IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. ALFONSO IGNACIO MORALES Defendant and Appellant.	No. VA-071974 (Los Angeles County) California Supreme Court No. S136800

AUTOMATIC APPEAL FROM A JUDGMENT OF DEATH
SUPERIOR COURT OF LOS ANGELES COUNTY
THE HONORABLE MICHAEL A. COWELL, JUDGE PRESIDING

OPENING BRIEF OF APPELLANT ALFONSO IGNACIO MORALES

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OPENING BRIEF OF APPELLANT ALFONSO IGNACIO MORALES

I.

INTRODUCTION

In the early morning hours of Friday, July 12, 2002, Appellant Alfonso Ignacio Morales (Morales), a 24-year-old severely learning disabled man, entered the home of his neighbors and friends Miguel "Mike" Ruiz and Maritza Trejo, stabbed and killed them and Mike's grandmother Ana Martinez, and sexually assaulted their daughter Jasmine Ruiz, age 8, and drowned her in the bathtub. The physical evidence quickly led investigators to conclude that Morales perpetrated the killings. But the record is a puzzle that does not explain why Morales, who had no history of criminal activity or drug use, would suddenly massacre his friends.

Faced with this crime, the prosecution presented the pieces of evidence so that the homicides appeared to be the work of an individual of normal intelligence who planned and premeditated, staged the crime scene, and tried to hide or destroy the evidence. But the prosecution leaves an incomplete puzzle, the gaps of which point to insufficient evidence and were filled in the guilt phase, *inter alia,* with the

very questionable testimony of a crime scene reconstruction expert. The penalty phase, by contrast, supplies ample evidence that Morales was severely intellectually impaired and was incapable of planning and implementing this crime.

Thus while there is no dispute that Morales killed the Ruiz family and left a bloody, complicated crime scene, one of the worst the prosecutors and defense attorneys had ever seen (See 10RT 2009-2011, 2014-2023), the motivation for the crimes remains a mystery. The prosecution chose to charge Morales with the death penalty based on premeditated multiple murders committed during perpetration of a burglary, robbery, sexual assault, and lewd act on a child under 14. (3CT 594-602; 4CT 988-998) For the reasons above and those that follow, the verdicts of guilt and penalty should be overturned.

II.

STATEMENT OF THE CASE

A.

INFORMATION, AMENDED INFORMATION, AND NOTICE OF INTENTION TO SEEK CAPITAL PUNISHMENT

On May 23, 2003, the Los Angeles County District Attorney's Office filed an eight-count felony information, charging Morales Alfonso Ignacio Morales as follows:

Count 1	First Degree Murder of Miguel Ruiz, with the special circumstances that Morales was engaged in the crimes of burglary and robbery + personal use of a knife.	Penal Code sections 187, subd. (a) and 190.2, subd. (a)(17); 12022, subd. (b)(1).
Count 2	First Degree Murder of Maritza Trejo, with the	Penal Code sections 187, subd. (a) and 190.2, subd.

	special circumstances that Morales was engaged in the crimes of burglary and robbery + personal use of a knife.	(a)(17); 12022, subd. (b)(1).
Count 3	First Degree Murder of Anna Martinez, with the special circumstances that Morales was engaged in the crimes of burglary and robbery + personal use of a knife.	Penal Code sections 187, subd. (a) and 190.2, subd. (a)(17); 12022, subd. (b)(1).
Count 4	First Degree Murder of Jasmin Ruiz, with the special circumstances that Morales was engaged in burglary, robbery, torture, lewd act upon a child under 14, sexual penetration with a foreign object by force and violence + personal use of a knife.	Penal Code sections 187, subd. (a): 190.2, subd. (a)(17); 190.2, subd. (a)(18); 12022, subd. (b)(1)
Count 5	First degree residential robbery + personal use of a knife.	Penal Code sections 211; 12022, subd. (b)(1)
Count 6	First degree residential burglary + personal use of a knife.	Penal Code sections 459; 12022, subd. (b)(1).
Count 7	Forcible lewd act upon a child under 14+ personal use of a knife + great bodily injury + substantial sexual contact.	Penal Code sections 288, subd. (b)(1), 1203.066, subd. (a)(1) and (a)(8), 12022, subd. (b)(1); 12022.8; and 1203.066, subd. (a)(8).
Count 8	Sexual penetration by a foreign object + personal	Penal Code sections 289, subd. (a)(1); 12022, subd.

	use of a knife + great bodily injury + use of firearm and knife.	(b)(1); 12022.8; and 12022.3, subd. (a).

(3CT 594-602)

On April 4, 2005, the District Attorney filed an amended information encompassing the above charges with the following additions (highlighted):

Count 3	First Degree Murder of Anna Martinez, with the special circumstances that Morales was engaged in the crimes of burglary and robbery + personal use of a knife + **infliction of great bodily injury on a person 70 years old or older.**	Penal Code sections 187, subd. (a) and 190.2, subd. (a)(17); 12022, subd. (b)(1); **12022.7, subd. (c).**
Count 8	Sexual penetration by a foreign object + personal use of a knife + great bodily injury + use of firearm and knife + **great bodily injury.**	Penal Code sections 289, subd. (a)(1); 12022, subd. (b)(1); 12022.8; and 12022.3, subd. (a); **12022.9.** .

(4CT 988-998)

B.

REPRESENTATION AND ARRAIGNMENT

Morales was represented by the Los Angeles County Public Defender's Office at all proceedings. On May 23, 2003, he was arraigned on the information, pled not guilty, and denied all special allegations and special circumstances. (3CT 605) On April 4, 2005, he was arraigned on the amended information, pled not

guilty, and denied all special allegations and special circumstances. (4CT 999-1000)

C.

GUILT PHASE

Morales was tried in a 35-day jury trial before the Honorable Michael A. Cowell, Judge Presiding. The trial of the guilt phase began on February 22 and concluded on April 19, 2005.

1. Voir Dire

On February 22, 2005, voir dire commenced. Voir dire continued from February 22 to February 25, 2005 for completion of questionnaires (4CT 942-949) and again on March 10, 2005, March 21 through 30, 2005. (4CT 952-975) On March 30, 2005, 12 jurors and six alternate jurors were impaneled, sworn and affirmed to try the case. (4CT 974-975)

2. Law and Motion

On March 25, 2004, the court heard and granted a motion to quash defense subpoena filed by the Los Angeles County Sheriff's Department, without prejudice. (3CT 647)

On July 15, 2004, the court heard and denied a defense motion for discovery pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 and granted it as to *Brady v. Maryland* (1963) 373 U.S. 83. (3CT 759-560)

On February 15, 2005, the court heard and granted a defense motion in limine regarding prior behaviors pursuant to Evidence Code section 1101. The court heard and denied prosecution motions in limine to introduce evidence of Morales's motive and intent to commit burglary and sexual battery and murder. (4CT 913-914; 1SCT 13-43.)

3. Trial

On April 1, 2005, the guilt phase trial commenced. On April 1 and 4, 2005, additional pretrial motions were heard. (4CT 984-985, 999-1000)

4. Opening Statements

On April 4, 2005, the parties made their opening statements. (4CT 999-1000)

5. Prosecution and Defense Cases

The trial of the prosecution's case began on April 4 and concluded on April 14, 2005. (4CT 999-1014) On April 14, 2005, the trial court heard and denied a defense motion for judgment of acquittal pursuant to Penal Code section 1118.1 (25CT 7146-7147)

6. Deliberations and Verdict

On April 18, 2005, the jury deliberated and reached a verdict of guilt on all counts. (25CT 7178-7179) On April 19, 2005, the verdict was read. (25CT 7204-7212)

D.

PENALTY PHASE

The trial of the guilt phase began on April 21 and concluded on May 5, 2005.

1. Law and Motion

On April 21, 2005, the penalty phase trial commenced. On April 21, 2005, pretrial motions were heard. (25CT 7214-7215A)

2. Opening Statements

On April 25, 2005, the parties made their opening statements. (26CT 7218-7220)

3. Prosecution and Defense Cases

On April 25, 2005, the trial of the prosecution case began and concluded. (26CT 7218-7220) The trial of the defense case began on April 26 and concluded on April 27, 2005. (26CT 7236-7241) The prosecution's rebuttal began on April 27 and concluded on April 28, 2005. (26CT 7240-7241)

4. Closing Argument and Instructions

On May 2, 2005, the court instructed the jury and the parties made closing arguments. (26CT 7247-7248)

5. Deliberations and Verdict

The jury deliberated from May 3 to May 5, 2005. The jury reached a verdict and fixed the penalty at death. (26CT 7250-7253, 7320-7321)

E.

SENTENCING

On August 23, 2005, the trial court issued a Judgment and Commitment of Death and Death Warrant, pursuant to Penal Code section 1193, as to Counts 1, 2, 3 and 4. (26CT 7388-7393)

F.

APPEAL

Morales's conviction and sentence were automatically appealed to the California Supreme Court pursuant to Penal Code sections 190.6, 1239 and California Rules of Court, rule 8.600(a). (26CT 7396)

III.

STATEMENT OF FACTS

A.

SUMMARY OF EVIDENCE

Morales Alfonso Ignacio Morales (Morales), age 24, lived with his stepfather, Jerry Rodriguez, and his mother, Manuela Rodriguez, at 13838 Close Street in an unincorporated area of Whittier, California. (10RT 2119; see 26CT 7046);13RT 2912-2913; 14RT 3127-3129) Morales' life history bears out that he was severely learning disabled. (18RT 4025-4027) He was relegated to special education classes beginning in the first grade and continuing through high school. His brain was damaged in the left hemisphere and left frontal lobe. The damage impaired his ability to learn, his behavior, and all other circumstances in his life. (18RT 4042-4043, 4055) His disability caused him to be alone and isolated, the object of scorn from other children. He also grew up in a chaotic home situation, in which all of the adult males in his life abused him both emotionally and physically, and his stepfather Jerry Rodriguez perpetually ridiculed his inability to perform simple intellectual tasks. (17RT 3878-3879)

By the time Morales was an adult, his functional IQ varied from normal to that of an eight or nine year old, depending on the task tested. (18RT 3963-3966, 4029-4031) His mother described him as a child in a man's body because he did not have the mind of an adult. She had to purchase his car for him and do all the paperwork. She had him pay her every month, and she made the car payment. When he applied for jobs, he brought home the applications so she could help him fill them out. (17RT 3851-3853) When he worked, he gave her money. (17RT 3856-3857) When Morales was 17, his older brother Emiliano (Emi), a smart and talented young man who was very good to him, was killed in a freak accident at Yosemite National Park. The entire family was devastated, and Morales withdrew from everyone. (17RT 3841-3842, 3883-3882)

Morales' family lived around the corner from 10216 Gunn Avenue, the home occupied by Miguel "Mike" Ruiz and his wife Maritza Trejo (Trejo); her daughter Maritza Trejo (Maritza); their daughter Jasmine Ruiz (age 8); and Mike Ruiz's grandmother Ana Martinez (Ana). (10RT 2107-2110) The families were friendly. Jasmine was a close friend of Morales' niece, about the same age. (17RT 3894-3895) Morales came to the house on Gunn often, almost every day. Mike worked with computers out of a home office. Morales would "hang out" and talk with Mike, who was teaching him about computers. He often stayed for meals, and he gave the Ruiz family a boxer puppy from the same litter as his dog.

It appears some friction arose between Morales and the Ruiz family, when he became interested in Maritza. One day, he and Jasmine were on the patio and he stared through the big window at Maritza. He kept telling her to come outside, but she did not want to do so. Jasmine was laughing, so Maritza assumed she was playing a joke. She told her parents, who told Jasmine not to do that again. Morales apologized to her parents and bought food that night for the whole family. (10RT 2120-2123) Sometime later, Morales asked Trejo whether Maritza could go to the movies with him. Trejo said it was Maritza's decision. Maritza did not want to go. She avoided him the next night by staying at her aunt's house in case he showed up. After that time, Maritsa stayed in her room if Morales was around. (10RT 2122-2123, 2184) She thought Morales was "slow" thinking. She did not recall telling the police he was "retarded." (10RT 2191)

In June 2002, a neighbor noticed that Morales' car was not parked in front of the Ruiz home as it had often been in the past. (10RT 2222-2228) It was not established how often Morales drove his car the quarter of a block from his house to the Ruiz's house, as opposed to walking over, and there was little evidence to show that a falling out between Morales and Mike Ruiz had actually occurred.

In any event, the physical evidence established that on Friday morning, July 12, 2002, sometime before 8:00 a.m., Morales entered the Ruiz house and killed the entire Ruiz family except for Maritza, who was away babysitting for a cousin.

Mike Ruiz was stabbed several times in the neck, Maritza Trejo was stabbed 45 times in the neck and body, and Ana Martinez was stabbed two times in the neck. Jasmine Ruiz was sexually assaulted and drowned her in the bathtub.

There was a large amount of blood in the entryway, on the carpet, and on the walls. The house was a mess. Food items were thrown all over. There was barbeque sauce on one of the walls and a can of tomato paste opened and spread around. A cleanser-like substance was on the bodies and on the floor. It looked like someone had tried to clean up parts of the kitchen. (11RT 2316-2320, 2330-2331) The bodies had been dragged into the master bedroom, where Ruiz was lying on his back, covered in blood, Trejo was lying face down with her arm draped over the Ruiz, and an Ana was at the end of the bed curled up in a fetal position, with blood around her neck and face area. A can of Ajax was sitting on the floor. (11RT 2320-2321, 2323-2324) Jasmine's body was in the bathtub in the bathroom with a statute weighing her down. (11RT 2320-2321)

B.

GUILT PHASE

1. PROSECUTION CASE

a. Background

In July 2002, Maritza Raquel Trejo (Maritza) lived in a three-bedroom house at 10216 Gunn Avenue in Whittier, California, with her mother, Maritza Trejo (Trejo); stepfather, Miguel Ruiz (Mike Ruiz); sister Jasmine Ruiz (Jasmine) (age 8); and Miguel Ruiz's grandmother Ana Martinez (Ana). (10RT 2107-2110) Mike worked with computers out of a home office and also at Sound City for Trejo's brother, installing car stereos. Kenelly Zeledon was married to Trejo's brother. (10RT 2111-2114, 2233-2235) Trejo also worked for the uncle at the swap meet, selling stereos and devices for car stereos. (10RT 2111-2114) Maritza was out of school and babysat for her uncle, usually at his house in Chino. (10RT

2115-2116) Ana had suffered a stroke and normally stayed at the house. Jasmine was eight and in the second grade. Maritza and Jasmine shared a bedroom, although Jasmine usually slept with her parents. The family also had two dogs who would bark if someone they did not know came to the house. (10RT 2111-2114, 2117)

Morales Alfonso Ignacio Morales, age 24, was a neighbor and a friend of Ruiz. (10RT 2119; see 26CT 7046) He lived around the corner with his stepfather, Jerry Rodriguez, and his mother, at 13838 Close Street. (13RT 2912-2913; 14RT 3127-3129) He came to the house on Gunn often, almost every day. Ruiz and Morales would "hang out" and talk. (10RT 2119) About a month earlier, another neighbor, Hector Alvarez, noticed that Morales's car, a green Mustang, was not parked in front of the house anymore.[1] Alvarez was at the Ruiz house often to use the internet. (10RT 2222-2228; Peo. Exhs. 2, 31)

Jasmine also knew Morales. Maritza recalled one occasion when Jasmine watched a DVD with him. (10RT 2119) Another time, Morales and Jasmine were on the patio and Morales stared through the big window at Maritza. He kept telling her to come outside, but she did not want to do so. Jasmine was laughing, so Maritza Raquel assumed she was playing a joke. Maritza told her parents, who told Jasmine not to do that again. Morales apologized to her parents and bought food that night for the whole family. (10RT 2120-2123)

Some time later, Morales asked Trejo whether Maritza could go to the movies with him. Trejo said it was Maritza's decision. Maritza did not want to go. She avoided him the next night by staying at her aunt's house in case he showed up. After that time, Maritza stayed in her room if Morales was around. (10RT 2122-2123, 2184) She thought Morales was "slow" thinking. She did not recall telling the police he was "retarded." (10RT 2191)

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[1] No explanation was given as to why Morales would drive over and park his car in front of the Ruiz home, when he lived around the corner.

b. July 11, 2002

Dorris Morris lived on Close Street in Whittier. There were two houses on her property, and the back wall abutted the Ruiz's house on Gunn. (11RT 2289-2291; 13RT 2808-2811) On July 11, 2002, at 12:00 p.m., Morris noticed that there was a step stool against the back fence. She left and put the step stool inside her garage. (11RT 2299-2300; Peo. Exh. 33.)

At 6:00 p.m., Kenelly and Ruiz closed the Sound City shop. Ruiz said he would see them the next day. (10RT 2233-2235) Maritza was at her uncle's house in Chino and stayed there for the night. (10RT 2128-2129) Sometimes she also babysat for Kenelly. (11RT 2250-2253) Between 8:00 and 8:30 p.m., Michael James Gardner stopped by the house on Gunn. Ruiz was one of his best friends. He sat outside with Ruiz and Trejo for about 30 minutes. Everything seemed fine. They were happy and smiling. (11RT 2262-2264)

c. July 12, 2002

On Friday morning, July 12, 2002, a neighbor on Gunn, Octavio Ochoa, left his house around 8:00 a.m. He did not hear anything unusual. (10RT 2201-2202) Between 8:00 and 8:30 a.m., Ruiz's father, Miguel Ruiz, Sr., and his wife, stopped by the house to give his mother, Ana, a new pair of shoes. He knocked on the door but no one answered. He then knocked on Ana's window, to no response. He and his wife sat on the porch. After about ten minutes, he left the shoes on the porch and left. (11RT 2279-2284) It was not usual for the family to be asleep at that time, but he thought perhaps Trejo had the day off and wanted to sleep in. (11RT 2285-2286) Ruiz did not show up at work. Kenelly tried to call him but got no answer. (11RT 2235-2237) She was aware that Ruiz had changed his cell number, but she did not recall when. (11RT 2253-2254)

A relative, Harold Suarez, had left his car at the shop for Ruiz to perform some work on a blown amplifier. He had an appointment to meet Ruiz at the shop at 9:00 a.m. Ruiz did not make that appointment. This was unusual, because Ruiz was very punctual. (10RT 2204-2209) At 9:15, Suarez called Ruiz's cell phone.

Someone picked up without speaking and hung up. He called ten minutes later and the same thing happened; someone picked up and then hung up. (10RT 2204-2207)

At 11:00 a.m., Maritza called the house and Ruiz's cell phone. There was no answer. This was unusual, because Ruiz always had his cell phone. Trejo was supposed to be off work that day, so Maritza expected someone to pick up the phone. (10RT 2128-2129, 2132-2134)

At 9:00 p.m.,[2] when her uncle got off work, Maritza had him drive her to the house on Gunn. She noticed that everything at the house was closed up, which was unusual. The two cars were in the driveway. She did not have a key. She knocked on the front door, but no one answered. She called both Ruiz's and Trejo's cell phones, but there was no answer. She and her uncle and his two children left and got something to eat. They returned to the house but no one answered the door. She and her cousins played with the two dogs through the fence. The dogs normally would have been inside in the kitchen. (10RT 2135-2137)

After Maritza promised to call her aunt Kenelly to pick her up and spend the night there, her uncle and his family left. Martiza talked to one of Ruiz's friends. (10RT 2137-2138) She called Kenelly and said she was home but her parents were not and no one was answering the door. Between 10:00 and 10:30 p.m., Kenelly picked her up and took her home to Downey. (10RT 2137-2138; 11RT 2235-2237)

Leopoldo Salgado managed a bar called Tequila 2's on Whittier Boulevard in East Los Angeles. He met Morales when Morales lived on Close Avenue, right before the events in this case. At 11:00 p.m., he saw Morales at the bar. It was a busy night and he did not have time to talk. Morales wanted to talk to him. He told Morales to stick around and they could talk later. Morales waited outside.

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[2] There is no evidence as to what Maritza did between 11:00 a.m. and 9:00 p.m.

(10RT 2209-2213, 2216; 12RT 2480-2483) Morales was in his car in the parking lot at 2:00 a.m., when the bar closed. They spoke briefly and Salgado left. (10RT 2214-2215; 12RT 2480-2483)

d. July 13, 2002

(1) Items Missing and Found In Neighbor's Yard

On Saturday, July 13, 2002, Dorris Morris, the neighbor on Close Street, set the alarm for 6:00 a.m. so that she would wake up and go out and rake the leaves. (11RT 2291-2294) She looked out her window and noticed a trash barrel and a stool against her side wall, towards the back of her lot. (11RT 2291-2294; Peo. Exhs. 32, 34.) She got dressed and 15 minutes later went outside. The barrel and the stool were gone. She raked up the leaves and went behind her garage to get a barrel to dump them in. One of her two barrels was missing. (11RT 2295-2296, 2303)

Morris found a small black case in her yard, wedged between her garage and a sheet metal cover over her master sprinkler valves. She asked the young men next door if they had put it there, and they said no. She called the sheriff. (11RT 2296-2297) At 8:00 a.m., Sheriff's Deputy Bruce Goldowski responded and opened up the case. It contained a Compaq laptop computer with cords, business cards with the name Miguel Ruiz on them, a gold bracelet and a gold lighter. (11RT 2298, 2310-2312)

(2) Discovery of the Homicides

Kenelly called Trejo several times that morning, but there was no answer. (11RT 2238-2239) She went to work but called family members to see if they had heard from Trejo. By 10:00 a.m., she decided to leave work and go to the house to see if everything was okay. (11RT 2238-2239) Maritza also called her mother's work, because she knew she would be at work by then. Her mother was not at work. Kenelly took Maritza back to the house on Gunn. They knocked on the doors. There still was no answer. (10RT 2139; 11RT 2240-2241)

Maritza used a trash can and jumped over the fence and went to the kitchen door. It was closed but not locked, and she went inside. Everything was a mess. There were dishes all over the place. It smelled really bad and there was a lot of red "stuff." The dogs were inside. Trejo normally kept a very neat kitchen and house. Jasmine's cereal bowl was out. (10RT 2140-2141, 2176-2178, 2194-2195; 11RT 2240-2241; Peo. Exhs. 5, 8.) Maritza walked into the living room. It was also a mess and also smelled really bad. There was a lot of blood on the floor and carpet and there were a lot of towels that had been used to clean up the blood. The television was moved. The computer was gone from the office and there was a lot of blood in his room. (10RT 2142-2143) The video stand had been moved. (10RT 2150-2154)

Maritza went to the front door, said everything in the house was a mess, and let Kenelly in. Kenelly told Maritza to wait outside. Kenelly went inside. (10RT 2142-2143; 11RT 2241-2242) The fish tank was dirty and a lot of the furniture had been moved. She walked into the office. It was a mess. There were pants on the floor and blood. Ruiz did not usually leave clothes on the floor. (11RT 2243-2244, 2254-2258) He was very clean and liked everything in perfect order. (10RT 2150-2154; Peo. Exh. 12)

Kenelly walked into the master bedroom. The furniture had been moved. She walked into the girls' room. It was a mess. There was honey all over the furniture. She walked into the bathroom. She saw Jasmine's feet. Her body was in the bathtub, weighed down by a statue, and blood was running down her leg. (11RT 2244-2245) The statue was one of two and originally in the first bathroom, which both Jasmine and her parents used. (10RT 2167-2168; Peo. Exh. 1)

Kenelly walked into the other bedroom. Ruiz and Trejo were dead on the floor next to each other. Ana's body was there too. Ruiz was wearing underwear. Trejo had on a tank top and shorts. Ana was in a dressing gown. (11RT 2244-2246; 2248-2249.)

Kenelly screamed and tried to look for a phone. She did not touch the bodies. (11RT 2259) She walked outside and hugged Maritza. (10RT 2142-2143; 11RT 2247) She and Maritza were crying. Ochoa, one of the neighbors, walked outside and asked them if they needed help. They asked him to call 911, and he did so. (10RT 2200-2201)

(3) The Crime Scene

At 10:50 a.m., Deputy Sheriff Todd Kammer responded to the call and arrived at the scene on Gunn. He talked to Kenelly and Maritza and called for additional units. When the backup units arrived, the sheriffs shut down the streets and closed off the neighborhood. (11RT 2313-2315) Once the area was shut down, Kammer entered the house through the front door. There was a large amount of blood in the entryway, on the carpet, and on the walls. The house was a mess. Food items were thrown all over. There was barbeque sauce on one of the walls and a can of tomato paste opened and spread around. A cleanser-like substance was on the bodies and on the floor. It looked like someone had tried to clean up parts of the kitchen. He tried to stay on the clean areas and leapfrogged his way from one side to the next, back to the bedrooms. (11RT 2316-2320, 2330-2331)

Kammer reached the bedroom with the three bodies. Ruiz was lying on his back, covered in blood, Trejo was lying face down with her arm draped over the Ruiz, and an Ana was at the end of the bed curled up in a fetal position, with blood around her neck and face area. A can of Ajax was sitting on the floor. (11RT 2320-2321, 2323-2324) He backtracked to the bathroom, where he could see Jasmine's body in the bathtub. He did not enter the bathroom. He retraced his steps and exited through the front door. (11RT 2320-2321)

Kammer entered the house a second time when the fire department arrived. He escorted the paramedic into the house. The paramedic stayed in the threshold of the rooms. He did not approach the bodies. He was able to make a visual determination that they were deceased. (11RT 2322-2323)

Gil Trujillo, a forensic identification specialist with the Sheriff's Department, responded to the scene. His duties were to inventory evidence items and take fingerprints from Kenelly and Maritza (11RT 2332-2334) He collected a pair of sandals from Kenelly (11RT 2247, 2334-2335), a pair of sandals from Maritza (11RT 2334-2335), and a chair that had been tested for prints. He delivered the chair to Senior Criminalist Robert Keil. (11RT 2334-2335) On July 17, Trujillo took aerial photographs of the area surrounding the crime scene. (11RT 2335-2336; Peo. Exhs. 2, 72.)

Deputy Sheriff John Vanderschaaf was assigned to the crime lab as a latent print examiner and crime scene investigator. He responded to the scene. He put on booties and gloves to avoid contamination of the scene. He walked through the scene and documented any shoe impressions he encountered. (11RT 2341-2342) He took photographs of the shoe impressions, first general photographs of the immediate area and then close-ups for comparison later. (11RT 2343) He found shoe impression evidence in the entryway, kitchen, one of the bathrooms, the backyard, on a wood chair in the girls' bedroom, and on a leather chair in the office (Peo. Exhs. 68, 69). (11RT 2343-2344)

It looked like the chair had been removed from the kitchen and placed in front of some high cupboards in the bedroom, which were opened. (11RT 2346-2347) The chair was dusty and Vanderschaaf could see where the shoe print had displaced the dust. Dean Gialamas took an electrostatic lift of the shoe impression, using fingerprint powder. The chair was photographed and Deputy Trujillo transported it to the lab for more precise photographs. (11RT 2345-2347, 2352-2354, 2366-2368; Peo. Exhs. 66, 67) No marijuana was found in the house. (12RT 2441)

Tammy Klein, senior criminalist with the Sheriff's Department, responded to the scene. (11RT 2371-2372) After she walked through the house with the detectives, Klein called for backup. By 3:15, Gialamas had responded to the scene and called Don Johnson, another senior criminalist, as well as two trainees. Once

they arrived, they split up the scene and started documenting evidence. (11RT 2374-2375)

In the bathroom where Jasmine was found, Klein documented and collected bloodstains on the floor, sink, and in the bathtub. She also collected a piece of cut orange electrical cord on the floor and a shoe impression. (11RT 2375, 2389, 2390-2391, 2398-2402; Peo. Exh. 41) The body was in the bathtub. A ceramic statue was on top of the body, and a lemon-scented detergent had been poured in the basin of the statue. A purple sex toy was positioned between her legs. (11RT 2389, 2410-2416; Peo. Exhs. 56, 57, 58) It was six to eight inches long and shaped like a penis. An empty package was found in the office closet, which might have been the package for the sex toy. (12RT 2458-2460) There was a soap scum ring around the bathtub, which tested positive for blood. This may have indicated the presence of blood and water in the tub. (12RT 2468-2469)

Senior Criminalist Eucen Fu went to the crime scene. He put on gloves entered the bathroom and prepared a sexual assault kit on the body of Jasmine. (12RT 2592-2599, 2609-2610) The kit included vaginal swabs, anal swabs, two swabs of the vaginal cavity, one swab of the anal cavity, and an external swab of the general area. The swabs were placed in tubes. (12RT 2600-2602) On July 14 at 1:00 a.m., he arrived back at the lab. At 1:50 a.m., he transported the kit back to the lab and dried the swabs by opening them up into the air. (12RT 2602-2603; 13RT 2618-2621) At 7:00 a.m., he repackaged the swabs and placed them in the freezer. (12RT 2602-2603; 13RT 2618-2621) On July 15, at 5:30 a.m., he resumed work on the kit. At 5:30 p.m., he sealed the kit and submitted it to evidence control. (12RT 2604; 13RT 2622-2624)

In the entryway, there were shoe prints, smeared blood on the walls and door, and blood spatter on the walls and the door. (11RT 2376-2380, 2412-2416; Peo. Exh. 59) The evidence was first photographed and measured, and then collected with a cotton swab. (11RT 2379) There were towels on the floor on the carpet. (11RT 2380; 2398-2402; Peo. Exh. 42) There was liquid in a bucket that

looked like bloody water and chunks of cheese. (11RT 2402-2407; Peo. Exh. 42) The mop handle was seized and transported to the lab for processing. (12RT 2546-2547)

A new pair of shoes hung on the door handle. (11RT 2412-2416) It appeared that someone had tried to clean up the entryway and the kitchen floor. The blood smears were diluted as though someone had tried to wipe through the blood. (12RT 2425)

From the entryway to the hallway, there were more towels and little throw rugs. A piece of carpeting under the towels was saturated with blood. There were scratch or drag marks and blood leading from the living room into the hallway and into the bedroom. (11RT 2386-2387, 2402-2407; Peo. Exh. 45)

In the living room, a black sandal under the end of the sofa had bloodstains. There was smeared blood on the sofa. It looked like handprints and blood spatter. (11RT 2388, 2402-2407; Peo. Exhs. 43, 44) There was a significant amount of blood on the floor and carpeting. (11RT 2402-2407; Peo. Exh. 44)

In the dining room, there were long drapes in front of a sliding glass door. At the top, where the drapes closed, there were bloodstains. (12RT 2468)

In the bedroom where the bodies were found, there was a bottle on the bodies of Ruiz and Trejo, and the bodies appeared to be positioned. (Peo. Exhs. 50, 51) Trejo was wearing one earring. ((11RT 2388-2389, 2390, 2407-2412; 12RT 2426-2427; Peo. Exh. 50, 51, 54, 55) There was blood spattered on the upper surface of Ruiz's body and blue powder had been sprinkled over both bodies. A white towel was laid across the Ruiz's chest and tape across his mouth. He had a neck injury. There was another piece of cut orange electrical cord beneath Ana's body. A blanket on the bed had bloodstains. A sample was taken of the bloodstained area of the carpet and on the seat back of the chair next to the older female. (11RT 2388-2389, 2390, 2407-2412; Peo. Exh. 50, 51, 54, 55)

In the girls' bedroom, identification personnel seized pillows from the bed, a comforter, a pair of panties, and a piece of black electrical tape. (11RT 2391-

2392, 2398-2402; Peo. Exh. 39) A wooden chair was photographed. (12RT 2421-2424; Peo. Exh. 66) A shoe impression was taken from the chair. (12RT 2456-2458) No blood was found in this bedroom. (12RT 2448-2452)

In the master bedroom, a third piece of cut electrical cord (Peo. Exh. 49) was found on the bed. (11RT 2390, 2392-2394; 12RT 2421-2424; Peo. Exh. 65) Also collected and sampled were towels and bedding, a cutting of bloodstained carpet next to the bed, smeared blood on the wall, bloodstains on the nightstand, a bloodstain on the door frame, bloodstains on the other side of the door frame, smeared blood on the dresser, bloodstained carpet in the hallway between the master bedroom and the girls' room, a telephone cord tied around the leg of the bed, a telephone base unit with blood on it, a telephone handset with blood on it, and a light switch with blood on it. (11RT 2392-2395.) Food sauce was spattered on the walls and other things were poured on the bed linens. (11RT 2398-2402; Peo. Exh. 36) The bed linens were not tested at the scene for blood. (12RT 2448-2452)

In the kitchen, a screen had been cut along the window. (12RT 2467, 2469-2470) There were bloody shoe impressions in front of the sink. The impressions were photographed with a scale and then sprayed with a chemical enhancement called Leucocrystal Violet, which turns the stains dark purple and illuminates portions not visible to the naked eye. (11RT 2395-2397, 2412-2416; 12RT 2421-2424; Peo. Exh. 61, 62, 63) The double sink tested positive for blood, but the test was not conclusive. (11RT 2396-2397, 2398-2402; Peo. Exh. 37)

In the office, there was a window without a screen and a screen found sitting against the house. (12RT 2467) There were multiple blood stains. (11RT 2398-2402; 12RT 2421-2424; Peo. Exh. 40, 64) A chair had a shoe impression on it. (12RT 2421-2424; Peo. Exh. 68) A bloodstained gold-colored hoop earring was found under the desk. (12RT 2426-2427; Peo. Exh. 35) In the entry into the bathroom next to the office, there were bloody shoe impressions and blood that had pooled and flowed down the wall. (11RT 2412-2415; Peo. Exh. 60) In the

bathroom, there was a hamper containing a shirt and shorts with bloodstains on them. (11RT 2402-2407; 12RT 2453-2456; Peo. Exhs. 46-49; Def. Exh. P) Sheriff's Deputies Barry Hall and Rodriguez were also at the scene interviewing neighbors. While Hall was talking with Mario Hernandez, one of the neighbors, Morales Alfonso Morales walked up. He said he knew Ruiz very well, had been inside his home a number of times, and considered him to be his mentor about computers. Morales was not able to provide any information. (12RT 2475-2480)

Sergeant Timothy Miley was trying to find out who had given Ruiz one of his dogs and who drove a green Mustang. (12RT 2486-2487) Hall and Rodriguez were talking to someone at Morales's house around the corner at 13838 Close Street. (12RT 2487-2488) Miley noticed the green Mustang, checked the license plate, and learned that it came back as registered to Morales. He asked if Morales was there, and Morales came out of the house. (12RT 2487-2488) Miley had seen the prints on the chair in the girls' bedroom and had taken digital photographs of them. (12RT 2488) He noticed similar prints in the dirt by Morales's front door, in a planter area around a gate. He asked Morales if he could look at the bottom of his boots, and Morales agreed. (12RT 2489, 2493-2494)

(4) Investigation

(a) Interview of Neighbor

On July 14, 2002, Sergeant Miley interviewed neighbor Dorris Morris, who told him about the green trash can and stool that disappeared from her backyard Saturday morning. She also told him about seeing the stool in her yard on Thursday morning, which she had put in her garage. (12RT 2494-2496) Miley recovered the step stool, had it photographed, and transported it to the lab. (12RT 2497-2498)

(b) Interview of Morales In Front of His House and Seizure of His Boots

Sheriff's Deputy Elizabeth Smith was with Sergeant Miley when he talked to Morales in Morales's front yard. (14RT 3047-3048) Morales said that Ruiz

recently had purchased a shipment of stolen Japanese beer and was selling it. He also said Ruiz had software that enabled him to bypass Direct TV. People brought disks to his house and Ruiz programmed the disks so they could access Direct TV. (14RET 3049-3050)

Smith noticed that the print on the wooden chair in the house had left a diamond pattern. She asked Morales to see the bottom of his shoes. The pattern on the bottom of his boots seemed consistent with the shoe print on the chair. (14RT 3050-3051)

Smith and Miley asked Morales to accompany them to the Whittier Substation. Morales had said that he knew a lot about Mike Ruiz. Miley showed Morales the digital photographs of the boot prints and said they looked a lot like the shoes he was wearing, Doc Marten, size 9. Morales disagreed but gave them to Miley so they could eliminate him from the crime scene. (12RT 2490; Peo. Exh. 70)

Sheriff's criminalist Don Johnson, Scientific Services Bureau, biology section, performed some preliminary testing of the boots and concluded they had the same wear pattern as the pictures. (12RT 2491; RT15 2857-2859) The boots tested negative for blood. (12RT 2492-2493) The boots were seized as evidence and given to Larry Mitchell. (12RT 2491) Mitchell placed the boots in a paper evidence baggie, and transported them back to the crime lab and delivered them to Robert Keil. (12RT 2470-2474; Peo. Exh. 70, 71)

(c) First Interview of Morales at the Whittier Sheriff's Substation

At 8:34 p.m., Morales was at the station with Smith. Smith engaged Morales in general conversation. (1ACT 149; 14RT 3052) At some point, Sheriff's Detectives Stephen Davis and Joseph Sheehy joined them. Morales was not read his *Miranda* rights. Davis said, "I want you to understand that you're free to leave, you know. We can stop this interview any time you want." (Peo. Exh.

147, transcription of tape recording (Peo. Exh. 146) of 7-14-02, at ACT 149; 14RT 3053-3055)

Morales related the following during this interview. The last time he was at the Ruiz house was Tuesday or Wednesday, July 9 or 10, between 12:00 and 2:00 p.m. (1ACT 151-152) They watched TV in the living room and Morales also was in the computer room. He may have used the office restroom. (1ACT 153) He was not allowed in the daughter's room. (1ACT 154) Sometimes he helped move Ana from one place to another. (1ACT 155) He also went outside and used Ruiz's weights from time to time. (1ACT 156) Morales left the Ruiz house at 2:00 p.m. and thought that he went home. (1ACT 157) He stayed home the rest of the night and went to sleep at 4:00 a.m. (1ACT 158)

Morales got up Thursday morning, July 11. He stopped by friend Gabriel's house, to give him an old computer. At 3:00 p.m., he went to Leo's Bar. (1ACT 159-162) He stayed there until the bar closed at 2:00 a.m. Friday morning. He did not have a drink. (1ACT 162)

Friday morning, July 12, Morales went home, watched TV, and went to bed between 3:00 and 4:00 a.m. (1ACT 163-165) He got up about 12:00 noon. (1ACT 165) No one was home when he got up. (1ACT 166) He left the house around 1:00 p.m., stopped by Gabriel's, and arrived at Leo's Bar again at 2:00 p.m. (1ACT 166-168) He stayed at the bar again until it closed at 2:00 a.m. and then went home. (1ACT 167-168, 173)

Saturday morning, July 13, Morales's got up at 9:00 a.m. (1ACT 168) His stepfather Jerry Rodriguez was home. The mailman stopped by with a letter for Morales's mother and mentioned that some people died around the corner. (1ACT 169)

When asked why his shoes would match up with the crime scene, Morales said he had no idea. (1ACT 170) The deputies also asked him about bruising to his knuckles, a cut on his thumb, and a smaller cut between the web of his finger

and his thumb. He said the cuts were from working with electronics and that the bruises were just the way they always were. (1ACT 171-172)

Detective Smith said, "I think that maybe if you weren't there, you absolutely know what happened inside that house. And either way, I think you need to tell us what happened, sweetie. I mean, we have been working this case almost non-stop for two days. . . And I don't know if you heard about it, if somebody told you about it, but my sense with you – because we spent a lot of time together today... Is that you know. And you really need to tell us so that – so that those spirits can go up and rest. Okay? Can you tell us what happened inside that house?" (1ACT 174) Morales responded, "I have no idea." (1ACT 174)

Detective Smith continued, "I think you know, sweetheart. I kn -- know you now... What I'm trying to tell you is that if you could explain some things. Things got out of hand, things got a little uncontrollable, you didn't mean for things to happen. This is the time we need to know. We need to know what happened because there's always an explanation for these things. There's always two sides to a story. And you need to tell me what happened inside that house. Or why you went into that house after all that happened. You need to tell me. We know you did. You know you did. And you got to tell us. I mean, you really – you really have to tell us. You really do. I know you don't want to, but you have to tell us, sweetheart. Tell us what happened." (1ACT 175) Morales answered, "I honestly don't know what happened." (1ACT 175)

Despite continued questioning, Morales insisted that he never entered the house on Gunn and agreed to allow the detectives search his house on Close. (1ACT 176-182) Detective Smith asked if someone else was involved and Morales did not want to tell on that person, and Morales said no. (1ACT 182) Detective Davis filled out and read the Consent to Search Form to Morales, and at 9:07 p.m., Morales signed it. (1ACT 183-184)

(d) Second Interview of Morales at the Norwalk Sheriff's Station

Two deputies transported Morales to the Norwalk Sheriff's Station. Detective Smith met them there. She was told by the deputies that Morales told them that he was in the house when Ruiz and his family were murdered, and that he wanted to talk to her again. (14RT 3056-3057)

At 9:50 p.m., Smith began the second interview. (14RT 3063-3065; Exh. 149, transcription of tape recording (Peo. Exh. 148) of 7-14-02, at ACT 80) Deputy Tim Mitry also was present part of the time. Smith read Morales his *Miranda* rights. (1ACT 80) Morales said he understood his rights and wanted to telephone his mother before he talked. (1ACT 80-81) Smith said okay and continued to question Morales. (1ACT 81)[3]

Morales related the following during this interview. At 8:00, Morales went to the Ruiz house and knocked on the office window. There were two men in the office with Ruiz. They spoke in a different Spanish dialect and they seemed angry at him. (1ACT 81-82) The men accused Ruiz of "messing around" with a friend's wife. They told Morales to come in. (1ACT 82-83) Morales had a family friend, Mario, who said Ruiz was having an affair with a woman whose husband was in the Puerto Rican Mafia. (1ACT 90, 97) Ruiz mentioned that he was going to break off the relationship with the girlfriend, because his wife had found out. (1ACT 123)

At this point, Morales asked again, "Can I talk to my mom now, please? I just need to talk to her." (1ACT 84) Smith asked, "Uhm, you want me to call her and ask her to come down?" Morales responded, "If that's what you want. [*Crying*] I guess – it's okay." Deputy Mitry commented, "She's trying to comfort

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[3]The second and third interviews are presented chronologically whenever possible. Certain information was repeated or filled in later in the interviews, but is presented in the order it was obtained rather than integrated into the narrative of what occurred.

you." Smith asked Mitry to call Morales's mother, and Smith assured Morales that they would get her down there. (1ACT 84-85) Shortly thereafter, Mitry said he called but she could not come over because she was talking to detectives. (1ACT 87)

Morales continued talking. He said the men tied him up with package tape and put a sock in his mouth. He never saw them before and did not know where to find them. He did not recall what kind of car they drove. (1ACT 85-87) The men said they would kill him and his father, just like they killed the Ruiz family. (1ACT 87) They did not hit him. The cuts on his hands were from the electronics. (1ACT 88)

Smith said they would keep Morales's family safe. Morales continued to cry. He was shaking and frightened and extremely nervous. Smith explained that the family could go into witness protection. (1ACT 90-93) Morales said, "I would never hurt Mike [Ruiz]. He's my – he was my friend." (1ACT 94)

Morales insisted the incident occurred Thursday [July 11] and that they left in the morning. (1ACT 94) Ruiz, Trejo and Ana were killed before Jasmine was attacked. (1ACT 96-97) The men took the bodies into the back bedroom. They instructed him to mess up the house. (1ACT 95) At another point, he said it occurred Wednesday night. (1ACT 100)

The men did not steal anything from the house. They told Morales to take "everything for the computers with him. (1ACT 98-99) He put them in the garage and the men locked it up. (1ACT 99) Smith reassured Morales, "You're gonna be okay, sweetie." (1ACT 99)

Morales continued. Each man had a gun. He knocked on the window and they told him to come in. (1ACT 101) They tied him up and taped his hands with clear tape. (1ACT 102-103) He was in the living room the whole time. (1ACT 103) When the attack started, Ruiz was in his office and Trejo was in the kitchen making coffee. Ana was in her room. Jasmine was in her room. "I made sure she wasn't around – in sight." (1ACT 100)

When Ruiz entered the living room he was bleeding from his throat. He was on the floor and said something Morales did not understand. (1ACT 100-105) The men killed Trejo, but Morales did not hear a struggle. (1ACT 105) Next, they killed Ana. He did not know how they did it. (1ACT 106) He heard gargling, like bathtub water, coming from one of the victims. (1ACT 106-107)

When Smith asked about Jasmine, Morales started crying again. (1ACT 106) The men went into the other room. Morales was not to sure which room. When asked if "they did something bad to the little girl," Morales said "They had to ... Because I heard – They were nowhere in sight. What else could they been [sic]doing? It's like – nothing else they could be doing." (1ACT 107, 124) He could hear "gargling." (1ACT 107)

The men stayed in the house until morning. They told Morales to throw stuff around, like barbeque sauce, and to take "that stuff." (1ACT 108) They went through each room and instructed Morales to take monitors, a laptop, a CD player, and another computer. (1ACT 109-111)

Morales asked what would happen if the police could not find the two men. He started crying again. (1ACT 111) Smith assured him that his family would be kept safe. (1ACT 112-113) Morales said the men were wearing black suits. They had medium complexions. One wore a ponytail to his shoulders and had a skinny face. He was the same height as Ruiz, 6'1". (1ACT 113-114) The other man was about the same height or taller. (1ACT 114)

The men followed Morales to his house and helped him drag the stolen items in a green trash can. (1ACT 117) By this time it was getting to be daylight Friday morning [July 12]. (1ACT 118-119) The men did not force him to participate in the murders. They just made him throw stuff around. (1ACT 119)

Morales asked "You know what time my mom will be here?" Smith said, "Should be pretty soon." (1ACT 120) Morales said, "I didn't even feel like eating since then." (1ACT 122)

(e) Third Interview of Morales at the Norwalk Sheriff's Station

At 12:11 a.m., the third interview commenced. Detectives Stephen Davis, Joseph Sheehy and Elizabeth Smith were present with Morales. (14RT 3073-3076; Exh. 153, transcription of tape recording (Peo. Exh. 154) of 7-14-02, at ACT 126) Detective Davis read Morales his *Miranda* rights. (1ACT 126) Morales said he understood his rights. (1ACT 126-127) Davis questioned Morales. (1ACT 126-170)

Morales said that the incident began Thursday night at approximately 8:00 p.m. (1ACT 127-128) He knocked on Ruiz's office window, left of the door. (1ACT 128) Ruiz was with two men. They were standing and talking to him in his office. They all told Morales to come in. (1ACT 129) He entered through the front door. (1ACT 134)

One of the men was in his 30's, with black hair, a long ponytail and a skinny face with a long nose. He was wearing a black suit and gloves. He spoke the same dialect as Ruiz, so he probably was Puerto Rican. (1ACT 130-131) The second man was dressed the same way. His hair was slicked back and his face was a little chubbier. They both had guns. (1ACT 132-133) They did not pull out the guns until Morales came inside. (1ACT 134) They put his hands behind his back and bound them with electrical tape. He was in living room. (1ACT 135-136)

Ruiz was in his office. Trejo was in the kitchen. Ana and Jasmine were in their rooms. The men were speaking in Spanish, but Morales did not fully understand what they were saying. Something was said "about the guy's wife." (1ACT 136-137) Ruiz fell on the floor and there was blood everywhere. (1ACT 137) Trejo was crawling over. It was "too late for her too." (1ACT 138) He did not see the struggle. (1ACT 139) He was sitting on the couch, facing the TV. (1ACT 139-140) Trejo asked during the struggle, "Why are you doing this to us?" (1ACT 140)

Morales was scared and had his eyes closed. He did not know what the men did to Trejo. There was blood everywhere. When she was dead, there was blood all over her body. (1ACT 141-142) Then they went after Ana. They grabbed her and took her into the other room. He did not see what happened. (1ACT 142-143) They were in the other part of the house for awhile, perhaps an hour. (1ACT 144, 147) He could not hear anything except for "gargling" from Ruiz and Trejo. (1ACT 145-146) The men came back out. They said if Morales ever talked, they would kill him. (1ACT 147)

The men told Morales to ransack the house. He got food from the kitchen and threw it around. (1ACT 149) They untied him, got the large garbage can from outside, and brought it to the side of the house. He took CDs, computers, computer components, and the like. The men pulled it over the wall, and followed him to his house. They were wearing gloves. (1ACT 151-154)

It was getting towards daylight when Morales got home. (1ACT 156) The men told him to put the items in the carport. He put everything in the carport and locked it with his stepfather's old lock. (1ACT 157) The men threatened again to kill him. He was afraid to call the police. (1ACT 158)

Detective Davis confronted Morales and said, "You know you're lying and I know you're lying. The only way you're gonna feel better is if you get this off of your chest. I mean, you're upset about this, man. You know and you need to tell us what happened and be truthful about it. This – this didn't happen that way. Nobody forced you to do anything. (1ACT 159)

Morales insisted that "That's it. It happened. That's why I'm telling you guys." (1ACT 159) Davis confronted him again, "Alfonso, that's not true. That's not true. Look at me. It's not true. You know it's not true. Now, the best thing that you can do is to tell us the truth about what happened, get this off of your chest and get this off of your conscious. It's time to own up. Do you feel badly about what happened?" Morales responded, "Yes, I do." (1ACT 160) He denied that the watches and Direct TV cards in his room were stolen. (1ACT 161-162)

Davis had seen a knife on the wall. He said, "Is that the knife you used to cut their throats with?" (1ACT 163) Morales said the knife was not operable. Davis asked where the knife he used was located. Morales answered that he did not know what he was talking about. (1ACT 163) Davis commented, "Well, I think you don't know because they're a figment of your imagination. And the only reason you're making up this story is because you got caught. You don't know what else to say. You can't – you don't – you don't have enough sense to admit that you did something wrong." (1ACT 165)

Davis asked, "Why did you say to – you know – you know the guy that lives across the street from Mike [Ruiz], right? ... Leo, Yeah. Why'd you tell him that you wondered what it would be like to kill somebody? Why did you say that to him?" Morales said something unintelligible. (1ACT 166)[4]

Morales denied he had a feud going on with Ruiz. He owed Ruiz $100 and had gone over to give him $50. (1ACT 167) He had asked Maritza out once, but they never went out. He had knocked on her window, and Ruiz told him not to ask her out. He was not watching Jasmine through the window and he did not like young girls. (1ACT 167-169) Davis said, "Alright. I want you to think about it for awhile and if you change your mind and you want to tell me the truth, let me know, alright? Okay." Morales answered, "That is the truth." (1ACT 169) Davis concluded the interview. (1ACT 170)

(f) Search of Morales' House and Property

While Detective Smith was interviewing Morales, sheriff's deputies searched Morales's house and property at 13838 Close Street. Present were Sergeant Miley, Sheehy, Davis, Longshore, Rodriguez and Hall. Also present were Tammy Klein from the identification section and two trainees. (13RT 2768, 2792-2793; 14RT 3058-3061) Miley noticed a padlocked shed in the backyard.

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[4]The parties later stipulated that when Leo was interviewed, he said he never heard or claimed to hear a statement by Morales that he "wondered what it would be like to kill someone." (14RT 3076)

(Peo. Exh. 105) He asked Jerry Rodriguez, Morales's stepfather, if he knew the location of the key. Rodriguez did not know the shed had a lock. A deputy cut off the lock. Miley opened the door, found a large trash bin with wheels (Peo. Exh. 108), opened the lid, and found 26 items including computer equipment, DVD's and cords, consistent with what was taken from the Gunn address. (13RT 2769, 2776-2777,2794-2796; Peo. Exh. 32) No key was found in Morales's possession that unlocked the shed. (13RT 2813)

Deputies loaded the trash bin into a criminalist's van. (13RT 2770-2771, 2796-2797) It took several people to lift the bin and put it into the van, which transported the items to the laboratory. (13RT 2770-2771) At the lab, each item was documented. Some items were sent to serology to test for blood. Some were retained by the identification section to test for prints. (13RT 2771-2773)

Deputies searched Morales's bedroom. They recovered several watches and a computer tower. (13RT 2797-2798) Miley found a jacket hanging up and a small model car. Inside the right front pocket of the jacket, he found a bracelet, a gold ring, and a silver chain with a gold ring. In the left pocket he found a "Lifestyles" condom, a little girl's wristwatch, and a black cigarette lighter. (13RT 2798-2800) Two cell phones were recovered, but Miley did not know if they were connected to Miguel Ruiz. (13RT 2807) All items were submitted to Sheehy and Davis to analyze. (13RT 2805)

Miley also saw a woodpile in the back yard. It was not searched at that time. Later, some items were recovered from under the woodpile. (13RT 2801-2802, 2811-2812)

(5) Forensic Evidence

(a) Autopsy Results

i. Miguel Ruiz

Juan Carrillo, M.D. was assigned by the Los Angeles County Coroner to conduct an autopsy and determine the cause of death of Miguel Ruiz. (13RT 2625-2626; Peo. Exh. 28) Carrillo performed the autopsy. Ruiz was 6'2" and

weighed 205 pounds. (13RT 2652) He suffered multiple sharp force injuries. The cause of death was a slicing wound of the neck. There were two separate slices of the neck. One wound cut through the skin, the neck muscles, cartilage of the epiglottis, exposing the airway, and the external jugular veins on both the right and left side. (13RT 2627-2631) It only took a one inch cut to get to the airway. (13RT 2638-2639; Peo. Exh. 88)

This type of cut to the neck would cause a steady flow of blood. The wound is fatal, although not immediately fatal. The flood slowly drains from the body, and a person with this type of wound would be able stay upright for a few minutes. (13RT 2627-2631)

There also were several small stab wounds to the forehead, back of the neck, and left back, all of which were nonfatal. (13RT 2627) The cutting wound to the left forehead was superficial. It penetrated the scalp and nicked the skull. (13RT 2627, 2632) Carrillo could not tell what type of knife caused the wound. (13RT 2642-2646)

The other wound to the neck only hit muscle. The tips of this wound had a sharp cut, indicating the knife used had two sharp edges or that it came in at such an angle that it cut both ends. (13RT 2627, 2632) The wound was consistent with the victim having been attacked from behind. (13RT 2635-2636) There were no defensive wounds. (13RT 2635-2636)

The third wound was to the left mid-back and ran along the back muscle. It probably was produced with a single-edged knife. The two wounds to the back are consistent with two different types of knives. (13RT 2627, 2632, 2633-2635; Peo. Exh. 86)

There was a significant wound to the right arm that was orange and dry. The wound was consistent with a cord having been wrapped around the arm and the body dragged. It was caused after death. (13RT 2633, 2640-2641)

A toxicology test was performed. The subject tested positive for alcohol and negative for drugs. Marijuana is not in the protocol and not tested. (13RT 2649-2650)

ii. Ana Martinez

Jeffrey Gutstadt, M.D. was a deputy medical examiner with the Coroner. (13RT 2653-2654) He performed the autopsy on Ana Martinez. She was 5'4" and weighed 124 pounds. Blood and fingerprints were taken. (13RT 2654-2655; Peo. Exh. 29)

Ana Martinez sustained two major, sharp-force injuries to the neck, both of which were fatal. (13RT 2655-2656) The cause of death was sharp-force trauma from these wounds. (13RT 2669-2670) One of the wounds was a Y-shaped gaping wound to the neck, resulting in hemorrhaging of the jugular veins. (13RT 2656-2659) The wound went in a general direction of downward and backward. It was made by a blade with at least one sharp edge. It cut through structures all the way to strike the C5 vertebra, one of the bones of the spine in the neck. There is a defect near the bottom of this injury, consistent with damage by a sharp-force instrument configured with a knife. (13RT 2657-2659) The second wound also was a stab wound to the left clavicular area, causing injury to the subclavian artery. (13RT 2656, 2660-2661, 2662-2663) That blood ended up in the chest. (13RT 2662-2663)

The Y-shape of the wounds indicates that there was some movement of the weapon while it was in the body. There could have been movement of the body as well. The neck wounds were fatal because they involved the jugular veins. Death would not occur immediately because it would take time to bleed out. (13RT 2660-2661) There were 300 milliliters of blood in the right chest, 400 milliliters of blood in the stomach, and blood in the lungs. The average person has 5,000 milliliters of blood. (13RT 2662) The wounds were consistent with an attacker holding two different weapons. The perpetrator may have been behind the decedent, but there are other possibilities. (13RT 2665, 2672-2674) Gutstadt

could not determine whether the instrument was a single or double edged sharp instrument. (13RT 2679)

The decedent also sustained two small sharp-force wounds to the left neck near the shoulder, a scrape and tearing of the skin of the scalp at the top of the skull, and minor abrasions to the knees. These wounds were nonfatal. (13RT 2655-2656, 2666-2667) They occurred around the time of death or perimortem. All of the other wounds were prior to death. (13RT 2666-2668) There were no defensive wounds. (13RT 2669-2670)

iii. Maritza Trejo

Raffi Djabourian, M.D. was a deputy medical examiner with the Coroner. (13RT 2682-2683) He performed the autopsy on Maritza Trejo. (13RT 2684; Peo. Exh. 93) The cause of death was multiple stab and incised wounds, both considered sharp force injuries. A stab wound goes deeper into the body. An incised, or cut, wound is longer rather than deeper. (13RT 2684)

Trejo suffered at least five fatal wounds. The first wound was a stab wound towards the bottom of the neck. The second wound was at the left upper chest in the area of the collarbone, just below the first wound. (13RT 2686-2689; Peo. Exh. 89, 90) The third wound was a stab wound in an area of the left back just adjacent to the left armpit. It involved the left lung and left chest cavity. (13RT 2690-2693; Peo. Exh. 94, 95) This was the deepest wound, at 5-1/2 inches. (13RT 2705-2706) The fifth and final fatal wound was towards the front of the neck, just above the first stab wound. (13RT 2690-2693; Peo. Exh. 89) There also were two stab wounds adjacent to each other on the top of the head, consistent with use of a knife. (13RT 2690-2693; Peo. Exh. 91)

In addition, Trejo suffered a laceration towards the forehead and top of the head, typical of impact with a sharp object. (13RT 2693-2696; Peo. Exh. 92) The next wound was an incised wound to the right little finger. Dr. Djabourian considered this to be a defensive wound. He found at least eight and possibly nine defensive wounds on the hands, all incised wounds. (13RT 2693-2696; Peo. Exh.

96) All but one were on the right hand, between two and four inches deep. There was a deep stab wound to the left ear. (13RT 2696-2697, 2707-2709; Peo. Exh. 152) The wounds to the Trejo's back were consistent with fleeing from an attacker. The clusters of wounds on the back were consistent with movement. (13RT 2699; Peo. Exh. 95)

Dr. Djabourian was of the opinion that some of the wounds suggested use of a single edge weapon and some of a double edged weapon. The pattern of injuries was scattered on various parts of the body, indicating a fair amount of movement and possible struggle. (13RT 2698) In cases involving multiple wounds, the coroner generally does not hazard an opinion as to how many knives were involved, and he was not asked in this case to compare any of the wounds to any type of instrument. (13RT 2702-2704) He could not ascertain the number of weapons used, the number of assailants, the order in which the wounds were received, or whether more than one instrument was used. (13RT 2705-2706, 2710) The wounds could have resulted from several different categories of knives. (13RT 2707-2709)

The decedent also suffered a large incised wound to the left cheek, with hemorrhaging. Hemorrhaging suggested that the wounds were premortem. Some abrasions to the knees and forehead may have been postmortem. (13RT 2700) Of the 45 sharp force injuries, 31 were stab wounds and 14 were incised wounds. (13RT 2701)

iv. Jasmine Ruiz

James Ribe, M.D., was a deputy medical examiner with the Coroner. (13RT 2712-2713) He performed the autopsy on Jasmine Ruiz (13RT 2713-2715; Peo. Exh. 101) She was eight years old and in the Tanner II stage of sexual development, where there is the beginning of nipple enlargement and pubic hair. (13RT 2716) The cause of death was asphyxia, with the possible mechanisms of body compression and freshwater drowning. (13RT 2736)

Jasmine had no rigor mortis. She had pronounced liver mortis over her back and some early signs of decomposition. There was dried foam around the nose and mouth and white foam coming out of the nose. (13RT 2716-2717; Peo. Exh. 99) The foam from the nose suggests drowning. In addition, there was watery fluid around the outside of the lungs and in the stomach. This is not seen in strangulations or suffocations. Based on these factors, and the finding of asphyxial death, there is a strong suggestion that drowning may have been part of the mechanism of death. (13RT 2734-2735)

There were petechiae over the front of the decedent's neck, face, eyelids, neck and chin. (13RT 2716-2717; Peo. Exh. 99) Petechia are strongly associated with asphyxia. When they occur on the face or the yes, they usually are caused by either body or neck compression. Body compression was strongly suspected because the petechiae ran most of the way down the neck. The compression would have occurred somewhere around the upper chest. It is possible to have petechiae and still be alive after the body compression has been applied. (13RT 2718-2719)

Facial petechiae is an unusual finding in drowning. (13RT 2737-2738) Although it is highly probable that body compression and drowning both contributed to the decedent's death, there is no absolute proof that she drowned. (13RT 2739-2740) There also were no grab marks, signs of restraint, or ligature marks on the body. The only signs of struggle were a finger nail mark on the ankle and a scrape on the left hip. (13RT 2742-2744) There were petechiae, body compression, and a forehead injury. (15RT 3241-3247)

Jasmine suffered an abrasion on the outside of her left buttock, a scratch on the back of the upper thigh and small abrasion on one of her feet. There were severe injuries to the external genitalia and anal area. Her fingers and toes were wrinkled because they had been immersed in water for a long period of time, probably several hours. This is called "washerwoman change." (13RT 2720-2722; Peo. Exh. 102)

There was a two-inch long laceration on the back wall of the vagina and vaginal entrance, which extended between the skin between the vagina and the anal area, and two inches into the back wall. (13RT 2722-2727; Peo. Exh. 103) There was soft tissue hemorrhage caused by blunt force. The remnants of the anterior hymen were completely dark red, caused by blunt force resulting in bruising, hemorrhage or bleeding. (13RT 2723-2377; Peo. Exh. 103) The damage to it was caused by forcible insertion of some kind of blunt object into the vagina. (13RT 2729-2730)

The two-inch tear to Jasmine's vagina was 45 degrees front to back, going backwards and inwards. It went through the posterior wall of the virginal introitus, completely through the posterior wall of the vagina, into the rectovaginal soft tissue between the vagina and the rectum, and into the muscle ring or sphincter, which was torn. It took a great deal of force to cause that injury, the maximum strength of an adult person. (13RT 2729-2730)

There were periurethral tears, lacerations, on either side of Jasmine's urethral opening. There were similar tears on the lateral borders of the labia minora, caused by stretching of the skin by blunt force. (13RT 2728-2729) There was bruising to the sides of the anus and three tears in the perineum and anal genital area. (13RT 2730-2732)

When Jasmine was found, blood was draining from both areas of the decedent's body. There were extensive soft tissue hemorrhages adjacent to the urethra, behind the vagina and behind the rectum, caused by bruising of the deep tissues inside the body around the internal organs. This damage could have been caused by forcible insertion of a blunt object. (13RT 2733.) The injuries would have caused severe pain and based on the bleeding and bruising were premortem. (13RT 2734) She may or may not have been conscious. (13RT 2745)

(b) Boot Prints

Robert D. Keil, senior criminalist with the Sheriff's Department Scientific Services Bureau, compared the photograph of the bottom of Morales's boots with

a photograph of the chair found in the girls' bedroom, which had partial shoe impressions. (12RT 2499-2504, 2505-2506; Peo. Exh. 66, 67 [chair]; recall 12RT 2456-2458) Using a life-sized photograph of the chair (12RT 2510-2513), Keil identified a total of eight separate and distinct impressions. He identified two of those impressions from Morales's right boot and two other impressions from Morales's left boot. He was of the opinion that the boot impressions excluded all other types of shoes. (12RT 2513-2515; Identifier RDK1) He believed the prints on the chair were relatively recent, because a print would not survive repeated sittings on a chair. (12RT 2535-2536)

Keil also evaluated shoe prints in the entryway, A, B and C. (12RT 2518-2519; Peo Exh. 59) Impressions A and B corresponded to a pair of shoes belonging to Kenelly Zeledon, but there were not sufficient individual marks to exclude all other shoes. (12RT 2521-2522, 2541-2542; Identifier RDK-2) He eliminated the impression from Kenelly's sandal as to any other prints found in the residence. (12RT 1516-2527) Impression C was similar to the outsole on the Morales's boots but lacked sufficient detail because of wetness or dilution. Keil was not certain whether impression C came from Morales's boots. (12RT 2521-2522) The impressions were on linoleum; he did not look at any prints on the carpet. (12RT 2534)

Keil used the same identification procedure on an assemblage or multiple partial prints, S, G, T and U. (12RT 2523-2526; Peo. Exh. 60) Impression S is similar to Morales's right boot, RDK1, but it also could have been made from any other right shoe of similar size, wear and outsold pattern. The same was true of impressions G, T and U. (12RT 2523-2526, 2537-2540) Impressions O and P there were some similarities, but he did not note the differences. (12RT 2537-2540)

Exhibit 61 was a photo of possible shoe impressions in the kitchen, labeled Q and R. Once again, there were some elements in the class character and outsole in Q but not sharp enough to make any useful comparison to the overlays he

prepared. (12RT 2526-2527; Peo. Ex. 61.) The impressions in Exhibits 62 and 63 also were similar to RDK-1, but there was insufficient detail to make a comparison. The impression in Exhibit 63 had some similarities to and some differences from RDK1. (12RT 2528-2530)

Keil examined photographs of shoe impressions from the outside backyard area, in the soil, labeled J, K and L. These impressions were not similar to any of the shoes he received for examination. He had no pair of shoes that could have produced these impressions. (12RT 2531, 2537-2540; 13RT 2845-2847) There also was a mark on one of the bodies that was not similar to J, K or L. In his opinion, the mark was not consistent with a shoe impression. (12RT 2532-2533) Keil looked at impression D in the bathroom and found no discernible shoe print to compare. He could not locate a shoe print as to impression F behind the couch. (12RT 2543-2544)

(c) Fingerprints

On July 12, Darnell Carter, Sheriff's Department forensic identification specialist, responded to the crime scene and seized the mop handle, wrapped it, and took it to the lab. (12RT 2545-2547) He also took a set of fingerprints and palm prints from Morales at the Los Angeles County Jail. The prints also were submitted to the lab. (12RT 2547-2548, 2556-2557; Peo. Exh. 76) On July 16, he photographed Morales's left hand. (12RT 2549-2550; Peo. Exh. 77; Def. Exh. T-Z, AA) Donna Brandelli, forensic identification specialist, processed the mop handle. She developed three latent fingerprints, including a palm print, from the mop handle. (14RT 3100-3102)

Donald Keir, forensic identification specialist, latent section, received a latent palm print off the mop handle, taken by Brandelli. (12RT 2556-2557; 2560-2563; Peo. Exh. 78) Keir compared the latent fingerprints from the crime scene to the exemplars taken from Morales. He concluded that the latent print on the mop handle was made by the left palm of Morales. (12RT 2563-2564; Peo. Exh. 76,

78) Latent prints from a keyboard, manila envelope, and top of a computer also matched Morales. (13RT 2820-2821, 2824-2825)

Keir was not able to match six latent prints taken from different items. (12RT 2567-2569, 2571-2572) Three were not identifiable and three were identifiable but not identified. (12RT 2573-2578) The prints labeled at the lab were identifiable prints but did not match any of the exemplars he had. (12RT 2581) Many prints were difficult to examine because of slippage and smearing. (12RT 2581) Thirty prints excluded the entire Ruiz family. (13RT 2825-2828) No prints were matched to Jasmine or Ana. (13RT 2832-2833)

(d) Woodpile Items

In the summer of 2002, Jerry Rodriguez was in his backyard, getting wood from the woodpile to burn. He found two ammo boxes at the bottom of the pile. He had seen them before in Morales's bedroom. He opened the boxes (Peo. Exh. 113) and saw Morales's jacket (Peo. Exh. 116) and handcuffs in one box and a pair of pants in another, and a t-shirt Morales always wore that said "Slayer" on it. (14RT 2920-2922; Peo. Exh. 115, 140) Rodriguez debated whether he should hide these items or turn them in. He decided to turn them in. (14RT 2923-2925)

On July 26, 2002, Rodriguez called Deputy Joseph Sheehy. Based on that call, Sheehy prepared a second search warrant for 13838 Close Street. (13RT 2833-2834) Before Sheehy served the warrant, Rodriguez arrived at the station and gave him a box containing two green ammo cans. The items inside were mixed together, bloodstained and wet. (13RT 2840-2842; Peo. Exh. 113) Inside one can, the sheriffs removed a black tee shirt, a pair of boxer shorts, two white socks, a pair of Levi's jeans, one folding knife, and a can that had white lettering on it. (13RT 2842-2844; Peo. Exh. 115) Inside the second ammo can, they removed one pair of "Peerless" handcuffs, a black jacket with an orange liner, a small black flashlight, a small knife in a black leather sheath, and a fingerless weight-lifting glove. (13RT 2842-2844; Peo. Exh. 116) A Marine Corps medal was pinned to the chest of the jacket. There were bloodstains on the knives. A

matching weight-lifting glove was recovered from the right front pocket of the jacket. There also was some white nylon twine inside the pocket. (13RT 2842-2844)

(e) DNA Typing

i. Sexual Assault Kit

Donald Johnson, senior criminalist at the Sheriff's Department Scientific Services Bureau, forensic biology section, testified as to the DNA analysis. (15RT 2854-2856) He compared the DNA Short Tandem Repeat ("STR") profile extracted from sexual assault samples from Jasmine (Peo. Exh. 82, 83) with the reference samples processed from Jasmine (Peo. Exh. 84) and Morales. (15RT 2861-2874) Thirteen DNA sites or loci were evaluated. The results from the sexual assault samples indicated a mixture of DNA. All of the loci present were consistent with Jasmine's or Morales's profile. (15RT 2870-2874; Peo. Exh. 85)

The major component of a semen mixture matched Morales's DNA. The minor components were consistent with Jasmine. (15RT 2875-2877) In the anal epithelial cell DNA analysis, all 13 loci matched Jasmine. (15RT 2877) In the spermatozoa in anal and vaginal samples, there was a mixture in which the major part matched Jasmine and the minor part was consistent with Morales. Only one sperm cell was identified in the vaginal sample. (15RT 2877-2879)

Johnson used various instruments to copy the DNA, including the 310 Genetic Analyzer, which separates the DNA types and identifies them. The instrument is computer driven. A stutter filter is used. The manufacturer recommended a 15 percent stutter value only at some locations, but the sheriff's department uses a 15 percent value at all locations. A higher stutter filter can eliminate peaks, which are used to identify on an individual locus. (15RT 2897-2901) Stutter is expected at every peak, but the concern is that a DNA peak could be within the stutter peak and not seen. All the values shown on his chart were above the threshold. (15RT 2903-2904)

Utilizing this technology, Johnson calculated the random match probability at one out of 15.3 quintillion in the Hispanic population, one in 8,013 quintillion in the African-American population, and one in 1,324 quintillion in the Caucasian population. (15RT 2880-2881) He explained that the large number is created based on an FBI static population pool creating statistics based on 100 to 300 test subjects. The frequency at each column or locus is multiplied together with each other column, resulting in the large number. (15RT 2893-2894) There were no DNA types that could have belonged to anyone other than Jasmine or Morales. (15RT 2905) Samples were available for retesting. (15RT 2906)

ii. Shoelace

Flynn Lamas, senior criminalist at the Sheriff's Department Scientific Services Bureau, forensic biology section, testified as to the DNA analysis. (14RT 3006-3009) He developed a profile from a possible bloodstain on the shoelace of Morales's boot. The profile was consistent with a mixture of at least two people. The major profile matched that of Maritza Trejo. Miguel Ruiz was included as a possible contributor to the minor profile. (14RT 3019) Samples were available for retesting. (14RT 3028)

iii. United Knife

A United knife with a black handle was found in the ammo cans from the woodpile. (13RT 2842-2844, 2882-2884; 14RT 2936-2941; Peo. Exh. 125-127) There was blood on both the left and right side of the blade and inside the grooves on the sheath. There also may have been tissue and black hairs on each side. (14RT 2942-2943) Lamas developed a profile from blood on the knife handle consistent with a mixture from at least two people. The major profile matched Trejo. Morales could not be excluded as a possible contributor to the minor profile. The DNA could have originated from both blood and skin cells. (14RT 3020) The random match probability, i.e., the probability that someone other than Trejo was the major contributor, was one in 3.12 million in the Hispanic population; one in 2.89 million in the Caucasian population; and one in 27.75

million in the Black population. (14RT 3026-3027) Samples were available for retesting. (14RT 3028)

iv. Vaquero Knife

A Vaquero cold steel folding knife with a plastic handle was found in the ammo cans from the woodpile. (13RT 2842-2844; 2882-2884; 14RT 2936-2941; Peo. Exh. 120-122) There was blood on the left side of the blade, where the blade inserted into the handle. (14RT 2944-2945) Lamas developed a profile from blood on the knife handle consistent with a mixture from at least two people. The major profile matched Ruiz. The minor profile could have come from Trejo. (14RT 3021-3022) Only two markers were used and therefore the probability that a random person contributed the blood was one in two in the Hispanic population; one in four in the Caucasian population; and one in six in the Black population. (14RT 3027) There was no DNA corresponding to Morales. (14RT 3025-3026) Samples were available for retesting. (14RT 3028)

v. Third Knife

A third knife also was seized. (14RT 2936-2941; Peo. Exh. 123, 124) The blade was rusty on the left side. The base of the blade was negative for blood, and the wooden handle yielded weak positive results for blood. (14RT 2943-2944)

vi. Jacket

The jacket found in one of the ammo cans in the woodpile was tested for blood. (13RT 2842-2844; 14RT 2948; Peo. Exh. 116) Klein found and documented bloodstains that had originated on the outside and soaked through. The interior of the sleeves was heavily stained from the end of the cuffs upward towards the elbows. Stains also ran up and down the front of the jacket to the sides of the zipper, and around the neck and shoulder areas. (14RT 2960-2966; Peo. Exh. 128, 129, 130, 131, 132) Lamas developed a profile from blood on a jacket consistent with a mixture from at least two people. The major profile matched Trejo. The minor profile could have come from Morales. (14RT 3021-3022) Samples were available for retesting. (14RT 3028)

vii. Jeans

Lamas developed a profile from blood on the jeans consistent with a mixture from at least two people. The major profile matched Trejo. The minor profile could have come from Morales. (14RT 3016-3017) There was not a full profile for the minor profile. (14RT 3016-3017)

viii. Boxer Shorts

Lamas used differential extraction, a procedure which separates epithelial cells from sperm cells, to develop a profile from a semen stain found on the boxer shorts. The sperm cell fraction profile from the stain was consistent with a single source male contributor matching Morales. The epithelial cell fraction from the stain was a mixture consistent with DNA profiles of Jasmine and Morales. Together, Jasmine and Morales accounted for all alleles detected. (14RT 3017-3019, 3020-3021) Lamas calculated the random match probability for the sperm fraction, i.e., the probability that a random person contributed the profile, as one in 1.32 quintillion Caucasians; one in 15.36 quintillion Hispanics; and one in 8.01 quintillion Blacks. (14RT 3023-3024) As to the blood on the boxer shorts including both Jasmine and Morales, the probabilities of randomly finding these profiles were one in 1.02 million Caucasians; one in 1.13 Hispanics; and one in 8.15 million Blacks. (14RT 3026)

ix. Orange Cord #1

Lamas developed a profile from an orange cord. That profile was consistent with a mixture from at least three people. The major profile matched Miguel Ruiz at nine of the 13 STR markers. The minor profiles could have originated from Maritza Trejo and Ana Martinez. (14RT 3022) Lamas only used the markers that matched Ruiz. The random match probability, based on the nine markers, was one in 467.1 billion in the Hispanic population; one in 709.7 billion in the Caucasian population; and one in 2.68 trillion in the Black population. (14RT 3025) Based on the combined probability of inclusion, the probability was one in nine in the Hispanic population; one in 12 in the Caucasian population; and one in 13 in the

Black population. (14RT 3027) Samples were available for retesting. (14RT 3028)

(x) Orange Cord #2

Lamas examined a second orange cord, resulting in a single source female contributor matching Ana Martinez. (14RT 3022) He calculated the probability that someone randomly contributed the DNA was one in 600.6 quadrillion in the Hispanic population; one in 1.03 quintillion in the Caucasian population; and 101 quadrillion in the Black population. (14RT 3025) Samples were available for retesting. (14RT 3028)

(6) Crime Scene Reconstruction

Sheriff's Deputy Paul Delhauer was a criminal investigative analyst, criminal profiler, and reconstruction expert. (14RT 3111-3114) He testified to his opinion as to how the crime occurred, based on blood spatter, blood stains, knife wounds, and various other items of evidence in the house.

Delhauer was of the opinion that the sequence of events was as follows: (14RT 3123) Ruiz was killed from behind, probably as a result of surprise. The injury to his neck occurred in the office. There were no defensive injuries. (14RT 3123) The blood spatter on the computer or printer was consistent with a puddle of blood following the type of injury to the front of Ruiz's neck. (15RT 3175) The wound to the front of the neck had very fine jagged marks, consistent with serration. (15RT 3179-3182)

The location of the blood spatter on the office walls suggested that blood was generated when Ruiz's throat was cut. As the knife moved from one direction to the other, the blood came off in the opposite direction. (15RT 3168-3171) The directional spatter to the walls and table in the office and shoe impressions at the bottom of a bathroom attached to the office suggest an individual moving through that area. (14RT 3115-3117, 3119-3120; 15RT 3164-3168)

Ruiz's clothing was on the floor and caught blood that would have ended up on the floor. (15RT 3164-3168) Impressions from the office looking into the

bathroom were consistent with those from Morales's boots. (15RT 3185) Blood steaks on the wall to the left of the closet were consistent with blood spurting out of severed veins and Ruiz moving from the back of the office to the door out of the room, after sustaining the injuries. (15RT 3184-3185) [5]

In the bathroom attached to the office, there were several items of clothing on the floor that were bloodstained. Under the items on the floor was a nozzle with red streaks, along with a long cylindrical object and clear plastic tube. There was also a reddish brown substance on a pair of green shorts and blue tank top, consistent with having wiped off the nozzle. (15RT 3186-3187) The hose appeared to be a bidet hose, used for cleansing vaginal or rectal areas. It could be attached to a faucet or a hot water bottle similar to an enema bag. (15RT 3187-3188) Delhauer believed it may have been used to douche Jasmine. However, he did no experiments to verify whether the hose was wiped on the clothes, or whose blood was on the clothing. The hose was not retained as evidence. (15RT 3280-3284; Def. Exh. KK, LL, MM, NN, OO)[6]

Delhauer believed Trejo entered the office during or immediately following the assault on Ruiz. Trejo was attacked there and managed to flee toward the front door. She was then pursued, intercepted, and stabbed multiple times, close to the front door. (14RT 3124) A gold hoop earring on the floor near the bottom leg of

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[5]Delhauer disagreed with the pathologist who said Ruiz was stabbed with the assailant's left hand; he believed it was the right hand. (15RT 3216-2330) He also disagreed with the pathologist's conclusion that the wound margins were clean. (15RT 33229-3232) He was not present for the autopsies and did not talk to the pathologists that performed them. (15RT 3220-3229)

[6]Delhauer did not walk into the bathroom because criminalists were working there. (15RT 3264) The defense presented evidence that this apparatus actually was a hookah hose. (See "Defense Case," *post.*) He did not know whether it was a hookah hose and had not seen a hookah used to smoke marijuana. If he were told that the criminalists testified the only personal items in the bathroom with blood were two articles of clothing, it would not change his opinion that the streaks at the end of the hose were blood. He did not do any tests to replicate stain pattern or scaling, or look at the items personally. (15RT 3288-3291)

the desk is consistent with the injury penetrating the left earlobe and left side of Trejo's neck, likely dislodging the earring. (15RT 3182-3183) Blood evidence from the right side of the office was consistent with Ruiz sitting at his desk. The left side of the spatter came from Trejo, who likely would have been standing when the stab injury was produced. (15RT 3182-3183) In the south door jamb leading from the living room into the office, directional blood spatter was created by the motion of an individual passing from the office into the living room. (15RT 3171-3172)

The blood spatter near the front door indicated that Trejo was moving to the door, suffered an attack, and as a result of multiple stabbings went from an elevated position to a low position, with continued stabbing when the person was on the ground. (14RT 3134-3138, 3142-3150) As she approached the front door, it opened, and then she was down on the floor. (14RT 3152-3153)[7] The next image was the top of the room divider. There were large gobs of blood projected because of Trejo's motion. Someone wiped through the stain with some kind of cloth. A partial handprint indicated that a hand was coming down at a slight angle on the room divider as the individual was moving toward the door. (14RT 3150-3152)

Delhauer interpreted the knife wounds. (14RT 3118-3119) He used meat and modeling clay as media to reproduce injuries. (14RT 3118-3119)[8] The United knife had a five-inch blade. (14RT 3132-3134) He believed it was in its sheath during the assaults and that the blood trapped on the blade was superficially rinsed

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[7]Delhauer admitted that the blood spatter in the entry to the house was not DNA-typed to any individual or several people. The blood on Trejo's clothing also was not typed. It could have been Ruiz's blood on her clothing. (15RT 3258-3260)

[8]Delhauer acknowledged that clay does not react the same way as skin. He performed experiments and got the replication he wanted after about thirty minutes. (15RT 3274-3277) He also agreed that wound distortion or deformation occurs because of the movement of the person with the knife, the victim and the motion to the knife itself. He did not replicate this in his experiment because he cannot say what happened at a given point. (15RT 3277-3280)

and remained trapped in the sheath. The sealed box held in the moisture. (14RT 3130-3131) The Vaquero folding knife had a six-inch blade. (14RT 3132-3134) Based on the contour of the knife and its serrated blade, Delhauer believed it was responsible for the larger slashing-type injuries to Trejo's left cheek and throat. (15RT 3159-3160) The third knife, a dagger, had a three-inch blade. (14RT 3132-3134) The injuries to Trejo's neck and left shoulder were consistent with a double-edged dagger. (15RT 3162-3163, 3183)

There was a large burgundy colored stain under the sofa and in the back hallway. Based on the stains on the rug and handprints and the amount of blood, Ruiz fell at or near the south side of the couch. (15RT 3192-3193)[9] A piece of broken statue in the living room was consistent with a patterned injury to Ana's elbow. (15RT 3197, 3201-3202) There also was a bruise to Jasmine's left hip which could have resulted from colliding with the statue. (15RT 3197) The double-edged dagger and Vaquero folding knife were consistent with slash marks to Ana. (15RT 3206)[10] The cut electrical cord around Ana's body was consistent with having been dragged, as with Ruiz. (15RT 3206)

The stains under the sofa and in the back hallway were consistent with drag mark, suggesting that the bodies of Ruiz and Trejo were dragged into the back bedroom. (15RT 3188) The position of their bodies in the bedroom was consistent with rope being tied to drag the bodies. Powder and then liquid was poured over Ruiz's body, and tape was wound around his body. (15RT 3202-3206)

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[9]Handprints on the back of the couch that could have been blood were not DNA tested. (15RT 3268-3271)

[10]Delhauer reported that there appeared to be a slash wound to Ana's neck and a stab wound in the center of it. He said the stab wound could have been inflicted from behind, but he could not say so with certainty. (15RT 3260-3261)

There were reddish stains consistent with blood spatter on a pale blue pillowcase and on the bedding in the master bedroom. (15RT 3254-3257)[11]

Jasmine was sexually assaulted, rendered unconscious, drowned in the bathtub, the statue placed on top of her body to weigh her down. There was no splash or resistance, suggesting she was unconscious when she was placed in the water. There also was no evidence of strangulation. (14RT 3125-3126) In the closet a bag was found containing empty plastic packaging consistent with an object found with Jasmine's body. (15RT 3185) A mass of fluid from the lungs or pleural cavities is over her nose, consistent with it having been suspended in water and then settled on her face when the water was drained from the tub. (15RT 3207)

A purple vibrator was found between Jasmine's legs. (15RT 3208) Patterned stains on the bed were consistent with a wet object with what looked like herbal salad dressing on it; the object was shaped like the vibrator. (15RT 3209-3210)[12] There were bloodstains on the bedspread. (15RT 3247-3250) [13]

The deposit of food items and a broken statue near the entertainment center were consistent with crime scene staging. Crime scene staging is committed by an offender to leave a false impression about what happened and to distract suspicion away from himself. Here, the presence of food streaks in the non-bloody areas suggested an effort to make the crime look like it was committed by multiple offenders. (15RT 3195-3196)

Delhauer noted items outside the house. He suggested that a tag found in the windowsill or the north exterior wall be compared with a t-shirt at Morales'

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[11]If a criminalist testified there was no blood in the master bedroom, it would not change Delhauer's opinion because it still looked like blood. (15RT 3255-3258)

[12]Delhauer believed the shape of the stain was not consistent with a salad dressing bottle. He had no information was to whether the vibrator actually was in the bedroom. (15RT 3250-3254)

[13]Delhauer did not examine the bedspread. If a criminalist testified there was no blood in the bedroom it probably would change his opinion. (15RT 3247-3250)

house missing a tag. The tag was not a match. There was nothing in the windowsill to tear off the tag. If it had matched, he would have concluded it was staged to look like a burglary and entry through the window. (15RT 3264-3268)

2. DEFENSE CASE

Morales did not testify. The defense called Richard Salazar, a retired officer from the Los Angeles Police Department who worked in narcotics and current investigator with the Public Defender's Office. (15RT 3296-3300) Salazar testified that what Deputy Delhauer thought was a bidet hose was actually a hose for a hookah pipe used to smoke tobacco, hashish and marijuana. (15RT 2936-3300; Def. Exh. NN, OO, QQ, RR)

C.

PENALTY PHASE

1. PROSECUTION CASE

a. Victim Impact[14]

Numerous family members were called to describe the impact the homicides had on their lives. Maritza Rachel Trejo recounted the day her family was found slaughtered in her home. She reflected on the love she had for her family members, particularly her mother and sister Jasmine, and the emptiness she felt in their absence from her life. She described to getting therapy and the difficulty in maintaining a normal life after the murders. (17RT 3700-3712)

Kenelly Zeldon also testified about the trauma of finding the murder victims in their home. She described the experience as a "nightmare." Kenelly told the jury what an effective salesperson Maritza Trejo had been for her business. Kenelly was very close to Jasmine who played often with Kenelly's children. One of her children was in the car when she found the bodies. She didn't know what to tell him when he said he wanted to come in and play with Jasmine. Since the murders Kenelly had suffered anxiety, insecurity and flashbacks. (17RT 3714-3723)

Mike Ruiz' father, stepmother and sister described the devastating effects of losing their son, brother and friends. Mike was an only child and was very close to his father. Since the murders the father had become very anxious and had lost his job. (17RT 3725-3727) Mike's sister Olga described the loving relationship she had with Mike and the other family members. She had no children of her own and her niece Jasmine was "her heart."(17RT 3737-3751.)

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[14] For a more complete description of the victim impact evidence presented to the jury see Argument V. D., *infra.*

b. Weapon Possession Allegations

Sheriff's Deputy Young Kim testified that he worked at the Twin Towers Correctional Facility. One of his duties was to check module security every 15 to 30 minutes. He would walk around to make sure everything was safe and that inmates did not have anything with which to harm themselves. (17RT 3752-3754)

On December 21, 2002, Kim was performing a security check and looked in Morales's cell. He found what was possibly a "shank" fashioned out of a plastic spoon, sharpened on one side, with a thread around the other end, to create a better grip to stab someone. (17RT 3754, 3761-3762) The thread came from Morales's suicide gown. (17RT 3762-3763) The spoon had been sharpened by rubbing it against the cement floor to a dull point, although Kim did not see the process. (17RT 3764)

Kim confiscated the item from Morales and made a report. (17RT 3754, 3761-3762) He did not "write up" Morales for having a weapon; it was an "information only" report. (17RT 3758) He

This was not the first time Kim had seen this type of item. He put the item in a contraband box. Morales told him he was using it as a "fishing line," to throw something out to the person in the next cell. Kim did not believe this worked at Twin Towers because there was no room under the door, but he also did not measure the gap of the door. (17RT 3755-3758)

Morales was a suicide risk. Kim could not recall where the item was when he looked inside. The item was thrown away and there was no picture taken of it. (17RT 3759-3760)

Sheriff's Deputy Joseph Chavez testified that he was the supervising line deputy at Twin Towers. He supervised deputies and inmates and daily functions at the jail. (17RT 3765-3766) On February 15, 2003, deputies searched Morales's cell and recovered a blade from a shaving razor and a homemade handcuff key. (17RT 3766) Inmates were not allowed to possess the blade part of the razor

alone. Anything altered from its original form was contraband. (17RT 3766-3767) The blade could be used as a weapon, held between the fingers or held in the mouth and spat out at an opportune time to slash at staff. (17RT 3768-3769)

The key appeared to be silver metal, like a paperclip that had been manipulated by hand into a handcuff key. Chavez demonstrated with a regular handcuff key how part of it actually triggers the locking mechanism. They key confiscated from Morales looked the same. (17RT 3767-3768, 3774) Chavez did not try the key on any of the handcuffs. (17RT 3772-3774)

The blade and the handcuff key were destroyed and a report written that Morales had violated jail rules. (17RT 3770) Because a criminal report was not written the items were not saved. (17RT 3771)

2. DEFENSE CASE

a. Family History

Manuela Chavez Rodriguez (Manuela) is Morales's mother. She testified as follows: She had three children, Yvette, Emi and Morales. When Morales was born, he was a month-and-a-half overdue. When they brought him to her, he was black, blue and purple. She asked the staff what was wrong with him and was told he was healthy. That coloring lasted until he was six months old. (17RT 3806-3809, 3810-3811; Def. Exh. UU [family photograph].)

When Morales was six, Manuela found out that he was learning disabled. He attended a Catholic school but never took his First Communion because he could not read and did not know what the commandments and prayers meant. (3812-3813) In elementary school, Morales came home in tears almost every day because of the way he was treated. (17RT 3813) The first grade was the only grade Morales was not in special education. Manuela helped him with his homework and sometimes did it for him. He simply could not do the work and became frustrated. He had to repeat the seventh or eighth grade. (17RT 3814-3816)

Manuela and Morales's father, Emiliano Morales, argued frequently, often in front of the children. Her husband struck her and the police were called. The children watched out the window as the police grabbed her husband, dragged him outside, and beat him. (17RT 3817-3818, 3896-3897) He left when Morales was four years old. Morales was devastated, although his father worked in the neighborhood. (17RT 3818-3819)

When Morales was six, Manuela's boyfriend Donald Rodriguez (Donald) came to live with the family. Also living with them was Manuela's adopted mother Josie, who was paralyzed and bedridden, and her two nieces whose mother had died. (17RT 3819-3821) Donald was much stricter with the children than Manuela. He would discipline Morales with a big paddle. Manuela talked to the school and asked them to notify her if they saw any indication of violence on Morales. (17RT 3822-3823) Donald abused Morales the entire time he lived with the family. (17RT 3862-3864) After about a year, Manuela threw Donald out. (17RT 3822-3823, 3863-3864)

One of Manuela's nieces, Tina, began to take drugs. On several occasions, Manuela had to take Tina to USC Medical Center and have her admitted to the mental ward. Tina became paranoid and sat up all night with a knife in her hands. One day she left the house and did not return. Some time later, Manuela received a letter that Tina had committed suicide in San Francisco. (17RT 3824-3825)

Emi was interested in art and sports. He played hockey for nine years. Manuela took Morales went to an ice rink when he was 14, where he fell and cut his leg. He refused to skate after that. She tried to get him interested in other sports, but he would say, "Not right now." (17RT 3826-3838)

When Morales was ten, Manuela married Jerry Rodriguez (Jerry). Jerry was an alcoholic and got fired from his job because of his drinking. (17RT 3829-3830) He verbally abused Morales and pushed him away. He ridiculed Morales by calling him things like "stupid" and "you dumb ass" in front of the other children. Manuela would say Morales was learning disabled, but Jerry would tell

her that there was nothing wrong with him. (17RT 3831-3832) Manuela would tell Morales to go somewhere and ignore Jerry, because he was drunk. (17RT 3862-3864) Manuela threw Jerry out a couple of times, but he came back. (17RT 3862-3864) He kept saying things to Morales until the end. (17RT 3862-3864)

Jerry treated Emi differently because Emi made him proud. Emi was everything to Jerry, while he thought Morales was stupid. When Jerry upset Morales, he would leave the house and just go. Sometimes he walked aimlessly until he did not know where he was. Then he called Manuela to come and pick him up. He was about 12 when he started running away. (17RT 3832-3833) If Morales did not leave the house, he locked himself in his room. (17RT 3834)

Jerry also was jealous of Emi. He got angry at Manuela and said she did "everything for that kid." He said, "What's the next thing you are going to do, sleep with him?" That ended the marriage for her, but they stayed together in the same house. (17RT 3846; Peo. Exh. WW [family photo].)

When Morales was 15 or 16, Manuela took him to the California Rehabilitation Center to help him gain some skills to get a job. (17RT 3854-3855, 3868-3869) At times, he would not go to the center and not be home. (17RT 3861) She tried to get him SSI benefits. They put him through some tests, which he passed, and she was told he was not eligible for the benefits. (17RT 3858)

When Morales was 17, Emi was killed in Yosemite in a rock fall. (17RT 3834, 3844) Morales was devastated by his brother's death. He shared had shared a bedroom with Emi. (17RT 3834) He turned the bedroom into a shrine to Emi. He kept everything just the way Emi had left it, including artwork, trophies and medals. (17RT 3830-3840, 3843-3844; Def. Exh. XX [Emi's cartoon artwork], YY [Emi's drawing], ZZ [Morales's drawing of the Lion King].) He went into a shell and pulled away from everybody and everything. At family parties or functions, he would find a corner and stand there and watch. When his grandparents arrived, he would hug or kiss them and then go back to his corner. (17RT 3841-3842) He lost interest in the rehabilitation center. (17RT 3865-3866)

After Emi's death Morales started wearing all black and got into heavy metal music. Manuela purchased a t-shirt for him that said "Slayer" on it. (17RT 3843) His habits also changed. He slept during the day and watched TV and played video games at night. (17RT 3844) He kept the doors and windows open and a bamboo Samurai sword and a flashlight with him, just in case someone tried to come in. (17RT 3845) Manuela identified a photograph of Morales wearing a blue item made of quilted material used for inmates on suicide watch. He wore that item for seven months. (17RT 3853)

Morales locked his bedroom door when he slept. The police found some of Manuela's expired credit cards in his room when they searched it. She did not recall telling the police that she did not know he had them. (17RT 3858) Jerry's drinking worsened after Emi's death. He drank constantly day and night. (17RT 3834)

Manuela worked at Acme Display in downtown Los Angeles. Sometimes her customers would give her various items. Once she was given two boxes of pornographic videos, which she gave to Jerry. After about a year, she gave one of them to Morales, who was 20 at the time. This upset Jerry. (17RT 3847-3848)

Manuela knew the Ruiz family very well. In the summer, she visited their house around the corner almost every day. Jasmine was at Manuela's house often to play with her grandchild. (17RT 3848) Morales also spent time at the Ruiz home. He gave the family a purebred boxer puppy. (17RT 3849) Morales and Mike Ruiz were friends, and Mike taught Morales about computers. Morales spent a lot of time at the Ruiz home and was friends with everyone in the family. (17RT 3859-3860) When Manuela heard the Ruiz family had been killed and Morales arrested, she immediately left work. She was devastated. (17RT 3849)

Manuela loved Morales. She believed he was a child trapped in a man's body. He did not have the mind of an adult. She had to purchase his car for him and do all the paperwork. She had him pay her every month, and she made the car payment. When he applied for jobs, he brought home the applications so she

could help him fill them out. (17RT 3851-3853) When he worked, he gave her money. (17RT 3856-3857)

Jerry always was asking Morales when he was going to move out. Jerry was very critical and told Morales that he was in his twenties still living at home and mooching off his parents. Morales just walked away. (17RT 3853-3854) Jerry would get mad at Morales, who would cause trouble around the house and have tantrums as he grew older. (17RT 3856-3857)

Morales's sister, Yvonne Ybarra, was the oldest of the three Morales siblings. (17RT 3869-3886) She described how Morales got blamed for things. When they were small children, Yvonne found a box of matches at her Aunt Lulu's house, lit it, and threw it into a closet starting a fire. The adults assumed Morales was responsible. Their father grabbed him, took him into another room, and beat him with a belt. Yvonne was too scared to admit that she did it. (17RT 3883-3885)

Yvonne remembered when Donald Rodriguez lived with the family. He had a deep, loud voice that was scary, and he would hit the children with a belt or a paddle. (17RT 3869-3870) He would bend the children over his knee, drop their pants, and spank them. (17RT 3871-3872) Yvonne and her siblings held each other for comfort because they were scared. Even her bedridden grandmother yelled at Donald and told him to leave the children alone. (17RT 3873-3874)

Donald disciplined Morales the most frequently, a couple of days out of the week and sometimes more than once in a day. (17RT 3869-3872) Donald seemed to have a low tolerance for Morales. (17RT 3871-3872) Morales would cry. Sometimes the neighbors would scream out in Spanish, "That's enough. Leave him alone." After a beating, Morales would go into the bedroom, curl up on the bed, and face the wall. He had marks from the beatings. Sometimes he had difficulty sitting down on the couch or in the car. It was obvious that he was uncomfortable. (17RT 3875)

When Morales was nine, Jerry Rodriguez came into the Morales household. Jerry always put Morales down and said he was slow at a lot of things. Morales asked his mother for help with his schoolwork, and Jerry would always make some kind of snide remark. (17RT 3876-3877) When Morales was older and offered to help Yvonne's children, ages seven and eight, Jerry commented that they did not want his help because they probably were smarter than he was. Jerry ridiculed Morales every day. (17RT 3878-3879) Jerry drank every day, and the more he drank, the more he berated Morales. (17RT 3880)

Manuela and Jerry spent a lot of time with Emi. He played hockey, so there were practices and games. Emi received the majority of the attention. (17RT 3881)

Before Emi died, Morales was an outgoing person. He tried to communicate with people. After Emi died, Morales became more isolated. He walked away when Jerry made his comments. When he was older, he stood up for himself and confronted Jerry about his drinking. (17RT 3881-3882) He also closed their bedroom off to everyone and kept it locked. Everything was kept in the same place. Morales was very protective of Emi's personal belongings. If someone wanted to see Emi's artwork, he would allow them to view it only under his supervision. (17RT 3882-3883)

When Morales was 17, about a month after Emi's death, he took a pager from Yvonne. A few days later, a girl answered and told Yvonne that Morales had given it to her. Yvonne went to see the girl and saw that he also had given her a bottle of perfume and a ring that belonged to Yvonne. (17RT 3888-3889) The girl's mother told Morales not to come around anymore. Yvonne had words with Morales and they stopped talking, although he maintained a relationship with her children. (17RT 3891-3893)

Yvonne believed that Morales grew up in a home that was in some ways unstable. If something was wrong, Morales was blamed. He was pushed out of the way by a lot of people. (17RT 3886) Yvonne thought that Manuela could

have helped Morales in more ways, especially when he was young. Even Yvonne and Emi would shut him out at times.

Yvonne's daughter greatly missed Jasmine. They were best friends. Both of her children knew what happened to the Ruiz family, and she recently told them about their uncle's involvement. They love Morales and support him, as well as love the Ruiz family and Jasmine. (17RT 3894-3895)

Two men who knew Morales's family testified about their memories of them. John Tregaro lived in the area of 22nd Street and Alameda for 52 years. He knew Manuela, her first husband Emiliano Morales, and the three children. He recalled Morales alone, still in diapers, walking up and down the street by himself. (17RT 3896-3897)

As Morales grew older, Tregaro noticed that he was often by himself and the other children did not seem to want to play with him. Morales's father worked across the street, and Tregaro saw Morales stand by the business and just stare at it. Tregaro rarely saw Manuela with him. (17RT 3898-3900) The family moved when Morales was nine. (17RT 3900-3901)

Raymundo Cervantes worked at the Prudential Lighting Company near 22nd Street and Alameda for 27 years. He also knew the Morales family. (17RT 3901-3903) When Morales was six or seven, Cervantes saw him go back and forth to school, always by himself. His expression was different than other children. (17RT 3901-3903)

b. Educational History

(1) First Grade

Leonora Mejia was Morales's teacher in the first grade, in 1990, at St. Turibius School, a Catholic school. She had been a teacher for 60 years. (17RT 3779-3784, 3792-3794) Morales was at the bottom of the class and was not always able to follow directions. For instance, if they played "Simon Says," he could not do it well. He would do something weird and not correctly follow the instruction. (17RT 3779-3784) If they were playing "Hokey Pokey," and the

class was told to put their right hands out, Morales would put out his left hand. The other children tried to show him how to do it correctly, but he usually used the wrong hand. (17RT 3874) English may have been his second language. Mejia talked to all students in English, not Spanish, because she wanted them to learn English. (17RT 3796)

If Morales answered a question in class, his answer was often not relevant to the question. The other children would laugh. Sometimes the children had races. If he saw the other children ahead of him, he stopped and dropped himself down on the ground. (17RT 3785-3787) Morales's classmates loved him and would try and help him. He also had a brother and sister at school who looked out for him. (17RT 3795-3796)

The school offered special education classes, and Morales was released to report to the Title 1 teacher about three times a week. At one point, Mejia was asked to give the names of students she thought should be in special education classes, and she included Morales. (17RT 3787-3788) Mejia spent extra time with Morales, but he was behind the rest of the class, had limited speech, and cried in frustration if he could not say what she wanted him to say. (17RT 3789-3890)

Sometimes Morales arrived at school accompanied by a male adult. He spoke to Morales in a stern, angry voice and said he better not hear any report, or Morales would be in trouble. If Mejia needed to talk to Morales's parents, she talked to his mother. (17RT 3791-3792)

(2) Fourth through Sixth Grade

Pearl Williams was Morales's teacher in grades four through six, when he was in special education classes. She had been a teacher for 43 years. (17RT 3797-3800) She testified as follows:

Morales was a quiet, polite child. He sometimes became frustrated with a task and either withdrew or asked for help. He was teased at school but did not fight back. (17RT 3797-3800) He had difficulty expressing himself and withdrew into himself. (17RT 3801) He ranked in the middle of her special education

students. (17RT 3803-3804) He played with other students and would smile. (17RT 3803-3804)

Morales's coordination also was different from other children. A special teacher with the adaptive physical education program visited the school once a week and worked with children like Morales to help with their coordination. Morales was in this program the three years Williams was his teacher. (17RT 3802-3803)

(3) Middle School

Patricia Urista was Morales's special education teacher at Chester W. Nimitz Middle School in 1992 and 1993. (18RT 3919-3922, 3933-3936) Special education classes encompassed learning handicapped students with specific learning disabilities. (18RT 3922)

Morales was reading at the first or second grade level in the eighth grade. He tried very hard but was near the bottom ranking of the class. His vocabulary was very limited. He spoke in very basic one syllable words, like a young child. (18RT 3923-3925) Most students had lockers, but Morales was unable to use a combination lock. (18RT 3925-3926) He received average grades, "C's" or "C-pluses." She gave him an "A" in United States History and Geography based on projects he did and an "A" in math, for his effort. (18RT 3933-3936) Nonetheless, he had severe learning deficits. (18RT 3936-3937)

Urista did not feel that Morales had the social and academic skills necessary to perform in high school. She talked to Morales's mother about keeping him in the eighth grade another year. His interests were like those of a younger child. (18RT 3926-3927) He tried to fit in. He would try and mimic the other children in the class, but they saw that and did not accept it. He was not an accepted member of the group, which caused him to be quiet and withdrawn with a hurtful look on his face. (18RT 3927-3928) He had not mastered even a basic understanding of social interaction with his peers. He had boundary issues. (18RT 3929-3930)

Morales wore baggy clothes with outdated sports logos on them. The other children laughed at him and picked on him. He was always by himself on the playground. (18RT 3930-3931) He had a flat affect on his face, meaning no expression at all. (18RT 3932-3933)

(4) High School

Franklin Jones was a special education teacher at Bell High School when Morales was a student there. Jones did not have Morales in class, but he noticed him around school. Morales was nearly always by himself. He had a blank look on his face. His eyes were not focused like a normal child's eyes. Jones never talked to Morales. (17RT 3905-3907)

Douglas Rihn was a physical education teacher at Montebello High School. At times, the special education students would come over and mainstream with the regular students in his classes. In 1996, Morales was one of the special education students. He sometimes required individual instruction, and it took him a little longer to process what he was supposed to do. He was not a disruptive student. He did not smile much. (17RT 3908-3912)

c. Educational and Learning Disability Evaluation

Nancy Cowardin held a Master's Degree in educational psychology, with a concentration in special education. She was a teacher for 13 years. The court appointed her to evaluate Morales and his educational records. (18RT 3938-3940) Morales was classified as learning disabled (LD) at an early age. The designation of a child as having LD usually occurs when a teacher observed a child having learning problems. If a child is referred in the first grade, then it is a serious disability. (18RT 3940-3941)

There are a variety of service options for special needs children. The child can be pulled out of his regular classroom just maybe an hour a week or they can attend the resource program a couple of periods a day. The last and most restrictive option would be a special day class where the child is enrolled all day and that is his or her base. If the day class did not meet the child's need then he or

she might go to a nonpublic school, or, if that did not work, be sent to an institutional setting. (18RT 3942)

Special day classes are for students who need more than 50 percent of the school day in a special environment. (18RT 3942-3943) Morales immediately began in special day class and stayed in that designation throughout all of his schooling. He graduated from a special education program at Montebello High School, but he was functionally illiterate because he was below about fifth to sixth grade level. Under present day standards, he would not been awarded his high school diploma. (18RT 3945-3946)

When a child qualifies as a special education student, a team puts together an Individualized Education Plan, or "I.E.P." In Morales's 1992 and 1993 IEP, one of the short-term objectives was to communicate likes and dislikes during class time. Another was to seek out adult intervention when being teased by peers. Some of the baseline data indicated he was being picked on from time to time and was unable to assert himself. (18RT 3943-3945)

In September 2004, Cowardin administered tests to Morales while he was at the Twin Towers. Morales still had learning disabilities. As an adult he would continue to qualify for the special education program as one with specific learning disabilities. The two areas that he would qualify for as an adult were spelling and math. (18RT 3947)

Mental retardation and LD are different. Mental retardation is a developmental disability. The I.Q. is affected. Most skills are reduced and significantly below the population mean of a hundred. Adaptive skills deficits are very low also. A person with LD by definition have an I.Q. that is average or higher. Their learning skills, however, are very compromised. Some people with LD have learning skills that are as impaired as people with mental retardation. LD is determined by measuring a two standard-deviation discrepancy between I.Q. and actual performance on a standardized test. (18RT 3948)

Morales made a diligent effort on the tests Cowardin administered to him. It was very apparent Morales had "expressive dyslexia," where the person may be able to read, but had a deficit when he or she had to write. Morales was a good reader with 11th grade comprehension, but there was a disconnect when he had to express himself in writing. (18RT 3949-3951)

While Morales scored close to the mean IQ of 100 in both reading and decoding and document literacy, his spelling was a 59 and math a 62. That discrepancy defines LD. His profile had highs and lows. A person with mental retardation have a flat profiles. Although Morales's arithmetic skills were weak, his functional math ability put him closer to average. His single word vocabulary [expressiveness] was an 84, just below average. His receptive vocabulary [understanding words] score was 96. His language fundamentals [inserting language into more difficult contexts]score was 68. Morales's profile showed the spikes expected to be seen in students with LD. (18RT 3954-3956)

Morales's grade point average in February 1995 was 2.0. In the classes in which he did poorly, he had excessive tardies and absences. (18RT 3975-3979) A June 1996 high school assessment report stated that Morales's "failures have nothing to do with identified learning disabilities but are entirely due to adolescent issues of motivation and willingness to follow teacher direction." (18RT 3980) However, LD students as they age typically will cut classes when they are required to have a skills they do not possess. (18RT 3983-3985)

Cowardin prepared a report on Morales entitled "Mental Age Estimates." The report depicted the mental ages across many of the skills she Morales tested on. There were areas that Morales scored as high as age 22, like the receptive single word vocabulary where he scored a 94. His reading was 16-and-a-half years. His scores fluctuated just like the standard scores did. Spelling was at age seven and a half; arithmetic, at age eight and a half; 14 years old for expressive vocabulary but below ten years of age for language inserted in context. (18RT 3957-3958)

With this information, Cowardin as a teacher would know to design a program that used visual means wherever possible because that was Morales's stronger skill. Morales' auditory skills [what he heard and the processing of what he heard] was being performed below level of age of nine. This spiky profile is usually seen in kids with LD that makes them different than kids with mental retardation. (18RT 3959)

Cowardin prepared another chart, under the heading "Information Processing Age Scores." Morales was again scored by his mental ages. From testing Cowardin again saw that Morales needed things explained visually where possible. He could recall letter sequences with precision but dropped down to age seven-and-a-half when asked to repeat back a sentence that was said to him. (18RT 3960-3963) On pure visual scale, Morales operated on a value of 13.4 years of age. He was operating at just below the age of nine when it came to processing what he heard. (18RT 3963-3966)

By the time of trial, Morales was reading at an 11th grade level, apparently a newly developed reading ability. If a person is given a chance to practice a lot, which he can do in jail, he can upgrade his skills. Cowardin believed that was part of the reason he suddenly tested so well. He had been in custody for two years and was given a chance to read. His math skills had gone down. One of the facts of special education is that without continued exposure a person will lose data. That is what appears to have happened. (18RT 3981-3983)

An Individual Transition Plan or "I.T.P." establishes goals that are directed toward a high school student who will be leaving school and entering adulthood. She saw Morales's I.T.P. dated June of 1994, when he was 15-and-a- half. The goal areas were employment skills, targeting the filling out of a job application; mobility, how to use public transportation; the third was auditory memory, telephone skills, answering the phone and making calls. (18RT 3967-3968)

Learning disabilities go outside the school into a person's everyday life. It can affect decision-making and adaptability, because social information is affected

as well. It is a life-long condition. (18RT 3968) If a child has great parents who participate in his life and see that he participates in the community, in sports, and appreciates the child at home, then the child can override the learning disability to some extent. But in cases where those other factors are not present, that learning disability is just one more problem, the straw that breaks the camel's back. (18RT 3970) Children with learning disabilities can do something inadvertent and get in trouble and they do not even know what they did. (18RT 3970)

Children with learning problems need consistency, a consistent approach and repetition of the same lessons. An alcoholic parent would be very inconsistent. Learning disabled children do not like is surprises, because they do not do well adapting when they do not know what is coming next. Having a harsh disciplinarian at home causes such a child to begin to feel no good in anything. There is no place they are doing well. (18RT 3971-3972)

Cowardin found Morales to be very reserved, hard to read, holding back emotion. He did not interact spontaneously for a long time. He was very careful. (18RT 3973) He received assistance through the Department of Rehabilitation for about four years. It overlapped somewhat with the time he spent in high school. (18RT 3974) The Department of Rehabilitation classified him as most severely impaired in terms of vocational rehabilitation and job training. (18RT 3986)

d. Neuropsychological Evaluation

Arnold Purisch, Ph.D., was a clinical psychologist with a specialty in clinical neuropsychology. He was board certified by both the American Board of Professional Neuropsychology and the American Board of Clinical Neuropsychology. There were only five to ten people in the entire country with these two board certifications. (18RT 4011-4014) He taught practicing psychologists in a postdoctoral program in neuropsychology at Fielding Graduate University. (18RT 4014) He was one of the psychologists who developed the Luria-Nebraska Battery test, which when it was developed in the early 1980's, was one of the more prominent tests in the field. It now is seeing less use. (18RT

4015) His clinical practice exposed him to many people with head trauma, strokes, or who had Alzheimer's. (18RT 4017)

A neurologist is concerned with a person's brain function and does imaging of the brain to see whether or not there is a physical problem with the brain. A neuropsychologist, on the other hand, focuses on how brain defects affect a person's ability to function. Dr. Purisch tried to separate out what might be the result of psychological problems versus structural brain defects. (18RT 4016-4017) Tests for brain damage would be performed by a neurologist, not a neuropsychologist. (18RT 4061)

Dr. Purisch reviewed records and administered a series of tests in his evaluation of Morales. (18RT 4016-4017) He interviewed Morales for approximately one hour and tested him for about eight hours. Morales clearly suffered brain damage. The testing indicated damage to the left hemisphere and the left frontal portion of the brain. (18RT 4043-4056)

Dr. Purisch started with very open-ended questions to Morales about whether he felt like he had any problems functioning either currently or in the past. Morales listed a few problems that he thought were longstanding in nature, but his complaints were limited. Morales seemed to downplay his functional difficulties by identifying only a few problems of longstanding nature. (18RT 4018-4019) Dr. Purisch was not aware of any history of actual physical brain trauma. The testing results indicated that the brain damage was developmental, i.e., something he was born with. (18RT 4044)

Dr. Purisch concluded from Morales's records, tests, and observations, that Morales had problems with brain functioning but wanted the doctor to believe that he functioned well. He felt very uncomfortable talking about himself in negative terms. (18RT 4020-4021) He claimed he had good social functioning and had girlfriends off and on. (18RT 4052) While his records showed he had significant problems that presented very early in school, Morales downplayed them by using the term "dyslexic." (18RT 4022)

Dr. Purish administered the TOMM test, a test of memory malingering. Morales's performance on that test showed good motivation and effort and was nearly perfect. (18RT 4023) Morales told him he had never been a victim of violence, abuse or trauma. (18RT 4045-4046)

Dr. Purisch administered a number of other tests. He concluded that Morales was outside of normal range on many of them. In some tests he scored well below what was expected. He scores were consistent with someone who had brain damage. The scores were also consistent with his school records. (18RT 4023-4024)

Based on testing, Dr. Purisch scored Morales's verbal I.Q. at 99, in the average range. His scores on each componant of the IQ tests should have been equivalent to his verbal I.Q. However, Morales's scores reveal that on almost every test of his performance he scored below his verbal intelligence. Morales overall average was 77. This 22-point difference between his verbal IQ and performance IQ is found in less than one percent of the population. (18RT 4025-5027; Def. Exh. DDD.)

In school Morales' grades were inconsistent. If he had been mainstreamed, however, his grades would have been atrocious. Because he was in special education the grades he received were probably inflated. (18RT 4052) Morales also had difficulty with his working memory. He had significant difficulty pursuing one line of thought without losing his train of thought. It was difficult for him to form a lengthy cogent train of thought. (18RT 4027-4029)

Dr. Purisch compiled another graph of test results translated into age equivalents. It shows the WIAT results and what is typical of the average person of a certain age. Morales scored reading comprehension in the high teens, but his spelling capability was equivalent of an average nine year, eight month old. His ability to express his thoughts when talking was the equivalent of someone who was nine years, four months old. Most of the tests that could be translated to age put Morales' intellectual capacity as the equivalent of a person between nine and

eleven years old. (18RT 4029-4031; Def. Exh. EEE.) Morales scored fairly high in passive "listening comprehension" but as soon as the tests required him to generate something or to organize his thoughts he had considerable difficulty. (18RT 4031-4033)

Dr. Purisch reviewed a chart showing Morales's performance on tests that required him to process things auditorily and visually. He was 25 or 26 years old when he took the tests, and the results show at best he was up to the equivalent of 16 years old. He had difficulty processing information, regardless of whether he heard it or saw it, although he was worse in processing what he heard compared to what he saw. This pattern is very typical in injuries to the left side of the brain. This confirmed Morales' problems and also gave a pattern that was consistent with problems with the left side of the brain independently found on his testing. (18RT 4033-4034; Def. Exh. CCC.)

The neuropsych test results were consistent with classic left frontal lobe type of damage. (18RT 4056) An individual who is born with a developmental disorder is not going to have this condition show up on CAT scans or MRI's. Frequently people with developmental disorders look normal but their brains are not functioning anywhere near normal. (18RT 4058)

Dr. Purisch concluded Morales had difficulty in performing any tasks in which he had to formulate his own thoughts. He would sit around trying to think of what he wanted to do, but he could not organize things. He was very passive. He was not very motivated. Passive mentation due to the brain damage results in passivity in behavior. When an individual, like Morales, cannot reason things out when the complications of life confront them, they may react in an impulsive manner. Some testing showed that under stress Morales would have faulty impulse control. (18RT 4034-4036) Morales did not think things through and reacted impulsively to situations out of frustration. (18RT 4053-4054)

Morales tested at roughly the equivalent of a ten year old regarding the ability to think things through, problem solve, organizing his behavior, and the

ability to evaluate his behavior to pick out appropriate responses and emotions. (18RT 4037) Morales had difficulty with impulse control throughout his life. He had been victimized and had little control in his life. Dr. Purisch noted that at times victims would act out in order to get back at people who have victimized them. The records were pretty clear that Morales was picked on by other students, and there was similar abuse within his family. (18RT 4049-4050)

Dr. Purisch reviewed records from the California State Department of Rehabilitation. Those records indicated that while Morales wanted to succeed he was very passive and let the system take care of him. Although Morales would try to succeed, he could not keep it together and would undermine his efforts. He could not sustain himself in a goal-oriented direction. (18RT 4038-4039) Morales often acted in a negative manner when he was dealing with the Department of Rehabilitation for the four years he was in the program. (18RT 4048)

The school dropout rate for people with LD is high because they become frustrated with failure and do not want to go to class. Morales' deficits made him passive and reactive and made it difficult "tough it out" just stay the course. (18RT 4056-4057) Dr. Purisch also noted that the vast majority of Morales' negative behaviors expressed themselves following the death of his brother in 1996. (18RT 4058)

There were times Morales did very well at the Department of Rehabilitation and times he did not do well. It really had to do much more with the sense of being inadequate and covering up, and not being able to sustain appropriate goal-related behavior. (18RT 4050-4051) While he was capable of aggressive, immature behavior, in the vast majority of circumstances, Dr. Purisch did think Morales operated with a premeditated malicious state of mind. (18RT 4048) Morales was in his mid-twenties and was not going to improve in terms of brain development. (18RT 4040)

3. PROSECUTION REBUTTAL

From 1995 to 1999,[15] Morales was Myrna Zavala's client at the Department of Rehabilitation. Zavala was working with school personnel to provide services for Morales to prepare him for employment with "hands-on" experience. They placed him in a couple of community-based employment situations. (18RT 4094-4096) There were three levels of severity of need in the vocational rehabilitation program – "disabled," "severely disabled," and "most severely disabled." Morales fit into last category of "most severely disabled" which was the most difficult category in the program. He had problems with interpersonal skills, work skills, personal care, self-direction, cognitive process, and mobility. In August of 1995, Morales felt inadequately experienced and knowledgeable and unable to make an informed choice regarding doing anything. (18RT 4109-4112, 4126)

After Emi's death in 1995,[16] Zavala wrote in a report that Morales had had a very difficult summer. She also wrote that the mother had not expressed any concerns to her about his reaction to the death. (18RT 4126)

In April 1996, Morales's first placement was at Pacific Pet Center. That lasted until May 1996. The purpose of placing a student is to see if the student can learn how to interact with supervision. They want to observe the student to see how they learn on a job. They want the student to find something they might be interested in. (18RT 4096-4097) The people there were willing to train and work with him. They were optimistic about hiring him although they let him go in June because they did not have an opening for him. (18RT 4113-4114)

In March 1997, a program teacher in the Regional Occupational Program reported that Morales had been participating in rotation of jobs but she began to see a change in him. He had been very quiet but was recently having trouble

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[15] Morales was born on December 1978, making him 16 or 17 when he started the program. (See 26CT 7046)

[16] Morales's mother testified that Emi died when Morales was 17 (17RT 3834, 3844), which would have been 1995. (See 26CT 7046)

getting along with his peers and displaying disrespectful behavior to others. In June of that same year he was taken out of their program because of his immature behavior. (18RT 4115-4116)

In the summer of 1997, Morales was placed through the summer youth employment program at the summer program at the YMCA at Wilcox Elementary School in Montebello. (18RT 4078-4080, 4098) Jacqueline Derimow and her son, Nicholas, testified about an incident. Nicholas was eight years old and attended the summer program at the YMCA. Morales was an aid to the main counselor. (18RT4078-4080) Nicholas walked into a bathroom and saw Morales putting another child's head in the toilet. He asked Morales what he was doing, some words were exchanged, and Morales did the same thing to him. (18RT 4082-4083) There was nothing in the toilet except water. Nicholas' forehead touched the water, and then he was released. His head and hair got wet. (18RT 4084-4085)[17] Jacqueline pulled Nicholas out of the camp program the next day. (18RT 4081) Morales was fired as a result of the incident. (18RT 4092-4093)

In February 1998, Morales started going to the East L.A. Skill Center to improve his reading, writing, and math skills and help him secure employment in the electronic industry. Zavala talked to Morales about his attendance at the Center. She tried to emphasize to him he needed to attend his classes to build up his skills. She had him sign a contract saying he would attend his classes. He did not keep the terms of the contract and he was asked to leave the center. After his mother intervened Morales was given another opportunity at the Center. (18RT 4101-4105)

In her annual review on November 24, 1998, Zavala wrote that Morales' goals remained tentative and that his present goal was to be a semi-skilled worker.

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[17]In common parlance, dunking the head of another person in the toilet is known as a "swirlie." "Wiktinonary" defines a "swirlie" as follows: "Noun. [para.] **swirlie** (*plural* **swirlies**) [para.] A prank in which the victim's head is held down a toilet bowl which is then flushed.

She also wrote that he had much difficulty as a result of poor impulse control, including a serious lack of judgment, and that he would rather have others make decisions for him. (18RT 4117-4119)

In February 1999, Morales again stopped going to the Center. When Zavala talked to him, he told her he was still attending. She met with the counselor at the Center, determined he had not been attending and had breached his contract. Zavala had Morales come in when he was dismissed from the Skills Center. She wanted to talk to him about his attendance. She told him that since he violated his contract she was not going to continue his program there. She told him she was concerned about some of his choices. He then was terminated from the program. (18RT 4105-4106, 4119-4122)

Zavala wanted to include Morales' mother in the discussion, but he did not want her there. She told Morales his mother was a natural support that he needed, but she would respect his choice not to include her in their discussion although Zavala did not agree with it. Morales' mother had always been very active in contacting Zavala and asking for progress reports. (18RT 4123-4124) Zavala was concerned that at age 19, Morales still did not how to take the bus and get to places he needed to be. (18RT 4117)

Zavala and Morales discussed possible areas of employment throughout his case. Morales talked about law enforcement, about being a security guard, joining the military. He also talked about electronics. Zavala did not believe going into security or the police field was a very good match for him. (18RT 4098-4099) Toward the end of his time with the Department of Rehabilitation, Morales told Zavala he just wanted to look for a job and did not want to do more training. She documented in her notes that he was very immature and acted childish at times. (18RT 4127)

Zavala told Morales she was going to close out his case for failure to cooperate by not adhering to his responsibilities as stated in his individual plan for

employment. He said he accepted the decision to close his case and indicated that the decision was appropriate and he had no dispute. (18RT 4124-4125)

Zavala later found out Morales had found a job as a security guard or bouncer at a nightclub. She spoke to his mother and expressed her concerns that it was not a good job for him. He got another job, not in security, and she closed her case with him working at that job. (18RT 4107) He found the last job through his uncle. (18RT 4108)

IV.

ARGUMENT: GUILT PHASE

A.

THE TRIAL COURT DENIED MORALES DUE PROCESS AND A FAIR TRIAL, WHEN IT PERMITTED HIM TO BE CONVICTED ON EVIDENCE THAT WAS LEGALLY INSUFFICIENT TO SUPPORT A VERDICT OF FIRST DEGREE MURDER IN COUNTS 1 THROUGH 4. THE ERROR WAS A VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 7 AND 15 OF THE CALIFORNIA CONSTITUTION

1. Introduction

There can be no dispute that Morales killed the Ruiz family and left a bloody, complicated crime scene, one of the worst the prosecution and defense had ever seen. (See 10RT 2009-2011, 2014-2023) However, "[I]t is well established that the brutality of a killing cannot in itself support a finding that the killer acted with premeditation and deliberation. 'If the evidence showed no more than the infliction of multiple acts of violence on the victim, it would not be sufficient to show that the killing was the result of careful thought and weighing of considerations.' [Citations] Moreover, although premeditation and deliberation may be shown by circumstantial evidence [citation], the People bear the burden of establishing beyond a reasonable doubt that the killing was the result of premeditation and deliberation, and that therefore the killing was first, rather than second, degree murder. [Citation]." (*People v. Anderson* (1968) 70 Cal.2d 15, 24-25.)

Based on *Anderson* and its progeny, the fact that Morales committed four homicides does not prove that he premeditated those crimes. As is the case with all crimes, the record must contain sufficient evidence to sustain a true finding as to all elements charged. (*People v. Johnson* (1980) 26 Cal.3d 557, 562.) Substantial evidence must exist as to each essential element of the charge.

(*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Johnson, supra*, 26 Cal.3d at 576-577.) Substantial evidence is "that which is reasonable, credible and of solid value." (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Johnson, supra*, 26 Cal.3d at 577.) In this case, there must be substantial evidence of premeditation and deliberation, but there is none.

2. Guidelines Under *People v. Anderson*

In *People v. Anderson* (1968) 70 Cal.2d 15, this Court set forth guidelines to be used to determine whether premeditation and deliberation has been established: "[A] finding of premeditation and deliberation cannot be sustained in the absence of any evidence of (1) defendant's actions prior to the killing, (2) a 'motive' or 'reason' from which the jury could reasonably infer that defendant intended to kill ..., or (3) a manner of killing from which the jury could reasonably infer that the wounds were deliberately calculated to result in death." (*Anderson, supra*, at pp. 33-34.)

In *People v. Cole* (2005) 33 Cal.4th 1158, the Court clarified that the *Anderson* guidelines are tools – not binding rules -- to help a reviewing court assess the sufficiency of the evidence in a first degree murder case: "Generally, there are three categories of evidence sufficient to sustain a premeditated and deliberate murder: evidence of planning, motive, and method. [Citations] When evidence of all three categories is not present, 'we require either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing.' [Citation] But these categories of evidence, borrowed from *People v. Anderson* (1968) 70 Cal.2d 15, 26-27, 'are descriptive, not normative.' [Citation] They are simply an 'aid [for] reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere

unconsidered or rash impulse.' [Citation]" (*Cole, supra*, 33 Cal.4th at p. 1224, cited with approval in *People v. Elliot* (2006) 37 Cal.4th 453, 470-471)

a. Planning Activity

The first category of evidence supporting premeditation and deliberation under *Anderson* and the cases that follow is "... (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing-what may be characterized as 'planning' activity; ..." (*People v. Anderson, supra,* 70 Cal.2d at pp. 26-27.)

Despite what the crime scene looked like, the prosecution still had to prove planning activity **before** that scene was created. (*People v. Cole* (2005) 33 Cal.4th 1158, 1224.) The prosecution failed to do so. The only two items of evidence that potentially support planning or premeditation were (1) the testimony of neighbor Dorris Morris about the presence of the stepladder and trash barrel by her fence on Saturday morning, July 13, 2002, at 6:00 a.m.; and (2) the folding Vaquero knife and small United knife, both discovered in late October 2002, in the ammunition cans in Jerry Rodriguez's woodpile. (RT 2842-2844, 2585-2587, 2920-2922)

None of this evidence establishes premeditation. The testimony of neighbor Dorris Morris does not show that Morales planned the homicides. The relevant time line with respect to the homicides was from Thursday, July 11, 2002, at 8:30 p.m., through Saturday morning, July 13, 2002, at 10:00 a.m. The prosecution maintained in final argument that on Friday morning, July 12, 2002, between 6:00 and 8:00 a.m., Morales took the stepladder and trash barrel from Morris' yard and used the stepladder to enter the Ruiz yard (16RT 3472), killed the Ruiz family (16RT 3470-3475), and then used the barrel to stash items he had taken from the Morris house. (16RT 3476)

Morris testified that she saw a stepstool by the fence Thursday afternoon, July 11, and put it back in the shed. (11RT 2299-2300; Peo. Exh. 33.) The

homicides allegedly occurred early Friday morning, July 12. (16RT 3473) Saturday morning, July 13, Morris looked out her window and noticed a trash barrel and a stool against her side wall, towards the back of her lot, and that both were gone 15 minutes later. (11RT 2291-2296, 2303; Peo. Exhs. 32, 34.) She added that she raked up the leaves, went behind her garage to get a barrel to dump them in, and found one of her two barrels was missing. (11RT 2295-2296, 2303) If the homicides occurred on Friday morning, as the prosecution maintained, there is no evidence that Morales put the stepladder and trash barrel in place prior to the homicides, and Morris' testimony about seeing them on Saturday morning does not demonstrate planning and premeditation, although it may reveal actions after the killings. The fact that a stool was seen up against the fence the previous Thursday is of no import. There is no evidence as to who put it there or how long it was there and no evidence that it was placed there again, along with the trash barrel, before the killings.

There also is no evidence that Morales was armed with the knives when he entered the Ruiz home. The evidence showed that two knives were used in the homicides, the United knife to kill Maritza Trejo (13RT 2842-2844; 14RT 2942-2943; Peo. Exh. 116), and the Vaquero folding knife to kill Mike Ruiz. (13RT 2842-2844; 2882-2884; 14RT 2936-2941, 2944-2945; Peo. Exh. 120-122) Had the prosecution presented evidence that the knives were in Morales's possession before he entered the Ruiz home to commit the crimes, that fact would tend to establish premeditation. On the other hand, if he entered the house without the knives and grabbed them from somewhere, a trier of fact reasonably could infer that he entered without the intent to commit a criminal act, and then subsequently flew into a rage, grabbed the knives, and committed the killings.

Thus the prosecution failed to present evidence to support that Morales was armed when he entered the Ruiz house. There was no testimony, from Jerry Rodriguez or any other witness, that Morales owned the knives or had been seen

with them in his possession on prior occasions. There also was no evidence to refute the possibility that the knives already were in the Ruiz house when he arrived. As a result, there was insufficient evidence of planning activity. (*People v. Anderson, supra,* 70 Cal.2d at pp. 26-27.)

b. Motive

Motive is the second category of evidence supporting premeditation and deliberation under *Anderson* and its progeny, to wit, "facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, ..." (*People v. Anderson, supra,* 70 Cal.2d at pp. 26-27.) The prosecution failed to produce evidence of what could have motivated Morales to kill the Ruiz family. It is likely that if there was a falling out between Morales and Mike Ruiz or his family, Maritza Trejo, the only surviving family member, would know what happened.

Maritza Raquel, however, never testified as to a falling out. She recalled that Morales came to the house on Gunn often, almost every day and that Ruiz and Morales would "hang out" and talk. (10RT 2119) She mentioned an incident in which Morales stared at her through the window, as a joke he planned with Jasmine, but Morales apologized to her parents immediately and brought dinner that night to make up for his gaffe. (10RT 2120-2123) After that, she avoided him because she did not want to go out with him. (10RT 2122-2123) None of this is evidence of any kind of unresolved dispute between Morales and the Ruiz family; indeed, it appears that if there was some friction, it was "smoothed over" very quickly. (10RT 2122-2123)

The only other evidence of a possible falling out was the testimony of Hector Alvarez, a neighbor on Gunn Street who went over to the Ruiz house often to use the internet. (10RT 2222-2228; Peo. Exhs. 2, 31). Alvarez recalled that Morales was at the Ruiz house constantly, his green Mustang parked in front. A month or two before the homicides, Alvarez noticed that Morales's car was no

longer parked out in front. (10RT 2222-2228) But Morales lived around the corner, and there is no evidence that he did not walk over to the house instead of driving the quarter of a block, particularly in the summertime when it was light outside in the evening. The fact that his car was not parked out in front did not establish an altercation between the parties.

The prosecution itself had no explanation about a motive. Ignoring the fact that Maritza Raquel was a family member who surely would have known about a falling out between Morales and her family, the prosecution argued in closing that "a lot of times in murder cases you don't have evidence of motive because the defendant has killed the only people who could have told us what the motive was." (16RT 3511) Soon thereafter, the prosecution asserted, "And there's a little bit of evidence. Here when the defendant gives his statement, he talks about owing Mike Ruiz money, a hundred or a hundred bucks. The defendant had some confrontation with Raquel [Maritza Raquel]. Something happened. Something definitely happened. We don't know what it is. But he went from being there almost every day to not being there at all. Clear evidence of motive. They weren't getting along. Something happened." (16RT 3511)

The prosecution's characterization of a "clear evidence of motive" was sorely lacking a foundation. Even if Morales owed Mike money, there is no evidence that they had a fight about it. Morales did not have a "confrontation" with Maritza Raquel; he looked in her window and was perhaps inappropriate, but he apologized, brought dinner, and continued to socialize with the family for an undisclosed length of time thereafter. The prosecution insisted that "Something happened ... They weren't getting along," but there is no foundation for that either.

The only evidence left is the fact that Hector Alvarez did not see Morales's car in front of the Ruiz home for a month or two before the killings. This is insufficient evidence of motive. (*People v. Anderson, supra,* 70 Cal.2d at pp. 26-27.)

c. Manner of Killing

The third *Anderson* guideline is that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." (*People v. Anderson, supra*, 70 Cal.2d at pp. 26-27.) The manner of the killings in this case, however vile, do not reflect a preconceived plan. Indeed, it appears that they occurred in a frenzy and that the so-called "staging" of the crime scene with spilled food products and the like occurred as an afterthought.

3. Conclusion

Based on the foregoing, counts 1 through 4 must be reversed based on insufficient evidence to establish willful, deliberate premeditated murder. Where as here there was insufficient evidence to support the verdict, the appropriate remedy is reversal and dismissal of the first degree murder charge, with prejudice. (See *United States v. Dixon* (1993) 509 U.S. 688; *People v. Morris* (1988) 46 Cal.3d 1, 22; *People v. Trevino* (1985) 39 Cal.3d 667, 699; *People v. Pierce* (1979) 24 Cal.3d 199, 209-210.)

B.

THE TRIAL COURT DENIED MORALES DUE PROCESS AND A FAIR TRIAL, WHEN IT PERMITTED THE PROSECUTION CRIME SCENE RECONSTRUCTION EXPERT TO TESTIFY TO THE SEQUENCE AND TIMING OF THE HOMICIDES. THE ERROR WAS A VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 7 AND 15 OF THE CALIFORNIA CONSTITUTION

1. Introduction

Morales firmly maintains that the evidence was legally insufficient to convict him of murder in the first degree under the guidelines set forth in *People v. Anderson, supra,* 70 Cal.2d at pp. 24-27 and *People v. Cole, supra,* 33 Cal.4th at p. 1224. The ability to establish premeditation was very questionable because there was a dearth of evidence to show planning before the crimes; the motive of a falling out between Morales and Mike Ruiz was speculative at best; and the crime scene depicts a frenzied attack rather than a preconceived design. (Argument A., *ante*.) Without a clear motive, the prosecution had to convince the jury that Morales was capable of, and did, plan and premeditate the attack and that the crime scene he left was carefully orchestrated.

Enter Paul Delhauer, a deputy sheriff and "reconstruction expert" hired by the prosecution to prove what the crime scene itself could not: That Morales planned and premeditated a well-thought-out, organized series of murders of the entire Ruiz family. Despite extensive law and motion and discussion about circumscribing Delhauer's testimony to conform to his expertise, the trial court did not rein him in. In the end, much of Delhauer's testimony lacked foundation and in some instances credulity, supplied the jury with conjecture instead of solid opinion and resulted in an unreliable verdict of first degree murder.

The trial court's failure to limit Delhauer's testimony deprived Morales of his constitutional rights to due process of law, a fair trial, and a reliable determination of guilt and of penalty. (U.S. Const. Amends. V, VI, VIII and XIV; Cal. Const., Art. I, §§ 7, 15 and 17; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Beck v. Alabama* (1980) 447 U.S. 625, 638; *Ford v. Wainwright* (1986) 447 U.S. 399)

2. Factual and Procedural Background

On April 1, 2005, the defense informed the court that it had met with the prosecution about the testimony of Paul Delhauer, the prosecution's crime scene reconstruction expert, and attempted to identify certain areas about which he was not qualified to testify. The defense noted that "there seems to be an agreement, but I don't want to speak for him." (10RT 2011-2012) The court commented, "I would certainly agree that any expert witness should be limited to the area of expertise. I'm not ruling on your concerns now." (10RT 2012) The court added that "It's my intention to really expedite the presentation of evidence in this case, and I intend to permit the prosecution – or both sides really, but particularly the prosecution to ask leading questions, to introduce hearsay, as long as the underlying trustworthiness of the testimony is not at issue." The defense agreed, "I think in this particular case it's understandable, given that there were literally dozens of police officers searching locations, finding items. We appreciate the court's concerns." (10RT 2012)

After some discussion about unrelated issues, the defense indicated that it bracketed certain portions of Delhauer's report as inadmissible. (10RT 2049; Court Exh. 1.) The prosecution stated that it would not introduce opinion as to excluded items of evidence or mental issues (10RT 2049-2050) The prosecution explained that Delhauer "is going to be testifying about the physical items that he found at the scene, how this crime occurred, the evidence of staging, the evidence of method and manner of death" and assured the court that it would not introduce

his opinion that "the defendant thought about what he was doing beforehand..." The court observed, "Clearly that would be inadmissible." (10RT 2050)

The defense suggested that the bracketed report be made part of the record so that "the witness is well aware of the areas in which we are talking about." The court responded, "I'm not making any ruling at this point except to agree generally that he shouldn't testify beyond the scope of his expertise." (10RT 1051) The defense noted that portions of the report contained an opinion about appellant's personality profile and should be excluded. The court stated, "Again, this case hinges on real physical forensic evidence, and I think that kind of – that might be interesting for the speculative aspects of an investigation, but after the fact I don't see that it has any relevance." (10RT 2052)

The court admitted the report as Court's Exhibit 1 and noted that "It reflects your areas of concern and the People's representation they won't seek to elicit any of this opinion evidence of Investigator Delhauer." (10RT 2053) The court ruled that Delhauer could testify as to his observations of physical evidence at the crime scene but could not testify as to his conclusion about appellant's intent at the time of the crimes." (10RT 1052-1057) The court agreed that the bracketed portions of the report were speculative or went beyond Delhauer's expertise and would be stricken." (10RT 2057-2058).

The court ruled that it would not exclude observations of the expert based on the crime scene but would exclude testimony to the extent the expert started to extrapolate meaning and significance. The expert could not testify as to an ultimate conclusion regarding Morales' intent. (10RT 2054-2055)

3. Standard of Review

Ordinarily, a trial court's determination of whether a witness qualifies as an expert will not be disturbed on appeal absent a manifest abuse of discretion. (*People v. Bolin* (1998) 18 Cal.4th 297, 321-322) A claim that expert opinion

evidence has been improperly admitted is reviewed under the deferential abuse of discretion standard. (*People v. Panah* (2005) 35 Cal.4th 395, 478.)

This deferential standard of review does not obviate the trial court's critical duty to act as a gatekeeper when the expert testimony veers into speculation. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 753) Moreover, heightened scrutiny is appropriate and necessary when admission results in error of constitutional magnitude in the context of a capital case. The United States Supreme Court has applied heightened scrutiny to procedures in capital cases because "death is [] different." (*Gardner v. Florida* (1977) 430 U.S. 349, 357-358; see also *Lockett v. Ohio* (1978) 438 U.S. 586; and *Godfrey v. Georgia* (1980) 446 U.S. 420.)

The increased concern with accuracy in capital cases has led the Supreme Court to "set strict guidelines for the type of evidence which may be admitted, must be admitted, and may not be admitted." (*Lambright v. Stewart* (9th Cir. 1998) 167 F.3d 477, citing *Skipper v. South Carolina* (1986) 476 U.S. 1; *Booth v. Maryland* (1987) 482 U.S. 496.) These authorities suggest that the record should be independently reviewed to determine whether the trial court's erroneous admission of prejudicial evidence was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

5. Governing Law and Application

a. The Trial Court Has the Duty to Act as a "Gatekeeper" and Exclude Expert Testimony That Lacks Foundation and Based on Speculation and Conjecture.

As with all testimony, expert opinion must be relevant and based on an adequate foundation. (Evid. Code, §§350, 400; *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516) It must be related to a subject that is sufficiently beyond common experience that the opinion of the expert would assist the trier of fact. (Evid. Code, §800) It must originate from an expert who has "special knowledge,

skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid .Code, §720, subd. (a); *Huffman v. Lindquist* (1951) 37 Cal.2d 465.) And it must be more probative than prejudicial. (Evid. Code, §352; *People v. Roscoe* (1985) 168 Cal.App.3d 1093)

The party seeking to admit expert testimony has the burden of proving its admissibility. (Evid. Code, §§400, 401, 550; *Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208) That burden is not met simply by establishing that the proffered witness has credentials in the general field. The proponent of the testimony must affirmatively show that the witness' expertise is directly and specifically related to the subject of the opinion proffered. *(See, Salasguevara v. Wyeth Laboratories, Inc.* (1990) 222 Cal.App.3d 379 [reversing grant of summary judgment in favor of the defense in a medical malpractice action where the defendants relied on the deposition testimony of the plaintiff's own doctor because nothing in the record demonstrated that the doctor was a specialist qualified to render an opinion on the precise issues involved in the action].)

In *Sargon Enterprises v. University of Southern California, supra,* 55 Cal.4th 747, this Court delineated the boundaries of admission of expert testimony pursuant to Evidence Code sections 801 and 802. In *Sargon*, the plaintiff, a dental implant manufacturer, sued USC for damages for breach of contract. At trial, the trial court excluded the proffered testimony of the manufacturer's expert on lost profits. The Court of Appeal reversed based on the exclusion of this expert testimony and remanded the matter to the trial court. (*Id.* at pp. 754-761) The trial court again excluded the testimony. (*Id.* at pp. 761-767) The Court of Appeal reversed again and remanded for a new trial on lost profits. (*Id.* at p. 767-769) The Court granted USC's petition for review, reversed the Court of Appeal, and held that the trial court was correct in excluding the lost profits testimony. (*Sargon, supra*, 55 Cal.4th at pp. 769-782)

While the Court in *Sargon* was required to assess the complex issue of the efficacy of lost profits in lengthy and protracted breach of contract litigation, the

principles set forth in its opinion are very straightforward: A trial judge has broad discretion but that discretion is not without limits. Where the opinion of an expert is without adequate foundation and the opinion is grounded in speculation, conjecture, or a leap of logic, the trial court should act as gatekeeper and exclude it. If the court fails to do so, it abuses its discretion. (*Sargon, supra,* at pp. 769-774, 774-782)

Accordingly, the Court in *Sargon* affirmed the trial court's decision to exclude the proffered testimony of Sargon's expert about lost profits because he relied on data that was not relevant to measuring lost profits, and his methodology was speculative and based on an inadequate foundation that the fledgling company would have achieved market share. (*Id.* at pp. 776-777)

b. Delhauer's Testimony Lacked Foundation and Was Based on Speculation and Conjecture.

A trial judge has broad discretion in deciding whether to admit the testimony of an expert. But as *Sargon* explains, broad discretion does not mean all discretion. When an opinion is built on a faulty foundation it is *ipso facto* unreliable and should not be before the jury. And when the court allows such opinion, it fails at its job as gatekeeper. (*Sargon Enterprises, Inc. v. University of Southern California,supra,* 55 Cal.4th at p. 753.) That is what happened here.

At the outset, the court ruled that Delhauer properly could testify about his observations, but the testimony needed to be circumscribed when it veered into an opinion as to the sequence of events. The court remarked, "I just wanted to indicate that the court would not exclude any observations that are observations of the crime scene. ... The extent to which he starts extrapolating meaning and significance –" (10RT 2055) Once Deputy Delhauer began to testify, however, the court overruled all defense objections and allowed him complete latitude. In so ruling, the court abused its discretion as gatekeeper and enabled Delhauer to

testify to matters lacking foundation. His opinion testimony veered into speculation and conjecture, (*Sargon, supra,* at pp. 769-774, 774-782)

On April 12, 2005, the prosecution called Delhauer as its crime scene reconstruction expert and final witness for its case-in-chief. (14RT 3112) Early in that testimony, the defense interposed an objection based on foundation and speculation. (14RT 3138-3141) The court overruled the specific objection. On defense request, the court ruled that the defense was deemed to have made a continuing objection based on lack of foundation. (14RT 3141) Delhauer testified the remainder of the afternoon. (14RT 3141-3153)

On April 13, 2005, the defense began the morning with a renewal of its objection to Delhauer's testimony. This colloquy followed:

> "Mr. Marquez: I understand we do have an ongoing objection with regard to speculation and lack of foundation, but there's the other issue of continuous narrative answers.
>
> The Court: You're still free to object. I'm not saying you can't object on any grounds, just that one ground of lack of foundation as an indicated ruling. I will deem that to be a continuous objection. If at any point you feel the questions are leading or suggestive or the answers are narrative, without a question pending, feel free to object.
>
> Mr. Marquez: The court's prior ruling didn't include speculation.
>
> The Court: Yes, it did. All right. My ruling was that I'm going to allow Deputy Delhauer to testify as an expert and, I don't know, if there's a question that's asked that's totally off the wall and entirely speculative, yes, I will still sustain an objection. But asking him his opinion as to what may have happened or how stains may have gotten in place, you can still object. I'm not going to hold you in contempt if you object. I'm just indicating in advance the ruling is that I will permit him to tender an opinion.
>
> Mr. Marquez: With regard to the narrative, we objected several times yesterday. Rather than having to do that would the court consider simply advising the prosecution and its witness to try to adhere to –

The Court: It would be helpful if we can have more question and answer rather than the lengthy –

Mr. Glaviano: The problem is -- I'll do that. I have no problem with that. But when a picture comes up, I ask him what are we seeing on a picture, it calls for a rather -- it's not a yes or no answer.

The Court: I agree. I agree. [para.] All right. Let's bring them out.

Mr. Marquez: Just some semblance of question and answer." (15RT 3154-3156)

The defense objected again when Delhauer testified that the ammunition boxes seized contained twine, handcuffs, knives, a sheath, and a can of mace, and that they were consistent with preparation for predatory offenses such as sexual assault. The court sustained this objection. (15RT 3213-3214)

On cross-examination, the underpinnings of much of Delhauer's testimony fell apart. Delhauer disagreed with the pathologist's opinion as to the angle of Miguel's neck wound and whether it was clean or serrated. (15RT 3216-3220) He admitted that the blood in the house entry was not typed (15RT 3258-3260); a bag of sex toys had no blood and may not have been retained for evidence as he said in his report (15RT 3268-3271); blood on Trejo's clothing was not typed (15RT 3258-3260); handprints on the back of the couch which may have been blood were not DNA tested (15RT 3268-3271); and movement by the victim can distort wound and prevent reproduction of the dynamics of the assault. (15RT 3277-3280) He insisted that reddish stains on a pillowcase in the master bedroom looked like blood, even though the criminalist testified otherwise. (15RT 3255-3257) An object he identified as a bidet hose possibly used to douche Jasmine later was established to be a hookah hose. (15RT 3280-3291)

Nonetheless, Delhauer testified in detail as to how he believed the homicides occurred, and in the following sequence: Morales entered the house and the front office, surprised and disabled Miguel Ruiz and inflicted fatal stab wounds. Trejo entered the front office and surprised Morales, who chased and

stabbed her multiple times with a Vaquero folding knife. Next, Morales hit Ana Ruiz on the head with a statue and slashed her with the same knife. After that, Morales dragged the bodies of Ruiz and Trejo from the living room into the back bedroom. Finally, Morales sexually assaulted Jasmine Ruiz and drowned her in the bathtub. (For more detail, see Statement of Facts, "B.1.d(6). Crime Scene Reconstruction," at AOB 45-50, *ante*.)

Delhauer's testimony transformed the crime scene from chaotic, frenzied, and inexplicable into something methodical, rational and *premeditated.* The factual underpinnings for his opinion, however, were nonexistent. While he may have been qualified to match up knife wounds and analyze blood spatter, there was no foundation for his opinion as to the sequence of events. Despite its intent, the court erred in failing to carefully restrict what Delhauer could and could not testify to. The ultimate effect was that he testified to a conclusion that was at best conjecture but misled the jury by its logic that the crime was the result of a well-thought-out plan of attack.

If there were any question that the Delhauer's testimony went too far, the court's own comments afterwards put those doubts to rest. The defense sought to exclude additional autopsy photographs depicting Miguel Ruiz's would marks and asked that Delhauer's description that they were serration marks be excluded. (15RT 3310) After further argument by the prosecution, the court commented:

> "This is enormous prejudice. First of all, I think the defense has done a very effective job of discrediting Deputy Delhauer in at least some aspects of his testimony. The comments on the blood spatter and everything are very interesting and probably I think very appropriate and accurate and I accept much of what he has said. But I also think that the man has tended to overextend himself in terms of the – his opinions.
>
> And the most obvious and glaring example is his pontificating as to a – This being a bidet tube that was in his opinion used to

douche Jasmine when it turns out it is in all probability a hookah pipe tube. I think the defense has done an awful lot to discredit him.

Nonetheless, the jury has seen this entire presentation of his, much of which is cumulative, much of which has already been independently established by either investigating officers or coroners or criminalist and he basically gave an overview of the entire case beginning with an outside view of the house that had absolutely nothing to do with his opinions, just goes from beginning to end. He's just summarized the entire case." (15RT 3311-3312)

The defense argued again that it was error to admit Delhauer's testimony. (15RT 3313)

The court responded:

"It has been admitted in the sense that the witness has – with the exception of those things where I've excluded it or sustained an objection. But to the extent that Deputy Delhauer has taken the stand, testified to something, stated his opinion, shown that summary that summarizes his opinion, this is all evidence that has previously been before the jury. And if the court excludes it now, we're basically closing the barn door after the horse is gone. Because I'm not excluding as evidence, I'm simply saying, well, you heard it, you saw it, but you can't consider it in its original form during your deliberations." (15RT 3313-3314)

After further argument by the defense, the court ruled:

"... Getting back to the subject of the deletions. Unless you've got some specific issue raised to an objection sustained by the court and was excluded, I think this should all go in subject to the modifications already indicated, on the understanding that you

can argue to your heart's content to the jury that Delhauer has been largely discredited. And I think he has. There are large areas in which he hasn't been and his observations are appropriate.

It's also entirely cumulative and I think, quite frankly, you can have a field day saying this man is full of himself and his opinions go far afield of his limited expertise. And you have some factual basis. So certainly if there's anything in there to the extent that it memorializes his opinion, I don't see any great prejudice to the defense because the defense has the ability to attack his opinions." (15RT 331-3316)

After more discussion, the defense renewed its objection that Delhauer's testimony lacked foundation and was speculative. The defense asked the court once again to strike his testimony on state and federal constitutional grounds under the Fifth and 14th Amendments. (15RT 3323-3325)

The court concluded,

"But I do want to say this. Again, your cross-examination of Detective Delhauer was very effective to the extent that you made it sound as if he was basing his expertise upon his grammar school education. However, he has had an awful lot of on-the-job training. And as we know from watching, 'My Cousin Vinny,' his education, training or experience, once does not have to have formal education to qualify as an expert.[18] I stand by the ruling that Deputy Delhauer

[18]In the unlikely event the Court is not familiar with the plot in *My Cousin Vinny,* the trial court in this case was referring to the fact an unschooled witnesses can qualify as an expert pursuant to Evidence Code section 801. In *Vinny*, at the eleventh hour, the protagonist-lawyer Vincent "Vinny" Gambino qualified his fiancée Mona Lisa Vito as an expert in tire skid marks based on her years of experience working as a mechanic in her father's auto repair garage. Lisa then

is entitled to testify as an expert. His opinions may be overblown, but that's a question to be argued by both sides. There's an awful lot of validity to what he has done, to what he's testified to in my opinion. I think that his expertise is very much demonstrated, in my opinion, by some of the observations that he has made.

I do think that he has tended to deviate from the scientific method to the extent he's allowing himself to render opinions that go beyond the limits of his expertise, but that's my personal opinion and it's got no bearing on this case. It certainly is not enough to justify striking the entirety of his testimony. I think he is entitled to testify as an expert, he did so, and the court's going to leave it all out

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testified that the innocent murder defendants' car, a Buick Skylark, did not have "Positraction," a rear slip differential, and thus could not have made the skid marks left by the getaway car. She further explained why the only other likely car to leave such skid marks was a 1964 Pontiac Tempest. A records search confirmed that a stolen 1964 Tempest and its occupants were found in the next county, with a loaded .357 Magnum in the back seat; they already had been apprehended on unrelated theft charges. Realizing that the defendants were the innocent victims of mistaken identity, the court dismissed the case against them, and Vinny won the day. (See *My Cousin Vinny*, at the Internet Movie Database, summarized in *My Cousin Vinny*, in Wikipedia.)"

While *Vinny* is fiction, it is noteworthy that the trial court in this case recognized by its comment why Lisa was a qualified expert but court seems to have missed the other critical point about her testimony: Through his questioning and Lisa's answers, Vinny established the difference between marks left by a Tempest and a Skylark, thereby laying an unassailable foundation that the defendants' Skylark could not have left the marks. This testimony was in stark contrast to that of the prosecution's FBI expert witness in *Vinny*, who testified that that the getaway car was the Skylark based on chemical analysis of the type of rubber in its tires, an inadequate foundation because so many tires were manufactured with that rubber. Thus *Vinny* demonstrates that the reliability of an expert's opinion must be predicated on solid establishment of the factual foundation on which the opinion is based, something lacking in this case. (See *Sargon Enterprises v. University of Southern California, supra,* 55 Cal.4th 747, 774-779.)

there for the jury to consider and for both sides to argue." (15RT 3324-3325)

Despite its own skepticism, the trial court allowed all of Deputy Delhauer's testimony to remain in evidence. The judge's own words underscore the error. The court opined that to whatever extent Delhauer's testimony was problematic, much of it was cumulative and independently established by other expert witnesses. (15RT 3311-3312)

Defense cross-examination flatly refutes this assessment. Delhauer disagreed with the pathologist's opinion as to the angle of Miguel's neck wound and whether it was clean or serrated. (15RT 3216-3220) He insisted that reddish stains on a pillowcase in the master bedroom were blood, although the criminalist testified otherwise. (15RT 3255-3257) He admitted that the blood in the house entry, on Trejo's clothing, and on the back of the couch was not typed. (15RT 3258-3260, 3268-3271) The inability to assess the source of the blood at each critical point in the crime scene calls into question his assessment of the sequence of events. (See again, Statement of Facts, "B.1.d(6). Crime Scene Reconstruction," at AOB 45-50, *ante*.)

Delhauer's misidentification of the hookah hose as a bidet used on Jasmine may have been the least damaging portion of his testimony simply because it was so easily and absurdly refuted. But it remains a powerful metaphor for the overblown nature of his opinion and his tendency to skate over what the other experts believed to reach his desired conclusion. (See 15RT 3280-3291)

The court remarked that "[Delhauer] just summarized the entire case." (15RT 3311-3312) This comment dismisses as unimportant "just a" case summary, but in reality the problems with Delhauer's testimony rendered baseless most of his "summary" – i.e., his opinion as to how the killings went down was unreliable. This unreliable "summary," in turn, could have no effect other than to mislead the jury into viewing the killings as well-planned and premeditated.

The court stated that Delhauer's testimony was "entirely cumulative and I think, quite frankly, you can have a field day saying this man is full of himself and his opinions go far afield of his limited expertise. And you have some factual basis. ... I don't see any great prejudice to the defense because the defense has the ability to attack his opinions." (15RT 3315-3316)

The court's comment betrays a profound misunderstanding of its role as expert opinion gatekeeper. (See again *Sargon, supra,* 55 Cal.4th at pp. 774-779.) The very purpose of expert opinion is to assist the jury in understanding "a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) If as in this case that opinion is unreliable because it lacks foundation, the prejudice resulting from it having been presented to the jury as fact is obvious: There is a grave danger that the jury will reach a verdict based on information that is at best misleading and at worst objectively untrue. That is exactly what happened here. "It is well settled that an expert's assumption of facts contrary to the proof destroys the opinion. [Citation] Also as one appellate court has pointed out, 'It is impossible for any expert basing his testimony solely upon other evidence introduced in the case thus to lift himself by his own bootstraps. If his opinion is not based upon facts otherwise proved, or assumes facts contrary to the only proof, it cannot rise to the dignity of substantial evidence.' [Citation]." (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 338-339.)

Based on the foregoing, the trial court's decision not to strike Deputy Delhauer's testimony – despite the court's own misgivings – was an abuse of discretion and in error. (See *Sargon Enterprises v. University of Southern California, supra,* 55 Cal.4th 747, 774-779.)

5. Prejudice

The trial court's error in admitting and then not striking Deputy Delhauer's testimony deprived Morales of his constitutional rights to due process of law, a fair trial, and a reliable determination of guilt and of penalty. (U.S. Const. Amends. V, VI, VIII and XVI; Cal. Const., Art. I, §§ 7,15 and 17; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Beck v. Alabama* (1980) 447 U.S. 625, 638; *Ford v. Wainwright* (1986) 447 U.S. 399) The resulting prejudice is evaluated under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24, which shifts the burden to the state to provide beyond a reasonable doubt that the error did not contribute to the verdict obtained. (*Ibid.*) Respondent will not be able to meet that burden.

The crime scene was frenzied and chaotic, the product of inexplicable rage. In its raw form, the scene was not likely to have been planned and carried out by an individual who premeditated and deliberated before doing so. Deputy Delhauer's testimony imposed upon that scene reason, organization and order based on assumptions largely refuted. Some of those assumptions were as elementary and as wrong as disagreeing with forensic experts as to whose blood was where. Some were as absurd as characterizing a hookah pipe for a bidet hose. Enough of the assumptions were wrong that his opinion was on very shaky ground.

However, the testimony gave the jury a hook on which to hang a finding of premeditated murder, and Delhauer's testimony was tantamount to telling the jury just that: Morales surprised Ruiz from behind and cut his neck. (14RT 3123; 15RT 3175, 3179-3182). Trejo entered the office at the time of the assault, and Morales stabbed and killed her as well [but the blood on the door jamb was never tested or shown to be hers]. Stains on the bedding in the master bedroom were consistent with blood spatter [but a criminalist testified there was no blood in the master bedroom]. (15RT 3254-3258]. There also were bloodstains on Jasmine's bedspread [but Delhauer did not examine it and there was no blood in the

bedroom]. (15RT 3247-3250) Morales douched Jasmine with a bidet hose [which turned out to be a hookah pipe]. ((15RT 3288-3291)

On the other hand, Dr. Purisch, the psychologist who performed the neuropsychological exam on Morales, concluded that Morales was so disabled from a frontal lobe injury that he was incapable of organizing what he wanted to do and too passive to do so even if he wanted to. Dr. Purisch explained that when an individual such as Morales cannot think things out, when the world kind of hits him and he reacts to it, he does so oftentimes in an impulsive manner. There is a reaction to things rather than an organization of one's thoughts. Some tests showed that under stress in particular, Morales would have faulty impulse control. (18RT 4034-4036) Morales did not think things through and reacted to situations out of frustration. (18RT 4053-4058)

Dr. Purisch's assessment was unrefuted and was supported by a great deal of evidence. It confirmed that Morales was not capable of organizing an attack, but was capable of committing the offenses in a reactive, impulsive manner. Deputy Delhauer's opinion that the homicides were methodical and organized imposed order on the inexplicable, was without foundation and speculative. Nonetheless Delhauer's opinion gave the jury the go-ahead to find premeditation even though a neuropsychologist explained why that was improbable. Because it facilitated a finding of premeditation, admission of his opinion was not harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

C.

THE TRIAL COURT DENIED MORALES DUE PROCESS AND A FAIR TRIAL WHEN IT OVERRULED DEFENSE OBJECTIONS TO ADMISSION OF UNNECESSARILY GRUESOME CRIME SCENE PHOTOGRAPHS. THE ERROR WAS A VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION,

1. Introduction

While the prosecution is entitled to put on victim impact evidence, there are limits to emotion-provoking material that can have no effect other than to inflame the jury into a decision that looks more like passion-inducing retribution than a reasoned consideration as to whether a capital defendant's life should be spared. In this case, the prosecution engaged in overkill when it introduced the color photographs of the victims, which are gut-wrenching to look at. The photographs should have been limited to what was necessary for the jury to understand an overview of what happened, and the court's refusal to do so on defense request was error.

2. Factual and Procedural Background

a. Defense Motion to Exclude Cumulative Photographs

Prior to trial, the court indicated that "because of the incredible complexity of this case, forensic complexity and the physical complexity of the crime scene, the Court is inclined to give wide latitude to the People in terms of pictures that might help address, if not resolve, the question of how this happened, whether or not one person was capable of accomplishing all of this; and I would be disinclined to allow anything that is purely cumulative, but I don't know to what extent that may come into play." (10RT 2010) The court went on, "I just want to indicate, I know there are going to be a vast number of pictures in here. The Court

has no problem with allowing them in. The gruesomeness aspect of them is going to be difficult to overcome. I suppose all we can hope for is there will be some kind of numbing effect after seeing them collectively. Although that may be an absurd hope." (10RT 2010)

The defense responded, "We certainly understand the Court's point. In part, as we see it, they should be permitted to present their case. We certainly understand. The Court did mention, though, cumulative photographs of which are numerous photographs of a graphic nature. And Mr. Glaviano [prosecutor] is pulling them at this point in time. Sometimes there are three or four photographs of the exact same thing. Very close-up shots." (10RT 2011)

The court decided, "We'll address that as we go through. I want to give you a preview of what my mind-set was before we started this hearing." (10RT 2011)

The prosecutor commented that he would make it clear from the first witness that the photos are disturbing, some of the most disturbing photos he has ever seen. Of the first four photos of the victims' bodies for identification purposes, the prosecution selected one photo for each point to be made by the witnesses, with nothing duplicated. (10RT 2014-2016) The defense objected that the prejudicial effect of the photographs outweighed their probative value under *People v. Hall* (1980) 28 Cal.3d 143. (10RT 2016-2017) The photographs of Jasmine were particularly horrible, and the defense asked that they be presented in digitized form, in black and white.

The court decided to allow four photographs of Jasmine into evidence: (1) Statue over the body, showing injury and fluid to vaginal and anal area; (2) Overview with statue removed; (3) Close up with overview; and (4) Vaginal and anal area ripped open. The defense said its objection to the photos was not that they are gruesome but that they are so bad that it will be hard to keep jurors from running out of the courtroom, and there may be alternatives. The court ruled, "I'm not going to minimize the impact or undermine the impact of this case by reducing

them to black and white pictures." (10RT 2017-2023) The court overruled defense objection to a shot of Jasmine with her skull pulled back, showing she was hit with a blunt item. The defense wanted to use a black and white photo. The court said there was a minimal amount of blood and the picture is clean and surgical. (10RT 2046-2047)

The second group of tagged photographs was of Miguel Ruiz. Those photos included shots of the victim: (1) lying down with tape around his face; and (2) the Coroner's photograph with his neck and shoulder showing the full extent to the damage to his neck and showing drag marks. The victim was nearly decapitated. Over defense objection, the court ruled there was a legitimate reason for showing the color photographs, which depict full extent of the injuries, and not using black and white photos instead. (10RT 2023-2026) The defense argued that the photos of Miguel were cumulative. The court overruled the objection as to the photographs: (1) showing the left side of the throat and undercut tissue; (2) showing right side of victim's neck, showing near decapitation; (3) picture of his skull, pulled back, although an earlier similar picture was excluded (letter K); and (4) incised injury overlaying a stab wound to the throat. (10RT 2037-2042)

The third group of tagged photographs was of Ana Martinez, the elderly victim. The court admitted a photograph showing wounds to the victim's chest area and neck and that two different type of knives were used. The court excluded photo (J) as cumulative. (10RT 2026-2029)

Finally, the court overruled the defense offer to stipulate to the identity of the victims and stated that prosecution had a right to place four photos of victims in evidence, identified by a family member who was not the surviving victim. The court agreed that any defense objections regarding this evidence was deemed to be made throughout trial. (10RT 2058-2062)

b. Photographs Admitted

Ultimately, the court admitted color photographs of the victims, as follows:

(1) Maritza Trejo: Coroner's photograph (Peo. Exh. 27); overview of bodies of Maritza and Mike (Peo. Exh. 50, 51); close-up of Maritza (Peo. Exh. 53). (26CT 7382-7385)

(2) Miguel "Mike" Ruiz: Coroner's photograph (Peo. Exh. 28); overview of bodies of Maritza and Mike (Peo. Exh. 50, 51); close-up of Mike (Peo. Exh. 52); autopsy of Mike, face with tape (Peo. Exh. 86); tape taken from Mike (Peo. Exh. 87); Mike's neck wound (Peo. Exh. 88); left side of Mike's face (Peo. Exh. 89, 90); Mike's scalp depicting neck, left side, back and hand (Peo. Exh. 91-96). (26CT 7382-7385)

(3) Ana Martinez: Coroner's photograph (Peo. Exh. 29); "Grandma" [Ana] overview (Peo. Exh. 54); "Grandma" close-up (Peo. Exh. 55); Ana Martinez neck (Peo. Exh. 97). (26CT 7382-7385)

(4) Jasmine Ruiz: Coroner's photograph (Peo. Exh. 30); Jasmine's bathroom, Jasmine's head (Peo. Exh. 41); Jasmine with statue (Peo. Exh. 56); Jasmine head with close up (Peo. Exh. 57); Jasmine with statue on top of her (Peo. Exh. 79); Jasmine with statue removed (Peo. Exh. 80); Close up of Jasmine showing location of dildo (Peo. Exh. 81); Jasmine neck showing petechiae (Peo. Exh. 98); Jasmine right eyelid showing petechiae (Peo. Exh. 100); Jasmine feet (Peo. Exh. 101); Jasmine palm (Peo. Exh. 102); Jasmine damage to vagina (Peo. Exh. 103); Jasmine damage to rectum (Peo. Exh. 104). (26CT 7382-7385)

3. Standard of Review, Governing Law and Application

"The admission of allegedly gruesome photographs is basically a question of relevance over which the trial court has broad discretion." (*People v. Scheid* (1997) 16 Cal.4th 1, 13-14.) "A trial court's decision to admit photographs under

Evidence Code section 352 will be upheld on appeal unless the prejudicial effect of such photographs clearly outweighs their probative value." (*People v. Moon* (2005) 37 Cal.4th 1, 34)

However, "[U]nnecessary admission of gruesome photographs can deprive a defendant of a fair trial and require reversal of a judgment. [Citation] Autopsy photographs have been described as 'particularly horrible,' and where their viewing is of no particular value to the jury, it can be determined the only purpose of exhibiting them is to inflame the jury's emotions against the defendant. [Citation]" (*People v. Marsh* (1985) 175 Cal.App.3d 987, 997)

The trial court's decision to admit photographs of the victims, particularly Jasmine and Miguel, was an abuse of discretion. There was no question as to the identity of the victims, and their injuries were well-described. The photographs were excessive and had no effect other than to render what was already a gruesome murder scene more inflammatory.

4. Prejudice

The photographs violated Morales' rights to due process and a fair trial under the Fifth and Fourteenth Amendments, and contravened the need for reliability in the application of the death penalty mandated by the Eighth Amendment. Once again, the resulting prejudice is evaluated under the standard set forth in *Chapman v. California, supra,* 386 U.S. at p. 24, which shifts the burden to the state to provide beyond a reasonable doubt that the error did not contribute to the verdict obtained. (*Ibid.*) Respondent will not be able to meet that burden.

The trial court's decision to admit the foregoing photographs went far beyond the purpose of establishing the crime scene, having no effect other than provoking jury emotion and subjective response. If one or more jurors had a reasonable doubt about whether Morales premeditated the killings, that doubt was

unfairly neutralized by the photographs because they were so inflammatory that no trier of fact could avoid being unduly swayed after looking at them. Consequently introduction of the photographs was not harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

V.

PENALTY PHASE ISSUES

D.

THE TRIAL COURT DEPRIVED MORALES OF DUE PROCESS, A FAIR TRIAL, AND THE RIGHT TO PRESENT A DEFENSE PURSUANT TO THE FEDERAL AND STATE CONSTITUTIONS, WHEN IT ADMITTED VICTIM IMPACT EVIDENCE

1. Introduction

While the prosecution is entitled to put on victim impact evidence, there are limits to emotion-provoking material that can have no effect other than to inflame the jury into a decision that looks more like passion-inducing retribution than a reasoned consideration as to whether a capital defendant's life should be spared. In this case, the prosecution introduced the testimony of surviving family members Maritza Raquel Trejo, Kenelly Zeledon, Miguel Ruiz, Sr., Luz Ruiz, Olga Lizzette Ruiz to testify regarding victim impact. The trial court erred by failing to limit the testimony of these witnesses to avoid inflaming the jury

2. Factual and Procedural Background

a. Law and Motion

On January 26, 2005, the defense filed a *Notice of Motion to Limit Victim Impact Evidence,* pursuant to Penal Code section 190.3, the United States Constitution, Amendments 5, 6, 8 and 14; the California Constitution, Articles I, sections 7, 15, 17 and 24; and Evidence Code sections 210 and 352. (4CT 865-881) On February 1, 2005, the prosecution filed its *Response to Defense Motion to Limit Victim Impact Evidence.* (4CT 886-890)

On April 21, 2005, the trial court heard argument on the motion. The defense objected to the admission of photographs of Jasmine at age 6, a drawing

Jasmine made at school in which she said, "I love my family" "my sister's the best in the world" and about her dog, a short video photograph of Jasmine at her house, and the announcement of the funeral of the victims. (16RT 3618-3624, 3629-3630, 3634-3638)

The defense further argued that the prosecution victim impact witnesses could not just "vent" and state why Morales should get the death penalty and asked that the witnesses be admonished to control their emotions. The defense pointed out that the admission of victim impact evidence even in California is limited pursuant to *People v. Pollock* [(2004) 32 Cal.4th 1153, 1180-1183]. The prosecution responded that the witnesses would not "vent" but had the right to testify how the murders have affected them. (16RT 3630-3634)

The court ruled that the witnesses would not be allowed to give prepared statements from the stand, but admitted the funeral announcement with the victim's pictures depicted in a collage and the short video photograph of Jasmine. (16RT 3634-3438)

After testimony on an unrelated issue, the defense objected again to the introduction of victim impact evidence with respect to additional photographs and improper victim impact statements, based on federal and state constitutional grounds under the 8th and 14th Amendments. The defense further argued that this evidence was not sufficiently trustworthy and was constitutionally irrelevant, arbitrary and discriminatory and failed to protect Morales's right to be free from cruel and unusual punishment and be accorded due process and equal protection. The defense further objected pursuant to Evidence Code section 352. The defense requested that its objections be deemed continuing objections, and the court confirmed that the defense would be deemed to have made a continuing objection to all items throughout the trial. (16RT 3671-3672)

b. Testimony

The prosecution called family members Maritza Raquel Trejo, Kenelly Zeledon, Miguel Ruiz, Sr., Luz Ruiz, Olga Lizzette Ruiz to testify regarding victim impact. The defense did not cross-examine these witnesses. (17RT 3700-3751)

Maritza Raquel Trejo testified that on the day the crimes were discovered, she realized her family was dead when she heard Kenelly screaming and crying from inside the house, Kenelly came outside and hugged Maritza. Maritza wanted to go back inside, but Kenelly would not allow her to do so. (17RT 3700-3702) Days later, Maritza went back inside the house to clean. She spent half the day alone in the room she shared with Jasmine Ruiz, picking things up and putting them away. (17RT 3702) Jasmine was Maritza's sister, and she loved her. She did not return to El Salvador because of Jasmine. Jasmine was a happy and active girl, always telling jokes. (17RT 3702-3706, 3712-3713; Peo. Exh. 155, 156 [photographs], 163 [videotape].) They did things together and Jasmine wanted to be just like Maritza, dress like her and talk like her. Maritza missed that. She identified a drawing Jasmine made of her family. It said, "I love my family. My mom and dad are the best in the world and my sister she is the best in the world, too. Jasmine." (17RT 3702-3706; Peo. Exh. 157)

Maritza had a good relationship with her mother, Maritza Trejo. Trejo was Maritza's mother but she was also her friend. She was a happy, friendly person who Maritza never saw get angry. Maritza stayed behind in El Salvador when her mother came to the United States. They only had a few years together. It meant so much for Maritza to finally be able to come to the U.S. and live as a family. Now she had no family with whom to share. (17RT 3706-3707)

Miguel Ruiz (Mike) raised Maritza as though he was her real father. This made her feel special. He was always there for her, always smiling. He was proud of her accomplishments, and now she did not have anyone to be proud of

her. (17RT 3707-3709) She felt that the people who should be here, helping to celebrate her life, were not the ones here. (17RT 3710)

Anna Martinez, Ruiz's mother, was an active person until the last year of her life. Even though she required a lot of help from everyone, she still kept an eye out for the entire family. She wanted everyone to be okay. (17RT 3710)

Maritza was in therapy for two years before going to school at the University of California, Berkeley. She thought she would be okay at school, but recently she had been back in therapy and using medication to help concentrate. It was hard. (17RT 3711-3712)

Kenelly Zeledon testified about what she saw when she entered the house the day the crimes were discovered. The first body she saw was that of Jasmine. It was a nightmare. Then she went into the bedroom and saw Ruiz, Trejo, and Martinez. She could not believe this was happening. (17RT 3714-3715)

Mike Ruiz was a lovely man, a perfectionist. He liked everything organized and clean. If anyone needed help, he was there. He was very outgoing and happy. (17RT 3715-3716)

Maritza Trejo was Kenelly's friend and her husband's sister. People were drawn to Trejo's outgoing personality. She was always joking around and laughing. She was an outstanding salesperson. (17RT 3716-3717) She worked for Kenelly's husband and was his right hand. She handled everything at their other store. After Maritza died they had to shut down one store because her husband could not handle both stores. (17RT 3722)

Anna Martinez could not communicate very well because of her condition, but she always was hugging and loving. She was a very caring person. (17RT 3718)

Jasmine Ruiz was very dear to Kenelly. Jasmine loved playing "dress-up." She would tell Kenelly not to throw her clothes away, because when she grew up she was going to wear them. Jasmine played with Kenelly's son. The day at the house when Kenelly found the bodies, her son was in the car and kept calling out

that he wanted to get out of the car and play with Jasmine. Kenelly did not know what to say to him, except to stay in the car. (17RT 3718-3720)

After the murders, Kenelly found herself becoming anxious at night. She went around the house to make sure all the doors and windows were locked. She had to make sure all the lights were on to go into the bathroom and that nothing was in the bathtub. (17RT 3720) Kenelly worked as an emergency response social worker, investigating child abuse. Every time she encountered a sexual abuse case, Jasmine would come to mind. (17RT 3721)

The first Christmas after the deaths was difficult. There was just emptiness. For the previous five years, they all had been together for the holidays, but since then, it was very empty. (17RT 3723; Peo. Exh. 158 [photograph of Ruiz, Trejo and Jasmine at Magic Mountain]; 159 [photograph of Jasmine and Trejo at the store].)

Miguel Ruiz, Sr., the father of Miguel Ruiz, testified that after he left the shoes on the porch for his mother, Anna Martinez, he went home. Later a friend of his son called and told him something was wrong at the house. He drove to the house and saw the police all over. He knew something bad had happened. (17RT 3725-3727)

Anna Martinez was Ruiz Sr.'s best friend. He was her only son and he saw her at least every two or three days. They were very close and were a very close family. (17RT 3727-3728; Peo. Exh. 160 [photograph of Ruiz, Sr. and Martinez on Mother's Day].)

Mike Ruiz was Ruiz, Sr.'s only son and they were very close. Anything he asked of Ruiz, Ruiz would do. Ruiz, Sr. got along well with Trejo. She took care of the family. He loved Jasmine, who was a very intelligent child. (17RT 3729-3730) Everything changed after the deaths. Ruiz, Sr. lost his job. He could not sleep. He was nervous and still suffered. He could not forget what happened. (17RT 3731)

Luz Ruiz was married to Miguel Ruiz, Sr. She testified that she was with Ruiz, Sr. when left the shoes at the house on Gunn for Martinez. They were at the house at least three times a week, or the family would be at their home. (17RT 3732-3733) Luz got along well with Mike Ruiz. They would joke around, and he was the only person they would use when something was wrong with anything electrical, including the car. (17RT 3734) Luz did not see as much of Trejo because she was working. She would sit on the floor and draw with Jasmine, who was a happy child. (17RT 3734) Luz's husband was not the same man since the crimes. She tried to treat him as normal as possible, but it was hard. He was very depressed. (17RT 3734-3735)

Olga Ruiz was the younger sister of Mike Ruiz. Mike was her mentor. They talked about the big party they were going to throw when they both turned 40. She turned 40 in August and Mike would have turned 40 the previous year. That party would never happen. (17RT 3736-3737) Mike was a very trusting person and very friendly. He was a great brother, son, and a dedicated father. Olga had seen Morales at Mike's house. Ruiz treated him the way he treated everyone, with open arms. (17RT 3737-3738)

Maritza Trejo was very giving and very loving. Olga would drop by the house every morning before work and they would drink coffee. Maritza would greet her at the door with her cup of coffee ready. (17RT 3738)

Ana Martinez raised Olga and Mike Ruiz while their parents worked. She was very nurturing. At the time of her death, Ana could not talk or take care of herself because of a tumor and operation in her head. (17RT 3742-3743)

Olga did not have any biological children. Her niece Jasmine, was her heart. Jasmine loved to play and to dance. She was very intelligent and talked about becoming a teacher or a veterinarian. (17RT 3744, 3749-3750; Peo. Exh. 161 [photograph with Mike].)

The last time Olga talked to Ruiz was the day before the murders. The day of the murders, Olga tried calling Ruiz but he did not pick up. She found that

strange. After work, she picked up her mother and they went to the house on Gunn. There were police, an ambulance, and people everywhere. She had no idea what happened. The sheriffs told them about the murders. She was in total disbelief. (17RT 3740-3741)

The sheriffs asked Olga and her mother to go to the station. They still did not know what happened. She found out when she was asked to identify the family at the morgue. She had to look at photographs. It was the most horrific experience she has ever had. (17RT 3746-3746) A few days after the murders, Olga and her mother went inside the house. It was like being in a horror movie, with red "stuff" everywhere. (17RT 3749) She identified the invitation to the funeral. (17RT 3749-3750; Peo. Exh. 162)

Olga was still waiting for someone to call her and tell her the nightmare was over and they were alive. She knew that would never happen and that they were never going to return. She did not know how to deal with it. She had gone to therapy because of the anger she had inside. She missed them all so much. (17RT 3747-3748) The worst part was not knowing how much her family suffered and why someone would torture a little girl. She felt helpless at not being able to help her family when she was there every single day, and the one day she did not go there, something like this happened. (17RT 3751)

c. Jury Instruction Settlement

After testimony but prior to argument, the defense proposed CALJIC 8.85 (Supp. 6), "Cautionary & Limiting: Victim Impact." (18RT 4002-4005) The proposed instruction read,

> "Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crime. Such evidence, if believed, was not received and may not be considered by you to divert your attention from your proper role of deciding whether defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional

evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy"

(26CT 7293)

The defense offered to delete the final sentence, which read, "On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy." (18RT 4002-4005; 26CT 7293) The court initially agreed. (18RT 4003) After further opposition from the prosecution, the court reversed itself and ruled that the final sentence should be included. (18RT 4003-4004) The defense deferred its decision about the instruction. (18RT 4005)

The parties returned to argument on this issue after the prosecution rested on rebuttal,. (28RT 4135 et seq.) The court ruled that the instruction could only be given if it included the final sentence. The defense objected and said that if the court was going to give the instruction with the final sentence, it would withdraw the instruction. The instruction was not given. (18RT 4138-4142, 4181-4203; see 26CT 7293)

d. Closing Argument

The prosecution discussed victim impact at length during closing argument: Morales's actions affected the family members left behind. This was a very close family. Maritza Raquel had to deal with the fact that Morales slaughtered her whole family. She went on to UC Berkeley and her family would be so proud. She was on medication because it was hard for her to concentrate. She only had a few years with her mother after she came from El Salvador. She wanted to go to law school. She lost Jasmine and talked about Jasmine always being excited about her birthday. Now Maritza Raquel had nothing but horrible memories every year. (19RT 4213-4215)

Kenelly had to find the bodies. She was a social worker and dealt with sexual assault; that was very difficult because she thought about how Jasmine suffered. She had to explain to her son what happened to Jasmine. Her husband could not talk about it. The Christmas after they died was hard and empty. (19RT 4215-4217)

Miguel Ruiz, Sr. lost his only son, his daughter-in-law, his mother, and her granddaughter, all at once. He could not work, concentrate, or sleep. He quit his job. His relationship with his wife was strained. (19RT 4217-4218) Luz Ruiz, the wife of Ruiz, Sr., lost her stepson, daughter-in-law, mother-in-law and granddaughter. (RT 4218-4219)

Olga Ruiz lost her brother, sister-in-law, grandmother and niece. She had to go to the Coroner's Office and identify them from their pictures. The pictures did not even look like them and depicted horrible deaths. She and Mike could not celebrate their 40th birthdays together. She was bitter. The holidays were empty. She did not have a Christmas tree. Her worst memory was finding out how her family was killed. (19RT 4219-4222)

Surviving family members felt guilt at not being able to help or do something. Olga testified that had they all died in an accident, it would have been very sad, but not as horrible as all of them having been murdered. (19RT 4222-4223)

e. Final Instructions and Deliberations

The court provided final instructions and the jury commenced deliberations. (19RT 4268-4274)

f. CALJIC 8.85.1 – Spring 2010

After the trial in this case, CALJIC added a new instruction, 8.85.1 as to Victim Impact Evidence in Spring 2010. The new instruction read:

> "Victim impact evidence has been received in this trial for the purpose of showing, if it does, the financial, emotional, psychological or physical effects of the victim's death on the family and friends of the victim[s]. You may consider this evidence as part of the circumstances of the crime in determining penalty. Your consideration must be limited to a rational inquiry, and must not be simply an emotional response to this evidence. These witnesses are not permitted to offer any opinion as to what is the appropriate penalty in this case."

(CALJIC 8.85.1, Spring 2010 Ed., at p. 503)

3. Governing Law and Application

a. Standard of Review

This Court has long held that during the penalty phase of a capital trial, the prosecution may present evidence regarding not only the physical and emotional effects of the capital offense being tried under factor (a) of Penal Code section 190.3, but also the effects of a defendant's violent criminal activity under factor (b) of section 190.3 on victims and survivors of that activity. (See *People v. Clark* (1990) 50 Cal.3d 583, 628-629; *People v. Edwards* (1991) 54 Cal.3d 787, 832-837; *People v. Mickle* (1991) 54 Cal.3d 140, 187; *People v. Garceau* (1993) 6 Cal.4th 140, 201-202, overruled on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118; *People v. Holloway* (2004) 33 Cal.4th 96, 143.)

According to this Court, the prohibition against victim impact evidence at the sentencing phase of a capital trial has largely been overruled and thus is not barred by the federal Constitution. (*People v. Holloway, supra*, 33 Cal.4th at p. 143,fn. 13, citing *People v. Garceau, supra*, 6 Cal.4th at pp. 201-202.) A trial court's erroneous admission of victim impact evidence is analyzed under the harmless-error standard for federal constitutional error set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (See *People v. Clark, supra*, 50 Cal.3d at p. 629; *Payne v. Tennessee* (1991)501 U.S. 808, 824.).

b. Evidence

In *Payne v. Tennessee* (1991) 501 U.S. 808, the United States Supreme Court upheld admission of evidence describing the impact of a state defendant's capital crimes on a three-year-old boy who was present and seriously wounded when his mother and sister were killed. The court held the Eighth Amendment did not preclude admission of, and argument on, such evidence (*id.* at p. 827), thereby overruling the blanket ban on victim impact evidence and argument imposed by its earlier decisions in *Booth v. Maryland* (1987) 482 U.S. 49, and *South Carolina v. Gathers* (1989) 490 U.S. 805. The court did not hold that victim impact evidence must, or even should, be admitted in a capital case, but instead merely held that if a state decides to permit consideration of this evidence, "the Eighth Amendment erects no per se bar." (*Payne v. Tennessee* (1991) 501 U.S. at p. 827; see also *id.* at p. 831 (conc. opn. of O'Conner, J.).) The court was careful to note that the Due Process Clause of the Fourteenth Amendment would be violated by the introduction of victim impact evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair . . . ." (*Payne v. Tennessee* (1991) 501 U.S. at p. 825; see also *id.* at pp. 836-837 (conc. opn. of Souter, J.).)

Payne recognized that while the federal Constitution does not impose a *blanket ban* on victim impact evidence, such evidence may violate the Fifth, Sixth, Eighth and Fourteenth Amendments where it is so inflammatory as to invite an irrational, arbitrary, or purely subjective response from the jury. (*Payne v. Tennessee* (1991) 501 U.S. at pp. 824-825; *Edwards, supra*, 54 Cal.3d at 836.) The admissibility of victim impact evidence therefore must be determined on a case-by-case basis.

As Justice Souter explained in his concurring opinion in *Payne:*

> "Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation. Cf. *Penry v. Lynaugh* [(1989)] 492 U.S. 302, 319-328 [] (capital sentence should

> be imposed as a "reasoned *moral* response") (quoting *California v. Brown* [(1987)] 479 U.S. 538, 545 [](O'Connor, J., concurring)); *Gholson v. Estelle* [(5th Cir. 1982)] 675 F.2d 734, 738 ('If a person is to be executed, it should be as a result of a decision based on reason and reliable evidence'). . . . With the command of due process before us, this Court and the other courts of the state and federal systems will perform the 'duty to search for constitutional error with painstaking care,' an obligation 'never more exacting than it is in a capital case.'" (*Payne v. Tennessee* (1991) 501 U.S. at pp. 836-837 (conc. opn. of Souter, J.), citing *Burger v. Kemp* (1987) 483 U.S. 776, 785.)

While this Court has tolerated a wide range of victim impact evidence, it also has recognized its limits. In a series of cases decided after the trial in this case, for instance, the Court has upheld admission of videotapes portraying victims' lives. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1287-1291 [25-minute video interview with the victim, taped a few months before her death]; *People v. Kelly* (2008) 42 Cal.4th 763, 793-799 [videotape of 19-year-old victim's life prepared and narrated by her mother]; *People v. Zamudio* (2008) 3 Cal.4th 327, 363-370 [14-minute video montage of victims as adults, narrated by their children and grandchildren].) It also has upheld admission of photographs and letters written by the victim. (See *People v. Valencia* (2008) 43 Cal.4th 268, 300 [photograph of 22-year-old victim, accompanied by testimony of his father, who lived in poverty in Oaxaca, Mexico and was supported by him and who read his final letter to the jury]; and *People v. Edwards* (1991) 54 Cal.3d 787, 832-835.)

The *Kelly* and *Zamudio* cases eventually made their way to the United States Supreme Court, which on November 10, 2008 denied certiorari. Two justices in *Kelly*, however, expressed grave concerns as to whether victim impact evidence should be admitted at all because of its impingement of due process, and a third justice, (*Kelly v. California* (2008) 555 U.S. 1020 [J. Stevens, dissenting from denial of certiorari; J. Souter, expressing opinion he would grant review].)

Justice Stevens commented,

> "As these cases demonstrate, when victim impact evidence is enhanced with music, photographs, or video footage, the risk of unfair prejudice quickly becomes overwhelming. While the video tributes at issue in these cases contained moving portrayals of the lives of the victims, their primary, if not sole, effect was to rouse jurors' sympathy for the victims and increase jurors' antipathy for the capital defendants. The videos added nothing relevant to the jury's deliberations and invited a verdict based on sentiment, rather than reasoned judgment.
>
> "I remain convinced that the views expressed in my dissent in *Payne* are sound, and that the *per se* rule announced in *Booth* is both wiser and more faithful to the rule of law than the untethered jurisprudence that has emerged over the past two decades. Yet even under the rule announced in *Payne*, the prosecution's ability to admit such powerful and prejudicial evidence is not boundless.
>
> "These videos are a far cry from the written victim impact evidence at issue in *Booth* and the brief oral testimony condoned in *Payne*. In their form, length, and scope, they vastly exceed the 'quick glimpse' the Court's majority contemplated when it overruled *Booth* in 1991. At the very least, the petitions now before us invite the Court to apply the standard announced in *Payne*, and to provide the lower courts with long-overdue guidance on the scope of admissible victim impact evidence. Having decided to tolerate the introduction of evidence that puts a heavy thumb on the prosecutor's side of the scale in death cases, the Court has a duty to consider what reasonable limits should be placed on its use." (*Kelly v. California, supra,* 555 U.S. at p. ___, 129 S.Ct. at p. 567 [J. Stevens, dissenting from denial of certiorari])

Even though the United States Supreme Court has not yet provided a litmus test for what is and is not constitutionally admissible as victim impact evidence, as Justice Stevens advocates, it is clear that some cases have attempted to draw limits. In *Prince, supra*, this Court recognized, "Case law pertaining to the admissibility of videotape recordings of victim interviews in capital sentencing hearings provides us with no bright-line rules by which to determine when such

evidence may or may not be used. We consider pertinent cases in light of a general understanding that the prosecution may present evidence for the purpose of '"reminding the sentencer ... [that] the victim is an individual whose death represents a unique loss to society" [Citation]' but that the prosecution may not introduce irrelevant or inflammatory material that '"diverts the jury's attention from its proper role or invites an irrational, purely subjective response." [Citation]'" (*Prince, supra*, at p. 1288, citing *Payne v. Tennessee, supra*, 501 U.S. at p. 825, and *People v. Edwards, supra*, 54 Cal.3d at p. 836.)

The Court in *Prince* noted that, "Courts must exercise great caution in permitting the prosecution to present victim-impact evidence in the form of a lengthy videotaped or filmed tribute to the victim. Particularly if the presentation lasts beyond a few moments, or emphasizes the childhood of an adult victim, or is accompanied by stirring music, the medium itself may assist in creating an emotional impact upon the jury that goes beyond what the jury might experience by viewing still photographs of the victim or listening to the victim's bereaved parents. The trial court in the present case clearly understood the power of this type of evidence, commenting early in the proceedings that 'I have a great deal of concern about the medium of a videotape creating a situation of grave prejudice,' and that 'there is a qualitative difference between a videotape and a still photograph from an emotional standpoint.' In order to combat this strong possibility, courts must strictly analyze evidence of this type and, if such evidence is admitted, courts must monitor the jurors' reactions to ensure that the proceedings do not become injected with a legally impermissible level of emotion." (*Prince, supra*, at p. 1289, cited with approval in *Kelly, supra*, at pp. 794-798 and *Zamudio, supra*, at p. 367)

People v. Edwards, supra, 54 Cal.3d 787, 832-835 upheld the admission of photographs of the victim while she was alive, and the prosecutor's argument referring to the impact of the crime on her family. In so doing, the Court held that

"factor (a) of section 190.3 allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim," but "only encompasses evidence that logically shows the harm caused by the defendant." (*People v. Edwards, supra,* 54 Cal.3d at p. 835.) The Court was careful to note that it was not holding that factor (a) includes all forms of victim impact evidence and argument. (*Ibid.*) Rather, there are "limits on emotional evidence and argument . . . [and] the trial court must strike a careful balance between the probative and the prejudicial. . . . [I]rrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*Id.* at p. 836.)

The striking feature of the victim impact evidence that *Payne* deemed appropriate, and not so inflammatory as to risk a verdict based on passion, is the extremely limited nature of this evidence. In *Payne,* the grandmother of the three-year-old surviving victim testified in response to a single question (*Payne v. Tennessee* (1991) 501 U.S. at p. 826: "He 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 pp. 814-815)

The victim impact evidence introduced in this case was so voluminous, inflammatory and unduly prejudicial as to "divert the jury's attention from its proper role [and] invite[] an irrational, purely subjective response[.]" (*People v. Edwards, supra,* 54 Cal.3d at p. 836.) The evidence was so out of proportion to the evidence introduced in other cases as to shift the focus of the jury from "a reasoned *moral* response" to Morales's personal culpability and the circumstances of his crime (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319) to a passionate, irrational, and purely subjective response to the sorrow of the surviving Ruiz family members. (See *Cargle v. State* (Ok.Cr.App. 1995) 909 P.2d 806, 830 ["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."].)

The emotionally charged and detailed testimony introduced in this case was precisely the type of evidence that *Payne* and progeny recognized as unduly prejudicial and likely to provoke irrational, capricious, or purely subjective responses from the jury. (*Payne v. Tennessee, supra,* 501 U.S. at p. 825; *People v. Edwards, supra,* 54 Cal.3d at p. 836.) Introduction of this testimony violated Morales's rights to due process and a fair trial under the Fifth and Fourteenth Amendments, and contravened the need for rationality and reliability in the application of the death penalty mandated by the Eighth Amendment.

c. Instruction

The trial court compounded the prejudicial effect of the victim impact evidence when it failed to correctly instruct the jury as to how it should be evaluated. In *People v. Zamudio, supra,* the trial court declined to give CALJIC 8.85, Supp. 6, the same instruction proposed by the defense in this case but including the language in the last paragraph that, "...On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy." (*People v. Zamudio, supra,* 43 Cal.4th at p. 368.)

The Court in *Zamudio* observed, "For several reasons, the trial court did not err in declining to give defendant's proposed instruction. First, the substance of the requested instruction, insofar as it correctly stated the law, was adequately covered by the slightly modified version of CALJIC 8.84.1 the trial court gave; '[t]he proposed instruction would not have provided the jury with any information it had not otherwise learned from CALJIC No. 8.84.1.' [Citation] [fn. omitted] Second, the requested instruction is misleading to the extent it indicates that emotions may play no part in a juror's decision to opt for the death penalty. Although jurors must never be influenced by passion or prejudice, at the penalty phase, they 'may

properly consider in aggravation, as a circumstance of the crime, the impact of a capital defendant's crimes on the victim's family, and in so doing [they] *may exercise sympathy for the defendant's murder victims and ... their bereaved family members.* [Citation.]' [Citation] 'Because the proposed instruction was misleading ..., and because the point was adequately covered by the instructions that the court did give, the trial court acted correctly in refusing to use" the instruction defendant proposed.'[Citation]" (*Zamudio, supra*, at pp. 368-369)

In response to *Zamudio*, the Committee on Jury Instructions added CALJIC 8.85.1, set forth above, as follows:

> "Victim impact evidence has been received in this trial for the purpose of showing, if it does, the financial, emotional, psychological or physical effects of the victim's death on the family and friends of the victim[s]. You may consider this evidence as part of the circumstances of the crime in determining penalty. Your consideration must be limited to a rational inquiry, and must not be simply an emotional response to this evidence. These witnesses are not permitted to offer any opinion as to what is the appropriate penalty in this case."

(CALJIC 8.85.1, Spring 2010 Ed., at p. 503) The Comment to No. 8.85.1 notes that *Zamudio* sought instruction as to a "rational inquiry." (*Ibid.*)

The fact that the defense-requested instruction and no comparable instruction was given to the jury resulted in further prejudice.

4. Prejudice

The trial court's decision to admit the voluminous victim impact testimony went far beyond the purpose of victim impact evidence, having no effect than provoking jury emotion and subjective response. If one or more jurors had any lingering doubt about Morales' guilt, that doubt was unfairly neutralized by the photographic evidence depicting the lives of the deceased family members and the abject sorrow of those testifying about their loss. (See again dissent to denial of

certiorari in *Kelly v. California, supra,* 555 U.S.1020) Introduction of this testimony violated Morales's rights to due process and a fair trial under the Fifth and Fourteenth Amendments, and contravened the need for reliability in the application of the death penalty mandated by the Eighth Amendment.

Admission of the victim impact evidence in this case was not harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

E.

THE TRIAL COURT DEPRIVED MORALES OF DUE PROCESS, A FAIR TRIAL, AND A RELIABLE PENALTY DETERMINATION, WHEN IT INSTRUCTED THE JURY ABOUT THE PROCESS OF WEIGHING FACTORS UNDER MODIFIED CALJIC NO. 8.88

1. Introduction

CALJIC 8.88, as written and as modified in this case, violated Morales's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal constitution and the corresponding sections of the state constitution. The instruction was vague and imprecise, failed to accurately describe the weighing process the jury must apply in capital cases, and deprived Morales of the individualized consideration the Eighth Amendment requires. The instruction also was improperly weighted toward death and contradicted the requirements of Penal Code Section 190.3 by indicating that a death judgment could be returned if the aggravating circumstances were merely "substantial" in comparison to mitigating circumstances, thus permitting the jury to impose death even if it found mitigating circumstances outweighed aggravating circumstances Reversal of the death sentence is required. Morales recognizes that similar arguments have been rejected by this Court in the past. (See, e g, *People v. Lindberg* (2008) 45 Cal.4th 1, 51-52; and *People v. Duncan* (1991) 53 Cal 3d 955, 978.) However, Morales respectfully submits that these cases were incorrectly decided for the reasons set forth herein and should be reconsidered

2. Factual and Procedural Background

The trial court instructed the jury with CALJIC No. 8.88 as follows:

"CALJIC 8.88 Penalty Trial—Concluding Instruction

It is now your duty to determine which of the two penalties, death or imprisonment in the state prison for life without possibility of parole, shall be imposed on the defendant.

After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

An 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. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. There is no need for you as jurors to unanimously agree to the presence of a mitigating or aggravating factor before considering it. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the

mitigating circumstances that it warrants death instead of life without parole.

You shall now retire to deliberate on the penalty. The foreperson previously selected may preside over your deliberations or you may choose a new foreperson. In order to make a determination as to the penalty, all twelve jurors must agree.

Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom."

(26CT 7282-7283)

The defense requested the court add the following language to the second paragraph of CALJIC No. 8.88:

"The permissible aggravating factors are limited to those aggravating factors upon which you have been specifically instructed. Therefore, the evidence which has been presented regarding the defendant's background may only be considered by you as mitigating evidence."

(13CT 3641)

The court also added the following supplemental language, on defense request:

"CALJIC 8.88 (Suppl. 2) Mitigation Defined

"Mitigation evidence is not evidence offered as an excuse for the crimes of which you have found defendant guilty. Rather, it is any evidence which in fairness may serve as a basis for a sentence less than death. The law requires your consideration of more than the bare facts of the crime. Mitigating circumstances may include, but not be limited to, any facts relating to defendant's age, character, education, environment, life, and background, which might be considered extenuating or tend to reduce his moral culpability or

make him less deserving of the extreme punishment of death. You must consider a mitigating circumstance if you find there is evidence to support it. The weight which you accord a particular mitigating circumstance is a matter of your judgment."

(26CT 7313)

3. Governing Law and Application

a. CALJIC No. 8.88 Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Impose a Sentence of Life Without Possibility of Parole

California Penal Code Section 190.3 directs that, after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating, circumstances." (Pen. Code, § 190.3[19] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (*Boyde v. California* (1990) 494 U.S. 370, 377)

This mandatory language, however, is not included in CALJIC No.8.88 Instead, the instruction informs the jury merely that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by Penal Code Section 190.3. The instruction by its terms would plainly permit the imposition of a death penalty

[19]The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. However, this Court has held that this formulation of the instruction improperly misinformed the jury regarding its role and disallowed it. (*People v Brown* (1985) 40 Cal 3d 512, 544, n 17)

whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances. Put another way, reasonable jurors might not understand that if the mitigating circumstances outweighed the aggravating circumstances, they were required to return a verdict of life without possibility of parole. By failing to conform to the specific mandate of Penal Code Section 190.3, the instruction violates the Fourteenth Amendment. (*Hicks v Oklahoma* (1980) 447 U S. 343, 346-347)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by the applicable statute. An instructional error which incorrectly describes the burden of proof, and thus "vitiates all the jury's findings," can never be shown to be harmless. (*Sullivan v Louisiana* (1993) 508 U.S. 275, 281 (Emphasis in original).)

This Court has found the formulation set forth in CALJIC No 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating." (*People v. Duncan* (1991) 53 Cal 3d 955, 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The opinion cites no authority for this proposition, and Morales respectfully urges that the case is in conflict with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See, e g, *People v. Moore* (1954) 43 Cal.2d 517, 526-29, *People v Costello* (1943) 21 Cal.2d 760; *People v Santana* (2000) 80 Cal App 4th 1194, 1208-09.)

In *People v. Moore, supra,* 43 Cal 2d 517, this Court stated the following about a set of one-sided instructions on self-defense: "It is true that the instructions do not incorrectly state the law, but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but *that principle should not have been left to implication.* The

difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. *There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles.*" (*Id.* at pp. 526-27 [internal quotation marks omitted, emphasis added].)

In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming it were a correct statement of law, the instruction at issue here stated only the conditions under which a death verdict could be returned, and contained no statement of the conditions under which a verdict of life was required. *Moore* is thus squarely on point.

In addition, the slighting of a defense theory in the instructions has been held to deny not only due process but also the right to a jury trial, because it effectively directs a verdict as to certain issues in the defendant's case. (*Zemana v Solem* (D.S.D. 1977), 438 F.Supp 455, 469-470, aff'd and adopted, 573 F 2d 1027, 1028 (8th Cir 1978), see *Cool v United States* (1972) 409 U.S 100 [disapproving instruction placing unauthorized burden on defense].) Thus the defective instruction violated Morales's Sixth Amendment rights as well. Under the standard of *Chapman v California*, 386 U S at 24, reversal is required.

b. CALJIC No. 8.88 Failed to Inform the Jurors That They Had Discretion to Impose Life Without Possibility of Parole Even in the Absence of Mitigating Evidence

"The weighing process is `merely a metaphor for the juror's personal determination that death is the appropriate penalty under all the circumstances '" (*People v Jackson* (1996) 13 Cal.4th 1164, 1243-44 [citations omitted].) Thus, this Court has held that the 1978 death penalty statute permits the jury in a capital

case to return a verdict of life without possibility of parole even in the complete absence of any mitigating evidence. (*People v Duncan, supra*, 53 Cal.3d at 979, *People v Brown* (1985) 40 Cal 3d 512, 538-541, reversed on unrelated grounds in *California v Brown* (1987) 479 U.S. 538 [jury may return a verdict of life without possibility of parole even if the circumstances in aggravation outweigh those in mitigation].)

The jurors in this case, however, were never informed of this critical fact. To the contrary, the language of CALJIC No 8.88 implicitly instructed the jurors that if they found the aggravating evidence "so substantial in comparison with the mitigating circumstances," death was the permissible and proper verdict. That is, if aggravation was found to outweigh mitigation, a death sentence was compelled. Since the jurors were never instructed that it was unnecessary for them to find mitigation in order to impose a life sentence instead of death sentence, they were likely unaware that they had the discretion to impose a sentence of life without possibility of parole even if they concluded that the circumstances in aggravation outweighed those in mitigation - and even if they found no mitigation whatever. As framed, then, the CALJIC No 8.88 had the effect of improperly directing a verdict should the jury find mitigation outweighed by aggravation. (See *People v. Peak* (1944) 66 Cal App 2d 894, 909.)

Since the defect in the instruction deprived Morales of an important procedural protection that California law affords noncapital defendants, it deprived Morales of due process of law. (*Hicks v Oklahoma, supra*, 447 U S at 346; see *Hewitt v Helms* (1980) 459 U.S. 460, 471-472), and rendered the resulting verdict constitutionally unreliable in violation of the Eighth and Fourteenth Amendments. (*Furman v Georgia* (1972) 408 U S 238.)

c. The "So Substantial" Standard for Comparing Mitigating and Aggravating Circumstances Set Forth in CALJIC No. 8.88 Is Unconstitutionally Vague and Fails to Set Forth the Correct Statutory Standard

Under the standard CALJIC instructions, the crucial question of whether to impose death hinges on the determination of whether the jurors are "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without possibility of parole " (CALJIC No 8.88, 26CT 7287-7283) There is nothing in the words "so substantial" that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v Georgia* (1980) 446 U.S. 420, 429.) The phrase "so substantial" creates a standard that is vague, directionless and impossible to quantify. It thus invites arbitrary application of the death penalty in violation of the Eighth and Fourteenth Amendments.

The word "substantial" caused constitutional vagueness problems when used as part of aggravating circumstances in the Georgia statutory death penalty scheme. (*Arnold v State* (1976) 224 S E 2d 386). In *Arnold*, the Georgia Supreme Court ruled that while it "might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of a death sentence compels a different result." (*Ibid*) The United States Supreme Court has specifically praised the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (*Gregg v Georgia* (1976) 428 U.S. 153, 202.) The phrase "so substantial," as used in CALJIC No 8.88, is too amorphous to constitute a clear standard by which to judge whether the penalty is appropriate, and its use in this case rendered the resulting death sentence constitutionally indefensible.

d. CALJIC No. 8.88 Failed to Convey to the Jury That the Central Decision at the Penalty Phase Is the Determination of the Appropriate Punishment

As noted above, CALJIC No 8.88 informed the jury that, "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole " (13CT 3659-3660.) Clearly, just because death may be warranted in a given case does not mean it is necessarily appropriate. To "warrant" death more accurately describes that state in the statutory sentencing scheme at which death eligibility is established, that is, after the finding of special circumstances that authorize or make one eligible for imposition of death.[20]

Eighth Amendment capital jurisprudence demands that the central determination at the penalty phase be whether death constitutes the appropriate, and not merely a warranted, punishment. (See *Woodson v North Carolina* (1976) 428 U S 280, 305) Because CALJIC No 8.88 does not adequately convey this standard, it violates the Eighth and Fourteenth Amendments.

4. Prejudice

As set forth above, based on the closeness of the case, as evidenced by the length of deliberations and the number of questions posed by the jury that went

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[20] "Warranted" is a considerably broader concept than "appropriate." Webster's defines the verb "to warrant" as "to give (someone) authorization or sanction to do something, (b) to authorize (the doing of something)" WEBSTER'S UNABRIDGED DICTIONARY (2d Ed 1966). In contrast, "appropriate" is defined as, "1. belonging peculiarly, special 2. Set apart for a particular use or person [Obs.] 3. Fit or proper, suitable, " (Id at 91) "Appropriate" is synonymous with the words "particular, becoming, congruous, suitable, adapted, peculiar, proper, meet, fit, apt" (id), while the verb "warrant" is synonymous with broader terms such as "justify, authorize, support." (*Id.,* at 2062.)

directly to Morales's state of mind, it is reasonably likely that this error affected the death verdict. Reversal is required.

F.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT MORALES'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

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

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6.)[21] See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 (while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review).

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[21]In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, "is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (126 S.Ct. at p. 2527.)

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

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code section 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The

result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

G.

MORALES' DEATH PENALTY IS INVALID BECAUSE PENAL CODE SECTION 190.2 IS IMPERMISSIBLY BROAD.

To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against Morales the statute contained 33 special circumstances[22] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or

[22]This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797.

acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

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

H.

MORALES'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE SECTION 190.3(A) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[23] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[24] or having had a "hatred of religion,"[25] or threatened witnesses after his arrest,[26] or disposed of the victim's body in a manner that precluded its recovery.[27] It also is

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[23]*People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3.
[24]*People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, *cert. den.*, 494 U.S. 1038 (1990).
[25]*People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S. Ct. 3040 (1992).
[26]*People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S. Ct. 498.
[27]*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, *cert. den.* 496 U.S. 931 (1990).

the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

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

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

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

I.

CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY DETERMINATION OF EACH FACTUAL PREREQUISITE TO A SENTENCE OF DEATH; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death.

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

Morales's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296 [hereinafter *Blakely*]; and *Cunningham v. California* (2007) 549 U.S. 270 [hereinafter *Cunningham*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there

was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (Id., at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (Id., at 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at 299.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 313.)

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

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *(United States v. Booker, supra,* 543 U.S. at 244.)

In *Cunningham,* the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. *(Cunningham v. California, supra*, 549 U.S. 270.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

a. In the Wake of *Apprendi*, *Ring*, *Blakely*, and *Cunningham*, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra,* 16 Cal.4th at p. 1255; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral

and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

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

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[29] These factual determinations are essential prerequisites to death-

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[28] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

[29] In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.*, 59 P.3d at p. 460)

eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[30]

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

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

The U.S. Supreme Court in *Cunningham* explicitly rejected this reasoning.[31] In *Cunningham* the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a

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[30] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown* (1985) 40 Cal.3d 512, 541.)

[31] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black*, 35 Cal.4th at 1253; *Cunningham, supra,* 549 U.S. at p. 289.)

reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (*Id.*, pp. 6-7.) That was the end of the matter: *Black's* interpretation of the DSL "violates Apprendi's bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." *(Cunningham, supra,* 549 U.S. at p. 288-289.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.*, p. 14.) "The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* 'bright-line rule' was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that '[t]he high court precedents do not draw a bright line')." (*Cunningham, supra,* 549 U.S. at p. 290.)

In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.*

In its effort to resist the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.)

This holding is simply wrong. As section 190, subd. (a)[32] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, 549 U.S. at p. 278.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment

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[32] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

authorized by the jury's verdict. The Supreme Court squarely rejected it: "This argument overlooks *Apprendi*'s instruction that 'the relevant inquiry is one not of form, but of effect.' 530 U.S., at 494, 120 S.Ct. 2348. In effect, 'the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict.' *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151." (*Ring*, 536 U.S. at p. 604.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 536 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 536 U.S. at 604.)

In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Blakely*, 542 U.S. at p. 328; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the

penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

b. Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring* (Ariz. 2003) 65 P.3d 915, 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People,* 64 P.3d 256 (Colo.2003); *Johnson v. State,* (Nev. 2002) 59 P.3d 450.[33])

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique

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[33] See also Stevenson, "The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing" (2003) 54 *Ala L. Rev.* 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death).

in its severity and its finality"].)[34] As the high court stated in *Ring*, *supra*, 536 U.S. at pp. 589, 609: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death."

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

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[34]in its *Monge* opinion, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* (1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri* (1981) 451 U.S. 430, 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).)

a. Factual Determinations

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

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. Imposition of Life or Death

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

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338 [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Cal.3d 306 [same]; *People v. Thomas* (1977) 19 Cal.3d 630 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky*, *supra*, the U.S. Supreme Court reasoned: "[I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . 'the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [Citation omitted.] The stringency of the 'beyond a reasonable doubt' standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that 'society impos[e] almost the entire risk of error upon itself.'" (455 U.S. at p. 755.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be

effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson*, *supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 [emphasis added].) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

3. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived Morales of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown*, (1987) 479 U.S. 538, 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*, 16 Cal.4th at p. 1255) there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

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

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d

at p. 267.)[35] The same analysis applies to the far graver decision to put someone to death.

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

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias* (2006) 39 Cal.4th 1, 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, *ante*.)

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[35] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra,* 548 U.S. 163 [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

4. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51 (emphasis added), the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review."

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that cannot be charged with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia* (1972) 408 U.S. 238. (See Section A of this Argument, *ante*.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra,* 548 U.S. 163), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d

907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

5. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945

The U.S. Supreme Court's recent decisions in *U. S. v. Booker* (2005) 543 U.S. 220, *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Morales's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

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

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

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

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034) The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

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

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death: "The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider 'whether or not' certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft* [(2000) 23 Cal.4th. 978, 1078-1079]; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887.) *Indeed, 'no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors.'* (*People v. Arias* [(1996) 13 Cal.4th 92, 188].)" (*People v. Morrison* (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, 34 Cal.4th at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)

The very real possibility that Morales's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived Morales of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) – and thereby violated Morales's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343;

Fetterly v. Paskett (9th Cir. 1993) 997 F.2d 1295, 1300 [holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment]; and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].)

It is thus likely that Morales's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated Morales "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

J.

THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS.

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

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra,* 17 Cal.3d at p. 251; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and

any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[36] as in *Snow*,[37] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."[38]

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[36] "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Prieto* (2003) 30 Cal.4th 226, 275; emphasis added.)

[37] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (*People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 3; emphasis added.)

[38] In light of the Supreme Court's decision in *Cunningham*, *supra*, if the basic structure of the DSL is retained, the findings of aggravating circumstances supporting imposition of the upper term will have to be made beyond a reasonable doubt by a unanimous jury.

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, *ante*.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Section C.3, *ante*.) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[39] (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra,* 536 U.S. 584.)

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[39] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at p. 609.)

K.

CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. ("Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking" (1990) 16 *Crim. and Civ. Confinement* 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v.*

Guyot (1895) 159 U.S. 113, 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See, *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311]].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[40] Categories of

[40]See Kozinski and Gallagher, "Death: The Ultimate Run-On Sentence," 46 *Case W. Res. L.Rev.* 1, 30 (1995).

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

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

VI.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted on behalf of defendant and Morales Alfonso Ignacio Morales that the judgment of conviction and sentence of death must be reversed.

Dated: November 7, 2013

Respectfully submitted,

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VI.

CERTIFICATE OF WORD COUNT

Rule 8.630, subdivision (b)(l), California Rules of Court, states that an Morales's opening brief in an appeal taken from a judgment of death produced on a computer must not exceed 95,200 words. The tables, the certificate of word count required by the rule, and any attachment permitted under Rule 8.204, subdivision (d), are excluded from the word count limit. Pursuant to Rule 8.630, subdivision (b), and in reliance upon Microsoft Office Word 2007 software which was used to prepare this document, I certify that the word count of this brief is 49,716 words.

Dated: November 7, 2013.

Respectfully submitted,

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VIII.

PROOF OF SERVICE BY MAIL

State of California)
)
County of Los Angeles)

I am employed in the County aforesaid; I am over the age of eighteen (18) years and not a party to the within action; my business address is 6520 Platt Avenue, PMB 834, West Hills, CA 91307-3218.

On November 6, 2013, I served the within Morales's Opening Brief on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at West Hills, California, addressed as follows:

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DIANE E. BERLEY