No. S146939



IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>LEE SAMUEL CAPERS,<br><br>Defendant and Appellant. | San Bernardino County<br>Case No. FBA-02684 |



**APPELLANT'S OPENING BRIEF**

Appeal from the Judgment of the Superior Court
of the State of California for the County of San Bernardino

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DEATH PENALTY

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# APPELLANT'S OPENING BRIEF

## STATEMENT OF APPEALABILITY

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

## INTRODUCTION

The crimes in this case occurred on or about November 10, 1998. Though the police suspected that they had been committed by appellant, appellant's half-brother, Anthony Leatham (aka "Eagle"), Carlos Loomis (aka "Bam-Bam") and Ruben Romero (aka "Wino"), the police had no physical or eyewitness evidence tying any one of the four suspects to the crimes. The case lay dormant until January 5, 2001, at which time

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

appellant, who had previously told the police on at least five occasions that he was not involved in the crimes, contacted them and gave them the first of a series of statements in which he said that he had participated in the crimes with Bam-Bam, Wino, and a third person, a "youngster," whose name he did not know.

Based on his statements to the police, appellant was charged with and ultimately convicted of the murders of Nathaniel and Consuelo Young. None of the other suspects were ever charged, presumably because appellant's statements against them were unreliable and could not be independently corroborated, as required by law. (Pen. Code, § 1111.)

The arguments raised herein concern the reliability and trustworthiness of appellant's uncorroborated statements to the police and Lisa and Martin Blake, and the extent of his involvement, if any, in the charged crimes.

Specifically, appellant argues that the judgment must be reversed because the evidence against him rests on his uncorroborated statements to the police and the Martins, statements which he demonstrates are untrustworthy and unreliable.

At trial, defense counsel also sought to prove through one Amber Renteria that the robbery and burning of the victims was committed by Loomis and Romero. Renteria had told the police early on in their investigation that she had overheard Loomis say that he and Romero had robbed and burned down a store on Main Street. Renteria later recanted what she told the police about Loomis and Romero and, when called as a defense witness at trial, claimed the "Fifth" on the ground that she faced unspecified possible accessory liability under Penal Code section 32. However, as shown by the record, she faced no possible liability as an

accessory because the applicable three-year statute of limitations had run at the time she was called as a witness. Though she had recanted her earlier statements implicating Loomis and Romero, defense counsel was hopeful that she would repeat her earlier statements implicating them if she was forced to take the witness stand and to testify under oath. Appellant argues that the erroneous ruling with respect to Renteria's claimed Fifth Amendment privilege requires, at the very least, reversal of the death sentence.

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## STATEMENT OF THE CASE

On March 19, 2004, an amended information was filed in the San Bernardino County Superior Court charging appellant with Count 1, a violation of section 187 (first degree murder of Nathaniel Young); Count 2, a violation of section 187 (first degree murder of Consuelo Young); Counts 3 and 4, violations of section 211 (second degree robbery of Consuelo Young and Nathaniel Young, respectively); Count 5, a violation of section 451, subdivision (a) (arson causing great bodily injury to Consuelo Young); Count 6, a violation of section 12021, subdivision (a)(1) (possession of a firearm by a felon); and Count 7, a violation of section 4502, subdivision (a) (possession of a weapon in a penal institution). The information further alleged the following special circumstances as to Counts 1 and 2: multiple murder (§ 190.2, subd. (a)(3)); that appellant committed the murders while engaged in the commission of robbery (§ 190.2, subd. (a)(17)(A)); kidnapping (§ 190.2, subd. (a)(17)(B)); and burglary (§ 190.2, subd. (a)(17)(G)). As to Counts 1, 3 and 4, it was alleged that appellant personally used a deadly weapon, to wit, a handgun, within the meaning of section 12022.53, subd. (b). As to Counts 3, 4 and 5, it was alleged that they were serious felonies within the meaning of section 1192.7, subd. (c), and violent felonies within the meaning of section 667.5, subdivision (c). As to Count 7, the information alleged 10 prior felony convictions. (2CT 384-390.)[2]

On March 19, 2004, appellant pleaded not guilty and not guilty by reason of insanity to the charges and denied all of the additional allegations. (2CT 392.)

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[2] "CT" refers to the clerk's transcript on appeal; and "RT" refers to the reporter's transcript on appeal.

On October 15, 2004, appellant's counsel indicated to the court that appellant requested "the opportunity" to withdraw his plea of not guilty by reason of insanity, and the trial court granted appellant's request based on defense counsel's representation. (2CT 406; 2RT 137.) On December 3, 2004, at the request of the prosecution, appellant personally withdrew his plea of not guilty by reason of insanity. (2CT 408.)

On January 10, 2006, appellant's motion to represent himself was filed. (2CT 450-453.) He withdrew the motion in open court on February 2, 2006. (2CT 455.)

On April 25, 2006, appellant's case came on for trial. (3CT 502.)

On May 1, 2006, jury selection began. (3CT 511.) Also on May 1, 2006, appellant's motion to bifurcate the priors was granted. (3CT 512.) Jury selection was completed on May 15, 2006. (31CT 8875-8876.)

On May 17, 2006, the prosecution began presenting its case. (31CT 8877.)

On June 1, 2006, the prosecution rested. The defense rested "on the state of the evidence." (31CT 8904; 8RT 1790.) The judge dismissed Count 6 under upon the prosecution's motion under section 1385. Appellant's section 1118.1 motion for a judgment of acquittal as to Count 5, a violation of section 451, subdivision (a) (arson causing great bodily injury), was heard and the court reserved ruling on the motion. (31CT 8909.)

On June 5, 2006, the court granted appellant's section 1118.1 motion by amending the information to allege a violation of section 451, subdivision (d) (arson of property). (31CT 8934.) The prosecution filed a second amended information. Appellant was re-arraigned on the amended information and pleaded not guilty to all counts and denied all of the

additional allegations. (*Ibid.*) The prosecution's motion to strike the kidnapping special circumstance allegations alleged in Counts 1 and 2 was granted. (31CT 8935.)

On June 7, 2006, the jury began its deliberations. (31CT 8941.)

On June 12, 2006, the jury found appellant guilty of Count 1, a violation of section 187 (first degree murder of Nathaniel Young); Count 2, a violation of section 187 (first degree murder of Consuelo Young); Counts 3 and 4, violations of section 211 (second degree robbery of Consuelo Young and Nathaniel Young, respectively); Count 5, a violation of section 451, subdivision (d) (arson of property); and Count 6, a violation of section 4502, subdivision (a) (possession of a weapon in a penal institution). The jury found the multiple murder (§ 190.2, subd. (a)(3)), robbery (§ 190.2, subd. (a)(17)), and burglary (§ 190.2, subd. (a)(17)(G)) special circumstance allegations to be true. As to Counts 1, 3 and 4, the jury found that appellant personally used a deadly weapon, to wit, a handgun, within the meaning of section 12022.53, subdivision (b). (31CT 8978-8991.)

On June 14, 2006, appellant was tried on the priors by the trial court. The court found appellant's five prior section 211 (robbery) convictions to be true, and his five prior section 422 convictions (criminal threats) to be not true. (31CT 9019.)

On June 26, 2006, the penalty phase commenced. The prosecution called several witnesses and rested. (31CT 9030-9031.)

On June 28, 2006, appellant presented the testimony of only one witness, who testified for about four minutes, and rested. (31CT 9033.)

On June 29, 2006, the jury began its penalty phase deliberations. (31CT 9039.) On that same date, the jury returned a verdict of death. (31CT 9040.)

On September 22, 2006, appellant's case came on for sentencing. The court denied the automatic motion to modify the verdict to life without the possibility of parole (§ 190.4, subd. (e)). (32CT 9119.) The court sentenced appellant to death on Counts 1 and 2, violations of section 187 (first degree murder) with special circumstances (multiple murder, robbery and burglary). As to Count 6, a violation of section 4502, subdivision (a) (possession of a weapon in a penal institution), the court imposed the indeterminate sentence of 25 years to life pursuant to the provisions of section 1170.12. As to Count 3, a violation of section 211 (robbery), the court imposed the upper term of five years plus an additional 10 years for use of a firearm (§ 12022.53). As to Count 4, also a violation of section 211, the court imposed one-third of the middle term (one year) plus an additional 25 years to life for use of a firearm (§ 12022.53). As to Count 5, a violation of section 451, subdivision (d) (arson of property), the court imposed a sentence of eight months, one-third the middle term. The court stayed the sentences on Counts 3, 4 and 5 pursuant to section 654. The court imposed restitution fines in the amounts of $10,000 and $1994.24. (32CT 9120-9121, 9141-9146.)

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## STATEMENT OF FACTS

### A. The Guilt Phase

#### 1. The Homicides

On November 9, 1998, Margaret Carter, the comptroller at the Marine Logistics Base in Barstow, became concerned when Nathaniel Young did not show up for work as scheduled because it was unlike him not to do so. Because she knew he had a brother in Hawaii and had also mentioned something about taking a trip to Arizona, she did not do anything about Nathaniel's absence. (5RT 1045-1048.)

When Nathaniel did not show up for work the following day, Carter called Nathaniel's home and left a message on his answering machine. She went to a meeting at work and asked the head of one of the branches what to do. He suggested that she call the police and request that they perform a welfare check, so when Carter got back to her office, she called the Barstow Police Department and requested they perform a welfare check on Nathaniel. (5RT 1048-1049.)

At that point, Carter received a call from two of her co-workers, Loretta Becknall and Nancy Derryberry, who had gone to the business owned by Nathaniel, T's Galore 'N More, and were concerned because there appeared to have been a fire in the shop. Carter told the women to return to the base, and she spoke with them about what they had observed at the shop. Carter called the Barstow Police Department again. She then called the provost marshal's office on base and spoke to an employee named Bonnie Hulse, who was an investigative assistant for the Criminal Investigation Division of the Marine Corps, and reported that she had a missing employee and had requested a welfare check from the police but

was told she needed to notify the provost marshal, who has jurisdiction on a military base. (5RT 1049-1052.)

Loretta Becknall and Nancy Derryberry went to T's Galore 'N More on November 10, 1998, between 9:00 and 10:00 a.m. Becknall was concerned because Nathaniel had not come into work and no one was able to get in touch with him. Becknall and Derryberry looked into the windows at the shop but could not see inside because of dark smoke and soot. They considered going around to the back of the business but decided against it. Instead, they returned to the base and reported what they had observed to Carter. (5RT 1055-1058.)

Bonnie Hulse testified that on November 10, she received a call from Carter, who reported that two of her co-workers had driven past Nathaniel's store and reported that it appeared as though there had been a fire. Carter wanted to file a missing person's report. Hulse checked with military investigators, who told her that they could only take a report for military personnel and their families. Hulse called the Barstow Police Department, and was referred to the Sheriff's Department. She called the Sheriff's Department, who told her to call the police since Nathaniel lived in Barstow. She called the Barstow Fire Department and reported a fire at a business but was told there had been no report of a fire at the shop's location. She had a feeling that the bodies of Nathaniel and his wife would be found inside the shop, because if his wife had not called in for Nathaniel, Hulse suspected they were together. After making her calls, she heard on her scanner that two bodies had been found. (5RT 1060-1062.)

Salvatore Carrao, the Barstow Fire Department division chief, and fire engineer Steve Ross went to T's Galore 'N More on November 10, 1998. There they observed a large quantity of black soot that had started to

cool and run down the windows. (5RT 1064-1065.) They checked the front door, but it did not open. They went around back to look for evidence of entry or fire, and were able to push open the closed, but unlocked, back door. (5RT 1065-1066.) As Carrao opened the door, he was able to smell that there had been a fire and he observed a body. He saw no signs of an active fire, and after looking around some more, he observed another body. He radioed for law enforcement and his supervisor. (5RT 1067.)

Carrao told Ross there were dead people inside, and Ross opened the door. He observed no fire damage to the building, just smoke. As he entered the store, his foot slipped on a greasy substance, so he decided not to go any further. (5RT 1067-1068.) Carrao and Ross made sure no one else entered the building until the police arrived, about 10 minutes later. (5RT 1071.)

Barstow Police Department Sergeant Andrew Espinoza responded to the scene at T's Galore 'N More at 11:52 a.m. on November 10. Other officers were already on the scene, and there was yellow crime scene tape as well. (5RT 1087-1090.) Espinoza was briefed by other officers, and crossed the crime scene tape to get to the back of the business. (5RT 1091-1092.) He examined the back door but found no signs of a forced entry. He did not enter the business, but rather peered inside and saw work tables, chairs and papers. He also saw two bodies, one was that of a man laying face down, whose body had been burned, and the other was a clump of ashes, soot and bone fragments. (5RT 1094-1096.) Two golf clubs were propped up on the man's body. (5RT 1099.)

Espinoza was assigned to protect the scene and assist the forensic specialist in conducting the crime scene investigation. (5RT 1101-1102.) The police had an evidence technician there. The Sheriff's Department was

also called to assist with processing the scene. The police technician, Diane Sluder, was new to the job and the scene was complicated. (5RT 1102-1103.) Espinoza briefed Sluder, and directed her to take photographs of the entire exterior of the business. She also took a few photographs of the interior from the vantage point of the back door. (5RT 1103-1104.) While Sluder was taking photographs, Espinoza searched the exterior area around the back parking lot and building itself for evidence. There were some flattened cardboard boxes with tire tread marks in the parking lot that were later collected as evidence. (5RT 1105.)

A locksmith unlocked the front door around 2:30 p.m., and Espinoza and criminalist Randy Beasley entered the building. (5RT 1106-1107.) The store's interior consisted of a display area with t-shirts on one side and a work area with desks and computers on the other. The building was divided in half with a false interior wall running from east to west. (5RT 1107-1108.) There was a display counter that held a cash register. The work area looked like a business office, with a draftsman type table. There was a storage room with doors that were bolted and secured with a metal bar. There was a bathroom off the storage room. (5RT 1111-1112.) Beasley found a wallet next to a purse that belonged to Consuelo. There was a wallet inside the purse but there was no money. The wallet found next to the purse belonged to Nathaniel. There was no money in his wallet, and credit cards appeared to be missing. (5RT 1127-1129.) Beasley also found five .45 caliber bullets and one bullet casing. (5RT 1134-1135.) Beasley observed a trash can containing blood, water and a bloody mop. He opined that someone tried to clean up the blood, but did not do a very good job. (5RT 1139.) Beasley saw a pair of women's panties that had been found in

a toilet. The panties had been cut at the crotch area from leg to leg with pinking scissors. (5RT 1141-1142.)

Rita Gay, a fire detection specialist, was dispatched by the Barstow Fire Department to T's Galore 'N More at 11:40 a.m. She met with Detectives Leo Griego and Espinoza at the back of the store and then entered through the front door. She observed the furnishings and floor covered in soot, and saw two victims on the floor, including a male with golf clubs across his back. Near the male victim she could smell a faint odor of gasoline. She did not examine or touch either victim. (6RT 1184-1187.) The male victim had burning to his clothing. The female victim was more severely burned and showed decomposition to the left side of her body. (6RT 1197-1198.) It appeared as though a flammable liquid had been poured on each of the bodies. There was no trail of fire between the bodes, and Gay opined that the victims were set on fire individually. (6RT 1189.)

Diana Francis, a police department evidence technician, responded to T's Galore 'N More at approximately 11:58 a.m. She photographed the exterior of the business and surrounding area, as well as the interior of the shop. (6RT 1196-1198.) She also assisted with the collection of evidence, including the golf clubs. (6RT 1199.) Francis made several videos of the crime scene, including one of criminalist Beasley doing fluorescein testing and later one of appellant during a re-enactment of the crime. (6RT 1200.)

Leo Griego, a detective with the Barstow Police Department, arrived on the scene on November 10, 1998, at 11:50 a.m. (6RT 1331-1332.) Other law enforcement and fire personnel were already there when he arrived. (6RT 1332-1333.) Later that day, he went to the Motel 6 on Yucca Street in Barstow. There, he saw Consuelo's 1995 Chevrolet Camaro in the

motel's parking lot. The car was locked, and there was no key in the ignition. (6RT 1358-1359.) He then returned to the crime scene. He was there when the coroner examined the bodies. Griego saw what he believed were bullet wounds in Nathaniel's neck. He also observed duct tape wrapped around Nathaniel's neck. (6RT 1361-1363.)

Griego went back to the crime scene the following day, at which time he collected golf clubs, blood samples, debris that was around Consuelo's body, a wallet, a purse, and a few other items. (6RT 1366-1367.)

On November 14, Griego and others returned to the crime scene and collected additional evidence. At that time, they found four bullets; two along the east wall near where the bodies were found, and two west of where the bodies were found, one under a chair and the other under a desk. (6RT 1372-1373.)

Catherine Wojcik, a sheriff's department criminalist, did a comparison of hairs found at the crime scene with known hairs from Nathaniel and Consuelo. (7RT 1508-1510.) She determined that two hairs from the golf club and two hairs from the wall were similar to Consuelo's hair, but she could not say that the hairs actually were hers. Wojcik confidently ruled out Nathaniel as a contributor of those hairs. (7RT 1511-1512.) She also examined loose hairs from Nathaniel's right hand, which were attributed to both Nathaniel and Consuelo, and loose hairs from Nathaniel's head, which were consistent with Consuelo's. (7RT 1512-1513.) She also examined two rolls of duct tape that were later found by Detective Griego in the home of another suspect, Carlos Loomis. (7RT 1657-1658; see fn. 5, *post.*) The duct tape did not match the duct tape recovered at the crime scene. (8RT 1727.)

Detective Espinoza spoke with Rita Gay at the scene on November 10, and she told him that the fire appeared to be a "slow burn." This meant that the fire did not immediately flame up, but rather smoldered for a long time. (7RT 1531.) This was determined in part by the fact that there were t-shirts that had been placed on the body and set on fire, but they did not flame; rather they smoldered and burned slowly. (7RT 1532.)

Forensic pathologist and deputy medical examiner Dr. Steven Trenkle performed the autopsy of Nathaniel Young on November 13, 1998. (7RT 1537, 1542.) The external exam of the body revealed that the body was clothed and there was blood staining on the clothes. There was duct tape around the neck and on the lower jaw, and there were areas of the body that had been superficially burned or scorched. The skin on the shoulder and torso area was moderately charred and blackened, but the burning did not burn the skin down to the muscle or bone. (7RT 1544, 1555-1556.) There were superficial injuries to the front part of the face and gunshot wounds to the back of the head and in the neck. (7RT 1552.)

There were abrasions to the face that could have been caused when Nathaniel hit the ground after being shot. In his right eye, there was diffuse congestion of the vessels of the sclerae, the white part of the eye. (7RT 1553.) This indicated that the body was laying on its right side, rather than face down. (7RT 1554.)

Dr. Trenkle determined that the cause of death for Nathaniel was gunshot wounds of the head, neck and chest. (7RT 1581.) There were two gunshot wounds to the lower right side of Nathaniel's face, an entrance

wound and separate exit wound. His mandible was also fractured. (7RT 1559-1560.) There was no stippling to the entrance wound.[3] (7RT 1561.)

There were three entrance wounds found on the back of Nathaniel's head. One wound was a loose, contact wound, which suggested that the gun was in contact with the scalp, but not tightly pressed. (7RT 1568.) This wound went into the back of the head and through the brain and transected the brain stem. The bullet embedded in the brain and was recovered during the autopsy. (7RT 1569-1570.)

Dr. Trenkle determined that the cause of death for Consuelo was multiple blunt force head injuries, which included blows to the top of the head and to the sides of her jaw and forehead. An amendment to the death certificate was filed after toxicology reports came in, indicating that thermocutaneous burns were a contributing cause of death. (7RT 1623.) Dr. Trenkle believed that while it was possible Consuelo was alive at the time the fire was set, she would have been unconscious and near death. Dr. Trenkle could not confirm the presence of carbon monoxide in her blood or soot in her airway. Ultimately, nothing in the autopsy suggested that Consuelo was alive at the time that the fire was started, but Dr. Trenkle believed it to be a possibility. (7RT 1621-1622.) In retrospect, Dr. Trenkle would not have listed the burns as a contributing factor in her death, rather he would have included a note on the autopsy report that stated that while

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[3] Dr. Trenkle testified that "stippling" is a pattern that shows up on the skin from a gunshot wound when the gun is less than a foot away. The pattern is caused by unburned particles of gun powder that exit with a tremendous amount of force and embed into the skin, causing an abrasion. (7RT 1561.) When a gun is fired more than about 18 inches away from the skin, there is generally no stippling. (7RT 1562.)

Consuelo may have been alive at the time the fire was started, he could not be certain. (7RT 1628.)

Dr. Trenkle could not determine from his examination of Nathaniel's body how many shooters there were or what their positions might have been at the time Nathaniel was shot. Likewise, he could not conclusively determine Nathaniel's position when he was shot. (7RT 1628-1629.)

Charlene Garcia, Nathaniel Young's daughter, testified that her father and Consuelo had been married approximately seven years. Nathaniel worked at the military base, ran a newspaper called Caliber, and owned the shop T's Galore 'N More. Consuelo ran the t-shirt shop during the day when Nathaniel was working at the base. (5RT 1073-1074.) Consuelo owned a yellow-gold Camaro, which she would park at the back of the shop. (5RT 1075.)

On November 10, 1998, Charlene was at her home in Victorville and was contacted by her step-sister who had become concerned because the Youngs could not be reached. Charlene told her stepsister she would check on the Youngs in the morning. That same night, Charlene's brother, Nathaniel Young, Jr., came to her home accompanied by Detectives Espinoza and Libby to tell her that the Youngs had been killed. (5RT 1076-1077.)

At some point after November 10, Charlene cleaned out the t-shirt shop and made a list of anything that was missing. Everything in the shop was blackened and covered in soot. (5RT 1077.) The only thing she said was missing was Nathaniel's gun. (5RT 1078.)

### 2. Appellant's Statements

On November 15, Detective Griego received a call from Barstow police officer John Cordero. Cordero told him that appellant wanted to talk to him (Griego) about the murders. (6RT 1380.)

Griego talked to appellant on November 15, 1998, at appellant's residence, and then later that same day at the police department. Griego *Mirandized* appellant at the police station and questioned him about the murders. (6RT 1381.)

Appellant told Griego that he had heard about the shootings from someone else. According to Griego, appellant identified the two people involved, and said they were going to split the proceeds from the robbery. Appellant told Griego that he was not involved. (6RT 1382.) Griego did not provide the names of the people appellant had identified at that time.

Griego next spoke to appellant several months later, on January 14, 1999. At that time, Griego was focusing his attention on two suspects, appellant, 24 years old, and appellant's half brother, Antonio Leatham, aka "Eagle," 16 years old. Appellant again denied any involvement, and did not give Griego any additional information. (6RT 1382-1383, 1408.)

Griego contacted appellant on December 9, 1999. Griego needed a saliva sample from appellant to compare to the analyzed evidence in the case. At that time, appellant was at his mother's house in Corona, and Griego made arrangements to go over there with a nurse from the police department to obtain a biological sample. He collected samples of appellant's blood, saliva and his hair. These samples were then submitted to the crime lab for analysis. (6RT 1384.)

Griego's next contact with appellant was on January 28, 2000. Griego did not learn anything new related to the murders. (6RT 1384-1385.)

Griego saw appellant again on February 1, 2000, in Barstow, possibly at the jail. Appellant agreed to talk to him, but, once again, Griego did not learn anything new from appellant at that time. (6RT 1385.)

From the time of the murders until February 2000, Griego had a total of five contacts with appellant. Appellant never admitted any direct involvement in the crimes on any of those occasions. He only talked about who he thought might have knowledge of or involvement in the crimes. (6RT 1386.)

The next time Griego saw appellant was on January 5, 2001, at the Riverside police department. Griego had been notified by a Riverside detective that appellant was in custody there, and that another individual had information that appellant had given him about a double murder in Barstow where the victims were burned. Griego told the detective he was interested in talking to appellant, and he and Espinoza drove to the Riverside County jail.

On that same date, appellant was interviewed by Riverside Police Detectives Ron Sanfilipo and Steve Shumway. Griego was in an adjoining room with video capability, and he monitored the interview on the video screen. The interview was videotaped. (6RT 1387-1388.)[4]

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[4] Redacted recordings of the interrogation sessions were played for the jury during trial and entered into evidence as exhibits. (Exhs. 78A-83A; 6RT 1381, 1388, 1390, 1394, 1398, 1406, 1416, 1432, 1432-1433, 1438-1439, 1433; 7RT 1446.) The jury additionally was provided transcripts of the redacted recordings, which were also entered into evidence. (Exhs. 78B-83B; 32CT 9210-9422.)

After giving him his *Miranda* rights, Sanfilipo and Shumway talked to appellant about the Young murders for about half an hour. Griego then went into the interview room to speak to appellant. He also read appellant his *Miranda* rights. After waiving his *Miranda* rights, appellant spoke to Griego for about 45 to 60 minutes. Appellant was then transported to Barstow, where he was interviewed again by Griego and Detective Keith Libby. That interview was also videotaped. (6RT 1391-1393.)

During that interview, appellant told Griego and Libby that two people came to see him, one who went by the name of Wino and another who went by the name of Bam-Bam, about doing a robbery. Appellant was told that he would get an ounce of dope and money if he agreed to act as a lookout.[5] He said he agreed because "he was real bad on dope." Appellant said that Wino and Bam-Bam robbed a couple at gunpoint. Wino and Bam-Bam roughed up and verbally abused the couple. Wino and Bam-Bam took the couple out of his line of sight, and 10 to 15 minutes later, he heard gunshots and Bam-Bam, Wino and another guy jumped into a blue or white Camaro. They told appellant that they were going to the Motel 6. Appellant said he went back to his mom's house. (32CT 9219-9220.)

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[5] Griego testified that Bam-Bam's real name is Carlos Loomis, and Wino's real name is Ruben Romero. (6RT 1407-1408.) Bam-Bam and Wino were both considered suspects in the days following the crimes in this case. The police had information that Loomis brought a stolen vehicle to the area, and that Romero had committed a robbery at the Downtown Motel, which is directly across the street from T's Galore 'N More. (6RT 1436.) Griego and Espinoza contacted Loomis on February 6, 2001, at the California Youth Authority in Paso Robles, California. And Griego contacted Romero on February 9, 2001, at Ironwood State Prison in Blythe, California. (6RT 1437.) At the time of the charged crimes in this case, Loomis was 15 years old, and Romero was 22 years old. (6RT 1407-1408.) Griego testified that he had spoken to Loomis on several occasions, and he said that he did not know anything about the case. (8RT 1729-1730.)

Appellant denied going inside the store. He said he stayed out front. He said that he was under the influence at the time and, as a result, did not remember much. He repeatedly denied that his half-brother, Eagle, was involved. Appellant was a little unclear on the details of what actually happened, explaining that he had been up for several days and under the influence of drugs. (32CT 9232.)

Later in that same interview, appellant said that he forced the man and the woman into the building. (32CT 9237.) Appellant only took about five steps into the building. He saw mops and a chair. (32CT 9240.) He did not touch anything. Shots were fired and appellant ran around towards the front of the building. When the shots were fired, the woman was curled up on the floor. She had been beaten up by Bam-Bam. She pleaded, "Stop please. Don't hurt me, don't hurt us. Don't hurt us." (32CT 9242.) Bam-Bam hit her with something that was stick-like and about three to four feet long. The man was trying to protect her. Bam-Bam was also hitting the man with this stick-like instrument. The man was unable to protect the woman because appellant "kept pulling him away from her." Appellant grabbed the man by the throat and hit him a few times. The man said to appellant, "Please leave my wife alone, leave my wife alone." (32CT 9263.) Wino was waving a gun. Appellant heard two shots being fired. The shots were being fired at the man and the woman. When appellant heard the gunshots, he tried to run. He went back in and saw flames around the people. He said that Bam-Bam was "throwing" gasoline in the area of where the bodies were. "I smelled the gasoline and I don't know if he lit something or whatever and poof." (32CT 9255.)

Before starting the fire, Bam-Bam had raped the woman. (32CT 9256-9257.) Bam-Bam made the man watch. Wino was pointing a gun at

the man. The man had been beaten pretty badly at that time and was not resisting. Appellant turned his back and did not want to watch while Bam-Bam raped the woman. (32CT 9260-9261.) The woman had been shot by Wino before she was raped by Bam-Bam. (32CT 9262-9263.)

Appellant was asked whether anything of value was taken, and he said that Bam-Bam and Wino "had some stuff when they left", but that he (appellant) "didn't get nothing out of it." (32CT 9250, 9279.) He could not recall what the woman was wearing. He did not see her underclothes. "I didn't see none of that. Like I said it was fairly dark there . . . . And I couldn't really see what was going on." (32CT 9267.)

Appellant said that the fourth participant in the crime, whom he described as a 14-year-old kid, got scared and ran away from the scene. (32CT 9251.) Wino told Bam-Bam not to leave anything behind, and Bam-Bam picked up the expended bullet casings, which he later threw out of the getaway car. (32CT 9280-9282.) Appellant did not know how Wino obtained the gun that was used in the shootings, which he described as a black, .45 caliber automatic. He said that the handle was "taped up." (32CT 9285-9286.)

Appellant told the detectives, "I didn't pull the trigger; I didn't rape nobody, I didn't set nobody on fire." (32CT 9287.)

Appellant agreed to meet with the detectives again the next day to show them "what [he] saw and did there at the business." (32CT 9296.) He was then returned to the Riverside County jail. (32CT 9298-9299.)

On January 6, 2001, appellant was taken by Griego and Libby to the crime scene to do a video re-enactment of the crime. Appellant agreed to do the re-enactment, saying that it was the "right thing to do." (32CT 9301.)

Appellant again recounted the events leading up to the robbery-murders in this case. (32CT 9301-9319.) He said that he was acting as a lookout while Bam-Bam, Wino and "the other juvenile" made contact with the victims. Appellant heard some yelling and saw Wino pointing a gun at the man and the woman. The man was trying to protect the woman. Bam-Bam demanded money, and the woman said that she had none. Appellant returned to the front of the store, where he remained for about three minutes. Either Bam-Bam or Wino called out his name, and he returned to the rear of the store. He was then told to return to the front of the store. He stayed there for a short while and then went back to the rear of the store, where he saw the couple on the ground. Bam-Bam kicked the man, and then they started beating both the man and the woman. Wino grabbed the woman by the hair and put his gun to her head. The man was trying to protect the woman. Appellant was then summoned for help. Wino told him that "they don't want to give up anything." (32CT 9322.) The couple was ordered to stand up. When the man tried to grab Wino, appellant hit the man in the face. The man resisted, and appellant hit him two more times. Bam-Bam was "screaming, hollering, kicking, hitting both the victims at the time." (32CT 9322.) Appellant then helped force the couple into the back of the store. Appellant grabbed the man by his throat and his shirt. He hit him several times and dragged him to the back of the store. Appellant went back to the front of the store to be a lookout. He heard more hollering and screaming and went to the rear of the store. Bam-Bam and Wino were trying to force the couple into the store. Wino held a gun to the woman's head. Appellant grabbed the man and pulled him away from the woman, and dragged him inside the store. The man continued to try to protect the woman, and both appellant and Bam-Bam hit him. At some point, the man

was gagged to shut him up. (32CT 9351-9352.) Wino pointed his gun at the couple and demanded money "or fuck it, we'll just have to kill you." (32CT 9336.) Appellant thought that Wino was "just like making idle threats." (*Ibid.*) Appellant said that "Bam-Bam was running around somewhere else . . . the youngster is standing next to Wino and I walk out the door." (*Ibid.*)

When appellant re-entered the store, "that's when the shooting happened." (32CT 9336.) Appellant did not think that Wino was going to actually shoot anyone. "I thought he was just, just talking." (*Ibid.*) Appellant heard two shots. He panicked, and ran out the door. Appellant heard the woman moaning. Bam-Bam was running around and laughing. Wino said that he shot the couple in the name of Satan. (32CT 9388.) The man was not moving. Bam-Bam picked something up and started hitting him with it. It was some kind of stick, made of either metal or wood. Wino said, "let's rape the bitch." (32CT 9340.) Appellant said that they should just leave, "we don't have time for this." (*Ibid.*) Bam-Bam said, "they don't have no money, they got to pay, somehow." (*Ibid.*) The woman was barely moving or making any noise. As appellant went to leave, he saw Bam-Bam undress the woman, fondle her breasts and try to rape her. (32CT 9341.) According to appellant, the man was still alive. He heard Bam-Bam say to the man, "I want you to watch this." (32CT 9354.) After Bam-Bam raped the woman, appellant said that the couple had been moved and he smelled something like kerosene or gasoline. Bam-Bam had a Bic lighter and a piece of paper. Bam-Bam lit the piece of paper and dropped it on the floor near the couple and set them on fire. Appellant left and Bam-Bam and Wino followed. All three got into a car and drove toward the Motel 6. On the way, Bam-Bam threw away the bullet casings. At the

conclusion of the video re-enactment, appellant made the following statement:

> You know what, I was here when it happened. Okay, I'm just as guilty as the man who pulled the trigger and the man who started the fire. Okay. I'm just as guilty as the individuals that robbed and murdered this couple. I feel bad for them, it wasn't supposed to happen that way to them you know but that still isn't going to change the fact that I was actually involved here and it's not going to change the fact, yes, I'm expecting a conviction out of this and whatever I receive I deserve, that's it. That's all I got to say.

(32CT 9360.)

On January 25, 2001, Griego met with appellant at the Riverside County jail. (32CT 9371.) Appellant said that he was afraid that Bam-Bam and Wino would try to blame him and his half-brother, Eagle, for the robbery-murders. Appellant was adamant that Eagle had nothing to do with the killings. (32CT 9375.)

Appellant also told Griego that there were a lot of things he did not tell him in the previous interviews. He said that he was "basically" the one calling the shots. (32CT 9382-9383.) Wino was someone he got to help him, and that he had just met Bam-Bam that night. Appellant said that he was the one who got rid of the bullet casings and the gun. He "dumped" the gun near some train tracks. He offered to show the police where he had disposed of the gun. (32CT 9371.)

Appellant said that he was the one who fired the gun. He does not know whom he shot; he "let off three (3) rounds." (32CT 9374.)

Bam-Bam and Wino were there. Bam-Bam poured the gasoline on the victims and Wino lit them on fire. Wino was feeding the fire by throwing stuff on the fire. (32CT 9376.)

On April 16, 2002, Detectives Griego and Espinoza met with appellant in the county jail in Barstow. Appellant had been brought down from North Kern State Prison in Delano. Appellant was again given *Miranda* warnings, which he waived. (32CT 9386-9387.) He recounted how he met Bam-Bam and Wino, and decided to rob the owners of the t-shirt shop. They went to the t-shirt shop and waited for the owners to close up. Appellant was drinking a 40-ounce can of Olde English. Bam-Bam and Wino confronted the owners at the back of the store, and a struggle ensued. Appellant saw the man struggling with either Bam-Bam or Wino, and he grabbed the man and dragged him into the back of the store. He told the man that "if he move I'm gonna kill you, don't make this hard on you so make it easy we just want some money that's all. He wouldn't give it up." (32CT 9396.)

After they got the couple into the back of the store, appellant started hitting the man in the head with some "kind of piece of metal, scrap iron or something." (32CT 9397.) "It was kind of squarish, flat." (32CT 9398.) The man was pleading that they leave his wife alone. Appellant told him to give him the money and that everything would be okay. Appellant said that the person named Bam-Bam was on top of the woman. He had removed her dress or pants and panties, and he was holding her down. Wino then shot the man. Appellant heard two or three shots. The gun was some type of a Glock. Appellant did not know where the man had been shot because he was walking around the store at the time. (32CT 9397, 9399.) The Glock belonged to Wino. (32CT 89400.) He saw a Camaro car parked in the back. Appellant found the keys to the car in the man's pocket when he went through them. He threw the keys next to the car, because he "wanted to take the car when we were done." (32CT 9404.) He also removed some

change and "maybe" $100 from the man's pockets. Appellant took the woman's wedding ring off of her finger. Somebody had hit her; she was either unconscious or dead when the ring was taken. He later sold the ring for some dope. (32CT 9417.)[6]

Appellant told the detectives that "somebody" was tied up with duct tape, but he was not sure of that. (32CT 9405.)

Appellant said that he had been using meth and alcohol that day. "I'd been drinking all that day." (32CT 9405.) He was using "at least an eighth and a half, 2 or 3, I was smoking it [meth]." (32CT 9418.)

Appellant then stated that he was the one who poured gasoline on the victims and lit the fire. "I started pouring it on them if they didn't tell us where the money was at, you know, I was gonna light him . . . light him on fire and . . . that's when the shots went off and I panicked. I said there's gonna be evidence here so I lit a match and dropped it." (32CT 9408.) The only flame he saw was the flame from the match. The fire was started after the man and woman had been shot. (32CT 9409.)

Appellant also said that he was the one who pulled the trigger, picked up the casings, and threw them away after they left the crime scene. Appellant said that either Bam-Bam or Wino was driving the get-away car. (32CT 9411.)

Appellant was once again adamant that his half-brother, Eagle, was not involved. (32CT 9414.)

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[6] Appellant's testimony that he removed the woman's wedding ring and sold it was contradicted by Detective Griego, who testified that the coroner's staff removed five rings from Consuelo's body, including a "wedding set." (8RT 1723.)

Appellant expressed remorse for what he had done. He said that he decided to tell the truth because what he had done was "haunting" him. (32CT 9421.)

Appellant then said that he was unable to identify the "individuals with me." (*Ibid.*) "I'm just saying you know, because me trying to remember who they were, you know what I mean, it's going to drive me nuts, you know what I mean?" (32CT 9422.)

Lisa Martin met appellant through mutual friends and agreed to let him stay with her at her place in Corona. Appellant stayed with her, and slept on the couch for about a month, around December of 1999. (7RT 1449-1450, 1461.) After he had been at her place about two weeks, he allegedly told Martin about killing people in Barstow. At first she did not believe him, because she knew appellant to be a nice person, but he brought it up several times. Appellant allegedly told her that he committed the crime because he needed money and hated black people. Appellant said that he went into a store, tied up a man and a woman, shot the man, poured lighter fluid or gasoline on the woman, and set them on fire. (7RT 1450-1452.) The woman was begging and screaming for her life and appellant thought it was funny. (7RT 1452-1454.) At one point, appellant told Martin that he committed the crimes by himself. On another occasion, he told her that he committed them with his half-brother, Eagle, and on a third occasion he said that he did it with another person who acted as a driver. (7RT 1488-1489.)

Martin did not know if appellant used drugs, but many times it appeared as though he was using and he acted paranoid. (7RT 1477-1478.) Appellant's half-brother, Eagle, came to her house at one point, and appellant mentioned the murders in front of him. (7RT 1494.) About a

week after appellant told her about the murders, Martin called appellant's mother and told her to come and move him out. (7RT 1479.)

Shortly after he had moved out, on January 4, 2000, appellant and two others came to her house and committed an armed robbery, holding her and her family at gun point. (7RT 1467.) A safe with birth certificates, jewelry, medical records and important papers was taken, as was about $12,000 in cash. (7RT 1470.) Martin said she did not report the robbery to the police because she was afraid appellant would kill her and her family. She was upset and devastated that appellant robbed her; she considered it to be a breach of trust. (7RT 1472.) A week or two after the robbery, appellant called her and told her that he was watching her son and knew what time he got out of school. (7RT 1483.) On or about January 27, 2000, she reported the threats against her son to Detective Griego. She knew Griego's name because appellant would often bring it up and say he was going to kill him. (7RT 1485-1486, 1491-1492.) Martin told Griego what appellant had said to her about the Barstow murders, and that he needed to watch him. (7RT 1463-1464.)

Blake Martin-Ramirez, Lisa Martin's then 14-year-old son, was also present when appellant allegedly made statements about having killed someone in Barstow. Martin-Ramirez saw appellant over a period of about two months, and, while at first appellant provided little detail, eventually he talked openly about the murders he allegedly committed. Appellant said he had killed a male and a female by shooting one of them and lighting them on fire. Appellant said he took the victims' sports car. (7RT 1497-1499.)

Martin-Ramirez saw appellant under the influence of drugs often. He once found a straw in the couch cushion, and believed appellant was

using methamphetamine or cocaine. (7RT 1505.) Martin-Ramirez was also present during the robbery in 2000. (7RT 1500-1501.)

Detective Dennis Florence testified regarding a shoot-out involving a person by the name of Jerry Corhn in March 2002. Corhn fired on officers pursuing him after an attempted narcotics transaction, and he ultimately died from a self-inflicted gun shot wound to the head. The firearm recovered from Corhn's vehicle was tested to see if it matched any bullet casings in the system in order to attribute the weapon to other crimes. In April 2002, the sheriff's crime lab reported that ballistics recovered from the scene at T's Galore 'N More matched the Glock confiscated from Corhn's car. (6RT 1302-1307; see also 1320-1323; 8RT 1769-1770.)

Detective Griego contacted appellant on April 18, 2002, and asked him if he knew Jerry Corhn. Appellant said that he did, and that he had purchased a shotgun and a firearm from him. (7RT 1659-1660.)

Ramon Tirado testified that he had contact with both appellant and Antonio Leatham a week prior to the robbery of T's Galore 'N More. At that time, appellant and Leatham asked him if he knew any places to rob, and Tirado told them that he did not. (8RT 1778-1779.) Tirado testified that there were two other people present, but he did not know who they were and said that he had never seen them before. Leatham introduced one of them as his cousin from Corona; the other person was also from Corona. (8RT 1778-1779, 1782.) Leatham asked Tirado if he knew anything about the t-shirt store and whether it made any money. Tirado told him that they had just opened and did not have any money. Both appellant and Leatham asked Tirado if he would participate in the robbery of the store, and Tirado said no. (8RT 1774-1776, 1785-1786.) When Tirado was interviewed by police detectives, he told them that Leatham had a gun, possibly a .38

revolver, and appellant had some CS riot grenades. (8RT 1780, 1786-1787.)

### 3. The DNA Evidence

At the conclusion of the People's case-in-chief, the following stipulation was read to the jury regarding DNA testing conducted in this case:

> The People though its attorney, Steven Sinfield, and the Defendant, through his attorney, Samuel Saltalamacchia, hereby stipulate that DNA samples were obtained in this case from blood stains found inside T's Galore 'N More, fingernail clippings of Nathaniel and Consuelo Young, a piece of gum from a trash can inside of T's Galore 'N More, items (a)-12, and cuttings from a pair of panties found inside T's Galore 'N More, item (a)-(10). That these sample were analyzed by Mehul Anjaria, a criminalist, who, if called to testify, would qualify as an expert in the area of DNA analysis and would testify that based upon his analysis of all DNA samples . . . analyzed, came back to either Nathaniel or Consuelo Young. No DNA samples came back matching the DNA of defendant, Lee Capers.

(8RT 1791.)

### 4. The Weapon Charge

Deputy Sheriff Oswaldo Rodriguez searched appellant's cell at the West Valley Detention Center, on September 3, 2002, and found a shank under appellant's bed. The shank was a spoon handle, sharpened at the tip, and affixed with window putty and cellophane wrap. (7RT 1517-1519.) After being questioned about the shank, appellant allegedly told Rodriguez that he feared for his life, and that the shank was for protection. (7RT 1521.) Rodriguez testified that it is not uncommon for jail inmates to be in possession of a shank. (7RT 1523-1524.)

## B. The Penalty Phase

The prosecution presented victim impact evidence from Nathaniel's daughter, Charlene Garcia, and four incidents of prior violence by appellant. The defense called but a single witness, appellant's biological grandfather, Albert Capers, who was on the witness stand for about four minutes.

### 1. Prosecution Evidence in Aggravation

Misty Sedillo testified that in December 1993, when she was 16 years old, she drove around Barstow and San Bernardino with appellant and a group of friends. "They" wanted to shoot at a particular house. Sedillo told them not to because there were children playing in the yard and her brother was inside that house. No shots were fired. (10RT 2323-2325.) Later that same day, while still driving around in the car, appellant pointed a gun at Sedillo's head. She never reported the incident because she believed appellant was only joking around. She believed he was just putting up a front and trying to fit in. (10RT 2328-2329.)

Lisa Martin testified again regarding the robbery committed by appellant. She described how appellant and two companions forced their way into her apartment, and then held her roommate and family, including two children, at gunpoint while they ransacked the home looking for money and valuables. Martin testified that the robbery lasted several hours, and she was afraid she would be killed. (10RT 2340-2347.) Appellant told her out of the earshot of his companions that she should give him money but not tell the others or he would put a bullet in her head. Appellant found and took $6,000 cash and some jewelry. (10RT 2347-2348.) A safe containing money and some important papers and several valuable vases were also taken. Martin's roommate was told there was a grave for him in Barstow,

and appellant told Martin he was Mafia affiliated. A couple of days later, appellant called Martin and told her that her son was being watched, so she took him out of school. (10RT 1349-2358.)

Penny Bartis, Martin's mother, also testified about the robbery. She said that after the robbery she received four or five phone calls from appellant asking for Martin. Martin, fearing for her life, went to Colorado, leaving her children with Bartis. (10RT 2378.) Bartis also testified that she knew appellant for about a month because Martin had let him sleep on the couch. During that time, Bartis noticed that appellant was occasionally under the influence of something, probably marijuana. (10RT 2381-2382.)

Deputy Sheriff Daniel Renear testified that while employed at the West Valley Detention Center he intercepted a letter written to District Attorney Michael Ramos from appellant, post-marked May 31, 2003. (10RT 2331-2335.) In the letter, appellant stated that the authorities would never know who was really involved in his case, and that the state should give him the death penalty, because if he wasn't given death "a lot [*sic*] of blood will be on the counties [*sic*] hands." (10RT 2333-2334.)

Vanessa Lopez, a deputy sheriff at West Valley Detention Center, testified that on March 4, 2006, she searched appellant's cell and found a shank under his bunk. It was a hard plastic spoon broken on the end and sharpened on both sides; four inches long, wrapped in cellophane paper with an eraser on the tip of the sharpened edge. (10RT 2418-2420.) Appellant told her that he had been carrying it to court in order to "hit" someone who was testifying against him. (10RT 2422.) Lopez did not know if appellant planned to use the weapon offensively or defensively. (10RT 2423.)

Nathaniel's daughter, Charlene Garcia, offered victim impact testimony about the effect the Youngs' deaths had on herself and the rest of the family. (10RT 2389-2417.)

Finally, the parties stipulated that appellant had suffered a prior conviction for receiving stolen property. (10RT 2426, Exh. 109.)

**2. Defense Evidence In Mitigation**

The defense called one witness at the penalty phase: Albert Capers, appellant's biological grandfather. Albert testified that he and his wife adopted appellant and raised him. Albert testified that he did not know that appellant had been charged with robbery and murder until being told by defense counsel, just before he took the witness stand. Albert testified that he is African-American and that appellant is not racist against African Americans. He said that he loves appellant. (10RT 2479-2481.)[7]

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[7] The entirety of Albert Caper's testimony fills less than three pages of the reporter's transcript (10RT 2479-2481), and the clerk's minutes reveal that he was on the witness stand for no more than four minutes (31CT 9033).

## ARGUMENT

## I.

## APPELLANT'S CONVICTIONS AND SENTENCE OF DEATH MUST BE REVERSED BECAUSE THEY REST ENTIRELY ON HIS UNCORROBORATED STATEMENTS TO THE POLICE AND TO THE MARTINS

### A. Introduction

An accused may not be convicted of a crime by his or her own uncorroborated confession. (*Opper v. United States* (1954) 348 U.S. 84, 93 [the "corroboration rule"]; *Smith v. United States* (1954) 348 U.S. 147, 152–153; *United States v. Marshall* (6th Cir.1988) 863 F.2d 1285, 1287.) The rule's "purpose is to prevent errors in convictions based upon untrue confessions alone." (*Smith v. United States*, *supra*, 348 U.S. at p. 153.) The concern is "[c]onfessions may be unreliable because they are coerced or induced" or may be unreliable because "it is extracted from one who is under the pressure of a police investigation." (*Ibid.*) Because factual admissions made out of court have the same possibilities for error as confessions, they too must be corroborated. (*Opper v. United States*, *supra*, 348 U.S. at p. 91.)

The concern for reliability is even greater in capital cases because the penalty of death is qualitatively different from every other sentence, however long. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; see also *Lockett v. Ohio* (1978) 438 U.S. 586, 605.) As a result, there is a corresponding need in capital cases for reliability in the determination that death is the appropriate punishment in a specific case. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; see also *Sumner v. Shuman* (1987) 483 U.S. 66, 72 [same]; *Beck v. Alabama* (1980) 447 U.S. 625, 638 [heightened reliability required at both guilt and penalty]; *People v. Cudjo* (1993) 6

Cal.4th 585, 623 ["the Eighth Amendment imposes heightened reliability standards for both guilt and penalty determinations in capital cases"].)

In the present case, the requisite "heightened reliability" is lacking because appellant's convictions and death sentence rest entirely on his unreliable and uncorroborated statements to law enforcement and the Martins. As conceded by the prosecutor below, no physical or eyewitness evidence ties appellant to the charged crimes.[8]

Because appellant's statements to law enforcement and the Martins lack "substantial independent evidence which would tend to establish the[ir] trustworthiness" (*Opper, supra*, 348 U.S. at p. 93), his convictions and sentence of death must be reversed.

**B. Appellant's Statements To Law Enforcement**

On November 15, 1998, five days after the commission of the crimes in this case, Detective Leo Griego contacted appellant. At that time, appellant told Griego that he had heard about the shooting but that he was not involved. (6RT 1381-1382.)

Griego next spoke to appellant on January 14, 1999. (6RT 1382.) Again, appellant denied any involvement in the charged crimes (6RT 1383.)

Griego saw appellant on December 9, 1999, and again on January 28, 2000. (6RT 1383-1384.) He learned nothing new about the murders and robberies. (6RT 1384-1385.)

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[8] During a pretrial proceeding, the prosecutor remarked: "I think probably – the whole case comes down to statements made by the defendant." (2RT 272.) At another hearing, he admitted "This case, we do not have any physical evidence tying this defendant to the case." (3RT 432.)

Griego next saw appellant on February 1, 2000. At that time, appellant provided Griego with the names of those who he thought might have knowledge or involvement. (6RT 1385-1386.)

On January 5, 2001, appellant, who was then in the Riverside County jail, told Riverside County Police Detective Steve Shumway that he needed to talk to Detective Griego. (32CT 9214.)

On that same day, Griego went to Riverside to talk to appellant. Later that day, appellant was transported to the Barstow Police Department where he was interviewed by Griego and Detective Keith Libby. (6RT 1393.)

In that interview, appellant said that he had been approached by two people named Bam-Bam and Wino,[9] who wanted to do a jack move (a robbery). He was offered an ounce of dope and money if he agreed to help. He said he agreed because "he was real bad on dope." Wino was in charge of the operation. While they were waiting for the right time to act, appellant went to a local liquor store (Barstow Liquor) and purchased a "forty ounce" beer, and consumed half of it. (32CT 9222.) Appellant acted as the lookout while Wino, Bam-Bam and a third guy robbed a couple at gunpoint. Wino had the gun. Wino and Bam-Bam verbally and physically abused the couple, and took the couple out of his line of sight. About 10 to 15 minutes later, he heard gunshots. Bam-Bam and Wino jumped into a blue or white Camaro and said that they were going to the Motel 6. Appellant left and went back to his mom's house. (32CT 9219-9220.)

Appellant denied going inside the store. He said he stayed out front. He repeatedly denied that his half-brother, Eagle, was involved. Appellant

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[9] Detective Griego testified that Bam-Bam's true name is Carlos Loomis, and Wino's is Ruben Romero. (6RT 1407-1408.)

said he was a little unclear on the details of what actually happened, explaining that he had been up for several days and under the influence of drugs. He said that he was smoking "a sixteenth a day." (32CT 9232.)

Appellant expressed fear for his safety. (32CT 9226.) "I'm afraid for myself and the whole and they can kill me in there to [*sic*]." (32CT 9235.) Appellant said that he did not come forward sooner "because of the safety of my family." (32CT 9234.) He was now speaking because his family had moved to Corona. (*Ibid.*)

Libby told appellant that he had information placing appellant inside the t-shirt store, and that he did more than just act as a lookout. (32CT 9227-9228.) Libby told him that being a lookout on the outside is no different from being a lookout on the inside, "And being outside really kind of makes you look worse than being inside." (32CT 9228-9229.) Appellant said that he stayed out in front of the store the entire time. (32CT 9229.)

Libby then told appellant that if he said he was not inside that it made it all the more likely that his brother was involved. (32CT 9231.) Appellant then said that he helped force the victims into the back of the store. (32CT 9236.)

Libby then told appellant that he had made a "big step." But that "it's not much different than what you already said. It doesn't change anything, okay. But the biggest issue Lee is the one that you're most afraid of. It's the one you're the most afraid of and it's because you have this caring and loving in your heart and that's proof, Eagle. That's for your brother, right." (32CT 9238.) Appellant said that he was not protecting his brother. (*Ibid.*)

Appellant then said that he took about five steps into the store. At that time, Wino had a gun and fired it. Appellant could not remember who

was shot first or where the person was inside the store. "I was loaded, I was loaded . . . ." (32CT 9238-9239.) He also said that he had been up for several days. (32CT 9245.)

After the shots were fired, appellant ran toward the front of the building. (32CT 9241.) He said that he saw Bam-Bam hitting the couple. (32CT 9248.)

Libby then told appellant that telling a little bit of the truth "isn't good for you. It's not good for you. The whole truth is good for you." "[W]ell [*sic*] forget about your brother okay because I can tell that, that's something you don't even want to go with because, I want to buy that man, all right." (32CT 9249.) Appellant said, "That's the truth about my brother, my family will tell you." (*Ibid.*)

Libby told appellant that "But to believe that about your brother . . . I have to know that what you're telling me is the complete truth and Lee I don't know that right now because I know there's been many other things that we asked you . . . ." (32CT 9249.)

Appellant said that "it's hard for me to remember[.] I was high man. I was high." (32CT 9250.)

Appellant then told Libby that after the people were shot, they were set on fire. Bam-Bam was the one who grabbed the gasoline and started throwing it around.

Appellant said that he got in the car with Wino and Bam-Bam and went to the Motel 6. (32CT 9271.) Later he went to his mother's house where he saw his brother. (32CT 9277.)

Appellant said that the only person he talked to about the crime was a drug dealer he worked for by the name of Lisa Martin. He said that he

told her that he "was involved with a crime where a couple got killed and were set on fire. That's it." (32CT 9291.)

Griego told appellant that when they talk to Wino and Bam-Bam "they're going to want to put everything on you." (32CT 9293.) Appellant said that he and Wino have had a long time rivalry. (32CT 9293.)

At the conclusion of that interview, appellant was taken back to the Riverside County Jail. At that time, he again expressed concern for his personal safety. "I don't feel safe." (32CT 9297.) "And if this gets out, I'm through, I'm dead." (*Ibid.*)

The following day, January 6, 2001, appellant was taken by Griego and Libby to the crime scene to have him re-enact the crime. (32CT 9301-9361.)

During the re-enactment, appellant repeated much of what he had said the previous day. He said that Wino, Bam-Bam and a youngster stood near the store discussing what they were going to do. "Wino, Bam-Bam, and the youngster was going rob these people . . . . And uh, all I had to do is keep a look out for the PD, for you, whoever it might be going up and down Main Street and the side streets." (32CT 9307.)

He said at that time he had been up six or seven days on methamphetamine. (32CT 9310.) He bought a beer to calm his nerves. (32CT 9316.) He stood on Main Street acting as look out for the police. (32CT 9317.) He was walking back and forth. He went to the back of the store and saw Wino armed with a gun ordering the couple to get down on the ground. (32CT 9319.) Bam-Bam said give us the money, and the woman said "we don't have any money." (*Ibid.*) Appellant said he then went back to the area in front of the store, and took a drink of his beer. (32CT 9320.)

He then returned to the rear of the store and saw the couple on the ground. Wino told appellant to come and help. Wino had the gun to the female's head. When the man tried to grab Wino, appellant struck him several times. Bam-Bam was kicking and hitting both the victims. (32CT 9322.) Appellant went back out to the front of the store. When he returned, he saw Bam-Bam and Wino trying to drag the couple to the back door of the store. (32CT 9322.)

Appellant was told that the man was not cooperating, so he "helped them bring them in." He then went back out front and drank some more beer. He said that he "was under the influence and I was half drunk already." (32CT 9328.) He then returned to the back of the store where he saw that Bam-Bam and Wino were still trying to get the couple to go inside the store.

Bam-Bam, Wino and the youngster pushed the woman through the door. The woman went in first. Appellant pushed the man inside the store. (32CT 9333.) Wino was yelling, "we want the money, we want the money, or fuck it, we'll just have to kill you." Bam-Bam was running around; the youngster was standing next to Wino. Appellant left. As he returned, the shooting started. He heard two shots. Appellant panicked and ran out the door not knowing what to do. He came back. (32CT 9336-9337.) Bam-Bam picked up something and beat the couple. (32CT 9338.) Appellant told him to stop and "let's get out of here." (32CT 9338.)

Bam-Bam said that "they don't have no money, they got to pay, somehow." Bam-Bam reached down, undressed the woman and tried to rape her. Appellant could not watch and turned away. (32CT 9340-9341.)

A short time later, he saw Bam-Bam light a piece of paper with a BIC lighter. Bam-Bam dropped the paper and it ignited the gasoline. (32CT 9343.)

Wino ran to the victims' car, unlocked it and started it. Wino told appellant to get in the car. (32CT 9343.) They drove to the Motel 6. (32CT 9344.)

When pressed for more details about the fire, appellant said that he did not know the size of the fire. He said that he left when it started. "I didn't stick around to look." (32CT 9344-9345.)

Libby told appellant that Bam-Bam and Wino would say that appellant was "lying, he's the one that did all this, they're also going to say somebody else and they're going to say it was this juvenile you don't [*sic*] have identified and you know was Eagle." (32CT 9358.) He said to appellant, "So what can we do to dispute that?" (*Ibid.*) Appellant replied, "I just told you what happened." (*Ibid.*)

Appellant was next contacted on January 25, 2001. At that time, Griego and Detective Espinoza arranged for appellant to see his brother. (See 32CT 9368-9369.) After appellant met with his brother, he was interviewed by Griego and Espinoza. (32CT 9370.)

Appellant again told Griego that his brother did not do anything. (32CT 9371.) Appellant then said that he was the one who got rid of the gun. He threw it out on some train tracks. (32CT 9371.)

Appellant then made the following statement:

> But just so you know, get my little brother involved with this, you know, putting him in custody, you know, I mean, where does Bam-Bam and Wino fall into this? You

know what I mean. It seems like this is just a conspiracy against me and him. Me and my brother you know?

(32CT 9372.)

Espinoza then told appellant:

> Remember like when we were talking earlier that eventually they are going to try and make it look like it was just you and Eagle, remember? Now you're beginning to feel that. You're just beginning to feel just a taste of that and what it's like. And what's going to happen is Detective Griego [*sic*] haven't talked to them yet but we are planning on it. And when it comes down to it, they're going to start saying exactly what you think they are going to say. They are going to put it on you and on your brother and then it is really going to come down hard. That's why we were trying to get him to say something. Because we don't have anything to counter what ever [*sic*] Bam-Bam and Wino say. Yeah it looks like it's coming down on you and Eagle but this is just the beginning. We're trying to get enough information so that we can counter that with whatever they tell us.

(32CT 9372-9373.)

Appellant again expressed concern for his "little brother":

> Just do me one favor man, make sure that my little brother is safe when he goes into county because he has never been in jail before, not County, to him that's big time, you know? Just make sure that he'll be okay, that's all I'm asking.

(32CT 9373.)

Espinoza then said to appellant, "You told me earlier that you wanted to take the rap for everybody. . . . What's that all about?" Appellant replied, "Just charge me with everything, you know what I mean?" (32CT 9373.)

Appellant then said that he was the one who pulled the trigger. "This happened so quick you know and I was afraid to tell you guys, you know."

Griego said: "Don't be afraid, you've gone this far Lee. You've gone this far. Okay, you pulled the trigger, who did you shoot first?" Appellant replied: "I shot, I don't know, it was dark, like I told you, you know, I can't remember." (32CT 9373.) He was asked if he shot "both people or one?" Appellant said, "I don't know who I shot, I just let off three (3) rounds." (32CT 9374.)

He was asked where he got the gun. He said he did not want to answer "because my whole family could get put in jeopardy and everything you know what I mean." (32CT 9374.)

Appellant was asked who was present when he fired the gun. He said that Bam-Bam and Wino were there, "they're the ones you know, basically, poured the gas and lit them up and everything, you know." (32CT 9375.)

Griego said that someone might say that appellant was lying through his teeth, and implored him to tell the truth. Appellant replied, "Oh you want me to say that my brother was there[,] he wasn't there when I did it." Griego said: "Okay, he wasn't there when, when you shot the people?" Appellant replied, "I shot 'em okay Griego. If that is what you guys want to know, I shot them, all right." (32CT 9375.)

Espinoza asked appellant what Wino did, and appellant said, "Espinoza, I can't remember." Espinoza said, "Oh sure you can. Sure you can. You know something?" Appellant said that Bam-Bam poured the gasoline on the victims and Wino lit them on fire and "he was feeding the fire with uh, whatever, some type of, throwing stuff on them to burn them, you know." (32CT 9376.)

Espinoza asked who assaulted the lady, and appellant said, "I can't remember it was either Bam-Bam or Wino one of those guys. You've got to remember, Espinoza, I was up on dope." (32CT 9376.)

Appellant replied, "Look, all you guys have to know, all you guys need to know is that I was the one who pulled the trigger." (32CT 9377.) Appellant said that he did not take anything from the business. He only had the firearm and the casings. He said that the burning of the bodies was not his idea. "[I]t was there's [*sic*]." (32CT 9380.) He did not know how the fuel for the fire got there. He could not recall anybody coming in with a gas can. He said that Bam-Bam left and came back, but he doesn't know if he had a gas can. (32CT 9377.)

Appellant offered to show the police where he had discarded the gun along the railroad tracks. (32CT 9379-9380.)

Espinoza and Griego tried yet again to get appellant to admit that Eagle was inside the building. (32CT 9379.) And appellant again expressed concern for his brother, "How long are you going to keep my brother for, I want to ask you guys that." Griego told appellant that his brother will be arraigned on Monday. (32CT 9381.)[10] Appellant wanted the police to know that "I just want [my brother] to go home, man, you know be, be, be Antonio, he ain't Eagle anymore, you know what I mean. I just want him to go home and be Antonio." (32CT 9382.)

Appellant asked if the new charges would affect his (appellant's) bail because his family was going to try to "get me out after my parole hold,

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[10] After Leatham met with appellant, appellant's brother was booked on an unrelated offense. (32CT 82-83.) He was never arrested on the instant charges.

after my parole hold is lifted, for you know in about a month or so, my family is going to try to bail me out." (32CT 9381.)

Appellant then said, "You guys want to know who pulled the trigger, I did." Espinoza said, "Yea, well I can understand you being afraid and not telling us before. I just hope that you are not taking the rap for these other guys just because you think you have to. If you didn't pull that trigger, then don't do it. If you did well then face up to it." Appellant replied, "That's what I am doing, facing up to it, all right." Espinoza said, "Okay, that is fine." (32CT 9382.)

Appellant said that he was the one calling the shots ("basically"). Wino was just somebody to do it with. He had met Bam-Bam that night. (32CT 9383.)

Griego and Espinoza's final interview of appellant was on April 16, 2002. (32CT 9385-9422.)

During that interview appellant no longer claimed that he was the one who did the shooting. He said that the person who called himself Wino did the shooting. (32CT 9397, 9399.) However, appellant said that he was the one who poured gasoline on the victims to scare them into giving up their money. (32CT 9409.) It was at that point when they were shot by Wino. Appellant said he panicked. "I said there's gonna be evidence here so I lit a match and dropped it." (32CT 9408.) According to appellant, the match "didn't ignite." (32CT 9408-9409.) As to who may have started the fire, appellant said "somebody else could have . . . hit them with a match or something, I don't know. I do remember that when I dropped that match it did not go up." (32CT 9409.)

Griego told appellant that "it's good you said what happened. Would you like to see the other people brought to justice, the ones that were

with you?" Appellant replied, "It really doesn't matter Griego, because you know, I'm gonna be doing time anyway, you know, just leave them out of it. I'll just go ahead and ride this out myself."[11] Griego asked "Why?" And appellant said, "Because I can't really identify the individuals with me." (32CT 9421.) "My, my family can tell you when I get loaded I don't remember shit. I just black out, you know, I go to the extreme when I get high, when I get drunk, that's what happened, that's all I can say right now." (32CT 9422.)

### C. Appellant's Alleged Statements To The Martins

According to Lisa Martin, around the end of Christmas 1999, appellant, who was staying at her home as a guest, said that he had killed a man and woman in Barstow. (7RT 1449, 1450-1451.) He said that he did it because he needed money and hated black people. (7RT 1452.) He said that he went into a store and tied up the couple. The man gave him trouble so he shot the man and poured gasoline or lighter fluid on the woman, and set them both on fire. (*Ibid.*) After he set them on fire, he got into their car and drove to a motel in Barstow to hide a gun. (7RT 1453.) At one point he showed her an old-fashioned, silver flip-top lighter and said that this was the lighter he had used to start the fire. (7RT 1453-1454.) Appellant showed no remorse. He would talk about it like it was no big deal. (7RT 1454.) On one occasion, appellant told Lisa Martin that he committed the

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[11] At no time was appellant ever informed by law enforcement that his statements could lead to a charge of capital murder and the death penalty. He was told only that "the penalty for the offenses are [*sic*] very serious." (32CT 9302.) That appellant did not fully appreciate the penal consequences of his statements to law enforcement is shown by his query to Griego where, after saying that he had personally robbed and killed the two victims, he asked whether the new charges would affect his family's ability to get him out on bail after his parole hold was lifted in about a month. (32CT 9381.)

crimes by himself. On another occasion, he told her that he had committed them with his half-brother, Eagle, and on a third occasion he said that he did it with another person (unnamed) who acted as a driver. (7RT 1488-1489.) She reported what appellant had told her to Detective Griego on or about January 27, 2000. (7RT 1485, 1492.)

Lisa Martin said that at the time appellant made these statements he often appeared to be on drugs, and looked like a drug addict. He would sweat profusely and pace around and act funny, weird and strangely. (7RT 1477-1478.) He acted paranoid and accused her of being a cop. (7RT 1486.) She may have told law enforcement that appellant was using narcotics and alcohol at the time. She did not remember telling the police that appellant was using speed, crack and marijuana, but if it was in her statement she must have said it. (7RT 1493.)

Lisa Martin's son, Blake, said that when appellant was staying with them he was under the influence more times than not of either meth or cocaine. (7RT 1505.)

**D. The Corroboration Rule**

If the prosecution uses the defendant's admissions (or confession) to prove an element of the crime that cannot otherwise be adequately proven, then the defendant's statement must be corroborated by "substantial independent evidence which would tend to establish the trustworthiness of the statement." (*Opper v. United States*, *supra*, 348 U.S. 84, 91, 93; see also *People v. Cuevas* (1955) 131 Cal.App.2d 393, 397 [same, citing *Opper*, *supra*].) This is referred to as the "corroboration rule." The corroboration rule is a common-law principle that was developed to prevent the government from relying too heavily on confessions. The rule is premised on the idea that inculpatory confessions and admissions are frequently

unreliable for many reasons, including coercion, delusion, neurosis, self-promotion, or protection of another person. Jurors find such statements inherently powerful, however, and may vote to convict based upon such statements alone. (See, e.g., Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, (1997) 32 Harv. C.R.-C.L. L.Rev. 105 & fn.7.)[12]

The corroboration rule, which is intended to prevent convictions of innocent defendants, also encourages better law enforcement because police and prosecutors cannot rely solely on a defendant's statements to prove a case. As explained by the high court in *Smith v. United States*, *supra*, 348 U.S. 147, the purpose of the corroboration requirement:

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[12] The corroboration rule is designed to serve different purposes than *Miranda* (*Miranda v. Arizona* (1966) 384 U.S. 436) and the voluntariness requirement. While these two doctrines seek to protect suspects from coercive police tactics during custodial interrogations, the corroboration rule is premised on the idea that suspects may give false confessions voluntarily. (See *Smith v. United States*, *supra*, 348 U.S. at p. 156.) To guard against that, the corroboration rule requires prosecutors to present evidence in addition to a defendant's own confession, and this evidentiary "reinforcement" reduces the potential for an erroneous conviction. (See *United States v. Dalhouse* (7th Cir. 2008) 534 F.3d 803, 805-806.)

The corroboration rule is also different from the corpus delicti rule, which it replaced in the federal system. (See, e.g., *United States v. Kerley* (7th Cir. 1988) 838 F.2d 932, 940 ["The corpus delicti rule no longer exists in the federal system . . . ."].) The corpus delicti rule precludes conviction where the corpus of the offense has been established on the basis of a defendant's uncorroborated statements, and is intended to ensure "that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1169.) As noted by the *Alvarez* court, "In federal prosecutions, and in a minority of states, the rule is simply that the accused's incriminating statement cannot be proof the crime occurred unless there is some independent evidence that the statement is *trustworthy*." (*Id.* at p. 1169, fn. 3, italics in original.)

> is to prevent "errors in convictions based upon untrue confessions alone"; its foundation lies in a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused. Confessions may be unreliable because they are coerced or induced, and although separate doctrines exclude involuntary confessions from consideration by the jury, further caution is warranted because the accused may be unable to establish the involuntary nature of his statements. Moreover, though a statement may not be "involuntary" within the meaning of this exclusionary rule, still its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation – whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past. Finally, the experience of the courts, the police and the medical profession recounts a number of false confessions voluntarily made. These are the considerations which justify a restriction on the power of the jury to convict, for this experience with confessions is not shared by the average juror.

(*Id.* at p. at 153, citations omitted.)

Moreover, as held by the Supreme Court in *Escobedo v. United States* (1964) 378 U.S. 478: "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation." (*Id.* at pp. 488-489, fns. omitted.) As such, sufficient extrinsic evidence is required "to preserve the integrity of the right against self-incrimination, the presumption that every accused is innocent until his guilt is established beyond a reasonable doubt and the accusatorial nature of our criminal justice system." (*Naples v. United States* (D.C. Cir. 1964) 344 F.2d 508, 514, overruled on other grounds in *Fuller v. United States* (D.C. Cir. 1967) 407 F.2d 1199.) "Such

guarantees of trustworthiness are particularly necessary in capital cases where the risk of fabrication or inaccuracy [by the defendant] must be viewed with an eye towards the question to be determined by the trier of fact." (*State v. Brooks* (La. 1995) 648 So.2d 366, 376-377.)

Further, in cases, like appellant's, that involve multiple statements or confessions, courts applying the corroboration rule reject the notion that serial confessions can be used to corroborate one another in the way independent evidence of the crime does. (See, e.g., *United States v. Calderon* (1954) 348 U.S. 160, 165 [holding that the defendant's various statements concerning his net worth could not corroborate each other in a prosecution for tax evasion].) The high court reiterated in *Wong Sun v. United States* (1963) 371 U.S. 471, 490, fn.15, in the context of the corpus delicti rule, that "one uncorroborated admission by the accused does not, standing alone, corroborate an unverified confession." (See also *State v. McGill* (2014) 50 Kan.App.2d 208, 328 P.3d 554, 560; *State v. Weisser* (N.M.Ct.App. 2006) 141 N.M. 93, 101, 150 P.3d 1043, 1051, and cases cited therein; *State v. Kelley* (2010) 239 Or.App. 266, 277-278, 243 P.3d 1195; *McMillian v. State* (1985) 65 Md.App. 21, 34, 499 A.2d 192, 198 ["Multiple confessions of an accused cannot be viewed as corroborative of one another."]; *United States v. Northrup* (D.Nev. 1980) 482 F.Supp. 1032, 1037 ["If two admissions, in and of themselves, are untrustworthy, obviously they cannot be bootstrapped together to raise each other to the level of trustworthiness."]; 1 McCormick on Evidence (7th ed. 2013) § 146, p. 809, fn. 3 ["one extrajudicial uncorroborated statement . . . cannot be used to corroborate another extrajudicial statement"].)

In *United States v. Northrup*, *supra*, 482 F.Supp. 1032, the court applied the corroboration rule to statements the defendant was alleged to

have made to two people neither of whom were in law enforcement. In finding that the corroboration rule applied equally to statements made to non-law enforcement personnel, the court found that the defendant's statements made to one of the two were not sufficiently trustworthy because "[a]t the time [defendant] made those statements, he was drunk and obviously was boasting, trying to impress a woman who 'appeared to be the kind who would be impressed by such statements.'" (*Id.* at p. 1038.) In its analysis of the issue, the court stated: "Can we say that these statements, made under these circumstances, are inherently trustworthy and do not require corroboration, merely because they were not made to an investigating police officer? I suggest not." (*Ibid.*)

Similarly, in *State v. McGill*, *supra*, the court rejected the state's argument that extrajudicial confessions made to law enforcement officers are distinguishable from those made to other persons in terms of the corpus delicti rule, and held "that the corpus delicti rule requires corroborating evidence for all extrajudicial confessions, regardless of whether they are made to law enforcement or some other person." (328 P.3d at p. 560.)

Lastly, as the corroboration rule pertains to the sufficiency of the evidence to corroborate a defendant's confession (cf. *Warszower v. United States* (1941) 312 U.S. 342, 347-348),[13] no objection at trial is required to raise this claim on appeal. (Cf. *People v. Alvarez*, *supra*, 27 Cal.4th 1161, 1172, fn. 8 ["No decision of this court . . . has suggested that an evidentiary

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[13] In *Warszower v. United States*, *supra*, the court held that "an uncorroborated confession . . . does not as a matter of law establish beyond a reasonable doubt the commission of a crime." (*Id.* at pp. 347-348; see also *United States v. Singleterry* (1st Cir. 1994) 29 F.3d 733, 738 ["courts often characterize corroboration requirements as governing the sufficiency of the evidence"].)

objection at trial is a prerequisite to raising instructional and sufficiency claims on appeal."].)

### E. Appellant's Many Conflicting Statements To Law Enforcement Lack Any Indicia Of Trustworthiness

In this case, appellant gave a total of 10 statements to the Barstow Police Department. In the his first five statements, which were taken by Detective Griego, appellant denied any involvement whatsoever in the charged crimes. He told Griego only "who he thought might have knowledge or involvement in it." (6RT 1386.)

In his seventh statement,[14] made on January 5, 2001, appellant told law enforcement that the crimes had been committed by two persons he knew as Bam-Bam and Wino, and that he only acted as a lookout and nothing more. However, after being told that being the lookout on the outside is no different from being the lookout on the inside and in fact "really kind of makes you look worse than being inside" (32CT 9228-9229), and being repeatedly told that if he said he was not inside the store that it made it all the more likely that his brother was involved (32CT 9231), appellant changed his story and said that he had gone inside the store. He then said that he helped Bam-Bam and Wino force the victims into the back of the store but denied taking any part in the actual robbing, shooting or the burning of the two victims.

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[14] His sixth statement involved Griego's brief interaction with appellant at the Riverside County Police Department on January 5, 2001, where appellant was being held on charges stemming from the Martin robbery. Griego had been summoned there by Riverside County Police Detective Steve Shumway, who had in turn received a letter from appellant saying that he had information about the Young murders and wanted to talk to Griego. (32CT 9213-9214.) Later that same day, appellant was transported to the Barstow Police Department, where he was interviewed by Griego and Detective Libby.

His eighth statement (the crime re-enactment on January 6, 2001) was essentially a repeat of his seventh statement.

In his ninth statement, made on January 25, 2001, after constant pressure from law enforcement to implicate his brother, appellant accepted partial and then full responsibility for the robbery and the shootings of the two victims. He said that Bam-Bam poured gasoline on the victims and Wino "lit them on fire." (32CT 9376.)

In his final statement, made on April 16, 2002, at which time he was in state prison serving a 23-year sentence for the Martin robbery (32CT 9385), his story changed again. This time he said that Wino was the one who shot the victims and that he, not Bam-Bam, was the one who poured gasoline on the victims. He also claimed that he was no longer able to identify the people he knew as Bam-Bam and Wino or any of the people who were with him at the time of the charged crimes.

There is no evidence in this case to show why appellant's last four statements to law enforcement, where he said that he participated in some fashion in the charged crimes, are any more reliable and trustworthy than his first six, where he adamantly denied any involvement whatsoever in those crimes.

Indeed, there are several reasons why appellant's statements to law enforcement lacked minimal reliability and trustworthiness:

First, appellant's memory of what actually transpired on the day of the charged crimes was, according to what he told law enforcement, significantly impaired by his use of illicit drugs (primarily methamphetamine, cocaine and marijuana) and alcohol at the time of the charged crimes and his lack of sleep in the week preceding the date of the crimes. For example, appellant told the investigating detectives that he had

consumed a half ounce of methamphetamine in the days preceding and on the day of the charged crimes; that he had consumed a 40-ounce beer (Olde English)[15] on the day of the charged crimes; that he had not slept for six or seven days before the date of the charged crimes; and that he had not taken his medication. (32CT 9414.)[16] He said that the combination of the three had affected his memory of what actually happened on the day in question. (See 32CT 9222, 9359 ["I just want you to understand that it's hard for me to remember, it's two years ago. And I was up seven, seven days of methamphetamine, I was half drunk you know and the small details are hard for me to remember."]; 32CT 9232 [saying that he was unclear on the details of what actually happened, explaining that he had been up for several days and under the influence of drugs, smoking "a sixteenth a day," which prompted Detective Libby to say, "Damn, that's much man."]; 9245 [saying that he had been up for several days, prompting Libby to remark that "dope will do that to you"]; 9238-9239 [no recollection who was shot first or where the person was inside the store]; 9247 [when pressed to described what was used to beat the victims, appellant said, "I was loaded man, I was high man, you know. And it's hard for me to remember."]; 9270 ["I can't remember the specific details. I was too spun out. You know, I was too loaded."]; 9312 ["after three days of . . . of using I started

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[15] Olde English is a malt liquor that has a high alcohol content in comparison with most beers. "It is available in a variety of serving sizes including, since the late 1980s, a forty ounce (1.183-litre) bottle." (See <http://en.wikipedia.org/wiki/ Olde_English_800> [as of November 3, 2014], fns. omitted.)

[16] Appellant told Griego, "I was . . . for one I was on meth . . . number two I was drunk . . . number three . . . I wasn't on my medication at the time . . . ." (32CT 9414.)

to lose my memory; I started to lose all comprehension of reality"]; 9405 [saying that he was under the influence of both alcohol and meth. "I'd been drinking all that day."].)[17]

Appellant also said that his drug use and not sleeping for many days at a time ("5, 6, 8 days"), caused him to have hallucinations ("started hearing shit, started seeing shit"). (32CT 9367.)

That methamphetamine and alcohol abuse can affect both short and long-term memory has been well-documented by numerous medical and scientific studies.[18] These effects on memory have also been the subject of

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[17] Also, during his visit to the crime scene for purposes of doing a re-enactment of the crime, appellant made the following statement about not remembering all of the details: "And again, I'm going to say, while the camera's rolling, I was up several days on methamphetamines, and uh, (unintelligible) it's kind of hard to remember specifically details and things that we said." (32CT 9310.) "[At the] time of the robbery and the murder I was not even up, not even up six or seven days the most on methamphetamine [*sic*]." (*Ibid.*)

[18] Here is a small sampling of those studies:

> People who have been addicted to methamphetamine and alcohol for an extended period of time are at risk of developing certain negative effects. Memory loss is the most common effect. Both alcohol and methamphetamine negatively impact memory. When the two are combined, this effect is amplified. Psychosis is another concern. Psychosis causes hallucinations, delusional thinking and paranoia.

(<http://www.projectknow.com/research/mixing-alcohol-and-meth/> [as of November 3, 2014].)

> Alcohol can produce detectable impairments in memory after only a few drinks and, as the amount of alcohol increases, so does the degree of impairment. Large quantities of alcohol, especially when consumed quickly and on an empty stomach, can produce a blackout, or an interval of time

(continued...)

expert testimony. (See, e.g., *People v. Cowan* (2010) 50 Cal.4th 401, 425; *People v. Ledesma* (2006) 39 Cal.4th 641, 661.)

Thus, appellant submits that his excessive and continued use of methamphetamine and alcohol before and after the date of the charged crimes undercuts the reliability and trustworthiness of his various statements to law enforcement concerning the true extent of his involvement in those crimes, if any. (Cf. *People v. Panah* (2005) 35 Cal.4th 395, 478 [evidence of a witness's drug use is admissible to attack the credibility of a witness if the evidence shows that the witness was under the influence at the time of the facts described by the witness, or that the witness's mental faculties were impaired by narcotics use]; *People v. Fauber* (1992) 2 Cal.4th 792, 839 ["To say . . . that the memory of some of

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[18](...continued)
for which the intoxicated person cannot recall key details of events, or even entire events.

(<http://pubs.niaaa.nih.gov/publications/aa63/aa63.htm> [as of November 3, 2014].)

> What are the long-term effects of meth abuse? Memory loss and confusion: You may have a hard time remembering things. Your ability to learn information will decrease. You may feel confused. You may also do things more slowly than before.

(<http://www.allinahealth.org/mdex/ND7759G.HTM> [as of November 3, 2014].)

> Methamphetamine, a highly addictive stimulant drug, whose abuse has reached epidemic proportions in many parts of the United States, causes long-term changes in the human brain that are associated with impaired memory and motor coordination, according to a study published in the March 2001 issue of the American Journal of Psychiatry.

(<http://www.nih.gov/news/pr/mar2001/nida-01.htm> [as of November 3, 2014].)

the witnesses may have been affected by drugs is to say no more than the common knowledge that ingestion of drugs affects perception"].)

The trustworthiness and reliability of appellant's statements to law enforcement is also called into question by evidence that when he spoke to law enforcement in 2001 and for the first time said that he had participated in the commission of the charged crimes, he was on some type of "heavy medication." (32CT 9388.) When appellant gave his last statement to law enforcement and made a number of incriminatory statements, he said that he was on "psychotopic [*sic*] medication." (32CT 9410.)

In addition, after appellant stated that his only involvement was that of a lookout, to get appellant to say that he was inside the t-shirt store, Detective Libby told appellant that being the lookout on the outside of the store was no different than being the lookout on the inside, "[a]nd being outside really kind of makes you look worse than being inside." (32CT 9228-9229.) Law enforcement also pressured appellant to confess to full participation in the charged crimes by telling him that if he continued to maintain he was not inside the store it made it all the more likely that his brother was involved, something that appellant, who was very protective of his brother, repeatedly denied. (32CT 9231.)

To get the police to drop the subject of his brother's possible involvement, appellant told them that he was responsible for the robbery and the shootings and to leave his brother out of it.

Finally, the record supports the inference that when appellant gave his final statement to the police and claimed that he was unable to identify from lineups the persons he knew as Bam-Bam and Wino, he did so because he feared the consequences of being labeled a snitch if it came out

that he had implicated them in the instant offenses. (See 7RT 1522; see also 32CT 9214, 9297.)[19]

Thus, taking all of these factors into consideration – appellant's drug and alcohol use before, during and after the date of the charged crimes; police pressure to get him to implicate himself further in the actual commission of the charged crimes in order to save his brother from being implicated; appellant's fear of being labeled a snitch if he identified the persons he knew as Bam-Bam and Wino; and evidence that he was on some type of "heavy medication" when he told the police that he was involved in the commission of the charged crimes – this Court can have no confidence in the reliability and trustworthiness of appellant's statements to law enforcement.

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[19] Just before appellant met with Griego in Riverside, he had expressed concerns for his safety and that of his family to Riverside County Police Detective Steve Shumway. He said to Shumway that he did not want anybody to know that he was

> giving this information up . . . [b]ecause the type of individuals that were involved in this murder . . . they're hooked, hooked up with some big time drug cartels out in Barstow. A couple of Mexican Mafia members, and I don't want to, I want to make sure of that, basically my family is going to be okay, by my name not popping up.

(32CT 9214.)

After meeting with Detectives Griego and Libby and implicating Bam-Bam and Wino in the charged offenses, appellant expressed grave concern for his personal safety upon his return to the Riverside County Jail, saying that "if this gets out, I'm through, I'm dead." (32CT 9297.)

### F. Appellant's Alleged Statements To The Martins Also Lack Any Indicia Of Trustworthiness

The statements appellant is alleged to have made to the Martins also fail to satisfy the requirements of the corroboration rule.[20]

First, appellant's statements to the Martins lack any indicia of reliability or trustworthiness because they were made when, according to the Martins, appellant was high on a combination of crack cocaine, methamphetamine, alcohol and marijuana and when he was acting "weird," "funny," and "strangely," and making all sorts of wild statements. (See 7RT 1477-1478, 1505.)

That a person's excessive drug and alcohol use can impair a person's ability to perceive, recollect and recall has been discussed *ante*, and that discussion is incorporated by this reference here.

Second, weighing against the truthfulness of the Martins's testimony, as defense counsel below tried to establish, is that they were undoubtedly biased against him because he had robbed and threatened them. (See Evid. Code, § 780, subd. (f) [jury allowed to consider the existence of a witness's "bias, interest, or other motive" for testifying untruthfully]; see also CAJJIC No. 2.20 ["The existence or nonexistence of a bias, interest or other motive"]; CALCRIM No. 105 ["Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided?"].)

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[20] As discussed *ante*, as far as the requirements of the corroboration rule are concerned, it makes no difference whether the statements the defendant is alleged to have made are made to members of law enforcement or to individuals who, like the Martins, have no connection to law enforcement. (See *United States v. Northrup*, *supra*, 482 F.Supp. at p. 1038; *State v. McGill*, *supra*, 328 P.3d at p. 560.)

### G. Conclusion

Given the lack of reliability and trustworthiness of appellant's statements coupled with the lack of any corroborating physical or eyewitness evidence connecting him to the charged crimes, the heightened reliability requirements of the corroboration rule for capital cases have not been met here, and reversal of the entire judgment is required.

Assuming, arguendo, that the Court finds sufficient evidence to corroborate appellant's statements that he assisted Bam-Bam and Wino in some fashion in the commission of the charged crimes and affirms appellant's murder convictions on one of several derivative liability theories (felony murder, accessory, aider and abettor), appellant's death sentence must nonetheless be reversed because the evidence as to the extent of his exact participation in the charged crimes fails to meet the heightened reliability standard for imposition of the death penalty. Here, the evidence as to whether appellant was the one who committed the most serious acts of shooting and setting the victims on fire rests entirely on his uncorroborated statements, thereby creating the constitutionally intolerable risk under the Eighth Amendment that the death penalty has been "imposed in spite of factors which may call for a less severe penalty." (Cf. *Lockett v. Ohio* (1978) 438 U.S. 586, 605 (plur. opn. of Burger, C.J.).)

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## II.

## APPELLANT WAS DENIED HIS DUE PROCESS RIGHT TO PRESENT THE TESTIMONY OF AMBER RENTERIA CONCERNING STATEMENTS SHE OVERHEARD MADE BY CARLOS LOOMIS IN WHICH HE HAD ADMITTED THAT HE AND RUBEN ROMERO HAD ROBBED AND BURNED DOWN A STORE ON MAIN STREET

### A. Introduction

The prosecution's theory at trial was that four people were involved in the commission of the charged crimes, appellant, Carlos Loomis (aka Bam-Bam), Ruben Romero (aka Wino), and appellant's half-brother, Antonio Leatham (aka Eagle), and that appellant, based on a series of videotaped statements he made to the police, was the one who had robbed, shot and set the two victims on fire. (See 5RT 1038-1041.)

In support of his defense that he was not responsible for the robbery and the burning of either of the two victims, and that his earlier statements to the police in which he claimed no or limited involvement in the charged crimes were true, appellant sought to present the testimony of Amber Renteria regarding two statements she had made to police Detective Leo Griego in which she said that she had overheard Loomis admit his and Romero's involvement in the robbery and burning down of T's Galore 'N More. She later retracted her statements implicating Loomis and Romero.

At trial, Renteria successfully fought appellant's attempts to force her to testify by claiming her Fifth Amendment privilege against self-incrimination on the basis that she faced possible prosecution based on the retraction of her statements implicating Loomis and Romero.

As appellant demonstrates below, Renteria had no valid Fifth Amendment privilege, and the erroneous exclusion of her testimony denied

him his state and federal constitutional rights to compel the attendance of witnesses on his behalf, due process, and the requirement of heightened reliability in capital cases, and requires, at the very least, reversal of the death judgment. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 17.)

**B. Factual Background and Proceedings In The Trial Court**

According to reports written by Detective Leo Griego, Amber Renteria made two statements implicating Loomis and Romero in the charged crimes. Her first statement was made on May 26, 1999, and her second on October 5, 1999. (See 8RT 1711.)[21] As represented to the trial

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[21] Detective Griego's various contacts with and interviews of Renteria were before the court as exhibits to appellant's motion to admit Renteria's testimony. (See, e.g., 8RT 1820; 31CT 8914.)

Detective Griego's May 26, 1999, report reads as follows:

> On Wednesday, 5-26-99 at approximately 1243 hours, I made contact with Amber Renteria who was in one of the interview rooms at the Barstow Police Department with Officer John Cordero. I had obtained permission from Cordero, who had arrested Renteria for a probation violation, to interview her.
>
> I told Renteria of the different murder investigations I was conducting. When I mentioned the murders of Nathaniel Young and Consuelo Young, Renteria said, "I heard Bam-Bam and Wino did that shit." I asked Renteria how it was that she knew it was "Bam-Bam" and "Wino" were involved. Renteria told me that she had overheard "Bam-Bam" say that he had to "get out of town" because he and his "Homie", "Wino", had "robbed a place on Main Street" and "the place burned down."
>
> Renteria told me that "Bam-Bam" had also said that he had to "burn the place to get rid of evidence." I asked

(continued...)

court by counsel for the defense and the prosecution, Renteria allegedly retracted her May and October 1999 statements implicating Loomis and Romero several years later, on October 16, 2003,[22] at which time she told

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[21](...continued)
Renteria where she was located when she overheard "Bam-Bam" make those statements. Renteria told me that she heard "Bam-Bam" make those statements to a person called "Midget."

Renteria told me that "Bam-Bam" is a "boy" about 14 years of age that had the name of "Carlos."

(31CT 8914.)

On October 5, 1999, Detective Griego re-interviewed Renteria. At that time, she "appeared to be alert, coherent and sober." (31CT 8917.) After confirming the fact that Renteria knew both Loomis and Romero, he asked her to repeat what she had been told by Loomis. She told him that Loomis told her that he had done a robbery and asked her for a ride out of town. Griego asked her if she remembered the other things that Loomis had told her, and she said that she did not remember. After Griego reminded Renteria of what she had previously told him, "she stated 'I could have told you what's in the report.' Renteria said, 'I'm not going to say I didn't say that." (31CT 8918-8919.)

[22] Renteria had actually retracted her statements implicating Loomis and Romero several years earlier in a letter she had sent to Detective Griego dated on or about October 29, 1999. This letter is referenced in a police report prepared by Detective Griego on March 8, 2000, a copy of which is located in the Clerk's Transcript at 1CT 36. In his report, Detective Griego states that after he met with Renteria on October 5, 1999, at which time "Renteria again told me with [*sic*] the same information that she had in the past concerning 'Bam-Bam' and 'Wino,'" "Renteria later (on 10-29-99) sent me a letter at the Barstow Police Department 'retracting' her statements." (*Ibid.*)

Unfortunately, the fact that Renteria had actually retracted her statements implicating Loomis and Romero in 1999 was never brought to the court's attention by the parties below and therefore plays no part in the discussion here. The significance of Renteria's 1999 retraction letter as it relates to her Fifth Amendment privilege not to testify and the trial court's

(continued...)

Detective Griego that her prior statements implicating Loomis and Romero were untrue, and were made while she was on drugs. (31CT 8923-8924.)[23]

Notwithstanding that Renteria had allegedly retracted her 1999 statements implicating Loomis and Romero in 2003, defense counsel called her as a witness at the guilt phase.

After speaking with her court-appointed counsel (San Bernardino County Public Defender Mark Shoup), Renteria asserted her Fifth Amendment privilege and refused to answer any questions about any statements allegedly made to her by Loomis. (8RT 1710-1711.) At that time, Shoup represented to the court that "I believe that she has a legitimate claim of privilege, and she chooses to exercise that." (8RT 1704.) The following conversation between the court and Shoup then ensued:

| | |
|---|---|
| THE COURT: | As an officer of the Court, can you tell me what kind of incrimination could possibly come out of the conversation she had with Detective Griego, if she had one? |
| MR. SHOUP: | I fear that any statement she might make could lead her to being prosecuted for a misdemeanor offense. |
| THE COURT: | Can you tell us the number? |
| MR. SHOUP: | 148 [*sic*].[24] |

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[22](...continued)
ruling is discussed in Argument III, *post*.

[23] Detective Griego's final reported contact with Renteria occurred on October 16, 2003. He told her that he was still investigating the murders in this case. She told him that she "was on drugs back then and not in my right state of mind. . . . What I told you at first about two people, Bam-Bam and Wino is not true." (31CT 8923-8924.)

[24] Penal Code section 148 makes it a crime to willfully resist arrest.
(continued...)

THE COURT: So . . . in other words, without putting words in anyone's mouth, when you're telling me that it's possible that she could – if she got on the stand and she were called and she made an inconsistent statement today, then the 148 would be giving false information to a peace officer, making a false report. That's an example.

MR. SHOUP: That's an example of one way it could be perceived.

THE COURT: Is there another way that you know of?

MR. SHOUP: No.

(8RT 1713-1714.)

The court said that it did not "see how there would be a basis for me to do anything to . . . force her to make statements that may tend to incriminate her." (8RT 1716.) The court noted that the prosecution could offer Renteria transactional immunity from prosecution, if he so chose. The prosecutor indicated that the People aren't giving immunity in this case. (8RT 1716-1717.)

The court ruled that it would not allow the defense to call Renteria at this time, but said that it would allow defense counsel "to come in with P's and A's and reopen if you find something different as far as the testimony of Renteria." (8RT 1789-1790.)

At a subsequent proceeding, defense counsel noted that Renteria had no Fifth Amendment privilege for the misdemeanor offense of making a false police report because the one-year statute of limitations for that offense had long since expired. The court asked when Renteria gave her

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[24](...continued)
Penal Code section 148.5 makes it a misdemeanor offense to make a false police report.

last statement in which she had repudiated her earlier statement, and the prosecutor indicated that her last police interview was in October 2003. (8RT 1798.)

The court then inquired whether there was a felony statute that applied to Renteria's statements. The prosecutor did not know, but raised the possibility that she could be an accessory after the fact under Penal Code section 32. The court responded, "I don't know how realistic she can be an accessory after the fact if her initial statement to Detective Griego was that something that pointed suspicion at somebody else. I don't know." (8RT 1799.) Defense counsel noted that on the present record Renteria did not have a valid privilege.

At the next court proceeding, the prosecutor stated that he had spoken to Renteria's court-appointed attorney, and, based on that conversation,

> it's my opinion that she still would be susceptible to P.C. 32. Let me explain why. [¶] Assuming her first statement, initial statement to Detective Griego is the truth, that she overheard Bam-Bam say that he was involved in the murder and arson. If later on she decides that she wants to protect him, because she's friends[25] with him, so she . . . decides that she wants to now protect him. So she tells Detective Griego that, my initial statement to you was incorrect. I was on drugs at the time. It wasn't true, and she tells Detective Griego this on 10-16-03. If that is her intent, that is P.C. 32. Now, again, I don't know what her intent is. I have never spoken to her. I don't know, but that is an argument.

(8RT 1811-1812.)

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[25] Defense counsel objected to the prosecutor's statement that Renteria and Loomis were friends, saying that there was no evidence to support that statement. (8RT 1811.) The prosecutor stepped back from that statement and claimed only that she knew him. (*Ibid.*)

Shoup said that if Renteria's last conversation with the police occurred in October of 2003, "the [three-year] statute of limitations for P.C. 32 is not up." (8RT 1812.)

Defense counsel noted that Shoup's analysis presupposes "That she is in a way actively helping Mr. Loomis," and "[t]here is no evidence of that." (8RT 1813.)

The court asked Shoup whether he had talked to Renteria since the last court appearance, and Shoup replied, "I believe that calls for privilege and I decline to answer that question, respectfully." (8RT 1815-1816.)

The court, after examining the elements of a section 32 violation, said that it "would be interested in seeing a case where someone has been prosecuted for Penal Code section 32 for simply making a statement or changing a statement already made." (8RT 1823.) No such case was forthcoming from either the prosecutor or Shoup.

Defense counsel said that under the prosecutor's section 32 analysis, Renteria's original statement had to be true. The prosecutor did not agree. (8RT 1824-1825.) The court asked him to "articulate a scenario in which it can be false and still be P.C. 32?" (8RT 1824.) The prosecutor answered as follows:

> She could have made up that first statement, but still know that he was involved. If she overheard another conversation that she never told Griego about, and then lying to Griego when she talked to him in 2003 to protect Loomis.

(8RT 1825.)

Based on the prosecutor's representation that Renteria could be held liable for prosecution under Penal Code section 32 as an accessory after the fact, the court upheld Renteria's Fifth Amendment privilege, stating, "I

think if she's got exposure, she's got the right to take the 5th, and I don't have the ability to do anything about it." (8RT 1845.)

The court said that it would grant Renteria immunity from prosecution if it had the power to do so just to resolve the matter, and asked the prosecutor if his office would grant Renteria immunity; the prosecutor said no. (8RT 1838, 1907.)

In the prosecutor's view "there is no evidence before this Court that anything that Ms. Renteria said is true." (8RT 1849.) Or "that she has any credibility whatsoever." (*Ibid.*) He explained the reason why his office would not grant Renteria immunity from prosecution:

> [T]he reason why my office will not grant immunity is if we believe that what Ms. Renteria said in 1999 was the truth, and if we believe that Mrs. [*sic*] Renteria had any credibility whatsoever, we would have used Ms. Renteria's statement to file on Carlos Loomis murder charges. We did not do that. We believe she has no credibility at all. That's important to put on the record. That is part of the reason we are not granting immunity to Ms. Renteria.

(9RT 2263-2264.)

The court then ruled that it would not allow the defense to call Renteria at the guilt phase and she was excused. (8RT 1908.) The court subsequently ruled that it also would not allow the defense to call her at the penalty phase. (10RT 2313.)

### C. The Governing Legal Principles

For those accused by the government of having committed a crime, the Sixth Amendment to the United States Constitution sets forth several fundamental protections, including the right of one accused of a crime to compel the testimony of those who have favorable evidence. Thus, the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused

shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." This constitutional guarantee, generally termed the compulsory process clause, applies in both federal and state trials. (*Washington v. Texas* (1967) 388 U.S. 14, 18 [6th Amendment's compulsory process clause is incorporated into the 14th Amendment's due process clause, making it applicable in state prosecutions].)

A defendant's right to compel witnesses to come into court and give evidence in his or her defense is a fundamental one. As the high court explained in *Washington v. Texas, supra*:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

(*Washington v. Texas, supra*, 388 U.S. at p. 19.)

California Constitution, article I, section 15, similarly guarantees as a matter of state constitutional law that "[t]he defendant in a criminal cause has the right . . . to compel attendance of witnesses in the defendant's behalf." This Court has likewise found the state constitutional right to compel the attendance of witnesses is a basic component of a fair trial. (*People v. Jacinto* (2010) 49 Cal.4th 263, 269; *In re Martin* (1987) 44 Cal.3d 1, 30.)

The right to compel the attendance of witnesses does not, however, include the right to compel the witness to waive his or her Fifth Amendment privilege. (*Washington v. Texas, supra*, 388 U.S. at p. 23, fn.

21; see also *United States v. Trejo-Zambrano* (9th Cir. 1978) 582 F.2d 460, 464.) But the privilege against self-incrimination protects the witness only "against real dangers, not remote and speculative possibilities." (*Zicarelli v. New Jersey State Commn. of Investigation* (1972) 406 U.S. 472, 478.)

To constitute a denial of the right to present a defense, a trial court's exclusion of evidence must "infringe[ ] upon a weighty interest of the accused." (*United States v. Schaefer* (1998) 523 U.S. 303, 308.) A "weighty interest of the accused" is infringed where "the exclusion of evidence seriously undermined 'fundamental elements of the defendant's defense' against the crime charged." (*Miskel v. Karnes* (6th Cir. 2005) 397 F.3d 446, 455, quoting *United States v. Schaefer, supra*, 523 U.S. at p. 315). Thus, "'[w]hether the exclusion of [witnesses'] testimony violated [defendant's] right to present a defense depends upon whether the omitted evidence [evaluated in the context of the entire record] creates a reasonable doubt that did not otherwise exist.'" (*United States v. Blackwell* (6th Cir. 2006) 459 F.3d 739, 753, quoting *Washington v. Schriver* (2d Cir. 2001) 255 F.3d 45, 47, brackets by quoting court.)

In the present case, Renteria's Fifth Amendment privilege against self-incrimination was not well-taken, as she faced no possible criminal liability as a result of any of her statements regarding Loomis and Romero.

### D. Renteria Was Not Liable For Prosecution As an Accessory After The Fact

Penal Code section 32 provides:

> Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with

such felony or convicted thereof, is an accessory to such felony.

The constituent elements of the accessory offense have been summarized as follows:

> The crime of being an accessory is a complex one, being composed of the following elements, each of which must be alleged and proved by the prosecution: (1) someone other than the accused, the principal to the crime, must have committed a specific, completed felony; (2) the accused must have harbored, concealed or aided the principal; (3) the element of *scienter* must be present in this, that the accused must have had knowledge that the principal has committed a felony, or has been charged or convicted thereof; (4) the element of specific intent must have been present, namely, that the accused must have harbored, concealed or aided with the intent that the principal may avoid or escape from arrest, trial, conviction or punishment.

(*People v. Hardin* (1962) 207 Cal.App.2d 336, 341.)

As none of the constituent elements of the accessory offense are present here with respect to Renteria's alleged 2003 retraction of her 1999 statements implicating Loomis and Romero in the charged crimes, she did not face liability as an accessory after the fact to the charged crimes.[26]

The first required element is proof that Loomis and/or Romero actually "committed a specific, completed felony." But, other than appellant's statements (and even Renteria's earlier statements implicating

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[26] Assuming for the sake of argument that Renteria's statements in 1999 implicating Loomis and Romero or her retraction of those statements in 2003 were false, at the very most she faced a misdemeanor charge for making a false police report (Pen. Code, § 148.5) and, as recognized by the court and the parties below, the one-year statute of limitations for violation of that offense had long since expired at the time she was called as a witness at appellant's trial.

Loomis and Romero) there was no evidence that either Loomis or Romero actually committed any of the charged crimes, and they were never arrested or charged with any of these offenses. As such, the first element is lacking.

In terms of the required scienter element, there is no evidence that Renteria had any actual knowledge as to the person or persons who committed the charged crimes.

There is also no evidence that Renteria ever harbored, concealed or aided either Loomis or Romero or anyone else. Indeed, her initial statements to Griego, far from aiding Loomis and Romero, implicated them in the charged crimes.

Finally, with respect to the final element, there is no evidence that Renteria's 2003 repudiation of her 1999 statements was made with the specific intent that either Loomis or Romero avoid or escape arrest, trial, conviction or punishment. As held by the court in *People v. Duty* (1969) 269 Cal.App.2d 97:

> [T]he offense [of accessory] is not committed . . . by refusal to give information to the authorities, or by a denial of knowledge motivated by self-interest.

(*Id.* at pp. 103-104, fns. omitted; see also *People v. Plengsangtip* (2007) 148 Cal.App.4th 825, 838 ["a statement that one *knows nothing* about a crime, even if false, is equivalent to a passive nondisclosure or refusal to give information, which is insufficient to support an accessory charge"].)[27]

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[27] A person's reluctance to be a witness in a criminal case is not that unusual. For example, in *People v. Gutierrez* (1994) 23 Cal.App.4th 1576, a murder case, three witnesses gave statements to the police identifying appellant as the shooter. At the time of trial, however, all three of the witnesses were extremely reluctant to testify, having been threatened by defendant's brother if they said anything. When called to testify, they either denied any knowledge of the incident, claimed they could no longer

(continued...)

In short, none of the elements essential to establish Renteria's possible liability for violation of section 32 are present here, and the trial court, which was skeptical from the start that Renteria could be charged as an accessory, erred in following the prosecution's lead and concluding otherwise.

Furthermore, the prosecutor's speculation that Renteria could be prosecuted for being an accessory after the fact based on her 2003 retraction of the statements she made in 1999 rings hollow, as the prosecution was well-aware of Renteria's statements in 1999 implicating Loomis and Romero as well as her retraction of those statements in 2003 and did not prosecute her for being an accessory after the fact or making a false police report. As suggested by defense counsel below, the threat of a prosecution under section 32 was devised by the prosecutor to keep Renteria off the witness stand, for even if he did not find her credible, a jury might give some credence to her original, spontaneous statement to the police.

As a general rule, "Governmental interference violative of a defendant's compulsory-process right includes . . . the intimidation of defense witnesses by the prosecution. [Citations.] [¶] The forms that such prosecutorial misconduct may take are many and varied. They include, for

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[27](...continued)
remember the events or claimed they really could not see well enough the morning of the incident to identify the shooter. (*Id.* at pp. 1586-1587.) One of the three, "claimed the day she spoke to the police she had had several beers, had taken Valium as well as codeine and was so intoxicated she could remember nothing." (*Id.* at p. 1587.) Over defense objection, the prosecution was permitted to present evidence that each of the three witnesses had been threatened by defendant's brother. No mention was made in that case that any of the witnesses were ever threatened with or faced prosecution for being an accessory after the fact based on their later statements denying any knowledge of the incident.

example, statements to defense witnesses to the effect that they would be prosecuted for any crimes they reveal or commit in the course of their testimony. [Citations.]" (*In re Martin, supra*, 44 Cal.3d at p. 30.) "The defendant need not show the government acted in bad faith or with an improper motive." (*Id.* at p. 31.) The defendant also need not prove that the prosecutor's remarks were the direct or exclusive factor in the witness's decision not to testify. "[A]ll that need be shown is a strong suggestion the comments were the cause." (*People v. Bryant* (1984) 157 Cal.App.3d 582, 590; see also *In re Martin, supra*, 44 Cal.3d at p. 31 [prosecutorial misconduct may be deemed a substantial cause if it carries significant coercive force and is soon followed by a witness's refusal to testify].).)

Here, the prosecutor's comments that Renteria could face possible prosecution under section 32 was communicated to her by the two attorneys who were appointed to represent her, Deputy Public Defenders Shoup and Zywiciel, and was discussed by the court and counsel in Renteria's presence. (9RT 2247-2267.)

The prosecutor's threat of prosecution was unquestionably a "substantial cause" of Renteria's refusal to testify as a defense witness (see *In re Martin, supra*, 44 Cal.3d at p. 31), and therefore interfered with appellant's compulsory-process right.

### E. The Erroneous Exclusion Of Renteria's Testimony Requires Reversal

Violations of federal constitutional rights are subject to the harmless beyond a reasonable doubt standard of prejudice set forth in *Chapman v. California* (1967) 386 U.S. 18, i.e., such errors will be found prejudicial unless the state can show beyond a reasonable doubt that the error did not contribute to the verdict. (*Sullivan v. Louisiana* (1993) U.S. 275, 279. [state

has burden to show that the verdict rendered at trial "was surely unattributable to the error"].) The state cannot meet that burden here.

For violations of state law at the guilt phase, reversal is required where it is reasonably probable that the error affected the trial result. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "Reasonably probable" is defined as a probability sufficient to undermine confidence in the outcome. (*In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 6.) For violations of state law at the penalty phase, the state's harmless-error standard is the "reasonable possibility" standard. (*People v. Brown* (1988) 46 Cal.3d 432; see also *People v. Wallace* (2008) 44 Cal.4th 1032, 1092 [explaining that the reasonable-possibility standard of prejudice first articulated in *Brown* is the "'same in substance and effect'" as the beyond-a-reasonable-doubt standard of prejudice articulated in *Chapman v. California* , *supra*, 386 U.S. at p. 24].)

Here, the erroneous exclusion of Amber Renteria's testimony affected both the jury's guilt and penalty verdicts and reversal is required because it cannot be shown beyond a reasonable doubt that the error did not contribute to the jury's guilt and penalty verdicts.

The fact that Renteria retracted her earlier statements implicating Loomis and Romero in the charged crimes does not undermine appellant's claim that error was committed, and his jury should have been allowed to hear Renteria's testimony. None of Renteria's prior statements were given under oath, so there is no way of knowing what she would have said if called to the witness stand and sworn to tell the truth. If she testified consistent with her earlier statements implicating Loomis and Romero, the prosecution would have called Griego to testify regarding her later retractions. If she testified consistent with her retraction in 2003, claiming

that she was "on drugs back then and not in my right state of mind," the defense would have called Griego to impeach her with her earlier statements in May and October 1999, and his observation when he interviewed her in October 1999 that she "appeared to be alert, coherent, and sober." (31CT 8903.) In any case, Renteria's credibility as a witness and which of her two accounts was true was for appellant's jury to decide. (See CALJIC No. 2.20.)

The importance of Renteria's testimony concerning the statements made by Loomis that he had committed the robbery and the burning at the t-shirt store was that it corroborated appellant's earlier statements to the police that Loomis and Romero actively participated in the robbery, and that Loomis, acting on his own, was the one who set Consuelo Young on fire, presumably to cover up evidence that he had raped her, as her pelvic and abdominal areas were severely burned. (See, e.g., 7RT 1586.) Renteria's testimony would have also provided support for defense counsel's argument that appellant's later statements to the police in which he shifted the blame away from Loomis and Romero for the robbing, shooting and burning of the two victims and now claimed full responsibility for those crimes were not true, but made out of fear for his personal safety if it came out that he had informed or snitched on Loomis and Romero. As argued by defense counsel,

> he [appellant] was scared to be known as a informant or snitch. Informants and snitches in custody can be beaten, hurt, and sometimes even killed.

(5RT 1043; see also 7RT 1522 [testimony of Deputy Sheriff Oswaldo Rodriguez regarding what sometimes happens to informants in a jail setting].)

Relieving appellant of direct responsibility for the burning of the two victims would have also provided strong mitigating evidence at the penalty phase by reducing his personal culpability for what the prosecutor argued was the most gruesome, inhumane and evil offense. (10RT 2538.)[28] Even the trial court noted that Renteria's statements had "some potential lessening of the responsibility of this offense borne specifically by Mr. Capers." (8RT 1845.)

In urging appellant's jury to reject the death penalty and spare appellant's life, defense counsel argued residual or lingering doubt as to appellant's true role in the charged crimes. He said:

> If you are angry at the photographs you have seen today, you have a right to be, but what happens if it wasn't Lee Samuel Capers that set the fire? What happens if he wasn't the shooter? What happens if someone else was the shooter? There is no certainty. You have convicted him, but there is some space beyond a reasonable doubt and the absolute certainty that's necessary before you impose death.

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[28] Appellant acknowledges that he would have still faced possible derivative liability as an aider and abettor if his jury concluded that he had acted "with knowledge of the criminal purpose of the [other] perpetrator[s] and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." (*People v. Beeman* (1984) 35 Cal.3d 547, 560; see *People v. Prettyman* (1996) 14 Cal.4th 248, 259 ["Accomplice liability is 'derivative,' that is, it results from an act by the perpetrator to which the accomplice contributed."].) But even if appellant's jury were to find him guilty of the charged crimes on some theory of derivative liability, it could still have spared his life if it believed, consistent with the defense theory that Loomis and Romero were the ones responsible for shooting, robbing and burning the two victims, that "[appellant's] participation in the commission of the offense was relatively minor." (11RT 2617; Pen. Code, § 190.3, factor (j); CALJIC No 8.85.)

(10RT2568; see also 2570 [asking the jurors to "look at lingering or residual doubt"].)

Because there is a "reasonable possibility" that appellant's jurors would not have unanimously agreed that death was the appropriate penalty had Renteria been compelled to testify, reversal of the death judgment is required.

Accordingly, reversal of the entire judgment is required.

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## III.

## BASED ON THE UNDISPUTED EVIDENCE BEFORE THIS COURT, AMBER RENTERIA IN POINT OF FACT HAD NO VALID FIFTH AMENDMENT PRIVILEGE BECAUSE THE STATUTE OF LIMITATIONS FOR VIOLATION OF PENAL CODE SECTION 32 HAD LONG SINCE EXPIRED AT THE TIME SHE WAS SUMMONED AS A WITNESS IN THIS CASE

As shown by the record provided to appellate counsel and filed in this Court, Amber Renteria retracted the various statements she made implicating Carlos Loomis and Antonio Romero in the charged crimes on at least two separate occasions: the first was in a letter she sent to Detective Griego on or about October 29, 1999 (hereafter "retraction letter") (1CT 36; see Argument II, fn 22, *ante*); and the second was when she was contacted by Detective Griego on October 16, 2003 (see 31CT 8923-8924). The trial court was told only of Renteria's retraction in 2003; no mention was made by the parties of her 1999 retraction letter.

As discussed in Argument II, *ante*, Renteria's Fifth Amendment privilege not to testify was sustained by the trial court only because it had been told about Renteria's retraction in 2003, and because the three-year statute limitations for a possible violation of Penal Code section 32 (accessory after the fact) based on that retraction had not yet expired on the date she was summoned as a witness in this case, June 1, 2006.

Undoubtedly, had the court been informed about Renteria's original retraction letter, it would have concluded that the statute of limitations for a violation of section 32 based on her having retracted her statements implicating Loomis and Romero in the charged crimes had long since expired at the time she was called as a witness. Having so concluded, it

would have denied her Fifth Amendment right against self-incrimination and compelled her to testify.

Even though Renteria's retraction letter was not before the trial court when it ruled on her Fifth Amendment claim, the issue raised herein is nonetheless properly before this Court on appellant's automatic appeal because it is based on undisputed facts and presents purely a question of law (see *Williams v. Mariposa County Unified School District* (1978) 82 Cal.App.3d 843, 850 ["Where, as here, the facts with reference to the contention newly made on appeal appear to be undisputed and that probably no different showing could be made at a new hearing it is deemed appropriate to entertain the contention as a question of law on the undisputed facts and pass on it accordingly"]; accord, *Ward v. Taggart* (1959) 51 Cal.2d 736, 742; *People v. Butler* (1980) 105 Cal.App.3d 585, 588 [a party may raise a new theory on appeal where it involves a purely legal question arising from undisputed facts]), and because the error raised herein is both obvious and seriously affects the fairness, integrity, and public reputation of the judicial proceedings in this case (see *Silber v. United States* (1962) 370 U.S. 717, 718; *United States v. Atkinson* (1936) 297 U.S. 157, 160 ["In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings"]; *People v. Renchie* (1962) 201 Cal.App.2d 1, 7; *People v. Ross* (1961) 198 Cal.App.2d 723, 730).

Here, the three-year statute of limitations for violation of Penal Code section 32 based on Renteria's retraction of her prior statements to Detective Griego implicating Loomis and Romero in the charged crimes

commenced running on or about October 29, 1999, the date Detective Griego reported having received her retraction letter and expired three years later, on or about October 29, 2002. (Cf. *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 330-331 [statute of limitations commences when "law enforcement personnel learns of facts which, when investigated with reasonable diligence, would make that person aware a crime had occurred"], disapproved on other grounds in *People v. Whitmer* (2014) 59 Cal.4th 733, 739; accord, *People v. Zamora* (1976) 18 Cal.3d 538, 571–572; *People v. Bell* (1996) 45 Cal.App.4th 1030, 1061.) Renteria's later retraction in 2003 did not result in the statute of limitations commencing anew as it simply confirmed what she had stated previously in her retraction letter. (Cf. *Trigg v. Superior Court* (1975) 49 Cal.App.3d 685.)[29]

As the statute of limitations for violation of Penal Code section 32 had long since expired by the time Renteria was called as a witness on June 1, 2006, she could not be prosecuted for any possible violation of section 32 for having retracted her various statements implicating Loomis and Romero in the charged crimes and therefore she had no Fifth Amendment privilege. As such, error was committed.

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[29] In *Trigg v. Superior Court, supra*, 49 Cal.App.3d 685, petitioner Trigg was charged with perjuriously signing, on September 7, 1968, an affidavit for registration to vote, as to which said perjury was not discovered until June 28, 1974. Petitioner moved to strike the charge on the ground that its prosecution was barred by the three-year statute of limitations. In granting the writ, the court rejected the People's contentions that petitioner's voting within the three-year period constituted a continuation of the 1968 perjury, or that his 1972 voter's change-of-address card amounted to republication of that perjury. (*Id.* at pp. 687-688.)

As argued previously, (see Argument II, *ante*, at pp. 74-78), the trial court's erroneous excusal of Renteria denied appellant his right to a fair trial and a reliable penalty verdict in violation of his state and federal constitutional rights and reversal of the entire judgment is required.

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## IV.

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

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (I) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should this Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

### A. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, Penal Code section 190.2 contained 21 special circumstances.

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

### B. The Broad Application of Section 190.3, Subdivision (a) Violated Appellant's Constitutional Rights

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 11RT 2616.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749, disapproved on other grounds in *People v. Black* (2014) 58 Cal.4th 912, 919-920 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. *(People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Appellant urges the court to reconsider this holding.

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### C. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden of Proof

#### 1. Appellant's Death Sentence Is Unconstitutional Because it Is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (CALJIC Nos. 8.85, 8.86 & 8.87; *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. More specifically, appellant's jury was not told that it had to find beyond a reasonable doubt that the crime proffered as factor (b) evidence involved the use or attempted use of force or violence or the express or implied threat to use force or violence. (11RT 2619.)

*Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604-605, and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478 require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No.

8.88; 11RT 2636-2637.) Because these additional findings were required before the jury could impose the death sentence, *Blakely*, *Ring*, and *Apprendi* require that each of these findings be made beyond a reasonable doubt. The trial court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson*, *supra*, 25 Cal.4th at p. 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). The Court has rejected the argument that *Blakely*, *Ring* and *Apprendi* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Blakely*, *Ring* and *Apprendi*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected appellant's claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair, supra,* 36

Cal.4th at p. 753.) Appellant requests that the Court reconsider this holding.

### 2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here, fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury

instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law ].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

### 3. Appellant's Death Verdict Was Not Premised On Unanimous Jury Findings

#### a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Nonetheless, this Court has "held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona*, *supra*, 536 U.S. 584. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision

will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal Constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

### b. Unadjudicated Criminal Activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (CALJIC No. 8.87; 11RT 2619-2620.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson*, *supra*, 25 Cal.4th at pp. 584-585.) Here, the prosecution presented evidence regarding unadjudicated criminal activity allegedly committed by appellant, and the jury was instructed that each juror could decide for him or herself whether appellant had committed the alleged crime. (CALJIC No. 8.87; 11CT 2619-2620.)

The United States Supreme Court's decisions in *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward*.

### 4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (11RT 2637.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright, supra*, 486 U.S. at p. 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

### 5. The Instructions Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal

Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when a life without the possibility of parole verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

### 6. The Instructions Violated the Sixth, Eighth And Fourteenth Amendments by Failing to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 293-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a

likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. *(Boyde v. California, supra*, 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland, supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

### 7. The Penalty Jury Should Be Instructed On the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law, his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner, and his right to the equal protection of the laws. (U.S. Const., 8th & 14th Amends.)

In *People v. Arias, supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

### D. Failing to Require That the Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the court to reconsider its decisions on the necessity of written findings.

### E. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights

#### 1. The Use of Restrictive Adjectives in the List Of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; [Pen. Code, § 190.3, factors (d) and (g)]) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland, supra*, 486 U.S. at p. 384; *Lockett v. Ohio, supra,* 438 U.S. at p. 604.) Appellant is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

### 2. The Failure to Delete Inapplicable Sentencing Factors

Some of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. (See, e.g., factors (e) [whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act] and (f) [whether the defendant reasonably believed the circumstances morally justified or extenuated his conduct]. The trial court failed to omit those factors from the jury instructions, likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

### 3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289).

Appellant's 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. Consequently, the jury was invited

to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.)

### F. The Prohibition Against Intercase Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of the Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., intercase proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct intercase proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges this Court to reconsider its failure to require intercase proportionality review in capital cases.

### G. California's Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence,

and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rules 4.421 and 4.423.) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that this Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider.

### H. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms

This Court has repeatedly rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency." (*Trop v. Dulles* (1958) 356 U.S. 86, 101; see also *People v. Cook*, *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the court to reconsider its previous decisions.

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## V.

## REVERSAL OF THE JUDGMENT OF CONVICTION AND THE SENTENCE OF DEATH IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT COLLECTIVELY UNDERMINED THE FUNDAMENTAL FAIRNESS OF APPELLANT'S TRIAL AND THE RELIABILITY OF THE RESULTING DEATH JUDGMENT

Assuming, arguendo, that the errors asserted in Arguments I-IV, taken separately, do not require reversal, the effect of these errors should be evaluated cumulatively because together they undermine confidence in the fairness of the trial and the reliability of the resulting death judgment. (Cal. Const., art. I, § 15; U.S. Const., 8th & 14th Amends.; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect the trial with unfairness that the resulting verdict is a denial of due process]; *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 298 ["The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair"]; *People v. Hill* (1998) 17 Cal.4th 800, 844-848 [reversing entire judgment in capital case due to cumulative error].) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

In addition, the death judgment must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of

appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing penalty phase].) In this context, this Court has expressly recognized that evidence that may not affect the guilt determination can have a prejudicial impact on the penalty trial. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase]; accord, *Arizona v. Fulminante* (1991) 499 U.S. 279, 301-302 [erroneous introduction of evidence at guilt phase had prejudicial effect on sentencing phase of capital murder trial]; *United States v. McCullough* (10th Cir. 1996) 76 F.3d 1087, 1101-1102 [erroneously admitted confession harmless in guilt phase but prejudicial in penalty phase].)

In the present case, given the lack of sufficient corroboration of appellant's statements to the police and the Martins (Argument I) and the erroneous exclusion of Amber Renteria's testimony (Arguments II and III), the cumulative effect of these errors deprived appellant of his state and federal constitutional rights to a fair trial, due process and a reliable determination of guilt. (U.S. Const., 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 330-331; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *People v. Brown, supra,* 46 Cal.3d at p. 448.) Appellant's convictions and the special circumstance findings must therefore be reversed. (*People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital-murder conviction for cumulative error].)

The cumulative effect of the errors asserted in Arguments I-III coupled with the many defects in California's capital sentencing scheme (Argument IV) requires, at the very least, reversal of the death judgment because it cannot be shown by the People that these errors had no effect on the jury's penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi, supra,* 472 U.S. at p. 341; *Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Brown, supra,* 46 Cal.3d at p. 447.)

As held by this Court in *People v. Hamilton* (1963) 60 Cal.2d 105, a case cited by the *Brown* court (*People v. Brown, supra,* 46 Cal.3d at p. 447):

> If only one of the twelve jurors was swayed by the inadmissible evidence or error, then, in the absence of that evidence or error, the death penalty would not have been imposed. What may affect one juror might not affect another. The facts that the evidence of guilt is overwhelming, as here, or that the crime involved was, as here, particularly revolting, are not controlling. This being so it necessarily follows that any substantial error occurring during the penalty phase of the trial, that results in the death penalty, since it reasonably may have swayed a juror, must be deemed to have been prejudicial.

(*People v. Hamilton, supra,* 60 Cal.2d at p. 137.)

Accordingly, the cumulative effect of the errors in this case requires reversal of the judgment of conviction and the sentence of death.

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## CONCLUSION

For the reasons set forth above, the entire judgment must be reversed.

DATED: November 6, 2014

Respectfully submitted,
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**CERTIFICATE OF COUNSEL**
**(CALIFORNIA RULES OF COURT, RULE 36(b)(2))**

I, Peter Silten, am the attorney assigned to represent appellant in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates, is approximately 28,945 words in length.

DATED: November 6, 2014

PETER R. SILTEN

## DECLARATION OF SERVICE BY MAIL

*People v. Lee Samuel Capers*

Supreme Court No. S146939
Superior Court No. FBA-02684

I, the undersigned, declare as follows:

I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 1111 Broadway, 10th Floor, Oakland, California, 94607. I served a copy of the following document(s):

**APPELLANT'S OPENING BRIEF**

by enclosing it in envelopes and

/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
**/X/ placing** the envelopes for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelopes were addressed and mailed on **November 6, 2014,** as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on November 6, 2014, at Oakland, California.

MARCUS THOMAS