038.) The translation available to the jury when it watched the interrogation (The videotape was played for the jury on April 3, 2001, see 42 RT 9776) was one that was filled with prejudicial errors. The trial court's subsequent warning to the jury that it was not evidence and should only be used as a guide did not unring the bell of damaging mistranslations that accompanied the jury's viewing of the videotape. Appellant's mistrial motion should have been granted.

### F. The Cumulative Effect of Translation Errors and Omissions was to Deny Appellant a Fair Trial.

In *United States v. Cirrincione*, the court held:

> We hold that a defendant in a criminal proceeding is denied due process when: (1) what is told him is incomprehensible; (2) the accuracy and scope of a translation at a hearing or trial is subject to grave doubt; (3) the nature of the proceeding is not explained to him in a manner designed to insure his full comprehension; or (4) a credible claim of incapacity to understand due to language difficulty is made and the district

> court fails to review the evidence and make appropriate findings of fact.

(*United States v. Cirrincione* (7th Cir. 1985) 780 F.2d 620, 634.)

This list of interpretive and mistranslation problems constituted reversible error as a general denial of due process and a denial of the right to be truly present at one's trial. (780 F.2d at p. 634.) The same result should be reached in this case.

## VI. ENTRIES INTO APPELLANT'S YARD AND RESIDENCE ON JULY 12 AND 13, 1998, WERE ILLEGAL, AND THE ADMISSION OF THE FRUITS OF THAT ILLEGALITY PREJUDICED APPELLANT.

### A. Factual and Procedural Background

#### 1. The Warrantless Searches at the Parnell Ranch

On July 12, 1998, about 9:15 p.m., Deputies Owens, Murchison and Walker were dispatched to the Parnell Ranch regarding the assault on Yolanda Martinez. When they spoke with her they learned that her children, husband and brother-in-law were missing. Officers determined the suspect to be appellant, who lived in a mobile home/trailer in an enclosed yard on the ranch. Deputies Walker and Reed entered appellant's trailer shortly thereafter, with guns drawn; Walker testified that information he received from dispatch was that appellant was coming back to the trailer. (1 RT 67–68, 88; 3 RT 730–731, 765, 770–771.)

Detective Summers testified that he and Deputy Officers Reed, Ferreira and Thomas, on foot and without a warrant, and accompanied by a K-9, searched all of the buildings, outbuildings, residences, ponds and a neighboring farm. Nothing was seized during these searches. (3 RT 736–737, 740.)

Deputy Reed later made a second warrantless entry into appellant's trailer and removed two long rifles from inside: a .22 caliber rifle found

under the bed in the living room, and a .30-06 bolt-action rifle with a scope located above the bed in the living room. (1 RT 88.)

Around 11:45 p.m., sheriff's detectives arrived and took charge. Detective Summers testified that he and Deputy Owens also entered appellant's trailer with guns drawn; "It's always possible that the suspect could return." (4 RT 851.) Without a warrant, Detective Summers and Deputy Owens entered and searched appellant's trailer. Summers noticed a number of items of evidence. He picked up and examined a dark-colored checkbook cover from which he seized two twenty-dollar bills, a five-dollar bill, several one-dollar bills and a driver's license in the name of Jose Luis Martinez. He also seized from interior locations several letters, official documents and personal papers that belonged to appellant. Appellant's residence was then secured with crime scene tape. (2 CT 391.)

Detective Summers then searched the vehicle belonging to Jose and Yolanda Martinez, without a warrant. At this point he interviewed Randy and Julie Parnell, and at approximately 2:00 a.m. on July 13, 1998, an all points bulletin was issued for appellant's arrest. (1 RT 115, 168; 4 RT 859.)

### 2. The Warrant and Subsequent Searches at the Parnell Ranch

At 12:45 p.m. on July 13, 1998, fifteen and one-half hours after the initial dispatch, Detective Carrington obtained a warrant signed by Judge

Francis Kearney. Carrington signed the affidavit which contained information for which there was no identifying source and information gleaned during the warrantless entries into appellant's yard (curtilage) and trailer. The affidavit provided no probable cause for a search of appellant's yard; its scope was limited to the trailer itself. (2 CT 407 et seq.)

Around 1:30 or 2:00 p.m. on July 13, 1998, Detective Carrington entered appellant's trailer and conducted a search. She did not provide knock-notice. She removed items of evidence. She searched the yard and removed items from it. (4 RT 945, 1045.)

### 3. The Warrantless Search of Apartment Where Appellant Was Arrested

On July 15, 1998, a large number of FBI agents and Long Beach police officers arrested appellant at the apartment of Maria Josefina Torres Yanez. She provided a voluntary written "consent" in Spanish to search her apartment after he was arrested. She told agents about a white-colored Mervyn's shopping bag in the closet across from the front door of the apartment, which was confiscated along with a cream-colored cowboy hat hanging from the wall in the living room which Josefina identified as appellant's. The agents searched the shopping bag and removed its contents. They had no warrant. (4 RT 979–986.)

### 4. Motion to Suppress

Appellant filed a motion to suppress evidence seized pursuant to section 1538.5 on August 19, 1999. (2 CT 388 et seq.) An opposition to the motion was filed on August 27, 1999. (2 CT 469 et seq.) Testimony was taken on September 1–3, 1999, and September 22, 1999. (3 RT 636–5 RT 1092.) The prosecution filed supplemental points and authorities on September 15, 1999, highlighting the theory that appellant had abandoned the property by his flight from the crime scene, thereby waiving any reasonable expectation of privacy, (2 CT 538 et seq.), and on September 20, 1999, addressing the issue of knock-notice. (3 CT 573 et seq.) A supplemental brief was filed by appellant on September 27, 1999. (3 CT 624 et seq.)

Argument was held on September 28, 1999. (5 RT 1112–1154.) The trial court then denied appellant's motion to suppress all evidence seized. (5 RT 1164–1175; 3 CT 655.) On April 2, 2001, appellant sought to renew the motion in Napa County on grounds that testimony from deputy Stewart had not been considered in Placer County, and changed the picture available to Judge Couzens. The trial court ruled that the new information "does nothing to undercut the ruling itself that the defendant had abandoned anything he had any ownership interest in or any possessory right respecting

or any expectation of privacy," and there was therefore no need for a renewed hearing pursuant to section 1538.5. (8 CT 2272, 33 RT 8328; 42 RT 9816–9817.)

In ruling on a motion to suppress, the trial court is charged with (1) finding the historical facts; (2) selecting the applicable rule of law; and (3) applying the latter to the former to determine whether or not the rule of law as applied to the established facts has been violated. (*People v. Ayala* (2000) 24 Cal.4th 243, 279.) On appeal, this Court reviews the trial court's resolution of the first inquiry, which involves questions of fact, under the deferential substantial-evidence standard, but subjects the second and third inquiries to independent review. (*People v. Parson* (2008) 44 Cal.4th 332, 345.)

The trial court's ruling was in error. First, the exigency that existed when the authorities first appeared on the Parnell ranch no longer justified warrantless searches and seizures after the first search. Second, the search pursuant to warrant was unlawful because the warrant was derived from hearsay information about subsequent illegal searches, and was not valid. Third, the notion that appellant lost all reasonable expectation of privacy in his curtilage of his residence, his residence, and his property because he ultimately fled was stretched to the point that any criminal fleeing the scene

of a crime would retrospectively lose his rights to privacy and standing to complain that his rights were violated. The evidence seized by the illegal searches must be suppressed.

### B. The Warrantless Entries into Appellant's Yard and Trailer on July 12 and 13, 1998, Were Presumptively Unlawful and Not Excused by any Exception.

"The right to be let alone is the most comprehensive of rights and the right most valued by civilized men." (*Olmstead v. United States* (1928) 277 U.S. 438, 478 (dis. opn. of Brandeis, J.).) Both the state and federal constitutions protects privacy from unreasonable government intrusion. (See *Griswold v. Connecticut* (1965) 381 U.S. 478; Cal. Const., art. I, §§ 1, 7, and 13.)

In order to protect against the hazards of official lawlessness, the Exclusionary Rule serves "as a judicially created remedy designed to safeguard the Fourth Amendment generally through its deterrent effect." (*United States v. Leon* (1984) 468 U S. 897, 905.) The Exclusionary Rule bars the introduction of evidence obtained in violation of the Fourth Amendment in criminal proceedings (*Wolf v. Colorado* (1949) 338 U.S. 25) against a defendant who had a reasonable expectation of privacy enveloping the illegally obtained evidence. (*Katz v. United States* (1967) 389 U.S. 347; *Mapp v. Ohio* (1961) 367 U.S. 643, 655.)

Appellant had a reasonable expectation of privacy in his home and the areas within the curtilage of the home. Only exigent circumstances justify warrantless entry into one's home regardless of the existence of probable cause. (*Payton v. New York* (1980) 445 U.S. 573; *People v. Ramey* (1976) 16 Cal.3d 263; *People v. Ortiz* (1995) 32 Cal.App.4th 286, 291.) There is no "crime scene" exception to the requirement of a warrant. (*Thompson v. Louisiana* (1984) 469 U.S. 17, 21.)

An exigent circumstance is needed for a warrantless entry into one's home regardless of the strength of the probable cause to arrest or the existence of a statute authorizing an arrest. (*Payton v. New York*, *supra*, 445 U.S. at p. 585.) In *People v. Ramey*, *supra*, this Court defined exigent circumstances as "an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence." (16 Cal.3d at p. 276.)

Since the passage of Proposition 8 in California, the federal standard for exclusion must be applied. (*In re Lance W.* (1985) 37 Cal.3d 873, 879.) The federal standard finds a violation of the Fourth Amendment and requires exclusion of the evidence if the search and seizure were objectively

unreasonable. (*Scott v. United States* (1978) 436 U.S. 128, 135–136; *Maryland v. Macon* (1985) 472 U.S. 463, 470–471.)

Where, as here, the claim of exigent circumstances rests on the imminent threat of danger to life and property, the court is to apply an objective test: was the threat so imminent and serious that a reasonable policeman would believe that a warrantless, emergency entry was necessary to save lives and property? The action must be "'prompted by the motive of preserving life or property and [must] reasonably appear[ ] to the actor to be necessary for that purpose.' (*People v. Roberts* (1956) 47 Cal.2d 374, 377 [ ].)" (*People v. Duncan* (1986) 42 Cal.3d 91, 97.)

After the initial search by Deputy Walker and several others turned up nothing, there was no justification for subsequent intrusions without obtaining a search warrant. The police could easily have sealed off the property in question and attempted to obtain a warrant. They chose not to. The subsequent searches were illegal.

Entry into and search of the curtilage of a residence is tantamount to entry into and search of the residence itself. It requires a warrant; it is a *Payton* search. (*Oliver v. United States* (1984) 466 U.S. 170, referring to *Payton v. New York*, *supra*, 445 U.S. 573, 585 [warrant required for

residential search]; see also *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 634; *People v. Edwards* (1969) 71 Cal.2d 1096, 1104.)

The "curtilage" is "the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life. (*Oliver v. United States*, *supra*, 466 U.S. at p. 180.) Once established that the area in issue is part of the curtilage, it matters not whether or not there is any fence at all. (*People v. Thompson* (1990) 221 Cal.App.3d 923, 944, fn. 7.) "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." (*California v. Ciraolo* (1986) 476 U.S. 207, 212–213.)

"[A] warrantless search of a home or its curtilage effected by means of a physical intrusion into the curtilage violates the Fourth Amendment. . . ." (*People v. Stanislawski* (1986) 180 Cal.App.3d 748, 755, citations omitted.) A warrantless search is unlawful. "The presumption of unlawfulness, to be sure, can be rebutted—but the burden rests squarely on the prosecution." (*People v. Ledesma* (1987) 43 Cal.3d 171, 227; see also *People v. Williams* (1999) 20 Cal.4th 119.)

Here, officers entered appellant's residence at least three times after their initial search and prior to obtaining a warrant. To enter the trailer the

officers had to open a gate to a fenced yard, thereby invading (or intruding upon) curtilage of the trailer. Privacy expectations are most heightened in areas immediately adjacent to a private home. (See *Dow Chemical Co. v. United States* (1986) 476 U.S. 227, 235–236.) The exigent circumstances that were present during the first search had dissipated. The subsequent warrantless searches violated appellant's reasonable expectation of privacy.

### C. Deficiencies in the Affidavit in Support of The Search Warrant Issued on July 13, 1998, Render the Subsequent Searches and Seizures Illegal.

The search warrant issued on July 13, 1998, was not valid. Its supporting affidavit is not based on personal knowledge, and is based on uncorroborated hearsay. Additionally, probable cause within the affidavit, if any, is dependent upon information secured during earlier illegal warrantless entries into appellant's yard and trailer, and is the fruit of those illegal entries.

Neither Desiree Carrington (the affiant) nor the magistrate could have reasonably relied upon the sufficiency of the affidavit. Furthermore, the search warrant, by its terms, did not authorize a search of the yard (curtilage) and did not specify with particularity things to be seized from the yard. Any items seized from the curtilage of the residence must be suppressed.

A search warrant may issue only if probable cause has been shown by oath or affirmation. (U.S. Const, 4th Amend., Cal. Const, art. I, § 13; § 1525.) Unlawful police conduct does not provide the basis for a later search warrant. (*People v. Roberts* (1956) 47 Cal.2d 374, 377.) This is so even where the fruits of that unlawfulness do not appear on the face of the affidavit; to be valid, an affidavit must be supported by lawfully obtained information. (*Murray v. United States* (1988) 487 U.S. 533, 542.)

Hearsay statements in an affidavit do not establish probable cause for issuance of a warrant unless the affidavit, on its face, provides a substantial basis of crediting that hearsay. (*Jones v. United States* (1960) 362 U.S. 257, 270; *People v. Superior Court (Bingham)* (1979) 91 Cal.App.3d 463, 472–475.)

In her affidavit in support of the search warrant, Detective Desiree Carrington relied solely on the information supplied to her by Detective Summers, which in turn was based upon Deputy Reed's and Detective Summer's illegal entries into appellant's home on July 12, 1998. (See affidavit, attached as Exh. A to appellant's first motion to suppress evidence, at 2 CT 408–415.)

Since the observations and items of evidence listed were obtained during these illegal entries, these observations and items of evidence must

be excised from the search warrant affidavit to determine if probable cause still exists for obtaining a search warrant. "[T]he reviewing court must excise all tainted information but . . . must uphold the warrant if the remaining information establishes probable cause." (*People v. Weiss* (1999) 20 Cal.4th 1073, 1081 [applying *Franks v. Delaware* (1978) 438 U.S. 154, 171–172].) When this affidavit is stripped of the illegally secured observations and references, it fails to establish probable cause for any search.

### D. There Was No Abandonment of His Home by Appellant That Removed His Reasonable Expectations of Privacy.

The prosecution filed new documents on September 20, 1999, stating that appellant's flight "constituted abandonment of the trailer, and in turn, a relinquishment of any and all reasonable expectation of privacy regarding the search of the trailer." (2 CT 548.)

The only case the state relied on below for this point was *United States v. Levasseur* (2nd Cir. 1987) 816 F.2d 37, which is patently distinguishable and completely inconsistent with the "exigent circumstances" argument initially relied on by the prosecutor to justify warrantless searches.

In *Levasseur*, the defendants were the objects of an intensive nationwide search for approximately 10 years. They successfully eluded law

enforcement authorities during that period by adopting aliases and living "underground." The Agents were aware of those facts. Defendants were also aware that law enforcement officers had just surrounded another house and arrested colleagues there, and of later discovery of evidence that defendants had settled in another state within days of arrests of colleagues. Although there was information discrediting an informant not included in the affidavit,

> [M]ore than thirty paragraphs in the Cross Affidavit recited detailed information, not obtained from [the informant] about the appellants' criminal activities, about previous discoveries of weapons, ammunition, dynamite and other materials at houses abandoned by the appellants, and about the then-recent sightings of explosives, weapons, and other evidence in the particular places to be searched. . . . Those paragraphs provided more than enough "independent and lawful information . . . to support [a finding of] probable cause." (Citation omitted).

(*United States v. Levasseur*, 816 F.2d at pp. 43–44.) It also established defendants' abandonment of the house in which they left their weapons, clothing, and personal belongings. (*Ibid.*)

Here, appellant lived in the trailer with a fenced-in yard that was searched by the deputy sheriffs. Implicitly acknowledging that it had previously argued that the officers who had searched appellant's trailer and curtilage were reasonably afraid that appellant could have come back to his trailer, the state here relies on the *Levasseur* language that "The facts and

circumstances pertinent to the court's abandonment inquiry *are not limited to those which were known to the officers at the time of the search and seizure* (emphasis added). Rather, any subsequently discovered events may support an inference that appellants had already chosen and manifested their decision, not to return to the property (citations omitted)." (2 CT 540.)

As articulated by the state, this exception would swallow up virtually every case in which the accused does not return home after committing a crime. This Court discussed the issue of abandonment of a reasonable expectation of privacy in the context of a motel room in *People v. Parson*, *supra*:

> "[T]he intent to abandon is determined by objective factors, not the defendant's subjective intent. '"Abandonment is primarily a question of intent, and intent may be inferred from words, acts, and other objective facts. [Citations.] Abandonment here is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search."' [Citations.]"

(*People v. Parson, supra*, 44 Cal.4th at p. 346.)

Although appellant was ultimately captured in Wilmington, California, far to the south of Auburn, his subsequent course cannot be allowed to show an immediate abandonment of all reasonable expectation of privacy in his home where he had lived for an extended period, and the

loss of any standing to challenge the search and seizure that he has presented to the court. No other case has followed the *Levasseur* standard allowing facts to be gleaned from far in the future after the searches were made.

This Court's standard for determining abandonment employed in *Parson* has long been adequate to resolve these issues. Usually, subsequent behavior has been used by defendants to argue that they had not abandoned their privacy interest in personal property. (See, e.g., *People v. Daggs* (2005) 133 Cal.App.4th 361, and cases cited therein.)

The searches in question were done within hours of the commission of the crimes at bench. Many items which appellant likely had a keen interest in retaining were in his trailer. Indeed, he fled when seeing the authorities come to search his home. It was error to hold that as soon as he left the Parnell ranch, he abandoned all expectation of privacy in his home, and all standing to make a motion to suppress—especially in light of the prosecutions's stipulation that he had a reasonable expectation of privacy when these searches took place. (3 RT 635; 5 RT 1135, 1144.)

### E. Appellant Was Prejudiced by the Illegally Seized Materials.

Law enforcement pieced much of the case together based upon the illegally seized materials, especially concerning the manner in which the

two adults were killed. The types of rifles and ammunition played a large part in establishing the circumstances of the killings. (See prosecutor's closing argument at 47 RT 10277–10312.)

Some jewelry was seized as well; although the special circumstance related to robbery were dismissed, the instructions related to felony-murder allowed the prosecutor to argue (47 RT 10304–10307) and the jury to find appellant guilty of the felony-murder of each of the Martinez brothers because the murders were committed in the course of a robbery. (See Arg. X, *post.*) The use of the illegally seized materials violated the Fourth Amendment as well as appellant's rights to a fair trial, due process of law, and a reliable penalty determination as guaranteed by the state and federal constitutions.

## VII. INVESTIGATORS KNOWINGLY AND WILLFULLY UTILIZED ILLEGAL METHODS TO OBTAIN INCRIMINATING STATEMENTS FROM APPELLANT—A MONOLINGUAL MEXICAN NATIONAL—DURING HIS FIRST THREE DAYS IN CUSTODY, BY FAILING TO INFORM HIM OF HIS RIGHT TO CONSULAR ASSISTANCE, FAILING TO ADEQUATELY *MIRANDIZE* HIM, EXPLOITING HIS IGNORANCE OF OUR JUDICIAL SYSTEM, COERCING COMPLIANCE, AND THUS VIOLATING FEDERAL AND STATE CONSTITUTIONAL PROTECTIONS, AND TREATY OBLIGATIONS; THE TRIAL COURT'S WRONGFUL ADMISSION OF THESE STATEMENTS CONSTITUTED PREJUDICIAL ERROR AND REQUIRES THIS JUDGMENT BE REVERSED IN ITS ENTIRETY.

### A. Factual and Procedural Background

#### 1. En Route to Long Beach Police Station with Agent Stevens

On July 15, 1998, at approximately 8:40 p.m., the FBI, Long Beach Police, and Los Angeles Police arrested appellant in an apartment in Wilmington, California. Some 20 armed officers were involved in the arrest. Appellant was ordered out of the apartment at gunpoint and handcuffed. No *Miranda* advisement was given.

Following the arrest, FBI Agent Stevens and Long Beach Police Department (LBPD) Detective Robbins drove appellant to the LBPD for questioning. (10 RT 2679, 2692; 11 RT 2740–2744.) During this 15–20 minute car ride, Agent Stevens had a conversation in Spanish with appellant in the back seat of the car. No *Miranda* advisement was given. In the car,

appellant asked Stevens what he was being charged with and she responded: four murders and the rape of a female. Appellant responded that he didn't rape the woman. Appellant then commented on the fact that Stevens spoke Spanish. He said he was from Mexico, from the town of Apatzingan. He said that he had been going to return to Mexico after he left the apartment. (11 RT 2723–2726; 39 RT 9311.)

Upon arriving at the LBPD, appellant was placed in the Homicide Room. Around 10:10 p.m., Robbins and Stevens began to question appellant. Before any *Miranda* advisement had been given, a conversation took place during which the officers secured appellant's agreement to provide a statement. He again said he committed the homicides but not the rape. He was not yet advised of any constitutional rights.

Appellant was then asked if he could read and he responded affirmatively. Agent Stevens did not have a standard *Miranda* warning form with her; instead appellant was handed a document written in Spanish entitled "Consideracion de los derechos civiles." (Exh. 23; see 12 RT 3027.) Appellant did not read the document aloud and neither officer inquired as to his reading level. After allowing some time for appellant to "read" the form, Stevens took the document from him and read it to him. She did not explain any of the rights she read. Appellant was then told to sign the document,

which he did. He was frightened; he thought that if he did not do what the officers wanted, they would beat him. (4 CT 1015.) The 20 or so FBI agents and police officers who arrested him were armed. (10 RT 2517, 2658.) He did not understand his rights, and did not understand the criminal justice system. (10 RT 2452, 2692, 2696, 2698, 2702–2703, 2728–2729; 4 CT 1015–1016; 3 SCT 279.)

According to certified interpreter Santiago Flores, the document appellant signed does not indicate that he has the right to seek advice from an attorney, and concludes as follows: "I understand every one of these rights that have been explained before, and I wish to speak over/argue about/discuss the case with the officer." (12 RT 3034–3038.) Mr. Flores, a skilled and experienced interpreter who had worked for the DEA as well as several prosecutors and courts, and had translated numerous *Miranda* advisements, had never seen any *Miranda* advisement like the one signed by appellant in this case. (*Ibid.*)

Mr. Flores identified numerous points of confusion in the language employed in the advisement. The place where appellant signed simply said "signature," and said nothing about the signator having any understanding of the document he signed. (12 RT 3040–3042.) He thought that the language regarding the right to remain silent was confusing, and the right to

the advice of an attorney was not conveyed. (12 RT 3082, 3089.) When asked if there were any errors in that part of the videotape transcribed on page two where Detective McDonald referred to the signing of the advisement, Mr. Flores said that he could not tell because the interpreter and the officer were both talking at the same time. (See Exh. 281, transcript at 3 SCT 219 et seq., esp. 3 SCT 277–278.)

After signing the document, appellant was interrogated and gave a statement. No video or audio recording was made of the interrogation.

Agent Stevens acted as interpreter. Robbins took notes and a report was prepared a couple of days later.

Stevens testified at one point that they didn't record the interrogation because they were under the impression that some counties didn't want to do it that way. Robbins did not speak Spanish. Stevens was raised in New Mexico by her mother who speaks Spanish but has had no formal instruction in Spanish, and speaks a different dialect than appellant. (4 RT 979; 9 RT 2407; 10 RT 2527, 2700; 11 RT 2701, 2747, 2749, 2753.)

Appellant indicated that he had met with his two brother-in-laws and Yolanda and her two kids pursuant to a previous arrangement where they were going to take him to the consulate to get his passport or I.N.S. papers properly updated. (39 RT 9315–9316.)

Appellant was not offered anything to eat while he was in Long Beach. The interrogation room was "freezing"; appellant was not offered a shirt until after the interrogation was concluded. (11 RT 2714, 2735.)

The thrust of appellant's statements during this interrogation was that there was a quarrel between him and the Martinez brothers because they accused him of womanizing on their sister, his wife. There was a fight. He got hold of the rifle and shot them. He dragged their bodies to a hole about 100 feet away. He couldn't remember anything after that. He then went back to his trailer and beat Yolanda. He did not know why he beat her. He then took the children and led them away from the trailer. He didn't know what he was going to do but he finally hit them with a piece of wood or wooden handle of a shovel. Then he put their bodies in the hole and put some dirt on them. As he was returning he could see police arriving at the trailer so he hid. (39 RT 9319–9327.)

Thus, on July 15, two hours after his arrest and about 12 hours before the next interrogation, he says it was self-defense or mutual combat; that he couldn't remember a lot of it; and that he didn't know why he hit the children. There was no indication from him at this juncture that the hole was pre-dug, that he was lying in wait, or that any of the murders were pre-planned.

### 2. En Route from LBPD to Placer County Jail

At approximately 1:00 a.m. on July 16, 1998, appellant was transferred to the custody of Placer County Sheriff's Sergeant Robert McDonald and Detective Mike Bennett, and transported by plane to Auburn, CA. He arrived about 5:00 a.m. and was taken to the Placer County Jail and booked. Appellant was given no food or water during this trip.

### 3. 7/16/98 Interview with McDonald and Bennett at PCSD

At 11:00 a.m. McDonald and Bennett transported appellant to the PCSD to question him. Interpreter Frank Valdez was also present at the interrogation. The interrogation was videotaped. At the beginning, McDonald asked appellant a few questions about the advisement he was given in Long Beach—"this form down in Long Beach that you filled out . . . your rights."[47] The "form" was not handed to appellant to see or read, the advisement was not re-read or explained to him. No new *Miranda* warning was given prior to questioning.

---

[47] McDonald: "One real quick thing, do you remember this form down in Long Beach that you filled out . . . your rights. do you understand these? did you understand when you signed them? Okay. Knowing about this you want to—can we talk? Okay. What I want to do is just talk about this week and you know Yolanda and Jose Martinez. And is that Jose's brother, Juan?"

Defendant: "Yes."

(3 SCT 219.)

Toward the end of the interview, McDonald seemed unsure that appellant understood his rights and then asked him some further questions about his understanding of them[48] after which the interview concluded.

During this interview, appellant initially gave substantially the same account of events he had given to FBI agents in Long Beach. (See 3 CT

---

[48] "McDonald: I showed you this form, and you said you remember?
Defendant: Yes.
McDonald: Could you describe for me your rights as you understand them?
Defendant: [Of] that I don't understand anything.
McDonald: Well, you've read it and you signed it. And you told me when we started that you understood.
Defendant: I cannot understand what rights I can have.
. . .
McDonald: And did you decide to talk to us?
Defendant: Yes.
McDonald: Because you wanted to and you didn't want to talk to an attorney?
Defendant: What am I going to gain by talking to a lawyer?
McDonald: Okay. Again, there is nothing else you want to ask?
. . .
Defendant: When are we going to have the court?
McDonald: Either tomorrow or Monday will be your first appearance.
Valdez: Can I tell him what that is?
McDonald: Sure.
Valdez: The first time just going to tell him they're telling him what the charges are and whether that the person is not guilt and they prove them seems—the facts—he says he doesn't understand anything about the justice system."
McDonald: We still don't."
(3 SCT 279.)

221–254.) Thereafter, he said or acquiesced to leading questions as follows:[49]

(1) that there was no argument, that he shot the men "next to" the hole rather than dragging them (thus the casings found near the hole); that they were standing near or next to the hole when he shot them both in the head and back several times; that he lured them up to where the hole was; and that after he shot them he put them in the hole (3 SCT 254–258);

(2) that he put a rope around Yolanda's neck and hit her in the face and side; that he cut her clothes and underwear so that if she got loose, she wouldn't go out; that he put his hand inside her (and there's ambiguity in the tape about whether he told her that she could have done it the easy way before but she turned him down during his previous advance); that he had intended to take her out to see the children and then kill her; and that he dug the grave deep enough so that he could put Yolanda in there after he raped and humiliated her and killed her (3 SCT 258–262);

(3) that he untaped the children after he had left Yolanda in the trailer tied up (meaning that he taped the children during the assault on

---

[49] There are several copies of the transcript of the 7/16/98 interview. The one most commonly referred to is an exhibit to the motions related to appellant's claims related to violations of the Vienna Convention on Consular Relations ("VCCR"). People's Exh. 23, 2 Supp CT 226 et seq.

Yolanda because they wouldn't stop crying, but cf. other version where he says he taped them after leaving Yolanda tied up in the trailer and after taping them he walked them up the hill to near the hole; that he found the stick or shovel near the hole that he used to hit the children; and that he used a shovel head, and not a stick (3 SCT 263–269);

(4) that he had it all planned for about a week—"I just planned it," that he wasn't included in all the family things and everybody didn't like him; that he called someone else, Juan Carlos Martinez, in Santa Ana and invited him up [implication is appellant was going to kill him, too]; that, yes, he acknowledged, "the reason [he] killed Yolanda [sic] and Jack—Arelia and Juan and Jose [was] because they're part of the [Martinez] family and they didn't accept [him] like they did everybody else . . . and that pissed [him] off,"; that he had no anger with the children—the reason he killed the children was that "I didn't have any other way out. I had done something—the other thing. I had already done the other thing so—there was no way out. The kids followed me a lot"; that he first came up with the idea that he wanted to kill Yolanda and her family several days [before/ago] but he didn't have the courage to do it until when he did it; that the hole had been dug on the Monday or Tuesday previous to the shootings on Sunday,

July 12; and that it took three hours to dig because the [dirt] wasn't very hard (3 SCT 276);

(5) that he had trouble with "nervousness" for several years; that he doesn't sleep very much at night; that he had tried diazepam four or five years before but it didn't have much effect and he didn't feel he should be taking it anymore. It was recommended to help him sleep at night; When he gets these "pains" (nervousness) "I don't feel right with my body." The pains were in his back [and neck]. When asked if the pains came from working, he said, "No. No. The nerves—they inflame themselves, they swell." Q: "Are there times in your life that things are happening that those nervous things are worse than others?" D: "When I cannot control them. I have in the face is tremblers and in the hand . . . (inaudible)." (3 SCT 272);

(6) that he was having the "tremblers" even a week ago, the Sunday before, when he started thinking about killing them and started digging the hole. Even when he was making the hole he "would be trembling." When he would have these nervous things happen. "Would it make you think any different? [D] Yes. [Q] Describe it? [D] It's something like—things like what I did, things that I have never have [done] before." (3 SCT 274–275); and

(7) Continuing about the "trembles": [Q] But you had these feelings for five or six years? [D] Of the nerves, yes. [Q] Did you ever do anything like this before? [D] No. [Q] Did you ever feel like you wanted to kill anybody before getting the nervous feelings before? [D] No, When we discuss with visits—I would—oh—I would stop arguing and I would leave the house to stop arguing and then I would return when I felt more in control. [Q] When Mike asked you about your feelings about the family and why you may have killed this family and you—were you truthful about because of this anger [sic] that you had and as you sit here today do you think that's the reason that you killed them? [D] No. [Q] And why today do you think you killed them? [D] I suppose that was the problem but I don't know—I don't understand that because I already did it." (3 SCT 275.)

#### 4. At the Parnell Ranch Walk-Through Around 10 a.m. on 7/17/98

At approximately 10:00 a.m. on July 17, 1998, appellant was transported to the Parnell Ranch from the Placer County jail and instructed to assist the officers in a videotaped walk-through of the events of July 12, 1998. He did so, and was chained and on a leash throughout the walk-through of the crime scene. Virginia Ferral, dispatcher for the PCSD, acted as "interpreter." She was not a certified interpreter. McDonald, Bennett and

three others[50] were present. (8 RT 2124–2125; 10 RT 2521; 11 RT 2885–2905, 2919–2924; 7 CT 1914; see videotape, People's Exh. 274X.)

Before the walk-through, which lasted about 20 minutes, McDonald told appellant that a tape was being made to accurately document appellant's statements. McDonald, however, decided not to make a sound recording of the event. No one told appellant that the sound was purposely turned off. As it turned out, the audio was not completely disabled and some sound permeated the video.

At the start of the walk-through, appellant requested a lawyer. He was informed that was a "whole other thing . . . are you going to help us now or not?" He was not read his *Miranda* rights nor shown the previous written advisement from Long Beach. Appellant then voiced fears of talking to the police. The videotape does not contain any indication that appellant consented to the walk-through, other than by his compliance with police directions.

### 5. Appellant's Challenges to the Use of His Statements

Appellant was arraigned in Placer County on Friday, July 17, 1998, at 1:00 p.m., about 40 hours after his arrest on Wednesday, July 15, at

---

[50] Ferral, Stewart, and Pollock.

8:40 p.m. At that time, he was first advised of his right to get in touch with the Mexican consulate. (1 RT 5.)

Appellant filed a motion to suppress his statements on December 13, 2000. (5 CT 1388.) He also filed a motion to suppress his statement and/or to preclude the prosecution from seeking the death penalty for failing to advise appellant of his right to consular assistance, on August 23, 2000. (4 RT 911 et seq.)

Testimony was taken on both these issues as well as issues related to potential violations of appellant's rights under the Vienna Convention on Consular Relations ("VCCR") over several days (see 8–12 RT)[51] The issues was argued on January 4, 2001. (12 RT 3131–3184.) Later that same day, the trial court found that appellant's *Miranda* waivers were adequate, and that a continuing waiver was found, and that under the totality of the circumstances, each of appellant's statements was voluntary. (12 RT 3190–3200.) In a separate finding, the trial court found that appellant had been deprived of his VCCR rights, but that no remedy was appropriate. (12 RT 3091–3095.)

---

[51] The parties stipulated that the testimony received on the VCCR claim could be considered on the issue of appellant's *Miranda* claims. (See 5 CT 1477.)

Detective Bennet played appellant's videotaped statement for the jury. (42 RT 9776.) The jurors were each given a copy of a transcript of the tape that was in many ways inaccurate; they were told by the trial court that the transcript was not evidence, and was to be used as a guide. (45 RT 9552–9553.)

### B. Appellant's Waiver of His Constitutional Rights Was Neither Voluntary, Knowing, Nor Intelligent.

In *Miranda v. Arizona*, *supra*, the United States Supreme Court held that where law enforcement officers undertake custodial interrogation of a suspect, specific procedural safeguards must be followed to protect the individual's Fifth and Fourteenth Amendment privileges against self-incrimination. Before any questioning begins, the accused must be warned that he has a right to remain silent; that any statement may be used against him; that he has the right to the presence of an attorney during questioning; and that if he cannot afford an attorney, one will be appointed at public expense.

> Without proper safeguards, the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprized of his rights and the exercise of those rights must be fully honored.

(*Miranda*, *supra*, 384 U.S. at 467; see also *Dickerson v. United States* (2000) 530 U.S. 428, 435.)

Thereafter, an accused may waive his rights. However, the waiver must be not just voluntary, it must also be knowing and intelligent. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464; *People v. Frye* (1998) 18 Cal.4th 894, 987.)

> The inquiry has two distinct dimensions. (citations) First, the relinquishment of the right must have been voluntary in the sense that it was a product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived (citations).

(*Moran v. Burbine* (1986) 475 U.S. 412, 421.)

A valid waiver of *Miranda* rights depends upon the "totality of the circumstances including the background, experience, and conduct of defendant." (*United States v. Garibay* (9th Cir. 1998) 143 F.3d 534, 536.) The government's burden to make such a showing "is great," and the court will "indulge every reasonable presumption against waiver of fundamental constitutional rights." (143 F.3d at p. 537.)

There is a presumption against waiver. (*North Carolina v. Butler* (1979) 441 U.S. 369, 373.) The prosecution bears the burden of proving by a preponderance of the evidence that a defendant knowingly and intelligently waived his *Miranda* rights. (*Colorado v. Connelly* (1986) 479 U.S. 157, 168; *People v. May* (1988) 44 Cal.3d 309, 315–320.) Although waivers need not be in writing, they do need to be explicit. (*Butler*, *supra*, 441 U.S. at p. 373.)

This Court applies federal standards in reviewing a defendant's claim that the challenged statements were elicited from him in violation of *Miranda.* (*People v. Bradford* (1997) 14 Cal.4th 1005, 1033.) In reviewing the trial court's rulings, this Court accepts its resolution of disputed facts, and its evaluations of credibility, if substantially supported, but independently determines from the undisputed facts, and those properly found by the trial court, whether the challenged confessions were obtained illegally. (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 128.)

Here, appellant has no prior experience with the American criminal justice system. He is a Spanish-speaking Mexican national whose life had been spent working in fields or pastures. The judicial process in Mexico varies greatly from the American system. He was not advised of his right to contact the Mexican consulate.

Thus, police interrogated appellant on three separate occasions.

(1) Arrested in Wilmington by a phalanx of heavily armed police officers, placed in a "freezing" interrogation room, appellant was first instructed to read an inadequate and misleading "civil rights form."

The "rights" articulated on the form fail to adequately and correctly express all of the constitutional rights that appellant was being asked to surrender. Agent Stevens reread aloud and verbatim the purported waiver form, but the defects remained. Thereupon, appellant was instructed to sign the form. The form (Exh. D at the hearing), simply had a signature line, without any indication of the significance of the signature, i.e., an indication that he understood what he was signing. He did so without question. Interrogation began in earnest. He did what the police told him to do because he was afraid that they would beat him if he did not. (4 CT 1015.)

(2) Appellant was transported to Placer County in the early morning hours of July 16, 1998. He got little, if any, sleep. He got no food from the point of his arrest, around 8:40 p.m. on July 15, 1998, until near the conclusion of the second interview, sometime after 1:00 p.m. on July 16, 1998, after he had confirmed the sequence of events provided him by his questioners. (3 SCT 270.)

There was no mention of Appellant's *Miranda* rights until the conclusion of the second interrogation, when he plainly advised the officers that he did not understand any of his rights. When the interpreter told the police that appellant said that he did not understand the criminal justice system, Detective Bennett retorted, "We still don't." (3 SCT 279.)

(3) The third interview, at the Parnell ranch on July 17, 1998, also occurred under difficult and prejudicial circumstances. A recording (Exh. 274X), although incomplete and frequently inaudible, demonstrates that appellant was chained and leashed; he was frightened and confused and lacked any understanding of his constitutional rights. Further, when appellant requested counsel, he was told this is not the time for that. His meek acceptance of that response underscores his failure to comprehend the earlier rights admonishment, and his reflexive compliance with whatever the officers wanted, as best as he understood their desires.

In sum, Agent Stevens' original advisement failed to accurately or adequately convey the substance of the *Miranda* warnings. This flaw rendered the initial statement and all subsequent statements inadmissible. Further, appellant's background, responses and conduct undermine any claim that he freely and voluntarily relinquished his right to remain silent or to consult with counsel prior to any interrogation. The totality of the

circumstances rendered any waiver ineffectual, as the purported waiver, and the statements themselves, were not free and voluntary.

### C. Appellant's Confessions Were Involuntary.

The Fourteenth Amendment to the U.S. Constitution and article I, section 15 of the California Constitution bar the prosecution from using a defendant's involuntary confession. (*People v. Massie* (1998) 19 Cal.4th 550, 576.) Both the state and federal Constitutions require the prosecution to establish, by a preponderance of the evidence, that a defendant's confession was voluntary. (*Lego v. Twomey* (1972) 404 U.S. 477, 489; *People v. Markham* (1989) 49 Cal.3d 63, 71.) Under both state and federal law, courts apply a "totality of circumstances" test to determine the voluntariness of a confession. (*Withrow v. Williams* (1993) 507 U.S. 680, 693–694; *People v. Williams* (1997) 16 Cal.4th 635, 660 [disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

In determining whether a confession was voluntary, "[t]he question is whether defendant's choice to confess was not 'essentially free' because his will was overborne." (*People v. Memro* (1995) 11 Cal.4th 786, 827.) Among the factors to be considered are "'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity' as well as 'the defendant's maturity [citation];

education [citation]; physical condition [citation]; and mental health.'" (*People v. Williams*, *supra*, 16 Cal.4th at p. 660.)

On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review. (*People v. Jones* (1998) 17 Cal.4th 279; *People v. Memro*, *supra*, 11 Cal.4th at p. 826.) Under the due process approach, courts look to the totality of circumstances to determine whether a confession was voluntary; the surrounding physical circumstances, as well as the techniques employed by interrogators and a defendant's personal characteristics, are relevant to the legal determination of voluntariness as well as the reliability of the confession. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.) In this case, the totality of the circumstances includes a failure of the FBI and subsequent officials to inform appellant of his right to contact the Mexican consulate for assistance.

As noted above, appellant spoke little English, and knew nothing about legal proceedings in this country. He had had little sleep, was first questioned in a freezing room immediately after being arrested by 20 heavily armed law enforcement officers. He believed that if he did not talk to the police, he would be beaten. He was transported from Long Beach to

Auburn overnight, and was jailed while the officers who accompanied him went home to sleep. Appellant was weak, exhausted, frightened, inexperienced. He was not informed of his right to contact the Mexican consulate. It cannot truthfully be said that his submitting himself to the questioning of the authorities was knowing or voluntary.

### D. The Trial Court Erred in Giving No Weight to the State's Failure to Comply with the VCCR When Ruling That Appellant's Statements Were Knowing and Voluntary.

The trial court found that appellant was entitled to be notified of his consular rights as provided for by the VCCR, and that the police had failed to inform him of these rights without delay," as the VCCR requires. (See Arg. VIII, *post.*) However, the trial court found that no remedy at all for this treaty violation was appropriate.[52]

The court then proceeded to make an entirely separate analysis of appellant's challenge to his statements as coerced, and to the validity of his purported waiver to his rights. (12 RT 3195.) It found that the statements were voluntary, and that his waiver was valid. There is no indication that the trial court gave any thought at all in this analysis to the acknowledged

---

[52] As will be seen below, the trial court's finding that the failure to advise appellant of his right to consular assistance was negligent is objectively unreasonable, and undercut by documentary evidence and FBI agent testimony. (Arg. VIII.)

violation of appellant's rights under the VCCR. The court's refusal to consider the VCCR violation as part of the totality of the circumstances in considering issues waiver and voluntariness of appellant's confessions violated his right to present a compete defense. (*Crane v. Kentucky, supra.*)

The trial court relied on the Ninth Circuit's en banc decision in *United States v. Lombera-Camorlinga* (9th Cir. 2000) 206 F.3d 882 (en banc) as authority for the fact that suppression of a defendant's statements is not an available remedy for this treaty violation standing alone, and appellant does not dispute that holding. The U.S. Supreme Court has held the same. (*Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, 350.) However, the *Sanchez-Llamas* court also recognized that an Article 36 violation can be relevant to determining the admissibility of a defendant's statements, "as part of a broader challenge to the voluntariness of his statements to police." (*Ibid.*)

Although violations of appellant's VCCR rights to consular notification are not sufficient to require suppression of his statement, there is no doubt that it was part of the circumstances surrounding appellant's interrogation, and as such, must be considered as part of the totality of the circumstances. It is beyond serious question that a violation of Article 36

obligations may in some circumstances impact on the admissibility of a defendant's custodial statements.

The United States unconditionally ratified the VCCR treaty in 1969. As a result, it became binding on all local authorities under the Supremacy Clause of the United States Constitution. (U.S. Const., art. VI, cl. 2; *Hines v. Davidowitz* (1941) 312 U.S. 52, 62–63 [a treaty establishing rules governing the rights or privileges of aliens "is the supreme law of the land"]; cf. *Alden v. Maine* (1999) 527 U.S. 706, 753 ["The Supremacy Clause does impose specific obligations on state judges"].)

Article 36(1)(b) of the VCCR requires that the detaining authorities must advise a foreign national without delay of his right to consular notification:

> [I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested in prison, custody or detention shall also be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.*

(VCCR, April 24, 1963, 21 U.S.T. 77, emphasis added.)

Article 36(1)(c) grants consular officers the right "to visit a national of the sending State who is in prison, custody or detention, to converse and

correspond with him and to arrange for his legal representation." Finally, Article 36(2) provides that local laws and regulations "must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

The obvious purpose of these binding treaty obligations is to ensure that foreign nationals facing prosecution and imprisonment have prompt access to the assistance of their consulate. The reasons for consular involvement from the earliest stage of a serious criminal case are readily apparent: prompt consular assistance "can be invaluable because cultural misunderstandings can lead a detainee to make serious legal mistakes, particularly where a detainee's cultural background informs the way he interacts with law enforcement officials and judges." (*Osagiede v. United States* (7th Cir. 2008) 543 F.3d 399, 403.) As the Ninth Circuit has observed in a related context, for a vulnerable foreign national the state of confusion engendered by interrogation "may be even more resonant due to language differences and an exacerbated sense of isolation and helplessness." (*United States v. Juvenile* (*RRA-A*) (9th Cir. 2000) 229 F.3d 737, 746.) Consular notification "as soon as reasonably possible" thus ensures that the foreign detainee "has access to meaningful support and counsel." (*Ibid.*)

The U.S. Supreme Court has long recognized that foreign nationals are especially susceptible to making involuntary statements. (*Miranda v. Arizona, supra*, 384 U.S. at p. 457 [potentiality for compulsion is "forcefully apparent" in a case where the suspect was an "indigent Mexican defendant"].) Indeed, the Supreme Court has considered the fact that the defendant "was a foreign-born young man" with "no past history of law violation or of subjection to official interrogation" as important in ultimately determining that his will was overborne by police misconduct. (*Spano v. New York* (1959) 360 U.S. 315, 321.)

Other courts have likewise found that foreign nationality is a relevant factor in the voluntariness analysis. (*United States v. Shi* (9th Cir. 2008) 525 F.3d 709, 730 [when the challenged statement was given by a foreign national, the Court will "[o]f course . . . consider whether extra steps were taken to ensure that the defendant understood his rights" (citing *United States v. Amano* (9th Cir. 2000) 229 F.3d 801, 804–805)]; see also *United States v. Moreno* (9th Cir. 1984) 742 F.2d 532, 536 [defendant's "lack of familiarity with police procedures in this country, his alienage and his limited ability to speak and understand the English language contributed significantly to the quantum of coercion present"].)

"Trial judges are presumed to know the law and to apply it in making their decisions." (*Walton v. Arizona* (1990) 497 U.S. 639, 653.) By the time the trial court addressed appellant's suppression motions, a substantial body of precedent had already recognized that the failure to comply with consular treaty obligations is also a relevant factor in the voluntariness determination. (See, e.g. *United States v. Amano*, *supra*, 229 F.3d at p. 805 [incorporating violation of consular treaty obligations into the "totality of the circumstances" analysis when assessing *Miranda* waiver in a foreign national's case]; *United States v. Miranda* (D. Minn. 1999) 65 F.Supp.2d 1002, 1007 [denial of consular advisement to Mexican detainee would be prejudicial where "such contact might have prevented him from making the statements that he now seeks to exclude"]; *State v. Ramirez* (Ohio App. 3d. 1999) 732 N.E.2d 1065, 1070–1071 [*Miranda* violation "would have been avoided" through compliance with Article 36 because "the American legal system would have been explained to appellant who, as a Mexican national, had not been exposed to nuances of our justice system the way that most Americans are"]; *Ledezma v. State* (Iowa 2001) 626 NW.2d 134, 152 [a Mexican consular officer "would explain the significant differences between the American and Mexican criminal justice systems"; timely

contact with consular officials "can eliminate false understandings and prevent actions which may result in prejudice to the defendant"].

In *United States v. Rangel-Gonzales* (9th Cir. 1980) 617 F.2d 529, the court found that even if the Consulate "would have done nothing more than advise appellant of his right to counsel . . . *it remains difficult from a practical standpoint to equate being advised by the [arresting authority] in an adversary setting with being advised by the Mexican Consulate*"].) (*Id.* at pp. 532–533, emphasis added.)

An appropriate advisement of Article 36 rights would have provided appellant with the impetus to seek consular advice and support before giving any further statement to the police. (See 4 CT 915.) *Consular Notification and Access*, the State Department's comprehensive police training manual on Article 36 requirements, had been distributed to police departments nationwide, and was readily available on-line and included detailed instructions both on the nature of consular assistance and on the

procedures to be followed when detaining foreigners.[53] Its 1998 recommended advisement of Article 36 rights read:

> As a non-U.S. citizen who is being arrested or detained, you are entitled to have us notify your country's consular representatives here in the United States. *A consular official from your country may be able to help you obtain legal counsel, and may contact your family and visit you in detention, among other things. If you want us to notify your country's consular officials, you can request this notification now, or at any time in the future. After your consular officials are notified, they may call or visit you. Do you want us to notify your country's consular officials?*[54]

(U.S. Dept. of State, *Consular Notification and Access* (1st ed. Jan. 1998), *Suggested Statements to Arrested or Detained Foreign Nationals.*)

Providing this information to appellant—a confused and isolated foreigner with no prior record—would very likely have triggered an invocation of consular notification and a decision to await the consulate's assistance before making any other statements.

---

[53] The full text of the current *Consular Notification and Access* (2010) is available on the Bureau of Consular Affairs website: <http://travel.state.gov/content/travel/english/consularnotification.html> [as of Jan. 21, 2014]. The version in effect at the time of appellant's interrogations can be found at http://www.state.gov/www/global/legal_affairs/ca_notification/ca_prelim.html [as of Apr. 5, 2014.]

[54] This language was used verbatim by the prosecutor when informing appellant of his consular rights at his arraignment on July 17, 1998; see 1 RT 5.

These are not superfluous advisements. Mexico's consular officers are trained to provide comprehensive and immediate assistance to Mexican nationals facing serious charges. They so testified in this case. (See testimony of Luis Enrique Castresana Rubio of the Consulate of Mexico in Sacramento at 9 RT 2222 et seq.)

Their consistent practice upon learning of the detention of Mexican nationals is to contact the detainee as soon as possible in order to ensure that the detainee's legal rights are protected. Consular protection officers immediately advise Mexican nationals of their rights in terms that are familiar to them, while verifying that they understand the significance of those rights within the U.S. legal process and that they are not subjected to any form of intimidation, inducement or deception. (See I.C.J. (June 20, 2003) Memorial of Mexico, *Avena and Other Mexican Nationals* (Mex. v. U.S.), No. 128, at ¶¶ 49–60 <http://www.icj-cij.org/docket/files/128/8272.pdf> [as of Jan. 22, 2014] [outlining the advisory and protective functions of Mexican consular officers that alleviate the vulnerability of Mexican nationals facing interrogation]; cf. U.S. Dept. of State, Foreign Affairs Manual (2011) § 7 FAM 422 at ¶ (6) <http://www.state.gov/documents/organization/86605.pdf> [as of Jan. 22, 2014] [U.S. consular officers "must make every effort to gain prompt personal access to an

arrested U.S. citizen or national" in order to have "*the opportunity to explain* the legal and judicial procedures of the host government and *the detainee's rights* under that government *at a time when such information is most useful*"] italics added.)

If consular contact had been permitted at any time during the extended and repeated interrogations, it is more likely than not that appellant would have understood and invoked his *Miranda* rights. As *United States v. Rangel-Gonzales*, *supra*, pointed out, there is a significant difference between law enforcement advising and counseling by the consulate. (*Id.*, 617 F.2d at pp. 532–533.)

Moreover, in these highly coercive circumstances, it is likely that the Consulate would have acted on its treaty rights by promptly arranging for the presence of an attorney during his questioning. (See VCCR art. 36 (1) (c) [sovereign right of consulate "to arrange for [a detained national's] legal representation"]; *id.*, art. 5(I) [consular functions include "arranging appropriate representation for nationals of the sending State . . . for the preservation of the rights and interests of these nationals"]; *Osagiede v. United States*, *supra*, 543 F.3d at p. 403 [along with providing "critical resources for legal representation" a consulate can "intervene directly in a proceeding if it deems that necessary"]; *Torres v. State* (Okla. Crim. App.

2005) 120 P.3d 1184, 1188 [concluding that "the Mexican government takes its consular obligations to its citizens very seriously, particularly when those citizens are capital defendants in another country"].)

In sum, the trial court correctly ruled that there was a VCCR violation, a failure to comply with Article 36's requirement that an accused foreign national be informed of his or her rights to consular assistance without delay. The trial court also correctly ruled that this violation by itself did not require suppression of appellant's statements. It erred, however, in dropping the issue entirely when considering the admissibility of appellant's statements, and not giving that violation any weight at all in its consideration of the totality of the circumstances in determining whether appellant's statements were coerced. (*Crane v. Kentucky*, *supra*.)

Had it done so, it is likely that it would have found that in the totality of the circumstances surrounding appellant's arrest and interrogation in Long Beach, that a proper consular advisement would likely have led to appellant's seeking consular assistance, and not talking further to the agents. Even if the advisement had been provided after appellant's initial statements to the police, it would have blocked the far more damaging statements made or acquiesced to by appellant during his interview in Placer County. In this case, depriving appellant of consular information

access at a time when it would have been of greatest value to him "contributed significantly to the quantum of coercion present." (*United States v. Moreno, supra,* 742 F.2d at p. 536.) Appellant's statements must be suppressed, or the case remanded to the trial court for a full consideration of appellant's challenge to the admissibility of his statements.

### E. Admission of Appellant's Statements Was Prejudicial Error.

Convictions obtained in cases where an involuntary confession is admitted into evidence will be reversed if the introduction of the involuntary confession was not harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306–312; *People v. Cahill* (1993) 5 Cal.4th 478, 509–510.) In *Fulminante*, the high court recognized the extraordinary prejudice associated with confessions: "A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. (citation and internal quotations omitted)." (499 U.S. at p. 296.)

*Miranda* error is likewise reviewed under the harmless standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24, and *People v. Johnson* (1993) 6 Cal.4th 1, 32–33. "The *Chapman* test is whether it appears 'beyond a reasonable doubt that the error complained of did not

contribute to the verdict obtained.'" (*Yates v. Evatt* (1991) 500 U.S. 391, 402–403.)

There is no question that appellant was prejudiced by his confessions. The videotape of his confession was played for the jury, who was also provided an inaccurate transcript as a guide. The confession was a keystone of the prosecutor's closing argument. It provided the factual basis for the lying-in-wait special circumstance by showing calculated preplanning; it allowed argument of the absence of mental impairment; it undermined any subsequent defense of quasi self-defense or even unreasonable self-defense based on his description of their anger at him for womanizing; it detailed aggravated circumstances to consider under factor (a) at penalty; it was inconsistent with earlier statements; it showed premeditated murder, and implied possibly more intended victims (other Martinez family members); and presented a thwarted plan to kill Yolanda. It cannot be said beyond a reasonable doubt that appellant would not have had more favorable results had his statements not been a part of his trial. He use of appellant's confession not only violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, it also violated his rights to a reliable guilt and penalty phase determination as

guaranteed by the Eighth Amendment to the U.S. Constitution, and rights as provided by applicable international law.

## VIII. THE TRIAL COURT PREJUDICIALLY ERRED IN FINDING THAT THE ACKNOWLEDGED VCCR VIOLATION WAS NEGLIGENT.

### A. Factual and Procedural Background

Consular Admonishment/Advisement occurred at arraignment in Placer County on Friday, July 17, 1998 at 1:00 p.m.—approximately 40 hours after appellant's arrest on Wednesday, July 15, at 8:40 p.m. The two words appellant uttered were "What for?" His public defender, Feldman, then had a discussion with Arturo and went on the record to say, "I believe at this time we would like to wait." (1 RT 5–6.)

On January 17, 2001, the Placer County Superior Court made the following findings after a hearing over the course of three months in late 2000:

> (1) There was delay in advisement per VCCR:
>
> The threshold issue is first, does the Convention apply to the defendant? And the answer in my view is unequivocally, yes. It is not disputed that the defendant at the time of his arrest was a Mexican national. The second issue then is, was there a delay in the advisement? The Court finds that there was. The defendant was arrested on July 15th, 1998, at 8:40 p.m. in the Los Angeles area. He was arraigned on the murder charges on July 17th, 1998, at 1:30 p.m. in Placer County. At that time the district attorney advised the defendant of his right to notification of the Mexican consulate. Between these two points in time the following occurred: The defendant was interviewed by the FBI in Long Beach which took about an hour. He was flown back to Placer County under police escort. He was interviewed by Placer County authorities

> initially on a videotaped interview which lasted about an hour and a half. The next day he visited the scene of the crime for a strolling interview with the police which took approximately half an hour. All of this spanned some 40-plus hours. It cannot be said that the advisement was given "without delay" under these circumstances. The mandate of the Vienna Convention regarding notice in my view has been violated.

(12 RT 3191–3192.)

(2) Suppression of the confession and statements given by appellant is not an appropriate remedy (*Lombera-Camorlinga*) ["particularly in the absence of not [sic] a single case nationwide that holds to the contrary. Clearly all of the courts interpreting the matters have been consistent at least as to the suppression rights. . . ."] (12 RT 3193.)

(3) Preclusion of the death penalty reaches too far, i.e., the argument that the district attorney "might have" decided not to seek the death penalty had he not had appellant's statements is entirely speculative and there is no appropriate nexus between the violation and the sanction of preclusion of the death penalty.

(4) Part of the court's consideration of the sanction depends on whether the violation was willful. The court accepted the district attorney's statement that "he did not know of the Vienna Convention until an hour or so prior to the defendant's arraignment. The defendant has presented no

compelling evidence to the contrary." (12 RT 3193.) The trial court did not mention the FBI.

(5) The violation has occurred regardless of the actual or constructive knowledge of law enforcement since the VCCR imposes the duty of notification and is "essentially a strict liability statute." (12 RT 3194.) However, the law enforcement violation of the VCCR here was "negligent, not intentional. The heavy sanction of issue preclusion is not warranted under such circumstances and has no rational connection to the nature of the violation itself. The sanction also is inappropriate given . . . the act does not call for the cessation of questioning at the request of the consulate or the consulate must be given access to the defendant prior to questioning," but only notifying the consulate of the fact of the arrest. (12 RT 3194.)

The Court found "no sanction appropriate to the circumstances." It also relied on section 834c, noting that the legislature had the issue squarely in front of it but did not say that police questioning must stop upon request of a foreign national to speak to a consulate, or that any sanction should be ordered because of the violation. (12 RT 3195.)

Finally, the trial court found that the authorities are "unclear" as to the exact nature of the rights created by the VCCR; there may be some

personal rights, but not of constitutional dimension. "The court finds no violation of the constitutional rights of the defendant because of the violation of the Convention." All relief was denied. (12 RT 3195.)

The trial court then proceeded to make a separate analysis of appellant's challenge to his statements as coerced, and to the validity of his purported waiver to his rights, and found that the statements were voluntary, and that his waiver was valid. (See Arg. VII, *ante*.) There is no indication that the trial court gave any weight at all to the acknowledged violation of appellant's rights under the VCCR.

### B. The FBI Agents Gave Testimony Regarding Their Knowledge of Appellant's Status as a Mexican National and Whether They Knew that the VCCR Applied That Is Unworthy of Belief.

#### 1. The Very Basis for the FBI's Involvement Was the Fact That Appellant Is a Mexican National.

On September 3, 1999, Special Agent Elizabeth Stevens of the FBI testified during a motion to suppress evidence. (4 RT 977–978.) She and several other agents went to 606 Bayview Avenue in Wilmington, California, in order to arrest appellant; she was there pursuant to a criminal complaint and arrest warrant prepared on July 15, 1998, by Jeffery Rinek, Special Agent from Sacramento. The three-page affidavit prepared by

Rinek which accompanied the Arrest Warrant contained the following language in the second paragraph:

"I am currently investigating a matter involving the flight from California to Mexico of *Arturo Juarez Suarez, a Hispanic male born August 15, 1967 who is a Mexican national citizen.*" (Emphasis added; see 15 CT 3902.) Rinek later testified that he was called by the Placer County Sheriff's deputies who had interviewed Yolanda Martinez and several others, and had obtained phone records, "numerous and lengthy telephone calls to Mexico immediately before the murders." (15 CT 3903.) According to the district attorney, there was a conference call on July 14, 1998, where the sheriff's deputies named appellant and said that they thought he was fleeing towards Mexico. (9 RT 2294.)

Rinek's affidavit concluded by saying that appellant "had fled to Mexico to avoid prosecution." Because he had presumably crossed state lines, Rinek asked that a warrant be issued charging appellant with the offense of Interstate Flight to avoid Prosecution, in violation of 18 U.S.C. § 1072. (15 CT 3904; 37 RT 8995 et seq., 37 RT 9009; see also testimony of Placer County Sheriff's Detective Diana Stewart, 37 RT 8998 et seq.) Thus, not only did the FBI know that appellant was a Mexican National, they made his return to Mexico a basis for their jurisdiction to arrest him.

By July 15, 1998, officials knew that appellant was a migrant worker likely heading back to Mexico. (RT 2294.) The fact that appellant was a Mexican National was no secret by then; a secretary in the prosecutor's office learned of his nationality while watching a local news show on television. (10 RT 2572.)

After Rinek prepared the complaint and the warrant, and got it signed by a federal judge in the Eastern District, appellant's nationality had been established.

### 2. The FBI Has Long Trained Its Agents on the Obligation to Inform Foreign Nationals of their Consular Rights.

It may be true that the Placer County District Attorney's office did not know about the VCCR until just before appellant was arraigned on July 17, 1998. However, the same cannot be said for the FBI, which has been training its agents on their obligations in this regard for decades.

The FBI Manual of Investigative Operations and Guidelines has set forth agent obligations when arresting a foreign national since at least 1983. See paragraph 11-2.3.3, dated May 10, 1982: "In every case in which a foreign national is arrested by the FBI, inform the foreign national that his/her consul will be advised of his/her arrest unless he/she does not wish such notification to be given." (See Appendix A, one page from the official

manual <http://vault.fbi.gov/miog/manual-of-investigative-operations-and-guidelines-miog-part-02-02-of-06/view> [as of Jan. 27, 2014].)

The FBI also has a legal handbook for special agents such as Stevens and Rinek. (Legal Handbook for Special Agents <http://vault.fbi.gov/Legal%20Handbook%20for%20FBI%20Special%20Agents> [as of Jan. 27, 2014].)

Paragraph 3-10 of the handbook, published in early 1998, provides that "In every case in which a foreign national is arrested by the FBI, Agents are to inform the foreign national that his/her consul will be advised of his/her arrest unless he/she does not want notification to be given." (See Department of Justice Legal Handbook for Special Agents [of the FBI], section 3-10: "Foreign Nationals," p. 12, effective Mar. 31, 1983, handbook page attached as Appendix B.)

In addition to these manuals and handbooks, federal regulations govern the behavior of all law enforcement agencies regarding arrest procedures for foreign nationals. See 28 C.F.R. 50.5(a) (1998) [32 Fed. Reg. 1040 (1967)] (Department of Justice arrest procedures):

> (a) This statement is designed to establish a uniform procedure for consular notification where nationals of foreign countries are arrested by officers of this Department [of Justice] on charges of criminal violations. It conforms to

practice under international law and in particular implements obligations undertaken by the United States pursuant to treaties with respect to the arrest and detention of foreign nationals. Some of the treaties obligate the United States to notify the consular officer only upon the demand or request of the arrested foreign national. On the other hand, some of the treaties require notifying the consul of the arrest of a foreign national whether or not the arrested person requests such notification.

(1) In every case in which a foreign national is arrested the arresting officer shall inform the foreign national that his consul will be advised of his arrest unless he does not wish such notification to be given. If the foreign national does not wish to have the consul notified, the arresting officer shall also inform him that in the event there is a treaty in force between the United States and his country which requires such notification, his consul must be notified regardless of his wishes and, if such is the case, he will be advised of such notification by the U.S. Attorney.

(2) In all cases (including those where the foreign national has stated that he does not wish his consul to be notified) the local office of the Federal Bureau of Investigation or the local Marshal's Office, as the case may be, shall inform the nearest U.S. Attorney of the arrest and of the arrested person's wishes regarding consular notification.

(3) The U.S. Attorney shall then notify the appropriate consul except where he has been informed that the foreign national does not desire such notification to be made. However, if there is a treaty provision in effect which requires notification of consul, without reference to a demand or request of the arrested national, the consul shall be notified even if the arrested person has asked that he not be notified. In such case, the U.S. Attorney shall advise the foreign national that his consul has been notified and inform him that notification was necessary because of the treaty obligation.

(28 C.F.R. 50.5(a) (1998) [32 Fed. Reg. 1040 (1967)].)

### 3. The FBI Agents' Testimony Regarding Their Failure to Advise Appellant of His Right to Consular Assistance Was Incredible.

The prosecutor called Special Agent Elizabeth Stevens to testify on September 3, 1999, as part of a suppression motion brought pursuant to section 1538.5. On July 15, 1998, she went to 606 Bayview Avenue, Wilmington, California, to serve the arrest warrant on appellant. She was the leading agent, likely assigned to that role because of her greater familiarity with Spanish than her colleagues.

When she was asked if she had seen a copy of the arrest warrant authorizing the seizure of appellant, she answered "yes." The prosecutor then showed her a certified copy of the arrest warrant, which was marked for identification as Exhibit 40. (4 RT 977–978.) She identified that document—which identifies appellant as a Mexican national—as the one she had seen prior to arresting appellant. Based on her testimony and identification of the document, People's Exhibit 40 was admitted into evidence. (5 RT 1117.) When she arrived at the apartment where appellant was staying, she did not have a search warrant, but she did have the arrest warrant. (4 RT 993.)

But by the time of the hearing on appellant's VCCR motion in October 2000, the FBI had closed ranks against appellant. Affidavits for

several agents were drafted within the FBI legal department, each of them saying that the particular agent did not know that appellant was a Mexican national, and did not know of any obligation to inform him of consular rights. (See 10 RT 2674, 15 CT 3895–3900.) Agent Stevens testified that actually, she had never seen the arrest warrant, and no one else had seen it, either. (10 RT 2659.) She also testified that she did not know appellant was a Mexican National at the time of the arrest. (10 RT 2663.)

Ms. Stevens had previously testified that while they were in the police car together, that she had talked with appellant about his family and where he was from. On cross-examination, she recalled that they had talked about "nationality or family." (10 RT 2664.) She then added that the discussion in the back of the police vehicle before they arrived at the Long Beach police station was not really about nationality: "*Just because someone is born in a certain area doesn't mean that's their nationality.*"[55] (10 RT 2565, emphasis added.)

Without a warrant, the 20 armed officers would have been no more than a gang; it is the warrant that gave them legitimacy, and probable cause

---

[55] Section 1 of the Fourteenth Amendment to the United States Constitution provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

to enter the dwelling and seize appellant. When counsel asked Stevens if it is normal for someone in the group of agents making an arrest to carry an arrest warrant, the trial court sustained the prosecutor's relevancy objections. (10 RT 2666.) The agent could not recall whether she knew that appellant was heading for Mexico. (10 RT 2669.) Shortly thereafter, she testified that she talked with appellant while they rode in the back seat from the place where he was arrested to the Long Beach police station.

> I believe he asked, said something to the effect of you speak Spanish or something to that effect and I told him yes, and he indicated that he was, he would have been at the apartment only a day and that he was going to Mexico and that led me to ask him where he was from and I think when he told me that I indicated that or he asked me if my family was from Mexico or something to that effect.

(11 RT 2743–2744.)

Thus, Agent Stevens actually asked appellant where he was from, after he told her he was on his way to Mexico. Without any of the testimony or documentation concerning the warrant, she knew he was from Mexico before the interrogation of appellant began in the Long Beach police station.

In sum:

(1) FBI agents have been trained in their obligation to inform foreign nationals of the right to contact their consulate since at least 1983, and probably since 1969;

(2) the FBI's initial involvement was based on the fact that appellant, known to his boss and the surviving victims and everyone else he knew in Placer County, was a Mexican national, and was probably fleeing the country;

(3) the arrest warrant said as much in its first substantive paragraph;

(4) the agent in charge of the arrest testified that she had seen the warrant, and carried a copy with her when she arrested appellant, before testifying that she had never seen it (see also affidavits of several FBI officers attesting to their ignorance of the warrant's contents or existence);

(5) the likelihood of the arrest warrant being taken with the agents when they went to arrest appellant is high, since without it they had no authority to arrest appellant, but the trial court blocked appellant from determining whether normal practice was to bring such a document to an arrest scene in order to gain entry; and

(6) FBI agents later, in lieu of appearing in court, submitted affidavits that were mass-produced by the Legal department, in which they all said they did not know appellant's nationality at the time of his arrest.

Testimony of Special Agent Elizabeth Stevens and the affidavits of the other FBI agents to the effect that they did not know appellant's nationality at the time he was arrested is incredible. Agent Stevens actually testified that she learned that he was born in Mexico and his family lived there while talking to appellant in the car before his interrogation. All agents were trained to give advisements of the availability of the consulate to foreign nationals. The FBI failed to provide the advisements to appellant they were bound by law to provide, and manufactured testimony and affidavits about their ignorance of the critical fact that led to their involvement in the first place. There is no support for the trial court's conclusion that their failure to provide the mandatory advisement was made in good faith; such a finding was objectively unreasonable.

### C. Prejudice, Remedy

The FBI withheld its advisement and access to consular support in order to elicit a confession. This not only violates article 36 of the VCCR, but it also violates section 834c. The trial court found that no remedy was appropriate because no case law had recognized suppression of statements or abandonment of the death penalty as appropriate remedies for an article 36 violation, but the trial court thought that the presence or absence of good faith made a difference in terms of whether or not an exclusionary rule

application was appropriate—and so has the U.S. Supreme Court. (See *United States v. Leon* (1984) 468 U S. 897, 922.)

There was a deliberate omission of the advisement of a "statutory" right as well as a treaty right. Prophylactic remedies may well be in order to deter future misconduct. (See, e.g., *United States v. Blue* (1966) 384 U.S. 251, 255 [recognizing that "this Court in a number of areas has recognized or developed exclusionary rules where evidence has been gained in violation of the accused's rights under the Constitution, federal statutes, or federal rules of procedure."].)

The appropriate remedy for deception by FBI agents regarding whether or not they knew a critical fact that was squarely stated in the arrest warrant they used to arrest appellant is suppression of appellant's statement. As shown in Argument VII, *ante*, the use of appellant's statements requires reversal of his convictions and sentence.

## IX. THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO INSTRUCT THE JURY TO CONSIDER THE PROSECUTOR'S FAILURE TO MAKE A TIMELY DISCLOSURE OF THE PRESENCE OF A PSYCHOLOGIST AS A HIDDEN OBSERVER OF APPELLANT'S JULY 16, 1998, INTERROGATION.

Dr. Frank Dougherty was a forensic psychologist retained by the prosecution to observe the interrogation of appellant on July 16, 1998. He viewed the interrogation live, by means of closed circuit television, and shared his observations with prosecutor Ned Beattie. Counsel for appellant did not learn of his existence until October 2000. Dr. Dougherty told counsel that could no longer remember details; he believed he took some contemporaneous notes about what he saw, but after diligent search, he was unable to find them. He prepared a declaration regarding this incident on April 8, 2001. (45 RT 10122–10129; 10 CT 2748–2749.) Counsel asked that the jury be instructed pursuant to CALJIC No. 2.28.[56] That interview

---

[56] At the time of appellant's trial, CALJIC No. 2.28 provided in pertinent part as follows: "The prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at trial so as to promote the ascertainment of truth, save court time and avoid any surprise which may arise during the course of the trial. Delay in the disclosure of evidence may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the non-complying party's evidence. [¶] Disclosures of evidence are required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of trial must be disclosed immediately. . . . The weight and significance of any delayed disclosure are matters for your consideration. However, you should consider whether the untimely

was critical, the most important evidence in the case. There were indices within the interview that Dr. Dougherty may have been actively involved; the last-minute review of appellant's understanding, or lack thereof, of his constitutional rights may have been the product of outside prompting. (45 RT 10032–10033.)

Counsel argued that appellant was forever deprived of the chance to ask about appellant's demeanor, and question him about a topic with which the prosecutor would not have been concerned—the voluntariness of appellant's statements. Was it Dr. Dougherty who signaled that he wanted to know about appellant's understanding of what was taking place? The passage of time deprived appellant of a percipient witness to a critical aspect of the case. (45 RT 10031.)

The prosecution objected to any such instruction. They never intended to, and did not, use Dr. Dougherty as a witness. Mr. Beattie could only recall that Dougherty turned and said to him that "it doesn't look like there's anything wrong with him." He did not believe there was any *Brady*-type[57] materials or that there had been any formal discovery request that

---

disclosed evidence pertains to a fact of importance, something trivial or subject matters already established by other credible evidence."

[57] *Brady v. Maryland* (1963) 373 U.S. 83.

would have required him to turn over Dr. Dougherty's name. (45 RT 10032.)

On April 11, 2001, the trial court denied appellant's request for the instruction. The bases were that (1) it wasn't clear that Dr. Dougherty actually took notes, and (2) it would be speculative to conclude that the notes would possibly have aided the jury because they concerned an event which was recorded, and that the jury could see for itself. (47 RT 10250.)

This ruling was prejudicial error. The whole point of Dr. Dougherty's watching the live interview was to provide the prosecution with expert opinion on the mental status of appellant, or whether appellant showed signs of "mental illness or aberration." (47 RT 10032.) Experts are allowed in court to present their views of events or evidence shown to the jury because a properly qualified expert had training and experience to see patterns or gain information about appellant that was beyond the common experience of the trier of fact. That's why experts are allowed to testify. (See Evid. Code, § 801.)

Section 1054.5(b) provides in its last sentence that the "court may advise the jury of any failure or refusal to disclose and of any untimely disclosure." CALJIC No. 2.28 was drafted to provide for this eventuality. The damage caused by the failure of the prosecution to disclose the

presence of an expert witness at the critical interview was prejudicial. The deprivation, at a time when appellant was without counsel, of first-hand observations of an expert psychologist retained by the prosecution cost appellant a valuable opportunity to develop evidence about aspects of appellant's mental status that could have been useful at the penalty phase, or aspects of the questioning process: "He may have made other observations that demonstrated something about mental state, mental abilities, coherence, all sorts of things that we just don't know about." (47 RT 10033.)

Failure of the prosecution to notify appellant for over two years of the presence of an expert on mental state issues at the recording of an interrogation session that generated the most critical piece of evidence in this case, compounded by the trial court's refusal to instruct the jury that it should take this failure into account when assessing the weight of this evidence deprived appellant of due process and a fair, reliable, and impartial determination of his guilt and sentence, in violation of his rights under the Sixth, Eighth and Fourteenth Amendments. Accordingly, appellant's convictions and sentence must be set aside.

## X. THERE WAS INSUFFICIENT EVIDENCE THAT THE APPELLANT HAD COMMITTED FELONY-MURDER AGAINST THE MARTINEZ BROTHERS AND THE COURT ERRED IN INSTRUCTING THE JURY ON THAT THEORY AND ALLOWING THE PROSECUTOR TO ARGUE IT.

The trial court committed reversible error in allowing the jury to base its murder verdicts as to the Martinez brothers (counts three and four) on a theory of murder in the commission of a robbery when, as the court itself had already ruled in dismissing the special circumstance allegations based on that theory, appellant did not possess an independent felonious intent to commit robbery and in fact, any robbery was incidental to the commission of the murders.

The prosecution's theories of first-degree murder of the Martinez brothers and special circumstances were felony-murder robbery, lying-in-wait; it also charged premeditation and deliberation. (1 CT 116–117, 120–121.) After all evidence was presented, appellant moved to dismiss the felony-murder special circumstances alleged in counts three and four, pursuant to section 1118.1. He argued that they must be struck under well-settled principles set out in *People v. Green* (1980) 27 Cal.3d 1, because whatever robberies might have occurred were incidental to appellant's main objective of killing Jose and Juan Martinez. (46 RT 9989 et seq.)

The prosecutor contended that the removal of a chain from each of the adult decedents, which were later found in appellant's trailer, was a robbery, and was one of the purposes of the killings. (46 RT 9997–9998.) The evidence of robbery was the presence in appellant's trailer of gold chains worn by the victims, along with their wallets; the money inside was intact. Appellant said during his Placer interrogation that he did not want any of the victim's things; he responded "yes" to the detective's question of whether he took them to keep them from being identified. (3 SCT 267.) This, of course, is a classic situation of a felony committed to further a murder. (See *People v. Green*, *supra*, 27 Cal.3d 1 [defendant took his wife's clothing, purse and jewelry after killing her in order to hinder identification of her].)

The thrust of the prosecution's evidence and argument from start to finish of its case was that appellant pre-dug a grave and had planned the killings for at least several days. In the course of considering appellant's motion the trial court stated that "the basis for the ruling would be that, as to the murder in the course of robbery special circumstance, this looks an awful lot like that *Green* case in which case—in other words, that what was going on here was a robbery in the course of a murder, not a murder in the course of a robbery." (46 RT 10127.)

After further elucidation of its feelings by the trial court, the prosecutor stated, "we have reviewed the question of the robbery special circumstance as to Counts Three and Four, and with the record in the condition it is factually, we do not want to risk that issue on appeal; therefore, we will not object to the 1118 as to that particular special circumstance." The court promptly granted the motion to strike those two special circumstances. (46 RT 10128–10129.)

But the trial court did not preclude the prosecutor from arguing felony-murder robbery even though it is established law that the felony-murder cannot be a theory for first-degree murder if the felony is an afterthought, or incidental to the murder. A felony committed in the course of a murder rather than a killing committed in the course of the commission of a felony will not qualify for the felony-murder rule. (*People v. Green*, *supra*, 27 Cal.3d at pp. 58–59.) The prosecution asked for CALJIC No. 8.21.1 as modified, to cover all felony-murder allegations, over appellant's objection. (46 RT 10079–10083.) The court erroneously allowed the instruction with modifications, and so instructed the jury. (46 RT 10443–10445.)[58]

---

[58] "The unlawful killing of a human being, whether intentional, unintentional, or accidental, which occurs during the commission or attempted commission of the crime of robbery, or the crime of rape, or the

The prosecutor then argued that appellant was guilty of felony-murders.[59] (See 47 RT 10303–10308.) There was a special instruction

---

crime of penetration with a foreign object, or as a direct causal result of the crime of robbery, or rape, or penetration with a foreign object, is murder in the first degree when the perpetrator had the specific intent to commit that crime.

The specific intent to commit robbery, or rape, or penetration with a foreign object, and the commission or attempted commission of such crime must be proved beyond a reasonable doubt.

The person or persons killed need not be the victim or victims of the crime, so long as the killing occurs in the commission or attempted commission of the crime or as a direct causal result.

For purposes of determining whether an unlawful killing has occurred during the commission or attempted commission of a robbery, the commission of the crime of robbery is not confined to a fixed place or limited period of time.

A robbery is still in progress after the original taking of physical possession of the stolen property while the perpetrator is still in possession of the stolen property and fleeing in an attempt to escape. Likewise, it is still in progress so long as immediate pursuers are attempting to capture the perpetrator or to regain the stolen property.

A robbery is complete when the perpetrator has eluded any pursuers, has reached a place of temporary safety, and is in unchallenged possession of the stolen property after having effected an escape with such property." (48 RT 10443–10445.)

[59] The prosecutor told the jury: "This is an area which we wanted to provide you, and you can get back there in the jury room now having three different theories of first degree murder to deal with, and you could say well, what happens if, for example, six of you feel it's first degree premeditated murder, three of you are of the view it's lying in wait, and three of you are of the view it's some type of felony murder as to one or more of the murders in this particular case. What happens then? What happens then is the law says that the jury need not be unanimous as to a particular theory of murder in the case. You can have that mix, so long as the jury is unanimous as to the underlying facts of the case." (47 RT 10307–10308.)

proffered by the defense that would have required the jury to find an independent felonious intent to rob in order to convict appellant of felony-murder of the Martinez brothers. (9 CT 2390.) The instruction was refused; the trial court held that "there's no rule that says there has to have been a felonious purpose independent of the 187 for purposes of the felony murder rule" (46 RT 10102.) This ruling was error.

The evidence is insufficient to show that the robbery was anything but an afterthought. The gold chains were very small and easy to carry. If they were the target of an intended robbery there is no reason for appellant to have left them behind. The prosecution's whole case, beginning with the interrogation of appellant in Placer County, was aimed at showing a preplanned intent to kill the decedents, and probably Yolanda as well. There is not a shred of evidence pointing to any independent intent to rob. Any robbery that took place was incidental to the murders.

This Court has held that notwithstanding the variety of criticisms leveled against the felony-murder rule, it is a statutory creation by the legislature[60] that the Court cannot set aside. (*People v. Dillon* (1983) 34

---

[60] Section 189, the felony murder statute, provides in relevant part: "All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing,

Cal.3d 441, abrogated on other grounds by *People v. Chun* (2009) 45 Cal.4th 1172, 1186.)

The fundamental rationale of the felony-murder rule is the deterrence of negligent or accidental killings in the course of the commission of dangerous felonies. (*People v. Hansen* (1994) 9 Cal.4th 300, 310.) In *Green*, the case relied on by all parties in this case, this Court applied this rationale to a case where both a murder and a robbery had been committed. The evidence made it clear, however, that the robbery was in furtherance of the murder, and incidental to the murder; there was no independent desire to rob in addition to the defendant's murder of his wife.

In *People v. Thompson* (1980) 27 Cal.3d 303, this Court applied these principles in a different factual setting. There the evidence revealed quite clearly that the defendant had come to the victims' house at the behest of another in order to kill the victims. He then took their car keys. In concluding that the evidence presented at trial was not sufficient to sustain a

---

or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree."

robbery felony-murder special-circumstance finding under *Green*, the Court explained:

> [T]he determination as to whether or not a murder was committed during the commission of robbery or other specified felony is not "a matter of semantics or simple chronology" . . . [but] [r]ather . . . involves proof of the intent of the accused. A murder is not committed during a robbery within the meaning of the statute unless the accused has "killed in cold blood in order to advance an independent felonious purpose, e.g., [has] carried out an execution-style slaying of the victim or witness to a holdup, a kidnaping, or a rape."

(*Thompson*, *supra*, 27 Cal.3d at p. 322, citations omitted.)

Noting the evidence suggested the defendant may have taken the car keys "simply to effect his getaway from the shootings," this Court found that "[w]hen the whole record is viewed in a light most favorable to the verdict, it establishes at most a suspicion that [defendant] had an intent to steal independent of his intent to kill. (27 Cal.3d at p. 324.) Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact. (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) Under such circumstances, the special-circumstance finding could not be upheld. (27 Cal.3d at pp. 324–325.)

The purposes and reach of the felony-murder statute in this regard are identical to the special-circumstance statute. In *People v. Murtishaw* (1981) 29 Cal.3d 733, this Court found sufficient evidence to sustain a

conviction of felony-murder because there was testimony by a percipient witness that the accused, in a remote part of the desert, and without transportation, had said that he wanted to steal the victim's car. This Court distinguished the case from *Green*, and held that since there was evidence of an independent intention to commit the felony in addition to evidence of murder, the evidence was sufficient. (*Murtishaw*, *supra*, 29 Cal.3d at p. 752, fn. 13.)

In this case, all evidence regarding the motive of these killings and the assault on Yolanda Martinez was focused on showed resentment of the victims by appellant, or an attack by the victims on appellant for cheating on their sister. All parties seemed to understand that these were the motives for the crime is when the trial court struck, in accord with the prosecutor's wishes, the special circumstances related to robbery of the Martinez brothers. It was error for the trial court to allow argument and instructions on felony-murder in the dearth of sufficient evidence.

### A. The Error Was Prejudicial

The test for determining whether instructions on a particular theory of guilt are appropriate is whether there is substantial evidence which would support conviction on that theory. "It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of

the case." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) Where there are alternate theories of guilt, one of which is not supported and another which is supported, the verdict will be set aside unless it is possible to discern how the jury ruled. If the jury did make separate determinations that the defendant was guilty on each separate theory, then there is no basis to invalidate a legitimate premeditated murder verdict. (*People v. Davis* (2005) 36 Cal.4th 510, 565; see also *People v. Morris* (1988) 46 Cal.3d 1, 24.)

In *People v. Anderson* (1965) 63 Cal.2d 351, there were theories of premeditation, murder in the perpetration of mayhem, and murder by torture. One of the theories was not supported by sufficient evidence and this Court could not determine from the record upon which theory the guilty verdicts were based. The convictions were therefore reversed. (*Id.* at pp. 359–360.)

Here, there were no separate verdict forms for each theory of murder; there were only verdict forms addressing murder, along with an argument from the prosecutor saying that the jurors could have a separate belief in different theories, so long as they agreed on what happened. (11 CT 2937, 2944.) Like *Green* and *Anderson,* it cannot be determined if any jurors relied on a theory for which the evidence was insufficient. Therefore, the murder convictions for each of the Martinez brothers must be

set aside and further proceedings on this allegations are barred by the double jeopardy clause. (*People v. Green, supra*, 27 Cal.3d at p. 62.)

## XI. THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE IS UNCONSTITUTIONAL.

To withstand scrutiny under the Eighth Amendment as a valid predicate for the determination of death-eligibility, a special circumstance 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. (*Godfrey v. Georgia* (1980) 446 U.S. 420, 427.) In California, this narrowing function is performed by requiring the trier of fact to determine whether the murder involved one or more of the special circumstances set out in section 190.2, subdivision (a), before a defendant is eligible to receive the death penalty. "[T]he special circumstances serve to 'guide' and 'channel' jury discretion 'by strictly confining the class of offenders eligible for the death penalty.' [Citation.]" (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 467.) In order to perform this constitutionally required function, a special circumstance finding "must genuinely narrow the class of persons eligible for the death penalty, and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens* (1983) 462 U.S. 862, 877.)

The lying-in-wait special circumstance (section 190.2, subd. (a)(15)) as interpreted by this Court accomplishes neither of these goals. As Justice Mosk noted, "it is so broad in scope as to embrace virtually all intentional

killings." (*People v. Morales* (1989) 48 Cal.3d 527, 575.) *Morales* eliminated the need for physical concealment. Since *Morales*, this Court has effectively eliminated any need for a period of lying in wait any longer than that needed for premeditation and deliberation (*People v. Sims* (1993) 5 Cal.4th 407, 433–434),[61] or a requirement that there be a surprise attack from a position of advantage. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500–501, 512–515.)

The Ninth Circuit upheld a challenge to this statute on vagueness grounds by finding a distinction between first degree murder by lying-in-wait and the special circumstances, on grounds that "[u]nlike special circumstances murder while lying in wait, first degree murder by means of lying in wait does not contain a temporal requirement." (*Houston v. Roe* (9th Cir. 1999) 172 F.3d 901, 908; *Morales v. Woodford* (9th Cir. 2004) 388 F.3d 1159, 1174–1178.) *Sims*, however, holds that there is no temporal

---

[61] "Defendant contends a reasonable juror would have understood the instruction to mean that the lying-in-wait requirement could be satisfied by a brief period of premeditation and deliberation, and that because concealment of purpose satisfied the concealment element, the instruction failed meaningfully to distinguish the special circumstance from a first degree murder perpetrated by means of lying in wait or based upon premeditation and deliberation.

"We disagree. The reference to premeditation and deliberation related solely to the *duration* of the period of lying in wait and did not dispense with the other elements peculiar to the special circumstance. . . ." (*People v. Sims*, *supra*, 5 Cal.4th at 433–434.)

distinction between murder while lying in wait and premeditated murder. Not only does section 190.2, subdivision (a)(15) do nothing to rationally narrow the pool of murderers eligible for death, but since it is now effectively indistinguishable from premeditated first degree murder, it is unconstitutionally vague. (*Kolender v. Lawson* (1983) 461 U.S. 352, 357.)

The pattern jury instructions given in appellant's case were hopelessly confusing and contradictory. His jury received the standard CALJIC No. 8.81.15 instruction regarding the elements of the lying-in-wait special circumstance set out in section 190.2, subdivision (a)(15).[62] "Lying

---

[62] To find that the special circumstance, referred to in these instructions as murder while lying in wait, is true, each of the following facts must be proved.

First, that the defendant intentionally killed the victim.

And, second, that the murder was committed while the defendant was lying in wait.

The term while lying in wait within the meaning of the law of special circumstances is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise, even though the victim is aware of the murderer's presence. The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.

Thus, for a killing to be perpetrated while lying in wait, both the concealment and watchful waiting as well as the killing must occur during the same time period, or in an uninterrupted attack commencing no later than the moment concealment ends.

If there is a clear interruption separating the period of lying in wait from the period during which the killing takes place, so that there is neither an immediate killing nor a continuous flow of the uninterrupted lethal events, the special circumstance is not proved.

in wait" is defined more than once, and in materially different ways. The first definition says that the temporal element of lying in wait need not continue for any particular period of time, no longer than the time required to premeditate and deliberate. Premeditation and deliberation were separately defined for appellant's jury as potentially lasting a "short period," no more than is needed to weigh and consider the question of killing. (47 RT 10442–10443.)

But appellant's jury was also told that the special circumstance of lying in wait is established where there is, *inter alia*, a "substantial period" of watching and waiting for an opportune time to act.

The jury was told that elements include "concealment by ambush," which can be found "even though the victim is aware of the murderer's presence, if there is a "concealment of purpose," but a "*mere* concealment of purpose" is not sufficient the meet the requirement of concealment. There must also be a "position of advantage," which can be standing in

---

The mere concealment of purpose is not sufficient to meet the requirement of concealment set forth in this special circumstance.

However, when a defendant intentionally murders another person, under circumstances which include first, a concealment of purpose, second, a substantial period of watching and waiting for an opportune time to act, and third, immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage, the special circumstance of murder while lying in wait has been established. (47 RT 10455–10456.)

front of the victim (*Hillhouse*), but this suffices only if there is "a substantial period of watching and waiting"—but watching and waiting in the first part of the instruction need not take any longer than the premeditation required by a first-degree murder.

The instruction given to appellant's jury is impossible to understand and apply. If the temporal element is the equivalent to that of first-degree murder, then the statute loses all claim to performing a rational narrowing function, and the later requirement of a "substantial period of watching and waiting" is a confusing, contradictory and unnecessary addition to the instruction. If the special circumstance does require a "substantial period" of watching and waiting (see *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 500), then the instruction is incorrect on a material point.

Where the jury is given an incorrect instruction, merely giving a correct one as well does not cure the harm since it is impossible to know which of the instructions the jury actually followed. (See *People v. Rhoden* (1972) 6 Cal.3d 519, 526). "It cannot be overemphasized that instructions should be clear and simple in order to avoid misleading the jury." (*Guerra v. Handlery Hotels, Inc.* (1959) 53 Cal.2d 266, 272.) The instruction given to appellant's jury regarding the lying-in-wait special circumstance was

neither clear nor simple.[63] Section 190.2, subdivision (a)(15) as interpreted by this Court and as presented to appellant's jury, violates the Eighth and Fourteenth Amendments to the U.S. Constitution. The jury's findings that appellant was guilty of lying in wait in order to commit his crimes must be set aside.

---

[63] The quote by Justice Mosk describing CALJIC No. 2.90 is even more apt for CALJIC No. 8.25: "But this, now hallowed, language produces the same sheep-like acceptance as the 'Emperor's New Clothes.' Judges awesomely intone the ponderous gibberish, as lawyers hypnotized into believing they understand the fatuity listen respectfully, while jurors, noticing His Honor's serious mien and the lawyers' sage expression, mimic the exampled air of grave comprehension." (*People v. Brigham* (1979) 25 Cal.3d 283, 316.)

## XII. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT SPECIAL CIRCUMSTANCES FINDINGS REGARDING THE KILLING OF THE TWO CHILDREN.

### A. There Was Insufficient Evidence to Support the Lying-in-Wait Special Circumstances Finding Regarding the Killing of the Two Children.

The jury found the lying-in-wait special circumstances to be true for all four victims. (11 CT 2925, 2932, 2939, 2946.) There was, however, insufficient evidence to support this finding regarding Jack and Areli Martinez, the victims in counts one and two.

The elements of the lying-in-wait special circumstance have been described as:

> [A]n intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. . . . [Citations.] The element of concealment is satisfied by a showing "that a defendant's true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim." [Citation.]

(*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 500, quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 388.)

In considering challenges to the sufficiency of the evidence, a reviewing 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. 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. This Court does not, however, limit its review to the evidence favorable to the respondent. The issue must be resolved in light of the whole record, not isolated bits selected by respondent, and be resolved on the basis of evidence that is reasonable, credible, and of solid value. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Bassett* (1968) 69 Cal.2d 122, 139; *Jackson v. Virginia* (1979) 443 U.S. 307, 319.)

This Court's first in-depth discussion of the lying-in-wait special circumstance is found in *People v. Morales*, *supra*, 48 Cal.3d 527. In that case, the defendant armed himself and, pursuant to a prearranged plan, climbed into the back seat of his accomplice's car, directly behind the victim. After the accomplice drove to a more isolated location, the defendant launched an attack from the backseat, attempting to strangle the victim with a belt. (48 Cal.3d at p. 554.)[64]

---

[64] The Court summarized the evidence in *Morales*, as it pertained to the lying-in-wait issue, as follows:

> Accomplice Ortega asked victim Winchell to accompany him to a shopping mall to find a gift for a friend. After learning from Ortega that the couple would be arriving soon to pick him up, defendant armed himself with a belt, knife and hammer, telling his girlfriend Racquel Cardenas that he was

The *Morales* opinion noted that the lying-in-wait special circumstance must be defined so as to present a type of murder "sufficiently distinct from 'ordinary' premeditated murder to justify treating it as a special circumstance." (48 Cal.3d at p. 557.) Otherwise, "constitutional considerations . . . might well prevent" the application of the lying-in-wait concept as a special circumstance. (*Ibid.*)

Here, the prosecutor answered its own question about why appellant had killed the children by quoting his own statements that it was because of the fight, after that, "there was no way out." (47 RT 10352; see 3 SCT 271.) During that same interview, appellant repeatedly said that he did not know what he was doing, that he did not understand what he was doing when he killed the children. (3 SCT 177–178.) Josefina Torres asked him why he had killed the children, and he said that he didn't know; they were crying. It was his nerves, and he was desperate. (39 RT 9244.)

---

> going to do Ortega a favor and 'hurt' a girl by strangling her with his belt. When Ortega and Winchell arrived, defendant climbed in the backseat, directly behind Winchell in the front seat. After Ortega had driven through town to a more isolated location, defendant reached over the seat and attempted to strangle Winchell with the belt. The belt broke, and then he began to beat her head repeatedly with the hammer. Winchell's cries for help from driver Ortega indicated that she was taken by surprise, and was previously unaware of any plan to harm her.

(48 Cal.3d at p. 554.)

In closing argument, the prosecutor argued that there was evidence of lying in wait because appellant was able to carry out a plan to take each of the adults by surprise. (48 RT 10403.) Regarding the children, however, the prosecutor's only argument was that appellant killed the children in order to "save his own skin." (48 RT 10411.) He did not argue that there was any evidence pointing to the children being killed by appellant while lying in wait, because there is no such evidence. The lying-in-wait special circumstance findings regarding the killing of the two children are not supported by substantial evidence, and must be set aside.

### B. There Was Insufficient Evidence to Support a Felony-Murder Conviction for the Killing of Each of the Two Children to Facilitate Flight from the Crime Scene.

Special-circumstances charged by the prosecution for the killings of Jack and Areli Martinez included section 190.2, subdivision (a)(17)(a), commission of the murders to facilitate flight after the commission of the rape of Yolanda Martinez, as charged in count five and after the commission of a rape by a foreign object, as charged in count six. (1 CT 121–122.) Appellant challenged each of these special circumstances via his section 1118.1 motion. (45 RT 10000.)

Counsel argued that appellant was not engaged in flight by any definition of what would constitute flight. The court summarized its understanding of counsel's argument when it turned to the prosecutor:

> [H]e's saying you can't give somebody engaged in flight special circumstances until they flee; that just being their [sic] packing your suitcases isn't enough . . . But if you're still just kind of hanging around the scene of the crime –
>
> MR. BEATTIE: Waiting to commit a few more?
>
> THE COURT: Yeah. You haven't fled. And if you haven't fled, you can't be subject to the special circumstance."

(45 RT 10004.)

> I would have to cite you Guzman and Fields, and bring up the facts of the cases here, because as I recall, there wasn't a strict situation of flight ongoing. So I would like to look at those. Also, we would like to look at the aspect of the killing to facilitate the escape or avoid detection, which is embodied in the CALJIC, and I'd like to find cases that support that. I hope its here for a reason, and I'm not being facetious, but I don't know of a case that addresses that.

(45 RT 10005.)

When argument on this issue resumed, the prosecutor contended that the killing of one person can be considered a felony murder as long as it is contemporaneous or in the same transaction. (See *People v. Guzman* (1988) 45 Cal.3d 915, 952; *People v. Fields* (1983) 35 Cal.3d 329, 364–367.) The court responded,

> [THE COURT]: You didn't charge him with a special circumstance of murder committed in the course of a rape or oral penetration. You charged him with a special circumstance of murder during flight after.
>
> MR. BEATTIE: Right.
>
> THE COURT: So I think it would be inconsistent with the felony murder theory predicated upon the rape or the oral penetration as the felony.
>
> MR. BEATTIE: If the felony murder theory and the special circumstance felony murder tracked exactly the answer would be yes. But there is law that does support a broader analysis to the felony murder theory in that killing, rape situation . . . and the killing can be of another person., that's another special request.

(45 RT 10051–10052.)

Counsel for appellant complained of a lack of notice: "This is the first time we've heard that particular theory come in. Particularly given the manner in which they've [sic] charging it." After further discussion, counsel repeated his contention that it would be error to allow the prosecutor to come in with any theory they want provided that by the end of the trial there is evidence to support it—and here, there was no evidence to support the actual felony-murder special circumstance charged. (45 RT 10056.) The trial court ruled that the prosecutor was entitled to proceed on felony-murder charges on all four counts of murder. (45 RT 10056.) This ruling was error.

It's true that this Court has long recognized the "one continuous transaction" analysis as a standard for sufficiency of evidence to support a felony-murder instruction or conviction, where the felony murder is alleged to have been committed during flight from the scene of the felony's commission. (See, e.g., *People v. Wilkins* (2013) 56 Cal.4th 333, *passim*; *People v. Welch* (1972) 8 Cal.3d 106, 118–119; *People v. Chavez* (1951) 37 Cal.2d 656, 669–670; see also *People v. Hernandez* (1988) 47 Cal.3d 315, 348.) But the prosecutor presented no evidence at all that the killing of the children was done to facilitate escape or flight. He argued that the children were killed because:

> He said to the officers with regard to the children he had no way out because of what he did. What does that tell you? He's thought through the consequences of his acts. He has thought through the fact that these children, even though they're small, can identify him. If you believe that he was in fear. He was in fear of the fact that they were going to tell someone what it is he had done to their mother. What it is that had occurred on that property that day. And to save his own skin he killed them.

(48 RT 10411.)

Assuming that the jury agreed with the prosecutor, that would support a convection of murder, and a multiple-murder special circumstance, but it does not support a finding that the special circumstance actually charged in this case was true. For example, this Court has also

recognized in this context that a defendant has a right to a jury determination of each separate element of the crimes charged, which cannot be usurped by a judge; it was error for a judge to find in a response to a jury's question, that there was "one continuous transaction" which is an element necessary to establish sufficiency of evidence to support a felony-murder instruction or conviction. (*People v. Sakarias* (2000) 22 Cal.4th 596, 624–625.)

The prosecutor's difficulty with charging special circumstances led to the dismissal of six of them. (46 RT 10129–10133.) The problem centers on the fact that the crimes were so horrible, and yet so at odds with everything we know about the accused, who had never been arrested in over a decade of living in the United States, that there was no satisfactory explanation for the crimes presented by either the defense or the prosecution, and no obvious felony being committed or course of action taken, beyond the killings themselves. The court's rationale for the "one continuous transaction" rule is to inhibit the commission of felonies, not murders. The trial court continually suggested to the prosecution that it confine itself to the multiple-murder special circumstance (see, e.g., 45 RT 10005) but its suggestions were not heeded. The court erred in allowing the

prosecution to proceed with these special circumstances, which were not supported by sufficient evidence.

### C. Prejudice

Because only one murder verdict was returned, it is possible that there were some jurors who believed that appellant killed the children in a frenzy of wanting to silence them, and not as part of any premeditated intent to commit any particular felony. Because it is impossible to tell what theory was embraced by which juror, the murder convictions must be set aside; see Prejudice argument, *ante*, Arg. X.)

## XIII. APPELLANT PRESENTED CREDIBLE EVIDENCE TENDING TO SHOW THE EXISTENCE OF INVIDIOUS DISCRIMINATION IN THE DISTRICT ATTORNEY'S PURSUIT OF THE DEATH PENALTY AGAINST HIM; THE TRIAL COURT'S REFUSAL TO ALLOW APPELLANT DISCOVERY TO PURSUE A CLAIM OF DISCRIMINATORY PROSECUTION CONSTITUTED REVERSIBLE ERROR.

On June 26, 2000, appellant filed a motion for discovery. (6 CT 1665–1751.) He sought an order allowing him access to information pertinent to resolution of a selective prosecution inquiry; his request was limited to material and information readily available to the district attorney. In support of this motion he presented a compilation of data involving the prosecution of murder, attempted murder, and special circumstance homicide, showing a pattern of discriminatory prosecution as to the pursuit of the death penalty against him.

Appellant showed that from 1977 until 1998, four people were prosecuted in Placer County for multiple murders involving children: McGraw, Hill, Knorr, and appellant. Defendants McGraw, Hill, and Knorr were offered the opportunity to plead guilty to negotiated settlements with waiver of the death penalty. Appellant was not. McGraw, Hill, and Knorr were Caucasian. Appellant is Hispanic. (Cf. 6 CT 1672.) In the decade prior to appellant's case, only two murder prosecutions proceeded to trial in Placer County with the prosecution seeking death: (Kenneth) Williams and

Harper. Both are African-American. Appellant thus demonstrated a right to and need for such discovery and reasonably limited the scope of his discovery request. (*Murgia v. Municipal Court* (1975) 15 Cal.3d 286; *United States v. Armstrong* (1996) 517 U.S. 456.)

The prosecutor replied with documents that included declarations from the prosecutors in each of the four cases cited by appellant. (6 CT 1752–1777; 7 CT 2009–2035.)

Argument was held on January 31, 2001. (13 RT 3269–3283.) The trial court denied the motion. The court found that no threshold showing had been made; that the prosecutor's statistics showing no racial disparity were not challenged by appellant; that each case highlighted by appellant was readily distinguishable; and that the present case, if proven, with four victims, two children, and a rape charge, is "certainly a death penalty case." The motion for discovery was denied. (13 RT 3283–3285.)

The trial court's ruling was in error. In this case, the prosecutor announced on July 16, 1998, before it had the transcript of the interview of appellant in Placer County and the day before appellant was arraigned, that appellant was charged with numerous special-circumstance crimes. (1 CT 7 et seq.) It formally announced it was seeking death for appellant three weeks later. (1 CT 41.) This immediate decision, made before any of

appellant's individual characteristics were known, contrasts sharply with the careful attention to the character and background of the Caucasian defendants who were not subject to the death penalty. (Cf., the prosecutor's detailed declarations explaining why they did not seek the death penalty against other defendants named by appellant.) While it is true that this case is egregious, the issue here is whether or not appellant received the same type of consideration from the prosecutor's office as did those who committed similar crimes. He did not.

In *Murgia*, *supra*, this Court held that because the issues related to a constitutional defect in the institution of the prosecution, rather than to the guilt or innocence of the accused, it should be resolved by the trial court. (15 Cal.3d at p. 293, fn. 4.) Evidence of discriminatory intent is usually in the possession of law enforcement authorities rather that the defendant. (*People v. Gray* (1967) 254 Cal.App.2d 256, 266.) In *Murgia*, this Court found that the allegations were sufficient to establish a prima facie claim of discrimination, and held that "traditional principles of criminal discovery" required that defendants be allowed discovery of information relevant to their claim. (*Murgia*, *supra*, 15 Cal.3d at pp. 301, 306; see *Bortin v. Superior Court* (1976) 64 Cal.App.3d 873, 878.)

Here, the only defendants against whom the prosecutor sought the death penalty were minorities. For each Caucasian defendant for which the prosecutor supplied evidence, the process of determining whether or not to seek the death penalty was a careful one that took into account the character, intelligence level, and background of the accused. (6 CT 1752–1777; 7 CT 2009–2035.) None of these factors were considered in the present case. Appellant presented a prima facie case of intentional discrimination. The trial court prejudicially erred in not allowing discovery as sought by counsel.

According to *Murgia*, the appropriate remedy is to remand this case to the trial court, and consider appellant's challenge to discriminatory prosecution after appellant has been provided the discovery he requested. (*Murgia*, *supra*, 15 Cal.3d at 306.) If appellant, after being provided with the requested discovery, can establish that he was discriminated against, his death penalty must be set aside.

## XIV. THE ILLEGAL AND SECRETIVE DISSEMINATION BY THE PLACER COUNTY SHERIFF AND MEDICAL RECORDS STAFF TO THE PROSECUTOR OF JAIL LOGS DISCLOSING IDENTIFYING INFORMATION OF DEFENSE EXPERTS AND VISITORS ASSISTING IN PREPARATION OF THE DEFENSE—AND THE PROSECUTION'S MISUSE THEREOF TO CONTACT AND INTERVIEW SUCH DEFENSE EXPERTS AND VISITORS AND TO ASCERTAIN DEFENSE STRATEGY—VIOLATED A HOST OF APPELLANT'S CONSTITUTIONAL RIGHTS; THE TRIAL COURT'S REFUSAL TO ESTOP OR PRECLUDE THE PROSECUTION FROM SEEKING DEATH AND/OR RECUSE THE DISTRICT ATTORNEY REQUIRES REVERSAL OF THE ENTIRE JUDGMENT.

### A. Factual and Procedural Background

While appellant was incarcerated at the Placer County Jail, the Placer County District Attorney requested from the Placer County Sheriff the identity of all appellant's visitors at the jail. The prosecutor used this information to identify and interview so-called social visitors, as well as to identify, and contact by telephone, certain professional visitors. The prosecutor had also ascertained the purpose behind these visits. All this was done without notice to the defense. At the time this occurred, the defense had not been provided with a list of prospective prosecution trial witnesses, other than as contained in routine police reports, nor had the defense provided the names of anticipated trial witnesses to the prosecution.

Appellant learned of these acts when one of his potential expert witnesses phoned counsel Leonard Tauman to report that she had received a

call from a man named Joe Bertoni. Mr. Bertoni had asked her for a copy of her curriculum vitae, and tried to elicit from her information about her work on other cases. (3 CT 671.)

Appellant's other counsel, Mary Beth Acton, received a phone call at home from another of appellant's potential experts. That expert had also been called by Mr. Bertoni. Bertoni told her that he was aware she was going to be a witness in appellant's case, and that he had the names of other defense witnesses, including at least one confidential expert witness; it was evident to the expert that Bertoni had done a background check on her, and that he was attempting to elicit information concerning appellant, including her acknowledgment of, and relation to, the other expert. (3 CT 672.)

No one from the defense team had disclosed the identity of either expert. Alarmed, counsel filed an emergency application for a restraining order pending a hearing on December 13, 1999. (3 CT 669 et seq.)

By the December 13 hearing, counsel for appellant had learned that the prosecution had learned the names of these experts because it had been granted access to all of the visitor's logs showing who had come to visit appellant in jail. After discussion on the issue, a hearing was scheduled for January 19, 2000, and the trial court ordered that in the meantime, no one from the DA's office was to do any further review of the jail access logs,

nor could the prosecutor's office contact any potential witness based on those logs. (5 RT 1181 et seq.; 5 RT 1196.)

On January 13, 2000, the prosecutor filed points and authorities regarding its access to and use of the jail visitor's log, and a declaration from Mr. Bertoni. (3 CT 683, 686 et seq.) On that same day, appellant filed a motion to estop the prosecutor from seeking the death penalty and/or recusal of the Place County District Attorney. (3 CT 698 et seq.)

At the hearing on January 19, 2000, Mr. Bertoni testified how he got the logs in question the previous September, at the direction of prosecutor Beattie, and what the logs showed. (5 RT 1202–1260.) Donna Sylvia, Corrections Supervisor at the Placer County Jail, described giving the logs to Mr. Bertoni; she testified that visitation logs were routinely given to law enforcement. (5 RT 1261–1289.) After reviewing various documents, some in camera, the trial court directed the parties to file simultaneous briefs on January 28, 2000. They did so. (See prosecutor's brief at 3 CT 750 et seq.; appellant's brief at 3 CT 784 et seq.)

The matter was argued on February 2, 2000. (5 RT 1309–6 RT 1354.) The trial court ultimately rejected appellant's requests for either recusal of the prosecutor's office or removal of the death penalty from the sentencing opinions, but it did sign an order directing the Placer County Jail

and jail staff from disclosing to any person, either directly or indirectly, any information pertaining to defense experts in this case that were retained pursuant to section 987.9. The court also directed the prosecutor's office to not access, acquire, or receive any such information through any information system shared with the Placer County Jail or by any other direct or indirect means. (See 6 RT 1355–1363; 3 CT 715, 804; Order signed Feb. 9, 2000, at 3 CT 816–817.)

Appellant filed a renewed motion to recuse the prosecutor's office or estop the death penalty as an option in this matter on December 13, 2000. (5 CT 1409 et seq.) In that motion appellant alleged that shortly after November 7, 2000, prosecutor Tom Beattie, the man who directed Joe Bertoni to gather all jail visitation logs of appellant's visitors, contacted Yvonne Maxfield, an employee of California Medical Forensic Group ("CMFG"). CMFG held a contract with Placer County to provide medical services, including psychotherapeutic services. In response to Mr. Beattie's questions, Ms. Maxfield told him that appellant's file contained no records implicating a psychotherapist/client relationship. (11 RT 2768, 2775.) Previously, Mr. Beattie had secretly identified all of appellant's non-CMFG professional visitors.

The prosecutor did all this in order to learn whether appellant had made any "complaints of headaches, nervousness, or nervous condition" or manifested and "physical or medical or mental condition." The goal was to gather information to use against appellant "for any issue forthcoming on the *Miranda* waiver . . . and two, it may well bear on any type of mitigating feature or absence thereof in the penalty phase of the case, particularly the absence of complaints of "headaches or nervousness or anything like that." (11 RT 2767–2768, 2771.)

The prosecutor issued a subpoena duces tecum to CMFG seeking this information. The phone call made by Mr. Beattie, however, was a successful end run around the subpoena, and rendered it irrelevant. The prosecution learned what it needed to know about any evidence of mental conditions that appellant might use during pretrial motions, or at a penalty phase. The issue was argued on December 22, 2000. (12 RT 2971 et seq.) Appellant's request for sanctions was denied. (12 RT 2985–2986; 6 CT 1496.)

This misconduct violated appellant's Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment guarantees of rights to privacy and association, the assistance of counsel and to prepare a defense, due process and reciprocal discovery, equal protection, to not incriminate himself, to be free

of unreasonable searches and seizures, and to statutory rights to confidentiality in the preparation of a defense (§§ 987.9 and 1017) and to confidentiality and privacy under the Information Practices Act (Civ. Code, § 1798 et seq.). These violations prejudiced appellant by informing the prosecutor of crucial aspects of appellant's defense, and disrupting the preparation of his defense. They require that his convictions and especially his sentence be set aside.

### B. A Pretrial Detainee Retains His Constitutional Rights Except Insofar as They must Be Compromised to Appropriate Penological Interests.

A defendant in custody retains his constitutional and statutory rights, except insofar as necessary to preserve jail security. "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." (*Turner v. Safley* (1987) 482 U.S. 78, 84.) "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate *penological* interests." (*Id.*, 482 U.S. at p. 89, emphasis added.) Since prisoners retain rights that are constitutional in nature, there must be some sort of accommodation between institutional needs and constitutional requirements. (*Bell v. Wolfish* (1979) 441 U.S. 520, 546.) Due process requires that any practices restricting prisoners' rights must be "rationally related to a legitimate nonpunitive

governmental purpose" and not excessive in relation to that purpose. (*Id.* at p. 563.)

California prisoners additionally are afforded the protections of section 2600, which provides that "[a] person sentenced to imprisonment in a state prison may during that period of confinement be deprived of such rights, and only such rights, as is reasonably related to legitimate penological interests." Further,

> [B]y enactment of Penal Code sections 2600 and 2601, the Legislature established a policy that prisoners retain the rights of free persons, including the right of privacy, except to the extent that restrictions are necessary to insure the security of the prison and the protection of the public. Although these statutes speak of persons confined in state prison, detainees in local jails as a matter of logical and constitutional necessity enjoy at least equal rights."

(*De Lancie v. Superior Ct.* (1982) 31 Cal.3d 865, 868.)

### C. Dissemination of Jail Visitor's Logs by the Sheriff to the District Attorney Is Prohibited, with Exceptions Not Pertinent to this Action.

Appellant recognizes that the jail may collect identifying information from all persons visiting inmates at the jail, and that such data collection is an important part of maintaining institutional security. Dissemination of that information, however, is controlled by Civil Code section 1798 et seq. Those sections are grounded in rights to privacy articulated in article I,

section 1, of the California Constitution and the First, Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution.

Although the sheriff as jailer may collect the information at issue here, he may not disclose it absent an appropriate government purpose. (Civ. Code, §§ 1798.3, 1798.24 and 1798.68.) Here, the purpose behind the prosecutor's asking the sheriff for the visitor log information, and the sheriff providing it to him, was to provide the prosecutor access to defense strategy and evidence, and to potential defense witnesses. Certainly no court would issue a warrant allowing the District Attorney access to jail logs for that purpose.

### D. The Prosecutor Violated Appellant's Right Against Self-Incrimination.

As in any capital case, appellant had to rely on experts to assist him in preparation of the defense case. In order to assist in that preparation, experts were required to visit appellant at the jail, either to make professional assessments or to secure information necessary to their work. Those experts must sign in with the jail, providing pertinent identifying information; that disclosure of information is necessary to jail security. The prosecution's use of such compelled evidence deriving directly from the appellant violated appellant's right against self-incrimination.

Prosecutorial discovery applies only to evidence that the defendant reasonably expects to introduce at trial. Compelled pretrial disclosure of *anticipated* witnesses survives a Fifth Amendment challenge because this merely affects the timing of that disclosure. The government would learn of the identity of those witnesses during the trial in any event. (*Williams v. Florida* (1970) 399 U.S. 78; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 365–372; *Jones v. Superior Court* (1962) 58 Cal.2d 56, 60–61.)

This Court has recognized that in capital cases, there is cause for special concern regarding the timing of penalty phase prosecution discovery. (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1237.) Here, the prosecutors made a mockery of the systems of discovery and disclosure then in effect, and simply reached out to grab the names of all potential experts or treatment providers that had made any contact with appellant, and to directly contact them with questions about their relationship with other potential experts, the treatment given or not given to appellant, and how they were related with other defense experts. In so doing, they violated appellant's right against self-incrimination.

The identity of experts alone will frequently reveal the purpose and strategy of defense case preparation, and is thus protected by privilege. (See *Smith v. Superior Court* (1981) 118 Cal.App.3d 136 [psychotherapist-

patient privilege prevents disclosure of therapist's identity since that would disclose confidential information about whether patient is seeking treatment]; *Rosso, Johnson, Rosso & Ebersold v. Superior Court* (1987) 191 Cal.App.3d 1514, 1519 [237 Cal.Rptr. 242] [although client's identity usually not considered privileged, list of persons who contacted the firm about particular medical device was shielded from disclosure because it "would reveal the nature of a medical problem, ordinarily considered a confidential communication"].)

The identity of experts can reveal the purpose and strategy of defense preparation. It provides a lode of information that would not otherwise be available to the prosecution. Particular kinds of forensic experts, for example, reveal the direction of the defense case. The defendant's failure to identify and call certain experts may disclose abandonment of explored defenses. This may lead to the prosecution investigating that very area to find useful prosecution evidence, or it may lead to damaging cross-examination questioning of called defense witnesses.

In addition to raising due process, work product, and attorney-client privilege concerns, discussed below, this compelled disclosure of potential (as contrasted to anticipated) witnesses violated defendant's rights to present a defense and privilege against self-incrimination. Of course, direct

disclosure by the agency charged with treating mental problems of Placer County jail inmates of whether or not appellant had sought such treatment is a violation of numerous statutory and constitutional prohibitions against interference with the development of a defense, but also of appellant's right against self-incrimination.

### E. The Prosecution's Misuse of the Jail Logs Violated Appellant's Right to Counsel.

The Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution guarantee that an accused will enjoy the right to counsel. A defendant has a right to the effective assistance of counsel. "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." (*United States v. Cronic* (1984) 466 U.S. 648, 656.)

Effective assistance of counsel, particularly in capital cases, requires the employment of appropriate experts to assist in the preparation of the defense. (*People v. Deere* (Deere II) (1991) 53 Cal.3d 705; *Ake v. Oklahoma* (1985) 470 U.S. 68, 84.) In order to provide the assistance mandated by the Constitution, counsel must be able to consult with the defendant, personally or through experts, without interference or

impediment from the prosecution. (*Rodriguez v. Superior Court* (1993) 14 Cal.App.4th 1260, 1264–1270.)

Following appointment of counsel, the prosecution may not use informants or police officers to extract information from the accused; such conduct offends a defendant's right to counsel. (*Massiah v. United States* (1964) 377 U.S. 201.) Additionally, included in the Sixth Amendment right to counsel is the accused's right to communicate privately with counsel. (*Barber v. Municipal Court* (1979) 24 Cal.3d 742.)

Once the accused is represented by counsel, the government is prohibited from engaging in conduct which interferes with the accused's right to communicate with counsel. In order to consult with his client and properly prepare a defense, counsel and his agents must provide revealing information that is entered into jail logs. In accessing those logs for the purpose of discovering potential witnesses and divining defense tactics, the prosecution uses against the accused the very defense investigation the constitution compels.

The prosecutor's improper access to jail logs violated the attorney-client and work-product privileges. The documents secured by the prosecution, and the prosecution's follow-up phone calls to potential defense expert witnesses without notifying appellant's counsel, provides the

government with an unfair and illegal advantage. It also has a chilling effect on the attorney/client relationship. When discussions deemed private and privileged result in the prosecution anticipating the defendant's case, it naturally creates distrust between client and counsel.

By accessing and misusing the information contained in the jail logs, the prosecutor unconstitutionally and prejudicially interfered with defendant's right to counsel. There is a realistic possibility that this invasion benefitted the prosecution and harmed appellant's defense. (*People v. Alexander* (2010) 49 Cal.4th 846, 889.) His convictions and death sentence, therefore, should be set aside.

### F. Appellant Has Been Denied Due Process and Equal Protection of the Law by the Procedures Employed by the Prosecutor in this Case.

Prosecutorial discovery must be truly reciprocal to pass constitutional muster. (*Wardius v. Oregon* (1973) 412 U.S. 470; *Izazaga v. Superior Court, supra,* 54 Cal.3d, at pp. 372–378.) This issue was raised by the defendant in *People v. Tillis* (1998) 18 Cal.4th 284. Defendant complained that the prosecution had access to arrest data banks not available to the defense. This Court first explained the rationale of *Wardius.*

> In that case, the high court held unconstitutional a discovery statute that required the defense to provide the names of alibi witnesses, but did not require the prosecution to disclose the names of rebuttal witnesses to the defense's alibi witnesses

> The court reasoned that, although the due process clause "has little to say regarding the amount of discovery which the parties must be afforded, . . . it does speak to the balance of forces between the accused and his accuser." [citation omitted.] The high court thus mandated reciprocity as an element of firmamental fairness in any criminal discovery scheme.

(*Tillis*, *supra*, 18 Cal.4th at pp. 294–295.)

In this case, the prosecution has utilized records kept by the jail not available to the defense. Use of these records disrupts the reciprocity mandated by the due process clause of the constitution in two ways. In the first instance, the records accessed by the prosecution are not available to the defense. The sheriff's jail staff refuses requests for records, and turns such requests over to the District Attorney. Because of the limitations on the court's power to compel discovery, the defense has no access to that information in the hands of the prosecution. Thus the defense does not have access to the same information available to (and availed of in this case) the prosecution.

More importantly, the prosecution has managed to secure information concerning the identity of defense experts and, derivatively, defense strategy. The defense has no comparable access to prosecution experts. The prosecution's misuse of the jail logs has so skewed the

information available to the two sides that appellant has been denied due process.

### G. Obtaining the Placer County Jail Visit Control Records Is a Violation of the Equal Protection Clause of the Fourteenth Amendment.

The prosecution would not have access to the information contained in the Placer County Jail Visit Control records but for the fact that appellant was being held without bail in the county jail. If appellant were out of custody, agents of his attorneys and others providing assistance in the case could visit appellant and see him freely without being identified and interviewed by law enforcement agencies. The ability of the prosecution to obtain the information hinges upon the appellant's incarceration status. As such, the defendant is unfairly penalized because he is incarcerated.

That the prosecution is able to obtain information regarding the defense of a case either because the accused is in custody and unable to afford bail, or in custody due to exercise of prosecutorial discretion in charging a nonbailable offense, invidiously discriminates against defendant (and others so situated). Prosecution "self-help" discovery of records containing the identity of visitors, and the dates, times, and duration of inmate visits is intolerable and unacceptable in any criminal proceeding; more so where the People seek death. So, too, was the prosecutor's direct

phone call to the official provider of mental health services to Placer County Jail inmates. Such discrimination is a violation of the equal protection clauses of the state and federal constitutions. (*Murgia v. Municipal Court, supra*, 15 Cal.3d 286.)

### H. Section 987.9 Requires That Information Concerning Expert Witnesses and Defense Strategies Remain Confidential.

Section 987.9[65] provides an indigent capital defendant an avenue to apply for the funds to employ investigators and experts reasonably necessary for the preparation of his defense. That section mandates that the

---

[65] This section provides in pertinent part:
(a) In the trial of a capital case or a case under subdivision (a) of Section 190.05, the indigent defendant, through the defendant's counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. The fact that an application has been made shall be confidential and the contents of the application shall be confidential. Upon receipt of an application, a judge of the court, other than the trial judge presiding over the case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to the defendant's attorney. The ruling on the reasonableness of the request shall be made at an in camera hearing. In making the ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

application for funds remain confidential and that any hearing required to determine the reasonableness for funds must occur in camera.

The California Legislature expressly mandated that any application for funds and any hearing concerning the funds remain confidential. Thus, whether appellant applied for and received funding for a specific expert is strictly confidential, as is the identity of that expert. (See also Evid. Code, § 1012; *Smith v. Superior Court, supra.*) "The confidentiality requirement was evidently intended to prevent the prosecution from learning of the application for funds and *thereby improperly anticipating the accused's defense.*" (*People v. Berryman* (1993) 6 Cal.4th 1048, 1071, overruled on other grounds, quoting *People v. Anderson* (1987) 43 Cal.3d 1104, 1132, emphasis added.) This is a well-established rule of law. (See also *Keenan v. Superior Court* (1982) 31 Cal.3d 424 [to avoid undue disclosure of defense strategy, defendant may apply for appointment of second counsel using the confidentiality provisions of section 987.9].) The Attorney General of California issued an opinion concerning the confidentiality of experts and investigators funded through section 987.9:

> The purpose for the confidentiality provisions of section 987.9 is seen as an efforts to fill the constitutional need of providing the indigent defendant in a capital case with sufficient monies for ancillary services necessary to prepare and present a complete and effective defense but in such a

> way that would not run afoul of the constitutional warnings . . . against the premature disclosure of certain of its aspects.

(66 Ops.Atty. Gen. 407, 11/2/1983, p. 10.)

The California legislature and California courts have been solicitous of a capital defendant's need for confidentiality in preparing his defense. By accessing the very information so carefully kept confidential, the District Attorney undercuts the precise protections provided for the defense by the legislature and acknowledged by the courts and the Attorney General.

Prosecution access to the names of confidential visitors defeats the purpose of the confidentiality aspect of the funding statute, and contravenes clear statutory, decisional law and constitutional provisions for a defendant's fundamental rights to due process, to prepare a defense, and to a fair trial. The prosecutor's direct telephone calls to potential expert witnesses whose names were derived from logs kept in order to preserve jail security, and to the government provider of mental health services in search of information about records of any treatment asked for or received by appellant for mental-health-related matters was a further abuse of authority and a violation of appellant's constitutional rights to a fair trial.

## I. Appellant Was Prejudiced by the Errors Set Forth in This Section.

The infringement of appellant's constitutional and statutory rights is complete. Appellant's ability to secure a fair trial was fatally compromised. Appellant involuntarily provided to the prosecutor information used in the prosecution of this action, in which the People sought death. The prosecutor had in hand who visited appellant, how often and for how long. This supplied the prosecution with invaluable information regarding the strategy likely to be employed by the defense. This also supplied the prosecution information they used to develop their own strategy, to prepare their own experts, and to more effectively examine appellant's witnesses. This damage to the integrity of the defense case (and ultimately the integrity of the court process) was irreparable.

The collection of this privileged and confidential information also compromised the attorney-client relationship. Without disclosing client confidences, it is readily inerrable that appellant is mistrustful of further fully cooperating with counsel and necessary experts. He was promised all this information was strictly protected from government intrusion unless the experts were to be called as witnesses. As a foreign national, appellant would reasonably distrust any additional promises of confidentiality. As to lay witnesses and potential witnesses, their willingness to work with the

defense was compromised. Although the prosecution is free to interview those lay persons they choose, individuals are less likely to provide assistance to the defense if they know that they may be subject to police interrogation merely by dint of having visited appellant and having assisted the defense.

These violations strike at core principles of the criminal justice system:

(1) Freedom to develop defense strategies and to consult with necessary experts free from prosecution snooping;

(2) The certain knowledge that the prosecution may not use information garnered from an appellant to lighten their burden, particularly where the government is demanding the ultimate penalty;

(3) The right to due process;

(4) The right to equal protection of the laws, i.e., to no worse than reciprocal rights to information; and

(5) The right to a fair trial.

These rights were irrevocably compromised by the government's conduct in this case. The damage inflicted upon appellant's rights and upon his ability to defend against the charges cannot now be made right.

## J. Conclusion

The prosecution unlawfully exploited jail logs maintained solely for the security of the jail. They improperly gleaned valuable information pertaining to the defense of this capital case. The prosecution contacted potential lay and expert witnesses as well as others who were assisting in developing background information as part of the defense case. The intrusion into the defense camp violated important privacy and confidentiality statutes. The intrusion violated constitutional rights held by the appellant designed to provide him with a fair trial. The intrusion violated the reciprocity mandates of California criminal discovery, and so undermines the constitutionality of all prosecutorial discovery. The intrusion disrupted the defense and impaired the attorney-client relationship. The appropriate remedy is for appellant's convictions and death sentence to be set aside.

## XV. APPELLANT WAS PREJUDICED BY THE ADMISSION OF INFLAMMATORY, "NIGHTMARISH" PHOTOGRAPHS.

### A. Procedural Background

The prosecution sought to admit several photographs in this case, including photographs of the victims. (Motion in Limine, filed Feb. 1, 2001, 7 CT 1837 et seq.) One group consisted of 14 photographs of the exhumations of the victims from where they had been buried. (Exhibits A–D.) Another group of 25 photographs were proffered from the autopsy of the four victims. (Exhs. E–J.) (7 CT 1857–1867.)

On February 9, 2001, appellant filed objections to the photographs of bodies as they were being removed from the grave as grisly and ghoulish, certain to distract the jury from their duties, not probative of issues in dispute, and cumulative. He objected to all autopsy photographs as extremely prejudicial and cumulative, several photographs used to demonstrate a single point. (7 CT 1965 et seq.)

Argument was held on February 14, 2001. (18 RT 5451 et seq.) Appellant said that the gravesite photographs "carry with them traditional horrors that are not even associated with mangled bodies that are talked about in other cases. These are exhumations. That is an aspect of horror that we just don't run across in criminal courts and that people run across only in nightmares." (18 RT 5454.) The court replied by saying that its reactions

to the photograph did not change its views of the case: "the death of a little child is a terrible – terribly heartrending thing. I don't know that seeing it in a photograph raises any emotions that aren't there just thinking in the abstract about the fact of the death of a child." (18 RT 5457.)

Appellant contended that the impact of the photograph was qualitatively different, and much more intense, than other ways of presenting the same facts to the jury." I think these photographs are chilling and nightmarish, and their prejudicial impact is plain. I think it's plain to those of us wh – I think – I think it is – it heavily impacts those of us who work with this all the time, and I think for jurors who are not used to it I think it will have an extraordinary impact that is undue, given the ability to introduce this evidence in other ways, and the likelihood that it will move us away from reasoned decision on both phases of the case." (18 RT 5459.)

The prosecutor did not dispute that the photographs would have a great impact on the jury, but argued that such an impact is "simply a necessary adjunct, unfortunately, of the young victims the defendant chose to murder and the way he chose to dispose of all the bodies of the victims. "Its just an inescapable consequence of who he chose to be victims and how he chose to dispose of them." (18 RT 5460–5461.)

The prosecutor then went thought the photographs and indicated why he considered them relevant to proved a disputed point. (18 RT 5462–5476.) Before the trial court addressed each picture, applying an Evidence Code section 352 consideration to each, counsel pointed out that the pictures would be shown to the jury on a projection screen. (18 RT 5476.)

At the conclusion of is review, the court found that:

A1, A2, and A3 would be allowed, while A4 would be excluded subject to a motion for reconsideration outside the presence of the jury;

B1, B2, and B3 would be allowed, while B4 would be excluded subject to a motion for reconsideration outside the presence of the jury;

C1, C2, and C3 would be allowed, while C4 would be excluded subject to a motion for reconsideration outside the presence of the jury;

D1 would be permitted, while D2 would be excluded subject to a motion for reconsideration outside the presence of the jury;

E1 would be excluded, E2 and E3 would be allowed, while E4 would be excluded as cumulative;

F1 and F2 would be allowed, F3 would be allowed subject to cropping to remove Jack's genitals, and F4 would be allowed;

G1 and G2 would be allowed;

H1, H2, H3, and H4 would be allowed;

I1, I2, and I3 would be allowed, while I4 would be excluded as cumulative;

J1 and J2 would be allowed, while J3 would be excluded subject to motion for reconsideration outside the presence of the jury, and J4 would be allowed; and

K1, K2, and K3 would be allowed. (7 CT 2078–2079.)

At trial, the photographs were presented to the jury on March 20, 2001, via Detective William Summers. (34 RT 8453 et seq.) The gravesite photographs (Exhs. 188–198) were presented first, via projection onto the courtroom wall by an ELMO, a device capable of taking a regular photograph that is not a transparency, and projecting a much larger version onto a flat surface.[66] The operator of the ELMO was capable of magnifying portions of the photographs. Detective Summers utilized a laser pointer to highlight portions of the photograph, such as "a small hand of a child clutching a stick." (34 RT 8493.)

---

[66] It was settled that the screen used to show exhibits was eight feet wide and seven feet tall. It was positioned on the opposite wall of the jury box; the distance from the screen to the inside of the jury box railing was 25 feet. (86 RT 14021.)

The prosecution also used "blowups," or expanded portions of the photographs to highlight particular features:

> A. And in that photograph it shows the small female child clad in a red shirt, beige shorts face up with her left arm outstretched at a 90-degree angle in a southerly direction and her right hand is slightly bent at approximately a 30-degree angle in an upright position, her legs are outstretched with no shoe on her left foot, and she is face up with her mouth open.
>
> Q. Okay. Detective, had her body been moved by any of the personnel present before this picture was achieved?
>
> A. No.
>
> Q. Directing your attention, if I may, to the area what appears to be her nose as we can see it in the photograph there, does there appear to be a dark coloration in the vicinity of her nose?
>
> A. Yes, that appears to be in the upper portion of the photograph, depicting her face, is -- shows face up. There appears to be a moist area about the nostrils.
>
> Q. And does that photograph accurately show what you saw when you examined that area of her face in looking into the grave?
>
> A. Yes, sir.
>
> Q. I'm going to zero in on that, if I may. And enlarge that particular area, perhaps, for a better view or not, as the case may be.
>
> A. This blowup of the previous photograph shows a closeup of the female child's face, face up with her mouth open, completely covered with dirt, as –

> Q. Detective, my question would be -- I'm going to. Detective, my question would be -- I'm going to try to go through this as best you can. Can you take the laser pointer and show the area, the moist area around her nose? We can probably see that, but I just want to be clear.
>
> A. With the laser right at the middle of the photograph, you can see the female child's nose with the moist dirt around the nostrils.
>
> Q. Thank you, Detective.

(34 RT 8495–8496.)

After the presentation of the gravesite photographs was concluded (34 RT 8515), aerial photographs of the site were presented. Before the noon recess, counsel for appellant pointed out that the enlargement process and close-ups of particular portions of the photographs were not part of the court's ruling on their admissibility: "When the enlargement came up, the closeup of the face and one of the photographs -- I don't have my note right in front of me, but I think that changes what that photograph looks like, what it really depicts and may have some bearing on admissibility." (34 RT 8529.) The court responded that it thought the overhead projections to be of significantly lower quality of the actual photographs, but agreed to require the prosecutor to inform appellant's counsel before any subsequent picture is blown up, to see if counsel had a concern. (34 RT 8530.) The ELMO was used again by the prosecutors, in closing argument; see e.g., 47 RT 10292.

Dr. Donald Henrikson was called to testify about the autopsies he performed on the victims. (34 RT 8573.) He illustrated his testimony with 32 autopsy photographs, presented to the jury in the same way as the gravesite photographs, via projections onto the courtroom wall. (34 RT 8577–8632.)

### B. Inflammatory Nature of the Photographs at Issue

Over the years, as the technology of capturing and printing images has matured, and gotten both cheaper and more effective, the use of graphic, and at times gruesome, visual imagery in the courtroom in both civil and criminal trials has become commonplace. The trial court's statement that the photographs do not add anything that the facts of the cases don't already contain (18 RT 5457) is simply not true. Research shows that graphic photographic evidence affects conviction rates in criminal law, and verdicts and damage in civil litigation.[67] This Court has long recognized the prejudicial effect of visual images, but generally allows their admission because they also have probative value that is not clearly

---

[67] See, e.g., Bright & Goodman-Delahunty, *Gruesome Evidence and Emotion: Anger, Blame, and Juror Decision-making* (2006) 30(2) Law & Hum. Behav. 183–202; Douglas at al., *The Impact of Graphic Photographic Evidence on Mock Juror Decision in a Murder Trial: Probative or Prejudicial* (1997) 21 Law & Hum. Behav. 485–501; Oliver & Griffitt, *Emotional Arousal and 'Objective' Judgment* (1976) 8(5) Bulletin of the Psychonomic Society 399–400.

outweighed by that effect; the question is if the photographs are "*unduly* prejudicial." (*People v. Duff* (2014) 58 Cal.4th 527, 556–557 [emphasis added]; *People v. Booker* (2011) 51 Cal.4th 141, 187.)

The trial court was wrong in allowing so many photographs, and such indelible photographs as Exh. 190 [Areli's hand protruding from the dirt, clutching a stick], and Exh. 191 [Areli's body covered with a film of dirt, her open mouth filed with dirt, one arm at a right angle and the other holding on to a root] to be presented to the jury. "The jury can, and must, be shielded from depictions that sensationalize an alleged crime, or are unnecessarily gruesome, but the jury cannot be shielded from an accurate depiction of the charged crimes that does not unnecessarily play upon the emotions of the jurors." (*People v. Ramirez* (2006) 39 Cal.4th 398, 454.)

This Court's task it to review the trial court's ruling under Evidence Code section 352 for abuse of discretion (*People v. Lucas* (1995) 12 Cal.4th 415, 449.) A reviewing court will reverse a trial court's exercise of discretion to admit crime scene or autopsy photographs only when "the probative value of the photographs clearly is outweighed by their prejudicial effect." (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 134.)

In determining whether there was abuse of discretion in admitting crime scene or autopsy photographs in homicide trial, the reviewing court

addresses two factors: (1) whether the photographs were relevant, and (2) if so, whether the trial court abused its discretion in finding that the probative value of evidence was not substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice. (*People v. Salcido* (2008) 44 Cal.4th 93, 147–148.)

Only relevant evidence is admissible (Evid. Code, § 350; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 132; *People v. Garceau* (1993) 6 Cal.4th 140, 176-177; *People v. Babbitt* (1988) 45 Cal.3d 660, 681), and all relevant evidence is admissible unless excluded under the federal or California Constitution or by statute. (Evid. Code, § 351; see also Cal. Const., art. I, § 28, subd. (d).)

Relevant evidence is defined in Evidence Code section 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the evidence tends "'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive. [Citations.]" (*People v. Garceau*, *supra*, 6 Cal.4th at p. 177.) The trial court has broad discretion in determining the relevance of evidence (*ibid.*; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 132; *People v. Babbitt*, *supra*, 45 Cal.3d at p. 681), but lacks discretion to admit photographs of a

crime victim that are probative only on non-issues, and are irrelevant evidence. (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 132; *People v. Burgener* (1986) 41 Cal.3d 505, 527; *People v. Turner* (1984) 37 Cal.3d 302, 320–321.)

If the evidence was relevant, then the issue before this Court is whether the trial court abused its discretion under Evidence Code section 352 in finding that the probative value of the photograph was not substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice." (*People v. Scheid* (1997) 16 Cal.4th 1, 13.) The trial court's exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect. (*People v. Crittenden*, *supra*, 9 Cal.4th at pp. 133–134.)

This Court has "described the 'prejudice' referred to in Evidence Code section 352 as characterizing evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues. [citation]" (*People v. Scheid*, *supra*, 16 Cal.4th at p. 19.) The federal Constitution is violated by the admission of prejudicial photographs if the photographs violate appellant's

right to due process by rendering the trial fundamentally unfair. (*Kealohapauole v. Shimoda* (9th Cir. 1986) 800 F.2d 1463, 1464–1465.)

Accepting that photographic evidence can inform the jury of facts not easily conveyed by other means, there comes a point where victim photographs serve as hammers of inflammatory images that overwhelm a juror's ability to rationally sort through the evidence and reach a dispassionate conclusion. That point was passed in this case. The photographs admitted over objection did little or nothing that was not done by other photographs to elucidate any witness testimony, and primarily served to invoke feelings of pity, sympathy, and horror. Their admission violated appellant's constitutional rights to a fair trial, due process of law, and a reliable sentence. It rendered appellant's trial fundamentally unfair, and requires that the verdicts against him be set aside.

### 1. The Autopsy Photographs Were Cumulative, and More Prejudicial than Probative.

Autopsy photographs of a murder victim are always relevant at trial to prove how the crime occurred; the prosecution need not prove these details solely through witness testimony. (*People v. Carey* (2007) 41 Cal.4th 109, 127.) They can, however, be prejudicial. "Autopsy photographs have been described as 'particularly horrible,' and where their viewing is of no particular value to the jury, it can be determined the only

purpose of exhibiting them is to inflame the jury's emotions against the defendant." (*People v. Marsh* (1985) 175 Cal.App.3d 989, 998; quoting *People v. Burns* (1952) 109 Cal.App.2d 524, 541.)

In *People v. Marsh*, *supra*, the defense objected on Evidence Code section 352 grounds to the introduction of seven slides of autopsy photographs which graphically depicted the cranial injuries of the murder victims. The prosecutor argued that the slides were relevant to show the amount of force used to inflict the fatal blows. The slides were admitted, and the defendant was convicted. (175 Cal.App.3d at p. 997.) On appeal, the court held that although cause of death was the central issue in the case, the autopsy surgeon's testimony was adequate to make the prosecution's point. Thus, the slides in question were far more prejudicial than probative and their introduction into evidence was prejudicial error. (*Ibid.*)

The court also observed that autopsy photographs are often far more prejudicial than probative because much of the revulsion which they induce in the viewer is caused not by the wounds themselves but by the activities of the autopsy surgeon. The court noted that the photographs in the case before it were "gruesome solely because of the autopsy surgeon's handiwork; . . . In other words, their inflammatory nature has been greatly enhanced by the

manner in which the surgeon chose to 'pose' the body portions." (175 Cal.App.3d at p. 998.)

In similar cases, the courts have emphasized the cumulative nature of gruesome photographic evidence. In *People v. Gibson* (1976) 56 Cal.App.3d 119, the court permitted the prosecution to present numerous photographs of the victim to illustrate the testimony of the coroner. The defense objected to the introduction of two especially gruesome autopsy photographs, but the court overruled the objection. The court held this to be error and reversed the judgment. The court reviewed the photographs in question and found them to be "gruesome, revolting, and shocking to ordinary sensibilities." (*Id.* at p. 135.)

A factor found significant by courts reviewing claims of the prejudicial admission of photographs is whether the images were clinical, or whether they portrayed the victim's whole body, and particularly his or her face. (See *People v. Davis*, *supra*, 46 Cal.4th at p. 615 [challenged photographs were not gruesome and did not depict blood or show victim's face]; *People v. Garcia* (2008) 168 Cal.App.4th 261, 294 [challenged photographs consisted of close-up shots of the bullet wounds on the body, and did not depict victim's face or entire body]; *People v. Staten* (2000) 24 Cal.4th 434, 463 [challenged photographs were admissible to show

circumstances of crime at penalty phase of capital murder; photographs were not unusually gruesome, they depicted cleaned-up wounds and did not show victim's face, they were neither cumulative nor misleading].)

Here, there the autopsy photos of each victim were numerous. The photographs of the children have many images of their faces, and one that depicts nearly the entire small body of Jack, laid out on his back. (Exh. 231G.) It took expansion of the photos and use of a laser pointer to highlight the damage, i.e., adhesive tape residue, shown by some of the pictures. (34 RT 8584, 8586–8587, 8607–8608.) The autopsy photographs were excessive in number, and their prejudicial impact far outweighed whatever probative value they possessed.

### 2. The Gravesite Photographs Were Cumulative, and Far More Prejudicial than Probative

Photographs of exhumations are not automatically rejected because of their prejudicial impact, but their horrific nature makes them subject to closer scrutiny. In *State v. Lundgren* (Ohio 1995) 653 N.E.2d 304, 318, the defendant argued that the trial court should have rejected 23 color exhumation photographs, the testimony accompanying the exhumation photographs, and a color videotape of the exhumation process:

> We note that the photos and videotape show only an excavation, mud and debris. The bodies, though sometimes discernible, are not visible in detail and do not render this

> evidence gruesome. Still, we find that the probative value of this evidence did not outweigh its prejudicial effect and, therefore, the trial court abused its discretion in admitting the exhumation evidence.

(*Id.*, 653 N.E. 2d at p. 318.)

The court later found that the error was not prejudicial in that non-capital case.

In *Fritz v. State* (Okla. 1991) 811 P.2d 1353, defendant contended that the prosecutor's attempt to introduce photographs of the decedent's exhumed body demonstrated the prosecution's "utter disregard for justice and his obsession with conviction at all costs." However, the defendant had objected to the attempted introduction of the evidence and the objection was sustained. Since the jury never saw the photographs at issue, this claim of prosecutorial misconduct was rejected. (*Id.*, 81 P.2d at p. 1160.)

Here, two of the gravesite photographs in particular are unforgettable. One (Exh. 190) depicts a child's fist reaching upward out of the dirt, clutching a stick. It could be—it has been—an image used to advertise a horror movie. The other (Exh. 191) depicts Areli's body, covered with a thin film of dirt. Her left arm sticks out straight at a 90-degree angle from her body, her mouth is open and her right hand is clutching a root.

There is a much greater prevalence of violent images in movies and on television in recent years, but depictions of violence against children remain largely off-limits; it is not part of video games or network televison shows. Such images can have unmatched power; the iconic photograph of a naked Vietnamese child, her clothes burnt off by napalm, her face contorted in pain, running toward the photographer, is recognized as having done much to undermine America's appetite for the Vietnam war.[68] Counsel for appellant made an eloquent presentation of how and why these photographs would inevitably preempt any reasoned or moral response to the entire picture of this case, by inciting feelings so strong as to overwhelm reason. It

---

[68] See Priest et al., *Three Images: the Effects of Photojournalism on the Protest Movement During the Vietnam War:*

> "The nail in the coffin so to speak for the public image of the Vietnam War came on June 8, 1972, when a South Vietnamese fighter plane swooped in on a cluster of its own soldiers, and some women and children, and opened fire (Leekley; p. 88). Huynh Cong "Nick" Ut happened to be in the right place at the right time that day, and captured the group as they attempted to flee the cloud of burning napalm behind them. His photo was seen on the cover of Time later that month, and is still remembered today as one of the most infamous images of the Vietnam War."

(Priest et al., <http://academics.wellesley.edu/Polisci/wj/Vietnam/ThreeImages/brady2.html> [as of Mar. 1, 2014]; Daily Mail Reporter, *I've Never Escaped from That Moment: Girl in Napalm Photograph That Defined the Vietnam War 40 Years On* (June 1, 2012) MailOnline <http://www.dailymail.co.uk/news/article-2153091/Napalm-girl-photo-Vietnam-War-turns-40.html> [as of Mar. 1, 2014].)

violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to a fair trial, due process of law, and reliable verdicts and death sentence for the trial court to have admitted them. Appellant's convictions and death sentence must be set aside.

## XVI. THE TRIAL COURT ERRED IN REFUSING TO DECLARE A MISTRAL AFTER THE PENALTY PHASE TESTIMONY OF YOLANDA MARTINEZ.

### A. Procedural Background

On April 23, 2001, appellant filed a motion in limine challenging the use of victim impact testimony by respondent. (11 CT 3007 et seq.) After a discussion of *Payne v. Tennessee* (1991) 501 U.S. 808, and *People v. Edwards* (1991) 54 Cal.3d 787, appellant argued:

> "[I]ntroduction of 'victim impact' evidence, a concept which at best is vague, overbroad, and lacking identifiable standards, violates Defendant's right to a fair trial, to due process, to confrontation and to a reliable capital verdict, in denigration of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Federal Constitution and Art. I, sections 7, 15, 16, and 17 of the California constitution, and should be further excluded based upon Ev. C. Section 350 and 352 (relevancy and undue prejudice."

(11 CT 3008.)

Appellant went on to argue that if such evidence was admitted, it should be limited "in material respects." (1 CT 3009 et seq.)

On May 14, 2001, the parties argued over whether, and if so, what kind of victim impact evidence would be presented to the jury. (55 RT 10796 et seq.) The prosecution presented the victim impact evidence it proposed to offer the jury. The trial court reviewed the evidence proffered (two videotapes of the family, eight photographs, a letter from Yolanda

Martinez and testimony showing impact on her of being informed of her family's death). After discussion, and over objection, the trial court finally allowed Yolanda Martinez to testify again about the impact on her of losing her immediate family. Two photographs were also allowed, as was a videotape of her family and her children taken hours before their deaths, in which the two children were wearing the same clothing in which they were clad when pulled out of their grave.[69] (55 RT 10893)

After the videotape, Exhibit 302, was played for the jury (56 RT 10997–10998), Yolanda testified. She became very emotional, and a break was declared; her sobs from outside the courtroom could be heard as she went down the hall to the bathroom. (56 RT 11015–11016.) Appellant moved for a mistrial, on grounds that Yolanda's testimony was so moving that it made the jury feel responsible for her and that they should act as agents for her in obtaining revenge; a dispassionate decision by representatives of the community rather than of Yolanda had become impossible.

The trial court responded,

> At the end of the morning when she was describing the helplessness she felt as she saw her children's fear for her, she

---

[69] Videotape of the children, People's Exh. 302, two photographs marked Exhs. 304 and 305. (56 RT 10943.)

> began to cry uncontrollably, and that's when we took the morning recess. That certainly is emotional. But it was of such short duration and so understandable on a human level as a result of what happened, it was, I think -- there is -- the only conclusion you can reach overall is that her composure and testimony are actually remarkably restrained for what she has witnessed and what happened to her. The emotionalism the defense may be talking about is the emotion -- is the emotionalism of the case, of the facts of the case. And I don't know how you would be able to reduce the emotionalism of a case in which a father and an uncle are shot and placed in a pre-dug grave, and then a mother is garroted and assaulted in the presence of her three and five-year old children, who are then duct taped, removed to the grave, clubbed, and buried alive. The notion of being able to render that so, for want of a better term, antiseptic that people aren't going to react to it is not comprehensible to me, and I think that given that those are the facts that the jury has determined occurred, anything that happened in the penalty phase is going to be emotional. So the reason I'm going to deny the mistrial motion is because the salient facts of the case certainly engender emotionalism. But I don't find that what the jury saw and heard today is particularly emotionally charged, given the fact -- facts of the case.

(56 RT 11021.)

Counsel for appellant expressed concern over victim impact testimony in general, but specifically with those cases that go beyond the parity concerns of *Payne*, so much so that they undermined the whole purpose of a criminal trial:

> [S]urviving victims are naturally in a position where a jury's sympathy would reach out for them. And when a jury is invited to step into the shoes of the victim, then we undermine the very purposes behind a jury trial, which is to have neutral decision makers come in, hear the evidence, and

> dispassionately arrive at what is a fair conclusion. What we -- what we've done by allowing this level of impact -- victim impact evidence in is undermined the very guarantees that the Fifth, Sixth, Eighth and Fourteenth Amendments were designed to insure.

(56 RT 11022.)

The trial court reiterated its ruling denying the motion for a mistrial. (56 RT 11025.)

### B. The Standard of Review and the Standard of Prejudice

The United States Supreme Court has made clear that capital cases require heightened due process, absolute fundamental fairness, and a higher standard of reliability. (*Beck v. Alabama*, *supra*, 447 U.S. 625; *Lockett v. Ohio* (1978) 438 U.S. 586; *Monge v. California* (1998) 524 U.S. 721.) This Court should, in accordance with these dictates, review *de novo* the trial court's admission of victim impact evidence in a capital trial. (See *People v. Gordon* (1990) 50 Cal.3d 1223, 1265.) A trial court's erroneous admission of victim impact evidence is analyzed under the harmless error standard for federal constitutional error set forth in *Chapman v. California*, *supra*, 386 U.S. at p. 24. (See *People v. Kelly* (2007) 42 Cal.4th 763, 799; *People v. Gonzalez* (2006) 38 Cal.4th 932, 960–961.)

### C. Appellant Was Prejudiced by Inflammatory Victim Impact Testimony

In 1991, the U.S. Supreme Court overruled its previous decision in *Booth v. Maryland* (1987) 482 U.S. 49, and held that the Eighth Amendment does not preclude a state from allowing victim impact evidence and statements. (*Payne v. Tennessee* (1991) 501 U.S. 808.) In *Payne*, a mother and her three-year-old daughter were killed with a butcher knife in the presence of the mother's two-year-old son, who survived critical injuries suffered in the attack by defendant. The prosecution presented the testimony of one victim impact witness, the boy's grandmother, who testified that the boy missed his mother and sister. (*Id.* at pp. 808, 816.) According to the court, "victim impact evidence serves entirely legitimate purposes," for it enables the jury to have before it all information necessary to a determination of punishment, and balances the presentation to the jury of mitigating evidence by the accused. (*Id.* at p. 825.)

The state does not have free rein to introduce anything or everything about the victim; *Payne* suggests that the state can only present "a glimpse of the life" of the victim. (*Payne*, 501 U.S. at p. 822 (citation omitted); see also *id.* at p. 830 (conc. opn. of O'Connor, J.).) The Supreme Court also cautioned against unduly prejudicial victim impact statements: "In the event that evidence is introduced that is so unduly prejudicial that it renders the

trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*Payne*, 501 U.S. at p. 825.)

While the federal Constitution does not impose a blanket ban on victim impact evidence, such evidence may violate the Fifth, Sixth, Eighth and Fourteenth Amendments where it is so inflammatory as to invite an irrational, arbitrary, or purely subjective response from the jury. (*Payne*, 501 U.S. at pp. 824–825; *People v. Edwards*, *supra*, 54 Cal.3d at p. 836.) As Justice Souter explained in his concurring opinion in *Payne:*

> Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation. Cf. *Penry y. Lynaugh* [(1989)] 492 U.S. 302, 319-328 [ ] (capital sentence should be imposed as a "'reasoned moral response") (quoting *California v. Brown* [(1987)] 479 U.S. 538, 545 [ ] (O'Connor, J., concurring)); *Gholson v. Estelle* [(5th Cir. 1982)] 675 F.2d 734, 738 ("If a person is to be executed, it should be as a result of a decision based on reason and reliable evidence"). . . . With the command of due process before us, this Court and the other courts of the state and federal systems will perform the "duty to search for constitutional error with painstaking care," an obligation "never more exacting than it is in a capital case."

(*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 836–837 (conc. opn. of Souter, J.), citing *Burger v. Kemp* (1987) 483 U.S. 776, 785.)

This Court's interpretations of *Payne* have unreasonably expanded its holding, and have allowed victim impact testimony to overwhelm a defendant's mitigating evidence. (See, e.g., *People v. Taylor* (2010)

48 Cal.4th 574, 646 ["Our prior decisions recognize that, under *Payne*, constitutionally permissible victim impact evidence includes reference "'to the status of the victim, and the effect of [her] loss on friends, loved ones, and the community as a whole.' [citations omitted]."].)

Not only has the breadth of victim impact evidence grown way beyond the reach of *Payne*, but also the depth of feeling allowed to be presented to the jury. Here, the trial court's own presentation of the prosecution's case was powerful. To have a bare-bones depiction of these facts was enough. Allowing them to be supplemented by the raw anguish of the one who suffered the most from these crimes was truly "so inflammatory as to risk a verdict impermissibly based on passion, not deliberation." Appellant did not receive the "reasoned moral response" to which he, and the community at large, was entitled. His rights to due process, a fair trial, and a reliable penalty determination were violated. He is entitled to a new penalty trial.

## XVII. WHERE THE STATE RELIES ON THE IMPACT OF A MURDER IN ASKING FOR DEATH, THE DEFENDANT SHOULD BE PERMITTED TO RELY ON THE IMPACT OF AN EXECUTION IN ASKING FOR LIFE.

### A. Introduction and Procedural Background

In a motion in limine filed on May 10, 2001, the prosecutor objected to the elicitation by appellant of any testimony regarding the anticipated impact of an execution on his family members. The basis for the objection was the statement by this Court in *People v. Ochoa* (1998) 19 Cal.4th 353, 456: "sympathy for a defendant's family is not a matter that a capital jury can consider in mitigation." (12 CT 3082.) After discussion, the trial court held that the law sided with the prosecution, and such testimony as only admissible to highlight personal characteristics of the accused. (56 RT 10919–10922.)

The issue was raised again during an instructional conference on June 8, 2001. (63 RT 11856 et seq.) Appellant's objection to striking the word "sympathy" from factor (k) instruction was overruled. (63 RT 11865.) Before retiring to deliberate, appellant's jury was instructed that "you may not consider sympathy for the defendant's family respecting the possibility of his execution except as it may illuminate some positive quality of the defendant's background or character." (69 RT 12877.)

Failure to allow the jury to consider the impact of appellant's execution on his extended family violated the Eighth and Fourteenth Amendments to the United States Constitution, and render his trial fundamentally unfair. This impact of an execution is a "circumstance of the crime," and is particularly so where, as here, there are family members related to both the victim and the accused. By confining those who testified for appellant to detached appraisals of his history and character, while allowing those affected by this crime to fully express their own personal anguish, the dice were loaded in favor of death. Appellant's death sentence should be set aside.

### B. The Impact of an Execution Is Part of the Circumstances of the Crimes for which Appellant Was Tried.

The U.S. Supreme Court has long held that a state may not preclude the sentencer in a capital case from considering *any* relevant evidence in support of a sentence less than death. Over 60 years ago, the high court recognized that:

> [H]ighly relevant—if not essential—to a [sentencer's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts of individualized punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

(*Williams v. New York* (1949) 337 U.S. 241, 257; see also *Skipper v. South Carolina* (1986) 476 U.S. 1; *Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 114; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; *McCleskey v. Kemp* (1987) 481 U.S. 279, 306: "[s]tates cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty"; and *Payne v. Tennessee*, *supra*, 501 U.S. at p. 809: "[V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce. . . ."

It was precisely because of the broad latitude afforded capital defendants that the Supreme Court reversed its opposition to victim impact evidence and held that "evidence about . . . the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." (*Payne*, *supra*, 501 U.S. at p. 826.) The underlying premise of the majority decision in *Payne* is that the sentencing phase of a capital trial requires an even balance between the evidence available to the defendant and that available to the state. (*Id.* at pp. 820–826.)

An execution's impact on the defendant's family easily crosses the "low threshold for relevance" imposed by the Eighth Amendment to the United States Constitution. (*Smith v. Texas* (2004) 543 U.S. 37, 43; *Tennard*

*v. Dretke* (2004) 542 U.S. 274, 285.) Appellant asks this Court to reexamine its position regarding evidence of the impact his execution would have on his family and friends.

The Eighth Amendment does not permit a state to exclude evidence which "might serve as a basis for a sentence less than death." (*Smith v. Texas*, *supra*, 543 U.S. at p. 43.) So long as a "fact-finder could reasonably deem" the evidence to have mitigating value, a state may not preclude the defendant from presenting that evidence. (*Id.* at p. 44.)

There is no doubt that execution impact evidence could have such an impact. Neither respondent nor this Court has denied this obvious point; the Court simply holds that it is "improper." (*People v. Bennett* (2009) 45 Cal.4th 577, 601.)

In his concurring opinion in *Payne*, Justice Scalia explicitly noted that since the Eighth Amendment required the admission of all mitigating evidence on the defendant's behalf, it could not preclude victim impact evidence because "the Eighth Amendment permits parity between mitigating and aggravating factors." (*Payne*, *supra*, 501 U.S. at p. 833.) The *Payne* majority explained that the impact of the victim's death on his surviving family members was essential for the jury to understand the

victim's "uniqueness as an individual human being." (*Id.* at p. 823; accord *id.* at p. 831 (conc. opn. of O'Connor, J.) and pp. 835, 837 (Souter, J.).)

*Payne* explained that the Court's broad rulings requiring admission of "any mitigating evidence" were also premised on the need to ensure the jury understood the *defendant* as a "uniquely individual human being." (*Payne*, *supra*, 501 U.S. at p. 822.) The high court has ruled that the impact of a victim's death on the victim's family is essential for the jury to understand the *victim* as a unique human being; it follows that the impact of the defendant's death on his own family is equally essential for the jury to understand the *defendant's* uniqueness as a human being. The Supreme Court's Eighth Amendment jurisprudence has long recognized that evidence showing the defendant's uniqueness as a human being may not be excluded from a capital penalty phase. (See, e.g., *Lockett v. Ohio*, *supra*, 438 U.S. at p. 605; *Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 110.)

Courts throughout the country have recognized that a defendant's execution impact evidence is relevant to the sentencing decision. (See, e.g., *State v. Mann* (Ariz. 1997) 934 P.2d 784, 795 [noting mitigating evidence of "the effect on [defendant's children] if he were executed"]; *State v. Simmons* (Mo. 1997) 944 S.W.2d 165, 187 [noting mitigating evidence that defendant's "death at the hands of the state would injure his family"]; *State*

*v. Rhines* (S.D. 1996) 548 N.W.2d 415, 446–447 [noting mitigating evidence of "the negative effect [defendant's] death would have on his family]; *State v. Benn* (Wash. 1993) 845 P.2d 289, 316 [noting mitigating evidence of "the loss to his loved ones if he were sentenced to death"]; *State v. Stevens* (Ore. 1994) 879 P.2d 162, 167–168 [concluding that the Supreme Court's mandate for unfettered consideration of mitigating circumstances required consideration of the impact of an execution on the defendant's family]; *Lawrie v. State* (Del. 1993) 643 A.2d 1336, 1339 [noting that defendant's "execution would have a substantially adverse impact on his seven-year-old son . . . and on [defendant's] mother"]; *Richmond v. Rackets* (D. Ariz. 1986) 640 F.Supp. 767, 792 [noting trial court's consideration of testimony relating "the impact of the execution" on defendant's family], revd. on other grounds, *Richmond v. Lewis* (1992) 506 U.S. 50; compare *State v. Wessinger* (La. 1999) 736 So.2d 162, 192 [rejecting defendant's argument that an instruction precluded the jury from considering the impact of a death sentence on the defendant's family].)

Not only does the Eighth Amendment guarantee appellant the right to place any mitigating evidence before the jury, but in the context of this case, where Yolanda Martinez went beyond describing her pain to demonstrating it by crying uncontrollably, principles of equal protection and

fundamental fairness also require that appellant be afforded the same opportunity to present evidence of the pain and loss his execution would cause members of his family. (*Wardius v. Oregon*, *supra*, 412 U.S. 470.) Failure to allow appellant to also put forward such evidence trivializes the impact his loss would have on his family, and skews the moral and normative determination the jury was asked to make toward the imposition of death.

In light of *Payne v. Tennessee*, *supra*, and these other authorities from around the country, the jury in this case should have been permitted to consider the impact of a potential death sentence on appellant's family.

This result is especially appropriate in a case like this, where the state relies on *Payne* to introduce highly emotional testimony about the impact of the crime on the surviving victim.[70] When the state introduces such testimony, the "parity" concerns of *Payne* are strongly implicated. Appellant should have been permitted to use sentence impact evidence as a counterweight.

---

[70] As the trial court described Yolanda's testimony, "At the end of the morning when she was describing the helplessness she felt as she saw her children's fear for her, she began to cry uncontrollably, and that's when we took the morning recess." (56 RT 11020.)

Practical concerns support such an approach. In the area of victim impact, the reality is that more traditional methods of ensuring the reliability of testimony—such as cross-examination—are simply not feasible. (See *Booth v. Maryland*, *supra*, 482 U.S. at p. 506 [noting that it would be "impossible" to use cross-examination to rebut victim impact evidence].) Here, Yolanda was not cross-examined. Since cross-examination cannot realistically serve to balance the scale when victim impact evidence is presented, it is only fair that sentence impact evidence be allowed.

Appellant recognizes that this Court has on several occasions rejected arguments that the federal constitution required consideration of sentence impact. (See, e.g., *People v. Williams* (2013) 56 Cal.4th 165, 207–208; *People v. Bennett*, *supra*, 45 Cal.4th at 600–602; *People v. Smith* (2005) 35 Cal.4th 334, 366–367; *People v. Smithey* (1999) 20 Cal.4th 936, 999-1000; and *People v. Ochoa* (1998) 19 Cal.4th 353, 454–456.)

The trial in *Ochoa*, this Court's first discussion of this issue and the case relied on by the parties in the case at bench, occurred before *Payne v. Tennessee* had overruled *Booth v. Maryland*. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 873, fn. 21.) Thus, the jury in that case was not permitted to

consider "sympathy for the victim or his family." (19 Cal.4th at p. 873, n.21.) As a consequence, the parity concerns of *Payne* were not present.[71]

But just as plainly, these parity concerns *are* implicated in this case. Here, in contrast to *Ochoa*, *Bennett* and *Smithey*, the prosecutor *did* rely on victim impact evidence in asking for death. In his opening statement to the jury at penalty phase, the prosecutor said,

> Obviously nothing anybody can do can bring them back. But we have some photographs, which are limited in nature, and we also have a videotape, which is very special. What's special is what's in it. It so happened gratuitously or otherwise, how -- whatever adjective you'd use to call it, that before the Martinezes left Galt to come up to the Parnell Ranch on the afternoon of the 12th to, as far as they know, to pick up Mr. Juarez for an appointment in Sacramento the following day, they had a video camera in their home. And the camera was activated by Yolanda Martinez. They had just purchased this video camera, and pictures of their children were taken with the camera at that time. The time you'll see on the camera is roughly 2:35. This camera shot, which you're going to see, which is only one minute and 57 seconds, give or take, is of the children approximately five to six hours before they were murdered. And when you go back and you see the photographs of the little bodies in the grave, you'll see that they're, in fact, wearing the same clothes that you're going to see on the videotape.

(56 RT 10961.)

---

[71] An examination of the record in *Smithey* shows that the jury returned a verdict of death on June 22, 1989. (*People v. Smithey*, No. S011206, CT 1117–1118, 1120, 1150.) *Payne* was decided on June 27, 1991. Thus, *Smithey* too was a pre-*Payne* case and the parity concerns of *Payne* were not present.

Just after the showing of the videotape, Yolanda Martinez testified about the devastating impact of the loss of her children, and her inability to do anything for them. In fact, the victim, Yolanda Martinez, was "weeping uncontrollably" according to the trial court. If victim impact is admissible to show the victims as unique human beings. The other part of victim impact evidence is to show the impact of the loss of the victim, and if *Payne*'s concern with parity is to mean anything, appellant should have been allowed to show his uniqueness as a human being by introducing sentence impact evidence in asking for life.

Execution impact evidence is plainly relevant under *Smith* and *Tennard*. As the Supreme Court has concluded, victim impact evidence is relevant because it shows the "uniqueness" of the victim. For the very same reasons, execution impact evidence is relevant because it shows the uniqueness of the defendant by shjowing the impact his loss would have if he were also to be killed. This evidence satisfies the "low threshold for relevance" precisely because a juror deciding whether appellant should live or die "could reasonably deem" the evidence to have *mitigating value*. No reviewing court can say with any confidence that the testimony of appellant's 24 family members and friends about the impact his execution would have on them as individuals would not have had mitigating value.

In *People v. Bennett*, this Court sustained the trial court's refusal to have an expert testify regarding the impact the defendant's execution would have on his children, and relied on its previous reasoning in *Ochoa.* (*Bennett*, *supra*, 45 Cal.4th at pp. 600–601.) The basis was a distinction between the evidence that the defendant is loved by his family, and the impact that his death would have upon them; "The former constitutes permissible indirect evidence of a defendant's character while the latter improperly asks the jury to spare the defendant's life because it 'believes that the impact of the execution would be devastating to other members of the defendant's family.'" (*Id.* at p. 601.)

In *Bennett*, this Court rejected the contention that because the prosecution could present victim impact evidence, appellant should be permitted to introduce execution impact evidence, by not directly addressing the issue of parity. The Court simply stated that the only permissible mitigation evidence is that which deals with the defendant's own circumstances, not those of his family. (*Bennett*, *supra*, 45 Cal.4th at p. 602.)

This distinction is always arbitrary, and particularly artificial in this case. The impact of a defendant's execution on his family is a "circumstance of the crime" in every sense that the impact of the victim's

loss on the victim's family registers. In this case, Isabel, the sister of Juan and Jose, was also the wife of appellant. Their two children were nieces of the victims. The prohibition placed on Isabel from talking about the impact on her of her husband's loss, and how it would compound her pain at losing her family members, is a pointless and arbitrary distinction that makes no logical or emotional sense.

In asking the Supreme Court to overrule *Booth* and admit victim impact testimony, the Attorney General of California formally took the position that "[i]f the death penalty is constitutional, as the Court has repeatedly held, it cannot be unconstitutional to permit the pros and cons in the particular case to be heard." (*Payne v. Tennessee*, No. 90-5721, Brief of Amicus Curiae, State of California at p. 10, 1991 WL 11007883 at p. 13.) Just as victim impact evidence represents one of the "pros" in a particular case, the devastating impact of an execution on the family of a defendant is one of the "cons."

An execution's impact on the defendant's family easily crosses the "low threshold for relevance" imposed by the Eighth Amendment to the United States Constitution. (*Smith v. Texas*, *supra*; *Tennard v. Dretke*, *supra*. Appellant asks this Court to reexamine its position regarding

evidence of the impact his execution would have on his family and other members of his community.

### C. Prejudice

Capital defendants have a constitutional right to present to the sentencer any mitigating evidence demonstrating the appropriateness of a penalty less than death. (*Skipper v. South Carolina*, *supra*, 476 U.S. at p. 5; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) They have a corollary right to have the sentencer consider the mitigating evidence under instructions which permit the sentencer to give a reasoned, moral response to the mitigating evidence. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319–320; *Eddings v. Oklahoma*, *supra*, 455 U.S. at pp. 113–114; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 605.)

Errors of this type require a new penalty phase unless the state can prove them harmless beyond a reasonable doubt. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1117.) Here, the state will be unable to carry this burden.

Though the crimes were horrific, this was not a case bereft of mitigation. Outside the day of July 12, 1998, appellant was a valuable member of the community. He had no arrests, a long and honorable record of responsible work, and was cared for by an extended family as well as by his employers in this country and local officials from the town in Mexico

where he grew up. Dozens of these people appeared to testify on his behalf. The jury deliberated over three days; it was not an easy choice for them to make. (Statement of the Case, *ante*.)

As is the case with victim impact evidence, sentence impact evidence is a particularly powerful type of evidence and argument. Appellant's right to present a defense, as well as his rights to due process, a fair trial, and a reliable penalty determination were violated. On the record of this case, the exclusion of this mitigating evidence from the defense side of the scale cannot be deemed harmless. Only one juror need have been moved to vote for a sentence of less than death. A new penalty phase is required.

## XVIII. THE PROSECUTOR COMMITTED MISCONDUCT BY ELICITING PREJUDICIAL EVIDENCE WITHOUT ASKING THE TRIAL COURT FOR AN ADVANCE RULING.

Appellant's motion in limine filed on February 5, 2001, asked that any evidence of appellant's reputation or misconduct not be admitted until a hearing was held outside the presence of the jury. (7 CT 1913 et seq.) The trial court agreed. On February 14, 2001, the court ordered that "no evidence as to other crimes, or as to the character or reputation of the Defendant may be offered during the guilt phase of the trial, subject to Motion for Reconsideration outside the presence of the Jury." (7 CT 2079.)

### A. Yolanda's Gesture

Deputy Keith Walker was the first deputy sheriff to arrive at the crime scene. (30 RT 7753.) He was talking to the Parnells, owners of the ranch, and trying to also talk to Yolanda Martinez. She was trying to talk to him at the same time. He described how she looked; her face was badly beaten, and she had what appeared to be a scarf around her neck. When he asked her abut the scarf, she took the scarf, put it in her mouth, said "Arturo bad," and made a grating noise, while drawing her right index finger across her neck. (30 RT 7756–7757.)

Appellant made an objection, and the jury was excused. Counsel referred to the motion in limine previously filed, in which counsel had

successfully asked that any such evidence be discussed prior to being admitted. Her gesture was hearsay. Even if admissible as an excited utterance, appellant had moved to exclude such evidence. The gesture was prejudicial, because it is in essence the expression of the victim of terrible crimes expressing what she hoped the penalty imposed on appellant should be. (30 RT 7758.)

The prosecutor countered by saying that it was an expression of anger, perhaps a desire to get even, but in any event admissible as an excited utterance even if it is hearsay. (30 RT 7765–7765.) Appellant then formally objected and moved for a mistrial on the basis that the surviving victim of a capital offense is no allowed to express what the ultimate outcome of a trial should be; to allow the gesture into evidence violated the principles of what victim impact testimony is admissible. (30 RT 7765.)

The trial court urged counsel, especially the prosecutor, to remember its rulings on in limine motions. (30 RT 7767.) However, the court denied the mistrial motion, on the basis that the gesture did not likely mean what counsel thought it meant, and more likely was conveying that there was binding of some sort around her neck, or was an expression of undifferentiated outrage. (30 RT 7768 .) The remote chance that it would have been interpreted by the jury as anything more would not justify a

mistrial, even if the trial curt would have excluded the evidence had it been provided an opportunity.

Counsel then asked that the court admonish the jury to disregard that part of Ms. Martinez's statement. The trial court denied that request as well, on grounds that the likelihood of the jury considering it for the purpose set out by counsel was extremely remote. (30 RT 7773–7774.)

The trial court erred in not taking the evidence more seriously, and in failing to see how this vivid evidence was likely to remain in the juror's minds particularly after hearing Ms. Martinez testify in the penalty phase. Had the prosecutor sought to elicit evidence of this gesture in the penalty phase, there is no question that it would have been rejected; the Eighth Amendment bars the admission of a victim's "opinions about the crime, the defendant, and the appropriate sentence." (*Payne v. Tennessee*, *supra*, 501 U.S. 808, 830, fn. 2; *People v. Ervine* (2009) 47 Cal.4th 745, 794.) Instead, it was admitted at the penalty phase through the circumstances of the crime.

This gesture is widely understood to mean death, and has been used to convey directions that a particular person should be killed. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 921 [accomplice directed defendant to kill victim "by moving an index finger across his throat."].)

The trial court's failure to recognize the prejudicial impact of this evidence and to either grant a mistrial or to direct the jury to disregard the gesture was prejudicial error. It was prejudicial at the guilt phase because it introduced victim impact testimony at the guilt phase of the trial that would not even have been admissible at the penalty phase. It was also irrelevant evidence, and it was inflammatory. The trial court abused its discretion in failing to grant the mistrial motion, and in failing to admonish the jury.

This evidence was also improperly before the jury at the penalty phase. Had the trial court been asked by the prosecutor to allow it, there is no doubt that such a request would have been rejected as impermissible and irrelevant. (*Payne v. Tennessee, supra,* 501 U.S. at p. 830, fn. 2.) It was very much a part of the evidence before the jury at the penalty phase.[72]

The prosecutorial misconduct at the guilt phase and the court's failure to grant a mistrial/admonish or admonish the jury was prejudicial error. There is a reasonable possibility that one or more jurors were swayed by its admission to vote for death. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

---

[72] The jury was instructed that they should consider all the evidence presented at the guilt phase in the course of deciding which penalty to impose. (69 RT 12875.)

The prosecutor's misconduct and the trial court's failure to respond in a meaningful way violated appellant's rights to due process and a reliable guilt and penalty determination. Appellant's convictions and death sentence must be set aside.

**B. Ernest Orosco's Hearsay**

Ernest Orosco was called by the prosecution during the guilt phase to talk about his relationship with both appellant and the victims and the last time they were altogether. (40 RT 9502.) The prosecutor persisted in asking what the witness and appellant talked about as they drove to and from the Martinezes' place in Galt. Eventually, he asked, "Did you in fact drive Mr. Juarez back to his residence in Auburn that night?"

A. Yes.

Q. And do you recall anything the two of you talked about on the way back?

A. Yes.

Q. And what was that?

THE COURT: Excuse me a moment.

MR. TAUMAN: Your honor, were going to have to have a hearing.

(40 RT 9516.)

The issue was Mr. Orosco's answer to a question about whether or not he and Arturo discussed anything as they rode home from the party. The answer was that appellant said something about being with a girl in Santa Gertrudis. The interpreter, however, gave a long pause before interpreting, and therefore the answer does not appear in the record until after the jury leaves. Counsel points out that while the answer was not translated, "we don't know whether any of the jurors speak enough Spanish to understand what the answer was. . . ." (40 RT 9517.) Counsel moved for a mistrial because of the prosecutor's violation of the court's order.

The prosecutor denied knowing anything about any court order. (40 RT 9518.) The trial court denied the mistrial motion, but told the jury that to the extent any of them understood the witness's answer, they should disregard it. (40 RT 9520–9521.)

The prosecutor's convenient memory lapse is difficult to understand, in light of the court's explicit ruling, embodied in a minute order, that nothing about appellant's conduct should be presented to the jury without a hearing before the court, and the sensitivity of the question of whether or not appellant had been unfaithful to his wife; the court had ordered that "no evidence as to other crimes, or as to the character or reputation of the

Defendant may be offered during the guilt phase of the trial, subject to Motion for Reconsideration outside the presence of the Jury." (7 CT 2079.)

The incident constituted serious misconduct. In conjunction with the previous incident involving Yolanda's gesture, reversal is required. At the least, it suggested to the jury—even the English-only speaking jurors, that appellant said something incriminating or bad. The appropriate response by this Court to this and the other numerous instances of misconduct delineated in this brief (see Arg. XIX, *post*), is to set aside appellant's convictions and sentence.

## XIX. THIS CASE WAS IMPERMISSIBLY SKEWED TOWARDS DEATH BY PROSECUTORIAL MISCONDUCT

"The first, best, and most effective shield against injustice for an individual accused . . . must be found . . . in the integrity of the prosecutor." (Corrigan, *Commentary on Prosecutorial Ethics* (1985) 13 Hastings Const. L.Q. 537.)

Here, the prosecutors committed various acts of misconduct suggesting that they had a sense of entitlement to override well-settled legal principles because of the gravity of the crimes at bench. The most blatant example was their gaining the names of potential experts from the jail, and then calling them at their homes or offices in order to find out what appellant might be doing when defending himself, and what their knowledge was of other potential experts. (Arg. XIV, *ante.*)

They persevered in questioning Ernesto Orosco in order to get him to provide the jury with damaging and inadmissible character evidence without following the court's order—an order they repeatedly violated—that any matters reflecting on appellant's character should be first presented to the court outside the jury's presence. (Arg. XVI.) They said nothing about the fact that they had an expert psychologist present when the most critical evidence in this case—the taped statement of appellant—was being created; when appellant stumbled across this fact years later, the expert

witness had largely forgotten what his notes contained. (45 RT 10122–10129; 10 CT 2748–2749.)

"The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial." (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 648–649) (dis. opn. of Douglas, J.); see also *Berger v. United States*:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

(*Berger v. United States* (1935) 295 U.S. 78, 88.)

In California, it is a prosecutor's duty "to see to it that those accused of crime are afforded a fair trial." (*People v. Talle* (1952) 111 Cal.App.2d 650, 677 ["The role of the prosecution far transcends the objective of high scores of conviction; its function is rather to serve as a public instrument of inquiry and, pursuant to the tenets of the decisions, to expose the facts."];

*People v. Franklin* (1961) 194 Cal.App.2d 23, 29–30.) In order to be entitled to relief under federal law, defendant must show that the challenged conduct was not harmless beyond a reasonable doubt. (*People v. Blacksher* (2011) 52 Cal.4th 769, 828, fn. 35.)

The damage done by the misconduct set out in arguments IX, XIV, and XVI has been set forth in each argument. It is worth adding that the damage done by the invasion of appellant's defense preparation cannot be calculated. We cannot say how far and fast word of what the prosecution was doing to potential experts traveled, or what potential theories and evidence relevant to appellant's sentence were not developed or presented. It cannot be said beyond a reasonable doubt that the prosecutorial misconduct set out in this brief did not affect at least one juror's verdict in the penalty phase of appellant's trial. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

## XX. THE VIOLATIONS OF APPELLANT'S RIGHTS CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, AND REQUIRE THAT APPELLANT'S CONVICTIONS AND PENALTY BE SET ASIDE.

### A. Introduction

Appellant was deprived of a fair trial and a reliable penalty in violation of customary international law as informed by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the American Declaration of the Rights and Duties of Man. Moreover, the death penalty, as applied in the United States and the State of California, violates customary international law as evidenced by the equal protection provisions of the above-mentioned instruments as well as the International Convention Against All Forms of Racial Discrimination.

International law sets forth minimum standards of human rights that must be followed by states that have signed treaties, accepted covenants, or otherwise accepted the applicability of these standards to their own citizens. This Court has not only the right, but the obligation, to enforce these standards.

### B. Background

International law "confers fundamental rights upon all people vis-a-vis their own governments." (*Filartiga v. Pena-Irala* (2nd Cir. 1980) 630 F.2d 876, 885.) International law must be considered and administered

in United States courts whenever questions of right depending on it are presented for determination. (*The Paquete Habana* (1900) 175 U.S. 677, 700.) To the extent possible, courts must construe American law so as to avoid violating principles of international law. (*Trans World Airlines, Inc. v. Franklin Mint Corp.* (1984) 466 U.S. 243, 252; *Murray v. The Schooner Charming Betsy* (1804) 6 U.S. (2 Cranch) 64.)

The first modern international human rights provisions appear in the United Nations Charter, which entered into force on October 24, 1945. The U.N. Charter proclaimed that member states of the United Nations were obligated to promote "respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[73] By adhering to this multilateral treaty, state parties recognize that human rights are a subject of international concern.

---

[73] Article 1(3) of the U.N. Charter, June 26, 1945, 59 Stat. 1031, T.S. 993, entered into force October 24, 1945.

In his closing speech to the San Francisco United Nations conference, President Truman emphasized that:

> The Charter is dedicated to the achievement and observance of fundamental freedoms. Unless we can attain those objectives for all men and women everywhere—without regard to race, language or religion—we cannot have permanent peace and security in the world.

Robertson, Human Rights in Europe (1985) p. 22, n.22 (quoting President Truman).

In 1948, the U.N. drafted and adopted both the Universal Declaration of Human Rights (Universal Declaration)[74] and the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).[75] The Universal Declaration is part of the International Bill of Human Rights,[76] which also includes the International Covenant on Civil and Political Rights (International Covenant),[77] the Optional Protocol to the International Covenant,[78] the International Covenant on Economic, Social and Cultural Rights,[79] and the human rights provisions of the U.N. Charter.

---

[74] Universal Declaration of Human Rights, adopted December 10, 1948, U.N. Gen.Ass.Res. 217A (III). It is the first comprehensive human rights resolution to be proclaimed by a universal international organization.

[75] Convention on the Prevention and Punishment of the Crime of Genocide, adopted December 9, 1948, 78 U.N.T.S. 277, entered into force January 12, 1951. Over 90 countries have ratified the Genocide Convention, which declares that genocide, whether committed in time of peace or time of war, is a crime under international law. See generally, Burgenthal, *International Human Rights in a Nutshell*, Vol. 14 (1988) p. 48.

[76] See generally, Newman, *Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills"* (1991) 40 Emory L.J. 731.

[77] International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 717, entered into force March 23, 1976.

[78] Optional Protocol to the International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 302, entered into force March 23, 1976.

[79] International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966, 993 U.N.T.S. 3, entered into force January 3, 1976.

The United States and our Bill of Rights were the inspiration of international human rights law. Our government has acknowledged international human rights law and has committed itself to pursuing international human rights protections by becoming a member state of the United Nations and of the Organization of American States. As a key participant in drafting the U.N. Charter's human rights provisions, the United States was one of the first and strongest advocates of a treaty-based international system for the protection of human rights.[80] In the late 1960s and throughout the 1970s, the United States became a signatory to numerous international human rights agreements and implementing human rights-specific foreign policy legislation.[81]

In the 1990s, the United States ratified three comprehensive multilateral human rights treaties. The Senate gave its advice and consent to the International Covenant; President Bush deposited the instruments of ratification on June 8, 1992. The International Convention Against All Forms of Racial Discrimination (Race Convention),[82] and the International

---

[80] Sohn and Burgenthal, *International Protection of Human Rights* (1973) pp. 506–509.

[81] Burgenthal, *International Human Rights*, *supra*, p. 230.

[82] International Convention Against All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969 (hereinafter Race Convention). The United States deposited instruments of

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention)[83] were ratified on October 20, 1994. These instruments are now binding international obligations for the United States. It is a well established principle of international law that a country, through commitment to a treaty, becomes bound by international law.[84]

The United States, by signing and ratifying the International Covenant, the Race Convention, and the Torture Convention, as well as being a member state of the OAS and thus being bound by the OAS Charter and the American Declaration, recognizes the force of customary international human rights law. Many of the substantive clauses of these

---

ratification on October 20, 1994. 60 U.N.T.S. 195 (1994).

More than 100 countries are parties to the Race Convention.

[83] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, 39 U.N. GAOR Supp. (No. 51) at p. 197, entered into force on June 26, 1987. The Senate gave its advice and consent on October 27, 1990, 101st Cong., 2d Sess., 136 Cong. Rev. 17, 486 (October 27, 1990) (hereinafter Torture Convention). The United States deposited instruments of ratification on October 20, 1994. 1465 U.N.T.S. 85 (1994).

[84] Burgenthal, *International Human Rights*, *supra*, p.4.

treaties articulate customary international law and thus bind our government.[85]

Safeguards adopted by international organizations are also indicative of customary international law. The Safeguards Guaranteeing Protection of Rights of Those Facing the Death Penalty adopted by the United Nations Economic and Social Council provides, "[c]apital punishment may only be carried out pursuant to *a final judgement by a competent court after legal process which gives all possible safeguards to ensure a fair trial . . .* including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings." (Emphasis added.)

None of the statutes upheld by *Gregg* establish an affirmative obligation of the United States to redress racial discrimination and to proceed with vigor and deliberation to ensure that race is not a prejudicial factor in criminal prosecutions. However, treaties to which the United States is a member create just such an obligation.

The U.S. Supreme Court has aptly said: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."

---

[85] Newman, *Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills"* (1991) 40 Emory L.J. 731, 737.

(*Trop v. Dulles* (1958) 356 U.S. 86, 100.) The protection of human dignity is the core principle which animates both the Eighth Amendment and international human rights law in the form of treaties ratified by the United States. The Preamble of the International Covenant on Civil and Political Rights, to which the United States is a party, asserts that "these rights derive from the inherent dignity of the human person." (International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (ratified by the United States on June 8, 1992); see also the Preamble to the Convention for the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (ratified by the United States on October 21, 1994) [requiring "universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race" and "the earliest adoption of practical measures to that end"].) The Race Convention and the ICCPR, as shown above, are ratified treaties, are the "supreme law of the land." (U.S. Const., art. VI.) The United States is now therefore bound to protect the rights enumerated in those treaties.

International human rights law binding on the United States is adamant that all persons possess the fundamental human right to equality before the law and equal protection of the law, without discrimination based on race. Failure to rectify the manifest inequity of treatment in this case

would run afoul of these binding norms that were freely entered into by the United States and are part of U.S. law. The Supreme Court has recently considered international human rights law in its constitutional analyses, as a reflection of the "values that we share with a wider civilization." (*Lawrence v. Texas* (2003) 539 U.S. 558, 573 [citing decisions of the European Court of Human Rights in analysis of Due Process Clause requirements]; see also *Grutter v. Bollinger* (2003) 539 U.S. 306, 344 (conc. opn. of Ginsburg, J.), [citing the Convention on the Elimination of All Forms of Racial Discrimination as instructive in determining merits of discrimination claim]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 fn. 4 [citing the International Covenant on Civil and Political Rights in decision limiting the execution of juveniles]; *Roper v. Simmons* (2005) 543 U.S. 551, 575–577 [citing numerous human rights conventions in deciding that execution of juvenile offenders violates the Eighth Amendment].)

A thorough review of the high court's history in the wake of the *Roper* decision has shown:

> [T]hose political and journalistic commentators who say that the Court has never before cited or relied upon foreign law are clearly and demonstrably wrong. In fact, the Court has relied on such sources to some extent throughout its history. . . . the historical evidence suggests to us that citation of foreign law is most (if at all) justifiable when the U.S. Constitution asks the Justices to weigh whether a certain practice is reasonable,

> as it does in the Fourth Amendment, or whether it is unusual, as it does in the Eighth Amendment.

(Calabresi & Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision* (2005) 47 William & Mary L.Rev.)

The U.S. Supreme Court has explained that international human rights standards are not controlling on an Eighth Amendment analysis (*Roper*, 543 U.S. at p. 578), but has nonetheless reaffirmed that reference to international authorities is "instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments.'" (*Id.* at p. 575.) Recently-ratified treaties such as the Race Convention should, therefore, provide meaningful guidance to this Court in its ongoing re-evaluation of the "evolving standards of decency that mark the progress of a maturing society." (*Trop*, 356 U.S. at p. 101; accord *Coker v. Georgia* (1977) 433 U.S. 584, 596, fn. 10 ["climate of international opinion" reinforces a conclusion regarding evolving standards of decency]; *Graham v. Florida* (2010) 130 S.Ct. 2011, 2033 [continuing the Court's "longstanding practice" of looking "beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual."].)

It is incumbent upon the Court to view the application of the death penalty in this case in light of the recent international commitments the United States has made in the protection of individuals against racial discrimination, and overwhelming evidence that race discrimination is an inextricable part of our death penalty scheme. Because the death penalty as applied in the United States is fraught with intractable discrimination and racism, it violates not only our highest constitutional principles, but also international treaties and norms of *jus cogens* quality.

This Court has repeatedly rejected claims that international law has any application to California capital proceedings, on grounds that it does not prohibit a sentence in accord with state and federal constitutional requirements. (*People v. Hamilton* (2009) 45 Cal.4th 863, 896; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511; *People v. Jenkins* (2000) 22 Cal.4th 900, 1055.) To the extent that this Court has concluded that international law need not be considered as long as standards of domestic law are met, then the opinion in *Jenkins* and ensuing cases (see, e.g., *People v. Curl* (2009) 46 Cal.4th 339, 362–363), effectively eliminates international legal principles by holding that international law is no broader than the law of a sovereign state. If this were the case, then every nation on earth could claim that international law is only binding to the extent it reiterates domestic law.

As the United States Constitution and Supreme Court jurisprudence recognize, international law is part of the law of this land. International treaties have supremacy in this country. (U.S. Const., art. VI, cl. 2.) Customary international law, or the "law of nations," is equated with federal common law. (Restatement Third of the Foreign Relations Law of the United States (1987), pp. 145, 1058; see *Eye v. Robertson* (1884) 112 U.S. 580; U.S. Const. art. I, § 8 (Congress has authority to "define and punish . . . offenses against the law of nations").) This Court therefore has an obligation to fully consider possible violations of international law, even where the conduct complained of is not currently a violation of domestic law. Most particularly, it is obliged to enforce violations of international law where that law provides more protections for individuals than does domestic law.

## XXI. THE RACIAL DISCRIMINATION PERMEATING CAPITAL SENTENCING THAT IS ACCEPTED BY DOMESTIC LAW VIOLATES BINDING INTERNATIONAL LAW, AND REQUIRES THAT APPELLANT'S DEATH PENALTY BE SET ASIDE.

There is one area of law in which international law clearly reaches further than domestic law: race discrimination. Appellant is aware of this Court's language that a defendant "does not have to turn to international law for protection from racial discrimination. Both the state and federal Constitutions and various statutory provisions prohibit the state from engaging in racial discrimination." (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511.) A closer look, however, shows that racism is both implicitly and explicitly accepted by state and federal courts in the context of the death penalty.

Race discrimination is an inevitable byproduct of a system which is structured to allow discretion, even when the exercise of discretion is guided by racism. Because the death penalty is in fact imposed in the United States in a racially discriminatory manner, international law, as evidenced by the International Covenant, the American Declaration, and the Race Convention, all of which are subscribed to by the United States, prohibits its application to appellant, a man of Hispanic background.

Article 26 of the International Covenant provides that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex. . . ."[86] Again, this protection is found in article 2 of the American Declaration which guarantees the right of equality before the law.[87]

The Race Convention, a signed and ratified treaty, contains extensive protections against racial discrimination. Article 5 of the Convention provides:

> [S]tates Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
> (a) The right to equal treatment before the tribunals and all other organs administering justice;
> (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution. . . .[88]

---

[86] International Covenant on Civil and Political Rights, *supra*.

[87] American Declaration of the Rights and Duties of Man, *supra*.

[88] International Convention Against All Forms of Racial Discrimination, *supra*. Indeed, long before this Convention, the United States recognized the international obligations to cease state practices that discriminated on the basis of race. See also *Oyama v. California* (1948) 332

Furthermore, "States Parties shall assure to everyone within their jurisdiction effective protection and remedies through the competent national tribunals and other State institutions against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention. . . ."[89]

---

U.S. 633, holding that the California Alien Land Law preventing an alien ineligible for citizenship from obtaining land violated the equal protection clause of the United States Constitution. Justice Murphy, in a concurring opinion, stated that the U.N. Charter was a federal law that outlawed racial discrimination and noted:

> Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. [The Alien Land Law's] inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned.

(*Id.* at p. 673.) See also *Namba v. McCourt* (1949) 185 Or. 579, 204 P.2d 569, invalidating an Oregon Alien Land Law, and stating that:

> The American people have an increasing consciousness that, since we are a heterogeneous people, we must not discriminate against any one on account of his race, color or creed . . . When our nation signed the Charter of the United Nations we thereby became bound to the following principles (article 55, subd. c, and see article 56): "Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." (59 Stat. 1031, 1046.)

(*Id.* at p. 604.)

[89] International Convention Against All Forms of Racial Discrimination, *supra*.

Section 702 of the Restatement Third of the Foreign Relations Law of the United States recognizes that a state violates international law if, as a matter of state policy, it practices, encourages or condones systematic racial discrimination. The right to be free from governmental discrimination on the basis of race is so universally accepted by nations that it constitutes a peremptory norm of international law, or *jus cogens*.[90] As such, the courts ought to consider and weigh the *jus cogens* quality of international norms; if of *jus cogens* quality, these norms should have a stronger influence against, and increase the burden of justification for, contrary state actions.[91] (See, e.g., *Kadic v. Karadzic* (2nd Cir. 1995) 70 F.3d 232, 238 (prohibition against torture has gained status as *jus cogens* because of widespread condemnation of practice).)

The death penalty in the United States has long been imposed in a racially discriminatory manner. The 1990 report of the United States General Accounting Office synthesized 28 studies and concluded that there

---

[90] A peremptory norm of international law, *jus cogens*, is a "norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." (Vienna Convention on Consular Relations and Optional Protocols U.N.T.S. Nos. 8638–8640, vol. 596, pp. 262–512; Restatement Third of the Foreign Relations Law, *supra*.)

[91] Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society* (1988) 28 Va. J. Intl. L. 627–628.

is a "pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the *Furman* decision.[92] In 82 percent of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., "those who murdered whites were found more likely to be sentenced to death than those who murdered blacks."[93] The GAO report noted that racism was "found at all stages of the criminal justice system process."[94]

The Baldus study, an empirical analysis accounting for 230 non-racial variables, also found strong evidence of racial bias. The study concluded that killers of whites in Georgia are 4.3 times more likely to be

---

[92] United States General Accounting Office, *Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing* (1990) GAO/GOD-90-57. (In *Furman v. Georgia* (1972) 408 U.S. 238 [33 L.Ed 346, 92 S.Ct. 2726], the United States Supreme Court held that Georgia and Texas state statutes governing the imposition and carrying out of the death penalty violated the Eighth and Fourteenth Amendments of the Constitution.)

[93] United States General Accounting Office, *Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing* (1990) *supra*, at p. 5.

[94] United States General Accounting Office, *Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing*, *supra*, p. 6.

sentenced to death than killers of blacks.[95] Professor Baldus, along with statistician George Woodworth, also conducted a study of race and the death penalty in Philadelphia in the years 1996–1998. They examined a large sample of murders eligible for the death penalty between 1983 and 1993. They found that, even after controlling for levels of crime severity and the defendant's criminal background, blacks in Philadelphia were 3.9 times more likely to receive a death sentence than other similarly situated defendants.[96]

In 1994, a Staff Report by the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary concluded that "racial minorities are being prosecuted under federal death penalty law far beyond their proportion in the general population or the proposition of criminal offenders."[97] The report analyzed the application of specific provisions of the Anti-Drug Abuse Act of 1988 (also known as the "drug

---

[95] Baldus, Woodworth, Zuckerman, Weiner & Broffitt, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia* (1998) 83 Cornell L.Rev. 1638.

[96] *Ibid.*

[97] *Racial Disparities in Federal Death Penalty Prosecutions 1988–1994*, Staff Report by the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, 103 Cong. 2nd Sess., March 1994.

kingpin law"), which authorize the death penalty for murders committed by those involved in certain drug trafficking activities, to criminal defendants.

Significantly, the staff report found that while three-quarters of those convicted under the provisions of the Anti-Drug Abuse Act have been white and only 24 percent of the defendants have been black, just the opposite is true for those chosen for death penalty prosecutions: 78 percent of the defendants have been black and only 11 percent of the defendants have been white.[98] This contrasts sharply with the statistics of federal death penalty prosecutions before the 1972 *Furman* decision: between 1930 and 1972, 85 percent of those executed under federal law were white and 9 percent were black.[99] Looking at this information, the staff report concluded that the "dramatic racial turnaround under the drug kingpin law clearly requires remedial action."[100]

The staff report also stated that

> Nearly 40% of those executed since 1976 have been black, even though blacks constitute only 12% of the population. And in almost every death penalty case, the race of the victim is white. Last year alone, 89% of the death sentences carried out involved white victims, even though 50% of the homicides in this country have black victims. Of the 229

---

[98] *Ibid.*

[99] *Ibid.*

[100] *Ibid.*

> executions that have occurred since the death penalty was reinstated, only one has involved a white defendant for the murder of a black person.[101]

These statistics led the staff report to conclude that "Race continues to plague the application of the death penalty in the United States."[102]

In 1995, researchers at the University of Louisville found that blacks convicted for killing whites were more likely to receive the death penalty than any other offender-victim combination.[103] In fact, in 1996 "100% of the inmates [on Kentucky's death row] were there for murdering a white victim, and none were there for the murder of a black victim, despite the fact that there have been over 1,000 African-Americans murdered in Kentucky since the death penalty was reinstated."[104] This evident bias in use of the death penalty led to Kentucky's Racial Justice Act, passed in 1998, which permits race-based challenges to prosecutorial decisions to seek the death penalty.[105] There is no equivalent in California, nor is there even a

---

[101] *Ibid.*

[102] *Ibid.*

[103] Keil and Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976–1991* (1995) 20 Am.J.Crim.Just. 17.

[104] Dieter, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides*, Death Penalty Information Center (June 1998).

[105] *Ibid.*

jury instruction that warns the jurors to avoid race or group prejudice in their deliberations over the appropriate penalty.

A recent study in North Carolina found that the odds of a defendant receiving a death sentence were three times higher if the person was convicted of killing a white person than if he had killed a black person. The study, conducted by Professors Michael Radelet and Glenn Pierce, examined 15,281 homicides in the state between 1980 and 2007, which resulted in 368 death sentences. Even after accounting for additional factors, such as multiple victims or homicides accompanied with a rape, robbery or other felony, researchers found that race was still a significant predictor of who was sentenced to Death. (Radelet & Pierce, *Race and Death Sentencing in North Carolina, 1980–2007* (2011) 89 N.C. L.Rev. 2120–2159.

Although roundly condemned in the abstract, racism permeates our criminal justice system. Its persistence is encouraged by the requirement that it be photographed or documented before any court will act to condemn it. In *McCleskey v. Kemp*, *supra*, 481 U.S. 279, the U.S. Supreme Court rejected a federal Equal Protection challenge to a Georgia death sentence which was shown by statistical evidence to have been imposed pursuant to a statewide pattern of racially disproportionate capital sentencing.

Starting from the premise that the federal Equal Protection Clause is concerned only with state action consisting of purposeful discrimination by official decision-makers, the *McCleskey* majority opinion first translated this principle into a requirement that, "to prevail under the Equal Protection Clause, McCleskey must prove that the decision-makers in his case acted with discriminatory purpose" (481 U.S. at p. 292) and then held that "an inference drawn from the general statistics [concerning capital sentencing patterns] to a specific decision in a trial and sentencing is simply not comparable to" statistical proof of racial discrimination in other contexts. (*Id.* at p. 294.) Hence, the majority held, any claim that a death sentence violates the federal Equal Protection Clause must be established by case-specific proof of subjective racial animus on the part of the prosecutor, jurors, judge or legislature. (*Id.* at pp. 292–299.)

Thus, the *McCleskey* majority limited the federal Equal Protection Clause to treating "the superficial, short-lived situation where we can point to one or another specific decision-maker and show that his decisions were the product of conscious bigotry," while leaving untreated "the far more basic, more intractable, and more destructive situation where hundreds upon hundreds of different public decision-makers, acting like Georgia's prosecutors and judges and juries—without collusion and in many cases

without consciousness of their own racial biases—combine to produce a pattern that bespeaks the profound prejudice of an entire population."[106]

The *McCleskey* decision was driven by a realization that racial discrimination in capital sentencing was not peculiar to Georgia, but was inevitable under any modern-day American procedure for imposing the death penalty.[107] Thus, the court saw that its only real choices were to

---

[106] Amsterdam, *Race and the Death Penalty* (1988) 7 Criminal Justice Ethics 2, at p. 86.

[107] The *McCleskey* majority says repeatedly that the death penalty in the United States would be abolished de facto if the Court were to hold that a statistical showing of state-wide racially discriminatory capital-sentencing practices sufficed to invalidate death sentences imposed under those practices. (See, e.g., 481 U.S. at p. 319 ("McCleskey's wide-ranging arguments . . . basically challenge the validity of capital punishment in our multiracial society"); *id.* at pp. 312–313 ("At most, the . . . [empirical study presented by McCleskey] indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. . . . As this Court has recognized, any mode for determining guilt or punishment 'has its weaknesses and the potential for misuse.' . . . Specifically, 'there can be "no perfect procedure for deciding in which cases governmental authority should be used to impose death."'"); *id.* at p. 312 n.35 ("No one contends that all sentencing disparities can be eliminated."); *id.* at p. 315 n.37 ("The *Gregg*-type statute imposes unprecedented safeguards in the special context of capital punishment. . . . Given these safeguards already inherent in the imposition and review of capital sentences, the dissent's call for greater rationality is no less than a claim that a capital punishment system cannot be administered in accord with the Constitution. As we reiterate . . . , the requirement of heightened rationality in the imposition of capital punishment does not 'plac[e] totally unrealistic conditions on its use.'"); *id.* at p. 319 ("The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor [this is a euphemism for race—the only "factor" at issue in *McCleskey*] in order to operate a criminal justice system

outlaw capital punishment entirely or to tolerate racial bias in the dispensing of death sentences. It chose the latter. However legal at present in the United States, this choice clearly violates the Race Convention, and international law.

The discretion that is now a mandatory part of California's death penalty sentencing scheme guarantees that racism will have an opportunity to flourish throughout the process. The Supreme Court recognizes that any "process that . . . excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind" is intolerably inhumane. (*Woodson v. North Carolina* (1976) 426 U.S. 280, 304.) The problem with this now-constitutionally-required discretion, though, is that—as the Supreme Court was compelled to concede in *McCleskey*, 481 U.S. at p. 312—"'the power to be lenient [also] is the power to discriminate.'"

The same reluctance to impose the death penalty regularly which had put an end to mandatory capital sentencing sways jurors, and often prosecutors as well, to forgo the extreme punishment of death unless their outrage at a crime overwhelms their empathy for the defendant. Neither

---

that includes capital punishment. As we have stated specifically in the context of capital punishment, the Constitution does not 'plac[e] totally unrealistic conditions on its use.'"); and see *id.* at pp. 310–311.)

outrage nor empathy are dispassionate, rational processes. They are impressionistic and impulsive and are strongly moved by racial, caste, and class biases. Capital sentencing procedures conferring broad discretion on prosecutors to seek and jurors to choose a death sentence provide "a unique opportunity for racial prejudice" (*Turner v. Murray* (1986) 476 U.S. 28, 35) to operate in ways that courts cannot, and do not, effectively restrain.

The covenants against racism to which the United States subscribes do not tolerate acceptance of racism, even when cloaked in the name of "discretion" or when racism is an acceptable motive if combined with more legitimate bases for decision making. Article 1 of the International Convention Against All Forms of Racial Discrimination defines "racial discrimination" as:

> [a]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

General Recommendation No. 14: Definition of discrimination (Art. 1, par.1) 03/22/1993, emphasis added.)

*McCleskey* ordains that racism can only be proved if that is the *purpose* of a challenged act or omission, but specifically forbids the establishment of racism by showing the *effects* of a challenged practice or

system independent of anyone's express intentions. In so holding, it violated the Convention to which the United States specifically subscribed.

This Court has explicitly allowed racism to be part of the process of exercising peremptory challenges of potential jurors, provided that it is not the only reason for such challenges. In *People v. Montiel* (1993) 5 Cal.4th 887, the Court wrote, "To rebut a race- or group-bias challenge, counsel need only give a *nondiscriminatory* reason which, under all the circumstances, including logical relevance to the case, appears *genuine* and thus supports the conclusion that race or group prejudice *alone* was not the basis for excusing the juror. (Citations omitted.)" (*People v. Montiel*, *supra*, 5 Cal.4th at p. 910, fn. 9; emphasis in original.)

To say that "race or group prejudice *alone*" is an impermissible basis of a peremptory challenge must mean that race bias is permissible if it is not the only basis for the exercise of a peremptory challenge. Otherwise, the word "alone" would be superfluous. It cannot have been accidentally included as part of the standard's delineation; not only do principles of judicial interpretation require us to give significance to each word, but the Court's emphasizing the word "alone" must mean that the word was an integral part of the standard's formulation—a part worth emphasizing.

Appellant can discern no other contribution of the word "alone" to this formulation than a recognition that *some* racism, or purposeful discrimination, is permissible, so long as it is not the only basis for the exercise of a peremptory challenge. By allowing purposeful discrimination provided that it is not the sole basis for the removal of a juror, this Court institutionalizes the routine practice of racism.

This Court has not done so in other aspects of the law; elsewhere, it has recognized that destructive behavior may be motivated by various reasons in addition to race bias, and nevertheless condemned such behavior. (See *In re Sassounian* (1995) 9 Cal.4th 535, 549, fn. 11 [to satisfy national origin special circumstance, § 190.2, subd. (a)(16), killing need not have been *solely* because of victim's "nationality or country of origin"]; *In re M.S.* (1995) 10 Cal.4th 698, 716 [the words "because of" construed as found in the similarly worded statutes, §§ 422.6 and 422.7, to only require that the prohibited bias be a substantial factor in the commission of the crime].)

The language in *Montiel*, however, means that racism is permissible, provided it is not the only factor—indeed, there is nothing in this Court's pronouncements that would prevent it from being a substantial factor in the decision to excuse a potential juror. This Court continues to leave open the

possibility that racist intent may coexist with permissible intent in the exercise of peremptory challenges. (*People v. Alvarez* (1996) 14 Cal.4th 155, 197; *People v. Schmeck* (2005) 37 Cal.4th 240, 276–277.)

Race discrimination is both the most detectable symptom and the most invidious consequence of the inability to rationally regulate life-and-death sentencing choices. It has persisted unchecked under every form of post-*Furman* capital-sentencing procedure. None of the statutes upheld by *Gregg v. Georgia*, *supra*, 428 U.S. 153, and its progeny are formally sufficient to cure the *Furman* arbitrariness/discrimination problem or have come close to eliminating it. To the contrary, capital sentencing decisions under the "guided discretion" type of statute sustained in *Gregg* and in effect in California have consistently been found to turn on the race of the victim and secondarily on the race of the defendant, usually in combination.

The protections of the Race Convention, International Covenant, and American Declaration establish an affirmative obligation of the United States to redress racial discrimination and to proceed with vigor and deliberation to ensure that race is not a prejudicial factor in criminal prosecutions. It is incumbent upon the Court to view the application of the death penalty in this case both in light of the international commitments the

United States has made to the protection of individuals against racial discrimination, and in acceptance of the overwhelming evidence that race discrimination is an inextricable part of our death penalty scheme. Because the death penalty as applied in California is fraught with intractable discrimination and racism, it violates international norms of *jus cogens* quality. Appellant's death sentence must be reversed.

## XXII. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

In *People v. Schmeck* (2005) 37 Cal.4th 240, a capital appellant represented a number of often-raised constitutional attacks on the California capital sentencing scheme that had been rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (*Id.* at p. 303.) This Court acknowledged that in dealing with these attacks in prior cases, it had given conflicting signals on the detail needed in order for an appellant to preserve these attacks for subsequent review. (*Id.* at p. 303, fn. 22.) In order to avoid detailed briefing on such claims in future cases, the Court authorized capital appellants to preserve these claims by "do[ing] no more than (i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (*Id.* at p. 304.)

Accordingly, pursuant to *Schmeck* and in accordance with this Court's own practice in decisions filed since then,[108] appellant identifies the

---

[108] See, e.g., *People v. Taylor* (2010) 48 Cal.4th 574 [108 Cal.Rptr.3d 87, 169–170]; *People v. McWhorter* (2009) 47 Cal.4th 318; *People v. D'Arcy* (2010) 48 Cal.4th 257, 307–309; *People v. Mills* (2010) 48 Cal.4th 158, 213–215; *People v. Ervine* (2009) 47 Cal.4th 745, 810–811;

following systemic and previously rejected claims relating to the California death penalty scheme that require reversal of his death sentence and requests the Court to reconsider its decisions rejecting them.

### A. Failure to Narrow

California's capital punishment scheme, as construed by this Court in *People v. Bacigalupo*, *supra*, 6 Cal.4th at pp. 475–477, and as applied, violates the Eighth Amendment by failing to provide a meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast majority who are not. This Court has repeatedly rejected this argument. (See, e.g., *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308; *People v. Mills*, *supra*, 48 Cal.4th at p. 213; *People v. Martinez*, *supra*, 47 Cal.4th at p. 967; *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.) The Court's decisions should be reconsidered because they are inconsistent with the federal Constitution.

### B. Burden of Proof and Persuasion

Under California law, a defendant convicted of first-degree special-circumstance murder cannot receive a death sentence unless a penalty-phase jury subsequently (1) finds that an aggravating circumstance or aggravating

---

*People v. Carrington* (2009) 47 Cal.4th 145, 198–199; *People v. Martinez* (2010) 47 Cal.4th 911, 967–968.

circumstances exist, (2) finds that the aggravating circumstances outweigh the mitigating circumstances, and (3) finds that death is the appropriate sentence. The jury in this case was not told that these three decisions had to be made beyond a reasonable doubt, an omission that violated the Supreme Court decisions in *Ring v. Arizona*, 536 U.S. 584 and its progeny. Nor was the jury given any burden of proof or persuasion at all (except as to a prior conviction and/or other violent criminal conduct). These were errors that violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to a jury trial, to equal protection, to a reliable and non-arbitrary determinations of the appropriateness of the death penalty, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308; *People v. Mills*, *supra*, 48 Cal.4th at p. 213; *People v. Martinez*, *supra*, 47 Cal.4th at p. 967; *People v. Ervine*, *supra*, 47 Cal.4th at pp. 810–811; *People v. McWhorter*, *supra*, 47 Cal.4th at p. 379; *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

### C. Factor (a)

Section 190.3, factor (a)—which permits a jury to sentence a defendant to death based on the "circumstances of the crime"—is being applied in a manner that institutionalizes the arbitrary and capricious imposition of death, is vague and standardless, and violates appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, to equal protection, to a reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment.

The jury in this case was instructed in accord with this provision. (59 RT 8909.) In addition, the jury was not required to be unanimous as to which "circumstances of the crime" amounting to an aggravating circumstance had been established, nor was the jury required to find that such an aggravating circumstance had been established beyond a reasonable doubt, thus violating *Ring v. Arizona*, 536 U.S. 584 and its progeny[109] and appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at p. 609.) This Court has repeatedly rejected these arguments.

---

[109] *Ring v. Arizona* (2002) 536 U.S. 584; *Blakely v. Washington* (2004) 542 U.S. 296; *United States v. Booker* (2005) 543 U.S. 220; *Cunningham v. California* (2007) 549 U.S. 270.

(See, e.g., *People v. Mills*, *supra*, 48 Cal.4th at pp. 213–214; *People v. Martinez*, *supra*, 47 Cal.4th at p. 967; *People v. Ervine*, *supra*, 47 Cal.4th at p. 810; *People v. McWhorter*, *supra*, 47 Cal.4th at p. 378; *People v. Mendoza*, *supra*, 24 Cal.4th at p. 190; *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 304–305.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

**D. Factor (b)**

During the penalty phase, the jury was instructed it could consider criminal acts which involved the express or implied use of violence. (59 RT 8909.) The jurors were not told that they could rely on this section 190.3 factor (b) evidence unless they unanimously agreed beyond a reasonable doubt that the conduct had occurred. In light of the Supreme Court decision in *Ring v. Arizona*, 536 U.S. 584 and its progeny, the trial court's failure violated appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at p. 609.)

In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable, non-arbitrary penalty phase determination and to freedom from cruel and unusual

punishment. This Court has repeatedly rejected these arguments. (See, e.g. *People v. Martinez*, *supra*, 47 Cal.4th at p. 968; *People v. Lewis* (2006) 39 Cal.4th 970, 1068.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

**E. Factor (c)**

The jurors were never told that before they could rely on this or any other aggravating factor, they had to unanimously agree that defendant had committed the prior crime. In light of the Supreme Court decisions in *Ring v. Arizona*, *supra*, and its progeny, the trial court's failure violated appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Id.* at p. 609.) In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable and non-arbitrary penalty phase determination. This Court has repeatedly rejected these arguments; *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.) The Court's decisions should be reconsidered because they are inconsistent with the federal Constitution.

## F. Inapplicable, Vague, Limited and Burdenless Factors

At the penalty phase, the trial court instructed the jury in accord with standard instruction CALJIC No. 8.85. (59 RT 8909–8912.) This instruction was constitutionally flawed in the following ways: (1) it failed to delete inapplicable sentencing factors; (2) it contained vague and ill-defined factors, particularly factors (a) and (k); (3) it limited factors (d) and (g) by adjectives such as "extreme" or "substantial"; and (4) it failed to specify a burden of proof as to either mitigation or aggravation.

These errors, taken singly or in combination, violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 304–305; *People v. Ray* (1996) 13 Cal.4th 313, 358–359.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

## G. Written Findings

The California death penalty scheme fails to require written findings by the jury as to the aggravating and mitigating factors found and relied on,

in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (*People v. Taylor*, *supra*, 108 Cal.Rptr.3d 87 at p. 170; *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308; *People v. Mills*, *supra*, 48 Cal.4th at p. 213; *People v. Martinez*, *supra*, 47 Cal.4th at p. 967.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

### H. Intercase Proportionality Review

The California death penalty scheme fails to require intercase proportionality review, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308–309; *People v. Mills*, *supra*, 48 Cal.4th at p. 214; *People v. Martinez*, *supra*, 47 Cal.4th at

p. 968.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

## I. Disparate Sentence Review

The California death penalty scheme fails to afford capital defendants with the same kind of disparate sentence review as is afforded felons under the determinate sentence law, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Mills*, *supra*, 48 Cal.4th at p. 214; *People v. Martinez*, *supra*, 47 Cal.4th at p. 968; *People v. Ervine*, *supra*, 47 Cal.4th at p. 811.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

## J. Cruel and Unusual Punishment

The death penalty violates the Eighth Amendment's proscription against cruel and unusual punishment. This Court has repeatedly rejected this argument. (See, e.g., *People v. Thompson*, *supra*, 49 Cal.4th at pp. 143–144; *People v. Taylor*, *supra*, 48 Cal.4th at p. 663; *People v.*

*McWhorter*, *supra*, 47 Cal.4th at p. 379.) Those decisions should be reconsidered because they are inconsistent with the aforementioned provision of the federal Constitution.

### K. Cumulative Deficiencies

Finally, the Eighth and Fourteenth Amendments are violated when one considers the preceding defects in combination and appraises their cumulative impact on the functioning of California's capital sentencing scheme. As the Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6. See also *Pulley v. Harris* (1984) 465 U.S. 37, 51 [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].)

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.

To the extent respondent hereafter contends that any of these issues is not properly preserved because, despite *Schmeck* and the other cases cited herein, appellant has not presented them in sufficient detail, appellant will seek leave to file a supplemental brief more fully discussing these issues.

## XXIII. THE ERRORS, BOTH SINGLY AND CUMULATIVELY, OBSTRUCTED A FAIR TRIAL, AND REQUIRE REVERSAL.

Many of the errors urged in this brief are sufficiently important to justify reversal in and of themselves. However, if this Court finds more than one error, but concludes that each error, standing alone, can be deemed harmless despite the factors discussed above, then this Court must also consider the cumulative effect of the errors. (*Williams v. Taylor* (2000) 529 U.S. 362, 399; *People v. Hill* (1998) 17 Cal.4th 800, 844–845 ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"]; *People v. Cardenas* (1982) 31 Cal.3d 897, 907; *People v. Duran* (1976) 16 Cal.3d 282; *People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Zerillo* (1950) 36 Cal.2d 222, 233.)

Fifth, Eighth, and Fourteenth Amendment due process and reliability concerns require meaningful appellate review in capital cases. (See *Parker v. Dugger* (1991) 498 U.S. 308, 321.) Absent a consideration of the cumulative impact of errors, meaningful appellate review would not be possible.

"Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial

setting that is fundamentally unfair." (*Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 963; *People v. Hill*, *supra*, 17 Cal.4th at p. 844.) In such cases, "'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of a the errors in the context of the evidence introduced at trial against the defendant." (*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381.)

An error can be found to be sufficiently minor so that a more favorable result on a retrial is unlikely. However, if there is a series of errors that would all be corrected at a retrial, it becomes much more difficult to conclude that the trial under review was fundamentally fair. Reversal of appellant's convictions and death sentence is required because of the substantial prejudice flowing from the cumulative impact of the errors described in this brief.

## XXIV. GUILT PHASE ERRORS THAT DO NOT RESULT IN REVERSAL OF THE CONVICTIONS MUST ALSO BE CONSIDERED IN THE PENALTY PHASE; ANY SUBSTANTIAL ERROR AT THE PENALTY PHASE MUST BE DEEMED PREJUDICIAL.

### A. Errors That Were Harmless in the Guilt Phase Might Still Adversely Impact the Penalty Determination.

This brief contains a variety of arguments urging this Court to find reversible error during the guilt phase of the trial. Should this Court reject those arguments and hold that the errors committed during the guilt phase were harmless as to the guilt phase determinations, then it would be necessary to give separate consideration to the possibility that a harmless guilt phase error had a prejudicial impact on the penalty determination.

The jury was expressly told that all guilt phase evidence must be considered during the penalty phase: "In determining which penalty is to be imposed on defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. . . ." (69 RT 12875.)

However, since the nature of the question the jury resolves at the guilt phase is fundamentally different from the question resolved at the penalty phase, the possibility exists that an error might be harmless as to the guilt determination, but still be prejudicial at the penalty phase. For example, the improper admission at the guilt phase of evidence pointing to appellant's bad character or Yolanda's desire that appellant be killed (see

Arg. XVI) could have tipped the scales of a close decision by the jury at the penalty trial.

This Court has expressly recognized the danger that improper character evidence can taint the penalty determination, even in cases where the evidence of guilt is overwhelming.

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal. But in determining the issue of penalty, the jury, in deciding between life imprisonment or death, may be swayed one way or the other by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a "reasonable probability" that a different result would have been reached in absence of error.

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136–137.)

By definition, it takes less to raise a lingering doubt than it takes to raise a reasonable doubt. Obviously then, guilt phase errors which might be found harmless under traditional guilt phase tests of prejudice might nonetheless have the effect of negating a lingering doubt as to guilt—or a lingering doubt as to appellant's state of mind when the crimes were committed. Such errors may prejudicially impact the penalty determination

even if they can be found harmless as to the guilt verdict. Accordingly, this Court must make a separate assessment of the impact of each guilt phase error, and of the cumulative impact of all guilt phase errors, on the penalty determination.

### B. Any Substantial Error Requires Reversal of the Penalty Verdict

Prior to the adoption of California's current death penalty procedures, in which juror discretion is guided by a statutory list of aggravating and mitigating factors, this Court recognized in two key cases that assessment of the impact of an error is more difficult in a penalty trial than in a guilt trial. In addition to the language in *People v. Hamilton*, *supra*, 60 Cal.2d at 136–137, this Court addressed the question of prejudice at a penalty phase determination in *People v. Hines*:

> [T]he jury may conceivably rest the death penalty upon any piece of introduced data or any one factor in this welter of matter. The precise point which prompts the [death] penalty in the mind of any one juror is not known to us and may not even be known to him. Yet this dark ignorance must be compounded 12 times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner. We cannot determine if *other* evidence before the jury would neutralize the impact of an error and uphold a verdict. . . . We are unable to ascertain whether any error which is not purely insubstantial would cause a different result; we lack the criteria for objective judgment. Thus, *any* substantial error in the penalty trial may have affected the result; it is "reasonably probable"

> that in the absence of such error "a result more favorable to the appealing party would have been reached." (Citation.)

(*People v. Hines* (1964) 61 Cal.2d 164, 169.)

After some experience implementing the current death penalty law, this Court expressed dissatisfaction with what had come to be known as the *Hamilton/Hines* standard, referring to it as the:

> [v]ery generous rule of penalty phase prejudice applicable to pre-1972 death penalty statutes. In view of the jury's "absolute" penalty discretion under these laws, any "substantial" penalty phase error was deemed prejudicial and reversible. (*Id.*, at p. 763.) This strict standard of penalty phase reversal no longer applies, however, under the 1977 and 1978 death penalty laws, which include constitutionally sufficient standards. to guide jury discretion. *(Robertson, supra,* 33 Cal.3d at p. 63 [conc. opn. of Broussard, J.]; see *Davenport, supra,* 41 Cal.3d at pp. 280 [plur. opn.] & 295 [conc. & dis. opn. of Broussard, J.].)

(*People v. Lucky* (1988) 45 Cal.3d 259, 294.)

While it is true that juries today have more guidance in choosing the penalty than did juries in the days of the death penalty law at issue in *Hamilton* and *Hines*, the fact remains that penalty determinations are still very different from guilt determinations. In the guilt phase, the jury makes inherently factual decisions—exactly what events occurred? What was the defendant's state of mind when they occurred? Which witnesses should be believed? In a penalty phase, juries make similar decisions in some respects, but they also make a highly normative determination when they make the

ultimate decision as to whether death or life without parole is the appropriate penalty for a particular crime and offender.

Thus, it is clear that the discretion that a jury possesses in deciding penalty remains much broader than the discretion possessed when determining guilt or innocence, because it is a "moral or normative" decision rather than a resolution of disputed facts. (*People v. Prieto* (2003) 30 Cal.4th 226, 263; see also *People v. Snow* (2003) 30 Cal.4th 43.) The present penalty phase jury was instructed, "You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors that you are permitted to consider." (69 RT 12879–12880.) No guilt phase jury possesses discretion comparable to that.

In regard to review of the impact of state-law errors on a capital penalty verdict under the modem death penalty law, this Court has modified the *Hamilton/Hines* standard and held that the correct standard is whether there is a reasonable or realistic possibility that the jury would have a different verdict absent the error or errors. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

The particular error under discussion in *Brown* was a failure to instruct on the need to find that prior violent criminality could be considered in aggravation only if found true beyond a reasonable doubt.

Because the prior violent criminality was proven overwhelmingly and not refuted by the defense at trial, this Court was able to conclude that the omitted instruction would have made no difference.

However, the *Brown* standard is not so easily applied when a jury hears evidence it should not have heard, or is deprived of evidence it should have received, or when the error at issue impacts on the overall normative being made, rather than impacting strictly on a factual decision as in *Brown.*

*Brown* did not expressly accept or reject the underlying principles set forth in *Hamilton* and *Hines.* On the other hand, *Brown* did find that other penalty errors, which resulted in the jury hearing arguably improper aggravating evidence, argument, and/or instructions, were also harmless. This result was reached without substantial discussion, and was based on a simple conclusion that the properly admitted aggravating evidence was overwhelming, and that a consideration of all of the instructions and arguments indicated that the jury would not have been confused about proper legal principles. (*People v. Brown*, *supra*, 46 Cal.3d at pp. 449, 451–454, 456.)

It is questionable whether the *Brown* reliance on "overwhelming" aggravation evidence is consistent with the principle that each juror has considerable discretion to determine how much weight should be assigned

to each aggravating or mitigating factor. Thus, any substantial error that was not purely technical must be deemed to satisfy the reasonable possibility test set forth in *Brown*.

The "reasonable possibility" test was derived from a comment by Justice Broussard in a concurring opinion in which he simultaneously recognized the continued validity of the "any substantial error" test, albeit with a slight modification:

> I am also troubled by the majority's discussion of prejudicial error. The majority quote from cases decided during the 1960's (*People v. Hines* (1964) 61 Cal.2d 164, 169; *People v. Hamilton* (1963) 60 Cal.2d 105, 135–137) which stress the impossibility of determining whether any particular factor may have influenced one of the twelve jurors to vote for the death penalty. That language, however, was prompted by the fact that the jury at the time those cases were decided was required to decide the question of penalty "without benefit of guideposts, standards, or applicable criteria." *(People v. Hines, supra,* 61 Cal.2d at p. 168, quoting *People v. Terry* (1964) 61 Cal.2d 137, 154.) It does not apply with equal force to verdicts under the statute with constitutionally sufficient standards to guide jury discretion. We may still use the "any substantial error" test developed in the cited cases, but "substantiality" now should imply a careful consideration whether there is any reasonable possibility that an error affected the verdict.

(*People v. Robertson* (1982) 33 Cal.3d 21, 63 (conc. opn. of Broussard, J.), emphasis added.)

The United States Supreme Court has expressly recognized the validity of the rationale underlying the conclusion reached in *Hines*, as set forth above: "It is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer." (*Satterwhite v. Texas* (1988) 486 U.S. 249, 258.)

In another capital case, the high court again recognized this principle:

> In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds. See, e.g., *Lockett v. Ohio*, 438 U.S. at 605 ("[T]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments"); *Andres v. United States,* 333 U.S. 740, 752 (1948) ("That reasonable men might derive a meaning from the instructions given other than the proper meaning of § 567 is probable. In death cases, doubts such as those presented here should be resolved in favor of the accused"); accord, *Zant v. Stephens*, 462 U.S. 862, 884–885 (1983). Unless we can rule out the substantial possibility that the jury may have rested its verdict on the "improper" ground, we must remand for resentencing.

(*Mills v. Maryland* (1988) 486 U.S. 367, 377.)

*Any* error that impacts on the reliability of the judgment in a capital case—even if it is purely an error of state law—carries Eighth Amendment

reliability implications. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Thus, every error in this case that affected the penalty determination should be reviewed under the federal constitutional standard set forth in *Chapman v. California* (1967) 386 U.S. 18 [whether the prosecution can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict].

Of course, the federal *Chapman* standard is also affected by the inescapable fact that the greater discretion in sentence determinations, compared to guilt determinations, makes it far more difficult to confidently determine that an error had no impact on the outcome. For example, in *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341, a death judgment was reversed when the Court found an error and concluded, "[b]ecause we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires."

### C. The Present Penalty Trial Must Be Considered Unusually Close, So No Error That Impacted the Penalty Determination Can Be Deemed Harmless.

Whether this Court uses the "no effect" standard, the *Chapman* standard, or any other standard, it is clear in the present case that any guilt or penalty phase error that potentially impacted the penalty determination

must result in reversal of the penalty verdict. The crimes were horrific—but no one, as the trial court recognized, offered any explanation for why they happened. There was nothing in appellant's past, either in his personal relationships with the deceased, or with those who knew him as a child, as a young man, or as an employee, that would suggest such an explosion.

Dozens of people stepped up to testify on his behalf. Despite the horrific nature of these crimes, the jury deliberated for more than seven hours, over three days. For the reasons stated herein, any combination of errors in this case had a reasonable possibility of affecting the verdict, and requires that appellant be given a new penalty phase trial.

## CONCLUSION

For the foregoing reasons, the judgment against appellant must be reversed.

Dated: April 25, 2014

Respectfully submitted,

LISA R. SHORT
MICHAEL R. SNEDEKER

Attorneys for Appellant
ARTURO JUAREZ SUAREZ

## CERTIFICATE OF WORD COUNT

After conducting a word count on this opening brief, I have determined there are a total of 86,717 words in a Times New Roman 13-point font.

DATED: _____

Respectfully submitted,

_____
LISA R. SHORT

Attorney for Appellant
ARTURO JUAREZ SUAREZ

## DECLARATION OF SERVICE BY MAIL

Re: *People v. Arturo Juarez Suarez*, Cal. Supreme Court No. S105876; Napa Co. Super Ct. No. CR103779. I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is PMB 422, 4110 SE Hawthorne Blvd., Portland, Oregon 97214. I served a true copy of the attached

## APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope (or envelopes) addressed as follows:

Placer County District Attorney
11562 B Avenue
Auburn, CA 95603-2687

Clerk, Napa County Superior Court
825 Brown Street
Napa, CA 94559

Valerie Hriciga, Esq.
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

Attorney General of California
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102

Arturo Juarez Suarez
P.O. Box T-47397
San Quentin State Prison
San Quentin, CA 94974

Each said envelope was then, on April 24, 2014, sealed and deposited in the United States mail at Portland, Oregon, Multnomah County, the county in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 24, 2014, in Portland, Oregon.

_____
Michael R. Snedeker