SUPREME COURT NO. S129501

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

JULIAN ALEJANDRO MENDEZ,

Defendant and Appellant.

Superior Court
No. RIF090811

APPEAL FROM THE SUPERIOR COURT OF RIVERSIDE COUNTY

Honorable Edward D. Webster, Judge

APPELLANT'S OPENING BRIEF

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By appointment of the Supreme Court
on automatic appeal

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TABLE OF CONTENTS

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/ / /

///
///

TABLE OF AUTHORITIES

CASES **PAGE(S)**

///

CONSTITUTIONS

United States Constitution

California Constitution

STATUTES

Evidence Code

Health and Safety Code

Penal Code

JURY INSTRUCTIONS

CALCRIM

CALJIC

OTHER

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INTRODUCTION

Appellant, a member of a criminal street gang called Northside Colton, was sentenced to death following his conviction of two murders. The first victim was purportedly shot because he issued a gang challenge in Northside Colton territory, the second because she witnessed the first killing. At all times the prosecution insisted appellant, who was tried with two (non-capital) codefendants, personally committed these killings, although the prosecution's central dilemma was that most of the evidence

against appellant was provided courtesy of a veracity-impaired accomplice named Samuel Redmond, who testified after arranging a plea bargain to save himself from the fate he found it expedient to ensure would be appellant's.

In this appeal, appellant will demonstrate he was convicted of the first murder on legally insufficient evidence. There are reasons to believe one of the other codefendants on trial committed it, and there are compelling reasons to believe Redmond committed the second murder. Appellant was convicted of both offenses largely because of irrelevant, unreliable, and prejudicial gang evidence, evidence that had nothing to do with the offenses for which he was tried but everything to do with frightening the jury into convicting him for his affiliation with Northside Colton and the gangster life in general. Much of this irrelevant, unreliable, and prejudicial gang evidence furthermore consisted of testimonial hearsay in violation of the Sixth Amendment to the United States Constitution.

Additional constitutional violations occurred when the trial court allowed through the back door what it had barred from the front: statements of one of the nontestifying codefendants implicating appellant in violation of appellant's Sixth Amendment right to confront the witnesses against him, and an admission by appellant to the police he was near the second victim

when Redmond shot her which had been made following appellant's repeated request for counsel in violation of the Fifth Amendment.

Appellant will further demonstrate other evidentiary and instructional errors resulted in a fundamentally unfair guilt phase trial.

During the penalty phase, instructional error left the jury free to consider numerous factual and legal misstatements by the prosecutor as substantive evidence when deliberating whether to kill appellant Julian Mendez, and extensive victim impact evidence further ensured the jury's deliberations would be emotionally-charged but legally standardless.

STATEMENT OF THE CASE

On August 11, 2000, a felony complaint in case RIF092861 was filed in the Riverside Superior Court charging appellant Julian Mendez with two counts of murder with premeditation and deliberation. (Cal. Pen. Code, § 187.)[1] The following allegations attended count one, the murder of Michael Faria:

° Multiple murder special circumstance. (§ 190.2, subd. (a)(3).)

° Principal armed with handgun enhancement. (§ 12022, subd. (a)(1).)

° Crime committed for benefit of gang enhancement.[2] (§ 186.22, subd. (b)(1).)

° Personal firearm use resulting in death or great bodily injury enhancement. (§ 12022.53, subds. (d) & (e).)[3]

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

[2]The offense predated the March 8, 2000 enactment of the gang murder special circumstance in Penal Code section 190.2, subdivision (a)(22).

[3]Section 12022.53, subdivisions (d) and (e) were alleged as a single enhancement, though submitted to the jury as separate enhancements upon which separate findings were made. (8 CT 2233-2234, 2238-2239.) Section 12022.53, subdivision (e) extends the firearm enhancement to any principal also violating section 186.22, subdivision (b), thus obviating the personal use requirement of section 12022.53, subdivision (d).

The same allegations attended count two, the murder of Jessica Salazar, with the following additions:

° Witness murder special circumstance. (§ 190.2, subd. (a)(10).)

° Kidnap murder special circumstance. (§ 190.2, subd. (a)(17.) (1 CT 1-2.)

Appellant was arraigned on August 25, 2000, represented by attorney Michael Belter of the Criminal Defense Panel. (1 CT 7.) Attorney Belter indicated the prosecution would seek the death penalty against appellant Mendez, though formal notice thereof had not yet been filed. (1 RT 4-5.)

The preliminary hearing was held on January 22, 2001. Appellant was held to answer on all charges and allegations. (1 CT 15; 1 RT 64.) An information containing the same charges and allegations as those contained in the complaint was filed on February 5, 2001; again appellant was the only named defendant. (1 CT 20-22.)

On February 9, 2001, a prosecution motion to consolidate several defendants pursuant to Penal Code section 1098 was heard and granted. Case RIF092861 was thereafter consolidated into case RIF090811 for all further proceedings. (1 CT 25; see also 1 CT 16-20 [written prosecution motion].)

On April 20, 2001, a second amended information[4] was filed against appellant, Samuel Redmond, Daniel Lopez, Joe Rodriguez, and Jess Vargas, alleging the same charges and allegations as those contained in the complaint and information in case RIF092861. (1 CT 29-32.) At the arraignment on that date, the prosecution stated it would be seeking the death penalty against appellant and defendant Samuel Redmond, stated the prosecution was "not taking a formal position" on the death penalty as to defendants Lopez and Rodriguez, and stated the death penalty was not sought against Vargas. (1 CT 28; 1 RT 266-267.) Written notice of the prosecution's intention to seek the death penalty against appellant was filed on April 25. (1 CT 33-35.)

On October 25, 2002, appellant filed a motion to suppress appellant's out-of-court statement made on April 8, 2000[5] on the ground it was involuntarily made (1 CT 48-59), and a motion for separate trials or, in the alternative, separate juries on *Aranda-Bruton*[6] grounds, specifically because of statements made by codefendants Joe Rodriguez and Samuel

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[4]This was the second amended information in RIF090811, but technically the first as to appellant.

[5]The motion was later expanded to include a statement made on February 24, 2000. (2 RT 148, 250.)

[6]*People v. Aranda* (1965) 63 Cal.2d 518: *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620; 20 L.Ed.2d 476].

Redmond (1 CT 60-67). The motion for separate trials or separate juries was refiled with minor modifications on February 24, 2004, this time specifying statements made by Joe Rodriguez.[7] (1 CT 117-133.) Various other motions were also filed on February 24 (1 CT 134-199), among them a motion to exclude victim impact evidence (1 CT 140-160).

On June 24, 2004, the court ruled separate juries would hear the case against appellant and the case against Joe Rodriguez and Daniel Lopez.[8] (1 CT 264.) On July 15, 2004, the prosecution indicated it would not seek to introduce the tape of appellant's statement to the police, thus rendering moot--at least for the time being[9]--appellant's motion to suppress the statement. (4 CT 995.)

The jury was sworn on July 27, and opening statements were made the same day. (7 CT 2029.) On August 26, the prosecutor withdrew and the court struck the kidnap special circumstance attending count 2.[10] (22 RT 2760.) Guilt phase deliberations began on August 31. (7 CT 2099-

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[7]By then the prosecution had withdrawn the threat of the death penalty against Redmond in exchange for his guilty pleas to the murders and promise to testify. (Exhibit 31.)

[8]The case against Jess Vargas was apparently dismissed and refiled in San Bernardino County. (1 RT 280.)

[9]See arguments IV and V, *post*.

[10]*Ario v. Superior Court* (1981) 124 Cal.App.3d 285, 289.

2100.) On September 8, the jury found appellant guilty of first degree murder in counts 1 and 2.[11] (8 CT 2232, 2237.) As to count 1, true findings were also returned as to the 12022.53, subdivision (d) enhancement; 12022.53, subdivision (e); and 186.22, subdivision (b)(1) enhancement. (8 CT 2233-2234, 2236) As to count 2, true findings were returned as to these three enhancements in addition to the witness-murder special circumstance under section 190.2, subdivision (a)(10). (8 CT 2238-2240, 2242.) A multiple murder special circumstance pursuant to section 190.2, subdivision (a)(3) was also found true.[12] (8 CT 2235, 2241.)

Testimony in the penalty phase began on September 20. (8 CT 2261.) Penalty phase deliberations began on September 22. (8 CT 2273.) On September 24, the jury returned death verdicts on both counts. (8 CT 2299.) On November 19, after denying appellant's motion to modify the death sentence, the court imposed concurrent death sentences as to counts 1 and 2. (8 CT 2312-2313, 2335-2336.) The court neglected to orally impose

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[11]The other jury found Rodriguez guilty on count two (victim Jessica Salazar) but hung on count one (victim Michael Faria); it acquitted Lopez on count one but hung on count two. ‹http://public-access.riverside.courts.ca.gov›, under case RIF090811 and names of Daniel Lopez/Joe Rodriguez.

[12]These appear to be duplicates; i.e., a single multiple murder finding was made.

sentence on the enhancements,[13] but the minute order states "Order for enhancements made off the record and to be made part of the record at date of correction hearing." (8 CT 2314.) The minute order and abstract of judgment reflect two consecutive 25 year to life sentences for the section 12022.53, subdivision (d) enhancements attending both counts, and two consecutive 3 year midterms for the section 186.22, subdivision (b)(1) enhancements. (8 CT 2313-2314, 2337-2338.)

This appeal is automatic under section 1239, subdivision (b).

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[13]See argument XIV, *post*.

STATEMENT OF THE FACTS

THE GUILT PHASE

Introduction

The prosecution's preferred narrative went something like this: One evening, a group of hapless teenagers including the two victims, 15-year-old Michael Faria and 14-year-old Jessica Salazar, was walking down the street near the epicenter of a notorious criminal street gang, Northside Colton. Following a brief but initially peaceful interaction between this group and Northside members--which included appellant and codefendants Joe Rodriguez and Daniel Luna--an altercation ensued between the gang and Michael Faria, after Faria said something stupid that led the Northside members to believe he was affiliated with Northside's mortal enemy, Westside Verdugo. This perception resulted in the Northside members chasing the group and appellant shooting Faria to death.

The Northside Colton members, the prosecution's preferred narrative continued, then coaxed a distraught and intoxicated Jessica Salazar into a sports utility vehicle and took her for the proverbial ride. During a stop at a gas station, appellant told the others the still-clueless Salazar had to die because she had witnessed Faria's killing. The group drove Salazar to a remote location, where she was removed from the SUV and shot in the head

by appellant.

This fanciful narrative was, however, largely provided courtesy of the driver of that sports utility vehicle, an admitted murderer and snitch named Samuel Redmond. Redmond steadfastly denied he was a Northside Colton member despite abundant evidence to the contrary, steadfastly denied he had anything to do with Faria's death, and claimed he did not kill Jessica Salazar but only held her right before she was shot not to control but to comfort her. Despite these averments, Redmond nevertheless pled guilty to both Faria's and Salazar's murders, admitted the attendant special circumstances, and agreed to testify against appellant to himself avoid the death penalty.

One of Faria's friends was 75% sure codefendant Joe Rodriguez was the one who shot Michael Faria, an identification suggesting a tall person shot him. Rodriguez and Redmond are both 5'11", whereas appellant, whose nickname is "Midget," is only 5'5". In addition, there is compelling evidence Redmond himself shot Jessica Salazar and then commemorated the event by obtaining a tattoo of a devil--"Devil" or "Diablo" was Redmond's gang nickname--holding a woman. That two different guns were used further reflects the likelihood of two different shooters.

The following consists of prosecution evidence only; there was no

defense evidence presented during the guilt phase.

The Backdrop: Northside Colton

All three codefendants stipulated that Northside Colton was a criminal street gang within the meaning of Penal Code Section 186.22, subdivision (b), and that all three were members of the gang. (14 RT 1767-1768.) Despite this stipulation, the prosecution was allowed to present extensive testimony by a police gang expert based on both double and testimonial hearsay.[13]

Northside[14] Colton, or "NSC," a Hispanic street gang, is "one of [the] most active gangs" in the city of Colton. (14 RT 1772-1773, 1777.) Northside Colton's territory is the north side of Colton, which it shares a small part of with an allied gang, Eastside Colton. (14 RT 1773, 1787.) Westside Verdugo, another Hispanic street gang, is "particularly active on the west side of San Bernardino." (14 RT 1773.) The gang expert opined there was a "well-known hatred" between Westside Verdugo and Northside Colton because of "numerous incidents"[15] over the years. (14 RT 1821.) This rivalry purportedly explained the events that occurred the night the two

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[13]See argument III, *post*.

[14]The transcripts variously employ "Northside" and "North Side."

[15]These incidents will be detailed in arguments II and III.

victims were shot.

Count One (Victim Michael Faria)

Sam Redmond's Friday Night

On Friday, February 4, 2000, Samuel Redmond, whose sister was married to appellant's brother Manny Mendez, lived in a Colton apartment with appellant. (7 RT 1001, 1005-1006.) Redmond, who worked in landfill maintenance for the city of Redlands, got off work around 3:00 p.m. and followed his "normal routine" for a Friday night, which was "get ready to party." (7 RT 1009.) Around 20 minutes after Redmond got home, appellant (a.k.a. "Midget") arrived with Daniel Lopez (a.k.a. "Huero"), and the three smoked around 1/4 gram of methamphetamine. (7 RT 1018, 1020, 9 RT 1237.) Redmond, who had already consumed two 24-ounce cans of Budweiser on the way home from work, drank more beer at the apartment, and thinks appellant might have drunk a 24-ounce beer. (7 RT 1020, 9 RT 1237-1238.) The methamphetamine smoking continued "through the whole day, the whole night, morning, different times." (7 RT 1010.)

Around 6:00 p.m., the three left in Redmond's black Nissan Pathfinder, with Redmond driving, to look for girls. (7 RT 1005, 1021-1023.) They purchased an additional 18 pack of beer and ended up at a

hangout spot, the Four Seasons apartments,[16] where they smoked more speed. (7 RT 1022-1023.) At the Four Seasons they met up with Joe Rodriguez (a.k.a. "Gato"), who was drunk. (7 RT 1024-1026.) Rodriguez left with them and eventually got a page from the house of a Northside Colton member named "Lazy." (7 RT 1026-1027, 1030-1031.) "Lazy" was the brother of Art Luna, whose nickname was "Rascal." (7 RT 1032.) The group headed for the Luna residence on Michigan Street in Colton. (7 RT 1031.)

A subset of Northside Colton is known as the "bloque," which consists of the older or founding gang members from the area where NSC started out. (14 RT 1774.) The Luna residence at 1890 Michigan Street was considered part of the "bloque." (14 RT 1801.)

The Shooting of Michael Faria: Testimony of Sergio Lizarraga and David Flores

That same night, a group of friends had gathered at Sergio Lizarraga's house on Michigan Street. The group included Lizarraga, Michael Faria, Jessica Salazar, Greg Frias, and David Flores.[17] (11 RT

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[16]According to the gang expert, the allied gangs Northside and Eastside Colton have claimed the Four Seasons apartments "at one time or another." (14 RT 1808-1809.)

[17]Flores was no longer Lizarraga's friend by the time of the trial. (11 RT 1483, 1577.)

1482, 1486.) Faria and Salazar had kissed a couple of times but they were not boyfriend and girlfriend. (11 RT 1495.) According to Lizarraga, who was "on probation together" with Faria,[18] Faria was not a gang member. (11 RT 1498) According to David Flores, however, Faria was a member of a gang that claimed the west side, though Flores could not recall whether that gang was Westside Verdugo. (7 RT 919-920.) Flores himself denied Westside Verdugo membership while admitting his juvenile file stated he was a member. (7 RT 892, 919.)

Lizarraga, 17 at the time, drove to a liquor store with Greg Frias and found someone to purchase a case of beer for them. (11 RT 1484-1485.) The group drank beer and played cards for around an hour, at which time Lizarraga's mother came home and kicked them out for drinking. (11 RT 1486-1487.) They "grabbed the radio, the beer, the cards, some sandwiches and stuff" and headed for a baseball field next to a nearby school to continue the party. (11 RT 1487-1488.) Lizarraga had maybe one or two beers, and though he knew Flores at one time had done a lot of drugs, he did not see anyone in his group using other drugs that night. (11 RT 1567, 1577.) Flores admitted he drank enough that night to be stumbling, and was

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[18]Lizarraga was on probation for taking and wrecking his stepfather's car. (11 RT 1498-1499.) The record does not indicate why Faria was on probation.

"a little too drunk . . . to remember a lot of stuff." (6 RT 821, 837, 844.)

As they walked down Michigan Street, a black SUV passed them. (11 RT 1488-1489.) Lizarraga did not see Faria make any hand gestures as the SUV passed. (11 RT 1578.) The SUV parked and the driver walked across the street to a house at 1820 Michigan. (11 RT 1489.) Lizarraga did not know who lived there, and while he knew gang members "were around" the neighborhood, he did not know any of them. (11 RT 1492.) At some point Jessica Salazar ran ahead and urinated near a brick wall on the side of a house; Lizarraga and Flores, talking, fell behind the others. (11 RT 1493.)

When Lizarraga and Flores caught up, two guys who had been in the SUV were talking to Salazar, with Faria and Frias standing to the side. (11 RT 1494.) The guys from the SUV, all of whom were Hispanic, looked like gang-bangers: "Just the mentality. Shaved head, white shirt, [creased]-up jeans. Certain types of shoes. Stuff like that." (11 RT 1497-1498, 1501.) Lizarraga was aware that Salazar, who attended continuation school, hung around with gang members, but he did not know if they were from a particular gang. (11 RT 1544-1545.) Lizarraga said "let's go" to Salazar and she started walking away, but one of the guys from the SUV said, "I think I know you," and she went back. (11 RT 1494, 1496.) Faria seemed a little jealous when the guy was talking to Salazar. (6 RT 857.)

Lizarraga again said, "Come on, let's go," at which point the person he assumed was the SUV driver returned from the house and Faria asked him, "Where you from?" The assumed driver asked Faria where he was from, and, "Michael said he backs up the West." (11 RT 1499.) Lizarraga, who had heard of a gang called Westside Verdugo, said Faria meant, "He backs up West like a gang or some crap like that--or something like that." (11 RT 1499-1500.) In response, the assumed SUV driver said, "Fuck the Westside.[19] Northside Colton." (11 RT 1501.)

Faria tried handing Lizarraga the gym bag he was carrying, but Lizarraga refused to take it and said, "Chill out. Be cool. Turn around, walk away." (11 RT 1502.) At some point the assumed driver threw a beer can at the brick wall behind them. (11 RT 1502, 1530.) When Faria placed the gym bag on the ground and approached the driver, Lizarraga said to the driver, "Be cool. It's cool. It's cool. Don't want no trouble." (11 RT 1503.) The driver then threw "a really hard punch" which caused Lizarraga to reel; Lizarraga continued to tell the driver he did not want any trouble, and again told Faria to "Just chill out." (11 RT 1504-1501.) Lizarraga was, however, "pretty sure" the guy who hit him was not Sam Redmond. (11 RT

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[19]The SUV driver might have said, "Fuck the West. Northside Colton." (11 RT 1501.)

1521.) He also stated he could no longer remember any faces from that night, but at a live lineup in March 2000, he had identified Joe Rodriguez as someone present. (11 RT 1534-1535, 1537.)

According to David Flores, after the initial confrontation between Faria and the guy from the SUV, Faria and the guy ended up shaking hands: "They were buddy buddy. And then, I don't know, I guess they got extra help or something, got all brave and shit." (6 RT 832.) This "extra help" arrived in the form of a red car that discharged five people. (6 RT 835.) At that point, according to Flores, the guy who had confronted Faria "got pumped up by his home boys" and "started like set tripping[20] or something." (6 RT 836-837.)

Lizarraga said Faria turned and started to walk away. Lizarraga saw that Flores, who was being chased, was running toward the baseball field and was going to get away. (11 RT 1505.) Two people were chasing Flores, and Lizarraga could not tell whether they were from the SUV. (11 RT 1508-1509.) The next thing Lizarraga remembers is Faria being jumped, and when Lizarraga ran to him, some guy grabbed Lizarraga's shirt

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[20]Despite the fairly obvious implication of the term, Flores was evasive as to the meaning of "set tripping." Flores agreed a "set" sometimes referred to a gang, but said the phrase was "[n]ot necessarily" associated with gangs. (6 RT 836, 838.) Flores agreed with the statement "tripping" can "mean acting crazy or acting the fool." (6 RT 837.)

and Salazar said to him, "No, he's cool. He's not from the West,"[21] whereupon the guy let go of him and Lizarraga continued toward Faria. (11 RT 1509.) Lizarraga told a detective in 2000 he was certain Joe Rodriguez ran toward the spot where Faria was getting beat up. (11 RT 1538.)

Lizarraga saw Faria lying on the ground getting kicked by six to eight people. (11 RT 1511.) As Lizarraga ran towards him to help, he heard three gunshots. (11 RT 1512-1513.) Upon hearing the shots, everyone started running, and Lizarraga ended up hiding behind a car with Greg Frias. (11 RT 1517.) David Flores, also hiding behind a car, saw a red car with five or six guys in it cruising slowly around about the time he heard the gunshots. (6 RT 863.) After asking some neighbors to call the police because someone had been shot, Lizarraga went over to an unconscious Faria. (11 RT 1518.) He knew Faria was breathing because he was "snoring really loud," and he stayed with him until the ambulance took Faria away. (11 RT 1519.)

Lizarraga told the police he was 75% sure it was Rodriguez who shot Faria as he lay on the ground. (11 RT 1543-1544.) Given this fact, it is worth noting Rodriguez is 5'11" (11 RT 1611), whereas appellant (a.k.a.

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[21]That Salazar made this statement about Lizarraga--but not Faria--tends to indicate she believed Faria was "from the West."

"Midget") is only 5'5" (8 CT 2322), suggesting Lizarraga saw a tall person shoot Faria. Redmond is also 5'11". (Exhibit S [Redmond field interrogation card].)

The Shooting of Michael Faria: Sam Redmond's Version and Denial of Involvement

Redmond denied any involvement in the altercation or shooting--this despite the fact he pled guilty to Faria's murder. According to Redmond, who was 22 at the time, while en route to the Luna residence they had seen a "group of youngsters" walking on the street, and Redmond parked the SUV across the street from the Luna residence. They "started talking to the youngsters" because Rodriguez knew Jessica Salazar, and while they were talking, "Rascal and a carload of youngsters," six or seven people including two of Joe Rodriguez's younger brothers, "Lil' Eddie" and Rudy, also pulled up to the Luna residence. (7 RT 1033-1034; 8 RT 1053-1054.) Redmond said he walked across the street to talk to Rascal and the others, and was soon joined by Daniel Lopez. (8 RT 1055.) While Redmond was at Rascal's car with Lopez, the people across the street began arguing and fighting. (8 RT 1057-1058.) There were "a lot of people," and because he did not know everyone who had been in Luna's car, he could not tell "who was the victim's group and who was in the car." (8 RT 1059.)

According to Redmond, appellant and Joe Rodriguez chased after the

Faria group, whereas Redmond stayed at the car and told Rascal and Lopez to "let the youngsters fight that out." (8 RT 1061.) At that point, however, Lil' Eddie retrieved a gun from the Luna residence and handed it to Rascal. (8 RT 1062.) The gun was either a .380 or 9 millimeter handgun. (8 RT 1065.) Rascal, Lopez and Lil' Eddie walked quickly away toward the fleeing Faria group but Lopez turned around and said, "Let's go get Midget." (8 RT 1062-1063, 1065, 1067.)

Redmond and Lopez ran to the SUV and drove until they saw appellant and Joe Rodriguez running back in their direction. Appellant had a gun in his hand. (8 RT 1069.) The gun appeared to be a "[p]retty small" semiautomatic, but Redmond could not tell whether it was the same gun Lil' Eddie had handed to Rascal. (8 RT 1069-1070.) In fact, Redmond had previously told detectives the gun Rascal had was a bit larger than the one appellant had. (10 RT 1279.) In any event, appellant and Joe Rodriguez got into the SUV. (8 RT 1069.)

Also in the vicinity was Jessica Salazar, who was "going hysterical on the sidewalk and not knowing where to go." (8 RT 1070.) Salazar "was just crying, and then it was like she was out of it"; she was "in a confused state, and, like, lost." (8 RT 1071-1072.) Appellant told Joe Rodriguez, who knew Salazar, to tell her to get in the car; she got in the back seat.

Redmond asked appellant where he wanted to go, and appellant said "just drive." Redmond, who denied knowing anyone had been shot at that point, said he told appellant he would drop everyone off at the Four Seasons and then leave. (8 RT 1075.)

Forensics

A forensic pathologist said that though only 15 at the time of his death, Michael Faria, who was 5'10 1/2" and 194 pounds, appeared to be 18 or 19 years old. (11 RT 1586.) He had a blood alcohol content of .08 (11 RT 1605), and survived for 12 to 14 hours following his arrival at the hospital (11 RT 1584). His body exhibited five gunshot wounds (11 RT 1588); as detailed below, four of them were entrance wounds. The shots were fired from an "indeterminate range," meaning the barrel of the gun was at least two feet away from the victim when the gun was fired; and while there were "a lot of hypothetical possibilities," the gunshot wounds were consistent with the victim's being on the ground and the shooter's standing over him. (11 RT 1590, 1593-1594, 1600-1601.) One shot was to the back of the head, with the bullet striking the inside of the skull and bouncing back into the brain; one bullet passed through the left lung and the diaphragm before bruising the heart and passing through the liver; one shot was to the right forearm; and one shot was to the back of the left hand,

which also left an exit wound. (11 RT 1592, 1594-1596, 1598.) The gunshot wounds to the head and abdomen were the cause of death. (11 RT 1602.)

Three .22 shell casings and a Budweiser Millenium 2000 beer can were recovered from the crime scene. (6 RT 805.) Faria had been killed by a .22 firearm. (20 RT 2444.)

Count Two (Victim Jessica Salazar)

Sam Redmond Drives Jessica Salazar to the Location Where She Is Shot

Once at the Four Seasons, Redmond told everyone to get out of the car because he was leaving: "I was going to go to my girlfriend's house where I should have been." The maroon car Art Luna had arrived in at the Michigan Street residence was there, and while Redmond did not see Luna at the Four Seasons, he did see the "youngsters" who had been at Michigan Street. Redmond told appellant that Jessie,[22] who was now driving the maroon car, could take appellant wherever he wanted to go, but appellant "said no, you've got to drive." (8 RT 1076.) Appellant told the maroon car group to go to his apartment because they needed to talk, and said he would

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[22]"Jessie" is presumably Jess Vargas, initially named as a codefendant in the second amended information. (1 CT 29-32.) The case against Vargas appears to have been dismissed and refiled in San Bernardino County. (1 RT 280.)

be there in a little bit. (8 RT 1077.)

Redmond testified appellant told him to get on the freeway and drive, without indicating where. (8 RT 1077.) During the drive, Salazar was "[l]ike . . going nuts, She keeps crying and saying 'Why did you do that? Why did you do that? And kept crying over and over like she was hysterical." (8 RT 1078.) They did not drive far before Redmond said he needed gas, and appellant said he had money and would pay for it. (8 RT 1077.)

They stopped at a gas station in Riverside County,[23] though Redmond indicated, "All this gas station part is, kind of, foggy to me. I don't recall too much about the gas station part." (8 RT 1078, 1091.) At the gas station Salazar was upset but not hysterical; she was "sniveling," which Redmond defined as "[l]ike crying." (8 RT 1079-1080.) Redmond went to the restroom, and thinks someone--"I'm not sure which one, who it was"--was coming out while he was going in. Redmond was also "pretty sure I think I remember" a conversation that took place in the restroom between appellant and either Gato or Huero. (8 RT 1080-1081.) No one was guarding Salazar when they were in the bathroom, though Redmond

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[23]Meaning they had left San Bernardino County, where Colton is located.

thinks someone was pumping gas at the time. (8 RT 1089.)

According to Redmond, in the restroom appellant said, "She's gotta die." (8 RT 1081.) Redmond did not remember whether anyone, himself included, responded. (8 RT 1083.) They got back into the car and began "just driving" around. (8 RT 1083-1084.) Redmond was driving, Huero was in the front passenger seat, Gato was seated behind Redmond, appellant was seated behind Huero, and Salazar was seated between appellant and Huero. (8 RT 1104.) Redmond, who continued drinking and "was getting pretty drunk," thought Salazar was going to die. (8 RT 1084.)

Redmond drove for 20 to 30 minutes and ended up going down a dirt road: "It was like the side of a mountain." (8 RT 1090-1091.) Redmond claimed he was driving aimlessly, and further claimed it was entirely coincidental he just happened to end up in the secluded spot where Jessica Salazar was killed. (8 RT 1090-1091, 10 RT 1272-1273.) After the truck slid on the dirt road appellant asked if Redmond wanted to let him drive, but Redmond refused. (8 RT 1091.) Someone said "we should take a piss" and they pulled to the side of the road. (8 RT 1092.) Everyone except Salazar got out; Redmond knew no one actually needed to urinate because they had just done so at the gas station. (8 RT 1095.)

Sam Redmond's Version of Jessica Salazar's Death and its Aftermath

Redmond claimed that outside the car, appellant reiterated Salazar had to die. (8 RT 1095.) He said appellant told Rodriguez to kill her because she knew him and could identify him,[24] but "Gato said he ain't going to kill a girl." (8 RT 1095-1096.) Appellant then told Gato to take Salazar out of the car, someone--probably Gato--said "She ain't going to come out," and appellant said to just drag her out if necessary. Huero went around to one side of the car, and Gato opened the door on the other side and pulled her out. "At that point she started going crazy again," crying, employing hand movements, and saying, "Stop it" and "Don't." (8 RT 1097.) Redmond thinks Huero got in the car after Gato pulled Salazar out. (8 RT 1097-1098.) Gato too got back in the car after he had removed Salazar, leaving Redmond and appellant outside with her. (8 RT 1098.)

Redmond admitted he held Salazar just prior to her death but insisted his purpose was entirely beneficent. He held her not to subdue her but to, in effect, comfort her in her last moments: "She knows now. He has a gun in his hand. She starts going nuts. That's when Midget told me hold onto

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[24]It should here be recalled that Lizarraga believed Rodriguez shot Faria, and Salazar was distraught because she had presumably witnessed Faria's shooting.

her. I grabbed onto her shoulders to calm her down. It wasn't for like that long. A couple seconds. She was shaking a lot, and she tripped, and I let her go, and she fell." (8 RT 1098.) Redmond claimed he was not attempting to prevent her escape, but put his "hands on her shoulders, like, calm down." (10 RT 1276.)

After she fell, Redmond walked to the rear of the Pathfinder so he could get back in the driver's side, "and that's when he shot her. . . . After she fell and she was getting up, she had her hands like, don't, and he shot her." Redmond thinks appellant shot her in the head, and the shot immediately felled her. (8 RT 1100.) Redmond said there was a car coming and they should go, but appellant said, "No, I have to put two in her head." The gun, which Redmond thought was the same gun appellant had at Michigan Street[25] (10 RT 1277), malfunctioned, and appellant began "messing with the chamber, trying to get the bullet unjammed." Redmond said, "What the fuck. There's a car coming. Let's go," whereupon appellant began "[h]itting the gun on the concrete, trying to get it to work."[26] Redmond said he was leaving and appellant got in the car without

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[25]Faria was shot with a .22, Salazar with a .380.

[26]It is difficult to reconcile Redmond's claim appellant repeatedly struck a loaded semiautomatic handgun against concrete--an act of stupidity just this side of playing Russian roulette--with the prosecution's portrayal of appellant as a firearms-savvy gang enforcer.

shooting Salazar a second time. (8 RT 1099, 1101.)

On the way back to their apartment, appellant said he wanted to burn Redmond's truck: "Gotta get rid of it. Can't tie it back to me." Redmond told him he was "fucking crazy" and refused. (8 RT 1105.) Redmond, drunk and purportedly upset by what he had seen, was having difficulty driving, and appellant again offered to drive and Redmond again declined the offer. Redmond parked the SUV on the other side of the apartment complex because appellant told him not to park it in front. (8 RT 1106.)

Their living room was already full of the "youngsters" who had been at Michigan Street and then at the Four Seasons, but Redmond went to his room and locked himself in because, "I didn't want to deal with none of them. I didn't want to deal with it."[27] (8 RT 1107-1108.) At some point, however, appellant said he wanted the clothing and shoes of everyone present at the Salazar killing; they gave them to him, though Huero kept his shoes because they were the only pair he had there. (8 RT 1109.) Early in the morning, Manny Mendez took Redmond and Huero to a motel. (8 RT 1110.) Redmond could not remember whether Gato was with them. (8 RT 1111.) Appellant had asked two women who were at the motel, Priscilla

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[27]Redmond said, "I wanted to be by myself. I don't think I left the whole weekend. I stayed in my house the whole weekend, I think" (8 RT 1108), before stating he went to a motel the next morning (8 RT 1109).

and Daniella, to say they were with Redmond and Huero all night, whereas appellant planned to stay at the apartment and say he was with his girlfriend. (8 RT 1109-1110.)

A couple of days later, Manny Mendez called Redmond and told him to go the house where Daniella, Priscilla, and another girl lived. At the house, "they" told the ever-passive Redmond to switch his tires with those from an Isuzu Rodeo, tires that fit Redmond's truck. (8 RT 1112-1113.) Redmond knew appellant was later arrested driving the Rodeo, but he did not know whether appellant used the car prior to the tire switch. (8 RT 1113-1114.)

On March 24, 2000, Sam Redmond did a video reenactment of the Salazar murder for police. (17 RT 2091, 2094.)

Forensics

Jessica Salazar's body was found in the Pigeon Pass Road and "Dump Road" area in Riverside County, just outside Moreno Valley. (7 RT 983.) Two live .380 cartridges were found on the ground near her body, and a .380 bullet was recovered during the autopsy. (20 RT 2444.) She died from "[p]erforations of skull and brain due to gunshot wound of head." The cause of death or "mechanism of death" was not hemorrhaging but the "complete destruction of the brain, which eventually [affects] the brain stem

which controls breathing and your heart rate." (12 RT 1647.) There were two entrance wounds, one on the back part of the left wrist, the other just above the left ear. (12 RT 1642-1643.) There was no stippling on either wound, meaning the gun was at least two feet away when fired. (12 RT 1657.) The bullet traveled from the back of the head toward the front and upward in relation to the ground. (12 RT 1646-1647.) There was an exit wound on the inside of the left wrist, but none for the head wound. (12 RT 1648, 1652.) The entrance wound on the head had an unusual shape, leading the pathologist to believe the bullet might have lost its gyroscopic spin and been tumbling when it entered the head, something consistent with the same bullet's having penetrated the victim's wrist before entering her head. (12 RT 1654.) There was no way to determine whether the victim was standing or on the ground when she was shot; as long as there was a continuous line from the gun to the wrist wounds to the head entrance wound, she could have been in any position. (12 RT 1656.)

Tire prints recovered from the scene matched the tires that had been on Redmond's SUV. (17 RT 2168.) Also, a black polyester fiber recovered from the victim's sole was consistent with carpeting from the rear passenger floor of Redmond's Nissan Pathfinder. (17 RT 2170-2171.)

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Samuel Redmond: The Relevant Biography

Sam Redmond had known appellant since elementary school, and Redmond's sister was married to appellant's older brother, Manny Mendez. (7 RT 1001.) He pled guilty to the murders of both Michael Faria and Jessica Salazar with the understanding he would receive life without possibility of parole and serve his time in a federal facility outside the state system. (7 RT 999.)

On February 20, 2000--little more than two weeks after the murders--a Colton police officer pulled over Redmond's SUV for a cracked windshield. (11 RT 1608.) Redmond was driving and NSC members Joe Rodriguez and Art Luna were passengers. (11 RT 1610.) Redmond was arrested on an outstanding warrant and the car was searched. (11 RT 1617.) Under a seat the officer found a loaded .38 Special Taurus revolver, whereupon Redmond was also arrested for possessing the gun. (11 RT 1614, 1616-1617.) The officer further found a glass smoking pipe in the car. (11 RT 1630.) The police asked Redmond about the Faria and Salazar murders but Redmond managed to bail out within 24 hours; he was arrested for the murders themselves around a month later. (9 RT 1194, 10 RT 1361.)

Redmond implied that his frequent interactions with gang members

were, however, entirely fortuitous, and he even claimed to possess only "somewhat" an understanding of what a "gang banger" was. (7 RT 1000.) He knew about Northside Colton but had personally known and talked to only "a handful" of NSC members, "about ten," and denied ever having been an NSC member himself. (7 RT 1036-1037.) Despite this professed ignorance of gang matters, Redmond readily identified several NSC and Eastside Colton members. (9 RT 1172-1174.)

In reality, a police field investigation card reflected Redmond's admission he had been an NSC member with an a.k.a. of "Devil" since 1996. (15 RT 1931.) Despite this and other evidence, Redmond denied he had ever been an NSC member, and also denied ever using the moniker "Devil" or "Diablo" on the streets, stating he only started using it around six months after his arrest in the current case. (8 RT 1036; 9 RT 1189.) He said no one in jail used a real name, and he went by Diablo so no one would know his true name while he was in custody. (9 RT 1191.)

Danielle Gonzalez, who was an NSC member for around four years until she left the gang in 2003 (15 RT 2013), testified otherwise concerning Redmond's moniker. There was NSC gang writing, including names, on her bedroom wall. (15 RT 2015, 2017.) In 1999 and 2000 Gonzalez saw Redmond, who went by the nickname "Devil," hang out "[a] lot" with NSC

members. (15 RT 2029, 2038.) "Devil" was one of the names on her wall. (15 RT 2037.) Redmond said he watched Daniel Lopez write "Devil" on Danielle Gonzalez's wall--he was not sure whether it was before or after the killings--but denied it was his nickname at the time. (9 RT 1192.) It was just "crazy" that Colton police listed his moniker as "Devil" when he was arrested on February 20, 2000. (10 RT 1295.)

In addition to a clown tattoo on his right calf--clown tattoos are frequently associated with gang members--Redmond had a tattoo of a devil or demon with wings holding a girl or woman on his left calf, a tattoo he claimed he got before rather than after the Salazar murder. (9 RT 1195-1196, 1198; 10 RT 1292; 15 RT 1985.) When Redmond was arrested for possessing the .38 handgun on February 20, however, police booking information reflected the clown tattoo on his right calf but did not reflect the demon tattoo on his left, something Redmond claimed was yet another mistake by the police. (10 RT 1296, 15 RT 1935-1937.) Redmond denied the woman depicted in the tattoo was a Latina, and denied he got the tattoo to commemorate Jessica Salazar's killing. (9 RT 1243, 1297.)

Finally, as his arrest for possessing the .38 Taurus revolver after the Faria and Salazar killings might suggest, Redmond had an affinity for firearms. Before February 4, 2000, while living at a previous apartment,

Redmond had the key to a safe that contained two handguns--he thinks they were .22's--but claimed the handguns belonged to appellant, even though appellant did not live there. (10 RT 1352, 1354.) At the apartment he shared with appellant and Manny Mendez, a party house frequented by NSC but also Eastside Colton members, he no longer had any handguns[28] but kept rifles including an AK-47 in an air-conditioning duct. (10 RT 1348-1349, 1354, 1360.) There were, in fact, between seven and ten guns in the duct. (10 RT 1363.) Despite this impressive array of firepower, Redmond maintained he was not "the keeper of the weapons" for Northside or Eastside Colton. (10 RT 1361.)

Appellant's Jailhouse Conversation[29]

On April 9, 2000, Nicole Bakotich visited appellant at the Robert Presley Detention Center and authorities recorded their conversation. (19 RT 2308, 2312.) At one point appellant and Bakotich switched phones (19 RT 2315-2316), something Bakotich said was caused by problems with the

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[28]When asked whether the .38 Redmond was arrested for carrying in his SUV shortly after the Faria and Salazar murders was one of the guns he kept in the attic, Redmond replied, "Not to my knowledge," rather than continue to deny he still kept handguns. (10 RT 1363-1364.)

[29]In arguments IV and V, appellant will demonstrate the trial court's refusal to redact certain statements relayed on the tape violated *People v. Aranda, supra,* 63 Cal.2d 518, *Bruton v. United States, supra,* and *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

cord (19 RT 2330).

During that conversation, appellant related to Bakotich things a detective had told him during the previous night's interrogation, including things that were not true.[30] Appellant repeatedly denied his involvement in the shootings and said Redmond had committed them. Appellant's statements included the following:

° " . . . They know that I was there, okay? But, the only thing is that, I mean, I didn't do the shooting. See, what I mean we all know Sam did 'em. You \mean [sic] I told Rascal to tell the guys, just Fuck it, say [that][31] Sam did it. I mean the only thing I got a problem with is Gato, cause he's saying I did them too. Then they are saying that Lil Huero says it too. But not all of them said that I was the shooter, but all of them said I was there. All of them are scared. All of them are scared, they already told cops, I mean that I am able to do something to them or something. But, they all got busted.." (7 CT 2062-2063.)

° [After Bakotich asks if authorities have a weapon] "No, but they

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[30]The trial court even found it necessary to tell the jury police officers are allowed to tell a defendant something that is not true, and stated, "[T]here's a lot of things on that tape that you've heard no other evidence about, and it's not being used to prove that other material." (23 RT 2910-2911.)

[31]"That" is added by written interpolation in the clerk's transcript. Further interpolations are also indicated by brackets.

don't need it, they don't need a weapon, they got evidence. They got guys saying that I was there and I was the shooter." (7 CT 2065.)

° "Well, if I get convicted on both I get the death penalty. If I beat the girl[']s, if I can even beat one of them I can probably [just] get life in prison, but as it looks, A [sic--"eh"], it's the death penalty so I don't know what's going on. . . ." (7 CT 2065.)

° "So, I told a cop. He asked me, hey, well if you didn't shoot her, who shot her? I'm like, well figure it out. He is like one question okay. Where were you standing when she got killed? I was standing like 6 feet away from her, and he's like 'cause I need to get out of that one. If I can get out of that one I can probably get if anything self defense on the guy because they fucken [sic] started it, you know what I mean? I mean they started it. . . . (7 CT 2067.)

° "No, it happened right there in front of--on Michigan, in front of Artie's house. So, so fucken. So, they're going to, I'm going to try self-defense, A, on that one. I'll probably get 18, 18, if I can beat it. If I can get out of, fucken girl, you know, that's the only thing that--that's the only problem. That's what's giving me the death penalty is her, 'cause they say I killed her. I didn't kill her, fuck. I figure I get, what does self-defense carry 6?" (7 CT 2068.)

° ". . . . It's going to go from death penalty, I've got to beat death penalty, then from death penalty I've got to go life at least 18 or something." (7 CT 2068.)

° "We are going to go with that plan thou [sic]. Sam did it. Know what I mean? . . . ¶ But I got to get them to testify against him and say, yeah he did it, you know what I mean? So hopefully they do, you know what I mean? If they do we can get accessory and probably get off and say, hey man we fucken cooperated with the District Attorney. Look we fucken told on this guy. What is up, give us 18, you know what I mean? Or give us at least 10, or fucken 6. 6 or something. I mean, show us some kind of fucken love. That's all I got to hope for, but that's after I get proven. See I got to beat the death penalty. I got to beat that first. . . ." (7 CT 2072.)

° "Fucken, I got these motherfuckers on my back. All of them. All of them, fuck, said I was there, A. Fucken, if they would have just kept their mouths shut, A. Fucken everything would have been cool and shit, A. But thing is that--that they are fucken saying that I was the fucken shooter, A, you know what I mean? So, I mean, how is that going to look for a jury? You got 8 guys saying that I was the shooter." (7 CT 2077.)

° ". . . . I got to beat the death penalty, A. I don't want to go. I don't want to go. I don't want to go to death row. I mean, maybe I can go

do . . . . 25 to life for something. I can live to 45 or 46 years old maybe get a chance at life again, but if I get death [R]ow that's it. . . ." (7 CT 2078.)

THE PENALTY PHASE

Prosecution Evidence

The prosecution's case for executing Julian Mendez consisted of victim impact evidence and a stipulation regarding appellant's priors.[32]

Richard Faria, Michael's father, described Michael as "a loving son" who "cared about other people." (25 RT 3057.) Richard said he was shocked to hear testimony Michael had claimed affiliation with a gang. (25 RT 3057.) In addition to his parents, Michael Faria had two sisters and a brother. (25 RT 3060.) After Richard Faria learned Michael had been shot, Richard and his ex-wife, Michael's mother, went to the hospital and saw Michael on life support. (25 RT 3059.) His death affected the entire family. (25 RT 3061-3062.) The fact he was murdered rather than died from disease or accident affected his father because Michael "had no way of defending himself." (25 RT 3062.)

Brittany Faria was 13 years old at the time of trial. (25 RT 3066.) Michael used to protect her from boys "who used to pick on me and stuff,"

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[32]The victim impact evidence was objected to by the defense and is the subject of argument XII, *post*.

and once pulled her out of a car that was on fire but which she was afraid to leave. (25 RT 3067-3068.) In the hospital she saw him "lying on his bed all bloody and stuff," and she was "[s]cared, crying, hurt" when he died. (25 RT 3070-3071.)

Elaine Serna, Michael's mother, said he was not a gang member and said she was shocked when detectives asked to search his room because the shooting was gang-related. (25 RT 3077.) She said the family lived in housing projects on the west side at the time, and thinks Michael "was probably just . . . saying that he was from . . . the west side of town probably." (25 RT 3078.) There were gang members at the projects, but the gang members, who were friends of Michael's, were from a Los Angeles gang rather than Westside Verdugo. (25 RT 3078.)

Serna said her other son Richard "seems to have a lot of anger," though he graduated from high school and she was proud of him. (25 RT 3086.) Her other daughter Leanna, however, had begun to claim Westside Verdugo, and her bedroom was tagged with gang graffiti. (25 RT 3087-3088.) Serna said Leanna "knows that her brother wasn't a gang member," but was claiming Westside Verdugo "because if he died from something, that she's just going to go ahead and claim that too." (25 RT 3088.) Serna herself used drugs for six months after Michael's death and "went into

recovery" for six months thereafter. (25 RT 3089.)

April Salgado was Jessica Salazar's first cousin. (25 RT 3091.) Jessica was "very popular" and "hung out with everybody," including gang members. (25 RT 3093, 3097.) After Jessica died, April's father would not allow her to be in her room by herself because he did not want her to sink into depression. (25 RT 3095.) April's brother Martin added that as a result of Jessica's death, "there's a hole in the heart of everybody that's loved her, everybody that she loved, you know." (25 RT 3104.)

Jessica's mother, Denise Salazar, had been put on medications to deal with Jessica's death; her "world stopped" when she died. (25 RT 3111, 3126.) Jessica had turned 14 a month before she died; the last graduation she attended was from sixth grade.[33] (25 RT 3109, 3122.) When she was in fifth grade she wrote a poem, "Jessica's Cry," that was placed in the beginning of a book called For the Love of Jessica, a book that dealt with kids at risk of gang involvement. (25 RT 3110, 3112.) Denise read the poem to the jury.[34] (25 RT 3113-3114.)

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[33]An objected-to videotape containing portions of the graduation ceremony was shown to the jury. (25 RT 3128 [exhibit 136].)

[34]"Jessica's Cry" reads as follows:

Most of us don't want to die, but, anyway, in our coffin there we lie.
You could have been stabbed, or shot, or took an

Jessica looked after her learning-disabled brother Matthew, who was "extremely angry" following her death. According to Denise, "I've had him wanting to kill himself so he can be with his sister. He's been in 5150[35] a couple of times and behavioral health at Arrowhead." (25 RT 3118-3119.) It was three and one-half years before the family could even say her name in front of him. (25 RT 3120.)

Stipulations were introduced that in January 1997 appellant was convicted of possessing an assault weapon in violation of Penal Code section 12280, subdivision (b), and in August of the same year was

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overdose of pot.

No one cares anymore; people are getting shot to the floor.

There are screams everywhere; people are running here and there.

There is someone on the ground; when they are found, everyone's crying.

The truth is everyone is dying.

We pray to God every night, but the next day begin to fight.

Everyone is killing each other, not knowing all the pain and hurt they're going to make or all the souls they are going to take.

Just to prove they are tough.

I don't know about you, but I've had enough.

They're taking innocent lives.

It could be your brothers, your sisters, your wives, or maybe even you. (25 RT 3113-3114.)

[35]The reference is to Welfare and Institutions Code section 5150, which permits 72 hour involuntary treatment and evaluation for someone posing a danger to himself or others as the result of a mental disorder.

convicted of possessing methamphetamine in violation of Health and Safety Code section 11377, subdivision (a). (25 RT 3133-3134.)

Defense Evidence

Manuel Mendez, appellant's 63-year-old father, was in state prison when appellant was born, and did not know his son's birth date; he had been using drugs for 43 years, and had spent around half of his life behind bars. (26 RT 3156, 3161.) He committed various crimes to support his heroin habit, and pimped women including his wife Shirley, who had been "a good woman" and "a lady" until she met him. (26 RT 3156, 3158-3159.) He also got Shirley, who eventually developed serious mental problems requiring hospitalization, hooked on heroin. (26 RT 3159-3160, 3163.)

They had six children together, and while at first Manuel Mendez cared whether the children saw him inject heroin, he eventually quit caring. (26 RT 3157, 3159.) Although Manuel was not a gang member, gang members came over to the house, which was "like a shooting gallery." (26 RT 3160.) He eventually tired of getting arrested for breaking into stores, so he started taking his children to orange groves at night and having them steal oranges to sell to feed his drug habit. (26 RT 3158.) When oranges were not in season, he would make a "work for food" sign and take to the streets with the children, knowing people would give them money, with

which "I'd go get high and buy them something to eat." (26 RT 3169.) Enrique Mendez, appellant's older brother who was currently in prison for attempted murder, said the children used to steal things to get necessities like food and shoes because their parents were incapable of providing for them. (26 RT 3261.)

Manuel said appellant was "a good kid, always respect me," and when asked why appellant would have any respect for him given the things he had done, Manuel said he thought it was "[m]aybe because--I used to discipline them as much as I can, you know." (26 RT 3163-3164.) Apparently, one of Manuel's "discipline" techniques involved taking appellant and his brother to a park to fight until they were exhausted, meanwhile placing bets with his gang member friends on the outcome. (26 RT 3164.) Also, Manuel thought he had given appellant a positive lesson when appellant told Manuel someone was picking on his sister, and Manuel gave him a bat and told him to take care of it. (26 RT 3165.)

In addition to appellant, two of his other sons, Manny and Enrique, were in prison, and his oldest daughter had drug problems that led to the removal of her children. (26 RT 3165-3166.) The oldest daughter, Yvonne Mendez Ele, said Manuel used to beat apellant. (26 RT 3187.) The two youngest sons, however, had lived with their grandmother and turned out

different; unlike the parents, the grandmother had rules, and it was a safer environment. (26 RT 3168, 3191.) Andres, a high school graduate employed as a cook, had been in the Colton Police Department Explorer program, but decided not to be a police officer because he did not like guns. (26 RT 3193.) Anthony, still in high school, was a member of the police Explorer program and wanted to be a cop. (26 RT 3209, 3211.) Appellant encouraged both Andres and Anthony to stay in the Explorer program and told them not to be like him. (26 RT 3194-3195, 3214.)

It did not surprise Mary Hernandez, appellant's grandmother, that her son Manuel did not know appellant's birth date, because he was rarely around the kids. (26 RT 3239.) Ms. Hernandez thought the mental breakdown of appellant's mother when he was young was caused by drugs, and when appellant was 11 or 12, he stayed with her on and off, and "I kept fighting over him because his mother wanted to take him home, and I wanted to keep him at home to give him a better life." (26 RT 3240-3241.) She wanted to protect him from what was happening with his older brother, but his mother had custody (and his father was in jail at the time). (26 RT 3243.) After appellant left to stay with his mother, Ms. Hernandez heard he had been involved with gangs, drugs, drinking, and joyriding. (26 RT 3243-3244.)

Ray Sanchez was a Northside Colton member currently serving 13 years for a gang-related manslaughter conviction. (26 RT 3250-3251.) When Sanchez was a young gang member, "We're always in the streets, and we would always see this little guy in the streets by himself just roaming and got to know him. He looked like he had nowhere to go. So we ended up, you know, letting him hang with us, in other words." Sanchez's mother took appellant in, not as a "homie," but as "a little kid," and Sanchez did not even know appellant had a family "because he was just always by himself." (26 RT 3252.) It did not surprise Sanchez that appellant became a Northside Colton member; according to Sanchez, gang members "don't join gangs most of the times to hang out with homies, they join gangs because that's pretty much their family." (26 RT 3254.)

ARGUMENT

I

THERE IS INSUFFICIENT EVIDENCE APPELLANT MURDERED MICHAEL FARIA; AS A RESULT, THE MULTIPLE MURDER SPECIAL CIRCUMSTANCE AND ENHANCEMENTS ATTACHED TO COUNT ONE ARE VOID, AND A NEW PENALTY PHASE TRIAL IS REQUIRED

A. Introduction

There was legally insufficient evidence appellant killed Michael Faria, and the unmitigated stream of irrelevant but prejudicial gang evidence, including numerous dead bodies unrelated to this case, no doubt goes a long way toward explaining why the jury convicted him of it.[36] The prosecutor even expressed doubt whether appellant would be found guilty: "If this jury does not . . . come back guilty on the Faria killing or hangs on the Faria killing, I shared with Mr. Belter [defense counsel] my concern that I don't know that I could introduce victim impact testimony if he is acquitted of the Faria killing."[37] (24 RT 2958.) The trial court, during the Penal Code section 190.4, subdivision (e) motion to modify the death verdict, also expressed doubts whether appellant killed Faria:

> It seems to me that even if he did not pull the trigger on Mr.

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[36]See arguments II and III, *post*.

[37]To which the court sensibly responded, "I'm sure if there's actual acquittal you could not because he's been found not guilty." (24 RT 2958.)

> Faria, he certainly is responsible legally for that death because he--he is a North Side Colton gang member. He is more than just a North Side Colton gang member in name, he has lived it. It is his value system. He supports those gang values. And whenever a challenge goes forward, he is there to support the gang. So he morally and legally is responsible for the death of Michael Faria. (28 RT 3370.)

But appellant should not have been found guilty of Faria's murder just because he was a Northside Colton member. And if he should not have been found guilty of Faria's murder, the multiple murder special circumstance cannot be sustained, meaning one of the two special circumstances alleged is invalid, and appellant is entitled to a new penalty phase trial.

B. General Legal Standards: Sufficiency of the Evidence

The due process clause of the United States Constitution requires the prosecution to prove every element of a crime beyond a reasonable doubt. (U.S. Const., 5th and 14th Amends; *In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368];) "[T]he 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* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *People v. Johnson* (1980) 26 Cal.3d 557, 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." (*People v. Johnson, supra,* 26 Cal.3d at p. 576.)

This does not, however, mean 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 'Not 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.)

Finally, 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.)

C. The Evidence is Insufficient

There was no direct evidence appellant shot Faria; in fact, the only direct evidence was Sergio Lizarraga's testimony that someone else (Joe Rodriguez) shot him. The circumstantial evidence, on the other hand, 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.)

According to Sam Redmond, after the group arrived at Michigan Street he was walking towards Art Luna's car when he heard an argument and saw a fight break out. (8 RT 1057-1059.) While Redmond, Lopez, and Luna were at Luna's car, some of the individuals in the fight ran away and disappeared from Redmond's sight; appellant, Rodriguez, and "the whole car load that came with Rascal [i.e., Art Luna]" chased them. (8 RT 1057-1058, 1060-1061.)

Northside Colton member "Lil' Eddie"[38] went inside the nearby house and retrieved a gun, which he gave to "Rascal." (8 RT 1062.) The gun was "[a] black gun, probably like a .380 or a 9 mm, I don't know," and

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[38]"Lil' Eddie" was Joe Rodriguez's brother. (8 RT 1054.)

"looked like a pretty small gun." (8 RT 1063, 1065.) Rascal, Lil' Eddie, and Lopez started in the direction of the Faria group, but Lopez soon returned and said to Redmond, "Let's go get Midget." (8 RT 1062-1063.)

Redmond and Lopez got in Redmond's SUV and drove until Redmond saw appellant and Rodriguez running back toward them; appellant had a gun in his hand, and he and Rodriguez got in Redmond's SUV. (8 RT 1069.) Redmond was unable to say whether the gun appellant had was the same gun Lil' Eddie had handed to Rascal. (8 RT 1070.) They soon noticed Jessica Salazar, who was "going hysterical on the sidewalk and not knowing where to go." (8 RT 1070.) "I remember Midget telling Gato to tell her to get in because Gato knew her, knew who she was previously before this incident, so I guess they went to school [together] . . . ." (8 RT 1074.) Redmond said he was unaware there had been a shooting.[39] (8 RT 1075.)

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[39]Redmond thought Faria had been "beat . . . up or something" (10 RT 1321), and denied knowing there had been a shooting as late as the stop at the Four Seasons (10 RT 1269).

At the Rodriguez/Lopez retrial, which was obviously not evidence before appellant's jury but the transcript of which was provided during record correction proceedings (30 RT 3439-3440), Redmond said he remembered testifying at the first trial that he saw appellant return to the car with a gun, "[B]ut as to today, I can't remember seeing it in my mind no more." (2 RT [Rodriguez/Lopez retrial] 248.) Also, when asked who killed Faria, Redmond replied, "I still don't know to this day." (1 RT

Redmond thus did not claim to have seen appellant shoot Faria, nor did any other witness. David Flores, a friend of Faria's, lived in a Westside Verdugo neighborhood and denied that he himself was a member, but knew his juvenile file stated he was one. (7 RT 892, 919.) Flores gave contradictory answers as to whether Faria was a Westside Verdugo member. (7 RT 920, 941-942.) After the initial altercation, Flores and Faria ran in the same direction. (7 RT 840-841.) Flores heard shots, saw a car "rolling up," and hid. (7 RT 842-843.)

Flores said he could not identify anyone present that evening. (6 RT 820.) He did, however, state when he and Sergio Lizarraga were interviewed after the shooting, Sergio picked out three people in a photo lineup identified by the police as Northside Colton members,[40] and Flores agreed with Sergio at the time. (6 RT 865.) He later admitted he had identified Joe Rodriguez in a live lineup, but again claimed it was based on what Sergio told him. (7 RT 896-897, 913.) He had been unable to identify appellant, Redmond, or Lopez in live lineups. (7 RT 899-902.) He later changed his testimony and said he identified Rodriguez as the driver of the SUV based on what he had actually seen. (7 RT 951.)

[Rodriguez/Lopez retrial] 188.)

[40]The three NSC members were named Monge, Villareal, and Alcala. (6 RT 865.)

When interviewed following Faria's killing, Sergio Lizarraga identified Rodriguez during a live lineup; he thought Rodriguez was the SUV driver, and saw him run down the street to where Faria was getting beat up. (11 RT 1537-1538.) He was unable to identify appellant. (11 RT 1540.) Lizarraga did, however, think he had seen the person who shot Faria, and was 75% sure it was Joe Rodriguez. (11 RT 1543-1544.) In other words, the one percipient witness identified somebody other than appellant as the shooter. Lizarraga's identification further suggests he saw a tall person shoot Faria, and it is worth noting that both Rodriguez (11 RT 1611) and Redmond (Exhibit S [Redmond field identification card]) are 5'11", whereas appellant (a.k.a. "Midget") is only 5'5" (8 CT 2322).

Evidently hoping to deflect suspicion from himself, Joe Rodriguez made statements implicating appellant in the Faria killing, statements which the court excluded under *Aranda-Bruton* (thus the separate juries for Rodriguez and Lopez). Many of the statements found their way before the jury, however, because appellant repeated them in the recorded jailhouse tape with Nicole Bakotich.[41] As will be clear from their content, however, these statements are about what the police claimed "Gato" (Joe Rodriguez)

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[41]The tape was played at 19 RT 2325-2326. Elsewhere in this brief (see arguments IV and V), appellant has argued the court erred in allowing most of these statements into evidence.

told them regarding Faria, not about what appellant actually did. Appellant told Bakotich the following regarding the Faria incident:

a) "[T]hen they showed a fucking tape of Gato telling, saying. ¶ He heard shots and that's when he looked over that he seen me standing over the guy, so that's what he said." (7 CT 2062.)

b) "I mean, the only thing I got a problem with is Gato, 'cause he's saying I did them too. Then they are saying that Lil' Huero says it too." (7 CT 2063.)

c) "Yeah. He reenacted the crime and Sam did too. I guess it's fucking gay lovers and shit saying I was the shooter." (7 CT 2064.)

d) "Then he said I got another one of Joe Rodriguez. That's Gato. He's all, it's right here. He reenacted the other crime." (7 CT 2077-2078.)

e) "If I can get out of that one [Salazar] I can probably get if anything get self defense on the guy because they fucken started it, you know what I mean. I mean they started it. The detectives know he just can't figure. He can't pinpoint it. . . . I need to know what guy started it. He's all I'm like you being so smart why don't you figure it out." (7 CT 2067.)

f) (After Bakotich asks "where all this happened?") "No, it happened right there in front of--on Michigan, in front of Artie's house. So, so

fucken. So, they're going to, I'm going to try self-defense, A, on that one." (7 CT 2068.)

g) "Joe says, *I'm repeating what is on tape. Okay*? Joe said he heard shots. Okay? Cop says, well, when you heard shots, he's all, what did you do after that? He's--I looked up. Okay. When you looked up, what did you see? Who did you see standing over the body? He's all, I seen Midget. Then I told you what I seen on videotape. So that's it." (7 CT 2080-2081, italics added.)

Appellant's statements do not provide sufficient evidence to sustain the conviction. During this taped conversation, appellant is relaying to Bakotich his appraisal of his legal situation, not a description of actual events.[42] Appellant's statement, "I can probably get if anything get self defense on the guy because they fucken started it," is part of his frank (if erroneous) self-evaluation of his legal position: He knew he was charged with Faria's murder and knew Faria had initiated the gang challenge that resulted in his death.[43] Appellant further makes it clear he is repeating what

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[42]It is important to remember appellant told Bakotich that Redmond was the actual killer. (7 CT 2063 ["(W)e all know Sam did 'em . . . ."]; 7 CT 2082 ["Tell him to just say that. Go with the truth. That Sam did it . . . ."].) Appellant has always maintained his innocence. (28 RT 3381.)

[43]There is, of course, always the possibility that Detective Del Valle suggested appellant must have acted in self-defense, and appellant was parroting the suggestion.

Rodriguez said on the tape, not what actually happened, when Rodriguez told police he saw appellant standing over the body. Finally, the statement "it happened . . . in front of Artie's house" referred to the location of the initial confrontation between Faria and the Northside Colton members rather than to the spot where Faria was shot, which was not in front of Luna's house; that appellant refers to the scene of the initial confrontation rather than the scene of the shooting when describing where "it happened" is in fact circumstantial evidence he was not at the shooting scene.

The evidence in this case is thus unlike the quantity and quality of evidence in *People v. Champion* (1995) 9 Cal.4th 879, where this court, considering a sufficiency challenge to the evidence of two murders, contemplated the evidentiary significance of a tape-recorded conversation between the defendant and a codefendant. In addition to eyewitness testimony identifying the defendant as leaving the house containing the two shooting victims, the defendant's possession of jewelry belonging to one of the victims, a photograph of the defendant with a revolver "of the type used to kill" one of the victims, and the defendant's participation in a similar robbery/murder in the same neighborhood, this court found the tape-recorded conversation implicated appellant in the murders. (*Id.* at p. 927.) Included in that conversation was the co-defendant's asking, "Was that a

waterbed in that room?" and appellant's response, "Uh-uh." (*Id.* at p. 910.) The court noted this and other statements in the conversation reasonably could be interpreted to mean[44] not only that the two were referring to the waterbed in the victims' home, but that the defendants believed someone knew of their participation in the murders, that the codefendant was asking whether that someone had spoken to law enforcement, and that the defendant was explaining the other party had not done so. (*Id.* at pp. 913-914.)

Finally, the evidence points to someone else present that night, someone who had every bit as much purported motive as appellant--i.e., Northside Colton member Joe Rodriguez--as the one who killed Faria. It was Joe Rodriguez's brother Lil' Eddie who retrieved the handgun from the house, then ran up the street after Rodriguez, who was chasing Faria. David Flores identified Rodriguez but not appellant as present that night. Sergio Lizarraga saw Rodriguez run down the street to where his friend Faria was getting beat up and was 75% sure Rodriguez shot him.

No rational trier of fact could have found beyond a reasonable doubt

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[44]This court listed these specifics in the context of finding the trial court correctly admitted the tape to begin with (*People v. Champion, supra,* 9 Cal.4th 879 at pp. 913-914), and presumably these specifics are the same conclusions the jury could have drawn when this court stated the tape recording was corroborating evidence of guilt.

that appellant murdered Faria. Even the prosecutor wondered aloud whether he could obtain a conviction for it, and the trial court expressed doubt that appellant had shot him. Regardless of whether Rodriguez or Rascal or Lil' Eddie or Redmond killed Faria, the evidence appellant killed Michael Faria is legally insufficient and his conviction for murdering him, along with the true findings on the enhancements on count one, must be reversed.

D. Because There Is Insufficient Evidence Appellant Murdered Michael Faria, the Multiple Murder Special Circumstance is Invalid and the Penalty Verdict Must Be Reversed

A sufficiency of evidence challenge to a special circumstance is reviewed under the same test applied to a conviction (*People v. Stevens* (2007) 41 Cal.4th 182, 201), the standard employed in the above argument regarding the Faria killing. There were two victims and hence a multiple murder special circumstance alleged in this case, and obviously, if appellant did not kill Faria, there is no evidence to support the multiple murder special circumstance, and the true finding thereon must be stricken.

Because there is insufficient evidence to sustain one of the two special circumstances, appellant is likewise entitled to a new penalty phase trial, as the penalty phase jury's consideration of constitutionally-deficient evidence denied appellant the individualized sentencing determination

required by the Eighth and Fourteenth Amendments. (*Zant v. Stephens* (1983) 462 U.S. 862, 879 [103 S.Ct. 2733, 77 L.Ed.2d 235].) In analyzing prejudice from the introduction of an improper sentencing factor, the United States Supreme Court has held that, "An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." (*Brown v. Sanders* (2006) 546 U.S. 212, 220 [126 S.Ct. 884, 163 L.Ed.2d 723], italics in original.)

There was no such other sentencing factor here; the case was tried on the theory that appellant alone killed Faria.[45] Though based on an imagined scenario rather than actual evidence, the prosecutor stressed the circumstances attending Faria's killing in argument to the penalty phase jury:

> He had just murdered a 15-year-old kid who had mouthed off to his gang. And he didn't just murder him, he executed him after his homeboys had got their yucks, had had their fun, their sadistic little pleasure in kicking Faria until he couldn't feel the kicks anymore because he was unconscious, his body laying there and

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[45]During the penalty phase argument, the prosecutor said Rodriguez "administered a good old-fashioned ass whooping [to Faria], but that's all he did." (27 RT 3295-3296.)

broken. They all stood around him. How many was there? Eight? Nine? Ten maybe?

Everybody could see that he was not an adversary. Everybody could see by the rules of the street, even by the standards of the gang members, they had handed out street justice to Faria. They had punked him out. They had beaten him and kicked him into unconsciousness. He lays there the fool for having done what he did. They punished him. They punished him severely. They punished him beyond all acceptable normal standards.

But that wasn't good enough for Julian. Julian stood over that kid and while he laid there and while they all stood there gloating over what they had just done to that punk that claimed the West Side, Midget pointed the gun at that kid's head and put a bullet in his brain. And he didn't just shoot him once, he shot him again, shot him in the torso to make sure that punk never got up again.

And why did he do that? Because the kid said he backed up the West Side. Midget decided his fate as he stood over him and decided Michael Faria . . . deserved the death penalty, and then he executed him.

And despite having just done that to another human being, what did the evidence show? Did it show that he went, oh, my God, what have I done? It just got--it got carried away? No. (27 RT 3288, 3290-3291.)

Also:

He is subject to the death penalty because he cold-bloodedly executed a 14-year-old girl who just happened to see something that could have put his friends away for a while and himself. But he also committed another murder an hour before or so, whatever the time was, when he killed Faria. So he is eligible for the death penalty under two special circumstances. (27 RT 3297.)

And:

So yeah, you hear about five people being gunned down, 20

> people being blown up, how does this compare? Well, this was up close and personal. He stood over Michael. Wasn't like some detached thing like setting a bomb, you know, 200 yards away, letting it go off. You're looking into the eyes and into the face of the person that you're killing up close and personal, and that's what he did in the murder of Michael Faria. (27 RT 3299.)

In addition, the victim impact evidence provided by members of the Faria family has been detailed elsewhere in this brief. (See penalty phase statement of facts, *ante*, and argument XII, *post*). None of the other sentencing factors "enable[d] the sentencer to give aggravating weight to the same facts and circumstances" displayed above.

Because there is insufficient evidence appellant killed Michael Faria, the conviction of murder in count one must be reversed, the enhancements and multiple murder special circumstance stricken, and a new penalty phase trial ordered.

II

THE TRIAL COURT'S DECISION TO ADMIT IRRELEVANT AND PREJUDICIAL EVIDENCE OF THREE GANG-RELATED HOMICIDES AND A PURPORTED DRIVE-BY SHOOTING WAS AN ABUSE OF DISCRETION AND VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. Introduction

Over objection, the prosecution was allowed to present to the jury testimony and demonstrative evidence detailing, among other things, three previous gang-related murders and a purported drive-by shooting.[46] The demonstrative evidence (exhibit no. 76) consisted of a "gang board" with photographs and written descriptions of several incidents involving appellant and Northside Colton.[47] That the testimony regarding these and other incidents involved both double hearsay and rank testimonial hearsay in violation of the Sixth Amendment is addressed in the next argument; that there was no valid evidentiary basis to admit four of these incidents in the first instance is the subject of this argument. The prosecutor argued, and

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[46]The prosecution never came close to establishing a drive-by shooting had in fact occurred--something the trial court recognized (26 RT 3233)--but asserted such as fact during both the guilt and penalty phases (23 RT 2848, 27 RT 3302). Rather than endlessly repeat "purported" or "alleged," appellant will occasionally refer to this incident as simply a "drive-by."

[47]Exhibit no. 75 was Rodriguez's gang board, exhibit no. 77 Lopez's.

the trial court accepted, the incidents were relevant to the changed offenses pursuant to Evidence Code section 1101, subdivision (b), but the simple fact that the prosecution's gang expert never even attempted to tie the other gang crimes to the Faria and Salazar murders belies the notion these offenses were introduced for anything other than their prejudicial effect.

In a case such as this, it is difficult to imagine anything more prejudicial than an additional pile of bodies resulting from gang violence, particularly when that pile was irrelevant to any of the contested issues the jury needed to decide regarding the murders of Michael Faria and Jessica Salazar. The trial court's decision to admit evidence of three additional murders and a drive-by shooting was a prejudicial abuse of discretion under state law; denied appellant the due process of law under the Fifth and Fourteenth Amendments to the United States Constitution by rendering his trial fundamentally unfair; undermined the reliability required by the Eighth and Fourteenth Amendments for the conviction of a capital offense; and, because the prosecutor referenced the erroneously-admitted evidence during the penalty phase (e.g., 27 RT 3302), deprived appellant of the reliable, individualized sentencing determination required by the Eighth and Fourteenth Amendments. Appellant's convictions and death sentence must be reversed.

B. The Record Below

1) In Limine

a) The Murders of Jesse Garcia and Cindy Rodriguez

In general, the prosecutor portrayed Michael Faria as a hapless kid who said something stupid at the wrong place and wrong time. (See, e.g., 23 RT 2829-2830.) During a pretrial discussion regarding the admissibility of gang evidence, however, the prosecutor stated, "[t]he entire crux of the People's case is the blood feud between Westside Verdugo and Northside Colton is so long-running and so deep" that "Westside Verdugo is their mortal enemy." (12 RT 1686.) The prosecutor stated an NSC member named Jesse "Sinner" Garcia had been killed by Westside Verdugo in 1994, and codefendant Rodriguez's mother "was executed by Westside Verdugo in the doorway of her apartment at the Four Seasons." (12 RT 1685-1686, 1688.) Regarding Garcia's death, the prosecutor claimed, "Interviews with Northside Colton members and Westside Verdugo members [i.e., at the time of Garcia's death] confirm that the gang mentality relating to this shooting was that it was Westside Verdugo that did this and payback was required. There was payback exacted." (12 RT 1688.) Regarding Cindy Rodriguez's death, the prosecutor claimed, "The Rodriguez brothers want blood for the slaughter of their mother. This documents the blood feud

between these two [i.e., gangs] and helps explain how three [sic] members of a gang could execute an innocent 14-year-old girl and why they executed Michael Faria." (12 RT 1686.) In other words, the prosecutor was claiming the killings of both Garcia and Cindy Rodriguez provided motive for the Faria and Salazar murders. He also wanted to introduce a photograph of NSC members wearing NSC shirts to Garcia's funeral. (12 RT 1688.)

Counsel for codefendant Lopez registered his opposition to the evidence and offered to stipulate "that Westside Verdugo was regarded as an enemy of Northside Colton."[48] (12 RT 1688.) Counsel objected that "the prejudicial nature of that type of evidence is overwhelming in some ways" and said he "would object strongly to that evidence," noting that what happened on February 4 was not the result of a decade of previous violence between the two gangs, but "was pretty simple" in that Faria was killed because he claimed an affiliation with the west side, and Jessica Salazar was killed because she witnessed Faria's killing, "not because

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[48]The prosecutor indicated he would accept a stipulation that NSC was a criminal street gang for purposes of the gang enhancement, but, disingenuously claiming such stipulation "does not do anything for my motive on the 187s," said he would not stipulate if "my evidence is going to be limited." (12 RT 1700.) This case was tried from beginning to end as a gang case, and given the stipulation NSC was a criminal street gang, the gang dynamics testified to by Detective Underhill--i.e., Faria's challenge at the heart of NSC territory--more than provided "motive on the 187s."

something happened five years ago to Mr. Rodriguez' mother or ten years ago to some other gang member." (12 RT 1689.)

The court disagreed, stating, "You are absolutely right in one sense. It's the kind of thing that makes an ordinary citizen abhor gangs and gang violence. But the other side of that same coin is that's what appears to motivate gangs and gang violence. Not just in the context of gangs, but any society. If an atrocity is visited upon your family, you are more inclined to visit an atrocity on some other family." (12 RT 1690.) Counsel for Lopez then posed this telling question: "Does the Court really believe that the murder of Jessica Salazar or even the murder of Michael Faria was revenge for the killing of Joe Rodriguez' mother?" (12 RT 1690.) The court did not directly answer the questions, stating only that, "The fact some atrocity has been visited on my side I think would make me more likely to do it." (12 RT 1691.)

While all may be fair in love and war, legal rules govern a criminal trial, and perhaps the trial court's equation of gang dynamics with World War II explains why the court permitted so much irrelevant and prejudicial gang evidence without engaging in the proper legal analysis under section 1101, subdivision (b): "Is it by the end of like World War II--aren't the Marines starting to hate the Japanese with a passion? Aren't we starting to

refer to Germans in derogatory terms? Didn't the level the Germans and Russians got to in World War II, isn't this what goes on here? Isn't this a microcosm of war attitude?" (12 RT 1691.)

Counsel for Lopez objected that the "revenge theory" was speculative, and noted the phrase "Where you from?" in a gang context was a territorial challenge that would result in a spontaneous fight. (12 RT 1691-1692.) The suggestion the Faria and Salazar killings were revenge for the killings of Jesse Garcia and codefendant Rodriguez's mother was "an enormously prejudicial leap" because the retaliation motive would lead the jury to speculate the defendants had been involved in other murders too.

At this point, omitting crucial facts, the prosecutor indicated he had a newspaper article related to the death of Rodriguez's mother that was seized during searches following the Faria and Salazar murders "[f]rom proven documented gang associates and girlfriends of these gentlemen and their gang associates. Eddie Limon's house . . . the guy who handed the gun to Rascal in this case." (12 RT 1692.) What the prosecutor neglected to add was that Eddie Limon was Cindy Rodriguez's son and Joe Rodriguez's brother. (14 RT 1823, 1827.) "Proven documented gang associates" thus translated into a murder victim's child with an article about his mother's death.

Appellant's counsel questioned whether the person in the Garcia funeral photograph who was supposed to be appellant was not, in fact, Andy Luna.[49] (12 RT 1696) In any event, the court allowed both the photograph--"You [i.e., the prosecutor] can say it's Mr. Mendez. If you're impeached on that, that's fine."--and the evidence of the Garcia killing itself with this comment: "Generally speaking, over 352 objection, the incident involving Jesse Garcia will be allowed to be testified to in the context of motive evidence, gang commitment, reasons why they would dislike Verdugo and that it's a feud to the point of death." (12 RT 1697.)

Regarding Rodriguez's mother, appellant's counsel reiterated "the general objection I think all parties either lodged as to any introduction of gang evidence." (12 RT 1697.) The court overruled under Evidence Code section 352

> . . . any objection to evidence concerning the death of codefendant Rodriguez'[s] mother, assuming proper foundation is shown. And I would expect proper foundation being shown relating to how you came across that newspaper article in the context of other Northside Colton gang graffiti. I would think that would be circumstantial evidence of essentially strong feelings that are more than likely to be

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[49]Exhibit 78 is a photograph, allegedly taken at Garcia's funeral, of various NSC members wearing NSC shirts. This photograph appears to have been introduced to demonstrate gang affiliation (12 RT 1688), which is a separate question from details of how Garcia died--not to mention the relevance of the photograph of Garcia's corpse in its casket on appellant's gang board.

> shared by other gang members. It would seem to me if I'm a member of a very close group of people, I look at them as being my brothers, and [if] my brother's mother was killed, I would have that same anger. That is consistent with what I've learned about gangs during the course of my career as a judge. (12 RT 1698.)

In the same vein as its comparison of gang rivalries to World War II, the court's statement reflects its apparent belief virtually *any* prior acts of gang violence were admissible as "circumstantial evidence of essentially strong feelings that are more than likely to be shared by other gang members."

b) "Blood and Tissue" Evidence from Shooting of John Rojas Outside Luna Residence

The prosecutor also wanted to introduce evidence appellant had been in a vehicle involved in another homicide in the 1800 block of Michigan Street, the murder of John Rojas for which Daniel Luna was convicted. After the vehicle was impounded, the prosecutor claimed "the victim's blood and tissue was found blown into the car." (12 RT 1686.) This, the prosecutor continued, explained why appellant wanted to burn Sam Redmond's car: "Jessica Salazar was probably less than 15 feet away from Sam Redmond's SUV when he put a bullet in her head. That's why he had learned way back in 1995[50] you have to get rid of the car if anybody gets shot close to it." (12 RT 1687.)

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[50]Rojas was shot in May 1994. (14 RT 1859.)

The factual predicates underlying the prosecution's theory of admissibility are thus that 1) blood and tissue evidence was recovered from the car, 2) the evidence was instrumental in the prosecution of NSC member Daniel "Chato" Luna, and 3) appellant was aware of these facts. If any of these three was untrue, the basis for admitting the evidence dissolved.

Appellant's counsel represented that although Daniel Luna had been convicted in this offense, his conviction was later reversed on appeal. (12 RT 1698-1699.) He further represented that when Rojas was shot he was standing next to a car appellant had been in earlier, and that appellant was in a house smoking PCP when the shooting occurred. The court reserved ruling on the incident, while indicating it would probably admit it. (12 RT 1699.)

Defense counsel, asserting appellant had been interviewed only "as a witness," later reiterated his understanding that appellant was in the garage of the residence when the shooting occurred, and that Luna's conviction for the offense was overturned on appeal and the case was not retried. (12 RT 1711-1712.) The court concluded the incident was relevant as Evidence

Code section 1101,[51] subdivision (b) evidence to demonstrate appellant "would know that cars would have evidence, and that's why when he says 'Let[']s burn the car,' that would be consistent with what he learned in the past." (12 RT 1715.)

As it turns out, the forensic reports were inconclusive as to whether the blood and tissue purportedly recovered from Chato's VW were in fact blood and tissue, and in the description of the Rojas killing on appellant's gang board, the sentence indicating the victim's blood and tissue were found on the door panel was taped over. (14 RT 1803-1804; see also 14 RT 1757-1760.) The factual basis for this entire incident had evaporated--though the Rojas killing remained on the gang board for the remainder of the trial.

c) Purported Drive-by Shooting

While defense counsel objected to evidence of this incident, and in particular to a statement on the gang board regarding gunshot residue found

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[51]In relevant part, California Evidence Code, section 1101, provides that, "[E]vidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion," while allowing "the admission of evidence that a person committed a crime . . . or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act."

on appellant's palms[52] (13 RT 1729-1730), the incident was barely mentioned during in limine proceedings. The basis for admitting this incident is, in other words, anybody's guess.

The description on appellant's gang board (exhibit no. 76) reads as follows:

> December 7, 1995: 7:22 p.m.: Colton PD Patrol Off. Gamache hears multiple gunshots and sees vehicle in immediate vicinity driving 10 mph. Driver of vehicle is NSC gang member Paul John "Creeper" Negrete. Mendez is passenger. Upon consent search of vehicle, officers find a fully-loaded .22 cal. handgun in center console. Officers search trunk and find fully-loaded M1 .30 cal. carbine, a loaded SKS 7.62 mm. high-powered rifle, a loaded 12 ga. shotgun, and a .38 cal. revolver. The barrel of the shotgun was still warm to the touch. A .22 cal. live round was found in Mendez's left front pants pocket. Two .22 cal. live rounds were also found on ground next to passenger side of vehicle.

Regarding this incident, the court later remarked, "I don't have sufficient evidence to get to there being a drive-by shooting . . . ." (26 RT 3233.) If anything, this was an understatement. While the officer's hearing gunshots and warm barrel may reasonably imply the shotgun had been recently fired, there was absolutely no evidence produced that it had been fired *at someone* rather than *at something,* such as a tree, a road sign, or even into the air.

In general, defense counsel objected to any of the incidents portrayed

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[52]The court ordered the statement deleted from the board. (13 RT 1729-1730.)

on the gang board. "I want the record to be clear that I have made a general objection to the board, the evidence being presented at all. And I would like it to be clear that my objection is that it's highly prejudicial, that these are incidences . . . some of which are criminal incidents or offenses that are otherwise not readily admissible against Mr. Mendez in the guilt phase of the trial. ¶ I think the introduction of the evidence per se would be highly prejudicial and inflammatory and we would ask the Court not to permit the introduction of the evidence." (13 RT 1725.)

It is noteworthy that there appear to be only five references to Evidence Code section 1101, subdivision (b) in the entire discussion of other-crimes evidence, four of them--two by the court, two by attorney Exum--pertaining to Rodriguez. (12 RT 1705, 1707, 1716; 13 RT 1745.) Only once did the court refer to section 1101, subdivision (b), in connection with appellant Mendez; this single reference came regarding the supposed brain matter on the car. (12 RT 1715.) Little attention was given to this court's admonition to admit other-crimes evidence "only with caution" (*People v. Balcom* (1994) 7 Cal.4th 414, 426), and had such caution been exercised, the purported grounds for admitting any of the evidence would not have withstood scrutiny.

/ / /

2. Trial

Before the prosecution's gang expert, Detective Jack Underhill, testified, the court read the following cautionary instruction to the jury regarding gang evidence:

> Ladies and gentlemen of the jury, it's my understanding that through this witness Mr. Ruiz will be presenting a considerable amount of what is called "gang evidence," and that evidence may also involve other criminal acts, not just by parties here, but other parties that may have been involved with North Side Colton.
>
> That evidence is not being offered, and should not be considered by you, as character or general disposition evidence in the sense that it's generally not allowed in court to prove previous crimes to say because a person did crimes on day one, they did crimes on day two. It's not being offered for that purpose. Does everybody understand that?
>
> However, there is a gang allegation specifically alleged and it's also alleged in one of the allegations of special circumstance,[53] so that evidence is being admitted for purposes of those allegations.
>
> Also, that evidence may be considered by you as it may be relevant to motive, intent or common scheme or plan. Now, for those purposes you may consider that, and it may even be identity later on, I don't know. But what weight and significance you choose to give this evidence will be completely up to you. Does everybody understand that? (14 RT 1766-1767.)

The court also read the criminal street gang stipulation:

> I believe that it would be stipulated between all parties and all

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[53]The court was mistaken. There was no gang special circumstance alleged; the offense in this case preceded the March 8, 2000, enactment of Penal Code section 190.2, subdivision (a)(22).

> defendants that North Side Colton, goes by the letters NSC, is a criminal street gang within the meaning of Penal Code Section 186.22(b) whose members have engaged in a pattern of criminal gang activity, including, but not limited to, murder, attempt[ed] murder, drive-by shooting, robberies, carjackings and witness intimidation.
>
> Further stipulated, I believe between all parties and all defendants, is that the defendant Mendez, the defendant Rodriguez and the defendant Lopez are, and were at all relevant times, members of North Side Colton. (14 RT 1767-1768.)

Detective Underhill told the jury the animosity between NSC and Westside Verdugo was "a well-known hatred that's been going on for years due to numerous incidents." (14 RT 1821.) This animosity apparently began in 1994[54] with the murder of NSC member Jesse "Sinner" Garcia. (15 RT 1918-1919.) Garcia was shot while walking down a Colton street in a drive-by shooting by Westside Verdugo members. (14 RT 1834.) There was no connection between the death of John Rojas and the death of "Sinner."[55] (14 RT 1863.) Garcia's funeral took place on July 6, 1994. (14 RT 1862.)

Detective Underhill added that a couple of months earlier, investigating officers from his department had determined "Mendez was

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[54]Detective Underhill mistakenly referred to the year as 1996. See, e.g., 14 RT 1832.

[55]Meaning, obviously, gang member Rojas did not belong to Westside Verdugo.

present at the scene of a shotgun killing of a rival gang member John Rojas."[56] Rojas was killed on the sidewalk in front of the Luna residence on Michigan Street, and, "In a voluntary statement to police Mendez admits to being outside in front of the Luna house near the garage. He heard two to three shotgun blasts and saw the victim on the ground. He fled in North Side Colton member Daniel 'Chato' Luna's yellow Volkswagen." (14 RT 1859-1860.) "Chato" was charged with the Rojas murder, though appellant was not charged with any crime in connection therewith. (14 RT 1860.) The "rival gang" Rojas belonged to was never identified.

Detective Underhill was not aware of any NSC/Westside Verdugo killings or significant assaults from Garcia's murder in 1994 until 1998. (15 RT 1919.) On July 8, 1998, Westside Verdugo members went to the Four Seasons apartments to buy drugs, where they were jumped by Northside Colton members, who took one of the Westsider's cell phones. (14 RT 1818-1819.) Northside Colton later called the Westsiders and taunted them to return to the apartments if they wanted the phone back. Return they did, knocking on an apartment door at the Four Seasons and shooting to death Cindy Rodriguez, Joe Rodriguez's mother, when she

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[56]The ubiquitous hearsay employed in this case is addressed in the next argument.

answered the door. (14 RT 1819.) It appears she was shot because she unfortunately happened to answer the door, not because she was Joe Rodriguez's mother. (14 RT 1820.) Detective Underhill opined NSC would be expected to retaliate for the murder to save face in the gang community. (14 RT 1821.) He could not, however, recall any retaliatory homicides of Westside Verdugo members by NSC members between the time of Cindy Rodriguez's murder in 1998 and the current offenses in 2000. (14 RT 1825.)

Detective Underhill also testified gang members keep mementos of crimes they commit or crimes committed against them. (14 RT 1826.) While serving a search warrant on the apartment of NSC member Eddie Limon, police found a newspaper article referring to the death of Cindy Rodriguez entitled, "Babysitter is Slain at Apartments." (14 RT 1824, 1827.) Eddie Limon was, however, Cindy Rodriguez's son and Joe Rodriguez's younger brother.[57] (14 RT 1823, 1827.)

In addition, Detective Underhill did not know whether Westside Verdugo members were upset about the Faria and Salazar killings. (15 RT 1926.)

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[57]The suggestion Limon kept the article as a gang memento rather than because he was the victim's son borders on absurdity.

Finally, Underhill testified that at 7:22 p.m. on December 7, 1995, Colton Police Officer Gamache heard multiple gunshots and saw a car in the area driving ten miles per hour. (14 RT 1863.) NSC member Paul John Negrete, a.k.a. "Creeper," was driving the car, in which appellant was a passenger. In the console of the car officers found a loaded .22 handgun, and in the trunk they found a loaded M-1 carbine, a loaded SKS rifle, a .38 revolver, and a loaded 12-gauge shotgun, the barrel of which was still warm to the touch. A live .22 round was found in appellant's pant pocket, and two live .22 rounds were found on the ground next to the passenger side of the car. (14 RT 1864.)

During discussions of jury instructions, in particular the People's request for CALJIC 2.50 [Evidence of Other Crimes],[58] the court said, "It seems to me if I give that instruction to the jury that . . . the gang evidence is not meant to show character, I've covered it. ¶ Otherwise, I would have to go through and give a list how they could consider it." The court apparently recognized it had not admitted the evidence under any of the legally-recognized grounds in Evidence Code section 1101, subdivision (b):

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[58]CALJIC No. 2.50 [Evidence of Other Crimes] enumerates the permissible uses (e.g., intent, identity, motive) other than bad character or criminal disposition for which other-crimes evidence may be considered. (8 CT 2173-2174.)

"The problem is it's not so simple. It's not just intent, it's not just motive, it's not just identity. *In some respects it's how gangs operate and the associations and the expectations that come when you're operating in a gang environment, which is very hard to write.*" (22 RT 2746, italics added.)

At the conclusion of the guilt phase, the court made the following statement to the jury:

> There's one other thing I did want to say, and I'm going to reopen the case just for this one point. I do not mean to suggest what weight and significance you give to the gang evidence and/or evidence of other crimes. That is for you, the jury, to decide. However, this evidence, if believed, may not be considered by you just to prove that Mr. Mendez is a person of bad character or that he has a general disposition to commit crimes. Generally speaking, prior misconduct is not allowed into evidence just to show the person is, quote-unquote, a bad person. It may be allowed in to put things in context, to give you an understanding of motive and intent *and so forth*. But it's only for that limited purpose. So when I give you the instruction "evidence was admitted for a limited purpose," that's what I'm talking about. I just want to be clear about that. (23 RT 2797-2798, italics added.)

The jury was also instructed with CALJIC No. 2.09:

> Certain evidence was admitted for a limited purpose. At the time this evidence was admitted, you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted.
>
> Do not consider this evidence for any purpose except the limited purpose for which it was admitted. (23 RT 2803; 8 CT 2112.)

While "motive and intent" may indeed be limited purposes, "and so forth" is not one, meaning the jury could use the evidence as it pleased.

3) Appellant's Gang Board

There was a general Northside Colton "gang board" (People's exhibit number 1) containing pictures of appellant, Rodriguez, Redmond, and Lopez. Individual gang boards were also prepared and displayed for appellant (exhibit no. 76),[59] Rodriguez, and Lopez. Appellant's individual gang board consisted of written descriptions of the following incidents:

° May 1, 1994, killing of John Rojas outside the Luna residence.

° May 5, 1994, detention of appellant with three NSC members during a traffic stop.

° May 12, 1994, Mendez riding in stolen car driven by his brother and NSC member Enrique "Tiny" Mendez; other passenger is NSC member Jesse Perez; car crashes into police car.

° July 6, 1994, funeral of Jesse "Sinner" Garcia.

° December 7, 1995, after hearing gunshots, police stop automobile driven by NSC member Paul John "Creeper" Negrete in which appellant is passenger, and recover numerous firearms, including a shotgun whose

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[59]Appellant will request that People's exhibit number 76 be forwarded to this court.

barrel is warm to the touch.

° October 20, 1996, police contact appellant who admits NSC membership.

On the left side of the board are five age-progression photographs of appellant, along with a photograph of Jesse Garcia in his casket. On the right hand side is a photograph that appears to be of Jesse Garcia and an unidentified young Hispanic male throwing gang signs and appears to have been taken in a commercial photo booth. No attempt was ever made to explain the relevance of these photographs--perhaps the People believed it would help their case to provide "before" and "after" pictures of Jesse Garcia--and the inclusion of these blatantly irrelevant photographs reflects just how far out of hand the trial court allowed the gang evidence to get.

C. General Legal Principles

In general, the admission of evidence, including gang evidence, is subject to an abuse of discretion standard. (*People v. Brown* (2003) 31 Cal.4th 518, 547.) The standard is deferential but it is not empty. (*People v. Williams* (1998) 17 Cal.4th 148, 162.) "Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error."

(*People v. Partida* (2005) 37 Cal.4th 428, 439.)

Here, however, the trial court essentially invented a new theory for admitting other-crimes evidence under Evidence Code section 1101, subdivision (b): "It's not just intent, it's not just motive, it's not just identity. In some respects it's how gangs operate and the associations and the expectations that come when you're operating in a gang environment, which is very hard to write." Because of this legal novelty, the admissibility of the gang evidence should be subject to de novo review by this court. "A trial court's determination of the admissibility of evidence of uncharged offenses is generally reviewed for an abuse of discretion. [Citations.] To the extent the trial court's ruling depends on the proper interpretation of the Evidence Code, however, it presents a question of law; and our review is de novo." (*People v. Walker* (2006) 139 Cal.App.4th 782, 794-795.)

In addition, the erroneous admission of evidence may result in a due process violation if it renders a trial fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70 [112 S.Ct. 475, 116 L.Ed.2d 385]; *People v. Partida, supra*, 37 Cal.4th at p. 652.) "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt," and it is the prosecution's burden to so demonstrate. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87

S.Ct. 824, 17 L.Ed.2d 705].)

Regardless of whether this court reviews the issue de novo or for an abuse of discretion, appellant submits the trial court's decision to admit evidence of three additional murders and a drive-by shooting denied him the due process of law under the Fifth and Fourteenth Amendments to the United States Constitution by rendering his trial fundamentally unfair. The error further undermined the reliability required by the Eighth and Fourteenth Amendments for the conviction of a capital offense. (*Beck v. Alabama* (1980) 447 U.S. 625, 638 [100 S.Ct. 2382, 65 L.Ed.2d 392].) In addition, because the prosecutor referenced the erroneously-admitted evidence during the penalty phase (e.g., 27 RT 3302 [drive-by]), the admission of the evidence deprived appellant of the reliable, individualized sentencing determination required by the Eighth and Fourteenth Amendments. (*Zant v. Stephen, supra,* 462 U.S. at p. 879.)

This court has recognized the unique danger posed by gang evidence. "Although evidence of a defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged--and thus should be carefully scrutinized by trial courts--such evidence is admissible when relevant to prove identity or motive, if its probative value is not substantially

outweighed by its prejudicial effect." (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.) Whether the gang evidence is cumulative--keep in mind the stipulation Northside Colton was a criminal street gang--can be considered in evaluating whether the trial court abused its discretion in admitting it. (*Id.*, at p. 1196.) The key inquiry is whether the evidence is relevant to begin with: "[G]ang evidence is inadmissible if introduced only to 'show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense.'" (*People v. Avitia* (2005) 127 Cal.App.4th 185, 193; see also *Dawson v. Delaware* (1992) 503 U.S. 159, 166-167 [112 S.Ct. 1093, 117 L.Ed.2d 309.)

D. The Evidence Was Irrelevant Under Evidence Code section 1101, Subdivision (b)

This court has repeatedly stated other-crimes evidence should be "admitted only with caution." (*People v. Balcom, supra,* 7 Cal.4th at p. 426.) Sadly, no such caution was apparent here. The trial court's neglect to carefully analyze the purported grounds for admission led to the introduction of irrelevant but prejudicial gang evidence.

As this court noted in *People v. Thompson* (1980) 27 Cal.3d 303, "Evidence of an uncharged offense is usually sought to be admitted as 'evidence that, if found to be true, proves a fact from which an inference of another fact may be drawn.' [Citation.] As with other types of

circumstantial evidence, its admissibility depends upon three principal factors: (1) the *materiality* of the fact sought to be proved or disproved; (2) the *tendency* of the uncharged crime to prove or disprove the material fact; and (3) the existence of any *rule* or *policy* requiring the exclusion of relevant evidence." Regarding materiality, "the fact sought to be proved may be either an ultimate fact in the proceeding or an intermediate fact 'from which such ultimate fact[] may be presumed or inferred.'" (*Id.* at p. 315, italics in original.) "Ultimate facts" include identity and the elements of the charged crimes (such as intent), whereas "[m]otive, opportunity, plan, scheme, design, and modus operandi are examples of intermediate facts." Uncharged offense evidence employed to prove such intermediate facts is material "*only* if the intermediate fact tends logically and reasonably to prove an ultimate fact which is in dispute." (*Id.* at p. 316, fns. 13, 14, italics in original.)

A trial court's determination whether other-crimes evidence offered under section 1101, subdivision (b) should be admitted for one of the reasons specified therein (e.g., motive or intent) is "essentially a determination of relevance." (*People v. Kipp* (1998) 18 Cal.4th 349, 369.)

Like any other evidence, factual testimony by an expert must be relevant to the issues. (*People v. McDonald* (1984) 37 Cal.3d 351, 366.)

Appellant and his two codefendants stipulated that Northside Colton was a criminal street gang within the meaning of the S.T.E.P. Act, and that the three were Northside Colton members. (14 RT 1767-1768.) The flood of irrelevant testimony regarding NSC that inundated this trial was thus not only unnecessary but, given the definition of relevant evidence as "evidence having any tendency in reason to prove or disprove any disputed fact" (Evid. Code, § 210), was not even strictly relevant: Whether NSC was a criminal street gang, and whether appellant was a member of it, were no longer disputed facts by virtue of the stipulation. Since only relevant evidence is admissible (Evid. Code, § 350), the trial court should have excluded it.

Even if other-crimes evidence is relevant, however, "such evidence 'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352,'" meaning the evidence must be examined to determine "whether the probative value of the evidence of defendant's uncharged offenses is "substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Balcom, supra,* 7 Cal.4th at pp. 426-427.)

In *People v. Ewoldt* (1994) 7 Cal.4th 380, this court delineated the

permissible use of uncharged bad acts evidence under Evidence Code section 1101. "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. . . . In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant 'probably harbor[ed] the same intent in each instance.'" (*Id.* at p. 402.) If the prosecution wishes to demonstrate the existence of a common design or plan, a greater degree of similarity between uncharged and charged offenses is required. "To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts . . . ," so that "evidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts." (*Id.* at pp. 402-403.) Attempted proof of identity requires the greatest degree of similarity between uncharged and charged offenses. "The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature." (*Id.* at p. 403.)

As this court cautioned in *Ewoldt*, "In ruling upon the admissibility

of evidence of uncharged acts . . . it is imperative that the trial court determine specifically what the proffered evidence is offered to prove, so that the probative value of the evidence can be evaluated for that purpose." (*People v. Ewoldt, supra*, 7 Cal.4th 380, 406.) That such careful analysis did not happen here demonstrates an abuse of discretion.

1) Intent or Motive

While the trial court indicated the uncharged gang crimes were relevant on the issues of intent and motive, it would appear the court was employing the term "intent" in a general sense, rather than in the narrow legal sense (as in, for example, "specific intent"), because "intent" in the narrow legal sense was essentially irrelevant in this case. No party contested that whoever shot Michael Faria and Jessica Salazar intended to kill them. The real question posed here is whether the other three murders (Garcia/Rodriguez/Rojas), and the purported drive-by shooting involving appellant, were admissible on the issue of motive.

Clearly, other-crimes evidence can be admissible to establish motive. (Evid. Code, § 1101, subd. (b); *People v. Clark* (1992) 3 Cal.4th 41, 127.) More specifically, gang evidence relating to "payback" can be introduced *if* it is "relevant to the issues of motive and intent" for a charged offense. (*People v. Martinez* (2003) 113 Cal.App.4th 400, 413.) Here, the fact the

state's gang expert never attempted to tie *any* of this evidence to the charged offenses underscores its utter lack of relevance.

Had the trial court initially exercised the caution required for admitting other-crimes evidence rather than simply analogize gang violence to warfare, it could have quickly disposed of the relevance of the Rojas killing in May 1994 and purported "drive-by" in December 1995. Rojas was not a member of Westside Verdugo, and no attempt was made to link his killing to any ongoing dispute between NSC and Westside Verdugo. The one potentially permissible use of this evidence under section 1101--that appellant had *knowledge* some of Rojas's body tissue was recovered from Chato's car, which *knowledge* explained why appellant wanted to torch Redmond's Pathfinder--evaporated before Underhill testified when it turned out there was no evidence any such body tissue had in fact been recovered. Likewise, no attempt was made to link the purported drive-by in December 1995 to the rivalry. Rojas was thus just another body, and the drive-by just another attempted murder, employed to prejudice appellant in the eyes of the jury.[60]

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[60]Exhibit 82, an NSC "gang roster" found during a search of Eddie Limon's residence, included the name "Lil Smiley" followed by "R.I.P." Though how "Lil' Smiley," whose name was Armando Garcia, died was utterly irrelevant in this case, the trial court prompted Detective Underhill to inform the jury he too had died as the result of some unspecified "gang

Nor is motive demonstrated by the killings of NSC member Jessie Garcia and NSC relative Cindy Rodriguez by Westside Verdugo. While in the abstract the "endless cycle of violence and retribution" theory may appear plausible, it quickly disintegrates upon scrutiny. For one thing, consider the dates involved. The Faria and Salazar murders occurred in February 2000; Garcia was killed in July 1994, and Cindy Rodriguez in July 1998. Gang revenge killings are immediate; they do not take years. (See, e.g., *People v. Perez* (2004) 118 Cal.App.4th 151, 157-158 [hypothetical to gang expert posited killing of gang member immediately followed by shooting of rival gang members]; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 648 [following drive-by shooting, police department "immediately instituted a heightened state of alert, anticipating retaliation for the shooting"]; *People v. Vang* (2001) 87 Cal.App.4th 554, 556-557 [retaliatory drive by shootings committed within minutes of each other]; *People v. Francisco* (1994) 22 Cal.App.4th 1180, 1192 ["[A]ppellant . . . referred to having been at a party where someone was shot. It was immediately after this occurrence, that appellant and his coperpetrator got the gun in order to shoot someone. Again the inference is available that the shooting was in retaliation for the shooting at the party."]

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problem." (14 RT 1828-1829, 1832-1833.)

Virtually dispositive of the relevance question is that the state's gang expert never asserted any evidentiary link between the Garcia/Rodriguez killings and the charged offenses when rendering his expert opinion. Regarding the death of Cindy Rodriguez, Underhill stated generally that because she was an NSC family member, "there would have to be some type of retaliation for that murder" (14 RT 1819), and "[t]here would have to be some kind of payback for what happened" (14 RT 1822). When the moment of truth arrived, however--meaning when the prosecutor was setting up the expert to deliver his opinion the murders were done "for the benefit of, at the direction of, or in association with" NSC (14 RT 1855-1856)--neither the prosecutor's questions nor the detective's answers so much as mentioned the Rodriguez murder.

Instead, Underhill explained Faria's killing as the result of the general dynamics of gang challenges--precisely as defense counsel for codefendant Lopez had done in limine when opposing evidence of the killings. (12 RT 1689-1692.) When Faria said "Where are you from?" to the occupants of the Pathfinder, it was a challenge that had to be met by them with "Where are you from?" Faria escalated the brewing confrontation by saying, "I back up the West Side." (14 RT 1849-1850.) It was then especially important for the NSC members to declare their gang

affiliation[61] because the challenge had been issued in the NSC epicenter, the bloque. (14 RT 1851.) Nowhere does Underhill mention the Garcia or Rodriguez killings:

> Q: Now . . . the killing of Michael--in your opinion was that committed for the benefit of, at the direction of, or in association with any members of North Side Colton?
>
> A: Yes.
>
> Q: And would you please explain your answer, how you came to that conclusion.
>
> A: Well, like I was talking about before, when these guys made the challenge to the North Side Colton, they . . . have no choice but to come back and retaliate and go after these gang members who are making that challenge on their turf. The . . . rules of the gang dictate that that has to happen.
>
> Q: Well, okay. But . . . if they chased him off, was there more purpose to be served by being very, very violent with him to send a message?
>
> A: Yes. You want to send a message out to that gang, to any other gangs in the area, that North Side Colton will come back. It's what we talked about with the intimidation factor and the fear. The more fear you have, the more respect that particular gang has. If they didn't . . . respond back that way, then they would lose respect in the eyes of the gang members and the other gangs in the area.
>
> Q: Is the killing of Michael in your opinion something that enhances the respect that other gangs will hold for North Side Colton members?

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[61] According to Sergio Lizarraga, the driver of the SUV said, "Fuck the Westside. Northside Colton." (11 RT 1501.)

> A: Yes. This builds a reputation in the gang world that North Side Colton will do this kind of thing. It builds up their reputation . . . in hopes that other gangs will fear them. (14 RT 1855-1856.)

Underhill further opined Jessica Salazar was killed simply to eliminate her as a witness to Faria's murder, and, while he stated the murder was committed for gang benefit, he did not mention any unique gang dynamics involved in it. (14 RT 1856-1858.)

Underhill made brief reference to Garcia's funeral after he had given his opinion regarding the killings (14 RT 1860-1861, 14 RT 1862-1863), and the fact Garcia had died at the hands of Westside Verdugo was not even mentioned until cross-examination by appellant's counsel. (15 RT 1918.) No one ventured an explanation as to how the photograph of Garcia in his casket on appellant's gang board was even remotely relevant to any issue in dispute.

In short, according to the prosecution's best evidence, simple gang dynamics explained the murder of Faria, and the desire to eliminate a witness explained the murder of Jessica Salazar. Any rival gang member challenging NSC in the same manner at the same location would have been subject to the same treatment. The Rojas, Garcia, and Rodriguez murders did not provide motive for the offenses, and were thus irrelevant but highly prejudicial.

2) Common Design or Plan

Nor was any of the evidence--the Rojas/Garcia/Cindy Rodriguez murders or the alleged drive-by--relevant to a common design or plan. "[I]n establishing a common design or plan, evidence of uncharged misconduct must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.'" (*People v. Ewoldt, supra,* 7 Cal.4th at p. 402.)

It is unclear why the trial court believed any of the four challenged incidents constituted a common design or plan, though some examples of properly-admitted design or plan evidence illustrate the trial court's error. "For example, in a prosecution for shoplifting in which it was conceded or assumed that the defendant was present at the scene of the alleged theft, evidence that the defendant had committed uncharged acts of shoplifting in a markedly similar manner to the charged offense might be admitted to demonstrate that he or she took the merchandise in the manner alleged by the prosecution." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 394.) Or, regarding a common scheme or plan to commit a sex offense, similarities between prior offenses and the current offense demonstrated the defendant "abducted a stranger, a female; used a weapon; assured the victim that he

would not harm her; took her to a remote location; and carried bindings with him, indicating that the behavior was planned." In the same case, regarding a common scheme or plan to commit burglary, the similarities were the "defendant targeted the home of a stranger, was armed, focused on a female resident, and entered the residence with an intent to tie up or assault the victim under circumstances indicating that he lay in wait outside before executing his plan." (*People v. Davis* (2009) 46 Cal.4th 539, 602-603.)

Here, two of the prior murders involved Northside Colton *victims*; one involved rival gang member John Rojas; and one involved appellant's alleged participation in a drive-by shooting, with the jury left to speculate as to possible victims. Given its location outside the Luna residence on Michigan Street, it is possible the Rojas killing involved "a concurrence of common features [so] that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." Had there been testimony, for example, that Rojas issued a gang challenge similar to Faria's, and that the same general scenario unfolded resulting in Rojas's death, an argument might have been made that NSC had a common plan or scheme to deal with interlopers on the bloque.

But there was no such testimony. The death of Rojas was presented

in a vacuum, yet another gang-related corpse without context. Like the other murders and drive-by shooting, the evidence was presented not for motive, intent, or common plan or scheme, but to terrify the jury into convicting appellant.

3) Things "Very Hard to Write"

The trial court stated it was admitting the evidence on "how gangs operate and the associations and the expectations that come when you're operating in a gang environment, which is very hard to write [i.e., in a jury instruction]." (22 RT 2746.) What this really means is the trial court believed *all gang evidence was admissible* without further examination, something far removed from this court's admonitions to scrutinize other-crimes evidence "with great care" by means of a "closely reasoned analysis." (*People v. Thompson, supra*, 27 Cal.3d at p. 314.)

E. The Evidence Was Highly Prejudicial and Should Have Been Excluded Under Evidence Code Section 352

As indicated above, establishing the relevance of other-crimes evidence--something that was not done here--is only the first step. Assuming relevance is established, the trial court must examine the evidence to determine "whether the probative value of the evidence of defendant's uncharged offenses is "substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue

prejudice, of confusing the issues, or of misleading the jury." (*People v. Balcom, supra,* 7 Cal.4th at pp. 426-427.) As this court has admonished, "Evidence of uncharged offenses 'is so prejudicial that its admission requires extremely careful analysis.'" (*People v. Ewoldt, supra,* 7 Cal.4th at p. 404.) As demonstrated above, such "extremely careful analysis" did not occur in the trial court, and introduction of at least three additional casualties of gang violence and a drive-by shooting was essentially gratuitous: "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. Karis* (1988) 46 Cal.3d 612, 638.)

The trial court's impromptu instructions to the jury not to consider the gang evidence as character evidence was not sufficient to dispel this emotional bias. "While the court did admonish the jury concerning the proper use of the gang evidence, certain gang evidence admitted was so extraordinarily prejudicial and of such little relevance that it raised the distinct potential to sway the jury to convict regardless of [the defendant's] actual guilt." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 228.) In addition, "The naive assumption that prejudicial effects can be overcome by instructions to the jury [citation omitted] all practicing lawyers know to be

unmitigated fiction." (*Krulewitch v. United States* (1949) 336 U.S. 440, 453 [69 S.Ct. 716, 93 L.Ed. 790] (conc. opn. of Jackson, J.)) That this evidence was introduced with virtually no regard to its relevance is aptly illustrated by appellant's gang board, with its photograph of Jesse Garcia in his casket, and its details of the John Rojas killing when the only purported basis for admitting the Rojas killing--i.e., that appellant was aware biological evidence had been found on Luna's car, thus providing a reason why appellant (according to Redmond) wanted to torch the Pathfinder after the Salazar shooting--had been taped over because the prosecution could not establish blood or tissue was in fact found on the car.

The irrelevance of the evidence was demonstrated by the complete neglect of the state's gang expert to do anything but recite details of the incidents. In addition, and for what it may be worth, the prosecutor made no attempt during the guilt phase argument to compensate for this neglect by asserting any of the incidents were relevant to the charged offenses. Instead, the prosecutor employed the incidents to prejudicial effect--which, it must be concluded, was the reason for their introduction to begin with. Regarding the purported drive-by,

Is Mr. Mendez somebody who is unfamiliar with guns?[62] He's

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[62]Appellant's familiarity with firearms was not at issue in the case.

> rolling with another gang member . . . . Officer on duty in a marked unit hears gunshots. He looks up, sees a car that Mendez is in driving ten miles an hour. He's just heard a shooting. *It's clear it's a drive-by shooting.* Pulls the car over. Driver is a Northside Colton gang member, Creeper, this guy up here. (23 RT 2847-2848; italics added.)

Then, in the very next sentence, and despite the prosecution's utter failure to prove a drive-by had ever taken place, the prosecutor posed this question: "Is death part of their lives?" (23 RT 2848.)

The prosecutor reminded the jury of the Rojas incident not because it was relevant for any of the reasons he had initially suggested (and the court had bought), but to explain to the jury why the government needed to employ Sam Redmond as its star witness:

> So you're going to make a deal with that lunatic Art Luna? Remember how we heard about Mr. Mendez being at the scene of that shotgun slaying of Rojas back in I think 1994? The guy drops on Art Luna's sidewalk. That's the one where he jumps into the yellow Volkswagen driven by the guy they prosecuted for the case. (23 RT 2898.)

This gratuitous and prejudicial reminder of the Rojas killing underscores that it was completely irrelevant for any valid 1101, subdivision (b) purpose.

Appellant submits he would not have been convicted absent this irrelevant but highly prejudicial evidence of gang violence, and given the closeness of the case--the case against appellant consists largely of the

testimony of a murderous and veracity-challenged snitch motivated to save his own life--there is "*a reasonable chance*, more than an *abstract possibility*" of a different result had the other-crimes evidence not been introduced. (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, italics in original, citing *People v. Watson* (1956) 46 Cal.2d 818, 837.)

In addition, evidence of the other killings and alleged drive-by shooting deprived appellant of "his right to the fundamentally fair trial guaranteed by the due process clause," because "the admission of the evidence so fatally infected the proceedings as to render them fundamentally unfair."[63] (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 919.) "The . . . issue is not whether introduction of [the evidence] violated state law evidentiary principles, but whether the trial court committed an error which rendered the trial so arbitrary and fundamentally unfair that it violated federal due process." (*Id.* at p. 920.) In other words, that the court violated Evidence Code section 352 in admitting the evidence does not per se establish a due process violation: "Only if there are *no* permissible inferences the jury may draw from the evidence can its

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[63]Although there was no specific due process objection made below, appellant may argue on appeal the admission of the evidence over Evidence Code section 352 objection "had the additional legal consequence of violating due process." (*People v. Partida, supra*, 37 Cal.4th at p. 435.)

admission violate due process." (*Id.* at p. 920; italics in original.)

Here, as demonstrated above, there were no permissible inferences the jury could draw from the evidence, and the People cannot hope to demonstrate the error was harmless beyond a reasonable doubt, the required standard for error of federal constitutional dimension. (*Chapman v. California, supra,* 386 U.S. at p. 24.) The evidence was irrelevant to any point in contention, it was designed to evoke an emotional response--fear--from the jury, and it constituted impermissible character and guilt-by-association evidence pure and simple.

The convictions and judgment must be reversed.

III

THE UBIQUITOUS GANG HEARSAY INTRODUCED AT TRIAL WAS TESTIMONIAL HEARSAY IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM, AND WAS FURTHERMORE INHERENTLY UNRELIABLE AND SHOULD HAVE BEEN EXCLUDED UNDER BOTH STATE AND FEDERAL LAW

A. Introduction

In the previous argument, appellant demonstrated the trial court abused its discretion in allowing evidence including three additional gang-related murders and a purported drive-by shooting, which error ultimately rendered appellant's trial fundamentally unfair and resulted in a due process violation. In this argument, appellant will demonstrate evidence regarding these and other incidents was defective to begin with both constitutionally and under state law, because it consisted of testimonial and unreliable double hearsay.

As the prosecutor told the trial court, "[Y]our Honor has done enough of these trials to know if you can pick one thing that is crucial to a gang expert's opinion, it is the original F.I. cards . . . ." (15 RT 1893.) These field interrogation cards were, however, prepared by police officers other than the prosecution's gang expert, Colton Police Department gang investigator Jack Underhill, based on interviews by these other police officers with purported gang members. Most of the gang evidence testified

to by the detective, including virtually everything on the gang boards, was thus not just hearsay, but double hearsay: Detective Underhill was relaying what someone told someone else. This double hearsay was ultimately employed by Detective Underhill in expressing to the jury his opinion that appellant, Rodriguez, and Lopez committed the murders and the reasons why they had done so.

In this argument, appellant will demonstrate there is no "expert's exception" to the Sixth Amendment whereby the same police officer, precluded by the Constitution from testifying what John Doe, an unavailable witness, told him about something, could introduce the exact same statement by claiming he or she considered it in forming an expert opinion. The detective's use of these field identification cards, which were prepared with an eye to future prosecution under the S.T.E.P. act,[64] violated appellant's confrontation rights under the Sixth Amendment to the United States Constitution. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This "bedrock procedural guarantee applies to both federal and state prosecutions." (*Crawford v. Washington* (2004) 541

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[64]The S.T.E.P. act refers to title 7, chapter 11 of the Penal Code, which is entitled, "Street Terrorism Enforcement and Prevention Act."

U.S. 36, 42 [124 S.Ct. 1354, 158 L.Ed.2d 177].)[65] "[E]ven if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." (*Id.* at p. 53.) These field interrogation cards were clearly testimonial hearsay and inadmissible as "akin to the types of official and business records admissible at common law," because "the regularly conducted business activity" of the police was "the production of evidence for use at trial. " (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. --- [129 S.Ct. 2527, 2538, 174 L.Ed.2d 314].)[66]

In addition, the information contained in these cards and any other reports was presumptively unreliable because it consisted of double hearsay and should have been excluded under state law. Its admission in violation of state law further compromised appellant's federal due process rights under the Fifth and Fourteenth Amendments and state due process right under article I, section 15 of the California Constitution.

Finally, because both confrontation clause and hearsay rules are designed to ensure reliability, their violation here undermined the reliability

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[65]*Crawford* was decided on March 8, 2004; appellant's jury was sworn on July 27, 2004.

[66]It appears this court is currently reviewing issues posed by *Melendez-Diaz* in *People v. Dungo* (2009) 176 Cal.App.4th 1388, review granted Dec. 2, 2009, S176886.

required by the Eighth and Fourteenth Amendments for the conviction of a capital offense. (*Beck v. Alabama, supra,* 447 U.S. at p. 638.)

This case was prosecuted as a gang case. Because most of that gang evidence was both defective and prejudicial, reversal of the convictions is required.

B. Proceedings Below

Defense counsel specifically objected it was necessary "that we have somebody who is testifying with respect to something other than rank hearsay."[67] (12 RT 1697.) While counsel did not explicitly invoke the confrontation clause of the Sixth Amendment, appellant's "new constitutional arguments are not forfeited on appeal" because "the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional *legal consequence* of violating the Constitution." (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17, italics in original.) Indeed, "it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values."

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[67]This belies the trial court's later statement that "Nobody has objected to anything on those photo boards, and we have allowed hearsay to go into all this." (15 RT 1895.)

(*California v. Green* (1970) 399 U.S. 149, 155 [90 S.Ct. 1930, 26 L.Ed.2d 489].)

The trial court ended up imposing virtually no restrictions on Detective Underhill's testimony. Detective Underhill said a "S.M.A.S.H. card is a card that's given to the gang officers to complete, to fill out when they make contact with a gang member or get some documentation on a gang member."[68] (14 RT 1790.) Police officers filled out S.M.A.S.H. cards "on a daily basis when we would contact gang members or suspected gang members. We would then speak to them, complete gang cards on them, photograph them if necessary, and just . . . briefly talk with them and try to find out exactly what their involvement and what level of involvement they are with the gang." (14 RT 1771.)

The detective indicated that younger gang members are "more gullible" and more likely to admit their gang membership. (14 RT 1792.) As gang members "get older, get arrested, get schooled by the older guys, [it is] not uncommon for them to start denying their gang membership because they don't want to be tagged with . . . additional charges of being in

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[68]S.M.A.S.H. is an acronym for San Bernardino County Movement Against Street Hoodlums. (14 RT 1771.) At trial, these cards were variously referred to as "S.M.A.S.H. cards," "gang cards," "field interrogation cards," "field identification cards," and "F.I. cards," and these terms will be used interchangeably here.

a gang." (14 RT 1797.) In other words, the detective said the purpose of these cards was to gather evidence for future prosecution, something clearly "testimonial" within the meaning of *Crawford.*

The gang expert based his opinions on multi-leveled testimonial hearsay which was paraded before the jury. Detective Underhill testified to six encounters listed on exhibit 76, appellant's gang board, five between appellant and police officers other than Underhill, and one involving the funeral of Jesse "Sinner" Garcia.

- The first bit of hearsay detailed the killing of rival gang member John Rojas. (14 RT 1859-1860.)

- The second hearsay incident was a traffic stop four days after the Rojas killing, where appellant was detained with fellow NSC members Daniel Luna (who the prosecutor reminded the jury had been charged with the Rojas killing), Jesse "Sinner" Garcia (who the prosecutor reminded the jury was dead), and Jimmy Continola. (14 RT 1860-1861.)

- The third hearsay incident occurred seven days later, where appellant and NSC member Jessie "Wackie" Perez were riding in a stolen Honda Prelude driven by Enrique Mendez; the Honda crashed into a Colton police unit after a high speed chase. The car's ignition was punched, and a slide hammer, a tool to do the punching, was found in the car. (14 RT

1861.) Based on his review of the S.M.A.S.H. card other officers filled out following this incident, Underhill testified appellant wrote gang graffiti on the card, admitted he was an NSC member, said his moniker was "Midget," and had "Colton" tattooed on the back of his neck. (14 RT 1862.)

- The fourth incident was the funeral of Jesse Garcia; one side of the gang board contained a photograph of Garcia in his casket, the other a photograph of Garcia, alive and forming a "C" with his hand, and an unnamed young male. (14 RT 1863.)

- The fifth hearsay incident was a traffic stop following a purported drive-by shooting, where Underhill testified a police officer heard shots and pulled over a car driven by Paul "Creeper" Negrete in which appellant was a passenger, and in which the officer located numerous firearms, including a shotgun whose barrel was warm to the touch. (14 RT 1863-1864.)

- The final hearsay entry was a contact of appellant by Colton gang officers, where appellant supposedly self-admitted NSC membership and had a tattoo in Chinese common "[t]o gang members and a lot of people" that meant "trust no man." (14 RT 1865.)

Testimonial hearsay was also admitted against the codefendants. Detective Underhill testified to six encounters listed on exhibit 77 between codefendant Lopez and police officers other than himself. (14 RT 1791-

1810.) One of these encounters included the police serving S.T.E.P. notices on NSC members; S.T.E.P. notices, an acronym based on the Penal Code "where . . . you find the definition of a gang,"[69] are documents served on gang members informing them "that law enforcement considers them to be a criminal street gang." (14 RT 1807.)

The detective likewise testified to five encounters on exhibit 75 (Rodriguez gang board) between codefendant Rodriguez and police officers other than himself.[70] (14 RT 1810-1826.) In addition, all those pictured and listed on the general NSC gang board (exhibit 1)--appellant, Rodriguez,

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[69]Title 7, chapter 11 is called the "Street Terrorism Enforcement and Prevention Act."

[70]A new exhibit sticker on exhibit 75 reflects it was also introduced at Rodriguez's retrial, and it has obviously been altered from the exhibit introduced at appellant's trial. The last or fifth entry on Rodriguez's gang board currently in the exhibit room at Riverside Superior Court is in a different font from the other entries and reads, "February 20, 2000. Rodriguez detained in Sam Redmond's Nissan Pathfinder during traffic stop. Also in car is NSC gang member Art 'Rascal' Luna."

In the current proceedings, the fifth item down on exhibit 75 was dated July 8, 1998, and read as follows: "West Side Verdugo members come to The Four Seasons apartments to buy drugs. They are jumped by NSC members and a cell phone is taken from West Siders. NSC later call West Siders using a stolen cell phone and taunt West Siders to return if they want their phone back. West Sider members later return and knock on door of apartments at Four Seasons. Rodriguez' mother Cindy answers the door and is immediately shot. (Photo of Rodriguez's brother taken April 30th, 2002, shows tattoos 'Why have I lost you' and 'I.E.')" (14 RT 1751-1752; see also 14 RT 1818-1819.) Rodriguez's trial counsel objected to the picture of Rodriguez's brother on the board. (14 RT 1751-1752.)

Redmond, and Lopez--were said to be self-admitted NSC members, but none had self-admitted to Underhill.[71] (15 RT 1955-1956.)

Sometimes the hearsay exceeded even double levels, as was demonstrated when the prosecutor attempted to impeach his own evidence. Exhibit no. 1 reflected Sam Redmond's admission of NSC membership since May 1996. The prosecutor asked Detective Underhill whether Redmond had admitted NSC membership to anyone in the Colton Police Department. Underhill, implausibly,[72] said "Sam denied to everybody in

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[71]Detective Underhill further referenced field interrogation cards for Danielle and Denise Gonzalez (14 RT 1880-1992), Daniel Luna (15 RT 1921-1922), Redmond (15 RT 1929-1930), and Art Luna (15 RT 1941-1942).

[72]The court later read from the transcript and interposed its thoughts:

"By Mr. Ruiz [prosecutor]: 5-9-96. Thank you.

"Then I see 'Aka Devil' on there. I want to ask you about the entries on there. Did anyone--are you aware of anyone from the Colton Police Department or its gang unit ever having Sam Redmond admit to them that he was actually a member of the Northside Colton?"

Answer: "No. Sam denied to everybody in our department that he was a member."

I mean, that--that answer again didn't raise a concern to me, although clearly there is a problem with that answer that he denied to everybody in the department. I mean, I don't know if . . . Inspector Underhill actually talked to every member of the Colton Police Department to see if they have all talked to Sam Redmond. I doubt that they have.

But at any rate, next, "Isn't it true that--well, have you had a chance

our department that he was a member." Underhill did, however, testify that Redmond admitted he was an NSC member to an Officer Quiroz at the San Bernardino Police Department. (14 RT 1842-1844.) Underhill then said he

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to review the taped interview of Mr. Rodriguez from the February 20th, 2000, stop where he was with Redmond and Art Luna? Have you had a chance to review that transcript at all or not?"

Answer: "No."

"Okay. Do you know if Mr. Rodriguez ever said that Sam was a member of Northside Colton?"

Well, if he didn't review the transcript, how could he even say? He gets the answer out, "No, not that I know of." No one objects to that.

Question: "How about Mr. Mendez? To your knowledge, did Mr. Mendez ever claim that Sam was a member of Northside Colton?"

Answer: "No."

Again, I don't recall in Mr. Mendez' taped statement he was asked those questions, and I don't recall any officer asking him that question. But again, no problem with any of these answers.

Question: "And to your knowledge, has Mr. Lopez ever claimed that Sam was a member of Northside Colton?"

Again--the answer is "No."

Again, how would he know that if made not to him? Clearly, if made to him, he can answer the question. (15 RT 1905-1906.)

The court was simply mistaken in asserting there had been no objections to the evidence; appellant's counsel objected to the gang evidence in toto on hearsay and Evidence Code section 352 grounds. (12 RT 1697, 13 RT 1725.)

had not personally spoken to Officer Quiroz, but had spoken to an Officer Fivey who spoke to Quiroz, and Underhill learned the gang card where Redmond admitted NSC membership had been purged from the system,[73] all of which prompted this question from the prosecutor designed to impeach his own exhibit: "So you have no personal knowledge what the basis of this Quiroz statement is where he claims Redmond admitted to him back in '96 that he was a member of the gang. Is that true?" (14 RT 1845-1846.) This was too much even for the trial court, which told the prosecutor he needed to bring Quiroz in to testify rather than attempt to impeach him with "complete hearsay."[74] (14 RT 1846-1847.)

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[73]Amazingly, the only missing field identification card was the one where the state's star witness, Sam Redmond, admitted NSC membership, thereby impeaching his testimony to the contrary.

[74]At this point, then, gang expert Underhill was testifying about what Officer Fivey said about what Officer Quiroz said about what Sam Redmond said. As the trial court stated, "That's the testimony you were using Mr. Underhill to testify about San Bernardino's preparing of a S.M.A.S.H. card, and then on top of that basing that upon the testimony of Underhill talking not to the gentleman who prepared the card but to a second person. And this is a card that apparently is the basis for the poster board that the People prepared indicating that Mr. Redmond was an admitted gang member in 1996, which is extraordinary because that officer had a wonderful ability to see into the future because he was using the name 'Devil,' which is the same name Mr. Redmond said he first started using in jail. It's almost extraordinary that a person eight years before that would be able to come up with this name on a S.M.A.S.H. card. So it seems rather relevant to me, and I don't know why a S.M.A.S.H. card by San Bernardino P.D. would be any worse than the S.M.A.S.H. card prepared by Colton P.D. which was being used. I was very uncomfortable with having Underhill

The gang hearsay enabled the prosecution to not only elicit Detective Underhill's opinion that appellant, Rodriguez, and Lopez committed the murders, but their intent in so doing. After reviewing the dynamics of gang challenges, the detective opined they had killed Faria "for the benefit of, at the direction of, or in association with" Northside Colton members. (14 RT 1855.) Detective Underhill shared with the jury the same conclusion regarding the murder of Jessica Salazar, and agreed it was his "opinion that it was committed at the direction of at least one of the members of the gang as well." (14 RT 1856-1858.)

The field identification cards and any other police reports behind such conclusions were rank testimonial hearsay that should have been excluded under the Sixth Amendment, and were utterly unreliable---they were at least double hearsay--and should have been excluded under both state and federal law. Detective Underhill even acknowledged their inherent unreliability:

> Q: I mean, not to belabor a point, but it sounds like on these F.I. cards, you're really kind of at the mercy of whichever officer fills them out.

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testify as to the quality of that card. So that's why I was unhappy about that testimony. And I still am unhappy with that testimony, and I'm willing to debate that with the world. Anybody would be unhappy with that testimony." (15 RT 1887-1888.)

A: Yes, you're correct on that.

Q: I mean, if it's not filled out correctly or if they don't ask certain questions, then you don't have the information?

A: If you're not getting accurate information, yes. (15 RT 1962-1963.)

Finally, conflicting jury instructions only exacerbated the problem. On the one hand, the trial court told the jury police reports were hearsay but, when used to refresh an officer's recollection, were not "being introduced for the truth of what's stated." (6 RT 864; see also 7 RT 883.) Given Detective Underhill's description of them, S.M.A.S.H. cards obviously fell within the definition of a police report. On the other hand, the court instructed jurors that in evaluating an expert witness, they should consider "the facts or materials upon which each opinion is based, and the reasons for each opinion," adding, "An opinion is only as good as the facts and reasons on which it is based. If you find that any fact has not been proved, or has been disproved, you must consider that in determining the value of the opinion." (23 RT 2808.)

As will be demonstrated below, these conflicting instructions reflect the fundamental flaw in cases asserting apparent hearsay is not hearsay when used as the basis of an expert's opinion because it is introduced not for truth but to show the weight of the expert's opinion, when it is obvious

these statements must be evaluated for their truth for the expert's opinion to have any validity. "'The chief value of an expert's testimony . . . rests upon the *material* from which his opinion is fashioned and the *reasoning* by which he progresses from his material to his conclusion . . . .' In short, 'Expert evidence is really an argument of an expert to the court, and is valuable only in regard to the proof of the *facts* and the validity of the *reasons* advanced for the conclusions.'" (*People v. Lawley* (2002) 27 Cal.4th 102, 132, italics in original.)

C. The Testimonial Hearsay Employed by the Expert Violated the Sixth Amendment

Detective Underhill indicated the purpose of the field identification cards was to document gang involvement for future prosecution under the S.T.E.P. act.[75] (14 RT 1771, 1790, 1797, 1807.) Because they served this function and because they consisted of hearsay, they were testimonial hearsay, and much of Detective Underhill's testimony violated appellant's right to confront the witnesses against him in violation of the Sixth Amendment.

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[75]In fact, included among the S.M.A.S.H. cards in exhibit R is a S.T.E.P. notice signed by Daniel Luna, where he acknowledges he has been notified by the police that Northside Colton "is a criminal street gang within the meaning of Penal Code 186.22."

1) *Crawford v. Washington*

In *Crawford v. Washington, supra,* 541 U.S. 36, the defendant stabbed a man who had allegedly tried to rape the defendant's wife, and both the defendant and his wife gave similar but "arguably different" versions of the stabbing, particularly as to whether the victim had first drawn a weapon. (*Id.* at pp. 38-39.) At trial the defendant's wife invoked the state marital privilege and refused to testify, though in Washington the privilege did not extend to a spouse's out-of-court statements admissible under a hearsay exception. Because the defendant's wife had admitted leading the defendant to the victim's apartment "and thus had facilitated the assault," the state invoked the declaration against penal interest exception to the hearsay rule. (*Id.* at p. 40.) After the defendant objected on confrontation clause grounds, the trial court admitted the wife's tape-recorded statement on the authority of *Ohio v. Roberts* (1980) 448 U.S. 56 [100 S.Ct. 2531, 65 L.Ed.2d 597], according to which the Sixth Amendment did "not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears 'adequate "indicia of reliability."' (*Crawford v. Washington, supra*, 541 U.S. at p. 40.)

The *Crawford* court concluded that the prosecution's introduction at trial of the tape-recorded statement of the defendant's wife violated the

Sixth Amendment. (*Id.* at pp. 68-69.) "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (*Id.* at p. 68.) "Testimonial" applies to a police interrogation (*ibid.*), and "interrogation" is used in *Crawford* "in its colloquial, rather than any technical legal, sense." (*Id.* at p. 53, fn. 4.)

In *Crawford*, the court "once again reject[ed] the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon 'the law of Evidence for the time being.' [Citations.] Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." (*Crawford v. Washington, supra,* 541 U.S. at pp. 50-51.) "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.' . . . Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." (*Id.* at p. 61.)

Despite this seemingly clear pronouncement, however, several California Court of Appeal cases have left testimonial hearsay in gang cases

to "the law of Evidence for the time being," this law being either that experts can testify using hearsay, or that the apparent hearsay is not introduced for the truth of the matter (and is thus not really hearsay) when it is used as the basis of the expert's opinion.

2) California Courts of Appeal Evade *Crawford* by Allowing a State "Law of Evidence" to Trump the Sixth Amendment

The first case that appears to have considered the application of *Crawford* to a gang expert's employment of hearsay evidence via his conversations with other gang members is *People v. Thomas* (2005) 130 Cal.App.4th 1202. In *Thomas*, a police gang expert "testified that he learned through casual, undocumented conversations with other gang members" that the defendant was a street gang member with the moniker of "Little Casper" or "Villain." (*Id.* at p. 1209.) Against the defendant's claim the introduction of this hearsay violated the Sixth Amendment, the *Thomas* court concluded,

> *Crawford* does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion. *Crawford* itself states that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (*People v. Thomas, supra,* 130 Cal.App.4th at p. 1210.)

While the legal conclusions of *Thomas* are still at odds with the Sixth Amendment, at least in *Thomas* the police gang expert testified regarding conversations he had personally engaged in. In appellant's case, Detective Underhill testified to the contents of what gang members told police officers other than himself.

The notion in *Thomas* and other cases that hearsay statements "on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion" is unmitigated fiction. Juries are generally instructed just the opposite regarding expert testimony, as was the jury in this case with CALJIC No. 2.80: "An opinion is only as good as the facts and reasons on which it is based. If you find that any fact has not been proved, or has been disproved, you must consider that in determining the value of the opinion. . . ." (23 RT 2808; 8 CT 2127.) In other words, the jury was told the hearsay Detective Underhill relied on needed to be *true* for his opinion to have any value.

> [T]he Confrontation Clause absolutely bars admission of testimonial hearsay where the defendant has not had the opportunity to cross-examine the declarant. The argument that the statements are not hearsay--because they are not offered for their truth but only to show the weight of the expert's opinion--betrays all logic. The jury cannot assess the weight of the expert's opinion without considering the hearsay for its truth. (Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony* (2008)

96 Geo. L.J. 827, 878-879.)[76]

Also, since *Thomas* relies on a single line quoted in parentheses in a footnote in *Crawford*--("The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted")[77]--it is worth consulting the source of the quote. In *Tennessee v. Street* (1985) 471 U.S. 409 [105 S.Ct. 2078, 85 L.Ed.2d 425], the defendant, whose trial was severed from others charged with the crime, made a detailed confession to a sheriff, then denied committing the offense at trial. He claimed his confession was derived from a written statement another participant had previously given the same sheriff, and asserted the sheriff read the other participant's statement to the defendant and directed him to say the same thing. (*Id.* at p. 411.) In rebuttal, the sheriff denied the defendant had been read the other participant's confession or was pressured to repeat it, and, after the trial court twice told the jury the statement was admitted not to prove its truth but for rebuttal only, the sheriff read the other participant's confession to the jury. (*Id.* at pp. 411-412.) Against a claim the introduction of the statement violated *Bruton v. United States, supra,* 391 U.S. 123, the court noted the co-participant's confession was not

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[76]The same article describes *Thomas* as "a paradigm example of introduction of stealth testimonial hearsay." (96 Geo. L.J. at p. 856.)

[77]*Crawford v. Washington, supra,* 541 U.S. at p. 59, fn. 9.

hearsay admitted as substantive evidence against the defendant, as it was introduced not for its truth, but to enable the jury to compare the two confessions and determine whether the defendant's "coerced imitation" story was plausible.[78] (*Id.* at p. 413.) In other words, the reliance of *Thomas* on this quote in the *Crawford* footnote is fundamentally misplaced and does not support it conclusion that testimonial hearsay ceases to be such merely because it is relayed by an expert who also employs it to fashion an opinion.

People v. Ramirez (2007) 153 Cal.App.4th 1422 similarly misinterprets *Crawford,* while inadvertently acknowledging the inherent contradiction at the heart of the "expert's exception" to the Sixth Amendment. In *Ramirez*, a police gang expert testified that two members of the defendant's gang had previous convictions for murder and attempted murder, and that these crimes were committed for the benefit of the gang.[79]

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[78]The Supreme Court also noted "[t]he Clause's fundamental role in protecting the right of cross-examination . . . was satisfied by [the sheriff's] presence on the stand." Defense counsel could cross-examine the sheriff if counsel doubted the co-participant's confession was accurately recounted, or doubted the sheriff's testimony he did not read from the statement and direct the defendant to say the same thing. "In short, the State's rebuttal witness against respondent was not [the co-participant], but [the sheriff]." (*Tennessee v. Street, supra*, 471 U.S. at p. 414.)

[79]In *People v. Gardeley* (1996) 14 Cal.4th 605, 621-622, this court held predicate offenses for a section 186.22., subdivision (b) gang enhancement need not be gang related, meaning this portion of the expert's

(*Id.* at p. 1425.) Significantly, the defendant "did not identify any out-of-court statement that [the detective] repeated during his testimony," and instead contended the detective's "knowledge of the facts of the predicate crimes must have been based on testimonial hearsay or statements made during police interrogation." (*Id.* at p. 1426.)

The defendant in *Ramirez* attempted to distinguish *Thomas* by claiming the hearsay in *Thomas* had not been elicited for the truth of the matter, "but merely to assess the weight of the expert's opinion." (*Id.* at p. 1427.) Unwittingly expressing the fallacy at the heart of the "expert's exception," the *Ramirez* court stated, "But any expert's opinion is only as good as the truthfulness of the information on which it is based. Thus in *Thomas*, the expert's opinion that the defendant is a member of a gang has value only if the jury believes the hearsay on which the expert relied." Then, however, after acknowledging the hearsay is being admitted as substantive evidence after all, the *Ramirez* court concludes with this ipse dixit: "Hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned." (*People v. Ramirez, supra*, 153 Cal.App.4th at p. 1427.) On the contrary, *Crawford* condemned the use of *all* testimonial hearsay, allowing only "testimonial

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testimony was superfluous anyway.

statements for purposes other than establishing the truth of the matter asserted"--i.e., for a purpose such as the one in *Tennessee v. Street.*

Joining in the confusion is *People v. Sisneros* (2009) 174 Cal.App.4th 142, which, while offering no real analysis of its own, first cites the above quote from *Ramirez* regarding *Crawford* without acknowledging the unwitting concession in *Ramirez* that hearsay is in fact being admitted as substantive evidence. (*Id.* at p. 153.) *Sisneros* then cites *Thomas* to support the usual justification that "admission of expert testimony based on hearsay will typically not offend Confrontation Clause protections because 'an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion.'" (*Id.* at p. 154.)

People v. Cooper (2007) 148 Cal.App.4th 731, a non-gang case involving theft from an elder or dependent adult (Pen. Code, § 368, subd. (e)), offers a more sustained analysis of the *Crawford* issues presented to the court, yet reaches a similar erroneous conclusion regarding expert use of testimonial hearsay. *Cooper* was a People's appeal from an order dismissing an information after the trial court excluded on *Crawford* grounds two videotaped interviews of the victim, a portion of one of the

videotapes depicting a tour of the victim's home to document its condition, and the testimony of a prosecution psychologist who would have testified based in part upon the excluded videotapes. (*Id.* at pp. 734-735.)

After reviewing *Crawford* and its successor case, *Davis v. Washington* (2006) 547 U.S. 813 [126 S.Ct. 2266, 165 L.Ed.2d 224], which refined the distinction between "testimonial" and "nontestimonial," the court considered in turn each item excluded by the trial court. The *Cooper* court found the first videotaped interview was non-testimonial, in that most of the interview was conducted by a nurse and social worker from Genesis[80] and Adult Protective Services rather than the elder abuse detective accompanying them, the purpose of their questions was to assess the victim's mental capacity, and it was unknown at the time whether a crime had even occurred. (*Id.* at pp. 743-744.) Even if the first interview had been testimonial, there were substantial sections of the interview "not subject to the confrontation clause because they were not sought to be admitted for the truth of the matter asserted, but as evidence of [the victim's] mental state," such as the victim's asserting she lived in Belmont Shores when she lived in Monrovia and her inability to recall basic

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[80]The case does not spell out what "Genesis" is, though it appears to be affiliated with the Los Angeles County Department of Mental Health. ‹http://www.lacelderabuse.org› [as of June 21, 2010].

information like her social security number. (*Id.* at p. 744.)

Unlike the first interview, the court found the primary purpose of the second interview was to gather information for prosecution, while again noting the victim's "responses that demonstrated a lack of memory or comprehension are not hearsay offered to show her mental condition." (*People v. Cooper, supra*, 148 Cal.App.4th at p. 745.) The court found the videotape depicting the condition of the victim's residence was simply demonstrative, nontestimonial evidence. (*Id.* at p. 746.) Remanding the case to the trial court to determine which statements in the interviews were not testimonial hearsay, the *Cooper* court cautioned "that simply because statements are not subject to the confrontation clause does not automatically entitle them to admission in evidence." (*Id.* at pp. 745-746.)

So far, so good. Unfortunately, *Cooper* then turned to the question of the expert's use of testimonial hearsay and undermined its previous thoughtful parsing of the confrontation clause issues by parroting *Thomas*: "Hearsay relied upon by experts in formulating their opinions is not testimonial because it is not offered for the truth of the facts stated but merely as the basis for the expert's opinion." (*People v. Cooper, supra*, 148 Cal.App.4th at p. 747.)

Thomas, *Ramirez*, *Sisneros*, and *Cooper* thus run afoul of the Sixth

Amendment as interpreted by the Supreme Court in *Crawford*. The notion that testimonial hearsay violating the Sixth Amendment somehow transmutes into something else when relayed by an expert--generally (though not always) a law enforcement officer--is a legal fiction, though a pernicious one. "A legal fiction is an 'assumption that something is true even though it may be untrue, made esp. in judicial reasoning to alter how a legal rule operates; specif., a device by which a legal rule or institution is diverted from its original purpose to accomplish indirectly some other object.'" (*People v. Najera* (2006) 138 Cal.App.4th 212, 220-221, quoting Black's Law Dict. (8th ed. 2004) p. 913, col. 1.) "The proper use of legal fictions is to prevent injustice . . . ."[81] (*People v. Home Ins. Co.* (1866) 29 Cal. 533, 543.) Here, what might be called "the expert's exception" to the Sixth Amendment achieves an unjust result; the same police officer, precluded by the Constitution from testifying what John Doe, an unavailable witness, told him about something, could introduce the exact same statement by claiming he or she considered it in forming an expert

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[81]An example of a legal fiction preventing injustice is the doctrine of transferred intent, "used to reach what is regarded with virtual unanimity as a just result: when an assailant, through 'bad aim' or other mistake, kills the wrong person, he is just as culpable, and should be punished to the same extent, as if he had hit the intended mark." (*People v. Czahara* (1988) 203 Cal.App.3d 1468, 1474.)

opinion.

A recent Court of Appeal decision, *People v. Hill* (2011) 191 Cal.App.4th 1004, at least recognized the problem in "the implied assumption that the out-of-court statements may help the jury evaluate the expert's opinion without regard to the truth of the statements. Otherwise, the conclusion that the statements should remain free of *Crawford* review because they are not admitted for their truth is nonsensical. But this assumption appears to be incorrect." (*Id.* at pp.1129-1130.) *Hill* correctly observed that "where basis evidence consists of an out-of-court statement, the jury will often be required to determine or assume the truth of the statement in order to utilize it to evaluate the expert's opinion." (*Id.*, at p. 1131.)

Hill further recognized "[i]t is noteworthy that the California Supreme Court decisions concluding basis evidence is not admitted for its truth were reached before the United States Supreme Court reconsidered the confrontation clause in *Crawford* . . . ." The *Hill* court found, however, its "position in the judicial hierarchy" meant it was compelled to "follow *Gardeley* and the other California Supreme Court cases in the same line of authority" rather than hold a jury necessarily evaluated out-of-court basis statements for their truth. (*People v. Hill, supra,* 191 Cal.App.4th at p.

1131.)

The flaw in this conclusion is that *Gardeley* was decided in 1996 and *Crawford* in 2004. *Hill* acknowledges that *Crawford* "reconsidered the confrontation clause," and it is precisely the violation of the confrontation clause of the Sixth Amendment that is at issue here, something not considered by *Gardeley*. "It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An appellate decision is not authority for everything said in the court's opinion but only 'for the points actually involved and actually decided.'" (*People v. Knoller* (2007) 41 Cal.4th 139, 154-155.) At least *Hill* correctly diagnosed the problem, but it was wrong to conclude this court's precedent compelled it to adopt a contrary conclusion.

Virtually all of the evidence Detective Underhill related to the jury consisted of testimonial hearsay in flagrant violation of the Sixth Amendment and *Crawford*.

D. The Hearsay Employed by the Police Gang Expert Was Inherently Unreliable and Should Have Been Excluded Under State Law, and Its Employment in This Case Furthermore Resulted in a Federal Due Process Violation

A trial court's decision to admit hearsay evidence (*In re Cindy L.* (1997) 17 Cal.4th 15, 35) and gang expert testimony (*People v. Roberts* (1992) 2 Cal.4th 271, 298) is reviewed for an abuse of discretion. Evidence

admitted in disregard of state evidentiary rules that render a trial fundamentally unfair, however, result in a due process violation under the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175].)

1) Gang Experts and Hearsay Evidence

The culture and habits of criminal street gangs are proper subjects for expert testimony. (*People v. Gardeley, supra,* 14 Cal.4th at p. 617.) Expert testimony can be based on material not admitted at trial "so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions," though "any material that forms the basis of an expert's opinion testimony must be reliable." State case law recognizes even ordinarily inadmissible material such as hearsay can form the proper basis for an expert's opinion testimony, as long as it is "reliable."[82] (*Id.* at p. 618.) Still, while "an expert may give the reasons for an opinion, including the materials the expert considered in forming the opinion, . . . an expert may not under the guise of stating reasons for an opinion bring before the jury incompetent hearsay evidence." (*People v. Price* (1991) 1 Cal.4th 324, 416.)

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[82]In the previous section, however, appellant demonstrated that state cases allowing an expert to relay testimonial hearsay to a jury violate *Crawford.*

It would appear the term "incompetent hearsay" means something like detail about the hearsay facts underlying an expert's opinion. "In other words . . . while an expert may rely on inadmissible hearsay in forming his or her opinion [citation], and may state on direct examination the matters on which he or she relied, the expert may not testify as to the details of those matters if they are otherwise inadmissible." (*Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 415.) "The rule [excluding such testimony] is based in part upon the rationale that by allowing an expert to testify as to the details of inadmissible hearsay reports, the jury might improperly consider such testimony as independent proof of the facts described in the reports and the adverse party is denied the opportunity to cross-examine the person who made the statements." (*People v. Dean* (2009) 174 Cal.App.4th 186, 196-197.)

There is an obvious tension between this precept and the notion that "any material that forms the basis of an expert's opinion testimony must be reliable. . . . For 'the law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. 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.) On the one hand, the law recognizes the danger of jury exposure to

inadmissible hearsay by means of expert testimony detailing the reasons for his or her opinion. On the other hand, the law recognizes this same opinion is worthless unless the data upon which it is based is accurate. The obvious question arises of how a jury is expected to assess the accuracy of an expert's data without hearing it in full to begin with.

Trial courts are expected to balance these competing interests. "Because an expert's need to consider extrajudicial matters, and a jury's need for information sufficient to evaluate an expert opinion, may conflict with an accused's interest in avoiding substantive use of unreliable hearsay, disputes in this area must generally be left to the trial court's sound judgment." (*People v. Catlin* (2001) 26 Cal.4th 81, 137.) The trial court "has discretion 'to weigh the probative value of inadmissible evidence relied upon by an expert witness . . . against the risk that the jury might improperly consider it as independent proof of the facts recited therein,' . . . because a witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into 'independent proof' of any fact." (*People v. Gardeley, supra,* 14 Cal.4th at p. 619.)

2) The Hearsay Employed by the Police Expert Was Inherently Unreliable

In appellant's case, unfortunately, the trial court abused its discretion by failing to even exercise it. "[P]rejudice may arise if, 'under the guise of

reasons, the expert's detailed explanation brings before the jury incompetent hearsay evidence.' [Citations.] In this context, the court may 'exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value.'" (*People v. Catlin, supra*, 26 Cal.4th at p. 137.)

The "rule that hearsay evidence is inadmissible because it is inherently unreliable is of venerable common law pedigree . . . ." (*In re Lucero L.* (2000) 22 Cal.4th 1227, 1248.) A fortiori, double hearsay is even more likely to be unreliable, and is generally inadmissible. (Evid. Code, ¶ 1201; *People v. Alexander* (2010) 49 Cal.4th 846, 876 ["[A]ny statement by defendant in the missing records that this was his first eyeglass prescription would have been inadmissible in light of its double-hearsay nature].) This court has characterized "double hearsay assertions" as "not evidence." (*People v. Coddington* (2000) 23 Cal.4th 529, 589; overruled on another point by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) "[D]ouble or triple hearsay is not the sort of evidence upon which responsible persons customarily rely in the conduct of serious affairs. They are the untested statements or surmised statements of persons of no proven competence to make them and are in themselves insufficient to sustain findings on material facts." (*Skip Fordyce, Inc. v. Workers' Comp. Appeals*

Bd. (1983) 149 Cal.App.3d 915, 927.)

As we have seen, the prejudicial details related by Detective Underhill regarding the gang evidence were all at least double hearsay. Not only that, Detective Underhill left open the possibility some of the information contained on the field identification/gang cards was not only hearsay, but anonymous hearsay. Asked whether there was only one card kept on a person or whether every new contact generated a new card, Detective Underhill answered there were multiple cards kept depending on the number of contacts. (15 RT 1917.) Although he stated an officer "identifies himself or herself as the author or the individual gathering that information," he also answered "Yes" when asked, "So multiple cards, or occasionally you just fill in additional information on a card?" (15 RT 1918.) The detective thus left open the possibility subsequent entries could be made on a card by a different officer.[83]

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[83]That this in fact happens is demonstrated on the face of the cards, where it is virtually impossible to tell who wrote down what information. In the October 29, 2000, contact contained in exhibit P (S.M.A.S.H. cards for Danielle Gonzalez), for example, the gang number, second address (work/school), and "DL #" were clearly entered by someone other than Officer Vogelsang, who places a line through his "7's." The information on the face of exhibit Q (S.M.A.S.H. card for Denise Gonzalez) is likewise clearly in the writing of someone other than Officer Dominguez. Exhibit R (S.M.A.S.H. cards for Daniel Luna) contains a hodgepodge of different writing styles.

The inherent unreliability of the hearsay employed in this case is further illustrated by Detective Underhill's use of field identification cards in drawing conclusions about Northside Colton's membership. Exhibit 82, for example, depicts an NSC gang roster containing both the names "Huero" and "Lil' Huero." Detective Underhill testified they were two different people, and while "Huero" was Daniel Lopez, he did not know who "Lil' Huero" was. He also admitted, however, "Lil' Huero" was listed as a moniker of Daniel Lopez on a field identification card. (15 RT 1974-1975.) In other words, maybe the "Huero" on the roster was Daniel Lopez, or maybe "L'il Huero" was Daniel Lopez, or maybe neither "Huero" nor "L'il Huero" was Daniel Lopez.

In *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, the court considered the defendant's claim the evidence offered to establish a predicate offense for a gang enhancement was insufficient. The court's comments are instructive:

> The only testimony presented to prove this part of the "pattern of criminal gang activity" was by the expert witness on gang practices. The witness offered only nonspecific hearsay of a suspected shooting of one Family member by another. The witness, a South San Francisco police officer, had no personal knowledge of the incident and only repeated what San Bruno police told him they believed about the shooting. Such vague, second-hand testimony cannot constitute substantial evidence that the required predicate offense by a gang member occurred. [Citation.] While experts may offer opinions and the reasons for their opinions, they may not under

> the guise of reasons bring before the trier of fact incompetent hearsay evidence. (*Id.* at p. 1003.)

Detective Underhill's opinions were likewise based on "vague, second-hand testimony" that brings "before the trier of fact incompetent hearsay evidence."

Because the copious hearsay introduced here was inherently unreliable, the trial court abused its discretion in allowing Detective Underhill to testify regarding it. In addition, as will be demonstrated below, the erroneous admission of the unreliable gang hearsay evidence rendered the trial fundamentally unfair and resulted in a due process violation. (*People v. Partida, supra,* 37 Cal.4th at p. 439.)

F. If This Court Concludes Defense Counsel Failed to Preserve Any of the Above Claims, Appellant Was Denied His Constitutional Right to the Effective Assistance of Counsel Under the Sixth and Fourteenth Amendments

This court has "concluded that, [a]s a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal." (*People v. Partida, supra,* 37 Cal.4th at p. 436.) On the other hand, trial counsel may

waive "any appellate challenge by failing to advance a 'clear and specific' ground for objection in the trial court." (*People v. Morris* (1991) 53 Cal.3d 152, 205.)

> What is important is that the objection fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling. If the court overrules the objection, the objecting party may argue on appeal that the evidence should have been excluded for the reason asserted at trial, but it may not argue on appeal that the court should have excluded the evidence for a reason different from the one stated at trial. A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct. (*People v. Partida, supra,* 37 Cal.4th at p. 435.)

Assuming this court deems waived any matter forwarded in this argument because of inadequate objection, appellant received the ineffective assistance of trial counsel.

The Sixth Amendment right to counsel "is the right to the effective assistance of counsel" (*Strickland v. Washington* (1984) 466 U.S. 668, 686 [104 S.Ct. 2052; 80 L.Ed.2d 674]), a right also guaranteed by article I, section 15 of the California Constitution (*People v. Ledesma* (1987) 43 Cal.3d 171, 215). To establish ineffective assistance of counsel, appellant must demonstrate that (1) counsel's representation was deficient in falling below an objective standard of reasonableness, and (2) counsel's deficient representation prejudiced appellant, i.e., there is a reasonable probability

that the result would have been more favorable to appellant absent counsel's challenged act or omission. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 687-688, 694.)

As to the deficient representation component of this claim, if a purported error "resulted from an informed tactical choice within the range of reasonable competence" (*People v. Pope* (1979) 23 Cal.3d 412, 425), a reviewing court will not find ineffective assistance of counsel, because reviewing courts generally afford the informed choices of defense counsel deferential scrutiny (*Strickland v. Washington, supra*, 466 U.S. at p. 689). This "deference" is not, however, "abdication." (*People v. Ledesma, supra*, 43 Cal.3d at p. 217.) There must in fact be an informed tactical choice to begin with. (*People v. Nation* (1980) 26 Cal.3d 169, 179.) Deficient performance of trial counsel is established by "the obvious danger of prejudice and the absence of any tactical advantage to be served" by counsel's act or omission. (*People v. Robertson* (1982) 33 Cal.3d 21, 42.)

While this court has indicated that ineffective assistance of counsel claims should generally be litigated on habeas corpus, it has also recognized that valid ineffective assistance of counsel claims may be presented on direct appeal if "there simply could be no satisfactory explanation" for trial counsel's challenged acts or omissions. (*People v.*

Mendoza Tello (1997) 15 Cal.4th 264, 266-267.) As indicated in section B, *ante*, trial counsel objected it was necessary "that we have somebody who is testifying with respect to something other than rank hearsay" (12 RT 1697) regarding gang evidence, though he did not specifically object on Sixth Amendment confrontation grounds.[84] As indicated in the previous argument, trial counsel also objected to all of the gang evidence on Evidence Code section 352 grounds, and by implication to the other gang offenses on Evidence Code section 1101, subdivision (b) grounds ["these are . . . criminal incidents or offenses that are otherwise not readily admissible against Mr. Mendez in the guilt phase of the trial"]. (13 RT 1725.) Trial counsel thus sought to exclude the body of evidence at issue here, and obviously could not have had any rational tactical justification for not making adequate objection under the confrontation clause of the Sixth Amendment.

As to the prejudice component of an ineffective assistance of counsel claim, "A reasonable probability is a probability sufficient to undermine confidence in the outcome" (*Strickland v. Washington, supra,* 466 U.S. at p. 694), a standard that has also been described as "a significant, but

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[84]Once again, *Crawford* was decided on March 8, 2004, well before appellant's jury was sworn on July 27, 2004.

something less than 50 percent, likelihood of a more favorable ruling." (*People v. Howard* (1987) 190 Cal.App.3d 41, 48.) The prejudice resulting from the admission of the gang evidence in violation of the confrontation clause is addressed in the next section.

G. Appellant Was Prejudiced by the Testimonial and Unreliable Hearsay

Because the admission of testimonial hearsay invokes the confrontation clause of the Sixth Amendment, the error in admitting the evidence is evaluated under *Chapman v. California, supra,* 386 U.S. at pp. 24, 26, requiring the prosecution to demonstrate the error harmless beyond a reasonable doubt. Virtually all of the gang evidence testified to by Detective Underhill involved testimonial hearsay, thus subjecting it to *Chapman* scrutiny.

While ordinarily the erroneous admission of gang evidence is subject to the *Watson* test, here, in addition to the Sixth Amendment *Crawford* violations, the evidence admitted in disregard of state evidentiary rules rendered the trial fundamentally unfair and resulted in a due process violation under the Fourteenth Amendment. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346 [arbitrary deprivation of state-created liberty interest violates Fourteenth Amendment]; *People v. Partida, supra,* 37 Cal.4th at p. 439.) In addition, the *Chapman* standard applies if any of the aggregated

errors is constitutional in nature. (*United States v. Rivera* (10th Cir. 1990) 900 F.2d 1462, 1470, fn. 6; *People v. Woods* (2006) 146 Cal.App.4th 106, 117.) In the present case, because there is even "a reasonable chance, more than an abstract possibility" (*College Hospital Inc. v. Superior Court, supra*, 8 Cal.4th at p. 715) the verdicts would have been more favorable to appellant absent the error, a fortiori reversal is required under *Chapman*.

"'Legions of cases and other legal authorities have recognized the prejudicial effect of gang evidence upon jurors.' [Citations.] That prejudice not only affects the jurors' assessment of the defendants' credibility, but also taints their view of events with the inference of defendants' criminal disposition. 'We have recognized that admission of evidence of a criminal defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged.'" (*People v. Memory* (2010) 182 Cal.App.4th 835, 862.) In a case of this nature involving two execution-style murders by gang members, the gratuitous evidence of other gang violence was precisely the type that "uniquely tends to evoke an emotional bias against [the] defendant without regard to its relevance on material issues." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

Expert testimony based on unconstitutional and unreliable evidence

was employed to buttress the state's otherwise weak case, and resulted in appellant's convictions based on his association with a violent street gang. The prejudice resulting from the evidence concerning the Rojas, Garcia, and Cindy Rodriguez murders and the purported drive-by shooting has been addressed in the previous argument. The ubiquitous gang hearsay additionally enabled the prosecution to place before the jury visual aids in the form of gang boards and the testimony and opinion of a police gang expert, who not only opined that appellant, Rodriguez, and Lopez committed the murders, but that they did so for the sake of Northside Colton. (14 RT 1849, 1855, 1857-1858.) As this amounted to "an improper opinion on the ultimate issue," it was improper. (*People v. Killebrew, supra*, 103 Cal.App.4th at p. 657-658.) This improper opinion regarding the killings was, however, made possible in the first instance by the improper use of testimonial and unreliable hearsay.

The prosecutor furthermore made extensive use of the gang evidence during argument to the jury, asserting, for example, "I don't think you can properly decide this case and answer that ultimate question, murder one with special circumstances, unless you look at the gang evidence in this case" (23 RT 2825; see also 2829-2834, 2847-2851, 2888-2889 [rebuttal argument], 2899-2902 [rebuttal]), and specifically vouching for the

S.M.A.S.H. cards (23 RT 2837) and Detective Underhill's status as a gang expert (23 RT 2888).

The prosecutor was correct in recognizing the centrality of the gang evidence. Unfortunately, however, the testimonial and unreliable hearsay underlying the gang evidence did the opposite of allowing the jury to "properly decide this case," and as the People cannot hope to demonstrate the testimonial and unreliable hearsay used to obtain appellant's conviction was harmless beyond a reasonable doubt, the convictions and judgment must be reversed.

IV

THE TRIAL COURT'S DECISION TO ALLOW, BY MEANS OF A JAILHOUSE RECORDING, STATEMENTS MADE BY CODEFENDANT JOE RODRIGUEZ IMPLICATING APPELLANT VIOLATED HIS SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM

A. Introduction

In *People v. Aranda, supra,* 63 Cal.2d 518, this court held, as a judicially declared rule of practice, that those portions of a non-testifying codefendant's confession implicating a defendant in a criminal act could not be introduced against him or her. Thereafter, in *Bruton v. United States, supra,* 391 U.S. 123, the United States Supreme Court held the introduction of such confessions violated the Confrontation Clause of the Sixth Amendment of the United States Constitution. Here, in recognition of that principle, the trial court ordered separate trials for codefendants Joe Rodriguez (a.k.a. "Gato") and Daniel Lopez (a.k.a. "Huero") because Rodriguez had given a statement[85] to police implicating appellant in both killings, particularly the Faria killing.

The trial court also, however, allowed the jury to hear a recording

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[85]As this court noted in *People v. Anderson* (1987) 43 Cal.3d 1104, 1123, "Both *Bruton* and *Aranda* use the broad term 'statement' and the narrow term 'confession' interchangeably, and neither expressly nor impliedly limits its reach to the latter."

made of a jail conversation between appellant and a friend, Nicole Bakotich, by which means Rodriguez's statements were nonetheless relayed to the jury. In this conversation, appellant told Bakotich the police had played a tape for him in which Rodguez implicated appellant in the killings. The court, ignoring the fact appellant merely described to Bakotich what Rodriguez had told law enforcement and in fact disputed the truth of Rodriguez's statements, erroneously allowed Rodriguez's statements over *Aranda-Bruton* objection by claiming they represented an adoptive admission, consciousness of guilt, and creation of a false alibi.

The portions of the jailhouse conversation relaying the substance of Rodriguez's statement to police implicating appellant violated appellant's Sixth Amendment right to confront the witnesses against him, and, as a practical matter, negated the constitutional protections separate juries in this case were designed to afford appellant. In addition, because "the powerfully incriminating extrajudicial statements of a codefendant" are "devastating to the defendant" but inherently unreliable, unreliability which is "intolerably compounded" when the declarant is unavailable for cross-examination (*Bruton v. United States, supra,* 391 U.S. at pp. 135-136), the introduction of the statements undermined the reliability required by the Eighth and Fourteenth Amendments for an accurate guilt phase

determination during a capital trial. (*Beck v. Alabama, supra,* 447 U.S. at p. 638.) Rodriguez had an obvious motive to implicate appellant--Sergio Lizarraga told the police he believed Rodriguez shot Faria--yet appellant was never afforded the opportunity to cross-examine him about his statements implicating appellant. There was simply no good reason not to redact Rodriguez's statements from the tape.

The trial court characterized the evidence as crucial: "And in light of the fact that Redmond had to be given a deal to testify, this is probably the most reliable probative evidence in the case." (19 RT 2301-2302.) Because this highly-prejudicial evidence was erroneously admitted in the first instance, however, reversal of appellant's convictions is required.

B. Proceedings Below

Because of the *Aranda-Bruton* problem with Joe Rodriguez's statements,[86] defense counsel filed a motion for separate trials or separate juries. (1 CT 60-67.) The trial court ordered two juries, a "green" jury for appellant and an "orange" jury for Rodriguez and Lopez. (2 RT 215; 5 RT 756-757.) In appellant's trial, the prosecutor nonetheless sought to introduce the audiotape of a conversation between appellant and Nicole

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[86]Rodriguez's statement to the police was six to eight tapes long. (2 RT 210.)

Bakotich [hereafter, "the Bakotich tape"] which took place when Bakotich visited appellant at the Robert Presley Detention Center in Riverside on April 9, 2000. (19 RT 2308, 2311-2312.) Trial counsel objected to "references to things that are attributed to Mr. Rodriguez, in other words, Mr. Mendez is attributing to Mr. Rodriguez, that either are not true or are not--have not been presented as evidence in this case," which counsel characterized as "the *Aranda* issue as to Joe Rodriguez." (19 RT 2299, 2303.)

The court quoted from the tape and commented:

> [L]isten to this. "Mendez: No, it happened right there in front of--on Michigan in front of Artie's house. So, so, fucking. So they're going to, I'm going to try self-defense, A,[87] on that one. I'll probably get 18. 18 if I can beat it. If I can get out of the fucking girl. That's the only thing that--that's the only problem. That's what's giving me the death penalty is her, 'cause they say I killed her. I didn't kill her, fuck. I figure I get--what does self-defense carry? Six?"
>
> That's adopting essentially what Redmond says happened at that fight.[88] So whether you call this an adoptive admission, whether you call it consciousness of guilt, whether you call it the verbal manifestations of him mentally coming up with a plan, clearly what he is relying upon and what his thought processes are, which is so clearly described here--this is almost a unique view into the creation of a false alibi. And it seems to me that it's highly relevant, highly admissible. And in light of the fact that Redmond had to be given a

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[87]"Eh" is probably a preferable transcription.

[88]The trial court did not acknowledge the possibility that appellant could have been parroting a suggestion made by the police that appellant acted in self defense.

> deal to testify, this is probably the most reliable probative evidence in the case. If we are dealing with any kind of search for the truth, the jurors have to see this. And your objection will be noted. Obviously you're objecting to any references to Joe Rodriguez as *Aranda/Bruton*. You're probably also, I would assume, objecting to the situation where he says "eight guys say I was the shooter." All those references. (19 RT 2301-2302.)

The court ultimately allowed the Bakotich tape in its entirety:

> [T]hese are statements made by Mr. Mendez. And even though he is adopting other persons' statements, they become his admissions. There is additional evidence of his assuming the truth of those statements by the way he uses them and tries to portray them into his defense. Just focus briefly on his statements with the death of the man. "I could say that was self-defense because they started it. But the girl they have got fucking problems with," using Mr. Mendez' language, in the circumstances.
>
> As I said before, this seems to me extraordinarily probative and reliable, and I really don't think this is the type of situation that *Aranda/Bruton* is trying to deal with." (19 RT 2304-2305.)

The court believed the fact appellant merely relayed Rodriguez's previously-excluded statements removed them from the protections afforded by Sixth Amendment

C. The Objected-to Statements

Trial counsel objected on *Aranda-Bruton* grounds to the following statements[89] appellant made in the jailhouse tape:

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[89]These statements are presented as they appear in the reporter's transcript rather than in the tape transcripts, so that, for example, "fucken" is reproduced as "fucking."

1) "[T]hen they showed a fucking tape of Gato telling, saying. ¶ He heard shots and that's when he looked over that he seen me standing over the guy, so that's what he said." (19 RT 2300; 7 CT 2062.)

2) "I mean, the only thing I got a problem with is Gato, 'cause he's saying I did them too. Then they are saying that Lil' Huero says it too." (19 RT 2302; 7 CT 2063.)

3) "Yeah. He [Rodriguez] reenacted the crime and Sam did too. I guess it's fucking gay lovers and shit saying I was the shooter." (19 RT 2302; 7 CT 2064.)

4) "Then he said I got another one of Joe Rodriguez. That's Gato. He's all, it's right here. He reenacted the other crime." (19 RT 2303; 7 CT 2077-2078.)

5) "Joe says, I'm repeating what is on tape. Okay? Joe said he heard shots. Okay? Cop says, well, when you heard shots, he's all, what did you do after that? He's--I looked up. Okay. When you looked up, what did you see? Who did you see standing over the body? He's all, I seen Midget. Then I told you what I seen on videotape. So that's it." (19 RT 2303; 7 CT 2080-2081.)

D. The Trial Court's Reasons for Admitting the Statements Were Erroneous

Because the *Aranda-Bruton* claim involves the legal implications of

given facts, it is subject to de novo review by this court. (*People v. Cromer* (2001) 24 Cal.4th 889, 900-901; *United States v. Mitchell* (9th. Cir. 2007) 502 F.3d 931, 964.)

To begin with, by noting the statements were "probably the most reliable probative evidence in the case" because of Redmond's inherent credibility problems, the trial judge appeared to be putting a thumb on the prosecution's end of the scale of justice. In any event, as previously indicated the court gave several reasons--all of them erroneous, as will be demonstrated below--for admitting the statements. Not only was the court legally mistaken concerning these several reasons, it was legally mistaken in concluding appellant's relaying Rodriguez's statements to Bakotich somehow removed them from Sixth Amendment protection; and even if any of the court's justifications had at least some merit, none trumped the Sixth Amendment. The net result, after all, was that a nontestifying codefendant's statements implicating appellant ended up before the jury--and appellant had no opportunity to cross-examine Rodriguez concerning them.

In *People v. Anderson, supra,* 43 Cal.3d 1104, for example, a non-

testifying codefendant presented a diminished capacity defense[90] employing expert testimony. Each expert was then "cross-examined on the basis of his opinion and responded by recounting statements [the non-testifying codefendant] had made incriminating defendant." (*Id.* at pp. 590-591.) Concluding the admission of the statements "was plainly error" (*id.* at p. 1122), this court noted "what is material for *Bruton-Aranda* analysis is not how the statement under review should be classified in the abstract--as a confession, an admission, or even an exculpatory declaration--but rather whether on the facts of the individual case it operates to inculpate the other defendant." (*Id.* at p. 1123.) In addition, "The unreliability of a codefendant's incriminating statements is plainly not affected by the purpose for which they are introduced at trial. Nor is their impact: as we have observed, the accusation of the person who claims not only to have witnessed the defendant's act but also to have been his partner in crime--for whatever purpose it is received--is manifestly the kind of evidence that jurors cannot put out of their minds." (*Id.* at p. 1124.)

In addition, each of the court's stated reasons--"whether you call this an adoptive admission, whether you call it consciousness of guilt, whether

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[90]The offense in *Anderson* occurred in 1979; the diminished capacity defense was abolished in 1981. (*People v. Saille* (1991) 54 Cal.3d 1103, 1111.)

you call it the verbal manifestations of him mentally coming up with a plan, . . . almost a unique view into the creation of a false alibi"--was wrong on the merits. In the ensuing discussion, it must be remembered appellant is challenging in this argument the admission of those statements violative of *Aranda-Bruton* that caused the trial court to order separate juries to begin with, and not the jailhouse tape in toto. One of the trial court's fundamental errors lay in treating the tape as a whole, when it should have considered whether the specific statements defense counsel objected to could be redacted from the tape. The admission of those portions of the tape containing Rodriguez's statements had the practical effect of nullifying the court's previous exclusion of them under *Aranda-Bruton*.

1) "Adoptive Admission"[91]

According to Evidence Code section 1221, "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." "In determining whether a statement is admissible as an adoptive admission, a trial court must first decide whether there is evidence

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[91]The CALJIC instruction for adoptive admissions, CALJIC No. 2.71.5, was not given to the jury, though the standard instruction on admissions, 2.71, was. (23 RT 2807; 8 CT 2124.)

sufficient to sustain a finding that: (a) the defendant heard and understood the statement under circumstances that normally would call for a response; and (b) by words or conduct, the defendant adopted the statement as true." (*People v. Davis* (2005) 36 Cal.4th 510, 535.)

Here, neither criterion was met. Nicole Bakotich did not make the statements; rather, a police officer played a tape of Joe Rodriguez implicating appellant during an interrogation of appellant.[92] Appellant did not hear and understand the statements under circumstances that would normally call for a response, as he was undergoing police interrogation; he thus first heard the statements under circumstances which "lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment." (*People v. Riel* (2000) 22 Cal.4th 1153, 1189.)

Nor did he otherwise adopt Rodriguez's statements as true. "[T]he mere recital or description of another's statement does not necessarily constitute an adoption of it: '[A] statement describing another's declaration is normally not regarded as an admission of the fact asserted by the other. One does not admit everything he recounts or describes merely by reason of the relating of it.'" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1258.) In fact,

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[92]In fact, appellant relayed Rodriguez's statement to Bakotich mere hours after Del Valle played the tape. See subdivision (c) of next argument.

at several points in the tape, appellant explicitly *denied* having killed either victim:

"They know that I was there, okay? But, the only thing is that, I mean, I didn't do the shooting. See, what I mean we all know Sam did 'em." (7 CT 2062-2063.)

"He asked me, well, if you didn't kill the girl then who did? I'm like I don't know, A, you can figure it out yourself, you figured everything else out." (7 CT 2066-2067.) Also, "He asked me, hey, well if you didn't shoot her, well who shot her? I'm like, well figure it out." (7 CT 2067.)

"That's what's giving me the death penalty is her, 'cause they say I killed her. I didn't kill her, fuck." (7 CT 2068.)

"[Gato] reenacted the other crime [i.e., the Faria killing]. [The police interrogator's] all but there was a confrontation that made you guys, you kill this guy. I'm like man I didn't kill him." (7 CT 2078.)

"I told Artie to get at him. Tell him to just say that. Go with the truth. That Sam did it; you know what I mean, fuck it, A." (7 CT 2082.)

Because appellant explicitly denied to Bakotich he had committed the killings, the admission of the statements violated "the longstanding rule that denials are not admissions and must be excluded from evidence along with the underlying accusations." (*People v. Jennings* (2003) 112

Cal.App.4th 459, 474-475.) The statements were not admissible as adoptive admissions.

2) "Consciousness of Guilt"

The trial court gave two "consciousness of guilt" instructions at trial: CALJIC Nos. 2.04 [Efforts by Defendant to Fabricate Evidence] and 2.06 [Efforts to Suppress Evidence]. (23 RT 2803; 8 CT 2110-2111.) None of the specific statements trial counsel sought to exclude on *Aranda-Bruton* grounds had anything to do with any purported attempts to fabricate or suppress evidence.

Because appellant merely relayed--and denied the truth of--what the police told him others had said, the trial court was just plain wrong. While there may have been other statements in the jailhouse tape that at first glance supported such instructions,[93] none of them were included in the statements by Rodriguez otherwise barred by *Aranda-Bruton.* Again, the court addressed the tape as a whole when it should have been addressing the specific objectionable statements contained therein.

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[93]As indicated in the next section, appellant's statements that he encouraged others to blame Redmond for the killings were accompanied by statements that Redmond did in fact commit the killings.

3) "Verbal Manifestations of Him Mentally Coming up with a Plan," or "Creation of a False Alibi"

As with the "consciousness of guilt" rationale, nothing in Rodriguez's statements supports the court's position, and the court in fact appears to be referring to those sections of the tape where appellant stated he told others to say Redmond had committed the killings.

Preliminarily, the court misspoke when it referred to the statements as creation of a "false alibi." An alibi refers to evidence introduced "for the purpose of showing that [a defendant] was not present at the time and place of the commission of the alleged crime for which he is . . . on trial." (CALJIC No. 4.50.)[94] Appellant did not present an alibi at trial, and presumably the court was referring to those sections of the tape where appellant appeared to suggest he had directed others what to say about the night's events.

This appearance was, however, deceiving, and a closer look at the tape transcript does not bear out that appellant was attempting to create a "false alibi." Take, for example, this statement: "They know that I was there, okay? But, the only thing is that, I mean, I didn't do the shooting. See, what I mean we all know Sam did 'em. You mean I told Rascal to tell

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[94]CALJIC No. 4.50 was not given at trial.

the guys, just Fuck it, say that Sam did it." (7 CT 2062-2063.) Or this: "I told Artie to get at [Eddie]. Tell him to just say that. Go with the truth. That Sam did it; you know what I mean, fuck it, A." (7 CT 2082.) Statements such as these demonstrate that while appellant may have been urging others to blame Redmond for the shootings, he was simultaneously urging them to "[g]o with the truth" because they all knew "Sam did 'em."

But more to the point, these statements were not even among those trial counsel sought to exclude under *Aranda-Bruton.* The trial court again was looking at the tape as a whole rather than at the specific objectionable statements.

E. The Statements Violated Appellant's Sixth Amendment Right to Confront the Witnesses Against Him

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." at p. 42.) "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (*Crawford v. Washington, supra,* 541 U.S. at p. 68.) The term "testimonial" applies to prior testimony in judicial proceedings and police interrogations (*ibid.*), though "interrogation" is defined in *Crawford* "in its colloquial, rather than any technical legal, sense." (*Id.* at p. 53, fn.

4.) As an illustration of the "colloquial" sense of "interrogation," the *Crawford* court found a Sixth Amendment violation in the prosecution's introduction at trial of a tape-recorded statement describing a stabbing made by the defendant's wife to the police. (*Id.* at p. 38.) In any event, Rodriguez's "recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition." (*Id.* at p. 53, fn. 4.)

More specifically, confrontation clause problems involving the admission of statements made by a non-testifying codefendant implicating a criminal defendant have, of course, previously been addressed by the courts. In *People v. Aranda, supra*, 63 Cal.2d at pp. 529-530, and prompted by "grave constitutional doubts" about the then-current practice of permitting joint trials when the confession of one defendant implicated a codefendant and the jury was instructed not to consider the confession against the codefendant, this court held, as a judicially declared rule of practice, that the practice was no longer tenable. The remedy was the following:

> When the prosecution proposes to introduce into evidence an extrajudicial statement of one defendant that implicates a codefendant, the trial court must adopt one of the following procedures: (1) It can permit a joint trial if all parts of the extrajudicial statements implicating any codefendants can be and are effectively deleted without prejudice to the declarant. By effective deletions, we mean not only direct and indirect identifications of codefendants but any statements that could be employed against

> nondeclarant codefendants once their identity is otherwise established. (2) It can grant a severance of trials if the prosecution insists that it must use the extrajudicial statements and it appears that effective deletions cannot be made. (3) If the prosecution has successfully resisted a motion for severance and thereafter offers an extrajudicial statement implicating a codefendant, the trial court must exclude it if effective deletions are not possible. (*Id.* at pp. 530-531.)

In *Bruton v. United States, supra,* 391 U.S. 123, the Supreme Court, citing with approval the *Aranda* decision, held the introduction of a non-testifying codefendant's extrajudicial statements incriminating a defendant violated the Sixth Amendment. (*Id.* at pp. 126, 130.) For all practical purposes, following the so-called "truth in evidence" provision of Proposition 8 in 1982, the rules of *Aranda* and *Bruton* are coextensive. (*People v. Fletcher* (1996) 13 Cal.4th 451, 465.)

Here, in recognition of the *Aranda-Bruton* problem with Rodriguez's statements vis-a-vis appellant Mendez, the trial court initially employed a variant of the second option recognized in *Aranda* by ordering separate juries, one to hear the case against appellant and the other to hear the case against Daniel Lopez and Joe Rodriguez. The obvious problem with not redacting the jail tape is that Rodriguez's statements were placed before the Mendez jury anyway, raising the question of what was gained by separate

juries in the first place.[95]

Regardless of the trial court's proffered reasons, the trial court erred in allowing Rodriguez's statements into evidence, irrespective of the vehicle by which they arrived. (See, e.g., *Douglas v. Alabama* (1965) 380 U.S. 415 [85 S.Ct. 1074, 13 L.Ed.2d 934]; *People v. Shipe* (1975) 49 Cal.App.3d 343; *People v. Harris* (1969) 270 Cal.App.2d 863 [all cases involving and condemning backdoor violations of the Sixth Amendment].) If it was not error to allow them by means of the jailhouse tape, it would not have been error for the trial court to introduce Rodriguez's statements in a joint trial. But this, we know, would have violated *Aranda-Bruton*--not to mention *Crawford*. Appellant was no more able to cross-examine Joe Rodriguez about his statements implicating appellant after appellant relayed the statements to Bakotich than he was when the trial court excluded those statements on *Aranda-Bruton* grounds.

F. Appellant Was Prejudiced by the Admission of Rodriguez's Statements

Because it implicates a federal constitutional right, *Aranda-Bruton* error is scrutinized under the harmless- beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 34 [87 S.Ct. 824, 17 L.Ed.2d

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[95]Presumably there was some potential benefit to Rodriguez and Lopez in not being tried by a death-qualified jury, but none, ultimately, to appellant Mendez.

705]. (*Brown v. United States* (1973) 411 U.S. 223, 231- 232 [93 S.Ct. 1565, 36 L.Ed.2d 208.)

In *People v. Anderson, supra*, 43 Cal.3d 1104, 1128-1129, this court considered a raft of federal and state cases discussing *Bruton* violations[96] before deriving the following conclusion: "From these cases . . . the following rule may be derived: if the properly admitted evidence is overwhelming and the incriminating extrajudicial statement is merely cumulative of other direct evidence, the error will be deemed harmless."

The "properly admitted evidence" in this case was anything but "overwhelming," as most of it derived from an accomplice turned snitch, Sam Redmond. The trial court recognized the centrality of the statements on the Bakotich tape vis-a-vis Redmond's testimony when it noted and overruled defense counsel's *Aranda-Bruton* motion: "[I]n light of the fact that Redmond had to be given a deal to testify, this is probably the most reliable probative evidence in the case." (19 RT 2301-2302.)

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[96]*Brown v. United States, supra*, 411 U.S. at pp. 224-227, 230-232; *Schneble v. Florida* (1972) 405 U.S. 427, 429-432 [92 S.Ct. 1056, 31 L.Ed.2d 340]; *Harrington v. California* (1969) 395 U.S. 250, 252-254 [89 S.Ct. 1726, 23 L.Ed.2d 284]; *People v. Leach* (1975) 15 Cal.3d 419, 446-448; *People v. Floyd* (1970) 1 Cal.3d 694, 702, 720-721; *In re Whitehorn* (1969) 1 Cal.3d 504, 512-517; *In re Lara* (1969) 1 Cal.3d 486, 488-490; *In re Hill* (1969) 71 Cal.2d 997, 1013-1015; *In re Sears* (1969) 71 Cal.2d 379, 383-388; and *People v. Flores* (1968) 68 Cal.2d 563, 565, 568.

Redmond obviously had a great deal of difficulty with the truth. He denied gang membership in Northside Colton when he in fact had been a documented gang member since 1996. (8 RT 1036; 15 RT 1931.) He denied he had gone by the gang moniker "Devil" or "Diablo" before the offenses, asserting he had only adopted the nickname six months or so after his arrest to avoid having other inmates learn his real name, when there was abundant evidence he had used the moniker well before the offenses were committed. (9 RT 1189, 1191; 15 RT 1931, 2030, 2037.) Denying the tattoo he had on his left calf of a devil holding a girl was obtained to commemorate Jessica Salazar's murder, he claimed to have received the tattoo before her killing, though when he was arrested for gun possession on February 20, 2000--sixteen days after Salazar was killed--police booking information reflected a clown tattoo on his right calf but nothing on his left. (9 RT 1197; 10 RT 1296-1297; 15 RT 1936.) He claimed to have done nothing at Michigan Street except drive the other participants away from the scene--and specifically denied knowing anyone had been shot at that point--yet pled guilty to both murders with the understanding he would receive a sentence of life without possibility of parole (7 RT 799; exhibit 31 [Redmond guilty plea form]. No number of delphic legal insinuations by the prosecutor (see, e.g. 10 RT 1403-1404) can obscure the fact that if

Redmond was telling the truth about the Faria killing, he was guilty at best of violating Penal Code section 32[97] following the assault with fists he acknowledged witnessing, in which case his conviction and sentence of life without possibility of parole for the Faria murder are an obvious injustice.

Redmond was also, of course, an accomplice as a matter of law whose testimony required corroboration pursuant to Penal Code section 1111.[98] The court used the tape, and thus the Rodriguez statements relayed to Bakotich by appellant, as "sufficient corroboration of the informant" in denying the Penal Code section 1118.1 motion. (22 RT 2737.) The prosecutor further argued the tape constituted "[a]ccomplice corroboration in spades." (23 RT 2838.)

Nor was the incriminating extrajudicial statement merely cumulative

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[97]Penal Code section 32 provides as follows: "Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony."

[98]Penal Code section 1111 provides as follows: "A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. ¶ An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

of other direct evidence, especially as to the Faria killing. Although Redmond pled guilty to Faria's murder, he also claimed not to have played any role in it. All Redmond said was that after Faria issued a gang challenge and the Northside and Eastside Colton members chased the Faria group, Redmond saw "Rascal" (Art Luna) run up the street with a gun and later saw appellant Mendez get in the car with a gun, though Redmond could not tell whether it was the same gun, and he had previously told the police the two guns were different sizes.[99] (8 RT 1062, 1070.) In addition, Sergio Lizarraga told police he was 75% sure it was Rodriguez who shot Faria (11 RT 1543-1544), giving Rodriguez ample motive to finger appellant for the killing.

Compare such ambiguous evidence to Rodriguez's statements relayed by appellant in the jailhouse tape: "[T]hen they showed a fucking tape of Gato telling, saying. ¶ He heard shots and that's when he looked over that he seen me standing over the guy, so that's what he said." (19 RT 2300; 7 CT 2062.) Or this: "Then he said I got another one of Joe

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[99]In fact, at the retrial of Rodriguez and Lopez, when asked whether he had previously testified appellant returned to the car with a gun, Redmond stated, "I can remember testifying to that, but as to today, I can't remember seeing it in my mind no more." (2 RT Lopez/Rodriguez Retrial 248.) And when asked who killed Michael Faria, Redmond said, "I still don't know to this day." (1 RT Lopez/Rodriguez Retrial 188.)

Rodriguez. That's Gato. He's all, it's right here. He reenacted the other crime [i.e., the Faria killing]." (19 RT 2303; 7 CT 957-958.) And this: "Joe says, I'm repeating what is on tape. Okay? Joe said he heard shots. Okay? Cop says, well, when you heard shots, he's all, what did you do after that? He's--I looked up. Okay. When you looked up, what did you see? Who did you see standing over the body? He's all, I seen Midget. Then I told you what I seen on videotape. So that's it." (19 RT 2303; 7 CT 2080-2081.)

The trial court's admonition regarding the Bakotich tape, furthermore, served only to confuse matters, especially given the blurry distinction between videotape and audiotape in appellant's statements: "In the Bakotich tape there are references to a couple of things. One is a videotape reenactment allegedly by Gato, Mr. Rodriguez, and identification of Mr. Mendez by nine or ten people as having been there. There's been no evidence that any of that actually happened. This tape [i.e., the Bakotich tape] is not being introduced for that material. That tape is only to be considered by you in reference to Mr. Mendez' state of mind or to the extent he adopts these things." (23 RT 2910.) This admonition did nothing to mitigate the prejudice inherent in the jury's hearing Rodriguez's statements previously excluded under *Aranda-Bruton*.

During argument, the prosecutor further made copious use of

Rodriguez's statements implicating appellant in the Bakotich tape, urging--contrary to the trial court's admonition quoted in the previous paragraph--the jury to believe Rodriguez's statements for their truth:

> Do we know that he was there in that group? Oh, yeah. How do we know that? His own words recorded on tape. He says, They got me, man. They got people saying that I did it. They reenacted it. Gato is saying I did it.
>
> His home boy, Gato, is ratting him off. (23 RT 2834.)

And this:

> But the thing is, he starts talking about, you know, what they are going to do. "I told Rascal to tell the guys, just fuck it, say Sam did it. I mean the only thing I got a problem with is Gato."
>
> I didn't make this up. These are his words on tape.
>
> "I mean the only thing I got a problem with is Gato because he's saying I did them too."
>
> Not him, not her. Them. Gato, my home boy, is telling the cops yeah, man, Midget did them. And that's a big problem for Midget. That's his home boy. That's somebody he thought he could count on. That's somebody who has been putting in work since 1994, representing, as the kids say. (23 RT 2836.)

And:

> Now, when you listen to the Bakotich tape, when you listen to the Bakotich tape, he throughout admits that he adopts what the other people are saying. He says, you know, they got Gato. They are doing a reenactment. (23 RT 2843.)

And:

> I don't know, but let's see what he says. "They took me to an

interrogation room. They showed me videotapes of everybody. They showed me videotapes of Sam. Then they showed me a fucking tape of Gato telling"--

He doesn't say "lying," he doesn't saying "making it up." He said telling what happened. And he's talking about Gato. He says he heard shots. This is on page 1, which is Bates No. 942. It starts at 942 and it goes to 969. "They showed a fucking tape of Gato."

You don't have to take my word for it. This is the transcript.

--"telling saying he heard shots, and that's when he looked over that he seen me standing over the guy, so that's what he said."

I'm sorry. I consider that evidence. It came out in court. You heard it. Gato has given it up. You know--and he has a few choice words to say about Gato later. Maybe I'll share that with you. Maybe you'll see it for yourself when you go through there.

And so he says, "You mean I told Rascal to tell the guys, just fuck it. Say that Sam did it. I mean, the only thing I got a problem with is Gato because he is saying I did them too." (23 RT 2889-2890.)

And:

The very next page, third page, he is talking about Gato doing him, rolling over on him. "Yeah, man. I fucking grew up with them, A. Fucking, I helped him out through his mom's problems, everything, A. And he's fucking went and done this."

The betrayal of friends. That's gotta hurt. Remember how he told you . . . . these guys all grew up together. They even went to funerals together. You can see Huero at the young age of 14 going to their little buddy's funeral together. These guys grew up together. And because this guy smoked an innocent 14-year-old girl, he is pissed off at his home boy for telling on him. Where is the honor anymore, you know?

I fucking grew up with him man. I fucking helped him out.

> Then Bakotich says right after he says he fucking went and done this, like he did this to me; can you believe it? Bakotich says, "And then sit and see him on videotape. That's dirty."
>
> You know, he's got his little rooting section. That's really dirty what they did to you.
>
> What is his answer? "Yeah. He reenacted the crime and Sam did too. I guess it's fucking gay lovers and shit saying I was the shooter." Wow, okay. So he just called his old home boy, Joe Rodriguez, a fucking gay lover because he is, what, speculating as to why Joe would say that about him too? Or is it because Sam is telling you the truth, like we have said from day one. From day one. (23 RT 1891-2892.)

And finally:

> "Then he said I got another one"--He is talking about the investigator said he's got another one--"of Joe Rodriguez." Mendez tells her, "That's Gato. He's all, it's right here. He reenacted the other crime."
>
> So great. That's why Mendez is so scared. That's why Mendez is trying to get his buddies to come in and commit perjury and lie to a jury[100] and go with the story that Sam did it, because his goose is cooked. He's got one of his buddies reenacting the execution of the girl. And he's got his other down gang member, Gato, reenacting for the police on videotape the murder of Faria. That's why he's so desperate, and that's why he's got to try to communicate in this jail setting what the plan has to be. (23 RT 2896.)

Given the above--i.e., the import of the statements themselves, that his codefendant Rodriguez had accused appellant of the murders; the

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[100]As has been demonstrated in this argument, this statement misstates the evidence.

inherent credibility problems with Sam Redmond; the trial court's abortive admonition; and the prosecutor's extensive use of the statements during argument--the People simply cannot demonstrate the error harmless beyond a reasonable doubt, and the convictions and judgment must thus be reversed.

V

THE TRIAL COURT'S DECISION TO ALLOW, IN THE GUISE OF A JAILHOUSE RECORDING, A STATEMENT PREVIOUSLY EXCLUDED UNDER *MIRANDA* MADE BY APPELLANT TO A POLICE DETECTIVE, VIOLATED HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO COUNSEL AND NOT TO BE COMPELLED TO BE A WITNESS AGAINST HIMSELF

A. Introduction

In *Miranda v. Arizona, supra,* 384 U.S. 436, the Supreme Court delineated certain constitutional requirements for custodial police interrogations. Among those requirements is, "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." (*Id.* at p. 474.) During interrogations on February 24 and April 8, 2000, appellant repeatedly invoked his right to counsel, invocations law enforcement repeatedly ignored. Defense counsel filed a motion to exclude any statements made during appellant's interrogation on the ground those statements were involuntary, including a statement denying that he shot Jessica Salazar but admitting he was close to her when it happened. The prosecutor recognized appellant had clearly invoked the right to counsel before that portion of the interrogation containing the admission and never sought to have it admitted, though he initially sought to introduce portions of the interrogation that preceded the statement. Later, expressing misgivings about whether appellant had invoked much earlier, the

prosecutor withdrew his request to admit *any* interrogation evidence whatsoever.

The problem is that mere hours after the interrogation on April 8 ceased, appellant related certain details of it, including the incriminating statement at issue here, to Nicole Bakotich during their recorded jailhouse conversation. Over objection, the court admitted this portion of the tape into evidence, and once again, the court allowed through the back door what it had barred from the front. This issue is similar to the preceding *Aranda-Bruton* issue, because it arose in the same context--the Bakotich tape--and had the same result: the introduction to the jury of evidence correctly excluded by the court on constitutional grounds.

Because this issue involves the legal implications of given facts, it is subject to de novo review by this court. (*People v. Cromer, supra,* 24 Cal.4th at pp. 900-901.)

B. Proceedings Below

Defense counsel filed a motion to exclude any statements made on April 8, 2000, on the ground appellant had thrice invoked his right to counsel and his statements were involuntary. (1 CT 48-59; 2 RT 249.) Defense counsel also asserted appellant had invoked during a statement made on February 24, 2000. (2 RT 148, 250.) During the first significant

discussion of the matter, defense counsel again referred to the "*Miranda* voluntariness motion." (3 RT 359.)

1) The Interrogations

Because the prosecutor ultimately withdrew his request to introduce any of appellant's statements to police, the interrogation transcripts are unfortunately not part of the record.[101] There were, however, extensive references to them during *Miranda* discussions and defense counsel filed a written motion (1 CT 48-59), allowing for the following re-creation.

The first interview occurred on February 24, 2000, Bates numbers 3747 through 3809. According to the court, on page 9 of that interview (Bates 3800), "Mr. Mendez says, 'No, I'll just have my attorney present. I mean, I'm trying to--trying to be--I mean, I tried to answer what I could, and I mean, I don't know what's going on or whatever like anybody is saying that I was there or whatever all,' et cetera." (3 RT 361.)

The second interview occurred on April 8, and consisted of three tapes. The court read from the interrogation transcript of the second tape beginning at Bates 3847:[102]

Mendez says, "I don't even understand what's going on, you know.

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[101]As of this writing, a post-certification augment request for the transcripts is pending before this court.

[102]The actual invocation occurred at Bates 3848. (3 RT 364.)

Ah, I'm tired right now, you know.

De[l] Valle [detective]: Okay.

Mr. Mendez: I don't understand, you know.

De[l] Valle: I understand.

Mr. Mendez: What's going on?

De[l] Valle: It's right now 9:20.

Mendez: I don't know what's going on--

De[l] Valle: Okay.

Mendez: -- you know.

De[l] Valle: Listen.

Mendez: I think I should do this with an attorney.

[Del Valle:] Well, hold on, hold on, hold on. Let me ask you something. Do you want to listen to this right now?

[Mendez:] I don't know.

[Del Valle:] You don't know. Do you want to?

[Mendez:] Yes.

[Del Valle:] Are you sure it's okay?

[Mendez:] Yes.

[Del Valle:] Can I continue?

[Mendez:] Yes. (3 RT 361-362.)

The prosecutor conceded appellant had clearly invoked by the third

tape and did not ask the court to review anything past the second tape. Two further invocations appeared on this third tape, at the beginning (Bates 3869) and roughly halfway through (Bates 3884). (3 RT 363-364.) As recounted in defense counsel's written motion, the factual averments in which were not disputed:

> During the third tape, Del Valle continues to accuse Mendez of lying about his gang affiliation and moniker. . . . Mendez again invokes his right to counsel. Del Valle ignores this request for a second time[103] and continues to interrogate Mendez. Del Valle advises Mendez that he is facing the death penalty.
>
> [Mendez] clearly invoked his right to counsel, however, the detective failed to terminate the interrogation. Eventually Mendez admitted that he knew about a confrontation but that he did not kill Salazar. Again, Mendez invoked his right to counsel by saying, that if he had an attorney he would consider answering the detective[']s questions. That if Mendez was provided an attorney he would consider answering the detective's questions truthfully.[104] Del Valle did not terminate the interrogation and ultimately, Mendez indicated that he was present at the time Salazar was killed, however he was not the actual killer. (1 CT 52.)
>
> 2) First In Limine Discussion on July 14, 2004
>
> The court indicated it had reviewed the transcripts through the

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[103]I.e., the second time during Del Valle's interrogation, the first invocation during that interrogation occurring at Bates 3848. Detective Brown conducted the interrogation on February 24 during which the first invocation was made. (3 RT 365-366.) In other words, this was actually the third invocation.

[104]This, then, is the third invocation during the Del Valle interrogation, and the fourth invocation in toto.

second invocation (i.e., the one at Bates 3848) and was "really concerned that that looks like an invocation to me." After the court observed "I don't think the defendant has said very much about anything significant until that point," defense counsel said "there's only one part where Mr. Mendez says anything that I would believe would be incriminating," which was on the third tape--i.e., the statement at issue in this argument. (3 RT 315.) The prosecutor stated he did not plan to introduce the tapes themselves, but wanted the officer's testimony appellant had denied certain matters that "are easily disproved as lies and would constitute consciousness of guilt under 1111."[105] (3 RT 316.)

The court continued: "First of all, he says, 'I'm tired. I don't know where you're going to. I think I should talk with a lawyer,' and then Del Valle continues [along] his happy course." (3 RT 316.) The prosecutor then appeared to concede everything after this second invocation was inadmissible:

> So it would be our position up until the second statement that he makes, "Hey, maybe I should have a lawyer," that it is admissible up to that point because the officer did try to clarify what could be considered an ambiguous statement on that. But when you've got two ambiguous statements, I think the law says the second time we've got to say no, that that's an invocation by the second time.

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[105]Penal Code section 1111 requires corroboration of accomplice testimony; the reference was to corroboration of Redmond.

The prosecutor told the court that it did not need to read anything after this second invocation. (3 RT 317.)

The court then made the following finding "unless [the prosecutor] finds a very compelling case":

> I believe that the second time, the one in the tape where Del Valle is talking to him and he--the defendant first says, "I don't know what you're speaking about. Where are we going to with this?" and says, "I think I should talk to a lawyer," he says it almost that quick, I find that to be an invocation at this point in time. You don't have to worry about anything past that point. (3 RT 317-1.)

Defense counsel stated, "I'm going to assume that's the Court's order," and the prosecutor again told the judge to read no further in the transcripts. (3 RT 317-1 to 317-2.)

3) Second In Limine Discussion on July 14, 2004

Defense counsel indicated he wished to "frame what remains as an issue on the *Miranda* voluntariness motion." (3 RT 359.) The court then read the portions of the interrogations quoted above containing the first two invocations. After stating it was not deciding whether the first request for an attorney "alone is an invocation" (3 RT 361), the court repeated, regarding the second request, "[T]hat sure seemed like an invocation to me being it's the second time that he mentioned his desire to talk to the attorney. It was prefaced by 'I don't know what's going on' and saying 'I think I should talk with a lawyer,' which seems like a pretty clear

statement to me. So it was represented to me that I did not have to continue reading the rest of these transcripts because the litigation was going to focus up to that point." (3 RT 362.)

The prosecutor then said he had been confused during the earlier in limine discussion: "I was looking at two other questionable invocations, and I was not considering the first one that Your Honor had mentioned. . . . I was indicating to the Court that the Court did not need to read past the second transcript of the second interview."[106] (3 RT 362-363.) The ensuing discussion clarified the court need not read the third transcript of the second interview beginning at Bates 3869, where appellant invoked for a third and fourth time at Bates 3869 and Bates 3884.[107] (3 RT 363-364.) The prosecutor explicitly agreed with the court's order formally excluding the entire third tape (Bates 3969 through 3896) from evidence. (3 RT 368.)

4) The Next Day, the Prosecutor in Effect Admits Appellant Invoked from the Beginning and Withdraws the Request for Admitting into Evidence *Any* of Appellant's Interrogations

In effect recognizing that any statements made by appellant were

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[106]The prosecutor earlier stated the police had a duty to clarify a defendant's second request for counsel even if it appeared ambiguous. (3 RT 317.) Even if the first invocation on February 24 was ambiguous--and appellant by no means concedes it was--that would mean the police breached the duty of inquiry following the second invocation at Bates 3848.

[107]The incriminating statement followed the fourth invocation. (1 CT 52.)

involuntary following the first invocation on February 24, the prosecutor withdrew his request to have any of the statements admitted. Regarding the second invocation of April 8 (Bates 3848), the prosecutor stated, "I am not comfortable, especially with it being a death case, with the state of the record now as to his invoking or not invoking [so] I am not going to seek to introduce that." (3 RT 418.) Regarding the first invocation of February 24, the prosecutor said he would listen to the tape "where the talk about an attorney on Mr. Mendez' part first comes up to see if that's kind of a run on and that may be why Sergeant Brown did not stop questioning. *I don't expect that to be the case*. So I am not going to seek to introduce Mr. Mendez' statements and wanted to save the Court and the rest of us the time from going into it any further." (3 RT 418-419, italics added.)

The court said it appreciated the prosecutor's decision "for a number of reasons" (3 RT 420)--and that should have been the end of it.

5) Despite All of the Above, the Jury Ends Up Hearing by Far the Most Incriminating Statement Made During the Interrogations

Unfortunately, that was not the end of the issue. During the surreptitiously taped jailhouse conversation between appellant and Nicole Bakotich on April 9, which occurred around 8:00 the morning after appellant's interrogation by Del Valle (19 RT 2309-2311), appellant made the following statement:

> He [Detective Del Valle] asked me, hey, well if you didn't shoot her, well who shot her. I'm like, well figure it out. He is like one question okay. Where were you standing when she got killed? I was standing like 6 feet away from her, and he's like 'cause I need to get out of that one. If I can get out of that one I can probably get if anything get self defense on the guy because they fucken started it, you know what I mean. I mean they started it. The detectives know he just can't figure. He can't pinpoint it. . . . I need to know what guy started it. He's all I'm like you being so smart why don't you figure it out. (7 CT 2067.)

During trial, after detailing his *Aranda-Bruton* objections to the Bakotich tape, defense counsel added the following:

> I have one other objection, which is on Bates 947.[108] That would be in the second to last paragraph. Actually, it's the larger paragraph where Mr. Mendez is speaking, and it starts off "He is like one question, okay. Where were you standing when she got killed? I was standing like six feet away from her. And he's like, 'cause I need to get out of that one. If I can get out of that one, I can probably get, if anything, get self-defense." Then it goes on. If you recall from the *Miranda* issue that we raised prior to the commencement of the trial, this was--this admission of Mr. Mendez is that he was six feet away from Miss Salazar when the shots were fired. That was part of what we were attempting to exclude in court based on counsel's representations concerning Detective Del Valle, et cetera, and the invocation of *Miranda*. Those statements were all excluded. My concern is that the statement that's otherwise been excluded, although Mr. Mendez is again repeating it, I'm going to ask that it not be included in this particular tape. I readily see that this is not an interrogation by Detective Del Valle. I think I should raise an objection to it nonetheless. (19 RT 2303-2304.)

As indicated above, this admission was made on the third tape following appellant's fourth invocation of his right to counsel, a tape the prosecutor

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[108]This is the Bates number on the Bakotich transcript.

never even attempted to introduce because of the flagrant Fifth Amendment violations.

The court nevertheless decided to allowed that which the court had formally excluded and the prosecutor had not even sought to introduce:

> THE COURT: All right. Mr. Ruiz, I'm satisfied that this tape is admissible for a number of different reasons. I don't find there is any *Massiah*[109] or *Miranda* issues here, possibly because it sure looks to me like Miss Bakotich is either the girlfriend or steady visitor of Mr. Mendez, and just coming to visit--the internal context of this transcript compellingly suggests that--and I suspect she will confirm that when she testifies.
>
> Secondly, these are statements made by Mr. Mendez. And even though he is adopting other persons' statements, they become his admissions. There is additional evidence of his assuming the truth of those statements by the way he uses them and tries to portray them into his defense. Just focus briefly on his statements with the death of the man. "I could say that was self-defense because they started it. But the girl they have got fucking problems with," using Mr. Mendez' language, in the circumstances. (19 RT 2304-2305.)

The tape was played for the jury. (19 RT 2325.)

Appellant's coerced statement was perhaps the single most prejudicial admission appellant made during the entire lengthy interview, and if the trial court's decision was the correct one, the earlier extended

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[109]*Massiah v. United States* (1964) 377 U.S. 201, 202-203 [84 S.Ct. 1199, 12 L.Ed.2d 246]. *Massiah* involved the government's knowing employment of a snitch to elicit incriminating statements from an indicted defendant represented by counsel. Presumably the trial court was stating it did not appear Bakotich had been used by the government to obtain statements from appellant.

discussions of *Miranda* issues, including the prosecutor's concessions and the court's rulings, were a massive waste of time.

C. Analysis

In *Miranda v. Arizona, supra*, 384 U.S. at p. 442, the court addressed the right to counsel during a custodial interrogation:

> Once warnings have been given, the subsequent procedure is clear. If 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. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent. (*Id.* at pp. 473-474.)

The United States Supreme Court has established a bright-line rule regarding further interrogation once the accused requests counsel. "[A]n accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 [101 S.Ct. 1880, 68

L.Ed.2d 378.) Any further statements made in counsel's absence "are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards." (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 177 [111 S.Ct. 2204, 115 L.Ed.2d 158].) The "fruits of the interrogation initiated by the police" following a request for counsel cannot be used against a defendant (*Edwards v. Arizona,* supra, 451 U.S. at p. 485), although statements made in deliberate violation of *Edwards* may be admitted for impeachment if they are otherwise voluntary. (*People v. Neal* (2003) 31 Cal.4th 63, 67.) The purpose behind the impeachment rule is to ensure that "[i]f a defendant exercises his right to testify on his own behalf, he assumes a reciprocal 'obligation to speak truthfully and accurately'. . . ." (*Michigan v. Harvey* (1990) 494 U.S. 344, 351 [110 S.Ct. 1176, 108 L.Ed.2d 293].)

Involuntary statements, on the other hand, are inadmissible for any purpose. (*Michigan v. Harvey, supra,* 494 U.S. at p. 351) Assuming the statements are involuntary, the fact a defendant "did not actually confess to the crime does not change the result." (*People v. Bey* (1993) 21 Cal.App.4th 1623, 1628.) As will be demonstrated below, there are compelling reasons to consider the admission at issue here involuntary.

Even if it was voluntary, however, it should have been excised from the Bakotich tape. Appellant did not testify, and the statement made in violation of *Edwards* was used not for impeachment but in the state's case-in-chief.

There are clear indicia that appellant's statement was involuntary: The police ignored his request for an attorney *four times on two different occasions*. Defense counsel consistently characterized the basis for excluding defendant's statements as an issue of voluntariness. Counsel's written motion filed nearly two years before trial was captioned "Notice of Motion and Motion to suppress Defendant's statement; [Voluntariness]"[110] and was "made on the grounds that defendant's April 8, 2000[111] statement was involuntary and given under coercive circumstances in violation of defendant's constitutional rights and protections under the Fifth, Sixth, Eighth and Fourteenth Amendments." (1 CT 48-49.) At the motion itself, counsel referred to the motion as a "voluntariness motion" (3 RT 359, 419), and the trial court acknowledged it as such (3 RT 360). The fact that the prosecutor never even attempted to introduce statements on the third tape and subsequently decided to withdraw *any* of appellant's statements from

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[110]"Voluntariness" is not an interpolation; the brackets are in the original motion.

[111]This was later expanded to include the February 24 interview.

the trial court's consideration is tantamount to a concession the statements--and especially the statement at issue here on the third tape--were involuntary.

In *People v. Neal, supra,* 31 Cal.4th 63, this court noted several factors it found significant in concluding a defendant's statement was involuntary. In *Neal*, the police continued an interrogation despite the young defendant's repeated invocation of his rights to silence and to counsel, and badgered the defendant by accusing him of lying and issuing a threat that "if you don't try and cooperate . . . , the system is going to stick it to you as hard as they can." (*Id.* at p. 68.) This court pointed to the officer's deliberate violation of *Miranda*, the defendant's youth and minimal education, the deprivation and isolation imposed during confinement, and a threat made by the officer among the factors it considered before concluding the defendant's statement was involuntary. (*Id.* at p. 78.)

Here, appellant invoked his right to counsel four times, each of which was deliberately ignored by his interrogators. His education was minimal; it appears he was "pretty much . . . on the streets" when he was supposed to begin attending high school. (26 RT 3243.) He was confused during the February 24 interrogation--"I don't know what's going on"--and confused and fatigued during the April 8 interrogation--"I don't even

understand what's going on, you know. Ah, I'm tired right now, you know." (3 RT 361.) Furthermore, as recounted in defense counsel's written motion, Detective Del Valle continually accused appellant of lying: "The detective continually told Mendez that he was lying . . . ." (1 CT 53.) Like the police officer in *Neal*, Del Valle also issued a threat: "Detective Del Valle advised Mendez that he has spoken with others and is concerned that the information might get Mendez killed." (1 CT 52.) As with *Neal*, therefore, appellant's statement was involuntary and should have been excluded for all purposes.

Appellant recognizes "[an incarcerated] defendant's 'conversations with his own visitors are not the constitutional equivalent of police interrogation.'" (*People v. Leonard* (2007) 40 Cal.4th 1370, 1402.) The visiting room in a jail is not a constitutionally-protected area. (*Lanza v. New York* (1962) 370 U.S. 139, 143 [82 S.Ct. 1218, 8 L.Ed.2d 384].) Custodial conversations may be monitored "even where the express purpose is to gather evidence to support the prosecution." (*People v. Loyd* (2002) 27 Cal.4th 997, 1009.) The issue here, however, is not whether the jail authorities had the right to tape the conversation or whether the prosecution had the right to introduce those parts of the tape that did not circumvent *Miranda*. Appellant's admission contained in that tape was involuntary,

and as this court has stated, "It long has been held that the due process clause of the Fourteenth Amendment to the United States Constitution makes inadmissible any involuntary statement obtained by a law enforcement officer from a criminal suspect by coercion." (*People v. Neal, supra,* 31 Cal.4th at p. 79.) And, even if the admission was voluntary, it could be used only as impeachment. (*Michigan v. Harvey, supra,* 494 U.S. at pp. 350-351.)

The refusal of the police to honor *any* of appellant's invocations of the right to counsel "by any objective measure reveal[s] a police strategy adapted to undermine the *Miranda* warnings" (*Missouri v. Seibert* (2004) 542 U.S. 600, 616 [124 S.Ct. 2601, 159 L.Ed.2d 643]) previously given. In *Oregon v. Elstad* (1985) 470 U.S. 298, 300 [105 S.Ct. 1285, 84 L.Ed.2d 222], the Supreme Court considered whether an initial inadvertent[112] failure of law enforcement to administer *Miranda* warnings tainted a subsequent statement following full *Miranda* advisals. The defendant in that case contended the subsequent statement must be suppressed as the "tainted fruit of the poisonous tree" of the *Miranda* violation. (*Id.* at p. 303.) The court disagreed, finding a mere failure to provide *Miranda* warnings does not

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[112]"Although the *Elstad* Court expressed no explicit conclusion about either officer's state of mind, it is fair to read *Elstad* as treating the living room conversation as a good-faith *Miranda* mistake . . . ." (*Missouri v. Seibert, supra,* 542 U.S. at p. 615.)

breed "the same consequences as police infringement of a constitutional right." (*Id.* at p. 304.)

In *Seibert*, however, the police adopted a deliberate strategy of questioning a suspect without *Miranda* warnings until the suspect made a statement, and then provided *Miranda* warnings and continued questioning until the suspect repeated the earlier statement. (*Missouri v. Seibert,* supra, 542 U.S. at pp. 605-606.) The court affirmed the ruling of the Missouri Supreme Court, which had observed in holding the statements inadmissible, "To allow the police to achieve an 'end run' around *Miranda* . . . would encourage *Miranda* violations and diminish *Miranda*'s role in protecting the privilege against self-incrimination." (*Id.* at p. 606.) The *Seibert* court made it clear it had rejected the "fruit of the poisonous tree" doctrine in *Elstad* because the subsequent *Miranda* warnings "could reasonably be found effective," whereas if "earlier and later statements are realistically seen as parts of a single, unwarned sequence of questioning," both earlier and later statements must be suppressed. (*Id.* at p. 612, fn. 4.)

The admission contained in appellant's statement to Bakotich was the "fruit of the poisonous tree" and should have been excised from the tape. As the court noted in *Nix v. Williams* (1984) 467 U.S. 431, 441 [104 S.Ct. 2501, 81 L.Ed.2d 377], the seminal case of *Wong Sun v. United States*

(1963) 371 U.S. 471 [83 S.Ct. 407, 9 L.Ed.2d 441], "extended the exclusionary rule to evidence that was the indirect product or 'fruit' of unlawful police conduct . . . ." Although originating in Fourth Amendment violations, the "fruit of the poisonous tree" doctrine has also been applied to violations of the Fifth and Sixth Amendments. (*Nix v. Williams, supra,* 467 U.S. at p. 442.) "The core rationale consistently advanced by this Court for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections." (*Id.* at pp. 442-443.)

Here, the trial court's decision to allow the most incriminating "fruit" through the back door rewarded rather than deterred the deliberate decision by law enforcement *four times* to ignore appellant's request for counsel. The question to be asked is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." (*Nix v. Williams, supra,* 467 U.S. at p. 442.) Appellant's admission to Del Valle was the direct product of unlawful police conduct, and appellant's repeating the statement to Bakotich, which came fast on the heels of his involuntary

admission to Del Valle, was the indirect product or fruit thereof.

"*Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301 [100 S.Ct. 1682, 64 L.Ed.2d 297].) Appellant related his admission to Del Valle to Bakotich early in the morning (8:00) of April 9, 2000, shortly after his interrogation by Del Valle, and the circumstances were such that appellant was likely to repeat to any visitor details of that interrogation. The record indicates tapes 1 and tape 2 consisted of 58 pages of transcript (Bates 3810-3868), and tape 3 consisted of an additional 27 pages (Bates 3869-3896). (3 RT 364, 368.) The record also reflects Bates page 3847 (or, page 8 of the second tape of the Del Valle interrogation) occurred around 9:20 p.m. (3 RT 361-362.) As the interrogation was thus not even halfway through at 9:20 p.m., it is only reasonable to assume it lasted at least a couple of hours more, until around midnight. Here, the prosecution cannot hope to sustain its "burden of establishing a break in the causative chain . . . ." (*People v.*

Sims (1993) 5 Cal.4th 405, 445) between the coerced statement and its poisonous fruit in the statement to Bakotich made shortly thereafter.

D. Appellant Was Prejudiced by the Admission of the Statement

Because they implicate constitutional issues, *Miranda* violations are governed by the *Chapman* standard, meaning the prosecution must demonstrate beyond a reasonable doubt the violation did not contribute to the verdict. (*People v. Neal, supra,* 31 Cal.4th at p. 86.)

"He [Detective Del Valle] is like one question okay. Where were you standing when she got killed? I was standing like 6 feet away from her, and he's like 'cause I need to get out of that one." While in this statement appellant does not admit killing Jessica Salazar--throughout the tape he maintained Redmond did--the admission he was anywhere in the vicinity of, not to mention so close to, an innocent 14-year-old girl when she was shot in the head caused incalculable prejudice. Indeed, for *Miranda* purposes, "No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense." (*Rhode Island v. Innis, supra*, 446 U.S. at p. 301, fn. 5.) Appellant's reference to "self defense on the guy because they fucken started it" was a similar admission regarding Faria.

Appellant's recital during the Bakotich tape of Rodriguez's

statements previously excluded under *Aranda-Bruton* is the subject of a previous argument, in which appellant contended the statements should have been redacted from the tape played for the jury. As was noted in that argument, the accomplice Redmond required corroboration pursuant to Penal Code section 1111, and the court used the tape, and thus the statement previously excluded under *Miranda*, as "sufficient corroboration of the informant" in denying the Penal Code section 1118.1 motion. (22 RT 2737.) The prosecutor further argued the tape constituted "[a]ccomplice corroboration in spades." (23 RT 2838.)

Certainly during argument the prosecutor made the most of appellant's statement to Del Valle taken in violation of *Miranda*. First, he claimed appellant admitted shooting *Michael Faria* from six feet away:

> The killing of Faria a self-defense? You have no self-defense instructions. Do not bother looking through all those instructions for anything on self-defense because there isn't anything, because it isn't self-defense. That kid was unconscious and helpless laying on the ground when this guy stood over him six feet away--look at the Bakotich tape--six feet away and executed that kid. (23 RT 2845.)

This prompted defense counsel to helpfully remind the jury, "Mr. Ruiz, I believe he said at some point in this tape Mr. Mendez says something like I was six feet away from him. And I think his reference was 'I told the police or said something about being six feet away from her.' So the reference is not to the Faria killing. The reference was to the Salazar killing." (23 RT

2876.) In rebuttal, the prosecutor again referred to the statement:

> Counsel was right about the six feet away. He is talking about the Salazar killing when he says, Where were you standing when she got killed? He is talking about what the investigator asked him. And what does he say? I was standing like six feet away from her. He's, like, I need to get out of that one. If I can get out of that one, I can probably get self-defense on the guy because they fucking started it. You know what I mean? I mean, they started it. (23 RT 2893.)

Regarding the only other real evidence against appellant, Sam Redmond, rather than repeat the details concerning the importance of Samuel Redmond's testimony and his utter lack of credibility, appellant respectfully refers the court to the prejudice section in his *Aranda-Bruton* argument. In a nutshell, there were compelling reasons not to believe a word out of Redmond's mouth.

The state cannot hope to prove harmless beyond a reasonable doubt the admission through the back door of appellant's statement previously excluded under *Miranda*, and the judgment must therefore be reversed.

VI

THE TRIAL COURT DENIED APPELLANT HIS SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WHEN IT DID NOT ALLOW COUNSEL TO CROSS-EXAMINE SAMUEL REDMOND REGARDING AN ADOPTIVE ADMISSION

A. Introduction

It is no exaggeration to state that appellant's fate hung on the credibility of Samuel Redmond. During his opening statement, the prosecutor said to the jury, "You will hear the testimony of Sam Redmond, the guy in the middle there, the one with the moniker or gang name of Devil." (6 RT 779.) While this would appear to be a concession Redmond was indeed a gang member with a gang name of "Devil," Redmond himself continually denied being a Northside Colton gang member with the moniker "Devil" or "Diablo."

Redmond testified for several days with a photoboard--People's exhibit 1[113]--depicting him as an admitted (since May 9, 1996) North Side Colton member known as "Devil" on display behind him in the courtroom. When counsel for codefendant Lopez asked Redmond whether he had informed the deputy district attorney that the information on the board was inaccurate, the prosecutor objected as speculative, and the court sustained

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[113]This exhibit will be forwarded to the court.

the objection under Evidence Code section 352.

While the trial court was eager to find appellant had made adoptive admissions in the Bakotich tape in the *Aranda-Bruton* context, doing so was the evidentiary equivalent of forcing a square peg into a round hole. Here, Redmond's silence would have been a classic adoptive admission, and the court's refusal to allow defense counsel to question him about it deprived appellant of his constitutional right to cross-examine the witnesses against him.

A confrontation clause challenge based on the exclusion of an area of inquiry is reviewed de novo. (*United States v. Larson* (9th Cir. 2007) 495 F.3d 1094, 1101.) In addition to the Sixth Amendment violation, the trial court's arbitrary curtailment of cross-examination violated appellant's due process right to present a defense in violation of the Fifth and Fourteenth Amendments (*Webb v. Texas* (1972) 409 U.S. 95, 98 [93 S.Ct. 351, 34 L.Ed.2d 330], and undermined the reliability required by the Eighth and Fourteenth Amendments for an accurate guilt phase determination during a capital trial (*Beck v. Alabama, supra,* 447 U.S. at p. 638).

B. The Record Below

The prosecution's star witness, the homicidal snitch Sam Redmond, first took the stand on Wednesday, July 28, 2004. (7 RT 997.) While he

was testifying, there was a board behind him, People's exhibit no. 1, that contained pictures of Redmond, appellant, Lopez, and Rodriguez. (9 RT 1153-1156, 1446.) The exhibit indicated Redmond had been a North Side Colton gang member since May 9, 1996, and went by the gang moniker of "Devil." (Exhibit 1; 9 RT 1174, 1188-1189; 10 RT 1431.)

Redmond testified on July 28, July 29, August 9,[114] and August 10, 2004. (7-10 RT.) Exhibit 1 was referenced by various counsel at several points during that testimony. (E.g., 9 RT 1154-1156, 1160-1161, 1173-1175, 1181, 1188-1189; 10 RT 1313, 1431.) On August 10, the following transpired between Redmond and Darryl Exum, counsel for Joe Rodriguez:

> Q: Okay. My last question is when was the first time you saw that board behind you?
>
> A: Last Wednesday when I first--
>
> Q: When we came to court?
>
> A: The first day I testified, yes.
>
> Q: Did you tell the district attorney the information under your name was incorrect?
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> MR. RUIZ: Objection, your Honor. It calls for speculation that I would ask him that question.
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> MR. EXUM: I didn't--I'm sorry.

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[114]The court was in recess the first week of August 2004. (8 RT 1117.)

THE COURT: Well, under Evidence Code Section 352 I'll sustain the objection. We can talk about that too. (10 RT 1446.)

Shortly thereafter:

THE COURT: ¶ We need to talk about the first issue relating to did someone say something to you that involved this witness. The second issue I want to do first, which is the easier one to handle.

I'm sure that you were going to ask him as to when you saw the information on that diagram why didn't you bring it to the attention of the district attorney. Is that where you were going to with that, Mr. Exum?

MR. EXUM: I'm not going to ask him why, I'm going ask him if he did.

THE COURT: Well, under Evidence Code Section 352 if he did or if he didn't, I think it's so equivocal and has little probative value. If it's, in fact, on there and he denied it, he can be impeached. Whether he told the district attorney that or not adds so little. We get into this long philosophical discussion as to what the expectations are. People can disagree. That's what it seemed to me. It was a minor point. (10 RT 1448.)

C. The Question Was Entirely Proper, as Redmond's Failure to Inform the Prosecutor the Information Was Wrong Is a Classic Adoptive Admission

The trial court was mistaken. No "long philosophical discussion" was required "as to what the expectations are," because the requirements for an adoptive admission are simple. Nor was Redmond's credibility "a minor point."

The requirements for another person's hearsay statement to be admissible against a party as an adoptive admission are twofold: "The party

has knowledge of the content of the other person's statement; and the party has, by words or conduct, adopted the statement or manifested belief in the truth of the statement." (1 Jefferson, Cal. Evidence Benchbook (4th ed. 2010) § 3.24, p. 105; Evid. Code, § 1221.) That it was a statement written on the board behind Redmond while he was testifying rather than a spoken statement is of no moment: "[A] 'statement' is defined as 'oral or written verbal expression' or 'nonverbal conduct . . . intended . . . as a substitute for oral or written verbal expression." (*People v. Lewis* (2008) 43 Cal.4th 415, 497-498; Evid. Code, § 225.)

The first criterion--i.e., that Redmond had knowledge of the content of the statement--is readily met, in that he admitted he had seen the board since the first day of his testimony (10 RT 1446), and had earlier testified he was aware the board indicated he was a gang member (9 RT 1174; 10 RT 1431), even a gang member with the moniker "Devil" (9 RT 1188-1189). Although Redmond's vehement denials of gang membership render the North Side Colton label under his photograph a direct accusation, "a direct accusation in so many words is not essential" for an adoptive admission, meaning any such statements need not be "accusatory on their face." (*People v. Fauber* (1992) 2 Cal.4th 792, 852.)

The second criterion--i.e., that Redmond adopted the statement or

manifested belief in the truth of the statement--is just as readily met. "The party need not expressly agree with the defendant's statement; an evasive or equivocal reply, or silence, is the more typical reply in adoptive admission cases." (1 Jefferson, Cal. Evidence Benchbook, *supra*, § 3.27, p. 107.) Assuming Redmond said nothing to the prosecutor about the prosecutor's own exhibit indicating he had been a long-term North Side Colton member nicknamed "Devil"--and it is highly unlikely the prosecutor would have objected to the question if Redmond had said anything--his silence in the face of the accusatory statement indicated a belief in its truth. (*People v. Geier* (2007) 41 Cal.4th 555, 590; *People v. Silva* (1988) 45 Cal.3d 604, 623-624.)

D. Appellant was Denied His Constitutional Right to Confront the Witnesses Against Him

[T]he Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment." (*Pointer v. Texas* (1965) 380 U.S. 400, 403 [85 S.Ct. 1065, 13 L.Ed.2d 923].) The right "to be confronted with the witnesses against the defendant" is likewise guaranteed by the California Constitution (Cal. Const., art. 1, § 15), a right identical to the federal right. (*People v. Contreras* (1976) 57 Cal.App.3d 816, 818.) "[T]he main and essential purpose of confrontation is to secure for the

opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." (*Davis v. Alaska* (1974) 415 U.S. 308, 315-316 [94 S.Ct. 1105, 39 L.Ed.2d 347]; *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1137.) The right to cross-examination thus includes the right to effective cross-examination. (*Douglas v. Alaska* (1965) 380 U.S. 415, 419-420 [85 S.Ct. 1074, 13 L.Ed.2d 934].)

The right to cross-examination is, of course, subject to reasonable limits. "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 [89 L.Ed.2d 674, 106 S.Ct. 1431.] Among these limits is the court's discretion under Evidence Code section 352 "to exclude evidence 'if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of

misleading the jury.'" (*People v. Sully* (1991) 53 Cal.3d 1195, 1220; Evid. Code, § 352.) "[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (*Delaware v. Van Arsdall, supra,* 475 U.S. at p. 679.)

The trial court's decision to terminate counsel's questioning about the adoptive admission denied appellant the Sixth Amendment's guarantee of an opportunity for effective cross-examination. Redmond's credibility--or lack thereof--was everything to the government's case. Redmond consistently denied being a North Side Colton member. (7 RT 1036-1037, 9 RT 1174, 10 RT 1364.) He admitted, however, keeping between seven and ten rifles--including an AK-47 assault rifle--concealed in an air conditioning duct in his apartment, an apartment frequented by both North Side and East Side Colton members. (10 RT 1303, 1348-1349, 1354, 1360, 1063.) Around a month before he was arrested for the Faria/Salazar murders, police found a loaded .38 Special Taurus revolver in his Nissan Pathfinder, his passengers just happening to be NSC members Joe Rodriguez and Art Luna. (11 RT 1608, 1610, 1614.) A police field investigation card reflected Redmond's admission he had been an NSC member since 1996. (15 RT 1931.)

Not only did Redmond deny NSC membership, he also denied ever using the names "Devil" or "Diablo" on the streets, testifying he only started using them around six months after his arrest in the current case, so no one would know his true name while he was in custody. (9 RT 1189, 1191; 10 RT 1292-1293.) Danielle Gonzalez, who left the gang in 2003, said Redmond went by the nickname "Devil" in 1999 and 2000. (15 RT 2013, 2029, 2038.) The same field investigation card that reflected Redmond's admission of NSC membership since 1996 indicated his nickname was "Devil." (15 RT 1931.) In addition, Colton police listed his moniker as "Devil" when he was arrested with Luna and Rodriguez for the gun possession on February 20, 2004, a month before his arrest on the murders. (10 RT 1295, 11 RT 1617.)

Whether Redmond had been a member of North Side Colton, and whether he had gone by the name "Devil" before his incarceration, were central to his credibility. If Redmond was telling the truth about both, he naturally would have pointed out to the prosecutor that the exhibit he testified in front of for four days was wrong. If he did not, his failure to do so was a significant factor the jury was entitled to consider. The court should have allowed the question.

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E. Appellant Was Prejudiced by the Court's Ruling

Confrontation Clause errors are subject to *Chapman* harmless-error analysis:

> 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. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (*Delaware v. Van Arsdall, supra*, 475 U.S. at p. 684.)

Most of these factors are present here. The importance of Redmond's testimony cannot be overstated. Redmond's testimony was both a necessary and sufficient condition for the jury to convict appellant of both murders, and since the convictions hinged on the testimony of a single accomplice, the prosecution's overall case was anything but strong. The prosecutor acknowledged the case stood or fell with Redmond during argument: "The defense in this case is scared to death. They are frightened that you are going to believe Sam Redmond. Because if you believe Sam Redmond, you can stick a fork in his client. He is done. It's all over. Because Sam tells you what happened." (23 RT 2887.)

Nor was counsel's question cumulative. While Redmond made a

point of denying NSC membership and the "Devil" moniker pre-incarceration, he also had a huge incentive to lie--i.e., to avoid the death penalty--about his involvement in the killings. If he was not lying about NSC membership and his nickname, he would have told the prosecutor about the accusations virtually staring him in the face the whole time he was testifying, and any failure to do so was worth a thousand denials of NSC membership or the "Devil" moniker on the witness stand.

As we have seen, there was abundant evidence contradicting Redmond's testimony on material points. That evidence includes Redmond's tattoo depicting a devil or demon with wings holding a girl, the issue being whether Redmond got the tattoo to commemorate his role in Jessica Salazar's murder. As this court has noted, gang tattoos commemorating crimes such as murder are "highly probative" and represent "an admission of defendant's conduct and a manifestation of his consciousness of guilt." (*People v. Ochoa* (2001) 26 Cal.4th 398, 438 [disapproved on another point in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14].) Redmond claimed he got the tattoo the same week he got the Pathfinder, meaning before Salazar's murder, and said he did not go by the name "Devil" at the time he obtained it. (15 RT 1195-1198, 10 RT 1292.) When Redmond was arrested for gun possession on February 20, however,

police booking information reflected a clown tattoo on his right calf but did not reflect the demon tattoo on his left calf, something Redmond claimed was a mistake by the police. (10 RT 1296, 15 RT 1935-1937.) It was no mistake; had the demon tattoo been there, the police would have noted it "[b]ecause it's another identifying characteristic of Mr. Redmond." (15 RT 1937.)

Finally, despite the admission in his opening statement that Redmond was a gang member with the moniker "Devil" (6 RT 779), the prosecutor thought Redmond's denial of North Side Colton membership so vital to his case he ended his rebuttal argument on the point:

> And they want you to believe he is some hardcore gang member. This is this conniving master criminal, master hardened gang member that has fooled everybody.
>
> (Videotape[115] being played)
>
> MR. RUIZ: Oh, yeah. He is a hard gang member. He's crying like a little girl because they just filled out a booking form for him for murder.
>
> (Videotape being played)
>
> MR. RUIZ: Oh, yeah. He's a gang member. (23 RT 2904.)

Too bad the prosecutor's objection and court's ruling meant the jury never got to hear whether Redmond had denied such membership under

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[115]Exhibit no. 115. In the videotape Redmond is upset but hardly "crying like a little girl."

circumstances that virtually compelled him to do so.

Because appellant was prejudiced by the trial court's refusal to allow complete cross-examination of the main witness against him, the judgment must be reversed.

VII

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM AND RIGHT TO PRESENT A DEFENSE BY THREATENING TO ALLOW EVIDENCE SAM REDMOND PASSED A POLYGRAPH TEST IF COUNSEL CONTINUED TO CROSS-EXAMINE HIM CONCERNING ONE OF SEVERAL UNLIKELY COINCIDENCES IN HIS TESTIMONY

A. Introduction

California law could not be more clear: Polygraph evidence, including evidence of offers or refusals to take a polygraph test, is per se inadmissible absent stipulation by all parties. (Evid. Code, § 351.1.) The trial court thus erred when it threatened to allow the prosecution to present evidence Sam Redmond passed a polygraph test before pleading guilty if defense counsel persisted in asking Redmond about one in a series of extraordinary coincidences in his testimony.

Defense counsel attempted to establish that Sam Redmond lied about a number of things in order to avoid the death penalty, among them that appellant rather than Redmond shot Jessica Salazar, and that to continue avoiding the death penalty Redmond had to testify at trial in accordance with his previous statements to authorities. The trial court's polygraph threat, however, left the jury with the impression that Redmond's statement to authorities was somehow divorced from the plea arrangement shortly

thereafter sparing him the death penalty, and that Redmond could have told the jury he had killed either Faria or Salazar or both and still not be subject to the death penalty as long as he was telling "the truth." This false impression--i.e., that Redmond had nothing to lose regardless of how he testified--served to vouch for his otherwise utterly strained credibility, when the reality is that of course Redmond had little choice but to testify he saw appellant kill Salazar and insinuate appellant killed Faria. The trial court's threat denied appellant his right to confront the state's primary witness against him, right to fully present a defense, and right to a reliable guilt phase determination in a capital case in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

B. Proceedings Below

At one point during Evidence Code section 402 proceedings on another issue, the prosecutor placed on the record that Sam Redmond had taken a polygraph test, and correctly noted, "I obviously cannot refer to the witness offering to take a poly or any mention at all of a poly . . . ." All counsel agreed to euphemistically refer to the polygraph session as the "DOJ interview" should the need arise. (9 RT 1143.) The court then made the following comment regarding the stipulation, in which it appears--surprisingly, given the clear state of the law the prosecutor had just noted--

the court was otherwise inclined to tell the jury Redmond's willingness to take a polygraph supported his veracity even if the actual results were technically unreliable:

> Arguably that's--that works to the benefit of the defense,[116] because under some circumstances if a person made a statement at a polygraph, even though the polygraph is unreliable, and I would tell the jury that, it might have some [e]ffect on if the person's telling the truth or their perception of a person willing to tell the truth if that's what he's facing. If they're all agreeable to the DOJ interview, I'll leave it at that. (9 RT 1144.)

The court's apparent inclination to mention the polygraph in support of Redmond's veracity later became an outright threat. During cross-examination by appellant's counsel, Redmond gave contradictory answers regarding the terms of his plea bargain to avoid the death penalty. Redmond said his deal was conditioned upon his not being the actual killer of either Faria or Salazar. (9 RT 1229-1230, 1233.) He also stated it was contingent upon his telling "the truth" at trial, while indicating it was up to the jury rather than the deputy district attorney to determine whether he was doing so. (9 RT 1228.) Redmond then said even if the jury did not believe him, he thought he should still get his deal, adding he did not think there

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[116]Although the meaning of "that works to the benefit of the defense" is not entirely clear, it appears the court is erroneously stating the euphemism "DOJ interview" benefitted the defense by enabling it to avoid mention of the polygraph, when it would have been error to mention the polygraph absent stipulation whatever the circumstances.

was any way for the district attorney to get out of the deal. (9 RT 1229.)

During cross-examination by Attorney Exum, however, Redmond said only the judge could determine whether he was telling the truth, adding that his interpretation of the clause in the plea agreement[117] stating any intentional deviation from the truth would cause him to lose all benefits meant "if later on down the line, say, the judge or someone finds out I'm lying, then they could take my plea bargain back and I could be prosecuted for these murders and sought [sic] the death penalty." (10 RT 1290.) Redmond indicated that after he learned he faced the death penalty he decided he did not want it (10 RT 1332-1333), and thought he signed the plea agreement within two weeks of making that decision (10 RT 1334). When asked whether he believed he would still get the deal if he testified to something different from what he said during the crime scene re-enactment, Redmond evaded the question and stated, "What I was told is all I have to do is tell the truth and I will get my plea agreement." (10 RT 1335.)

During cross-examination by Attorney Gunn, Redmond admitted he initially thought if he cooperated with the police and district attorney and told them he was not the shooter, he could go home and back to his job. (10 RT 1339-1340.) In fact, Redmond felt betrayed by law enforcement and the

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[117]Redmond's plea agreement was admitted into evidence as exhibit no. 31.

D.A.'s office when he was arrested and when he learned he was facing the death penalty. (10 RT 1340-1341.) He acknowledged he pled guilty to the murder of Michael Faria but repeated he had nothing whatsoever to do with it. (10 RT 1342-1346.)

During redirect examination, however, Redmond contradicted his earlier statement his plea bargain was conditioned on his not being the actual killer and said it was his understanding he would still be entitled to his deal if he got on the stand and said, "Fooled you. I'm really the shooter. I killed those people." (10 RT 1399.) He was free to say anything and still get the deal as long as it was the truth. (10 RT 1400-1401.) If there was a dispute between Redmond and the prosecutor over what the truth was, a judge would decide. (10 RT 1401.)

Attorney Belter asked Redmond about his four interviews with law enforcement, and Redmond admitted lying during the first two of them, on February 20 and March 23, 2000. (10 RT 1423-1424.) Counsel established Redmond's next interview, with Detective Del Valle and Deputy District Attorney Barham, occurred during the crime re-enactment on March 24, 2000. (10 RT 1425.) Three years then went by before Redmond had the DOJ interview, following which, a week or two later on August 29, 2003, Redmond entered his plea arrangement whereby he was spared the death

penalty in return for his testimony. (10 RT 1425-1426.) The following transpired next:

> Q: Now, you've told us about other coincidences[118] that have occurred in your involvement in this, like going to the secluded spot was a coincidence and some other things like that?
>
> A: Yes.
>
> Q: Are you telling us that was just a sheer coincidence that you had another interview a week and a half before you signed your plea agreement?
>
> MR. RUIZ: Objection. Calls for speculation.
>
> THE COURT: Well, we probably should meet with the court reporter and counsel in the hallway.
>
> (Outside the Presence of the Juries:)
>
> THE COURT: All right. All counsel are present in the hallway. It seems to me what's going to happen here, if you're going to suggest that it's a coincidence,[119] that Mr. Ruiz could bring out that it was conditioned upon him passing a polygraph, and that's a huge difference. And I think at this point in time that's where we stand.
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> MR. BELTER: I will abandon those questions if that's what

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[118]The "coincidences" counsel was alluding to included Redmond's testimony he just happened to drive to the remote location where Jessica Salazar was killed (8 RT 1090-1091, 10 RT 1272-1274, 23 RT 2871), just happened to write "Diablo" in his cell while supposedly trying to avoid detection although "Devil" was a documented NSC member (9 RT 1215-1216, 1218-1219, 23 RT 2871-2872), and just happened to have a tattoo of a devil embracing a woman that was not documented by police until after Salazar's murder (9 RT 1195-1198, 23 RT 2874).

[119]The court misspoke, meaning to say "not a coincidence."

the Court feels.

> MR. GUNN [counsel for Lopez]: I don't necessarily think that should be the interpretation of that, then, your Honor. The impression that was left . . . was that he can get on the stand and say he was the killer and that would be okay, and we know that's not the case, though.
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> THE COURT: But, see, that's--you can argue back and forth. If he says he's the killer and they don't believe him, there's the issue of perjury, that's a fair argument. But to suggest that this last interview was somehow part of this entire coincidence where the deal came about and to suggest somehow this is part of all these other coincidences happening to impeach his credibility is really an unfair inference. If you don't think it's unfair, say it was conditioned upon his passing a polygraph.
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> MR. GUNN: I understand, but I think the other unfair inference left is that they would have given him a deal even if he had told them that he had killed the two of them. We know that's not the case. I mean, really, that's a fair inference also. (10 RT 1426-1427.)

After the court suggested defense counsel simply ask Redmond whether it was Redmond's belief law enforcement and the district attorney's office accepted his version of events from the DOJ interview, the court continued:

> THE COURT: The problem, of course, is what [Attorney Belter's] done is he's made this coincidence, this coincidence and this coincidence, which is fair impeachment, now taken to the situation where the D.A. says we're not going to give you this deal unless you take and pass this polygraph is really made unfair is my point, the inference. I can tell the jury to disregard that, but that's where I was concerned about. (10 RT 1428.)

When cross-examination resumed, counsel established Redmond's belief the district attorney's office had accepted his version as the truth. (10 RT

1430.) Redmond also stated his belief if he testified he was the actual killer, everyone including the district attorney would have problems with the testimony, though it would not be up to the district attorney whether to uphold his plea bargain, but up to the judge, who would hold some kind of hearing to determine whether he was telling the truth. (10 RT 1430.)

Defense counsel was attempting to establish Redmond told authorities during the "DOJ interview" exactly what they wanted to hear so that Redmond--who defense counsel asserted murdered Jessica Salazar--could avoid the death penalty. Defense counsel was also attempting to establish Redmond had to testify at trial in accordance with his statements during the "DOJ interview," meaning he was not free to testify that he had murdered Salazar even if he had in fact done so. The trial court's polygraph threat unfortunately left the jury with the impression that Redmond's DOJ interview was somehow divorced from the plea arrangement shortly thereafter sparing him the death penalty--it was "just a sheer coincidence" the interview occurred a week and a half before the plea--and that Redmond could have told the jury he had killed either Faria or Salazar or both and still not be subject to the death penalty as long as he was telling "the truth." The false impression Redmond had nothing to lose regardless of how he testified served to vouch for his testimony.

The notion that Redmond was free to do anything at trial other than

state he saw appellant kill Salazar and insinuate appellant killed Faria is, of course, absurd. The fact Redmond had not yet been sentenced was the prosecution's insurance Redmond would say exactly what he was scripted to say.[120]

C. Discussion

Because the relevant facts are undisputed, appellant's constitutional claims are subject to de novo review by this court. (*People v. Seijas* (2005) 36 Cal.4th 291, 304.) To the extent this court's evaluation of the trial court's polygraph threat turns on an interpretation of the Evidence Code--not that the statute leaves anything open to interpretation--it is also reviewed de novo. (*People v. Walker, supra*, 139 Cal.App.4th at p. 795.)

The Eighth and Fourteenth Amendments require heightened reliability for the conviction of a capital offense. (*Beck v. Alabama, supra,* 447 U.S. at p. 638.) Effective cross-examination serves the end of heightened reliability, and indeed, "cross-examination is the 'greatest legal

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[120]The insurance worked. Redmond had been sentenced by the time of the Rodriguez/Lopez retrial (1 RT Lopez/Rodriguez Retrial 187, 2 RT Retrial 363), and his testimony regarding the Faria incident was far more ambiguous than it had been when his life depended upon testifying otherwise. As indicated in an earlier argument, when asked at the retrial whether he had previously testified appellant returned to the car with a gun, Redmond stated, "I can remember testifying to that, but as to today, I can't remember seeing it in my mind no more." (2 RT Retrial 248.) And when asked who killed Michael Faria, Redmond said, "I still don't know to this day." (1 RT Retrial 188.)

engine ever invented for the discovery of truth.'" (*Kentucky v. Stincer* (1987) 482 U.S. 730, 736 [107 S.Ct. 2658, 96 L.Ed.2d 631].)

> The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." The right of confrontation, which is secured for defendants in state as well as federal criminal proceedings [citation], "means more than being allowed to confront the witness physically." [Citation.] Indeed, "[t]he main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*" [Citation.] Of particular relevance here, "[w]e have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." (*Delaware v. Van Arsdall, supra*, 475 U.S. at pp. 678-679, italics in original.)

The right to present a defense--specifically, that Redmond was Jessica Salazar's actual killer who lied during the DOJ interview, then was required to lie during trial to continue avoiding the death penalty--is also implicated here. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment . . . or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment [citations], the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690 [106 S.Ct. 2142, 90 L.Ed.2d 636].)

The trial court's threat also precluded cross-examination and the presentation of relevant evidence on behalf of the defense in violation of state law. (Cal. Const., Art. 1, § 15.) "Except as otherwise provided by

statute, all relevant evidence is admissible." (Evid. Code, § 351.) Evidence is relevant whenever "it tends logically, naturally, and by reasonable inference to prove or disprove a material issue." (*People* v. *Jaspal* (1991) 234 Cal.App.3d 1446, 1462.) "Relevant evidence is defined in Evidence Code section 210 as evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' The test of relevance is whether the evidence tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive." (*People* v. *Garceau* (1993) 6 Cal.4th 140, 177.) "As a general rule, motive for testifying may be relevant and probative in a given case." (*People* v. *Alvarez* (1996) 49 Cal.App.4th 679, 688.)

The trial court's threat concerning the polygraph if defense counsel persisted in questioning Redmond about obviously relevant evidence violated state law in an additional respect. Evidence Code section 351.1, subdivision (a) specifically divests the court of any discretion to admit polygraph evidence:

> 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 post conviction motions and hearings, or in any trial or 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.

"[I]n adopting Evidence Code section 351.1, the Legislature effectively codified the rule . . . involving polygraph evidence, namely that such evidence is categorically inadmissible in the absence of the stipulation of all parties." (*People v. Wilkinson* (2004) 33 Cal.4th 821, 845.) In other words, the court's curtailment of defense counsel's cross-examination of Redmond by threatening to allow introduction of polygraph evidence was blatant error.

The blanket exclusion of polygraph evidence is a "rational and proportional means of advancing the legitimate interest in barring unreliable evidence." (*United States v. Scheffer* (1998) 523 U.S. 303, 312 [118 S.Ct. 1261, 140 L.Ed.2d 413].) "[T]here is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques." (*Id.* at p. 309.)

It was hardly an "unfair inference" to suggest Redmond's guilty plea following his "DOJ interview" after he had not been interrogated by law enforcement for three years was not just coincidental, but stemmed from the fact Redmond was the one who killed Salazar and realized he could himself escape execution only by agreeing to testify appellant did it. Even if it was an "unfair inference," however, the trial court was legally powerless to allow introduction of the polygraph given this state's absolute prohibition of

polygraph evidence absent stipulation, and its threat to do so abridged appellant's Sixth Amendment right to confront the witnesses against him, right to present a defense under the Fifth, Sixth, and Fourteenth Amendments, and right to a reliable penalty determination under the Eighth Amendment.

D. Prejudice

As with the previous argument, the confrontation clause error that occurred here is subject to *Chapman* harmless error analysis. Factors considered by a reviewing court in determining whether the error was harmless beyond a reasonable doubt "include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (*Delaware v. Van Arsdall, supra*, 475 U.S. at p. 684.) The due process violation that occurred when the trial court curtailed appellant's right to present a defense is also subject to *Chapman* analysis. (*People v. Woodward* (1992) 4 Cal.4th 376, 387.)

Applying the *Delaware v. Van Arsdall* factors here, the importance of Redmond's testimony to the prosecution's case cannot be exaggerated: Redmond was the prosecution's case. The testimony concerning the point

in question was not cumulative because the court cut it off as soon as it began. As indicated in earlier arguments, the evidence corroborating Redmond was paper-thin, especially if the statements on the Bakotich tape made in violation of *Aranda-Bruton* and *Miranda* are excised, and evidence contradicting Redmond on vital points such as his gang membership[121] and tattoo commemorating the Salazar murder was abundant. While Redmond was otherwise fairly extensively cross-examined, he was not so on this crucial point. And finally, the "overall strength of the prosecution's case" stood or fell with the credibility of Sam Redmond, and in particular his

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[121]Had his testimony not occurred during a death penalty trial, Redmond's dissembling about his gang affiliation would have been amusing:

Q [By prosecutor]: What is NSC?

A: North Side Colton.

Q: And what is North Side Colton?

A: A gang.

Q: You say it almost like you're not sure that it's a gang; do you have--do you feel that you have a pretty good understanding of what a gang banger is?

A: Somewhat.

Q: Okay. Did you have friends that claimed gangs back then?

A: Some, not a lot. (7 RT 1000.)

willingness to lie to save himself from the death penalty. Redmond's credibility problems have been detailed at length in previous arguments, and appellant asks this court to incorporate those discussions here. Those credibility problems extended to the terms--whether express or implied--of the plea itself, however, and the trial court's polygraph threat curtailed counsel's ability to cross-examine Redmond concerning those terms.

The credibility problems are succinctly illustrated by Redmond's testimony concerning his guilty plea to the Faria murder. Either Redmond killed Faria or aided an abetted those who did kill him and lied when he said he did nothing, or Redmond neither killed Faria nor aided and abetted those who did and lied when he pled guilty to Faria's murder. Redmond replied "yes" when asked by the prosecutor, "And did you enter into that plea of guilty because you were, in fact, involved in the killings of those two people?" (7 RT 999.) On the other hand, Redmond denied any involvement in the Faria killing. He claimed he remained by his SUV when the other NSC and Eastside Colton members chased Faria and Faria's friends (8 RT 1060-1061), denied hearing any shots, and denied being aware anyone had been shot even after a hysterical Jessica Salazar got into his SUV (8 RT 1075). He testified he did nothing to cause Faria's death (10 RT 1343-1344), and did not feel responsible for it (10 RT 1387, 1438).

The prosecutor obviously sensed the need to provide some kind of

explanation why Redmond--yet again--appeared to be speaking out of both sides of his mouth: He had nothing to do with Faria's murder but admitted in a court of law he was guilty of it. The prosecutor established Redmond went to pick up appellant when Lopez said, "Go pick up Midget," and drove people away from Michigan Street. (10 RT 1403.) He also established Redmond now knew "that if you help gang bangers hurt somebody and that person dies, you could be responsible for that because you helped them," and that "if you aided and abetted killers by helping them flee the scene and do other stuff, you might, depending upon how the evidence came out, be held responsible for that." (10 RT 1403-14044.) Redmond then agreed with the prosecutor's suggestion he pled guilty to the Faria killing because he was "kind of in this thing up to his eyeballs." (10 RT 1405.) This line of questioning was, of course, disingenuous, because Redmond stated he was unaware Faria had been shot even after Salazar got in his car, but it provided just enough obfuscation to allow jurors to assume there was some mysterious legal reason to reconcile Redmond's denial of any culpability in Faria's death with his guilty plea to Faria's murder.

Evidently still sensing the need to buttress the bona fides of Redmond's plea bargain, the prosecutor even vouched for the quality of Redmond's legal representation in argument to the jury. (23 RT 2840 ["Sam Redmond was represented by not one, but two attorneys on a death

penalty case"], 23 RT 2841 ["Is your understanding of your deal, as gone over by two death penalty attorneys . . . .], 23 RT 2851 ["You can tear this {i.e., Redmond's deal} apart. And I can tell you two lawyers already have. They signed off on it."], 23 RT 2993 ["What I'm telling you is that, remember, he had two death penalty-qualified attorneys advising him. Their signatures appear in this agreement."], 23 RT 2884 ["Do you think with two lawyers advising him how to pitch that--I'm really sorry. ¶ This is a matter of life and death. This agreement soberly, responsibly reflects that."], 23 RT 2885 ["[I]f there's one lasting impression you have from this agreement that is signed off by all parties, signed by everybody, you will know this, that his only motivation is to tell the truth, and he has a real motivation."].) All of which raises the obvious question: If Redmond really had nothing to do with Faria's murder, and had competent legal representation, why did he plead guilty to it with its attendant life without parole sentence?[122] Just what were the circumstances attending Redmond's guilty plea? The trial court's threat prevented the jury from discovering those circumstances, especially vis-a-vis his continued denial of any culpability in Faria's murder.

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[122]Also, if Redmond's plea arrangement was conditional upon his passing a polygraph, and if he stated to the polygraph examiner he had nothing to do with Faria's killing, it is somewhat mystifying why the district attorney's office and the court accepted the guilty plea to it.

Finally, before issuing its threat, the court should have considered that not only is polygraph evidence inadmissible per se because it is deemed unreliable, but sociopathic personalities lacking normal physiological responses when lying can evade it, and just maybe Sam Redmond passed a polygraph because he was one of them. "Even if the basic debate about the reliability of polygraph technology itself were resolved . . . there would still be controversy over the efficacy of countermeasures, or deliberately adopted strategies that a polygraph examinee can employ to provoke physiological responses that will obscure accurate readings and thus 'fool' the polygraph machine and the examiner." (*United States v. Scheffer, supra,* 523 U.S. 303 at p. 310, fn. 6.) Indeed, "A fundamental premise of our criminal trial system is that 'the *jury* is the lie detector.'" (*Id.* at p. 313, italics in original.)

It was hardly out of line for defense counsel to question Redmond about the coincidence of his guilty plea following shortly on the heels of his DOJ interview, his first interaction with law enforcement in more than three years following his arrest. It was improper for the court to curtail cross-examination of Redmond by threatening defense counsel to admit legally inadmissible evidence. The state's entire case hinged on Redmond's credibility and his testimony that he did not shoot either victim. The prosecution cannot hope to demonstrate the court's curtailment of defense

counsel's cross-examination of Redmond concerning his guilty plea and right to present a defense were harmless beyond a reasonable doubt, and the convictions and judgment must be reversed.

VIII

THE TRIAL COURT EITHER LACKED DISCRETION TO ADMIT IRRELEVANT EVIDENCE--A PHOTOGRAPH OF VICTIM MICHAEL FARIA FOLLOWING MEDICAL INTERVENTION--OR ABUSED ITS DISCRETION IN ADMITTING IT UNDER STATE LAW; APPELLANT'S RIGHTS TO DUE PROCESS AND A RELIABLE VERDICT IN A CAPITAL CASE WERE FURTHERMORE VIOLATED

A. Introduction

Over relevance and Evidence Code section 352 objections, the trial court admitted a gruesome photograph (exhibit no. 42) of victim Michael Faria following surgical intervention. "Whether the trial court erred in admitting into evidence the challenged photographs of the murder victims depends upon two factors: (1) whether the photographs were relevant, and (2) whether the trial court abused its discretion in determining that the probative value of each photograph outweighed its prejudicial effect." (*People v. Ramirez* (2006) 39 Cal.4th 398, 453.)

Appellant will demonstrate the photograph was both irrelevant and prejudicial, and contends the admission of the evidence violated his Fifth and Fourteenth Amendment rights to due process and Eighth Amendment right to a reliable verdict and a proper penalty determination in a capital case.

B. Exhibit No. 42

With respect to certain photographs of Michael Faria "in autopsy

mode," defense counsel noted they were "in a state where the decedent is cut open and disemboweled, basically," and objected to "that particular aspect of any of these photographs" because "[t]hey don't show cause of death wounds and would only be inflammatory and prejudicial." (11 RT 1557.) Initially at least, the court appeared to agree: "I don't know why in a case like this where nobody's contesting cause of death why we would need to have any pictures with the body cut open." (11 RT 1558.)

David Gunn, counsel for codefendant Lopez, then specified photographs numbered 008 and 032 (not exhibit numbers) as particularly objectionable. (11 RT 1559.) In 032, the court asked the prosecutor to tape a piece of paper over the "area . . . which looks like it may be the result of either a person having some kind of surgical procedure trying to keep him alive, or it may be the result of the first step of the autopsy."[123] (11 RT 1559.)

Regarding photograph 008, the court asked the prosecutor what he intended to demonstrate:

> [Prosecutor Ruiz] Oh, this is how he arrived [i.e., at the coroner's office]. This is before any incisions or anything. And Dr. Trenkle had suggested that I use that if he can identify the person as that's how he arrived.

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[123]It appears photograph 032 ended up as exhibit 45. ("What you want to show is this number 2 injury right here?" (11 RT 1560).)

THE COURT: Okay.

MR. RUIZ: That was all. This is before any autopsy.

THE COURT: I'll overrule the objection to 8. What it is is it's a distance photograph to show what the victim looked like when he arrived at the autopsy, and I think that's necessary for identification purposes. It's some distance away. Obviously, it's the, a result of surgical procedure. (11 RT 1560.)

In response, Attorney Gunn offered to stipulate to identification of the body "if that's the only issue," noting the photograph shows the "body, kind of, opened up so to speak," and stating it had limited probative value compared to its prejudicial effect (11 RT 1560-1561.) The court stated there were "a lot worse" photographs, and that "a huge effort's already been made," then explained its apparent theory of relevance: "[T]o say . . . this [is] the condition of the body when it came there, that would be relevant to show there were, in fact, surgical procedures done, efforts were made to keep him alive, and would explain the starting point." (11 RT 1561.)

Appellant's trial counsel noted, "with respect to the prejudicial effect or the probative value," the only relevant issues in the autopsy were cause of death and whether the victim was supine when shot, and then stated, "So that particular photograph, if it's being presented to show that this is the state of the decedent as he got to the coroner's business or coroner's morgue, I don't think it's probative . . . ." Counsel for appellant and counsel for codefendant Rodriguez both seconded Attorney Gunn's description of the

photograph (as showing a "body, kind of, opened up"). (11 RT 1561.)

The prosecutor disputed the photograph showed victim Faria essentially disemboweled: "It shows gauze and looks like medical materials over the abdomen area, but you certainly can't see anything cut open in there."[124] (11 RT 1562.) The court again overruled defense objections: "I think it would be helpful to the pathologist as he explained his testimony. And he can refer to what he was provided with and how he examined the body and that he found other injuries as well, but they were not at all involved with the bullets that killed the person."[125] (11 RT 1562.)

Photograph 008 ended up numbered exhibit 42. (11 RT 1584-1585.) Defense counsels' point about relevance was made by the pathologist, who testified only that the picture reflected "essentially, the way I viewed the

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[124]The prosecutor was wrong. During the penalty phase, Faria's mother, Elaine Serna, testified, "I lifted up the blankets and everything was all opened up. All his insides were out and the blood was dripping from the bed." (25 RT 3081.) Regardless, it is basically irrelevant whether the photograph *in fact* shows Michael Faria "essentially disemboweled" or whether it shows "gauze . . . and medical materials" protruding from his abdominal area. What is relevant is the victim *appears* to be disemboweled in the photograph, and three attorneys described him as such without contradiction by the court. There is no reason to think the jury would see something else.

[125]As the only injuries on Faria the pathologist testified to were gunshot wounds (11 RT 1588-1602), the "other injuries" the court is referring are those caused by surgical intervention. This underscores the irrelevance of the photograph: All it shows are surgical injuries rather than cause of death injuries.

body. It's still in the yellow body bag and then there's a white hospital sheet around it." (11 RT 1585.) In addition, unwittingly acknowledging defense counsels' point about the prejudicial effect of the photograph, the prosecutor advised "family members not to look at any of the monitors during the entirety of this examination" just before displaying it to the jury. (11 RT 1584.)

C. The Photograph Was Irrelevant

Recognizing the possibility the admission of gruesome photographs can deprive a defendant of a fair trial, this court has cautioned that "trial courts should be alert to how photographs may play on a jury's emotions, especially in a capital case." (*People v. Weaver* (2001) 26 Cal.4th 876, 934.)

> The rules pertaining to the admissibility of photographic evidence are well-settled. Only relevant evidence is admissible [citations], and all relevant evidence is admissible unless excluded under the federal or California Constitution or by statute. [Citations.] Relevant evidence is defined in Evidence Code section 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the evidence tends "'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive. [Citation.]" The trial court has broad discretion in determining the relevance of evidence [citations] but lacks discretion to admit irrelevant evidence. [Citations.] (*People v. Carter* (2005) 36 Cal.4th 1114, 1166-1167.)

"In a prosecution for murder, photographs of the murder victim and the crime scene are always relevant to prove how the charged crime

occurred, and the prosecution is 'not obliged to prove these details solely from the testimony of live witnesses.'" (*People v. Pollock* (2004) 32 Cal.4th 1153, 1170.) The photograph in question here proved precisely *nothing* "about how the charged crime occurred," however, and the trial court's explanation of the photograph's relevance made no sense: "[T]his [is] the condition of the body when it came there, that would be relevant to show there were, in fact, surgical procedures done, efforts were made to keep him alive, and would explain the starting point." (11 RT 1561.) But no one at trial contended, for example, the negligence of medical personnel rather than the intentional act of whoever shot him was responsible for Faria's death, so whether surgical procedures and other efforts were performed to keep Faria alive was irrelevant to any issue the jury needed to decide. The photograph is gruesome because of these medical efforts to keep the victim alive, and this is simply not a situation where "[t]he photographs at issue . . . are gruesome because the charged offenses were gruesome, but they did no more than accurately portray the shocking nature of the crimes." (*People v. Ramirez, supra*, 39 Cal.4th at p. 454.)

Because the photograph was irrelevant in the first instance, the trial court lacked discretion to admit it. In the alternative, if this court finds the photograph was somehow relevant, appellant submits its probative value was necessarily so minimal the trial court abused its discretion.

D. The Photograph Was Prejudicial and Its Admission Violated State and Federal Law

"[W]e are guided by well-settled rules. 'The admission of photographs of a victim lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory. [Citations.] The court's exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect. [Citations.]'" (*People v. Scheid* (1997) 16 Cal.4th 1, 18.) "With regard to the issue whether the photograph had a prejudicial effect, we note that '[w]e have described the 'prejudice' referred to in Evidence Code section 352 as characterizing evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues.'" (*Id. at* p. 19.)

As appellant has demonstrated, there was no probative value to the photograph. It is, however, gruesome, which the prosecutor basically conceded when he warned the victim's family members in the courtroom not to look at it. "Unnecessary admission of gruesome photographs can deprive a defendant of a fair trial and require reversal of a judgment. [Citation.] Autopsy photographs[126] have been described as 'particularly

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[126]Although exhibit 42 was not an autopsy photo, it might as well have been.

horrible,' and where their viewing is of no particular value to the jury, it can be determined the only purpose of exhibiting them is to inflame the jury's emotions against the defendant. [Citation.]" (*People v. Marsh* (1985) 175 Cal.App.3d 987, 997-998.)

Like the photograph of Jesse "Sinner" Garcia in his casket on appellant's gang board, the photograph of an apparently disemboweled Michael Faria was of no particular value to the jury, and its introduction served only to further inflame the jury's emotions against appellant. Its admission violated state law. (Evid. Code, §§ 350, 352.) To the extent the error was one of state law, it also violated appellant's right to due process of law under the Fifth and Eighth Amendments by depriving him of a state-created liberty interest. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.)

The error also, however undermined the heightened reliability required by the Eighth and Fourteenth Amendments for the conviction of a capital offense (*Beck v. Alabama, supra,* 447 U.S. at pp. 637-638), and deprived appellant of the individualized capital sentencing determination on the basis of the circumstances of the crime also protected by the Eighth Amendment (*Zant v. Stephens, supra,* 462 U.S. at p. 879.) Accordingly, the judgment must be reversed.

IX

REFERENCES TO A "GUILT/INNOCENCE" DICHOTOMY IN TWO JURY INSTRUCTIONS AND THE COURT'S COMMENTS DURING VOIR DIRE DILUTED THE REASONABLE DOUBT STANDARD AND SHIFTED THE BURDEN OF PROOF TO APPELLANT, THEREBY DENYING HIM DUE PROCESS OF LAW IN VIOLATION OF BOTH THE UNITED STATES AND CALIFORNIA CONSTITUTIONS

A. Introduction

In a criminal trial, it is axiomatic the prosecution bears the burden of proving a defendant's guilt beyond a reasonable doubt, and a defendant is either guilty or not guilty; there is no such verdict as "innocent" in the United States. By the time of appellant's trial, several standard CALJIC instructions had removed language suggesting part of the jury's task was to determine guilt or "innocence." At least two instructions given during appellant's trial retained the language, however, an error exacerbated by other comments by the trial court employing the "guilt/innocence" dichotomy.

Appellant acknowledges.this court has consistently ruled against his position on this issue (see, e.g., *People v. Brasure* (2008) 42 Cal.4th 1037, 1059; *People v. Crew* (2003) 31 Cal.4th 822, 847-848; *People v. Snow* (2003) 30 Cal.4th 43, 97; *People v. Frye* (1998) 18 Cal.4th 894, 957-958 [disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390], but would urge the court to reconsider the matter, and furthermore raises the

issue for potential federal review. Appellant submits the defective instructions misstated the burden of proof and denied appellant due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and article one, section fifteen of the California Constitution, and further undermined the enhanced reliability required for conviction in a capital case by the Eighth Amendment.

B. The Jury Instructions

At the beginning of the trial, the court preinstructed the jury with the then-current version of CALJIC No. 0.50, which reads as follows: "You must not be influenced by pity for a defendant or prejudice against him. You must not be biased against the defendant because he has been arrested for this offense, charged with a crime, or brought to trial. None of these circumstances is evidence of guilt, and you must not infer or assume from any or all of them that he is more likely to be guilty than innocent."[127] (6 RT 766.)

At the end of the trial, the court again referenced the guilt/innocence dichotomy with CALJIC No. 2.01:

However, a finding of guilt as to any crime may not be based

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[127]The 2004 revision of CALJIC No. 0.50 reads, ". . . is more likely to be guilty than not guilty." There is no copy of the preinstruction in the clerk's transcript, and the trial court declined to order one during record correction proceedings. (30 RT 3429-3430.)

on circumstantial evidence unless the proved circumstances are not only, No. 1, consistent with the theory that the defendant is guilty of the crime, but, No. 2 cannot be reconciled with any other rational conclusion.

Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence as to any particular count permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to his guilt. (23 RT 2802-2803; 8 CT 2109.)

C. Additional References to Guilt and Innocence

During voir dire, the trial court made statements such as the following, which indicate the CALJIC instructions were not the only references to guilt or innocence:

- [Addressing jury panel] "But the fact that an Information has been filed, that a person has been arrested for a crime, a person is here in court standing trial, none of that is evidence of guilt or innocence." (4 RT 547.)

- [Addressing prospective juror Stout] "Almost always in the past when I've had somebody who has belonged to the Jehovah's Witness faith, they have said they can't serve as a juror because one of their religious tenets prevents them from sitting in a court such as this and making judgments about guilt or innocence." (4 RT 580.)

- [Addressing juror # 5] "You understand what the grand jury does is just decide if there is sufficient evidence to warrant trial. You're

not deciding guilt or innocence, and you're not using the beyond a reasonable doubt standard?" (4 RT 601.)

In addition, during the penalty phase, the court instructed the jury with CALJIC No. 8.85: "You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle." (27 RT 3282; 8 CT 2284.) While this obviously occurred after the verdicts had been rendered and could not have affected them, it illustrates how pervasive the guilt/innocence dichotomy was in this case.

D. The Instructions Misstated Both the Quantum and Burden of Proof

Trial counsel did not object to any of the instructions quoted above. Because the instructional error affected appellant's substantial rights, however, this court can review the issue without objection below. (*People v. Harris* (2008) 43 Cal.4th 1269, 1319; Pen. Code, § 1259.)

Here, the jury's task was to determine whether the prosecution had presented sufficient evidence for the jury to find appellant guilty beyond a reasonable doubt. That task was not to determine whether appellant had presented sufficient evidence to demonstrate his innocence. "In state criminal trials, the Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" (*Cage v. Louisiana* (1990) 498 US 39, 39 [111 S.Ct. 328;

112 L.Ed.2d 339].) In other words, "The beyond a reasonable doubt standard is a requirement of due process . . . . ," and, considered as a whole, jury instructions "must correctly convey the concept of reasonable doubt to the jury." (*Victor v. Nebraska* (1994) 511 U.S. 1, 5 [114 S.Ct. 1239, 127 L.Ed.2d 583].) "The Due Process Clause requires the government to prove a criminal defendant's guilt beyond a reasonable doubt, and trial courts must avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires." (*Id.* at p. 22.) In addition, the accused has no burden of proof or persuasion. (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 701-702 [95 S.Ct. 1881, 44 L.Ed.2d 508]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1214-1215.)

Appellant respectfully submits most[128] of the state cases considering the instructional issue presented here have turned the precept that "[c]hallenges to the wording of jury instructions are resolved by determining whether there is a reasonable likelihood that the jury misapplied or misconstrued the instruction" (*People v. Crew, supra*, 31 Cal.4th at p. 848) on its head. In *Crew*, for example, the defendant challenged four instructions, CALJIC Nos. 1.00, 2.01, 2.51 (motive), and

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[128]A conspicuous exception is *People v. Han* (2000) 78 Cal.App.4th 797, 809, which, while finding other instructions on reasonable doubt "make the law on the point clear enough," found the guilt/innocence language of CALJIC No. 2.01 "inapt and potentially misleading."

2.52 (flight) on the ground challenged here, in that the instructions referred to "guilt or innocence."[129] Noting CALJIC No. 2.02 "expressly reiterates that defendant's guilt must be established beyond a reasonable doubt," the *Crew* court concluded,

> it is not reasonably likely that the jury would have misapplied or misconstrued the challenged instructions . . . . The instructions in question use the word "innocence" to mean evidence less than that required to establish guilt, not to mean the defendant must establish innocence or that the prosecution has any burden other than proof beyond a reasonable doubt. (*People v. Wade* (1995) 39 Cal.App.4th 1487, 1493.) Here, the jury was repeatedly instructed on the proper burden of proof. (E.g., CALJIC Nos. 2.90, 4.21, 8.71.) (*People v. Crew, supra,* 31 Cal.4th at p. 848.)

Yet how are jurors are supposed to know "innocence . . . mean[s] evidence less than that required to establish guilt" rather than the common meaning of someone who did not commit a crime? When a criminal defendant "pleads innocent," as he or she does according to the mass media, most people suppose the defendant is denying guilt, not claiming there is "evidence less than that required to establish guilt." This prevalent definition of "innocence" is even one this court has employed, for example, in the context of criminal malpractice suits. A plaintiff alleging his or her criminal defense attorney committed malpractice is required not only to

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[129]It is worth noting of the current CALJIC versions of these four instructions, only one, CALJIC No. 2.01, retains the "guilt/innocence" language. Of their CALCRIM analogues--CALCRIM Nos. 200, 224, 370, and 372--only one (CALCRIM No. 224) retains the word "innocence."

demonstrate attorney negligence resulted in conviction, but must also demonstrate he or she was "factually innocent" of the charges. (*Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 545.)

Also, since *Crew* cites a Court of Appeal case, *People v. Wade*, it is worth taking a look at the permutations of the common meaning of "innocence" employed in that case. In *Wade*, the defendant challenged the guilt/innocence language in both CALJIC Nos. 1.00 and 2.01. (*People v. Wade, supra*, 39 Cal.App.4th at pp. 1491-1492.) Rejecting the defendant's argument CALJIC 2.01 "characterizes the jury's choices as guilt or innocence, thereby undermining the burden of proof and implicating defendant's federal and state constitutional rights to due process," the *Wade* court forwarded an unorthodox definition of innocence:

> Moreover, the challenged language did not tell the jurors they had to find defendant innocent in order not to convict him. "Innocence" in this jury instruction is used simply to connote a state of evidence opposing guilt. To say that evidence "points to" innocence does not suggest that a defendant has to prove his innocence. The language is used simply as a status of not guilty, a kind of compass or direction signal indicating where the evidence points. (*Id.* at p. 1492.)

But, as the *Wade* court noted, "The jury was also told to '[c]onsider the instructions as a whole and each in light of all the others.'" (*Id.* at p. 1491.) *Even if* redefining innocence as "a status of not guilty, a kind of compass or direction signal indicating where the evidence points" were not utterly

contrived, the "innocence" language in CALJIC No. 2.01 cannot be separated from CALJIC No. 1.00, which stated, "you must not infer or assume . . . that he is more likely to be guilty than innocent."

E. Prejudice

In reviewing ambiguous jury instructions, the court inquires "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*Estelle v. McGuire, supra,* 502 U.S. at p. 72.) *People v. Frye, supra,* 18 Cal.4th at p. 958, states the conclusion typical of the cases--at least those not actively redefining the meaning of the word "innocence"--considering the prejudice resulting from the use of the term "innocence" in certain CALJIC instructions: "Viewing the instructions as a whole, and in light of the record at trial, we conclude it is not reasonably likely the jury understood the challenged instructions to mean defendant had the burden of establishing his innocence."

Appellant respectfully submits there is another way to look at the simultaneous presence of both guilt/innocence instructions and standard formulations of reasonable doubt and the burden of proof, which is that the jury was told two conflicting things at the same time. In *People v. Dail* (1943) 22 Cal.2d 642, for example, the trial court gave two separate instructions regarding the credibility of accomplice witnesses, one that their

testimony should be viewed with distrust, and another that their credibility should be judged the same as any other witness. This court's conclusion in *Dail* is relevant to the present situation:

> The giving of a formal instruction which stated the statutory rule did not cure the error, but instead created a serious conflict, which would normally have the effect of misleading the jury. . . . [I]t was of the utmost importance that the jury be correctly advised as to the standards by which such testimony was to be weighed. Instead, the jury was misdirected by a clear and specific statement which in effect nullified the previous formal instruction, and no attempt was made to relate the two or explain the inconsistency. The result must inevitably have been a confusion in the jurors' minds on a matter vital to the judgment. Inconsistent instructions have frequently been held to constitute reversible error where it was impossible to tell which of the conflicting rules was followed by the jury. (*Id.* at p. 653.)

References to "innocence" were particularly likely to be prejudicial in appellant's case. In the jailhouse recording of the conversation between appellant and Nicole Bakotich, appellant admitted he was present at or near the scene of both killings. (7 RT 2062, 2067-2068.) The abundant gang evidence presented at trial, much of it irrelevant and prejudicial, has been previously detailed. One thing appellant was not was not likely to be in the jury's eyes was "innocent" given the conventional meaning of that term.

Whether the prosecution had proven his guilt beyond a reasonable doubt was a different matter. As has repeatedly been urged in this brief, this was not an open and shut case by any means, and appellant requests his previous arguments to that effect be incorporated here. Under these

circumstances, the references to "innocence" in CALJIC Nos. 0.50 and 2.01, as well as the trial court's additional references to the "guilt/innocence" dichotomy during voir dire, created the reasonable likelihood the jury believed it was appellant's burden to establish he was factually innocent, and the judgment must therefore be reversed.

X

CUMULATIVE ERROR DURING THE GUILT PHASE DEPRIVED APPELLANT OF HIS RIGHT TO DUE PROCESS OF LAW

As this court has recognized, "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) "Where . . . there are a number of errors at trial, 'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all 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.) "The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.'" (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

Assuming this court finds harmless the individual errors enumerated above, it should consider whether their aggregate effect denied appellant the due process of law. If any of the multiple errors is of federal constitutional magnitude, the *Chapman* standard applies to cumulative error analysis. (*People v. Woods, supra,* 146 Cal.App.4th at p. 117; *United States v. Rivera, supra,* 900 F.2d at p. 1470, fn. 6.) Given the numerous constitutional violations that occurred during appellant's trial, harmless error analysis should thus be conducted according to the dictates of

Chapman.

This brief has repeatedly stressed the government's case was anything but overwhelming. It depended almost entirely on the tainted word of Samuel Redmond, and even with Redmond's testimony, the evidence of one of the two murder counts was insufficient as a matter of law. "In those cases where the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors." (*United States v. Frederick, supra,* 78 F.3d at p. 1381.)

Much of the most prejudicial (and irrelevant) evidence against appellant either could not be or was not allowed to be subject to "testing in the crucible of cross-examination." (*Crawford v. Washington, supra,* 541 U.S. at p. 61.) Appellant's jury was presented with a slew of gang murders and other crimes that had absolutely nothing to do with his case, highly prejudicial evidence presented by means of double testimonial hearsay that could not be cross-examined. Compounding the problem was the court's allowing the jury to hear statements made by codefendant Rodriguez implicating appellant, more evidence not subject to cross-examination. That the trial court twice wrongly restricted cross-examination of Sam Redmond, whose credibility (or, more precisely, lack thereof) was absolutely crucial to this case, contributed even more to the pervasive untested evidence against appellant.

The jury was further led by the trial court to believe its task was to find appellant "innocent" rather than "not guilty," which it was unlikely to do given the deluge of prejudicial but irrelevant gang evidence, and appellant's admission--paraded in front of the jury in blatant violation of the Fifth Amendment--he was close to Jessica Salazar when she was shot. The gory and irrelevant autopsy photo of Michael Faria added to the mix, a picture that substituted for evidence. Not even Redmond claimed to have seen appellant shoot him, and both the prosecutor and trial court expressed doubt concerning his involvement.

The People cannot demonstrate beyond a reasonable doubt that the cumulative effect of the errors did not deprive appellant of a fair trial, and the convictions and death sentences must be reversed.

XI

THE DEATH SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO REINSTRUCT THE PENALTY PHASE JURY AFTER TELLING THE JURY TO IGNORE ALL PREVIOUS INSTRUCTIONS, WHICH FAILURE PREJUDICED APPELLANT AND VIOLATED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. Introduction

During the penalty phase, the trial court instructed the jury to disregard all previous jury instructions. The trial court then should have reinstructed the jury with the relevant instructions pertaining to general principles of law, but it did not.

Generally speaking, the court's failure to reinstruct meant, for example, jurors could make independent investigations (thus ignoring CALJIC No. 1.03; 23 RT 2800-2801); could employ hearsay and other evidence any way it wished (CALJIC No. 2.09; 23 RT 2803); had no guidance regarding prior consistent or inconsistent statements (CALJIC No. 2.13; 23 RT 2804), believability of witnesses (CALJIC No. 2.20; 23 RT 2804-2805), discrepancy in testimony (CALJIC No. 2.21.1; 23 RT 2805), willfully false witnesses (CALJIC No. 2.21.2; 23 RT 2805), weighing conflicting testimony (CALJIC No. 2.22; 23 RT 2805), or the sufficiency of testimony of one witness (CALJIC No. 2.27; 23 RT 2806); could draw a negative inference from appellant's failure to testify at the penalty phase

(CALJIC No. 2.60 (23 RT 2806-2807); could take cues from the judge (CALJIC No. 17.30; 23 RT 2911); had no individual duty to deliberate and could even make decisions by coin toss (CALJIC No. 17.40; 23 RT 2912); and were free to act as "partisans or advocates" during deliberations (CALJIC No. 17.41; 23 RT 2912).

In particular, during the guilt phase, the jury had been instructed, "Statements made by the attorneys during the trial are not evidence" (CALJIC No. 1.02; 23 RT 2800). The law presumes the jury followed the court's penalty-phase instruction to ignore this admonition. Appellant was prejudiced because during penalty phase argument, the prosecutor made numerous factual and legal misstatements, leaving the jury free to use the argument as substantive evidence while deliberating whether to execute appellant Julian Mendez.

The court's failure to properly instruct the jury denied appellant the due process of law, right to confront witnesses (because the prosecutor circumvented cross-examination by acting as an unsworn witness), and right to a reliable penalty determination, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, and 17 of the California Constitution.

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B. Proceedings Below

The trial court and defense counsel shifted course several times as to whether the penalty phase jury should be reinstructed with certain guilt phase instructions. During an initial discussion of penalty phase instructions, the court asked both counsel, "Preliminarily, how did you want to handle the credibility and other instructions that were given the jurors?" After defense counsel indicated he was "not asking the [c]ourt to reinstruct the jury in its entirety as to the circumstances of the offense,"[130] the court asked whether it should read the jurors the guilt phase instructions again but change CALJIC Nos. 1.00 [Respective Duties of Judge and Jury] and 17.42 [Jury Must Not Consider Penalty--Non-capital Case (sic)] "because they talk about penalty and things of that sort, sympathy." Defense counsel agreed. (24 RT 2953.)

The positions soon shifted: Credibility instructions but not all guilt phase instructions would be given. Stated the court, "I don't much care. I would just as soon have to read them again. I don't think I have to unless you want me to. Perhaps we take the credibility instructions and give penalty phase and leave all the rest of them out of it." (24 RT 2953.)

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[130]It is unclear whether counsel meant to say "elements of the offense" (see 24 RT 2962) or something else. "Circumstances of the crime" is a phrase that appears in Penal Code section 190.3, subdivision (a).

Defense counsel agreed the procedure "would be appropriate." (24 RT 2954.) Later, the court said, "I don't think anything up before 2.20 [Believability of Witness] is even necessary," added, "it might be appropriate to reinstruct them on that [i.e., 2.20] if you want to," and left the matter to counsel request. (24 RT 2961.) Defense counsel said he did not think reinstruction was necessary "as to the elements of the offenses" or "believability of witnesses, et cetera." (24 RT 2962.)

The day before penalty phase instructions were read and penalty phase arguments made, the court indicated it would give CALJIC No. 2.61 [Defendant May Rely on State of Evidence] because defense counsel had requested it, but made no mention of giving any other instructions previously given at the guilt phase. (26 RT 3276-3277.) The next day, the court gave penalty phase instructions, including CALJIC No. 8.84.1. Included in 8.84.1 was this specific instruction: "You must accept and follow the law that I shall state to you. Disregard all other instructions given to you in other phases of this trial." (27 RT 3281.)

After the prosecutor's argument, described more fully below, the court told counsel it had been looking through the mandatory jury instructions and realized it also needed to reinstruct on proof beyond a reasonable doubt because the penalty phase instructions regarding prior

criminal activity and prior convictions referred to it.[131] (27 RT 3316-3317.)

The court then said the following:

> THE COURT: There are a couple other things that we didn't do, and we did tell the jurors not to consider the prior jury instructions, but some of these I still don't think we need to tell them to do. For example, about how to make--ask questions of the Court. They're going to remember how to do that without me telling them. The manner of recording instructions, because something's been blacked out, they know what that means. How they should approach their task, I don't think we need to tell them that again. I don't think some of those beginning instructions that talk about the--instructions to be considered as a whole, use of notes. I think that just, kind of, distracts and throws [chaff] out there that should be intuitively obvious. Do you feel any need, Mr. Belter, to instruct them on that?
>
> MR. BELTER: No.
>
> THE COURT: I wouldn't if I was in your position. I think it's, kind of, nonsense again since we do tell them not to regard--not to

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[131]The court made this statement to the jury before re-reading CALJIC 2.90 defining reasonable doubt:

THE COURT: Ladies and gentlemen, in my initial instructions before counsel argued I made reference to the fact that evidence has been introduced that Mr. Mendez has suffered two prior felony convictions and there was a reference to criminal activity which I think relates to the 1995 incident on the board. You were told that you're not allowed to consider that until you're satisfied beyond a reasonable doubt that the convictions are either true or the criminal activity occurred, but I did not define "reasonable doubt" to you.

You probably remember reasonable doubt because it was given previously, but the law does require that I read that instruction to you now so I'm going to read that. The fact that I'm reading it now means that I have to do it at some point, so I'm doing it now, although it should have been done earlier. So I just want to bring that to your attention. (27 RT 3337.)

consider the prior instructions if they don't have that information.[132] (27 RT 3317.)

Perhaps the trial court believed the missing general instructions such as "instructions to be considered as a whole, use of notes" were, as the court commented in a different context, "the kind of thing that only an appellate lawyer and someone removed from reality could think would affect a jury." (27 RT 3343.) Maybe so, but conspicuously absent from the court's examples were the important legal precepts also contained in the missing instructions. The court had, in fact, already reinstructed with CALJIC No. 2.61 [Defendant May Rely on State of Evidence] (27 RT 3281), then realized it needed to reinstruct with an edited version of CALJIC No. 2.90. (27 RT 3316-3317, 3337-3338.) The fact the court stated it was necessary to reinstruct on reasonable doubt underscored its earlier admonition to the jury to disregard all previous instructions, including the ones that stated, "If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions" (23 RT 2799), and especially, "Statements made by the attorneys during the trial.are not evidence" (23 RT 2800).

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[132]It is unclear what the court was talking about in this sentence.

C. Analysis and Prejudice

1) The Issue is Preserved for Review

"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence." (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.) A reviewing court may review instructional error regardless of objection below "if the substantial rights of the defendant were affected thereby." (Pen. Code, § 1259.)

There is an exception, however: "When a defense attorney makes a 'conscious, deliberate tactical choice' to forego a particular instruction, the invited error doctrine bars an argument on appeal that the instruction was omitted in error." (*People v. Wader* (1993) 5 Cal.4th 610, 657-658.) Here, defense counsel's repeated acquiescence to the court's actions does not invoke the doctrine; counsel did not cause the court to err as the result of a "conscious, deliberate tactical choice" to forego reinstruction. In a somewhat analogous situation, in *People v. Graham* (1969) 71 Cal.2d 303, the defendant on appeal asserted the trial court erred in not instructing on involuntary manslaughter, and the Attorney General claimed trial counsel had invited the error. Commenting on a situation where the trial court inquired whether its proposed homicide instructions satisfied the attorneys,

and all three defense counsel agreed they did (*id.* at p. 317), this court found the record indicated defense counsel had not requested the involuntary manslaughter instruction as a matter of tactics, but out of "ignorance or inadvertence" (*id.* at p. 320).

"Ignorance or inadvertence" aptly describe trial counsel's actions here. Trial counsel was essentially passive during the discussions, and did not *cause* the trial court not to reinstruct; counsel in fact agreed with virtually any course of action the court proposed, reflecting the lack of any "conscious, deliberate tactical choice." In response to the court's asking the prosecutor and defense counsel how they wanted "to handle the credibility and other instructions that were given the jurors," defense counsel said, "I'm not asking the court to reinstruct the jury in its entirety as to the circumstances of the offense,"[133] but agreed with the court's suggestion it reread the guilt phase instructions with the exception of CALJIC Nos. 1.00 and 17.42. (24 RT 2953.) When the court changed course and suggested "[p]erhaps we take the credibility instructions and give penalty phase and leave all the rest of them out of it," counsel agreed to that too: "I think that would be appropriate." (24 RT 2953-2954.) Counsel soon contradicted

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[133]Again, counsel's statement is not directly responsive to the court's question, and it is unclear exactly what he meant by "the circumstances of the offense."

what he had just agreed to regarding credibility instructions: "So again, I don't think that it's going to be necessary to be reinstructing or--the jury as to the elements of the offense. Similarly with believability of witnesses, et cetera." (24 RT 2961.)

"Because counsel did not specifically ask the trial court to refrain from reinstructing the jury [at the penalty phase] with the applicable guilt phase instructions, counsel's actions did not absolve the trial court of its obligation under the law to instruct the jury on the 'general principles of law that [were] closely and openly connected to the facts and that [were] necessary for the jury's understanding of the case.'" (*People v. Moon* (2005) 37 Cal.4th 1, 37.) The invited error doctrine does not apply here.

2) The Court Erred in Failing to Give the Instructions

During the penalty phase the court read CALJIC No. 8.84.1 [Duty of Jury--Penalty Proceeding], which instructed the jury in relevant part, "You will now be instructed as to all the law that applies to the penalty phase of this trial. ¶ . . . . You must accept and follow the law that I shall state to you. *Disregard all other instructions given to you in other phases of this trial. . . .*" (27 RT 3281, italics added.) Unfortunately, the court then neglected to reinstruct with those legal concepts that pertained to both guilt and penalty phases. The jury is presumed to have done as it was instructed

(*People v. Carter, supra,* 30 Cal.4th at p. 1219), meaning it must presumed the jury disregarded the rules and principles contained in the applicable guilt-phase instructions.

"Normally, a trial court must instruct the jury on general principles of law that are closely and openly connected with the facts and necessary for the jury's understanding of the case, even absent a request from the defendant. [Citation.] Thus, if a trial court instructs the jury at the penalty phase not to refer to instructions given at the guilt phase, it later must provide the jury with those instructions applicable to the evaluation of evidence at the penalty phase." (*People v. Lewis, supra,* 43 Cal.4th at p. 535.) "Instructing the jury 'not to refer to the instructions previously given to you any further,' is consistent with CALJIC No. 8.84.1 . . . but if a trial court so instructs a capital jury, it must later provide it with those instructions applicable to the penalty phase." (*People v. Moon, supra,* 37 Cal.4th at 37.) As this court also observed in *Moon,* the use note following CALJIC 8.84.1 explains it "should be followed by all appropriate instructions beginning with CALJIC 1.01, concluding with CALJIC 8.88." (*Ibid.* at fn. 6.)

As in *Moon*, here the trial court's failure to reinstruct meant, "for example, unlike for the guilt phase, the jury was not specifically instructed

at the penalty phase how to consider statements by attorneys, testimony for which an objection was sustained, and insinuations couched in questions (CALJIC No. 1.02); nor was it instructed regarding the prohibition on independent investigation (CALJIC No. 1.03), the definitions of 'evidence,' 'direct evidence,' and 'circumstantial evidence' (CALJIC No. 2.00), how to consider inconsistent statements by witnesses (CALJIC No. 2.13), assessing the believability of a witness (CALJIC No. 2.20), the weighing of conflicting testimony (CALJIC No. 2.22), or the sufficiency of the testimony of a single witness (CALJIC No. 2.27)." (*People v. Moon, supra,* 37 Cal.4th at p. 36.) Additionally, the trial court's failure to reinstruct meant the jury was not specifically instructed at the penalty phase it could draw a negative inference from appellant's failure to testify at the penalty phase (CALJIC No. 2.60 (23 RT 2806-2807); could not take cues from the judge (CALJIC No. 17.30; 23 RT 2911); had an individual duty to deliberate and could not make decisions by coin toss or other chance determination (CALJIC No. 17.40; 23 RT 2912); and could not act as "partisans or advocates" during deliberations (CALJIC No. 17.41; 23 RT 2912).

The court's instruction to the jury to ignore previous instructions and subsequent failure to reinstruct at the penalty phase violated appellant's

Fifth and Fourteenth Amendment right to due process of law. Simply put, the state did not play by its own rules:

> Where . . . a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion [citation] and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

Because the trial court's failure to reinstruct meant the jury was free to consider statements made by the prosecutor during penalty phase argument as evidence, the prosecutor functioned as an unsworn witness against appellant not subject to cross-examination. Appellant was thereby denied his Sixth Amendment right to confront the witnesses against him. (*Crawford v. Washington, supra,* 541 U.S. at p. 42; *People v. Bolton* (1979) 23 Cal.3d 208, 213.)

And finally, the trial court's failure to reinstruct meant the jury was free to accept as true the legal and factual misstatements made during the prosecutor's penalty phase argument, misstatements that precluded accurate "consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death" in violation of the

Eighth Amendment. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973.)

3) Most Notably, the Instructional Error Meant the Jury Was Free to Consider the Prosecutor's Legal and Factual Averments Made During Argument as Substantive Evidence, Which Averments Prejudiced Appellant

More than once this court has found it necessary to "strongly urge trial courts to ensure penalty phase juries are properly instructed on evidentiary matters," as "[t]he cost in time of providing such instructions is minimal, and the potential for prejudice in their absence surely justifies doing so." (*People v. Moon, supra,* 37 Cal.4th at p. 37, fn. 7.) This "potential for prejudice" was fully realized in appellant's case.

As indicated above, among the guilt-phase instructions the jury was told to disregard was CALJIC No. 1.02, which instructed the jurors, "Statements made by the attorneys during the trial are not evidence." (23 RT 2800.) "We of course presume 'that jurors understand and follow the court's instructions'" (*People v. Mills* (2010) 48 Cal.4th 158, 200), the necessary consequence of which is that it must be presumed the jury believed it was free to consider attorney statements as evidence during the penalty phase. (*People v. Carter, supra,* 30 Cal.4th at p. 1219 [Attorney General's contention no reasonable jury would take literally instruction to disregard guilt phase instructions conflicts "with the oft-stated presumption

that the jury does as it is instructed to do."].)

Unlike other cases finding harmless error following the lack of reinstruction at the penalty phase (e.g., *People v. Lewis, supra,* 43 Cal.4th at pp. 535-536; *People v. Moon, supra,* 37 Cal.4th at pp. 37-38; *People v. Carter, supra*, 30 Cal.4th at pp. 1221-1222), here appellant was directly prejudiced as a result of the trial court's essentially telling the penalty phase jury it could now consider the prosecutor's argument as evidence. "The argument of the district attorney, particularly his closing argument, comes from an official representative of the People. As such, it does, and it should, carry great weight. . . . Defense counsel and the prosecuting officials do not stand as equals before the jury. Defense counsel are known to be advocates for the defense. The prosecuting attorneys are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige." (*People v. Talle* (1952) 111 Cal.App.2d 650, 677.)

The following statements made by the prosecutor during penalty phase argument, which the jury was free to consider as evidence, prejudiced appellant because the state cannot show beyond a reasonable doubt that the error did not contribute to the death verdict. (*Chapman v. California, supra*, 386 U.S. at p. 24.) These statements also resulted in prejudice under

the state standard for penalty phase instructional error, which is "whether there is a 'reasonable possibility' such an error affected a verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.) This court has "explained that "*Brown's* 'reasonable possibility' standard and *Chapman's* 'reasonable doubt' test . . . are the same in substance and effect," and noted that "[t]he United States Supreme Court has also recognized the substantial equivalency of the reasonable possibility and reasonable doubt formulations." (*People v. Gonzalez, supra,* 38 Cal.4th at p. 961 and fn. 6.)

During penalty phase argument, the deputy district attorney both misstated the law and stated facts never established by any witness. For example, the prosecutor misstated the law when he told the jury anything was allowed in deciding whether to execute appellant: "You're going to find that any reason that someone would want in either deciding for or against the death penalty is allowed." (27 RT 3291.) This is manifestly contrary to established law, which "permits the jury to consider only penalty factors (a) through (j) of section 190.3, and evidence relevant thereto, in determining aggravation." (*People v. Gordon* (1990) 50 Cal.3d 1223, 1275.) This statement left jurors free to render their individual penalty decisions based on anything that struck their fancy--including, for example, dislike of the parade of undesirables who testified on appellant's behalf at

the penalty phase (e.g., appellant's heroin-addict father Manual Mendez, NSC member and appellant's brother Enrique Mendez [serving time for attempted murder], and NSC member Ray Sanchez [serving time for manslaughter]). In finding no prejudice from the lack of reinstruction in *Moon*, this Court observed, "Certainly nothing in closing argument by either side suggested the jurors were free to make a 'standardless assessment of the evidence.'" (*People v. Moon, supra,* 37 Cal.4th at p. 39.) Precisely the opposite happened here.

In addition, during argument regarding factor (b) [other criminal activity involving violence or the threat therof], the prosecutor informed the jury appellant had been involved in a drive-by shooting: "Just because he doesn't have other acts of violence beyond the possession of the arsenal in that trunk of that vehicle pulled over right after, what--I think any reasonable person comes to a conclusion that it was a drive-by shooting, rolling by 10 miles an hour." (27 RT 3302.) The problem with the prosecutor's statement is that he was stating as *fact* what was only a possible *inference* there had been a drive-by shooting, a fact the People never came close to establishing during the guilt phase, as the trial court had

previously recognized.[134] (26 RT 3233.) Specifically, Detective Underhill testified that Officer Gamache heard shots, saw a vehicle traveling ten miles an hour, stopped the car which Paul "Creeper" Negrete was driving and in which appellant was a passenger,[135] and found numerous firearms therein, including a shotgun with a barrel purportedly warm to the touch. (14 RT 1863-1865.) Leaving aside the hearsay problems with this testimony for the moment (see argument III, *ante*), it may reasonably be inferred the shotgun had been fired recently--but at what? At a tree? In the air? One thing for certain is that absolutely no evidence--even the abject hearsay evidence that featured so prominently during this trial--was presented to demonstrate the shotgun had been fired *at someone,* yet this incident was presented by the prosecutor as a drive-by shooting in his argument for executing appellant. The more death and destruction appellant was good for, whether real or

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[134]In claiming appellant had been involved in a drive-by shooting, the prosecutor ignored a previous court ruling. Defense counsel expressed his concern about other gang offenses being introduced as aggravating factors, specifically about the prosecutor's potential argument "there is circumstantial evidence that there had been a shooting, and, therefore, Mr. Mendez is the person who did this shooting." (26 RT 3232-3233.) The court then stated, "*I would not let him argue that because that would have to be established beyond a reasonable doubt, and I don't have sufficient evidence to get to there being a drive-by shooting.*" (26 RT 3233, italics added.)

[135]Since only appellant and Negrete were mentioned as occupants of the car, this seating arrangement left little doubt as to which of the two the prosecutor was insinuating the alleged drive-by shooter was.

imagined, the better.

Referring to Jessica Salazar, the prosecutor urged, "So that factor [factor (e)--victim participation or consent] does not help the defense escape the death penalty in this case." (27 RT 3304.) "[H]elp the defense escape" implies death is somehow the default penalty unless the defense presented sufficient mitigating evidence, a legal error. "Because the appropriate penalty is not presumed and is a question for each individual juror, no presumption exists in favor of life or death in determining penalty in a capital case." (*People v. Maury* (2003) 30 Cal.4th 342, 440.) Also, by asserting factor (e), a mitigating factor only (*People v. Montiel* (1993) 5 Cal.4th 877, 944), "does not help the defense escape the death penalty," the prosecutor was turning the lack of mitigation into a factor in aggravation, another legal error. (*People v. Davenport* (1985) 41 Cal.3d 247, 288-290.)

The prosecutor further managed to inform the jury the law had changed since the Faria killing so that, in reality, there was an additional special circumstance appellant avoided:

> He did it--you know, when he killed Michael Faria, he wasn't facing the death penalty. You know what the special circumstances in this case are, you voted them true. Michael's killing was not a death penalty offense. At that time the law did not allow for the death penalty for a murder committed for a gang purpose. That didn't come until later. At the time of these murders a gang-related homicide was not a special circumstance subjecting you to the death penalty. (27 RT 3305.)

In other words, the prosecutor told the jury current law recognized yet another reason appellant was eligible for the death penalty, and had appellant killed Faria just a bit later, it would not have even needed Jessica Salazar's murder for a death sentence. The trial court had just instructed the jury it could consider during its penalty phase deliberations "the existence of any special circumstance found to be true" (27 RT 3281 [CALJIC No. 8.85]), and shortly thereafter, the prosecutor provided the jury with an additional one.

Another instance where the prosecutor testified was when, arguing against the applicability of factor (h) [jury can consider intoxication on defendant's capacity to appreciate criminality of conduct or conform conduct to law], he compared the effects of smoking methamphetamine to the effects of drinking espresso, a comparison that might be the source of considerable mirth had it not occurred in the penalty phase of a capital trial:

> All right. You heard they had been smoking speed earlier in the evening. And what did Redmond tell you that that did? Made him feel more alert, more on top of it, kind of get--to try to explain that to people who don't have experience with methamphetamine I think what you get from the testimony it's kind of like doing 20 espressos. You're just wired. You're just going. (27 RT 3306.)

Any juror otherwise inclined to believe meth-induced paranoia and violence might have played a role in the killings of Michael Faria and Jessica Salazar had been set straight by a representative of the government: On the night of

the killings appellant was no different from someone who had spent too much time at Starbucks.[136]

Arguing against factor (i), the prosecutor again misstated the law:

> Factor (i), the age of the defendant at the time of the crime. Well, you know, as gang members go he ain't all that young. You see how you get gang members who are gang members at a very early age. Is this some 16-year-old kid who commits a murder during the course of a robbery of a liquor store and intentionally shoots and kills the clerk and now you've got this 16-, 17-year-old kid facing the death penalty off of something like that, things got way out of hand in that robbery of a liquor store? No. He had been a member of this gang for years and years and years. He was a mature, violent, vicious gang member. (27 RT 3307.)

The obvious problem with this argument is that 16- and 17-year-olds have been ineligible for the death penalty in California since the enactment of the 1978 death penalty law. (West's Ann. Cal. Pen. Code, § 190.5.) Appellant was 21 at the time of the offense, and, "Depending upon the circumstances

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[136]"A diagnosis of Substance Dependence can be applied to every class of substances except caffeine." (DSM-IV-TR (4th ed., text revision, 2000) p. 192.)

"As with Cocaine Dependence, [amphetamine] usage may be chronic or episodic . . . . Aggressive or violent behavior is associated with Amphetamine Dependence, especially when high doses are smoked . . . . [P]aranoid ideation and psychotic episodes that resemble Schizophrenia, Paranoid Type, are often seen, especially in association with high-dose use." (*Id.* at pp. 224-225.)

"During intense Amphetamine Intoxication, paranoid ideation . . . may be experienced. . . . Extreme anger with threats or acting out of aggressive behavior may occur." (*Id.* at pp. 228-229.)

of the crime, age properly can be considered either as a mitigating or an aggravating factor." (*People v. Proctor* (1992) 4 Cal.4th 499, 554.) Despite the fact the jury was free to consider appellant's young age during penalty phase deliberations, the prosecutor told the jury it could not consider factor (i) in mitigation *based on a scenario that could not possibly happen.*

The prosecutor also told the jurors that if, while fleeing the crimes with Nicole Bakotich driving a getaway car, appellant had seen a school bus plunge into a lake, and, knowing he would be apprehended, decided to save the drowning children rather than make good his escape, the jurors "could consider that" under factor (k) [other circumstances extenuating the gravity of the crime]. Continuing this fanciful scenario, the prosecutor stated,

> But at risk to himself he does the right thing. He jumps in and saves as many kids as he can. As soon as he pulls out the last kid, the police arrive and say, hey, we finally caught you, and we're going to prosecute you for those crimes.
>
> Now, as jurors don't you think a fair system would say you could consider that? Yeah, he committed these horrible crimes, but yeah, he did something really good. He sacrificed himself.
>
> So where's the school bus, ladies and gentlemen? We proved our case. We proved the horrible crime that he did deserving of the death penalty, where's the 'but'? 'Yeah, but he did . . . .' Where is it? They had a chance to show us. That was yesterday in court. That was their case for 'Yeah, but . . . .'
>
> Did we hear about a school bus of kids he saved? No. Did . .

> . we hear something in that testimony that says don't do it? What did we hear? Okay. We heard he had a hard life." (27 RT 3310-3311.)

The "save the drowning kids knowing you will get caught if you do" scenario made it appear factor (k) mitigation was limited to beneficent or even heroic activity. A penalty phase jury is free to consider any mitigating evidence under factor (k), however, including that appellant "had a hard life." (*Boyde v. California* (1990) 494 U.S. 370, 382 [110 S.Ct. 1190, 108 L.Ed.2d 316]; *People v. Payton* (1992) 3 Cal.4th 1050, 1047-1048.) "In order to ensure 'reliability in the determination that death is the appropriate punishment in a specific case,' [citation], the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328 [109 S.Ct. 2934, 106 L.Ed.2d 256].) Mitigation is not limited to nearly superhuman heroics.

In addition, the statement, "We proved our case. We proved the horrible crime . . . ." followed by "[W]here's the 'but'? . . . They had a chance to show us," suggests two further things, both erroneous. First, the suggestion is that because the state proved its case during the guilt phase, it was now incumbent upon the defense to persuade the jury why appellant should not be executed--this despite the fact that in California there is no burden of proof placed upon either party during the penalty phase. (*People*

v. Cowan (2010) 50 Cal.4th 401, 509.) Second, this same suggestion obscures the jury's task during the penalty phase, which is to determine whether aggravating factors substantially outweigh mitigating factors. (*People v. Watson* (2008) 43 Cal.4th 652, 702.) The prosecutor reinforced these same two suggestions soon thereafter:

> Before you walked in here, before you heard any of these rules you knew one thing, the punishment must fit the crime. What is the appropriate punishment for that? Did you hear anything in the opportunity they were given you to prove their 'Yeah, but...,' that says you don't do what you need to do about that? (27 RT 3313-3314.)

Finally, the prosecutor went so far as to suggest the entire penalty phase proceeding was an empty formality once the guilt phase evidence had been presented and the jury rendered its verdicts:

> Ladies and gentlemen, thank you very much. . . . Thank you for being willing to make the tough decision in this case, but there's only one appropriate decision to be made here. You knew it when you first heard what he was accused of, part of your brain says if they prove it, he dies. He pays for this. (27 RT 3314-3315.)

Needless to say, this sentiment--if he did the crimes, he should automatically be put to death--violates the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 301 [96 S.Ct. 2978, 49 L.Ed.2d 944].) The statement is completely misleading, but the jury was nonetheless free to accept it as a correct statement of the law.

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D. Conclusion

Because it must be presumed the jury followed the court's instructions, and the court instructed the jury to disregard its previous instruction that what attorneys say during argument is not evidence, it must be presumed the jury disregarded the instruction and believed it could treat the prosecutor's statements detailed above as substantive evidence. Specifically, it must be presumed the jury believed 1) it could consider virtually anything as a factor in aggravation, 2) appellant had participated in an uncharged drive-by shooting, 3) the fact Jessica Salazar was not a participant in the events leading to her death was itself a factor in aggravation, 4) there was now an additional special circumstance making him death-eligible on yet another ground, 5) the effects of appellant's smoking methamphetamine the night of the offenses were like the effects of drinking too much coffee, 6) his age could not be considered a mitigating factor because he was not a 16- or 17-year-old facing execution in California, 7) appellant needed to have done something heroic to avoid execution, 8) the defense bore the burden of demonstrating some reason why appellant should not be executed, and 9) once the jury decided appellant had done what he was accused of there was sufficient reason to execute him regardless of the penalty phase.

The judgment of death must thus be reversed and the cause remanded for a new penalty phase trial because the state cannot show beyond a reasonable doubt that the instructional error did not contribute to the death sentence.

XII

THE VICTIM IMPACT AND PERSONAL CHARACTERISTIC EVIDENCE ALLOWED BY THE TRIAL COURT RESULTED IN AN UNRELIABLE SENTENCE OF DEATH UNDER THE UNITED STATES CONSTITUTION, AND FURTHER DENIED A STATE-CREATED LIBERTY INTEREST AND THUS CONSTITUTED A DUE PROCESS VIOLATION UNDER THE UNITED STATES CONSTITUTION

A. Introduction

In testimony that spans some 75 pages of the reporter's transcript, six members of the victims' families, three from each family, testified to their devastation. Three of these witnesses were children, thereby underscoring the youth of the departed.[137] Jessica Salazar's mother apparently broke down during her testimony, necessitating a break in the proceedings. A videotape of Jessica Salazar's sixth-grade graduation was played for the jury. Witnesses from both victims' families testified to mystical occurrences in connection with their deaths. Although "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion" (*Zant v. Stephens, supra,* 462 U.S. at p. 885), the net effect of this testimony was to create an emotionally-charged atmosphere in

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[137]As will be noted below, both victims likely appeared to appellant, who was unaware of their true ages, several years older than they in fact were.

which the jury deliberated whether to execute Julian Mendez.

First, the victim impact evidence was so extensive and prejudicial it created a fundamentally unfair atmosphere for the penalty trial and resulted in an unreliable sentence of death. (U.S. Const., Amends. 5, 8, 14; Cal. Const. Art. I, §§ 7, 15, 17.) "Where the State imposes the death penalty for a particular crime, . . . the Eighth Amendment imposes special limitations upon that process." *(Payne v. Tennessee* (1991) 501 U.S. 808, 824 [111 S.Ct. 2597, 115 L.Ed.2d 720].) Those special limitations were ignored here; 75 pages of testimony were hardly the "quick glimpse" (*id.* at p. 830 (conc. opn. of O'Connor, J.)) allowed by *Payne*.

Second, the trial court arbitrarily admitted victim impact and personal characteristic testimony, at one point even insinuating that *anything* (such as a videotape) kept by a parent demonstrated a parent's love and was ipso facto relevant as victim impact evidence. Such victim impact and personal characteristic testimony were not circumstances of the crime under state law and should have been excluded. In addition, the arbitrary admission of the evidence denied appellant a state-created liberty interest in violation of state and federal constitutional rights to due process of law. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

Appellant acknowledges many of the contentions in this argument

have been previously rejected by this court. (See, e.g., *People v. Brady* (2010) 50 Cal.4th 547, 574-581; *People v. Cowan, supra,* 50 Cal.4th at pp. 484-486; *People v. Verdugo* (2010) 50 Cal.4th 263, 298-299.) Appellant does, however, respectfully request this court to reconsider its positions, and submits appellant's case is otherwise unique.

B. The Discussions Below

On February 24, 2004, defense counsel filed a "Motion to Limit Prosecution's Proffered 'Victim Impact' Evidence," which was specifically a motion "pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution [to] exclude testimony by relatives of the victims that the prosecutor intends to call in the penalty phase of this trial, including the introduction and or reference to prosecution prepared production of photographs which depicts the life of victims [Faria] and Salazar." (1 CT 140.) Elsewhere in the motion counsel asked the court to exclude all victim impact evidence under Evidence Code section 352. (1 CT 158.) On June 24, hearing of the motion was deferred until such time as the penalty phase became an issue. (2 RT 205.)

On September 2, 2004, while the jury was still deliberating guilt, the court and prosecutor discussed proposed victim impact evidence. (24 RT 2957.) The trial court confirmed the prosecutor intended to call three

Salazar victim impact witnesses: her mother and the other two to be determined. (24 RT 2958-2959.) When the court stated, "Of course, your objection is noted for the record and overruled. Mr. Ruiz will be allowed to produce the evidence" (24 RT 2959), defense counsel reminded the court of the motion he had filed on February 24,[138] and indicated he wished "to be heard as to either excluding [victim impact evidence] and/or limiting it in the alternative." Defense counsel also asked the court to look at the motion, which the court agreed to do. (24 RT 2959.) In other words, the court ruled the prosecution's victim impact evidence admissible before it even knew what that evidence was or what defense counsel's precise objections to it were.

The trial court obviously abused its discretion in ruling the victim impact evidence admissible with only the sketchiest notion of what the prosecutor sought admitted and without even hearing defense counsel's specific objections to the evidence. "Abuse of discretion exists whenever in the exercise of its discretion, the court exceeds the bounds of reason, all of the circumstances before it being considered. [Citations.] To exercise the power of judicial discretion, all material facts and evidence must be both

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[138]The transcript reads February 4, 2004, though the motion is date-stamped February 24. (1 CT 140; see also 25 RT 3040.)

known *and considered*, together with legal principles essential to an informed, intelligent, and just decision. [Citations.]" (*People v. Davis* (1984) 161 Cal.App.3d 796, 804, italics in original.) Here, obviously, the material facts and evidence were neither known nor considered when the court made its initial decision.

A more specific discussion was held on September 20, 2004, the date the penalty trial began. Defense counsel stated the prosecutor intended to call "a number of witnesses" from both victims' families, and introduce a poem Jessica Salazar wrote at age 11 entitled "Jessica's Cry"[139] as well as a videotape of Jessica Salazar's sixth grade graduation.[140] (25 RT 3040.) (The videotape was played for the jury as exhibit no. 136. (25 RT 3128.)) His objection was "primarily" to the poem and "what I expect to see on the videotape," which he believed would "shift the jury's attention from deeming an appropriate sentence for Mr. Mendez and shift it to a consideration of what I might call a testimonial or memorial of Ms. Salazar." (25 RT 3040-3041.) At one point counsel asked the court "to exercise its discretion and limit the evidence to the testimony of the . . .

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[139]"Jessica's Cry" is reproduced in a footnote in the penalty phase statement of facts.

[140]Defense counsel stated he had just been advised about the videotape and had not yet seen it. It appears he first viewed it just before it was played for the jury deciding his client's fate. (25 RT 3105, 3128-3130.)

friends and/or relatives that Mr. Ruiz has proffered, and the other evidence, which is much more in the form of a testimonial type of demonstrative evidence, akin to what would be otherwise provided at a memorial or funeral, of these individuals should be precluded." (25 RT 3041.) Shortly thereafter, however, counsel concluded by stating, "[W]e would object to the introduction of . . . the impact evidence, in its entirety. If the Court's inclined to permit it, we're going to ask the Court to exercise its discretion and limit the victim impact evidence proffered by Mr. Ruiz and the People." (25 RT 3042.) (Of course, the court had already indicated it was not only inclined to, but would, permit the evidence--before even knowing what the evidence was.)

The prosecutor then provided more information about "Jessica's Cry." A psychologist, "a nice lady" who had earlier approached the bench "towards the end of the trial,"[141] had written a book entitled For the Love of Jessica, "which was the genesis of a counseling program to reach at-risk kids in light of what happened to Jessica, and this was the poem that was at the first page of that book." (25 RT 3043.) The prosecutor did not indicate how the poem constituted legitimate victim impact evidence, and instead

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[141]This may be the "unidentified woman" the prosecutor mistakenly believed was a family member who approached the bench on September 8, 2004. (24 RT 3038.)

spoke in general terms of what might be called the "retaliatory theory" of victim impact evidence he claimed to detect in the case law, according to which the prosecution had an "obligation" once the defendant presented mitigating evidence "to show the other side of the coin as it were." The court again overruled defense counsel's "general objection to victim impact evidence," but did note "there's a difference between victim impact and victim memorial evidence." (25 RT 3045.) "But the child's baby pictures . . . I'm not sure that is impact evidence as opposed to memorial evidence. ¶ . . . . Does *Brown* talk about that?" (25 RT 3046.)

The prosecutor replied this court's opinion in *People v. Brown* (2004) 33 Cal.4th 382 allowed even victim memorial evidence: "I would say a mom taking pictures of her kid, with her kids would . . . be one of those experiences like [they're] talking about in *Brown*." (25 RT 3046.) Asked by the court for a reaction to "those statements by the California Supreme Court," defense counsel replied his "biggest concern" was "evidence that is prior to the offense, evidence that would be characterized as testimonial or memorializing the victim we feel is inappropriate, that it was not what was intended or expected to be introduced as victim impact." (25 RT 3047.) Regarding "Jessica's Cry," the poem which purportedly foreshadowed Salazar's death, counsel noted it had been written several

years earlier, and proposed "that, sort of, speaking from the grave I don't believe is appropriate for this jury to consider in deciding what's the appropriate punishment for Mr. Mendez." (25 RT 3048.) The court responded the poem had been saved by Jessica's mother, "and it would seem to me that if you have a child that dies by the exact same means or circumstances that she predicts, that would have an impact on me and . . . have a tendency to show just the depth of feeling."[142]

And, regarding the videotape no one except the prosecutor had even seen, the court stated, "If I kept a videotape . . . of a big event that might show how much I loved my daughter and how much effort I made to do that sort of thing, that might be relevant on the impact."[143] (25 RT 3048.) After agreeing "that when you bring the sympathy back into these [death penalty] decisions, you're throwing predictability out the door . . . ," the court again indicated the prosecutor could present the evidence and overruled the defense objection. (25 RT 3049.) Defense counsel renewed his objections

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[142]At one point it appears Denise Salazar testified the poem was published when Jessica was in fifth grade, where her teacher "mailed it off to where they actually published and put . . . a lot of poems together in a book." (25 RT 3110.) She also said, however, she gave the poem "[j]ust in time" to "the lady that published that book," apparently meaning the psychologist. (25 RT 3113.)

[143]This would appear to be a "if someone keeps something it is admissible" test for penalty-phase evidence.

before the poem and videotape were introduced during Denise Salazar's testimony. (25 RT 3105-3107.)

Defense counsel said he appreciated the court had already ruled, but noted the court had the discretion "to limit that sympathetic value" of victim impact evidence "so that the process does not become . . . heavily weighted or overly and prejudicially weighted in favor of the victims, and which naturally would make [jurors] advocates of the victims." (25 RT 3050.) Before the court concluded "to the extent that we should feel sorry for Mr. Mendez, it's not inappropriate to feel sorry for Jessica Salazar and the jurors should hear it," and after it stated people "should be responsible" and "deal with the cost" of "killing a human being with all those human connections to other people and those dreams and things like that," the court made the following comment:

> That's why there was a time where Mr. Mendez 200 years ago would have been lynched, because people would have been so outraged in the community they would have broken down the jail cell and hung him. That's the public outrage. We don't do that anymore, but people still have strong feelings. That's what this is about. (25 RT 3051.)

What the court failed to recognize is that precisely because "people still have strong feelings" in cases like this, it was incumbent upon the court to ensure the jury channeled those "strong feelings" in a lawful manner.

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C. The Recent History of Victim Impact Evidence in Capital Cases

In *Zant v. Stephens*, the United States Supreme Court held juries must make "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime" during the penalty phase of a capital trial. *(Zant v. Stephens, supra,* 462 U.S. at p. 879, italics in original.) "Because there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case,'" and "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.'" (*Id.* at pp. 884-885.)

Given these standards, the court soon invalidated under the Eighth Amendment a statute mandating victim impact statements containing personal characteristics of the victims and the emotional impact of the crimes on the family, and containing the family members' opinions on the crime and the defendant. (*Booth v. Maryland* (1987) 482 U.S. 496, 502-503, 509 [107 S.Ct. 2529, 96 L.Ed.2d 440].) The court noted the focus of a victim impact statement is "on the character and reputation of the victim and the effect on his family," factors which "may be wholly unrelated to the

blameworthiness of a particular defendant." (*Id.* at p. 504.) Also noting a death sentence may be imposed based on a family's ability to be "articulate and persuasive in expressing their grief and the extent of their loss," the court held the nature of the information contained in a victim impact statement "creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner."[144] (*Id.* at p. 505; see also *South Carolina v. Gathers* (1989) 490 U.S. 805, 810-812 [109 S.Ct. 2207, 104 L.Ed.2d 876] [*Booth* holding barring victim impact evidence extended to prosecutor's argument to jury].)

In *Payne v. Tennessee, supra*, 501 U.S. at pp. 825, 827, however, a divided Supreme Court held the Eighth Amendment did not pose a per se bar to victim impact evidence: "Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." Overruling the per se exclusion rule of *Booth* and *Gathers*, the court stated it was "now of the view that a State

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[144]The danger, noted in *Booth*, that a death sentence may be arbitrarily imposed based on a family's ability to be "articulate and persuasive in expressing their grief and the extent of their loss," would appear to be present in spades in professionally produced or otherwise technically sophisticated videotape memorials played during the penalty phase, though cases discussing videotape memorials do not appear to share *Booth*'s concern. (*People v. Kelly* (2007) 42 Cal.4th 763, 794-799; *People v. Prince* (2007) 40 Cal.4th 1179, 1286-1291.)

may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." (*Id.* at pp. 825, 830.)

Significantly, it appears the victim impact material considered by the *Payne* court consisted only of the following testimony in addition to the prosecutor's argument: "He [the surviving victim] cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie." (*Id.* at 814-815.) In addition, the court realized the potential for future abuse of its ruling: "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*Id.* at p. 825.)

Following the *Payne* decision, this court had occasion to reconsider California law regarding victim impact evidence in *People v. Edwards* (1991) 54 Cal.3d 787. In *Edwards*, the defendant contended "that even aside from Eighth Amendment considerations, victim impact evidence is inadmissible in California because it does not come within any of the

aggravating factors listed in section 190.3." (*Id.* at p. 833.) This Court held, contrary to the defendant's position, that factor (a)[145] allows both evidence and argument "on the specific harm caused by the defendant, including the impact on the family of the victim," while cautioning "[t]his holding only encompasses evidence that logically shows the harm caused by the defendant." (*Id.* at p. 835.) Expressing concern in her concurring opinion about "the majority opinion's expansive dicta about the admissibility of victim impact evidence," Justice Kennard cautioned that "[w]hatever the outer boundaries" of victim impact evidence under factor (a), "the 'circumstances of the crime' must include the events that make up the crime itself and facts about the victim known to the defendant at the time of the crime." (*Id.* at p. 849.)

It would appear this court's current position regarding federal and state constitutional attacks on victim impact evidence is much broader than Justice Kennard's formulation:

> "In a capital trial, evidence showing the direct impact of the defendant's acts on the victims' friends and family is not barred by the Eighth or Fourteenth Amendment[ ] to the federal Constitution." [Citations.] "The federal Constitution bars victim impact evidence

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[145]"In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true . . . ." (Pen. Code, § 190.3, subd. (a).)

> only if it is 'so unduly prejudicial' as to render the trial 'fundamentally unfair.' [Citation.] State law is consistent with these principles. Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant and admissible as a circumstance of the crime under section 190.3, factor (a). [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 364.)

D. Appellant Respectfully Submits This Court Should Reconsider its Position That "Circumstances of the Crime" in Section 190.3, Subdivision (a) Include Victim Impact Evidence and Personal Characteristics of the Victim Unknown to the Defendant Either Before or During the Offense

In *People v. Fierro* (1991) 1 Cal.4th 173, Justice Kennard, concurring and dissenting, expanded the doubts she expressed in *Edwards* concerning the proper scope of factor (a) evidence. Although the Eighth Amendment does not "bar evidence of or argument on the personal characteristics of the victim of the capital crime" regardless of whether the defendant knew of those characteristics when committing the crime, nor does it "bar evidence or argument concerning the emotional impact of the crimes on members of the victim's family," because both demonstrate "'the specific harm' caused by the defendant's capital crimes," California law "limits the scope of evidence and jury argument in a manner independent of the limits imposed by the Eighth Amendment to the federal Constitution." (*Id.* at p. 258.) Under state law, the case in aggravation is confined to the factors listed in section 190.3, which "does not expressly list the specific harm caused by the crime, the victim's personal characteristics, or the

emotional impact of the capital crimes on the victim's family." (*Id.* at pp. 258-259.)

In *Booth,* for example, the court observed a clear distinction between "circumstances of the crime" on the one hand and personal victim characteristics and victim impact evidence on the other. (*Booth v. Maryland, supra,* 482 U.S. at pp. 502-505; 507, fn. 10.) *Gathers* found "circumstances of the crime" did not include personal characteristics of the victim unknown to the defendant. *(South Carolina v. Gathers, supra,* 490 U.S. at pp. 811-812.) And while *Payne* overruled both concerning what the Eighth Amendment permitted in capital sentencing proceedings, the court did not alter its earlier distinction between "circumstances of the crime" and "specific harm" or personal victim characteristics unknown to the defendant: "Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question . . . ." (*Payne v. Tennessee, supra*, 501 U.S. at p. 825.)

Observing "[n]othing in *Payne* . . . suggests that the plain meaning of 'circumstances of the crime,' as used in a capital sentencing scheme, generally encompasses evidence of either the victim's personal characteristics or the emotional impact of the crimes on the victim's family," Justice Kennard concluded the lesson of *Payne* was this:

> Rather than including victim impact as a "circumstance of the crime," the high court in *Payne* expanded from two to three the number of considerations permissible for capital sentencing under the Eighth Amendment. Previously a death sentence might be based only on the defendant's character and background and the circumstances of the crime, but after *Payne* it might be based also on the specific harm caused by the crime. (*People v. Fierro*, *supra*, 1 Cal.4th at p. 261 (conc. & dis. opn. of Kennard, J.)

There was, therefore, "compelling evidence that the phrase 'circumstances of the crime' as used in a capital sentencing scheme does not encompass personal characteristics of the victim that were unknown to the defendant." (*Id.* at p. 261.) Employing principles of statutory construction such as harmonizing related provisions and avoiding interpretations that make certain words unnecessary or redundant (*id.* at pp. 262-263), Justice Kennard concluded the majority had erred:

> The majority's construction of "circumstances of the crime" makes this factor so broad that it encompasses all of the other factors listed in section 190.3. To say that the "circumstances of the crime" includes everything that surrounds the crime "materially, morally, or logically," is to say that this one factor includes everything that is morally or logically relevant to an assessment of the crime, or, in other words, every fact or circumstance having any legitimate relevance to the penalty determination. This expansive definition makes all the other factors listed in section 190.3 unnecessary, because all are included within the "circumstances of the crime" as defined by the majority. For this reason, the construction adopted by the majority is improbable and should be disfavored. (*Id.* at p. 263.)

There was, however, a "reasonable construction" of the term "that avoids or at least minimizes overlap with other listed factors": "'[C]ircumstances 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." (*Id.* at pp. 263-264.)

Appellant respectfully submits this court should reconsider its opinions beginning with *Edwards* that have found personal characteristic and victim impact evidence admissible under factor (a) of section 190.3. Virtually none of the personal characteristics of Michael Faria or Jessica Salazar, and absolutely none of the victim impact material concerning either, were known to appellant at the time the offenses were committed. Appellant further submits he was prejudiced by the victim impact and personal characteristic evidence discussed below.

E. Because It Invited a Purely Irrational Response from the Jury, the Victim Impact and Personal Characteristic Evidence Introduced in This Case Was So Unduly Prejudicial as to Render the Penalty Phase Trial Fundamentally Unfair

Regardless of whether personal characteristic and victim impact evidence were properly admitted under factor (a), much of the following evidence was introduced to elicit a purely irrational response from the jury and thus violated the Eighth and Fourteenth Amendments, and further rendered the penalty phase trial fundamentally unfair under state law (*People v. Zamudio, supra,* 43 Cal.4th at p. 364), thereby depriving

appellant of a state-created liberty interest and creating a due process violation under the Fourteenth Amendment (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346).

This court has recognized that the expanded scope of factor (a) evidence allowed under *Edwards* and its progeny "does not mean that there are no limits on emotional evidence and argument . . . . (1) 'the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason,' and . . . (2) although a court should 'allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction,' . . . 'irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.'" (*People v. Robinson* (2005) 37 Cal.4th 592, 651-652.)

Here, unfortunately, the trial court curtailed virtually nothing in the penalty phase of appellant's trial, and as was demonstrated in section (B) of this argument, abused its discretion by ruling admissible the prosecution's victim impact evidence before the court even knew what that evidence was. "In a case . . . where fundamental rights are affected by the exercise of discretion by the trial court, we recognize that such discretion can only be

truly exercised if there is no misconception by the trial court as to the legal basis for its action." (*In re Carmaleta B.* (1978) 21 Cal.3d 482, 496.)

In addition, the court's failure to reinstruct the jury after telling the jury to ignore all previous instructions meant the jury was free, among other things, to consider attorney statements as evidence, and had no guidance regarding prior consistent or inconsistent statements, believability of witnesses, discrepancy in testimony, willfully false witnesses, or weighing conflicting testimony. In other words, there were no evidentiary standards by which the jury was left to judge the extensive amount of victim impact evidence presented during the penalty phase of this trial. In *Payne v. Tennessee*, for example, the victim impact evidence consisted of the brief testimony of a family member concerning the effects of his mother's and sister's murders on a surviving child. (*Payne v. Tennessee, supra,* 501 U.S. at pp. 814-815.) Here, on the contrary, testimony concerning personal victim characteristics and victim impact involved six witnesses and spanned some 75 pages of reporter's transcript. (25 RT 3056-3131.) The prosecutor further lost little opportunity to urge appellant be put to death because of what he had done to the victims' families.

During opening statement in the penalty phase, the prosecutor told the jury that although they would hear about "the hole that was created

where Jessica used to be and where Michael used to be," he would not be presenting the evidence "to rabble and rouse everybody up and tell them to light your torches and grab your pitchforks and kill the monster."[146] (25 RT 3054.) He informed the jury they would see a poem Jessica had written at age 11, "and it talked about how things like this happen, and then three years later it happened to her and it's called 'Jessica's Cry.'" (25 RT 3055.)

Richard Faria was Michael Faria's father. (25 RT 3056.) Asked "[w]hat kind of kid was Michael," the witness replied in highly emotional terms:

> Michael was a loving--a loving son. He cared about other people, cared about his mom, cared about his sisters and brother, cared about me. He was a son that did things to help others grow. We miss him a lot. He had dreams. He had goals. Dreams that--and goals that--as a young person his dreams and goals are real to him, and I believe that some day he would become one of the people he wanted to be, but he never got the chance to do that. It was taken from him. So-- the kind of person Mikey was, it was cut short. We won't really know what kind of person he could have been. All we know is Michael the child. (25 RT 3057.)

"Comments about the victim as a baby, his growing up and his parents' hopes for his future in no way provide insight into the contemporaneous and prospective circumstances surrounding his death; nor do they show how the circumstances surrounding his death have financially, emotionally, psychologically, and physically impacted a member of the victim's

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[146]Yet "kill the monster" is exactly what he was urging the jury to do.

immediate family. These types of statements address only the emotional impact of the victim's death. The more a jury is exposed to the emotional aspects of a victim's death, the less likely their verdict will be a 'reasoned moral response' to the question whether a defendant deserves to die; and the greater the risk a defendant will be deprived of Due Process." (*Conover v. State* (Okla.Crim.App. 1997) 933 P.2d 904, 921.)

The witness said the first time he had been aware Michael Faria claimed a gang affiliation with Westside Verdugo, which came as a "big time" blow or shock, was during court testimony, and there was otherwise "no evidence of that" at home. (25 RT 3057-3058.) Mr. Faria imagined how his son died:

> Because to be on the ground with a gun at your head defenseless, he had no way of defending himself. He was a helpless person there. I mean, it should not have been that way. I mean, he should have at least been given the chance to put up his hands and say no or something or scream out and say no or something like that. But it was complete tragic, sickening, evil, disgusting death. I mean, I don't even think he had any last words. You know, when someone's going to die they give you some last words or something, you know, and he wasn't even given--I don't think he was even given that opportunity just to say any last words. (25 RT 3062.)

Mr. Faria further described the last time he had seen "Mikey." The victim had asked to spend the night at a friend's house because the friend's

mother was going to take them to their community service obligations[147] the next morning. Mr. Faria told him to be back inside by 8:00 and he said he would.

> And I said, "I love you, Mikey," and he said I love you back. And that was unusual because he never said I loved you. He always--we always departed, he'd either say "Goodbye," or he'd say "Peace out," or he'd say "I'll see ya later." And we've never--I can never recall the time he responded with "I love you," but the one time he did respond with "I love you" was the best time because that was the last time. (25 RT 3063.)

Defense counsel renewed his previous objections to victim impact evidence before the next witness, Michael Faria's 13-year-old sister Brittany, testified. (25 RT 3064-3065.) When asked what she missed most about Michael, she replied, "Everything," and added, "He used to protect me from boys and stuff like when they messed with me." (25 RT 3067.) She also related a time when her uncle's car was on fire and she was too afraid to get out, and he grabbed her hand and pulled her out. (25 RT 3068.) She relayed how she had learned he had been shot and described seeing him in the hospital, "lying on his bed all bloody and stuff." (25 RT 3070.) She said she thinks about him all the time and that it is difficult to go to school because she thinks about him there. (25 RT 3071.) The

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[147]Faria and Sergio Lizarraga were on juvenile probation. (11 RT 1498-1499.)

prosecutor then displayed a picture–exhibit no. 133–which depicted the witness, her sister Leanna, and brother Michael. (25 RT 3072.)

Elaine Serna, Faria's mother, said he "liked to play a lot, joke around a lot," and was a "very, very cheerful person." She depended on him to help look after the younger kids and missed that. (25 RT 3074.) She described learning of his death as follows:

> I was--I was sleeping and I was having a nightmare, actually, that I had got shot, and I seen the bullet go through my face, and that startled me to wake up. And I went--I heard, like, somebody was at the door, so I went to go get the door. And there were two detectives walking away from the door already.
>
> And I asked them what kind of trouble did he get in to now because they had brought him to the house a couple of times prior for curfew, for being out on curfew. (25 RT 3075.)

Because Michael's father was on his paper route, the police called her sister to give her a ride to the hospital. (25 RT 3076.)

Ms. Serna gave the police permission to look in Michael Faria's room. (25 RT 3076.) The police indicated they were looking for gang-related evidence, which "shocked" the witness because he was not a gang member. (25 RT 3077.) She was at first "confused" when she heard that he claimed the west side, but after thinking about it, "I started to feel that he--we live on the West Side in some housing projects, and we hadn't been there very long, so I believe that he was probably just saying that he was

from the West, from the west side of town probably." She knew he had friends that were gang members, but they were from Los Angeles. (25 RT 3078.)

After Michael died, Serna "stayed out using drugs for, like, six months after" and ended up in recovery. (25 RT 3088-3089.) Her daughter Leanna claimed Westside Verdugo and had gang graffiti "all over the walls" of her room, something Serna explained as, "I think she feels that if her brother died for something that everybody says that he was claiming, that she's going to be claiming that too." (25 RT 3087-3088.) Serna believed Leanna claimed Westside Verdugo "[t]o feel it was justified somehow. Because she knows that her brother wasn't a gang member. He just wasn't a gang member. So I feel that she's doing this because if he died from something, that she's just going to go ahead and claim that too." (25 RT 3088.)

April Salgado was Jessica Salazar's older cousin; they were "very close." (25 RT 3091.) Jessica "liked to be the center of attention. She liked to make everybody laugh. She was the comedian." (25 RT 3092.) Jessica "wanted to do a lot of things" and was "very popular." (25 RT 3093.) After Jessica's death, April just wanted to stay in her room and "didn't want to talk about it," and her father made a temporary rule that she

could not be in her room "by myself because he didn't want me to go into a depression." (25 RT 3095.) She continued: "I wanted to know. What were her last words? What were--how did she feel? Was she scared? Did she know she was going to die? I wanted to know all that, you know. Did she beg for her life, you know? I wanted to know all that." (25 RT 3097.)

At this point it must be asked: Of what conceivable assistance to the jury were Richard Faria's and April Salgado's imagined reenactments of the last moments of Michael and Jessica? (25 RT 3062, 3097.) These imagined reenactments "were essentially characterizations of and opinions about the crime and defendant, the primary effect of which would be to 'inflame the jury' [citation] in order to elicit from it the maximum penalty." Such testimony "is too far removed from victim impact evidence's central purpose of explaining the loss to the family and society that resulted from the victim's death, and can too easily lend itself to improper characterization and opinion of the crime and defendant, to pass muster under the Eighth Amendment." (*People v. Robinson, supra,* 37 Cal.4th at pp. 657-658 (conc. opn. of Moreno, J.); but see *People v. Cowan, supra,* 50 Cal.4th at p. 485.)

April continued by testifying Jessica was "a people person" who hung out with all kinds of people, including kids in the neighborhood, "ravers or groupers," and skaters. She also hung out with gang members at

their houses. (25 RT 3097.) Speaking of Jessica's mother, Denise, April said it was "like her soul is gone" and she had not seen her happy since Jessica's death with one exception: "I think maybe two weeks ago was the first time that I actually seen, you know, her smile," which was "[w]hen we heard the verdict." (25 RT 3098.) Before she died, however, Jessica apparently had a falling out with her parents, and had only recently returned home when she was killed. She had been attending some kind of continuation school. (25 RT 3100.)

Martin Salgado was Jessica's age and had grown up with her. (25 RT 3101-3102.) She was "always cheerful, always happy," and "had the intelligence to do anything that she wanted to do." (25 RT 3102.) Since her death, "there's a hole in the heart of everybody that's loved her, everybody that she loved, you know." (25 RT 3104.)

Denise Salazar, Jessica's mother, said Jessica had turned 14 a month before her death. (25 RT 3109.) Jessica's fifth grade teacher had worked "with maybe . . . probation" before he taught at her school and inspired her to write the poem that was included in the book, For the Love of Jessica. (25 RT 3110.) Ms. Salazar was temporarily unable to continue testifying but did so after the court took a brief recess. (25 RT 3111.) She then read the poem "Jessica's Cry" to the jury. (25 RT 3113-3114.) Ms. Salazar

continued:

> She was also loving. And she carries the ills of the world in her heart, actually. I mean, she--there's been times that we would go around and just be shopping or just run into people and she would ask me when she was younger, it's, like, mom, why--why haven't the kids . . . shoes on their feet, or why do the people have to go hungry. And we would go--there's been a couple of times we went to the cemetery to go visit people, our relatives and stuff, and she didn't understand, you know, why didn't everyone have flowers on their grave. (25 RT 3114.)

The prosecutor had Ms. Salazar identify several photographs, some depicting Jessica at markedly younger ages, including 6 years old.[148] (25 RT 3115-3117.) A total of 13 photographs of Jessica, not including the graduation videotape or the picture of her sister Gina only,[149] were introduced during the penalty phase.

Ms. Salazar said her son Matthew, who had a learning disability, was "just not the same boy he was before" and was "very angry." For months he cried every night, "And I've had him wanting to kill himself so he can be with his sister. He's been in 5150 a couple of times and behavioral health at

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[148]The court did say "at some point I can see a problem" with baby pictures (25 RT 3049), but nonetheless allowed extensive penalty-phase photographic evidence.

[149]This was exhibit no. 123. The prosecutor withdrew it after the court pointed out "all it does is it shows Gina wearing a purple long-sleeve top, blue jeans making something on a little cooking board with flour on her nose and a big smile on her face." Jessica did not even appear in the picture. (25 RT 3145.)

Arrowhead."[150] (25 RT 3118.) For around three and a half years after her death he became "extremely angry" whenever anyone would mention her name. (25 RT 3119-3120.)

A videotape, exhibit no. 136, was made of Jessica's sixth grade graduation by her best friend's father. (25 RT 3127.) Jessica spoke at the graduation, and Ms. Salazar "was proud of her that day." The tape begins with Jessica and her friend Christina, both formally dressed and in a residential living room, addressing the camera regarding the upcoming graduation ceremonies.[151] (Played at 25 RT 3128.) The next segment depicts the graduation ceremonies at the school, adorned with balloons; the camera scans the audience most of the time.[152] (Played at 25 RT 3129.) The following segment shows Jessica giving a speech, and the final tape

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[150]Again, Welfare and Institutions Code section 5150 permits the temporary placement in a mental health facility for treatment and evaluation of a person who "is a danger to others, or to himself or herself, or gravely disabled.

[151]The trial court did not require a transcript be made of this videotape at trial, and did not do so when requested during record correction proceedings. (30 RT 3430-3432; 31 RT 3454-3456.) This court also declined (in case S181185) to order the trial court to order a transcript made of the tape. The above characterizations at the given pages are based on Denise Salazar's testimony characterizing what the jury will see when the next segment of the tape is played, as well as on the tape itself.

[152]It is worth noting that at this graduation, Jessica Salazar appears significantly more mature than the other students her age, and at the time of the offense would have appeared older than her actual age.

segment depicts her receiving a Presidential Award. (Both played at 25 RT 3130.)

The prosecutor compounded the prejudice from the extensive victim impact evidence during argument. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1071-1072 [in assessing prejudice, prosecutor's argument demonstrates critical nature of certain evidence]; *People v. Patino* (1984) 160 Cal.App.3d 986, 995 [*lack* of emphasis on certain evidence during argument may also be considered in assessing prejudice].) The prosecutor stated the law governing penalty-phase proceedings "makes sense because it takes everything into consideration anyone would ever want to take into consideration in arriving at this decision." The rules governing the death penalty "just didn't come into existence magically like some evidence fairy came in one day and pointed a wand and then there was the law." (27 RT 3287.) The law is now flawless because of the appellate process: "So when you find something that's in the law that doesn't make sense, we change it. And we change it and we change it and we change it until we get it right. We have got it right now." (27 RT 3287-3288.)

Having vouched for the perfection of the law governing their penalty deliberations--vouching that ironically took place just after the trial court committed a major error in not providing basic jury instructions once it had

told the jury to ignore all previous ones--the prosecutor told the jurors they could consider the seriousness of the crime and impact on the victims' families under "what we call factor (a)." (27 RT 3288.) Referring to Faria as "a kid" on numerous occasions,[153] the prosecutor placed this picture of his death in the jury's mind, although there was no evidence of such: "Julian stood over that kid and while he laid there and while they all stood there gloating over what they had just done to that punk that claimed the West Side, Midget pointed the gun at that kid's head and put a bullet in his brain." (27 RT 3290.)

At one point the prosecutor even seemed to argue the impact of the offenses on the families was the most compelling reason to kill Julian Mendez: "How can you possibly know how much to punish Midget unless you see the pain that he has caused, the destruction that he has caused and knowing the reasons why he did this, why he did this to these people?" (27 RT 3297-3298.) Although the family members had testified to the pain they felt, he invited those jurors who were parents to imagine even more pain: "You know, many of you are parents and I want you to try to think–in order to appreciate the gravity of this crime you have to embrace the horrific

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[153]The pathologist said Faria appeared to be 18 or 19, not 15. Assuming for the sake of argument appellant shot Faria, there thus would have been no reason for appellant to know, as the prosecutor said, he "had just murdered a 15-year-old kid." (27 RT 3290.)

nature of it." (27 RT 3299.) Also, "Now, imagine the pain that that must be for Denise Salazar because the answer to those questions [i.e., parents asking how and where their kids are] are she's dead." (27 RT 3300.) Discussing factor (k),[154] however, the prosecutor made certain the jury did not allow sympathy for appellant's family to enter into its deliberations. (27 RT 3308-3309.)

The prosecutor approached the end of his argument with another victim impact reference: "You know what the punishment has to be for a cold-blooded double execution because this doesn't exist anymore. There is a hole where Jessica used to be. That's his legacy. That's what he gave this family." (27 RT 3314.) Also, "Do you think that three hots and a cot for the rest of his life is an appropriate punishment for what he did? Do you think having medical care until he decides to die on his terms is an adequate punishment for what he did to that little girl, what he did to these families, for the stupid reason that he did it?" (27 RT 3315.)

The prejudice resulting from the victim impact evidence is demonstrated by this extraordinary statement by defense counsel during penalty phase argument: "And here's the thing, you're not here as advocates

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[154]"Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (Pen. Code, 190.3, subd. (k).)

of those families, you're not. *As much as you might be two days from now or three days from now advocates of those families*, in your role as jurors on a capital case you can't be advocates." (27 RT 3321, italics added.) In other words, defense counsel was forced to acknowledge the overwhelming power of those "strong feelings" the trial court stated in former times would have led to appellant's being lynched, and pleaded for jurors to put aside those feelings for 48 to 72 hours, following which they would naturally revert to the desire to avenge the killings for the sake of the families.

"The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.'" (*Monge v. California* (1998) 524 U.S. 721, 731-732 [118 S.Ct. 2246, 141 L.Ed.2d 615].) As has been documented above, the jury was bombarded with the kind of emotionally-charged testimony and demonstrative evidence designed to elicit anything but a rational response.

And not just raw emotion clouded the deliberative process. This court has recognized the danger that mysticism poses to a juror's ability "to

deliberate rationally" (*People v. Jenkins* (2000) 22 Cal.4th 900, 988), yet appellant's penalty phase even took on an occult flavor. During discussion of the admissibility of the poem "Jessica's Cry," defense counsel said Jessica "is talking about her death, it would appear" and "speaking from the grave," and the court stated Jessica died "by the exact same means or circumstances that she predicts" in the poem. (25 RT 3048.) The prosecutor concluded his penalty phase opening statement with the following statement: "And one of the pieces of evidence that you will receive is a poem that Jessica wrote. It will be marked next in order, and I'll have that number when we put it on the display, but a poem that was written by Jessica at the age of 11, three years prior to her death, that Jessica's mom kept, and it talked about how things like this happen, and then three years later it happened to her and it's called Jessica's Cry." (25 RT 3055.) In other words, the prosecutor told the jury Jessica had predicted her own death, and Jessica's mother read them the purported evidence that she had done so.[155]

There was more mystical evidence introduced on behalf of Michael

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[155]It is open to question whether the poem can be fairly read as some kind of prediction, though what is significant for present purposes is that all parties treated it as a prediction, and the penalty-phase jury was unfortunately free to treat the prosecutor's statement as substantive evidence that it was so.

Faria. Richard Faria said the only time Michael had ever said "I love you" when departing the house was the last time Richard saw him alive. (25 RT 3063.) More supernaturally tinged, and keeping in mind Michael died from a gunshot wound to the head, his mother Elaine Serna was asked where she was when she first found out what happened to him: "I was--I was sleeping and I was having a nightmare, actually, that I had got shot, and I seen the bullet go through my face, and that startled me to wake up." (25 RT 3075.) She woke up to find two detectives walking away from her door, who then informed her Michael had been shot–just as she had been in her dream.

The flood of victim impact testimony allowed in this case simply overwhelmed the jury's capacity to deliberate in a calm and rational manner, sweeping before it, for example, any lingering doubt (27 RT 3286) the jurors might have had about appellant's guilt. That a rational juror might well have lingering doubt about either murder is far from speculative; as indicated elsewhere in this brief, the prosecutor inadvertently acknowledged the jury might have trouble convicting appellant of the Faria murder (24 RT 2958), the trial court expressed doubt as to whether appellant had been the one who shot him (28 RT 3370), and the testimony of the murderous snitch Sam Redmond was impeached in numerous particulars.

Appellant has accordingly demonstrated he was prejudiced under the federal standard for penalty phase error, because the People cannot demonstrate "beyond a reasonable doubt that the assumed error did not contribute to the death verdict." (*People v. Carter, supra,* 30 Cal.4th at p. 1222, citing *Chapman v. California, supra*, 386 U.S. at p. 24.) There is also a reasonably possibility the error affected the death verdict. (*People v. Brown, supra*, 46 Cal.3d at p. 447.)

F. Conclusion

The victim impact and personal characteristic evidence were erroneously admitted in the first instance. Even if they were properly admitted, they resulted in an unreliable penalty determination; the jury's decision to execute Julian Mendez was ultimately made out of "caprice or emotion" because it was made in an atmosphere hostile to reasoned deliberations, including excessive emotion and the paranormal. This court should reverse the judgment of death and remand the case for a new penalty trial.

XIII

CUMULATIVE ERROR DURING THE PENALTY PHASE DEPRIVED APPELLANT OF HIS RIGHT TO DUE PROCESS OF LAW

Cumulative error analysis applies to the penalty phase as well as the guilt phase. "When an error or a combination of errors occurs at the penalty phase of a capital case, we reverse the judgment if there is a 'reasonable possibility' that the jury would have reached a different result if the error or errors had not occurred." (*People v. Hernandez* (2003) 30 Cal.4th 835, 877.) This court has concluded the "'reasonable possibility' standard and *Chapman's* 'reasonable doubt' test . . . are the same in substance and effect," a "substantial equivalency" also noted by the United States Supreme Court. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 961 and fn. 6.)

Here, there were two main penalty phase errors: the trial court's failure to reinstruct the penalty phase jury on even the most basic guidelines after it instructed the jury to disregard all previous evidence, and the trial court's decision to allow virtually unrestricted victim impact evidence. The failure to reinstruct meant the jury was left with no evidentiary standards at all by which to judge the extensive amount of victim impact evidence presented during the penalty phase.

"It is of vital importance to the defendant and to the community that

any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion'" (*Zant v. Stephens, supra,* 462 U.S. at p. 885.) The trial court's failure to reinstruct gave the jury carte blanche when it came to evaluating the extensive and prejudicial victim impact evidence, and "caprice" and "emotion" were the unavoidable result; considered together, the failure to reinstruct and the victim impact evidence "created a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors." (*People v. Hill, supra,* 17 Cal.4th at p. 847.) The state cannot prove beyond a reasonable doubt the combined errors did not affect the penalty phase verdicts, and the judgments of death must be reversed.

XIV

THE ENHANCEMENTS MUST BE STRICKEN BECAUSE THE TRIAL COURT FAILED TO IMPOSE JUDGMENT ON THEM

Because the trial court failed to impose judgment on them, the enhancements must be stricken.

On September 8, 2004, the jury returned true findings on the 12022.53, subdivision (d); 12022.53, subdivision (e); and 186.22, subdivision (b)(1) enhancements as to both counts 1 and 2. (8 CT 2233-2234, 2236; 8 CT 2238-2239, 2242.) On November 19, 2004, the trial court sentenced appellant to death "for the offense of murder as charged in Count 1 and Count 2 of the Second Amended Information . . . ." (28 RT 3375.) The court neglected, however, to orally impose judgment on the enhancements, though the minute order states, "Order for enhancements made off the record and to be made part of the record at date of correction hearing."[156] (8 CT 2314.) "Off the record," the court imposed two consecutive 25 year to life sentences for the section 12022.53, subdivision (d) enhancements attending both counts, two consecutive 3 year midterms for the section 186.22, subdivision (b)(1) enhancements, and two concurrent 25 year to life sentences for the section 12022.53, subdivision (e)

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[156]As of this writing, a post-certification augment request for this order pursuant to the trial court's wishes is pending before this court.

enhancements. (8 CT 2313-2314 [minute order]; 8 CT 2337-2338 [abstract of judgment].)

In *People v. Mesa* (1975) 14 Cal.3d 466, the information charged the defendant with two prior felony convictions, which the defendant admitted. Parallel to what occurred with the enhancements in appellant's case, in *Mesa*, "Although both the minute order of judgment and the abstract of judgment refer to them, the trial court failed to mention the priors in pronouncing judgment." (*Id.* at pp. 470-471.) Seeking to distinguish an earlier case, *In re Candelario* (1970) 3 Cal.3d 702, where a trial court neglected to orally pronounce judgment on a prior and filed an amended abstract of judgment adding the prior over a month later, the Attorney General claimed in *Mesa* the trial court's failure to impose oral judgment was salvaged by the court's inclusion of the priors in the minute order of judgment and the original abstract of judgment. (*Id.* at p. 471.)

This court disagreed. "Rendition of judgment is an oral pronouncement." (*People v. Mesa, supra*, 14 Cal.3d at p. 471.) Because entry of judgment in the minutes is a clerical function, "a discrepancy between the judgment as orally pronounced and as entered in the minutes is presumably the result of clerical error." (*Ibid.*) Nor does the inclusion of the enhancements in the abstract of judgment make a difference. "An

abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize." (*Ibid.*; *People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

In *Mesa*, the remedy was to strike the reference to the prior convictions from the abstract of judgment. (*People v. Mesa, supra,* 14 Cal.3d at p. 472.) The enhancements should likewise be stricken here.

XV

CALIFORNIA'S DEATH PENALTY SCHEME, BOTH IN THE ABSTRACT AND AS APPLIED AT APPELLANT'S TRIAL, VIOLATES THE FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW, SIXTH AMENDMENT RIGHT TO A JURY TRIAL, AND EIGHTH AMENDMENT RIGHT TO RELIABLE GUILT AND PENALTY DETERMINATIONS IN A CAPITAL CASE

Those features of California's death penalty scheme detailed in the ensuing arguments violate the United States Constitution. Appellant acknowledges this court has consistently rejected these arguments, at least insofar as they constitute a per se constitutional challenge to California's death penalty scheme, and presents them in an attenuated manner. This court has indicated such claims are "fairly presented even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*People v. Schmeck* (2005) 37 Cal.4th 240, 304.)

Appellant also requests the court to consider, especially in arguments (G) and (I), whether any of the issues presented resulted in an as-applied violation of appellant's constitutional rights.

A. PENAL CODE SECTION 190.2 IS IMPERMISSIBLY BROAD, RENDERING INVALID APPELLANT'S SENTENCE OF DEATH

A state's capital scheme must "narrow[] the class of death-eligible

murderers and then at the sentencing phase allow[] for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more." (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 246 [108 S.Ct. 546, 98 L.Ed.2d 568].) In particular, the Eighth Amendment requires the "narrowing" function to "circumscribe the class of persons eligible for the death penalty." (*Zant v. Stephens, supra,* 462 U.S. at p. 878.) This court has held that the special circumstances enumerated in Penal Code section 190.2 "perform the . . . constitutionally required 'narrowing' function . . . ." (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 468.)

The problem with this conclusion is the sheer number of special circumstances recognized under section 190.2, which has the practical effect of rendering virtually all convicted murderers in California eligible for the death penalty. This was the stated purpose of the author of the 1978 death penalty law, Senator John Briggs,[157] in his ballot pamphlet argument in favor of Proposition 7: "And, if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, that criminal would not receive the death penalty. Why? Because the Legislature's weak death penalty law does not apply to every murderer.

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[157]Senator Briggs is otherwise best known for authoring Proposition 6 on the same ballot. Proposition 6 sought to make homosexual teachers subject to dismissal by virtue of their homosexuality.

Proposition 7 would." (General Election Ballot Pamphlet, Nov. 7, 1978, "Argument in Favor of Proposition 7," p. 34, at ‹http://library.uchastings.edu/library/california-research/ca-ballot-pamphlets.html› [as of Sep. 9, 2010].). This announced intention to extend death penalty eligibility to all those convicted of murder was clear to the proposition's opponents: "Regardless of the proponents' claim, no death penalty law . . . can guarantee the *automatic* execution of all convicted murderers . . . ." ("Rebuttal to Argument in Favor of Proposition 7," p. 34, italics in original, at http://library.uchastings.edu/library/california-research/ca-ballot-pamphlets.html [as of Sep. 9, 2010].)

Regardless of whether Proposition 7 did in fact extend the death penalty to all those convicted of murder (see *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 143, fn. 11, overruled on another ground in *People v. Anderson, supra,* 43 Cal.3d at p. 1147[158]), its announced intention to do so has been remarkably successful in the decades since: At the time of the offenses in appellant's case (2000), there were 31 such special

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[158]Somewhat ironically, whereas the footnote cited above in *Carlos* stated "[o]ne difficulty with relying on ballot arguments is that they are stronger on political rhetoric than on legal analysis," *Anderson* buttressed its "reading of the statutory provisions" by citing ballot pamphlet arguments. (*People v. Anderson, supra,* 43 Cal.3d at pp. 1328-1329.)

circumstances recognized in section 190.2.[159]

Despite this court's repeated statement "that felony murder is a 'highly artificial concept' which 'deserves no extension beyond its required application,'" and observation that the felony-murder rule "erodes the relation between criminal liability and moral culpability" (*People v. Dillon* (1983) 34 Cal.3d 441, 462-463), the special circumstances enumerated in Penal Code section 190.2 include all first degree felony murders enumerated in Penal Code section 189 save one.[160] In addition, judicial construction of the lying-in-wait special circumstance has been so expansive as to render it virtually indistinguishable from any premeditated murder: "[I]n California, like a Venn diagram of nearly overlapping circles, the confluence of lying-in-wait and other types of murder is virtually complete." (*Morales v. Woodford* (9th Cir. 2004) 388 F.3d 1159, 1180 [McKeown, J., concurring and dissenting].) Little if anything is left to distinguish killers eligible for the death penalty from those not eligible.

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[159]This figure does not include the "heinous, atrocious, or cruel, manifesting exceptional depravity" special circumstance of subdivision (a)(14) found unconstitutionally vague by this court in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, 803, and does not include subdivision (a)(17), but does include the 12 felonies delineated therein.

[160]Torture is listed in the felony murder statute of section 189 but is a special circumstance (§ 190.2, subd. (a)(18)) separate from the other felony murders listed in subdivision (a)(17).

"Whereas the Constitution demands a funnel narrowing the pool of defendants eligible for the death penalty, California gives us a bucket." (*Id.* at p. 1185.)

"Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force." (*Roper v. Simmons* (2005) 543 U.S. 551, 568 [125 S.Ct. 1183, 161 L.Ed.2d 1].) Appellant submits California's "bucket" violates the Eighth and Fourteenth Amendments by failing to meaningfully distinguish the few convicted of murder and sentenced to death from the many convicted of murder who are not, and requests the court reconsider its previous position on the issue.

B. PENAL CODE SECTION 190.3, SUBDIVISION (A) ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF CAPITAL PUNISHMENT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THEREBY RENDERING INVALID APPELLANT'S SENTENCE OF DEATH

Penal Code section 190.3, subdivision (a) states in determining penalty the trier of fact shall take into account "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true . . . ." The relevant jury instruction given in this case, CALJIC No. 8.88, instructed the jury only that "[a]n aggravating factor is any fact, condition or event attending the commission of a crime which increases its severity or

enormity or adds to its injurious consequences which is above and beyond the elements of the crime itself." (27 RT 3338.) As a consequence, there is no practical limit to factor (a) evidence other than that it need be "above and beyond the elements of the crime itself."

Factor (a) does not violate the Eighth Amendment per se. (*Tuilaepa v. California* (1994) 512 U.S. 967, 976 [114 S.Ct. 2630, 129 L.Ed.2d 750].) In order to pass constitutional muster, however, "The State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision." (*Id.* at 973.) This the state has not done, and the absence of any meaningful limits on factor (a) "circumstances of the crime" evidence is reflected in the extraordinary expansion of victim impact evidence this court has deemed acceptable, evidence light years removed from the brief testimony describing a surviving child victim's reaction to the murders of his mother and sister the United States Supreme Court found constitutionally permissible in *Payne v. Tennessee, supra,* 501 U.S. at pp. 825-830.

In California, victim impact evidence may "form a substantial portion of a prosecutor's case in aggravation." (*People v. Dykes* (2009) 46 Cal.4th 731, 783.) California case law recognizes no bounds on who may testify; victim impact witnesses are not limited to family members but can

include "the victim's friends, coworkers, and the community." (*People v. Ervine* (2009) 47 Cal.4th 745, 792.) Testimony is not limited to expressions of grief, but can legitimately reflect "the spectrum of human responses" including anger, aggressiveness, fear, and an inability to work. (*Id.* at p. 793.) Given these expansive definitions, a member of "the community" could potentially give detailed testimony about his or her personal devastation over the death of someone he or she had never even personally known.

Nor does there appear to be any kind of reasonable limit on the technology that might be employed during victim impact statements, specifically on elaborate (e.g., *People v. Kelly, supra,* 42 Cal.4th at pp. 796-797) and even professionally-produced (*People v. Prince, supra,* 40 Cal.4th at p. 1287) video productions that become, in effect, victim memorials more appropriately displayed following a funeral rather than to a jury charged with deciding whether someone should live or die.

In addition to virtually unlimited victim impact evidence, factor (a) is so open-ended as to not "guard against," but instead virtually guarantee, "bias or caprice in the sentencing decision." As Justice Blackmun noted in *Tuilaepa*, California prosecutors are free to argue--and juries thus free to find--starkly contradictory "circumstances of the crime" (e.g., defendant

killed for motive such as money or for no motive, or defendant killed in cold blood or hot blood) as aggravating factors. (*Tuilaepa v. California, supra,* 512 U.S. at pp. 986-988 (dis. opn. of Blackmun, J.).) It ultimately matters not what the "circumstances of the crime" are, because they all support the imposition of the death penalty.

In *Godfrey v. Georgia* (1980) 446 U.S. 420, 428 [100 S.Ct. 1759, 64 L.Ed.2d 398], the high court considered a case where the Georgia Supreme Court affirmed a death sentence "based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible, and inhuman.'" The court reversed, noting, "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Ibid.*) There is certainly nothing in the words "circumstances of the crime," standing alone, that implies any such inherent restraint either, and judicial interpretation has refused to impose any. The result is that factor (a) "circumstances of the crime" violates appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, equal protection, and a reliable penalty-phase jury determination.

This court has previously rejected the claim that factor (a) allows the arbitrary or capricious imposition of the death penalty (*People v. D'Arcy* (2010) 48 Cal.4th 257, 308), and appellant respectfully asks the court to

reconsider its position.

C. BECAUSE THE JURY THAT SENTENCED APPELLANT TO DEATH WAS NOT REQUIRED TO FIND BEYOND A REASONABLE DOUBT THE EXISTENCE OF ONE OR MORE AGGRAVATING FACTORS THAT OUTWEIGHED ANY MITIGATING FACTORS, HE WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Except as to conviction of other crimes and existence of other criminal activity, appellant's jury was not instructed it need find the presence of aggravating factors true beyond a reasonable doubt, nor find beyond a reasonable doubt these aggravating factors outweighed mitigating factors. This court's previous conclusion--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" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255)--is, however, no longer tenable in light of more recent United States Supreme Court cases to the contrary. Nor can the issue be avoided by terming "'the sentencing function . . . inherently moral and normative, not factual,' and, hence, not susceptible to a burden of proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79.)

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435], the court concluded, "Other than the fact of a prior

conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Ring v. Arizona* (2002) 536 U.S. 584, 592-593 [122 S.Ct. 2428, 153 L.Ed.2d 555], the court overruled, in light of *Apprendi*, earlier Supreme Court precedent finding Arizona's aggravating factors to be "sentencing considerations" rather than "elements of the offense," and held because the enumerated aggravating factors were "the functional equivalent of an element of a greater offense," the Sixth Amendment required they be found true by a jury. (*Id.* at pp. 598, 609.) Next, in *Blakely v. Washington* (2004) 542 U.S. 296, 300 [124 S.Ct. 2531, 159 L.Ed.2d 403], the high court considered a situation where a trial court imposed an enhanced sentence after it found a statutorily-enumerated ground for imposing a sentence beyond the statutory maximum. The high court stated "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant,*" and held the trial court's procedure violated the Sixth Amendment. (*Id.* at pp. 303, 305, italics in original.) Finally, in *Cunningham v. California* (2007) 549 U.S. 270, 277-278 [127 S.Ct. 856, 166 L.Ed.2d 856], the court held California's determinate sentencing law, according to which a defendant was to be

sentenced to a statutory "middle term" unless the trial court made findings in aggravation by a preponderance of the evidence, violated the right to jury trial guaranteed by the Sixth and Fourteenth Amendments. (*Id.* at p. 293.)

Following these decisions, the question is whether California penalty phase juries make factual findings when deciding whether to impose the death penalty. If they do, the constitutional implications are clear--and there is little doubt our state's juries are called upon to do just that. Section 190.3 requires the "trier of fact" to determine whether death or life without possibility of parole is the appropriate sentence, and before imposing the death penalty, a jury must find that at least one aggravating circumstance exists and that aggravating circumstances substantially outweigh mitigating circumstances. As read to the jury in appellant's case, CALJIC No. 8.88 stated, in relevant part, "An aggravating factor is any *fact*, condition or event attending the commission of a crime which increases its severity or enormity, or adds to the injurious consequences which is above and beyond the elements of the crime itself." (27 RT 3338, italics added.) The jury is thus explicitly told it may consider *facts* as aggravating factors, and it may be questioned how often "conditions" or "events" are not themselves facts. Also, elements of a crime are essentially facts, and to describe an aggravating factor as any "fact, condition or event" which is "above and

beyond" the statutory elements of the offense is asking the jury to make a fact-driven inquiry. This fact-driven inquiry is a necessary precedent to the "moral and normative" inquiry also required during penalty phase deliberations.

"The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder." (*Monge v. California, supra,* 524 U.S. at pp. 731-732.) Penal Code section 190.3 provides two punishments as the result of penalty phase deliberations, death--the maximum punishment--and life without possibility of parole. As outlined above, unless a jury engages in an essentially fact-driven inquiry and finds at least one factor in aggravation and finds aggravating factors substantially outweigh mitigating factors, it cannot return the maximum penalty. Appellant submits the lesson of *Apprendi* and its progeny is that the Constitution requires these findings be made beyond a reasonable doubt before a death sentence can be lawfully imposed.

While the ultimate decision to impose the death penalty may be "moral and normative," the determination of whether aggravating factors exist and whether those factors outweigh mitigating factors is indeed "a

continuation of the trial on guilt or innocence of capital murder," and our state's failure to impose the same safeguards during the penalty phase eligibility proceedings violates the Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, jury trial, a reliable penalty phase determination, and equal protection. This court has previously held *Apprendi, Ring, Blakely,* and *Cunningham* do not mandate these safeguards (*People v. Lewis, supra,* 43 Cal.4th at p. 534), and appellant respectfully asks the court to reconsider its position.

D. CALIFORNIA'S FAILURE TO REQUIRE THE JURY BE INSTRUCTED THAT THE PROSECUTION CARRIES THE BURDEN OF PROOF OF ESTABLISHING BEYOND A REASONABLE DOUBT THE EXISTENCE OF AGGRAVATING FACTORS AND THAT DEATH IS THE MORE APPROPRIATE PUNISHMENT THAN LIFE WITHOUT POSSIBILITY OF PAROLE VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

This court has held that in the penalty phase of a capital case there is no requirement that the jury be instructed the prosecution bears the burden of proof beyond a reasonable doubt in finding aggravating circumstances or that the jury determine beyond a reasonable doubt death is the appropriate penalty. (*People v. Cowan, supra,* 50 Cal.4th at pp. 508-509.) Appellant respectfully submits the court should reconsider its position for the following reasons.

"Where one party has at stake an interest of transcending value--as a

criminal defendant his liberty--this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder." (*Speiser v. Randall* (1958) 357 U.S. 513, 525-526 [78 S.Ct. 1332, 2 L.Ed.2d 460]. This observation applies a fortiori when not just a defendant's liberty but his very life is at stake. And not only does due process require the prosecution shoulder the burden of proof when such important interests are involved, it requires the most exacting standard of proof known to the law: "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship, supra,* 397 U.S. at p. 364.)

The requirements of due process in a criminal trial--the allocation of the burden of proof to the prosecution beyond a reasonable doubt--do not apply during the guilt phase only. 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 [97 S.Ct. 1197, 51

L.Ed.2d 393].) These requirements of due process ensure reliability by reducing the margin of error (*Speiser v. Randall, supra,* 357 U.S. at pp. 525-526), nowhere more important than in jury deliberations over whether someone lives or dies. Because of the finality of death, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305.)

It is surely anomalous that this court has recognized the need for proof beyond a reasonable doubt by unanimous verdict even in certain civil cases involving important interests, but declines to do so when life itself is at stake. (See, e.g., *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1147 [noting statutes under Sexually Violent Predator law requires proof beyond a reasonable doubt and jury unanimity]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 229-230 [conservatorship under Lanterman-Petris-Short Act requires jury unanimity and proof beyond a reasonable doubt]; *People v. Thomas* (1977) 19 Cal.3d 630, 644 [same for narcotics addict commitment proceedings]; *People v. Feagley* (1975) 14 Cal.3d 338, 345, 349-350 [mentally disordered sex offender].)

"Because the death penalty is unique 'in both its severity and its finality' [citation], we have recognized an acute need for reliability in

capital sentencing proceedings." (*Monge v. California, supra,* 524 U.S. at p. 732.) Due process requires the jury be instructed the prosecution bears the burden of proving beyond a reasonable doubt that aggravating factors outweigh mitigating factors, and of establishing that death is the more appropriate penalty than life without possibility of parole.

E. THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS MANDATE WRITTEN JURY FINDINGS REGARDING FACTORS THE JURY CONSIDERED IN DECIDING TO IMPOSE THE DEATH PENALTY

"Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner." (*Gregg v. Georgia* (1976) 428 U.S. 153, 195 [96 S.Ct. 2909, 49 L.Ed.2d 859.) Unfortunately, this safeguard is not currently available in California. A penalty phase jury is given virtually unlimited discretion in its sentencing decision, and this court has specifically held a penalty phase jury is not required to make written findings regarding aggravating factors (*People v. Blair* (2005) 36 Cal.4th 686, 753)--which is not surprising, given that California jurors need not even agree upon such factors in the first instance, a separate error addressed in argument (C), *ante*.

The United States Supreme Court "has recognized that the

qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." (*California v. Ramos* (1983) 463 U.S. 992, 998-999 [103 S.Ct. 3446, 77 L.Ed.2d 1171].) It cannot be seriously disputed that written findings facilitate meaningful sentencing review. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15 [108 S.Ct. 1860, 100 L.Ed.2d 384].)

Given the need for a greater degree of scrutiny, it is anomalous that in California, written findings are required by due process in parole hearings (*In re Sturm* (1974) 11 Cal.3d 258, 272) but not capital penalty phase proceedings. It is further anomalous that in California's non-capital cases, Penal Code section 1170, subdivision (c), requires the sentencing court to "state the reasons for its sentence choice on the record at the time of sentencing." By requiring stated reasons for imposing a discretionary punishment in non-capital cases but not in capital cases, California affords capital defendants lesser rather than enhanced constitutional protection. (See argument (J), *post.*)

Additionally, Penal Code section 190.4 provides that during the automatic application for verdict modification the trial court "shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are

contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings." While the statute ultimately "requires the court to make an independent determination concerning the propriety of the death penalty, and to independently reweigh the evidence in aggravation and mitigation . . ." (*People v. DePriest* (2007) 42 Cal.4th 1, 56), it may be wondered how the trial court can determine "whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented" without knowing what those aggravating and mitigating circumstances were.

Because the United States Supreme Court has "held that 'death is different,'" it has "imposed protections that the Constitution nowhere else provides." (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994 [111 S.Ct. 2680, 115 L.Ed.2d 836].) Under California's current system, there is simply no alternate procedural protections that enable a reviewing court to determine whether the jury's decision to impose the death penalty was reliably made. (See, e.g., *Kansas v. Marsh* (2006) 548 U.S. 163, 178-179 [126 S.Ct. 2516, 165 L.Ed.2d 429].) The state's failure to require explicit jury findings regarding its reasons for imposing a sentence of death violates the Fifth, Sixth, Eighth, and Fourteenth Amendments rights to due process, a fair jury trial, a reliable capital verdict, and equal protection, and appellant

asks this court to reconsider its previous position on the issue.

F. CALIFORNIA'S CAPITAL SENTENCING SYSTEM IS SO LACKING IN OTHER CHECKS ON THE ARBITRARY IMPOSITION OF THE DEATH PENALTY THAT THE STATE'S LACK OF COMPARATIVE PROPORTIONALITY REVIEW RENDERS THE DEATH PENALTY UNCONSTITUTIONAL UNDER THE EIGHTH AMENDMENT

In *Pulley v. Harris* (1984) 465 U.S. 37, 41 [104 S.Ct. 871, 79 L.Ed.2d 29], the court considered the defendant's claim the Eighth Amendment required a state appellate court, upon request, to compare the death sentence in the case before it with the sentences in similar cases. Following the court's decision in *Furman v. Georgia* (1972) 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346] holding capital punishment cruel and unusual because of "statutes vesting unguided sentencing discretion in juries and trial judges," most states redrafted capital sentencing statutes to require some form of proportionality review. (*Pulley v. Harris, supra,* 465 U.S. at p. 44.) This kind of proportionality review did not assert the death penalty per se was inherently disproportionate and hence cruel and unusual punishment, but sought to ensure a defendant's death sentence was not disproportionate to others convicted of the same offense. (*Id.* at pp. 42-43.)

The court reviewed its previous decisions and concluded the Eighth Amendment did not require a proportionality review in all death penalty cases when requested by the defendant. (*Pulley v. Harris, supra,* 465 U.S.

at p. 50.) The court did, however, leave open the possibility "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review . . . ." (*Id.* at p. 51.)

Such is now the case in our state. There were only seven special circumstances in the 1977 California death penalty statute under review, which the court observed in passing had been "greatly expanded in the current statute." (*Pulley v. Harris, supra,* 465 U.S. at p. 51, fn. 13.) Indeed, as noted in argument (A) above, because of the sheer number of special circumstances and expansive interpretation of lying in wait, virtually all murders in the state are subject to some special circumstance or other; the constitutionally required narrowing function is no longer served by section 190.2. The main penalty phase factor--"circumstances of the crime"--has itself become an invitation to arbitrary and capricious sentencing. (See argument (B), *ante*). Finally, California's death penalty sentencing scheme lacks the safeguards that might remedy some of its manifold defects. (See arguments (C), (D), and (E), *ante*.)

California's death penalty law is now so expansive and lacking in procedural safeguards it "does not pass constitutional muster without comparative proportionality review . . . ," and appellant respectfully submits

this court should reconsider its repeated rejection of this claim. (See, e.g., *People v. Wilson* (2008) 43 Cal.4th 1, 30-31.)

G. THE PROSECUTION'S RELIANCE ON UNADJUDICATED CRIMINAL ACTIVITY TO CONVINCE THE JURY TO EXECUTE APPELLANT VIOLATED HIS RIGHT TO JURY TRIAL, DUE PROCESS, AND A RELIABLE PENALTY DETERMINATION UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS; AND EVEN IF SUCH WERE PERMISSIBLE IN THE ABSTRACT, THE SAME CONSTITUTIONAL INTERESTS ARE VIOLATED BECAUSE THE JURY WAS NOT REQUIRED TO UNANIMOUSLY FIND THE PRIOR CRIMINAL ACTIVITY TRUE

During argument regarding factor (b) [other criminal activity involving violence or the threat therof], the prosecutor informed the jury appellant had been involved in a drive-by shooting: "Just because he doesn't have other acts of violence beyond the possession of the arsenal in that trunk of that vehicle pulled over right after, what--I think any reasonable person comes to a conclusion that it was a drive-by shooting, rolling by 10 miles an hour." (27 RT 3302.) As noted earlier in this brief, the prosecutor was stating as *fact* what was only an *inference*: that there had been a drive-by shooting, something the People never came close to establishing during the guilt phase, as the trial court had previously recognized. (26 RT 3233.)

The "evidence" of unadjudicated criminal conduct should not have been allowed during appellant's penalty phase trial. The Washington

Supreme Court has succinctly stated the problem with the use of unadjudicated other crimes during the penalty phase: "A jury which has convicted a defendant of a capital crime is unlikely fairly and impartially to weigh evidence of prior alleged offenses. In effect, to allow such evidence is to impose upon a defendant who stands in peril of his life the burden of defending, before the jury that has already convicted him, new charges of criminal activity. Information relating to defendant's criminal past should therefore be limited to his record of convictions." (*State v. Bartholomew* (1984) 101 Wash.2d 631, 641; 683 P.2d 1079, 1046.)

In addition, although the penalty phase jury was instructed it had to find the existence of other unadjudicated criminal activity true beyond a reasonable doubt, it was also specifically instructed it need not unanimously find the other activity true before individual jurors could consider it a reason to execute appellant. (27 RT 3284; quoting CALJIC No. 8.87.) In California jury verdicts in criminal cases must be unanimous (*People v. Russo* (2001) 25 Cal.4th 1124, 1132), and appellant submits the state's failure to apply its own rules by not requiring a unanimous finding appellant engaged in unadjudicated criminal behavior violates federal due process. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

The use of prior unadjudicated conduct, or if such conduct is

permissible in the abstract, the failure of the trial court to instruct the jury it need unanimously find such conduct occurred before using it in aggravation, violated appellant's rights to due process, a jury trial, and reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Appellant respectfully requests this court reconsider its conclusion to the contrary. (*People v. D'Arcy, supra,* 48 Cal.4th at p. 308.)

H. THE USE OF RESTRICTIVE ADJECTIVES IN FACTORS (D) AND (G) BARRED FULL CONSIDERATION OF MITIGATION

Factor (d) states the jury may consider "whether or not the offense was committed while the defendant was under the influence of *extreme* mental or emotional disturbance"; factor (g), "whether or not the defendant acted under *extreme* duress or under the *substantial* domination of another person." (27 RT 3282, italics added; Pen. Code, § 190.3.) These factors can only be mitigating. (*People v. Montiel, supra,* 5 Cal.4th at p. 944.)

"It is beyond dispute that in a capital case 'the sentencer [may] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" (*Mills v. Maryland, supra,* 486 U.S. at p. 374.) The plain implication of "extreme" in both factors and "substantial" in factor (g) is to preclude jury

consideration of something less, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, and appellant asks this court to reconsider its position to the contrary. (*People v. D'Arcy, supra,* 48 Cal.4th at p. 308.)

I. THE TRIAL COURT'S FAILURE TO IDENTIFY STATUTORY MITIGATING FACTORS AS MITIGATING FACTORS PRECLUDED A FAIR PENALTY PHASE TRIAL AND RELIABLE PENALTY DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The jury was instructed that in imposing the death penalty it could consider the various factors enumerated in Penal Code section 190.3. (27 RT 3281-3282; CALJIC No. 8.85.) Special instructions referenced "[t]he mitigating circumstances that I have read for your consideration" (27 RT 3284-3285), stated "[t]he absence of mitigation does not amount to the presence of aggravation" (27 RT 3286), and instructed "[t]here is no need for the jurors to unanimously agree on the presence of a mitigating factor before considering it" (27 RT 3286). This was all well and good, with one major problem: with the exception of prior criminal convictions (27 RT 3283; CALJIC No. 8.86) and unadjudicated criminal activity (27 RT 3283-3284; CALJIC No. 8.87), the jury was not told which factors were mitigating and which factors were aggravating.

Certain factors--factors (d), (e), (f), (g), (h), and (k)--can only be mitigating. (*People v. Montiel, supra,* 5 Cal.4th at p. 944.) This court has

repeatedly stated "no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors." (See, e.g., *People v. Arias* (1996) 13 Cal.4th 92, 188.) Since, however, even trial judges trained in the law, who are not inherently less reasonable than jurors in parsing such matters, have confused statutory mitigating and aggravating factors, this proposition is demonstrably false. (See, e.g., *People v. Morrison* (2004) 34 Cal.4th 698, 727-728; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)

Such inherent potential for confusion was, if anything, even more likely to be realized in appellant's case, thanks to a special instruction requested by defense counsel and given by the trial court: "The factors in the above list which you determine to be aggravating circumstances are the only ones which the law permits you to consider." (27 RT 3285.) The instruction does state an important precept: i.e., that the prosecution's case in aggravation is limited to statutory aggravating factors. (*People v. Boyd* (1985) 38 Cal.3d 762, 775-776.) The wording is, however, unfortunate. As indicated above, certain factors can *only* be mitigating, yet the wording of this instruction gave the jury carte blanche to determine which factors were aggravating.

If, for example, some jurors bought the prosecution's silly

comparison of the effects of smoking methamphetamine to the effects of drinking too many espressos, they were free to conclude a negative answer to factor (h)--"[w]hether 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 requirement of law was impaired as a result of . . . the effects of intoxication"--was an aggravating factor. At the same time, other jurors who rejected the prosecutor's comparison and believed appellant was high when the offenses were committed but believed drug use could never mitigate criminal responsibility (see *People v. Ledesma, supra,* 43 Cal.3d at p. 208; *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511) were also free to employ the factor as aggravating.

The trial court's failure to identify statutory mitigating factors as just that precluded a fair penalty phase trial and reliable penalty determination in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, and appellant respectfully requests the court reconsider its previous position on the issue.

J. CALIFORNIA'S DEATH PENALTY SCHEME VIOLATES THE FOURTEENTH AMENDMENT'S GUARANTEE OF EQUAL PROTECTION OF THE LAWS

The Fourteenth Amendment to the United States Constitution provides that no state can "deny to any person within its jurisdiction the

equal protection of the laws." Most equal protection claims are reviewed under the "rational relationship" test, according to which a court seeks "only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose." (*Phyler v. Doe* (1982) 457 U.S. 202, 216 [102 S.Ct. 2382, 72 L.Ed.2d 786].) Those involving a "fundamental right," however, are reviewed under the "strict scrutiny" test: "[W]e have treated as presumptively invidious those classifications that . . . impinge upon the exercise of a 'fundamental right.' With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." (*Id.* at pp. 216-217.) "[P]ersonal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.)

Certain aspects of California's death penalty scheme turn this court's holding in *Olivas* on its head, so that "life itself" is given lesser rather than greater protection under state law. California recognizes the need for proof beyond a reasonable doubt by unanimous verdict in certain civil cases involving important interests, but does not require penalty phase juries to make unanimous findings beyond a reasonable doubt regarding aggravating

factors in deciding whether someone lives or dies. (See, e.g., *Hubbart v. Superior Court, supra,* 19 Cal.4th at p. 1147 [Sexually Violent Predator law]; *Conservatorship of Roulet, supra,* 23 Cal.3d at pp. 229-230 [conservatorship under Lanterman-Petris-Short Act]; *People v. Thomas, supra,* 19 Cal.3d at p. 644 [narcotics addict commitment proceedings]; *People v. Feagley, supra,* 14 Cal.3d at pp. 345, 349-350 [mentally disordered sex offender].)

Also, California does not require a penalty phase jury to record whatever findings regarding aggravating factors it did make in reaching its decision to impose the death penalty. In California's non-capital cases, on the other hand, Penal Code section 1170, subdivision (c), requires the sentencing court to "state the reasons for its sentence choice on the record at the time of sentencing." Nor does the state require the penalty phase jury to make written findings, something this court has found is required by due process in parole hearings. (*In re Sturm, supra,* 11 Cal.3d at p. 272.)

The enhanced protections this state affords "liberty" over "life" obviously do not reflect a classification that "has been precisely tailored to serve a compelling governmental interest," and thereby violate the Fourteenth Amendment's guarantee of equal protection of the laws. Appellant respectfully requests this court reconsider its previous position

that "capital and noncapital defendants are not similarly situated and therefore may be treated differently without violating constitutional guarantees of equal protection of the laws or due process of law." (*People v. Manriquez* (2005) 37 Cal.4th 547, 590.)

K. THE DEATH PENALTY VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE IT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY, AND OTHERWISE VIOLATES INTERNATIONAL LAW

The United States Supreme Court has "recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual." (*Roper v. Simmons, supra,* 543 U.S. at pp. 575-576.) It has, for example, acknowledged "the overwhelming weight of international opinion against the juvenile death penalty . . . ." (*Id.* at p. 578.) In addition, when considering whether the execution of mentally retarded persons constitutes cruel and unusual punishment, the court specifically noted it could consider the views of "other nations that share our Anglo-American heritage, and . . . the leading members of the Western European community." (*Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21 [122 S.Ct. 2242, 153 L.Ed.2d 335], citing *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830-831, fn. 31 [108 S.Ct. 2687, 101 L.Ed.2d 702].)

No Western European countries or nations that share our Anglo-American heritage (the United Kingdom, Canada, Australia, New Zealand)

retain the death penalty for any crimes, let alone as a regular form of punishment. (Amnesty International, Death Sentences and Executions, 2009--Appendix 1: Abolitionist and Retentionist Countries as of 31 December 2009 [dated March 2010] (www.amnesty.org).) This state's use of the death penalty violates international norms of humanity and decency--especially the norms of those countries most closely sharing our legal tradition--and thus constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments.

California's death penalty further violates the International Covenant on Civil and Political Rights. Article 6, section 1 of the Covenant provides that "No one shall be arbitrarily deprived of his life." As noted in the previous arguments in this section, however, the structural deficiencies in California's death penalty have rendered its imposition arbitrary. In addition, Article 7 of the Covenant provides "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." For the reasons expressed in the previous two paragraphs, our continued employment of the death penalty constitutes cruel (not to mention unusual) punishment.

Finally, the consideration of the views of other countries concerning the death penalty does not somehow impinge on our sovereignty. "It does

not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." (*Roper v. Simmons, supra*, 543 U.S. at p. 578.)

This court has previously rejected the claims asserted in this argument. (*People v. Brown, supra,* 33 Cal.4th at pp. 403-404.) Appellant respectfully requests the court reconsider its position.

L. CALIFORNIA'S CAPITAL SENTENCING SCHEME VIOLATES THE EIGHTH AMENDMENT BECAUSE OF ITS CUMULATIVE DEFICIENCIES

In assessing prejudice from errors committed during a trial, a reviewing court is not limited to examining the prejudice from each error in isolation, but may consider their cumulative effect. "Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial." (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.)

Appellant submits this court may engage in a similar "cumulative deficiencies" analysis with California's capital sentencing scheme. "The constitutionality of a State's death penalty system turns on review of that system in context," rather than on a "disengaged interpretation" of isolated

elements. (*Kansas v. Marsh, supra,* 548 U.S. at p. 179, fn. 6.)

The numerous structural defects in that scheme have been detailed in arguments (A) through (K) above. While appellant maintains for the reasons stated in those arguments that each individual defect renders the system unconstitutional, the net effect of those defects surely does, and appellant respectfully requests this court reconsider its position to the contrary. (*People v. Lucero* (2000) 23 Cal.4th 692, 741.)

CONCLUSION

For the reasons specified in the first argument, count 1 must be reversed, and its attendant enhancements stricken, because there is insufficient evidence to sustain the verdict. The multiple murder special circumstance must also be stricken and a new penalty phase trial ordered.

For the reasons specified in those arguments alleging guilt phase error (arguments II through X), the convictions of both counts, and ensuing death sentences, must be reversed and remanded for retrial.

For the reasons specified in those arguments alleging penalty phase error (arguments XI through XIII), the judgments of death must be reversed and a new penalty phase trial held.

Because the trial court failed to orally impose judgment on the enhancements, they must be stricken (argument XIV).

Appellant further asks this court to reconsider its positions in the twelve arguments contained in argument heading XV, and reverse the guilt phase convictions and death judgments accordingly.

Dated: 06/15/11

Respectfully submitted,

Randall Bookout

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Attorney for Defendant and Appellant,
JULIAN ALEJANDRO MENDEZ

CERTIFICATION OF WORD COUNT

I, Randall B. Bookout, hereby certify that, according to the computer program used to prepare this document, Appellant's Opening Brief, contains 77,748 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 15th day of June 2011, at Coronado, California.

Randall Bookout

Randall Bookout
Attorney at Law

DECLARATION OF SERVICE

Case Name: *People v. Julian Alejandro Mendez*

Cal. Supreme Ct. No. S129501
Superior Court No. RIF090811

I declare: I am employed in the County of San Diego, California. I am over 18 years of age and not a party to the within entitled cause; my business address is Post Office Box 181050, Coronado, California, 92178.

On June 15, 2011, I served the attached

APPELLANT'S OPENING BRIEF

of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Coronado, California on June 15, 2011.

I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed at Coronado, California, on June 15, 2011.

RANDALL BOOKOUT
(Typed Name)

Randall Bookout
(Signature)