SUPREME COURT COPY

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In the Supreme Court of the

State of California

People of the State of California, Plaintiff and respondent, v. **Alfred Flores III,** Defendant and appellant.	)	No. S116307

SUPREME COURT
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Appellant's Opening Brief

Automatic Appeal From A Judgment Of Death
Of The Superior Court Of The State Of California,
County Of San Bernardino
Honorable Ingrid A. Uhler, Judge
No. FVA-015023

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DEATH PENALTY

In the Supreme Court of the

State of California

People of the State of California,	)	No. S116307
	)	
Plaintiff and respondent,	)	
	)	
v.	)	
	)	
Alfred Flores III,	)	
	)	
Defendant and appellant.	)	
______________________________	)	

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In the Supreme Court of the

State of California

People of the State of California, Plaintiff and respondent, v. **Alfred Flores III,** Defendant and appellant.	)	No. S116307

Statement of Appeal

This is an automatic appeal following a judgment of death. (Pen. Code, § 1239, subd.(b).)[1] The judgment finally disposes of all the issues between the parties.

Statement of the Case

An information filed on October 25, 2001, charged Alfred Flores III with three counts of murder (§ 187), three enhancements alleging personal use of a firearm (§ 12022.5, subd. (a)(1)), and one special circumstance of multiple murder (§

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

190.2, subd. (a)(3)). (CT 167.)[2] Mr. Flores pleaded not guilty and denied the special allegations. (CT 171; 2 RT 88.)[3]

Jury selection began in October 2002 (3 RT 339), and the first witness was called on December 9, 2002. (9 RT 1799.) On March 7, 2003, after deliberating four days, the jury found Flores guilty of three counts of first degree murder. The jury found the multiple-murder special circumstance true, and also found that Flores personally used a firearm in the commission of each crime. (5 CT 1184-1191; 21 RT 4411.)

The penalty trial began on March 19, 2003. (5 CT 1340; 21 RT 4502.) On April 23, 2003, after deliberating three days, the jury returned a death verdict. (6 CT 1567; 23 RT 5179.)

On May 19, 2003, the court denied Flores's motions for a new trial and to reduce the death sentence to life without the possibility of parole and sentenced Flores to death. (23 RT 5214;

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[2] "CT" refers to the Clerk's Transcript; "RT" refers to the Reporter's Transcript.

[3] The complaint, filed on April 9, 2001, charged Mr. Flores with the same offenses and special allegations as the information. Flores was not arrested until September 6, 2001. (17 RT 3532.) He appeared in court for the first time on September 10, 2001, when he entered a plea of not guilty. (CT 119.)

23 RT 5191-93.) In addition, the court imposed then stayed punishment for consecutive terms of 25 years to life for each firearm-use enhancement under section 12022.53, subdivision (c). (23 RT 5214; 10 CT 2731.) The court ordered a restitution fine of $2,000 under section 1202.4 and victim restitution of $15,056.59. (23 RT 5217-18.)

Introduction

This case arises out of the deaths of three young men – Ricardo Torres, Jason Van Kleef, and Alexander Ayala – who were found at separate locations in Rialto and Fontana, San Bernardino County, over three consecutive days in March 2001. Each had been shot. (9 RT 1901-18, 1979, 10 RT 2064.) The case against the 21-year-old Alfred Flores rested chiefly on the accusations of 18-year-old Andrew Mosqueda and his aunt, 27-year-old Carmen Alvarez. All three were members of a local street gang, El Monte Trece. (12 RT 2335; 16 RT 3042.) Mosqueda and Alvarez were in custody when they testified at trial; both had been given immunity from prosecution for these crimes. (2 RT 243; 15 RT 3027.)

Mosqueda testified that he saw Flores shot Torres. (12 RT

2370.) There were no witnesses to the deaths of Ayala and Van Kleef. The prosecution argued that each was killed with the same firearm that killed Torres, and witnesses said they had seen Flores in possession of a similar gun. No useable fingerprints were found on the gun. (17 RT 3472.) DNA on the slide of the handgun could have come from persons connected to the case (Abraham Pasillas, Alvarez's husband, and Van Kleef), but Flores was excluded as a possible match. (16 RT 3319.) Otherwise, no physical evidence connected Flores to the crimes. A blood-stained undershirt found near Van Kleef's body bore DNA that could have come from Alvarez. (16 RT 3333.)

Flores was arrested in September 2001, as he crossed the border into California from Mexico. The police returned him that day to San Bernardino County. He was interrogated that night and all the next day by several officers. (2 RT 194-203.) Flores denied killing any of the victims. He said he did not recognize the gun the police believed was used in the shootings. (20 RT 4150.) He denied that he took the a 9 mm handgun to Mexico. (20 RT 4150.) In one of the final interviews, Flores supposedly said he was present when Van Kleef was killed, but he denied shooting

any of the victims. (18 RT 3815.)

Statement of the Facts

I. Guilt Trial.

A. The crimes occurred over three days, March 19-21, 2001.

1. Ricardo Torres.

Ricardo Torres's body was found on a pull-out next to Lytle Creek Road in an unincorporated section of San Bernardino County at about 9:00 p.m. on Monday, March 19, 2001.) Torres had been shot seven times and twice in the back of the head at close range. (18 RT 3666-67, 3675.) A cigarette butt, five 9 mm shell casings, and one live round were found near the body. (9 RT 1920-22; 9 RT 1951-56.) Shoe prints surrounded the cigarette butt. (9 RT 1934.) Blood pooling underneath the body suggested Torres had been shot at the scene. (9 RT 1952.)

Torres's belt buckle bore the number "13." (9 RT 1945.) No fingerprints were obtained from any of the items found at the scene. (9 RT 1955-56.)

The body was discovered by a passing motorist. Earlier, as she drove up the hill, the driver saw a "bronze" or "brown" van

with sliding doors parked on the side of the road, pointing downhill. (9 RT 1851.) The driver saw three or four Hispanic men in khaki pants and long white shirts outside the van. (9 RT 1856.) She described the men as "cholitos," meaning street gang members. (9 RT 1863.) At trial, she testified she saw three men, but on the night of the incident she told the police she saw four men outside the van, including one man who appeared to be about 40 years old, older than the others. (9 RT 1861-1862.) They appeared to be drinking. (9 RT 1851.)

The driver's daughter testified she saw "at least" three people outside the van, wearing white shirts and dark pants. One person sat inside the van. (9 RT 1875-78.) However, she told police on the night of the discovery that she saw two people sitting inside the van and four "Mexican" males outside it. (9 RT 1885.)

The two women discovered the body as they drove back down Lytle Creek Road about fifteen minutes later. (9 RT 1878.) The daughter saw a "reflection" on the side of the road; she told her mother she thought she had seen a body. They turned around. The headlights illuminated a body on the ground. (9 RT

1854.) They drove to a nearby store and called the police. (9 RT 1855.)

Torres's mother last saw him at 6:30 p.m. that evening outside their apartment in Rialto, which was within a few miles of where the body was found. (9 RT 1894.) He was alone. She did not know where he was going. (9 RT 1896, 1903.) She knew he was friends with Andrew Mosqueda and Alex Ayala. (9 RT 1895.)

2. Jason Van Kleef.

A truck driver found Jason Van Kleef's body in Rialto near midnight on Tuesday, March 20, 2001. (9 RT 1979.) Van Kleef had been shot once in the back of the head at close range. (17 RT 3391-98.) The size of the wound suggested he had been shot with a large caliber bullet, such as a 9 mm, .38 caliber, or .357 caliber. (17 RT 3398.)

The body was partially wrapped in a blue blanket. (10 RT 2041.) An extra-large white t-shirt was found with it. Based on the blood patterns, it appeared the shirt had been wrapped around Van Kleef after he was shot. (10 RT 2042.)

Aside from some partial shoe prints near the body, and a thin set of fresh tire tracks, there was no evidence at the scene –

no bullet casings and no signs of struggle. The police theorized that Van Kleef had been killed elsewhere and his body left where it was found. (10 RT 2014; 10 RT 2033.)

Van Kleef's mother last spoke to him by cell phone on the day before, March 19. (9 RT 1990.) He told her he was with Andrew Mosqueda. (9 RT 1992.) Cell phone records showed that Van Kleef called his girlfriend at 9:09 p.m. on March 19. (17 RT 3477-799.) The girlfriend did not remember the call. (17 RT 3479.)

3. Alexander Ayala.

Ayala's body was discovered at about 6:30 a.m. on Wednesday, March 21, 2001. (10 RT 2064.) A motorist saw the body off to the side of Lytle Creek Road, about 1/5 of a mile from where Torres's body had been found. (11 RT 2166.) Ayala had been shot five times, twice in the head. (18 RT 3695-3702.) It appeared Ayala had been dead for six to twelve hours, meaning he may have died around midnight on March 20. (11 RT 2168-69.) The stippling on his left hand and cheek suggested he had been shot at close range. (11 RT 2171; 11 RT 2235.) Several 9 mm cartridges were found nearby. (11 RT 2238-45.) Tire tracks

curved into and out of the scene; the police suspected these tracks were left by the vehicle used in the crime. (11 RT 2229.)

Ayala's sister saw him at home at about 11:00 p.m. on Tuesday, March 20. (11 RT 2074.) He said he was staying at home; it looked as if he was getting ready to go to bed. (11 RT 2075.) Ayala was not there when she awoke the next morning. (11 RT 2078.)

Ayala's mother worked from 4:00 p.m to 2:30 a.m. (11 RT 2086.) She saw him before she left for work on March 20 but he was not there when she got home. The front door was unlocked and Ayala's house key was on the couch. His mother believed he always carried his keys and locked the door when he left the house. (11 RT 2088.)

B. Andrew Mosqueda and Carmen Alvarez Accuse Flores of the Crimes.

The victims were friends and high school classmates of Andrew Mosqueda, a member of the El Monte Trece gang. At trial, Mosqueda had been already convicted of two armed robberies and two attempted murders that he had committed in March 2001 with other gang members, including Carmen

Alvarez. (12 RT 2424.)

Mosqueda and his friends spent a great deal of time at the apartment of his aunt, Carmen Alvarez, and her husband, Abraham, both long-time members of the El Monte Trece gang. Carmen and Abraham's apartment was "the party spot," a place for Mosqueda and his friends to drink and do drugs. (11 RT 2145.)[4] Photos showed Mosqueda with Ayala at various locations with other gang members, throwing gang signs. (12 RT 2484-87; exs. 110-112.)

Carmen, 27 years old, joined the gang in 1990. (15 RT 3042.) Abraham, 39 years old, grew up in El Monte and joined the gang even earlier. (13 RT 2663, 2698.) Mosqueda bragged to his friends that Carmen and Abraham were members of El Monte Trece. (18 RT 3745.) Carmen and Abraham denied they were active gangsters at the time of the killings, but both eventually admitted they still associated with El Monte Trece

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[4] Alexander Ayala's brother, Johnny Roybal, gave this description of Carmen's apartment to the police early in the investigation. (11 RT 2145.) Erick Tinoco, another friend of Mosqueda's, confirmed that people smoked marijuana at Carmen's. (18 RT 3632.) Tinoco also confirmed that both Carmen and Abraham talked about the El Monte gang. (18 RT 3632.)

members and attended gang gatherings. (13 RT 2664, 2710-2719; 15 RT 3042; 16 RT 3171-75.)

Mosqueda refused to admit to the police that he was a member of the El Monte gang. As late as the preliminary hearing, Mosqueda denied under oath that he was a gang member. (20 RT 4184; 20 RT 4200; 12 RT 2472.) He finally admitted he was a gang member in December 2002; he acknowledged that Carmen was present when he was "jumped" into the gang in February 2001. (20 RT 4184-86; 12 RT 2344.)

Mosqueda's younger sister, 16-year-old Jessica, wrote in her diary in February 2001 that Mosqueda " got in M13." (14 RT 2792.) Jessica testified Carmen Alvarez was a known gang member who attended gang functions while Jessica babysat her young daughter. (14 RT 2825, 2835.) Jessica said Carmen tried to get her into the gang but Jessica declined. (14 RT 2816-17, 2825.)

Mosqueda gave many different versions of the events. At trial, he testified that on Monday, March 19, 2001, he was with friends at Carmen's apartment. Flores, who he also called Casper and Wizard, was present. (12 RT 2348-2353.) At some point,

Flores suggested they take a ride to Lytle Creek in the van. (12 RT 2353.) Flores took Mosqueda aside and told him to put a gun in the van; he did not say why. Flores handed him a rifle wrapped in a towel. (12 RT 2355-58.) Mosqueda did not see a handgun on Flores but knew he sometimes carried a 9 mm. (12 RT 2359; 2408.) Mosqueda identified a Jennings-Bryco 9 mm as the gun that Flores carried. (12 RT 2410; see ex. 96.)

They got into Carmen's van. She drove and Flores sat in front, next to her. Van Kleef, Mosqueda and Torres sat in the back. (12 RT 2361.) Abraham, Carmen's husband, was not at the apartment that evening and did not join them in the van. (12 RT 2354.)

They stopped for beer at a convenience store on the way to Lytle Creek. (12 RT 2363.) Everyone got out of the van; Carmen went inside to buy the beer. (12 RT 2364.) They drove up Lytle Creek Road for fifteen to twenty minutes then turned around and came back down the hill. Carmen pulled into a turn-out, where everyone but Carmen got out to drink beer. (12 RT 2366-67.) No one was arguing or fighting. Mosqueda saw Flores talking to Torres, and then Flores shot Torres. (12 RT 2370.)

Flores allegedly fired the gun four or five times. Mosqueda thought Torres was shot first in the stomach and fell to the ground, where he was shot again. (12 RT 2371.)

Mosqueda claimed he never saw the gun; he said he was "frozen." (12 RT 2375.) Flores got back into the van; Mosqueda and Van Kleef followed. (12 RT 2375-76.) Carmen said nothing. She drove back to her apartment. Flores and Van Kleef went inside. (12 RT 2380.) Carmen drove Mosqueda to his home. They did not talk about the shooting. (12 RT 2383.) He went to bed. (12 RT 2385.)

The next morning on the way to school he passed Carmen's van and saw a hole in the windshield, on the passenger side. (12 RT 2388.) He saw Carmen who said something to him about Van Kleef. (12 RT 2389.) He did not see Flores that morning, nor did he recall telling the police that Flores had said to him that he "whacked" Van Kleef the night before because he was afraid Van Kleef would "rat" on him. (12 RT 2389.)

That night, Mosqueda and Ayala drove to Redlands with a couple of girls in Carmen's van. The windshield had been repaired. (12 RT 2395-2401.) They returned about 11:00 p.m.

Mosqueda dropped Ayala at Ayala's home. (12 RT 2403.) He returned the van to Carmen. (12 RT 2404.)

The investigating officers interviewed Mosqueda many times before trial. They testified that Mosqueda's trial testimony was the latest version of "several different stories" he had told them. (20 RT 4190.) San Bernardino Sheriff's Detective Joe Palomino (and other deputies) interviewed Mosqueda five times. Mosqueda lied repeatedly from the outset. (20 RT 4184.) He concealed his membership in El Monte Trece. From March 2001 to December 2002, he maintained he was "not a gang banger." (20 RT 4200; 20 RT 4184-86.)

Regarding the events of March 19, 2001, Mosqueda was at first "not forthcoming at all with any information" and then gave "several different stories." (20 RT 4187, 4190.) He denied going to Lytle Creek. (20 RT 4190-91; 12 RT 2411.) He said "Casper" (Flores) and Ricardo wanted to drive to Lytle Creek. (20 RT 4188.) He gave different accounts of who went in the van to Lytle Creek but he never included Carmen Alvarez in the early versions. (20 RT 4188.) His story of how Flores handed him a rifle to put into the van was not mentioned until December 2002.

(20 RT 4200.) He repeatedly gave different accounts of what happened after they returned from Lytle Creek. (20 RT 4190.)[5]

Similarly, Mosqueda gave various and conflicting versions of his actions the day after Torres's death. At first, he said he did not see Carmen or her van the morning of March 20; he claimed he first saw her that afternoon. He did not mention the broken windshield until December 2002, well over a year after the homicides. (20 RT 4193.) He first claimed he did not see Flores on March 20. (20 RT 4197.)

He told the police Ayala and Torres were killed because they would not join the gang but he admitted this was a guess and he had no reason to believe it. He admitted Flores never told him this. (12 RT 2427.) In fact, only once did Flores mention to Mosqueda the possibility of Torres joining the gang. (12 RT 2430.)

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[5] Robert Heard, an investigator for the San Bernardino County Sheriff's Department, also interviewed Mosqueda on March 22, 2001. (18 RT 3764-65.) Mosqueda was reluctant to talk and appeared to be afraid. Heard testified Mosqueda eventually admitted he was present when Ricardo Torres was shot, but he was evasive and vague about the details. (18 RT 3768.) Mosqueda said that "Casper" did it, then said it was "Wizard," but Casper and Wizard were the same person. Mosqueda claimed he was afraid to talk. (18 RT 3766.)

Carmen Alvarez was taken into custody in November 2002 for charges relating to her role in these crimes. (15 RT 3038.) She fled to Mexico immediately after the crimes were discovered. Carmen had known Flores several years. She met him when he was 13 years old; he had already been jumped into the gang. (16 RT 3160.) He lived with Carmen and her sister for a short time when he a young teenager. (16 RT 3161.) Carmen had not seen Flores for "years" until she and Abraham moved into an apartment in Rialto in February 2001 and Flores began visiting them. (15 RT 3038-3041.) He stayed for a few days at a time, off and on. (15 RT 3040.) She believed he had no place to live. (15 RT 3046.)

Andrew Mosqueda, Carmen's nephew, also visited the apartment frequently with his friends, including Ricardo Torres, Alex Ayala, and Jason Van Kleef. (15 RT 3044-45.) She did not remember if Flores talked to her about recruiting these boys for the gang to make it stronger, but she did recall telling him they were not "gang types," they did not want to be part of the gang, and he should leave them alone. (15 RT 3051-52.)

On March 19, 2001, Carmen was at home with Flores and

several boys, including Torres, Ayala, Van Kleef and Andrew Mosqueda. (15 RT 3050-53.) Flores suggested they go for a ride. Carmen wanted to do laundry but she agreed to accompany them. (15 RT 3055.)

Carmen, Flores, Mosqueda, Ricardo Torres, and Jason Van Kleef got into her 1998 Chevy Astro van. (15 RT 3056.) They drove without purpose for awhile until someone suggested they get beer. (15 RT 3061.) She drove to a gas station convenience store near Lytle Creek Road. (15 RT 3061.) Everyone got out of the van. Carmen identified photos of herself going in and out of the store, taken from the store's surveillance camera. (15 RT 3063; see exs. 104-106.)

With the beer in hand, they drove up Lytle Creek Road until they hit a dead end and then turned around to come down the hill. She pulled into a turnout and stopped the car. (15 RT 3065-66.) The boys got out of the car but she did not. It was very dark. She could not see them but heard them talking next to the van. (15 RT 3068.)

Without warning, she heard several gunshots, perhaps three or four. (15 RT 3069.) Mosqueda and Van Kleef got into the

van, then Flores, but Ricardo Torres did not. (15 RT 3069.) She thought Flores had a gun in his hand but she couldn't be sure because it was dark. (15 RT 3072.) He told her to drive. She asked what happened; no one said anything. (15 RT 3073.)

She dropped Flores and Van Kleef at her apartment, then drove Andrew Mosqueda to his apartment. (15 RT 3078-79.) Carmen went inside for a few minutes to put her laundry in the washer. (15 RT 3079.)

Carmen returned to her apartment. Flores and Van Kleef were there, but Van Kleef left soon after she returned. (15 RT 3082.) A few minutes later, Flores asked if he could take her van to go to a phone booth to make a long-distance call. (15 RT 3083.)

She did not recall how long he was gone, but when he returned he said he had gotten into an argument with some guys and her van had been damaged. (15 RT 3089.) The next morning, she saw the passenger side of the windshield was shattered. (15 RT 3092.) She suspected Flores had "done something" to Van Kleef and said so to Andrew when she saw him later that day. (15 RT 3093.) She had the windshield fixed. (15 RT 3095.)

Flores stayed at her apartment all day. He threatened

Carmen and told her not "get weak on me." (15 RT 3097.) She was afraid of him. She asked him to leave but he stayed near her all day. (15 RT 3098.)

On the night of Tuesday, March 20, Mosqueda and his friends borrowed her van for a few hours. They returned about 9:00 or 10:00 p.m. Flores then took the van; he was gone for an hour. (15 RT 3105.)

The next day, Flores accompanied Carmen wherever she went throughout the day. (15 RT 3107-11.) At the end of the day, Flores allowed her to go by herself to get dinner. Carmen went drove to a nearby restaurant to order food. When she came out, her van was gone. (15 RT 3117.)

Carmen made several calls before she reported the missing van to the police. She called her husband, Abraham, and her sister, Maria, who told her Flores had just come to her apartment driving Carmen's van. He said he was looking for Mosqueda. (16 RT 3119-24.)[6] Carmen went to Maria's house.

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[6] Carmen reported the van stolen at 8:58 p.m. (16 RT 3370.) She told the officer who took the report that she got to the taqueria at 8:15 p.m. and when she came out the van was gone. The taqueria was about 1/4 of a mile from Carmen's apartment building. (16 RT 3376.) She told the officer she

There she received a call from Flores. She asked him about the van; he said he had to "get out." (16 RT 3125.) He told her to keep her mouth shut and that she "should know what happens to rats." (16 RT 3126.)

Later that night Carmen told her brother George, a police officer in Fontana, about the shooting. (16 RT 3127.) He took her to the police station to talk to the detectives. (16 RT 3128.)

On March 23, Carmen fled to Mexico with Abraham and her five-year-old daughter and stayed there for a year. (16 RT 3138.) She refused several requests by the police to return to San Bernardino. (19 RT 4026.) When she returned in November 2002, she was arrested and charged with being an accessory to the homicides. (16 RT 3141, 3290.)

C. Mosqueda's Friends and Family Also Testify.

Jessica Ramirez, 16 years old at the time of trial, lived in Rialto with her parents and her brother, Andrew Mosqueda. (14 RT 2788.) She often visited her Aunt Carmen, who lived five minutes away. (14 RT 2789.) She frequently saw Flores staying

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had no idea who took the car. (16 RT 3374.)

at Carmen's apartment. (14 RT 2790-92.) Many people hung out at Carmen's apartment, including her brother and his friends. (14 RT 2792.) She knew Van Kleef and Torres. She was "sort of" dating Alex Ayala. (14 RT 2797.)

She had seen Flores carrying a "pistol" and a "long, skinny rifle." (14 RT 2799.) He kept the pistol in his pants and carried it with him when he left the apartment. (14 RT 2799-2800.) She saw the rifle a few times in the bedroom closet, wrapped in a towel. (14 RT 2800-01.)

Jessica was at Carmen's apartment in the early evening of March 19, 2001. She left at about 7:30 p.m. (14 RT 2807.) As she left, she saw a group of people leaving in Carmen's van. The group included Andrew Mosqueda, Flores, Van Kleef, Torres, and Carmen. (14 RT 2807-2809.) She did not recall telling the police she saw Mosqueda, Carmen, Van Kleef and two people she did not know leaving in the van. She did not recall telling the police she did not see Flores in the van. (14 RT 2833, 2839.)

Erick Tinoco, 22 years old, was a good friend of Alex Ayala and knew Torres, Van Kleef and Mosqueda. (17 RT 3583.) He lived near Carmen's apartment. On March 19, 2001, he went to

the apartment with Ayala and Mosqueda. They arrived after dark, about 7:00 or 8:00 p.m. (17 RT 3585.) Flores, Carmen and Van Kleef were there. (17 RT 3598.) He could not remember if Abraham was also there. (17 RT 3598.) Mosqueda said they were planning to "do a jale [job]." (17 RT 3599.) Later, Mosqueda said they were going to drive to the mountains to smoke weed; he did not invite Tinoco. (17 RT 3599.)

Tinoco testified that Flores looked angry. (17 RT 3605.) Carmen seemed worried. (18 RT 3634.) Ayala said he did not want to go; Tinoco offered to give him a ride home. (17 RT 3606.) He and Ayala left before the others departed. He did not see who got into the van to drive to the mountains. (17 RT 3608.)

The next night (Tuesday, March 20), Tinoco drove Carmen's van to Redlands with Mosqueda, Ayala, and some others. They stayed for an hour, then returned to Rialto. (18 RT 3619-21.) He was dropped off at his home in Rialto near 10:00 p.m. (18 RT 3622-23.) He had learned that day that Torres was missing. (18 RT 3616.)

Tinoco met Flores a few months before March 2001; he believed Flores was a member of the gang El Monte Trece. (17

RT 3586-87.) Tinoco saw him at Carmen's and Abraham's apartment, where Mosqueda and his friends went to smoke marijuana and drink beer. (18 RT 3632.)

Tinoco knew Mosqueda was also in the gang. He had seen the bruises on Mosqueda's face after he was jumped into the gang. (17 RT 3589.) When Tinoco first met Mosqueda, Mosqueda claimed to be part of the Maravilla gang. (18 RT 3631.) Tinoco was also present when Carmen's husband, Abraham, talked about the El Monte gang, but Abraham never pressured Tinoco to join it. (18 RT 3632.)

Tinoco counseled Torres not to join the gang. He said it was hard to get out of a gang once in it; he also advised Torres to avoid Flores. (RT 3588-91.) Torres feared he would be in trouble because he did not show up for his scheduled jump-in to the gang. (18 RT 3594.) He was afraid that Flores would be mad at him. (18 RT 3595.) However, he continued to visit Carmen's apartment when Flores was present. (18 RT 3630.)[7]

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[7] Tinoco's testimony regarding his conversation with Torres was admitted, over objection, as evidence of Torres's state of mind under Evidence Code § 1250. (17 RT 3589.)

Tinoco also discussed the gang with Ayala. Ayala said he would never join a gang because he seen others in his family do it, and he did not want to get involved in that kind of activity. (18 RT 3593.)

Carmen's husband, Abraham, denied that he went to Lytle Creek the night Torres was shot. (13 RT 2744.) He knew Mosqueda was a member of El Monte Trece, but he claimed he was not present when Mosqueda was jumped into the gang. (13 RT 2681.) He denied he sold drugs for the El Monte gang. (13 RT 2723, 2741.) He denied that he sought to involve Torres, Van Kleef and Ayala in the gang. (13 RT 2723-29.)

Abraham knew Flores since Flores was a young boy of eleven years. (13 RT 2672.) He acknowledged Flores stayed at his apartment every so often in 2001. (13 RT 2671.) He never saw Flores with a handgun. (13 RT 2676.)

Chantel Fausto, 19 years old, lived in the same apartment complex ("Club Royal") as Carmen and Abraham. (15 RT 2956.) She knew Mosqueda and the three victims from school and from seeing them in the apartment complex. (15 RT 2956.) On March 20, she went in Carmen's van to a "haunted house" with Ayala,

Mosqueda, Erick Tinoco and a girl named Francis. (15 RT 2958-60.) During the ride she asked where Torres was; they said they did not know. (15 RT 2960.) They dropped Ayala at his apartment at 10:40 p.m. and then went back to the Club Royal, arriving at 10:45 p.m. (15 RT 2969.) She went home and did not see any of the others the rest of the night. (15 RT 2969.)

D. The Convenience Store Video Tape.

A videotape from the convenience store where Carmen and the others went on the night of Torres's death was played to the jury. The tape did not show the faces of the people getting out of a van, but the prosecutor argued that the van was Carmen's and one of the people depicted getting out of the van was Flores. (12 RT 2542; 20 RT 4322-23.)

E. Alvarez's Van and the Alleged Murder Weapon Are Found in Mexico the Week after the Crimes.

A few days after the homicides, the police learned that Flores and the van were in Mexico. Maria Jackson, Mosqueda's grandmother and Carmen Alvarez's mother, lived in Rialto and knew of the crimes. She learned the suspected weapon was in Mexico and offered to get it for the police. (11 RT 2283.) On

March 28, 2001, she went to Mexico with Detectives Acevedo and Elvert. (15 RT 3002.)[8]

They met Trinidad Cambreros, a Mexican police officer, in Tijuana, Mexico. (11 RT 2285; 15 RT 3002.) They discussed how to get the gun; Cambreros said if he got it he must hand it over to the Mexican authorities and then they would have to file paperwork to have the gun brought back to the United States. Detective Elvert asked Jackson if she would bring the gun back over the border. (11 RT 2286.)

Jackson purchased the gun from Juan Louis Miranda, her nephew. (11 RT 2298.) The police paid her back. (11 RT 2291.) Miranda did not testify. There is no evidence how he obtained the gun.[9]

According to Maria Jackson, Miranda put the gun in her purse, but Acevedo took it out and checked to see if it was loaded. Cambreros then took it and pulled the trigger to see if it worked.

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[8] Jackson also received immunity for her testimony. (11 RT 2109.)

[9] Maria Jackson claimed that Miranda identified a photo of Flores as the man "who was here." (11 RT 2289.) However, a hearsay objection was sustained (11 RT 2289) and the testimony was stricken. (12 RT 2326.)

(11 RT 2289-90.) Jackson said their fingerprints would now be on the gun. Cambreros wiped the gun with a bed sheet and put it back into her purse. (11 RT 2310.) They took it out of the purse after they crossed the border into California. (11 RT 2292.)

Detective Acevedo corroborated Jackson's testimony, but denied handling the gun. (15 RT 3005.) He said Cambreros handled the weapon and then put it in Jackson's purse. (15 RT 3005.) He did not see Cambreros wipe the gun with anything. (15 RT 3008.) The officers gave Cambreros $100 for his "expenses." Cambreros did want to be served a subpoena to testify in this case, and Acevedo told Jackson not to mention that Cambreros was with them. (15 RT 3006.)

The van had been burned. (15 RT 3003.) The seats had been removed before it was burned and were recovered from a person who had bought them. (15 RT 3004.)

F. Flores's Arrest and Interrogation.

On September 6, 2001, Border Patrol Agent William Pellegrino apprehended four people attempting to cross the border near Tecate, thirty-five miles east of San Diego. (17 RT 3526-3530.) One of them was Alfred Flores. Flores told the

border agents he was a United States citizen and gave a false name. They took his fingerprints, ran them through the computer, and learned that Flores was wanted by the police in San Bernardino. (17 RT 3537.) The agents asked Flores if he was "Wizard." Flores replied, "You guys got me. You found me out." (17 RT 3538.)

Two sheriff's detectives (Robert Dean and Chris Elvert), a sheriff's investigator (Robert Heard), and a Rialto police detective (Todd Loveless) interrogated Flores in seven different sessions over September 6 and 7. (2 RT 194-203.)[10] Parts of two of the interviews were played at trial, and Detective Loveless testified to Flores's statements.[11]

Sheriff's detective Chris Elvert interviewed Flores on September 7, 2001. An edited videotape of his interview was played to the jury. (20 RT 4118.) Elvert told Flores that Mosqueda and Carmen had implicated him in the killings. He

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[10] Investigator Heard conducted a polygraph examination. (2 RT 221-22.)

[11] Flores was also interviewed by Detective Rod Kusch of the Los Angeles Police Department regarding the homicide of Mark Jaimes. The recording of this interview was admitted in the penalty phase. (22 RT 4855.)

told Flores that Flores had killed Torres. (20 RT 4119-21.) Flores denied it; he said he did not know who killed Torres. (20 RT 4124.) He said he knew Torres and Ayala, and Van Kleef less so, but he did not know why they were killed. (20 RT 4141-42.) Flores denied that he lived at Carmen's apartment. He said he stayed there occasionally. (20 RT 4145.)

Flores admitted he took the van to Mexico; he said Carmen owed him money. (20 RT 4133.) He burned the van because he was hearing "this and that." (20 RT 4127.) However, he denied that he had the Jennings handgun in Mexico; he said he brought a .22 caliber rifle with him to Mexico. (20 RT 4150.) He did not recognize a photo of the Jennings handgun. (20 RT 4150.) Elvert lied and told Flores that Flores's fingerprints and the victims' blood was on the gun. (20 RT 4130.) Flores said if his prints were on the gun he must have touched it, but he touches a lot of guns and he did not recognize this one. (20 RT 4153.) He denied accompanying Carmen and the others to the convenience store on the night Torres died; he said the person in the video tape was not him. (20 RT 4133.)

Detective Todd Loveless interviewed Flores about the Van

Kleef homicide on September 7. The recording of Loveless's interview was not played to the jury. In his direct examination, Loveless twice testified that Flores made incriminating statements that Flores in fact did not make.

First, Loveless claimed that Flores "admitted that the 9 mm belonged to him belonged to him because I had asked him whether or not — I can't remember whether I asked him or whether he volunteered the information, that his fingerprints would be found on it." (19 RT 3857.) On cross-examination, however, Loveless was compelled to admit that his written summary of the interrogation stated that Flores admitted taking a .22 caliber rifle to Tijuana, but not the 9 mm handgun. (19 RT 3932.)

Second, Loveless claimed he asked Flores about the place where Van Kleef's body was found and Flores "described it as being a dark place far from civilization. That was his word, civilization." (19 RT 3860.) But once again cross-examination forced Loveless to admit this was not true; it was Loveless himself, not Flores, who described the location as a "dark," "isolated area." (19 RT 3885.)

Throughout the interview, Flores denied killing the victims. He said hung out at Carmen's apartment and knew them from there. (19 RT 3854-5, 3878.) He admitted he took Carmen's van and drove it to Mexico. (19 RT 3857.) He said he took the van because Carmen owed him money. (19 RT 3882.) He said that just because his prints were on the gun did not mean that he killed anybody. (19 RT 3858.) He first said he was in Mexico when he heard about the killings; later he said he went to Mexico after the killings. (19 RT 3858.)

Flores said he could not tell the police who did the killings, and that if he got prosecuted because of that there was nothing he could do about it because he was not going to "rat anyone out." (19 RT 3879.) He said it was possible that his fingerprints would be found on the Burger King bag that was found near Van Kleef's body. (19 RT 3859.) He said it was possible his DNA would be found on the sheet and clothing that had been wrapped around Van Kleef's body. (19 RT 3860.)[12]

He admitted he was a member of El Monte Trece. He said

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[12] It was not.

he believed in street justice, not American justice. (19 RT 3864.) He said he tried to mentor Andrew Mosqueda by telling him to stay in school. He told Mosqueda that "killing was good as long as it was done for a good cause." (19 RT 3863.)

Investigator Robert Heard interviewed Flores after Elvert on September 7. (18 RT 3807.) Heard wrote out three "options" for Flores to consider. Option A was "I shot one, two or all three." Option B was "I was present when one, two or three of these young men were shot." Option C was "I told somebody to shoot one, two or three of those young men." (18 RT 3810; see ex. 83.) Flores said Options A and C were incorrect but Option B was correct. (18 RT 3814.) He denied he was present when Torres and Ayala were shot. He said, "I was present" when Van Kleef was shot. (18 RT 3814-15.)

G. The Physical Evidence.

1. Firearm Tool Mark Evidence.

The cartridge cases and bullets from the Torres and Ayala crime scenes were examined by Kerri Heward, a criminalist in the San Bernardino Sheriff's Office. (17 RT 3417.) Heward had been in the sheriff's department for nine years and in the

firearms identification unit since 1998, five years before trial. (17 RT 3418.) She had received training in firearm identification from the FBI Academy, the California Department of Justice, and the Association of Firearm and Toolmark Examiners, of which she was a member. (17 RT 3418.)

She described the evidence firearm – the Jennings 9 mm – as "not a real top of the line quality handgun" that "doesn't leave really good reproducible marks like a more expensive gun would." (17 RT 3468.) She test fired the gun six times. It was in good condition. (17 RT 3428.)

She used three different kinds of ammunition in her test fires. She test fired two bullets from the same ammunition manufacturer to "make sure that I am able to make an identification from test to test because if I can't make an identification from test to test, then the fact that it matches an evidence bullet doesn't really mean anything." (17 RT 3455.) Heward explained that bullets from the same manufacturer will match more closely than bullets from different manufacturers because ammunition varies; some is of harder metal, some softer, and the bullets will mark differently. (17 RT 3428.)

Heward testified that "it makes a difference what gun you use and what type of ammunition. You want what most closely resembles what was used in the crime." (17 RT 3454.) In this case, however, Heward did *not* use the same brand of ammunition as that found at the scene in her comparison. The spent cartridges recovered from the Torres scene were all Remington and Peters; the cartridges at the Ayala scene were PMC and Remington and Peters. (17 RT 3466.) Heward compared the evidence cartridges and bullets to test fires using Federal brand ammunition. (17 RT 3456-57.)

Heward's first test fire used two rounds of PMC ammunition. However, she could not positively identify these test fires. (17 RT 3456.) Similarly, her next two test fires, using Fiocchi brand ammunition, also failed to produce a match. (17 RT 3456.) Her final two test fires, using the Federal brand ammunition, produced a match and she therefore compared the evidence cartridges and bullets to the Federal test fires. (17 RT 3457.)

Heward expressed absolute certainty that the Jennings 9 mm was the gun used in the Torres and Ayala homicides. She

claimed that "[t]his gun fired the cartridge cases that were recovered from Torres crime scene and the Ayala crime scene." (17 RT 3468.) She also said, "I was able to determine that all of these cartridge cases submitted came from this firearm." (17 RT 3430.) Further, she claimed that she "identified" one of the bullets from the Ayala scene "to the Jennings pistol." (17 RT 3431.) She did not explain what "identified" meant. However, she said the other bullets from the Torres and Ayala scenes were "somewhat damaged" and she was unable to make a "positive" identification, although the bullets had the same "class characteristics" as the test bullets.(17 RT 3430, 3432.) Later she explained that her inability to match the bullets was also due to the poor quality of the Jennings pistol, which does not leave reproducible marks, "so that I can't identify a bullet that's gone through a body isn't solely because it's damaged in the body. A lot of it has to do with this gun." (17 RT 3468.)[13]

2. Tire Tracks.

The same general pattern of tire tread was observed at

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[13] Two bullets were recovered from Torres's body during the autopsy. One bullet was recovered from Ayala during the autopsy. (16 RT 3296-97.)

each crime scene. (17 RT 3433.) However, the impressions were too indistinct to determine if they were left by the same vehicle. (17 RT 3433.)

3. Shoe Prints.

The shoe pattern of the Nike tennis shoes Flores was wearing when he was arrested did not match any of the shoe prints observed at any of the crime scene. (17 RT 3470.) The pattern of the shoes Van Kleef was wearing when he was found matched the shoe prints found at the Torres scene. However, it could only be determined that the shoe patterns were left by the same type of shoe; the rocky soil did not permit the examiner to conclude that the shoe prints were left by the same shoe. (17 RT 3420-21.)

4. Fingerprints.

No useable prints were found on the Jennings handgun. (17 RT 3472.) Similarly, a print lifted from the van's front seat, and one taken from a match box found in the van, could not be compared. (17 RT 3473.) Useable prints were lifted from the Burger King bag found at the Van Kleef scene. These were compared to exemplars furnished by Flores, Mosqueda, Van

Kleef, Carmen, and Abraham. There was no match. (17 RT 3473.)

5. DNA.

Blood was drawn from Flores, Carmen, Abraham, Mosqueda, Torres, Ayala and Van Kleef for the purpose of DNA testing. (16 RT 3295.) Human skin tissue found on the Jennings handgun had DNA. Flores was positively excluded as the donor of this DNA ; Abraham Pasillas and Van Kleef were not excluded. (16 RT 3319.) DNA testing on spots taken from the van excluded everyone but Mosqueda. (16 RT 3323.) The cigarette butt found at the Torres crime scene matched the DNA of Mosqueda. (16 RT 3326.) Stains on the t-shirt found with Van Kleef were matched primarily to Van Kleef. One stain could have come from Carmen; everyone else was excluded as a potential donor. (16 RT 3333.)

Flores's DNA was not found on any of the evidence tested. (16 RT 3303-33.)

6. Clothing.

The hat found near Van Kleef bore a hole left by a large caliber bullet, possibly a .38 caliber or 9 mm, that had been fired

while in close contact with the hat. (17 RT 3438.)

A package of white t-shirts was found in the master bedroom closet at Carmen and Abraham's apartment. The t-shirts were the same size and make as the t-shirt found with Van Kleef's body. (17 RT 3491.)

H. Gang Testimony.

El Monte Police Detective Marty Penney testified he had been a police officer for 25 years and had worked for 14 years as a gang investigator. (19 RT 4032, 4064.) He was personally familiar with the gangs in El Monte, including the El Monte Trece gang. (19 RT 4034.) El Monte Trece had at one time been a much bigger gang, but over the years it had lost members and at the time of trial claimed only a handful of members. (19 RT 4037.) It had largely been taken over by another gang, El Monte Flores. (19 RT 4036.)

Penney testified the defendant Alfred Flores was a "documented" member of El Monte Trece. (19 RT 4044.) Flores's moniker was "Wizard." (19 RT 4044.) Penney did not know either Carmen Alvarez or Abraham Pasillas; he could not say whether they were founding members of El Monte Trece. (19 RT 4051.)

Penney testified, based on his "experience and training," that Torres's refusal to join the gang after being asked to would cause him "some problems" in the "area of disrespect." (19 RT 4054.) However, Penney admitted that in his experience he had never seen a person killed because he refused to join a gang. (19 RT 4094.) Penny speculated that it was "possible" Torres was killed because he refused to join the gang. (19 RT 4055.)

Detective Penney also his opinions on why Van Kleef and Ayala were killed. Penny theorized that "the suspect" killed Van Kleef to "protect himself." (19 RT 4058.) Penney offered that Ayala was also killed because he "witnessed a homicide" and was a "very serious potential threat to the suspect that committed the crime or crimes." (19 RT 4058.)[14] Penney also asserted that Ayala showed "disrespect" towards the gang by refusing to join it. (19 RT 4060.)

Penney claimed that in the "gang world," the three

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[14] After being reminded there was no evidence that Ayala witnessed a homicide, Penney shifted gears and theorized that because Ayala and Mosqueda were close friends, "the suspect would assume probably that he had received information about the homicide from Mosqueda." (19 RT 4059.) The court struck this testimony as speculative. (19 RT 4059.)

homicides would be considered "good murders." (19 RT 4062-63.) Further, Penney testified that Torres was shot to make an example of him. (19 RT 4063-64.)

II. Penalty Trial.

A. Brandishing a Firearm January 1997.

In January 1997, the El Monte police stopped a car based on a report that an individual in the car had pointed a firearm at people on the street. (21 RT 4655.) Flores was in the front passenger seat; a 9 mm handgun was on the floorboard at his feet. (21 RT 4658.) The gun was loaded and a round was in the firing chamber. (21 RT 4658.)

The citizen who made the initial report, Richard Torres, testified he was attending a party in El Monte on the night of January 10, 1997. Many of the partygoers were standing outside on the sidewalk. Torres saw a car drive by slowly several times. In the final drive-by, a gun was pointed out the window and someone in the car yelled something. Torres went inside and called the police. (21 RT 4622.) The police stopped the car shortly after. Torres identified Flores as one of the men in the car but was unsure if Flores was the person who brandished the firearm.

(21 RT 4624.)

B. Assault on Randall Sharenbrock April 1998.

Flores assaulted Randall Sharenbrock, a correctional counselor at the Karl Holton Youth Correctional Facility in April 1998. (21 RT 4522-30.) Sharenbrock had advised one of his wards to stay away from Flores. (21 RT 4525.) Later that day, as he was dismissing wards from the day room, he heard his name called. As he turned, Flores struck him twice on the left cheek and once on the right cheek with a pencil. (21 RT 4529.) Other counselors quickly came to his assistance; Flores voluntarily laid himself on the floor with his hands behind his back. Flores said, "Nobody talks shit about me." (21 RT 4529.) Flores pleaded no contest and was sentenced to state prison. (21 RT 4536.)

C. Shooting of Mary Muro September 2000.

In September 2000, Flores's former girlfriend, Mary Muro, was shot in the leg. (21 RT 4541-47.) The shooting occurred at night. Muro's eighteen-year-old daughter Vanessa was sleeping on the couch in the downstairs living room. (21 RT 4560.) She heard the door open and saw Flores in the doorway. He called out to Muro by her name. Muro's friend Sal came downstairs,

spoke to Flores briefly in Spanish, then ran back up the stairs. (21 RT 4565.) Vanessa saw a gun in Flores's hand. He pointed it at the retreating Sal but the gun seemed to jam. He pointed the gun again up the stairs and fired. (21 RT 4568.) Vanessa saw another arm point a gun through the doorway; the gun fired. Flores said, "kill the motherfucker." (21 RT 4568-4569.) The police found two empty .25 caliber casings on the ground near the doorway. (21 RT 4589.)

D. Assault on Michael Angulo September 2000.

In September 2000, Michael Angulo, the boyfriend of Flores's sister, Valerie Cardenas, got into an argument with Flores. (22 RT 4685-86.) Before the argument Angulo and Flores had a good relationship. Angulo thought the argument was over and walked away. As he did, he felt a small tear in his shirt. He was unharmed but later in the day was treated at a hospital for a superficial 1/4" abrasion on his back from a stabbing instrument. (22 RT 4711, 4703.)

Angulo told the police he had walked outside to check on his dog. Flores was there; he told Angulo, "stop looking at me." (22 RT 4704.) Angulo was confused by Flores's attitude. (22 RT

4704.) Flores went into the house and came out with an ice-pick. Angulo started to walk away and Flores stabbed him. (22 RT 4704-11.) Angulo later reported the incident to Flores's parole agent. (22 RT 4715.)

E. Shooting of Mark Jaimes November 2000.

In November 2000, Rick Milam employed a prostitute in the City of Commerce. (22 RT 4817-19.) While he was in the motel with the woman, his car was stolen. (22 RT 4820.) He reported the car stolen. On November 17, he was told the car had been recovered. He picked it up from the police tow yard. (22 RT 4823.) Later that night, his father opened the trunk and found a dead body inside. (22 RT 4825.)

The dead man was Mark Jaimes. (22 RT 4833.) Deputy Sheriff Rod Kusch learned that Lilian Perez, Flores's mother, was the prostitute that Milam had seen. (22 RT 4835.) When Kusch contacted her, Perez told him Jaimes had been killed in the Maywood Hotel. (22 RT 4835-38.)[15]

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[15] A Raven .25 caliber handgun was found in Milam's car with the body. A firearms identification expert concluded that the Raven .25 caliber fired the bullets that killed Jaimes. He also concluded that the cartridge casings found at the Muro shooting were fired from the Raven handgun. (21

Kusch interrogated Flores in September 2001, after Flores had been taken into custody. (22 RT 4864.) Flores said he was living with his mother in November 2000. He had been paroled from Salinas Valley State Prison in April 2000 and had been staying with different relatives after that because he had no home of his own. (22 RT 4858-59.) He knew his mother was a prostitute. He did not like it but he tried to ignore it. (22 RT 4875.)

Flores returned to his mother's motel room one night and found Jaimes there. (22 RT 4875-78.) Jaimes was lying on the bed, half dressed. Flores introduced himself as Perez's son. (22 RT 4885.) He expected Jaimes to leave at that point but Jaimes did not. Flores told Kush: "I told my mother you need to ask him to leave. I mean this is your house, I understand you pay the rent but you need to ask him to leave because I feel disrespected by his presence here." (22 RT 4886.)

Perez asked Jaimes to leave. He did not. (22 RT 4886.) Jaimes pulled out drugs and began to use them. This angered Flores: "But I'm thinking that this guy shouldn't be doing this right

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RT 4667-70.)

here. You know what I mean? And he's offering me, no I'm all right. You know what I mean? And he's just right there like, you know, there was a party in the pad ey [sic]. And there ain't no parties in the house. Go party in your own house." (22 RT 4887-1.)

Flores took his mother aside and told her Jaimes had to go. (22 RT 4887-1.) She agreed, but when she told Jaimes he began to get "real disrespectful." (22 RT 4887-1.) Jaimes yelled at Perez and demanded she give him his money back. (22 RT 4888.) He "kept getting crazy." Flores believed the incident "was getting out of hand." He told Jaimes to stop or he would "get violent." (22 RT 4880.) Jaimes refused to leave; Flores shot him. (22 RT 4889.)

In the interview with Kusch, Flores apologized to Jaimes's family, and to Jaime's mother especially, but he explained that what Jaimes did "wasn't right." (22 RT 4889.)

Jaimes died of multiple gunshot wounds. (22 RT 4933.) There was cocaine in his blood when he died. (22 RT 4933.)

F. Robberies in March 2001.

Andrew Mosqueda testified that he participated in two robberies in March 2001 with Flores, Carmen and other individuals. (22 RT 4779.) On March 7, 2001, the USA Donut Shop

in El Monte was robbed by four men at 9:30 p.m. The owners, Dustin Yan and Michael Phu, were the only people in the shop. (21 RT 4635.) Four men entered and demanded money; one man had a gun. Yan opened the cash register. The shorter of the robbers took money (about $80) from the register. The man with the gun then shot Yan in the chest. Everyone ran when the shot was fired. (21 RT 4641.) The shooter was about 5'11', a light-skinned Hispanic man, wearing a beanie. (21 RT 4643.) At trial, Yan did not identify Flores as one of the men. (21 RT 4644.)

Michael Phu saw the men enter the store. One of them had a long rifle or shot gun which was wrapped in a jacket. (21 RT 4649-50.) This man was 5'5' with a thin build and a dark-colored beanie. (21 RT 4653.) The robbers ordered Phu to face the wall; he did not see anything after that. (21 RT 4649.) Phu told the police that a man with a black semi-automatic pistol was the person who went around the counter and grabbed the cash register. (22 RT 4931.)

A security guard heard gunshots and saw four Hispanic men running from the donut shop. (22 RT 4757.) One carried a cash register drawer; they jumped over a wall and escaped. (22 RT 4758.) He could not identify any of them.

Mosqueda claimed the donut shop robbery was committed by Flores, himself, Carmen, and three others – Jessica, Mynor and "Pelon." (22 RT 4779.) They drove around in Carmen's van, planning to do a robbery but not sure where to do it. (22 RT 4779.) They formed a plan after they got to the donut shop. Flores allegedly had the only weapon, a 9 mm handgun. (22 RT 478–81.) They planned for Mosqueda to watch the door, Flores to hold the gun on the cashier, Pelon to act as look-out, and Mynor to grab the cash. (22 RT 4782.)

Mynor took the cash drawer and Mosqueda started to leave. He heard a gunshot but did not see Flores or anyone else shoot anybody. (22 RT 4787.) As far as he knew, Flores was the only one of them carrying a gun. (22 RT 4787.) Flores did not have a rifle. (22 RT 4804.)

On March 9, 2001, there was an attempted robbery of the Mariscos restaurant. (22 RT 4728.) Four people were shot. (22 RT 4744.) Two 9 mm casings were found in the entranceway. (22 RT 4744.)

One of the diners, Della Marie Lizarraga, testified there was only one robber. He entered, tried to grab the cash drawer and then

started shooting. (22 RT 4729-4733.) Flores was **not** the man she saw. (22 RT 4732.) An officer who took a statement from Lizarraga immediately after the robbery testified that she said the shooter was not the man who grabbed the cash register but a second man who stood near the entranceway. (22 RT 4745-48.)

Mosqueda said the Mariscos robbery was carried out by him, Flores and Pelon, with Carmen again waiting in the van. (22 RT 4790.) Flores planned the robbery. Flores was to hold the gun, Pelon was to grab the cash register, and Mosqueda was to act as the lookout. (22 RT 4792.) Mosqueda believed Flores was the only one who carried a weapon. (22 RT 4794.) Mosqueda did not enter the restaurant. From outside he heard five to six shots, then saw them run out. (22 RT 4795.) They did not get any money. (22 RT 4797.)

Mosqueda initially told the police he was in the van when the robbery occurred. (22 RT 4806.) This, he later admitted, was a lie. (22 RT 4807.)

A firearms examiner examined the 9 mm cartridge cases and fired bullets recovered from the scene of the donut shop and restaurant robberies. A cartridge case and a fired bullet from the

donut shop robbery she "identified" to the Jennings firearm. (22 RT 4928-29.) Three cartridge cases and one fired bullet from the seafood restaurant robbery she "identified back" to the Jennings firearm. (22 RT 4929.) She did not explain what she meant by "identified." (22 RT 4926-29.)

G. Possession of a Weapon in Jail September 2002.

Flores was found with a "slashing-type weapon" while in custody awaiting trial in the present case. (21 RT 4607.) In September 2002, while housed at the West Valley Detention Center, Flores was late returning to his cell. The deputies ordered him back to his cell over the public address system. (21 RT 4607.) Flores came out of the shower area, fully clothed. A search of his body uncovered a toothbrush with a razor attached. (21 RT 460, 4616.)

Flores was in a green jumpsuit at the time. The color of his jumpsuit indicated that Flores was in protective custody. Inmates in green jump suits are often targets of assaults by other inmates who assume they are cooperating with the police. (21 RT 4610.) Flores had asked to be put in a red jumpsuit so he would not be a target. (21 RT 4610.)

H. Victim Impact Testimony.

Ten witnesses testified about the character of the victims, how each loved his family, and what an asset each was to his family. Ricardo Torres's father, mother and sister testified that Torres was a happy, friendly person who cared about others, enjoyed science, liked to cook and build model cars, and was fastidious about his appearance. (23 RT 4959-61, 5016-21.)

Jason Van Kleef's father, mother and brother testified that he was a "fun-loving kid" who liked holidays and wanted to be a fireman. He was well-liked and flirted with girls. He was into "girls, music and the telephone." (23 RT 4962-76.)

Alexander Ayala's mother, two sisters and brother testified that Ayala was always happy and loved playing with his nieces and nephews. He enjoyed using computers and wanted to be a computer technician. His brother described him as smart, athletic and sentimental. (23 RT 4982-90, 5011.)

I. Defense Evidence.

Anthony Casas testified as an expert on prison conditions for prisoners sentenced to a term of life without the possibility of parole. (23 RT 5030.) Casas was retired from a life-long career in

the California Department of Corrections. He served in numerous capacities with the Department of Corrections, including Associate Warden of San Quentin State Prison and the Men's Colony at San Luis Obispo, Deputy Director for Policy and Planning, and Assistant Director for state prison camps. (23 RT 5030-31.)

Casas explained there are four levels of custody with Level Four being the highest. All prisoners sentenced to life without the possibility of parole are Level Four prisoners and remain at that level until they die in prison. (23 RT 5032.) Level Four prisoners get no conjugal visits, and have almost no opportunity for employment or education in prison. (23 RT 5034-5042.) Their cells are small and have solid doors that cannot be seen through. (23 RT 5036-39.) No one has ever escaped from the new Level Four prisons constructed in the 1990s, which is where Flores would be housed. (23 RT 5042.)

Steven Strong testified as an expert on Hispanic street gangs in Los Angles. (23 RT 5054.) Strong worked as a gang officer in the Los Angles Police Department for 20 years before retiring. (23 RT 5054.) He explained that most gang members come from broken homes. Their parents may be in prison, or dealing drugs, or

abusing drugs and working as prostitutes. (23 RT 5055.) The boys who join gangs often "don't have any basic parental guidance or people they can count on to help them as they are going to school, growing up." (23 RT 5055.)

Strong testified that these boys become attached to the gang because the gang is "always there for them" and their parents are not. (23 RT 5055.) According to Strong, "they get involved with them because they are the only people they come to know and the ones that they can rely on on a daily basis because they are always there." (23 RT 5055.) The loyalty to the gang runs so deep that a long-time gang member will accept responsibility for a crime he did not commit rather than testify against a fellow member. (23 RT 5056.)

Members of gangs will often refuse to testify even against rival gang members. (23 RT 5057.) They prefer to handle it themselves. They solve their problems with violence because it is the only way they have ever learned. (23 RT 5058-59.)

Mr. Strong reviewed the interviews conducted by the investigator Ronald Forbush of Flores's mother, Lillian Perez, his father, Alfred Flores, Jr., his sister, Tina Verdugo, and of the

woman who adopted Flores's younger brother. (23 RT 5060.) Strong learned that Flores's childhood was remarkably unstable. Flores bounced from different family members to social service programs, and ended up with Abraham Marquez when he was about 10 years old. Abraham was a gang member, and brought Flores into the gang at age 10 or 11. (23 RT 5061.) Flores witnessed violence in his home and on the streets from an early age. (23 RT 5062.) His mother and uncles were deeply involved in gangs, and his father, who spent five to six years in prison, was mostly absent. (23 RT 5063-64.)

Argument

Jury Selection

I. The Striking of a Juror Who Did Not Favor the Death Penalty, but Who Could Consider Death as a Sentence under the Circumstances of this Case, Denied Alfred Flores His Rights to Due Process, to an Impartial Jury Taken from a Fair Cross-section of the Community, and to a Reliable Penalty Determination.

A prospective juror, S. M., stated he had "doubts about the death penalty, but would not vote against it in every case." (18 CT 4943.)[16] He believed the death penalty "should be applied sparingly and only for the most heinous of crimes." (18 CT 4942.) The prosecutor challenged S. M. for cause. (5 RT 950.) Defense counsel objected. (5 RT 950.) The court granted the challenge. (5 RT 951.)

The court erred. The record does not support the finding that S. M.'s views on the death penalty "substantially impaired" his ability to follow the law and apply the death penalty if warranted. The unjustified removal of this juror violated defendant's rights to due process, to an impartial jury drawn from a fair cross-section of the community, and to a reliable penalty determination under the

[16] Appellant uses the prospective juror's initials, a convention used by this Court in *People v. Pearson* (2012) 53 Cal.4th 306.

Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, section 15 and 17 of the California Constitution. (See *Morgan v. Illinois* (1992) 504 U.S. 719, 727; *People v. Fauber* (1992) 2 Cal.4th 792, 816.) The error is reversible per se. (*Gray v. Mississippi* (1987) 481 U.S. 648, 666-68.)

Accordingly, the death sentence must be reversed.

A. The Jury in a Capital Case Cannot Be Limited to Those Who Favor the Death Penalty.

Prospective juror S. M. did not favor the death penalty because he believed it did not deter crime and carried the risk that a person could be put to death for a crime he did not commit. (18 CT 4939.) However, he stated unequivocally he could follow the law and impose the death penalty if warranted. The record does not show that the prospective juror's views on the death penalty as a policy substantially impaired his ability to follow the law.

The jury in a capital case cannot be limited to only those people who unequivocally support the death penalty. (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 521; *People v. Pearson* (2012) 53 Cal.4th 306, 332.) Those who oppose the death penalty, and who might be reluctant to impose it in all but the most serious cases,

are also qualified and entitled to sit as jurors. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176.) "It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that the are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Ibid.*)

When a court excludes those opposed to capital punishment from the venire, the State "crosse[s] the line of neutrality," "produce[s] a jury uncommonly willing to condemn a man to die," and violates the Sixth and Fourteenth Amendments. (*Witherspoon v. Illinois, supra,* at pp. 520-521.) "[A] sentence of death cannot be carried out if the jury imposing or recommending it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Id.* at p. 522, fn. omitted.)

In *Witherspoon*, *supra*, the United States Supreme Court held that a prospective juror cannot be excused for cause based on his or her views on capital punishment without violating a defendant's right to an impartial jury under the Sixth Amendment,

unless the prospective juror has made it "unmistakably clear" that he or she would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case . . . ." (*Witherspoon v. Illinois, supra,* 391 U.S. at p. 522, fn. 21.) The Court revisited the issue in *Wainwright v. Witt* (1985) 469 U.S. 412, where it reaffirmed the fundamental principles underlying the *Witherspoon* decision. In *Witt*, the Court clarified that a prospective juror may be excused for cause based upon his or her views on the death penalty only if the juror's answers convey a "definite impression" that his views "would 'prevent or substantially impair' the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt,* 469 U.S. at p. 424, 426 [adopting the test applied in *Adams v. Texas* (1980) 448 U.S. 38, 45].)

People v. Ghent (1987) 43 Cal.3d 739 adopted the *Witt* standard as determinative of whether a defendant's right to an impartial jury under article I, section 16 of the state Constitution has been violated by an excusal for cause based upon a prospective juror's views on capital punishment. (See also, *People v. Stewart* (2004) 33 Cal.4th 425, 440-441; *People v. Heard* (2003) 31 Cal.4th

946, 963.) Under this standard, "[a] prospective juror is properly excluded [only] if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate.' [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 974; accord *People v. Heard, supra*, 31 Cal.4th at p. 958.) "The real question is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case before the juror." (*People v. Heard*, *supra*, 31 Cal.4th at pp. 958-959 [internal quotation marks omitted, quoting from *People v. Ochoa* (2001) 26 Cal.4th 398, 431 & *People v. Hill* (1992) 3 Cal.4th 959, 1003].)

At trial, the moving party bears "the burden of demonstrating to the trial court that the [*Witt*] standard [is] satisfied as to each of the challenged jurors." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 445.) "As with any other trial situation where an adversary wishes to exclude a juror because of bias, . . . it is the adversary seeking exclusion who must demonstrate through questioning that the potential juror lacks impartiality . . . . It is then the trial judge's duty to determine whether the challenge is proper." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 423.)

On appeal, the trial court's ruling is entitled to deference and will be upheld on appeal if supported by substantial evidence. (*Wainwright v. Witt*, *supra*, 469 U. S. at pp. 426-430; *People v. Pearson, supra,* 53 Cal.4th at p. 330.) But deference is not abdication; the "need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment." (*Uttecht v. Brown* (2007) 551 U.S. 1, 9.) Thus, the reviewing court must examine the context in which the trial court ruled on the challenge in order to determine whether the trial court's decision that the juror's beliefs would or would not "'substantially impair the performance of [the juror's] duties' fairly is supported by the record." (*People v. Crittenden* (1994) 9 Cal.4th 83, 122.)

The record here does not support the conclusion that S. M.'s views on the death penalty "substantially impaired" his ability to follow the law and impose death if he believed it was warranted.

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B. Prospective Juror S. M.'s Answers to the Written Questionnaire and Voir Dire.

1. The questionnaire.

S. M. filled out the 37-page questionnaire that was given to all prospective jurors. (18 CT 4910.) The questionnaire summarized the circumstances of the case. It stated that three teenage boys had been shot and killed. Their bodies were discovered in different places. (18 CT 4912.)

According to his questionnaire responses, S. M. was a 40-year-old man, married with children, who had worked for the past eight years as a legislative analyst. He was a graduate of the University of California. (18 CT 4916-17.) Outside of work, he volunteered for a youth organization and taught martial arts. (18 CT 4918.) He had never served on a jury. (18 CT 4920.)

The questionnaire asked each prospective juror 33 questions about the death penalty. (18 CT 4938-45.) S. M. answered each one. He stated he was not categorically opposed to the death penalty, but believed the "[d]eath penalty should be applied sparingly, to protect society and only in circumstances where an individual is beyond compunction *and* the crime is serious enough to warrant

it." (18 CT 4938 [emphasis in original].)

In other responses, S. M. leaned towards opposing the death penalty for policy reasons. "I have reservations about its effectiveness to deter crime and its fairness," he wrote. (18 CT 4939.) Asked how he would vote in a hypothetical referendum to keep or abolish the death penalty, he stated he would vote to abolish it because it is not "an effective crime deterrent." (18 CT 4941.) However, he said he would not "refuse" to find the defendant guilty, or the special circumstances true, in order to avoid having to make a decision on the death penalty. To the contrary, he wrote, "There are circumstances in which it should be applied." (18 CT 4939.) He affirmed he felt "very much" comfortable considering the statutory aggravating and mitigating factors before deciding upon the appropriate penalty to be imposed. (18 CT 4940.)

He said his religious beliefs taught him the death penalty "should be applied sparingly and only for the most heinous crimes." (18 CT 4942.) He affirmed he would not always vote for life without parole over the death penalty. He stated, "I would weigh the evidence and the circumstances." (18 CT 4942.) He would be "reluctant" to vote for death or sign a death verdict," but not

reluctant to state a verdict of death in open court. (18 CT 4943.)

When informed that in this case "three deaths occurred in three separate incidents," he answered he could consider both life without parole and the death penalty as "realistic and practical" possibilities. (18 CT 4944.) He concluded he could be a "fair and impartial juror" because he could "weigh evidence and judge the merits of the case." (18 CT 4945.)

2. The voir dire.

Both sides questioned S. M. in voir dire. The prosecutor went first. She began: "You indicated in your questionnaire that you don't know if you can be fair and impartial because it's a death penalty case." (5 RT 941.) In fact, S.M. had not said that and he corrected her: " Not that I couldn't be fair and impartial, but that I'd be reluctant to impose the death penalty." (5 RT 941.) The prosecutor asked why he would be reluctant to "vote for death." (5 RT 941.) S.M. replied, "While I'm not fundamentally opposed to the death penalty, you know, as a concept, I do have concerns about how it is imposed." (5 RT 942.) Specifically, he was concerned with the possibility of putting an innocent person to death, and he referred to the number of people who had been exonerated through

DNA testing. He said, "I'm very uncomfortable with being placed with the responsibility of taking someone's life." (5 RT 942.)

The prosecutor asked if serving on a death penalty case would put him in a "moral dilemma." He said it would. (5 RT 942.) She asked if "would just rather not be in that position where you actually have to vote on death for other [sic] human being." He agreed that was correct. (5 RT 942.) The prosecutor said he appeared to be the "type of person that would probably try and do your darndest, but you feel because the death penalty is being sought in this case, that you don't think you'd be a good juror." (5 RT 943.) He agreed.

In response to questions from defense counsel, S.M. reiterated that he was "not fundamentally opposed" to the death penalty, but believed it should be reserved for "the most heinous of crimes." (5 RT 943.) He did not think "a garden variety first degree murder would necessarily qualify for the death penalty [and he] would be inclined to vote life without parole." (5 RT 945.) He understood that there must be a special circumstance to qualify a person for the death penalty. He stated, "I'm trying to decide whether I agree with if something is indeed a special circumstance,

you know. I understand the law defines it one way, but I have to look within and decide whether I can use that factor in determining whether I can take someone's life or vote that someone's life be taken." (5 RT 945.)

He understood the court would give him criteria to consider in deciding whether to impose death; he affirmed he would be able to consider all the different factors, but allowed that "I don't know if I could in good conscience vote the death penalty." (5 RT 946.) He then repeated that he could vote for death in an "appropriate case." (5 RT 946.)

The prosecutor moved to dismiss S.M. for cause. (5 RT 950.) The defense opposed the challenge. (5 RT 950.) The court stated, "Well, based on what I heard on both of these limited *Hovey* questions of both Mr. M. and Ms. H. [another juror the prosecutor challenged], I'm going to grant both challenges for cause for both Mr. M. and Ms. H., one over the defendant's objection and Ms. Snodgrass submitted as to Ms. H." (5 RT 951.)

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C. Reluctance to Impose the Death Penalty Is Not Substantial Evidence That a Prospective Juror's Ability to Follow the Law Is Substantially Impaired.

S.M.'s responses in voir dire showed he would be reluctant to impose the death penalty, but he gave no equivocal or wavering statements about his ability to follow the law and impose the death penalty in an appropriate case.

He continually and consistently stated that he could follow the instructions and impose the death penalty. He was not "fundamentally opposed" to the death penalty and could vote for death in an "appropriate case." (5 RT 943, 946.) He noted there are "circumstances in which" death penalty "should be applied." (18 CT 4939.) He was "very much" comfortable weighing aggravation and mitigation before deciding upon the appropriate penalty. (18 CT 4940.) He would not automatically vote for life but would "weigh the evidence and circumstances." (18 CT 4942.) He knew the defendant was charged with three murders, and in such a case he could consider death as a "realistic and practical" possibility. (18 CT 4944.)

S.M. also stated he would be reluctant to impose death, and expressed discomfort with being in the position of having to decide

whether death was an appropriate punishment. (5 RT 942.) He wondered whether he would be a good juror and if in "good conscience" he would be able to impose the death penalty. (5 RT 943-46.) However, a reluctance to impose to death, and discomfort with being on a jury that must decide the issue do not constitute substantial impairment. (*People v. Stewart, supra,* 33 Cal.4th 425, 447.) "To exclude from a capital jury all those who will not promise to immovably embrace the death penalty in the case before them unconstitutionally biases the selection process." (*People v. Pearson, supra,* 53 Cal.4th at p. 332.)

In *People v. Stewart, supra,* several prospective jurors were disqualified because they answered "yes" to a question on the written questionnaire that asked whether their "conscientious opinions or beliefs concerning the death penalty would *either* 'prevent *or* make it very difficult' for the prospective juror 'to ever vote to impose the death penalty.'" (53 Cal.4th at p. 446.) The Court held it was error to disqualify a juror based on this answer alone. The Court stated that in "light of the gravity of the punishment, for many members of society their personal and conscientious views concerning the death penalty would make it

'very difficult ever to vote to impose the death penalty.'" (*Id.*)

Thus, the question is not whether it would be difficult for the juror to impose death; the question is whether he could impose death in the case before him. (*People v. Lewis* (2008) 43 Cal.4th 415, 483.) The United States Supreme Court has recognized that "[e]very right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow man." (*Witherspoon v. Illinois, supra,* 391 U.S. at p. 515, n.8.) A juror "might find it very difficult to vote to impose the death penalty, and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (*People v. Stewart, supra,* 33 Cal.4th at p. 447.)

Here, S.M. candidly stated that he was opposed to the death penalty as a general policy, and would find it difficult to impose death, but at no point did he indicate he was "unwilling or unable" to follow the court's instructions and weigh the aggravating and mitigating factors in deciding the appropriate penalty. S.M.

expressly stated he could consider the death penalty as a "realistic and practical" possibility in this case. (18 CT 4944.) Indeed, he believed he would be a "fair and impartial juror" because he could "weigh evidence and judge the merits of the case." (18 CT 4945.)

Moreover, S.M.'s belief that the death penalty should be imposed sparingly does not mean he is "substantially impaired" from performing his duty as a juror. A prospective juror may not be excluded simply because he has a view of the death penalty that would lead him to impose it in fewer cases than another person, or that "would make it very difficult for the juror to ever impose the death penalty." (*People v. Stewart, supra,*33 Cal.4th at p. 447.) "A juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict." (*People v. Kaurish* (1990) 52 Cal.3d 648, 699.)

Just as a prospective juror is not "substantially impaired for jury service in a capital case" simply because his ideas about the death penalty are "indefinite, complicated, or subject to

qualifications" (*People v. Pearson, supra,* 53 Cal.4th at p. 331), S.M.'s opposition to the death penalty and his reluctance to impose it do not make him unqualified to sit on a death penalty case. Where the prospective juror's views are consistent, as they are here, the "need to defer to the trial court's ability to perceive jurors' demeanor" is lessened and "a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment." (*Uttecht v. Brown* (2007) 551 U.S. 1, 9, 20; *People v. Lewis, supra,* 43 Cal.4th at p. 487.) Thus, the duty of the reviewing court is to "review the record to determine if it fairly supports the trial court's determination" that the challenged juror's views on the death penalty "would have prevented or substantially impaired the performance of [his or her] duties as a juror." (*People v. Bramit* (2009) 46 Cal.4th 1221, 1233.)

The record does not support the trial court's finding that the prosecution proved by a preponderance of the evidence that S.M.'s views on the death penalty "substantially impaired" his ability to return a death sentence if he found it warranted by the evidence. At most, S.M. would have found it difficult to impose the death penalty, but as this Court has made clear, difficulty in imposing

death does not provide a ground for a challenge for cause. (*Stewart, supra*, 33 Cal.4th at p. 447.) Although S.M. may have been a juror that the prosecutor would have exercised a peremptory challenge upon, there was no ground for a cause challenge. The prosecution did not meet its burden of showing that prospective juror S.M. was biased and the court erred in dismissing the juror.

D. The Court Did Not Apply *Witt* Even-Handedly and Impartially.

The trial court's abuse of discretion in granting the prosecution's challenge for cause to juror S.M. is evidenced by the court's distinctly different approach to the jurors challenged by the defense. A trial court must apply the *Witt* standard in an even-handed and impartial manner. (*Morgan v. Illinois, supra*, 504 U.S. at p. 729 [holding the "requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment" requires court to excuse a pro-death penalty juror whose views impair his ability to return a life sentence]; see also *Ross v. Oklahoma* (1988) 487 U.S. 81, 86 [holding it was error to deny a challenge for cause to juror who made it clear he would vote automatically for death].) A court's application of the *Witt* standard in an arbitrary, capricious,

or partial manner does not comport with the essence of fairness guaranteed by due process of law.

Here, a comparison of the court's application of *Witt* to "pro-death" and "pro-life" jurors shows it decision to excuse prospective juror S.M. was arbitrary and capricious. The court refused to dismiss jurors who said they would "probably" vote automatically for death or "could not" impose life under the circumstances of this case. The court questioned these jurors to rehabilitate them, but did not question prospective juror S.M., even though the court described the attorney questioning as "limited." (5 RT 951.) The result of the court's uneven application of *Witt* was a jury that strongly favored the death penalty.

Consider the following pro-death jurors:

L.T.: She favored the death penalty and would vote to keep it. (22 CT 6124, 6126.) She believed in an "eye for eye." She believed "you should be punished in the same way that you punished someone else." (222 CT 6123.) She was only "somewhat" comfortable considering the aggravating and mitigating factors in deciding the proper penalty. (22 CT 6123.) She believed the purpose of the death penalty was "so that the taxpayers wouldn't

have as many prisoners to help support." (22 CT 6124.) She stated "[t]here are a lot of murderers in prison and our prisons are overcrowded." (22 CT 6124.) She thought the death penalty in California was fair: "I believe people should get the death penalty if they take another person's life." (22 CT 6125.)

In voir dire, when asked if she would automatically vote for death if defendant was found guilty of murdering three people, she said, "Probably. I would say probably, yes." (5 RT 839.) When questioned by the prosecutor, she said she was not "set" either way, and could consider both life without parole and death. (5 RT 840.)

The court then questioned Ms. T. (5 RT 841.) She said it was hard to answer the questions because she had not heard all the evidence, but she claimed she was "open-minded" and would not automatically vote for death. (5 RT 842.)

D.S.: He favored the death penalty and would vote to keep it. (22 CT 6014, 6013.) He agreed he would have a "hard time" imposing life without parole under the facts of this case because the fact there were three separate killings was "kind of extreme." (5 RT 1010-11.) He believed the defendant deserved the death penalty if he killed three people and although he would "hate to do

something like that, . . . I kind of feel that way." (5 RT 1012.)

Under questioning by the prosecutor, Mr. S. thought he could keep an open mind: "I guess I would be as fair as I possibly could." (5 RT 1016.)

S.T.: She favored the death penalty and would vote to keep it. (22 CT 6162, 6161.) She thought if the death penalty was "used more" crime would go down. (22 CT 6161.) Her Christian religion believed in the death penalty; she said the Old Testament teaches that "if you shed the blood of someone – yours should be shed as well." (22 CT 6162.) She agreed with that. (22 CT 6162.) She stated she could "possibly" vote for life in prison if there was "remorse." (22 CT 6162.) She agreed she could consider life in prison and return such a verdict if the facts warranted it. (22 CT 6163.)

In voir dire she denied she would consider a life sentence if defendant was convicted of killing three people:

> "Q: Could you also, given the fact that this is a case involving three young men who were killed and that you would have found that Mr. Flores killed them on three separate occasions, could you honestly see yourself in that circumstance imposing a sentence of life without the possibility of parole?

A: Very honestly I believe that if a life was taken premeditated under those special circumstances, I feel that it would warrant the death penalty.

Q: And — all right. And you could not impose life without the possibility of parole? We need your honesty.

A: Right. Yes.

Q: You could not?

A: I could not.

Q: You could not?

A: I could say it depends on the circumstances and all the evidence and all that, but I guess I would go to the death penalty."

(6 RT 1375-76.)

Under questioning by the court, however, Ms. T. said she could consider life without the possibility of parole and would not "automatically" vote for death. (6 RT 1379.)

The court denied defendant's challenges to these jurors. As a result, counsel was required to use three peremptory challenges on them. This uneven application of the *Witt* standard produced a jury "uncommonly willing to condemn a man to die." (*Witherspoon v. Illinois, supra.* 391 U.S. at p. 521.)

The written questionnaire given to each prospective juror asked numerous questions about the juror's attitude towards the

death penalty. Two questions in particular went directly to whether the prospective juror favored or opposed the death penalty.[17]

Question 130 asked how the juror would vote if there was a referendum "tomorrow" to keep or abolish the death penalty.[18]

Out of the 17 sworn jurors, 14 jurors said they would vote to keep the death penalty. Not one said he or she would vote to abolish it. One said he would not vote at all; two were not sure how they would vote.[19]

Question 139 described five different attitudes about the death penalty and asked the prospective juror to indicate which

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[17] See the sworn-juror questionnaires at 11 CT 2802 through 13 CT 3357.

[18] Question 130 asked:

"If we had a vote tomorrow in the State of California to decide whether or not to have a death penalty, how would you vote?
Keep the death penalty ___ Abolish the death penalty ___ Would not vote ___."

attitude best described the juror's own feelings.[20] Ten of the jurors put themselves in the group that favored the death penalty but would not impose it in all cases. Six put themselves in the group that neither favored not opposed the death penalty. One put herself in the group that"had doubts" about the death penalty but would not vote against it in every case.

These questionnaire responses show that a very high proportion of the jury favored the death penalty and had not qualms about imposing it. The trial court's uneven application of *Witt*

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: "Please read all of the group descriptions below (1-5) thoroughly. After reading them all, check the one that best describes you.

GROUP 1 (___)

I will always vote for death in every case of murder with special circumstances. I cannot and will not weigh and consider the aggravating and mitigating factors.

GROUP 2 (___)

I favor the death penalty but will not always vote for death in every case of murder with special circumstances. I can and will weigh and consider the aggravating and mitigating factors.

GROUP 3 (___)

I neither favor nor oppose the death penalty.

GROUP 4 (___)

I have doubts about death penalty, but I would not vote against it in every case.

GROUP 5 (___)

I oppose the death penalty. I will never vote for the death of another person."

contributed to this imbalance and undermined defendant's interest in a jury that represented a cross-section of the community. The result was a jury "uncommonly willing to condemn a man to die." (*Witherspoon, supra,* 391 U.S. at pp. 520-21.)

It is especially important in a capital case that the procedure for selecting the jury be free of bias. Imposing death in a capital case is a normative decision. Although the jury's discretion is guided by the enumerated circumstances in mitigation and aggravation, the weight each juror gives to those factors is discretionary and subjective. (See *People v. Boyde* (1988) 46 Cal.3d 212, 253 [holding a juror in a capital case is "free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider"].) If the accused is to be judged by a fair cross-section of the community, then the jury must be comprised not only of those who favor the death penalty and would apply it without hesitation, but also those who generally disfavor the death penalty and would apply it sparingly. (See *Wainwright v. Witt, supra,* 469 U.S. at p. 460 (dis. opn. of Brennan,

J.).)[21]

Given the importance of obtaining a cross-section of jurors, both to the defendant and to a society interested in imposing a fair system of capital punishment, the decision to excuse a facially-qualified juror must rest on substantial evidence that the prosecution has carried its burden of proving substantial impairment. The improper exclusion of even one juror based upon their opposition to the death penalty is reversible error. (*Gray v. Mississippi, supra,* 481 U.S. at pp. 666-68; *People v. Heard, supra,* 31 Cal.4th at p. 963.) Here, the record does not show that prospective juror S.M. could not follow the law. The death sentence must be reversed.

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Justice Brennan wrote: "Broad death-qualification threatens the requirement that jurors be drawn from a fair cross section of the community and thus undermines both a defendant's inherent interest in a representative body and society's interest in full community participation in capital sentencing. (*Wainwright v. Witt, supra,* 469 U.S. at p. 460 (dis. opn. Brennan, J.), citing *Witherspoon v. Witt, supra*, 391 U.S. at p. 519, fn.15.)

Guilt Trial

II. The Court Erred in Denying Flores's Motion to Exclude the Firearm Evidence and to Instruct the Jury on the State's Bad Faith Destruction of Evidence; the Error Violated Flores's Rights to Due Process and to a Reliable Guilt and Penalty Verdict under the State and Federal Constitutions.

A few days after the crimes, the police came to believe that Flores and the van were in Mexico. (11 RT 2177.) There was at that time, and still is, a treaty between the United States and Mexico that provides specific procedure for United States law enforcement authorities to follow in order to investigate in Mexico for evidence and persons suspected of committing crimes in the United States. This treaty, known as the Mutual Legal Assistance Cooperation Treaty with Mexico, became effective in 1991, 10 years before the investigation in this case. (Sen. Treaty Doc. No. 100–13, eff. May 3, 1991, 27 I.L.M. 443 ["Treaty"].) Through the Treaty, the United States and Mexico have agreed to "cooperate with each other by taking all appropriate measures that they have legal authority to take, in order to provide mutual legal assistance in criminal matters . . . . Such assistance shall deal with the prevention, investigation and prosecution of crimes . . . ." (Treaty, art. 1, par. 1, 27 I.L.M. at p. 447; *People v. Sandoval* (2001) 87 Cal.App.4th 1425,

1440 [recognizing Treaty and discussing its scope].)

Here, the prosecution and law enforcement officers ignored the Treaty. Operating completely outside the Treaty, the police instead used a civilian (Mosqueda's grandmother) and a Mexican police officer (Trini Cambreros) to make contact with persons in Mexico and recover the firearm alleged to have been used in the crimes. The Mexican police officer, who did not wish to become involved in the criminal proceedings in San Bernardino, wiped the gun clean so his fingerprints would not be on it, thereby destroying potentially exculpatory evidence.

Based on this, defense counsel moved for dismissal of the charges, exclusion of evidence of the recovery of the firearm and the firearm tool mark comparison conclusions by the prosecution's expert, and an instruction on the bad faith destruction of evidence. (4 CT 888-97.) The court denied the motion. The court did not decide whether the Mexican officer wiped the gun clean, as Mosqueda's grandmother testified to, but ruled the police could not have known of the potential exculpatory value of the firearm because it was not recovered until eight days after the crimes and "presumably" would have been handled by "many people" in that

time. (12 RT 2439.) Further, the court ruled that a violation of the Treaty does not create a ground for the exclusion of evidence. (12 RT 2445.)

The court erred. First, the State's decision to bypass the Treaty and seize evidence using a civilian related to two potential suspects and a Mexican police officer who did not wish his involvement in the case to become known was outrageous government misconduct. (See *United States v. Russell* (1973) 411 U.S. 423, 431-432; *Cooper v. Dupnik* (9th Cir 1992) (en banc) 963 F.2d 1220; The issue here is not whether violation of the Treaty requires exclusion of the evidence under the terms of the Treaty; the question is whether a violation of the Treaty, which ensures the orderly seizure of evidence and preservation of its exculpatory value, violates the Due Process Clause of the Fifth and Fourteenth Amendments, and Flores's right to a reliable guilt and penalty verdict under the Eighth Amendment.

Second, contrary to the court's ruling, the potential exculpatory value of the firearm was readily apparent. In fact, *some* exculpatory evidence was found on the firearm: DNA that could have come from either Carmen Alvarez's husband, Abraham

Pasillas, or Van Kleef, was found on the slide mechanism. (16 RT 3319.) The failure to exclude the firearm evidence or instruct the jury on the bad faith destruction of evidence also violated due process and the right to a reliable guilt and penalty verdict under the Fourteenth and Eigth Amendments. (*California v. Trombetta* (1984) 467 U.S. 479, 488; *Arizona v. Youngblood* (1988) 488 U.S. 51, 58; *People v. Zapien* (1993) 4 Cal.4th 929, 964.)

A. The Facts Supporting the Motion: the Prosecution Bypassed the Mutual Legal Assistance Treaty with Mexico and a Mexican Police Officer Wiped the Gun Clean of Fingerprints.

Based on statements made by Mosqueda and Alvarez and their family members, the police suspected Flores was the prime suspect and that he had fled to Mexico. (11 RT 2177.) Deputy Sheriff Chris Elvert testified that Carmen Alvarez's family told him Flores was living in Mexico with a relative and the van was with him. (11 RT 2177.) Elvert and three other San Bernardino law enforcement officers went to Mexico to look for Flores. (11 RT 2178.)[22] They went first to the Mexican police to get assistance for

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[22] Different law enforcement agencies investigated the three homicides, including the San Bernardino Sheriff's Department, Fontana Police Department and Rialto Police Department. For convenience, and because the agencies acted in concert, these agencies are referred to collectively as San

their search. Elvert and Detective Palomino stayed at the Mexican police station while Mexican authorities and Sergeant Dean and Detective Acevedo went to the place where Flores was allegedly staying. (11 RT 2178.) They did not see Flores. (11 RT 2179.)

Two days later, Elvert returned to Mexico with Detective Acevedo and Maria Jackson, Carmen Alvarez's mother. (11 RT 2179.) Elvert had learned after the first trip that the van had been burned and the remains taken to a tow yard. (11 RT 2180.) He also learned that the potential murder weapon was in Mexico. (11 RT 2180.)

The van was found in a tow yard; it was "completely burned." (11 RT 2181.) They then went to the house of Maria Jackson's nephew, Juan Miranda, who told them he could buy the suspected murder weapon from an unidentified third party. (11 RT 2182, 2205.) Miranda did not trust Elvert to pay him, but he accepted$100 from Maria Jackson and went to buy the gun. (11 RT 2182.) Elvert later reimbursed Jackson with county funds. (11 RT 2182.)

Bernardino law enforcement.

Miranda went alone to buy the gun. (11 RT 2206.) He returned in a short time with a gun in a plastic bag. (11 RT 2182.) According to Elvert, the gun remained in the plastic bag "until she [Jackson] placed it in her purse." (11 RT 2182.) Elvert claimed Jackson held onto the weapon until they returned to the United States, whereupon she handed it over to him. (11 RT 2182.)

Maria Jackson and Detective Acevedo gave different versions of how the gun was handled after Miranda brought it to them. Jackson testified that Miranda put it directly into her purse, but Detective Acevedo pulled the gun out to see if it was loaded. (11 RT 2290.) Acevedo then handed the gun to the Mexican police officer (Trini Cambreros) who handled the gun and pulled the trigger to see if it worked. (11 RT 2290.) Watching this, Jackson told Cambreros that"now the gun is going to have all kinds of fingerprints." (11 RT 2290.) Cambreros then wiped the gun with a bed sheet and returned it to the purse. (11 RT 2310.)

Detective Acevedo also contradicted Elvert's testimony. (15 RT 3005.) He testified Miranda handed the gun directly to Trini Cambreros, who "inspected" the weapon before placing it in Maria Jackson's purse. (15 RT 3005, 3018.) Cambreros took the gun out of

the bag, but Acevedo did not recall "if he opened it or took the magazine out to see if it was loaded." (15 RT 3018.) Acevedo claimed he did not see Cambreros wipe the gun but allowed that it might have happened when he was not looking. (15 RT 3008, 3019.)

Acevedo told Maria Jackson not to mention Cambreros's name. Cambreros had told Acevedo he did not want to be subpoenaed to testify at trial. (15 RT 3008, 3021.) Acevedo testified that Elvert gave Cambreros $100 for his "expenses." (15 RT 3009.)

Regarding the question of whether the gun was wiped clean by Cambreros, Elvert first categorically denied it and said the gun remained in the plastic bag the whole time. (11 RT 2208.) However, he later admitted he was not with Maria Jackson the whole time, and conceded Cambreros "could have" touched the gun and Elvert did not see it because he was "not next to them." (11 RT 2213.)

The gun was critical evidence. At trial, the prosecution's firearm tool mark expert testified that based on a comparison of the bullets found at the Torres and Ayala crime scenes and the bullets test fired from the Jennings 9 mm recovered in Mexico, she

believed the Jennings gun was the murder weapon. (17 RT 3431; 3432.)

B. By Obtaining the Evidence Through Informal Means, Outside the Treaty Protocol, the State Denied Flores's Due Process Right to Access to Exculpatory Evidence.

"Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed "what might loosely be called the area of constitutionally guaranteed access to evidence." (*Trombetta v. California, supra,* 467 U.S. at p. 484 , quoting *United States v. Valenzuela–Bernal* (1982) 458 U.S. 858, 67.)

Thus, the State must take adequate steps to ensure that exculpatory evidence is not lost or destroyed. (*Trombetta v. California, supra,* 467 U.S. 488; *United States v. Alvarez* (9th Cir.1996) 86 F.3d 901, 905 [holding it improper to delegate to non-attorney police officer responsibility to determine if officers' rough notes contain *Brady* material]; *Walker v. City of New York* (2d

Cir.1992) 974 F.2d 293, 299 ["It is appropriate that the prosecutors, who possess the requisite legal acumen, be charged with the task of determining which evidence constitutes *Brady* material that must be disclosed to the defense. A rule requiring the police to make separate, often difficult, and perhaps conflicting, disclosure decisions would create unnecessary confusion."]

Thus, in a case where the critical evidence may be in a foreign country, the prosecution must comply with existing international protocol in searching for and seizing that evidence in order to ensure the evidence is not damaged or destroyed, or allowed outside a proper chain of custody. Here, the Treaty provides a comprehensive road map for preservation and seizure of evidence. Article 7 allows for the compelled testimony in the United States of Mexican citizens. Article 12 covers requests for search and seizure. (Treaty, arts. 7 & 12, 27 I.L.M. at p. 448-50.) The prosecution failed to follow this procedure and as a result lost critical evidence.

The failure to follow the Treaty protocol resulted in a seat-of-the-pants investigation that employed a close relative of two of the prime suspects and a police officer who did not want to testify in

the United States and destroyed evidence to cover his tracks. The prosecution's failure to follow the law denied Flores access to potentially exculpatory evidence and resulted in an unfair trial and unreliable guilt and penalty verdict. Thus, the violation of the Treaty violated Flores's rights to due process and to a reliable guilt and penalty determination under the Fourteenth and Eighth Amendments.

C. By Wiping Clean the Surface of the Handgun, the Police Destroyed Potentially Exculpatory Evidence in Bad Faith.

The State has a constitutional obligation to preserve "evidence that might be expected to play a significant role in the suspect's defense." (*California v. Trombetta*, 476 U.S. at 488; accord, *People v. Roybal* (1998) 19 Cal. 4th 481, 509-10.) In *Trombetta*, the United States Supreme Court held that the State violates a defendant's right to due process when it destroys evidence that has "constitutional materiality" — i.e., evidence that (1) has "an exculpatory value that was apparent before the evidence was destroyed" and (2) is "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*California v. Trombetta, supra*, 467 U.S. at p. 479.)

The State's responsibility is more limited when the defendant's challenge is to "the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." (*Arizona v. Youngblood, supra,* 488 U.S. at p. 57.) In such case, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (*Id.* at p. 58.)

Fingerprint and DNA testing of the gun was potentially useful to Flores. The prosecution's argument was that Flores used the gun in the killings and carried the gun with him to Mexico. This argument would have been weakened if (1) Flores's fingerprints were not on the gun or (2) Mosqueda's or Alvarez's prints were on the gun, for this would have cast suspicion on them and undermined their credibility. As Flores's chief accusers, and the heart of the prosecution case, evidence that Mosqueda or Alvarez had handled the gun would have significantly weakened the prosecution's argument.

Thus, given the apparent materiality of the gun, and the

obvious need to preserve its surface for later testing, the question is whether the police acted in "bad faith" in wiping the gun clean. In *Youngblood,* police obtained semen samples from the clothing of a sexual assault victim. After conducting tests of the semen samples that were inconclusive as to the assailant's identity, the police failed to preserve the clothing for further testing. At trial, the defendant presented expert testimony that timely performance of other tests on samples from the clothing could have produced results that would have exonerated him. The Arizona Court of Appeals reversed the defendant's conviction, holding that "when identity is an issue at trial and the police permit the destruction of evidence that could eliminate the defendant as the perpetrator, such loss is material to the defense and is a denial of due process.'" (*Youngblood, supra,* 488 U.S. at p. 54.)

The *Youngblood* Court framed the issues as follows: "The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady,* makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve

evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." (*Id.* at p. 57.) Ultimately, the Court concluded "that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (*Id.* at p. 58.) In support of its finding that bad faith had not been shown there, *Youngblood* further concluded that "[t]he failure of the police to [preserve] the clothing and to perform tests on the semen samples can at worst be described as negligent." (*Ibid.*)

Although *Youngblood* held that bad faith can be shown in those cases in which the police knew that "the evidence could form a basis for exonerating the defendant," it did not expressly define bad faith. (*Id.* at p. 58.) The Court noted bad faith can be found in "those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant" and that bad faith "must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." (*Id.* at p. 56.)

Bad faith may be established by proof that law enforcement

officials acted intentionally or with reckless disregard of their duty to preserve evidence that might be useful to the defendant. Generally, bad faith may be shown either by an intentional act or by reckless disregard. (*Evans v. California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 553.) Although ordinary negligence does not amount to bad faith, extremely negligent conduct, like reckless and indifferent conduct, satisfies the bad standard. (*Kotsilieris v. Chalmers* (7th Cir. 1992) 966 F.2d 1181, 1185.)

Here, the potential exculpatory value of the gun was obvious. The police themselves later tried to lift fingerprints from the gun, which indicates they knew that fingerprints and DNA might be on the gun even though it was recovered a week after the crimes. (12 RT 2334; 13 RT 2620.) And, in fact, DNA belonging to Abraham Pasillas was found on the gun, showing that other DNA material, belonging to other persons, might have been found had the gun not been wiped clean.

Moreover, the evidence that could have been obtained from the gun could not have been gotten by any other means; fingerprints on a gun are unique. (*California v. Trombetta, supra*, 467 U.S. at pp. 488–489 ("evidence must . . . be of such a nature

that the defendant would be unable to obtain comparable evidence by other reasonably available means").)

At the very least, the police acted recklessly and in bad faith by not taking common-sense steps to preserve the gun in the condition it was found. Cambreros himself acted intentionally and in bad faith by wiping the gun to eliminate his fingerprints in order to obscure his role in the seizure of the gun and avoid having to testify in the case. Moreover, the San Bernardino officials committed intentional bad faith by side-stepping the mutual assistance treaty with Mexico. Had the San Bernardino authorities followed the Treaty, the assistance of Mexican officers would have been official and transparent, and Cambreros would have had no reason to erase evidence of his involvement. Especially in a capital case, one would expect the law enforcement officers in the United States to follow the law and avoid the bad faith destruction of evidence that occurred here.

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D. The San Bernardino Officers Had a Duty to Preserve the Evidence Once They Became Aware of It, and in Any Event the Mexican Officer Was an Agent of San Bernardino Law Enforcement When He Destroyed the Evidence.

San Bernardino law enforcement is responsible for the actions of Trini Cambreros, the Mexican police officer who informally assisted in the recovery of the gun. The State has a duty to preserve evidence not yet in its possession, and the Mexican officer was acting as an agent of the San Bernardino police.

The duty to preserve evidence applies to material evidence that is not yet in the State's possession. In *Trombetta*, the Supreme Court addressed "the government's duty to take affirmative steps to preserve evidence on behalf of criminal defendants." (*Trombetta, supra*, 467 U.S. at p. 486.) The Court did not suggest that the duty to preserve such evidence turned on whether the State already possessed the evidence; quite to the contrary, the Court framed the issue as "the extent to which the Due Process Clause imposes on the government the additional responsibility of guaranteeing criminal defendants access to exculpatory evidence beyond the government's possession." (*Id.*) Here, the gun was within the immediate control of the San Bernardino law officers, yet they took

no steps to preserve its evidentiary value.

Moreover, San Bernardino employed Cambreros as an agent to assist in the recovery of the gun and his actions are attributable to the law enforcement officers. (See *Dyas v. Superior Court* (1973) 11 Cal.3d 628, 633, fn.2 [holding housing authority police acted as agents of police in illegal search and seizure].) The duty to preserve evidence would be hollow if the police could dodge responsibility for the preservation of evidence by delegating the seizure of evidence to non-officers.

Those assisting the government's case are its agents. (*In re Brown* (1998) 17 Cal.4th 873, 881 [crime lab agent of prosecution for *Brady* purposes]; *Kyles v. Whitley* (1995) 514 U.S. 419, 438.) In *Dyas v. Superior Court, supra,* this Court held that in general the "exclusionary rule does not apply to evidence obtained in a search conducted by a person who is truly a private citizen," but where citizens are acted on behalf of the police, the citizen becomes an agent of the police. (*Dyas, supra,* 11 Cal.3d at p. 632.) In *Dyas*, the search was conducted by an officer of the Los Angeles Housing Department Authority. In that situation, the Court found that the search was not conducted by a private citizen for a private purpose

and the exclusionary rule applied. (*Id.*)

Here, the San Bernardino officers used the Mexican police officer as an extension of themselves in Mexico. The Mexican officer was not a private citizen acting for a private purpose. He was a police officer who was paid by San Bernardino law enforcement to assist them in recovering material evidence. He acted under the direction and authority of the San Bernardino officers. As such, San Bernardino was responsible for his acts.

E. The Court's Refusal to Suppress the Evidence or Instruct The Jury Was Prejudicial Error.

A trial court has great discretion to determine an appropriate sanction for the destruction of evidence. (*People v. Zamora* (1980) 28 Cal.3d 88, 99.) The court must fashion a remedy sufficient to "assure the defendant a fair trial." (*Brown v. Municipal Court* (1978) 86 Cal.App.3d 357, 363.) The court should consider the circumstances surrounding the loss or destruction of the evidence. (*People v. Hitch* (1974) 12 Cal.3d 641, 650.) Even where there is no evidence of governmental bad faith, the court may impose a sanction that is necessary to insure the defendant a fair trial. (*People v. Bailes* (1982) 129 Cal.App.3d 265, 272-273.)

When the State denies a defendant access to exculpatory evidence by *suppressing* the evidence, the usual remedy is a new trial with the suppressed evidence being available for use by the defense. (See *Giglio v. United States* (1972) 405 U.S. 150, 154-55; *California v. Trombetta, supra,* 467 U.S. at pp. 486-87.) That remedy is not available here. Rather, the appropriate remedy is exclusion of the testimony regarding the recovery of the firearm and the testimony regarding the tool mark comparison as fruit of the poisonous tree. (*Wong Sun v. United States* (1963) 371 U.S. 471.)

Exclusion is appropriate for the following reasons. First, the State engaged in egregious misconduct in deliberately avoiding the Treaty protocol and seizing the evidence by informal and unreliable means. Second, the evidence possessed readily apparent exculpatory value. Some limited exculpatory evidence (the possibility that it contained DNA from Pasillas and Van Kleef) was found on the gun, making it more likely that additional DNA or fingerprints would have been found if the firearm had evidence had been properly preserved. Third, no other comparable source of evidence was available to Flores. Although he denied committing

the crimes, and denied possessing the firearm in Mexico, once the gun was wiped clean he could not establish that the other suspects handled and possibly used the gun. Thus, given the seriousness of the misconduct and the significance of the evidence, exclusion was the appropriate remedy.

The destruction of the evidence and the court's refusal to exclude it denied Flores a fair trial and undermined his right to a reliable guilt and penalty determination under the Fourteenth and Eighth Amendments. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) The prosecution case would have been seriously undermined if the gun was not linked to Flores. By destroying potentially useful fingerprint evidence, the State denied Flores access to evidence that would have raised a reasonable doubt of his guilt as to the Ayala and Van Kleef homicides, where the firearm evidence was most incriminating. Under these circumstances, reversal of the conviction and/or judgment of death is required. (*Chapman v. California, supra,* 366 U.S. at p. 24.)

III. The Trial Court Abused its Discretion in Admitting the Speculative Testimony of a Gang Expert on the Motive for the Crimes; the Erroneous Admission of this Testimony Violated Flores's Rights to Due Process and to a Reliable Guilt and Penalty Determination under the Fourteenth and Eighth Amendments.

A. Defense Counsel Objected to the Testimony.

Before trial, the prosecution theory of the case was that Flores killed Torres because he believed Torres had information that could incriminate him in the killing of Mark Jaimes. (2 RT 261.) The trial court ruled this argument was "pure speculation," so the prosecution developed a new theory on which to convict Flores: "Ayala, Torres, and Van Kleef were killed because they were weak and wouldn't join the gang." (3 CT 691.) The prosecutor theorized that "[w]hen people do not respond to [Flores's] need for respect he kills them. This motive is similar in all of the San Bernardino County homicides." (3 CT 691.) Specifically, the prosecution sought to admit the testimony of a gang expert (El Monte Police Detective Marty Penney) because "[t]he jury must understand the gang mentality and motivations of gang members to understand this case." (3 CT 691.)

The defense objected on the basis that the gang evidence was

not relevant and, even if relevant, its admission would be more prejudicial than probative. (3 CT 710; 4 CT 959.)

The court acknowledged the defense's objection to "the entire information about the defendant's involvement with the gang and the theory that goes to the prosecution in terms of motive and intent," but admitted the evidence anyway, stating, "I think on the totality of the circumstances under 352, the probative value of that information is not substantially outweighed by its prejudicial effect." (2 RT 264.) The court believed the prosecution "probably will be able to lay foundation that this was gang-related based on the motives established by the evidence." (2 RT 264.) The court initially reserved its ruling on the expert testimony, but in mid-trial ruled the testimony was admissible. (19 RT 3995.)

At trial, Detective Penney Penny testified he had been a police officer for 25 years and had worked for 14 years as a gang investigator. (19 RT 4032, 4064.) He was personally familiar with the gangs in El Monte, including the El Monte Trece gang. (19 RT 4034.) El Monte Trece had at one time been a much bigger gang, but over the years it had lost members and at the time of trial claimed only a handful of members. (19 RT 4037.) It had largely

been taken over by another gang, El Monte Flores. (19 RT 4036.)

According to Penney, Alfred Flores was a "documented" member of El Monte Trece. (19 RT 4044.) Flores's moniker was "Wizard." (19 RT 4044.) Penney did not know either Carmen Alvarez or Abraham Pasillas; he could not say whether they were founding members of El Monte Trece. (19 RT 4051.)

Penney testified, based on his "experience and training," that Torres's refusal to join the gang after being asked would cause him "some problems" in the "area of disrespect." (19 RT 4054.) However, Penney admitted he knew of no instance where a person was killed because he refused to join a gang. (19 RT 4094.)

The prosecutor then sought Penney's opinion as to the motive for the Torres homicide based on a hypothetical:

> Q: Based on your training and experience in gang culture, is it possible then that Ricardo Torres was shot because he had failed to jump into the gang and some other information – he had some other information?
>
> A: Some information on the person that shot him?
>
> Q: Right.
>
> A: Yes.
>
> Q: Okay. Again focusing on the area of disrespect, was it disrespectful for Ricardo Torres not to jump into this

gang after giving his word that he would?

A: Absolutely.

(19 RT 4055.)

The court erred. The admission of this evidence violated Flores's rights to due process and a fair trial, and to a reliable guilt and penalty determination, under the Fourteenth And Eighth Amendments to the United States Constitution and Article I, section 15 of the California Constitution, and Evidence Code sections 1101 and 352.

B. The Court Abused its Discretion in Admitting Expert Opinion Testimony That Torres Was Killed Because He Refused to Join the Gang.

A court abuses its discretion when it admits expert opinion testimony that rests on assumptions unsupported by the trial evidence. (*People v. Moore* (2011) 51 Cal.4th 366, 406.) An expert's opinion testimony based on a hypothetical question must be rooted in facts shown by the evidence. (*People v. Vang* (2011) 52 Cal.4th 1038, 1045, citing *People v. Gardeley* (1996) 14 Cal.4th 605, 617.) The expert's opinion may not be based on assumptions of fact without evidentiary support, or on speculative or conjectural factors. (*Vang, supra*, at p. 379, citing *People v. Richardson* (2008)

43 Cal.4th 959, 1008.) "Like a house built on sand, the expert's opinion is no better than the facts on which it is based." *(People v. Gardeley, supra*, 14 Cal.4th at p. 618.)

Penney's opinion that Flores killed Torres because refused to join the gang, or because Torres had "some information" about Flores, was not "rooted in the fact shown by the evidence." (*Ibid.*) No evidence supported Detective Penney's testimony regarding the motive for the Torres killing. Penney's opinion rested on three suppositions, none of which was supported by evidence:

- Torres had "some information on the person who shot him;"
- It is "disrespectful" to refuse to join a gang; and,
- Flores personally recruited Torres and Ayala to join the gang.

First, there was no evidence Torres had "some information" on Flores. Penney's reference to "some information" relates to the prosecution theory that Flores killed Torres because Flores believed Torres "knew" he had killed Mark Jaimes.[23] The court disposed of

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[23] In the penalty phase, the prosecution contended that Flores killed Mark Jaimes, who was allegedly paying to have sex with Flores's mother when Flores came upon the two of them in a motel room. (22 RT 4835-38.)

this argument before trial, calling it "pure speculation." (2 RT 261.) No evidence was presented at the guilt trial that Flores killed Jaimes or that Torres believed Flores had killed Jaimes. Thus, there was no evidence that Torres had "some information" on Flores that caused Flores to kill him. Penny's testimony that Torres had such information invited the jury to believe that Penny knew something the jury did not.

Second, there was no evidence criminal street gangs kill people who refuse to join the gang. Detective Penney claimed his opinions rested on his "experience" as a gang investigator, yet in his experience he had never heard of anyone being killed for refusing to join a gang. (19 RT 4094.)[24]

Third, there was no evidence that Flores personally asked Torres, Ayala, or Van Kleef to join the gang. The three principal witnesses on this point were Andrew Mosqueda, Carmen Alvarez, and Abraham Pasillas; not one testified that Flores recruited the victims or was angry that they did not join the gang.

- Andrew Mosqueda testified that Flores never asked

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[24] Nor had the experienced trial court judge. (19 RT 3994.)

Torres or Ayala to join the gang. (12 RT 2375.) In one of his several versions of the events Mosqueda furnished to the police, he said Flores killed Torres and Ayala because they would not join the gang. At trial, however, Mosqueda was compelled to say that he had no reason to believe that was true. (12 RT 2427.) Flores never told him that. (12 RT 2427.) Flores did not express anger at Torres for failing to join; Flores said he was "disappointed." (12 RT 2372.) Moreover, Flores did not call Torres "weak." (12 RT 2372.) Mosqueda explained at trial that he told the police that because it was the only reason he could think of for the killings. (12 RT 2427.)

- Carmen Alvarez recalled a conversation she had with Flores about getting the "boys" jumped into the gang. (15 RT 3051.) He said he wanted to recruit them but she told him not to because they were not "gang member types." (15 RT 3051.)

- Abraham Pasillas testified that Flores once asked him what Pasillas thought about "getting the neighborhood big." (13 RT 2678-79.) There was no further discussion about this. Flores "asked him once and that was it. It was no conversation." (13 RT 2680.) Pasillas told Flores he was not interested in doing that. (13 RT 2680.) Detective Elvert testified that Pasillas said he had talked to

Flores more than once about recruiting members for the gang. (19 RT 3963.)

Nor was Penny's opinion based on a reasonable inference drawn from the evidence. An inference may constitute substantial evidence, but it must be the *probable* outcome of logic applied to direct evidence; a speculative possibility or conjecture are infirm. (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.) "A legal inference cannot flow from the nonexistence of a fact; it can be drawn only from a fact actually established." (*Eramdjian v. Interstate Bakery Corp.* (1957) 153 Cal.App.2d 590, 602; accord, *People v. Stein* (1979) 94 Cal.App.3d 235, 239; Evid. Code, § 600, subd. (b) [inference logically drawn from facts *found* or *established*].) “An inference may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guesswork." (*People v. Stein, supra*, 94 Cal.App.3d at p. 239.)

There is no evidence Torres had “information” about Flores, nor is there evidence that gangs kill people who refuse to join or that Flores was angry or felt “disrespected” by Torres's refusal to join the gang. Simply because Flores *could have* felt angry or disrespected by Torres does not support an expert opinion that this

was the motive for homicide. Accordingly, Detective Penney's opinion testimony was unsupported by the evidence and should not have been admitted.

C. Penny's Opinions Regarding the Motives for the Crimes Were No More Than His Personal View of How the Case Should Be Decided and Did Not Assist the Jury in Understanding the Evidence.

Notwithstanding the fact that Detective Penney knew of no instance where a person was killed because he refused to join a gang (19 RT 4094), Penney concluded that Torres was shot because he failed to jump into the gang, and that the suspect killed Van Kleef and Ayala to "protect himself."(19 RT 4058.) Further, Penney asserted Ayala was killed because he "witnessed a homicide" and "was a very serious potential threat to the suspect that committed the crime or crimes." (19 RT 4058.) After being reminded there was no evidence that Ayala witnessed a homicide, Penney shifted gears and theorized that because Ayala and Mosqueda were close friends, "the suspect would assume probably that he had received information about the homicide from Mosqueda." (19 RT 4059.)[25]

Penney claimed that in the "gang world," the three homicides

[25] The court struck this testimony as speculative. (19 RT 4059.)

would be considered "good murders." (19 RT 4062-63.) Further, Penney testified in response to questions from the prosecutor that Torres was shot to make an example of him:

Q: Statements that were made by the defendant, it's alleged in any event that he said to Ricardo Torres, 'You don't trust me,' and "Don't underestimate me,' and then shot Ricardo Torres. [¶] Does that give you any clue or insight into the fact he was shot to make an example of him?

A: That in combination with disrespect, yes.

Q: And also another statement, "He was weak,' after he was shot. [¶] Does that also give you some insight?

A: Yes.

Q: And what is that?

A: That he essentially was weak and that he actually had no respect for him as an individual, especially as a fellow gang member.

Q: Does that also somewhat explain the anger that you discussed earlier in the shooting of Ricardo Torres?

A: Yes.

(19 RT 4063-64.)[26]

These opinions were not based on the evidence adduced at trial. Moreover, these opinions do not rest upon Detective Penney's

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[26] Defense counsel objected to this testimony. (19 RT 4063.)

expert knowledge of gang culture but are simply his personal view of the evidence.

The opinion testimony of an expert witness is limited to opinions that "related to a subject that is sufficiently beyond common experience that the opinion" would assist the trier of fact, and "based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness." (Evid. Code, § 801.) An expert's opinion is not admissible if it consists of inferences and conclusions that can be drawn as easily by the jury as by the witness. (See, e.g., *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1598; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) As this Court stated in *People v. Prince* (2007) 40 Cal.4th 1179: " [A]n expert's opinion that a defendant is guilty is both unhelpful to the jury—which is equally equipped to reach that conclusion—and too helpful, in that the testimony may give the jury the impression that the issue has been decided and need not be the subject of deliberation." (*Id.* at p. 1227.) Similarly, in *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1183, the court explained that the rationale for admitting expert opinion testimony is that it will

assist the jury in evaluating the evidence and reaching a conclusion, but "[w]here the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions, then the need for expert testimony evaporates." Thus, expert opinion is inadmissible when the matter is one on which ordinary persons could reach a conclusion as intelligently as the witness. (*People v. McDonald* (1984) 37 Cal.3d 351, 367, overruled on another ground in *People v. Mendoza* (2000) 23 Cal.4th 896.) When the expert testifies to conclusions a lay jury can draw, the expert is no longer testifying as more skilled than the jury, and thus the expert's conclusions supplant the jury's own conclusions. (*People v. Arguello* (1966) 244 Cal.App.2d 413, 417-419.)

Here, Detective Penney's conclusions did not draw upon his special knowledge of gang culture. He knew of no comparable situation in which a gang member had been killed for refusing to join a gang. His opinion that Ayala and Van Kleef were killed because they were witnesses to a crime was not based on his expertise in gang matters, but was simply his personal view of the evidence. Accordingly, Detective Penney's opinions were inadmissible.

D. Even If Relevant, the Gang Evidence Should Have Been Excluded under Evidence Code Section 352.

Even if marginally relevant, the evidence should have been excluded under Evidence Code section 352. T he trial court must carefully scrutinize gang-related evidence before admitting it because of its potentially inflammatory impact on the jury. (*People v. Williams* (1997) 16 Cal.4th 153, 193; Evid. Code, § 352.) Evidence is substantially more prejudicial than probative under section 352 if it tends to evoke an emotional bias against the defendant. *(People v. Crew* (2003) 31 Cal.4th 822, 836-837.) Other relevant factors include (1) the inflammatory nature of the evidence, (2) the possibility the jury might be misled, (3) the speculative nature of the evidence, and (4) whether the evidence is cumulative. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.)

Gang evidence is inherently prejudicial. As this Court has noted, "evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 [holding that trial courts have the discretion to sever the gang enhancement from underlying felony due to the inherent prejudice of gang evidence].)

Evidence of gang membership casts a sinister light upon a defendant and erodes the presumption of innocence. This Court has emphasized that gang evidence is "highly inflammatory" and has cautioned against its admission unless the evidence bears substantial probative value. "When offered by the prosecution, we have condemned the introduction of evidence of gang membership if only tangentially relevant, given its highly inflammatory impact." *(People v. Cox* (1991) 53 Cal.3d 618, 660.) "The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*People v. Branch, supra,* 91 Cal.App.4th 274, 286.) "[E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose." (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1008-1009.)

Thus, even though other witnesses testified briefly to gang evidence, Detective Penney expanded on that evidence, discussing "good murders," drive-by shootings, and stabbings as acts committed by gang members. (19 RT 4045-51.) Given the inherently prejudicial nature of the evidence, it was incumbent upon the prosecution to lay a strong foundation that the homicides were motivated by gang activity. It failed to do so. Worse, by introducing the gang expert's opinion that was wholly based on the irrelevant gang evidence, it gave unmerited credence and legitimacy to the irrelevant and speculative gang evidence. Moreover, Detective Penney's opined that Torres was killed because he had "some information" about Flores. (19 RT 4055.) This invited the jury to speculate as to what that information must be. A reasonable person would believe the information must have been highly incriminating if the police detective believed it was a motive to kill.

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E. The Admission of the Gang Evidence Deprived Appellant of His Rights to a Fair Trial and Due Process and to a Reliable Guilt and Penalty Verdict under the Eighth and Fourteenth Amendments to the United States Constitution.

The erroneous admission of gang evidence is state law error that can rise to a federal due process violation. Here, the erroneous admission of Detective Penney's unfounded opinions made the trial fundamentally unfair, and violated Flores's constitutional rights to a fair trial and due process of law and to a reliable guilt and penalty determination. (*People v. Partida* (2005) 37 Cal.4th 428, 439 [holding the erroneous admission of evidence under state law violates due process under Fourteenth Amendment when it makes the trial fundamentally unfair]; *People v. Alberran* (2007) 149 Cal.App.4th 214, 229 [holding that admission of gang evidence rendered trial fundamentally unfair and required reversal under *Chapman*; citing *Estelle v. McGuire* (1991) 502 U.S. 62, 70; *Lockett v. Ohio* (1978) 438 U.S. 586, 603-605; U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 15 & 17.)

This case is similar to *People v. Albarran, supra,* 149 Cal.App.4th 214, where the court found the prosecution failed to prove a gang motivation for the charged crimes and held the gang

evidence rendered the entire trial fundamentally unfair in violation of due process. (*Id.* at 217.) *Albarran* involved a shooting in front of a house where a party was going on. (*Id.* at 218.) At the commencement of trial, the defense moved to exclude gang evidence as irrelevant and overly prejudicial (Evid. Code 352), but the prosecution argued the case presented a classic gang shooting and that the entire purpose of the shooting was to gain respect and enhance the shooters' reputations within the gang community, to intimidate the neighborhood and to earn ones bones within the gang, all of which was to be proven solely through the prosecutions gang expert, a police deputy. (*People v. Albarran, supra*, 149 Cal.App.4th at p. 219.) At the Evidence Code section 402 hearing concerning admission of the gang evidence, the expert testified about his numerous contacts with the defendant, the defendant's admission he was an active gang member, his gang tattoos, and the types of crimes committed by his gang. (*Id.* at 220.) However, the expert admitted he knew of no direct evidence linking the defendant to the charged crimes, and that he did not know the exact reason for the shooting. (*Ibid.*) The trial court ruled all of the gang testimony admissible because it was relevant on the issues of

motive and intent. (*Ibid.*) During trial, the prosecution introduced gang testimony via three Sheriffs deputies about their numerous contacts with the defendant, describing his gang involvement, his tattoos, and his gang moniker, and his having been jumped in to his gang. (*Ibid.*) Ultimately, despite the lack of independent evidence showing the offense was gang-related, the gang expert was allowed to testify the shooters would gain respect within the gang because those present would know of their actions and would spread word of them on the street. (*Ibid.*) The court reversed, holding admission of the gang evidence deprived Alberran of his federal due process rights. (*Id.* at 231-232.)

Here, as in *Alberran*, there was insufficient evidence independent of the prosecution's gang expert, and the gang evidence was used to create a motive not otherwise suggested by the evidence. There was no independent evidence Flores shot the suspects for their refusal to join the gang or for any other gang-related purpose. In fact, there was nothing inherent in the facts of the offense to suggest any specific gang motive.

Here, the evidence was prejudicial because (1) it was used to fill a gap in the prosecution case – the motive for the killings – and

(2) the evidence incriminating Flores was otherwise not strong. This constitutional violation requires the State to prove the error harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24.

The prosecutor repeatedly relied on Penney's opinions in portraying Flores as a gang killer and referred to Penney's conclusions in her opening and closing statements to the jury. (9 RT 1811, 1821; 20 RT 4326-27, 4395.) Penney's opinions, even though unsupported by the evidence, likely carried great weight with the jury simply because it was the opinion of a police officer well-experienced in gang crimes. Thus, the danger exists the jury adopted his conclusions because his status as a law enforcement officer gave his testimony an "unmerited credibility" before the jury. (See e.g., *United States v. Dukagjini* (2nd Cir. 2003) 326 F.3d 45, 53; *United States v. Alvarez* (11th Cir. 1988) 837 F.2d 1024, 1030 ["When the expert is a government law enforcement agent testifying on behalf of the prosecution about participation in prior and similar cases, the possibility that the jury will give undue weight to the expert's testimony is greatly increased."].) And, it is likely the jury believed Penney had access to other information

about the case that supported his opinions.

The evidence of Flores's guilt is not overwhelming, as evidence by the fact the jury deliberated four and one-half days reaching a verdict. (See *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [noting lengthy deliberations are a sign the case was not "open and shut"]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [holding six hours of deliberations suggest that errors in the admission of evidence were prejudicial].)

First, the sole witnesses to the Torres killing were Mosqueda and Carmen Alvarez, both of whom were potential accomplices with obvious motives to lie. (See *People v. Guiuan* (1998) 18 Cal.4th 558, 571-572 (Kennard, J., concurring) [accomplices have a "powerful built-in motive to aid the prosecution in convicting a defendant, regardless of the defendant's actual guilt or level of culpability, in the hope or expectation that the prosecution will reward the accomplices' assistance with immunity or leniency"]; see also *Williamson v. United States* (1994) 512 U.S. 594, 607-608 (Ginsburg, J., concurring) ["A person arrested in incriminating circumstances has a strong incentive to shift blame or downplay his own role in comparison with that of others, in hopes of receiving a

shorter sentence and leniency in exchange for cooperation"].)

Mosqueda was an admitted gang member who had committed other serious crimes in the same month as these homicides, and repeatedly minimized his role and Alvarez's role in the crimes. He gave various conflicting versions of the Torres incident. He persistently denied his own gang membership, and was reluctant to admit that Carmen Alvarez, another gang member, was in the van when Torres was shot.

There were no witnesses to the Ayala and Van Kleef homicides, and there was little evidence connecting Flores to those crimes. The case against Flores rested largely on the theory that he used the same weapon — the Jennings 9 mm — in each crime. However, the gun was found Mexico, not in Flores's possession, and there was no evidence that he brought the gun to Mexico.

In any event, the forensic evidence is far from positive proof that the Jennings gun was the firearm used in the crimes. The United States Supreme Court recently observed that "[s]erious deficiencies have been found in the forensic evidence used in criminal trials." (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 129 S.Ct. 2527, 2537.) The Court noted that "[o]ne

commentator asserts that '[t]he legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics.' Metzger, Cheating the Constitution, 59 Vand. L.Rev. 475, 491 (2006)." (*Id.*) Further, "[o]ne study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases." (*id.*, citing Garrett & Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L.Rev. 1, 14 (2009).

The National Academy of Sciences commissioned released a landmark report on forensic science: *National Research Council, Strengthening Forensic Science in the United States: A Path Forward* (2009) [hereafter "NRC 2009"]. The report stated that "[a]mong existing forensic methods, only nuclear DNA analysis has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between an evidentiary sample and a specific individual or source." (NRC 2009, *supra,* at p. 154.)

The NRC report specifically addressed the limitations of firearm and tool mark identification. "Because not enough is known about the variabilities among individual tools and guns, we are not

able to specify how many points of similarity are necessary for a given level of confidence in the result. Sufficient studies have not been done to understand the reliability and repeatability of the methods." (NRC 2009, *supra,* at p. 154.) According to the report, a "fundamental problem" with tool mark analysis is the "lack of a precisely defined process." (NRC 2009, *supra*, at p. 155.) Studies have shown a "heavy reliance on the subjective findings or examiners rather than on the rigorous quantification and analysis of sources of variability." (NRC 2009, *supra*, at p. 155.)

Thus, a federal court, after surveying the literature in the field, concluded "there can be a pattern of matching marks on cartridges fired from different guns." (*United States v. Monteiro* (D. Mass. 2006) 407 F.Supp.2d 351, 362.) The judge noted that "[a] recent article has highlighted the complexity of comparing patterns because of the difficulty in distinguishing between class, subclass, and individual characteristics, noting that a firearm 'may be wrongly identified as the source of a tool mark it did not produce if an examiner confuses subclass characteristics shared by more than one tool with individual characteristics unique to one and only one tool.'" (*Ibid*, quoting Adina Schwartz, *A Systemic Challenge to the Reliability and Admissibility of Firearms and Tool mark*

Identification, 6 Colum. Sci. & Tech. L.Rev. 2, 6 (2005).)

The risk of error was especially high here. The firearms examiner testified that the Jennings handgun did not leave "really good reproducible marks" because it was "not a real top of the line quality handgun." (17 RT 3468.) Although the examiner testified that the most reliable results would come from test firing the same brand of bullets as the suspected crime bullets, she did not do so. (17 RT 3454, 3456.)

Accordingly, given the significance of the evidence to the prosecution case, the accusing witnesses' strong motive to shift blame to Flores, and the absence of any other credible evidence linking Flores to the crimes, the admission of Detective penney's unfounded opinions violated Flores's rights to a fair trial and due process, and to a reliable guilt and penalty determination, under the Fourteenth and Eighth Amendments. The conviction and judgment must be reversed.

IV. Prosecutorial Misconduct Violated Flores's Rights to Confrontation, Due Process, and to a Reliable Guilt and Penalty Determination under the Sixth, Fourteenth, and Eighth Amendments.

The prosecutor and certain police witnesses repeatedly put false or unsupported allegations before the jury:

- Officer Loveless testified Flores admitted possessing the Jennings 9 mm (19 RT 3857) when in fact he had not (19 RT 3932);
- Officer Loveless claimed Flores described the place where Van Kleef's body was found as a "dark place far from civilization" (19 RT 3860) when in fact he did not; it was Loveless himself who used these words (19 RT 3885);
- In her opening, the prosecutor claimed Flores admitted possessing the firearm allegedly used in the crimes when in fact he did not ((RT 1822); and,
- In her examination of Maria Jackson, the prosecutor elicited an inadmissible hearsay identification by Juan Miranda (who never testified) of Flores as the man who brought the Jennings 9 mm to Mexico. (11 RT 2289.)

Officer Loveless's "mistakes" were corrected on cross-examination, but the prosecutor's misconduct, although objected to, was not. These instances of misconduct violated Flores's rights to confrontation, to due process and to a reliable guilt and penalty

determination under the Sixth, Fourteenth and Eighth Amendments, respectively, and to due process under the California Constitution, article I, section 15. The prosecutor's misconduct irreparably prejudiced appellant's trial and denied him the rights to confrontation, due process and a fair trial and requires reversal. (*Chapman v. California, supra,* 386 U.S. 18.)

A. The Prosecutor's Committed Misconduct in Her Opening Statement by Alleging Facts Unsupported by Evidence.

In general, a prosecutor commits misconduct by the use of "deceptive or reprehensible" methods to persuade either the court or the jury. (*People v. Price* (1991) 1 Cal.4th 324, 447; *People v. Strickland* (1974) 11 Cal.3d 946, 955; *People v. Pitts* (1990) 223 Cal.App.3d 606, 691.) A prosecutor has a duty to prosecute vigorously, but "while he may strike hard blows, he is not at liberty to strike foul ones." (*People v. Pitts, supra*, 223 Cal.App.3d at p. 691; *Berger v. United States* (1935) 295 U.S. 78, 88.) "Vigorous advocacy is admirable, but when it turns into a zeal to convict at all costs, it perverts rather than promotes justice." (*People v. Daggett* (1990) 225 Cal.App.3d 751, 758.)

Here, the prosecutor stated in her opening that Flores admitted having the 9 mm handgun when in fact he had not. It is

true that not every variance between the description of the evidence to be presented and the actual presentation of evidence is error or misconduct. (*Frazier v. Cupp* (1969) 394 U.S. 731, 736; *People v. Hernandez* (1970) 11 Cal.App.3d 481, 490-491; 5 Witkin, Cal. Crim. Law 3d (2000) Crim. Trial, § 518, p.738 ["Mere discrepancy between statement and proof is not reversible error."].)

However, "some remarks included in an opening or closing statement could be so prejudicial that a finding of error, or even constitutional error, would be unavoidable." (*Frazier v. Cupp, supra,* 394 U.S. at p. 736.) The Supreme Court gave no examples of what would be constitutional error in *Cupp*, but noted that "the prosecutor's good faith, or lack of it" was not controlling "in determining whether a defendant has been deprived of the right of confrontation guaranteed by the Sixth and Fourteenth Amendments." (*Ibid.*) In *Cupp*, the defendant and an accomplice, Rawls, were charged with murder. Rawls pleaded guilty before defendant's trial. At trial, the prosecutor in his opening statement paraphrased Rawls's confession to the crime. Rawls, however, refused to testify. The Court held there was no error because the jury was admonished that the statements of counsel were not evidence and, in any event, Rawls's statement was "not a vitally

important part of the prosecution's case." (*Frazier v. Cupp, supra,* 394 U.S. at p. 735.)

Moreover, a prosecutor commits misconduct when she refers to facts not established by the evidence. (*People v. Hill* (1998) 17 Cal.4th 800, 828; *People v. Pinholster* (1992) 1 Cal.4th 865, 948. Such statements "tend[ ] to make the prosecutor [her] own witness — offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, 'although worthless as a matter of law, can be "dynamite" to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." (*People v. Bolton* (1979) 23 Cal.3d 208, 213; *People v. Benson* (1990) 52 Cal.3d 754, 794 ["a prosecutor may not go beyond the evidence in his argument to the jury"].)

Here, the prosecutor told the jury that Flores admitted taking the 9 mm handgun to Mexico: "He admits to having the 9 mm. He also admits to taking down his rifle. That he had all of those. Went to Mexico with him." (9 RT 1822.) In truth, Flores did not admit possessing the 9 mm handgun or taking it to Mexico. Detective Loveless testified that Flores "admitted that the 9 mm belonged to him." (19 RT 3857.) Later, Loveless corrected himself:

Flores said he had a .22 caliber rifle in Mexico, but not the 9 mm handgun. (19 RT 3932.) No evidence was presented to support the prosecutor's claim that Flores "admitted" having the 9 mm handgun or taking it to Mexico.

Thus, the prosecutor committed misconduct in attesting that Flores possessed the handgun in Mexico.

B. The Prosecutor Committed Misconduct by Deliberately Eliciting Inadmissible Hearsay.

The deliberate asking of questions by a prosecutor calling for inadmissible and prejudicial answers is misconduct. (*People v. Bell* (1989) 49 Cal.3d 502, 532.) In *Bell*, during the cross-examination of a defense expert the prosecutor read from the police report an informant's statement that he had observed defendant in possession of a handgun the day before the crime and asked the expert whether he had considered the matter in forming his opinion. (*Id.* at p. 531-32.) The trial court found that the prosecutor's introduction of the hearsay statement was "clearly misconduct" because the informant's statement was irrelevant to the expert's opinion. This Court agreed, and held the deliberate asking of questions calling for inadmissible and prejudicial answers is misconduct. The Court found that the prosecutor had "engaged

in a deliberate attempt to put inadmissible and prejudicial evidence before the jury." (*Id.* at p. 532, citing *People v. Fusaro* (1971) 18 Cal.App.3d 877, 886.) Further, *Bell* court emphasized that the misconduct was particularly egregious because the prosecutor put before the jury the hearsay statement of a person who was not available for cross-examination. (*Id* .at p. 533.)

The police recovered the suspected murder weapon in Mexico on March 28, a week after the bodies of the three victims were discovered. (11 RT 2298.) The police obtained the weapon with the assistance of Maria Jackson, who was Mosqueda's grandmother and Carmen Alvarez's mother. (11 RT 2286; 15 RT 3002.) Juan Miranda, Maria Jackson's nephew, lived in Mexico and said he could buy the gun from a third party. (11 RT 2298.) With the approval of the San Bernardino law enforcement officers who were with her in Mexico, Jackson gave Miranda $100 to buy the gun. He left by himself and returned with a gun. (11 RT 2289.) Miranda did not testify at trial. No other witness identified the third party from whom Miranda bought the gun from, or from whom this unidentified third party obtained the gun. There was no evidence how the gun got to Mexico.

To fill this evidentiary gap, the prosecutor intentionally solicited inadmissible hearsay from Maria Jackson that Juan Miranda identified Flores as the person who was in Mexico. (11 RT 2289.) During her examination of Maria Jackson concerning the acquisition of the gun in Mexico, the prosecutor asked Jackson if Detective Acevedo showed Juan Miranda a photograph. (11 RT 2289.) Over a hearsay objection, Jackson said the photograph was of Flores. (11 RT 2289.) The prosecutor then asked, "And what did Juan Louis do in response when you showed him the flier?" (11 RT 2289.) As defense counsel objected, Jackson answered, "He said, 'Yeah, that's the man that was here." (11 RT 2289.) The court sustained the objection. (11 RT 2289.) Later, the court granted Flores's motion to strike the testimony. (12 RT 2326.)

Whether the prosecutor's solicitation of inadmissible hearsay was intentional or unintentional is not material; a showing of bad faith is not required to sustain a finding of prosecutorial misconduct. (*People v. Hill, supra,* 17 Cal.4th at p. 822 [rejecting argument that misconduct must be intentional and reversing conviction due to cumulative prejudice from misconduct].) Although misconduct does not require a finding of bad faith, it seems clear

the prosecutor's question was designed to elicit inadmissible hearsay.

It is black-letter law that an out-of-court identification of the defendant by a third party who does not testify at the hearing is hearsay. (*People v. Mayfield* (1972) 23 Cal.App.3d 236, overruled on other grounds in *People v. Hernandez* (2004) 33 Cal.4th 1040, 1052, fn. 3.) In *Mayfield*, a narcotics officer testified at a preliminary hearing that he bought drugs from defendant. The officer died after the preliminary hearing, and his superior was allowed to testify at trial that he had shown the officer a picture of defendant and the officer had identified the picture as a picture of defendant. (*Mayfield, supra,* 23 Cal.App.3d at p. 240.) The court ruled the out-of-court identification was hearsay under Evidence Code section 1220 and was not admissible as a prior identification under Evidence Code section 1238 because the latter section applied only where the witness making the identification testified at trial. (*Id.* at p. 241.)

The same holds true here. Miranda's statement to Jackson was made out of court and was offered for the truth of the matter asserted. It was obvious hearsay. (Evid. Code, § 1220.) Moreover,

the prosecutor had a motive to elicit the hearsay because without it there was no evidence that Flores had brought the gun to Mexico. The prosecutor committed misconduct in asking a question designed to elicit inadmissible evidence.

C. The Misconduct Violated Flores's Constitutional Rights.

Prosecutorial misconduct can rise to the level of federal constitutional error when it is "so egregious that it infects the trial with such unfairness as to make conviction a denial of due process." (*People v. Harris* (1989) 47 Cal.3d 1047, 1084, citing *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643; see also *In re Ferguson* (1971) 5 Cal.3d 525, 531.) Here, the misconduct made the trial fundamentally unfair because (1) it introduced damaging evidence against Flores and (2) did so without affording him the opportunity to confront the evidence.

In all criminal prosecution, the accused has a right, guaranteed by the Sixth and Fourteenth Amendments, "to be confronted with the witnesses against him . . . ." (U.S. Const., Amend. 6; *Pointer v. Texas* (1965) 380 U.S. 400.) The importance of confrontation was spelled out in *Pointer*: "There are few subjects,

perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." (*Pointer v. Texas, supra,*380 U.S. at p. 405.)

The Confrontation Clause ensures "the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." (*Maryland v. Craig* (1990) 497 U.S. 836, 845.) In *Crawford v. Washington* (2004) 541 U.S. 36, the United States Supreme Court held that all out-of-court statements that are "testimonial" in nature are inadmissible unless the declarant is unavailable and the accused has had a prior opportunity to cross-examine the declarant. In *Crawford,* the Court held that a wife's out-of-court statement to an officer during interrogation about a knife fight, in which the wife and her husband were suspects, could not be used

against the husband at his trial for attempted murder. (*Crawford v. Washington, supra*, 541 U.S. at p. 66.) The Court ruled that statements "taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." (*Crawford, supra,*541 U.S. at p. 52.) Second, the Court held that the testimonial statements of witnesses who do not appear at trial may not be admitted unless the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine the witness. (*Id.* at pp. 53-54.)

Here, Miranda's statement to Jackson was testimonial evidence under *Crawford.* First, Jackson showed the photograph of Flores to Miranda at the request of Detective Acevedo. (11 RT 2288.) She was acting as Acevedo's interpreter to allow the police to question Miranda. The statements of witnesses taken by the police in the course of an interrogation are "testimonial." (*Crawford v. Washington, supra,* 541 U.S. at p. 52.) Even if Jackson was not acting as Acevedo's interpreter, Miranda's statement is testimonial under *Crawford* because it is more akin to a formal statement or affidavit that "bears testimony" than an unsolicited statement such as a dying declaration or spontaneous utterance. (*Id.*)

Under *Crawford*, "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Crawford v. Washington, supra*, 541 U.S. at pp. 68-69.) Thus, out-of-court testimonial statements are admissible against a criminal defendant **only** when the witness is (1) unavailable at trial **and** (2) there has been a prior opportunity for cross-examination of that witness. (541 U.S. at p. 59.)

Accordingly, the prosecutor's claim that Flores admitted possessing the firearm and the hearsay identification of Flores violated Flores's right to confrontation and due process of law.

D. An Admonition Would Not Have Cured the Harm.

Although the court granted Flores's request to strike Jackson's testimony about Miranda's identification, the jury was never told that Jackson's answer had been stricken and could not be considered. (11 RT 2289.) The motion to strike was made days after the hearsay objection was sustained. (12 RT 2326.) In granting the motion, the trial court judge erroneously believed that she had "indicated to the jury that that comment was stricken from the record" when the hearsay objection was first raised. (12 RT

2326.) In fact, the jury was never admonished to disregard the statement.

A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. (*People v. Hill, supra,* 17 Cal.4th at p. 821-22.) Failure to request the jury be admonished does not forfeit the issue for appeal if "'an admonition would not have cured the harm caused by the misconduct.'" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1333, quoting *People v. Price, supra,* 1 Cal.4th at p. 447.)

Here, no admonition could have cured the harm. It is highly unlikely the jury could have put this information out of its mind as it weighed the case. (See *People v. Gibson* (1976) 56 Cal.App.3d 119, 130 [noting admonition to ignore highly prejudicial evidence has no "realistic effect"]; *Richardson v. Marsh* (1987) 481 U.S. 200, 208 [holding admonition to ignore evidence cures harm only when "the jury can possibly be expected to forget it in assessing the defendant's guilt"].) The jury could not possibly have ignored Miranda's identification when evaluating the evidence. Therefore, no request for an admonition was required.

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E. The Misconduct Was Prejudicial.

Under California law, misconduct is prejudicial when "it is reasonably probable that a jury would have reached a more favorable result absent the objectionable comments." (*People v. Haskett* (1982) 30 Cal.3d 841, 866.) However, where the misconduct renders the trial fundamentally unfair, the error rises to a constitutional violation and the burden shifts to the State to prove the error harmless beyond a reasonable doubt under *Chapman v. California, supra,* 386 U.S. 18.

In this case, it cannot be held that the misconduct was harmless beyond a reasonable doubt (*Chapman v. California, supra,* 386 U.S. at p. 24.) Without the inadmissible hearsay evidence from Maria Jackson that Miranda identified a photograph of Flores as "the man who was here," there was no credible evidence to establish that Flores possessed the specific Jennings pistol introduced into evidence at trial, that he brought it to Mexico, or that he sold it to Miranda or anyone else.[27] The fact that

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[27] Mosqueda identified the gun recovered in Mexico as one he had seen on Flores. (12 RT 2410.) However, as a prime suspect in the case, Mosqueda had incentive to lie. The independent identification by Juan Miranda carried more weight.

Miranda was unavailable for cross-examination, and the fact that the police wiped the gun clean made it impossible for Flores to refute the prejudicial inadmissible hearsay evidence elicited by the prosecutor's misconduct. Further, the Jennings handgun was the only evidence connecting the Ayala murder and the Torres homicides. The evidence to support the Ayala and Van Kleef verdicts was insubstantial, if not insufficient as a matter of law. Without evidence connecting Flores to the Jennings pistol, the case against Flores is greatly diminished. Under these circumstances, the prosecution cannot demonstrate that the egregious and reprehensible prosecutorial misconduct was harmless beyond a reasonable doubt, and reversal of both the guilt and penalty verdicts is required.

V. The Court Violated Appellant's Right to Confrontation, to Due Process, and to a Reliable Guilt and Penalty Determination under the Sixth, Fourteenth, and Eighth Amendments by Forcing Appellant to Sacrifice His Right to Cross-Examine a Witness.

A. The Court Ruled That if Defense Counsel Cross-Examined the Polygraph Examiner on Whether Flores Said He Was Present When Van Kleef Was Shot, the Court Would Allow the Prosecution to Admit a Videotape of the Polygraph Examination.

During Detective Loveless's interrogation of Flores, Flores agreed to take a polygraph test. (2 RT 221.)[28] Loveless escorted Flores to Sheriff's Investigator Robert Heard, who administered the examination. (4 RT 591.) Before trial, the court ruled that statements Flores made during the examination would be admissible at trial under Evidence Code section 351.1, subdivision (b), but the results of the exam would not be admitted. (4 RT 591.)

Before Investigator Heard testified, defense counsel objected to his anticipated testimony that Flores said he was present when Van Kleef was shot. (18 RT 3734.) Defense counsel objected that the part of the audiotape where Flores allegedly made that

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[28] Detective Elvert was the first to interrogate Flores; this occurred on September6. (2 RT 195-96.) The next day, Flores was interrogated by Los Angeles Police Detective Rod Kusch, then Rialto Police Detective William Loveless, and then Sheriff's Investigator Robert Heard. (2 RT 208, 217, 221.)

statement was inaudible. (18 RT 3734.) The trial court judge listened to the audiotape and stated she believed she heard Flores say, "I was present." (18 RT 3734.) The prosecutor argued the *videotape* should be admitted if Investigator Heard was challenged on cross-examination as to whether he heard Flores say he was present. (18 RT 3735-36.) The court agreed: "Depending how the cross-examination of Mr. Heard goes, there is a potential that the prosecution would be able to play the tape to give the jurors the ability to listen and hear and see how that interview process went, as long as the prosecution could eliminate any type of photography dealing with the polygraph machinery, and things of that nature, so that the jurors would not have the ability to understand that this interview process was during a polygraph examination." (18 RT 3736.) Thus, the court ruled that if defense counsel questioned whether Flores stated he was present in her cross-examination of Heard, the court would allow the prosecution to present a videotape of the interrogation. (18 RT 3734.)

Defense counsel objected. She argued that admitting the videotape would be prejudicial because the videotape "shows it's a polygraph room, it shows that it's during a polygraph

examination." (18 RT 3735.) The court overruled the objection. (18 RT 3736.)

In the presence of the jury, Investigator Heard testified he wrote out three "options" for Flores to consider. Option A was "I shot one, two or all three." Option B was "I was present when one, two or three of these young men were shot." Option C was "I told somebody to shoot one, two or three of those young men." (18 RT 3810; see ex. 83.) Flores said Options A and C were incorrect but Option B was correct. (18 RT 3814.) He denied he was present when Torres and Ayala were shot. He said, "I was present" when Van Kleef was shot. (18 RT 3814-15.)

B. The Court Erred in Forcing Appellant to Sacrifice His Sixth Amendment Right to Confrontation in Order to Preserve His Fourteenth Amendment Right to a Fair Trial.

A criminal defendant cannot be forced to surrender one constitutional right in order to preserve another. (See, e.g., *Simmons v. United States* (1968) 390 U.S. 370, 393-394 [a defendant need not give up his Fifth Amendment right against self-incrimination in order to assert his Fourth Amendment right against unreasonable searches and seizures]; *In re Roy C.* (1985)

169 Cal.App.3d 912, 918 [when the prosecution amended the petition after the prosecution's case-in-chief, the juvenile may not be forced either to give up his right to speedy trial or his due process right to notice].)

Flores had both the right and the need to cross-examine Heard on whether Flores said he was present when Van Kleef was shot. "The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' This right is secured for defendants in state as well as federal criminal proceedings under [*Pointer v. Texas* (1965) 380 U.S. 400]. Confrontation means more than being allowed to confront the witness physically. 'Our cases construing the (confrontation) clause hold that a primary interest secured by it is the right of cross-examination.'" (*Davis v. Alaska, supra,* 415 U.S. 308, 318, citing *Douglas v. Alabama* (1965) 380 U.S. 415, 418.) Thus, a defendant's Confrontation Clause rights have been violated when he is "prohibited from engaging in otherwise appropriate cross-examination ... and thereby 'to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.' " (*Delaware v. Van Arsdall* (1986)

475 U.S. 673, 680, quoting *Davis v. Alaska, supra*, 415 U.S. at 318.)

Flores was forced to surrender this right in order to keep the inadmissible and prejudicial polygraph evidence out of the trial. (*People v. Basuta* (2001) 94 Cal.App.4th 370, 389-391 [holding polygraph evidence prejudicial]; Evid. Code § 351.1, subd. (a) [providing that reference to polygraph examination inadmissible].) Although the prosecutor suggested the videotape could be altered to mask the fact that Heard was conducting a polygraph examination, there was no reason to believe how this could have been accomplished without causing the jury to speculate. Moreover, during his testimony Detective Loveless stated that Flores was taken to the "polygraph unit," and thus the the jury would have immediately understood that the efforts to conceal were meant to hide the polygraph examination. (19 RT 3911.)

Accordingly, the court erred in forcing this Hobson's Choice upon defense counsel.

C. The Error Was Prejudicial.

The court's ruling denied defense counsel the opportunity to cross-examine Investigator Heard on a critical issue. In assessing prejudice from Confrontation Clause error, the "correct inquiry is

whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." (*Delaware v. Van Arsdall, supra*, 475 U.S. at p. 684.) Under *Chapman v. California, supra,* 386 U.S. 18, the burden rests on the beneficiary of the error (here, the State) to prove that the error was harmless beyond a reasonable doubt.

The cross-examination of Heard was essential to show that Flores did not admit being present when Van Kleef was killed. The State cannot show this error was harmless. No tangible evidence connected Flores to the Van Kleef crime. Flores's supposed admission that he was present furnished the only evidence linking him to the crime. As discussed earlier in this brief, the case against Flores rested on the accusations of witnesses testifying under immunity from prosecution, each of whom had motivation to shift blame to Flores to avoid prosecution, and upon tool mark evidence that is both unreliable in general and especially so in this case. The ruling that essentially foreclosed cross-examination of Investigator Heard cannot be considered harmless.

VI. Officer Loveless's Testimony That Flores Was Taken to the "Polygraph Unit" Made the Trial Unfair, and Violated Flores's Rights to Due Process and to a Reliable Guilt and Penalty Determination under the Fourteenth and Eighth Amendments.

A. Without Prompting, Detective Loveless Testified That Flores Was "Taken to the Polygraph Unit."

Detective Loveless testified immediately after Sheriff's Investigator Robert Heard testified that Flores admitted being present when Van Kleef was shot. (18 RT 3814-15.) Defense counsel had objected to Heard's testimony because it was unclear from the video tape whether Flores had actually stated he was present when Van Kleef was shot. (18 RT 3735.) The trial court judge stated she heard Flores say he was present, but if the defense disputed it, she would allow the prosecution to play the videotape to show Flores's demeanor and body language when he made the statement. (18 RT 3735.) Defense counsel objected to showing the videotape because it might show that the statements occurred during a polygraph examination. (18 RT 3735.) The prosecutor said measures could be taken to make sure the jury did not see it was a polygraph examination. (18 RT 3736.) The court ruled the videotape could not be shown unless defense counsel

cross-examined Heard on whether Flores stated that he was present when Van Kleef was shot. (18 RT 3736.)

As noted, Loveless followed Heard to the stand. Near the end of her cross-examination of Loveless, defense counsel asked, "there was a break, I think, and Mr. Flores went and spoke to Mr. Heard?" (19 RT 3911.) Loveless replied, "At that point we concluded that interview, and he was escorted over to the polygraph unit." (19 RT 3911.) The court called for a recess immediately after that response. (19 RT 3911.)

Outside the presence of the jury, the court asked counsel, "Now, how do we cure that?" (19 RT 3911.) The court noted "it doesn't take much to deduce that Mr. Heard is a polygraph examiner after Detective Loveless said he was taken to the polygraph exam." (19 RT 3911-12.) The court then corrected itself, and stated that Loveless said Flores was taken to the polygraph "unit." (19 RT 3912.)

The prosecutor claimed Loveless "slipped" in mentioning the polygraph. (19 RT 3912.) Defense counsel observed that Loveless had been present when the issue was discussed before trial and knew there was not to be any mention of the polygraph

examination. (19 RT 3912.) The court did not believe Loveless intentionally committed misconduct, but admitted that his testimony was "[c]ertainly . . . prejudicial." (19 RT 3913.) The court stated that "jurors are going to want to know what happened at the polygraph unit. That's obvious. Whether they think Mr. Heard gave the polygraph exam, I don't think that is completely clear. They are going to wonder whether or not the defendant submitted his person to a polygraph examination at this point." (19 RT 3913-14.)

Defense counsel moved to strike Heard's testimony. (19 RT 3914.) The motion was denied. (19 RT 3914.) Counsel then moved for a mistrial. The motion was denied. (19 RT 3914.) The court decided to attempt to cure the error by falsely telling the jury that Flores was neither offered a polygraph examination nor did he submit to one, but was taken to the polygraph unit because it was near Detective Heard's office. (19 RT 3917.) The jury was so instructed. (19 RT 3921.)

The court erred in denying the motion to strike Heard's testimony and for a mistrial. The error violated appellant's rights to due process and to a reliable guilt and penalty determination

under the Eighth and Fourteenth Amendments.

B. The Court Erred in Refusing to Strike Heard's Testimony or Grant a Mistrial.

Evidence Code section 351.1, subdivision (a), enacted in 1983, provides:

> Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and postconviction motions and hearings, or in any trial or a hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, unless all parties stipulate to the admission of such results.

The statute creates an absolute, categorical ban on admission of polygraph evidence and an exception to the truth-in-evidence provision of Proposition 8 (Calif. Const., art. I, § 28, subd. (d)) "that relevant evidence shall not be excluded in any criminal proceeding." (*People v. Wilkinson* (2004) 33 Cal.4th 821, 848-850, and authorities cited therein [evidence inadmissible even if proponent is able to establish reliability under *Kelly / Frye* test]; *People v. Maury* (2003) 30 Cal.4th 342, 413; *People v. Basuta,*

supra, 94 Cal.App.4th 370, 389-391.) "This firm and broad rule of exclusion is justified by the unreliable nature of polygraph results, by the concern that jurors will attach unjustified significance to the fact of the outcome of such examination and because introduction of polygraph evidence can negatively affect the jury's appreciation of its exclusive power to judge credibility." (*People v. Basuta, supra,* 94 Cal.App.4th at p. 390; see also *United States v. Scheffer* (1989) 523 U.S. 303, 312 [categorical ban on polygraph is constitutionally acceptable due to its inherent unreliability].) Hence, polygraph evidence is inadmissible even if otherwise relevant to any issue in the case (see, e.g., *People v. Lee* (2005) 95 Cal.App.4th 772, 790-791), even if not offered to prove the results (*ibid.*), even if only to show an offer or refusal to take the test (see, e.g., *People v. Espinoza* (1992) 3 Cal.4th 806, 816-817; *People v. Basuta, supra,* 94 Cal.App.4th at pp. 389-391), and even if the opponent might otherwise be said to have "opened the door" to the subject (*People v. Samuels* (2005) 36 Cal.4th 96, 127 [prosecution's evidence that defendant was not cooperative in police investigation did not open door to inadmissible evidence that she cooperated by offering to take polygraph]; *People v. Basuta, supra,* at pp. 390-391

[erroneously admitted evidence that witness willingly took polygraph test did not open the door to allow opponent to introduce results]).

A motion for mistrial or to strike the testimony of a witness is directed to the sound discretion of the trial court. (*People v. Jenkins* (2000) 22 Cal.4th 900, 985.) The motion should be granted where prejudice has occurred during trial that cannot be cured by admonition or instruction. "Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." (*People v. Haskett* (1982) 30 Cal.3d 841, 854.)

As the trial court judge herself acknowledged, the mention of a polygraph here was "[c]ertainly . . . prejudicial." (19 RT 3913.) Courts have held the erroneous mention of a polygraph examination required reversal. (*United States v. Murray* (6th Cir. 1986) 784 F.2d 188, 189-190 [holding mere mention of polygraph so prejudicial as to demand reversal in case where evidence of guilt was "not overwhelming"].) Polygraphs are held to be prejudicial because juries tend to grant too much credibility to polygraph examinations. (See *Brown v. Darcy* (9th Cir.1986) 783 F.2d 1389,

1391 overruled on other grounds by *United States v. Cordoba* (9th Cir.1997) 104 F.3d 225.)

The court's admonition that Flores in fact was not offered a polygraph examination, and did not take one, was ineffective. It is entirely speculative whether the jury would believe it. The admonition was, admittedly, a false statement. (19 RT 3918.) As the court noted, the jurors were "not stupid," and they were going to believe Flores was taken to the polygraph unit "to submit to a polygraph examination." (19 RT 3919.) Further, the jury was likely to note that Investigator Heard was not a police officer. Heard testified that he "medically retired" from the police force in 1981 and "went to work" for the sheriff's department in 1999. (18 RT 3764.) His work was described as "assisting" homicide detectives with "interviewing particular witnesses." (18 RT 3764.) The jury knew that Detective Elvert was the lead investigator for the Sheriff's Department (11 RT 2166) and that had interrogated Flores on September 6, the day before Heard's interview. (20 RT 4116.) Given these circumstances, it was likely that one or more jurors saw through the falsity of the admonition.

Accordingly, the court erred in failing to grant the mistrial or

the motion to strike Heard's testimony.

C. The Polygraph Evidence Was Prejudicial.

The Sixth and Fourteenth Amendments guaranteed Flores a fair trial by an impartial jury. "A fundamental premise of our criminal justice system is that ' the jury is the lie detector.' " (*United States v. Scheffer, supra*, 523 U.S. at p. 313, quoting from *United States v. Barnard* (9th Cir. 1973) 490 F.3d 907, 912.) The erroneous admission of polygraph evidence improperly invades the province of the jury and its "exclusive power to judge credibility." (*People v. Basuta, supra*, 94 Cal.App.4th at p. 390.) As the United States Supreme Court has recognized, "by its very nature, polygraph evidence may diminish the jury's role in making credibility determinations" because the "aura of infallibility attending polygraph evidence can lead jurors to abandon their duty to assess credibility and guilt." (*United States v. Scheffer, supra*, at p. 313.)

Furthermore, the Eighth and Fourteenth Amendments guarantee heightened reliability in the guilt and penalty verdicts in a capital trial. (*Beck v. Alabama, supra,* 447 U.S. 625, 637-638.) A fortiori, the evidence on which the verdicts rest must be reliable.

(See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 585 [reliance on "materially inaccurate" evidence in capital case violates Eighth Amendment].) Similarly, federal due process demands that criminal convictions be based upon reliable evidence. (See, e.g., *Manson v. Braithwaite* (1977) 402 U.S. 98, 104-107; *People v. Badgett* (1995) 10 Cal.4th 330, 347-348.) The California Legislature has declared that polygraph evidence is unreliable. Hence, admission of evidence that suggested Flores took a polygraph examination also violated his rights under the Eighth and Fourteenth Amendments.

Because the error violated Flores's federal constitutional rights, respondent bears the burden of proving it harmless beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *Chapman v. California, supra,* 386 U.S. 18.)

Flores's credibility was a significant issue at trial. He repeatedly denied involvement in the crimes. The error here went to his credibility, by suggesting that he had failed a polygraph test. As this Court has observed when "[t]he jury was required, in order to reach a verdict, to reject the testimony produced by the defense and to accept that produced by the prosecution . . ., [i]t is apparent

that anything which tended to discredit the defense . . . or to bolster the story told by [the prosecution witnesses] assumed an importance that would not be attributable to it in the ordinary situation. Thus, even though the evidence was sufficient to sustain the verdict, its nature was such as requires close scrutiny when determining the prejudicial nature of any error." (*People v. Briggs* (1962) 58 Cal.2d 385, 404.)

People v. Cox (2003) 30 Cal.4th 916, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, is distinguishable. There, the prosecutor elicited testimony that a *witness* had taken a polygraph examination. The court immediately ordered the testimony stricken and instructed the jury to disregard it. (*Id.* at p. 951-52.) Here, in contrast, the testimony made it clear it was Flores who had taken the polygraph examination and the jury was never told to disregard the testimony. Rather, the jury was falsely told that Flores did not take a polygraph. As noted above, it was unlikely that all the jurors believed that falsehood, which under the circumstances, was transparently untrue.

Accordingly, the convictions and judgment must be reversed.

VII. The Erroneous Admission of Hearsay Testimony That Torres Was Afraid of Flores Violated Appellant's Rights to Due Process and Reliable Guilt and Penalty Determination under the Fourteenth and Eighth Amendments.

A. The Court Erred in Overruling Appellant's Hearsay Objection.

Erick Tinoco, a friend of Andrew Mosqueda's and the victims, testified to a number of statements that Ricardo Torres made to him about Torres's decision not to join the gang with Andrew Mosqueda. (17 RT 3594-95.) Tinoco testified to the following:

- Torres told him he was "glad" he did not get "jumped" into the gang. (17 RT 3594.)
- Torres said he went to church with his mother on the day he was supposed to have joined the gang. (17 RT 3594.)
- Torres said he thought he "might be in trouble" because he did not show up to be jumped into the gang. (17 RT 3594.)

Defense counsel objected on hearsay grounds; the objection was overruled. (17 RT 3594.) The court ruled the hearsay was admissible as evidence of Torres's "state of mind." (17 RT 3594.)

- Torres said "he didn't know if he should go back to Andrew's aunt's apartment because he was afraid that Wizard [Flores] was going to get mad at him, so he didn't know what to

do." (17 RT 3595.)

Later in his testimony, Tinoco stated that on the day Torres was killed, just before Carmen drove them to Lytle Creek, Jason came out of Carmen's apartment and told him that "Wizard is mad. He's pissed. He's mad at Ricardo." (17 RT 3601.) A hearsay objection was sustained and the testimony was stricken. (17 RT 3601.) The prosecutor argued the statement was not offered for the truth of the matter; the court ruled the evidence was irrelevant. (17 RT 3602.) A few moments later, the prosecutor asked Tinoco if Flores was angry because Torres was wearing a "Sur Streetwear" shirt. (17 RT 3602.) Defendant's objection was sustained. (17 RT 3603.) Tinoco was allowed to testify that Flores told Torres he should not wear that shirt, or something to that effect. (17 RT 3604.)

The court erred in allowing hearsay evidence that Torres was afraid of Flores and felt he might be in "trouble" for refusing to join the gang. Torres's state of mind was not relevant. Evidence of a victim's fear of the defendant is admissible only when relevant to an element of the offense or to prove the victim's conduct. (Evid. Code, § 1250; *People v. Hernandez* (2003) 30 Cal.4th 835, 872.) The

error in admitting the evidence was prejudicial.

Under Evidence Code section 1250, "evidence of a statement of the declarant's then existing state of mind . . . is not made inadmissible by the hearsay rule" when the evidence is offered to prove the declarant's state of mind "when it is itself an issue in the action" or the evidence is offered "to prove or explain acts or conduct of the declarant."[29] Thus, to be admissible, the declarant's state of mind must be factually relevant. (*People v. Jablonski* (2007) 37 Cal.4th 774, 819-20.) A hearsay statement of a victim's

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[29] Evidence Code section 1250 states in full:

(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:

(1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or

(2) The evidence is offered to prove or explain acts or conduct of the declarant.

(b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed.

fear is admissible only when the victim's fear is relevant to an element of the offense or the victim's conduct in conformity with that fear is in dispute. (*Ibid.*)

For example, in *People v. Thompson* (1988) 45 Cal.3d 86, the decedent's fear of the defendant was properly admitted to refute the defendant's claim that he and the victim engaged in consensual sexual intercourse before her death, and ths to prove an alleged rape-murder special circumstances. (*Id.* at pp. 103-04.) In *People v. Waidla* (2000) 22 Cal.4th 690, the decedent's statement that she feared defendant was relevant to whether she would have consented to defendant's entry into her residence where burglary special circumstance was alleged. (*Id.* at p. 723.)

However, evidence of the victim's fear of the defendant is not admissible to prove the identity of the person who committed the homicide. (*Hernandez, supra,* 30 Cal.4th at p. 872.) A host of cases have so held. (See, e.g., *Hernandez, supra,* 30 Cal.4th at p. 872; *People v. Noguera* (1992) 4 Cal.4th 599, 622 [victim's state of mind and conduct not in issue when the only dispute was the identity of the killer]; *People v. Ruiz* (1988) 44 Cal.3d 589, 608 [Evidence Code section 1250 does not apply where there is no purpose for

admitting evidence of the victims' expressions of fear of defendant other than as proof that those fears were justified, and that defendant in fact killed them].)

In the present case, Torres's fear was not relevant to an element of the offense. Nor was his fear relevant to prove his conduct before he was killed. The court erred in admitting these hearsay statements.

B. The Error Was Prejudicial.

The erroneous admission of evidence is generally state law error subject to the miscarriage-of-justice test set forth in *People v. Watson* (1956) 46 Cal.2d 818. An error under state law is reversible where "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Id.* at p. 837.) Here, the gap in the prosecution case was the complete absence of evidence that Flores had a motive to kill any of the victims. The improper admission of this evidence sought to persuade the jury that such a motive existed. It cannot be said to have been harmless.

Further, the admission of this unreliable hearsay evidence was fundamentally unfair, and violated Flores's rights to due

process and a reliable guilt and penalty determination under the Fourteenth And Eighth Amendments. (*Beck v. Alabama, supra,* 447 U.S. 625, 637-638; *Johnson v. Mississippi, supra,* 486 U.S. 578, 585 [reliance on "materially inaccurate" evidence in capital case violates Eighth Amendment]; *Manson v. Braithwaite, supra,* 402 U.S. 98, 104-107.)

VIII. There Is Insufficient Evidence That Flores Murdered Alexander Ayala and Jason Van Kleef; the Convictions and Special Circumstance Allegation Must Be Stricken and the Judgment Reversed.

A. Introduction.

The jury convicted appellant of the murders of Jason Van Kleef and Alexander Ayala based on insufficient evidence. No direct evidence, physical evidence, or eyewitness evidence connected appellant to the crimes, and the minuscule amount of circumstantial evidence was not "reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." *(People v. Johnson* (1980) 26 Cal.3d 557, 578.) Instead, the conviction likely was based on speculation and suppositions put forth by the prosecution and the prosecution's gang expert. The irrelevant and prejudicial gang evidence, particularly the prosecution's gang expert's opinion testimony that appellant killed the victims because of their refusal to join the El Monte Trace gang, improperly influenced the jury to convict appellant of these murders despite the lack of sufficient evidence on which to base these convictions. The prosecution failed to prove every element of first degree murder beyond a reasonable

doubt, and appellant's convictions of these offenses thus violated due process under the state and federal constitutions. (U.S. Const., 5th and 14th Amends; *In re Winship* (1970) 397 U.S. 358, 364.)

B. Standard of Review.

Convictions that are not supported by substantial evidence violate due process. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318; *People v. Bean* (1988) 46 Cal.3d 919, 932.) In assessing the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *(Jackson v. Virginia, supra,* 443 U.S. at p. 319; *People v. Johnson, supra,* 26 Cal.3d at p. 576.) This means the appellate court must "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." *(Johnson, supra,* at p. 576.)

This does not, however, mean that in reviewing the sufficiency of the evidence the appellate court limits its review to the evidence favorable to the respondent. Instead, the court's "task . . . is twofold. First, [the court] must resolve the issue in the light of the *whole record*--i.e., the entire picture of the defendant put before

the jury--and may not limit [its] appraisal to isolated bits of evidence selected by the respondent. Second, [the court] must judge whether the evidence of each of the essential elements . . . is *substantial*; it is not enough for the respondent simply to point to "some" evidence supporting the finding, for "[n]ot every surface conflict of evidence remains substantial in the light of other facts." Indeed, "A formulation of the substantial evidence rule which stresses the importance of isolated evidence supporting the judgment ... risks misleading the court into abdicating its duty to appraise the whole record." (*People* v. *Johnson, supra,* 26 Cal.3d at p. 577, quoting *People v. Bassett* (1968) 69 Cal.2d 122, 139.)

Further, reasonable inferences drawn from the evidence "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence." (*People v. Raley* (1992) 2 Cal.4th 870, 891.)

Moreover, the Eighth Amendment demands for heightened reliability in a capital case also require that this Court carefully review the evidence to ensure that the death sentence is not

imposed on the basis of speculative evidence. (See *Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585 [holding that Eighth Amendment "mandates heightened scrutiny in the review of any colorable claim of error"].)

C. The Evidence Is Insufficient.

No physical or eyewitness evidence connected appellant with the shooting deaths of either Jason Van Kleef or Alexander Ayala. Appellant was excluded as a match for all of the fingerprint and DNA evidence recovered from the crime scenes. (16 RT 3303-33; 17 RT 3473.)

There was no evidence as to the murder weapon used in the Van Kleef shooting. Aside from partial shoe prints near Van Kleef's body and a thin set of fresh tire tracks – neither of which connected Flores to the crime – there was no evidence at the scene, including no bullet casings. (10 RT 2014; 10 RT 2033.) The size of the wound suggested Van Kleef had been shot with a large caliber bullet, such as a 9 mm, .38 caliber, or .357 caliber. (17 RT 3398.)

Regarding the shooting of Alexander Ayala, a weapon was recovered in Mexico that the prosecution's expert, criminalist Heward, testified was the same gun used in both the Torres and

Ayala homicides. (17 RT 3468.) Maria Jackson purchased the Jennings gun from Juan Louis Miranda, her nephew, in Mexico. (11 RT 2298.) There is no evidence as to how Miranda obtained the gun. No useable prints were found on the Jennings handgun. (17 RT 3472.) DNA was found on the gun, but appellant was excluded as a possible match. (16 RT 3319.) Mosqueda testified that appellant sometimes carried a 9 mm and identified the Jennings-Bryco 9 mm recovered in Mexico as the gun that Flores carried. (12 RT 2408-10.) However, Mosqueda admitted he never saw the gun that was used in the Torres murder.(12 RT 2375.)

Despite the complete lack of evidence connecting Flores to the murders of Ayala and Van Kleef – including the absence of (1) physical evidence, (2) a murder weapon that could be traced back to Flores, (3) eyewitnesses, and (4) evidence of opportunity or motive – the prosecution bootstrapped the improper gang evidence to convince the jury that Flores killed Van Kleef and Ayala because they refused to join the El Montes Trece gang. At trial, Mosqueda admitted that while he originally told the police Ayala and Torres were killed because they would not join the gang, this was only a guess and he had no reason to believe it. He admitted Flores never

told him this. (12 RT 2427.) Mosqueda also retracted his statement that Flores admitted killing Van Kleef; he told the police that in fact it was Carmen Alvarez who told him Flores had killed van Kleef. (20 RT 4210.)

Moreover, the investigating officers who interviewed Mosqueda testified that Mosqueda's trial testimony was the latest version of "several different stories" he had told them and that Mosqueda lied to the deputies repeatedly from the outset. (20 RT 4184; 20 RT 4190.)

Further, the gang expert's testimony was entirely speculative and does not constitute substantial evidence of appellant's guilt. The expert (Detective Penney) allowed that it was "possible" Torres was killed because he refused to join the gang, but in his 25 years of police work he had never heard of such a thing happening. (19 RT 4094.) Detective Penny also speculated that Torres was killed because he had "some information on the person who shot him," but there was no evidence that Torres had "information" on appellant, and Penny never claimed he did. (19 RT 4055.) Penny's opinions lacked an evidentiary foundation and should never have been admitted, but even if admissible, his opinions added nothing to the

evidence to prove appellant guilty beyond a reasonable doubt.

Appellant denied killing Ayala and Van Kleef: He said he knew Torres and Ayala, and Van Kleef less so, but he did not know why they were killed. (20 RT 4141-42.) Flores admitted taking a .22 caliber rifle to Tijuana, but not the 9 mm handgun. (19 RT 3932.) He told one detective that he was present when Van Kleef was shot, but denied shooting Van Kleef or the others, and also denied ordering anyone else to do so. (18 RT 3814-15.)

The instant case is similar to those cases in which appellate courts have struck down murder convictions on the basis of insufficient evidence. In fact, there is even less evidence connecting Flores to the murders of Ayala and Van Kleef than in those cases in which appellate courts have overturned murder verdicts on the basis of insufficient evidence.

For example, in *People v. Blakeslee* (1969) 2 Cal.App.3d 831, the court reversed the defendant's conviction for the second degree murder based on insufficient evidence. (*Id.* at pp. 837–840.) In holding the evidence insufficient to prove the defendant committed the murder, the court in *Blakeslee* expressed particular concern with "the absence of evidence we would normally expect to find in a

murder prosecution based on circumstantial evidence." (Id. At p. 839.) The court emphasized that the missing evidence – a murder weapon, evidence linking the bullets which caused the victim's death to a particular weapon, evidence to establish a connection between a murder weapon and the defendant, tangible evidence such as fingerprints, palm prints, or powder burns, and testimonial evidence linking the defendant in some manner to a weapon — was not peripheral evidence. (*Id.* at pp. 839–840.)

As in *Blakeslee*, here, too, there was a striking absence of the evidence normally found in a murder prosecution based on circumstantial evidence, including no evidence of a murder weapon in the Van Kleef case, no evidence linking the bullets that caused Van Kleef's death to a particular weapon, no evidence of the type or caliber of weapon used, and no evidence between appellant and a murder weapon.

And, with respect to the murder of Ayala, there also is no evidence linking Flores to the murder weapon, and no tangible evidence such as fingerprints, palm prints, or powder burns or testimonial evidence that connects Flores to the Jennings handgun. In fact, Flores was excluded as the source of the DNA evidence

found on the murder weapon but two other possible suspects (Van Kleef and Abraham) were *not* excluded as possible matches. (16 RT 3319.) Similarly, the blood stained t-shirt found at the Van Kleef scene matched those found in Carmen Alvarez's apartment, and bore DNA that could have come from Carmen Alvarez, but none that could have come from appellant. (16 RT 3333.)

The *Blakeslee* court noted that it could draw an almost equally plausible case against the defendant's brother. (Id. at p. 840.) Similarly, an almost equally plausible case could be made against Abraham, or Carmen, or Mosqueda, all of whom had the same degree of opportunity and motive. Further, they were related to each other and spent much time together, raising serious questions about the credibility of their testimony. Mosqueda lied repeatedly about his involvement in the crimes, sought to hide his gang membership, changed his story repeatedly, and admitted committing armed robberies in the same month as these homicides. Carmen Alvarez, who fled the country immediately after the crimes, received a deal in exchange for her testimony. Maria Jackson, who recovered the alleged murder weapon, was Mosqueda's grandmother and had an obvious motive to protect him from

prosecution. In sum, each of appellant's principal accusers were also prime suspects and had much to gain by pinning the blame on appellant.

In short, the evidence that Flores killed Ayala and Van Kleef was not "reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." *(People v. Johnson, supra,* 26 Cal.3d at p. 578.) Thus, Flores' convictions for the murders of Ayala and Van Kleef must be reversed.

D. The Multiple Murder Special Circumstance Must Be Stricken and the Death Penalty Reversed.

As detailed above, the insufficient evidence that Flores killed Ayala and Van Kleef requires reversal of two of the three murder convictions, leaving only one murder conviction remaining. A multiple murder special circumstance requires more than one offense of murder.(Pen. Code, § 190.2, subd. (a)(3).) As a result, the multiple murder special circumstance must be stricken and Flores' penalty verdict must be reversed.

IX. Flores's In-Custody Statements to Detective Kusch Were Obtained in Violation of *Miranda*, And Violated Flores's Rights Not to Incriminate Himself, to Counsel, to Due Process, and to a Reliable Penalty Determination under the Fifth, Sixth, Fourteenth, and Eighth Amendments.

Miranda v. *Arizona* (1966) 384 U.S. 436 established what are now universally familiar procedural safeguards designed to protect suspects from coercion in the context of custodial interrogations. To ensure that statements made in that setting are a product of a person's free will and to protect the Fifth Amendment right against self-incrimination, warnings must be given before questioning begins; once warnings are given, "[i]f the individual indicates in any manner, at anytime prior to or during questioning, that he wishes to remain silent, the interrogation must cease."" *(Id.* at pp. 473-474.) Further, "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'" (*Michigan* v. *Mosley* (1975) 423 U.S. 96, 104, fn. omitted.)

In recent years, this Court and the United States Supreme Court have distinguished between the suspect's initial waiver of rights and his invocation of rights after he had already waived his

rights. (*Davis v. United States* (1994) 512 U.S. 452 [concerning invocation of right to counsel after waiver of rights]; *People v. Stitely* (2005) 35 Cal.4th 514 [concerning invocation of right to remain silent after waiver of rights]; *People v. Martinez* (2010) 47 Cal.4th 911 [concerning invocation of right to counsel after waiver of rights].) In each of these cases, it was held that a suspects' invocation of rights following a valid waiver must be unequivocal and unambiguous, and the police had no duty to stop the interrogation and ask the suspect to clarify his statement if it was unclear. (*Davis, supra,* 512 U.S. at p. 462; *Stitely, supra,* 35 Cal.4th at 535; *Martinez, supra,* 47 Cal.4th at p. 949.)

These cases, however, do not change a core principle of *Miranda*: whenever a suspect makes a clear and unequivocal statement that he wishes to remain silent, "the interrogation must cease." (*Miranda, supra,* 384 U.S. at p. 473; *Mosley, supra*, 423 U.S. at p. 100; *Berghius v. Thompkins* (2010) __ U.S. __, 130 S.Ct. 2250, 2260.) Here, when Detective Kusch asked Flores if Flores wished to waive his rights and answer questions about the Jaimes homicide, Flores unambiguously and unequivocally said "no," but the interrogation did not cease. Instead, Kusch continued to question

Flores until he obtained a confession. This was constitutional error.

Moreover, appellant asserts the following:

- Assuming Flores's assertion of his right to remain silent was ambiguous, the officer was required to stop and clarify Flores's response to the question of whether he wished to waive his rights;

- Assuming Flores waived his right to remain silent, his waiver was limited to questions about his name and age; and,

- Assuming Flores waived his right to remain silent, the waiver was coerced and involuntary.

The admission of Flores's incriminating statement, involuntarily obtained, violated his rights to remain silent and not incriminate himself, to counsel, to due process and a fair trial, to a reliable penalty verdict, and to be free from cruel and unusual punishment, and requires reversal of the death penalty. (U.S. Const. 5th, 6th , 8th & 14th Amends; Cal. Const., art. I, § 15; *Miranda v. Arizona, supra,* 384 U.S. 436.)

A. When the Officer Asked Flores If He Wished to Waive His Rights, Flores Said, "No."

Flores was arrested coming across the border into California from Mexico on the afternoon of September 6, 2001. (2 RT 194,

198.) San Bernardino Sheriff's Deputy Chris Elvert went to the border to take Flores into custody the same day and drove him back to San Bernardino. (2 RT 194.) Elvert did not advise Flores of his *Miranda* rights when he took him into custody. (2 RT 195.) An audio cassette secretly recorded what was said in the car, but the prosecution did not seek to admit the tape. (See 2 RT 194.)

The deputies and Flores arrived in San Bernardino late that night. Elvert began interrogating Flores shortly before 11:00 p.m. (2 RT 195; 20 RT 4116.) Elvert first told Flores that he wished to speak to Flores about several counts of murder "in San Bernardino." (20 RT 4118.) Elvert said he had already talked to Mosqueda and Carmen Alvarez, that they had given statements, and now Elvert wanted to hear Flores's version of the events. (20 RT 4118.) Elvert then advised Flores of his right to remain silent, that anything he said could be used against him in court, that he had the right an attorney before and during questioning, and that if he could not afford an attorney one would be appointed for him by the court. (20 RT 4119.) Flores said he understood his rights and was willing to talk to Elvert. (20 RT 4119.) Elvert questioned him for an hour. (2 RT 197.) Flores denied committing the charged

crimes and the interrogation ended. (20 RT 4165.)

The next day, on the morning of September 7, a different officer, Detective Rod Kusch of the Los Angeles County Sheriff's Department interrogated Flores about a different crime, the November 2000 homicide of Mark Jaimes. The interview was audio-recorded. (Ex. 222; 22 RT 4852-54.)[30]

Detective Kusch began by telling Flores he was there to talk about a "case" that occurred in Maywood on November 17, 2000. (22 RT 4855.) Kusch then advised Flores of his right to remain silent, that anything he said could be used against him, that he had the right to an attorney, and that an attorney would be appointed for him if he could not afford one. (22 RT 4856.) Flores said he understood his rights. (22 RT 4856-57.) The following exchange then occurred:

> RK: Basically what I'd like to do is talk about the the [sic] case that we investigated that we got call out on back on November 17th, 2000. Uh I'll tell you how we got called out on in a minute but uh do you want to take a few minutes to talk a little bit about that?

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[30] The transcript is exhibit 223. It is set forth in full in the reporter's transcript. (22 RT 4855.)

AF: No.

RK: Well essentially what I want to do is take a minute and kind of explain to you what uh what we called out on and what the investigation entailed and what not. Of course you know whether you choose to answer the questions is completely up to you um but obviously you know I just wanted to at least give you the thumbnail sketch of what we investigated, what we what we [sic] did and talk a little bit about that. Again you know you don't have to answer any questions. We're just sitting here, if you don't want to answer certain questions you don't have to answer them, if you want to answer other questions you answer those. So you know . . . for example some of the stuff I want to talk to you about is what's your name and birth date and stuff like that which are pretty simple questions. So. Do you want to take a few minutes and talk to me about that stuff?

AF: Oh yeah, well whatever.

(22 RT 4857.)

Detective Kusch then asked Flores a series of innocuous questions – his name, how he spelled it, whether he had a middle name, whether he was a Flores, Jr., or Flores III, where he lived, his mother's name, where she lived, when he was released from prison, what he did after that, and his father's address – until he

made his way to one question about the Jaimes homicide. (22 RT 4857-60.) Detective Kusch then digressed again to several questions about Flores's nickname, his tattoos, gang membership, and how he returned from Mexico, until returning again to the Jaimes case. (22 RT 4860-68.) Kusch told Flores that he would be charged with murder for Jaimes's death, but allowed that the killing might have been "justified," but he could not tell until he heard Flores's side of the story. (22 RT 4874.) Flores admitted he shot Jaimes when he came upon Jaimes in his mother's motel, that Jaimes had paid the mother for sexual intercourse, and refused to leave after Flores asked him to do so. (22 RT 4875-78.)

Before trial, Flores filed a motion challenging the admissibility of his statements to Kusch concerning the Jaimes homicide. (2 CT 547; 3 CT 726.) The court held an evidentiary hearing (2 RT 194) and denied the motion. (2 RT 289.) The court ruled that Flores's statement ("No") was not "an express invocation of a right to remain silent." (2 RT 290.) The court stated that Kusch's question immediately before Flores's "no" was, "I'll tell you how we got called out on in a minute but uh do you want to take a few minutes to talk a little bit about that?" The court believed

Flores's response might have meant either "No, I don't want to hear about how you got called out to investigate the scene" or "No, I don't want to talk about this at all." (2 RT 290.) The court found Flores's "no" was "clearly ambiguous," that Detective Kusch then "rightfully" sought to clarify Flores's response, and then Flores agreed to talk by saying, "Oh yeah, well whatever." (2 RT 291.)

Based on this reasoning, the court ruled that evidence of the Maywood homicide, including Flores's statements to Detective Kusch, could not be admitted in the guilt phase, but would be admissible in the penalty phase, and ultimately it was admitted. (2 RT 289; 22 RT 4855.) The court erred.

B. Whether Flores Waived His Rights Is Reviewed De Novo.

"In reviewing *Miranda* issues on appeal, [the court] accept[s] the trial court's resolution of disputed facts and inferences as well as its evaluations of credibility if substantially supported, but independently determine from undisputed facts and facts found by the trial court whether the challenged statement was legally obtained." (*People v. Martinez, supra,* 47 Cal.4th at p. 949 [citation omitted].) The prosecution bears the burden of proving a proper

advisement and waiver by a preponderance of the evidence. (*Colorado v. Connelly* (1986) 479 U.S. 157, 168; *People v. Markham* (1989) 49 Cal.3d 63, 71.) Whether a suspect's response to an admonition is ambiguous is evaluated objectively, from the point of view of the listening officer. (*People v. Williams* (2010) 49 Cal.4th 405, 428; *United States v. Rodriguez* (9th Cir. 2008) 518 F.3d 1072, 1080.) The inquiry into whether a defendant has invoked *Miranda* rights is an objective one, which asks what "a reasonable officer in light of the circumstances would have understood." *(Davis v. United States , supra,* 512 U.S. at pp.458-459.) On review, this Court reviews independently the trial court's determination of whether the defendant invoked his *Miranda* rights. *(People v. Gonzalez* (2005) 34 Ca1.4th 1111, 1125.)

C. Flores Clearly and Unequivocally Invoked His Right to Remain Silent.

It is axiomatic that a criminal suspect in custody has a Fifth Amendment right to remain silent, and one of the most important safeguards of that right is the right to cut off questioning. *(Miranda* v. *Arizona, supra,* 384 U.S. at p. 474.) After a suspect has been advised of his *Miranda* rights, "[i]f the individual indicates in

any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. *(Id.* at pp. 473-74.)

The United States Supreme Court recently reaffirmed that where a suspect makes a "simple, unambiguous statement[]" that he wants to-remain silent or does not want to talk with the police, he invokes his right to remain silent and the "right to cut off questioning." *(Berghuis* v. *Thompkins, supra,* 560 U.S. _, 130 S.Ct. 2250, 2260 [citations omitted].) Where an officer is faced with such an unequivocal and unambiguous invocation of the right to remain silent, "further interrogation must cease.'" (*Id.* at pp. 2263-2264.)

This Court has long held that "no particular form of words or conduct is necessary on the part of a suspect in order to invoke his or her right to remain silent." (*People* v. *Randall* (1970) 1 Cal.3d

948, 955.) A suspect seeking to invoke his right to silence need not "provide any statement more explicit or more technically-worded than 'I have nothing to say'" (*Arnold* v. *Runnels* (9th Cir. 2005) 421 F.3d 859, 865) or "I plead the Fifth." (*Anderson* v. *Terhune* (9th Cir. 2008) 516 F.3d 781, 787 [en banc].)

Here, Flores's invocation of his right to remain silent – a simple "no" – could hardly have been clearer. As in *Anderson v. Terhune,* "this is not a case where the officers or the court were left scratching their heads as to what [appellant] meant." (*Anderson v. Terhune, supra,* 516 F.3d at p. 787.) Kusch asked Flores if he could question him about the case "we got called out on back on November 17th 2000" and Flores said, "No." Flores's refusal was stated at the beginning of the interrogation, immediately after he was advised of his rights. He used no bywords of equivocation such as "maybe" or "might" or "I think." (See *Arnold v. Runnels, supra,* 421 F.3d at pp. 865-66 [distinguishing cases in which the invocation was found ambiguous from cases in which the invocation was found unambiguous].)

Flores had not already answered any of Kusch's questions. By answering as he did, Flores made it crystal clear at the outset

that he did not want to talk to Kusch about the Jaimes case. As stated by the federal court in *Arnold,* "it is difficult to imagine how much more clearly a layperson like appellant could have expressed his desire to remain silent." (*Id.* at p. 866.)

Indeed, this is precisely how it was interpreted by Sergeant Dean of the Sheriff's Department, who sat in on the interrogation. (2 RT 208.) In a hearing before trial, Sergeant Dean was asked if he heard anything during the interrogation that indicated Flores did not wish to speak to Officer Kusch. Dean replied that at "one point" he did. (2 RT 210.) Dean explained, "Lieutenant Kusch asked Mr. Flores if he wanted to talk about that, meaning the Maywood murder, and Alfred replied, 'No.'" (2 RT 211.)[31]

In cases where ambiguity has been found, the suspect's invocation of rights has been far less clear than Flores's unequivocal "no." (See, e.g., *People v. Steger* (1976) 16 Cal.3d 539,

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[31] At trial, Kusch testified that he did not think Flores said, "No." (22 RT 4915.) He believed the audiotape was unintelligible at that point. (22 RT 4915.) This after-the-fact observation was not before the court when it ruled on defense counsel's motion to exclude Flores's statements, was refuted by Sergeant Dean's recollection of the interrogation (2 RT 211), and makes no sense in light of Kusch's response to Flores; in response, Kusch agreed that Flores had the right to remain silent, and then asked if he could just ask Flores for his name and birth date and "stuff like that." (22 RT 4857.)

550 [when asked if she would waive the right to silence, suspect states, "If I can."]; *People v. Kelly* (1990) 51 Cal.3d 931, 950 [when suspected child killer was asked if he wanted to talk to the officers, he answered, "Well, what do I say, I don't know."]; *People v. Williams* (2010) 49 Cal.4th 405, 429 [suspect's confusion regarding whether she could have immediate access to an attorney properly clarified); *People v. Turnage* (1975) 45 Cal.App.3d 201, 212 [suspect agrees to talk but mentions he cannot afford an attorney "at the moment" and asks if the officer thinks he needs counsel]; *People v. McGreen* (1980) 107 Cal.App.3d 504, 520 [ambiguity requiring clarification where suspect's headshake was nonresponsive]; *People v. Mitchell* (1982) 132 Cal.App.3d 389, 402 [when asked if he would talk, suspect answered that he wanted to read a book and have his cigarettes]; *People v. Pack* (1988) 201 Cal.App.3d 679, 690 [suspect expressed either feigned or actual inability to understand his rights]; *People v. Vance* (2010) 188 Cal. App. 4th 1182, 1211 [ambiguity found where suspect was read his rights, said he understood them, and when asked for his "side of the story," replied, "I don't have a side of the story"].)

Despite the clarity of Flores's "no," the trial court believed the

response ambiguous because it read Kusch's question as compound, asking if Flores wanted to talk about the case and "how we got called out on it." Thus, the court believed Flores's response might have meant either "No, I don't want to hear about how you got called out to investigate the scene" or "No, I don't want to talk about this at all." (2 RT 290.) The court ruled that Kusch was entitled to clarify the response. (2 RT 290.)

But Kusch did not seek to clarify the response. He did not ask Flores what he meant by "no." Instead, Kusch acknowledged Flores's right to remain silent by agreeing that Flores did not "have to answer any questions." (22 RT 4857.) Kusch then explained that Flores could choose which questions he wanted to answer; Kusch explained, "[i]f you don't want to answer certain questions you don't have to answer them, if you want to answer other questions you can answer those." (22 RT 4857.) Kusch immediately went on to explain that "some of the stuff I want to talk to you about is what's your name and birth date and stuff like that which are pretty simple questions." (22 RT 4857.) Kusch then asked, "Do you want to take a few minutes and talk to me about that stuff?" Flores answered, "Oh yeah, well whatever." (22 RT 4857.)

Thus, Kusch's response does not show he was confused by Flores's express assertion of his right to remain silent. Under *Miranda*, Kusch was required to stop questioning Flores at the moment Flores refused to waive his rights. Kusch's continuing question was an end-run around *Miranda*. The admission of Flores's subsequent confession was a violation of his right to remain silent. *(Miranda* v. *Arizona, supra,* 384 U.S. at p. 474.)

D. If Flores's Response To The Question Whether He Wished To Waive His Rights Was Unclear, Kusch Was Obligated To Stop The Interrogation And Clarify What Flores Meant.

Kusch's continued questioning of Flores after Flores said "no," he did not want to talk, violated *Miranda*'s rule that "all questioning must cease" once the person in custody "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent." (*Miranda, supra,* 384 U.S. at pp. 473–474.) However, the court below avoided this conclusion by ruling that Flores did not "unambiguously" invoke his right to remain silent. (See *Berghuis v. Thompkins, supra*, 130 S.Ct. at p. 2260; see also *People v. Stitely, supra,* 35 Cal.4th at p. 535 [in order to invoke *Miranda*, the suspect must "unambiguously assert his

right to silence"].)[32]

Assuming, *arguendo*, that Flores's response was ambiguous, Detective Kusch had a duty to clarify what Flores meant. (*United States v. Rodriguez, supra,* 518 F.3d at pp. 1079-1080). *Rodriguez* holds that when faced with an arguably ambiguous or equivocal assertion of *Miranda* rights, interrogating officers are required to clarify the statement to determine if the suspect has in fact waived his rights. (*Ibid.*, citing *Nelson v. McCarthy* (9th Cir. 1981) 637 F.2d 1291, 1296 [where there has been an "equivocal assertion of a constitutional right [to silence], the attending officer can ask questions to clarify the defendant's wishes, but then only so long as he does not continue a general interrogation"); *United States v. Fouche* (9th Cir. 1985) 776 F.2d 1398, 1405; *United States v. Mendoza-Cecelia* (11th Cir. 1992) 963 F.2d 1467, 1472; *United States v. Cherry* (5th Cir. 1984) 733 F.2d 1124, 1130.)

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In *Berghius*, the defendant remained silent during questioning. He did not say he wanted to remain silent or that he did not want to talk with the police. The Court held that continued silence in the face of questioning was "ambiguous," and that the defendant could cut off questioning only by "unambiguously" asserting his right to remain silent. (*Berghuis, supra,* 130 S.Ct. at p. 2260].)

At the outset, there is a threshold issue whether Flores's response was a refusal to waive his right to remain silent or an invocation of the right after an initial waiver of rights. If the former, the interrogating officer had a duty to stop questioning and clarify Flores's response; if the latter, the officer had no duty to stop and clarify. "In order to invoke the Fifth Amendment privilege after it has been waived, and in order to halt police questioning after it has begun, the suspect 'must unambiguously' assert his right to silence or counsel." (*People v. Stitely, supra,* 35 Cal.4th at p. 535, quoting *Davis v. United States, supra,* 512 U.S. at p. 459; see also *People v. Martinez, supra,* 47 Cal.4th at p. 949 [holding that after defendant waives right to remain silent, the interrogating officer has no duty to stop and clarify a subsequent ambiguous or equivocal invocation of the right].)

This case is distinguishable from *Davis*, *Stitely*, and *Martinez*. In those cases, the defendant made an arguably equivocal assertion of his rights during the middle of questioning, following a valid waiver that occurred before the questioning began. Here, Flores's assertion of rights occurred at the very beginning of the interrogation, and he invoked his rights

immediately after being advised of his rights and asked if he wished to talk.

In *Davis*, the defendant waived his rights, answered questions for an hour and a half, and then said, "Maybe I should talk to a lawyer." (*Davis, supra*, 512 U.S. at p. 454.) In *Stitely*, the police read defendant the *Miranda* rights before taking him to the station house for questioning. Defendant waived each of his rights and agreed to talk to the police. At the station, defendant answered police questions until the police suggested he had fought with the murder victim; at that point, defendant said he "thought" he "should stop talking." (35 Cal.4th at p. 534.) However, defendant did not stop talking, and eventually admitted to the police that he took the murder victim out of the bar where she was last seen. (*Ibid.*)

In *Martinez*, the police interrogated defendant over a few days. On the first day, defendant waived his rights and agreed to talk to the police. After awhile, he said, 'That's all I can tell you," and the questioning stopped. (47 Cal.4th at p. 944.) The next day, a different officer sought to question defendant. After reminding defendant of his rights, the officer asked him if he wanted to talk.

Defendant said yes and spoke to the officers until the officers decided to take a break, at which time defendant said, "I don't want to talk anymore right now." (*Id.* at p. 945.) The questioning stopped until later that day when the police asked defendant more questions, then asked him if he wanted to take a polygraph examination. Defendant replied, "I think I should talk to a lawyer before I decide to take a polygraph." (*Id.* at p. 945.) The next morning, the police approached defendant again and asked if he wanted to talk; he agreed to do so and in the subsequent interrogation, admitted his guilt.

In each of these cases, the defendant waived his rights and spoke to the police, and then made ambiguous statements about wanting a lawyer or not speaking anymore in the middle of questioning. Here, before questioning began, Kusch advised Flores of his rights and asked if he wished to waive them; Flores said no. It is of no moment that Flores waived his rights the day before to Detective Elvert. Whether he was required to do so or not, Kusch re-advised Flores before any questioning began and Flores refused to waive his rights at that time. Unlike *Davis*, *Stitely*, and *Martinez*, Flores did not invoke his right to remain silent in the

middle of questioning, after waiving his rights and answering many questions, but did so immediately upon being advised of the right. Further, Kusch was a different officer, from a different jurisdiction, investigating a different case. Under those circumstances, it cannot be said that Kusch's interrogation was simply a continuation of Elvert's questioning.

Thus, Kusch was required to stop the questioning and clarify Flores's response if Kusch was unsure what Flores meant. (*United States v. Rodriguez, supra,* 518 F.3d at pp. 1079-1080.) Kusch did not do that. Instead, Kusch affirmed that Flores had a right to remain silent, then ignored the fact that Flores had not waived that right by simply continuing the interrogation, after falsely assuring Flores that he was only going to be asked background questions.

The court below found that in response to what it considered defendant's ambiguous assertion of his rights, Kusch properly asked "clarifying questions." (2 RT 291.) This is incorrect; Kusch did not ask defendant to "clarify" his response. He did not ask, "Do you mean you don't want to talk about how we got called out or you don't want to talk at all?" Instead, Kusch coerced Flores into

talking by telling him that he only wanted to ask him "simple questions," like his name and birth date. Kusch assured Flores that he did not have to answer any questions, then lowered the stakes by telling Flores (falsely) that he only wanted to ask "simple" questions about Flores's name and background. Nothing in Kusch's statements suggests he was unsure whether Flores intended to cut off all questioning or only those questions about the police got called out to investigate the scene, and nothing in Kusch's statements indicates any attempt at clarification of Flores's invocation of his *Miranda* rights.

E. Assuming Flores Waived His Rights At All, the Waiver Was Limited to Identifying Background Information.

As noted above, once Flores stated he did not wish to answer questions, Kusch did not seek to clarify Flores's answer, but instead offered Flores the option to answer certain questions such as Flores's "name and birth date and stuff like that which are pretty simple questions." (22 RT 4857.) Flores agreed to this.

A person in custody may selectively waive his right to remain silent by indicating that he will respond to some questions, but not to others. "A defendant may indicate an unwillingness to discuss

certain subjects without manifesting a desire to terminate 'an interrogation already in progress.' " (*People v. Clark* (1992) 3 Cal.4th 41, 122, quoting *People v. Silva* (1988) 45 Cal.3d 604, 629-630.) In *Clark*, defendant argued his custodial statements were inadmissible because he had requested an attorney during the interrogation. The Court found defendant had only invoked his rights to questions about an unrelated killing. "Defendant did not invoke the right as to all subjects, only as to one." (*Clark, supra,* 3 Cal.4th at p. 122; see also *Michigan v. Mosely, supra,* 423 U.S. at pp. 104-05 [defendant asserted rights in response to questions about robberies, but next day, after being re-advised of rights, answered questions about unrelated murder]; *United States v. Soliz* (9th Cir. 1997) 129 F.3d 499, 504, overruled on other grounds by *United States v. Johnson* (9th Cir.2001) 256 F.3d 895 [en banc] [holding defendant partially waived rights only as to citizenship status and his statements concerning other subjects were inadmissible].)

Here, Flores unequivocally invoked his right to remain silent about the "November 17th, 2000" incident, but later agreed to answer questions about his "name and birth date and stuff like

that." (22 RT 4857.) Where a defendant clearly indicates he will talk only about certain subjects, as Flores did here, it is improper for the police to interrogate him on other subjects to which he has invoked the right to remain silent. The continued interrogation is permissible only to the extent that the suspect's invocation is "scrupulously honored." (*Mosley, supra,* 423 U.S. at pp. 103-107 Where a suspect refuses to answer questions as to one or more subjects but not all, questioning must cease in the areas about which the suspect has declined to speak. *(United States* v. *Soliz , supra,*129 F.3d at p. 504; *United States* v. *Lopez-Diaz* (9th Cir. 1980) 630 F.2d 661, 664-665 [statements inadmissible because officer asked questions concerning offenses about which defendant had refused to talk]; compare *United States v. Thierman* (9th Cir. 1982) 678 F.2d 1331, 1335 [statement admissible because officers abided by limitations which defendant placed on subjects he was willing to discuss].)

Indeed, in *Clark*, this Court recognized that in a selective invocation context, it is improper to continue asking questions on the subject about which the defendant has refused to talk. (*People v Clark, supra,* 3 Cal.4th at p. 122 [where defendant agreed to talk

without counsel about one murder but not about another unrelated one, it "may not have been appropriate" for police to ask further questions about the latter].)

Accordingly, assuming Flores waived his right to remain silent, the waiver extended only to his "name and birth date and stuff like that" and did not include the Jaimes homicide. The court erred in admitting Flores's statements concerning the homicide.

F. Flores's Statement Was the Product of Psychological Coercion and Was Involuntary.

The Fifth Amendment guarantees a person's right to remain silent "unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." (*Malloy v. Hogan* (1964) 378 U.S. 1, 8 [holding the Fifth Amendment applicable to the states through the Fourteenth Amendment].) If a statement is the product of coercive police activity, it is involuntary and subject to exclusion at trial. (*Colorado* v. *Connelly, supra,* 479 U.S. 157, 167; *Mincey* v. *Arizona* (1978) 437 U.S. 385, 398.) This Court reviews independently a trial court's determination of voluntariness. (*People* v. *Guerra* (2006) 37 Cal.4th 1067, 1093.)

Under both state and federal Constitutions, courts apply a

"totality of circumstances" test to determine the voluntariness of a confession. (*Withrow v. Williams* (1993) 507 U.S. 680, 693-94.) It is the prosecutor's burden to prove by a preponderance of the evidence that statements obtained from the suspect were voluntary. (*People* v. *Williams* (1997) 16 Cal.4th 634, 659, citing *Lego* v. *Twomey* (1972) 404 U.S. 477, 489.) Here, Flores's statement was the involuntary product of improper police coercion and should have been suppressed.

In *Miranda,* the Supreme Court acknowledged that "inherently compelling pressures" are present whenever a person suspected of a crime is interrogated in custody, pressures which "work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *(Miranda v. Arizona, supra,* 384 U.S. at p. 467.) In addition to those inherent pressures, other factors short of brutality may work to compromise the free will of the accused. Interrogation tactics need not be violent or physical to be coercive. "Psychological coercion is equally likely to result in involuntary statements, and thus is also forbidden." (*Collazo v. Estelle* (9th Cir. 1991) 940 F.2d 411, 416 [en banc].)

A violation of the procedures required by *Miranda,* even a simple failure to warn, raises a presumption of coercion. (*United States v. Patane* (2004) 542 U.S. 630, 639; *Oregon v. Elstad* (1985) 470 U.S. 298, 306-307 & fn.1.) Although this Court has held that an interrogator's deliberate disregard of an invocation of *Miranda* rights is not per se coercive *(People v. Bradford, supra,* 14 Cal.4th at pp. 1039-1040), it has also held that where an interrogating officer disregards the defendant's invocation of *Miranda* rights and continues the interrogation in spite of it, that fact weighs heavily against the voluntariness of the defendant's subsequent statement (*People v. Neal* (2003) 31 Cal.4th 63, 81-82 [although defendant was vulnerable, detention conditions were harsh and officers made threats and promises, circumstance weighing "most heavily against the voluntariness" was continued interrogation after repeated invocations]).

A statement is also involuntary when it has been "extracted by any sort of threats." (*Hutto v. Ross* (1976) 429 U.S. 28, 30.) Officials may not extract a confession "by any sort of threats or violence, nor ... by any director implied promises, however slight, nor by the exertion of any improper influence." (*Bram v. United*

States (1897) 168 U.S. 532, 542-43, quoted in *Malloy, supra,* 378 U.S. at p. 7.) "[I]n carrying out their interrogations the police must also avoid threats of punishment for the suspect's failure to admit or confess particular facts and must avoid false promises of leniency as a reward for admission or confession." (*People v. Holloway* (2004) 33 Cal.4th 96, 115.)

When the Supreme Court held in *Miranda* that all questioning must cease once the suspect seeks to cut off questioning, it sought to prevent the exact sort of coercive technique employed here by Detective Kusch. *Miranda* took note of manuals that instruct the police how to extract confessions from suspects. The Court noted the manuals contain specific advice for dealing with a suspect who says he does not want to talk:

> The manuals also contain instructions for police on how to handle the individual who refuses to discuss the matter entirely, or who asks for an attorney or relatives. The examiner is to concede him the right to remain silent. 'This usually has a very undermining effect. First of all, he is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent impresses the subject with the apparent fairness of his interrogator.'

(*Miranda, supra,* 384 U.S. at p. 453-54, quoting Inbau & Reid, Criminal Interrogation and Confession (1962), at p. 111.)

This is what occurred here. Kusch did not stop questioning when Flores plainly said he did not wish to talk. Instead, Kusch reassured Flores he did not have to answer questions, explained the questions he wanted to ask were not incriminating anyway, and then persisted with a series of questions that ultimately led Flores to make statements about the Jaimes homicide. Along the way, Kusch told Flores he was going to be charged with murder, but it was possible that the killing was "something less than that" or even "justified." (22 RT 4874.) Kusch explained that the main evidence came from Flores's mother, but "whether that statement is truthful [he] didn't know." (22 RT 4872.) He said the only way to know if the statement was truthful was to compare it to Flores's own statement. (22 RT 4872.)

Kusch's implied promise that Flores could improve his chances of getting charged with something less than murder, combined with the failure to honor Flores's clearly-stated invocation of his right to remain silent, combined to coerce Flores into waiving his rights.

G. The Admission Of Flores's Statements Was Not Harmless Error.

The erroneous failure to suppress a defendant's confession or admission is reversible error unless the prosecution can show that the admission of the defendant's statement is harmless beyond a reasonable doubt. (*Arizona* v. *Fulminante* (1991) 499 U.S. 279, 306-312; *Chapman v. California, supra,* 386 U.S. at p. 23; *People v. Cahill* (1993) 5 Cal.4th 478, 509-510.) Under *Chapman,* the question is "not whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." (*Fahy* v. *Connecticut* (1963) 375 U.S. 85, 87.) Put another way, the court must look to "the basis on which the jury *actually rested* its verdict. [Citation.] The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279.) "To say that an error did not contribute to the ensuing verdict is . . . to find

that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt, supra,* 500 U.S. at p. 403.) Thus, "error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot . . . be conceived of as harmless." (*Chapman, supra,* 386 U.S. at p. 24.)

Here, Flores's statements to Kusch about the Jaimes killing included a full description of the motive and means of the murder of Mark Jaimes, and had an "indelible impact" on the jury's decision to sentence Flores to death. (22 RT 22 RT 4875-4889.) Absent Flores's confession that he killed Mark Jaimes, there was scant evidence connecting him to the murder. In fact, the only other evidence connecting Flores to the Jaimes shooting was the testimony of the prosecution's firearms examiner, who concluded that cartridge casings found at the 2000 Mary Muro shooting were fired from the same gun (a Raven .25 caliber handgun) as the cartridge casings found at the Jaimes homicide. (21 RT 4667-4670.)

Importantly, however, there was no evidence positively linking Flores to the Raven handgun. At the Muro shooting, a

witness described shots coming from a gun held by a second, unidentified shooter, fired from through the doorway. (21 RT 4568-4569.) The empty .25 caliber cartridge casings were found on the ground near that doorway. (21 RT 4589.) Thus, absent Flores's confession, the evidence indicates a strong probability that the Raven handgun belonged to the second, unidentified shooter, who fired the shots from near the doorway, rather than belonging to Flores.

Finally, the Jaimes murder was the strongest, most incendiary evidence against Flores at the penalty phase trial. It was the only evidence that Flores had committed a prior murder, which explains why the prosecutor placed so much emphasis on the Jaimes murder in his closing argument. (23 RT 5136-5141.) Further, the prosecutor repeatedly made direct and indirect references to Flores's involvement in the Jaimes murder, saying that Flores kills people who disrespect him (23 RT 5145) and commenting on Flores's future dangerousness by asking the jury, "How many people need to become his victim before he's given the ultimate penalty." (23 RT 5147.) The prosecutor's reliance in argument on the evidence is an objective means of assessing

prejudice. (*People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1487 [prosecutor's heavy reliance on defendant's statements in closing showed prejudicial error].)

Furthermore, significant mitigating evidence was presented, including testimony that Flores's childhood was remarkably unstable, that he bounced from different family members to social service programs, that he was brought into a street gang at age 10 or 11, that he witnessed violence in his home and on the streets from an early age, that his mother and uncles were deeply involved in gangs, and that his father, who spent five to six years in prison, was mostly absent. (23 RT 5061-64.)

Under these circumstances, the prosecution cannot demonstrate that the error in the admission of Flores's statements to Kusch was harmless beyond a reasonable doubt, and reversal of the penalty verdict is required.

X. Prosecutorial Misconduct Violated Flores's Rights to Confrontation, Due Process, and to a Reliable Guilt and Penalty Determination Under the Sixth, Fourteenth, and Eighth Amendments.

A. The Prosecutor Elicited Inadmissible Hearsay.

Following the same pattern as in the guilt trial, at the penalty trial the prosecutor once again elicited patently inadmissible hearsay. In her direct examination of Detective Kusch regarding the Mark Jaimes homicide, the prosecutor asked, "Now, did you at some point – well basically Lillian Perez told you basically her son is the one who shot Mr. Jaimes, correct?" Kusch immediately responded, "In short, yes." (22 RT 4843.) Defense counsel objected on hearsay grounds; the court sustained the objection and struck the testimony. (22 RT 4843.) As discussed in Argument IX, *supra*, Flores's confession to the Jaimes murder was illegally obtained and should have been suppressed. The prosecutor was aware that absent Flores's confession, there was only non-conclusive firearm evidence connecting Flores to the Jaimes homicide.

As noted, the deliberate asking of questions by a prosecutor calling for inadmissible and prejudicial evidence is misconduct.

(*People v. Bell, supra,* 49 Cal.3d at p. 532.) Here, as in *Bell*, the misconduct was particularly egregious because the prosecutor put before the jury the hearsay statement of a person who was not available for cross-examination. (*Id.* at p. 533.) And, as noted earlier, whether the prosecutor's solicitation of inadmissible hearsay was intentional or unintentional is not material; a showing of bad faith is not required to sustain a finding of prosecutorial misconduct. (*People v. Hill, supra,* 17 Cal.4th at p. 822.)

B. The Misconduct Was Prejudicial.

The misconduct here is a part of a pattern of misconduct by the prosecutor and the law enforcement witnesses to put before the jury prejudicial and inadmissible allegations. (See Argument IV, *supra.*) As such the rises to the level of federal constitutional error. (*Donnelly v. DeChristoforo, supra,* 416 U.S. at pp. 642-643.) Here, the hearsay allegation that Flores killed Jaimes made the trial fundamentally unfair because (1) it introduced damaging evidence against Flores and (2) did so without affording him the opportunity to confront the evidence. (*Pointer v. Texas, supra,*380 U.S. at p. 405.)

Under California law, misconduct is prejudicial when "it is

reasonably probable that a jury would have reached a more favorable result absent the objectionable comments." (*People v. Haskett, supra,* 30 Cal.3d at p. 866.) However, where the misconduct renders the trial fundamentally unfair, the error rises to a constitutional violation and the burden shifts to the State to prove the error harmless beyond a reasonable doubt under *Chapman v. California, supra,* 386 U.S. 18.

In this case, it cannot be held that the misconduct was harmless beyond a reasonable doubt (*Chapman v. California, supra,* 386 U.S. at p. 24.) Flores's confession that he killed Jaimes was obtained in violation of Flores's *Miranda* and Fifth Amendment rights. (See Argument IX, *supra*.) Once the confession is excluded the only evidence connecting Flores to Jaimes's death is the firearm evidence.

The prosecution's firearms expert testified to her opinion that the cartridge casings found at the 2000 Mary Muro shooting were fired from the same gun (a Raven .25 caliber handgun) as the cartridge casings found at the Jaimes homicide. (21 RT 4667-4670.) As noted earlier, firearm tool mark identification is unreliable. (See Argument III (D), *supra*.)

Moreover, there was no evidence positively linking Flores to the Raven handgun. At the Muro shooting, a witness described shots coming from a gun held by a second, unidentified shooter, fired from through the doorway. (21 RT 4568-4569.) The empty .25 caliber cartridge casings were found on the ground near that doorway. (21 RT 4589.) This evidence suggests the the Raven handgun belonged no to Flores, but to the second, unidentified shooter, who fired the shots from near the doorway.

The Jaimes homicide was the most incendiary evidence against Flores. It was the only evidence that Flores had committed a prior homicide, which explains why the prosecutor placed so much emphasis on the Jaimes murder in her closing argument and why the prosecutor intentionally solicited the inadmissible and prejudicial hearsay evidence from Detective Kusch that Flores's mother said Flores killed Jaimes. (23 RT 5136-5141; 23 RT 5145; 23 RT 5147.)

Taking the Jaimes homicide out of the picture, weakens the case for the death penalty significantly, especially given the important, albeit limited, mitigation evidence presented. (See Argument IX (G), *supra*; 23 RT 5061-64.)

Accordingly, the misconduct violated Flores's rights to due process, confrontation, and to a reliable penalty determination under the Fourteenth, Sixth, and Eighth Amendments. The judgment of death must be reversed.

XI. The Court Erred in Instructing the Jury on Mitigating Factors Not Supported by the Evidence and in Failing to Instruct the Jury That the Absence of Mitigating Factors Is Not an Aggravating Factor.

A. The Court Violated Appellant's Rights To Due Process And To A Reliable Penalty Determination By Instructing The Jury On Mitigating Factors Unsupported By Evidence.

The trial court instructed the jury under CALJIC No. 8.85 (2000 Revision) as to all aggravating and mitigating factors listed in Penal Code section 190.3, subdivisions (a) through (k). (6 CT 1485-86) Six of these mitigating factors were not supported by the evidence:

Factor (d): Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

Factor (e): Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

Factor (f): Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

Factor (g): Whether or not the defendant acted under extreme duress or under the substantial domination of another

person.

Factor (h): Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

Factor (j): Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

This Court has consistently held that a jury should not be instructed on principles of law that are not supported by the evidence presented at trial. (See, e.g., *People v. Williams* (1992) 4 Cal.4th 354, 361 [defendant not entitled to consent instruction absent evidence]; *People v. Hannon* (1977) 19 Cal.3d 588, 597.) However, the Court makes an exception in capital cases. In capital cases, the Court holds it is permissible to instruct the jury on mitigating factors that have nothing to do with the case. (*People v. Ghent* (1987) 43 Cal.3d 739, 776-777.) Appellant respectfully maintains that *Ghent* was wrongly decided and asks this court to reconsider its decision.

In *Ghent*, the Court held there was no danger the jury would draw a negative inference from the fact that many of the listed mitigating factors did not apply because the jury was told to consider only those factors that are applicable. Further, the Court said that deleting factors could prejudice the defendant, presumably because the jury might give him the benefit of the doubt as to whether there was evidence to support a mitigating factor. (*Ibid.*)

Of course, this reasoning could apply to non-capital cases, too. For example, a defendant in a non-capital homicide case might benefit from the jury being instructed on all forms of homicide, and not simply murder, but this Court has never so held.

Further, the failure to delete unsupported factors leaves the jury to decide which factors are relevant and applicable to appellant's case, and thus creates the possibility that the jury rejected relevant mitigating evidence because it thought that it was somehow inapplicable to appellant's case. Such a risk injects unreliability into the sentencing process and violates the defendant's rights under the Eighth Amendment. (*Boyde v. California* (1986) 494 U.S. 370, 380 [instructions which create the

reasonable likelihood that the jury was prevented from giving mitigating effect to relevant evidence violate the Eighth Amendment].)

The inclusion of these inapplicable factors in the list of aggravating and mitigating factors violates the defendant's federal constitutional right to due process and to a reliable and fair sentencing process under the Eighth and Fourteenth Amendments. Instructing the jury on inapplicable mitigating factors is error because those extraneous instructions inject irrelevant information into the jury's deliberations. Only relevant factors may be considered in making the capital sentencing decision; and the state is only permitted to use in aggravation those statutory factors that have been designated aggravating. (*People v. Boyd, supra,* 38 Cal.3d 762.) This danger is heightened because the instructions do not explicitly designate which factors are mitigating and which are aggravating, permitting jurors improperly to assign aggravating weight to a factor that can only be considered as mitigation, or to conclude that the crime is particularly aggravated because proof of some factor in mitigation has not been proved. (See *People v. Davenport* (1985) 41 Cal.3d 247, 289-290.)

Empirical research undercuts the argument that deleting inapplicable factors is unnecessary because jurors fully understand the penalty phase instructions and follow them expertly. This research demonstrates a critical misunderstanding by large numbers of jurors as to basic constitutional concepts underlying capital sentencing. (See Haney & Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions* (1994) 18 Law & Human Behavior 411, 423-424, 428-429.)

Another study of California jurors who had actually served in capital cases found that many of the jurors who were interviewed simply dismissed mitigating evidence that had been presented during the penalty phase because they did not believe it fit in with the sentencing formula that they had been given by the judge, or because they did not understand that it was supposed to be considered mitigating. (Haney, et al., *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death* (1994) 50 (no. 2) J. of Social Issues 149, 167-168.)

In summary, the failure to delete inapplicable factors deprived defendant of his rights to an individualized sentencing

determination based on permissible factors relating to him and the crime. In addition, this error, by artificially inflating the factors on death's side of the scale, violated the Fifth, Sixth, Eighth and Fourteenth Amendments' requirement of heightened reliability in the death determination. (*Ford v. Wainwright, supra,* 477 U.S. at pp. 411, 414; *Beck v. Alabama, supra,* 447 U.S. at p. 637.)

B. The Court Violated Appellant's Rights To Due Process And To A Reliable Penalty Determination By Failing To Instruct The Jury Sua Sponte That The Absence Of Mitigation Is Not Itself An Aggravating Factor.

In *People v. Davenport, supra,* 41 C.3d 247, the Court held that the absence of mitigating evidence cannot be considered a factor in aggravation. (*Id.* at p. 290.) The absence of mitigation does not automatically make one murder more offensive than others. (*Id.* at p. 289; see also *People v. Siripongs* (1988) 45 Cal.3d 548, 583 [absence of mitigating factor may not be considered as aggravating factor].) Although the Court has held the re is no sua sponte duty to instruct that the absence of mitigation cannot be considered an aggravating factor (*People v. Livaditis* (1992) 2 Cal.4th 759, 784), appellant respectfully requests the Court reconsider its decision under the facts of this case.

Here, the jury was not only given a list of mitigating factors that did not apply, but the prosecutor in closing noted the absence of mitigation, thereby implying most of the factors that one would might consider in mitigation of the death penalty are absent here and death is therefore warranted. (23 RT 5148.)[33] The prosecutor noted there was no evidence "on quite a few of the factors." (23 RT 5130.) The prosecutor later emphasized that no evidence of "mental defect, duress, or drug abuse" had been presented. (23 RT 5148.) In combination, the instruction on mitigating factors that did not apply, the argument highlighting the absence of these factors, and the failure to instruct the jury that the absence of mitigation is not aggravation likely misled the jury on what is mitigating and what is aggravating. (*People v. Boyd, supra,* 38 Cal.3d 762.)

The failure to instruct violated the Fifth, Sixth, Eighth and Fourteenth Amendments' requirement of heightened reliability in the death determination. (*Ford v. Wainwright, supra,* 477 U.S. 399, 411, 414; *Beck v. Alabama, supra,* 447 U.S. 625, 637.)

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[33] Flores's defense attorney did not object or ask the court to admonish the jury that the absence of mitigation is not aggravation.

C. There Is a Reasonable Possibility the Error Affected the Verdict.

State law error that occurs during the penalty phase is prejudicial when there is a *reasonable possibility* such an error affected a verdict. (*People v. Jackson, supra,* 13 Cal.4th 1164, 1232; *People v. Brown, supra,* 46 Cal.3d 432, 447.) The state reasonable-possibility standard is the same, in substance and effect, as the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California, supra,* 386 U.S. 18, 24. (*People v. Ochoa, supra,* 19 Cal.4th 353, 479.) Thus, the standard of prejudice is the same whether the error is one of state law only, or one of federal scope dimension. (See *Boyde v. California, supra,* 494 U.S. 370, 380 [instructions which create the reasonable likelihood that the jury was prevented from giving mitigating effect to relevant evidence violate the Eighth Amendment].)

It is reasonably likely that the instruction confused and misled the jury. The listing of a number of mitigating requirements that the defendant has not "met" unavoidably leads a juror to conclude that defendant's case for mitigation does not measure up to the standards for life in prison set by law. Given the

closeness of the case, as evidenced by the mitigating evidence presented and the length of the deliberations, it is reasonably likely that this error affected the death verdict. Reversal is required.

XII. California's Death Penalty Statute, as Interpreted by this Court and Applied at Appellant's Trial, Violates the United States Constitution.

A. Summary Of Argument.

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

The Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the United States Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179, n.6; see also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 [while comparative proportionality review is not an essential component

of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].)

Viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, the absence of a particular procedural safeguard, while perhaps not constitutionally fatal in the context of other sentencing schemes, may render California's scheme unconstitutional because it is a safeguard that might otherwise have made California's scheme reliable.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations

have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section essentially makes almost every murderer eligible for the death penalty.

No safeguards in the penalty phase enhance the reliability of the outcome. Jurors make critical factual findings without applying a burden of proof and without agreeing unanimously. Paradoxically, the principle that "death is different" has been stood on its head: protections taken for granted for lesser criminal offenses are suspended when the question is a finding that supports the death penalty. The result is a "wanton and freakish" system that randomly chooses imposes the death penalty upon a few defendants from among the thousands of murderers in California

B. Penal Code Section 190.2 Is Impermissibly Broad.

To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.

(Citations omitted.)" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the *class* of murderers eligible for the death penalty. The requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

However, in California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) The reach of section 190.2 has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now makes almost every murderer eligible for death.

This Court should review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.

C. Penal Code § 190.3, Subdivision (a) As Applied Allows Arbitrary and Capricious Imposition of Death in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Section 190.3, subdivision (a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.

The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime (*People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10), or having had a "hatred of religion" (*People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582), or having threatened witnesses after his arrest (*People v. Hardy* (1992) 2 Cal.4th 86, 204), or having disposed of the victim's body in a manner that precluded its recovery (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35). It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth

Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa*, *supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is

part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

D. California's Death Penalty Statute Contains No Safeguards To Avoid Arbitrary and Capricious Sentencing and Deprives Defendants of the Right to a Jury Determination of Each Factual Prerequisite to a Sentence of Death; it Therefore Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the

mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death.

1. Defendant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to prior criminality, defendant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors

outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this pronouncement has been squarely rejected by the Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Ring v. Arizona* (2002) 536 U.S. 584; *Blakely v. Washington* (2004) 542 U.S. 296. The question is whether the jury must make a factual finding in order to impose the greater punishment of death. If so, then the *Apprendi* principle applies. Because the jury must find at least one aggravating factor to be true before it can impose the death penalty, the right to a jury trial and to proof beyond a reasonable doubt applies.

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other

than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.* at p. 593.) The Court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Id.* at p. 598.) The Court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon

the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 313.)

In reaching this holding, the Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at p. 304; italics in original.)

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People*

v. Fairbank, supra; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors. As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury

must find that aggravating factors substantially outweigh mitigating factors. These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of fact-finding that traditionally has been

incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.)

The Supreme Court explicitly rejected this reasoning in *Cunningham.* In *Cunningham* the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (Id., pp. 6-7.) That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." *(Cunningham, supra*, p. 13.)

In its effort to resist the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same

analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.)

Appellant respectfully submits that this holding is wrong. As section 190, subdivision (a), indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, at p. 6.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to

only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it: "This argument overlooks *Apprendi*'s instruction that 'the relevant inquiry is one not of form, but of effect.' [Citation.] In effect, 'the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict.' *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151." (*Ring*, 530 U.S. at p. 604.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 530 U.S. at 604.) Section 190, subdivision. (a), provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither life without parole nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not

an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 530 U.S. at p. 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 124 S.Ct. at 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite fact-finding in the

penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring*, *supra*, 65 P.3d 915, 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *State v. Ring* (Az. 2003) 65 P.3d 915; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.)

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept

the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

2. The Jury Must Be Instructed That It May Impose A Death Sentence Only If They Find Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors.

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital

cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship, supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship, supra*, [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338 [commitment

as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 [same]; *People v. Thomas* (1977) 19 Cal.3d 630 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard.

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson*, *supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to

death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' " (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

3. California Law Violates the United States Constitution By Failing to Require Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived defendant of his federal due process and Eighth Amendment rights to meaningful

appellate review. (*California v. Brown*, *supra*, 479 U.S. at p. 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d

258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Sturm, supra,* 11 Cal.3d at p. 267.) The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Pen. Code, § 1170, subd.(c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Because providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421) the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

There are no other procedural protections in California's death penalty system that would somehow compensate for the

unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra* [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

4. California's Death Penalty Statute As Interpreted By The California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, Or Disproportionate Impositions Of The Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative

proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51 (emphasis added), the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review*."

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The Supreme Court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris, supra*, 465 U.S. at p. 52, fn. 14.) That number continues to grow, and expansive judicial interpretations of the lying-in-wait special circumstance have made first degree murders that can *not be charged* with a "special circumstance" a rarity.

The greatly expanded list fails to meaningfully narrow the

pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia, supra*. The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions, and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing. Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh, supra*), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro, supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review

now violates the Eighth Amendment.

5. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) bars the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

6. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or

irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death. (*People v. Kraft, supra*, 23 Cal.4th at pp. 1078-1079; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887.) The Court has stated that " 'no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors.' " (*People v. Morrison* (2004) 34 Cal.4th 698, 730, quoting *People v. Arias, supra,* 13 Cal.4th at p. 188.)

E. The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants Which Are Afforded to Non-Capital Defendants.

The United States Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non- capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2

Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

This Court has analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws. (*Bush v. Gore* (2000) 531 U.S. 98.)

To provide greater protection to non-capital defendants than

to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

F. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and Violates the Eighth and Fourteenth Amendments; Imposition of the Death Penalty Now Violates the Eighth and Fourteenth Amendments to the United States Constitution.

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366.) The non-use of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western

Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 (dis. opn. of Field, J.).)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly

disapproved." (*Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227.)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. (See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious

crimes.") Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia*, *supra*, 536 U.S. 304.)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments.

XIII. The Admission of Evidence of a Crime Committed by Flores When He Was a Juvenile as an Aggravating Factor in the Penalty Trial Led to Cruel and Unusual Punishment, and Violated Due Process and the Right to a Reliable Penalty Determination Under the Fourteenth and Eighth Amendments.

Section 190.3, factor (b) provides that in determining whether to impose the death penalty or life without possibility of parole, the trier of fact may take into consideration the "presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (See 6 CT 1485.) Among the acts of violent misconduct admitted against Flores was an alleged brandishing of a firearm that occurred in January 1997, when Flores was 17 years old. (21 RT 4620-24.)[34] The use of criminal conduct committed by a minor to impose the death penalty violates Flores's constitutional rights and such evidence should have been excluded. Consequently, the death judgment violates Flores's rights to be free from cruel and unusual punishment, to due process and to reliable and appropriate penalty determination under the Sixth, Eighth and Fourteenth Amendments of the

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[34] The probation report states Flores was born on December 18, 1979.

United States Constitution and article 1, sections 15 and 17 of the California Constitution. (*Graham v. Florida* (2012) __ U.S. __, 130 S.Ct. 2011; *Roper v. Simmons* (2005)543 U.S. 551; *Johnson v. Mississippi, supra,* 486 U.S. 578, 584; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115-116.)[35]

The Eighth Amendment prohibits the infliction of cruel and unusual punishments. (U.S. Const., 8th Amend.) This amendment guarantees individuals the right not to be subjected to excessive sanctions, a right which "flows from the basic precept of justice that punishment for crime should be graduated and proportioned to the offense." (*Roper v. Simmons, supra*, 543 U.S. at p. 560, quoting *Atkins v. Virginia, supra,* 536 U.S. at p. 311.) "Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force." (*Id* at p. 568, citing *Thompson v. Oklahoma* (1988) 487 U.S. 815, 856 (conc. opn. of O'Connor, J.).) This means the death penalty must be limited to "those offenders who commit a narrow category of the most serious crimes" and

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[35] In prior decisions the Court has rejected this argument. (*People v. Taylor* (2010) 48 Cal.4th 574, 653; *People v. Bramit* (2009) 46 Cal.4th 1221, 1239.) Appellant respectfully requests this Court to reconsider these decisions.

whose "extreme culpability makes them the most deserving of execution." (*Id.*) "This principle is implemented throughout the capital sentencing process" where "[s]tates must give narrow and precise definition to the aggravating factors that can result in a capital sentence." (*Id.*, citing *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-29 [plurality opinion].)

In *Roper v. Simmons, supra*, the United States Supreme Court made clear that, because "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood," it is "the age at which the line for death eligibility ought to rest." (*Id.* at p. 574.)

Roper articulated three reasons why individuals who commit murder while they are under 18 years of age should not, then or later, be made death eligible based upon that offense. First, the Court found that, in persons under age 18, a "lack of maturity and... underdeveloped sense of responsibility...of ten result in impetuous and ill-considered actions and decisions." (*Roper v. Simmons, supra*, 543 U.S. at p. 569 [internal citations omitted].) The Court also recognized that juveniles "are more vulnerable or susceptible to negative influences and outside pressures, including

peer pressure." (Ibid.) Juveniles "have less control... over their own environment [and therefore]... lack the freedom that adults have to extricate themselves from a criminogenic setting." (*Id.*) Additionally, the Court acknowledged that "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." (*Id.* at p. 570.)

In *Graham v. Florida, supra*, the Supreme Court held that the Eighth Amendment prohibits the imposition of a life without parole sentence upon a juvenile offender who has not committed a homicide. In so holding *Graham* makes clear that the holding of *Roper v. Simmons, supra,* 543 U.S. 551, cannot be limited to its facts.

In the wake of *Roper,* California can no longer use juvenile criminal activity as an aggravating factor. When the juvenile crime was committed, the individual was "one whose culpability or blameworthiness [was] diminished, to a substantial degree, by reason of youth and immaturity." (*Roper v. Simmons, supra*, 543 U.S. at p. 571.) When a juvenile crime is resurrected during a future adult criminal proceeding, the circumstances causing the juvenile's diminished culpability and blameworthiness when the

juvenile crime was committed are still present and frozen in time, even though the individual has chronologically aged. Accordingly, appellant's death penalty must be reversed

XIV. The Admission of Victim-Impact Testimony Violated Flores's Rights to Due Process and to a Reliable Penalty Determination under the Fifth, Eighth and Fourteenth Amendments.

The admission of the victim-impact testimony violated Flores's right to due process and a reliable penalty phase decision under the Fifth, Fourteenth and Eighth Amendments and requires reversal. This Court has ratified the admission of a similar sort of victim-impact testimony in prior cases. (See. e.g., *People v. Edwards* (1991) 54 Cal.3d 787, 835 [allowing victim-impact evidence as circumstance of the crime under factor (a) of Pen. Code, § 190.3]; *People v. Brown* (2003) 31 Cal.4th 518, 573 [victim-impact testimony not limited to blood relatives]; *People v. Marks* (2003) 31 Cal.4th 197, 235 [same].) Appellant respectfully requests the Court to reconsider its prior decisions.

The testimony was improperly admitted for several reasons. First, the testimony of a non-family member who was not present at the time of the crime goes beyond the sort of victim-impact testimony permitted by the United States Supreme Court in *Payne v. Tennessee* (1991) 501 U.S. 808, 827.) In *Payne,* a mother and her three-year-old daughter were killed with a knife in the presence of

the mother's two-year-old son, who survived injuries suffered in the attack. The prosecution presented the testimony of the boy's grandmother that he missed his mother and sister, and argued, among other things, that he will never have his "mother there to kiss him at night. His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing a lullaby." (501 U.S. at p. 816.) The Court held there was no Eighth Amendment bar to such testimony and argument. (501 U.S. at p. 827.)

However, the Court warned there are limits to victim impact evidence. The court held it would violate due process to introduce victim impact evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair . . . ." (501 U.S. at p. 825.) *Payne* is further limited by its facts. There, the evidence described the impact of a crime on a family member who was personally present during, and immediately affected by, the homicides. The testimony here went beyond this limit.

Second, in California the admission of victim-impact testimony is permitted only to the extent it is related to the "circumstances of the crime" under factor (a) of Penal Code section 190.3. (*People v. Edwards, supra,* 54 Cal.3d 787, 835-836.)

However, the "circumstances of the crime" should be understood "to mean those facts or circumstances either known to the defendant when he or she committed the capital crime or properly adduced in proof of the charges adjudicated at the guilt phase." (*People v. Fierro* (1991) 1 Cal.4th 173, 264 (conc. and dis. opn. Kennard, J.).) Although *Payne* held that the Eighth Amendment does not render victim-impact evidence inadmissible *per se*, the Court did not retreat from its holding in *South Carolina v. Gathers* (1989) 490 U.S. 805 that the term "circumstances of the crime" does not include personal characteristics of the victim that were unknown to the defendant at the time of the crime. (*Id.* at pp. 811-812.) Here, the testimony regarding the victims' personal characteristics, including their relationship to friends and family, were all facts that were unknown to defendant at the time of the crime.

Third, the lack of any express statutory authorization for the admission of victim-impact evidence, or a description of the types and limits of admissible evidence, raises federal constitutional concerns about the vagueness and the arbitrary application of Penal Code section 190.3. The "circumstances of the crime" aggravating factor has been held to be not unconstitutionally vague

or over broad, but judicial interpretations that permit this broad language to include victim-impact evidence raise serious questions about the continued constitutionality of factor (a) of Penal Code section 190.3. (See *People v. Boyette* (2002) 29 Cal.4th 381, 443 (allowing victim-impact evidence under § 190.3 does not make factor (a) unconstitutionally vague).)

The error is reversible. The erroneous admission of prejudicial or inflammatory victim-impact evidence is the sort of evidentiary error that rises to the level of an Eighth Amendment and due process violation. (*Payne v. Tennessee, supra,* 501 U.S. at p. 825; *Estelle v. McGuire, supra,* 502 U.S. 62, 75 (Due Process Clause is violated when evidentiary error "infuse[s] the trial with unfairness as to deny due process of law").) As previously noted and argued in this brief, the penalty phase case was extremely close. The jury deliberations were lengthy and there was significant mitigation evidence presented. Victim-impact evidence is especially emotional and evocative, and the erroneous admission of such testimony in this case cannot be deemed harmless.

XV. The Death Penalty Is Cruel and Unusual Punishment Proscribed by the Eighth Amendment.

Before trial, Flores moved to bar the imposition of the death penalty in this case on the ground the penalty violates due process and equal protection under the Fourteenth Amendment and the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution and the counterparts under the California Constitution. (2 CT 529; see *Gregg v. Georgia* (1975) 428 U.S. 153, 227-231 [the infliction of the death penalty is cruel and unusual punishment in all cases][dis. opn. of Brennan, J.], & 231-241 [dis. opn. of Marshall, J.].)

Flores renews this argument here and respectfully requests the Court to reconsider its prior decisions rejecting this argument.

XVI. The Cumulative Effect of the Errors at Trial Violated Appellant's Rights to Due Process and to a Reliable Guilt and Penalty Determination Under the Fourteenth and Eighth Amendments.

Even if any one of the errors described above was not by itself cause for reversal, the cumulative effect of the errors, in any combination, created a trial that was fundamentally unfair and denied Flores due process and a reliable guilty and penalty phase determination under the Fourteenth and Eighth Amendments to the United States Constitution. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 289-290, fn.3; *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, and fn. 15; *People v. Holt* (1984) 37 Cal.3d 436, 459 (holding cumulative effect of multiple errors resulted in miscarriage of justice, requiring reversal under California Constitution); *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622 [holding cumulative prejudice required reversal of judgment]; *Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, fn. 6 [holding cumulative errors may result in unfair trial in violation of due process].)

"Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may

cumulatively produce a trial setting that is fundamentally unfair." (*Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 963; *People v. Hill, supra*, 17 Cal.4th at p. 844 ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"].) In such cases, "a balkanized, issue-by-issue harmless error review is far less effective than analyzing the overall effect of the errors in the context of the evidence introduced at trial against the defendant." (*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381.)

Here, appellant has identified numerous egregious errors that occurred during the guilt and penalty phases of his trial. First, significant missing facts and holes in the evidence make it unclear what really happened in the case and undermine confidence in the verdicts. The evidence was insufficient to convict Flores of the Ayala and Van Kleef murders, requiring reversal of these two murder convictions and the penalty verdict based on the multiple murder special circumstance. Even assuming, arguendo, that the evidence of the Ayala and Van Kleef murders was sufficient, the weak state of the evidence against Flores provides a backdrop against which all the other errors must be judged.

A lack of chain of custody evidence with respect to the purported murder weapon led to speculative, prejudicial and unreliable evidence connecting Flores to that weapon. The violation of the Mutual Legal Assistance Treaty with Mexico led to unreliable evidence gathering and the destruction of critical evidence. This undermines confidence in the verdict.

Moreover, the forensic testimony connecting the evidence at the Torres and Ayala crime scenes was inconsistent and weak. The prosecution's firearms expert, Kerri Heward, testified that the Jennings 9 mm is"not a real top of the line quality handgun" and that it "doesn't leave really good reproducible marks like a more expensive gun would." (17 RT 3468.) Heward explained that bullets from the same manufacturer matched more closely than bullets from different manufacturers: "It makes a difference what gun you use and what type of ammunition. You want what most closely resembles what was used in the crime." (17 RT 3454.) Strangely, however, in this case Heward did not use the same brand of ammunition as that found at the scene in her comparison. The spent cartridges recovered from the Torres scene were all Remington and Peters; the cartridges at the Ayala scene were PMC

and Remington and Peters. (17 RT 3466.) Despite this, Heward professed certainty that the Jennings 9 mm was the gun used in the Torres and Ayala homicides. (17 RT 3468.) She also said, "I was able to determine that all of these cartridge cases submitted came from this firearm." (17 RT 3430.) Further, she claimed that she "identified" one of the bullets from the Ayala scene to the Jennings pistol. (17 RT 3431.) However, she said the other bullets from the Torres and Ayala scenes were "somewhat damaged" and she was unable to make a "positive" identification, although the bullets had the same "class characteristics" as the test bullets.(17 RT 3430, 3432.)

In addition to the insufficient, weak, inconsistent and incomplete evidence in this case, the prosecutor bolstered his case by a variety of impermissibly suggestive and inflammatory evidence that could not be confronted or rebutted. These multiple errors and their synergistic impact had the effect of making Flores appear guilty in the eyes of the jury.

The improperly admitted and inflammatory gang evidence, which was the only evidence holding together the prosecution's theory of motive and the only evidence connecting all three crimes,

significantly prejudiced Flores's case. As with the insufficient evidence of the Ayala and Van Kleef murders, the improper gang evidence infected the entire case with prejudice and provides another backdrop against which all the other errors must be judged.

In addition, the insidious prosecutorial misconduct in both the guilt and penalty trials violated Flores's state and federal constitutional rights and led to an unfair trial and unjust verdicts. Without the inadmissible hearsay evidence from Maria Jackson that Miranda identified a photograph of Flores as "the man who was here," there was no evidence connecting Flores to the murder weapon. That Miranda was unavailable for cross-examination, and the bad faith destruction of potentially exculpatory evidence made it impossible for Flores to refute the prejudicial inadmissible hearsay evidence elicited by the prosecutor's misconduct. The prejudice to Flores was amplified by the prosecutor's introduction of the inadmissible evidence as substantive evidence during opening and closing statements. (9 RT 1818; 20 RT 4337.) The penalty phase prosecutorial misconduct in soliciting testimony that Flores killed Jaimes was equally prejudicial. Finally, the trial

court's error in failing to suppress Flores's improperly obtained confession to the Mark Jaimes killing undermines any remaining confidence in the penalty verdict.

This series of errors, even if independently harmless, cumulatively rose to the level of reversible and prejudicial error. (See *People v. Hill, supra,* 17 Cal.4th at p. 844.) The cumulative effect of the errors here deprived appellant of due process, a fair trial, the right to confrontation, and the right to reliable guilt and penalty determinations in violation of appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments and cannot be shown to be harmless beyond a reasonable doubt.

Conclusion

For the reasons stated above, the judgment must be reversed.

Date:

Respectfully submitted,

____

Robert Derham

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Word Count Certificate

The appellant's opening brief contains 56,060 words, within the limit set forth in rule 8.630(b) of the California Rules of Court.

____

Robert Derham

CERTIFICATE OF SERVICE

I, Robert Derham, am over 18 years of age. My business address is 769 Center Boulevard #175, Fairfax, CA 94930. I am not a party to this action. On June ______, 2012, I served the **Appellant's Opening Brief** upon the parties and persons listed below by depositing a true copy in a United States mailbox in San Anselmo, CA, in a sealed envelope, postage prepaid, and addressed as follows:

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