IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ANH THE DUONG, Defendant and Appellant.	No. S114228 (Los Angeles County Sup. Ct. No. BA240170)

ON AUTOMATIC APPEAL
FROM A JUDGMENT AND SENTENCE OF DEATH

Superior Court of California, County of Los Angeles
Hon. Robert Martinez, Judge

APPELLANT DUONG'S OPENING BRIEF

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DEATH PENALTY

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STATEMENT OF APPEALABILITY

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

STATEMENT OF THE CASE

On October 24, 2001, the Los Angeles County Grand Jury indicted Appellant Anh The Duong (hereafter "Duong") for the following offenses:

Count I alleged that on or about May 6, 1999, Duong wilfully murdered Minh Dieu Tram in violation of section 187(a) and that the offense was a serious felony within the meaning of 1192.7(c)). 1:CT 117. Count I also alleged that in the commission of the offense, Duong personally and intentionally discharged a firearm which proximately caused the death of Minh Dieu Tram within the meaning of section 12022.53(d); personally and intentionally discharged a firearm within the meaning of section 12022.53(c)); and personally used a firearm within the meaning of sections 12022.5(a)(1)

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

and 12022.53(b). 1:CT 118.

Count II alleged that on or about May 6, 1999, Duong wilfully murdered The Hao Tang in violation of section 187(a) and that the offense was a serious felony within the meaning of 1192.7(c)). 1:CT 118. Count II also alleged that in the commission of the offense, Duong personally and intentionally discharged a firearm which proximately caused the death of The Hao Tang within the meaning of section 12022.53(d); personally and intentionally discharged a firearm within the meaning of section 12022.53©); and personally used a firearm within the meaning of sections 12022.5(a)(1) and 12022.53(b). 1:CT 118-119.

Count III alleged Duong wilfully murdered Robert A. Norman in violation of section 187(a) and that the offense was a serious felony within the meaning of 1192.7(c)). 1:CT 119. Count III also alleged that in the commission of the offense, Duong personally and intentionally discharged a firearm which proximately caused the death of Robert A. Norman within the meaning of section 12022.53(d); personally and intentionally discharged a firearm within the meaning of section 12022.53(c)); and personally used a firearm within the meaning of sections 12022.5(a)(1) and 12022.53(b). 1:CT 119.

Count IV alleged Duong wilfully murdered Lan Thi Dang in violation of section 187(a) and that the offense was a serious felony within the meaning of 1192.7(c)). 1:CT 120. Count IV also alleged that in the commission of the offense, Duong personally and intentionally discharged a firearm which proximately caused the death of Lan Thi Dang within the meaning of section 12022.53(d); personally and intentionally discharged a firearm within the meaning of section 12022.53(c)); and personally used a firearm within the meaning of sections 12022.5(a)(1) and 12022.53(b). 1:CT 120.

The indictment further alleged that Counts I, II, III, and IV together are a special circumstance (multiple murder) within the meaning of section 190.2(a)(3).

After Duong's July 16, 2001 arrest, the Los Angeles County Public Defender was appointed to represent him. 10:CT 2560. On September 10, 2001, Duong attempted

suicide. 10:CT 2633. He was unconscious for about a month during which he developed a serious lung infection from being on a ventilator. 10:CT 2643, 2645-2646. On October 23, 2001, Duong was brought into court on a gurney. 10:CT 2648. On October 29, 2001, the public defender withdrew from Duong's case due to a conflict of interest. 1:RT A1. The same day, Gary Meastas was appointed to represent Duong in his capital case. 1:RT A1.

On Duong's motion, the trial court entered a written order that all objections made by Duong in pretrial or trial proceedings would encompass all state and federal statutory and constitutional grounds. 1:CT 249-250.

Jury selection in this case began on October 3, 2002. 2 RT 192. On October 4, 2002, the trial was continued. 2:RT 318. Jury selection resumed on January 7, 2003. 4:RT 451. The jury's guilt phase deliberations commenced on January 28, 2003. 13:RT 2125. On January 30, 2003, the jury found Duong guilty of three counts of first degree murder and also the second degree murder of Lan Thi Dang. 4:CT 1048-1052; 13:RT 2143-2146. The jury found all the firearm enhancements true. 4 CT 1048-1052; 13 RT 2143-2147. In addition, the jury found true the multiple murder special circumstance. 4:CT 1053; 13 RT 2147.

On January 31, 2003, defense counsel informed the trial court that Mr. Duong wished to waive his presence at the penalty phase. The trial court permitted him to do so. 14:RT 2184-2194, 2197-2198. Mr. Duong personally asked the trial court if he could "accept the D.P. instead of going through this." 14:RT 2191. The trial court informed Duong that he could not do so without the consent of counsel because the "law doesn't permit someone to just come in and admit and be a party to what could be a suicide." 14:RT 2192.

The same day, Duong requested that his counsel neither present mitigating evidence nor cross-examine prosecution witnesses. 14:RT 2195-2197. The trial court ruled that Duong could prevent counsel from presenting mitigating evidence, but that

defense counsel was obligated to examine government witnesses and make arguments so as not to be "a co-participant in a suicide." 14:RT 2196-2201.

The penalty phase opening statements and evidence commenced on January 31, 2003. 14:RT 2204, 2214. On Friday February 7, 2003, the jury began its penalty deliberations. 17:RT 2944. On Monday February 10, 2003, the jury announced its death verdict. 17:RT 2948. The trial court denied Duong's motions for new trial and sentence modification on March 7, 2003. 17:RT 2961, 2968-2975. The same day, the trial court sentenced Duong to death. 17:RT 3000-3001.

STATEMENT OF FACTS

Guilt Phase

The night before and morning of the shootings

On May 6, 1999, Minh Dieu Tram, Thi Hoa Tang, Robert Norman, and Lan Thi Dang were fatally shot at the International Club in Pomona. 6:RT 882-888; 9:RT 1267-1270. Mr. Tram, Mr. Tang, and Mr. Norman were dead when police arrived. 6:RT 882-888, 891. Ms. Dang was transported to a hospital where she died shortly thereafter. 6:RT 890-891.

May 5, 1999 was the birthday of Wah Ching gang member Khiet Diep whose friends gathered at the International Club that night to celebrate his birthday. 6:RT 898, 903-905, 936-939, 941-942, 970; 7:RT 980-981, 1102; 8:RT 1198, 1203; 9:RT 1430, 1449-1450. Diep had worked at International Club more than three years and was a manager there. 9:RT 1429-1430. Patrons included gang members, most of whom were affiliated with Asian gangs. 6:RT 899-900, 943; 7:RT 985, 997, 1084-1085; 9:RT 1380, 1383-1384, 1387-1388, 1395, 1405-1406, 1413; 10:RT 1519. Duong, who associated with Lao Family, was there for Diep's birthday party; he mingled with members of several other gangs, including Wah Ching, Pine Street, Black Dragon, and Pomona Boys. 6:RT 899-900, 943; 7:RT 997, 1035-1036; 8 RT 1201-1202; 9:RT 1380, 1383-1384, 1413. Tram, an International Club regular, was present as well. 7:RT 1087. Tram and

Tang were Black Dragon gang members. 9:RT 1413.

Thi Van Le, a convicted felon, who was present when the shootings took place, went to the International Club that night as an informant for the Garden Grove Police Department and to attend Diep's birthday party. 6:RT 898, 903-905, 936-939, 941-942, 970; 7:RT 980-981. Le was also an informant for the United States Drug Enforcement Agency, and had been convicted of transporting large amounts of cocaine. 7:RT 994-996. Le was trying to work off his drug case. 7:RT 980-981; 994-996. Le was paid anywhere from $3,000 to $5,000 per trip for transporting between two and four kilos of cocaine. 6:RT 904; 7:RT 985-986. Le did not keep track of how much money he made in total, but it might have been as much as $100,000. 7:RT 1007-1008.

That evening, Le saw Duong, whom he knew as "John," by a table near the restroom.[2] 6:RT 907. Duc Nguyen[3], Le's partner in crime, had introduced Le to Duong on two previous occasions. 6:RT 900-907. Including Duong, Le knew more than 10 of the approximately 150 people who were present, including Duc Nguyen, Anthony Tran, Truong, and Bach Nguyen.[4] 7:RT 978.

At some point, Le went to use the restroom where he overheard an argument between Anthony Tran and three or four Asian men whom Le had never seen before.

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[2] John Bui, Khiet Diep and others also knew Duong as John. 7:RT 1094, 1111-1112. 10 RT 1616

[3] The record refers to more than one person with the last name Nguyen. For clarity, people with the last name Nguyen are referred to herein by their first and last names.

[4] International Club co-owner John Bui estimated that 50-60 people were present when the shootings took place. 7:RT 1087. Diep testified that it was unusually crowded and that more than 100 people may have been there. 9:RT 1431-1432.

6:RT 908-911; 7:RT 988-989. Duc Nguyen was also in the restroom.[5] 6:RT 910.

One of the unfamiliar men left the restroom and came back with a man in a black jacket, who became involved in the argument. Le did not see any weapons in the restroom, however, Le believed that the black-jacketed man's gestures and behavior would have led almost anyone to believe that he was "packing" or carrying a gun. 6:RT 945, 958-961, 965; 7:RT 988-989. This man was later shot in the back of the head. 6:RT 961-964, 966; 7:RT 989-990.

Someone broke up the argument. 6:RT 965. After Le left the restroom, Duong was sitting alone at a table near the restroom. 6:RT 912. Diep approached Duong and Duong said "what do you want?"[6] 6:RT 915; 7:RT 991. Diep's response was something to the effect of "we'll see" or "let me have time." 6:RT 915-916. Diep left Duong. 6:RT 917. Duong then stood up and went toward the bar. 6:RT 916-917.

About two minutes later, while Le was looking around International Club for a suspect in a Garden Grove case, he heard a gunshot. 6:RT 911-912, 917-918. Le immediately turned around and saw Duong, about 30 feet away, shooting at people in a booth. 6:RT 918, 948-950. Duong had a silver handgun with a clip and loader. 6:RT 945. Le heard 9-13 more shots. 6:RT 919. Someone tried to grab Duong, yelled "stop shooting" or "don't shoot," and fell on the floor. 6:RT 919-920, 951-955. Duong continued shooting. 6:RT 920. An Asian man who was in the line of fire jumped over a raised counter and to the front door as Duong shot at him. 6:RT 920-921, 926. After that man ran away, Duong continued shooting at the people in the booth. 6:RT 929. Le

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[5] El Monte police reports indicate that Diep told officers he was present during the argument in the bathroom. At trial, Diep testified that he neither saw nor heard any arguments, but that he might have heard about an argument. 9:RT 1432, 1441-1442.

[6] In a transcribed August 2001 interview with Detective Christine Carns, Le indicated that Duong had asked Diep "Do you want me to do him now?" 10:RT 1617-1918, 1621.

testified that he was not scared, because "If you have been in Vietnam in 1975 you wouldn't be scared of anything anymore." 6:RT 956.

Joey Hoa Minh Truong, an active Lao Family member, attended Diep's birthday party at International Club at Duong's invitation. 9:RT 1460, 1449-1450. Like Le, Truong saw a man at International Club wearing a long trench coat or jacket that was not normal for that time of night. 9:RT 1451-1452; 10:RT 1481-1482. The jacketed man walked in and out two or three times very fast, looking around. 9:RT 1451-1452. He was walking back and forth with confidence, "standing up." 10:RT 1482. Based on his experiences living on the streets, Truong was concerned about this man. 10:RT 1482.

Truong was playing pool when he heard shots. One of them was Duong and the other could have been the man in the black trench coat or jacket. 10:RT 1476-1477. He looked over at the bar and saw two men standing upright. He then heard two more shots. 9:RT 1455; 10:RT 1485-1486. Truong assumed one of them was Duong because there had been a conflict before the shootings. 10:RT 1487-1488. The guy at the bar's jacket opened and there was something shiny, like a gun. 9:RT 1456. Truong did not see the jacketed person draw a gun, but assumed both of them were about to do so. 9:RT 1456. Duong could have been the shooter, but Truong did not see him do it. 10:RT 1476. They were struggling or exchanging words. 9:RT 1457-1458; 10:RT 1487, 1520. Truong heard the gunshots before he saw the conflict. 9:RT 1458. Truong overheard that the man with the black trench coat had a gun, then someone pointed to a table where the man with the gun was sitting. 10:RT 1518-1523, 1526-1527. Truong had also heard that there could be trouble. 10:RT 1521. Truong stayed away, because he did not want to be near a gun-carrying person who might have felt threatened in a club full of gang members.[7] 10:RT 1519.

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[7] According to Truong, there were even gang members in the courthouse during trial. 10:RT 1519.

Truong immediately ran out of the bar, as did everyone else. 9:RT 1459; 10:RT 1476-1477. Truong had to have jumped over something to get out. 10:RT 1493. He was using the other people as a shield and ran out the back door because he had seen the man in the trench coat going in and out of the front door earlier. 10:RT 1493, 1495-1496. Truong could not recall whether he called Duong after the shooting. 9:RT 1463. 10:RT 1507.

John Bui, half owner of the International Club, had arrived at the International Club at 11:45pm on May 5, 1999. 7:RT 1052. Bui was not generally in charge of security, but he had to assume security duties in his partner's absence. 7:RT 1083-1084. The night of the shootings, Bui was there for fun. 7:RT 1083.

At around 12:15am, Bui was using the restroom and heard an argument between two groups, a total of six or seven people, including Duong, in front of the food preparation area.[8] 7:RT 1052-1054, 1089, 1107. Bui separated them and asked them to be friendly and not to argue. 7:RT 1053, 1090-1091. They stopped arguing and Bui sat with Tram and the other Asian male victim on a sofa. 7:RT 1055. Bui had not heard the argument, but Tram told him the argument was over his girlfriend being shot and him being beaten up at a club called Passions. 7:RT 1090; 10:RT 1612. The female victim and the white male victim, among others, were also sitting with Bui and Tram. 7:RT 1056. Bui spoke with Tram about his conduct and his involvement in the argument in front of the kitchen. 7:RT 1088-1089, 1108. Bui wanted to calm him down and to help

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[8] Pine Street gang member Pedro Murillo testified that there was a shoving match at the bar involving up to 15 people, some of whom were Wah Ching gang members; however he did not recall if either Duong or Tram were involved in the incident. 9:RT 1380, 1383-87, 1403-1404, 1419-1421. Murillo was playing pool after the shoving match; at some point he heard gunshots. 9:RT 1395-1396. Murillo went under the pool table and two men whom he did not recognize at the time, including Duong (who had a gun in the back of his waistband) looked under the table and then walked away. 9:RT 1397-1401.

resolve any problems. 7:RT 1092-1093. Bui asked some of the people involved in the incident to leave the club. 9:RT 1406. Bui did not see anyone harm or threaten Duong. 7:RT 1062-1063.

Three or four minutes later, Bui heard a loud sound and reflexively stood and turned around and saw the person behind him, who was Duong, holding a gun. 7:RT 1059, 1093-1094, 1108. He either grabbed the Duong from the front or extended his arms in front of Duong and said "no, no, no." 7:RT 1059-1060, 1069-1070, 1095-1098, 1109-1110. Bui told police that he tried to grab the gun from the Duong. 10:RT 1592-1593. Duong pushed Bui onto the floor. 7:RT 1059-1062, 1070, 1110. At trial, Bui said he could see Duong shooting from the ground, but then turned his face down. 7:RT 1071-1072, 1105.

When Bui spoke with police three or four hours after the shooting, he was not truthful and omitted details, including that the shooter was John from Lao Family. 7:RT 1094, 1111-1112. There was also a language barrier as Bui's native language is Vietnamese. When Bui identified a photo of Duong, he refused to sign the associated form because he was afraid that he himself would be shot. 7:RT 1079-1081. Bui asked the detective to keep his name out of the investigation and told the detective he did not want to testify. 7:RT 1081-1082. The judge ordered Bui in custody to guarantee that he would testify but then released Bui on condition that he surrender his passport and wear a monitoring device. 7:RT 1082.

Phone records show several calls between the phones of Anthony Tran and Cindy Hoang, who had dated Duong for about 10 years, in the early morning hours of May 6, 1999. 7:RT 1035. Hoang did not make or receive calls to Tran, but Duong sometimes used her cell phone. 7:RT 1043, 1045-1047.

The day after the shootings, Anthony Tran and Duc Nguyen each called Le at

around noon.[9] 7:RT 1000. Le went to Duc Nguyen's house in Garden Grove where there were many people, including Duong and Diep. 7:RT 1000. Le then took Diep to the home of someone named Khuong, who had also been at the International Club the night before. 7:RT 1002-1003. Le waited in the car while Diep went inside the house. When Diep came out, he was carrying a videotape. 7:RT 1003-1004. They then stopped at Le's house where Diep watched the video on Le's VCR. He then burned the video in Le's backyard barbeque. 6:RT 970-971; 7:RT 1006-1007, 1010. Although Le testified that he watched Diep burn the video, he had told Detective Carns that Diep told him he had burned the video at Khuong's house. 10:RT 1603-1604. Diep said the video was from International Club. 6:RT 971-973; 7:RT 1006-1007. Later that day, Le spoke with his DEA handler, agent Clark Wynch. 7:RT 980, 1006. Le later told detectives he could have taken the video to action news to make money. 7:RT 1010.

Diep's version of the events

The defense called Diep who testified to a different version of the events of May 5 and 6, 1999. On May 5, 1999, Diep arrived at 8:00 or 8:30pm and others came for his birthday party. 9:RT 1430. Diep denied that he knew Tram and denied that he called Tran to tell him that Tram was at International Club. 9:RT 1432; 10:RT 1547.

Diep testified both that he did not see or hear any arguments that night and also that he heard there was a little argument that night but he did not pay attention. 9:RT 1432,1441-1442. Diep saw Duong at International Club that night, but did not see him involved in any fights. 9:RT 1439. Diep had told Detective Carns that Tram and Duong had an argument in the restroom over a girl from another bar named Passions, but denied this in his testimony. 9:RT 1432-1434; 10:RT 1556-1558, 1599, 1616. Diep heard that Tram had a gun. 10:RT 1561. Diep heard shooting, but never saw anyone with a gun.

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[9] Anthony Tran testified that he did not recall whether he called Le the morning after the shootings. 8:RT 1205.

9:RT 1435, 1441. Diep told Detective Carns that the shooter was Fast John, Big John, or Fat John from Lao Family, but denied this in his testimony. 10:RT 1549, 1616. After hearing two to three shots, he ran out the door because he was afraid. 9:RT 1437. He spent the night at the house of a friend, whose name he did not recall, and then went home. 9:RT 1437-1438; 10:RT 1531-1532. He stayed with his mother all day because there was a ceremony for his father's death. 10:RT 1534. Diep did not go back to International Club to get a tape and was not told that he was under investigation for destroying a video tape. 9:RT 1438, 1441, 1444-1446. He later heard that Tram had been shot. 10:RT 1560.

Diep and Anthony Tran had worked together at Crystal Park Casino three or four years earlier. 9:RT 1442-1443. Tran did not keep paging Diep after the shootings. 9:RT 1443-1444. Diep did not recall whether he spoke with Tran in the morning after the shooting. 10:RT 1535. Diep could not explain calls to and from Tran from his mother's and brother's cell phones. 10:RT 1536-1541, 1544. Diep does not know Duc Nguyen and doubts that his brother knows him despite calls from Duc Nguyen to Diep's brother. 10:RT 1542-1544. Diep could not remember Le, did not remember a call with him on May 6, 1999, and did not see Le that day. 10:RT 1536, 1544.

Diep denied telling police that Duong was a Lao Family member. 10:RT 1546.

Duong's arrest

On July 16, 2001, law enforcement, acting on warrants, arrested Duong at a Costa Mesa 24 Hour Fitness basketball court. 1:RT 146-148; 8:RT 1215-1217. Six hours later, law enforcement, without a warrant, seized a Ford Expedition registered to Timothy Mukasa outside the building where Duong was arrested. 1:RT 159-173, 3 RT 359-369, 8:RT 1216.

Duong's physical prowess and affinity for weapons

The prosecution presented evidence and elicited from defense witnesses evidence that Duong was an experienced fighter and shooter. Aside from the International Club,

Truong had seen Duong with a gun at his work as a range master at the Huntington Beach Firing Line shooting range. 10:RT 1510. Duong tried to teach Truong how to shoot a gun, which Truong believes was a 9mm. 10:RT 1510-1511. Duong taught Truong safety first. 10:RT 1511. Truong acknowledged that Duong was a careful man, but he could not say that Duong would only shoot at what he wanted to hit. 10:RT 1511.

According to his longtime girlfriend, Cindy Hoang, Duong had a second degree black belt in Tae Kwon Do and had worked at a shooting range and had familiarity with guns. 7:RT 1038-1041. Duong taught Hoang how to hold a gun and point it at a target. 7:RT 1039-1041. Police retrieved a 1911 semi-automatic .45 caliber pistol which was loaded with .45 caliber rounds from Hoang's closet that she did not know was there. 7:RT 1032-1034; 8:RT 1261-1262.[10]

When Duong was arrested, law enforcement retrieved a Colt .45 handgun with a bullet in the chamber from their search of the center console of the Ford Expedition. 8:RT 1228-1229. This weapon was not used in the International Club shootings. 9:RT 1375.

Le told Detective Carns that Duong had a black belt in Karate. 10:RT 1622

Evidence of consciousness of guilt

The prosecution presented and elicited from defense witnesses evidence of Duong's consciousness of guilt and criminal leanings. This evidence included that shortly after the shootings, maybe the next day, Duong invited Truong to take a vacation with him to Texas. 10:RT 1505-1507. They flew together to Austin, Texas. 10:RT 1507. Duong told Truong he had a job, but took a week long vacation while Truong was visiting. 10:RT 1509.

Duong used aliases, including Thomas Calvin Lee, and John. 6:RT 930; 7:RT 1026-1027, 1042, 1094, 1111-1112; 10:RT 1549, 1616.

In addition, Duong used the California identification card and driver's license of

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[10] This weapon was not used at International Club. 9:RT 1374.

Hoang's brother, Long Hoang, to purchase a gun and for purposes of identification. 7:RT 1027-1031.

Forensic evidence

Criminalist Mike Oto retrieved a .40 caliber Taurus PT940 Smith and Wesson weapon from victim Tram's waistband. 8:RT 1189-1190; Peo. Exh. 6B-6C. The gun contained 10 live rounds of .40 Smith and Wesson ammunition in the magazine. 8:RT 1192. The safety was off. 8:RT 1193. There was no bullet in the barrel, so the slide would had to have been pulled back once to shoot. 8:RT 1192, 1194-1195. Oto testified that it might take half a second to pull the slide back. 8:RT 1195. After the first shot, the next shots could be fired off "bang, bang, bang." 8:RT 1195. In most semi-automatic weapons, when the slide comes back the trigger comes back a bit also, making it easier to shoot. 8:RT 1194.

Firearms examiner Patricia Fant examined casings and bullets retrieved from the scene and the bullets retrieved from the victims. 7:RT 1118-1127. All of them were RP45 .45 caliber. 7:RT 1118. Based on her examination of the bullets and casings, Fant believed that all of them were fired from a single .45 caliber semi-automatic weapon with the general rifling characteristics of a Colt Springfield Armory model 1911. 7:RT 1119-1120, 1123, 1136. Other brands, including Para-Ordnance, have similar rifling characteristics. 7:RT 1143-1144. Fant could not determine whether the weapon was semi- automatic or fully automatic, but she did believe that at least 10 shots were fired from one weapon. 7:RT 1136. A Colt Springfield 1911 with a single magazine can hold six or seven rounds in the magazine and one in the chamber. 7:RT 1144-1145. To shoot 10 rounds, one would have to eject the magazine and replace it or use an after-market magazine. 7:RT 1144-1145, 1147. After-market magazines are very common. 7:RT 1147. Fant was unsure whether a Para-Ordnance magazine could hold 10 rounds. 7:RT 1146. Fant could not determine whether the weapon had a hair trigger or whether it was fully automatic without examining the actual gun. 7:RT 1145-1148. However, the one

time Fant had a round discharge accidentally, the weapon had a regular trigger. 7:RT 1149. Fant had heard of at most two instances of bullets discharging accidentally. 7:RT 1149-1150.

Los Angeles Sheriff's Department senior criminalist Manuel Munoz reviewed Fant's findings. 11:RT 1778. Manufacturers never make guns fully automatic. 11:RT 1778. The Colt Springfield model 1911 has several safety mechanisms including a manual thumb safety on the left side, an internal safety called a quarter cock, a trigger disconnect, and a grip safety. 11:RT 1778-1779, 1781-1782. To fire, there must be a round in the chamber, the manual safety must be removed, the hammer must be cocked, the gun must be properly gripped, and the trigger must be pulled. 11:RT 1782-1784, 1790. If the firearm is working properly, it will fire once and the shooter must release the trigger, keep the external safety depressed, and pull it again to fire another round. 11:RT 1784, 1790, 1792-1794. The Springfield 1911 model magazine holds eight rounds and a ninth in the chamber. 11:RT 1786. Springfield sells an after-market magazine that fits the Colt .45 that holds eleven rounds in addition to a round in the chamber. 11:RT 1786-1787. The manufacturer makes a 13 round magazine for Para-Ordnance. 11:RT 1787.

With a fully automatic weapon, one only has to depress the trigger once to empty the magazine. 11:RT 1795. The trigger on the Colt .45 can be modified to require less or more pounds of pressure to depress the trigger. 11:RT 1795-1796. The magazine, the trigger safety, and other aspects of the gun can also be modified. 11:RT 1796. There's no way to determine whether any of these modifications were made without examining the actual weapon. 11:RT 1799.

Fant and Oto used trajectory rods in the booth where the victims were seated to get a sense of the suspect's position and the scene. 7:RT 1128-1130. They tried to line up entry and exit holes to try to determine the angles of some of the shots. 7:RT 1130. The trajectories were from the seat side of the booth to the outside of the booth and also

from high to low. 7:RT 1132. This is consistent with the shooter standing in front of and firing into the booth. 7:RT 1132. If people were sitting in the booth, then the shooter would have been aiming for the upper chest area or head, not for the limbs. 7:RT 1133-1134. When bullets go through something, their trajectories can change. 7:RT 1135. Fant did not try to determine whether the bullets might have struck anything before entering the booth. 7:RT 1135, 1142.

Homicide detective Richard Tomlin oversaw the crime scene investigation and helped look for firearms evidence. 8:RT 1157-1158. Because International Club is big, it would have been difficult for Tomlin to find every piece of ballistic evidence. 8:RT 1163. Tomlin did not have any information that the shooter shot at someone who was running toward the pool tables and did only a cursory walk through of that area. 8:RT 1162-1163. The booths were higher than the pool tables. 8:RT 1164. The closer the shot is, the larger the hole. 8:RT 1170. A .45 is a large caliber weapon. 8:RT 1170. Tomlin visually inspected the walls for bullet holes, but he and his partner did not specifically walk International Club looking for bullet holes. 8:RT 1170-1172. There were bullet strikes and shell casings against the wall of the ping pong room. 8:RT 1175.

Deputy medical examiner Lisa Scheinin reviewed the reports and notes from Dr. Jeffrey Gutstadt's autopsy of victim Tram. 9:RT 1267-1268. Tram died from multiple gunshot wounds. 9:RT 1271-1273, 1331-1333. Scheinin could not determine Tram's position when he was shot, but opined that the shooter was either taller or at a higher level than Tram when he shot him. 9:RT 1277. The distance between the shooter and Tram was indeterminate. 9:RT 1318.

Scheinin supervised Dr. Raffi Djabourian's autopsy of Thi Hoa Tang. 9:RT 1268. Tang was fatally shot. 9:RT 1287, 1295. One of his bullet wounds exited his inner left arm and then entered the chin area, consistent with his having put his arm up to protect himself. 9:RT 1289-1291. Tang's wounds were consistent with a scenario that, after his being shot in the arm and face, he fell to the right and someone stood over him

and fired into the area above his ear. 9:RT 1294. The distance between the shooter and Tang was indeterminate. 9:RT 1318.

Scheinin supervised John M. Andrews's autopsy of Robert Norman. 9:RT 1269. Norman died from a single gunshot wound which entered through his back and exited through his mouth, consistent with his having gotten out of the booth where he had been sitting to try to escape, then being shot in the back while he was crawling away. 9:RT 1295-1299. She could tell that the shooter was behind Norman, but not how far away they were from each other. 9:RT 1314-1318. If Norman's body was found as depicted in People's Exhibit 1C, near the end of the booth, someone may have thrown or placed his body in that position after he was shot. 9:RT 1348. Scheinin did not believe Norman was climbing over the booth when he was shot and did not believe that the bullet entered another victim before it entered Norman. 9:RT 1348, 1352.

Scheinin reviewed the report of Ogbonna Chinwah's autopsy of Lan Thi Dang, but did not review the autopsy photos. 9:RT 1269-1270. Dang died from a single gunshot wound that went through her left arm and reentered on the left side of her chest near her armpit. 9:RT 1300-1303. The wound could have gone through someone else before it entered Dang. 9:RT 1327-1328. The distance between the shooter and Dang, and the shooter's position relative to her were indeterminate. 9:RT 1318, 1326-1327.

Penalty Phase

Other Crimes Evidence

The prosecution presented evidence that Duong participated in one robbery murder, two murders, each during the course of an attempted robbery, and a robbery.

Thien Thanh Market

On May 3, 1997, Chau Quach was shot and killed in a robbery of the Thien Thanh Market which his family owned. 14:RT 2250, 2258-2259, 2266, 2277-2278. His

son in law, Thien Tang,[11] was shot in the leg. 14:RT 2250. Thien Tang later identified Duong as the shooter in a photo lineup. 14:RT 2261-2264, 2371.

Duong told his girlfriend, Christine Chen, he had hurt or killed someone when he robbed an Asian grocery store in San Jose. 15:RT 2647-2649, 2710. Duong took $300,000 or $350,000 at that robbery. 15:RT 2648, 2710.

Wintec

On August 28, 1998, Hsu Pin Tsai, an employee of a computer memory business called Wintec was killed during an attempted robbery at his workplace. 15:RT 2576-2577. Security guard Ted Garcia received a head wound during the same incident. 14:RT 2325.

Fremont police officer later stopped a white van and detained the driver, Johnny Tangha, and passengers Cuong Vo, Eugene Lee, and Ted Nguyen, all Asian males. 14:RT 2332-2345. Police retrieved from the van diagrams of Wintec, duct tape, a live round of 9mm ammunition, and a police scanner frequency guide. 14:RT 2340-2345, 2352-2353. Kourosh Nikoui, a Fremont police forensic specialist who conducted fingerprint analysis of the evidence opined that Duong's fingerprints were on two of the pages of the Wintec diagram. 14:RT 2402-2405. Michael Liu was later arrested. 14:RT 2365-2366. Cellular phone records reveal calls between Ted Nguyen's cell phone and the cell phone of Duong's mother, Lan Bang. Although Bang lived in Garden Grove, about 500 miles from Fremont, it was determined that her cell phone was within six miles of Wintec and within six miles of another suspect, Michael Liu on the date of the attempted robbery. 14:RT 2417-2419, 2421-2426. Bang had given the cell phone to Duong who told her it was missing and asked her to cancel the account. 15:RT 2512-2515. Duong told Chen he was involved in an incident at a computer chip factory in Fremont during

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[11] Thien Tang is referred to herein by his full name to distinguish him from victim The Hao Tang.

which someone was killed. 15:RT 2649, 2692.

Had the robbery at Wintec succeeded, perpetrators could have easily taken more than one million dollars in property. 14:RT 2290.

Traditional Jewelers

On January 16, 2001, security guard Rafael Gomez[12] received multiple gunshot wounds during an attempted robbery of his workplace, Traditional Jewelers. 15:RT 2459, 2484-2487. Nothing was taken. 15:RT 2594.

At some point before the robbery, Duong took Chen to Traditional Jewelers at Fashion Island to see what she thought of it as a place to do a job. 15:RT 2624. At some point afterwards, Chen was at Garza's house when Timmy Mukasa, Garza, Chan, and Duong discussed plans to rob Traditional Jewelers. 15:RT 2625. They were looking for watches. Duong said it was always his job to take down the security guard and he supplied the guns. 15:RT 2626.

Duong kept the guns which included an AK-47, an M-16, and a handgun, in a duffle bag in a closet at their condo. 15:RT 2627. Duong said his favorite gun was the AK-47. 15:RT 2627. Duong said he wore dark clothing, ski masks, beanies, and gloves for robberies. 15:RT 2628. The day of the Traditional robbery , Timmy Mukasa, Soewin Chan, Philip Garza, & Duong met at Duong's condo beforehand. 15:RT 2628. They got the guns ready. 15:RT 2629. They put duct tape on back of the BMW's license plate and slapped another one on when it was parked at Traditional so they couldn't be traced. 15:RT 2629-2630. Chen believed one of them had an AK-47. 15:RT 2631. They left in Duong's black BMW and stopped at McDonald's before returning home. 15:RT 2631. Duong told Chen he had shot the place up because he was pissed that they did not get anything. 15:RT 2632-2633.

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[12] Mr. Gomez testified at the penalty phase of Duong's trial. 15:RT 2479.

Jade Galore

Security guard Joseph Cambosa was shot and killed on March 13, 2001 during a robbery of Jade Galore, a jewelry store where he worked. 15:RT 2597. 53 Rolex watches worth about $500,000 were taken. 15:RT 2600.

It was Chen's idea to rob Jade Galore. 15:RT 2633. Chen testified in great detail about Duong's involvement in the planning and committing of the robbery and shooting the security guard. 15:RT 2633-2647, 2687-2690.

Christine Chen

The prosecution called Chen who was told by both the U.S. Attorney and by Monaghan that she was required to testify, but her testimony would not be used against her.[13] 15:RT 2609, 2665-2667. As indicated above, Chen testified about the Thien Tanh, Wintec, Traditional, and Jade Galore incidents. In October 2000, Chen met Duong, whom she knew as Tommy. 15:RT 2609. Chen and Duong began hanging out about a month after they met when he came back to visit San Jose. 15:RT 2609-2611. They went to San Francisco with some of Duong's friends and then Duong asked her to move to Orange County with him. 15:RT 2613-2614. Chen stayed with Duong until his arrest in July 2001. 15:RT 2614. Chen still loved Duong. 15:RT 2663.

Duong loved kids and kids loved him. 15:RT 2673-2674. When Chen's girlfriend Kim would come over with her four year old son, Duong took the time to play with him, watch cartoons, take him to eat, and play with action figures. 15:RT 2674. Duong was good with his own sisters. 15:RT 2674. Chen wished Duong could have gotten away from his friends so the two of them could lead a normal life. 15:RT 2674.

Chen did not like Duong's friends because they were always borrowing money and asking him to do things. 15:RT 2675. They couldn't hold their own. 15:RT 2675.

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[13] Although Duong had absented himself from other penalty phase proceedings, he chose to be present during Chen's testimony. 15:RT 2566.

Chen wanted him to get away from his friends because if you play with dirt you get dirty. 15:RT 2675. They weren't good for him. 15:RT 2675. She wanted him to lead his own life away from them. 15:RT 2675. She wanted to marry him. 15:RT 2675.

Duong's parents were divorced. 15:RT 2676. Chen met his step-dad but not his real father. 15:RT 2676. Chen had gone out to eat with Duong's sisters. 15:RT 2676-2677. Duong shared robbery proceeds with his mother and she knew where they came from. 15:RT 2698.

After Chen had surgery, Duong took care of her and got anything she needed. 15:RT 2677, 2706-2707. He took care of and supported her the whole time they were together. 15:RT 2677. She worked for fun. 15:RT 2677, 2707. He paid all her living expenses. 15:RT 2677. She cared for Duong for who he was, not for the money. 15:RT 2677.

Duong hung out with the wrong people when he was young, his family was poor, and they did not live in the greatest part of Orange County. 15:RT 2679.

Duong was born in Vietnam; he told Chen his family had to flee because the communists came. 15:RT 2696. They lost a lot of stuff. 15:RT 2696. He came to the U.S. with just his mother. 15:RT 2696. He has two younger sisters. 15:RT 2696.

Duong had a gambling problem; he would go on binges and would sell things to keep gambling when he lost large sums of money. 15:RT 2692-2694. Duong used ecstasy for the first couple of months he and Chen were together. 15:RT 2694.

After Jade Galore, when Chen told Duong a security guard died, he walked out of the room and was really quiet for a month afterward. 15:RT 2681. He does not intend to hurt people. 15:RT 2681. He was devastated when he found out. 15:RT 2681. He never planned to kill anyone, but it happened. 15:RT 2681.

Duong wanted to change Chen's life. 15:RT 2683. She was not doing well; she was working in a café, hanging out with bad people, smoking, drinking, and doing drugs. 15:RT 2683. He wanted to share his experience with Chen and other people he knew

who were on wrong path. 15:RT 2683. He wanted to show her a better way and told her not to waste her life, because she was still young but for him it was too late because he was already wanted by police. 15:RT 2683. Chen might have been his project. 15:RT 2683. She stopped smoking and using drugs and went back to school. 15:RT 2683. She became a better person, and was grateful. 15:RT 2683. He always wrote letters from county jail to keep Chen's mind focused on going to school and not smoking, doing drugs, or hanging around with those people. 15:RT 2683.

Duong shared an apartment in Costa Mesa with Eddie Mukasa. 15:RT 2614-2615. Duong did not have a job. 15:RT 2615. He supported himself doing armed robberies and gambling. 15:RT 2615-2616. Duong told her he did what the people in the movie *Heat* did, i.e., armed robberies. 15:RT 2616. Chen went with Duong to casino clubs and to Las Vegas. 15:RT 2616. She once saw him lose $70,000 in one week. 15:RT 2616.

When they first met, Duong drove a BMW. 15:RT 2617. At some point, Duong got a Honda by giving Timmy Mukasa the cash to buy it. 15:RT 2617-2618. The Honda was used in the Jade Galore robbery. 15:RT 2618. About a month later, Timmy Mukasa traded in the Honda for the Ford Expedition that Duong had when he was arrested. 15:RT 2619. Duong had a .45 semi-automatic pistol in the Ford Expedition. 15:RT 2619. Duong introduced himself as Tommy Chen and sometimes went by John or Johnny Long. 15:RT 2620. Chen once heard him referred to as Anh, but he denied that was his name. 15:RT 2620. Duong told Chen he was wanted by police. 15:RT 2620. He told Chen she could not get mail at their apartment because he did not want anyone to be able to find him. 15:RT 2621. Duong got mail at many place's including Soewin Chan's. 15:RT 1621. Duong kept a motorcycle at Chan's. 15:RT 2621.

A couple of weeks after Jade Galore, Chen went with Duong, Chan, and Philip Garza to buy two motorcycles. 15:RT 2623. They paid cash and Chen did not think the motorcycles were registered to Duong. 15:RT 2623.

Chen testified further about Duong's financial practices and his efforts to evade and hide evidence from law enforcement. 15:RT 2650-2651-2654. She also discussed the circumstances of his arrest. 15:RT 2655-2656.

Duong told Chen that if police started following his car after a robbery he would commit suicide because the alternative was to spend his life in prison. 15:RT 2651-2652.

Victim Impact Evidence

In addition to evidence of prior misconduct, the state presented in its case in aggravation victim impact evidence.

Jane Norman, the mother of victim Robert Norman testified about the emotional impact of his death on the Norman family and Norman's educational and employment endeavors. 16:RT 2772-2774.

Mach Dang, the father of victim Lan Thi Dang, testified to the physical and emotional toll that Dang's death had on he and his wife and about Dang's life aspirations. 16:RT 2776-2777.

Loan Dang, sister of Lan Thi Dang, who was present at the International Club when her sister was murdered, testified about the psychological impact of being present during her sister's homicide and of the loss of her sister. 16:RT 2778-2780.

I. THE TRIAL COURT'S PREJUDICIAL DENIAL OF DUONG'S MOTION FOR A CHANGE OF VENUE VIOLATED HIS RIGHTS UNDER THE FEDERAL CONSTITUTION AND STATE LAW

The trial court's erroneous denial of Duong's motion for a change of venue violated his rights to due process, equal protection, a fair trial and impartial jury, and a reliable penalty determination. U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 7, 15, 16.

A. Proceedings below

Prior to trial Duong moved pursuant to Penal Code section 1033 and the federal constitution for (1) a change of venue; (2) a protective order against publicity, i.e., a gag

order; and (3) an order excluding cameras and recording devices from the courtroom.[14] 1:CT 269-278; 1:RT 132, 144; 5:RT 723. The case was covered in local media as well as the nationally broadcast show, America's Most Wanted. 1:CT 269-278; 2:CT 316-325; 1:RT 130-134, 144; 5:RT 723. The trial court denied the motion, but allowed that it would reconsider its motion should additional information come to light. 5:RT 723. During jury selection, the trial court privately questioned three prospective alternates who indicated they had been exposed to media in this case. 5:RT 816-821. The trial court dismissed one of them for cause after she acknowledged reading a recent article about the case. 5:RT 817-818, 821.

B. State Law And The Federal Constitution Required a Change of Venue

Penal Code section 1033 provides in pertinent part that "[I]n a criminal action pending in the superior court, the court shall order a change of venue . . . to another county when it appears that there is a reasonable likelihood that a fair and impartial trial cannot be had in the county." Where the issue is raised before trial, doubts should be resolved in favor of a venue change. *Fain v. Superior Court,* 2 Cal.3d 46, 54 (1970); *Martinez v. Superior Court*, 29 Cal.3d 574, 578 (1981); see also *United States v. Cores,* 356 U.S. 405, 407 (1958).

On appeal, the reviewing court makes an "independent determination of whether a fair trial was obtainable" and reverses "when the record discloses a reasonable likelihood the defendant did not have a fair trial." *People v. Coffman*, 34 Cal.4th 1, 44 (2004); see also *People v. Williams*, 48 Cal.3d 1112, 1125 (1989) ("the reviewing court must independently examine the record and determine de novo whether a fair trial is or was obtainable."). As this Court has repeatedly explained, in this context, a "reasonable likelihood" means "something less than 'more probable than not,' and something more

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[14] Prior to Duong's arraignment, Judge Kahn prohibited reporters from photographing him. 10:CT 2660-2664.

than merely possible." See, e.g., *People v. Coffman*, 34 Cal.4th at 44-45, citing *People v. Bonin*, 46 Cal.3d 659, 672-673 (1988); *People v. Frazier*, 5 Cal.3d 287, 294 (1971).

In conducting its de novo review, the reviewing court considers the following five factors: (1) the nature and gravity of the case; (2) the nature and extent of the media coverage; (3) the size of the community; (4) the status of the defendant in the community; and (5) the prominence of the victim. *People v. Coffman*, 34 Cal.4th at 45.

Applying these factors to the instant case, the record discloses a reasonable likelihood that Duong could not receive a fair trial in Los Angeles County.

1. The Nature and Gravity of the Offense Required a Change of Venue

"The nature and gravity of the offense, capital murder, is a primary consideration" in determining whether a change of venue was necessary to a fair trial. *Martinez v. Superior Court*, 29 Cal.3d at 582. The term "nature" refers to the "peculiar facts or aspects of a crime which make it sensational, or otherwise bring it to the consciousness of the community." *Id.* "[T]he term 'gravity' of a crime refers to its seriousness in the law and to the possible consequences to an accused in the event of a guilty verdict." *Id.* "*Because* it carries such grave consequences, a death penalty case inherently attracts press coverage; in such a case the factor of gravity must weigh heavily in a determination regarding the change of venue." *Id.* at 583 (emphasis in original).

This case involved the shooting, in a crowded, public nightclub, of four young victims, including a man celebrating his twenty second birthday, a young woman who died in her boyfriend's arms as her younger sister watched, and a disk jockey who was at the club seeking employment. 2:CT 316, 319-320; 7:RT 1057. Law enforcement did not identify a suspect for seven months after the crimes and more than two years passed between the killings and Duong's arrest. 2:CT 317-318. Moreover, Duong was an alleged gang member. 2:CT 318.

These crimes, which involved multiple shootings in a public place by an alleged

gang member, were unquestionably sensational and of a type that would instill fear in the community from which Duong's jury was drawn.

Thus, the sensational, grave facts of this case required a change of venue.

2. The Nature And Extent of the Publicity Called For A Change Of Venue

In *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966), the United States Supreme Court stated that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." This is true regardless of the media's goals in reporting on the crimes. Indeed, this Court has long recognized that "'[a] reasonable likelihood of unfairness may exist even though the news coverage was neither inflammatory nor productive of overt hostility.'" *People v. Jennings*, 53 Cal.3d 334, 362 (2005), citing, *Martinez v. Superior Court*, 29 Cal.3d at 580. This is because "[w]hen a spectacular crime has aroused community attention . . . the possibility of an unfair trial may originate in widespread publicity describing facts, statements and circumstances which tend to create a belief in his guilt." *Corona v. Superior Court*, 24 Cal.App.3d 872, 877 (1972). Clearly, "[t]he goal of a fair trial in the locality of the crime is practically unattainable when the jury panel has been bathed in streams of circumstantial incrimination flowing from the news media." *Id.* at 878.

Prior to trial, the media coverage included inflammatory information, disputed facts, inaccuracies, and items that were inadmissible or were sure to be excluded at Duong's trial. The wide dissemination of such information violated Duong's right to have "his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978).

The media coverage prejudiced Duong in a number of ways.

First, it was well-publicized that law enforcement did not identify a suspect in the case until seven months after the shooting and that a two year national manhunt, publicized on America's Most Wanted, preceded Duong's capture. 2:CT 316-325. Such information undoubtedly showed that the police considered Duong especially dangerous. See, e.g., *People v. Edwards*, 54 Cal.3d 787, 832 (1991); *Wainwright v. New Orleans*, 392 U.S. 598, 614 (1968) (Douglas, J., dissenting) ("when the manhunt is on, passions often carry the day."). In addition, a suspect at large for a long period of time can create a sense of fear in a community. See, e.g., *People v. Prince*, 40 Cal. 4th 1179, 1211 (1997).

Second, although no gang allegations were filed in this case and Duong was in fact not affiliated with a solely Vietnamese gang, the media referred to a gang moniker and reported that Duong was a reputed member of a Vietnamese gang and the shooting appeared to be gang-related[15]. 2:CT 317-319, 324. Articles also noted that International Club was an Asian gang hangout that was once shut down after two killings in the parking lot. 2:CT 316, 319. Publicity about gang membership, particularly when such membership is irrelevant to the charged offenses, may necessitate a change of venue, even in the absence of opinion polls or other evidence that jurors were exposed to publicity. *Clifton v. Superior Court*, 7 Cal. App. 3d 245, 249-252 (1970); *People v. Malone*, 47 Cal.3d 1, 30 (1988). This is because, as this court has long acknowledged, evidence of gang affiliation is "highly inflammatory." *People v. Gurule,* 28 Cal.4th 557, 653 (2002); *People v. Williams*, 16 Cal.4th 153, 193 (1997); *People v. Cox*, 53 Cal. 3d 618, 660 (1991). *People v. Coddington*, 23 Cal.4th 529, 588 (2000), *overruled on other grounds, Price v. Superior Court*, 25 Cal.4th 1046, 1069, n. 13 (2001).

Third, after a pretrial hearing at which media were present, it was reported in print and on the internet that a federal court sealed the names of two prosecution

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[15] Duong was alleged to be a member of Lao Family, an Asian street gang. 7:RT 997, 1035-1036; 8:RT1202 . See Claim VI, below, which is incorporated by reference herein.

witnesses from the defense and the public. 3:CT 321. Although the prosecutor presented not a shred of evidence during trial that Duong had threatened witnesses in this case, media printed the prosecutor's explosive representations that the federal judge issued this ruling because it feared for the witnesses' safety. 3:CT 321; See, e.g., *United States. v. Richardson*, 651 F.2d 1251, 1252, 1254-1255 (8th Cir. 1981) (media coverage of threats to witness are prejudicial). In this way, the prosecutor disseminated through the media baseless, but highly prejudicial innuendo about Duong's conduct that he could not have introduced at trial in the absence of adequate substantiation. *People v. Warren*, 45 Cal.3d 471, 481 (1988). In doing so, the prosecutor made the absence of such allegations or evidence at trial meaningless. *Sheppard v. Maxwell*, 384 U.S. at 360.

Fourth, the media reported the opinion of an anonymous friend of victim Dang that "the guy was just trying to kill everyone in the booth because they were witnesses." 3:CT 316. The intent of the shooter in this case was the central issue in dispute and the prosecutor ultimately acknowledged to the jury that he could not prove motive. 12:RT 1929. In reporting such "gossip" the news media independently exacerbated the prejudice by, in the absence of real evidence, undercutting Duong's defense. *Sheppard v. Maxwell*, 384 U.S. at 360, n. 13.

Fifth, Duong was prejudiced by sensational stories that he was facing murder and robbery allegations in other jurisdictions, including charges that he: (1) shot a grocery store owner and his father-in-law, killing the older man; (2) masterminded the botched robbery of a high tech firm that resulted in a homicide; (3) robbed and shot up a jewelry store; (4) faced unspecified charges in federal court; and (5) committed other unspecified crimes 2:CT 318-319, 321-322, 324-325. This is another example of the media exposing to prospective jurors to damning evidence that would not be admitted during the guilt phase of Duong's trial. *Sheppard v. Maxwell*, 384 U.S. at 360; See also, *Marshall v. United States*, 360 U.S. 310, 311-313 (1959) (impact of two news accounts, including one which reported that defendant had two prior felony convictions, which were inadmissible

at trial, required reversal even though jurors stated they were not prejudiced by the information). Such evidence is "inherently prejudicial," *People v. Alcala*, 36 Cal.3d 604, 631 (1984), because it "creates 'the human tendency to draw a conclusion which is impermissible in the law: because he did it before, he must have done it again.'" *Bean v. Calderon*, 163 F.3d 1073, 1085 (9th Cir 1998), quoting *United States v. Bagley*, 772 F.2d 482, 488 (9th Cir. 1985).

Sixth, it was reported that although five of Duong's codefendants in the high tech firm robbery were convicted of murder, one accomplice had left the country. 2:CT 319. This report was particularly inflammatory when considered in combination with the prosecutor's comments that a federal judge feared for the safety of prosecution witnesses, with accusations that Duong was a Vietnamese gang member and that the killings were gang-related, with allegations that Duong was implicated in other homicides, and with the legnth of time between the crimes and Duong's arrest. Prospective jurors could easily have inferred that the cohort who remained at large posed a threat to jurors and witnesses even though Duong was in custody.

Seventh, coverage of Duong's case encompassed highly inflammatory information about the victims, including: (1) that as she lay dying, Ms. Dang's boyfriend cradled her in his arms as her sister watched; (2) that Ms. Dang's grieving boyfriend subsequently secluded himself in his bedroom; (3) that Ms. Dang was a good person who was not involved with gangs; and (4) that the day he was killed, victim The Hao Tang was celebrating his twenty second birthday. 2:CT 316, 319-320. Thus, before the jurors who decided Duong's guilt heard a speck of admissible evidence, they has access to information that, while heartrending, was wholly irrelevant to the determination of guilt. This Court has held that "the prosecutor's introduction of victim-impact testimony is impermissible at the guilt phase of a capital trial." *People v. Salcido*, 44 Cal.4th 93, 151 (2008). Underlying this rule is the reality that "[e]vidence about the victim and survivors . . . can of course be so inflammatory as to risk a verdict impermissibly based on passion,

not deliberation." *Payne v. Tennessee*, 501 U.S. 808, 836 (1991) (Souter, J., concurring). Thus, this is precisely the kind of information that, when disseminated to prospective jurors, eviscerates a defendant's right to have his guilt or innocence determined solely on the basis of the evidence. *Taylor v. Kentucky*, 436 U.S. at 485.

Eighth, the newspapers reported that Duong was in a coma and on life support after attempting to kill himself. 2:CT 318. Because Duong had no opportunity to place this information in context, prospective jurors could have easily inferred that his suicide attempt evinced a guilty conscience. See, e.g., *People v. Panah*, 34 Cal.4th 395, 482 (2005); *Johnson v. Sublett*, 63 F.3d 926, 928, 930-931 (9th Cir. 1995); *United States v. Cody*, 498 F.3d 582, 591-592 (6th Cir. 2007); *Tug Raven v. Trexler*, 419 F.2d 536, 543 (4th Cir. 1969); *United States. v. Johnson*, 354 F.Supp.2d 939, 958 (C.D. Iowa 2005).

Ninth, newspapers disseminated a one-sided version of additional key disputed facts, including (1) that International Club owner John Bui tried to separate Duong and victim Minh Tram moments before the killings; (2) that Bui tried to wrestle the gun away from the shooter, but was pushed to the ground; and (3) that the shooting may have stemmed from an argument that occurred earlier in the evening at the Passion Club in Alhambra. 2:CT 320, 322. The way in which the shooting unfolded was central to this case. But, instead of receiving a complete, contextualized picture of the homicides, prospective jurors who had heard no evidence in the case only had access to a single, dubious version of the story. Such extrajudicial exposure of the jury pool to a skewed, unreliable version of the facts flies in the face of "the requirement that the jury's verdict be based on evidence received in open court, not from outside sources." *Sheppard v. Maxwell*, 384 U.S. at 351. Moreover, Bui was an essential prosecution witness whose credibility the news media unfairly bolstered by portraying him as a hero. See, e.g., *United States v. Richardson*, 651 F.2d at 1254 (media exposure may have prejudiced jurors' assessment of witness's credibility).

Tenth, it was reported that the trial court denied Duong's motion to represent

himself. 2:CT 323. At least two kinds of prejudice could have stemmed from this information. A prospective juror could have inferred from this information that Duong and his lawyer were in conflict. In addition, in the absence of instructions, prospective jurors could have inferred that the trial court's ruling reflected its opinion of Duong's guilt or innocence. See, CALJIC 17.30.

Finally, extensive media coverage continued throughout Duong's trial. 2:CT 316-325; 1:RT 131-132. Indeed, the morning of January 8, 2003, after prospective jurors had assembled for jury selection, the San Gabriel Tribune published an article about the case. 4:RT 488. At least 10 prospective jurors indicated in their questionnaires that they had or may have heard or read about the case.[16] 5:CT 1489, 1501; 6:CT 1641; 7:CT 1851, 1961, 2012; 8:CT 2139, 2257, 2355; 10:CT 1628. In 2000, a wanted poster with Duong's name and photograph had appeared on America's Most Wanted, a nationally broadcast television show. 1:RT 131. As for exposure of prospective jurors to local print media, the trial court recalled that the San Gabriel Valley Tribune had approximately 27,000 subscribers. 1:RT 133. Other publications that may have reported on the case included the Pasadena Star, the Inland Valley Bulletin, and the Old Progress Bulletin. 1:RT 133. During voir dire, the trial court asked some prospective jurors to raise their hands if they subscribed to the Daily Bulletin, the San Gabriel Valley Tribune, or the Los Angeles Times. 4:RT 458, 484, 510, 539. In one group, seven prospective jurors raised their hands. 4:RT 484. In another group of jurors, a few jurors indicated that they subscribed to each publication. 4:RT 510. In another group, two jurors raised their hands. 4:RT 539.

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[16]Jury selection in this case commenced in October 2002. 2:RT 195. Duong then received a continuance and the jurors summoned in 2002 were dismissed. 2:RT 318, 329, 341. The court summoned a new group of prospective jurors in January 2003. 3:RT 395-398, 403; 4:RT 451. This claim refers only to selection of jurors summoned in January 2003.

The trial court and counsel questioned three prospective alternate jurors who indicated on their questionnaires that they had been exposed to media about this case.[17] 5:RT 815-821. One prospective juror admitted that the week she was to report for jury duty, she read an article about this case in the San Gabriel Valley Tribune. 5:RT 817-818. Another prospective juror recalled television coverage of the case on the evening news a couple of years earlier. 5:RT 818-819. The third prospective juror indicated that she had read something about the case probably right after the crime occurred; she had lived in El Monte, so the story caught her eye. 5:RT 819-820. She also recalled that the names of the people in the article were Asian. 5:RT 820. The trial court excused for cause only the prospective juror who had read about the case that week. 5:RT 821. Over Duong's objection, the trial court permitted news media to take and publish photographs of Duong in civilian clothing, and indicated that it would admonish jurors to stay away from news media. 6:RT 854-855. The trial court permitted news media to photograph pretrial proceedings and opening statements. 1:CT 126-128, 201-203. In addition, a local television station was allowed to video record all participants in Duong's sentencing and to audio record the trial court only. 5:CT 1252-1255.

Before opening statements, the trial court admonished jurors to avoid all media coverage of the case. 6:RT 859. However, the trial court's earlier admonitions focused only on local newspapers. 4:RT 458, 484, 510-511, 539; 5:RT 816; 6:RT 855. Thus it is unclear whether jurors, not otherwise admonished, continued to watch television accounts about the case. For these reasons, the nature and extent of the media coverage in this case militated in favor of a change of venue.

3. Duong's Status Within the Community Called For A Change Of Venue.

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[17]The record is silent as to why the trial court did not privately question other prospective jurors who indicated in questionnaires that they were exposed to media about the case.

Duong did not live in Los Angeles County, but was there only to attend a birthday party at the International Club. 9:RT 1449. Moreover, he was a reputed gang member who was captured only after a national manhunt. Because Duong was "friendless in the community" his status favored a change of venue. *Maine v. Superior Court*, 68 Cal. 2d 375, 388 (1968).

4. The Prominence of the Victims Called For A Change Of Venue

The status of the victims in the community is a factor in evaluating the risk of the prejudice that will ensue absent a change of venue. *Martinez v. Superior Court*, 29 Cal.3d at 584. As occurred here, sympathy-generating media coverage can thrust previously anonymous victims into positions of public prominence. *Id.* Although Ms. Dang, Mr. Norman, Mr. Tang, and Mr. Tram were not public figures when they were alive, news reports describing a wounded Ms. Dang laying in the arms of her grieving boyfriend, Mr. Tang being gunned down on his twenty second birthday, and Mr. Norman killed while attempting to fulfill his dream of working as a disc jockey rendered their status "significant." *Id.* The significance of the victims' posthumous prominence is amplified when considered in light of media portrayals of Duong as a dangerous Asian gang member, from whom witnesses must be protected. *Id.*

Therefore, the status of the victims in the community also weighed in favor of a change of venue.

C. The Trial Court's Error Requires Reversal

"'Science with all its advances has not given us instruments for determining when the impact of . . . newspaper exploitation has spent itself or whether the powerful impression bound to be made by such inflaming articles as here preceded the trial can be dissipated in the mind of the average juror by the tame and often pedestrian proceedings in court.'" *Maine v. Superior Court*, 68 Cal. 2d at 387, quoting, *Stroble* v. *California*, 343 U.S. 181, 201 (1952) (Frankfurter, J., dissenting). However, even in the absence of such

precise measures, the record below makes clear that the trial court's error resulted in constitutionally intolerable prejudice.

Such prejudice was amplified by the trial court's failure to exclude the media from proceedings at which the prosecutor made allegations about the safety of witnesses. Trial courts must take appropriate action to ensure a criminal defendant a fair trial. *Sheppard v. Maxwell*, 384 U.S. at 363. This includes imposing restrictions on the press where (1) media coverage is extensive; (2) other measures would not protect the defendant's rights; and (3) it is probable that the proposed restraint would protect the rights of the defendant. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 562, 565-567 (1976). By failing to exclude the press from proceedings at which the prosecutor implied that there were threats to the safety of witnesses, the trial court paved the way for the prosecutor to improperly use the media for "partisan advantage." *Id.* at 555, n.4. The most egregious example of the prosecutor trying the case in the media were his in-court comments, in the presence of the press, indicating that a federal court had sealed the identities of two witnesses because it feared for their safety. The prosecutor's comments would have been prejudicial under any circumstances. However, in this case, where the media also reported that Duong was a gang member and the case was gang related, the prosecutor's comments were nothing short of explosive. The threat posed by the prosecutor's comments and other inflammatory coverage played out when a prospective juror, in front of other prospective jurors, demanded to know whether the jurors would be safe or whether their jury service might lead to gang reprisals and informed the trial court that he had discussed these concerns several other jurors. 5:RT 638, 726. Also noteworthy were the expressed fears of victim Dang's father and sister, each of whom testified for the prosecution, about their safety and their fear of gang reprisals. 16:RT 2770.

It is especially troubling that the comments about the federal judge's motives for sealing the identities of witnesses originated with the prosecutor, "'because of the special

regard the jury has for the prosecutor.'" *People v. Bolton*, 23 Cal.3d 208, 213 (1979), *quoting* Vess, *Walking a Tightrope: A Survey of Limitations On The Prosecutor's Closing Argument,* 64 J.Crim.L. & Criminology 22, 28 (1973). As if these incendiary comments in the presence of news media were not enough, the prosecutor then exacerbated the prejudice in closing arguments by hammering into the jury's minds that key witnesses feared for their safety. 12:RT 1949-1950.

In sum, the media coverage of this trial continued through jury selection and until the end of trial. In addition to gang allegations and comments about the safety of witnesses, reporting included highly inflammatory information about the national manhunt for Duong, emotionally charged information about the victims, information about other robberies and homicides in which Duong was allegedly implicated, information that was at best misleading, information designed to incite prejudice based on race and national origin, and other explosive material. Critically, the trial court failed to restrict the presence of media in the courtroom when parties discussed baseless, but inflammatory innuendo that the safety of witnesses was compromised. The convergence of these factors made it impossible for Duong to receive a fair trial in Los Angeles County.

Accordingly, the trial court's failure to change venue violated Duong's constitutional rights to due process, equal protection, a fair trial and impartial jury, and reliable penalty determination. U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 7, 15, 16. The guilt verdicts, special circumstance finding, and penalty verdict must be reversed.

II. THE TRIAL COURT'S FAILURE TO SUPPRESS FRUITS OF THE UNCONSTITUTIONAL SEIZURE AND SEARCH OF THE FORD EXPEDITION REQUIRES REVERSAL OF DUONG'S CONVICTIONS AND DEATH SENTENCE

The trial court denied Duong his rights under the Fourth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their California

counterparts to be free from unreasonable searches and seizures, to due process of law, and from arbitrary imposition of the death penalty when it failed to suppress evidence retrieved during an unreasonable warrantless seizure of a Ford Expedition that was nowhere near him at the time of his arrest and that took place at least six hours later.

A. Proceedings Below

Six hours after Duong's July 16, 2001 arrest, law enforcement without a warrant seized a Ford Expedition registered to Timothy Mukasa outside the building where Duong was arrested. 1:RT 159-173, 3:RT 359-369.

On September 25, 2002, Duong filed, pursuant to Penal Code section 1538.5[18] and the state and federal constitutions, a written motion to suppress items recovered during the search of the Expedition, and items seized during a search of a residence, 1601 West Carriage Drive, Santa Ana, California. 2 CT 290-305.[19] Duong later withdrew the motion to suppress the fruits of the residence search. 1:RT 180.

On October 2, 2002, the prosecutor opposed in writing Duong's suppression motion, arguing that the search of the Expedition was a valid vehicle inventory search consistent with Vehicle Code section 22651(h)(1). 2:CT 308-310. The same day, the trial court held a hearing on Duong's motion to suppress evidence; law enforcement officers Robert Sharpnack, Edwin Everett, and Brian Harris testified.[20] 1:RT 145-182. Counsel stipulated that the search was not conducted pursuant to a warrant, but, rather, as an inventory search. 1:RT 145. Duong argued that because Harris received the Expedition

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18 Penal Code section 1538.5(a)(1)(A) permits a defendant to move to suppress evidence that discovered as the result of an unreasonable warrantless search or seizure.

19 Duong's original and supplemental 1538.5 motions and the prosecutor's responses are incorporated by reference herein.

20 Their testimony is summarized in section C of this claim, below.

key about six hours after Duong's arrest, and the actual search may have taken place up to nine hours after his arrest, there was no longer probable cause to search the vehicle without a warrant. 1:RT 177.

The prosecutor conceded that Duong had standing to contest the search and seizure of the Expedition registered to Mukasa, but argued that any delay in impounding and searching it was irrelevant. 1:RT 176, 180. The prosecutor also indicated that Duong was not in the Expedition at the time of his arrest. 1:RT 141.

On October 4, 2002, Duong filed a supplemental written motion to suppress items seized from the Expedition, arguing that Duong was neither driving nor in control of the vehicle within the meaning of Vehicle Code section 22651(h)(1), and even if he were, law enforcement were not following standardized policies when they searched for and seized the vehicle. 4:CT 866-868. The prosecutor filed a supplemental response to that motion on December 9, 2002. 4:CT 904-907.

The suppression hearing continued on December 9, 2002; witnesses Edwin Everett and Randall Lawton testified[21]. 3:RT 357-378. The prosecutor argued that the Expedition was inventoried pursuant to policies of the Costa Mesa Police Department. 3:RT 374-375. The prosecutor further contended that the impoundment was timely because law enforcement were continually working on the case from the time they arrested Duong until the time they impounded the Expedition; Duong did not need the vehicle during that time because he was in custody. 3:RT 375-376.

Duong countered that the issue was not whether the police department's policy was to inventory impounded vehicles. 3:RT 376-377. Instead, the relevant inquiry was the propriety of the impoundment which occurred when, more than six hours after Duong's arrest, an officer inserted a Ford key into every Ford in the parking lot. 3:RT 376-377. By putting the key in every Ford vehicle in the lot, law enforcement conducted

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[21] Their testimony is summarized in section C of this claim, below.

a search that was unauthorized by any caselaw or department policies. 3:RT 377.

Following counsels' arguments, the trial court denied Duong's suppression motion, finding that the purposes of impounding the Expedition were to remove an unattended vehicle from private property and to benefit the owner. 3:RT 378. In addition, the trial court held that inserting the recovered Ford key into every Ford vehicle in the parking lot was not a search. 3:RT 378.

B. Evidence Before the Trial Court

On July 16, 2001, between 4:45 and 5:00pm, Robert Sharpnack and other law enforcement officers arrested Duong pursuant to a warrant on the basketball court at a 24 Hour Fitness Center in Costa Mesa. 1:RT 147-148, 3:RT 358.

Shortly after Duong's arrest, Officer Russell Lawton viewed videotapes of Duong on and near the basketball court. 3:RT 372. Lawton then went to the area of the court where Duong had been and retrieved several items. 3:RT 372. These included a July 16, 2001 ticket from the parking lot that time-stamped 1623 hours, a Volkswagon key chain with four keys, including a key and remote to a Ford vehicle, a Motorola cell phone, and a 24 Hour Fitness Center identification card in the name of Long Hoang. 1:RT 157-159, 3:RT 365, 367-368, 372. Lawton asked witnesses at the basketball court whether the property belonged to them; none of them claimed ownership. 3:RT 373. Lawton gave the items to Everett and told him that the key belonged to Duong. 3:RT 366, 373. In addition, Everett independently determined from the recovered parking lot ticket, identification card, and Ford key that Duong was in possession of a vehicle. 3:RT 366.

Everett then gave the Ford key to Sergeant Archer who gave it to Officer Brian Harris with instructions to determine whether the key fit any of the cars in the parking lot. 1:RT 159, 165, 168-169, 3:RT 366, 368-369. Harris's supplemental report, dated July 16, 2001, indicates that he received the Expedition key and began searching the lot at about 11:00pm. 1:RT 171.

After receiving the key, Harris tried it in every Ford in the 24 Hour Fitness

Center parking lot. 1:RT 169, 173. After he matched the key to a Ford Expedition, Harris put the key in the door, tried the lock, and notified his supervisor who instructed Harris to remain with the Expedition until a tow truck arrived. 1:RT 169, 172. Everett ordered the Expedition impounded after he learned that Harris had located the vehicle that matched the key. 1:RT 159. When the tow truck arrived, Harris instructed the driver to wear gloves. 1:RT 170. Harris followed the towed Expedition about four or five miles to the Costa Mesa police department where Everett took custody of it. 1:RT 170, 172. Harris never searched the Expedition. 1:RT 170, 173.

In his search of the Expedition, Everett found in the center console some metal knuckles and a black bag containing a Colt .45 caliber handgun. 1:RT 160, 162, 166. In the driver's door pouch, Everett found a wallet containing a credit card in the name of Soewin Chan, a check and Visa card in the name of Christine Chen, a credit card in the name of Long Hoang, a California Identification Card in the name of Long Hoang with Duong's photograph on it, and some miscellaneous paperwork. 1 RT 160, 162, 166-167.

The same day, law enforcement requested a warrant to search the residence where Duong purportedly lived. 1:RT 149. That warrant was faxed to police at 1:00am on July 17, 2001. 1:RT 149-150, 155, 160-161, 360.

C. The Inventory Search of the Expedition Resulting from an Unreasonable Warrantless Search and Seizure, Violated Duong's Federal and State Constitutional Rights

The trial court accepted the prosecutor's repeated arguments that law enforcement conducted a proper inventory search on a vehicle impounded pursuant to Vehicle Code section 22651(h)(1) and police department policies. As explained below, this argument is meritless.

The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, prohibits unreasonable searches and seizures

where an individual has a reasonable expectation of privacy.[22] U.S. Const. Amend. IV; *Mapp v. Ohio,* 367 U.S. 643 (1961); *Rakas v. Illinois,* 439 U.S. 128 (1978). Pursuant to California Constitution, article 1, section 28, subdivision (a), California courts may only exclude evidence obtained in violation of the Fourth Amendment where controlling federal cases require exclusion. See *In re Lance W.,* 37 Cal. 3d 873, 887-890 (1985).

"The impoundment of an automobile is a seizure within the meaning of the Fourth Amendment." *Miranda v. City of Cornelius*, 429 F. 3d 858, 862 (9th Cir. 2005). However, vehicles are afforded less Fourth Amendment protection than homes both because of their inherent mobility and because there is a diminished expectation of privacy as to vehicles. *South Dakota v. Opperman*, 428 U.S. 364, 367-368 (1976).

Despite this reduced protection, the warrantless search or seizure of a vehicle is "per se" unreasonable under the Fourth Amendment unless one of a "few specifically established and well-delineated" exceptions applies. *Arizona v. Gant*, 556 U.S. 332, 338 (2009); *Katz v. United States*, 389 U.S. 347, 357 (1967); *Thompson v. Louisiana*, 469 U.S. 17, 20-21 (1984); *United States v. Hawkins*, 249 F.3d 867, 872 (9th Cir. 2001). One such exception allows police to search or seize contemporaneously a vehicle under the immediate control of a person under arrest. *Preston v. United States*, 376 U.S. 364, 367 (1964). Another exception permits police to conduct inventory searches of impounded vehicles to (1) protect the owner's property, (2) protect law enforcement from claims against lost or stolen property, and (3) protect police from potential danger. *South Dakota v. Opperman*, 428 U.S. at 369. Such inventory searches are consistent with the Fourth Amendment only when the vehicle is lawfully impounded and law enforcement follow

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[22] Although the Expedition was not registered to Duong, the prosecutor conceded his standing to challenge the search. For this reason, Duong does not address herein his expectation of privacy in the vehicle, its compartments, or its contents. 1:RT 176, 180.

standard procedures. *Ibid.* at 376; *Colorado v. Bertine*, 479 U.S. 367, 371 (1987).

1. The Search of the Expedition Was Not Incident to Duong's Arrest.

In California, Vehicle Code section 22651(h)(1) allows law enforcement to impound a vehicle without a warrant "[w]hen an officer arrests a person driving or in control of a vehicle for an alleged offense and the officer is, by this code or other law, required or permitted to take, and does take, the person into custody." However, when government authorities, relying on Vehicle Code section 22651(h)(1), impound a vehicle, "the statutory authorization does not, in and of itself, determine the constitutional reasonableness of the seizure." *People v. Williams*, 145 Cal.App. 4th 756, 762 (2006). While states may develop search and seizure laws to aid law enforcement, they may not "authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct." *Sibron v. New York*, 392 U.S. 40, 60-61 (1968). Thus, irrespective of any state statute, the prosecution has the burden of proving that the seizure of the vehicle is reasonable within the meaning of the Fourth Amendment. *Miranda v. City of Cornelius*, 429 F. 3d at 862, 864-865.

Here, the prosecutor relied on statutory language permitting impoundment of a vehicle *"when"* the person "*driving* or *in control*" of that vehicle is arrested. Vehicle Code § 22651(h)(1) (emphasis added.) This language mirrors the Supreme Court's holdings permitting the "*contemporaneous*" search or seizure incident to arrest of a vehicle within the "accused's *immediate control*." *Preston v. United States*, 376 U.S. at 367 (emphasis added). The prosecutor argued that the Expedition was within Duong's control at the time of the seizure because police recovered the key to the Expedition and a ticket from the 24 Hour Fitness Center Parking lot from the area where Duong was arrested. 1:RT 175-176. This argument fails because the justification for seizing or searching a vehicle without a warrant is "absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at

another place, without a warrant, is simply not incident to the arrest." *Preston v. United States*, 376 U.S. at 367. Moreover, under *Arizona v. Gant*, 556 U.S. at 335, the warrantless search violates the fourth amendment in this context because the exception to obtaining a warrant "does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle."

Duong was not in or near the Expedition when he was arrested and was even farther from it when it was impounded and searched. Although police believed that Duong had arrived at the fitness center in a vehicle, they identified no vehicle associated with Duong until at least six hours after he was taken into custody, and then only after an officer inserted the key recovered from the basketball court in every Ford vehicle in the parking lot. For these reasons, Duong was not a "recent occupant" of the Expedition: he was too far removed spatially and temporally from the Expedition both at the time of his arrest and the seizure and search of the vehicle. *See, e.g.*, *Thompson v. Louisiana*, 469 U.S. at 19 (where police, who testified they had time to secure a warrant, conducted the search about 35 minutes after defendant left the scene, the search was not contemporaneous to arrest); *United States v. Chadwick,* 433 U.S. 1, 15 (1977), *overruled on other grounds* by *California v. Acevedo*, 500 U.S. 565, 579 (1991) (search conducted over an hour after a defendant's arrest was invalid); *United States v. Osife*, 398 F.3d 1143, 1146 (9th Cir. 2005) (search and seizure of vehicle proper where defendant had recently occupied his car and was standing next to it at time of arrest); *United States v. Esparza*, 2007 U.S. Dist. Lexis 66455, n. 2 (D. Idaho) (where defendant, who was arrested on a valid warrant, fled to an adjacent residence and had no access to his car, the search of the car was "not incident to the arrest because Esparza was not an occupant or recent occupant of the vehicle – he was not in proximity, spatially, to the vehicle at the time of the arrest."); *United States v. Olivia*, 2006 U.S. Dist Lexis 2558, n. 1 (N.D.Cal.) (although defendant's arrest was constitutional, the search of his truck was not "incident to arrest" where defendant had left the vehicle 20 minutes earlier and defendant was in an

apartment living room during the search).

Furthermore, just as they obtained a warrant to search the apartment where they believed Duong was living, police could have obtained a warrant to search the Expedition. Clearly, had there been any urgency or exigency surrounding the impoundment of the Expedition, law enforcement would have immediately identified and searched or impounded it.

2. There Were No Other Legitimate Reasons to Impound the Vehicle Without a Warrant

The State's argument that the search was a proper inventory search of an impounded vehicle also fails. None of the caretaking justifications the High Court set forth for conducting routine inventory searches were present here. The time that elapsed between Duong's arrest and the search for and seizure of the Expedition make clear that law enforcement did not search for and seize it to protect the owner's property, shield themselves against liability, to protect themselves or anyone else from potential danger, or to determine whether the car was either abandoned or stolen. *South Dakota v. Opperman*, 428 U.S. at 369. Thus, the trial court's finding that the removal of the car was to benefit the owner clearly is belied by the evidence before it.

Moreover, the trial court's finding that police impounded the Expedition from the 24 Hour Fitness Center to remove an unattended vehicle from private property also lacked an evidentiary basis. A "trial court cannot assume facts for its decision." *Barrett v. Stanislaus County Employees Retirement Ass'n*, 189 Cal.App. 3d 1593, 1614, n.8 (1989).

Even assuming the police were motivated to remove an unattended vehicle from private property, they lacked statutory authority to do so.

Vehicle Code section 22653 permits the removal from private property of a vehicle under these limited circumstances: (a) where the vehicle has been reported stolen or embezzled, (b) if the vehicle was involved in and left the scene of a traffic accident, or (c) "*at the request of the property owner,*" when an officer arrests a person "driving or in

control of the vehicle" and "takes the person arrested before a magistrate without any unnecessary delay." Cal. Vehicle Code § 22653(a)-(c) (emphasis added).

No evidence before the trial court suggested that the Expedition was stolen, involved in a traffic accident, or removed at the request of the owner of the 24 Hour Fitness Center parking lot. Thus, absent facts not in evidence, the trial court could have found no statutory basis for removing the unattended Expedition.

D. The Trial Court's Errors Require Reversal

The erroneous admission of evidence seized in violation of a defendant's Fourth Amendment rights requires reversal unless the government can prove the error harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 24 (1967). It cannot do so here.

The unconstitutionally seized evidence was important at the guilt phase, because it fueled the prosecutor's improper argument that Duong was a bad, dangerous person whose weapon of choice was a Colt .45 Springfield Model 1911 semiautomatic handgun. This evidence was all the more prejudicial because it served an improper purpose.

The identity of the shooter at International Club was not in dispute. It was therefore unnecessary for the prosecutor to demonstrate the shooter's identity by tying him to a specific weapon. Nevertheless, the prosecutor capitalized on law enforcement's failure to locate the .45 caliber weapon used at International Club, by presenting irrelevant evidence that Duong had been in possession of .45 caliber handguns with no link to the International Club shootings. 7 RT 1114-1128, 1147-1148, 9 RT 1354, 1374-1375, 11 RT 1796, 1799. The only ostensible purpose for such evidence in this case was to persuade the jury that Duong was a dangerous person who routinely carried a loaded weapon.

The .45 caliber handgun retrieved in the search of the Expedition was central to this effort. In opening statements, the prosecutor promised to present expert evidence that although the murder weapon was never recovered, it could have been a Colt .45

Springfield model 1911 handgun. 6:RT 872. According to the prosecutor, the Colt .45 found in the closet of Duong's girlfriend, when considered with the Colt .45 retrieved from the Expedition "is evidence of the fact that Mr. Duong has a personal choice for this particular weapon." 6:RT 873-874.

In addition, Detective Everett testified that the Colt .45 he found in the Expedition was fully loaded and ready to fire with a bullet in the chamber. 8:RT 1228-1229. Thus, the admission of this evidence demonstrated not only that Duong had possessed more than one Colt .45, but also that, on at least one occasion separate from the homicides, he carried a loaded weapon– a highly prejudicial fact that was wholly irrelevant to the jury's determination of guilt.

In closing argument, the prosecutor again emphasized the importance of this evidence, arguing:

> [I]n the vehicle that he had, which was not registered to him, he has a .45 caliber handgun, not the murder weapon in this case, but it was the type of weapon that could have been the murder weapon.
>
> And the reason the evidence of it is important is it shows when you consider the fact that he has had the .45 caliber semi-auto, either Colt or Springfield, it's a model 1911, on other occasions, it's his weapon of choice and Mr. Munoz told you it's a high-quality weapon.[23] 12:RT 1950

The State cannot prove that in the absence of the unlawfully seized evidence, Duong would have been convicted of the instant crimes. *Chapman,* 386 U.S. at 24. The trial court's erroneous failure to exclude the evidence recovered from the Expedition clearly was not harmless beyond a reasonable doubt. Duong's conviction must be reversed.

Even assuming the error was harmless as to guilt, the prejudice at penalty phase

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[23] In contrast, the prosecutor presented evidence at penalty phase that Duong committed crimes with other weapons.

requires reversal of Duong's death sentence.

The seized evidence was also important at the penalty phase. It bolstered the testimony of star prosecution witness and admitted informant, Christine Chen, who received immunity for her testimony that Duong participated in other crimes including robbery murders at the Jade Galore and Traditional stores, the murders at a computer chip company, and the Thien Thanh grocery robbery murder. 15:RT 2608-2710.

Chen testified that Timothy Mukasa, with funds provided by Duong, purchased a Honda Accord which they later used in the Jade Galore robbery murder. 15:RT 2617-2619. Later, Chen asserted, Mukasa traded in the Accord for the Expedition in which Duong was arrested. 15:RT 2619. Chen indicated that Duong had a .45 caliber gun in the Expedition. 15:RT 2619.

The prosecutor noted in closing that Chen's participation in some of the uncharged crimes and her subsequent immunity deals might lead the jury to question her credibility. 17:RT 2911-2913. However, the prosecutor argued, the truth about Duong would never have come out without Chen's critical information. 17:RT 2911-2913.

Had the trial court suppressed evidence of the Expedition and its contents, Chen's testimony would have been the only evidence connecting Duong to either the Expedition or the Colt .45 retrieved from it. The unconstitutionally seized evidence corroborated her testimony connecting Duong to the Expedition and its contents, and it gave her entire testimony an aura of credibility. This effect was amplified because the trial court read to the jury CALJIC 2.21.2:

> A witness who is willfully false in one material part of his or her testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless from all the evidence you believe the probability of truth favors his or her testimony in other particulars. 17:RT 2853.

Thus, the jurors could have reasonably inferred that because there was corroboration for some of Chen's testimony, it could assume the remainder of her

testimony was truthful.

The improper bolstering of witness Chen with evidence retrieved in violation of the Fourth and Fourteenth Amendments injected arbitrariness into the jury's penalty determination in violation of the Eighth Amendment. *See, Tuilaepa v. California,* 512 U.S. 967, 973 (1994), (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ)). The state cannot prove this ill-gotten evidence was harmless beyond a reasonable doubt. *Chapman,* 386 U.S. at 24. The death verdict must be reversed.

III. DUONG'S INVALID WAIVER OF HIS RIGHT TO TESTIFY REQUIRES REVERSAL

Duong's waiver of his right to testify after the trial court erroneously suggested he could challenge the trial court's ruling to permit the prosecutor to cross-examine him with unadjudicated offenses on appeal if he did not testify was not knowing, intelligent, and voluntary. The trial court's misstatement was particularly misleading because the behavior of trial counsel, who concomitantly objected and advised Duong not to take the stand, further suggested that the issue was preserved for appellate review. The invalid waiver violated Duong's fundamental constitutional rights including the right to testify, present a defense, compulsory process, a fair trial, freedom from self-incrimination, an impartial jury, reliable guilt and penalty determinations free from arbitrariness, equal protection, and due process of law. The error also violated his rights under California law. Reversal is required.

A. Proceedings Below

Duong asked the trial court to rule in advance whether, if he testified, it would permit the prosecutor to cross-examine him or present evidence about several unadjudicated homicides. 8:RT 1240-1241, 1245, 1252-1254; 10 RT 1552, 1638.[24] The

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[24] Claim V, below, is incorporated by reference herein.

trial court initially declined to make an advance ruling, explaining that if he made "an erroneous ruling" to admit the uncharged homicides, he might "create an issue on appeal that the defendant didn't exercise his right to testify because of the erroneous ruling." 10 RT 1637-1638. The prosecutor indicated that he disagreed that the issue would be preserved if Duong did not testify; the trial court did not respond. 10:RT 1638.

Despite its perceived risk of appellate review, the trial court tentatively ruled that should Duong testify that he shot the victims in self-defense, in defense of another, inadvertently, or accidentally, the prosecutor could cross-examine him about two uncharged homicides. 4:CT 980-989; 11:RT 1665-1668, 1670.

Based on the trial court's ruling, defense counsel advised Duong not to testify and solicited an on the record waiver of his right to do so:

> It's the defense position as stated previously that it's in violation of Mr. Duong's 4th, 5th, 6th and 14th amendment rights of the federal constitution and state constitution to testify in this matter, and he understands that. However, based on the court's ruling of the two uncharged homicides which are still pending in other jurisdictions, he believes it is in his best interest not to testify.
>
> Mr. Duong, you understand that my advice in this case at this time is for you not to testify based on the status of the case at this time?
>
> The Defendant: Yes, now I will not testify.
>
> Mr. Meastas: And you understand you have a right to testify no matter what I say, whether I think it's good or not good for to you testify, you could still testify.
>
> Do you understand that?
>
> The Defendant: Yes.
>
> Mr. Meastas: And having that knowledge, what is your position?
>
> The Defendant: Now I will not testify. 11:RT 1685-1686.

Neither the trial court nor defense counsel explained to Duong that, under well-settled law, if he failed to testify he would waive his right to challenge the trial court's

erroneous ruling on the uncharged homicides on appeal. *See Luce v. United States*, 469 U.S. 38, 43 (1984); *People v. Collins*, 42 Cal.3d 378, 383-385 (1986); *People v. Sims*, 5 Cal.4th 405, 455 (1993).

B. Duong's Waiver of the Right To Testify at the Guilt Phase of His Capital Case Was Not Knowing, Intelligent, and Voluntary

A criminal defendant's fundamental right to testify, which is critical to the fairness of the adversary process, has several Constitutional underpinnings. *Rock v. Arkansas*, 483 U.S. 44, 51(1987). The Due Process Clause of the Fourteenth Amendment requires that a defendant be allowed to choose to remain silent or testify. *Id.*

The Sixth Amendment's Compulsory Process Clause allows a defendant to call witnesses on his behalf, *Id.* at 52, and "grants to the accused personally the right to make his defense." *Faretta v. California*, 422 U.S. 806, 819 (1975). "In fact, the most important witness for the defense in many criminal cases is the defendant himself." *Rock v. Arkansas*, 483 U.S. at 52.

In addition, the Fifth Amendment privilege against self-incrimination necessarily encompasses a corollary right to testify in one's defense. *Rock v. Arkansas*, 483 U.S. at 52-53; *Harris v. New York*, 401 U.S. 222, 230 (1971). The exercise of this constitutional right must remain "unfettered." *Harris*, 401 U.S. at 230; *Griffin v. California*, 380 U.S. 609, 614 (1965).

Nevertheless, a criminal defendant may waive this fundamental right. *See e.g., Iowa v. Tovar*, 541 U.S. 77, 87-88 (2004). A waiver is a "knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" *Edwards v. Arizona*, 451 U.S. 477, 482 (1981), quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The waiver of a constitutional right must be "done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970); *Iowa v.*

Tovar, 541 U.S. at 81 (2004); *People v. Collins*, 26 Cal.4th 297, 305 (2001). When a defendant misunderstands the consequences of a waived right, his relinquishment is not knowing. *Colorado v. Spring*, 479 U.S. 564, 575 (1987).

This Court has explained:

> To protect against inappropriate incursions on a defendant's exercise or waiver of a fundamental constitutional right . . . the federal Constitution long has been construed as requiring procedural safeguards, such as the requirement that a waiver of the right in question be made by the defendant personally and expressly. *People v. Collins*, 26 Cal.4th at 307-308.

This Court recognizes that the right to testify is a fundamental federal constitutional right. *People v. Nakahara,* 30 Cal.4th 705, 717 (2003). Nevertheless, this Court does not require a trial court to obtain a defendant's express waiver of the right to testify when, unlike here, "'the record fails to disclose a timely and adequate demand to testify." *People v. Bradford*, 14 Cal.4th 1005, 1052-1053 (1997), quoting *People v. Alcala*, 4 Cal.4th 742, 805 (1992).

However, where, as in this case, the "record raises . . . doubts about defendant's knowledge or understanding," a reviewing court should scrutinize the validity of the waiver. *People v. Farnam*, 28 Cal.4th 107, 148 (2002). Thus, this Court must look at the relevant circumstances surrounding the waiver. *Brady v. United States*, 397 U.S. at 749.

The record below reveals that Duong's waiver was not knowing, intelligent, and voluntary. Both the trial court and defense counsel contributed to Duong's misapprehension of the law. More than 15 years prior to Duong's trial, this Court adopted the "Luce Rule" prohibiting a defendant who does not testify from challenging on appeal a trial court's erroneous advance ruling to admit prior convictions on cross-examination. *People v. Collins*, 42 Cal.3d at 383-385; *Luce v. United States*, 469 U.S. at 43. Shortly after adopting the Luce Rule, this Court expanded it to include unadjudicated offenses. *People v. Sims*, 5 Cal.4th at 455 (1993). Despite this well-settled law, the trial court

indicated that if Duong, based on its ruling to permit cross-examination about uncharged homicides, elected not to testify, Duong would be able to raise the violation of his right to testify on appeal. The trial court never informed Duong that he would not be able to challenge the admission of those homicides on appeal.

The trial court's misleading statements were compounded when, after it ruled on the uncharged crimes, defense counsel solicited from Duong an on the record waiver of his right to testify. During the course of Duong's waiver, defense counsel continued to make strenuous objections in an effort to preserve the issue for appeal. 11:RT 1685-1686. Trial counsel's simultaneously objecting to the trial court's ruling and advising Duong not to testify strongly suggested that he could challenge the issue in appellate proceedings.

Crucially, neither the trial court nor defense counsel told him he was waiving his right to appeal the trial court's ruling on the unadjudicated offenses nor did they endeavor to ensure that Duong was not misled by the trial court's erroneous statements or trial counsel's efforts to preserve the issue for appeal. Duong's waiver of a fundamental right made in the absence of any advice as to its consequences and the trial court's uncorrected misleading statement of law is invalid. *Raley v. Ohio*, 360 U.S. 423, 437 (1959); See also, *People v. Redmond*, 71 Cal.2d 745, 758 (1969); *United States v. Pennycooke*, 65 F.3d 9, 11 (3^{d} Cir. 1995) (a trial court's "intrusion may have the unintended effect of swaying the defendant one way or the other.")

Under these circumstances, the record demonstrates that Duong waived his right to testify based on a misapprehension of the law and without "sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. at 748; *See also People v. Collins*, 26 Cal.4th at 311-312. In *People v. Rowland*, 4 Cal.4th 238, 258 (1992), this Court held that the Luce rule was fairly applied to defendant who acknowledged on the record its applicability– something Mr. Duong certainly did not do.

Duong's invalid waiver of his right to testify also violated his Fourteenth

Amendment Due Process rights which protect "the accused against conviction except upon proof [by the State] beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 364 (1970). The unconstitutional waiver of Duong's constitutional rights lightened the prosecution's burden of proof, permitting the jury, without ever hearing his defense, to find Duong guilty of three counts of first degree murder and one count of second degree murder instead of finding him guilty of lesser offenses. *See, e.g., Sandstrom v. Montana,* 442 U.S. 510, 520-524 (1979). Moreover, Duong's constitutionally infirm waiver of his right to testify so infected the trial as to render his convictions fundamentally unfair. *Estelle v. McGuire,* 502 U.S. 62, 67 (1991); *United States v. Antelope,* 430 U.S. 641, 650 (1977) *see also McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993).

Duong was also deprived of his right to a reliable adjudication at all stages of a death penalty case. *See Lockett* v. *Ohio,* 438 U.S. 586, 603-605 (1978); *Beck* v. *Alabama,* 447 U.S. 625, 638 (1980); *Penry* v. *Lynaugh,* 492 U.S. 302, 328 (1989), *abrogated on other grounds, Atkins v. Virginia*, 536 U.S. 304 (2002).

C. The Invalid Waiver of Duong's Right to Testify Requires Reversal

A defendant's invalid waiver of a fundamental right is structural error that compels reversal without a showing of prejudice. See *People v. Collins*, 26 Cal. 4th at 312-313. Duong's invalid waiver compels automatic reversal because an "appellate court cannot logically term 'harmless' an error that presumptively kept the defendant from testifying." *Luce v. United States*, 469 U.S. at 42; *People v. Collins*, 42 Cal.3d at 384.

Assuming arguendo that the invalid waiver is subject to harmless error analysis, the State cannot prove that Duong's failure to testify was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. at 24. Here, as in many cases, a "defendant's opportunity to conduct his own defense is incomplete if he may not present himself as a witness." *Rock v. Arkansas*, 483 U.S. at 52. Indeed, a defendant is often the most critical witness on his own behalf. *Id.*; *See also, Green v. United States*, 365 U.S. 301, 304

(1961) (Frankfurter, J., plurality opinion) ("The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself."); *People v. Barrick,* 33 Cal.3d 115, 129 (1982), *superseded on other grounds*, Cal.Const. Art. I, § 28(f) (jurors draw negative inferences when a defendant does not testify about matters solely within his knowledge); *United States v. Montgomery*, 390 F.3d 1013, 1015-1016 (10th Cir. 2004) (defendant's testimony important in "every case"); *United States v. Rein*, 848 F.2d 777, 782-783 (7th Cir. 1988) (defendant's testimony important where mental state at issue).

Duong's testimony was essential to his defense. Duong acknowledged that he shot the victims. Therefore, the only issue before the jury was his mental state during the homicides: an issue of which only Duong possessed personal knowledge. Duong asserted that he killed victim Minh Tram in self-defense or in defense of a third party and that he killed victims Norman, Dang, and Tang accidentally or inadvertently. But, in the absence of Duong's testimony, the trial court refused to instruct the jury on the primary defense theory. Thus, the jury was deprived of essential defense evidence and critical guidance from the trial court.

Furthermore, while trial counsel was able to cross-examine prosecution experts about the implications of forensic evidence and eyewitnesses about their observations the night of the homicides, even the trial court acknowledged that the evidence against Duong was subject to multiple interpretations. 11:RT 1821-1822. The prejudice of Duong's ill-informed failure to testify was amplified because the trial court excluded the proffered testimony of Dr. Posey which would have offered the jury an interpretation of the forensic evidence that corroborated Duong's defense.[25] The trial court also magnified the error by excluding evidence about International Club that would have supported the reasonableness of Duong's beliefs the night of the homicides and would have impeached

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[25] Claim IV, below, is incorporated by reference herein.

key prosecution witness John Bui, who testified about his efforts to stop Duong from shooting.[26] Thus, the trial court barred Duong from presenting to the jury the most credible evidence available about the central issue in the case. U.S. Const. Amends. VI, XIV; *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

The prosecutor's forceful efforts to persuade Duong not to testify underscore how pivotal his testimony would have been to the jury's determination. Indeed, the prosecutor argued that if Duong testified, the jury would likely find him credible because he was a "nice looking man" who would likely be "calm and collected" on the stand. 11:RT 1647.

The prosecutor was so concerned about the potential impact of Duong's testimony that, notwithstanding his argument that the unadjudicated offenses were admissible regardless of Duong's defense, he indicated he would not seek to introduce them if Duong did not take the stand. 11:RT 1646.

Duong's failure to testify enabled the prosecutor to argue in the most dehumanizing terms that the jury should find him guilty of first degree murder. Because they never heard Duong's voice or his version of events, the jurors had no reason to disbelieve the prosecutor's argument that Duong was such a "cool customer" that it did not "phase him to kill four people." 12:RT 1942. Further capitalizing on Duong's silence, the prosecutor asked the jury not to say to itself "I know he did it but there has got to be something going on here that we don't know about." 12:RT 1942.

Despite Duong's inability to present his side of the story, the jury requested readback of portions of the testimony of eyewitnesses Thi Van Le and John Bui about the sequence of the shootings. 13:RT 2126-2129. In doing so, the jurors indicated that they still had questions about Duong's intent and would have benefitted from hearing him describe his mental state in his own words. Duong's testimony would have supported an instruction on self-defense, defense of a third party, and accident which would have given

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[26] Claim IX, below, is incorporated by reference herein

the jury a legal framework for considering his theory of the case.

Finally, even if Duong's testimony would not have persuaded the jury to find him not guilty of first degree murder, the State cannot prove beyond a reasonable doubt that the humanizing effect of his testimony would not have contributed to the jury's penalty determination. This Court must therefore reverse Duong's death sentence if it finds that it can sustain his conviction of guilt despite his invalid waiver.

IV. THE TRIAL COURT'S EXCLUSION OF THE TESTIMONY OF DAVID POSEY, M.D., WAS AN ABUSE OF DISCRETION AND VIOLATED DUONG'S RIGHT TO PRESENT A DEFENSE

The trial court, based on its erroneous understanding of the law, excluded relevant, admissible evidence that was central to Duong's defense and that would have controverted the testimony of key prosecution witnesses Patricia Fant and Lisa Scheinin. The error eviscerated Duong's defense and arbitrarily forced the jury to determine his culpability based on a prosecution case that was never subjected to rigorous adversarial testing. The error deprived Duong of his Sixth, Eighth, and Fourteenth Amendment rights to present a defense; to confront witnesses against him; to due process; to have the prosecutor prove every element of the crime beyond a reasonable doubt; to effective assistance of counsel; and to capital guilt and penalty determinations free from arbitrariness, and violated the state constitution's prohibition on the exclusion of relevant evidence. U.S. Const. Amends. VI, VIII, XIV; Cal. Const., art. I, § 28(d).

A. Proceedings Below

1. The Proposed Testimony of David M. Posey, M.D.

a. Pre-Hearing Arguments

Duong sought to present a defense that he shot victim Mr. Tram in defense of a third party and that he shot Mr. Tang, Mr. Norman, and Ms. Dang accidentally, following a struggle with John Bui. To support Duong's theory of the case, Duong indicated that he hoped to testify and that he might call as an expert David M. Posey, M.D., a forensic

pathologist. The prosecutor, noting that Dr. Posey's report indicated that he believed "beyond a reasonable doubt" that the shooting of Mr. Tram was intentional and purposeful and that the shootings of Mr. Tang, Mr. Norman, and Ms. Dang were unintentional and accidental, demanded a hearing pursuant to Evidence Code section 402. 8:RT 1247-1249. The prosecutor objected to Dr. Posey testifying to his opinions beyond a reasonable doubt on issues that the jury would be deciding. 8:RT 1248; 11:RT 1721. According to the prosecutor, Dr. Posey could only properly testify to whether, based on his review of the autopsy reports, he "agrees or disagrees with the wounds inflicted on the victims." 11:RT 1722. In addition, the prosecutor contested Dr. Posey's expertise to opine about whether a shooting was random or intentional. 11:RT 1722. The prosecutor also objected to Dr. Posey's use of the legal standard, "beyond a reasonable doubt," and also to his use of the words "to a medical certainty." 11:RT 1723. Finally, the prosecutor argued that as a result of the materials on which he relied, Dr. Posey's conclusions were flawed. 11:RT 1723.

Duong argued that a 402 hearing was unnecessary, assuring the court that he had admonished Dr. Posey not to use the words "beyond a reasonable doubt" or to testify as to the strength of the evidence. 8:RT 1250, 11:RT 1723. Further, Duong pointed out that in his report Dr. Posey indicated that he would revisit his opinion should the evidence at trial differ from the evidence on which he relied to reach his initial conclusion. 11:RT 1724. Duong also said he would present Dr. Posey with hypotheticals based on the evidence before the jury so that Dr. Posey could then give his opinion as to whether, assuming the circumstances set forth in the hypotheticals were true, the homicides were intentional or unintentional. 11:RT 1724-1725.

The trial court was skeptical that medical science could form the basis of an opinion that the discharge of a firearm was intentional or accidental, particularly where the expert had not examined the firearm. 8:RT 1249-1250.

Defense counsel responded:

> I think given the evidence in this matter, that we are at a close distance and that there is an individual that is shot without interference, later you have shots that occur with an individual holding, grabbing struggling, whatever word you want to use, of the firearm, and I think I should be entitled to, if in fact he is at that distance, to make a -- give an opinion as to whether or not the trajectories, the wounds, are consistent with somebody that would be unobstructed in the shooting versus somebody that would be obstructed.

11:RT 1725.

The prosecutor countered that he was unaware that Dr. Posey had any expertise to so testify. 11:RT 1725. The trial court ordered a 402 hearing. 11:RT 1725.

b. Dr. Posey's Testimony at the 402 Hearing

Dr. Posey's report indicated that according to witnesses, the perpetrator shot Mr. Tram "with a volley of several shots. And then while an individual was trying to disarm the perpetrator, a second volley of shots accidentally and unintentionally injured and killed three other victims." 11:RT 1727.

To reach this opinion, Dr. Posey relied on autopsy reports, autopsy photographs, crime scene photographs, the crime scene video taken after one of the bodies had already been transported, the felony complaint against Duong, and a number of discovery pages. 11:RT 1728-1729. Dr. Posey did not rely on all the discovery pages provided to him, because not all of them were relevant. 11:RT 1730-1733.

As a forensic pathologist, Dr. Posey uses medical science in combination with factual evidence about the scene to try to form an opinion about a crime scenario based on his experience with

> injury pattern analysis, which I have done a lot over my career, starting with the Armed Forces Institute of Pathology, and the question posed to me could I render an opinion based on the wound patterns as to whether I felt it was intentional -- wounds were intentionally placed or unintentionally placed.

11:RT 1734.

Dr. Posey spent four years investigating aircraft accidents. 11:RT 1736. In his experience, investigating accidents was exactly the same as looking at and analyzing injury patterns in a homicide. 11:RT 1736. In each case, he would take a pattern of injuries or gunshot wounds and "work backwards through the scenario" in light of the information provided to him. 11:RT 1736. He could do so because he has studied gunshot wounds, has done multiple gunshot wound cases, and has worked in the field for almost 25 years. 11:RT 1738.

Dr. Posey could not have determined whether the firearm was discharged intentionally just from looking at the gunshot wounds to a single victim. 11:RT 1736. However, he was able to reach an opinion by comparing the wounds of each victim to those of the other victims. 11:RT 1736-1737.

Based on other gunshot cases, Dr. Posey believed that the wounds inflicted on Mr. Tram were purposefully placed with the intent to kill. 11:RT 1737. Ms. Dang's wound to the arm jumped out at Dr. Posey. 11:RT 1737. Based on the entire scenario, he did not believe that the shot was intended to kill her. 11:RT 1737.

As for Mr. Norman, Dr. Posey did not believe his wound was inflicted purposefully, because the shooter did such a good job on Mr. Tram. 11:RT 1737. Had the shooter raised the angle of the weapon a small amount, there would have been no question that the shooter intended to kill Mr. Norman. 11:RT 1737-1738.

Also, Dr. Posey received from defense counsel information that there was a scuffle after the first shot was fired[27]. 11:RT 1739.

Dr. Posey could not say whether the shooter intended to pull the trigger, but could

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[27] The prosecutor objected that there was no reference to a scuffle in the discovery on which Dr. Posey relied. 11:RT 1739-1742. Defense counsel pointed to page 39 of the discovery which indicated that witness John Bui stated that after the shooting began, he tried to grab the gun. 11:RT 1740-1741.

only provide an opinion as to whether he meant to kill the victims; pulling a trigger without aiming it at a target is not the same as pulling a trigger and meaning to shoot someone. 11:RT 1738-1739.

Insofar as his qualifications, Dr. Posey is a forensic pathologist who worked as a coroner and was trained in, among other things, determining cause and manner of death and bullet trajectories. 11:RT 1741-1742. He was in a better position than the jurors to interpret what happened, because he was trained in forensic medicine and in the reconstruction of injury patterns to try to determine what happened. 11:RT 1743. Dr. Posey is not simply a medical doctor; rather, he has 25 years of experience as a forensic specialist. 11:RT 1743-1744.

Dr. Posey does not rely solely on the gunshot wounds inflicted on a single person. 11:RT 1745. In this case, he reviewed the wounds received by all four victims. 11:RT 1745. Having the firearm that inflicted the wounds is only minimally important, because a small gun can kill as easily as a large gun. 11:RT 1745-1746. Whether the weapon had a hair trigger is not relevant as to whether the shooter intended to discharge the weapon. 11:RT 1746.

Dr. Posey had not heard the evidence that the jury heard, but assumed that the information he had was accurate because the discovery originated with the prosecutor's office. 11:RT 1746-1747.

Dr. Posey never conducted experiments or research to try to verify his opinions. 11:RT 1747. Dr. Posey was unaware of other pathologists who attempt to reconstruct crime scenarios. 11:RT 1747. Dr. Posey explained how he arrived at his opinion:

> You take multiple pieces. It's like building a house, you know. I take the information and then I look at the medical information. Does that fit what I am being told by the investigative information. Then I look at the photographs. Does that fit with what's being said here. A lot of times people can't write worth a darn, so the photographs tell me more than the written word does. Then I put all that together

and go back and say is it possible. At the very beginning when I first looked at this, I didn't think it was totally possible that this was -- that we had four dead bodies there and they weren't done at the same time all on purpose. What made me question the whole thing I got to the young lady and she had a wound that was an entrance-exit wound in the arm and reentrance into the body. Then I said, hmmm. And based on the question posed to me by counsel, maybe this could have been an unintentional injury . . . .

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Because Mr. Minh [sic] had three well-placed shots in his body, one the back of his head and two in the side. Again I don't know if it happened all the same time. I wasn't there or if it happened later bang, later bang, and later bang. I don't know. These are well-placed shots. Anybody handling a firearm will know if you put a shot the back of the head, the lights are out. If you put them in the chest, the chances are the guy isn't going to survive.

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I would think that one case by itself, if they shoot them in the chest, I would think they were thinking about ending the individual's life or at least stopping them from going forward. But when you relate this to the other three and you look at the wound pattern, that's what gave me the opinion, based on the other information I had from the investigative reports, that, yes, that could be a possibility that the these three victims weren't the intention of that crime that night, that this actually became more of a secondary accidental thing than it did as I did not, he did not, whoever the perpetrator, did start out to shoot these three people.

11:RT 1748-1749.

c. Additional Argument and the Trial Court's Ruling

The trial court explained that in its view, the gist of Dr. Posey's testimony was that Duong shot Mr. Tram with express malice and shot the other three victims without malice. 11:RT 1750. Penal Code section 29 prohibits expert witnesses testifying about a defendant's mental illness, defect, or disorder from testifying as to a defendant's mental

states, reserving that determination for the trier of fact. 11:RT 1751. The trial court believed that cases under Penal Code section 29 did not cover only mental health experts, but rather any testimony as to the defendant's state of mind. 11:RT 1751. Thus, in the trial court's opinion, Dr. Posey's testimony would invade the province of the jury. 11:RT 1751.

Duong argued that Dr. Posey was not providing mental health testimony, but rather injury pattern analysis. 11:RT 1751-1752.

The trial court held that Dr. Posey could testify, but could not give an opinion as to whether the shooting was accidental, intentional, or with or without malice. 11:RT 1752, 1755-1757.

Duong objected that the trial court's ruling violated his Fifth and Fourteenth Amendment rights to a fair trial and on all state and federal grounds. 11:RT 1758. Duong further argued that Dr. Posey possessed the requisite expertise based on the study of injury pattern analysis to assist the jury in an area where it lacked expertise. 11:RT 1759.

The prosecutor countered that Dr. Posey lacked expertise in determining mental state based on injury pattern analysis, that he had no experience analyzing gunshot wounds, that he was unaware of a body of science in this area, that he had not done any experiments in this area, and that he was unaware of any other experts who could provide such testimony. 11:RT 1759-1760.

The trial court repeated its belief that Penal Code section 29, and *People v. McCowan*, precluded Dr. Posey from testifying as to Duong's mental state. 11:RT 1761. The trial court believed that Dr. Posey was qualified with respect to areas typically considered by coroners and pathologists, but was not convinced that Dr. Posey's opinions were based on science and was concerned by the lack of studies or experiments in his stated area of expertise. 11:RT 1761-1762.

Duong again objected on federal constitutional grounds and noted that Dr. Posey

had done 1440 autopsies, testified 35 times as an expert for the government, plaintiffs, and defendants, and testified about injury pattern analysis in a Hawaii court-martial involving stab wounds. 11:RT 1763.

The prosecutor noted that Dr. Posey never claimed to have testified about the kind of firearm evidence he was offering in this case. 11:RT 1763.

Based on the trial court's ruling that Dr. Posey could not testify whether the shootings were accidental or intentional, Duong did not call Dr. Posey. 11:RT 1764-1765. In addition, based on that ruling, the trial court's tentative ruling to permit the prosecutor to impeach Duong with two unadjudicated homicides, and the trial court's suggestion that even if he did not testify, Duong could challenge the trial court's ruling on the unadjudicated homicides on appeal, Duong decided not to testify on his own behalf.[28] 11:RT 1767. In the absence of testimony from Dr. Posey and Duong, the trial court refused Duong's requested instructions on defense of a third party, self-defense and accident. 11 RT 1809-1824, 1832-1835. The trial court's rulings forced Duong to argue that he killed Mr. Tram in the heat of passion and that he lacked the intent to kill Mr. Tang, Mr. Norman, and Ms. Dang.

2. Prosecution Forensic Testimony

The trial court's erroneous exclusion of Dr. Posey's testimony must be considered in light of the testimony of two of the prosecution's key witnesses, Patricia Fant and Lisa Scheinin.

a. Testimony of Patricia Fant

Patricia Fant, a retired firearms examiner who worked for the Los Angeles County Sheriff, collected firearms evidence from the International Club crime scene the morning of the homicides. 7:RT 1114-1116. In addition, Fant compared bullets found at the

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[28] Claims III, above, and V, below, are incorporated by reference herein.

crime scene with those recovered during the autopsies. 7:RT 1122-1123. Fant concluded based on her comparison that these bullets were fired from a single .45 handgun. 7:RT 1123, 1136. Because she was unable to examine the firearm used in the shooting, Fant could not know whether the weapon was semi or fully automatic. 7:RT 1136.

Fant and her colleague, Michael Oto, placed trajectory rods in the booths to get an idea of the positions of the suspect, the victims, the angles of the shots, and to "get an idea of what happened at the scene." Peo. Exh. 5A-5D; 7:RT 1129-1130. The trajectory rods went from the inside of the booth to the outside of the booth and from high to low. 7:RT 1132, 1134-1135. This was consistent with the shooter standing in front of the booth and firing into it. 7:RT 1132. At least three of the shots entered fairly high up in the booth, demonstrating that the person shot from "an up position to a down position." 7:RT 1133-1134, 1136-1137. Some of the shots entered the booth at lower points; these also exited low on the booth. 7:RT 1141.

The angle of some of the shots may have been altered because they passed through something, but at some point, the shooter was in front of the booth. 7:RT 1135. The booth was made of naugahyde, stuffing, and possibly wood. 7:RT 1141. These were intervening objects which could have altered the trajectories of the bullets. 7:RT 1142. The shooter may have moved at some point during the shooting. 7:RT 1136. Fant did not examine the table that had been in the booth to determine whether the bullets had initially passed through them. 7:RT 1137-1138. Fant knew neither the table's measurements nor from what it was made. 7:RT 1138-1139.

Based on the trajectory rods and Fant's experience, she opined that if the victims were sitting up in the booth when they were shot, that the suspect was shooting for the victims' upper chest or head areas. 7:RT 1133. He was not shooting at arms or legs, but rather at the victims' center mass or head. 7:RT 1134. As a firearms instructor, Fant was taught to shoot at the head if she could, but otherwise to shoot at the center mass to maximize stopping power by shooting into the largest area of the body. 7:RT 1134. The

trajectory rods also inform Fant's opinion that the suspect was aiming down into the booth. 7:RT 1135.

b. Testimony of Lisa Scheinin, M.D.

Prosecution witness Lisa Scheinin, M.D., a deputy medical examiner with the Los Angeles County Coroner, testified about autopsies her office performed on May 9, 1999 on the four victims in this case. 9:RT 1265-1267. Scheinin supervised the autopsies of Robert Norman and The Hao Tang and reviewed reports of the autopsies of Minh Tram and Lan Thi Dang. 9:RT 1267-1270.

According to Scheinin, Mr. Tram received five gunshot wounds, four of which were fatal. 9:RT 1271, 1329-1330. These included a shot to the back of the head, two to the chest, and one to the abdomen. 9:RT 1272-1273. Scheinin could not determine the order in which the shots were received. 9:RT 1272, 1279, 1284. The bullet that caused the head wound traveled from back to front and up to down. 9:RT 1276. It was possible that Mr. Tram was looking slightly downward as the shooter, standing slightly behind him, shot him in the head. 9:RT 1276-1277. Scheinin could not say whether Mr. Tram was standing, sitting, or laying on the ground when he was shot, however it was clear to her that the gunman was higher than he was. 9:RT 1277.

Mr. Tram received a cluster of three entry wounds on the left side of his body. 9:RT 1278-1279. The wound to his side which was arbitrarily numbered "2" went down to up. 9:RT 1280. That wound is consistent with Mr. Tram having been first shot in the head, then having fallen onto his right side onto the booth, and then having been shot three times in the side by someone standing above him. 9:RT 1280-1281, 1283-1284, 1332. Once the bullet entered his brain, he would have quickly lost consciousness and would probably have been unable to move. 9:RT 1331-1332. The fifth wound probably entered his right forearm after exiting his abdomen. 9:RT 1282-1283, 1329-1330. This wound is consistent with him having been slumped over on his right arm while someone stood over him and fired. 9:RT 1284.

If Mr. Tram first received the wound to the heart, he would have gone into shock in between a couple of seconds and up to two minutes. 9:RT 1333. It is more likely that he went into shock quickly. 9:RT 1333. He could have remained conscious until he went into shock. 9:RT 1333.

According to toxicology reports, at the time of his death, Mr. Tram had no alcohol or illegal drugs in his system. 9:RT 1358.

Mr. Tang received four gunshot wounds, including one probable reentry wound. 9:RT 1286, 1353-1355. It is not possible to know the order in which the wounds were inflicted. 9:RT 1286, 1292, 1294. One wound entered his left temple, went through his brain, and was recovered from the upper part of the right side of his back. Peo. Exh. 47, 48; 9:RT 1286-1288, 1353-1355. That bullet traveled left to right, downward, and slightly front to back, suggesting that the gunman was at a higher level than Mr. Tang during the shooting. 9:RT 1288.

A second bullet entered Mr. Tang's outer left arm, exited through his inner left arm, and probably reentered through his chin, and went through his brain, where it was recovered. 9:RT 1288-1292, 1353-1354. This is consistent with Mr. Tang having thrown his arm across his face to protect himself. 9:RT 1290-1291. If he received this wound first, it would have rapidly disabled him. 9:RT 1336. Either that wound or the wound that entered through his temple would have incapacitated him. 9:RT 1355.

A third bullet went through Mr. Tang's left hand. 9:RT 1292-1293.

The photographs of Mr. Tang marked as People's 1B and 1D depict him with his upper body on the booth, laying on his right side, with his legs off the booth. 9:RT 1294. His position is consistent with him being shot in the left arm and face as he tried to defend himself, then falling to his right, after which someone stood over him and fired into the area above his ear. 9:RT 1294-1295.

Mr. Norman received one gunshot wound which entered his back, went upward through his body, and exited his mouth. 9:RT 1295-1297, 1299. Assuming that (1) Mr.

Norman was seated on the end of the booth where the man wearing the white shirt in People's exhibit 1C is seated; (2) Mr. Tram was on the other side of the booth; and (3) that Ms. Dang and Mr. Tang were between them, Mr. Norman's wound is consistent with him having come out of the booth to try to get away, getting as low as he could to crawl away, and being shot in the back. Peo. Exh. 45, 46; 9:RT 1297-1299, 1350-1352, 1357. In any case, Mr. Norman was probably below the shooter, perhaps crouched down. 9:RT 1322-1323, 1357.

It is unlikely that Mr. Norman was going up and over the booth when he was shot. 9:RT 1315, 1321. It is more likely that he was going down toward the floor. 9:RT 1321-1322. In reaching that opinion, Scheinin took into account the presence of the table in front of the booth. 9:RT 1322. Also, if Mr. Norman had been shot while climbing over the booth and his body was found lying on the floor near the booth as depicted in People's exhibit 1C, then someone would had to have carried him around or thrown his body over the booth. 9:RT 1348.

Had Mr. Norman been hit on the head with enough strength to knock him out, it would have left a mark which would have been noted in the autopsy. 9:RT 1323-1324. In Scheinin's opinion, Dr. Andrews, the examiner who performed Mr. Norman's autopsy, is extremely thorough and would have noted even a slight head injury. 9:RT 1324.

Scheinin saw no evidence that the bullet that killed Norman had entered and exited another person before entering his back. 9:RT 1352. In addition, there was no evidence that the bullet hit anything that caused it to deviate from its path of travel; the bullet traveled through organs and soft tissues and the pathologist was able to insert a single trajectory rod from the entry wound through the exit wound. 9:RT 1351-1353.

Ms. Dang suffered a single gunshot wound that entered the outside of her left arm, exited the inside of her left arm near her armpit, and reentered through the left side of her chest, injuring her lung, heart, and liver. 9:RT 1300-1303, 1345-1346. It is difficult to tell whether the shooter shot from above, below, or straight on. 9:RT 1326, 1356. Ms. Dang

could have been on the ground when she was shot. 9:RT 1326. However, she could only have been lying on her back if the shooter was on the floor, at the same level as her arm. 9:RT 1327. Scheinin believed this scenario was unlikely, because the shooter would have to have been in a very awkward position. 9:RT 1355-1356. It is possible that the wound to her arm had entered and exited another person before entering Ms. Dang. 9:RT 1327-1328.

In the case of each victim, the distance between the shooter and the victim was either distant, that is, two or more feet away, or indeterminate. 9:RT 1315-1319. No soot or stippling was observed. 9:RT 1318. This means either that the firearm was more than two feet away from the victim or that the shooting was at a closer range, but the victim's clothing absorbed any soot or stippling. 9:RT 1317, 1334-1335. To give a better estimate of the firing range, the weapon would have to be test fired, which was not possible in this case. 9:RT 1354.

Bullets generally travel on a straight path through a body, unless they are deflected by hitting a bone. 9:RT 1308-1309. Rarely, a bullet curves along the chest wall, following the gutter between ribs, rather than going straight. 9:RT 1309-1310. However, organs are too soft to deflect the path of a bullet. 9:RT 1310. Neither would clothing affect a bullet's path. 9:RT 1335. In addition, the larger the caliber of the bullet, the less likely it is to be deflected by bone. 9:RT 1310. Occasionally, a defect in a bullet might affect its path. 9:RT 1310. When a bullet hits something, it usually tumbles end over end, wobbles back and forth, or otherwise veers from its path. 9:RT 1325. There is no evidence in any of the autopsies that the bullets hit anything in the victims' bodies which caused their paths to deviate. 9:RT 1354.

It is fairly easy to tell if a bullet has ricocheted or hit an intervening object before entering a person. 9:RT 1339. Ricocheted wounds and reentry wounds are similar, except that to identify a reentry wound it is essential to determine through which other body part the bullet first passed. 9:RT 1339. In each autopsy here, it was possible to see

where the previous wounds went through the body. 9:RT 1339-1340.

In theory, if two people were sitting very close to each other, a bullet could first enter and exit one person and then enter the other. 9:RT 1338. This is more likely to happen if two people are close to each other than if they are far away from each other. 9:RT 1338. Scheinin saw no evidence that this happened in this case. 9:RT 1347.

It would be impossible to know, based solely on the wounds the victims received, their positions in the booth before they were shot. 9:RT 1312. Scheinin could only say whether a certain scenario was consistent, meaning that it fits very well with the wounds. 9:RT 1312-1313. Other variations could also be possible. 9:RT 1313.

Sometimes, when a person is shot, his or her body contorts or whips around. 9:RT 1314. It would not be possible from examining a body to determine whether this happened. 9:RT 1315.

B. The Trial Court Deprived Duong of State Law Rights and His Federal Constitutional Rights to Confront Witnesses Against Him and to Present a Defense

1. The Trial Court Abused Its Discretion by Excluding Relevant and Admissible Evidence Based on its Error of Law

a. The Proposed Testimony of Dr. Posey Was Both Relevant and Admissible

Dr. Posey's proffered testimony was relevant to Duong's intent, the central issue in this case. Therefore, it should not have been excluded unless it was otherwise inadmissible. Cal. Const., art. I, § 28(d); Cal. Evid. Code § 210. No bar to admissibility existed here. Rather, the trial court excluded the essence of Dr. Posey's proposed testimony because it erroneously believed that Penal Code section 29 and *People v. McCowan*, 182 Cal.App.3d 1, 11, 14 (1986), precluded any kind of expert testimony about the ultimate issue of a defendant's intent. 11:RT 1755-1757. In addition, the trial court doubted whether a forensic pathologist could testify based on injury pattern analysis whether the victims' wounds were consistent with accidental or purposeful shootings.

11:RT 1761-1762. The trial court erred. The language of Penal Code section 29 limits its application to experts testifying about a defendant's mental health or defect. Moreover, notwithstanding the trial court's misplaced concerns, the proffered testimony was of a type routinely admitted in California courts.

Penal Code section 29 provides:

> In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact.

Although the plain language of the statute is specific to experts testifying about mental health, the trial court indicated its belief that Penal Code section 29 also prohibited other kinds of experts from testifying about a defendant's mental state. 11:RT 1751. The trial court's interpretation was at odds with both principles of statutory construction and with the case precedent in effect during Duong's trial.

> Under settled canons of statutory construction, in construing a statute [a court] ascertain[s] the Legislature's intent in order to effectuate the law's purpose. [citation omitted]. [A court] must look to the statute's words and give them their usual and ordinary meaning. [citation omitted] The statute's plain meaning controls the court's interpretation unless its words are ambiguous. If the plain language of a statute is unambiguous, no court need, or should go beyond that pure expression of legislative intent.

Green v. State of California, 42 Cal.4th 254, 260 (2007). The words of Penal Code section 29 clearly restrict with great specificity the testimony of experts testifying about a defendant's mental health, while remaining silent as to other types of experts.

Even if the plain language of Penal Code section 29 were not dispositive, the

legislative history leaves no doubt about the Legislature's intent. See, *People v. Gonzalez*, 43 Cal.4th 1118, 1126 (2008). "Senate Bill No. 54 added to the Penal Code sections 28 and 29, which abolished diminished capacity and limited psychiatric testimony." *People v. Saille*, 54 Cal.3d 1103, 1111 (1991); Sen. Bill No. 54 as amended Aug. 11, 1981. Sections 28 and 29 should be read together, because they were enacted together. *People v. Saille*, 54 Cal.3d at 1113. Taken with Penal Code section 28, it is clear that the focus of the legislature in adopting Penal Code section 29 was to effectuate the abolition of the diminished capacity defense by limiting testimony about mental health. Had the Legislature sought to limit other kinds of expert testimony, it could and would have included such language in Penal Code section 29. See e.g., Fed. R. Evid. 704(b).

Moreover, in light of other statutes governing expert testimony, see, e.g., Cal. Evid. Code sections 720, 801, 805, the Legislature manifestly understood that many kinds of experts testify in criminal cases and that experts sometimes testify about the ultimate issues in criminal cases. See also, Fed. R. Evid. 704(a). Had the Legislature intended to restrict the testimony of experts not testifying "about a defendant's mental illness, mental disorder, or mental defect," it would have specified this in Penal Code section 29. The Legislature did not do so.

Furthermore, the trial court's belief that caselaw interpreting Penal Code section 29 precluded the admission of Dr. Posey's testimony was unfounded. The trial court stated that *People v. McCowan*, 182 Cal.App.3d 1, 11, 14 (1986), required it to exclude Dr. Posey's testimony. In fact, *McCowan* supports the opposite conclusion. In *McCowan*, the trial court permitted defendant to call Dr. Galioni, a mental health expert who testified that as a result of defendant's mental disorder, he was out of control the night of the offenses. *Id.* at 14. The trial court did not, however, permit Dr. Galioni to testify that defendant lacked the capacity to form the specific intent to commit the offenses. *Id.* at 11. The court of appeal approved the trial court's ruling, explaining that

> the statute does not forbid an expert from stating his opinion about the accused's mental state. Dr. Galioni stated his opinion that, as a result of defendant's mental disorder, he was out of control when he committed the offenses. Section 29 precluded Dr. Galioni only from testifying whether defendant had one of the mental states required for the offenses -- for example, malice aforethought. That ultimate determination must be made by the trier of fact.

Id. at 14. Thus, under *McCowan*, while a mental health expert could not have testified that Duong killed with or without malice, it would have been perfectly acceptable for Dr. Posey, even assuming that section 29 applied, to opine that, in light of the forensic evidence, it appeared that the killer meant to shoot Mr. Tram and did not mean to shoot Mr. Tang, Ms. Dang, or Mr. Norman. See also, *People v. Jackson*, 152 Cal.App.3d 961, 965-968 (1984) (trial court precluded psychiatrist from testifying that defendant lacked the capacity to form the requisite intent for attempted murder, but permitted testimony that the stabbing was "'nearly an involuntary act.'").

Moreover, *McCowan*, a court of appeal case, never addressed the scope of Penal Code section 29. Five years after *McCowan*, in *People v. Breaux*, 1 Cal.4th 281, 303 (1991), appellant, relying on the plain language of Penal Code section 29, argued that the trial court erred in prohibiting his psychiatric expert from testifying that as a result of his rage, drug use, and sleep deprivation, he did not premeditate and deliberate at the time of the homicide of which he was convicted. Finding no prejudice, this Court declined to rule on whether Penal Code section 29 proscribes experts who do not testify about a defendant's "mental illness, mental disorder, or mental defect" from opining about a defendant's mental state. *Id.* Nevertheless, as explained below, statutes and caselaw make it clear that Penal Code section 29 is inapplicable here.

It is well settled that "[t]estimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." Cal. Evid. Code § 805. Evidence Code section 805 applies to experts whose testimony relates "to a subject that is sufficiently beyond common experience that the

opinion of an expert would assist the trier of fact," and is

> [b]ased on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness . . . that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

Cal. Evid. Code § 801. Thus, six years after *Breaux*, consistent with Evidence Code sections 801 and 805 and notwithstanding Penal Code section 29, this Court held that it was proper for a pathologist to "explain" based on the victim's wounds that a killing had been done "in a deliberate manner." *People v. Welch*, 20 Cal. 4th 701, 751 (1999).

This Court has made clear that Evidence Code section 801 permits a forensic pathologist to offer expert testimony not only as to the cause of death but also as to possible circumstances under which death occurred. *People v. Mayfield*, 14 Cal.4th 668, 766 (1997). This includes testimony, based on injury patterns, as to whether death was inflicted accidentally or deliberately. *People v. Welch*, 20 Cal. 4th at 751; *People v. Obie*, 41 Cal.App.3d 744, 756-757 (1974), disapproved on another ground by *People v. Rollo*, 20 Cal.3d 109, 120, n.4 (1977); See also, *People v. Steele*, 27 Cal. 4th 1230, 1274-1275 (2002) (George, J., concurring). For example, in *People v. Benavides*, 35 Cal. 4th 69, 102 (2005), a pathologist testified that, based on the victim's injuries, it appeared that he was killed by someone in a rage. In *People v. Jones*, 14 Cal.App.4th 1252, 1256 (1993), a forensic pathologist testified that the position and severity of the victim's wounds led him to believe that "the killing had occurred during an uncontrolled outburst of rage rather than during a premeditated act." In another case, a forensic pathologist testified based on the victim's injuries that the attacker inflicted the wounds with "a degree of hesitation." *People v. Bobo*, 229 Cal.App.3d 1417, 1426 (1990). Other kinds of experts have also testified to their opinions about a suspect's mental processes. For example, this Court, explaining that the testimony was relevant to the defendant's motive and not simply an

opinion as to his guilt, found no error where the prosecutor's gang expert testified that gang members, such as defendant, are "armed with the *intention of shooting* anyone who issued any form of gang challenge." *People v. Ward*, 36 Cal.4th 186, 209-210 (2005) (emphasis added). Similarly, the court of appeal found that Penal Code section 29 did not preclude a gang expert from testifying that a defendant who was a gang member acted for gang-related purposes. *People v. Zepeda*, 87 Cal.App.4th 1183, 1208 (2001). Here, Duong sought to ask Dr. Posey whether a shooter who placed shots in the manner indicated by the autopsy reports would likely have done so purposefully or inadvertently. If credited by the jury, Dr. Posey's opinion as to the aim or purpose of the shootings could have led to a variety of legal conclusions. Like the gang experts in *Ward* and *Zepeda*, Dr. Posey would have, based on his experience in accident reconstruction analysis and forensic pathology, provided expert guidance as to the purpose of an hypothetical person who inflicted wounds like the victims in this case received.

California courts have long permitted narcotics officers to provide expert testimony on the ultimate issue of intent in cases involving the possession of drugs for sale. *People v. Harris*, 83 Cal.App. 4th 371, 374-375 (2000); *People v. Martin*, 17 Cal.App.3d 661, 668 (1971) (relying on Evidence Code section 805 and *People v. Cole*, 47 Cal.2d 99, 105 (1956)); See also, *People v. Newman*, 5 Cal.3d 48, 53 (1971), overruled on other grounds, *People v. Daniels*, 14 Cal.3d 857, 862 (1975); *People v. Arguello*, 244 Cal.App.2d 413, 415-422 (1966).

Physicians have also provided testimony about a defendant's mental state. For example, in a worker's compensation fraud case, the prosecutor was required to prove that the defendant knowingly making false statements with the specific "intent to defraud." *People v. Adan*, 77 Cal.App.4th 390, 393 (2000). The trial court permitted two physicians to testify for the prosecution that the defendant was malingering, which they defined as "an exaggeration of symptoms in order to secure some type of gain." *Id.* Although this definition of malingering was virtually identical to the requisite intent for

the crime of worker's compensation fraud, the court of appeal found that, absent testimony that defendant had the specific intent to commit worker's compensation fraud, there was no violation of Penal Code section 29. *Id.* The court of appeal further noted that Penal Code section 29 might have been inapplicable, because the physicians did not testify about any mental disability. *Id.* at n.3. *Adan* is similar to Duong's case. In each case, the experts were physicians whose opinions were relevant to the defendant's mental state but not dispositive of whether he had the intent to commit a specific crime. Also, like those of the physicians in *Adan*, Dr. Posey's opinions and expertise were unrelated to mental defects.

As explained above, courts have routinely permitted forensic pathologists to testify about mental processes based on injury patterns. However, even if such testimony were somehow unusual, as a medical doctor, Dr. Posey was clearly qualified to give an opinion about what happened to the victims from which the jurors would infer Duong's mental processes. This Court has explained that a forensic pathologist, as a medical doctor, is qualified to testify about a wide variety of issues. *People v. Chavez*, 39 Cal.3d 823, 828-829 (1985). In *Chavez*, this Court found no error where a forensic pathologist testified for the prosecution "that a person who performed the acts ascribed to defendant would have the requisite intent to commit robbery regardless of whether such person had been drinking or was drunk." *Id.* at 828. This was true even though the pathologist "had no professional experience in estimating blood alcohol based upon the actions of a live person." *Id.* at 829. The experience of Dr. Posey, who had performed 1440 autopsies and had extensive experience in reconstructing incident scenarios based on accident scene evidence was far more qualified to testify about the subject at hand than was the pathologist in *Chavez*.

For these reasons, the trial court clearly erred. When, as here, a "trial court's decision rests on an error of law, that decision is an abuse of discretion." *People v. Superior Court (Humberto S.)*, 43 Cal.4th 737, 746 (2008).

b. Dr. Posey's Testimony Was Also Admissible to Rebut the Testimony of Patricia Fant

As explained above, Patricia Fant opined that. based on her trajectory rod analysis, the shooter was aiming for or shooting for the victims' center mass or heads. The word aim means to intend or to intend "for a particular purpose." Dictionary.com Unabridged Random House, Inc., (v 1.1 2006). Thus, Fant, based on her analysis of forensic evidence, was testifying as to the shooter's intent. Once the prosecutor elicited Fant's testimony about the shooter's intent, Duong was entitled to present another point of view. *People v. Steele*, 27 Cal. 4th 1230, 1247-1248 (2002). This is true even though Duong did not specifically object to Fant's testimony. *Id.* at 1248-1249. In *Steele*, the defendant was charged with two killings. On direct examination, defendant elicited from the prosecutor's pathologist on cross-examination that one of the killings might have been committed in a "rage." *Id.* at 1247. The prosecutor did not object to this testimony, but on redirect, educed from the pathologist that the killing could also have been "methodical" and that because the two killings were very similar, if the same person committed both killings, that would influence his opinion about whether they were committed in a rage or methodically. *Id.* This Court explained that the prosecutor's cross-examination was proper because the defense opened the line of inquiry, the line of inquiry was relevant, and the prosecutor was entitled to present "the full picture." *Id.* at 1248-1249.

Dr. Posey's testimony was necessary and proper rebuttal evidence. It was restricted to evidence made necessary by the prosecutor's direct examination of Patricia Fant. See, *People v. Harris*, 37 Cal.4th 310, 335-336 (2005). The prosecutor opened the door by eliciting the same kind of testimony from Patricia Fant, the testimony was relevant to the central issue in the case, and the testimony was essential to Duong's ability to present the full picture to the jury. For these reasons, the trial court's ruling was erroneous.

2. Duong Was Entitled to Present a Complete Defense

The trial court's error was not merely a misunderstanding of state evidentiary rules, but also an assault on Duong's constitutional rights. Evidence may only be excluded from criminal trials if exclusion does not conflict with a defendant's Sixth and Fourteenth Amendment rights to a "meaningful opportunity to present a complete defense." *California v. Trombetta,* 467 U.S. 479, 485 (1984); *Crane v. Kentucky,* 476 U.S. 683, 690 (1986); *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). These rights are violated when a court arbitrarily excludes "important defense evidence" without serving any "legitimate interests." *Holmes*, 547 U.S. at 325. Indeed, "the Sixth Amendment was designed in part to make the testimony of a defendant's witnesses admissible on his behalf in court[.]" *Washington v. Texas*, 388 U.S. 14, 22 (1967). Excluding the testimony of a witness "whose testimony would have been relevant and material to the defense," *Id.* at 23, "deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" *Crane v. Kentucky,* 476 U.S. at 690-691, citing *United States v. Cronic*, 466 U.S. 648, 656 (1984). Moreover, preventing a jury from hearing such evidence interferes with the its ability to "decide where the truth lies." *Washington v. Texas*, 388 U.S. at 19.

Here, Dr. Posey's testimony was not only relevant, but it directly affected the jury's finding of guilt. *Chambers v. Mississippi*, 410 U.S. at 302. In barring the essence of Dr. Posey's proffered testimony, the trial court made it impossible for Duong to present evidence that could have persuaded the jury to find him not guilty of first degree murder. See, e.g., *Brown v. Runnels*, 2007 U.S. Dist. Lexis 9774 at 15-30 (N.D.Cal. 2007) (Sixth and Fourteenth Amendments violated where trial court limited expert testimony that would have established defendant's lack of malice where the central issue in the case was whether defendant had the intent to commit second degree murder); *Mott v. Stewart*, 2002 U.S. Dist. Lexis 23165 at 20 (D.Ariz. 2002) (exclusion of expert testimony "offered to negate the specific intent element of an offense or to establish an alternative

explanation for a defendant's conduct" violated defendant's right to present a defense). Furthermore, this evidence was critical to the jury's assessment of the testimony of Patricia Fant. See, e.g., *Depetris v. Kuykendall*, 239 F.3d 1057, 1062 (9th Cir. 2001). This was one in a series of erroneous rulings that left the jury without information that was vital to the reliability of its determination of his guilt.[29]

Crucially, the State had no legitimate interest in preventing Dr. Posey from presenting his view of the forensic evidence. As explained in section 2(a) above, the trial court's ruling was not based on a legitimate state interest, but rather on its misunderstanding and misapplication of state law. See, e.g., *United States v. Peters*, 937 F.2d 1422, 1424-1426 (9th Cir. 1991) (Sixth Amendment violated where trial court excluded defense expert based on its erroneous interpretation of state discovery rules). Moreover, because prosecution witness Patricia Fant testified about the intent of the shooter, the "state's interest is served marginally if at all by excluding" Dr. Posey's "testimony while allowing that of" Ms. Fant. *Mitchell v. Gibson*, 262 F.3d 1036, 1055 (10th Cir. 2001).

Because Dr. Posey's testimony was critical to Duong's defense and no legitimate state interest required the trial court to limit it, its exclusion was arbitrary and violated Duong's Sixth and Fourteenth Amendment rights.

3. The Trial Court's Ruling Violated Additional Constitutional Rights

In excluding the core of Dr. Posey's proffered testimony, the trial court, in violation of the Fourteenth Amendment, tipped the balance of forces against Duong and in favor of the prosecutor. See *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). The trial court also lessened the prosecutor's burden of proof. See, e.g., *Sandstrom v. Montana*, 442 U.S. at 520-524. While preventing Duong from presenting Dr. Posey's testimony, the

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[29] Claims III, above, and Claims Vand IX, below are incorporated by reference.

trial court permitted the prosecutor to elicit from Patricia Fant and other witnesses testimony about the shooter's intent and mental processes. Thus, the trial court through its imbalanced rulings not only denied Duong the opportunity to present a defense, but also unfairly bolstered the evidence presented by the prosecutor. Duong was equally if not more entitled than the prosecutor to present his version of the case. The inequality in the trial court's treatment of the parties skewed the proceedings in favor of the prosecutor by ensuring that the jury heard a mountain of highly inflammatory prosecution evidence, and had no opportunity to hear Duong's defense.

In addition, the exclusion of this evidence violated Duong's due process rights by arbitrarily depriving him of a liberty interest created by Cal. Constitution, article I, section 28(d) to present all relevant evidence. *Hicks v. Oklahoma*, 447 U.S. 343, 346-347 (1980). The trial court's error also deprived Duong of his right to a reliable adjudication at all stages of a death penalty case. *See Lockett* v. *Ohio,* 438 U.S. at 603-605; *Beck* v. *Alabama*, 447 U.S. at 638; *Penry* v. *Lynaugh,* 492 U.S. at 328 (1989).

4. The Trial Court's Ruling Requires Reversal

The violation of a defendant's right to present a defense is subject to harmless error analysis. *Crane v. Kentucky,* 476 U.S. at 691. Similarly, when a trial court prohibits a defendant from challenging the testimony of a prosecution witness, the state must prove that the errors are harmless beyond a reasonable doubt. *Delaware v. Van Ardsall*, 475 U.S. 673, 684 (1986). Here, the State cannot prove beyond a reasonable doubt that the violations of Duong's constitutional rights individually and when considered together did not contribute to the verdict. Even if the issue is reviewed only under California law the judgment must be reversed because it is reasonably probable that the error contributed to the verdict. *People v. Watson* 46 Cal.2d 818 (1956).

Injury pattern evidence was critical to the jury's determination of Duong's intent, the central issue in this case. Had Dr. Posey been permitted to testify consistent with Duong's proffer, the jury would have learned that, in one expert's opinion, the injury

patterns were consistent with the suspect shooting Mr. Tram purposefully, but shooting Mr. Tang, Ms. Dang, and Mr. Norman inadvertently. Without Dr. Posey's testimony, the jury was misled to believe that the only opinion held by any expert was that all the killings were deliberate. In closing, the prosecutor took full advantage of the lopsided picture before the jury, arguing:

> Ms. Fant who is very, very experienced with firearms testified. . . . that it was consistent with him standing and shooting into the booth, first towards the back of the booth or side, and then around in front of the booth firing into the booth from up to down, firing at people's head area and center mass area. And that somebody, ladies and gentlemen, is acting with a willful, deliberate, premeditated intent to kill.

12:RT 1960.

Dr. Posey's testimony would have also supported Duong's defense that he killed Mr. Tram in the heat of passion and that he killed Ms. Dang, Mr. Norman, and Mr. Tang inadvertently. However, in assessing the overwhelming prejudice of the trial court's faulty ruling, this Court must examine it in combination with the series of errors with which the trial court completely derailed Duong's defense. Duong planned to testify that he killed Mr. Tram in defense of a third party and that he killed Mr. Norman, Ms. Dang, and Mr. Tang accidentally. Dr. Posey's testimony would have supported and corroborated Duong's testimony. Had the trial court permitted Duong to present evidence about International Club's permit proceedings,, that evidence, in combination with Dr. Posey's testimony, would have corroborated Duong's claim of defense of a third party and impeached prosecution witness John Bui. Instead, as a result of the trial court's erroneous rulings, Duong was left with virtually no defense.[30] Indeed, based on these rulings the trial court refused to instruct the jury on defense of a third party or on

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[30] Claims III, above, and V, and IX, below, are incorporated by reference herein.

accident. This forced Duong to argue that he killed Mr. Tram in the heat of passion– a theory that was not consistent with the evidence.

The trial court, by permitting the jury to hear only the prosecution's evidence, left it with the misleading view that Duong had no case to present. See, e.g., *Holmes v. South Carolina*, 547 U.S. at 331. The State cannot prove that this decimation of Duong's defense was harmless beyond a reasonable doubt or that it did not contribute to the verdict. Duong's conviction must be reversed.

V. THE TRIAL COURT DEPRIVED DUONG OF HIS FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WHEN IT ERRONEOUSLY RULED THAT THE PROSECUTOR COULD INTRODUCE MINIMALLY PROBATIVE, BUT HIGHLY INFLAMMATORY PROPENSITY EVIDENCE IF DUONG TESTIFIED ON HIS OWN BEHALF

Over defense objection, the trial court erroneously ruled that the prosecutor could introduce incendiary evidence of two uncharged robbery homicides which bore no similarity to the charged crime if Duong testified that the International Club shootings were committed in self-defense, defense of another and/or as a result of inadvertence or accident. Despite well-settled law to the contrary, the trial court indicated that if Duong elected not to testify based on its ruling, he would be able to raise this issue on appeal. Duong prejudicially relied on the trial court's misstatement of law and made a waiver of his right to testify that was not knowing and intelligent.

The threat of this inflammatory, confusing, unnecessary, and unduly prejudicial evidence deprived Duong of his right to testify, present a defense, due process, a fair trial, an impartial jury, freedom from self-incrimination, to have the prosecution prove each element of the charged crimes beyond a reasonable doubt, and to guilt and penalty determinations free from arbitrariness and requires reversal.

A. Legal Standards Governing Cross-Examination of a Defendant with Other Crimes Evidence

Cross-examination is a matter "within the scope of the direct examination." Cal. Evid. Code § § 761, 773. "[I]f a defendant takes the stand and does not deny the crime charged, he may be cross-examined only as to matters about which he was examined in chief." *People v. Doebke*, 1 Cal.App.3d 931, 936 (1969), citing *People v. Robinson*, 61 Cal.2d 373, 392-394 (1964); *People v. Schader*, 71 Cal.2d 761, 769 (1969). Underlying these evidentiary provisions are a defendant's rights against self-incrimination and to have the prosecutor prove every element of the charged crime beyond a reasonable doubt. U.S. Const. Amends V, VI, XIV; *Schader*, 71 Cal.2d at 769-770.

However, a defendant's testimony may "open the door to otherwise inadmissible evidence which is damaging to his case." *McGautha v. California*, 402 U.S. 183, 213 (1971). This is because when a defendant testifies, his "credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of the waiver is determined by the scope of *relevant* cross-examination." *Brown v. United States*, 356 U.S. 148, 154-155 (1958) (emphasis added); *Portuondo v. Agard*, 529 U.S. 61, 69 (2000). This is true even if the cross-examination might inculpate him on another offense for which he is subject to prosecution. *People v. Coffman and Marlowe*, 34 Cal.4th 1, 72 (2004).

Thus, when a defendant voluntarily testifies, the prosecutor may inquire into "the facts and circumstances surrounding his assertions," or introduce "evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them." *Schader*, 71 Cal.2d at 771. This includes, "'the eliciting of any matter which may tend to overcome or qualify the effect of the testimony given by him on direct examination.'" *Id.*, quoting *People v. Pike*, 58 Cal.2d 70, 90 (1962). When a defendant's testimony places at issue "motives, intent, and state of mind during the" charged crime, a reviewing court must examine under the rubric of other crimes evidence the propriety of the prosecutor's introduction through cross-examination of collateral offenses. *Id.* at 773-774.

"Evidence of a person's character or a trait of his or her character (whether in the

form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Cal. Evid. Code § 1101(a). As Witkin has explained:

> The reasons for exclusion are: '*First*, character evidence is of slight probative value and may be very prejudicial. *Second*, character evidence tends to distract the trier of fact from the main question of what actually happened on the particular occasion and permits the trier of fact to reward the good man and to punish the bad man because of their respective characters. *Third*, introduction of character evidence may result in confusion of issues and require extended collateral inquiry.' [Citations.] 1 Witkin Evid. § 42 at 375, (4th ed. 2000) (italics original).

The rule excluding evidence of criminal propensity is over three centuries old in the common law. 1 Wigmore, Evidence § 194 at 646-647 (3d ed. 1940), cited in *People v. Falsetta*, 21 Cal.4th 903, 913 (1999) and *People v. Alcala*, 36 Cal.3d 604, 630-631 (1984). Indeed, the propensity rule is in effect in every jurisdiction in the United States. *People v. Ewoldt*, 7 Cal.4th 380, 392 (1994); see also *McKinney v. Rees*, 993 F.2d at 1378, 1380-1381 & n.2 (citing statutes and cases codifying or adopting the rule); *Jammal v. Van De Kamp*, 926 F.2d 918, 920 (9th Cir. 1991).

Evidence of uncharged misconduct is admissible when "relevant to prove some fact (such as motive, opportunity, intent [. . .]) other than his or her disposition to commit such an act." Cal. Evid. Code § 1101(b); *People v. Catlin*, 26 Cal.4th 81, 145-146 (2001). The critical inquiry in assessing the materiality of evidence concerning uncharged misconduct is the nature and degree of similarity between the uncharged misconduct and the charged offense. *People v. Ewoldt*, 7 Cal.4th at 402. "In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant 'probably harbor[ed] the same intent in each instance. [citations]'" *Id.*, quoting *People v. Robbins*, 45 Cal.3d 867, 879 (1988).

This Court has recognized that evidence of uncharged misconduct "'is so prejudicial that its admission requires extremely careful analysis.'" *People v. Ewoldt*, 7 Cal.4th at 404, citing *People v. Smallwood*, 42 Cal.3d 415, 428 (1986), and *People v.*

Thompson, 45 Cal.3d 86, 109 (1988). The primary goal of this careful analysis is to ensure that the evidence is *not* offered to prove character or propensity *and* that its practical value outweighs the danger that the jury will nevertheless view it as evidence of criminal propensity. Therefore, even if character evidence is relevant within the meaning of Evidence Code section 1101, subdivision (b), such evidence may not be admitted if its probative value is "substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury" under Evidence Code section 352. *People v. Ewoldt*, 7 Cal.4th at 404, citing *People v. Thompson*, 27 Cal.3d 303, 318 (1980).

This Court has enumerated five factors which a trial judge must consider in weighing evidence of uncharged misconduct under Evidence Code section 352: (1) whether the evidence is material, i.e., the tendency of the evidence to demonstrate the issue for which it is being offered; (2) the extent to which the source of the evidence is independent of the evidence of the charged offense; (3) whether the defendant was punished for the uncharged misconduct; (4) whether the uncharged misconduct is more inflammatory than the charged offense; and (5) whether the uncharged misconduct is remote in time. *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 404-405.

Trial court rulings on the admissibility of evidence under Evidence Code section 1101, subdivision (b), and on the admission or exclusion of evidence under section 352, are both reviewed for abuse of discretion. *People v. Lewis* 25 Cal.4th 610, 637 (2001) (Evid. Code § 1101(a)); *People v. Ashmus* 54 Cal.3d 932, 973 (1991) (Evid. Code § 352).

B. This Court Should Permit Duong to Appeal the Trial Court's Erroneous Ruling that, If Duong Testified, the Prosecutor Could Cross-Examine Him about Unadjudicated Offenses

To inform his decision about whether to testify Duong sought an advance ruling on the prosecutor's motion to cross-examine him about unadjudicated offenses. 8:RT 1240-1241, 1245, 1252-1254; 10:RT 1552, 1638. Duong made an offer of proof as to the substance of his testimony. 11:RT 1641 [see section C of this claim, below]. The trial

court initially declined to make an advance ruling, explaining that if he made "an erroneous ruling" to admit the uncharged homicides, he might "create an issue on appeal that the defendant didn't exercise his right to testify because of the erroneous ruling." 10:RT 1637-1638. The prosecutor indicated that he disagreed that the issue would be preserved, but the trial court never responded. 10:RT 1638. Nevertheless, the trial court ultimately issued a tentative ruling that if Duong's testimony were substantially similar to his proffer, the prosecutor could cross-examine him about two uncharged offenses. 11:RT 1665.

On the basis of the trial court's ruling, defense counsel, who continued to object, advised Duong to waive his right to testify; Duong did so on the record. 11:RT 1685-1686.[31]

California has adopted the federal "Luce Rule" which prohibits a defendant who does not testify from raising on appeal a trial court's in limine ruling to admit a prior conviction offered for impeachment. *People v. Collins*, 42 Cal.3d at 383-385; *Luce v. United States*, 469 U.S. at 43. This Court later extended the Luce Rule to include unadjudicated offenses admitted for any legitimate purpose. *People v. Sims*, 5 Cal.4th at 455. Although the Luce Rule was in place at the time of Duong's trial, this Court cannot, consistent with fundamental fairness, apply the rule to him.

As explained in Claim III, above, Duong's waiver of his fundamental right to testify was not knowing, intelligent, and voluntary, because the trial court indicated that its ruling on the uncharged homicides was appealable even if Duong did not take the stand. Duong's reliance on the trial court's misstatement of law would have been reasonable under any circumstances. Here, the trial court's comments were particularly misleading because defense counsel concomitantly objected to the trial court's ruling and

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[31] Claims III, above, and IX, below, are incorporated by reference herein.

advised Duong not to testify, further suggesting that the erroneous ruling could be properly raised on appeal. 8:RT 1240-1241, 1245, 1252-1254; 10:RT 1552, 1637-1638; 11:RT 1665-1668, 1670, 1685-1686.

Critically, in *Collins*, this Court announced that the Luce Rule would only apply prospectively, because application of the rule to a defendant who relied on earlier guidance from the courts would be "'grossly unfair' and would 'wreak a substantial inequity.'" *People v. Collins*, 42 Cal.3d at 388-389, quoting *United States v. Givens*, 767 F.2d 574, 578 (9th Cir. 1985). Duong's reliance on the trial court's misstatement of law, especially where his own counsel's actions fueled the misunderstanding, was no less reasonable than Collins's reliance on the state of the law at the time of his trial.

Moreover, while, in *Collins*, this Court described the difficulties a reviewing court faced in assessing the prejudice of an in limine ruling where a defendant did not testify, it also acknowledged that appellate courts could analyze the impact of the error based on a defendant's offer of proof. *People v. Collins*, 42 Cal.3d at 389-393. Because Duong's offer of proof makes it possible and because fundamental fairness requires it, this Court must review the trial court's erroneous ruling.

C. The Evidence of Duong's Participation in Two Robbery-Homicides was Not Relevant to Prove His Intent or to Prove Any Other Disputed Issue

1. Proceedings Below

Toward the close of his case-in-chief, the prosecutor moved that, if Duong testified that he shot the victims in self-defense, in defense of a third party, or inadvertently, he be permitted to cross-examine Duong and present rebuttal evidence about four uncharged homicides: (1) a 1997 murder and attempted murder at Thien Thanh supermarket in San Jose; (2) a 1998 murder and attempted murder at Wintec Industries in Fremont; (3) a 2001 attempted murder at Tradtional Jewelers in Newport Beach; and (4) a 2001 murder at Jade Galore jewelry store in Cupertino. 4:CT 968-969; 9:RT 1258, 11:RT 1650-1657. Later, the prosecutor added to this request uncharged robberies of Dell Computers in

Texas. 11:RT 1651.

Seeking an in limine ruling, defense counsel made the following offer of proof: Duong would testify that he shot Minh Tram because he believed that Tram was going to cause great bodily harm or death to a person named Khoung aka "Chestnut."11:RT 1641. After Duong shot Tram, John Bui intervened, Bui and Duong struggled over the gun, and the gun discharged, killing the other victims. 11:RT 1641. After Bui was pushed away from Duong, Duong fired additional shots at Minh Tram.
11:RT 1641.

The prosecutor indicated that if Duong so testified, he would test Duong's credibility with cross-examination about, among other things, where he got the gun, whether he went out to his car to get it, whether he had previously fired the gun to determine whether it was operable, why he brought the gun to the club, and whether he had ever previously pointed a gun at anyone. 11:RT 1642-1643. He also stated he would not initially go into specific incidents; rather, he would ask Duong whether he had ever intentionally pulled the trigger before and impeach him with the uncharged homicides if Duong denied having done so. 11:RT 1649, 1652-1653.

The trial court ruled that if Duong's testimony were substantially similar to his proffer, it would permit the prosecutor to cross-examine him about the homicides that took place during robberies of the Thien Thanh market and the Jade Galore jewelry store only. 11:RT 1665.

Duong then unsuccessfully argued that the trial court should limit the prosecutor to cross-examination on only one uncharged murder . 11:RT 1167-1168. Duong, arguing that the evidence of the other crimes was unreliable, requested a foundational hearing. 4:CT 981-984; 11:RT 1658. The trial court suggested that because most of the critical evidence, including eyewitness identifications and statements of Christine Chen, were outlined in police reports, a hearing was unnecessary. 11:RT 1657-1658. No hearing occurred.

The trial court indicated that if Duong testified and the evidence came in, it would instruct the jury to consider it only to determine whether Duong had the requisite intent to commit the charged crimes and whether any death was the result of inadvertence or accident. 11:RT 1666-1667.

a. The Thien Thanh Robbery-Homicide

The prosecutor alleged that on May 3, 1997, Duong approached two men, Thien Tang and Chau Quach, whom he shot. 1:RT 117; 11:RT 1650; 1:CT 224-225. Tang survived, but the Quach, an elderly man, did not. 1:CT 224-225; 1:RT 117; 11:RT 1650. The homicide occurred during the robbery of the Thien Thanh Supermarket in San Jose. 4:CT 1097, 1098-1100; 1:RT 117. Duong made an admission to Christine Chen that he was involved in the incident. 11:RT 1650. In addition, Mr. Tang identified Duong in a photo lineup. 11:RT 1650. The prosecutor told the court that the lineup contained 12 photographs. 11:RT 1650. In fact, the lineup, which was admitted into evidence, contains only nine photographs. Peo. PP exh. 5.

b. The Jade Galore Robbery-Homicide

The prosecutor alleged that on March 13, 2001, during a "takeover robbery at a high-dollar jewelry store in the middle of the day in a mall," Duong shot and killed a security guard, Josephino Cambosa, with a high powered rifle that, according to the prosecutor, fired either .227 or .223 ammunition. 1:RT 117-188; 11:RT 1652, 1654. Crime lab reports indicate that the ammunition that law enforcement recovered was actually nine and 7.62 millimeter. 1:CT 234.

A Rolex watch stolen from Jade Galore was recovered from a mail drop where Duong received mail. 11:RT 1654. A witness saw an Asian man with a ponytail running from a parked white Honda to Jade Galore. 16:RT 1656. Christine Chen, who took part in and helped plan the robbery, stated that a white Honda was used in the commission of the crime. 16:RT 1654.

In addition, receipts indicated that Duong had stayed in a hotel near Jade Galore

the night before the robbery. 16:1654. Also, witnesses would testify that within days of the Jade Galore robbery, Duong and friends went to a motorcycle shop and spent $30,000 to $40,000 in cash on motorcycles. 16:RT 1657.

The prosecutor said he believed Duong had told Ms. Chen that he had shot Mr. Cambosa, because he believed that Cambosa was going to shoot a coperpetrator, however, he needed to look this up. 11:RT 1652, 1654. Nothing in the record suggests that the prosecutor retrieved any such information prior to the trial court's ruling. Excerpts in the record of a law enforcement interview with Ms. Chen contain no such statements. 4:CT 1078-1100. Ms. Chen did not testify at the grand jury in this case. At penalty, she testified that Duong told her he shot the security guard because the guard was "reaching either for a gun or a phone to call 911." 15:RT 2645.

c. The Prosecutor's Arguments for Admitting the Uncharged Crimes

In support of admitting the uncharged robbery homicides, the prosecutor argued the following:

(1) Duong's testimony would put premeditation and his mental state at issue, entitling the prosecutor to impeach him with the uncharged homicides. 4:CT 696-971; 11:RT 1646. In this context, the uncharged homicides were not other crimes evidence, but rather intent evidence. 11:RT 1649. The uncharged killings *were not* similar to the International Club homicides. 10:RT 1636. However, they were critical to issues of intent, malice, and deliberation, because Duong had allegedly pointed a gun at someone both before and after the International Club shootings and "it is an unusual circumstance that one person points a gun at another human being in their life." 10:RT 1636-1637.

> We are dealing with a very unique intent that's formed in one person's mind when they initially go some place with a gun. When they loaded that gun before they put that gun on their person. When they go to a location with the state of mind that if there is trouble I am prepared to do this.

Would it be fair -- would it be fair to the prosecution in this case or to the victims if the jury heard Mr. Duong's testimony and said, you know what, he was put in a very unusual situation. This is the kind of thing he never faced before. And it's the same kind of thing he faced before, because he pointed a gun at people before and made the decision whether or not to end their life. And this goes to his intent. *It goes to his ability to premeditate it.*

One of the instructions, the premeditation instruction, your honor, talks about the lapse of time. And the instruction indicates that it will differ with different people under different circumstances and that *some people can premeditate* it very, very quickly. But that other people, they don't arrive at premeditated decision. It's merely an impulse.

Judge, isn't it relevant that this man has from close distances shot other people? Isn't that relevant as to how quickly he can premeditate it? *This man knows something few other people in a civilian society know, and, that is, that when you point a gun and pull the trigger, it ends somebody's life.* He knows that. He has that experience. He had that experience when he pulled the trigger in this case.

How can I question him, how can I reliably question him about his state of mind, his ability to deliberate, how quickly he can deliberate, if I am not able to inquire, have you done this before, you know the aftermath.

Think of the thought process, Judge. Realistically doesn't one think that if you have killed somebody you are -- it's going to be very difficult for you to do it again. You are going to walk away from a situation unless you have a criminal intent, *unless you are a criminal*, unless your intent is to kill people, and unless you can form that intent very quickly, unless you can deliberate very quickly.

Imagine, judge, the state of mind one would have having shot people in the past, some lived and some died, and having to look at them as they are laying on the ground after you shot them and looking into their eyes and seeing their eyes fade away, their life fade away and yet you again put yourself in that position where you once again take people's lives.

Judge, the offer of proof -- the offer of proof as to what

> Mr. Duong is going to testify to, especially as to how the shooting occurred, is gratuitous. That's the people's position. I don't mean that to mock it. But what I mean is I have a right -- I have a right, an obligation to carefully and thoroughly cross-examine on that issue. And the fact that this man has pointed a gun and pulled the trigger before is so critical as to the issue of intent. 11:RT 1643-1646, 1649 (emphasis added).

(2) The uncharged homicides *were* similar to International Club because in each case Duong went to a location with a loaded gun, pulled the trigger, shot in close range, and sometimes wounded or killed people whom he shot in the same parts of the body in which the International Club victims were shot. 11:RT 1642-1643, 1648, 1650.

(3) The uncharged crimes were admissible pursuant to Evidence Code section 1103(b) to rebut any testimony that victim Minh Tram behaved like a violent man the night of the homicides. 4:RT 971, 11:RT 1646-1647.

(4) Notwithstanding the other evidence that the prosecutor presented, absent cross-examination or rebuttal about the uncharged homicides, the jury would believe Duong's testimony because he was "nice looking" and would be "very calm and collected" during his testimony. 11:RT 1647.

(5) Despite prohibitions on referring to excluded evidence, in the absence of cross-examination or rebuttal evidence about the uncharged homicides, the jury would inevitably be misled during the defense closing argument if the evidence were not admitted. 11:RT 1647.

(6) The prejudice from excluding the uncharged homicides might spill over to eventual proceedings on the uncharged homicides in which Duong might also testify that he shot in self-defense. 11:RT 1648.

d. Duong's Objections

Duong opposed the prosecutor's motion orally and in writing. on the following

bases:

(1) The highly prejudicial evidence would deprive Duong of a fair trial and was inadmissible under the Fourth, Fifth, Sixth, and Fourteenth amendments to the federal constitution and all applicable state and federal law. 4:CT 980-989; 11:RT 1659.

(2) The unadjudicated offenses should be excluded under Evidence Code section 1101, because they were insufficiently similar to the International Club homicides to be admissible to prove intent or a modus operandi; unlike the International Club killings, each of the uncharged homicides allegedly occurred during the course of a robbery or attempted robbery. 4:CT 980-989; 11:RT 1659. The prosecutor's argument that the other crimes were relevant to intent was pretextual. 11:RT 1660-1661. In fact, evidence that Duong had previously killed with a firearm was only probative to demonstrate that he acted in conformity with his criminal propensity, a purpose explicitly prohibited by Evidence Code section 1101 and well-established California law. 11:RT 1666.

(3) The other homicides were inadmissible under Evidence Code section 352. Their admission was cumulative and unnecessary to impeach claims of inadvertence or accident because the jury heard evidence that Duong was a gang member who had been possession of two .45 caliber handguns that were similar to the weapon used at International Club. 4:CT 981. Moreover, exponential prejudice would flow from the evidence which would cause the jury to label Duong a murderer before making its decision. 11:RT 1666. It would be humanly impossible for the jurors to ignore the victims in the other homicides when evaluating Duong's guilt in the International Club killings. 11:RT 1661.

(4) Other jurisdictions were planning to try Duong capitally on the unadjudicated offenses; so, any cross-examination about those crimes might impact Duong's rights in any future proceedings. 11:RT 1670.

e. The Trial Court's Reasoning

The trial court explicitly rejected the applicability of Evidence Code section 1103(b) to this case. 11:RT 1663. It instead found that although evidence of the Thien Thanh and Jade Galore robbery-homicides was prejudicial, it had significant probative value in light of Duong's offer of proof that he would testify that he killed one victim in defense of a third party and the others inadvertently or accidentally. 11:RT 1665. In the trial court's view, evidence that Duong had previously shot "a vulnerable and innocent party has a logical and reasonable inference that his claim as to what happened on May 6th is not true." 11:RT 1664. The trial court acknowledged that the degree of similarity required by the case law was not present here, but found this case distinguishable because it is difficult to find similarities where there is an allegation of accident, inadvertence, or defense of a third party. 11:RT 1668.

2. The Trial Court Should Have Excluded the Unadjudicated Offenses Under Evidence Code Sections 1101(b) and 352

Neither the Thien Thanh Market nor the Jade Galore jewelry store robbery homicide met the threshold for admission under Evidence Code sections 1101(b) and 352. There was no proper purpose for admitting this inflammatory evidence and any slight probative value was substantially outweighed by the prejudice to Duong. Acknowledging that the similarities between the uncharged robbery-homicides and the instant case were lacking, the trial court nevertheless indicated that it would allow the prosecutor to use this improper evidence. However, even the prosecutor who was advocating the admission of this thinly-veiled propensity evidence found himself unable to maintain the fiction, noting that one does not kill twice "unless you are a criminal." 11:RT 1645.

The prosecutor's various arguments reveal no permissible purpose for admitting the unadjudicated offenses. Contrary to the prosecutor's suggestion, Duong never contested that he was capable of forming the specific intent to commit first degree murder. He simply argued that he did not form such intent in this case. Thus, Duong's

ability to form the mens rea to commit intentional murder was never at issue. *See People v. Demetrulias*, 39 Cal.4th 1, 16 (2006).

Also meritless is the prosecutor's argument that the uncharged crimes were otherwise admissible to prove Duong's intent. Rather, intent was simply the prosecutor's euphemism for impermissible propensity evidence. *People v. Alcala*, 36 Cal.3d at 634. To obtain a first degree murder conviction, the prosecutor had to prove that Duong had "an intent to kill formed *after* premeditation and deliberation and a weighing of considerations for and against killing." *People v. Rogers*, 39 Cal.4th 826, 874 (2006) (emphasis in original). In contrast, if Duong faced first degree murder charges for the unadjudicated offenses, such charges would be likely based on a robbery-murder theory. Cal. Penal Code § 189. As this Court has explained, "intent to steal is the only mental state relevant to felony murder in the commission of a robbery." *People v. Haley*, 34 Cal.4th 283, 317 (2004), citing *People v. Visciotti*, 2 Cal.4th 1, 56 (1992). It was therefore was impermissible for trial court to permit the prosecutor to use Duong's alleged intent to steal in another case to suggest that he intended to kill with premeditation and deliberation in this case.

And, while the "least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent[,]" *People v. Ewoldt*, 7 Cal.4th at 402, this Court has generally approved the use of unadjudicated misconduct in cases where there were significant similarities between the charged crime and the unadjudicated offense or where the charged and uncharged crimes required the same specific intent. *See e.g.*, *People v. Steele*, 27 Cal.4th at 1243 (evidence of an earlier killing admissible on issue of intent where "the killings bore several similarities. Both victims suffered manual strangulation and received a cluster of about eight stab wounds in the chest or abdomen. The victims resembled each other somewhat." In each case the defendant confessed, but blamed his conduct on intoxication or drug influence); *People v. Lewis*, 25 Cal.4th at 637 (other crimes evidence properly admitted as evidence of intent where in each case

defendant "intended to forcibly obtain cash from the victim"); *People v. Ochoa*, 19 Cal.4th 353, 410-411 (1998) (evidence of three similar attacks on women cross-admissible on issue of intent); *People v. Carpenter,* 15 Cal.4th 312 (1997) (other homicides admissible to prove intent where the same gun was used in the charged and uncharged homicide and each victim was shot in the head in a remote hiking area); *People v. Rowland*, 4 Cal. 4th at 259, n. 1 (in rape-murder case, trial court reasonable to permit impeachment with evidence that defendant had on other occasions forced women to engage in unwanted sexual activity); *People v. Hayes*, 52 Cal.3d 577 (where defendant charged with robbery-murder and burglary-murder, pretrial ruling to admit evidence of another assault where he also harbored the intent "to take money and other valuables" proper), habeas corpus granted on other grounds, *Hayes v. Brown* 399 F.3d 972 (9th Cir. 2002); *People v. Gallego*, 52 Cal.3d 115, 172 (1990) ("substantially similar" unadjudicated crimes were admissible to prove intent where, in each case "defendant forced [his wife] to drive to a mall in Sacramento to undertake a "hunt" for young women and lure the victims into his vehicle; he tied the victims' hands behind their backs; he took them to rural locations, removed them from [his wife's] presence, and took them to a separate spot for execution. Each victim was shot in the head at point-blank range with a handgun, and each time defendant and [his wife] threw the gun into the Sacramento River on the day after the killings."); *People v. Robbins*, 45 Cal.3d at 873, 878-879 (evidence that defendant sodomized and strangled another male child admissible to prove he intended to engage in lewd conduct with and kill the male victim); *People v. Rodriguez*, 42 Cal.3d 730, 756-757 (1986) (evidence that defendant had previously threatened to kill police admissible to prove intent, where victim was a deputy sheriff; victim was within the scope of the threat); *People v. Pendleton*, 25 Cal.3d 371, 377 (1979) (prior sex offenses admissible to prove intent of defendant charged with rape); *People v. Westek*, 31 Cal.2d 469, 480 (1948) (in trial for lewd conduct and sodomy on boys, prior sex offenses admissible to prove criminal intent where he testified that he touched the victim without lustful intent).

Moreover, the prosecutor's assertion that the intent to go someplace with a gun that he was prepared to use was somehow "unique" or unusual is simply untrue and the argument that Duong is one of a very few people who knows that shooting someone may result in death is patently absurd. This Court recognizes that in California "'the presence of firearms is fairly widespread and many individuals possess the capacity to misuse them.'" *Merrill v. Navegar, Inc.*, 26 Cal.4th 465, 486 (2001), overruling and quoting *Merrill v. Navegar, Inc.*, 75 Cal.App.4th 500, 524 (1999). Moreover, the victim himself arrived at International Club with a loaded weapon. 7:RT 1127-1128; 8:RT 1190-1193.

Tellingly, the prosecutor argued both that the unadjudicated offenses were similar to the charged crimes and that they were not. Apparently, so long as the trial court would allow him to utilize propensity evidence, any theory would do. As defense counsel aptly noted, the other crimes evidence was not necessary to impeach claims of accident, inadvertence, or defense of a third party. The prosecutor introduced evidence that Duong had possessed at least two .45 caliber handguns, the same type of weapon used in the International Club homicides. Peo. Exh. 56; Peo. Exh. 57; 7:RT 1024-1031; 8:RT 1228-1229; 9:RT 1261-1263. The prosecutor also elicited from witness Cindy Hoang that Duong had worked at a firing range, frequently fired guns, taught her how to shoot a gun, and gave her pointers about gun safety. 7:RT 1038-1041. Ms. Hoang also testified that Duong held a second degree black belt in Tae Kwon Do and was able to defend himself. 7:RT 1038. On cross-examination, the prosecutor educed similar testimony from Joey Hoa Minh Truong. 10:RT 1510-1512. The prosecutor in his case in chief and in rebuttal also presented extensive testimony about bullet trajectories and the workings of .45 caliber handguns all of which he argued supported his theory of first degree murder. 7:RT 1132-1137, 1146-1150; 9:RT 1277, 1280-1281, 1284, 1290-1291, 1294, 1297-1299, 1348, 1352-1357; 11:RT 1778-1790, 1798-1799. In addition, the prosecutor presented the testimony of eyewitnesses Thi Van Le and John Bui which he argued was inconsistent with accident or inadvertence. 6:RT 908-910, 912-929, 988-993; 7:RT 1052-1054, 1059-

1064, 1066-1078. Thus, the introduction of the robbery-homicides, which lacked any meaningful similarity to the charged crimes, would have been both highly incendiary and cumulative.

3. The Trial Court's Ruling on Other Crimes Evidence Violated Duong's State and Federal Constitutional Rights

As evidenced by his irrelevant and improper arguments about Duong's demeanor and appearance, hypothetical misleading of the jury during closing argument, and the prejudice to other jurisdictions that would ensue should the trial court exclude the uncharged crimes, Duong's potentially compelling testimony would have made it harder to meet his burden of proof. Nevertheless, the prosecutor was not entitled to contaminate the proceedings with bald-faced propensity evidence. The trial court's permitting him to do so violated Duong's right to due process under the Fourteenth Amendment which "protects the accused against conviction except upon proof [by the State] beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 364 (1970). The erroneous ruling would have invited the jury to find Duong guilty of first degree premeditated murder based on impermissible character evidence rather than proof beyond a reasonable doubt of his guilt. See, e.g., *Sandstrom v. Montana*, 442 U.S. at 520-524. Moreover, the introduction of the evidence so infected the trial as to render Duong's convictions fundamentally unfair. *Estelle v. McGuire,* 502 U.S. at 67; *United States v. Antelope,* 430 U.S. at 650; *see also McKinney v. Rees*, 993 F.2d 1378.

Moreover, in granting the prosecutor's motion, but denying Duong's motion to present evidence of prior incidents at the International Club, the trial court created an unfair disparity between Duong and the prosecution, violating Duong's right under the Fourteenth Amendment to a "balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. at 474.

In addition, the admission of this evidence violated Duong's due process rights by

arbitrarily depriving him of a liberty interest created by Evidence Code sections 352 and 1101 not to have his guilt determined by inflammatory propensity evidence. *Hicks v. Oklahoma*, 447 U.S. at 346-347. By ignoring well-established state law which prevents the State from using evidence admitted for a limited purpose as general propensity evidence and which excludes the use of unduly prejudicial evidence, the state court arbitrarily deprived Duong of a state-created liberty interest.

Duong was also deprived of his right to a reliable adjudication at all stages of a death penalty case. *See Lockett* v. *Ohio,* 438 U.S. at 603-605; *Beck* v. *Alabama*, 447 U.S. at 638; *Penry* v. *Lynaugh,* 492 U.S. at 328, *abrogated on other grounds*, *Atkins v. Virginia*, 536 U.S. 304 (2002).

4. The Error Requires Reversal

Because Duong made a detailed offer of proof as to the substance of his testimony and the prosecutor made a detailed proffer about the unadjudicated crimes, this Court can evaluate the prejudice that would have ensued from impeachment with the two robbery-homicides.

The prosecutor was so concerned about the impact Duong's testimony would have on his case that he indicated that, although he thought the uncharged homicides were admissible even if Duong did not testify, he would not seek to admit them unless Duong took the stand. 11:RT 1646.

As explained in Claim VI., before the start of trial, prospective jurors made known their fear that their participation in this trial put their lives at risk. 4:CT 948; 5:RT 725-729. Nevertheless, the prosecutor bombarded the jury with evidence of Duong's gang membership. The jury also heard evidence that key witnesses feared for their safety. 7:RT 1081-1082; 9:RT 1422. Moreover, as explained above, the jury was inundated with references to Duong's gun possession and facility with firearms. The prejudice from the propensity evidence the jury heard was already overwhelming. Learning that Duong might have been involved in additional homicides would have preyed on the jurors' fears

and eradicated any possibility that the jury could have impartially evaluated his defense or the state of the prosecutor's evidence.

Even in the absence of the unadjudicated homicides, the prosecutor's closing argument was replete with references to Duong as a "cold-blooded, calculating killer" who "didn't care that he killed these people" and for whom "taking the life of four people" was "nothing." 12:RT 1939-1942, 1944, 1950-51.

The prosecutor also argued that Duong was a threat to witnesses and suggested that Duong was a threat to anyone who participated in his trial:

> Mr. Bui told you he was afraid to say who did it. He was afraid for his life. We read from the transcript when he was on the stand and he indicated that he told the police on video that he thought he and his family would be shot. Mr. Murillo told you he thought his life was in danger by coming in to court and by helping the police, giving statements to the police. 12:RT 1949-1950.

Particularly in this context, the incendiary evidence of Duong's participation in the unadjudicated offenses would have obscured the evidence in this case and prevented the jury from fairly performing its constitutional duties.

For these reasons, the trial court's erroneous ruling was not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. at 24. Moreover, it is reasonably probably that the erroneously admitted gang evidence contributed to the verdict. *People v. Watson*, 46 Cal.2d at 836. The conviction must be reversed.

VI. THE TRIAL COURT ERRONEOUSLY AND PREJUDICIALLY ALLOWED THE PROSECUTOR TO REPEATEDLY PUT BEFORE THE JURY IRRELEVANT EVIDENCE THAT DUONG WAS A TATTOO-BEARING GANG MEMBER

Over defense objection, the trial court erroneously and repeatedly allowed the prosecutor to elicit irrelevant and highly inflammatory evidence that Duong was a tattoo-bearing member of the Lao Family gang who associated with other gang members. In addition, the trial court failed to limit the prosecutor who, despite pretrial assurances that

he would elicit gang references only when necessary, brought up Duong's gang affiliation at every opportunity.

The admission of this irrelevant, confusing, and inflammatory evidence which was far more prejudicial than probative deprived Duong of his federal and state constitutional rights to due process, a fair trial, an impartial jury, reliable guilt and penalty determinations, freedom of association, and to have the prosecution prove every element of the charged crimes beyond a reasonable doubt. In light of prospective jurors' expressed concerns that gangs might threaten their safety, these gang references far overshadowed the relevant evidence in this case. The error alone and when combined with the other errors described herein requires reversal.

A. Proceedings Below

Duong moved in writing pursuant to Evidence Code section 352 and federal due process to exclude "Any reference to gang membership, involvement, activity, participation, whatsoever." 1:CT 279. Duong argued that, absent gang allegations, Duong's gang associations were irrelevant and created a substantial danger of undue prejudice. 1:CT 279-282.

In pretrial hearings on Duong's motion, the prosecutor argued that Asian gangs would inevitably come up at trial, because various gang members were present at International Club during the shootings and Duong was an admitted Lao Family gang member. 1:RT 124. In addition, when witnesses described the shooter, they recognized him as "John from Lao Family." 1:RT 124. The prosecutor also believed that the jury would inevitably hear of victim Minh Tram's gang membership. 1:RT 125. Finally, the prosecutor argued that witness Christine Chen would testify that Duong admitted to her that he killed four people at an El Monte club because one of the victims was a rival gang member and it would be "difficult" to sanitize her testimony. 1:RT 125-126.

Duong countered that there should be no reference to his gang involvement or Lao Family membership because in the absence of gang allegations, evidence of gang

affiliation was irrelevant. 1:RT 126-127, 6:RT 841. Moreover, the eyewitnesses identified Duong's photograph, so there was no need for them to mention that they knew him as a gang member. 1:RT 127.

The prosecutor responded that John Bui, one of the owners of International Club, indicated to law enforcement shortly after the homicides that the shooter was John from Lao Family. 1:RT 127. Indeed, argued the prosecutor, reluctant witness Bui, "the most critical eyewitness, indicates *from day one* it's John from the Lau [sic] Family." 1:RT 128 (emphasis added). The prosecutor said he would introduce portions of audio and video recordings of Bui's statements to police that would ostensibly show that, over a year and a half period, police showed Bui a number of photo lineups and each time, Bui asked them to show him a photograph of John from Lao Family. 1:RT 127-128. Finally, the prosecutor indicated that if Duong's counsel called eyewitness identification expert, Bui's identification of the shooter as John from Lao Family would become important. 1:RT 129.

Duong asked the trial court to review the evidence and determine whether it would be practical to redact it. 1:RT 129. The trial court agreed to review the grand jury transcripts. 1:RT 129-130.

Before opening statements, Duong again brought up the motion to exclude gang references. 6:RT 834. The prosecutor argued that although he did not file gang enhancements, Duong's gang membership was relevant to motive, because one of the victims was a member of a different gang, members of several gangs were present, and the shootings took place after victim Minh Tram had a verbal dispute with a Lao Family member in the restroom. 6:RT 835-836, 839, 842.

The prosecutor added that, after the argument in the restroom, informant Thi Van Le heard Duong ask a Wah Ching member what he should do. 6:RT 836-837. The Wah Ching member answered, "let's see what happens." 6:RT 837-839. The prosecutor believed Thi Van Le would testify that members of various gangs were present during the

shootings and that after the homicides, Wah Ching and Lao Family members were responsible for the destruction of a video of the shootings. 6:RT 838-840.

The prosecutor also planned to present phone records indicating that Duong was in contact with at least three other Lao Family members after the shootings. 6:RT 637. The prosecutor assured the trial court he did not

> intend to make a big thing about it but it's clearly going to come out.. It's just that's the way I think the evidence is going to develop. It explains some of the interrelationships between the people and it also goes to motive. And I have not decided whether I am going to call a gang expert . . . . But it clearly goes for motive. I think one of the things that jurors will want to know is why would a man get up from a bar stool, walk across a bar stand in front of a booth and shoot people in the booth. There has to be a reason for it. And so I think that the evidence is relevant. 6:RT 840.

Duong offered that while references to International Club as a gang location were appropriate, Duong's gang membership was irrelevant. 6:RT 843. The prosecutor rejected this suggestion, because he felt it was unfair to refer to victims as gang members and International Club as a gang hangout, but to sanitize Duong whose gang membership was not disputed. 6:RT 844-845.

The trial court denied the defense motion to exclude gang evidence, opining that such evidence might lend weight to the testimony of John Bui, who identified Duong from a photograph and by his moniker and gang affiliation, noting that Bui had expressed concern for his safety. 6:RT 846-847. The trial court also considered the prosecutor's proffer that Christine Chen would testify that Duong and one of the victims were rival gang members and that Duong was concerned for his safety before he killed that victim. 6:RT 846.

The trial court gave an instruction to limit the jury's consideration of references to

Duong's gang affiliation[32].12:RT 1899-1890.

Duong's counsel conceded in opening statement that Duong shot the victims. 6:RT 878.

In closing, the prosecutor alerted the jury that he was not required to nor could he prove motive:

> I do not have to prove motive. I can't open up Mr. Duong's head and come out with why he did it. 12:RT 1929.
>
> ***
>
> In something like this you're not going to be able to show motive. How can I open up Mr. Duong's head to let you know what he was thinking at the time? I can't. I can ask you to look at his actions. 13:RT 2089-2090.

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[32] The trial court read a modified version of CALJIC 2.50 as follows:

> Evidence has been introduced for the purpose of showing that the defendant is or was affiliated with an organization referred to as the Lau Family [sic]. This evidence, if believed, may be considered by – may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes.
>
> It may be considered by you only for the limited purpose of determining if it tends to show the identity of the person who committed the crime, if any, of which the defendant is accused.
>
> A motive for the commission of the crime charged, for the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider such evidence for any other purpose. 12:RT 1899-1890.

B. Gang References Elicited by the Prosecutor

Despite the prosecutor's pretrial representations to the trial court about what he intended to prove with gang evidence, the prosecutor did not: (1) present evidence or argue that victim Minh Tram was a gang member whose killing was motivated by gang animus; (2) call Christine Chen at the guilt phase;(3) demonstrate that Bui's and Diep's identifications of Duong were based on his gang affiliation; or (4) show that Bui had "from day one" identified the shooter as or asked to see a photograph of John from Lao Family. Instead, the prosecutor mentioned or elicited from witnesses the following references to the gang affiliation of Duong, his acquaintances, and people present at International Club during the shootings:

1. In opening statement, the prosecutor alerted the jurors that witness Thi Van Le would testify that around midnight, at the International Clubs the day of the homicides,

> he was greeted by a member of the Pomona Boys which is an Asian street gang. And he was taken to an area near the rest room where there were members of the Wah Ching gang, the Lau [sic] Family gang, of which Mr. Duong was a member, and Pomona Boys. And this group, the group that involved those three different gangs, were celebrating the birthday of Khiet Diep, the assistant manager at the club. 6:RT 866

2. Also in opening statement, the prosecutor anticipated that John Bui would testify that gang members came to the International Club. 6:RT 868.

3. On direct and redirect examination of prosecution witness Thi Van Le, the prosecutor educed multiple references to the confluence of gang members at the International Club before and during the homicides as follows: Le went to International Club for the birthday party of Wah Ching gang member Khiet Diep. 6:RT 900. When Le arrived, an acquaintance escorted him over to a group of people which included Duong and Lao Family, Pomona Boys, and Wah Ching gang members. 7:RT

898. Le interacted with a Pomona Boys member and recognized Wah Ching gang members sitting together at a table. 6:RT 899-900. The group Le was with included Lao Family, Wah Ching, and Pomona Boys gang members. 7:RT 907.

In addition, Le observed an argument in the International Club restroom between Anthony Tran and three others who had to walk by tables occupied by Pomona Boys, Wah Ching, and Lao Family members. 7:RT 997.

The morning of the homicides, Le saw a man named Khuong at the table with Wah Ching, Pomona Boys, and Lao Family members. 7:RT 1003.

As for Duong's acquaintances, Duc Nguyen never told Le whether he was a Lao Family member, however, Anthony Tran did tell Le whether he, Tran, was a member of Lao Family. 6:RT 907.

4. On direct examination of Duong's former girlfriend, Cindy Hoang, the prosecutor elicited that she did not recall whether Anthony Tran was a Lao Family member. 7:RT 1035. Hoang knew that Duong affiliated with Lao Family, although she was not sure whether he was actually a member. 7:RT 1035. The prosecutor continued to ask Hoang whether Duong was a Lao Family Member. 7:RT 1035-1036. Hoang testified that Duong hung out with Lao Family for a while but not continuously. 7:RT 1036. After the prosecutor continued to press her, Hoang testified that she knew Duong was a Lao Family member. 7:RT 1036.

Duong had a tattoo that said "LF" on one arm. 7:RT 1036. Duong did not have this tattoo when he and Hoang began their relationship. 7:RT 1036-1037. Hoang could not recall when Duong got the "LF" tattoo, but he had it in May 1999. 7:RT 1037.

5. Although the prosecutor told the trial court that John Bui initially identified Duong as John from Lao Family, Bui testified on direct examination that he selected Duong's picture from a photographic lineup. 7:RT 1079-1080. Bui also told the jury he was reluctant to have his name involved in this case or to testify because he feared his family would be shot. 7:RT 1081-1082.

On redirect examination, Bui testified that he did not initially identify the shooter to the police as John from Lao Family. 7:RT 1111-1112.

6. On direct examination, the prosecutor pressed witness Anthony Tran to testify that Duong was a Lao Family member who had a large "LF" tattoo:

> Q And are you an associate of the Lau [sic] Family?
> A Yeah, they all my friend, yeah.
> Q Do you have an LF tattoo on you?
> A No, I don't.
> Q But you're an associate of the Lau [sic] Family?
> A Yeah, they live by me, yeah.
> Q Is that a "yes"?
> A Yes.
> Q And you know Mr. Duong to be a member of the Lau [sic] Family?
> A That I don't know if he a member or not. I don't know. I just --
> Q Well, he has a big tattoo on his arm, doesn't he, LF?
> A Well, then yeah.
> Q Well, you're familiar with that tattoo, aren't you?
> A Yes, yes.
> Q And it's a pretty big tattoo, isn't it?
> A I didn't see it. I don't know.
> Q Well, you just told me you're familiar with it.
> A Yeah, I'm familiar with the flag, yeah.
> Q Have you seen the actual tattoo that Mr. Duong has?
> A No.
> Q Never seen him in a short-sleeved shirt or without a shirt on?
> A Oh, I seen him in short sleeve, but I don't see him like no shirt on, no.
> Q So you have not seen his tattoo?
> A Yeah. 8:RT 1201-1202.

Also during Anthony Tran's testimony, the prosecutor brought defense witness

Joey Hoa Minh Truong into the courtroom. 8:RT 1210. Anthony Tran identified Truong and said he believed he had seen Truong at International Club the night of the shooting. 8:RT 1210. Anthony Tran could not recall whether Truong had been sitting with the Lao Family group that night, but he knew Truong as a Lao Family associate or member. 8:RT 1210-1211.

7. On direct examination, the prosecutor elicited several gang references from witness Pedro Murillo. Murillo was a member of the Pine Street gang, which was Asian. 9:RT 1383-1384. Murillo could not recall how large a gang Pine Street was in 1999. 9:RT 1384. Initially, Murillo could not identify which gangs were involved in a shoving match he had witnessed before the shootings, because he only knew members of his own gang. 9:RT 1387. After the prosecutor continued to press him, Murillo agreed that he had at some point said that Wah Ching members were sitting near the restroom and were involved in the shoving match. 9:RT 1387-1388. Murillo denied that Pine Street members were involved. 9:RT 1388. On redirect, the prosecutor asked Murillo whether he previously indicated he did not want to make an identification in this case because he feared for his safety; Murillo agreed. 9:RT 1422.

8. On cross-examination of defense witness Joey Hoa Minh Truong, the prosecutor continued to glean references to Duong's gang affiliations. Truong indicated that Duong was not talking with other Lao Family members at the International Club. 10:RT 1479. Truong did not know whether Duc Nguyen and Duong were friends, but knew that Duc Nguyen was not a Lao Family member. 10:RT 1480-1481.

9. On cross-examination of Khiet Diep, the prosecutor attempted to glean more evidence of gang affiliaton. Diep did not know whether Anthony Tran was a gang member, but he and Diep were former coworkers. 9:RT 1442-1443. Diep denied that he knew Duong as a member of a particular gang. 10:RT 1546. Diep also denied that on May 8, 1999 he told Sergeant Edmundson that he knew Duong as John from Lao Family

and denied that he knew to which gang Duong belonged . 10:RT 1546. The prosecutor then asked Diep whether he told Edmundson that he knew Duong as John from Lao Family and Diep indicated he did not. 10:RT 1546-1547. Diep again testified that he never mentioned a gang when he spoke with Edmundson and never said that John was the shooter. 10:RT 1549. In court, Diep identified Duong as the shooter. 10:RT 1549.

10. On cross-examination of defense witness and investigator Daniel Mendoza, the prosecutor elicited that Joey Hoa Minh Truong told Mendoza that both he and Duong were Lao Family members. 10:RT 1577.

11. On cross-examination of defense witness Christine Carns, the prosecutor asked whether on May 8, 1999, Khiet Diep told her that the shooter was known as "Fast or Fat John or Big John" from Lao Family. 10:RT 1614-1615. Carns indicated that he had. 10:RT 1615.

C. Legal Standards

Evidence Code section 1101 prohibits the admission of character evidence, including specific instances of conduct, to prove a person's conduct on a particular occasion, except when such evidence is relevant to establish a fact other than the person's character or disposition to commit similar acts. *People v. Ewoldt,* 7 Cal.4th at 393; *People v. Catlin*, 26 Cal.4th at 145-146.

The rule excluding criminal propensity evidence derives from early English common law and is currently in force in all United States jurisdictions. *See People v. Ewoldt*, 7 Cal.4th at 392; *People v. Alcala*, 36 Cal.3d 604, 630-631 (1984). The Supreme Court has explained the rationale behind this prohibition:

> The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. [footnote] The inquiry is not rejected because character is irrelevant; [footnote] on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with

> a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Michelson v. United States, 335 U.S. 469, 475-476 (1948).

The admissibility of bad character evidence depends upon the materiality of the fact at issue, the tendency of the proffered evidence to prove or disprove it, and any policy requiring exclusion. *People v. Catlin*, 26 Cal.4th at 145-146. Because such evidence is "inherently prejudicial," its relevancy must be "examined with care." *People v. Alcala*, 36 Cal.3d at 631.

This Court has frequently noted that gang evidence creates a risk that the jury will find the defendant guilty of the offense charged based on a general criminal disposition. *See, e.g., People v. Williams*, 16 Cal.4th at 193; *People v. Champion*, 9 Cal.4th 879, 922 (1995); *People v. Pinholster*, 1 Cal.4th 865, 945 (1992); *People v. Cardenas*, 31 Cal.3d 897, 905 (1982). Gang-related evidence is inadmissible if offered to prove a defendant's bad character. *People v. Sanchez,* 58 Cal.App.4th 1435, 1449 (1997). Gang evidence is only admissible if it is relevant to issues in the case other than criminal propensity, not more prejudicial than probative, and not cumulative to less inflammatory evidence. *See People v. Ruiz,* 62 Cal.App.4th 234, 240 (1998). Because gang evidence is "highly inflammatory" this Court has condemned its introduction by the prosecution "if only tangentially relevant." *People v. Cox*, 53 Cal. 3d 618, 660 (1991). This Court has also cautioned that because even relevant gang evidence may have a highly inflammatory impact on the jury, "'trial courts should carefully scrutinize such evidence before admitting it.'" *People v. Gurule,* 28 Cal.4th 557 at 653, *quoting People v. Champion*, 9 Cal.4th at 922.

Evidence Code section 352 requires a trial court to exclude evidence whose

probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, confusing the issues, or misleading the jury. "'The chief elements of probative value are relevance, materiality, and necessity.'" *People v. Welch*, 8 Cal.3d 106,116 (1972), *quoting People v. Schader*, 71 Cal.2d 761, 774 (1969). Unduly prejudicial evidence is that which "uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues." *People v. Coddington*, 23 Cal.4th at 588, *overruled on other grounds, Price v. Superior Court*, 25 Cal.4th 1046, 1069, n. 13 (2001). Evidence is substantially more prejudicial than probative under section 352 if it threatens the "fairness of the proceedings or the reliability of the outcome." *People v. Alvarez,* 14 Cal.4th 155, 204, n. 14 (1996).

When evidence of other acts is offered to prove a material fact, the court must balance the probative value of the evidence against its prejudicial effect to determine its admissibility. *People v. Stanley,* 67 Cal.2d 812 (1967). The weighing process "is particularly delicate and critical where what is at stake is a criminal defendant's liberty." *People v. Lavergne*, 4 Cal.3d 735, 744 (1971). Thus, "all doubts about its connection to the crime charged must be resolved in the accused's favor." *People v. Alcala,* 36 Cal.3d at 631.

D. The Highly Prejudicial Evidence of Duong's Gang Affiliation Was Not Probative of Any Material Issue in This Case

Only relevant evidence is admissible. Cal. Evid. Code § 350. Relevant evidence is that which tends to "prove or disprove any disputed fact that is of consequence to the determination of the action." Cal. Evid. Code § 210. "If a fact is not genuinely disputed, evidence offered to prove that fact is irrelevant and inadmissible under Evidence Code sections 210 and 350." *People v. Hall*, 28 Cal. 3d 143, 152 (1980), *overruled on other grounds*, *People v. Newman*, 21 Cal.4th 413, 418-422 (1999).

A prosecutor may only use bad character evidence to prove ultimate facts that are both "material" and "in dispute." *People v. Thompson*, 27 Cal. 3d 303, 315 (1980),

quoting People v. Thomas, 20 Cal.3d 457, 467 (1978); *People v. Williams*, 44 Cal.3d at 883. "Materiality concerns the fit between the evidence and the case. . . . If the evidence is offered to help prove a proposition that is not a matter in issue, the evidence is immaterial." 1 McCormick Evidence § 185 (6th Ed. 2006).

"In cases *not* involving the gang enhancement, we have held evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal." *People v. Hernandez*, 33 Cal.4th 1040, 1049 (2004) (emphasis in original); *see also People v. Malone*, 47 Cal.3d at 30 (Evidence of gang membership is irrelevant and prejudicial absent a showing of gang involvement in the charged offenses); *People v. Avitia*, 127 Cal.App.4th 185, 192-195 (2005) (reversing where the trial court admitted evidence of gang graffiti which had no evidentiary link to any issue in the case, but suggested that defendant had a criminal disposition).

Here, the prosecutor elected not to file gang enhancements and instead pursued a theory that Duong acted alone for incomprehensible reasons. The identity of the shooter was not at issue and the prosecutor conceded to the jury that he could not prove motive.The only issue in dispute was whether Duong intended to shoot each of the victims and what type of homicides were committed. Nevertheless, the prosecutor persuaded the trial court that gang evidence was necessary to demonstrate both identity and motive. The prosecutor's assertions fly in the face of the trial record.

Even if the shooter's identity had been contested, the prosecutor's assertion that Bui had from "day one"identified the shooter as John from Lao Family was unsupported by Bui's testimony or the law enforcement records to which he referred. It is thus not surprising that the prosecutor never followed through on his intention to present audio or videotapes of Bui's law enforcement interviews. Moreover, had identity been at issue, Bui could have easily testified that he recognized Duong because he had seen him previously at the International Club without mentioning Duong's gang affiliation.

It was equally unnecessary for eyewitnesses Khiet Diep and Thi Van Le to mention

gangs. Indeed, Diep testified that although he was *not* aware of Duong's gang affiliation, he did recognize Duong as the shooter.

The prosecutor's assertions that references to Duong's gang affiliation would inevitably come out because gang members were present at the International Club also lacked merit. The evidence summarized above in section B of this claim illustrates that the prosecutor actively sought testimony that Duong was in proximity of other gang members the night of the homicides even though witnesses could easily have testified that Duong was with a group of people, friends, or acquaintances. Once again, contrary to his pretrial representations to the trial court, the prosecutor presented not a shred of evidence to demonstrate that the relationships between the gangs members at International Club bore on any disputed ultimate fact or issue of consequence in the case.

Moreover, the prosecutor's pretrial assertion that it was imperative for Christine Chen to testify that Duong confessed to killing a rival gang member is belied by her failure to testify at the guilt phase.

In addition to the slew of references to Duong's gang associations, the prosecutor repeatedly and unnecessarily pressed witnesses to testify about his Lao Family tattoo. This evidence was not relevant to any disputed issue and was certainly cumulative to the extensive references to his gang membership.

Thus, despite his pretrial promise that he would not "make a big thing about it" the prosecutor made Duong's gang affiliation and tattoo a centerpiece of his evidence. In this way, the prosecutor relieved himself of the impossible burden of proving any relationship between Duong's gang affiliation and the charged crimes and gained the benefit of presenting copious and highly inflammatory propensity evidence that was irrelevant to any disputed issue.

The trial court should have excluded all the evidence of gang affiliation in this case pursuant to Evidence Code sections 1101, 210, 350, and 352. This highly inflammatory evidence invited the jury to find that Duong committed three first degree

murders and one second degree murder on the basis of his criminal propensity. More critically, the evidence had no probative value, because it was irrelevant, immaterial, and unnecessary.

E. Admission of the Gang Evidence Violated Duong's Constitutional Rights

The admission of this evidence violated Duong's right to due process under the Fourteenth Amendment which "protects the accused against conviction except upon proof [by the State] beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. at 364. The trial court's erroneous admission of gang evidence lightened the prosecution's burden of proof, permitting the jury to find Duong guilty of three counts of first degree murder and one count of second degree murder instead of finding him guilty of lesser offenses on the basis of his character and criminal propensity. *See, e.g., Sandstrom v. Montana*, 442 U.S. at 520-524. Moreover, the introduction of the evidence so infected the trial as to render Duong's convictions fundamentally unfair. *Estelle v. McGuire,* 502 U.S. at 67; *United States v. Antelope,* 430 U.S. at 650; *see also McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993).

In addition, the admission of this evidence violated Duong's due process rights by arbitrarily depriving him of a liberty interest created by Evidence Code sections 352 and 1101 not to have his guilt determined by inflammatory propensity evidence. *Hicks v. Oklahoma*, 447 U.S. at 346-347. By ignoring well-established state law which prevents the State from using evidence admitted for a limited purpose as general propensity evidence and which excludes the use of unduly prejudicial evidence, the state court arbitrarily deprived Duong of a state-created liberty interest.

Duong was also deprived of his right to a reliable adjudication at all stages of a death penalty case. *See Lockett* v. *Ohio,* 438 U.S. at 603-605; *Beck* v. *Alabama*, 447 U.S. at 638; *Penry* v. *Lynaugh,* 492 U.S. 302, at 328.

F. The Erroneous Admission of Gang Evidence Requires Reversal

As explained above, the issue before the jury in this case was not whether Duong shot the victims, but rather the type of homicides committed. While the nature of the homicides was in dispute, neither party contended that they were gang related. Nevertheless, the trial court permitted the prosecutor to bombard the jury with references to Duong's gang affiliation and tattoo. Such evidence is always inflammatory, but here the gang references were particularly prejudicial.

The prejudice in this case arose even before any evidence was presented. Questions 67-71 in the jury questionnaire elicited the opinions of prospective jurors about gangs. Although neither the trial court nor counsel had mentioned that this was a gang case, during jury selection, in the presence of all prospective jurors, a prospective juror told the prosecutor:

> I wanted to know if it was like gang involvement because I want to know for my personal safety or retaliation or anything like that like that [sic] can actually happen. 5:RT 638.

The prosecutor responded:

> [W]ell, I can't tell you about the facts at this point in time. I simply can't. I don't think that any juror would be put in a position where their personal safety would in any way, shape or form be an issue. That just wouldn't be allowed to happen, all right? Does that kind of answer the question. 5:RT 638.

The next day, shortly before the jury was empaneled, the court received the following note from Juror 1071:

> We have a question concerning our safety, especially since this is a gang-related crime. What is to prevent gang members from attending the trial and identifying the jurors. They have been known to do serious damage to their families as well.
>
> This question was asked of the prosecutor and he brushed it off as nothing. We are not satisfied with that answer. We would like to discuss this with you

and the lawyers but not in the presence of the accused. We do not want to give them any ideas. 4:CT 948.

Outside the presence of the other jurors, Prospective Juror 1071 indicated to the court that he was concerned about the safety of the jurors. 5:RT 725. The trial court assured him that in the event that safety concerns arose, it would take necessary precautions. 5:RT 725. The trial court continued that the suggestion or evidence of gang activity "doesn't per se create an emergency that requires precautions." 5:RT 725.

Prospective juror 1071 then indicated he had spoken about this with prospective jurors 0635, 1363, 8817, 1868, and 1087. 5:RT 726. These prospective jurors appeared before the trial court. 5:RT 726. The trial court explained to them that it was not clear that the case was gang related, but assured them that if safety issues arose, it would use its authority to protect the jurors. 5:RT 726-729. The trial court admonished them not to discuss the issue with other prospective jurors. 5:RT 729.

In this way, the sitting jurors heard Juror 1071 express concerns that Duong's gang affiliation threatened the safety of the jurors, but never heard the trial court's assurances that it would ensure their safety.

The impact of these inflammatory comments during jury selection was amplified because witnesses John Bui and Pedro Murillo testified that they feared for their safety. Their testimony was particularly incendiary because the jury never learned that there was no evidence that Duong or anyone else had actually threatened them. Moreover, the trial court never instructed the jury that it could only consider this testimony in evaluating the credibility of witnesses Bui and Murillo. Under these circumstances, the jury had carte blanche to assume that these witnesses feared for their safety because they had actually been threatened by Duong or some other gang member.

The prosecutor fueled this fear by implying in closing argument that Bui was an

innocent who had long been at the mercy of gang members[33]:

> Say you are a businessman, you are in that business, you have put your life's savings in it, everything you have worked for is in that business. You can't tell certain people come in, not come in. This is an extremely tough business to be in. You know, if a gang member comes to the door and he is not acting inappropriately, you can't say, well, you are a gang member. You can't come in my club. Next thing will happen that gang member will sue him and he will win and he will get a lot of money from Mr. Bui for discrimination that's exactly what will happen. 12:RT 1949.

Despite his pretrial assurance to the trial court that he did not intend to make a "big thing" of the gang evidence, the prosecutor continued with this explosive argument, further suggesting that Mr. Bui was afraid to make an identification because of Duong's association with the Lao Family. 12:RT 1949-1950.

As this Court has recognized, suggestions of extra-record evidence, such as the implication of threats to witnesses and jurors, "'although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor.'" *People v. Bolton*, 23 Cal.3d at 213, *quoting* Vess, *Walking a Tightrope: A Survey of Limitations On The Prosecutor's Closing Argument,* 64 J.Crim.L. & Criminology 22, 28 (1973).

The prosecutor never argued any evidentiary link between Duong's gang affiliation and the crimes because there was none. His closing argument instead leaves no doubt that the sole purpose of this evidence was to inflame the jury by arguing Duong's criminal propensity:

> Mr. Duong was there with his friends, with his group, the Lau [sic] Family. He was sitting with the Wah Chings. And he was not going to be upstaged by this young man over here, Mr. Tram. 12:RT 1944.

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[33] Claim IX, below, is incorporated by reference herein.

The prosecutor continued this argument in rebuttal:

> Remember, when Mr. Mendoza, the defendant's investigator talked to his friends and fellow Lau [sic] Family members, Mr. Tram [sic] and Mr. Truong, Mr. Tran said he didn't think the defendant was in there that night. And Mr. Truong said the defendant couldn't have been the shooter because he left before, he, Truong. 13:RT 2069.

For these reasons, the admission of this inflammatory evidence was not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. at 24. Moreover, it is reasonably probable that the erroneously admitted gang evidence contributed to the verdict. *People v. Watson*, 46 Cal.2d at 836. The conviction must be reversed.

VII. THE TRIAL COURT IN DENYING DUONG'S REQUEST FOR CALJIC 2.83, VIOLATED HIS CONSTITUTIONAL RIGHTS

The trial court's erroneous refusal to instruct the jury about resolving conflicts in the testimony of the prosecution's expert witnesses deprived Duong of the right to due process of law and other rights guaranteed by the California and federal constitutions. U.S. Const. Amends VI, VIII, XIV; Cal. Const., Art. I §§ 15, 16.

A. Proceedings Below

During the guilt phase, Duong twice requested CALJIC 2.83, "Resolution of Conflicting Expert Testimony":

> In resolving any conflict that may exist in the testimony of expert witnesses, you should weigh the opinion of one expert against that of another. In doing this, you should consider the relative qualifications and believability of the expert witnesses, as well as the reasons for each opinion and the facts and other matters upon which it was based. 5:CT 1208; 11:RT 1717-1718; 11:RT 1807.

The trial court initially indicated that it would give CALJIC 2.83 if Duong called Dr. Posey to testify as to a different interpretation of trajectories, exit wounds, reentry wounds, "or whatever." 11:RT 1718.

Although Dr. Posey did not testify, (see claim IV, above, incorporated by reference herein) Duong argued that the instruction was appropriate. 11:RT 1807. He reasoned that although he had not put on any defense experts, the prosecutor called a pathologist and a firearms expert who provided inconsistent testimony on similar subject matter. 11:RT 1807. The prosecutor argued that the instruction would only have been appropriate had Duong put on an expert. 11:RT 1807. The trial court refused to give the instruction, opining, "There doesn't appear to be competing opinions on similar subject matters." 11:RT 1807. Duong objected on all state and federal bases.

The trial court instructed the jury with CALJIC 2.80, 2.81, and 2.82 governing the jury's evaluation of expert and opinion testimony, omitting 2.83. 12:RT 1892-1894.

B. The Trial Court's Failure to Instruct the Jurors on Conflicting Expert Testimony Unfairly Bolstered the Credibility of the Prosecution's Expert Witnesses and Violated Additional Federal Constitutional Rights

Due Process prohibits courts from skewing the "balance of forces" at trial in favor of the prosecution. *Wardius v. Oregon*, 412 U.S. at 474. Applying this principle, this Court has rejected the giving of one-sided jury instructions. *People v. Moore*, 43 Cal.2d 517, 524-526 (1954). In *Moore*, the trial court gave two self-defense instructions requested by the prosecution, while declining to give two self-defense instructions requested by the defense. *Id.* at 526. Although the given instructions accurately stated the law, their phrasing emphasized the prosecution's point of view:

> It is true that the . . . instructions given at the request of the People do not incorrectly state the law of self-defense, but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply that actual or positive danger need not exist in order to justify self-defense, but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. The rules of law relating to self-defense should not have been

> stated exclusively from the viewpoint of the prosecution. There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles.

Id. at 526-527, quoting *People v. Hatchett*, 63 Cal.App.2d 144, 158 (1944).

Here, by instructing the jurors how to evaluate the testimony of experts individually, but failing to give CALJIC 2.83 to instruct them to compare the testimonies of various experts, the trial court similarly violated the Due Process Clause of the Fourteenth Amendment and California case law by impermissibly tilting the balance in favor of the prosecution with respect to the jury's evaluation of the credibility of key prosecution witnesses Lisa Scheinin, Patricia Fant, Michael Oto, and Manuel Munoz.

Apparently, the trial court erroneously believed that CALJIC 2.83 only applies when conflicting experts are presented by different parties. However, the plain language of CALJIC 2.83 compels the opposite conclusion. CALJIC 2.83 makes no reference to parties, but simply tells jurors how to evaluate conflicting expert testimony. Just as, in the absence of ambiguity, courts must adhere to the plain language of statutes, See, e.g., *Green v. State of California*, 42 Cal.4th at 260, courts must not impute meanings extraneous to the plain language of the instructions. Permitting such unfettered interpretation would undermine a foundational premise of the American trial process, that is, that jurors are presumed to understand the court's instructions. See, e.g., *People v. Hovarter*, 44 Cal.4th 983, 1005 (2008).

In Duong's case, the prosecution experts gave materially conflicting testimony on similar subject matters. The testimony of firearms expert Fant conflicted with that of pathologist Scheinin and the testimony of firearms examiner Oto conflicted with the testimonies of firearms experts Munoz and Fant. For example, Fant testified that the angle of some of the shots may have been altered because they passed through something. 7:RT 1135. In contrast, pathologist Lisa Scheinin was skeptical that any of the bullets passed through another person or object before hitting the victims. 9:RT 1337-1340,

1347, 1351-1353. This was an important distinction, because it bore directly on the shooter's intent, the central issue before Duong's jury.

Firearms examiner Mike Oto testified that generally, once the slide or safety is off on a gun, it is easier to pull the trigger. 8:RT 1194-1195. On the other hand, firearms expert Manuel Munoz testified that it becomes no easier to pull the trigger after the safety is off and an initial shot is fired. 11:RT 1794-1795. Patricia Fant testified that to her knowledge, it was possible for a semi-automatic weapon to discharge at least two bullets accidentally. 7:RT 1148-1149. These distinctions were critical to the issue of whether Duong meant to shoot Mr. Norman, Ms. Dang, and Mr. Tang.

In light of these important differences in expert testimony, the trial court was required to deliver CALJIC 2.83 regardless of who called the conflicting experts to the stand. In failing to give CALJIC 2.83, while presenting CALJIC 2.80 and 2.82[34], the trial court misled the jury to believing it should consider each expert witness in a vacuum when it was critical to Duong's case that jurors consider them in relation to each other.

In addition to giving the jury a lopsided view of the case, the trial court's error also lessened the prosecutor's burden of proof, by improperly bolstering the state's experts. See, e.g., *Sandstrom v. Montana*, 442 U.S. at 520-524. Moreover, the error interfered with Duong's right to present a defense by denying the jurors an instruction that would have supported his case that the homicides were something less than first degree murder. U.S. Const. Amend. VI. The trial court's error also deprived Duong of his right to a

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[34] CALJIC 2.80 instructs jurors to "consider the qualifications and believability of the witness, the facts or materials upon which each opinion is
based, and the reasons for each opinion."

CALJIC 2.82 explains that when a trial court permits counsel to ask expert witnesses to answer hypothetical questions that the trial court is not ruling on the truth of the facts assumed in the question. It is for the jury to decide whether the assumed facts have been proved.

reliable adjudication at all stages of a death penalty case. *See Lockett* v. *Ohio,* 438 U.S. at 603-605; *Beck* v. *Alabama*, 447 U.S. at 638; *Penry* v. *Lynaugh,* 492 U.S. at 328.

C. The Error Requires Reversal

As explained above, the error in this case confused and misled the jury about its consideration of Duong's intent, the central issue in this case.

For this reason, the state cannot establish beyond a reasonable doubt that the trial court's constitutionally erroneous failure to give CALJIC 2.83 was harmless beyond a reasonable doubt. See *Chapman v. California*, 386 U.S. at 24; *People v. Brown*, 46 Cal.3d 432, 448 (1988). Duong's convictions must be reversed.

VIII. THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT IT COULD FIND DUONG GUILTY OF FIRST DEGREE MURDER UNDER A THEORY OF LYING IN WAIT

Despite a lack of supporting evidence and over Duong's objection, the trial court erroneously instructed the jury that it could find Duong guilty of first degree murder if it found either premeditation and deliberation or lying-in-wait. In closing argument, the prosecutor relied heavily on a lying-in-wait theory of first degree murder. The trial court's instructions amplified by the prosecutor's argument made it possible for the jury to convict Duong of first degree murder on an erroneous theory of first degree murder. The error violated state law and deprived Duong of a fair trial and due process of law as guaranteed by the California and federal constitutions. U.S. Const., Amends, VI, XIV; Cal. Const., art. I, §§ 5, 15, & 16. The error requires reversal.

A. Proceedings Below

The trial court informed Duong that it would deliver CALJIC 8.25 which instructed the jury that it could find him guilty of first degree murder on a theory of lying-in-wait. 11:RT 1803. Duong objected that the instruction was inappropriate in light of the evidence and on all state law and federal constitutional grounds. 11:RT 1803. Nevertheless, the trial court instructed the jury that it could find Duong guilty of first

degree murder on a theory of lying-in-wait. 4:CT 1035; 12:RT 1899.

In closing, the prosecutor argued strenuously that the jury could find Duong guilty of first degree murder based on a theory of lying-in-wait. 12:RT 1971-1979. In addition, while arguing CALJIC 8.25, the prosecutor, referring to a diagram[35], argued that the jury could find Duong guilty of lying-in-wait first degree murder even if he lacked the intent to kill. 12:RT 1972.

B. The Evidence Did Not Support an Instruction on Lying-in-Wait

Penal Code section 189 provides that "All murder which is perpetrated by means of . . . lying in wait . . . is murder of the first degree."

To demonstrate that a defendant is guilty of first degree murder under a theory of lying-in-wait, the prosecutor must prove that the defendant (1) concealed his purpose; (2) waited and watched for a substantial period of time for an opportune time to act; and (3) attacked the unsuspecting victim by surprise from a position of advantage. *People v. Stanley*, 10 Cal.4th 764, 796-797 (1995); *People v. Hardy*, 2 Cal.4th 86, 163 (1992); *People v. Morales*, 48 Cal.3d 527, 557 (1989). The trial court erred in instructing the jury on first degree murder by means of lying-in-wait because the evidence supported neither concealment nor a substantial period of watching and waiting.

1. The Prosecutor Did Not Prove the Element of Concealment

As this Court has explained, the element of concealment demands that the defendant's conduct support an inference that he planned to take the victim by surprise.

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[35] This diagram ostensibly pertained to the law on lying in wait. 12:RT 1998-1990. In record correction proceedings, Duong's requested that this diagram be added to the record. RC:11.17.2008:7; The trial court agreed that if the diagram could be found, he would order it added to the record. RC: January 13, 2009 at p. 8, 20-21. The prosecutor and court clerk indicated that they were unable to locate the diagram and the trial court found that they had been lost or destroyed. RC: May 15, 2009 at pp. 9-10.

People v. Ceja, 4 Cal.4th 1134, 1140 (1993). Proving that the defendant engaged in planning is necessary to ensure that the defendant's state of mind is equivalent to premeditation and deliberation. *Id.* at 1139. In *Ceja*, this Court overturned a decision in which the court of appeal found insufficient evidence to support the trial court's instruction on lying-in-wait murder. *Id.* Among other things, the court of appeal had reasoned that the homicide appeared to be a result of anger and provocation, rather than planning. *Id.* at 1142. Despite reversing the court of appeal's decision, this Court never questioned that anger and provocation could negate the requirement that the defendant's mental state be equivalent to premeditation and deliberation.

The evidence presented below demonstrates that Duong never premeditated or deliberated the killing victim Tram, but rather acted out of anger, only after he was provoked by victim Tram's threatening behavior and one or more physical and verbal confrontations between rival gang members. 6:RT 908-910, 947, 958-967; 7:RT 988-992, 997, 1052-1054; 9:RT 1394-1395, 1403-1408, 1418; 10:RT 1481-1484, 1518-1527, 1561-1562. Moreover, the evidence shows that Duong never planned to kill victims Norman, Dang, and Tang, but, rather that they were killed as a result of Bui's intervention after the first shot was fired. 6:RT 919-920, 929, 951, 953-955, 969; 7:RT 1060-1061, 1069, 1090-1096, 1095-1098, 1108-1109; 10:RT 1517.

2. The Prosecutor Did Not Prove a Substantial Period of Watching and Waiting before the Shooting

This Court has also reaffirmed several times that a substantial period of watching and waiting is an element of lying-in-wait murder. In *People v. Stanley,* 10 Cal.4th at 796, the defendant argued that because deliberation is not an essential element of lying-in-wait murder, there was no difference between lying-in-wait and premeditated murder. This Court rejected Stanley's argument, explaining that lying-in-wait murder requires a "factual matrix" distinct from ordinary premeditated murder which includes the elements of concealment of purpose, a substantial period of watching and waiting, and a surprise

attack on an unsuspecting victim from a position of advantage. *Id.* at p. 796. This Court's reasoning in *Stanley* relied on *Morales*, 48 Cal.3d 527, which involved a lying-in-wait special circumstance allegation under section 190.2, subdivision (a)(15), rather than lying-in-wait murder under section 189. While the two forms of lying-in-wait are "largely similar, but slightly different," *People v. Ceja,* 4 Cal.4th at 1140, n. 2, this Court has continued to make clear that a substantial period of watching and waiting is an element of each. See e.g., *People v. Gurule,* 28 Cal.4th at 630; *People v. Cole,* 33 Cal.4th 1158, 1204-1205 (2004) ; see also *People v. Poindexter*, 144 Cal.App.4th 572, 584 (2006).

The prosecutor argued that the jury could find Duong guilty of lying in wait murder so long as he had enough time to "reflect and decide whether to kill or not to kill." 12:RT 1973. However, the issue was not whether the amount of opportunity for reflection would have been sufficient under some circumstances, but rather, whether under the circumstances of this case, Duong actually watched and waited for a substantial period of time. The record below demonstrates that, while Duong may not have shot the victims immediately following the initial provocation, the provocation continued and escalated until the first shots were fired. Indeed, even though Tram was armed with a loaded weapon, behaving in a threatening manner, and getting into altercations with Duong and other International Club patrons, club owner Bui decided, instead of removing Tram from the premises, to sit at Tram's table, thereby ramping up the provocation. 7:RT 1053-1054, 1088-1094, 1101-1108. Furthermore, the evidence shows that victims Dang, Tang, and Norman were not killed as a result of any watching or waiting, but rather as the result of Bui's intervention. 6:RT 919-920, 929, 951, 953-955, 969; 7:RT 1060-1061, 1069, 1090-1096, 1095-1098, 1108-1110; 10:RT 1517.

C. The Instructions on Lying-in-Wait Were Unconstitutionally Inadequate

The court's instructions were silent on two crucial issues. First, the instructions

failed to inform the jury that if it found that Duong acted in anger, in response to provocation, the jury could not find him guilty of first degree murder based on lying-in-wait. Second, the instructions did not inform the jury that lying-in-wait murder required a substantial period of watching and waiting. For these reasons, the instructions invited the jury to convict Duong on an erroneous legal theory.

The court gave CALJIC 8.25, the standard instruction on lying-in-wait murder, and also repeated the standard instructions defining premeditation and deliberation:

> Murder which is immediately preceded by lying in wait is murder of the first degree.
>
> The term lying in wait 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 its duration is such as to show a state of mind equivalent to premeditation or deliberation.
>
> The word premeditation means considered beforehand.
>
> The word deliberation means formed or arrived at or determined upon as a result of careful thought and weighing of consideration for and against the proposed course of action.

4:CT 1035; 12:RT 1899.

A court has a sua sponte duty to instruct the general principles of law relevant to the issues raised by the evidence. *People v. Hood*, 1Cal.3d 444, 449 (1969); *People v. St. Martin,* 1 Cal.3d 524, 531 (1970). The general principles of law governing the case are those principles closely and openly connected with the evidence adduced before the court which are necessary for the jury's proper consideration of the case. *People v. Wilson*, 66 Cal.2d 749, 759 (1962); *People v. Wade*, 53 Cal.2d 322, 334 (1959).

None of the court's instructions informed the jury that to convict Duong on a lying-in-wait theory that he had to have planned the attack, i.e., that his actions were not

an angry response to provocation. Trial courts must instruct jurors on facts affecting a defendant's ability to form the specific intent to commit a crime. See, *People v. Saille*, 54 Cal.3d 1103, 1119-1120 (1991). As a result of the deficient instruction, the jurors in Duong's case could have found that he committed first degree murder even if he did not lay in wait as part of a plan to attack the victims, but rather, as the facts demonstrate, acted in angered response to provocation.

In addition, the instructions erroneously failed to inform the jury that Duong had to have watched and waited for a substantial period of time. See *People v. Stanley*, 10 Cal.4th at 796; *People v. Hardy*, 2 Cal.4th at 163; *People v. Morales*, 48 Cal.3d at 557. In *People v. Edwards*, 54 Cal.3d 787 (1991), defendant's trial was held before the *Morales* decision, and consequently the trial court's lying-in-wait special circumstance instructions did not mirror the *Morales* language in explaining the elements of lying-in-wait. This Court nevertheless upheld the special circumstance finding, because the instructions fulfilled all the legal requirements of *Morales* even though the words were not always "precisely the same." *Id.* at 822-823. Although in *Edwards*, the instructions did not require the jury to find a "substantial" period of watching and waiting, the trial court did instruct the jury that "If the murder is done suddenly, without a period of waiting, watching and concealment, the special circumstance of lying in wait is not present." *Id.* at 822. Thus, the *Edwards* jury learned that the lying in wait had to last long enough to establish the elements of watching, waiting and concealment, and that sudden murder done without watchful waiting and concealment is not murder by lying in wait. Under those circumstances, this Court found that the jury would have understood that lying-in-wait murder "necessarily include[d] a substantial temporal element." *Id.* at 823.

Here, no instruction like the one in *Edwards* either explicitly or implicitly informed jurors that the watching and waiting period had to be substantial. To the contrary, CALJIC No. 8.25 stated that the lying-in-wait period needed to last only long enough to show a state of mind equivalent to premeditation or deliberation. For that

reason, under the instructions given, jurors could have found that Duong had sufficient time after the argument with Minh Tram to premeditate the attack even though the time elapsed would have been insufficient to find a substantial period of lying in wait if the jury had been correctly instructed. Accordingly, the lying-in-wait instructions were inadequate and erroneous.

D. Prejudice

The trial court's errors in instructing the jury on lying-in-wait murder despite the facts of this case and in giving an instruction that failed to articulate the requisite intent for first degree murder– an essential element of the crime– require reversal, because there was a basis in the record for the jury to have found for Duong on the omitted element of intent. *People v. Hamilton*, 80 Cal.App.3d 124, 133 (1978). Moreover, by failing to instruct the jury on an essential element of the crime, the trial court unconstitutionally relieved the prosecutor of his burden to prove every element of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364.

Duong's intent was the central issue before the jury. Once the trial court stripped Duong of the right to argue that he killed Minh Tram in self-defense or defense of others (See claims IV and VII, above, and IX, below, which are incorporated by reference herein). Duong's entire defense case rested on evidence that he killed Minh Tram in the heat of passion and that he killed victims Norman, Dang, and Tang inadvertently as a result of Bui's intervention. Thus, the trial court's failure to instruct the jury that it could not find him guilty of lying-in-wait murder if it found that Duong acted in response to provocation, did not plan to attack the victims, or did not engage in a substantial period of watching and waiting, increased the likelihood that the jury found Duong guilty of first degree murder without having the intent required by law.

The prosecutor took advantage of the confusion created by the court's lying-in-wait instruction by arguing that the requisite mental state for lying-in-wait murder is equivalent to premeditation *or* deliberation, with the jury uninformed that provocation or

a lack of waiting, watching, or planning negated the specific intent. 12:RT 1971-1979. Indeed, the prosecutor utilized a diagram during his argument that caused the trial court to express concern that it had created an appellate error.[36] 12:RT 1988-1990. The prosecutor's argument and diagram thus increased the likelihood that the jury found Duong guilty of first degree murder even though he did not harbor the requisite intent.

Moreover, the jury's request for readback of the testimony of John Bui and Thi Van Le "regarding the time frame sequence of shootings," 13:RT 2126, evinces its consideration of whether Duong had committed first or second degree murder. Specifically, they asked for "testimony that relates to the first shot and anything that intervened until the last shot." 13:RT 2134.

Under these circumstances, the state cannot prove beyond a reasonable doubt that in the absence of the lying-in-wait murder instructions, the jury would not have found Duong guilty of a lesser offense than first degree murder in the killing of victims Tram, Tang, and Norman. *Chapman v. California*, 386 U.S. at 24. His convictions must be reversed.

IX. THE TRIAL COURT'S ERRONEOUS EXCLUSION OF THE INTERNATIONAL CLUB PERMIT HEARING RECORDS DEPRIVED DUONG OF HIS RIGHTS TO CONFRONT WITNESSES AGAINST HIM AND TO PRESENT A DEFENSE

The trial court excluded relevant evidence that was essential to Duong's case that he lacked the intent to commit first degree murder and that would have impeached the credibility of key prosecution witness John Bui. The ruling sounded the death knell of Duong's defense, arbitrarily preventing him from subjecting the prosecutor's case to rigorous adversarial testing. The error deprived Duong of his Sixth, Eighth, and Fourteenth Amendment rights to present a defense; to confront witnesses against him; to due process; to have the prosecutor prove every element of the crime beyond a reasonable

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[36] See footnote 35, above.

doubt; to effective assistance of counsel; and to capital guilt and penalty determinations free from arbitrariness, and violated the state constitution's prohibition on the exclusion of relevant evidence. U.S. Const. Amends. VI, VIII, XIV; Cal. Const., art. I, § 28(d).

A. Proceedings Below

Duong subpoenaed records pertaining to and indicated his intention to call witnesses involved in International Club's City of El Monte business permit. 4:CT 933; 3:RT 381. The prosecutor moved pursuant to Evidence Code section 402 for a hearing to determine the relevancy of the evidence. 3:RT 381, 386. Duong suggested that the court rule based on the documents, but the prosecutor insisted that he needed testimony. 3:RT 386. The trial court agreed to hold a hearing. 3:RT 387.

Before and after the hearing, Duong explained that much of the evidence was relevant to the credibility of key prosecution eyewitness John Bui, a co-owner of International Club. 3:RT 385, 387. The evidence was crucial to the jury's assessment of Bui's credibility, because Bui was legally responsible for providing security at International Club, but on the night of the homicides, failed to maintain a functioning metal detector or to implement other security requirements imposed by the city. 3:RT 385, 440. Duong informed the trial court that the witnesses he intended to call provided reports and testified at a hearing that took place in 1999, after the homicides charged in this case, on whether to shut down International Club. 3:RT 385, 408.

Before and after the hearing, the prosecutor objected to the evidence under Evidence Code section 352 and suggested that its admissibility was questionable. 3:RT 381, 386, 440. The prosecutor complained that the evidence would be time consuming and would include a lot of hearsay. 3:RT 442-443. The prosecutor also argued that evidence that Bui failed to comply with permit requirements may have been appropriate for a civil case, but not a criminal case. 3:RT 442. Moreover, according to the prosecutor, it was unclear that anyone determined that the metal detector was not working on the night of the homicides, although it was clear that people got into the club with guns.

3:RT 442. Notwithstanding his pretrial arguments, the prosecutor acknowledged in closing argument that, on the night of the homicides, the metal detector was not functioning. 12:RT 1969.

1. The 402 Hearing

a. Testimony of Gary Haidet

In mid 1999, following the homicides, the City of El Monte's licensing commission put police Detective Haidet in charge of reviewing whether it should renew International Club's business permit. 3:RT 408, 416, 420-421. For that purpose, Haidet investigated the history of problems at International Club before and including the homicides, by reviewing documented calls to the police department which required either a police response or extra patrol. 3:RT 408-409. Haidet read police reports pertaining to some of these incidents, but did not independently investigate them or determine whether any resulted in criminal charges. 3:RT 418-421. Haidet testified under oath before the licensing commission about his findings. 3:RT 408-409.

In the course of his investigation, Haidet learned that from November 1996[37] through the morning of the homicides, International Club had 51 radio service calls requiring a police response, more than any other El Monte club with high police activity.[38]

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[37] Haidet first testified that he reviewed statistics from the period of November 1996 through the date of the homicides, but later testified that he reviewed statistics from 1992 through the date of the homicides. 3:RT 411, 414-415, 424-425. Counsel for Mr. Duong sought settlement of this during record correction proceedings. RC motion at p. 27, lines 16-19. The trial court denied the motion, finding that this should have been clarified at the time of Haidet's trial examination, not during record correction proceedings. RC: March 24, 2009 at p. 21.

[38] Haidet compared International Club with Victory Billiards and El Chabasco Bar. 3:RT 414, 421. Victory Billiards was smaller than International Club, but it did not have a dining

3:RT 409-411. Six of the calls were reports of guns seen or shots fired. 3:RT 414. Four or five were traffic accidents. 3:RT 419. The calls also included several batteries, brandishing of a gun by co-owner John Bui, a 1993 murder in the parking lot, the presence of a murder suspect on the premises, and a drive-by shooting. 3:RT 426. In addition to the radio calls, police initiated about 50 responses to International Club during the course of their patrol duties because they viewed it as an "active" location requiring police to keep an eye on things whenever there was a large event. 3:RT 414-415. Indeed, prior to the investigation, Haidet visited International Club five or six times as a patrol officer. 3:RT 416.

Haidet was familiar with a 1997 document in which El Monte conditioned renewal of International Club's permit on the owners' implementation of specific security measures. These included: (1) installation of a metal detector at the entrance; (2) installation of video surveillance cameras; (3) maintaining video surveillance recordings for at least seven days; and (4) having three security guards on duty during weeknights. Def. 402 exh. A; 3:RT 427-429.

The terms of Bui's business license also required him to promptly notify the El Monte police when he believed "that any person on the premises may [have been] engaged in any activity or conduct which is illegal under applicable law or which may otherwise pose a threat of violence or civil disturbance to any other person . . ." Def. 402 exh. A.

Haidet discovered through interviews of International Club bartenders and security guards that: (1) there was increase in Asian gang activity at International Club during the time period and a large portion of the clientele were Asian gang members; (2) employees or security guards often let in through the back door persons who were underage or who

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area. 3:RT 421. El Chabasco was smaller than either International Club or Victory Billiards. 3:RT 422.

were not permitted in through the front door; and (3) the metal detector had for some time been inoperable. In addition to information gleaned from International Club personnel, Haidet believed detectives told him it was inoperable the night of the homicides. 3:RT 412-413, 418, 422-423. Moreover, police units had difficulty responding to emergencies at International Club because it was located at the "extreme border" of the city. 3 RT 412. On the basis of this evidence which demonstrated that, among other things, International Club failed to comply with conditions set forth by El Monte in 1997, Haidet recommended that the city not renew International Club's permit. 3:RT 412, 429.

As an owner of the club, John Bui was responsible for maintaining security at the location. 3:RT 412. During the investigation, Haidet visited International Club three or four times in part to contact John Bui; it was difficult to find him there. 3:RT 416. Haidet could not recall whether he ever made contact with Bui or co-owner Earl Nguyen. 3:RT 417.

b. Testimony of William G. Howell

In 1999, Detective Howell was a sergeant with the homicide bureau of the Los Angeles County Sheriff's Department. 3:RT 431. From 1983 until about February 1998, while Howell was an Asian organized crime investigator, he learned that International Club was an Asian gang hangout. 3:RT 431, 435-436. Howell's primary task was to identify Asian gangs and crimes that specialized in Asian victims. 3:RT 436. For that reason, Howell visited International Club several times and confirmed that members of Asian criminal groups were present. 3:RT 432, 436. Howell was aware that Bui was a co-owner of International Club which was a gang hangout. 3:RT 432, 437. Howell asked several informants whether Bui was gang affiliated, but none provided any information. 3:RT 432-433, 436-437. At least two factions of the Wah Ching gang and one faction of the V-Boys gang frequented International Club. 3:RT 433.

At one point, Howell spoke with Detective Linda Parrot about his knowledge of the International Club. 3:RT 434. Howell's intelligence reports of his conversations with

Parrot were destroyed by orders of the Sheriff. 3:RT 435. Howell did not believe he gave an opinion about whether International Club's permit should be renewed, because that was not part of his function. 3:RT 435.

c. The Trial Court's Initial Ruling

After the hearing, the trial court tentatively ruled that the evidence would not come in, because it did not understand the relevance and because much of the evidence was hearsay. 3:RT 443-444. The trial court agreed to revisit the issue after hearing John Bui's testimony. 3:RT 443.

2. John Bui

In his opening statement, the prosecutor alerted the jury: "Mr. Bui will testify that he worked at this business for many, many years, attempted to build it up. Did his best to run a clean business. But he will testify that gang members did come there." 6:RT 868.

Bui testified that part of his job as owner was to diffuse arguments. 7:RT 1054. Bui had previously been in charge of security, but by the time of the homicides, he had transferred that responsibility to his co-owner. 7:RT 1083. In the absence of his partner, Bui assumed responsibility for "that thing" the night of the homicides. 7:RT 1083. Bui protested that, although he had been an owner of International Club for seven years, he could not handle everything. 7:RT 1084. Also, when his partner left for the day, it was "up to the manager to do the things." 7:RT 1101.

According to Bui, he had no way of knowing whether customers were gang members[39]:

> The people that come over there they don't show you so to know -- so that you would know they are or they are not from a gang. I need customers so that my business could be in

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[39] Thi Van Le, one of the prosecutor's star witnesses, testified that Bui's brother-in-law, Khiet Diep, who was a manager at International Club, was a Wah Ching gang member. 6:RT 899.

> existence. I just make sure that they come there, they like the place, they enjoy, and then go back home. 7:RT 1084-1085.

In addition, Bui, again denying that he was responsible for International Club security, claimed that every night he had two security guards and a metal detector. 7:RT 1086. The morning of the homicides, Bui did not check to see whether the metal detector was working; he could not recall the names of the security guards who worked that day. 7:RT 1086.

The night or morning of the homicides, after Minh Tram had an argument with other patrons, Bui had to calm him down to ensure there would be no further problems. 7:RT 1089, 1092-1093. Key prosecution witness Thi Van Le testified that Minh Tram appeared to be packing a gun and was acting like a big shot. 6:RT 965. Nevertheless, Bui testified that Minh Tram was behaving normally the night of the homicides. 7:RT 1089, 1092-1093. Indeed, according to Bui, the gun-carrying and argumentative Minh Tram was behaving just like the club's "regular customers." 7:RT 1089.

Bui testified that he initially refused to identify the shooter in writing or to come to court because he feared that he and his family would be shot. 7:RT 1081-1082.

As far as Bui's intervention in the shooting, he testified variously that he had grabbed the shooter, that he tried to grab the shooter, that he tried to grab the gun, and that he did not try to grab the gun. 7:RT 1060-1061, 1069, 1095-1098, 1108-1109. Key prosecution witness Thi Van Le testified alternately that Bui grabbed Duong, tried to grab Duong, and that he tried to stop Duong by coming from behind and putting arms around Duong in a bear hug type fashion. 6:RT 919-920, 929, 951, 953-955.

Regarding Bui's testimony, the prosecutor argued in closing:

> I am sure counsel will tell that you there were a lot of unsavory characters in Mr. Bui's nightclub. You have the videotape of the crime scene. That was a very nice place. Mr. Bui -- say you are a businessman, you are in that business, you have put your life's savings in it, everything you have worked for is in that business. You can't tell certain people come in,

not come in. This is an extremely tough business to be in. You know, if a gang member comes to the door and he is not acting inappropriately, you can't say, well, you are a gang member. You can't come in my club. Next thing will happen that gang member will sue him and he will win and he will get a lot of money from Mr. Bui for discrimination that's exactly what will happen.

It's not a business that I would want to be in simply because it is such a difficult business. You are constantly trying to juggle, keep everybody happy. But Mr. Bui lost everything he had that night. Did he lose his life? No. Did he suffer such as the victims suffered? Absolutely not. But he lost his entire business, his way of life, his livelihood. It's all gone. Club is gone.

But Mr. Bui stood there and waited for the police that night. . . .

And Mr. Bui told you he was afraid to say who did it. He was afraid for his life. We read from the transcript when he was on the stand and he indicated that he told the police on video that he thought he and his family would be shot. 7:RT 1948-1950.

3. The Trial Court's Final Ruling

After Bui testified, but before Duong presented his case, defense counsel asked the trial court

> to permit me based on Mr. Bui's testimony to bring in evidence of the fact that that location is a gang hangout and information having to do with Mr. Bui being involved as a security person.
>
> His testimony I think gave the jurors the idea that in fact he didn't do those things. And I think in fact that that's contrary to what some witnesses may testify to. 8:RT 1247

The trial court responded that in the absence of additional evidence, it would abide by its earlier ruling, explaining:

> I think it's clear from the testimony at this time that persons associated with at least three criminal street gangs were present that evening, and that on the night of this event Mr.

Bui was in the location.

But by his own testimony he did not involve himself in any sense of the word to security other than his attempt to intervene when the first gunshot took place. 8:RT 1250

Duong responded that Bui's testimony in which he minimized his responsibility for security was misleading; therefore, contrary to the trial court's assessment, it was precisely the reason for which this evidence was necessary. 8:RT 1251. Bui had used a gun in the past and had over time taken responsibility for security matters. 8:RT 1251. A juror could conclude based on this evidence that Bui was responsible for security issues and that Bui's testimony portrayed his level of intervention in the shootings inaccurately. 8:RT 1251-1252.

The trial court noted that there was no indication that Bui had a gun the night of the homicides and it did not see the relevancy of the evidence. 8:RT 1252. The trial court said of Bui, "I mean the facts are the facts. He did what he indicated. It corresponds with at least some other witness [sic]." 8:RT 1252. The trial court agreed to reconsider the evidence if other percipient witnesses contradicted Bui. 8:RT 1252. Later, the trial court acknowledged that, "the state of the evidence [was] at variance in terms of the nature of the struggle between Mr. Bui and the defendant." 11:RT 1683. The trial court also denied Duong's request for an instruction on self-defense or defense of a third party. 11:RT 1823-1824.

B. The Trial Court Deprived Duong of State Law Rights and His Federal Constitutional Rights to Confront Witnesses Against Him and to Present a Defense

1. The Proffered Evidence Was Both Relevant and Admissible

"[R]elevant evidence shall not be excluded in any criminal proceeding." Cal. Const., art. I, § 28(d). Relevant evidence "including evidence relevant to the credibility of a witness " is that which has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Cal. Evid. Code § 210.

The "jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony," including "[t]he existence or nonexistence of a bias, interest, or other motive," and "[t]he existence or nonexistence of any fact testified to by him." Cal. Evid. Code § 780(f), (i).

Duong's proffered evidence was relevant to material disputed issues, including: (1) to impeach Bui's testimony that he was not responsible for security at International Club; (2) to impeach Bui's testimony that he was not aware that International Club had for years been a major Asian gang hangout; (3) to show that at the time of his early statements to police in this case, Bui's business license was threatened, giving him motive to lie about his relationship to the victim and other gang members and about his failure to provide security at International Club; (4) to cast doubt on Bui's credibility by exposing that he was financially beholden to the Asian gang members who were a large percentage of International Club's clientele; (5) to support Duong's defense that Bui's attempt to wrest the gun from him resulted in the accidental killings of victims– a fact that the trial court acknowledged was in dispute; (6) to refute the prosecutor's improper bolstering of Bui's testimony when he stated that Bui ran a "clean" business; (7) to refute the prosecutor's continued erroneous bolstering of witness with Bui with closing argument that Bui was a helpless victim whose business was unsafe through no fault of his own when in fact he failed to take the steps required of him to improve safety at International Club; (8) to support Duong's defense that he shot Minh Tram because he reasonably feared for the safety of a third party or that Minh Tram was the source of provocation that aroused Duong's passions;[40] and (9) after the trial court permitted the prosecutor to introduce

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[40] The trial court foreclosed Duong's case that he acted in defense of a third party with two critical errors. First, Duong made an invalid waiver of his right to testify after the trial court indicated that he could appeal a ruling that if he testified the court would permit the prosecutor to introduce evidence of two unadjudicated homicides. This precluded Duong from testifying that he acted in defense of a third party. Second, the trial court

evidence of Duong's gang associations, to help the jury understand how the gang dynamics at International Club contributed to the reasonableness of Duong's fear the night of the homicides.

Neither the trial court nor the prosecutor specified which documents or testimony they believed were inadmissible, however all of the evidence Duong offered was clearly admissible. The six page 1997 document, marked Defense Exhibit A (402 hearing), which enumerated the conditions International Club owners John Bui and Earl Nguyen had to implement for the City of El Monte to renew its business license, was admissible for at least two reasons. It was a business record within the meaning of Evidence Code section 1270 and it was made by and within the scope of the reporting duty of a public employee under Evidence Code section 1280.

Haidet's testimony was admissible because he was an expert who would have opined about subjects "sufficiently beyond common experience" and his opinions would have "assist[ed] the trier of fact." Cal. Evid. Code § 801(a). Experts may testify about normal occurrences in a culture or system. See *People v. Ward*, 36 Cal.4th 186, 209-210 (2005). Expert evidence is frequently relevant to a jury's determination of the credibility of another witness. *Id.*. at 211. Bui was a key prosecution witness whose credibility was clearly at issue. Haidet could have explained to the jury that Bui was in fact vested with providing security at the club, that he was on notice of the dangers to patrons, and that Bui failed to do what the City of El Monte required him to do to ensure the safety of patrons. This may have been counterintuitive to jurors who heard Bui deny that he was responsible for keeping patrons safe, heard the prosecutor argue that Bui did his best to maintain security, and might have assumed that Bui would naturally act to keep patrons

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refused Duong's request to instruct the jury on self-defense or defense of a third party. For this reason, Duong was left to argue that he killed Minh Tram in the heat of passion. (Claims III and V, above are incorporated by reference herein.)

safe.

The evidence on which Haidet relied was independently admissible. The police statistics about calls to International Club are business records and records of public employees. Cal. Evid. Code §§ 1270, 1271, 1280. Moreover, the service calls were admissible even though Haidet did not independently investigate the incidents, because they were not offered to show that crimes occurred, but that reasonable people, including law enforcement, perceived International Club as a dangerous place whose security Bui failed to address. This bears directly on the reasonableness of Duong's fear that Minh Tram would harm his friends.

Statements to Haidet by security guards, bartenders, or other employees that the metal detector had not been working, that inappropriate people were routinely admitted through the back doors, and that the International Club was a haven for Asian gang members were admissible as declarations against the witnesses' pecuniary interests. Each of these individuals could have lost his or her job for revealing information that their employers did not want the authorities to have. The closure of International Club as a result of statements they made to law enforcement would have also threatened their livelihoods. Moreover, the security guards and their employers could have been liable to patrons harmed as a result of their failures to do their jobs. Cal. Evid. Code § 1230; See *Balard v. Bassman Event Security*, 210 Cal.App.3d 249 (1989) (security personnels' duty of care to patrons is identical to that of the business owner/proprietor); *Marois v. Royal Investigation & Patrol*, 162 Cal.App.3d 193, 199 (1984) (security guard may be liable for failing to act reasonably to protect patrons).

Even assuming that the evidence was not admissible, Haidet was nevertheless entitled to rely on these materials because they "were of a type that reasonably may be relied upon an expert in forming an opinion upon the subject to which his testimony relates." Cal. Evid. Code § 801(b). Thus, because the matter on which he relied is the kind of information normally relied on by permit evaluators, it was permissible for Haidet

to testify that these materials formed the basis his opinion that Bui was responsible for security and was on notice about threats to patrons, but failed to comply with city requirements. 801(b); See also *People v. McDaniels*, 107 Cal.App.3d 898, 905 (1980).

Howell's testimony was admissible because he had personal knowledge that International Club's owners were on notice that their place was a gang hangout. Cal. Evid Code § 702. Furthermore, once the trial court admitted the prosecutor's gang evidence, Duong was entitled to have Howell give expert testimony about the gang dynamics at International Club to help prove the reasonableness of his fear that Minh Tram was a threat to his friends. Cal. Evid. Code § 801(a).

Because the proffered evidence was both relevant and admissible, the trial court in excluding it violated Duong's rights under the state constitution, statutes, and laws.

2. Duong Was Entitled to Present a Complete Defense

States may establish rules excluding evidence from criminal trials. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). However, these rules may not conflict with a defendant's Sixth and Fourteenth Amendment rights to a "meaningful opportunity to present a complete defense." *California v. Trombetta,* 467 U.S. 479, 485 (1984); *Crane v. Kentucky,* 476 U.S. 683, 690 (1986); *Holmes*, 547 U.S. at 324. These rights are violated when a court arbitrarily excludes "important defense evidence" without serving any "legitimate interests." *Holmes*, 547 U.S. at 325. This is because the exclusion of such evidence "deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" *Crane v. Kentucky,* 476 U.S. at 690-691, citing *United States v. Cronic*, 466 U.S. 648, 656 (1984). Moreover, the exclusion of such evidence interferes with the jury's ability to "decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19 (1967).

In *Holmes*, the trial court, consistent with South Carolina law, excluded defendant's proffered evidence of third party culpability, finding that defendant "could not 'overcome the forensic evidence against him to raise a reasonable inference of his

own innocence.'" *Holmes*, 547 U.S. at 324, citing *State v. Holmes*, 361 S.C. 333, 343 (2004). The High Court reversed, finding that the trial court erred in focusing on "the strength of the prosecution's case" rather than considering whether the "evidence, if viewed independently, would have great probative value and . . . would not pose an undue risk of harassment, prejudice, or confusion of the issues." *Id.* at 329. So too, the trial court in Duong's case, rather than permitting the jury to assess the credibility of conflicting evidence, reasoned that because the court itself found Bui's testimony credible, it would not permit Duong to impeach his credibility or present evidence of another possible theory of the case.

Duong contested Bui's credibility and the reliability of other evidence that the prosecutor presented; nevertheless, the trial court, like the trial judge in *Holmes*, failed to accurately assess the prosecution's proof in light of Duong's "challenges to the reliability of the prosecution's evidence." *Id.* at 330. Although "the prosecution's evidence, *if credited*," would have supported the prosecutor's theory of guilt, "it does not follow that evidence" that supported Duong's contention that he believed Minh Tram posed a threat and provoked the shooting, and that his struggle with Bui led to the inadvertent or accidental shooting of victims Norman, Tang, and Dang, had "only a weak logical connection to the central issues in the case." *Id.* (emphasis in original).

In addition to placing undue emphasis on the strength of the prosecutor's case, the trial court also erred in focusing on the "strength or merits of [Duong's] defense," while failing to consider that the evidence "was all but indispensable to any chance of its succeeding." *Crane v. Kentucky,* 476 U.S. at 691.

Duong's proffered evidence was central to his defense that he shot Minh Tram in defense of another or after Minh Tram provoked a heat of passion response, and shot victims Tang, Norman, and Dang inadvertently or accidentally. The evidence about International Club and about Bui's failure to alert authorities after he had to break up a fight or argument between the armed and gang-affiliated Minh Tram and other gang

members underscored the reasonableness of Duong's fear of or the extent of provocation by Minh Tram. The evidence demonstrated that International Club was such a dangerous place that El Monte required the owners to install a metal detector, hire a licensed security firm, and install surveillance cameras . El Monte could only legally impose such onerous conditions because International Club had a history of criminal activity. *Ann M. v. Pacific Shopping Center*, 6 Cal.4th 666, 679 (1993), *superseded on other grounds*, Cal. Code Civ. Pro. § 437c(o)(2) (because requiring a business proprietor to hire security guards imposes a heavy burden, "a high degree of foreseeability is required in order to find that the scope of a landlord's duty of care includes the hiring of security guards" which "rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises.") The evidence further supported the reasonableness of Duong's perceptions because it demonstrated that although Bui and his co-owner were on notice that their establishment was a haven for dangerous criminal activity they, in flagrant violation of the terms of their business permit, failed to protect their patrons.

In addition, the evidence bolstered Duong's claim that his struggle with Bui led to the deaths of Norman, Tang, and Dang by demonstrating that despite his contentions to the contrary, Bui, as the proprietor of the International Club, was both experienced at dealing with security issues and was in charge of security that night. In light of this evidence, the jury was more likely to find that Bui's intervention and the resulting struggle for the gun caused unintended deaths.

Furthermore, no legitimate state interest weighed in favor of exclusion. The prosecutor and the trial court noted that a lot of the evidence was hearsay, but neither identified which specific portions were objectionable. As explained above, this evidence was clearly admissible. However, even if portions of the evidence had been inadmissible as a matter of state law, its exclusion violated Duong's Sixth and Fourteenth Amendment rights to present a defense and to due process, because the evidence was both trustworthy and critical to the defense. *Chambers v. Mississippi*, 410 U.S. at 302.

The prosecutor complained that the evidence would be time consuming, however the record does not support this contention. The testimony at the 402 hearing was brief and the six page permit renewal document was dwarfed by the voluminous prosecution exhibits before the jury. The evidence Duong proffered in support of his defense was certainly no more time consuming than the prosecutor's lengthy presentations of evidence about matters that were not at issue, including the identity of the shooter which Duong conceded in opening statement.

Under these circumstances, the trial court's exclusion of evidence which was central to Duong's defense served no legitimate government interest and arbitrarily deprived him of the right to present a defense in violation of the Sixth and Fourteenth Amendments. As a result of this failure of the adversarial process, the jury never learned evidence that would have demonstrated that Duong lacked the requisite intent to commit first degree murder.

3. Duong Was Entitled to Confront Key Prosecution Witness John Bui

A criminal defendant has the right to confront witnesses against him. U.S. Const., Amends. VI, XIV; *Pointer v. Texas*, 380 U.S. 400 (1965). This right entitles a defendant to test the "believability of a witness and the truth of his testimony[.]" *Davis v. Alaska,* 415 U.S. 308, 316 (1974). Thus, trial courts must give criminal defendants the opportunity to show that the government's evidence is untrue. *Greene v. McElroy*, 360 U.S. 474, 496 (1959). To that end, a defendant may present evidence that reveals a witness's "biases, prejudices, or ulterior motives[.]" *Davis v. Alaska,* 415 U.S. 308 at 316. "[W]here a defendant's guilt hinges largely on the testimony of a prosecution's witness, the erroneous exclusion of evidence critical to assessing the credibility of that witness violates the Constitution." *Depetris v. Kuykendall*, 239 F.3d 1057, 1062 (9th Cir. 2001).

These principles are embodied in Evidence Code section 780 which permits a jury to "consider in determining the credibility of a witness any matter that has *any* tendency

in reason to prove or disprove the truthfulness of his testimony." (Emphasis added) This includes the "existence or nonexistence of a bias, interest, or other motive," and the "existence or nonexistence of any fact testified to by him." Cal. Evid. Code § 780(f), (i).

Bui obviously had things to hide, the exposure of which were essential to the issue of his credibility. The 1997 permit renewal document and Haidet's testimony would have demonstrated that Bui was lying when he testified that he was not responsible for International Club security. Cal. Evid. Code § 780(i).

Moreover, the document would have revealed to the jury that despite an explicit term of Bui's business license, there is no evidence that Bui contacted the authorities after the dispute that preceded the homicides. In combination with testimony that (1) Bui and Minh Tram were friends; (2) Minh Tram was gang associated or affiliated; (3) Minh Tram was armed and acting like a big shot; and (4) Bui had to intervene to stop an argument or fight between Minh Tram and other gang members, the permit renewal document would have demonstrated to the jury that Bui was more concerned with protecting Minh Tram than he was with protecting the safety of his patrons. This would have rendered Bui less trustworthy in the eyes of jurors, by exposing his motives to lie or omit the truth to protect the gang members who were his friends and customers. 6:RT 958-966, 989-991; 7:RT 1051-1054, 1087-1089, 1101, 1107-1108; 8:RT 1188-1196; 9:RT 1403-1407, 1413-1414, 1451; 10:RT 1482, 1522-1524, 1561, 1600-1601, 1612.

Howell's testimony would have contradicted Bui's testimony that he was unaware of the gang presence at International Club. Cal. Evid. Code § 780(i). The permit renewal document and Haidet's testimony would also have revealed that at the time of his early statements to law enforcement, Bui, whose business license was threatened, had reason to lie to minimize his responsibility for security as well as his association with the gang members who sustained his business. Cal. Evid. Code § 780(f).

Duong's evidence that Bui's testimony was certainly misleading in some aspects would have cast doubt on the whole of the testimony, increasing the likelihood that the

jury would have found Duong guilty of a lesser degree of homicide. See *People v. Allison*, 48 Cal.3d 879, 894-895 (1989). Absent the proffered evidence, the jury could not "make an informed judgment as to the weight to place on," Bui's testimony whose "accuracy and truthfulness were key elements in the State's case[.]" *Davis v. Alaska,* 415 U.S. at 317. Thus, the exclusion of this evidence permitted the prosecutor to present his case free from the "rigorous adversarial testing" required by the Sixth and Fourteenth Amendments. *Maryland v. Craig*, 497 U.S. 836, 857 (1990).

4. The Trial Court's Ruling Violated Additional Constitutional Rights

In excluding Duong's proffered evidence, the trial court in violation of the Fourteenth Amendment tipped the balance of forces against Duong and in favor of the prosecutor. See *Wardius v. Oregon*, 412 U.S. at 474. The trial court also lessened the prosecutor's burden of proof. See, e.g., *Sandstrom v. Montana*, 442 U.S. at 520-524. While preventing Duong from presenting a complete defense, the trial court permitted the prosecutor (1) to elicit irrelevant testimony about Duong's gang associations, (2) to present evidence that Duong possessed guns that were unrelated to the charged crimes, and (3) to, if Duong had testified, cross-examine him about uncharged homicides. (Claims V and VI, above are incorporated by reference herein.) When Duong sought a 402 hearing on the uncharged crimes, the trial court denied the request and ruled based upon documentary evidence, but when the prosecutor sought a hearing on Duong's evidence, the trial court declined to rule on substantial documentary evidence. 4:CT 981-984; 11:RT 1658. In addition, the trial court prohibited Duong from presenting evidence of Bui's legal duties as the owner of International Club, but despite a lack of any evidence that the homicide weapon had been modified permitted the prosecutor to elicit testimony that it was illegal to render a .45 caliber pistol fully automatic. 7:RT 1150. Thus, the trial court through its imbalanced rulings not only denied Duong the opportunity to present a defense, but also unfairly bolstered the evidence presented by the prosecutor. Duong was

equally if not more entitled than the prosecutor to present his version of the case. The inequality in the trial court's treatment of the parties skewed the proceedings in favor of the prosecutor by ensuring that the jury heard a mountain of irrelevant and highly inflammatory prosecution evidence, and had no opportunity to hear Duong's defense.

In addition, the exclusion of this evidence violated Duong's due process rights by arbitrarily depriving him of a liberty interest created by Cal. Constitution, article I, section 28(d) to present all relevant evidence. *Hicks v. Oklahoma*, 447 U.S. at 346-347. The trial court's error also deprived Duong of his right to a reliable adjudication at all stages of a death penalty case. *See Lockett* v. *Ohio,* 438 U.S. at 603-605; *Beck* v. *Alabama*, 447 U.S. at 638; *Penry* v. *Lynaugh,* 492 U.S. at 328.

C. Prejudice

The violation of a defendant's right to present a defense is subject to harmless error analysis. *Crane v. Kentucky,* 476 U.S. at 691. So too, when a trial court deprives a defendant of "an opportunity cast doubt on the testimony of an adverse witness," the state must prove that the errors are harmless beyond a reasonable doubt. *Delaware v. Van Ardsall*, 475 U.S. at 684. Here, the State cannot prove beyond a reasonable doubt that the violations of Duong's constitutional rights individually and when considered together did not contribute to the verdict.

The only disputed issue at Duong's guilt phase was intent. The prosecutor contended that Duong intentionally killed the victims with premeditation, deliberation and malice aforethought. Duong, in contrast, asserted or tried to assert that he killed victim Minh Tram because he feared that Tram was a threat to a third party or in the heat of passion and that the struggle with Bui over the gun led to the accidental or inadvertent killings of Tang, Dang, and Norman.[41] However, when it excluded Duong's proffered evidence about International Club, denied his requested instructions on self-defense or

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[41] See footnote 40, above.

defense of third parties and accident, and excluded the expert testimony of Dr. Posey, who would have contested the State's interpretation of the forensic evidence, the trial court blinded the jury to Duong's defense. Had the jury heard evidence about the dangerous conditions, lack of security, and wilful disregard of the owners for the safety of patrons, it would have been more likely to believe that Duong reasonably feared for his safety, reasonably feared for the safety of another, or acted after Minh Tram's provocative behavior naturally excited and aroused his passion. In addition, with the benefit of evidence that Bui had for years been responsible for security the jury would have been more likely to believe that Bui's intervention led to the accidental or inadvertent deaths of victims Tang, Dang, and Norman.

Regardless of the trial court's opinion of the strength of Duong's defense, this evidence was "indispensable" to its potential success. *Crane v. Kentucky,* 476 U.S. at 691. Without it, the jury which could evaluate "the strength of only one party's evidence," could reach no logical conclusion "regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Holmes v. South Carolina*, 547 U.S. at 331. Under these circumstances, the jury could only conclude that Duong did not present a defense because he had no defense to present.

This evidence would have also eviscerated the credibility of key prosecution witness John Bui. As the High Court has recognized, the "opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable . . . . can make the difference between conviction and acquittal." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51-52 (1987).

Whether a Confrontation Clause

> error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or

> contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Delaware v. Van Ardsall, 475 U.S. at 684

Bui's testimony was a "crucial link in the proof . . . of the requisite intent to murder." *Douglas v. Alabama*, 380 U.S. 415, 419 (1965). This is because Bui, who intervened after Duong began to shoot, was, aside from Duong, in the best position to explain what ensued when he attempted to stop the shooting. Bui's testimony was therefore not cumulative of any other testimony. Moreover, as the trial court acknowledged, Bui's own testimony and the testimony of others were inconsistent on this point.

The prosecutor's exploitation of the trial court's error compounded the prejudice. In rebuttal, the prosecutor argued that "Mr. Bui worked hard to build that business up, was doing the best he could." 13:RT 2087. The prosecutor continued:

> It's a tough business. I don't think Mr. Bui probably has a lot of formal education. I think he's probably a very intelligent man, he speaks several languages.
>
> I have trouble, my Spanish is somewhat passable, but for me to say I'm going to move to Vietnam and learn Vietnamese or speak a different -- one of several dialects of Chinese, plus learn English? That's remarkable, ladies and gentlemen.
>
> But just because he may not communicate the way someone might expect him to in a court doesn't mean he was lying.
>
> *Where did he lie? He did everything he could to stop what was happening that night.*
>
> I ask you to think about this. The defense has made a big thing -- and again I don't blame them. Mr. Meastas has a job to do. But you have a job to do also. And that's to look at the big picture of what happened.
>
> I ask you to consider this. Consider this, ladies and gentlemen. Mr. Meastas has indicated, the defense has indicated that Mr. Minh Tram -- Tram was so upset that Mr. Bui had to take him over and cool him down. *But what did Mr. Bui tell you? He didn't join Mr. Tram over at that table for a couple minutes.*
>
> Think about that. After he breaks up this argument, dispute, fight,

whatever you want to call it, the evidence was clear that Mr. Tram went over and sat down at that table and it wasn't until a couple minutes later that Bui went over.

If Mr. Tram was just acting the role of a fool and completely uncontrollable, Mr. Bui wouldn't have left him alone for a couple minutes. Think about that. I ask you to consider all these factors when you decide what happened in there that night.

13:RT 2087-2089 (emphasis added).

Thus, without Duong's proffered evidence, the jury never learned that Bui's testimony was substantially untrue and that Bui had motives to mislead both law enforcement and the jury. Furthermore, the jury had no way of knowing that the prosecutor's representations about Bui were untrustworthy.

The trial court gave CALJIC 2.20 which mirrors Evidence Code section 780, providing guidance to the jury in assessing witness credibility. 12:RT 1886-1887. The trial court also gave CALJIC 2.21.2:

> A witness who is wilfully false in one material part of his or her testimony is to be distrusted in others.
>
> You may reject the whole testimony of a witness who willfully has testified falsely as to a material point unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars. 12:RT 1888.

By excluding Duong's proffered evidence, the trial court stripped these critical instructions of their value. The evidence in combination with these instructions would have diffused the impact of Bui's testimony and the jury would have been more likely to dismiss Bui's testimony in favor of Duong's version of events. Instead, Bui's unimpeached testimony gave the jury an exaggerated picture of the strength of the prosecutor's case for first degree murder and permitted the prosecutor to make misleading arguments to bolster Bui's testimony.

For these reasons, the errors, individually and in combination, require reversal.

X. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT DURING THE PENALTY PHASE CLOSING

ARGUMENT WHICH VIOLATED APPELLANT'S RIGHT TO A FAIR AND RELIABLE PENALTY DETERMINATION

During his closing argument at the penalty phase, the prosecutor made highly improper and prejudicial arguments which deprived Mr. Duong's state and federal constitutional rights to a fair trial, due process and a reliable penalty determination. Cal. Const., art I, §§ 7, 15, 16, 17; U.S. Const., Amends V, VI, VIII, XI.

When discussing whether the jury could consider life without parole as the appropriate punishment in this case, the prosecutor made the highly improper argument:

> There's no easy way out in this case. Remember something. You will have to look yourselves in the mirror for the rest of your life. And if you take an easy way out, I suggest that at some point in time, some day when you look yourself in the mirror, you will know in your heart you did the wrong thing.
>
> ***
>
> If you follow the evidence in this case there's but one conclusion to come to.

17 RT 2898-99. In arguing that imposing a prison sentence of life without parole would be taking the "easy way out" and suggesting that if the jury did in fact vote for life they would "know in your heart you did the wrong thing", the prosecutor violated Mr. Duong's right to a fair and impartial jury determination. *Viereck v. United States*, 318 U.S. 236, 247 (1943); *Penry v. Lynaugh*, 492 U.S. at 326-327. *Newlon v. Armontrout*, 885 F.2d 1328, 1338-1341 (8th Cir. 1989), *cert. denied*, 497 U.S. 103 (1990) (reversible error despite lack of objection by trial counsel where prosecutor argued that jury should return a death verdict because by doing so, they know they will have done "the right thing" when they read about other murders in the newspaper.)

The prosecutor continued to make improper comments during closing argument when, over trial counsel's objection, he argued that the jury could consider Mr. Duong's future danger in determining whether death was the appropriate punishment.

After stating to the jury that some might consider a sentence of life without parole similar to the analogy of being on a boat alone in an ocean surrounded by sharks where

the prison is the ocean and the other prisoners are sharks, the prosecutor stated: "And also you might well say that based on the evidence presented Mr. Duong is the shark." 17: RT 2900. Trial counsel objected that this was an improper argument regarding the question of Mr. Duong's future dangerousness, which defense counsel had not put before the jury. 17: RT 2921-22. The trial court overruled the objection.

The future dangerousness of a prisoner is not an aggravating factor under California's sentencing scheme. It is improper for the prosecutor to argue an irrelevant non-statutory aggravating factor where the defense has not put the issue before the jury. *People v. Davenport*, 41 Cal.3d 247, 288-290 (1985). Moreover, a sentencing jury is forbidden from improperly speculating on future events, including the defendant's future danger, when determining the appropriate punishment. *People v. Ramos,* 37 Cal.3d 136, 157 (1984). Here, where defense counsel did not present evidence to show that Mr. Duong would not be a danger in the future or any case in mitigation, it was improper for the prosecutor to argue that the jury should sentence Mr. Duong to death because he would be a "shark" in prison. *Kelly v. Stone,* 514 F.2d 18, 19 (9th Cir. 1975).

Twice during his closing penalty phase argument, the prosecutor argued that Mr. Duong had shown a lack of remorse. 17: RT 2904, 2916. Only this was belied by the testimony of Christine Chen (15:RT 2681) and by Duong himself when he attempted suicide before trial and asked the trial court, prior to the start of the penalty phase, if he could "accept the D.P. instead of going through this." 14 RT 2191. That the jury never learned of Duong's suicide attempt or his acceptance and even desire to be put to death only worsen the fundamental unfairness of the prosecutor's improper arguments.

A prosecutor's comments on a defendant's lack of remorse are improper, even absent an objection, when used to argue that death is the appropriate sentence. *People v. Price*, 1 Cal.4th 324, 472 (1991). Additionally, a prosecutor may not deliberately misstate facts in arguing that a defendant should be sentenced to death. *People v. Hill*, 17 Cal.4th 800, 823-824 (1998). The prosecutor's deliberate misrepresentation that Duong

did not show remorse was prejudicial and requires reversal of his death sentence. Here, the prosecutor commited both errors, each compounding the impact of the other.

Finally, over trial counsel's objection, the prosecutor from the prologue of a book entitled The Killing of Bonnie Garland, read the following passage to the jury:

> When one person kills another there is an immediate revulsion in the nature of the crime. But in the time so short as to seem indecent to the members of the personal family, the dead person ceases to exist as an identifiable figure. To those individuals in the community of good will and sympathy and empathy, warmth and compassion, only one of the key actors in the drama remains with whom to commiserate, and that is always the criminal. The dead person ceases to be a part of everyday reality, ceases to exist. The victim is only a figure in a historic event. And we inevitably turn away from the past toward the ongoing reality of everyday life. And the ongoing reality is that the criminal, trapped, anxious, now helpless, isolated, perhaps badgered, perhaps bewildered, is all that's left. He takes away compassion that is justly the victim's. And he will steal away his victim's moral constituency along with the victim's life.

17: RT 2920-23.

Although appellant is aware that this court has approved of this language in *People v. Rowland*, 4 Cal.4th at 277-278, n. 17 and subsequent cases, it seems clear that this type of irrelevant, prejudicial argument is violates appellant's Eighth Amendment right to a reliable penalty determination. *Dawson v. Delaware*, 503 U.S. 159, 166-167 (1992). The prosecutor's reading of this passage invited the jury to compare the victims in this case to Bonnie Garland, despite the fact that the jury knew nothing about her or the facts of that case. In similar circumstances, this court has prevented defense counsel from making a comparison to other cases in the closing argument of the penalty phase of a capital trial. *People v. Virgil*, 51 Cal.4th 1210, 1286 (2011) ("We have held that when, as here, a factual comparison with other notorious crimes cannot be made without a time-consuming inclusion of all of the facts in mitigation and aggravation, the trial court can exercise its discretion to control the scope of oral argument by refusing to allow defense counsel to compare the subject crime to other murders.") This Court should apply

the rule in *People v. Virgil* to the prosecutor's argument in Mr. Duong's case and reverse his death sentence.

For the above reasons, both individually and cumulatively, this Court should reverse Mr. Duong's death sentence because the prosecutor committed prejudicial misconduct through his improper and inflammatory closing argument. *Donnelly v. DeChristoforo* 416 U.S. 637, 642-643 (1974); *People v. Hill, supra*, 17 Cal.4th at 847.

XI. THE VICTIM IMPACT TESTIMONY IN THIS CASE EXCEEDED THE SCOPE OF ADMISSIBLE EVIDENCE UNDER *PAYNE* IN VIOLATION OF DUONG'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

The introduction over Duong's objection of the opinion of the father of International Club victim Lan Thi Dang and, with no notice to Duong, of the impact of unadjudicated crimes on victims' family members, violated his rights under the Sixth, Eighth and Fourteenth Amendments of the United States Constitution, his analogous rights under the California Constitution, and his rights under state law, including, but not limited to, his rights to due process of law, a fair trial, and a fair and reliable penalty determination.

A. Proceedings Below

The prosecutor filed a "Notice of Intent to Introduce Evidence of Aggravating Factors at Penalty Phase Pursuant to Penal Code section 190.3," in which he indicated he would present victim impact evidence as to the four International Club victims. 1:CT 183-186. Duong moved pursuant to the Eighth and Fourteenth Amendments to the federal constitution and state law to exclude victim impact evidence. 1:CT 251-255. The prosecutor then indicated that he would only introduce victim impact evidence pertaining to International Club victims Dang and Norman. 1:RT 117. Based on that representation, the trial court indicated it would limit victim impact evidence to those two victims, and agreed to rule on the admissibility of victim impact evidence at the time of a penalty phase. 1:RT 119-120.

Prior to penalty phase, Duong sought a hearing under Evidence Code Section 402 on all the prosecutor's proposed penalty phase evidence, because his counsel was unaware of the content of victim impact statements. 13:RT 2155, 2175-2176. The prosecutor again indicated that he would only present victim impact evidence about Ms. Dang and Mr. Norman. 13:RT 2156. The trial court instructed counsel to meet with the prosecutor about the victim impact statements and determine whether there was any need for the court to address their admissibility. 13:RT 2176. Duong's counsel indicated that he and the prosecutor should be able to resolve that. 13:RT 2181. The trial court expressed its opinion that victim impact evidence is generally admissible, with limitations. 13:RT 2181. When the prosecutor called Mr. Norman's mother to the stand, Duong's counsel again requested a 402 hearing on victim impact evidence, noting that he had received no discovery about the testimony of victim impact witnesses. 16:RT 2764. The prosecutor responded that he had faxed the victim impact statements to counsel a few days earlier. 16:RT 2764. The prosecutor retrieved the statements and defense counsel again requested a 402 hearing. 16:RT 2765. The trial court read the three page document, entitled, "County of Los Angeles Sheriff's Department Supplemental Report," dated February 3, 2002, file no. 099-00044-3199-011, written by Investigator Steven Davis. 16:RT 2766.

Duong's counsel objected on federal constitutional grounds and state law, including Evidence Code section 352. 16:RT 2766. Defense counsel explained that the proffered testimony had little probative value because it addressed information about the victims whom Duong did not know. 16:RT 2766-2767. Counsel continued that Penal Code section 190.3(a), which permits evidence about the circumstances of the crime, "only allows evidence which logically shows the harm caused by the defendant to the family members. And any evidence of circumstances of which the defendant could not reasonably have been aware of at the time of the offense I think needs to be limited." 16:RT 2768.

In addition, counsel asked that if the trial court admitted the evidence, that it limit the testimony to one witness per victim because the evidence is highly inflammatory and victim impact evidence is not an aggravating factor. 16:RT 2767.

Finally, defense counsel moved the trial court to prohibit victims' survivors from testifying as to their opinions about the crime, Duong, or the appropriate sentence and to exclude emotional testimony likely to provoke the jury to make an arbitrary or capricious penalty determination, including any mention by Ms. Dang's father or sister of their fears or the fears of their family members of gang reprisals. 16:RT 2768-2771.

The trial court denied the motion, permitting witnesses to testify to matters set forth in the sheriff's report. 16:RT 2770-2771. The prosecutor agreed not to elicit testimony about fear of gang reprisals. 16:RT 2771.

B. The Victim Impact Evidence Introduced in Duong's Case Exceeded the Scope of Payne and Violated Other Federal Constitutional and State Law Rights

States may permit relevant victim impact evidence and argument, so long as that evidence is not so unduly prejudicial that it renders the trial fundamentally unfair. *Payne v. Tennessee*, 501 U.S. at 825, 827. However, the United States Supreme Court has never held that the permissible scope of victim impact evidence includes either opinions of victims' family members about the defendant, *See Payne v. Tennessee*, 501 U.S. at 829, n.2, or testimony about the impact on victims of unrelated unadjudicated crimes admitted in the state's case in aggravation. Nevertheless, the trial court admitted both types of testimony, injecting arbitrariness into the jury's penalty determination and rendering his death sentence unreliable and fundamentally unfair.

The trial court's inclusion of this testimony also violated Duong's state and federal rights to receive adequate notice of aggravation.

Furthermore, the trial court abused its discretion under California law by admitting irrelevant victim impact evidence with no connection to the circumstances "materially,

morally or logically" surrounding the capital crime. *People v. Edwards*, 54 Cal.3d at 835.

1. Improper Opinion Testimony about Mr. Duong Violated the Eighth and Fourteenth Amendments

At the conclusion of his testimony, although no question was pending, Ms. Dang's father, Mach Dang, said, in the presence of the jury: "I thank you God for getting this defendant here because he is not able to kill another person." 16:RT 2777-2778. Duong immediately objected, but the trial court did not respond.[42] 16:RT 2777-2778. The trial court's failure to admonish the jury to disregard this outburst violated Duong's Eighth and Fourteenth Amendment rights to a reliable penalty determination.

In *Booth v. Maryland*, 482 U.S. 492, 502-503 (1987) the Supreme Court held that witnesses' opinions about the defendant, the crime, or the appropriate sentence were "irrelevant to a capital sentencing decision, and that [their] admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." *See also South Carolina v. Gathers*, 490 U.S. 805, 811 (1989). Although *Payne v. Tennessee*, 501 U.S. at 827, 829, n. 2, overruled *Booth* and *Gathers* to the extent that they prohibited argument and "evidence about the victim and about the impact of the murder on the victim's family," *Payne* did not overrule *Booth*'s holding that the Eighth Amendment proscribed the introduction of the "victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence[.]" For this reason, the Ninth Circuit found "obvious" constitutional error when a Navajo witness testified that it was difficult for her to know that defendant, also Navajo, disrespected tribal ways. *United States v. Mitchell*, 502 F.3d 931, 990 (9th Cir. 2007). So too, Mr. Dang's comments, which were irrelevant to the jury's penalty

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[42] The trial court's silence indicated that further objection would have been futile and would have only drawn attention to Mr. Dang's inflammatory outburst. See, *People v. Hill*, 17 Cal.4th at 820.

determination, violated the Sixth, Eighth and Fourteenth Amendments, injecting arbitrariness into the jury's penalty determination, depriving him of a fair trial by an unbiased tribunal, and leaving him helpless in the face of statements he could not confront, explain, or deny. See, *Gardner v. Florida*, 430 U.S. 349, 362 (1977); *California v. Trombetta*, 467 U.S. at 485.

2. Testimony about Family Members of Victims of Unadjudicated Crimes

Over Duong's objection, the trial court also permitted victim impact testimony pertaining to allegations unrelated to the capital crime. This evidence was inadmissible under Payne v. Tennessee and violated Duong's state and federal rights to adequate notice of evidence in aggravation.

Michael Jeng testified about his coworker, Hsu Pin Tsai, who was killed during a robbery of Wintec Industries. 14:RT 2304-2322; 15:RT 2575-2578; Peo. PP Exh. 12A-E. Mr. Tsai, who had worked at Wintec for some time, was disabled and wore a brace on his leg. 14:RT 2319. Mr. Tsai's wife, Jackie, who was seated outside the courtroom, also worked at Wintec; she had already gone home when her husband was killed. 14:RT 2319-2320.

Rafael Gomez testified that he was working as a security guard at Traditional Jewelers the day it was robbed. 15:RT 2480. Over defense objection, Mr. Gomez testified that since he was shot, he had been unable to return to work. 15:RT 2486. His family included his parents and siblings. 15:RT 2486-2487. Mr. Gomez would not be able to return to work until he had two additional surgeries. 15:RT 2487.

In *Payne* the High Court explained that "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question[.]" *Payne v. Tennessee*, 501 U.S. at 825. However, the holding in Payne does not encompass evidence or argument about the impact on victims of crimes introduced at penalty phase that are unrelated to the capital offense. Although

the United States Supreme Court has not opened the door to such evidence, this Court has suggested that it is proper. See, e.g., *People v. Edwards*, 54 Cal.3d at 835; *People v. Catlin*, 26 Cal.4th 81, 174-176 (2001).

In *People v. Benson*, 52 Cal.3d 754, 796-797 (1990), this Court held that evidence or argument about the impact of prior convictions on the actual victims was properly admitted at a capital penalty phase. The Benson holding explicitly did not extend to evidence of the impact of those crimes on the victims' survivors.[43] *Id.* at 797, n.9. Although neither Payne nor Benson suggested that evidence of the impact on victims's survivors of unadjudicated offenses met constitutional muster, this Court in *Edwards* relied on both of those cases in approving the admissibility of such evidence. *People v. Edwards*, 54 Cal.3d at 835. To the extent that *Edwards* permits evidence in aggravation of the impact of unadjudicated offenses on anyone but the actual victim, it violates *Payne* and the Eighth and Fourteenth Amendments to the federal constitution.

The trial court also erred in admitting this evidence because the prosecutor assured Duong that he would only present victim impact evidence pertaining to Robert Norman and Lan Thi Dang and the trial court indicated that victim impact evidence would be limited to testimony about those two victims. 13:RT 2156; 16:RT 2770-2771. In spite of these assurances, the jury heard victim impact testimony about Mr. Tsai, Mr. Gomez, and their families.

A prosecutor violates a defendant's due process rights by misinforming him about the evidence he intends to present. *Gray v. Netherland*, 518 U.S. 152, 168 (1996). Due process is also violated, where a defendant reasonably and detrimentally relies on a trial court's inaccurate representations. *Raley v. Ohio*, 360 U.S. 423, 437 (1959). In *Gray v. Netherland*, 518 U.S. at 168, the Supreme Court held that where the state apprised the

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[43] In *Benson*, the prosecutor presented evidence of prior convictions, whereas here the prosecutor presented, pursuant to Penal Code section 190.3(b), evidence of unadjudicated offenses.

defendant of the charges against him, defendant was not always entitled to notice of the specific evidence to be presented. However, the High Court explained that where, as here, the prosecutor misleads a defendant with false assurances that he will not present certain evidence, the state unconstitutionally deprives the defendant of a meaningful opportunity to defend himself. *Id.* at 164. Moreover, in this case Duong relied on the trial court's ruling that it would limit victim impact evidence solely to Ms. Dang and Mr. Norman. The trial court's ruling, independently and in conjunction with the prosecutor's misleading assurances, also violated Duong's right to due process of law. Because the misleading statements of the prosecutor and the trial court resulted in a death sentence based on caprice and emotion rather than reason, the errors also violated the Eighth Amendment. *Gardner v. Florida*, 430 U.S. at 357-358.

The right to a fundamentally fair and reliable penalty phase is embodied in Penal Code section 190.3 which prohibits the prosecutor from presenting evidence "in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial." A trial court abuses its discretion when it permits the prosecutor to introduce victim impact evidence of which the defendant had no notice as required by Penal Code section 190.3. *People v. Roldan*, 35 Cal. 4th 646, 734 (2005). Here, the prosecutor not only failed to provide Duong with notice of this additional victim impact evidence, but he affirmatively told the trial court he would limit victim impact evidence to victims Dang and Norman. For these reasons, the trial court violated Duong's statutory right to notice of aggravation. Moreover, although Penal Code section 190.3 is a state statute, its violation in this case is repugnant to the federal constitution. *See Raley v. Ohio*, 360 U.S. at 435.

Finally, the trial court should have excluded this evidence under Evidence Code section 352. *See People v. Box*, 23 Cal.4th 1153, 1200-1201 (2000) (Evidence Code section 352 applies to evidence introduced pursuant to Penal Code section 190.3). Here, the evidence of the impact of unadjudicated crimes on victims and their family members

was irrelevant to Duong's culpability for the capital crimes, was unduly prejudicial, and was confusing to the jurors who had no meaningful way to distinguish this improper testimony from evidence relevant to its penalty determination. The testimony therefore diverted "'the jury's attention from its proper role," and invited "'an irrational, purely subjective response.'" *People v. Smith*, 35 Cal.4th 334, 365 (2005), quoting, *People v. Stanley*, 10 Cal.4th 764, 832 (1995).

C. Prejudice

Mr. Dang's outburst and the testimony about the impact of unadjudicated crimes on the family members of Mr. Tsai and Mr. Gomez require reversal. In the absence of any instruction from the trial court, the jury had no basis for distinguishing between the improper testimony and the highly emotional testimony about the impact of the capital crimes on survivors of victims Dang and Norman. The prejudice is also evinced by the prosecutor's exploitation in his closing argument of the improper testimony.

The jury heard a slew of victim impact evidence about Norman and Dang. Robert Norman's mother, Jane Christine Norman, testified that her son was 20 when he lost his life. 16:RT 2772. The loss of her son was emotionally and physically disabling to her and other family members. 16:RT 2772-2773. Mrs. Norman, her husband, and their daughter had each undergone counseling after Mr. Norman's death. 16:RT 2773.

The killing occurred 22 days before the birthday of Mr. Norman's younger brother. 16:RT 2773.

At the time of his death, Mr. Norman was living with his parents, in his second year of college, and working as a disc jockey. 16:RT 2773. Mr. Norman was very interested in music and was studying business. 16:RT 2773. There were plans for Mr. Norman to work with his father in the construction business. 16:RT 2773.

Mrs. Norman explained that the loss of her son would be with her forever:

> [N]ot a day goes by that you are not thinking about your loved one and wishing you could have them back. And the holidays

> are extremely difficult. And of course his birthday when it rolls around every year, you realize the loss even more.

16:RT 2775.

Mach Dang, Lan Thi Dang's father, testified that he and his wife had suffered because of the loss of his daughter. 16:RT 2776. It was a big loss to their family and he was unable to forget her. 16:RT 2776. Since his daughter's death, Mr. Dang's wife was sick and unable to sleep. 16:RT 2777. Mr. Dang suffered chest pain all the time and was also unable to sleep. 16:RT 2777.

At the time of her death, Ms. Dang was living with her parents, going to school, and working part time. 16:RT 2777. She wanted to become a teacher. 16:RT 2777. Duong objected, but trial counsel issued no ruling or cautionary instruction. 16:RT 2777-2778.

Ms. Dang's 25 year old sister, Loan Dang, testified that she was present at International Club when Ms. Dang was murdered. 16:RT 2778. At the time of her death, Ms. Dang was 23 years old, living at home, and attending Long Beach College. 16:RT 2779. At the time of her testimony, Loan Dang was living at home and attending Cal State Fullerton. 16:RT 2779. After Ms. Dang was murdered, Loan Dang stopped going to school for two years, could only sleep at sunrise, suffered panic attacks, and continued having memories of her sister going into shock. 16:RT 2779. It was very hard for Loan Dang to go on; Ms. Dang was her best friend. 16:RT 2779. They went places together all the time. 16:RT 2779.

Ms. Dang wanted to become a teacher. 16:RT 2780. Although Loan Dang had two brothers and two other sisters, Ms. Dang had been her best friend. 16:RT 2780. Loan Dang was present when her sister was shot and witnessed the incident. 16:RT 2780. After the shooting, Loan Dang always thought something bad was going to happen and always had negative things going through her mind. 16:RT 2780. She was unable to be alone even for a second. 16:RT 2780.

Loan Dang indicated that the young man holding her sister in the photographs shown to the jury was Ms. Dang's boyfriend; he and his mother were present during court proceedings. 16:RT 2780-2781. At the time of the shooting, Ms. Dang's boyfriend was in the back room at International Club playing ping pong. 16:RT 2781. Loan Dang and her sister, Ms. Dang, had gone to International Club that night to visit the chef whom they had gotten to know from prior visits. 16:RT 2781. Neither Ms. Dang nor Loan Dang was involved in any gang activity. 16:RT 2781. Because the trial court permitted family members of Mr. Norman and Ms. Dang to testify, the jurors could only assume that the testimony about the family members of Mr. Tsai and Mr. Gomez was similarly relevant to the circumstances of the capital crime.

The prosecutor compounded the magnitude of the error by commenting on the inappropriate testimony:

> But if you were the kind of person to get in over your head, once you've got that $300,000, are you ever going to commit another crime in your life?
>
> Are you going to go up to Wintec Industries and shoot a man that had -- that wore a leg brace, that couldn't even get his car started quick enough to get away, and shoot him in the back after you realize you're not going to be able to get anything, out of pure meanness, what was the purpose in taking Pin's life that day? Leaving his wife a widow? What was the purpose in having him breathe his last breath in that parking lot at Wintec? There was no reason at all.[44] 17:RT 2902.

The prosecutor's argument demonstrates the importance of this improper testimony to his case for death.

For these reasons, the trial court's erroneous ruling was not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. at 24. Moreover, it is reasonably

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[44] The prosecutor conceded that jurors could find that Duong did not fire any shots during the Wintec robbery. 17:RT 2903.

probable that the erroneously admitted gang evidence contributed to the verdict. *People v. Watson*, 46 Cal.2d at 836. Duong's death sentence must be reversed.

XII. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT DUONG'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* 37 Cal.4th 240 (2005), this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (I) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." *Id.* at 303-304, citing *Vasquez v. Hillery* 474 U.S. 254, 257 (1986).

In light of this Court's directive in *Schmeck*, Duong briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the Court decide to reconsider any of these claims, Duong requests the right to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. *People v. Edelbacher, supra,* 47 Cal.3d 983, 1023 (1989), citing *Furman v. Georgia* 408 U.S. 238, 313 (1972) (conc. opn. of White, J.) Meeting this criterion requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. *Zant v. Stephens,* 462 U.S. 862, 878 (1983).

California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offense charged against

Duong, section 190.2 contained 21 special circumstances (one of which – murder while engaged in felony under subdivision (a)(17) –contained 12 qualifying felonies).

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. *People v. Stanley* 10 Cal.4th at 842-843. This Court should reconsider *Stanley* and strike down section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application of Penal Code Section 190.3(a) Violated Duong's Constitutional Rights

California Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." *See* CALJIC No. 8.85. Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court has never applied any limiting construction to factor (a). *People v. Blair* 36 Cal.4th 686, 749 (2005) ("circumstances of crime" not required to have spatial or temporal connection to crime.") As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis

other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. *See Maynard v. Cartwright* 486 U.S. 356, 363 (1988); but see *Tuilaepa v. California,* 512 U.S. at 987-988 (factor (a) survived facial challenge at time of decision.)

Duong is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Duong urges the Court to reconsider this holding.

C. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden of Proof

1. Duong's Death Sentence Is Unconstitutional Because it Is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of other criminality CALJIC Nos. 8.86, 8.87. *People v. Anderson,* 25 Cal.4th 543, 590 (2001); *People v. Fairbank* 16 Cal.4th 1223, 1255 (1997) ; see *People v. Hawthorne* 4 Cal.4th 43, 79 (1992) (penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification.") In conformity with this standard, Duong's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence.

Blakely v. Washington, 542 U.S. 296, 303-305 (2004), *Ring v. Arizona*, 536 U.S. 584, 604 (2002) , and *Apprendi v. New Jersey,* 530 U.S. 466, 478 (2000), require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in

this case, Duong's jury first had to make several factual findings: (1) that aggravating factors were present; (2) that the aggravatingfactors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. CALJIC No. 8.88; 4:CT 1205-06; 17:RT 2892-2894. Because these additional findings were required before the jury could impose the death sentence, *Blakely*, *Ring* and *Apprendi* require that each of these findings be made beyond a reasonable doubt. The trial court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." *People v. Sedeno* 10 Cal.3d 703, 715 (1974); see *Carter v. Kentucky* 450 U.S. 288, 302 (1981).

Duong is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi, People v. Anderson,* 25 Cal.4th at 589, fn. 14), and does not require factual findings. *People v. Griffin* 33 Cal.4th 536, 595 (2004). The Court has rejected the argument that *Apprendi*, *Blakely*, and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. *People v. Prieto,* 30 Cal.4th 226, 263 (2003). Duong urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, and *Blakely*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, Duong contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected Duong's claim that either the due process clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. *People v. Blair*, 36 Cal.4th at 753. Duong requests that the Court reconsider this holding.

2. The Jury Should Have Been Instructed That the Prosecution Had the Burden of Persuasion Regarding the Existence of Aggravating Factors

State law provides that the prosecution always bears the burden of proof in a criminal case. Cal. Evid. Code, § 520. Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided, and Duong is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. *Cf. Hicks v. Oklahoma,* 447 U.S. at 346.

Accordingly, Duong's jury should have been instructed that the prosecution had the burden of persuasion regarding the existence of anyfactor in aggravation, whether aggravating factors outweighed mitigatingfactors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88 the instructions given here (4:CT 1193-1194; 4:CT 1205-06; 17: RT 2883-2885; 17:RT 2892-2894), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. *People v. Lenart* 32 Cal.4th 1107, 1136-1137 (2004). This Court has also rejected any instruction on the presumption of life. *People v. Arias* 13 Cal.4th 92, 190 (1996). Duong is entitled to jury instructions that comport with the federal Constitution and thus urges the Court to reconsider its decisions in *Lenart* and *Arias*.

3. Duong's Death Verdict Was Not Premised on Unanimous Jury Findings

a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a

single set of aggravating circumstances that warranted the death penalty. *Ballew v. Georgia* 435 U.S. 223, 232-234 (1978); *Woodson v. North Carolina,* 428 U.S.280, 305 (1976). Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona, supra*, 536 U.S. 584. *See People v. Prieto,* 30 Cal.4th 226, 275 (2003).

Duong asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." *McKoy v. North Carolina* 494 U.S. 433, 452 (1990) (conc. opn. of Kennedy, J.).

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal Constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. *See, e.g.*, Cal. Pen. Code, § 1158a. Because capital defendants are entitled to more rigorous protections than those afforded noncapital defendants, (*see Monge v. California* 524 U.S. 721, 732 (1998) ; *Harmelin v. Michigan* 501 U.S. 957, 994 (1991)), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (*see, e.g.*, *Myers v. Ylst* 897 F.2d 417, 421 (9th Cir. 1990)), it follows that unanimity with regard to aggravating circumstances is constitutionally required.

To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" *People v. Medina* 11 Cal.4th 694, 763-764 (1995), would by its inequity violate the equal

protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury. Duong asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated Criminal Activity

Duong's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. CALJIC No. 8.87; 4:CT 1195-1196; 17:RT 2886-2887. Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. *See, e.g., Johnson v. Mississippi,* 486 U.S. 578, 584 (1988) (overturning death penalty based in part on vacated prior conviction.) This Court has routinely rejected this claim. *People v. Anderson,* 25 Cal.4th at 584-585. Here, the prosecution presented extensive evidence of unadjudicated criminal activity allegedly committed by Duong. 14:RT 2233-2327; 15:RT 2442-2663.

The United States Supreme Court's decisions in *Cunningham v. California* 549 U.S. 270 (2007); *Blakely v. Washington, supra,* 542 U.S. 296, *Ring v. Arizona, supra,* 536 U.S. 584, and *Apprendi v. New Jersey, supra,* 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Duong is aware that this Court has rejected this very claim. *People v. Ward* 36 Cal.4th 186, 221-222 (2005). He asks the Court to reconsider its holdings in *Anderson* and *Ward.*

4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon Duong hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." CALJIC No. 8.88; 4:CT 1205-06; 17:RT 2892-2894. The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. *Maynard v. Cartwright,* 486 U.S. at 362.

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. *People v. Breaux* 1 Cal.4th 281, 316, fn. 14 (1991). This Court should reconsider that opinion.

5. The Instructions Failed to Inform the Jury That the Central Determination Is Whether Death Is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. *Woodson v. North Carolina*, *supra*, 428 U.S. at 305. Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs that they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases", *Blystone v. Pennsylvania* 494 U.S. 299, 307 (1990), the punishment must fit the offense and the offender, i.e., it must be appropriate. *Zant v. Stephens*, 462 U.S. at 879. On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. *People v. Bacigalupo,* 6 Cal.4th 457, 462,

464 (1993). By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. *People v. Arias*, 13 Cal.4th at 171. Duong urges this Court to reconsider that ruling.

6. The Instructions Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

California Penal Code Section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. *See Boyde v. California, supra*, 494 U.S. 370, 377 (1990). Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated Duong's right to due process of law. *Hicks v. Oklahoma*, 447 U.S. at 346.

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. *People v. Duncan, supra*, 53 Cal.3d 955, 978 (1991). Duong submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. *See People v. Moore, supra,* 43 Cal.2d at 526-529; *People v. Kelly* 113 Cal.App.3d 1005, 1013-1014 (1980); see also *People v. Rice,* 59 Cal.App.3d 998, 1004 (1976) (instructions required on every aspect of case.) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when a verdict of life imprisonment without the possibility of parole is required, tilts the balance of forces in favor of the accuser and

against the accused. *Wardius v. Oregon* 412 U.S. at 473-474.

7. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments by Failing to Inform the Jury Regarding the Standard of Proof as to Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. *Brewer v. Quarterman,* 550 U.S. 286, 293-296 (2007); *Mills v. Maryland,* 486 U.S. 367, 374 (1988); *Lockett v. Ohio, supra* 438 U.S. at 604; *Woodson v. North Carolina, supra,* 428 U.S. at 304. Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. *Boyde v. California, supra,* 494 U.S. at 380. That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

8. The Penalty Jury Should Be Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. *Estelle v. Williams* 425 U.S. 501, 503 (1976). In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. *See* Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* 94 Yale L.J. 351 (1984); cf. *Delo v. Lashley* 507 U.S. 272 (1983).

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated Duong's right to due process of law, U.S. Const. Amend. XIV, his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner, U.S. Const.

Amend. VIII & XIV, and his right to the equal protection of the laws. U.S. Const. Amend. XIV

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. *Id.* at 190. However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing to Require That the Jury Make Written FindingsViolates Duong's Right to Meaningful Appellate Review

Consistent with state law, *People v. Fauber,* 2 Cal.4th 792, 859 (1992), Duong's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived Duong of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. *Gregg v. Georgia, supra,* 428 U.S. at 195. This Court has rejected these contentions. *People v. Cook,* 39 Cal.4th 566, 619 (2006). Duong urges the Court to reconsider its decisions on the necessity of written findings.

E. The Instructions to the Jury on Mitigating andAggravating Factors Violated Duong's Constitutional Rights

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial", CALJIC No. 8.85; Cal. Pen. Code, § 190.3, factors (d) and (g); 4:CT 1193-1194; 17: RT 2883-2885, acted as barriers to the consideration of

mitigation in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. *Mills v. Maryland*, *supra*, 486 U.S. at 384; *Lockett v. Ohio*, *supra*, 438 U.S. at 604. Duong is aware that the Court has rejected this very argument in *People v. Avila* 38 Cal.4th 491, 614 (2006), but urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to Duong's case. *See*, e.g., CALJIC No. 8.85, factors (e) (victim participation), (f) (moral justification), (g) (duress or domination), (I) (age of defendant), (j) (minor participation). The trial court failed to omit those factors from the jury instructions (4:CT 1193-1194; 17: RT 2883-2885), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of Duong's constitutional rights. Duong asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. 4:CT 1193-1194; 17: RT 2883-2885. The Court has upheld this practice. *People v. Hillhouse,* 27 Cal.4th 469, 509 (2002). As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. *People v. Hamilton* 48 Cal.3d 1142, 1184 (1989); *People v. Davenport*, *supra*, 41 Cal.3d at 288-289. Duong's jury was NOT instructed that the absence of a statutory mitigating factor does not constitute an aggravating factor even though it is a correct statement of law. Consequently, the jury was invited to aggravate Duong's sentence based on non-existent

or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. *Stringer v. Black* 503 U.S. 222, 230-236 (1992). As such, Duong asks the Court to reconsider its holding that the trial court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

F. The Prohibition Against Intercase Proportionality Review Guarantees Arbitrary and Disproportionate Imposition of the Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., intercase proportionality review. (See *People v. Fierro* 1 Cal.4th 173, 253 (1991). The failure to conduct intercase proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, Duong urges the Court to reconsider its failure to require intercase proportionality review in capital cases.

G. The California Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with noncapital crimes in violation of the equal protection clause. To the extent that there may be differences between capital defendants and noncapital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a noncapital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. *People v. Sengpadychith* 26 Cal.4th 316, 325

(2001); Cal. Rules of Court, rules 4.421 and 4.423. In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Duong acknowledges that the Court has previously rejected these equal protection arguments in *People v. Manriquez* 37 Cal.4th 547, 590 (2005), but he asks the Court to reconsider them.

H. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms

This Court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" *Trop v. Dulles* 356 U.S. 86, 101 (1958). *See, e.g.*, *People v. Cook* , *supra*, 39 Cal.4th at 618-619; *People v. Snow* 30 Cal.4th 43, 127 (2003); *People v. Ghent* 43 Cal.3d 739, 778-779 (1987). In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), Duong urges the Court to reconsider its previous decisions.

XIII. THE CUMULATIVE EFFECT OF THE ERRORSREQUIRES REVERSAL OFTHE CONVICTIONS ANDSENTENCE OF DEATH

There were serious constitutional errors in Duong's trial, including evidentiary and instructional errors in both phases of the trial. As set forth in the preceding arguments, each error was sufficiently prejudicial to warrant reversal of the judgment of conviction and the sentence of death. Even assuming that none of these errors is prejudicial by itself, their cumulative effect undermines any confidence in the integrity of the proceedings which ultimately resulted in four murder convictions and a death sentence. *See People v.*

Hernandez 30 Cal.4th 835, 877- 878 (2003); *People v. Hill,* 17 Cal.4th 800, 844-845 (1998); *People v. Holt,* 37 Cal.3d 436, 459 (1984); *People v. Cuccia*, 97 Cal.App.4th 785, 795 (2002); *Alcala v. Woodford,* 334 F.3d 862, 893 (9th Cir. 2003); *Cargle v. Mullin*, 317 F.3d 1196, 1206-1208 (10th Cir. 2003); *Killian v. Poole,* 282 F.3d 1204, 1211 (9th Cir. 2002); *Harris v. Wood,* 64 F.3d 1432, 1438-1439 (9th Cir. 1995).

In some cases, the cumulative effect of multiple errors may prejudice a defendant even if no single error requires reversal. *See Greer v. Miller*, 483 U.S.756, 764 (1987); *Donnelly v. DeChristoforo, supra,* 416 U.S. at 642-643 (cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"); *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978) ("prejudice may result from the cumulative impact of multiple deficiencies"). Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. *United States v. Wallace* 848 F.2d 1464, 1476 (9th Cir. 1988). When considered together, the errors in the guilt phase were prejudicial, and Duong's convictions must be reversed.

The death judgment against Duong also must be evaluated in light of the cumulative effect of error. Multiple errors, each of which might be harmless had it been the only error, can combine to create prejudice and compel reversal. *People v. Buffum,* 40 Cal.2d 709, 726 (1953); *People v. Zerillo,* 36 Cal.2d 222, 233 (1950); *Mak v. Blodgett,* 970 F.2d 614, 622 (9th Cir. 1992). Moreover, the errors being considered cumulatively must include those from both the guilt and penalty phases of trial. *See People v. Hayes*, 52 Cal.3d 577, 644 (1990) (court considers prejudice of guilt phase instructional error in assessing that in penalty phase); *Magill v. Dugger,* 824 F.2d 879, 888 (11th Cir. 1987) ("Although the guilt and penalty phases are considered 'separate' proceedings, we cannot ignore the effect of events occurring during the former upon the jury's decision in the later"). Evidence which may otherwise not affect the guilt determination can have a

prejudicial impact during the penalty trial. *In re Marquez,* 1 Cal.4th 584, 605, 609 (1992) (an error may be harmless at the guilt phase but prejudicial at the penalty phase.) The exclusion of critical defense evidence, the failure to properly limit the use of victim impact evidence, and the various instructional errors were prejudicial when considered cumulatively, and particularly so when considered in light of all the errors at both phases of the trial.

In dealing with a federal constitutional violation, an appellate court must reverse unless satisfied beyond a reasonable doubt that the combined effect of all the errors in a given case were harmless. *Chapman v. California, supra,* 386 U.S. at 24. In assessing prejudice, errors must be viewed through the eyes of the jurors, not the reviewing court, and the reasonable possibility that an error may have affected a single juror's view of the case requires reversal. *See, e.g., Parker v. Gladden,* 385 U.S. 363, 366 (1966); *People v. Pierce,* 24 Cal.3d 199, 208 (1979). Here, it certainly cannot be said that the errors had "no effect" on any juror. *Caldwell v. Mississippi,* 472 U.S. 320, 341 (1985). Given the number and severity of the errors in this case, their cumulative effect was to deny Duong due process, a fair trial by jury, and fair and reliable guilt and penalty determinations, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. The convictions and sentence of death must therefore be reversed.

CONCLUSION

For the reasons stated above, the judgment must be reversed.

Dated: February 21, 2014

Respectfully submitted,

DEBRA S. SABAH PRESS

CHARLES J. PRESS

CERTIFICATE OF WORD COUNT

I certify that Appellant Duong's Opening Brief consists of 64,678 words.

Dated: February 19, 2014

DEBRA S. SABAH PRESS

DECLARATION OF SERVICE

Re: *People v. Duong* No. S114228

I, DEBRA S. SABAH PRESS, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1442A Walnut Street #311; Berkeley, CA 94709-1405. I served a true copy of the attached:

APPELLANT DUONG'S OPENING BRIEF

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 21, 2014, at Berkeley, California.

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DECLARATION OF SERVICE

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I, DEBRA S. SABAH PRESS, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1442A Walnut Street #311; Berkeley, CA 94709-1405. I am serving a true copy of the attached:

APPELLANT DUONG'S OPENING BRIEF

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 21, 2014, at Berkeley, California.

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