IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. LOUIS MITCHELL, JR., Defendant and Appellant.	No. S147335 (San Bernardino County Superior Court No. FSB051580)

APPELLANT'S OPENING BRIEF

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

HONORABLE BRIAN S. MCCARVILLE, JUDGE

MICHAEL J. HERSEK
State Public Defender

HARRY GRUBER
State Bar No. 71053
Senior Deputy State Public Defender

1111 Broadway, 10th Floor
Oakland, California 94607
Telephone: (510) 267-3300

Attorneys for Appellant

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

STATE CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

CONSTITUTIONS

STATE STATUTES

STATE RULES

JURY INSTRUCTIONS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. LOUIS MITCHELL, JR., Defendant and Appellant.	)	No. S147335 (San Bernardino County Sup. Ct. No. FSB051580)

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code, § 1239, subd. (b).)[1]

STATEMENT OF THE CASE

On August 9, 2005, appellant was arrested by San Bernardino Police Department Sheriff's deputies. (1 CT 190.) A felony complaint, an information and two amended informations were filed against appellant charging him with offenses committed against Patrick Mawikere, Mario Lopez, Susano Torres, Juan Bizzotto, Jerry Payan, Armando Torres,

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

Armando De Santiago, Brenda April Wierenga, and David Edward Roark. (3 CT 577-592 [felony complaint], 3 CT 634-652 [information], 4 CT 931-946 [first amended information], 4 CT 1039-1049 [second amended information].)

Ultimately, on July 14, 2006, the People filed a six-count third amended information on which appellant was tried. (64 CT 17087-17091.) Count 1 charged appellant with the August 8, 2005, murder of Patrick Mawikere, with malice aforethought, in violation of section 187, subdivision (a). (64 CT 17088.) Count 2 charged appellant with the August 8, 2005, murder of Mario Lopez, with malice aforethought, in violation of section 187, subdivision (a). (64 CT 17088.) Count 3 charged appellant with the August 8, 2005, murder of Susano Torres, with malice aforethought, in violation of section 187, subdivision (a). (64 CT 17089.) Count 4 charged appellant with the willful, premeditated, and deliberate attempted murder of Juan Bizzotto on August 8, 2005, in violation of sections 664 and 187, subdivision (a). (64 CT 17089-17090.) Count 5 charged appellant with the willful, premeditated, and deliberate attempted murder of Jerry Payan on August 8, 2005, in violation of sections 664 and 187, subdivision (a). (64 CT 17090.) Count 6 charged appellant with the willful, premeditated, and deliberate attempted murder of Armando Torres on August 8, 2005, in violation of sections 664 and 187, subdivision (a). (64 CT 17090-17091.)

Additionally, the third amended information alleged the single special circumstance of multiple murder, within the meaning of section 190.2, subdivision (a)(3), as to counts 1 through 3. (64 CT 17088-17089.)

Finally, the third amended information alleged three penalty enhancements as follows: First, it was alleged that the offenses charged in

counts 1 through 6 were serious felonies within the meaning of section 1192.7, subdivision (c). Second, it was alleged that the offenses charged in counts 1 through 3 were violent felonies within the meaning of section 667.5, subdivision (c). Third, it was alleged that in the commission of counts 1 through 6, appellant personally discharged a firearm proximately causing great bodily injury and/or death within the meaning of section 12022.53, subdivision (d). (64 CT 17088-17091.)

On July 17, 2006, appellant pleaded not guilty to all counts and denied the truth of all special circumstance and penalty allegations as charged in the third amended information. (64 CT 17100.)

Meanwhile, on May 8, 2006, trial had commenced with jury selection.[2] (4 CT 1050.) On July 12, 2006, jury selection was completed, with 12 jurors and 6 alternate jurors sworn and seated. (64 CT 17084-17086.) The prosecution began its guilt-phase case-in-chief on July 17, 2006 (64 CT 17100), concluded its case-in-chief on August 1, 2006 (65 CT 17167), and rested on August 3, 2006 (65 CT 17167-17173). The defense did not present a case at the guilt phase and rested on August 7, 2006. (65 CT 17174.)

On August 8, 2006, both sides presented argument; the jury received its instructions and commenced its deliberations. (65 CT 17179-17181.)

---

[2] Jury selection commenced on the basis of the second amended information, filed on April 27, 2006. That information alleged, inter alia, that appellant had committed three counts of willful, deliberate, and premeditated murder in violation of section 187, subdivision (a); that a multiple-murder special circumstance pursuant to section 190.2, subdivision (a)(3) applied; and that appellant had committed six counts of willful, deliberate, and premeditated attempted murder in violation of sections 664 and 187, subdivision (a). (4 CT 1039-1049.)

On August 9, 2006, the jury returned its verdicts, finding appellant guilty as charged of three counts of first degree murder, three counts of attempted first degree murder, and finding true the special circumstance allegation and all the penalty enhancements. (65 CT 17201-17203.)

On August 21, 2006, the penalty phase commenced. (65 CT 17336-17738.) The prosecution completed its case on August 22, 2006. (65 CT 17338.) Appellant commenced his penalty-phase case August 24, 2006, and he rested on August 29, 2006. (65 CT 17343-17354.) On August 31, 2006, the jury was instructed; both sides gave closing arguments, and the jury began its deliberations. (65 CT 17358-17360.) On September 5, 2006, the jury returned a death verdict. (65 CT 17367-17368.)

On October 4, 2006, the trial court heard and denied the automatic motion for modification of the death verdict. (66 CT 17448-17451.) Probation was denied, and appellant was sentenced to death on counts 1 through 3 pursuant to section 190.2, subdivision (a)(3). As to those same counts, the trial court also sentenced appellant to 25 years to life pursuant to section 12022.53, subdivision (d), to run consecutive to the death sentences. As to counts 4 through 6, appellant was sentenced to life in prison with the possibility of parole on each count, and 25 years to life pursuant to section 12022.53, subdivision (d), to run consecutive to the life sentence on each of those counts. A $10,000 restitution fine was imposed; additionally, a $10,000 parole restitution fine was imposed and stayed. (66 CT 17448-17451.)

STATEMENT OF FACTS

A. The Guilt Phase

1. Introduction

The crimes presented at trial consisted of three incidents, spanning

approximately 30 hours on August 8-9, 2005. The story began with the triggering event – the purchase of a defective car at California Auto Specialist (hereinafter, "CAS"), a used car dealership in Colton, California.

On the morning of August 8, 2005, appellant accompanied his girlfriend Dorene Small to the dealership where she negotiated the purchase of a Dodge Durango truck. Appellant left Small at CAS to complete the financing. On the way to the bank, the Durango broke down, but Small elected not to back out of the transaction. Appellant returned to CAS that afternoon with two male companions. There, he confronted a group of CAS employees inside the dealership office with a handgun and shot four of them before he left the scene – killing two.

The second chapter of the story took place at "the Yellows," a housing project in San Bernardino. Approximately 45 minutes after the shootings at CAS, police were dispatched to a reported shooting at the Yellows. There, they found Susano Torres, a 16 year old, shot to death, and his brother, Armando Torres, suffering from a gunshot wound. According to the accounts of some witnesses, appellant, acting alone, was the person who shot the Torres brothers. Other witnesses claimed that appellant was one of two black men seen walking together shortly before the shooting. In confirmation, a surveillance video captured images of two men together shortly before the shooting. In some respects, these two men matched descriptions given by two of the surviving shooting victims at CAS.

The final chapter of the tale concerned events on the following day, i.e., August 9, 2005. That afternoon, San Bernardino police were dispatched to investigate a report of a person, later identified as appellant, acting bizarrely and firing a handgun in the air in front of a house on 19th Street. Appellant also threatened two people in a car with the gun.

Responding officers encountered appellant standing in the street. Appellant was belligerent and refused to obey police commands. Feeling threatened, an officer shot appellant in the leg, and appellant was arrested.

All the evidence about the crimes and appellant's arrest was presented by the prosecution. Defense counsel cross-examined the prosecution's witnesses, but presented no evidence. (13 RT 2384.)

2. The Shootings at the Used Car Dealership in Colton

a. Appellant accompanies his girlfriend to a used car dealership where she purchases a car that immediately breaks down

In August of 2005, appellant and Dorene Small were living together in an apartment in Riverside, along with Small's five children and three children fathered by appellant. (7 RT 1300-1302.) Appellant was unemployed at the time; Small was the breadwinner for the family. (7 RT 1302-1303.) Small had been in a car accident and received a settlement check from her insurance company on August 8, 2005. (7 RT 1302, 1304.) That same day, appellant accompanied Small to CAS to shop for a replacement vehicle for Small. (7 RT 1301, 1306.) They arrived at CAS between 10:00-10:30 a.m., in Small's white Chevy Lumina. Although the Lumina belonged to Small, it was driven and used by appellant. (7 RT 1305-1306.)

At first, they were helped by CAS salesman Juan Marcello Bizzotto. (7 RT 1307; 8 RT 1482.) Bizzotto could not speak English well and referred them to his colleague, Mario Lopez. (7 RT 1307, 1315; 8 RT 1484, 1515.) Lopez helped Small look at cars and complete paperwork to purchase a used brown Dodge Durango truck. (7 RT 1307-1309, 1312.) It

appeared that appellant tried to dissuade Small from buying the Durango because he preferred a larger truck, but Small did not like the bigger truck and, in any event, her poor credit status prevented her from qualifying for the more expensive truck appellant wanted. (7 RT 1410-1411; 8 RT 1483-1484.)

Appellant left CAS, leaving Small to finalize the car purchase with Lopez on her own. (7 RT 1319-1320.) There was conflicting testimony as to appellant's demeanor when he left Small. Jerry Payan, a CAS salesman who overheard the conversations between appellant and Small, recalled that appellant was angry with her over her choice. (7 RT 1410-1411.) Bizzotto, however, remembered that appellant acted "fine" during the deal, despite his disagreement with Small's decision. (8 RT 1484-1485.)

While still at the dealership, Small called home to tell the children she had bought a new car. (7 RT 1302, 1321-1323.) Small had discussed this with appellant before he left; he did not want her to break the news to their children yet, but to surprise them instead with the car itself. (7 RT 1322-1323.)

Small told Lopez that she needed to cash a check at a bank in order to make the necessary down payment. (7 RT 1324-1325.) Lopez allowed Small to drive the Durango to the bank, and Bizzotto followed Small in a separate car. (7 RT 1325.) On the way back to the dealership, the Durango broke down and could not be restarted. (7 RT 1328-1329.) The Durango was left on the side of the road for repairs, and Bizzotto drove Small back to the dealership to complete the purchase. (7 RT 1330.)

Small was not upset about the breakdown of the Durango. (7 RT 1330.) Although she told Bizzotto the Durango was "a fucking piece of shit," he insisted that Small otherwise took the Durango's breakdown with

equanimity. (8 RT 1489-1490.) According to Bizzotto, Small went ahead with the purchase although she had the right to back out of the deal. (8 RT 1491.) Small chose to take a loaner car and allow the dealership to fix the Durango. (7 RT 1331; 8 RT 1491.)

When Small arrived home, appellant was not there. She did not see their Chevy Lumina. (7 RT 1348.) Small noticed that appellant had left his cell phone, which was unusual. (7 RT 1343, 1345.) Appellant did not arrive home before she left for work. (7 RT 1346.) Small arrived at work at 2:30 p.m., but not feeling well, she left shortly thereafter and returned home around 4:00 p.m. (7 RT 1345, 1347, 1349.)

Before appellant returned to CAS that afternoon, he called Christina Eyre, who at the time of trial was appellant's girlfriend, and was in custody for violating the terms of her felony probation. (10 RT 2035.) Eyre said that appellant had been her boyfriend for about two years, including the time he was together with Small. (10 RT 2036.) On August 8, 2005, she spoke with appellant on the telephone at about 2:00 p.m. (10 RT 2046.) Their conversation lasted less than five minutes. Appellant mentioned that he and Small had been "screwed over" in a car deal; according to Eyre, appellant did not say he was mad, but noted that Small had insisted upon buying the defective Durango. (10 RT 2047-2048.)

b. Appellant returns to CAS and shoots four employees

The time frame for the shootings was established by Martha Kugler, the finance director for CAS, as between 2:15 p.m., when she left the dealership to take care of business across the street, and 2:25-2:30 p.m., when she returned to find that the shootings had already occurred. (7 RT 1375, 1379-1381.)

Shortly after Kugler initially left the dealership, Payan, Lopez, and Mawikere were gathered at Payan's desk facing the window overlooking the car lot. They saw appellant return to the dealership driving the same white Chevy Lumina in which he and Small had arrived earlier that day. (7 RT 1415.) Bizzotto was on his desk phone talking with his wife (Fernanda Lopez); he too noticed appellant's arrival. (8 RT 1491, 1530.) Bizzotto saw that appellant was not alone, but he was accompanied in the Lumina by two other people. (8 RT 1491.) Bizzotto described the two as African-American men between 25-35 years of age; they remained in the car as appellant entered the dealership. (8 RT 1494.) There were no customers in the dealership at the time. (7 RT 1416.)

Both Payan and Bizzotto noticed that appellant did not look the same as he had in the morning. Although both agreed that appellant was wearing jeans, Payan recalled that appellant was wearing a tank top, whereas Bizzotto remembered that appellant was shirtless. (7 RT 1421; 8 RT 1467, 1491.) According to Bizzotto, appellant had been wearing a camouflage hat when he first arrived with Small that morning, but he could not remember if appellant was wearing a hat when he returned in the afternoon. (8 RT 1492.) Payan noticed that appellant's hair was braided in corn rows. (7 RT 1421, 8 RT 1467.)

Payan and Bizzotto both saw Lopez meet appellant at the entrance of the dealership office. (7 RT 1419; 8 RT 1496.) Appellant addressed Lopez, repeatedly asking where his girlfriend was. (7 RT 1419-1420.) Lopez replied that Small had left to go to work. (7 RT 1420.) Both Payan and Mawikere stood up, intending to assist Lopez. Although Payan was not alarmed by appellant's behavior at this time, Bizzotto could see that, in contrast to his behavior earlier that day, appellant was excited and angry. (7

RT 1422; 8 RT 1495.)

Payan saw appellant pull a gun out of his pants pocket. (7 RT 1421.) At first, Payan froze in panic. He saw appellant shoot Lopez. Payan was looking at appellant when he heard the sound of a gunshot, and appellant was looking at Payan while he shot Lopez. (7 RT 1422.) When Payan heard a second gunshot, he ran toward a window looking to escape. (7 RT 1423; 8 RT 1467.)

Because appellant was standing in front of the only exit, Payan decided to escape by jumping through the closed window. (7 RT 1423-1424.) Before he crashed through the window, Payan heard two or three more gunshots and was hit in the right arm. (7 RT 1425.) Payan also received scrapes from the broken window glass. (7 RT 1426.)

Payan landed between two large cars parked outside the office. (7 RT 1426.) He tried to conceal himself by crouching between the cars, but appellant pointed his gun outside the window and shot at him. Payan heard one or two gunshots, but was not hit. (*Ibid.*) As he continued to crouch between the two cars, Payan heard another series of gunshots coming from inside the dealership. He also noticed that the Chevy Lumina in which appellant had arrived was in front of him, and there was a man sitting in the front seat. Payan made eye contact with him, and the man exited the Lumina. (8 RT 1448-1449.) This person was a tall, thin African-American man, perhaps 18 or 19 years old. Payan could see that this man had his hand down by his side, and it looked like he had a gun. (8 RT 1450-1452.)

Payan ran across the dealership lot and across the street, seeking help. (7 RT 1429; 8 RT 1449-1450.) He jumped into the passenger side window of a car that was sitting in traffic. (8 RT 1442, 1445.) Payan asked for help, but the driver appeared shocked by Payan's appearance and exited

his car. (8 RT 1443.) Payan drove the car away. (8 RT 1444.) Payan came upon an ambulance, bumped into its tire to get the attention of the driver, and was given medical assistance on the street before being transported to a hospital. (7 RT 1390-1394; 8 RT 1452-1455.)

At the same time Payan witnessed appellant's arrival and the shooting of Lopez, Bizzotto, who was at his desk on the telephone with his wife, saw appellant push Lopez back from the front door of the dealership as Lopez was attempting to escort him outside, pull out a gun, and shoot Lopez in the abdomen. (8 RT 1495, 1497.) Bizzotto saw Payan running towards, and jumping through, a window while appellant shot at Payan. (8 RT 1498.) When Mawikere tried to intervene, Bizzotto saw appellant point his gun at Mawikere, shoot him, and then turn toward Bizzotto. (8 RT 1498.) Bizzotto tried to hide underneath his desk, but appellant started shooting at him. (8 RT 1499, 1502.) Bizzotto was shot in the right arm and the right thigh. (8 RT 1500-1501.) Appellant fired about seven times at Bizzotto's other leg. Although none of these shots hit him, Bizzotto suffered shrapnel wounds in his left leg. (8 RT 1501.)

Bizzotto emerged from underneath the desk after he heard two additional shots, the sound of the door opening, and a car being driven away. (8 RT 1502.) He saw Lopez, in pain, about five meters distant, and told him to remain calm. (8 RT 1502-1503.). Mawikere had been shot and was unresponsive. Bizzotto instructed his wife, who was still on the phone and had heard at least 10 gunshots, to call 911. Bizzotto also called 911 himself. (8 RT 1503-1504, 1530-1531.)

Meanwhile, outside the dealership, the aftermath of the shooting was immediately evident. John Vasquez was driving on Valley Boulevard around 2:30 p.m., when he saw a man, later identified as Bizzotto, come out

of the dealership with blood running down his arm. (8 RT 1577-1578.) Bizzotto was staggering, and being assisted by another man who was holding his arm up. Vasquez noticed a broken window and thought that Bizzotto had fallen through it, so he stopped to offer help. (8 RT 1579-1580.) Bizzotto told Vasquez that he had been shot by two black men and feared for his life. (8 RT 1577.)

c. As a result of the shootings, two CAS employees are killed and two are injured, and the police search for appellant

Responding to the 911 calls, officers from the Colton Police Department arrived at CAS at approximately 2:45 p.m. (8 RT 1537.) A window in front of the dealership office had been smashed, and there was a trail of blood outside the window leading south toward Valley Boulevard. (10 RT 1920.) Officers encountered Bizzotto outside the dealership and saw that he had been shot in the arm. (8 RT 1537-1539; 10 RT 1918.) Bizzotto told them that the person responsible was a black man who had been at the dealership earlier that day to buy a black Durango. (10 RT 1920.) Inside the office of the dealership, officers found Lopez lying on the floor on his back, 10-12 feet from the front door. (8 RT 1540; 10 RT 1918-1919.) Lopez was conscious and in pain from two gunshot wounds, but able to relate that a lone black man, who had arrived in a white 1997 Chevy Lumina, had shot him. (8 RT 1540-1541, 1,551; 10 RT 1918-1919.) In a search for additional victims, the officers found Mawikere behind a desk – dead and face down, with a gunshot wound to the head. (8 RT 1541; 10 RT 1919.)

Criminalist Heather Harlacker located one fired cartridge case outside the CAS office building and 10 more fired cartridge cases and bullet fragments inside the building. (8 RT 1585-1586, 1592; 1595, 1628.) In

Harlacker's opinion, all 11 cartridge casings were from the same caliber gun, i.e., a 9 millimeter, but because of distinct markings on the cartridges, she could see that there were three separate brands of cartridges. (8 RT 1597-1600; 1616; 1628-1629.) Another criminalist, Kerri Heward, compared the cartridge casings found at CAS with a Sig Sauer pistol linked to appellant. In Heward's opinion, all these cartridges had been fired by that Sig Sauer, but she could not definitively match the bullet retrieved from Lopez's body with that gun. (11 RT 2206-2207, 2210.)

At CAS, the police received documentation for the sale of the Durango and obtained Dorene Small's address. (10 RT 1921.) A police detective visited Small that evening to tell her there had been a shooting incident at CAS and appellant was being sought as a suspect. (7 RT 1349-1350; 10 RT 1924-1925.) Small said that appellant used to frequent an apartment complex commonly known as "The Yellows" in San Bernardino. (10 RT 1926.)

The police attempted to interview Payan and Bizzotto at the hospital where they were being treated for their injuries. (8 RT 1465-1466, 1513.) Payan was shown photo displays of two suspects. At first, Payan was unable to cooperate because he was under the influence of morphine. (8 RT 1465.) Thereafter, Payan identified a photograph of appellant as the shooter, claiming he was 80-90 percent certain of his identification. (8 RT 1466, 1478.) Payan also identified a photograph of Romen Williams (aka "Chrome"), as the person he saw emerge from the Lumina following the shooting. (8 RT 1476-1478; 7 RT 1363-1365.) Bizzotto was physically unable to talk to the officer who visited him at the hospital. (8 RT 1513.) After his discharge from the hospital, Bizzotto was shown a display of six photographs and identified appellant's photograph as the person who shot

him. (8 RT 1514; 10 RT 1944.)

At trial, both Payan and Bizzotto described the injuries they suffered as a result of the incident. Payan received a single gunshot wound to the right arm below the elbow. (8 RT 1457.) When he jumped through the window at CAS, he suffered cuts to his arm and to his left knee. (8 RT 1457.) A jagged piece of glass entered the side of his left leg and tore tissue underneath his kneecap while he was running away. (8 RT 1457.) At the time of his testimony, Payan was still undergoing physical therapy for these injuries. He had lost some of the functioning in his right arm, and was told that it would always be "somewhat disabled." (8 RT 1457-1458.) Bizzotto described the lingering effects of the injuries. Approximately 50 percent of his right hand was paralyzed, but his right arm, while not fully recovered, was much better. (8 RT 1513.)

Autopsies were performed on Mawikere and Lopez. (10 RT 1963-1965.) Mawikere died of a single gunshot wound, fired at indeterminate range, which entered above and to the front of his left ear and passed through his head. (10 RT 1969-1972.) Lopez died of a gunshot wound to the abdomen, which entered the back of his torso and exited his front. (10 RT 1980-1982, 1985.) Lopez also sustained a gunshot wound to his left buttock with the 9 millimeter bullet lodging in his sacrum and a superficial, through-and-through gunshot wound to his left knee. (10 RT 1982-1984.)

3. The Shootings at the Yellows Apartment Complex

At approximately 3:00 p.m. on August 8, 2005, San Bernardino police officers responded to a shooting incident at the Yellows. (9 RT 1790, 1817.) The Yellows was the colloquial name given to an apartment complex between Sierra and Genevieve Avenues in San Bernardino. (9 RT 1790.) It was a housing development where the sound of gunfire and the

open carrying of guns were common events.[3] (9 RT 1753; 10 RT 1849-1850.)

Officer James Voss saw a group of people by Susano Torres, who was lying in a dirt area.[4] Voss checked Susano's pulse, found none, and called for medical assistance. (9 RT 1816-1817.) A tenant directed Voss to her apartment where he found Susano's brother, Armando, on the floor. Armando had been shot in the leg. (9 RT 1818.)

a. Armando Torres is shot and injured

Armando testified at trial, albeit reluctantly. Armando was the only witness who identified appellant as the person who confronted and shot him. (9 RT 1718, 1722.) Prior to his testimony, he had been incarcerated as a material witness. (9 RT 1662, 1706-1707.) At the time of his testimony, Armando, then 20 years old, was on felony probation and in custody for a robbery conviction. (9 RT 1662, 1709; 15 RT 2637.) Armando gave various reasons for his presence at the Yellows that day – to visit his mother, to visit a girlfriend, and to visit a friend and smoke methamphetamine. (9 RT 1709, 1712, 1713.) Armando, who was on the run from the law, did not live with his mother at that time but visited her frequently. (9 RT 1708.)

Armando was associated with the West Side Verdugo gang, but claimed he was not a gang member. Armando had an unusual tattoo of

---

[3] The distance between the CAS dealership and the Yellows was approximately eight miles, and it took a police officer between 15 to 16 minutes to drive there, depending on the route taken. (12 RT 2300-2301.)

[4] Hereinafter, Susano Torres will be referred to by his given name so as to avoid confusing him with his brother, Armando Torres. For the same reason, Armando Torres will be referred to by his given name. No disrespect is intended.

horns on his head. He claimed that the horns had nothing to do with gangs, but that he got the tattoo to cover up his receding hairline. (9 RT 1707-1708.)

Armando was familiar with appellant, and before August 8, 2005, never had a problem with him. (9 RT 1716.) On one or two occasions, appellant had asked Susano for "weed" because appellant knew Susano smoked that substance. (9 RT 1715-1716.)

On August 8, 2005, Armando saw Susano, standing by himself by the window of Rita Ochoa's apartment. Rita Ochoa, a 15-year-old girl, was at the window, and Susano was talking to her. (9 RT 1709-1710; 10 RT 1827-1828, 1843-1844.) Armando exchanged greetings with Susano and told him their mother was looking for him. (9 RT 1709.) Armando continued to his friend's apartment where he smoked methamphetamine. (9 RT 1712-1713.)

Afterwards, Armando came out of his friend's apartment and saw appellant walking towards him. (9 RT 1713.) Appellant appeared to be upset and told Armando that he wanted to talk. (9 RT 1714-1715.) When Armando asked what appellant wanted, appellant demanded that Armando come to him. Armando refused, and appellant pulled out a gun. (9 RT 1715.) Appellant, who was standing in the middle of the bushes, then shot at Armando three to five times.[5] (9 RT 1718-1719, 1722.) Appellant called Armando "the devil" and said Armando had "fucked up" before drawing his gun and shooting. (9 RT 1733.)

---

[5] Later that day, when Armando was interviewed by the police at the hospital and told that his brother Susano had been shot, he told the police that he knew the person who shot him by the nickname "Hollywood," and he identified appellant's photo from a photo lineup. (10 RT 2012.)

Armando suffered a single gunshot wound to his thigh. The bullet lodged in his thigh and was removed about a month later. (9 RT 1720.) A lady who lived in a nearby apartment pulled Armando to safety and called 911. (9 RT 1718-1719.) From inside the apartment, and about 30 seconds later, Armando heard more shots. (9 RT 1722.)

Armando's testimony was somewhat inconsistent. First, Armando claimed that "devil" was not a name that appellant or anyone else had used when referring to him (9 RT 1717), but later testified that appellant had called him the devil on the day before the shooting and that, despite Armando's objections, appellant always called him by that name. (9 RT 1737-1738.) Second, Armando said that appellant was alone during the encounter (9 RT 1716), but thereafter remembered that appellant was accompanied by another black man, whom he described as younger and shorter than appellant, wearing a red or magenta shirt with braids in his hair, and not having a gun. (9 RT 1740, 1742.) Third, Armando initially said that appellant pulled a gun from his front left pocket with his left hand and that the gun looked like a 9 millimeter Glock (9 RT 1717, 1721), but on cross-examination Armando testified that appellant used his right hand to pull out and shoot the gun (9 RT 1736, 1739) and previously had described appellant's gun as a .45. (9 RT 1744.) Fourth, although Armando initially could not remember what appellant was wearing (9 RT 1721), he later recalled that appellant was wearing a shirt and pants, but did not have a hat or bandana. (9 RT 1733.)

b. Susano Torres is shot and killed

Just before Armando's confrontation with appellant, Susano had been joined outside Ochoa's window by her step-cousin and friend, Phillip Mancha. Mancha, like Ochoa was 15 years old at the time of the shooting.

(10 RT 1827-1828.) Ochoa, who had lived at the Yellows for almost two years, was familiar with appellant because he had once lived there and was frequently around the apartments. (10 RT 1848.) However, she did not see appellant at the Yellows at any time on the day Susano was shot. (10 RT 1848.)

Sometime before 3:00 p.m., both Mancha and Ochoa heard some gunshots coming from the side of the apartments on Genevieve Avenue, next to the mailboxes. (10 RT 1828-1829.) Ochoa dropped to the floor of her apartment and urged Mancha and Susano to come inside. (10 RT 1845.) Although Mancha tried to discourage him from doing so, Susano went to check on the gunshots. Mancha heard more shots and ran to and climbed through Ochoa's window. (10 RT 1829.) Once he was inside, he heard Susano getting hit and yelling for help. All told, Mancha heard about six or seven shots. (10 RT 1832.)

When the shots stopped, Mancha looked out the window and saw a person with a white shirt and a green army camouflage hat running away. (10 RT 1832-1833.) He only saw the back of this person as he made his way between the mailboxes and the building toward the parking lot. (10 RT 1833.) Although he had been interviewed by the police shortly after the shooting, at trial Mancha denied describing the person he observed running from the shooting as a black man, six feet in height and weighing about 190 pounds, with a clean-shaven head, and wearing a green shirt. (10 RT 1836-1837.) Ochoa saw Susano on the ground, shaking and bleeding from the nose. (10 RT 1846.) Neither Ochoa nor Mancha identified Susano's shooter.

Only one witness, Valerie Hernandez, claimed to have seen Susano's

shooting, and she was the only one to identify appellant as the shooter.[6] Hernandez lived in an apartment directly over Ochoa's apartment on August 8, 2005. (9 RT 1747, 1752.) At approximately 3:00 p.m., Hernandez was in her apartment standing near her bedroom windows facing Sierra Avenue and fixing her air conditioner. (9 RT 1750-1751.) She could see the ground beneath her window and saw Susano talking with Ochoa below. (9 RT 1752, 1756.) Hernandez heard gunfire, but she did not know where it came from. (9 RT 1753.)

After hearing the first gunshots, Hernandez briefly conversed with Susano and then closed her window. (9 RT 1754, 1757.) Minutes later, she heard a few more gunshots. Hernandez looked outside and saw Susano being shot and falling to the ground. (9 RT 1754-1755, 1781-1782.) Hernandez claimed to have witnessed the shooting itself, but said she was unable to actually see the shooter's face because it was obscured by the leaves on a tree in front of her bedroom window. (9 RT 1769.) However, she described hearing five gunshots and seeing Susano receive each bullet and fall to the ground.

Hernandez saw the shooter less than 15 feet away from Susano with a gun in his hand and recognized him as appellant. (9 RT 1769, 1758-1762.) Before the shooting, Hernandez saw appellant on a regular basis at the Yellows (9 RT 1766) and considered him a friend (9 RT 1788). Hernandez heard somebody say "fuck that, fuck them" at the time of the shooting, but could not say that it was appellant who spoke. (9 RT 1775.)

---

[6] At the time of her testimony, Hernandez was in a witness relocation program. (9 RT 1748.) Following the shootings, Hernandez said she had been threatened and told not to give a statement to police. (9 RT 1748, 1772.) Her own family did not want her to testify. (9 RT 1774.)

After the shots were fired, she saw appellant pull down the gun – which was black with a light on its top – to his side and walk away between the apartments toward the parking area. (9 RT 1758-1762, 1763-1764.)

Hernandez's description of the shooter was inconsistent with earlier accounts she had given to the police and conflicted with some of the physical evidence connected to appellant at the time of his arrest. Hernandez was uncertain about the clothing appellant was wearing at the time of the shooting. (9 RT 1762.) She believed he was wearing black pants, a shirt and a silky type of bandana on his head that was green with a design. (9 RT 1763.) At trial, she was shown a green camouflage hat retrieved from the location where appellant was shot and arrested, but she said the hat was not similar to what appellant wore on his head while shooting Susano. According to Hernandez, appellant did not wear hats, but bandanas. (9 RT 1765.) Additionally, Hernandez claimed that appellant was holding the gun with his right hand at the time of the shooting. However, after prompting by the prosecutor, Hernandez stated that appellant had held the gun with his left hand. (9 RT 1775.)

Hernandez saw another person, whom she knew as "Chrome," with appellant during the shooting. (9 RT 1766, 1767.) Hernandez did not see Chrome with a gun. (9 RT 1767.) She thought Chrome saw her looking out the window. (9 RT 1768.)

c. Appellant is seen leaving the area of the Yellows following the shooting

On August 8, 2005, Rosalba Villaneda, Armando's sister-in-law, lived at the Yellows. (10 RT 1899, 1909.) Just before 3:00 p.m., she was talking with her ex-husband in the parking lot of the Yellows, when she heard several gunshots being fired. (10 RT 1906.) About five minutes

later, appellant walked by them with a gun in his right hand.[7] Appellant was unaccompanied. (10 RT 1899-1900, 1903, 1907.) Although Villaneda did not know him by name, she was familiar with appellant. (10 RT 1907, 1912, 1914-1915.) Appellant entered a car on the passenger side and left the area. (10 RT 1904-1906.)

A 42-second portion of a video recording taken from a surveillance camera at the Yellows, beginning at 3:00 p.m. on August 8, 2005, was played for the jury without an audio track. (10 RT 1867-1869; Exhibit 223.) The camera recorded a wide angle view of the sidewalk at the Yellows on Sierra Avenue, looking northbound down Sierra Avenue from the Gracelynn apartments. (10 RT 1862-1864; Exhibit 223.) In low resolution video, the jurors could see a shirtless black man walking across an alleyway, followed by another black man wearing a white shirt. Although the men's faces were not clearly depicted, it appeared that the shirtless black man was wearing a cap and holding what appeared to be a gun. (Exhibit 223.) San Bernardino Homicide Detective Steve Turner, who reviewed this surveillance recording on the day following the shootings at the Yellows, also described what the video, just viewed by the jury, showed. (10 RT 1882-1891.)

Romen Williams, known as "Chrome," invoked his Fifth Amendment right against self-incrimination and did not testify before the jury. (10 RT 1959, 2016.) Detective Vasilis testified about statements

---

[7] On cross-examination, Villaneda testified that she gave a statement to a Spanish-speaking police officer at the police station on the day of the shooting, when the events were still fresh in her memory. After reviewing her statement, she agreed that she had told the officer that appellant was holding a gun in his left hand. (10 RT 1902; 1909-1910.)

Williams made during a police interview. (10 RT 2017.) According to Vasilis, Williams said that on August 8, 2005, he was at the Yellows visiting a female friend nicknamed "Chocolate." (10 RT 2020.) Williams left Chocolate's apartment to go to the store on Sierra Avenue and took a path that was on the surveillance camera. (10 RT 2021.) Williams identified himself on surveillance photos and recognized the shirt he was wearing, a white shirt with a gray number "3," and the word "Irish" on it. (10 RT 2022.) Williams was wearing his hair in a bunch of pony tails. (10 RT 2024.) Williams identified appellant in the surveillance photos, using his nickname "Hollywood." Williams pointed out that appellant was wearing a light green hat. (10 RT 2022-2026.) Although Williams said he could clearly see in the surveillance photos that appellant had a gun in his hand, Williams claimed he had not noticed the gun at the time. (10 RT 2024.) Williams denied acting in concert with appellant at the Yellows that day and he said it was simply happenstance that he was depicted in the surveillance video as walking behind appellant. (10 RT 2026.)

d. The forensic evidence

After the shooting, seven cartridge casings, all 9 millimeter Winchester brand, and nine bullet fragments were collected at the Yellows. (10 RT 2064-2067.) Criminalist Heward concluded that six of the seven cartridge casings had definitely been fired from the same Sig Sauer pistol she had been given to examine in connection with the physical evidence retrieved from the CAS crime scene. (11 RT 2215.) The criminalist could not definitively say the seventh cartridge casing had been fired from the Sig Sauer, but there were sufficient identifying markings for her to conclude that it was probable that the seventh casing had been fired from that gun. (11 RT 2215-2216.) Heward also examined the bullet removed from

Armando's thigh. (11 RT 2216-2217.) Although that bullet displayed matching class characteristics to test bullets fired from the Sig Sauer, she could not detect a sufficient number of individual characteristics to say that the bullet had in fact been fired from the Sig Sauer. (11 RT 2217-2219.)

An autopsy established that Susano Torres had suffered a single, fatal, gunshot wound, inflicted from indeterminate range, that entered and exited his arm and went into his chest, resulting in internal bleeding as the bullet passed through both lungs. (10 RT 1988-1992.)

4. Appellant Is Shot and Arrested

a. Appellant's bizarre behavior on 19th Street

On August 9, 2005, Patricia Conger was living in a house on West 19th Street in San Bernardino. Conger was inside her house when she heard a couple of gunshots. She went outside and saw appellant in the street, acting crazy. (11 RT 2084.) He fired at least one shot, and Conger could hear clicking noises as if an empty gun was being fired. (11 RT 2076.) Appellant was pointing his gun at cars driving by and appeared to be angrily arguing with himself and screaming profanities. When Conger saw him fire into some bushes, she went back in the house and called the police.[8] (11 RT 2075-2076, 2081-2086.)

At about the same time, James Morrison, who also lived on the same street, was outside his house working on a car. Morrison heard several gunshots nearby and saw a man waving a pistol, so Morrison ran into his house. (11 RT 2089-2091.) Conger said the gunman was wearing blue pants and an army cap. Morrison said he was shirtless. (11 RT 2075, 2095-

---

[8] A tape recording of Conger's 911 call to the police was played for the jury. (11 RT 2076-2078.)

2096.) Both identified appellant as the gunman. (11 RT 2080, 2092.)

From inside his house, Morrison observed appellant walk to a nearby apartment building where he sat on a truck. Appellant was pointing the pistol at a red car, containing two of Morrison's neighbors, and "dry-clicking" the pistol. (11 RT 2093.) Both Conger and Morrison saw another black man approach appellant. (11 RT 2078, 2094.) After some interaction between them, appellant no longer had the gun. (11 RT 2078-2081, 2094-2096.) Appellant sat on the bumper of a truck until the police arrived. (11 RT 2096.)

Tracy Ruff was the man Conger and Morrison saw with appellant. Ruff, who was in custody, testified about his interactions with appellant on August 9, 2005. (11 RT 2124.) That day, Ruff lived at the Del Mar apartments on 19th Street, and around 1:00 p.m., he was hanging out with appellant, whom he knew by the nickname, "Hollywood Boo." (11 RT 2108-2010.) Ruff's friend, Rami. J., was present as well. (11 RT 2112.) According to Ruff, all three were sitting on the stairs facing 19th Street and smoking cigarettes and "weed," but not PCP (phencyclidine). (11 RT 2112-2113.)

Appellant pulled out a gun from the area of his waist and began shooting in the air. (11 RT 2113.) All told, appellant fired six or seven shots. (11 RT 2113-2114.) As appellant was shooting, all three men were laughing. Ruff could see cartridge casings being expelled from the gun. (11 RT 2114.) When appellant stopped firing, he went to the front of the apartments and Ruff followed, telling him that the police were going to come. (11 RT 2115.) Appellant was waving the gun around and yelling. (11 RT 2116.) Ruff initially could not recall what appellant said at the time, but later conceded telling the police the day of the incident that appellant

had said, "I killed the devil" when he was waving the gun in the air. (11 RT 2116.) He also testified that appellant did not look as if he was "high" or acting crazy while was firing the gun into the air. (11 RT 2124-2125.) However, Ruff conceded that at appellant's preliminary examination, he had testified that appellant was acting "crazy" after he smoked the weed and began shooting in the air. (11 RT 2127.)

Ruff asked for, and eventually received, the gun from appellant. (11 RT 2117.) Appellant gave Ruff the gun first and then handed over the gun's magazine. (*Ibid.*) When Ruff put the magazine back into the gun, he noticed that the magazine was empty. (11 RT 2118.) The gun was a black semiautomatic pistol. (11 RT 2120.) Ruff walked to the back of the apartment complex and concealed the gun in the front driver side tire area of a van. (11 RT 2118-2119, 2120.)

Ruff conceded he was not honest during the initial police questioning, but after being told he would be charged with conspiracy to commit murder, he began to cooperate. (11 RT 2122.) Although Ruff did not want to get involved, he told the officer where he concealed the gun given to him by appellant. (11 RT 2123.)

b. Police confront, shoot and arrest appellant

Officer Adams was the first policeman to arrive at the scene and confront appellant. (12 RT 2287-2288.) When Adams arrived, appellant was standing by a blue car. (12 RT 2288-2289.) Appellant, who was shirtless and wearing a camouflage baseball cap, immediately began to yell at Adams as he approached the officer. (12 RT 2291.) Adams commanded appellant to get down on the ground, but appellant did not comply and continued to approach Adams. (12 RT 2291-2292.)

According to Morrison, appellant yelled "Where is the police at?

Where is the police at?" before advancing on Adams. (11 RT 2098.) When Adams repeated his command, appellant replied, "I have a gun bigger than that." Adams again repeated his command, adding that he would shoot if appellant continued to disobey his orders. (11 RT 2099.) Morrison variously described appellant as "crazy," "out of control," "scary" and "very angry." (11 RT 2101, 2102, 2104.) Appellant was waving his hands around as he approached the officer, and it was clear that appellant did not have a gun in his hands. In Morrison's view, appellant seemed to be daring the officer to shoot him if he did not comply with the order to get on the ground. (11 RT 2101-2102; 2104.)

Adams saw that appellant did not have a gun in his hands, but he did not know if appellant had a weapon concealed on his person. (12 RT 2292.) Appellant was very agitated and showed no fear. Adams deemed appellant a definite threat, all the more so when appellant told him that he had a gun bigger than the officer's gun and that he was going to take Adams's gun from him. (12 RT 2292-2295.) As appellant steadily advanced towards him, Adams made the decision to stop his advance by shooting him in the leg. (12 RT 2294.) According to Morrison, after Adams shot appellant, appellant repeatedly yelled, "Why didn't you just kill me?" (11 RT 2099.)

Moments later, Officer Cogswell arrived and handcuffed appellant. (12 RT 2280.) During the handcuffing process, appellant challenged the two officers to a fight. (12 RT 2295-2296, 2283-2285.) Appellant made several references to "the devil" during the process of being restrained. (12 RT 2284.) In Adams's opinion, based on his 20 years of experience as a police officer, appellant's behavior suggested that he wanted to commit "suicide by cop." (12 RT 2297.)

c. Appellant's post-arrest behavior

Following his arrest, appellant was taken by ambulance to the Loma Linda Medical Center. (11 RT 2163-2165.) According to Officer Kevin Jeffery, during the ride, appellant screamed profanities. (11 RT 2163.) At the hospital, and while he was still ankle-strapped to the gurney, appellant was unresponsive for 45 minutes. (11 RT 2167.) Appellant then suddenly jumped up from the gurney, causing it to fall over. (11 RT 2168.) The ankle restraints prevented appellant from reaching the door to the emergency room. (11 RT 2168.)

At the hospital, appellant said that God would not judge him for killing the devil. (11 RT 2169, 2172.) Officer Jeffrey described the statement as "random," and he could not tell if it was directed at anyone in particular, or if appellant was talking to himself. (11 RT 2172-2173.) Appellant related that it was Cogswell who had shot him, and that Cogswell, despite being a white man, was actually "a brother." (11 RT 2169.) Appellant also observed that Jeffrey looked like he was from "the country," and told Jeffrey that his turn was next. Jeffrey considered this statement to be a threat. (11 RT 2169.) Appellant's behavior, characterized by rapid fluctuations between a state of agitation and calmness, was comparable to behavior Jeffrey had seen in persons under the influence of drugs such as PCP. (11 RT 2171-2172.)

d. The physical and forensic evidence

Gunshot residue testing on appellant after his arrest on August 9, 2005, established that he recently fired a firearm, handled a firearm, was within 6-10 feet of a discharging firearm, or had come in contact with a surface that contained gunshot residue. (11 RT 2188; 12 RT 2247-2248.)

At the 19th Street crime scene, a forensic technician located a

camouflage cap (11 RT 2141; Exhibit 161) and retrieved a 9 millimeter Sig Sauer semi-automatic pistol containing an empty magazine concealed in the wheel well of a van (11 RT 2145-2147). The technician also found an empty magazine from a 9 millimeter handgun in a pocket of the pants appellant was wearing at the time of his arrest. (11 RT 2155-2156, 2160, Exhibit 220.) The pistol was swabbed for potential DNA evidence and two latent fingerprints were lifted from it. (11 RT 2151-2152, 2156-2157.) Appellant's DNA could be identified to a virtual certainty to that taken from the pistol's frame. (12 RT 2251-2253, 2264-2266, 2268-2270.) It was stipulated that the two latent fingerprints lifted from the pistol were not those of either appellant or Williams, but that Ruff could not be eliminated as their source. (11 RT 2177.)

A white Chevy Lumina was located close to the van in which the Sig Sauer pistol had been found. (9 RT 1811; 11 RT 2149.) It was stipulated that a number of fingerprints found on the exterior of the Lumina were appellant's, and two prints found on the outside of the rear passenger door window were Williams's. (11 RT 2176.) Approximately an ounce of cocaine was discovered in the Lumina. (9 RT 1809-1810; 10 RT 1946.)

B. The Penalty Phase

1. The Prosecution's Case in Aggravation

The prosecution's penalty-phase case was three-pronged, consisting of (1) evidence that appellant had engaged in other acts of criminal activity involving the threat of violence, pursuant to section 190.3, factor (b); (2) evidence that appellant had suffered numerous prior felony convictions, pursuant to section 190.3, factor (c); and (3) victim impact evidence, pursuant to section 190.3, factor (a).

a. The evidence of other criminal activity involving the threat of force or violence

On July 10, 1988, Rebecca Davis and her daughter were passengers in a car driven by Lucy Chavez. (15 RT 2626.) While they were at a market in San Bernardino, two black men approached the car, one on either side. (15 RT 2627-2628.) Appellant was the man who approached the car on the passenger side. (15 RT 2630.) The other man on the driver's side had brass knuckles, demanded that Chavez get out of the car, pulled her out of the car and pushed her to the ground. (15 RT 2628, 2630.) Appellant told Davis to get out of the car with her daughter. (15 RT 2629.) During the incident, appellant was polite and did not lay his hands on Davis. (15 RT 2632.) After Davis complied, the two men got into the car and drove away. (15 RT 2629.) Davis believed that had she refused to follow appellant's orders, he would not have resorted to violence. (15 RT 2631.)

The prosecution also presented additional evidence to prove that appellant had committed assaults with a firearm at the apartment complex on 19th Street shortly before he was shot and arrested by police on August 9, 2005.

On August 9, 2005, Jacob Charles, who was 14 years old at the time of the trial, lived with his mother on 371 West 19th Street in San Bernardino. (14 RT 2511.) At about 3:00 p.m., Charles was inside his home when he heard three gunshots. When he went to the screen door to see what was going on, Charles saw appellant in the middle of the street with a gun. (14 RT 2511-2512.) Appellant was pointing the gun at his own head and talking to himself. Appellant said, "the devil is talking to me." (14 RT 2519.) Appellant pointed the gun at the sky, removed the clip, and again pointed the gun at his own head while saying, "See, I'll even shoot

myself." Charles heard the gun clicking as appellant said those words. (14 RT 2513.)

According to Charles, appellant then began yelling and pointing the gun inside a red car that was pulling up to the nearby apartments. (14 RT 2512.) Charles heard appellant say, "Come on. Get out. Get out. What's up," and he could hear clicking sounds from the gun. The car's occupants fled. (14 RT 2512-2513, 2521.) A black man approached appellant, urged appellant to calm down, and persuaded appellant to give him the gun. (14 RT 2514, 2517-2518.)

Brenda Wierenga was the driver of the red car described by Charles. (14 RT 2535.) At about 3:00 p.m. on August 9, 2005, Wierenga was driving to her home on West 19th Street in San Bernardino with David Roark as a passenger. (14 RT 2535.) As she was trying to park her car, a shirtless black man pointed a gun at them. (14 RT 2536, 2539.) Wierenga ducked under the steering wheel. (14 RT 2538-2539.) She could hear clicking noises coming from the gun. Roark told her to flee, so she drove away. (14 RT 2540-2541.) Wierenga was unable to identify the gunman in court. (14 RT 2539.)

Following the incident, Wierenga reported to the police that the gunman appeared to be "whacked out" on something, as if he was "shermed out," which were terms she used to describe drug usage. She herself had used drugs for 30 years, but had been clean for the last six years. (14 RT 2544.) According to Wierenga, the gunman was behaving as if he was under the influence of PCP, angel dust, or cannabinol. (14 RT 2545.)

On August 9, 2005, Armando DeSantiago was working as a delivery truck driver for Federal Express. At about 3:00 p.m., DeSantiago was making a delivery on 19th Street in San Bernardino. (14 RT 2523.) As he

exited his truck, he heard three gunshots. When DeSantiago could not determine where the sounds came from, he assumed he had heard fireworks and continued to make the delivery. (14 RT 2523-2424.) From the back of his truck, DeSantiago heard someone yelling and saw appellant in the middle of the street without a shirt, pointing a gun at anything that moved. (14 RT 2524-2526.) Appellant was yelling, "I'm the devil" and "I'm going to shoot everybody." (14 RT 2526.) DeSantiago tried to hide inside his truck. (14 RT 2526.)

When DeSantiago peeked out from his truck, appellant saw DeSantiago, pointed the gun at him, and pulled the trigger three times from a distance of 18 feet. (14 RT 2526.) While doing so, appellant claimed to be the devil and threatened to kill everybody as well as DeSantiago. (14 RT 2527, 2530.) DeSantiago froze in fear and closed the back door of his truck. (14 RT 2527-2528.) When he again looked out of the truck, DeSantiago saw that appellant was walking away, so DeSantiago jumped into his truck and drove away. (14 RT 2527-2529.) DeSantiago thought that appellant was either crazy or on drugs. (14 RT 2531.)

b. Evidence of prior felony convictions

Pursuant to stipulation, the jury learned that appellant had seven prior felony convictions. In chronological order, appellant had been convicted (1) on August 16, 1988, in San Bernardino Superior Court, of violating Vehicle Code section 10851 (unlawful taking of a motor vehicle)[9]; (2) on December 11, 1989, in Los Angeles County Superior Court, of

---

[9] This conviction arose out of the July 10, 1988, taking of Lucy Chavez's vehicle, which was the subject of Rebecca Davis's testimony earlier at the penalty phase. (See page 29, *ante*.)

violating Health and Safety Code section 11351 (possession for sale of cocaine); (3) on August 17, 1990, in Los Angeles County Superior Court, of violating Health and Safety Code section 11350 (possession of cocaine); (4) in Los Angeles County Superior Court, on November 9, 1992, of violating Health and Safety Code section 11351.5 (possession of cocaine base for sale); (5) in Los Angeles County Superior Court, on December 13, 1996, of violating Health and Safety Code section 11359 (possession of marijuana for sale); (6) in San Bernardino County Superior Court, on July 13, 2000, of violating Health and Safety Code section 11377 (possession of controlled substance); and (7) in San Bernardino County Superior Court, on December 17, 2002, of violating Health and Safety Code section 11351.5 (possession of cocaine base for sale). (66 CT 17643-17645; 14 RT 2494-2496, 2499.)

c. Victim impact evidence

The prosecution presented extensive and emotional victim-impact testimony from eleven witnesses including the families of the three homicide victims as well as two of the surviving victims of the CAS shootings. In some cases, the testimony of these witnesses was supplemented with photographs of the deceased victims.

i. The Lopez family

Rene Lopez was Mario Lopez's son.[10] (14 RT 2549.) At the time of the trial, Rene was employed with the Bureau of Prisons. His father's murder made it difficult for him to be fair at work while dealing with the inmates. (14 RT 2559.) Rene testified at length about what a caring and loving man his father was and the times and interests they shared. (14 RT

---

[10] Hereinafter, members of the victims' family will be referred to by their given names so as to avoid confusion. No disrespect is intended.

2550-2259.) Mario Lopez was still a young man at the time of his murder. The loss of his father left Rene angry, frustrated and depressed. (14 RT 2555-2556.) At the time of trial, Rene was still taking medication for his depression, and there were times when he did not talk to others for days. (14 RT 2557.)

Cecelia Lopez was Mario Lopez's wife. They had been married for nine years. (14 RT 2561.) According to Cecelia, Mario was a gentleman, devoted father and grandfather, hard-working man, and good provider for his family. (14 RT 2561-2562.) Cecelia was financially dependent on her husband, and as a result of his death, she was forced to sell her home and her dogs and live with her daughter as a renter. (14 RT 2562.) Cecilia recounted last seeing her husband on the morning of the day he was murdered, learning of the shooting at CAS, and not seeing him at the hospital that day until he had already been pronounced dead. (14 RT 2564-2566.) Cecelia identified and described photographs of her husband when his grandson was born and with her at the beach in Santa Monica, where they loved to go. (14 RT 2569-2570.)

ii. The Mawikere family

Patrick Mawikere's mother and father, John and Mary Mawikere, testified about the impact of the loss of their son. John learned of Patrick's shooting from their eldest son, Sandy, and he desperately tried to see Patrick at the CAS dealership and at the hospital, only to learn that Patrick was dead. (14 RT 2573-2574.) John described Patrick as a person who loved to work and was generous with his money. Patrick had promised to buy John a house in 2005, so John would no longer have to work two jobs. (14 RT 2575.) According to John, 1,600 people attended Patrick's funeral. John identified photographs of Patrick with his brother and parents, as well as a

photograph taken at the funeral, depicting John and Mary standing by Patrick's casket. (14 RT 2576-2579.) Mary corroborated her husband's account of Patrick as a loving and generous son. Patrick was very close to her, calling her daily, and was never shy about expressing his affection toward her. (14 RT 2582-2584.) Mary kept Patrick's Lexus as her car, but every time she entered the Lexus in her garage, she would cry. (14 RT 2585.)

iii. The Payan and Bizzotto families

Jerry Payan and Juan Bizzotto, both of whom had testified at the guilt phase concerning the events at CAS, testified at the penalty phase about the lingering effects of their experience. Payan described his friendship with Mario Lopez and Patrick Mawikere, noting that Mario was a well-grounded family man and Patrick was a fun-loving kid, similar in age to Payan's son. (14 RT 2587-2588, 2593-2594.) Payan testified that the physical and emotional aftermath of the wounds he suffered were considerable, citing his inability to play sports with his sons or to hug his wife. (14 RT 2588-2589.) Payan illustrated his testimony by identifying photographs showing him hugging his wife and children before he was shot. (14 RT 2589-2590.) Payan also identified a photograph depicting him at Patrick Mawikere's funeral. He left the hospital just to attend the funeral and attended Mario Lopez's funeral as well. (14 RT 2590-2591.) On the anniversary of the shootings, Payan returned to the CAS dealership where he prayed for his co-workers. (14 RT 2594-2595.)

Doris Payan, Jerry Payan's wife, confirmed that her husband's physical and emotional wounds affected their marriage. Together, they were undergoing therapy to cope with the effects of those wounds. (14 RT 2596.) Jerry, who had been a calm person before the shootings, was quick

to become agitated. (14 RT 2601.) He no longer felt safe and considered himself diminished and inadequate because of his decreased physical abilities. (14 RT 2602.)

Because she had socialized with Mario Lopez and Patrick Mawikere, Doris was able to add additional detail to her husband's description of them. She described Mario as "a man of wisdom" and a person who was always joking, and Patrick as "a really good kid" and a good example to others. (14 RT 2597-2599.) Her husband broke down emotionally in the hospital when he was told about the deaths of his friends and coworkers. (14 RT 2599-2600.)

Like Payan, Juan Bizzotto found his life diminished by the residual effects of the shootings. Pointing to a number of photographs, Bizzotto recounted how the damage to his right arm and hand hampered his ability to hold his twin children. (15 RT 2640-2641.) Bizzotto, who was naturally right-handed, wore a brace on that hand, and was 90 percent dependent on his left hand. (15 RT 2641.) The emotional and mental effects of the shooting also were significant. Bizzotto had trouble going out on the street because of his fear of black people. (15 RT 2642.) His inability to work and provide for his family weighed on his mind, and put a strain on his marriage because his wife had to work full-time. (15 RT 2642.) Bizzotto was required to stay at home and care for his children. (15 RT 2643.) The loss of his friends, Patrick Mawikere and Mario Lopez, also was very difficult for him. (15 RT 2643-2644.)

iv. The Torres family

Susano Torres was one of Rafaela Navarrete's eight children, and he lived with her at the Yellows when he was killed. (14 RT 2604-2607.) Navarette wanted to see Susano after he was shot, but she was denied

access to him. The stress of his death exacerbated her diabetes. (14 RT 2608-2609.) Navarette felt bitter and angry toward appellant, whom she knew before he killed Susano and shot Armando. She felt appellant was a hypocrite because he had been to her home, called her "his mom," and had given money to her younger children. (14 RT 2610.) Susano's death was very hard for Navarette to bear; she visited the cemetery daily where she talked to her departed son and cried. (14 RT 2611-2612.)

Sergio Quintero, an older brother to Susano and Armando Torres, missed the companionship he and Susano shared. Because the two of them used to fix cars together, it was hard for Sergio to engage in that activity without thinking about Susano. (14 RT 2613-2615.) Beatriz Lopez, Susano Torres's older sister, was 15 years older than Susano, but they were close. Beatriz recalled that Susano was an affectionate person who liked to play with children. (14 RT 2616-2619.)

Armando Torres, who had testified at the guilt phase, also testified as a victim-impact witness. At the time of his penalty-phase testimony, Armando was in custody. (15 RT 2634.) Like Sergio, Armando missed most his companionship with Susano, who treated him well. (15 RT 2634-2636.) Armando had difficulty sleeping at night. Since the shootings, Armando was perpetually in trouble and continued to use methamphetamine. He confessed that his drug usage became worse after he was shot. (15 RT 2636.) Yet despite his problems with drug abuse and the law, Armando believed he could stay out of trouble "from now on." (15 RT 2635-2636.)

2. The Defense Case in Mitigation

The defense presented evidence about (1) the circumstances of appellant's chaotic and disadvantaged upbringing; (2) his character as a

loving and caring father; (3) his success on probation and parole from 1990 until his arrest for these crimes; and (4) his being under the influence of PCP at the time of the crimes, which were aberrational events in his otherwise generally nonviolent life.

a. Appellant's upbringing and family history

Appellant presented testimony from seven members of his family demonstrating that he had grown up in a highly unstable, abusive, and neglectful home and that he and his siblings were in and out of foster care and group homes because of their mother's abuse and neglect as well as their father's inability to care for them. Summarizing this evidence, as well as relevant school and welfare services records, Dr. Alan Abrams, the psychiatrist tasked by defense counsel with examining appellant, determined that appellant had first been placed in foster care when he was 4 years old and was never able to be a child because, as the oldest sibling, he became responsible for caring for his younger brothers and sisters. Abrams concluded that appellant lacked appropriate role models, affection, caring, or adequate preparation to grow up to become a responsible and well-adjusted adult. (15 RT 2679-2681.)

Kathy Joiner, appellant's mother, was 16 years old when she married Louis Mitchell, Sr. ("Louis Sr."), and had three children with him, including appellant. (16 RT 2918.) Appellant was born in February of 1970. (16 RT 2920.) Joiner described her relationship with Louis Sr. as very volatile. (16 RT 2920.) She admitted that she stabbed Louis Sr. in 1975, because she had just had a baby and Louis Sr. had pulled her down the stairs. (16 RT 2919-2920.) Joiner denied having suffered brain damage after being beaten by Louis Sr., as reported to the Department of Human Services by her

mother. (16 RT 2919.) She did not recall whether she herself had reported those facts to a social worker in 1979. (16 RT 2921.) Joiner had been arrested for child abuse and neglect in November of 1979, when appellant was 9 years old. (16 RT 2919.) She could not recall whether in 1980, when appellant was 10 years old, all five of her children were made wards of the court. (16 RT 2920.) Joiner attributed her failure in parenting appellant to youth and inexperience. (16 RT 2922-2923.)

Louis Sr. began a relationship with Joiner before he joined the Marines, when he was 17 and she was 15 or 16. (16 RT 2909.) When Louis Sr. left the Marine Corps in 1971, appellant was about a year old. (16 RT 2909.) Louis Sr. described his marriage with Joiner as tumultuous. He confirmed that when appellant was 5 years old and his younger son Dante was 3, Joiner stabbed him in the back with a knife, and later moved out, leaving him with the two boys. (16 RT 2910-2911.) There were three separations before their divorce in 1975. In 1974, prior to the divorce, appellant and Dante were placed in foster care. (16 RT 2911.) Louis Sr. explained that the decision to place his sons in foster care stemmed from his inability to find work. He could not recall whether he made any effort to see his children once they were placed in foster care. (16 RT 2911-2912.)

Defense counsel confronted Louis Sr. with a number of reports from the Oregon Children's Services Division. Generally, these reports chronicled the abuse, neglect, and abandonment experienced by appellant and Dante in the period from 1973-1984, which caused the two brothers to be removed from the physical custody of their mother and placed in foster care. Additionally, the reports described the paucity of Louis Sr.'s efforts to visit his sons while they were in foster care. For the most part, Louis Sr. could not recall any of the specific allegations set forth in those reports, but

he attributed his inability to raise appellant on the difficulty he experienced in getting a job and on the inadequacy of his education. (16 RT 2911-2916.)

Appellant's stepmother, Wendy Williams, testified on his behalf. At the time of her testimony, she remained married to Louis Sr., but they had been separated for 22 years. Williams had three children with Louis Sr. (16 RT 2882-2883.) Williams cared for appellant on a couple of occasions. Once, appellant and his brother Dante came and lived with her and their father for a few months and then again for a short period after she had her daughter in 1981. Appellant was 10 years old when he first lived with Williams. (16 RT 2884.) Williams was aware of appellant's plight of going in and out of the criminal justice system, foster care homes and juvenile and youth facilities. (16 RT 2883.)

According to Williams, Louis Sr. was far from an ideal father to Williams's children or appellant and Dante. His parenting skills were not very good; he did not interact with children, and he drank and used drugs. (16 RT 2884.) Williams once came home and found appellant and Dante, unaccompanied by an adult and with a box of clothes, sitting on the porch of the apartment building where she lived. According to Williams, the two boys were either in their mother's care or in a foster home at the time they appeared unannounced at her doorstep. Williams never learned how they got there, and no one ever came to check on them afterwards. (16 RT 2885-2886.)

Appellant's uncle, John Mitchell, was Louis Sr.'s brother. (16 RT 2900.) He knew appellant from the time he was a baby. John had a hardscrabble upbringing in Oregon. The family was on welfare, and their mother died when he was 16 years old; there was no one to help them. (16

RT 2899-2900.) Bitter and angry over those circumstances, John enlisted in the Marines, as did Louis Sr. John served two combat tours of duty in Vietnam. (16 RT 2900.) After John returned from Vietnam, he became a police officer in Portland, Oregon. His brother took a different path; Louis Sr. was young, foolish, and an irresponsible father to his children. (16 RT 2901-2902.)

When Dante and appellant were about 5 and 6 years old, John and his wife cared for them for four to five months. While providing this care, John and his wife did not get any help from Louis Sr. or Joiner. (16 RT 2902.) Once they left John's care, the two boys "bounced around" from one foster home to another until they were in their teens. (16 RT 2903.) John described his brother as an absentee father to his children, a man who would occasionally visit his children but not act as a parent to them. He observed that both appellant's father and his mother lacked essential parenting skills because they were too young and inexperienced. (16 RT 2903-2904.)

Appellant's younger brother, Dante Mitchell, testified about his childhood with appellant. He was 5 years old and appellant was almost 7 when they first went into foster care following Louis Sr.'s incarceration. Thereafter, they were placed in more than five foster homes. (16 RT 2890.) When the two brothers returned to live with their father, things went downhill again. Dante could not remember when they were taken away from Louis Sr. again and placed in yet another foster home. (16 RT 2894.)

Lashona Blue was the mother of appellant's three children, Hassan Blue and Amena Blue, who were twins and 11 years old at the time of appellant's trial, and Mustafa, who was 8 years old. (16 RT 2924-2925.) Lashona met appellant in 1994. Although they were not married, they lived together in Los Angeles for three or four years. (16 RT 2925.) During

their relationship, appellant worked for his uncle for a period of time at a barbeque stand. (16 RT 2926.) He provided financial support for Lashona and their children when he was able. (16 RT 2930.) According to Lashona, appellant was a loving and caring father to his children, as well as to Lashona's daughter from a different relationship. He was never abusive to his children, to her, or to her daughter. (16 RT 2926.) Appellant's children loved and adored their father. Lashona found it difficult to believe that appellant committed the crimes for which he was then on trial for his life. (16 RT 2926.)

Appellant's daughter, Amena Blue, testified that although her father was in trouble, she still loved him. She promised to stay in touch with him by writing letters. (16 RT 2933-2936.)

b. Appellant's criminal record, mental health problems, and performance on parole

Dr. Abrams, who had served as the Chief Psychiatrist of Centinela State Prison in Imperial County, examined appellant and familiarized himself with the facts and circumstances of appellant's case. (15 RT 2654, 2664, 2676.) He read the discovery provided to him, including the accusatory pleading and the transcript of the preliminary examination, as well as appellant's school and welfare services records. (15 RT 2676-2677.)

In addition to confirming that appellant had grown up in a very unstable and abusive home, and that appellant and his siblings were frequently in and out of foster care and group homes, Abrams learned that appellant's academic performance as of 1987 was "terrible," despite his "quite high" innate intelligence. (15 RT 2681-2682.) Abrams also learned that appellant had an extensive juvenile record, starting in 1982, that

included more than two dozen arrests for a wide variety of misbehavior, such as drug offenses, running away, robberies, thefts, fighting, and making threats. (15 RT 2684-2685.) As Abrams explained, this was the type of conduct commonly engaged in by out-of-control teenage boys. Ultimately, the Juvenile Court in Oregon sent appellant to the McClaren Training School, Oregon's equivalent to the California Youth Authority, where appellant's behavior, as Abrams described, was "abysmal" and so sufficiently disturbed that he was psychiatrically assessed. (15 RT 2683-2685.) In spite of this juvenile record, Abrams thought it noteworthy that prior to the shootings and killings in August of 2005, he could not identify a single episode of violent conduct by appellant since 1990. (15 RT 2685-2686.)

Abrams chronicled appellant's progression through the criminal justice system as an adult, including periods when he was incarcerated in the California state prison system, beginning in 1991, and ending with appellant's last release on parole in 2004.[11] The offenses which resulted in appellant's prison commitment were invariably drug-related, and included possession of PCP. Based on appellant's prison classification scores and his eventual assignment to minimum security facilities, Abrams opined that appellant had become an "extraordinarily squeaky clean" prisoner. (15 RT 2686-2688, 2695-2696.)

As Abrams chronicled, prior to appellant's release from prison on parole in July of 2004, he was assigned to the Correctional Clinical Case

---

[11] Abrams noted that appellant's probationary sentence (after his conviction in 1988 for the unlawful taking of Lucy Chavez's vehicle) was revoked in April of 1991, resulting in appellant's entry into the California state prison system.

Management System ("CCCMS") for his depression. CCCMS was an outpatient designation within the prison system for inmates with mental diseases insufficiently severe to require hospitalization or constant detention. (15 RT 2694-2695.) With this designation, appellant was treated by a psychiatrist and continued to receive mental health treatment upon his release on parole. Abrams determined that by May or June of 2005, appellant elected to discontinue antidepressant medications prescribed by Department of Corrections psychiatrists as he was unhappy with their excessively sedating side effects. (15 RT 2700, 2745; 16 RT 2836, 2862.) Abrams explained that typically, a rapid withdrawal from antidepressants can result in irritability, insomnia, anxiety, and agitation. (15 RT 2701.)

In June of 2004, Karen Hofmeister, who had a master's degree in social work, was employed in the Psychiatry Department of the University of California, San Diego ("UCSD"). At that time, appellant was in prison and about to be paroled. (16 RT 2824-2825.) The UCSD Psychiatry Department had a contract with the California Department of Corrections ("CDC") to interview inmates in the prison mental health system who were about to be paroled to the Parole Outpatient Clinic. In that capacity, Hofmeister interviewed appellant on June 18, 2004, to provide the psychiatrists or psychologists at the Clinic with information about his background and drug history, as well as an assessment of his current mental status. (16 RT 2824-2825, 2828.)

During this interview, appellant told Hofmeister that when he got out of prison, he had nowhere to go and he expressed pessimism about his prospects outside of prison. He said that he had a difficult time functioning on the street and that he would have to resort to selling drugs to survive. (16 RT 2826.) In Hofmeister's assessment, appellant appeared to be

depressed, but expressed no homicidal ideation. (16 RT 2825, 2830.)

Dr. William Lawrence treated appellant prior to his release on parole. (16 RT 2867.) In March of 2005, Lawrence prescribed Wellbutrin, for appellant's diagnosis of dysthymia, a depression disorder. (16 RT 2839-2840, 2874.) Lawrence typically prescribed Wellbutrin for patients who used stimulants like cocaine or methamphetamine. (16 RT 2863.) Prior to prescibing Wellbutrin, Lawrence had prescribed appellant other medications such as Provigil, an antidepressant used to combat the symptoms of narcolepsy, and Remeron, an antidepressant used to decrease anxiety. (16 RT 2865-2867.)

Dr. Nuingyu Kim, a psychiatrist with CDC, saw appellant on June 24, 2005, about six weeks before the homicides, when appellant was out of custody. (16 RT 2836-2837.) At the time, appellant had been prescribed Wellbutrin for depression. Appellant told Kim he had stopped taking the medication a month before, claiming he was doing fine and did not want any more medication. (16 RT 2837.)

Kim noted that appellant had a long history of being institutionalized and was in the California Youth Authority ("CYA") prior to going to prison. Kim was aware that appellant had been physically abused by his mother, had been placed with Child Protective Services ("CPS"), and had a long history of substance abuse, with PCP being his drug of choice. Furthermore, appellant had experienced psychotic problems from the age of 12, had been placed in a prison psychiatric hospital due to his behavioral problems, and had been prescribed antidepressants including Paxil, Prozac, and Remeron. (16 RT 2838-2839.)

Kim was concerned about appellant's decision to discontinue the prescribed medication, but he could not force appellant to take medication

against his will. Consequently, he obtained appellant's agreement to come back in 30 days, so Kim could monitor appellant's depression. However, appellant did not show up in the following month. (16 RT 2,839.)

In 2005, CDC Parole Agent Steven Day was assigned to supervise appellant on parole. (16 RT 2845.) At the time of appellant's arrest on August 9, 2005, Day had supervised him for a little over three months. (16 RT 2846.) According to Day, appellant appeared to be compliant with the terms of his parole. Appellant made himself available for supervision, reported to Day, and Day visited with appellant at his residence. Appellant submitted to periodic random drug testing which usually was done once a month. Appellant never provided a positive test to Day. (16 RT 2847.) The last time Day tested appellant for drugs was two to three days before his arrest on August 9, 2005. The result of that test was negative. (16 RT 2847-2848.) Because of appellant's long history of substance abuse, Day was quite watchful in supervising him. According to Day, appellant's performance was satisfactory. (16 RT 2845.) Consequently, Day was shocked when he learned appellant had been arrested for murder. (16 RT 2847-2848.)

c. Appellant's being under the influence of PCP at the time of the homicides

A blood sample drawn from appellant on August 9, 2005, at the Loma Linda Medical Center where he was treated for the gunshot wound to his leg, contained 11 nanograms of PCP. (15 RT 2709; 16 RT 2766, 2780, 2810-2812, 2820.) According to Felix D'Amico, a drug recognition expert, PCP is an illegal drug that acts like an hallucinogen. (15 RT 2753-2755, 2764.) PCP commonly known as "Sherm," comes in liquid form, and usually is ingested by dipping a cigarette into the liquid and then smoking

the cigarette. (15 RT 2765.) People under the influence of PCP commonly are agitated and excited, and experience hallucinations or delusions. Such people are often paranoid. (15 RT 2765.)

When D'Amico reviewed the police reports recounting the circumstances of appellant's arrest, and combined them with the confirmed presence of PCP in appellant's blood, he concluded that appellant had been under the influence of PCP at the time he was shot and arrested. (15 RT 2770-2772.) A person who ingests PCP will display symptoms less than 10 seconds after smoking the drug. Those symptoms peak within two to three hours, but will still be observable four to six hours after ingestion. Behavioral manifestations of PCP use can be detected up to weeks after ingestion, because the PCP lingers in the body's fatty tissues and can be released by adrenaline. (15 RT 2771-2772.)

Dr. Jeff Grange, a medical doctor at the Loma Linda Medical Center, was one of the attending doctors in the emergency room on August 9, 2005. There, he came into contact with appellant. (16 RT 2789-2790.) Grange concluded that appellant was under the influence of PCP, based in part on the history he obtained from the paramedics and law enforcement officers, which suggested bizarre behavior. Grange observed that while in the emergency room, appellant was in a catatonic-like state, but later appellant suddenly leapt from the bed when the officers were outside the room. On the basis of this behavior, Grange had appellant screened for the use of illicit substances, and those tests were positive for both marijuana and PCP. (16 RT 2792.) Grange's diagnosis for appellant's condition was that he (1) had suffered a tibia gunshot wound; (2) had altered level of consciousness resolving in custody; and (3) suffered from PCP intoxication. (16 RT 2800.)

Defense counsel asked Dr. Abrams, who specialized in psychopharmacology and forensic psychiatry, to assess whether or not appellant was under the influence of PCP when he committed the crimes on August 8, 2005. (15 RT 2654-2664, 2705.) Abrams was aware that appellant had provided negative test results to his parole agent upon his release from prison in July of 2004. On the other hand, it appeared evident to Abrams that appellant had reverted to using illicit "street" drugs by the time of the shootings in August of 2005, based on the discovery of drugs in the car he was driving as well as his positive drug test at the Loma Linda Medical Center on August 9, 2005. (15 RT 2701-2702.)

Abrams conducted his psychiatric assessment of appellant on December 9, 2005, at a detention facility. (15 RT 2704.) During the interview, appellant was reluctant to discuss his life history and declined to discuss the events of August 8-9, 2005. Instead, appellant stated that he was being framed; "none of this happened;" that he was unable to receive justice in a racist society; and that no drug was strong enough to make him do something as crazy as the shootings he was charged with. (15 RT 2704-2705.)

Abrams explained that the positive drug test for PCP obtained from appellant's blood sample taken on August 9, 2005, demonstrated that appellant had used PCP within 24 -72 hours and that he had smoked a full dose at one point. (15 RT 2709.) The effects of PCP are completely unpredictable; a person under the influence of that drug can cycle between being completely out of control at one moment and catatonic at another moment. (15 RT 2712.) Moreover, laboratory research suggested that the use of antidepressants made the brain more sensitive to the effects of PCP. (15 RT 2713.) Given the amount of PCP detected in appellant's blood, in

combination with the objective accounts of appellant's irrational behavior, Abrams opined that sometime after 12:00 p.m on August 8, 2005, appellant's ability to act rationally changed dramatically. (15 RT 2719.)

In arriving at his conclusion, Abrams found appellant's responses during the December 9, 2005, psychiatric assessment highly significant. Although appellant was not psychotic or delusional, Abrams opined that appellant was sincere in claiming he was framed and sincere as well in appearing to have no conscious memory that the shootings had occurred. Although Abrams concluded that appellant was neither insane nor incompetent to stand trial, he was struck by the realization that "this was just an awful, awful story of someone who shouldn't have been smoking PCP after lots of years of not smoking it and went very sideways on PCP and didn't want to acknowledge it." (15 RT 2706.) Appellant's account of being unable to remember what he had done was consistent with Abrams's experience in six previous cases involving murders committed while under the influence of PCP. In all but one such case, Abrams had been told by the perpetrators that they could not remember the course of events surrounding the crimes. (14 RT 2720.)

I.

THE UNANIMITY-OF-DOUBT REQUIREMENT IN CALJIC NO. 8.71 AND CALJIC NO. 8.72 IMPERMISSIBLY AND PREJUDICIALLY SUBVERTED THE REASONABLE DOUBT STANDARD WHICH LOWERED THE STATE'S BURDEN OF PROOF FOR MURDER AND FIRST DEGREE MURDER

A. Introduction And Proceedings Below

Appellant was found death-eligible based on the multiple-murder special circumstance, which required that he be convicted of at least one first degree murder and one second degree murder in the same proceeding. (§ 190.2, subd. (a)(3).) Appellant was charged with three murders during two incidents separated by 45 minutes, first the killing of Mario Lopez and Patrick Mawikere at CAS and thereafter the killing of Susano Torres at the Yellows housing project. The prosecution proceeded solely on the theory that all three homicides were premeditated and deliberate first degree murder (12 RT 2354, 13 RT 2430-2450), and the jury was instructed on that theory, and only that theory, of first degree murder (65 CT 17263-17266). Thus, the instructions telling the jury how to resolve doubts as to whether the homicides were first degree murder, second degree murder, or manslaughter were crucial to an accurate and reliable determination of appellant's guilt.

At the close of the guilt phase, the trial court gave instructions on voluntary manslaughter and first and second degree murder, reflecting the various possible theories of culpability and defense which the evidence supported. (65 CT 17269-17280; 17283-17284.) The court also gave the 1996 revised versions of CALJIC Nos. 8.71 and 8.72.

The instruction pursuant to CALJIC No. 8.71, entitled "Doubt

Whether First or Second Degree Murder," told the jury:

> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you *unanimously agree that you* have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree.

(13 RT 2412-2413[12]; 65 CT 17281, italics added.)

The instruction pursuant to CALJIC No. 8.72, entitled "Doubt Whether Murder or Manslaughter" provided:

> If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but *you unanimously agree that you* have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of such doubt and find it to be manslaughter rather than murder.

(13 RT 2413; 65 CT 17282, italics added.) These were the same pattern instructions later found to be defective by this Court in *People v. Moore* (2011) 51 Cal.4th 386, 411-412 ("*Moore*").

These instructions diluted the prosecution's burden of proof and undermined the requirement of proof beyond a reasonable doubt by

---

[12] In its oral delivery of this instruction, the trial court strayed from the language of the written instruction by using the phrase "but you unanimously agree and you have a reasonable doubt" instead of "but you unanimously agree that you have a reasonable doubt" whether the murder was of the first or second degree. This discrepancy is immaterial because the difference would not have changed the meaning conveyed to the jury. In any event, written instructions control over oral instructions. (*People v. Osband* (1996) 13 Cal.4th 622, 717 [written instructions govern in any conflict with those delivered orally]; *People v. McLain* (1988) 46 Cal.3d 97, 111, fn. 2 [presumption jurors were guided by written version of instructions].)

confusing the jurors about their duties in the event that they had a doubt as to the degrees of murder, or a doubt about whether the crimes were murder or manslaughter in the first instance. Thus, they deprived appellant of a fair trial in violation of the due process clauses of the state Constitution (art. I, § 15) and the Fourteenth Amendment to the federal Constitution, and violated his jury trial rights under the state Constitution (art. I, § 16) and the Sixth Amendment to the federal Constitution, and require reversal of the judgment as to counts one, two, and three – the murder convictions and special circumstance finding.

B. The Delivery Of CALJIC Nos. 8.71 And 8.72, Requiring Jurors To Unanimously Agree They Had A Reasonable Doubt As To The Nature Of The Crime Or The Degree Of Murder Before Appellant Was Entitled To The Benefit Of That Doubt, Violated Both State Law And The Federal Constitution

Under longstanding California law, "when the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense." (*People v. Dewberry* (1959) 51 Cal.2d 548, 555; see *People v. Lee* (2011) 51 Cal.4th 620, 656 [quoting principle].) A similar rule is codified in section 1097, which provides in relevant part:

> When it appears that the defendant has committed a public offense . . . and there is reasonable ground of doubt in which of two or more degrees of the crime . . . he is guilty, he can be convicted of the lowest of such degrees only.

This rule, which requires that the jury "should give the defendant the benefit of any doubt," means that in homicide cases, the State has burden of

proving both the degree of murder and that the unlawful killing was murder rather than manslaughter beyond a reasonable doubt. (*People v. Morse* (1964) 60 Cal.2d 631, 657 [degree of murder]; see *People v. Dewberry*, *supra*, 51 Cal.2d at pp. 556-557 [distinction between murder and manslaughter].)

This state law is consistent with, and implements, the bedrock reasonable doubt standard which, under the Fourteenth Amendment, "'lies at the foundation of the administration of our criminal law.'" (*In re Winship* (1970) 397 U.S. 358, 363 ("*Winship*"), quoting *Coffin v. United States* (1895) 156 U.S. 432, 453.) The federal due process clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*Winship*, *supra*, 397 U.S. at p. 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40.) The burden of presenting such proof rests with the prosecution. (*Winship*, *supra*, at p. 361.) The due process reasonable doubt standard also is interrelated with, and central to, the Sixth Amendment right to trial by jury. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"]; *United States v. Gaudin* (1995) 515 U.S. 506, 510 [quoting principle]; see *Cunningham v. California* (2007) 549 U.S. 270, 281 [Sixth Amendment requires that any fact exposing a defendant to a greater potential sentence must be found by a jury and established beyond a reasonable doubt].) A jury instruction that lessens or dilutes the reasonable doubt standard runs afoul of these constitutional guarantees. (*Cage v. Louisiana*, *supra*, 498 U.S. at p. 41 [holding reasonable juror could have interpreted challenged instruction to allow finding of guilt based on degree of proof below that required by the

due process clause].)

The standard of review for appellant's claim is whether "there is a reasonable likelihood" that the jury understood the instructions in a manner that allowed conviction in violation of the requirement of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6; see *Boyde v. California* (1990) 494 U.S. 370, 380 [when claim is that an instruction is ambiguous and therefore subject to an erroneous interpretation, the proper inquiry is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the constitution].)

1. There Is a Reasonable Likelihood That the Jurors Understood and Applied the Unanimity-of-Doubt Requirement, Which This Court Criticized as Problematic and Confusing in *People v. Moore* (2011) 51 Cal.4th 386, in a Way That Violated State Law and the Federal Constitution

In accordance with the state-law and federal-constitutional principles discussed above, in *Moore*, *supra*, 51 Cal.4th 386, this Court recognized that the language of the 1996 revised version of CALJIC Nos. 8.71 and 8.72 requiring unanimity as to reasonable doubt was "problematic" (*id.* at p. 410) and could be understood and applied by jurors in an unconstitutional manner (*id.* at pp. 411-412). The Court also found the unanimity-of-doubt language to be unnecessary. (*Id.* at p. 411.) It ruled:

> We conclude the better practice is not to use the 1996 revised versions of CALJIC Nos. 8.71 and 8.72, as the instructions carry at least some potential for confusing jurors about the role of their individual judgments in deciding between first and second degree murder, and between murder and manslaughter.

(*Ibid.*) The Court did not address whether the possibility of confusion created by the unanimity-of-doubt provision was adequately dispelled by

other instructions given at the defendant's trial. (*Id.* at p. 412.) Instead, the Court held that, in light of true findings on burglary-murder and robbery-murder special circumstances, the error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24 because the jury must have found the defendant guilty of first degree murder on those felony-murder theories. (*Id.* at p. 412.)[13]

Appellant's jury was given the same CALJIC Nos. 8.71 and 8.72 as found to be confusing in *Moore*. In this case, the unnecessary references to unanimity of doubt likely misled the jurors about their ability to give effect to their own individual judgments on the critical question of whether the prosecution proved the murder charges beyond a reasonable doubt. Under state law and the federal guarantees of due process and trial by jury, each juror was to decide if he or she had a reasonable doubt about the prosecution's case. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278 [recognizing right to have jurors, rather than the judge, reach requisite finding of guilt as "most important element" of right to trial by jury]; *People v. Gainer* (1977) 19 Cal.3d 835, 848 [recognizing significance of principle according right of defendant to the individual judgment of each juror on the issue of guilt].) And each juror was to give appellant the benefit of any reasonable doubt in deciding whether the homicides the prosecution had proved were first or second degree murder and whether they were murder or manslaughter. (*Keeble v. United States* (1973) 412

---

[13] As this Court noted in *Moore*, prior to the revision in 1996, CALJIC No. 8.71 and CALJIC No. 8.72 did *not* require unanimity on reasonable doubt as to the greater offense before a juror could give the defendant the benefit of such doubt, nor is that requirement contained in CALCRIM No. 521. (*Moore*, *supra*, 51 Cal.4th at pp. 409-410, fn.7 and p. 412, fn. 8.)

U.S. 205, 208 [providing jury with option of convicting on a lesser included offense ensures defendant full benefit of reasonable doubt standard]; *People v. Dewberry*, *supra*, 51 Cal.2d at p. 555 [where sufficient evidence could support finding as to both the charged offense and a lesser included offense, jury must find defendant guilty of only the lesser offense].) CALJIC Nos. 8.71 and 8.72 directly addressed the role the reasonable doubt standard should play in making these determinations. However, their problematic unanimity-of-doubt language likely functioned in a way that inverted the benefit-of-the-doubt mandate so that it went to the prosecution rather than to appellant, where it statutorily and constitutionally belonged, and thus made it easier for the prosecution to obtain convictions on the greater charge.

As given to appellant's jury, CALJIC No. 8.72 required, as a predicate to finding the defendant guilty of the lesser offense, *unanimous agreement that there was a reasonable doubt* as to whether the defendant is guilty of the greater offense. Rather than mandating that jurors find the lesser offense of manslaughter if they had a reasonable doubt that the prosecution had met its burden of proving murder, the problematic unanimity-of-doubt language required the jurors to find the lesser offense *only if the jury unanimously agreed,* collectively, that there was a reasonable doubt about whether the crime is murder or manslaughter. Similarly, CALJIC No. 8.71 required jurors to find second degree murder, the lesser offense, *only* if the jury *unanimously agreed,* collectively, that there was a doubt as to whether the crime was murder of the first or second degree.

The unanimity-of-doubt requirements in CALJIC Nos. 8.71 and 8.72 imposed unprecedented limitations on what would otherwise be mandates to

find manslaughter or second degree murder when a juror is in doubt. The instructions literally told jurors who harbored reasonable doubt, that unless the doubt was shared by each and every juror, the duty to give the defendant the benefit of that doubt did not arise. And it is reasonably likely that appellant's jurors understood the instructions to mean what they said. Appellant's jurors may have thought that if they, individually, experienced doubt about a particular finding, then logically they should be able to give voice to that doubt by rejecting that finding. However, the instructions conveyed just the opposite. If just one juror was convinced the homicides were the greater offense, then the other eleven jurors, who did have doubt that it was murder or first degree murder, would have no obligation to vote for the lesser offense. In this way, the unanimity-of-doubt requirement could reasonably be read to negate the benefit-of-the-doubt principle to which appellant was entitled and thereby lessened the prosecution's burden of proof by making the *greater* crime – first degree murder under CALJIC No. 8.71 and murder under CALJIC No. 8.72 – the "default verdict." (*Moore*, *supra*, 51 Cal.4th at p. 410 [describing defendant's claim].)

In this case, the unanimity-of-doubt provision in CALJIC Nos. 8.71 and 8.72 gave the jury a mistaken and misleading description of the reasonable doubt standard. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 277 [instruction misdefined reasonable doubt standard by referring to "'grave uncertainty'" and "'substantial doubt,'" which lessened the prosecution's burden of proof].) Where the instructions required that reasonable doubt must be unanimous and said nothing about non-unanimous doubt, "the jury [would] likely fail to give full effect to the reasonable doubt standard, resolving its doubts in favor of conviction." (*Keeble v. United States*, *supra*, 412 U.S. at pp. 212-213 [without lesser included offense instruction,

there was a substantial risk that the jury would not acquit even if it had a reasonable doubt about the proof of the charged crime].) The lack of clear direction in this case reasonably may be taken to have distorted the factfinding process. (*Cool v. United States* (1972) 409 U.S. 100, 104 [instruction that reduces burden of prosecution is "plainly inconsistent with the constitutionally rooted presumption of innocence"].) In sum, there is a reasonable likelihood that appellant's jury understood and applied the confusing unanimity-of-doubt language in CALJIC Nos. 8.71 and 8.72 in a manner that violated state law and his Fourteenth Amendment due process and Sixth Amendment jury trial rights.

2. The Other Instructions Did Not Correct the Constitutional Error Resulting From the Unanimity-of-Doubt Requirement in CALJIC Nos. 8.71 and 8.72

As noted above in section B.1., in *Moore*, this Court declined to decide whether other instructions "adequately dispelled" any confusion which might have been caused by the unanimity-of-doubt language of CALJIC No. 8.71, unlike the Court of Appeal in *People v. Gunder* (2007) 151 Cal.App.4th 412, 424-425 ("*Gunder*") (relying on CALJIC Nos. 17.40 and 8.75 to find no error) and *People v. Pescador* (2004) 119 Cal.App.4th 252, 255-258 ("*Pescador*") (relying on CALJIC Nos. 17.11, 17.40, and 8.50 to find no error). (*Moore*, *supra*, 51 Cal.4th at pp. 410-412.) In deciding this issue, the jurors must be assumed to have viewed the relevant instructions together. After all, the jury is not permitted to apply one instruction on point, while ignoring another. (*Cupp v. Naughten* (1973) 414 U.S. 141, 146-147 ["a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge"]; *People v. Williams* (1997) 16 Cal.4th 635, 675 [citing principle].)

Here, the jury was specifically instructed "not to single out" one sentence or instruction and "ignore the others[,]" but was directed to consider the instructions "as a whole and in light of all the others." (65 CT 17229; CALJIC No. 1.01.) The other instructions provided to appellant's jury did not resolve the confusion about the effect of a juror's reasonable doubt in deciding the degree of murder or between murder and manslaughter that this Court identified in *Moore*.

At appellant's trial, as in *Gunder* and *Pescador*, the trial court delivered CALJIC No. 17.40. (65 CT 17296; *Gunder*, *supra*, 151 Cal.App.4th at p. 425; *Pescador*, *supra*, 119 Cal.App.4th at p. 257.) That instruction, captioned "Individual Opinion Required - Duty to Deliberate," is contained in section F, "Jurors' Duties," of Part 17, "Concluding Instructions." It counseled the jurors that they were not bound by the opinions of other jurors, but should each individually decide the case for themselves. The instruction provided:

> The People and the defendant are entitled to the individual opinion of each juror.
>
> Each of you must consider the evidence for the purpose of reaching a verdict if you can do so.
>
> Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors.
>
> Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision.
>
> Do not decide any issue in this case by the flip of a coin, or by any other chance determination.

(CALJIC No. 17.40 (7th ed.).) As shown by its terms, as well as its

placement in the "Concluding Instructions" part of the pattern instructions, CALJIC No. 17.40 was a general instruction that applied to all issues on which appellant's jury deliberated. It did not address any particular situation, but simply informed the jurors that they were to consider the evidence and instructions, discuss them with the other jurors, and either change or keep their opinion based upon their own views, informed by the views of other jurors.

In contrast, CALJIC Nos. 8.71 and 8.72 are set forth in section H of Part 8 of the pattern instructions, which address the "Duty of Jury" in "Crimes Against Life." They addressed two specific and complex situations – what the jurors must do when they decide an unlawful killing has been committed, but are in doubt as to whether it is murder or manslaughter, or in doubt about whether it was first or second degree murder. And, as explained above, the unanimity-of-doubt requirement in these instructions misdirected the jurors as to the circumstances in which they were required to give appellant the benefit of their doubt. The jurors would not likely have understood the general guidelines set forth in CALJIC No. 17.40 as rendering these two very specific unanimity provisions meaningless and as directing that they be discounted or ignored. Rather, giving a commonsense reading to the instructions, the jurors would likely have understood CALJIC No. 17.40 as stating a general principle governing their overall deliberations, and CALJIC Nos. 8.71 and 8.72 as providing specific guidance for deciding between murder and manslaughter and first and second degree murder if they were in doubt as to those choices.

This understanding of CALJIC Nos. 8.71 and 8.72 read together with CALJIC No. 17.40 is fully consistent with both state law and federal

constitutional law. Where an erroneous instruction can be read as compatible with another instruction that is claimed to have cured the error, this Court holds that the jury "considered [the erroneous instruction] fully effective, and the error in giving that instruction remained uncorrected." (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 878 [in malpractice case, instruction on plaintiff's right to compensation when defendant was negligent and negligence was proximate cause of plaintiff's injury could have been read as compatible with and did not cure erroneous instruction on contributory negligence by plaintiff].) The high court holds likewise. (*Francis v. Franklin* (1985) 471 U.S. 307, 319-320 [general instructions as to prosecution's burden and defendant's presumption of innocence were not inconsistent with and did not dissipate error in instruction's mandatory rebuttable presumption regarding intent].)

On the other hand, if the jurors closely parsed CALJIC No. 17.40, perhaps they would have concluded that its third paragraph, which states in part that "[e]ach of you must decide the case for yourself," was inconsistent with the unanimity-of-doubt requirement in CALJIC Nos. 8.71 and 8.72. In that case, CALJIC No. 17.40 still would not have adequately dispelled the confusion created by CALJIC Nos. 8.71 and 8.72. As this Court has made clear, "[w]here two instructions are inconsistent, the more specific charge controls the general charge." (*LeMons v. Regents of University of California*, *supra*, 21 Cal.3d at p. 878.) Moreover, both the high court and this Court have ruled that even a correct specific instruction that contradicts an erroneous specific instruction will not remedy an instructional infirmity. (*Francis v. Franklin*, *supra*, 471 U.S. at p. 322 [instructions as a whole did not make clear to the jury that one of the contradictory instructions carried more weight than the other]; *People v. Lee* (1987) 43 Cal.3d 666, 674

[conflicting instructions on issue of specific intent to kill were "constitutionally infirm"].) Simply stated, CALJIC No. 17.40 provided no fix for the problematic unanimity-of-doubt requirement in the challenged instructions.

Similarly, instructing the jury with CALJIC No. 8.50, entitled "Murder and Manslaughter Distinguished," did not dispel the confusion and misdirection caused by the unanimity-of-doubt requirement in CALJIC No. 8.72. (65 CT 17276.) The instruction discussed various elements of murder and manslaughter. As relevant here, CALJIC No. 8.50 stated that "[t]o establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder. . . ." (65 CT 17276.) As noted above, under the direction of CALJIC No. 1.01, the jurors reasonably would have considered CALJIC Nos. 8.72 and 8.50 together. Whereas CALJIC No. 8.50 set out the State's burden of proof generally with regard to murder and manslaughter, CALJIC No. 8.72 stated with greater specificity how this burden was to be applied in choosing between the greater and lesser included offenses. Because the jury was instructed not to ignore any instruction, it would not likely disregard the specific unanimity-of-doubt provision of CALJIC No. 8.72, even though CALJIC No. 8.50 did not itself contain that same requirement. As with CALJIC No. 17.40, whether the jurors viewed CALJIC No. 8.50 as consistent or inconsistent with CALJIC No. 8.72, that additional instruction would not have removed the constitutional defect in the unanimity-of-doubt requirement.

Finally, just as CALJIC Nos. 8.50 and 17.40 were inadequate to dispel the confusion that resulted from giving CALJIC No. 8.72, so too CALJIC No. 8.74 failed to resolve the problem caused by the unanimity-of-

doubt requirement in the challenged instructions in this case. CALJIC No. 8.74 informed the jurors that they had to agree unanimously whether appellant was guilty of first degree murder, second degree murder, or voluntary manslaughter. (65 CT 17284.)[14] That instruction, however, said nothing at all about reasonable doubt, let alone about how the jurors were to give effect to reasonable doubt in choosing between lesser and greater crimes. The jurors likely understood CALJIC No. 8.74 as stating the general unanimity principle for deciding the homicide offense and CALJIC Nos. 8.71 and 8.72 as stating the specific rules for resolving doubts as to which offense or degree of offense had been proved. Thus, CALJIC No. 8.74 did not eliminate the reasonable likelihood that the jurors understood that, under the challenged instructions, they must (a) unanimously maintain a reasonable doubt as to defendant's guilt of first degree murder before any one of them could vote for second degree murder and (b) unanimously maintain a reasonable doubt as to defendant's guilt of murder before any one of them could vote for voluntary manslaughter.

The decisions in *Pescador* and *Gunder*, which were decided before this Court's ruling in *Moore*, do not undercut the conclusion that giving CALJIC Nos. 8.71 and 8.72 to appellant's jury was error. In *Pescador*, the

---

[14] The jury was instructed under CALJIC No. 8.74 as follows:

> Before you may return a verdict in this case, you must agree unanimously not only as to whether the defendant is guilty or not guilty, but also, if you should find [him] guilty of an unlawful killing, you must agree unanimously as to whether he is guilty of murder of the first degree or murder of the second degree or voluntary manslaughter.

(65 CT 17284; CALJIC No. 8.74 (7th ed.).)

Court of Appeal rejected a challenge, similar to that appellant raises here, to the same versions of CALJIC Nos. 8.71 and 8.72. The court mistakenly relied on two decisions of this Court as upholding the validity of CALJIC Nos. 8.71 and 8.72 – *People v. Dennis* (1998) 17 Cal.4th 468, 536-537 and *People v. Morse*, *supra*, 60 Cal.2d at pp. 656-657 – without realizing that, unlike Pescador's trial, those cases did not involve the 1996 revision of the instructions which inserted the problematic unanimity-of-doubt requirement. (*Pescador*, *supra*, 119 Cal.App.4th at p. 257.)

Proceeding from that erroneous assumption, the court in *Pescador* simply ruled that the defendant's argument about CALJIC No. 8.71 "flies in the face of CALJIC Nos. 17.11 and 17.40" and that "in light of the instructions as a whole, the jury did not misinterpret CALJIC No. 8.71 as requiring them to make a unanimous finding that they had reasonable doubt as to whether the murder was first or second degree." (*Pescador*, *supra*, 119 Cal.App.4th at p. 257.) Although the court recited CALJIC Nos. 17.11 and 17.40 (*ibid.*), it did not explain how they, singly or together, established that the jury did not likely misunderstand CALJIC No. 8.71 and apply it in an unconstitutional manner. To be sure, CALJIC No. 17.11 instructs on reasonable doubt as to the degree of a crime without requiring a unanimity as to doubt. When given with regard to murder, the instruction could be read as directly conflicting with the unanimity provision in CALJIC No. 8.71.[15] Of course, such a conflict would do nothing to dispel the confusion created by the unanimity-of-doubt instruction. (See *Gunder*, *supra*, 151

---

[15] CALJIC No. 17.11 provides: "If you find the defendant guilty of the crime of _____, but have a reasonable doubt as to whether it is of the first or second degree, you must find [him][her] guilty of that crime in the second degree."

Cal.App.4th at p. 425 [making this point].) CALJIC No. 17.11, however, was *not* given in appellant's trial and therefore has no bearing on his claim of error.

In *Pescador*, the court also quoted CALJIC No. 8.50, but offered no analysis to support its conclusion that the instruction under CALJIC No. 8.72, as given at Pescador's trial, when considered in the context of CALJIC Nos. 8.50, 17.11 and 17.40, was correct. (*Pescador*, *supra*, 119 Cal.App.4th at p. 258.) As appellant explains above, CALJIC Nos. 8.50 and 17.40 do not eliminate the confusion arising from the defective unanimity-of-doubt provision. Nothing in *Pescador* meets or refutes those arguments. Plainly put, *Pescador* sheds little light on the question left open in *Moore* and to be answered here – whether the other instructions in this case dispelled the confusion this Court has identified in CALJIC Nos. 8.71 and 8.72.

Three years later, in *Gunder*, the same Court of Appeal revisited the same challenge to CALJIC No. 8.71. (*Gunder*, *supra*, 151 Cal.App.4th at pp. 424-425.)[16] In that case, as in appellant's case, the jury was not given CALJIC No. 17.11. The court acknowledged that the missing instruction addressed the subject of reasonable doubt as to the degree of murder "without any reference to unanimity as to doubt," but found this distinction between Gunder's case and *Pescador* to be unimportant. (*Id.* at p. 425.) Instead, the court read the unanimity-of-doubt requirement in CALJIC No. 8.71 as reflecting the directive given to the jury on the process for returning

---

[16] In *Gunder*, the court realized its error in *Pescador* in asserting that this Court had upheld the validity of the challenged CALJIC No. 8.71 when the cases it cited involved a different instruction. (*Gunder*, *supra*, 151 Cal.App.4th at p. 425.)

partial verdicts when there are lesser included homicides, i.e., CALJIC No. 8.75. (*Ibid.*) Based on this interpretation, the *Gunder* court concluded that the jurors would view the unanimity-of-doubt provision as addressing the "procedure for *returning verdicts*" and would not understand it as limiting CALJIC No. 17.40's "express reminder that each juror is not bound to follow the remainder in *decisionmaking*." (*Ibid.*, original italics.)

Whatever arguable validity *Gunder*'s rationale may have, the decision cannot be applied to defeat appellant's claim. *Gunder* depends on the role of CALJIC No. 8.75 to reach its conclusion that the jury would understand the unanimity-of-doubt requirement as a "procedural prerequisite" that did not limit the individual jurors' "decisionmaking" ability to give effect to any reasonable doubt they might have as to whether the murder was first degree. (*Gunder, supra*, 151 Cal.App.4th at p. 425.) But CALJIC No. 8.75 was *not* given to appellant's jury. Without that instruction, the unanimity-of-doubt requirement in CALJIC No. 8.71 was a unique, unexplained provision, and jurors would not reasonably have understood it as informed by a detailed "procedure for returning verdicts" they did not know.

Moreover, in *Gunder*, as in *Pescador*, the court did not consider, let alone counter, the arguments appellant presents here that the general instruction in CALJIC No. 17.40 would not have corrected the jurors' misunderstanding of the law arising from the specific instructions in CALJIC Nos. 8.71 and 8.72 and that CALJIC No. 8.50, distinguishing murder and manslaughter, would not have rectified the same flaw in CALJIC No. 8.72. Thus, *Gunder*, like *Pescador*, has little, if any, relevance to deciding whether in this case the defect inherent in the unanimity-of-doubt provisions of CALJIC Nos. 8.71 and 8.72 was corrected by other

instructions given at appellant's trial. As shown above, it was not, and giving those instructions violated appellant's state and federal due process and jury trial rights.

C. The Delivery Of CALJIC Nos. 8.71 And 8.72 With The Unanimity-Of-Doubt Requirement Mandates Reversal Of Appellant's Murder Convictions And Death Sentence

Instructing the jury with CALJIC Nos. 8.71 and 8.72 violated the state and federal Constitutions by compromising, indeed inverting, the reasonable doubt standard and lightening the prosecution's burden of proof in violation of their due process and jury trial guarantees. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 15 & 16.) Appellant recognizes that in *Moore*, this Court applied the *Chapman* federal constitutional harmless error standard to this error. (*Moore*, *supra*, 51 Cal.4th at p. 412.) The errors here, however, should be considered to be structural errors that require reversal per se. In the alternative, even if a prejudice assessment is required, the State cannot prove the errors harmless beyond a reasonable doubt under *Chapman v. California*, *supra*, 386 U.S. 18.

1. The Errors Were Structural Requiring Automatic Reversal

The United States Supreme Court distinguishes between federal constitutional errors that affect the fundamental framework of a criminal trial in such a way that defy an assessment of their effect on the verdict, which are deemed "structural" errors, and require automatic reversal and other federal constitutional errors, which are deemed "trial" errors and are subject to harmless error review under *Chapman v. California*, *supra*, 386 U.S. 18. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310.) Appellant acknowledges that the category of structural errors is very limited.

(*Johnson v. United States* (1997) 520 U.S. 461, 468.) Likewise, appellant understands that most instructional errors that violate a defendant's due process or jury trial rights are not considered to be structural error, but are subject to *Chapman* harmless error review. (See, e.g. *Hedgpeth v. Pulido* (2008) 555 U.S. 57, 60-61 (per curiam) [harmless-error review applies to instructing on multiple theories of guilt, one of which is invalid]; *Neder v. United States* (1999) 527 U.S. 1, 15 [harmless-error review applies to omission of an element of a crime]; *Yates v. Evatt* (1991) 500 U.S. 391, 402 [harmless-error review applies to unconstitutional presumptions regarding malice and unlawful act elements]; *Pope v. Illinois* (1987) 481 U.S. 497, 501-502 [harmless-error review applies to unconstitutional instruction on "value" prong in obscenity case]; *Rose v. Clark* (1986) 478 U.S. 570, 582 [harmless-error review applies to unconstitutional burden-shifting instruction].) However, instructional errors that undercut the reasonable doubt standard are different from most unconstitutional instructions.

As discussed in section B. *ante*, the reasonable doubt standard has a unique role of singular importance in the American criminal justice system. It "provides concrete substance for the presumption of innocence – that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" (*Winship*, *supra*, 397 U.S. at p. 363, quoting *Coffin v. United States, supra,* 156 U.S. at p. 453.) In *Winship*, the high court emphasized that the reasonable doubt standard embodied "interests of immense importance," specifically "in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with *utmost*

certainty." (*Id.* at pp. 363, 364, italics added.)

In light of the vital role of the reasonable doubt standard as an integral part of the jury's decisionmaking, the high court has held that instructions that subvert the proper application and understanding of the reasonable doubt standard undermine confidence in the jury trial process so that the resulting verdicts cannot stand regardless of the strength of the evidence. In *Cage v. Louisiana*, *supra*, 498 U.S. 39, a per curiam decision, the high court held that a jury instruction explaining reasonable doubt as "doubt as would give rise to a grave uncertainty," and "not a mere possible doubt. . . [but] an actual substantial doubt . . . could have been interpreted to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." (*Id.* at pp. 40-41.) The court reversed without discussing the question of prejudice or the standard for reversal. (*Id.* at p. 41.) Two years later, in *Sullivan v. Louisiana*, *supra*, 508 U.S. 275, the high court held that giving a substantially identical instruction so subverted the jury trial mechanism by which guilt was to be assessed beyond a reasonable doubt that the error was structural and therefore defied analysis by harmless-error standards. (*Sullivan v. Louisiana*, *supra*, at pp. 277, 281-282.)

Although CALJIC Nos. 8.71 and 8.72, the two defective instructions in this case, do not suffer from the same definitional infirmities as the reasonable doubt instructions in *Cage* and *Sullivan*, they had a similar effect. Indeed, by reassigning the benefit of any non-unanimous doubt as to whether the crime proved was murder or first degree murder from the defendant – where it belonged under the due process clause – to the prosecution, the unanimity-of-doubt requirement subverted the reasonable doubt standard in a more tangible way than the use of the terms "grave

uncertainty" and "substantial doubt" in the reasonable doubt instructions found unconstitutional in *Sullivan* and *Cage*. The delivery of CALJIC Nos. 8.71 and 8.72 thus vitiated all the jury's findings related to the homicide charges and, as a result, its consequence is "necessarily unquantifiable and indeterminate." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 282.)

As in *Sullivan,* a harmless error analysis would require the Court to speculate about how the jurors applied the reasonable doubt standard, here tainted by the unanimity-of-doubt requirement, in reaching the verdicts on counts 1-3. Such an inquiry would not be aided by looking at the evidence, as no assessment of the evidence could identify whether any juror had a reasonable doubt as to appellant's guilt on the homicide counts, but voted to convict on the greater offense because, as required by the instructions, his or her doubt was not shared unanimously by the other jurors. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) For this reason, the delivery of the flawed instructions in this case more closely resembles the errors in *Sullivan* and *Cage* than the error in a case such as *Neder v. United States*, *supra*, 527 U.S. 1, where the high court held that an erroneous jury instruction that omitted an element of the offense was subject to harmless-error analysis under the *Chapman* standard. (*Id.* at pp. 10-15.)

Cases both before and after *Sullivan* support this conclusion. In *Cool v. United States*, *supra*, 409 U.S. 100, the high court held in a per curiam decision that a jury instruction allowing consideration of defense witness testimony only if the jury was convinced of its truth beyond reasonable doubt "impermissibly obstructs exercise of" the right to present evidence in one's defense and "has the effect of substantially reducing the Government's burden of proof" in violation of *In re Winship*, *supra*, 397 U.S. 358. (*Cool v. United States*, *supra*, at p. 104.) Put another way, "the

evil in *Cool* was the unacceptable risk that jurors would understand the instruction to require that defense testimony be rejected out of hand which, if considered, might have given rise to a reasonable doubt about the defendant's guilt." (*Cupp v. Naughten*, *supra*, 414 U.S. at p. 153 (dis. opn. of Brennan, J.).[17]) For this reason, the court reversed the defendant's conviction without any assessment of prejudice. (*Cool v. United States*, *supra*, at p. 104; *Cupp v. Naughten*, *supra*, at p. 155 (dis. opn. of Brennan, J.) [when reasonable-doubt standard has been compromised as in *Cool*, the error can never be treated as harmless].) Here, a juror would have understood the challenged instructions in a manner analogous to the error in *Cool*. That is, a reasonable juror could have rejected outright an assessment of the evidence that might otherwise give rise to a reasonable doubt of appellant's guilt unless all the other jurors shared that doubt. Thus, the instruction would have had the effect of substantially reducing the State's burden of proof in an unquantifiable and indeterminate manner.

In *Doe v. Busby* (9th Cir. 2011) 661 F.3d 1001, the Ninth Circuit held that giving instructions that permitted a murder conviction based on a preponderance of the evidence that prior uncharged crimes occurred was structural error. (*Doe v. Busby*, *supra*, 661 F.3d at pp. 1022-1023.) The court of appeals distinguished factors the high court had relied on in *Neder v. United States*, *supra*, 527 U.S. 1, to decide that the instructional error in omitting an element of the charged offense was amenable to harmless error

---

[17] In *Cupp*, the high court held that an instruction providing that "[e]very witness is presumed to speak the truth" and specifying the manner by which the presumption may be rebutted did not deny due process by shifting the burden of proof to the defendant or negating the presumption of innocence. (*Cupp v. Naughten*, *supra*, 414 U.S. at pp. 142, 148-149.)

analysis. (*Id.* at pp. 1018-1020.) The court went on to observe that the defective instruction did not present an evidentiary issue for the jury, but rather introduced error after the taking of evidence and "necessarily impact[ed] the whole of trial because the judge has allowed the properly received evidence to be filtered through . . . 'an unconstitutional lens.'" (*Id.* at pp. 1022-1023, quoting *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, 824.[18]) The court thus found the instructional errors vitiated the jury's findings by lowering the ultimate burden of proof below a reasonable doubt, resulting in a verdict that did not meet the minimum standard under the Sixth and Fourteenth Amendments. (*Ibid.*)

Finally, appellant's position that the unanimity-of-doubt provision in CALJIC Nos. 8.71 and 8.72 was structural error requiring automatic reversal is consistent with the decision in *People v. Aranda* (2012) 55 Cal.4th 342. In *Aranda*, this Court held that the trial court's failure to give the standard reasonable doubt instruction was federal due process error as to the defendant's conviction for active participation in a criminal street gang (§ 186.22, subd. (a)) because the other instructions did not specifically link the reasonable doubt principle to the elements of that crime. (*People v. Aranda*, *supra*, at pp. 361-362, 363.) The Court also held that this instructional omission was not structural error, but was subject to *Chapman*

---

[18] In *Byrd v. Lewis* (9th Cir. 2009) 566 F.3d 855, the Ninth Circuit "overrule[d] *Gibson* to the extent that it applies structural error review to an instructional error that affects only an element of the offense, a permissible evidentiary inference, or a potential theory of conviction, as opposed to an instructional error that affects the overarching reasonable doubt standard of proof." (*Byrd v. Lewis*, *supra*, 566 F.3d at p. 866.) Here, as in *Doe v. Busby*, *supra*, 661 F.3d at p. 1022, the claim is that structural error review must be applied in the case of instructional error that affects the reasonable doubt standard.

harmless error review. (*Id.* at pp. 363-365.) As the Court stated, "the touchstone for determining the appropriateness of harmless error review is the ability to ascertain the effect of the constitutional violation." (*Id.* at p. 364.)

On this key point, the Court drew a clear distinction between error in giving "a misleading description of the reasonable doubt standard," as in *Sullivan v. Louisiana*, *supra*, 508 U.S. 275, and error, as in *Aranda*, in omitting the standard reasonable doubt instruction as to a single charged offense when (1) the reasonable doubt principle is mentioned elsewhere in the instructions, but is not specifically linked to the elements of that offense and (2) the other instructions do not misdefine reasonable doubt in a manner that effectively lowers the prosecution's burden of proof. (*People v. Aranda*, *supra*, 55 Cal.4th at pp. 363, 365.) Relying on the high court's reasoning in *Sullivan*, this Court explained that an instruction that misdefines reasonable doubt is structural error because it "'vitiates all the jury's findings' and its effect on the verdict is 'necessarily unquantifiable and indeterminate.'" (*Id.* at p. 365, quoting *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 282.) In contrast, the error in omitting the standard reasonable doubt instruction in *Aranda* was not, in this Court's view, structural error because its impact on the gang-offense verdict was susceptible to harmless error review under the "distinct features revealed by the record in this case." (*People v. Aranda*, *supra*, at pp. 365-366, 368.) As shown above in section B.1., the error in this case – requiring unanimous agreement by all jurors as to doubt before a single juror could give effect to his or her own reasonable doubt by voting for the lesser offense of homicide or lesser degree of murder – was akin to the misdefinition of reasonable doubt in *Sullivan*, the very type of error effectively lowering the

prosecution's burden of proof that *Aranda* recognizes to be structural error.

For all the foregoing reasons, this Court should find that the mistaken and misleading unanimity-of-doubt requirement in CALJIC Nos. 8.71 and 8.72 requires automatic reversal of the murder convictions.

2. In the Alternative, Reversal Is Required Because the State Cannot Prove the Errors Harmless Beyond a Reasonable Doubt

As the high court held in *Sullivan*, in a case where an instructional error consists of a misdescription of the burden of proof, "[a] reviewing court can only engage in pure speculation – its view of what a reasonable jury would have done" in an entirely misdirected endeavor to determine whether the instruction "played no significant role in the finding of guilt beyond a reasonable doubt." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 281.) Even if this Court does not find the error here to be structural, and instead attempts to divine what a reasonable jury would have done if properly instructed, the State cannot prove the error in giving CALJIC Nos. 8.71 and 8.72 with the unanimity-of-doubt provision was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

The *Chapman* harmless error inquiry does not ask "whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) In other words, the question is not whether there was sufficient evidence for the jury to convict if the erroneous instruction had not been given. (*Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87.) Rather, the reviewing court must determine "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana*, *supra*, at p. 279, original italics; see *Fahy v. Connecticut*, *supra* at p. 87 [relevant "question

is whether there is a reasonable possibility that the error complained of might have contributed to the conviction"].) If even one juror could have entertained a reasonable doubt that the homicides were committed with premeditation and deliberation, the error is prejudicial. (See *People v. Mason* (2013) 218 Cal.App.4th 818, 826 ["The error is not harmless because, even if a properly instructed jury would not have voted to acquit . . ., the views of some jurors may have been swayed resulting in a hung jury"]; *People v. Brown* (1988) 46 Cal.3d 432, 471, fn. 1 (conc. & dis. opn. of Broussard, J.) [a hung jury is a more favorable verdict than a guilty verdict].) Under these standards, the State cannot prove the error harmless beyond a reasonable doubt.

The jury verdicts in this case do not provide an easy answer to the prejudice question, as they did in *Moore*, *supra*, 51 Cal.4th a p. 412. In *Moore*, the defendant was prosecuted for first degree murder on the dual theories of felony murder and deliberate and premeditated murder with allegations of two felony-murder special circumstances, which were found true. The felony-murder special circumstances verdict established that the jury relied on the felony-murder theory, so the Court could conclude beyond a reasonable doubt that the error in CALJIC Nos. 8.71 and 8.72 did not contribute to the murder convictions. (*Ibid.*) Appellant, in contrast, was prosecuted for first degree murder only on the theory of premeditation and deliberation, and only a multiple-murder special circumstance was alleged and found true. Thus, unlike in *Moore*, nothing about the verdicts in this case can assure the Court that the erroneous unanimity-of-doubt requirement in CALJIC Nos. 8.71 and 8.72 did *not* affect the jury's decision to convict appellant of first degree murder on counts 1-3. On the contrary, the erroneous instructions here – reasonably understood as directing the

individual jurors to ignore any doubt they had that the prosecution proved the elements and degrees of murder *unless* all the other jurors were also in doubt – had a direct bearing on the only offenses that could subject appellant to a death sentence.

In addition, the evidence in this case shows that the State cannot prove the instructional errors harmless beyond a reasonable doubt. In her closing argument, the prosecutor pressed the evidence that she thought proved that appellant premeditated and deliberated the killings at CAS and the Yellows: (1) appellant had a motive, which the prosecutor contended was to kill "specific people" he felt had "wronged" him in a car deal and to shoot everyone inside the dealership (13 RT 2434) and similarly at the Yellows to confront and kill people whom he felt had wronged him (13 RT 2434-2435); (2) appellant drove several miles to CAS with a loaded gun, which gave him time to plan to kill, and thereafter drove to the Yellows, which again gave him time to plan the crimes (13 RT 2433); and (3) appellant fired multiple shots thereby proving that appellant wanted all the shooting victims to die (13 RT 2432). However, the inferences the prosecutor urged the jury to draw from the evidence were by no means the only reasonable inferences. In other words, the evidence the prosecution relied upon did not unerringly demonstrate premeditation and deliberation, so that no reasonable juror could find otherwise. But the flawed instructions, containing the unanimity-of-doubt requirement, did not allow for a reasonable juror who was not inclined to draw the inferences suggested by the prosecutor to give voice to his or her doubts, and vote for a lesser offense, unless all the remaining jurors shared them as well.

a. The homicides at CAS

As to motive and time to plan the killings, the evidence demonstrated

that in returning to CAS in the afternoon of August 8, 2005, appellant had time to premeditate and deliberate his actions, but there was room within that evidence for reasonable doubt as to whether he, in fact, arrived with a preexisting plan to shoot or kill anyone. The evidence allowed for the inference that appellant arrived at the dealership in the expectation of finding Dorene Small there, and that he drew a gun and began to shoot only after he learned that she had left and he was being escorted from the premises. According to Jerry Payan, after entering the dealership, appellant addressed Mario Lopez, and repeatedly asked him where his girlfriend was. (7 RT 1419-1420.) A juror could reasonably infer from this testimony that appellant had returned to the dealership intending to persuade Small not to go through with the sale and that he began shooting suddenly in anger only after he realized that she was gone and the sale had been finalized.

Moreover, contrary to the prosecutor's assertion (see 13 RT 2437), there was evidence of an argument at the dealership before the shooting. Juan Bizzotto testified that appellant was excited and angry when Lopez attempted to escort him out of the dealership. (8 RT 1495.) Thus, at variance with the picture the prosecutor painted, a juror could have concluded on the basis of this evidence that appellant had not planned to shoot or kill anyone before his arrival at CAS. While it is possible that appellant formulated a plan to kill after he learned that Small had left and Lopez was physically guiding him out of the dealership, the conclusion that such a rapidly-arrived at decision, made in anger, amounted to overwhelming evidence of premeditation and deliberation is hardly compelling. (*People v. Cole* (2004) 33 Cal.4th 1158, 1224 [deliberate and premeditated murder arises out of a cold, calculated judgment, rather than a rash impulse].)

Additionally, on the basis of what transpired in the morning of August 8, 2005, a juror could believe that appellant's distress over the car sale gave him a reason to return to CAS, but doubt that this motive proved a plan to kill everyone who worked at the dealership. When appellant was present at CAS with Small shopping for a car, a juror could reasonably conclude that appellant would only have viewed Lopez as the salesman responsible for selling a "lemon" to Small. (7 RT 1307-1309, 1312, 1319-1320.) Bizzotto's involvement in the transaction was minimal, because his command of English was so poor that he had to be replaced by Lopez, and both Payan and Mawikere had nothing to do with the sale.[19] (7 RT 1307.) A reasonable juror could conclude that even if appellant arrived at the dealership intending to confront Lopez for taking advantage of Small, he had no pre-existing plan to kill Bizzotto, Payan, or Mawikere when he entered the CAS dealership in the afternoon.

It is true that this Court has held that bringing a loaded firearm to a location where it is thereafter used to kill will support an inference of a plan to engage in a violent encounter with the victim of a killing. (*People v. Marks* (2003) 31 Cal.4th 197, 230 [bringing a loaded gun rather than money into a taxi supported inference defendant intended to rob and kill taxidriver]; *People v. Adcox* (1988) 47 Cal.3d 207, 240 [bringing a loaded rifle to isolated location and thereafter using it to shoot kneeling and unaware victim in the head from behind suggested murder had been planned].) However, such conduct must be considered in the specific context of this case. The evidence demonstrated that appellant lived in a

---

[19] Bizzotto required the service of an interpreter in order to testify at trial. (8 RT 1479-1481.) In addition, according to Payan, he and Mawikere only looked at Small's paperwork involving financing. (7 RT 1408-1410.)

community in which carrying a loaded gun was not unusual and did not invariably show a plan to kill. According to Valerie Hernandez and Rita Ochoa, who lived at the Yellows at the time of the shootings, the open carrying of guns and the sound of gunshots were common occurrences at the Yellows. (9 RT 1753; 10 RT 1849-1850.) Appellant had once lived at the Yellows and was "always around" the housing project. (10 RT 1848.) According to Tracy Ruff, he and his companion were smoking "weed" with appellant on the day following the shootings at CAS and the Yellows. Appellant produced a gun from his waistband and began to fire it in the air. All three thought this reckless behavior was "funny." (11 RT 2112-2114, 2128.) Whether lawful or not, carrying a gun was part of the world in which appellant lived. Taking into account these regrettable but real circumstances, a reasonable juror could conclude that the fact appellant carried a loaded gun with him to CAS and the Yellows did not foreclose doubt he had a premeditated and deliberate plan to kill.

Similarly, the fact that appellant fired multiple shots at Lopez, Bizzotto, and then at Payan would not unerringly lead a juror to conclude he intended to kill them, much less conclude that the manner in which these shots were fired indicated a pre-existing plan to kill them. These circumstances of the homicides simply would not preclude a juror from doubting that appellant's acts were so particular and exacting as to be accomplished according to a preconceived design. (See *People v. Anderson* (1968) 70 Cal.2d 15, 26-27.)

First, although the circumstance that multiple shots were fired at the time of the killings, in connection with other facts, may show a killing was premeditated and deliberate, multiple gunshots by themselves do not foreclose reasonable doubt that the perpetrator acted pursuant to a pre-

conceived and thought-through design. (See *People v. Gonzales* (2011) 52 Cal.4th 254, 295 [multiple gunshots fired at close range without evidence of provocation or struggle supports inference of premeditation and deliberation]; *People v. Chun* (2009) 45 Cal.4th 1172, 1205 [attacks on three victims involving multiple gunshots consistent with second degree murder].) In *People v. Anderson, supra*, 70 Cal.2d 15, this Court found that the infliction of sixty knife wounds on the victim indicated the killing was "hasty and impetuous" rather than deliberate and premeditated. (*Id.* at pp. 21, 31.) If the infliction of sixty separate knife wounds on a single victim allows for the inference that they were inflicted upon a rash impulse, the fact that multiple gunshots were fired in rapid succession in this case does not conclusively demonstrate and preclude reasonable doubt that appellant intended to kill pursuant to a cold, calculated design.

Second, the evidence demonstrated that Bizzotto and Payan were shot in the limbs. Bizzotto was shot in the right arm and the right thigh, and thereafter appellant fired about seven times at Bizzotto's other leg, without hitting him once. (8 RT 1501.) Likewise, Payan was hit in the arm by a gunshot while attempting to escape from the office. (7 RT 1425-1426.) On the basis of the location of these wounds, a juror could doubt that there was a pre-existing plan to kill them. Moreover, there was no evidence from which the jury could reasonably infer that the non-lethal gunshot wounds suffered by Bizzotto or Payan resulted from a preexisting plan to kill them that was frustrated by intervening events such as, for example, a jammed gun, the lack of ammunition, or the arrival of a rescuer.

Third, although Mawikere was killed by means of a single gunshot to the head, this occurred only after he attempted to intervene in the confrontation between appellant and Lopez. (8 RT 1498.) There was no

evidence that appellant was looking for Mawikere before or after the fatal encounter with Lopez. Thus, while the location of Mawikere's fatal wound was consistent with an intent to kill, under these circumstances it did not conclusively demonstrate that appellant fired the shot as the result of a cold, calculated judgment. (Cf. *People v. Romero* (2008) 44 Cal.4th 386, 401 [single gunshot fired from a gun placed against the back of a victim's head, "execution-style," supported finding of premeditation and deliberation, but only when there was no evidence of a struggle]; see *People v. Thomas* (1945) 25 Cal.2d 880, 900 ["premeditation and deliberation" element of first degree murder involves "substantially more reflection" than may be involved in "mere" formation of specific intent to kill].) Similarly, the fatal abdominal gunshot wound inflicted on Lopez was not of a character that foreclosed reasonable doubt about premeditation and deliberation, especially as Lopez was shot at the time he was attempting to steer appellant, who was visibly agitated, out of the office in order to better explain that Small had long since departed. (8 RT 1497-1498.)

Finally, evidence not addressed by the prosecutor, but discussed in Argument II, *post*, indicated that appellant was hallucinating about "the devil" both at the Yellows shortly after the events at CAS and on the following day when he was shot and arrested. The circumstances allowed room for at least one juror to conclude that (1) appellant did not kill or attempt to kill any of the victims at CAS with premeditation and deliberation or (2) the killing of Lopez and Mawikere was not murder. The shootings at the Yellows took place approximately 45 minutes after the shootings at CAS, and a reasonable juror could believe that appellant was suffering from hallucinations during both of the shooting incidents. Indeed, according to a time line set forth in the prosecutor's closing argument, she

maintained that only 20 minutes separated the two events. (13 RT 2443, 2470.)

In sum, all the circumstances marshaled by the prosecutor in her closing argument to persuade the jurors that appellant had committed the charged crimes at CAS with premeditation and deliberation could still have allowed for a reasonable juror to conclude that appellant's anger got the better of him once he arrived at the dealership and learned that Small was no longer there, and thus that the shootings were the product of a heated and rash impulse or an intent to kill, but were not premeditated and deliberate. (*People v. Boatman* (2013) 221 Cal.App.4th 1253, 1268 [finding evidence of defendant's bad mood or anger suggested a rash and impulsive intent to kill rather than premeditation and deliberation].)

Indeed, the prosecutor herself described appellant as "a *madman* who's going to these locations with a loaded gun and shooting everybody," in an effort to convince the jury that appellant had not been provoked by anyone at CAS and therefore had committed first degree murder and attempted murder with premeditation and deliberation instead of any of the lesser included crimes upon which the jurors had been instructed. (13 RT 2435, italics added.) Surely, the prosecutor's description of appellant as a madman, shooting everybody in sight, undercuts any notion that the crimes at CAS must have been the product of cold and calculated judgment. A juror who agreed with the prosecutor's description may have concluded that appellant, in an angry and distressed state, formed the intent to kill but did not premeditate, or acted upon a heated impulse. However, under the instructions challenged here, which contained a unanimity-of-doubt requirement, such a juror could not give appellant the benefit of the doubt to which he was entitled, and vote for a lesser offense, unless all other

jurors concurred. In this way, the prosecutor's task in securing appellant's conviction for the greater charge was made immeasurably easier, thus unconstitutionally lightening her burden of proof so that it cannot be said that the verdicts here were surely unattributable to the flawed instructions.

b. The homicide at the Yellows

The evidence that appellant premeditated and deliberated before the events at the Yellows was even more equivocal. There was no evidence explaining why the shootings at the Yellows took place. Indeed, the prosecutor conceded that Armando Torres did not know why appellant confronted him. (13 RT 2445.) Nor was there any evidence whatsoever as to why appellant fired at Susano Torres. Instead, the prosecutor was left to speculate that appellant went to the Yellows to settle some score with the Torres brothers. (13 RT 2431, 2434-2435, 2449, 2466.) Certainly, there was room for a reasonable juror to conclude, based on the dearth of motive evidence, that appellant went to the Yellows for reasons other than searching for and then shooting the Torres brothers, and that it was only happenstance that appellant encountered them there. After all, Rita Ochoa and Valerie Hernandez testified that appellant often frequented the Yellows and had lived there at one time, whereas Armando Torres testified that he was not living at the Yellows on the day he was shot, but went there to visit his mother despite being on the run from the law. (10 RT 1848; 9 RT 1766, 1708.)

In contrast to the prosecutor's view of the evidence in her closing arguments, the actual circumstances of the shootings at the Yellows also allowed for a reasonable juror to conclude that the shootings were not preceded by pre-existing reflection or careful thought and weighing of the considerations necessary for a finding of premeditation and deliberation.

(*People v. Anderson*, *supra*, 70 Cal.2d at p. 27.) There was evidence that appellant fired a number of shots at Susano Torres from a distance of 15 feet, but only one struck Susano in the arm, albeit with fatal results. (9 RT 1758.) Likewise, appellant fired a number of shots at Armando Torres, but only one bullet struck Armando – in the thigh. (9 RT 1720.) This kind of evidence did not unerringly point to a preexisting plan to kill, carried out calmly and with deliberation, as might be indicated by close-range shots to the head. (*People v. Gonzales*, *supra*, 52 Cal.4th at p. 295 [close-range shooting without provocation or evidence of a struggle supports inference of premeditation and deliberation].)

Here, as with the CAS crimes, the prosecutor's characterization of appellant as a madman (see 13 RT 2435), shooting at everyone in sight, was entirely apt – but not necessarily in the way the prosecutor apparently intended in her closing argument. Rather, when determining whether the error was harmless beyond a reasonable doubt, this Court must also take into account the impact on the jurors of evidence which suggested that appellant's behavior throughout the roughly 24-hour period encompassed by the prosecution's proof was consistent with the delusional and unstable mental state in which he was found by the police at the time of his arrest on August 9, 2005. A reasonable juror could have concluded on the basis of the evidence that the manner of the shootings at the Yellows was at least as consistent with an impulsive PCP-induced episode of random violence such as was exhibited on the following day as it was with premeditation. Indeed, the prosecutor herself did not shrink from utilizing appellant's hallucinatory statements throughout the 24-hour period as evidence of his guilt. (13 RT 2448, 2449.)

Surely, if the prosecutor thought it would be persuasive to use such

evidence to prove guilt, the State should not now be heard to argue that such evidence was incapable of influencing a juror's thinking when deciding whether appellant harbored the requisite mental states for manslaughter, murder, or first degree murder as to the crimes committed at the Yellows. Likewise, and as mentioned earlier, because only 45 minutes separated the shootings at the Yellows from those at CAS, the State should not be heard to claim that any reasonable doubt a juror may have entertained as to whether the shootings at the Yellows were premeditated and deliberate, or without malice, could not possibly have spilled over into that juror's assessment of appellant's mental state at the time of the CAS crimes, especially as the prosecutor argued in rebuttal that both of the shootings sprees were the product of a single and all-encompassing premeditated and deliberated plan by the same shooter. (13 RT 2470.)

To be sure, while a reasonable juror could have found that appellant acted with premeditation and deliberation in engaging in the shootings at CAS, but without premeditation and deliberation at the Yellows, it would not have been unreasonable for such a juror to have found that both shootings were impulsive and the product of a delusional mind acting upon imaginary and diabolical provocations. It was certainly within the realm of reason for the jurors to view appellant's conduct as three similar and connected episodes – whether in support of the prosecutor's theory of the case or in support of a reasonable doubt that appellant harbored the requisite mental states to be convicted of the greater homicide offenses.

D. Conclusion

The unanimity-of-doubt requirement grafted onto the 1996 revisions of CALJIC Nos. 8.71 and 8.72 transferred the benefit of any non-unanimous doubt harbored by a juror as to whether the crime proved

was murder or first degree murder from the defendant – where it belonged under the due process clause – to the prosecution. This requirement was not only "problematic," as this Court acknowledged in *Moore*, *supra*, 51 Cal.4th at p. 410, but more fundamentally it subverted the reasonable doubt standard just as surely as did the use of the terms "grave uncertainty" and "substantial doubt" in the reasonable doubt instructions found constitutionally wanting in *Sullivan* and *Cage*. The other instructions did not dispel the confusion or cure the error resulting from the unanimity-of-doubt provision. As a result, there is a reasonable likelihood that appellant's jury understood and applied the unanimity-of-doubt language in CALJIC Nos. 8.71 and 8.72 in a manner that violated state law and his Fourteenth Amendment due process and Sixth Amendment jury trial rights. The consequences of such categorical error cannot be determined or measured. Such errors, as occurred here, necessarily vitiate all the jury's findings related to the homicide charges. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 282.)

Even if this Court were to find the errors here were not structural, and instead endeavor to conjecture what a reasonable jury would have done if properly instructed, the State cannot prove the instructional error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) The evidence did not unerringly show that any of the homicides were murder, or if murder, murder that was premeditated and deliberated. In each instance, the evidence allowed for at least one juror to entertain a reasonable doubt as to appellant's guilt of the greater charged offense. The convictions on counts 1, 2, and 3, and the special circumstance finding must be reversed.

II.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING APPELLANT'S REQUEST TO DELIVER CALJIC NO. 8.73.1 AT THE GUILT PHASE

At the guilt phase, appellant requested that the trial court instruct the jury, pursuant to CALJIC No. 8.73.1, that it should consider any evidence that the perpetrator of an unlawful killing suffered from a hallucination which contributed as a cause of the homicide on the issue of whether the killing was done with or without deliberation and premeditation. The trial court refused the instruction on the ground that there was insufficient evidence to warrant its delivery. The court's refusal to give this instruction violated state law as well as appellant's federal constitutional rights to a fair trial and a meaningful opportunity to present a defense under the due process clause of the Fourteenth Amendment, and requires reversal of the entire judgment. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 15 & 17; §§ 1093, subd. (f) and 1093.5.)

A. Proceedings Below

At the August 3, 2006, conference to settle the guilt phase jury instructions, the trial court broached the topic of whether CALJIC No. 8.73.1 should be given. (12 RT 2359.) That instruction, entitled "Evidence Of Hallucination May Be Considered In Determining Degree Of Murder," reads as follows:

> A hallucination is a perception that has no objective reality.
>
> If the evidence establishes that the perpetrator of an unlawful killing suffered from a hallucination which contributed as a cause of the homicide, you should consider that evidence solely on the issue of whether the perpetrator killed with or without deliberation and premeditation.

(CALJIC No. 8.73.1 (7th ed.).) Defense counsel requested that the instruction be given. (12 RT 2360.)

The trial court did not have an immediate answer to the question of whether the instruction was required. It observed that although there was no medical evidence that appellant was hallucinating, there was evidence that he was "yelling about shooting the devil" as well as evidence that Armando Torres had tattoos of horns on his head. (12 RT 2359.) The prosecutor took the position that because Armando Torres actually had such tattoos, appellant's statements about shooting the devil were not hallucinations. (12 RT 2359-2360.) Defense counsel countered that although Armando had horn tattoos, he obviously was not the devil and that appellant's statements about shooting the devil did not necessarily refer to Armando Torres. (12 RT 2360.) The prosecutor agreed. (12 RT 2361.) The trial court deferred deciding the issue to another day so that it and counsel could study *People v. Padilla* (2002) 103 Cal.App.4th 675, a case cited in the "Use Note" to CALJIC No. 8.73.1. (12 RT 2360-2361.)

On August 7, 2006, the trial court revisited the issue. Defense counsel informed the trial court that appellant had instructed him "not to present a psychiatric defense or a drug defense" at the guilt phase, and that he had decided for tactical reasons not to oppose his client's wishes. (13 RT 2382.) In response to the trial court's inquiry, defense counsel stated he was still requesting that CALJIC No. 8.73.1 be given. (13 RT 2382.) The prosecutor maintained that the evidence only arguably showed that appellant might have been under the influence of some drug on August 9, 2005, the day following the charged homicides, and therefore the instruction was not relevant. (13 RT 2383.) The trial court refused the instruction "based upon the state of the evidence at this time." (13 RT

2383.)

B. The Denial Of The Requested Hallucination Instruction, Which Was Supported By Substantial Evidence, Violated State Law

Under California law in criminal cases, even in the absence of a request, "'a trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case.'" (*People v. Anderson* (2011) 51 Cal.4th 989, 996, quoting *People v. Martinez* (2010) 47 Cal.4th 911, 953.) That duty encompasses the delivery of instructions on the defense theory of the case, including instructions on any defense (1) upon which the defense relies or (2) any other defense supported by substantial evidence and not inconsistent with the defendant's theory of the case. (*People v. Anderson*, *supra*, 51 Cal.4th at p. 996; *People v. Gutierrez* (2009) 45 Cal.4th 789, 824.)

Similar rules apply when the defendant in a criminal case requests a defense-related instruction, including a pinpoint instruction which relates evidence to an element of a crime such as premeditation and deliberation. (*People v. Saille* (1991) 54 Cal.3d 1103, 1117-1120.) The instruction must be given when it is supported by substantial evidence. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142-1143; *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12.) Evidence is "substantial" in this context if it permits reasonable jurors to conclude that the particular facts underlying the instruction existed, i.e., "evidence sufficient to deserve jury consideration." (*People v. Wilkins* (2013) 56 Cal.4th 333, 347; see *People v. Williams* (1992) 4 Cal.4th 354, 362.) Moreover, doubt as to the sufficiency of the evidence must be resolved in favor of the defendant. (*People v. Flannel*, *supra*, 25 Cal.3d at pp. 684-685, fn. 12.) Finally, a court reviews de novo the denial of a defense instruction, including whether substantial evidence

supports the request. (*People v. Manriquez* (2004) 37 Cal.4th 547, 581; *People v. Waidla* (2000) 22 Cal.4th 690, 733.)

Applying these standards, there was clearly substantial evidence to warrant the delivery of CALJIC No. 8.73.1, i.e., that appellant "suffered from a hallucination which contributed as a cause of the homicide[s]," in support of the defense that he did not kill or attempt to kill with premeditation and deliberation. As used in CALJIC No. 8.73.1, "[a] hallucination is a perception that has no objective reality." (*People v. Padilla, supra*, 103 Cal.App.4th at pp. 679-680.) The evidence that appellant suffered from hallucinations so as to warrant the delivery of CALJIC No. 8.73.1 was twofold.

First, Armando Torres testified that on August 8, 2005, appellant had referred to him as "the devil" prior to shooting him. (9 RT 1717, 1726-1727, 1733-1735, 1737-1738.) On direct examination, Armando testified that it was only immediately before the shooting that appellant had called him the devil, and that appellant had never before referred to him in this manner despite their previous interactions. According to Armando, nobody called him "devil." (9 RT 1717.) Thus, "devil" was not Armando's nickname. Clearly, the belief by the perpetrator of a shooting that his victim was the devil is evidence of a hallucination. (See, e.g., *People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437, 1444-1445 [defendant hallucinated that victim was transforming into the devil]; *People v. Duckett* (1984) 162 Cal.App.3d 1115, 1118-1119, 1126 [evidence that defendant experienced auditory hallucinations commanding him to kill supported instruction that such condition affected ability to premeditate and deliberate]; *People v. Pennington* (1967) 66 Cal.2d 508, 514-515 [evidence of defendant's incompetency based in part upon hallucinations of

conversing with the devil].) Indeed, in *People v. Mejia-Lenares, supra*, a case in which the court of appeal held that the defendant's hallucinations could not legally support a defense of imperfect self-defense, the defendant was acquitted of first degree murder, but convicted of second degree murder, where the jury was instructed with CALJIC No. 8.73.1. The defendant had presented evidence that he fatally stabbed the victim out of fear that the victim was transforming into the devil, which the defendant conceded he just imagined, and wanted to kill him. (*People v. Mejia-Lenares, supra*, 135 Cal.App.4th at pp. 1444-1445.)

At the jury instruction conference, which was held after Armando Torres had testified, the prosecutor implicitly acknowledged that appellant's statements about the devil could indicate a hallucinatory mental state. She noted that although Armando had horn tattoos on his head, he was not the devil. (12 RT 2359.) When defense counsel argued that the "discussion about the devil" was "not necessarily in reference to Armando," (12 RT 2360), the prosecutor admitted that appellant might be talking about "the other devil," and not about Armando at all (12 RT 2361). Certainly, the prosecutor's concession was reasonable in light of the evidence she produced at trial. Armando's direct testimony, if credited by the jury, provided a basis for finding that appellant was hallucinating immediately before he shot and killed Susano Torres and approximately 45 minutes after the killings at CAS.

Armando, however, was not consistent on this subject. On cross-examination, he testified that appellant had referred to him as the devil on the previous day as well, and "always" called him "devil," despite Armando's expressed displeasure at the use of that term. (9 RT 1737-1738.) This inconsistency obviously did not affect the prosecutor's

assessment that appellant's references to "the devil" were not necessarily about Armando. Nor does this inconsistency alter the fact that substantial evidence supported the CALJIC No. 8.73.1 instruction. In deciding whether the evidence supports a defense instruction, the trial court should not measure its substantiality by evaluating the credibility of the witnesses, a task reserved for the jury. (*People v. Breverman* (1998) 19 Cal.4th 142, 162; *People v. Flannel, supra*, 25 Cal.3d at p. 684.) Thus, even when it does not inspire confidence in a court's view, the testimony of a single witness, including the defendant, may constitute substantial evidence for purposes of defense instructions. (*People v. Melton* (1988) 44 Cal.3d 713, 746 [defendant's testimony supported instruction on theft as lesser included offense of robbery in felony murder case]; see *People v. Lewis* (2001) 25 Cal.4th 610, 646 [stating similar principle].) Here the evidence came not from potentially self-serving statements of the defendant after the crime, but from a victim, Armando Torres, and his testimony about appellant's behavior at the time of the crimes, by itself, sufficed to require delivery of CALJIC No. 8.73.1 as requested.

Second, there was ample evidence from multiple, independent witnesses, including law enforcement officers, that appellant was hallucinating on the following day. Tracy Ruff testified that appellant had smoked "weed" before acting crazily by shooting a gun in the air and screaming about having killed the devil. (11 RT 2116, 2127-2128.) Officer Jeffery testified that appellant's erratic behavior and statements while strapped to the gurney in the hospital were consistent with that of people under the influence of phencyclidine (PCP), and that appellant said that God would not judge him for killing the devil. (11 RT 2171-2174.) Finally, Officer Cogswell testified that at the time appellant was shot and then taken

into custody, appellant made several statements referring to the devil. (12 RT 2284.)

There was no logical or legal basis to preclude the jurors from considering evidence of appellant's mental state on the day following the shootings to prove his mental state at the time of the shootings. As other courts recognize, "events that occur after an offense has been perpetrated may be relevant in an assessment of what transpired at the earlier time." (*United States v. Mena* (1st Cir. 1991) 933 F.2d 19, 25, fn. 5 [jury could consider defendant's statements on tarmac after airplane landed in deciding whether he had the requisite wrongful intent when he approached the cockpit and demanded the pilot fly to Cuba]; see *United States v. Carreon* (7th Cir. 1980) 626 F.2d 528, 535, fn. 14 [predisposition refuting entrapment defense may be proved by evidence concerning defendant's actions either before or after commission of the crime].) Because evidence of premeditation and deliberation often is circumstantial, that element may be proved or disproved by evidence of the defendant's conduct after the incident. (See *People v. Avila* (2009) 46 Cal.4th 680, 714-715 [defendant free to argue post-crime conduct did not indicate premeditation or deliberation]; *People v. Moon* (2005) 37 Cal.4th 1, 28, 32 [evidence of flight relevant to whether defendant premeditated and deliberated]; *Government of Virgin Islands v. Roldan* (3d Cir. 1979) 612 F.2d 775, 782 [court relies in part on defendant's attempts to conceal murder after crime in finding sufficient evidence of premeditation and deliberation].)

Here, the jury could consider Armando's testimony about appellant talking about the devil at the Yellows on August 8, 2005, as evidence that he was hallucinating when he shot Armando and killed Susano at that location and when he committed the crimes 45 minutes earlier at CAS.

Similarly, the jury could consider evidence of appellant's bizarre behavior and his statements concerning the devil on August 9, 2005, both to evaluate Armando's testimony concerning the events at the Yellows on the previous day and as circumstantial evidence that appellant was hallucinating at the time of the shootings at the Yellows and at CAS as well. In short, there was substantial evidence that appellant suffered from a hallucination within the meaning of CALJIC No. 8.73.1 so that the instruction should have been given.

The remaining question is whether there was substantial evidence that the hallucination "contributed as a cause" of the homicides or attempted homicides. (CALJIC No. 8.73.1.) That question is easily answered. Appellant's statements themselves establish the nexus between the hallucination and the crimes. A statement that the shooter believes that God will not judge him for killing the devil, if credited by the jury, satisfies the requirement that the hallucination was a contributing cause to the killing. As noted previously, when determining whether a defense is supported by the evidence, a trial court does not make credibility determinations; it considers only whether there is evidence sufficient to deserve consideration by the jury and must resolve any doubts in favor of giving the instruction. (*People v. Salas* (2006) 37 Cal.4th 967, 982; *People v. Barnett* (1998) 17 Cal.4th 1044, 1145; *People v. Jeter* (1964) 60 Cal.2d 671, 674-675.)

To be sure, at the time the trial court addressed the instructions, defense counsel acknowledged that no direct evidence had been presented to show that appellant was under the influence of PCP intoxication on August 8, 2005, in contrast to the evidence showing his PCP intoxication on August 9, 2005. (12 RT 2360; 13 RT 2382.) However, this fact is not

dispositive, and to the extent that the prosecutor suggested otherwise, she was wrong. (See 13 RT 2382 [asserting that the instruction should not be given because evidence showed only that appellant "may or may not have been under the influence of something" on August 9].) CALJIC No. 8.73.1 imposes no requirement that evidence of the *cause* of the hallucination must be presented before the jury could take into account the *effect* of the hallucination in deciding whether the homicides and/or attempted homicides were premeditated and deliberate. This stands in sharp contrast to some other mental state defense instructions. (See, e.g., CALJIC No. 4.10 and CALCRIM No. 3451 [defendant must prove he is incompetent to stand trial as a result of a mental disorder or developmental disability]; CALJIC No. 4.00 and CALCRIM 3450 [insanity defense requires proof that mental disease or defect caused incapabilities].) For this reason, defense counsel correctly maintained that CALJIC No. 8.73.1 was warranted on the state of the evidence even after stating that he intended to heed appellant's request to forgo the presentation of either a drug or psychiatric defense. (13 RT 2382-2383.)

The trial court's ruling eliminated defense counsel's ability to argue that the law provided for a jury finding of second degree murder and/or unpremeditated attempted murder on the basis of hallucination if the jury rejected the defense counsel chose to emphasize, i.e, that there was a reasonable doubt as to appellant's identity as the perpetrator of the crimes at CAS and the Yellows. (13 RT 2456-2460.) As noted previously, a defendant in a criminal trial has the right to jury instructions on inconsistent defenses as long as each defense is supported by the evidence. (*People v. Breverman, supra*, 19 Cal.4th at pp. 157-159; *People v. Elize* (1999) 71 Cal.App.4th 605, 611-613.) Consequently, the trial court has the obligation

to instruct fully on every supportable theory of defense, not just those theories that have the strongest evidentiary support or upon which the defendant has openly relied. (*People v. Breverman, supra*, 19 Cal.4th at p. 149.) Here, defense counsel specifically requested that CALJIC No. 8.73.1 be given, notwithstanding his decision to focus his closing argument on contrasting the relatively weaker evidence of appellant's identification as the perpetrator of the crimes committed at the Yellows with the stronger evidence that he was the one who committed the earlier crimes at CAS. (13 RT 2456-2460.) As defense counsel put it, he was requesting the instruction because the record contained evidence that appellant was under the influence of some kind of controlled substance on the day following the homicides. (11 RT 2382-2383.) This could only mean that defense counsel believed that the post-crime evidence of appellant's PCP-induced hallucinations was relevant to a crucial question for the jury to resolve: did appellant premeditate and deliberate prior to committing the homicides and attempted homicides on the previous day?

Nothing in *People v. Padilla, supra*, 103 Cal.App.4th 675, the sole case cited in the Use Note to CALJIC No. 8.73.1 and examined by the trial court prior to its ruling refusing the instruction, alters the conclusion that there was substantial evidence to warrant delivery of the instruction. *Padilla* found no error in refusing to admit proffered evidence of hallucination to negate malice so as to reduce murder to voluntary manslaughter, but found prejudicial error in refusing to admit such evidence when offered to negate deliberation and premeditation and thus reduce first degree murder to second degree murder. (*Id.* at pp. 678-680.) CALJIC No. 8.73.1 simply states the legal principle at the core of *Padilla*'s holding.

Appellant's case is distinguishable from *People v. Ward* (2005) 36

Cal.4th 186. In *Ward*, the defendant requested that the jury be instructed with CALJIC No. 8.73, an instruction similar to CALJIC No. 8.73.1, informing the jury that in the event the evidence established there was provocation which played a part in inducing a homicide, but the provocation was insufficient to reduce the homicide to manslaughter, the jury should nevertheless consider the provocation for any bearing it might have on whether the defendant killed with or without premeditation and deliberation. At Ward's trial, the trial court agreed to give CALJIC No. 8.73, but for unexplained reasons, neglected to do so. (*People v. Ward*, *supra*, 36 Cal.4th at p. 214, fn. 5.) This Court combed the record for evidence of provocation, but found none regarding the pivotal fact – "the defendant's emotional reaction to the conduct of another, which emotion may negate a requisite mental state." (*Id.* at p. 215.) Because the record demonstrated that the victim's purported provoking words were prompted by the goading of Ward's accomplice, and there was no substantial evidence of provoking words by the victim directed to Ward or of Ward's interpretation of what the victim said, this Court found no error in failing to give the instruction. (*Id.* at pp. 214-215.) In contrast, appellant's multiple references to the devil immediately before shooting Armando, and on the following day, amounted to substantial evidence supporting the hallucination instruction.

Similarly, cases following *Ward*, in which this Court found there was no substantial evidence to warrant delivery of CALJIC No. 8.73 upon request, are also distinguishable. In *People v. Enraca* (2012) 53 Cal.4th 735, the Court found no error in the trial court's denial of the defendant's request that CALJIC No. 8.73 be given because substantial evidence of provocation was lacking where the victims "were killed facedown,

execution style, and not while engaged in a defensive effort." (*People v. Enraca, supra*, 53 Cal.4th at p. 760.) In *People v. Carasi* (2008) 44 Cal.4th 1263, the Court found no error in the trial court's refusal to give CALJIC No. 8.73, noting that "all the available evidence suggests that, having desired [the victim's] death for a considerable period of time, [the defendant] actively planned the murders with [a] codefendant . . . for at least one week." (*People v. Carasi, supra*, 44 Cal.4th at p. 1307.) Both the extensive planning activity and the calculated manner in which the murder was carried out overwhelmingly undermined any notion that provocation from the victim played a role in the killing. (*Ibid.*) Here, unlike *Enraca* and *Carisi*, there was ample evidence that appellant acted upon a condition – a hallucination – precluding premeditation and deliberation.

To summarize, there was substantial evidence for the jury to conclude that appellant was hallucinating at the time of the shootings at both the Yellows and CAS and his hallucinations contributed as a cause of the homicides and attempted homicides, so that the jury could find that appellant had not premeditated and deliberated. The trial court's failure to give this instruction thus amounted to a violation of state law.

C. The Denial Of The Requested Hallucination Instruction Also Violated Appellant's Federal Constitutional Rights To A Fair Trial And A Meaningful Opportunity To Present A Defense

The trial court's refusal to give CALJIC No. 8.73.1 violated not only state law, but the federal Constitution as well. It has long been established that the due process clause of the Fourteenth Amendment guarantees criminal defendants a meaningful opportunity to present a complete defense. (*California v. Trombetta* (1984) 467 U.S. 479, 485.) Few rights are as fundamental as this one (*Rock v. Arkansas* (1987) 483 U.S. 44, 51,

fn. 8), which is "among the minimum essentials of a fair trial" (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294).

The right to present a defense necessarily includes the right to have the jury instructed on the defense relied upon, for "the right to present a defense would be meaningless were a trial court completely free to ignore that defense when giving instructions." (*Taylor v. Withrow* (6th Cir. 2002) 288 F.3d 846, 851-852 [refusal to instruct on self-defense].) This constitutional right includes "the right to have the jury consider defenses permitted under applicable law to negate an element of the offense." (*United States v. Sayetsitty* (9th Cir. 1997) 107 F.3d 1405, 1414 [recognizing due process right to, and finding plain error in denying, requested instruction].) In *Sayetsitty*, the Ninth Circuit held that the trial court erroneously refused to instruct on voluntary intoxication as the defendant requested, thus allowing the jury to convict the defendant for aiding and abetting second degree murder even though it may have believed that he was too intoxicated to form a specific intent.

Here, the trial court's refusal to give CALJIC No. 8.73.1, as appellant requested, operated in a similar fashion. As discussed in section B., defense counsel requested the instruction, which would have provided an alternative defense: even if the jury found appellant to be the perpetrator of the crimes, they were not premeditated and deliberate. This alternative defense theory cannot be dismissed as insignificant. Defense counsel's initial request for the instruction was made four days before he informed the trial court that he would accede to appellant's purported desire to not present a psychiatric or drug defense. (12 RT 2360 [August 3, 2006].) Thereafter, he renewed the request for the instruction (13 RT 2382), indicating that he still viewed CALJIC No. 8.73.1 as important to the

defense.

With the hallucination instruction, defense counsel could have argued that even if the jurors found that appellant was the shooter at the Yellows, (1) appellant was hallucinating not only when he was arrested, but at the time of the shootings at the Yellows, and given the temporal closeness of the crimes, most likely at the time of the shootings at CAS and (2) appellant's hallucinations negated, or at least raised a reasonable doubt about, the premeditation and deliberation elements of murder and attempted murder. CALJIC No. 8.73.1 would have provided the necessary legal reference point to connect the evidence of appellant's devil hallucinations with his conduct at the time of the homicides and attempted homicides. The instruction would have allowed defense counsel to point the jury to the devil hallucinations as a specific, affirmative reason for rejecting the prosecutor's contention that all the shootings were done with premeditation and deliberation.

Without the instruction, defense counsel could not make this argument. He had no legal basis to argue that the jury could use the evidence showing that appellant suffered from hallucinations, which contributed as a cause of the homicides and attempted homicides, to decide the critical question of appellant's mental state when he committed the shootings at CAS and the Yellows. Because the jury had no other means of connecting the evidence of hallucinations with the "premeditation and deliberation" element of the first degree murder and attempted murder, this error seriously affected the fairness of the defendant's trial. (*United States v. Sayetsitty*, *supra*, 107 F.3d at p. 1414.)

In analogous cases, federal courts have found that a trial court's failure to instruct the jury on a defense deprived the defendant of his due

process right to present that defense. In *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, the Ninth Circuit reasoned that the denial of a requested entrapment instruction denied the defendant due process by stripping him of a "meaningful opportunity" to defend himself. (*Id.* at pp. 1098-1099.) In the absence of the instruction, Bradley's jury was left with only the evidence of his confession to the crime and his defense counsel "could not point to a legal grounds on which the jury could acquit." (*Id.* at p. 1099.)

In *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, the defendant was charged with kidnaping for robbery on the basis of evidence he and an accomplice had kidnaped the manager of a restaurant to obtain the combination to the restaurant's safe. At the conclusion of the prosecution's case, the trial court refused to grant Conde's motion for acquittal on the kidnaping for robbery charge, based upon Conde's argument that the purpose of the kidnaping was to commit a commercial burglary rather than a robbery. In support of that defense, Conde requested, but was refused, an instruction on the lesser included offense of simple kidnaping. Moreover, the trial court would not permit defense counsel to argue that theory to the jury. (*Id.* at pp. 737-738.) The Ninth Circuit found that the refusal of the instruction denied Conde his due process right to "adequate instructions on the defense theory of the case," an error compounded by precluding defense counsel from arguing that theory to the jury. (*Id.* at pp. 739, 741.)

In *Clark v. Brown* (9th Cir. 2006) 450 F.3d 898, a felony-murder case based on the commission of arson, the Ninth Circuit held that the trial court's refusal of a defense instruction – informing the jury that if it believed the arson was incidental to the commission of murder, it could not return a true finding as to the felony-murder special circumstance – denied Clark his due process right to present a complete defense. (*Id.* at pp. 908-

909.)

In this case, as in *Bradley*, *Conde*, and *Clark*, the refusal of the requested instruction left defense counsel with no legal basis to argue a defense theory of the case. Without CALJIC No. 8.73.1, the jury could not use the evidence showing that appellant suffered from hallucinations to decide the critical question of appellant's mental state at the time of the charged offenses. Appellant's trial thus lacked one of the minimal essentials – a meaningful opportunity to present a complete defense – necessary to be deemed fair under the Fourteenth Amendment.

D. The Instructional Error Requires Reversal

When a defendant challenges a trial court's failure sua sponte to instruct, or to instruct fully, on all lesser included offenses as state-law error, this Court applies the standard of reversal embodied in article VI, section 13 of the California Constitution, i.e., the *Watson* (*People v. Watson* (1956) 46 Cal.2d 818, 836) test. (*People v. Breverman*, *supra*, 19 Cal.4th at pp. 177-178.) This Court also applied the *Watson* test to find no error when the trial court refused a defendant's request to instruct the jury on a lesser included offense. (*People v. Moye* (2009) 47 Cal.4th 537, 558 [rejecting instruction on heat of passion theory of voluntary manslaughter].) But this case is not governed by *Watson*, because, as appellant has demonstrated, the refusal to give CALJIC No. 8.73.1 denied his right to a fair trial and a meaningful opportunity to present a defense under the due process clause of the Fourteenth Amendment to the federal Constitution. The hallucination instruction bore directly on appellant's culpability for homicide by informing the jury that a hallucination could preclude premeditation and deliberation. When, as here, the denial of a requested instruction results in defense counsel's inability to the urge the jury to consider an applicable

defense that would negate an element of the offense, it is federal constitutional error and must be assessed under the *Chapman* (*Chapman v. California* (1967) 386 U.S. 18, 24) harmless-beyond-a-reasonable-doubt standard.[20]

It is axiomatic that federal standards of reversal govern federal constitutional violations occurring in state court criminal trials. The high court made this point clear in *Chapman*: "Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." (*Chapman v. California*, *supra*, 386 U.S. at p. 21.) This Court has acknowledged this basic principle. (See *People v. Moye*, *supra*, at 47 Cal.4th at p. 558, fn. 5 [in response to dissenting opinion that the *Chapman* standard should apply to denial of requested defense instruction, majority notes that defendant did not raise federal constitutional claim].) When the federal claim is proved, the state law standard for prejudice no longer governs. (*People v. Thomas* (2013) 218 Cal.App.4th 630, 633, 644 [finding federal constitutional error and reversing under *Chapman*, rather than *Watson*, where trial court denied defendant's request to instruct on heat of passion to negate malice].)

The question is whether the State can prove beyond a reasonable

---

[20] As discussed in Argument I., section C., *ante*, on direct appeal federal constitutional error is assessed under either the federal constitutional standard of automatic reversal or the *Chapman* harmless-beyond-a-reasonable-doubt standard. In contrast to his argument about the errors in giving CALJIC Nos. 8.71 and 8.72, appellant does not contend that automatic reversal is required on this claim; rather, *Chapman* is the applicable prejudice test.

doubt that the error in refusing to give CALJIC No. 8.73.1 did not contribute to the guilty verdicts on the murder and attempted murder charges. (*Chapman v. California, supra*, 386 U.S. at p. 24.) In this case, it cannot. In assessing prejudice, the Court must consider the impact of not giving the hallucination instruction on appellant's ability to negate the element of premeditation and deliberation on counts 1 through 6. In Argument I, section C.2., *ante*, and incorporated by reference here, appellant has shown in detail that the facts and circumstances of the shootings at both CAS and the Yellows left ample room for reasonable doubt about whether appellant shot his victims with a premeditated and deliberate intent to kill. The evidence that appellant may have had a motive for and the time to plan the crimes, carried a loaded gun, and fired multiple shots at his victims, when considered carefully and critically, did not present such overwhelming proof of premeditation and deliberation that at least one juror could not have entertained doubt about appellant's state of mind.

The evidence that appellant was experiencing hallucinations about the devil and shooting the devil in the 24-hour period from the shootings at the Yellows through his arrest expanded the evidentiary basis for such doubt. The record shows that just before his arrest, appellant was shooting his gun at random strangers and shooting into the air, while muttering to himself about the devil. (See, e.g., 11 RT 2101, 2102, 2104, 2116; 12 RT 2284.) Appearing threatening and fearless, appellant was shot because he would not comply with police commands. (11 RT 2098-2099; 12 RT 2292-2295.) The arresting officers believed appellant was behaving like someone under the influence of PCP. (11 RT 2171-2172.) The evidence further shows that appellant was talking about the devil just before he shot

Armando Torres, and within minutes of shooting and killing Susano Torres (9 RT 1714-1715, 1733, 1754-1755; 10 RT 1828-1832) and soon after the CAS crimes, which could support the inference that appellant was in the same state of mind at the time of the crimes as at the time of his arrest the following day. It is noteworthy that the prosecutor in her closing argument made this same connection by explicitly referring to appellant's statements about the devil on August 9, 2005, and linking them to similar statements he made to Armando prior to shooting him and then Susano on the previous day. (13 RT 2444, 2448-2449.) If it was proper for the prosecutor to rely on the nexus between appellant's statements on both days to prove his guilt beyond a reasonable doubt, then surely it was proper for the jurors to consider the same evidence in entertaining a reasonable doubt.

As explained in sections B. and C., *ante*, the trial court's refusal to give CALJIC No. 8.73.1 precluded defense counsel from using this evidence of appellant's devil hallucinations to counter the prosecution's contention that the shootings were premeditated and deliberated. Because the evidence on the element of premeditation and deliberation was not overwhelming, the State cannot prove the error harmless beyond a reasonable doubt. If the jury had been told that it could consider evidence that at the time of the shootings appellant was experiencing a hallucination, which contributed as a cause to the homicide crimes, on the critical issue of whether he killed with or without deliberation and premeditation, there was a reasonable possibility that at least one juror could have concluded that appellant did not act with the requisite mens rea for first degree murder and premeditated attempted murder. Accordingly, this Court cannot conclude that the guilty verdicts were "surely unattributable to the error" in refusing to deliver CALJIC No. 8.73.1. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p.

279.) The judgment must be reversed.

III.

THE CUMULATIVE EFFECT OF THE INSTRUCTIONAL ERRORS AT THE GUILT PHASE REQUIRES REVERSAL

Jury instructions are important. The rule requiring the trial court to instruct the jury on the law so that it may determine every material issue presented by the evidence – whether it be the prosecutor's theory supporting guilt or any defense thereto – is designed to ensure the most accurate possible judgment. (*People v. Breverman* (1998) 19 Cal.4th 142, 155.) As this Court stated long ago, "[j]ust as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense." (*People v. Sedeno* (1974) 10 Cal.3d 703, 716.) The trial court's duty to instruct on the applicable law is the means to guarantee "a verdict . . . no harsher or more lenient than the evidence merits." (*People v. Wickersham* (1982) 32 Cal.3d 307, 324.) It serves not only to secure the defendant's constitutional rights at trial, but also the broader interest of the overall administration of justice by protecting the jury's "truth-ascertainment function." (*People v. Breverman, supra*, 19 Cal.4th at p. 155, quoting *People v. Barton* (1995) 12 Cal.4th 186, 196).

Appellant has argued that each of the instructional errors at the guilt phase, addressed in Arguments I and II, *ante*, is prejudicial by itself. Each error raises serious question about whether the jury accurately and reliably found that the prosecution proved beyond a reasonable doubt an essential element of its case for capital murder – that appellant premeditated and deliberated the murders. Assuming, arguendo, this Court concludes that each error by itself is not prejudicial, it should find that the cumulative

effect of these errors nevertheless undermines confidence in the reliability of the adjudication of appellant's guilt and warrants reversal of the guilt judgments as to counts 1-3 and the true finding as to the special circumstance under section 190.2, subdivision (a)(3).

Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Chambers v. Mississippi* (1973) 410 U.S. 284, 298, 302-303 [cumulative errors denied defendant a fair trial]; *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32 ["[u]nder the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial"]; *People v. Williams* (2009) 170 Cal.App.4th 587, 646 ["[w]hen the cumulative effect of errors deprives the defendant of a fair trial and due process, reversal is required"].) In a capital case, the requirement of heightened reliability in the determination of guilt and penalty (see *Beck v. Alabama* (1980) 447 U.S. 625, 638) renders cumulative error and prejudice analyses particularly appropriate. 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. (*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].)

Appellant's case presents a convergence of three guilt-phase instructional errors. First, as set forth in Argument I, *ante*, the jury received two instructions, CALJIC Nos. 8.71 and 8.72, that diluted the prosecution's burden of proof and undermined the requirement of proof beyond a

reasonable doubt by misleading the jurors about the need for unanimity before fulfilling their duties in the event that they had a doubt as to the degrees of murder, or a doubt about whether the crimes were murder or manslaughter in the first instance. Second, as set forth in Argument II, *ante*, the trial court's refusal to give CALJIC No. 8.73.1, an instruction requested by appellant, that the jurors should consider any evidence that the perpetrator of an unlawful killing suffered from a hallucination, which contributed as a cause of the homicide, on the issue of whether the killing was done with or without deliberation and premeditation, violated appellant's state law and federal constitutional rights to a meaningful opportunity to present a defense to the charges of first degree premeditated and deliberate murder.

The combination of the instructional errors here had a synergistic effect as to the first degree murder convictions. Although the evidence was sufficient to warrant the giving of the requested hallucination instruction, its omission prevented defense counsel from pointing to that evidence and arguing that the law allowed the jurors to use such evidence to conclude that the State had not shouldered its burden of proof with respect to the premeditation and deliberation element of first degree murder. The error in failing to give the requested hallucination instruction was exacerbated by the delivery of an instruction that misled the jurors into believing that before any one juror could give appellant the benefit of a reasonable doubt as to whether he had premeditated and deliberated before killing, all twelve jurors had to share such a doubt. Thus, the jurors were deprived of any concrete means to connect the hallucination evidence in the case with a crucial legal principle allowing them to arrive at a reasonable doubt that appellant had premeditated and deliberated. The omission of the

hallucination instruction hamstrung a defense to the first degree murder charge that defense counsel had sought to employ, and the delivery of the misleading instruction setting forth the juror's duties with respect to giving appellant the benefit of any reasonable doubt as to whether he had committed first degree or second degree murder erected an impermissibly high barrier to a juror's ability to give voice to a reasonable doubt. (*People v. Eid* (2010) 187 Cal.App.4th 859, 884 ["The cumulative instructional errors impaired defendants' ability to present a complete defense"].) Considered together, these two instructional errors packed a more potent prejudicial punch than when examined separately. (See *United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381 [noting that in the presence of "a number of errors at trial, 'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors"].)

The cumulative effect of these errors so infected the guilt phase of appellant's trial with unfairness as to make the resulting first degree murder verdicts and the special circumstance finding a denial of the state and federal guarantees of due process. (Cal. Const., art. I, § 15; U.S. Const., 14th Amend.; *Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 298, 302-303.) Those verdicts, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476 [reversing heroin convictions for cumulative error]; *People v.*

Holt (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].) Additionally, in the absence of a valid first degree murder verdict, the true finding as to the multiple murder special circumstance cannot stand. Accordingly, the combined impact of the guilt phase instructional errors requires reversal of the entire judgment.

IV.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AT THE PENALTY PHASE BY DELETING AN APPLICABLE PARAGRAPH OF CALJIC NO. 2.20

The jury convicted appellant of three murders committed during two separate incidents which were separated by less than two hours. The prosecution's case for death rested heavily on the circumstances of those killings as well as the testimony of victim impact witnesses. Chief among the witnesses who testified concerning the shootings at the Yellows where Susano Torres was killed, was Armando Torres, Susano's older brother. Armando himself was the victim of an attempted murder for which appellant stood convicted. In addition to his testimony at the guilt phase, where he positively identified appellant as the man who shot him, Armando testified at the penalty phase about the lasting effects of being shot and the loss of his younger brother. Prior to his testimony at appellant's trial, Armando had been convicted of robbery, a felony, and he was impeached with that felony conviction when he testified at the guilt phase. However, at the penalty phase, the trial court delivered incomplete and insufficient jury instructions relating to the assessment of witness credibility, which prejudicially denied appellant his state and federal constitutional rights to a fair penalty trial, as well as his right to due process and a reliable penalty determination, requiring reversal of the death judgment. (Cal. Const., art. I, §§ 15, 16, 17; U.S. Const., 8th & 14th Amends.)

A. Penalty Phase Jury Instruction Hearing

At the hearing to decide the jury instructions to be given at the penalty phase, the trial court addressed the topic of the content of CALJIC No. 2.20, the instruction on what jurors may consider in assessing the believability of a witness. In a brief discussion with counsel, the trial court

reviewed whether or not evidence supported the inclusion of any of the six bracketed paragraphs in the instruction.[21]

During this discussion, when the trial court stated that "no witness had a felony conviction," defense counsel agreed, and the prosecutor remained silent. (17 RT 2948.) The trial court fashioned an instruction, ultimately delivered to the jury, which eliminated the last six paragraphs of the pattern CALJIC No. 2.20 instruction, as well as the reference to "affirmation" in the instruction's introductory paragraph.[22] (65 CT 17384;

---

[21] Inclusion of one or more of the six bracketed paragraphs was contingent on the presence of evidence of either (1) the witness's prior statements that were consistent or inconsistent with his or her testimony; (2) the character of the witness for honesty or truthfulness or their opposites; (3) the witness's admission of untruthfulness; (4) the witness's prior conviction of a felony; (5) past criminal conduct of the witness amounting to a misdemeanor; or (6) whether the witness testified under a grant of immunity.

[22] Instruction No. 7 given by the trial court read as follows:

> Every person who testifies under oath [~~or affirmation~~] is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness.
>
> In determining the believability of a witness you may consider anything that has a tendency to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following:
>
> The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness testified;
>
> The ability of the witness to remember or to communicate any

(continued...)

17 RT 2947-2948, 2969-2970.)

The trial court and defense counsel failed to recall that prosecution witness Armando Torres, who testified at both the guilt and penalty phases, had admitted that he had been convicted of robbery, a felony. (9 RT 1706 [Armando's admission of his felony conviction during guilt phase

---

[22] (...continued)
matter about which the witness testified;

The character and quality of that testimony;

The demeanor and manner of the witness while testifying;

The existence or nonexistence of a bias, interest, or other motive;

The existence or nonexistence of any fact testified to by the witness;

The attitude of the witness toward this action or toward the giving of testimony [.] [;]

~~[A statement [previously] made by the witness that is [consistent] [or][inconsistent] with [his] [her] testimony] [.] [;]~~

~~[The character of the witness for honesty or truthfulness or their opposites] [;]~~

~~[An admission by the witness of untruthfulness] [;]~~

~~[The witness's prior conviction of a felony] [;]~~

~~[Past criminal conduct of a witness amounting to a misdemeanor] [;]~~

~~[Whether the witness is testifying under a grant of immunity~~].

(65 CT 17384.)

testimony].) As a result, the penalty phase jury was not instructed that a witness's prior conviction of a felony bore on his credibility, either as set forth in CALJIC No. 2.20 or CALJIC No. 2.23.[23] In contrast, the version of CALJIC No. 2.20 given at the guilt phase contained the language pertaining to felony convictions (65 CT 17240; 12 RT 2345) and the jury received CALJIC No. 2.23 at the guilt phase as well (65 CT 17244; 12 RT 2346). At the penalty phase, however, the jury was specifically instructed to disregard the guilt phase instructions. (65 CT 17394; 17 RT 2974.)

B. The Court Erred When It Failed Sua Sponte To Instruct The Jury With All Applicable Provisions Of CALJIC No. 2.20

A trial court has a duty to instruct sua sponte on the general principles of law relevant to the evidence, including general principles relating to the evaluation of evidence. (*People v. Carter* (2003) 30 Cal.4th 1166, 1219-1221; § 1093, subd. (f).) That duty includes the giving of correct instructions regarding the credibility of witnesses. (*People v. Horning* (2004) 34 Cal.4th 871, 910-911; see also, § 1127.) A claim of instructional error is reviewed de novo.[24] (*People v. Cole* (2004) 33 Cal.4th

---

[23] CALJIC No. 2.23 (7th ed. 2002) provides:

> The fact that a witness has been convicted of a felony, if that is a fact, may be considered by you only for the purpose of determining the believability of that witness. The fact of a conviction does not necessarily destroy or impair a witness's believability. It is one of the circumstances that you may consider in weighing the testimony of that witness.

[24] Appellant's claim of instructional error is cognizable on appeal notwithstanding defense counsel's lack of objection below. This Court has (continued...)

1158, 1210.)

CALJIC No. 2.20 informs the jurors that they are "the sole judges of the believability of a witness and the weight to be given the testimony of each witness." The instruction lists certain factors the jurors may consider in determining credibility, one of which is a witness's felony conviction. The instruction should be given sua sponte in every criminal case, omitting paragraphs inapplicable under the evidence. (*People v. Horning*, *supra*, 34 Cal.4th at pp. 910-911; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883-884; accord, Use Note, CALJIC No. 2.20 (7th ed. 2002) pp. 49-50.)

Here, just as in *People v. Horning*, *supra*, 34 Cal.4th at p. 910, "the court, with the concurrence of the parties, mistakenly believed no witness had suffered a felony conviction" and, accordingly, failed to mention it or give appropriate instructions. (*Ibid.*) In this case, where the jurors had received an appropriate version of CALJIC No. 2.20 at the guilt phase, but not at the penalty phase, that omission was error.

The failure of a trial court to reinstruct a jury during the penalty phase on the applicable principles of evaluating the credibility of witnesses, as provided in CALJIC No. 2.20, is error. (*People v. Blacksher* (2011) 52 Cal.4th 769, 845-846; *People v. Carter*, *supra*, 30 Cal.4th at pp. 1219-1221.) In both *Carter* and *Blacksher*, the respective trial courts specifically instructed the penalty phase jurors pursuant to CALJIC No. 8.84.1 to disregard all other instructions given at earlier phases of the trial. (*People v. Carter*, *supra*, at p. 1218; *People v. Blacksher*, *supra*, at p. 846.)

---

[24] (...continued)
held that appellate review of instructional error is warranted under section 1259, even without objection in the trial court, to the extent that any erroneous instruction affects the substantial rights of a defendant. (See, e.g., *People v. Bonilla* (2007) 41 Cal.4th 313, 329, fn. 4.)

Thereafter, the trial court in *Carter* neglected to instruct the penalty phase jurors with several instructions pertaining to the evaluation of testimony, including CALJIC No. 2.20.[25] (*People v. Carter*, *supra*, at p. 1219.) Similarly, in *Blacksher*, the trial court neglected to instruct the penalty phase jurors with a group of instructions containing the applicable principles for evaluating witness credibility, including both CALJIC No. 2.20 *and* CALJIC No. 2.23. (*People v. Blacksher*, *supra*, at p. 845.)

As in *Carter* and *Blacksher*, the trial court at the penalty phase of appellant's trial instructed the jury to disregard all other instructions given at "other phases" of appellant's trial. (65 CT 17394; 17 RT 2974.) It must be presumed that appellant's jury acted as it was instructed to do. (*People v. Carter*, *supra*, 30 Cal.4th at p. 1219; *People v. Sanchez* (1995) 12 Cal.4th 1, 79.) Although the trial court's truncated delivery of CALJIC No. 2.20, omitting the required language that a witness's felony conviction is a matter to be considered in determining the believability of his or her testimony, was not as all-encompassing as the omissions this Court identified as error in *Carter* and *Blacksher*, the trial court here committed instructional error nonetheless.

The instructional omission was not only state-law error, but it also violated the federal Constitution. At the penalty phase of a capital case, the jury has broad discretion in weighing the aggravating and mitigating evidence. Omitting the instruction discouraged the jury from testing the evidence, and violated appellant's federal constitutional rights to due

---

[25] Among the omitted instructions were several that the Court had previously held to be required in every criminal case, i.e., CALJIC Nos. 2.22 [weighing conflicting testimony]; 2.80 [expert testimony]; 3.11 [accomplice testimony]; and 3.12 [weighing accomplice testimony]. (*People v. Carter*, *supra*, at p. 1219.)

process and a reliable penalty determination. (*Simmons v. South Carolina* (1994) 512 U.S. 154, 168-170 [due process requires accuracy in jury instructions]; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 342 (conc. opn. of O'Connor, J.) [reliability of capital sentencing process enhanced by accurate instructions].)

> A fundamental premise of our criminal trial system is that 'the *jury* is the lie detector.' [Citation.] Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' [Citation.]

(*United States v. Scheffer* (1998) 523 US 303, 313.)

The question for the jury was: taking all relevant credibility factors into account, should Armando Torres's testimony about the crimes and their impact on him and his family be believed? Appellant was entitled to have the jury accurately and comprehensively assess that testimony; that assessment was part of appellant's "right to require the prosecution's case to survive the crucible of meaningful adversarial testing." (*United States v. Cronic* (1984) 466 U.S. 648, 656.) As part of his case for life, appellant was entitled to rebut the victim-impact testimony presented by the prosecution in aggravation. (*Payne v. Tennessee* (1991) 501 U.S. 808, 823.) It is a valid defense that the testimony of witnesses indispensable to the prosecution's case is false. (*United States v. Partin* (6th Cir. 1974) 493 F.2d 750, 761-762.) In such a case, the defendant is entitled to appropriate instructions guiding the jurors in their evaluation of witness credibility, including factors affecting credibility such as impeachment with proof of prior felony convictions. (*United States v. Partin, supra*, 493 F.2d at pp. 761-762.) Omitting such instructions deprived the jury of the law necessary

for its rigorous assessment of the Armando's penalty phase testimony, and violated appellant's federal constitutional rights to due process and a reliable penalty determination. This is particularly true where the jurors received appropriate instructions on factors affecting Armando's credibility at the guilt phase, but incomplete instructions on such factors at the penalty phase coupled with an instruction to disregard the guilt phase instructions.

C. The Instructional Error Requires Reversal Of The Death Sentence

In a capital case, the state standard of prejudice for penalty phase error is whether there is a reasonable possibility that the error affected the verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 446-448.) The burden of proof under the state standard is on the defendant. (*People v. Hamilton* (2009) 45 Cal.4th 893, 918; *People v. Carter*, *supra*, 30 Cal.4th at pp. 1221-1222.) Under the federal Constitution, such error requires reversal unless the State proves it was harmless beyond a reasonable doubt, i.e., that the error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24.) In this case, several factors come into play that establish the error was prejudicial under both the state law and the federal Constitution.

First, it is not a foregone conclusion that the jury would have sentenced appellant to death solely on the basis of the incident at CAS. It is true that defense counsel's argument for LWOP treated all the crimes for which appellant stood convicted as a single and aberrant episode in appellant's life. The crimes were best understood as the tragic consequence of appellant's relapse into PCP use and thus inconsistent with his nonviolent past history as a small-time drug dealer. (17 RT 3008-3009.) However, the jury could not have been unaware that the CAS incident was different from the shootings at the Yellows. The CAS incident had been

triggered by appellant's irrational and out-of-all-proportion reaction when he arrived at CAS and realized that the sale of the defective car to Dorene Small had been completed and, in his view, she had been cheated. In contrast, the evidence presented at trial did not readily account for the conduct of the person who shot the Torres brothers at the Yellows soon after the CAS shootings. The incident at the Yellows could thus be viewed by the jurors as a truly senseless and inexplicable crime, and one in which a blameless juvenile was killed. Such a crime, committed close on the heels of the CAS shooting, could well have tipped the scales in favor of the death penalty for appellant.

Second, when a witness whose testimony is beneficial to the prosecution has been impeached with proof of a prior felony conviction, the defendant benefits from a jury instruction identifying such a conviction as a factor affecting the witness's credibility. (*People v. Horning*, *supra*, 34 Cal.4th at p. 911.) Armando Torres was unquestionably such a witness at both the guilt and penalty phase of appellant's trial. In that context, where Armando's guilt phase testimony had been critical to the prosecution in obtaining appellant's conviction for the first degree murder of Susano, at the penalty phase his testimony as a victim impact witness possessed added significance in the prosecution's successful effort to obtain a death verdict. This Court has recognized that under section 190.3, factors (a) and (k) authorize the admission of any evidence relevant to aggravation and mitigation respectively, including the nature and circumstances of the crimes for which the defendant stands convicted. (*People v. Gay* (2008) 42 Cal.4th 1195, 1219-1220.) The trial court, by instructing the jurors to disregard the guilt phase instructions (which provided a legal conduit for the jurors to channel any mistrust they might have had of Armando's

testimony at the guilt phase), and then neglecting to repeat the appropriate paragraph of CALJIC No. 2.20 dealing with felony convictions, provided an unwarranted veneer of credibility to the entirety of Armando's testimony, and especially to what he said at the penalty phase. Thus, the instructional error might well have tilted the scales in favor of the jury's death verdict.

Armando's penalty phase testimony not only emphasized the fraternal loss he felt as a result of Susano's murder, but stressed that his own life had spiraled downward into perpetual criminality and drug addiction as a consequence of appellant's crimes at the Yellows. This doleful testimony, if believed, was of a different class to the harm attested to by the victim impact witness from the CAS shootings.

To be sure, Jerry Payan, like Armando, had suffered physical injury from appellant's criminal behavior. And John and Mary Mawikere, like Armando, lost a member of their family. Yet only Armando's testimony described a present and future life hopelessly affected by the impact of appellant's crime. It is also true that at the penalty phase, "victim impact" evidence from other members of the Torres family was introduced but their testimony was not as detailed as Armando's, nor were these witnesses present at the scene at the time Susano was shot and killed. Moreover, unlike the other members of his family, Armando suffered painful physical injury when he was shot by appellant. As described above, Armando's account was unique among the penalty phase witnesses who testified about the aggravating aspects of the crimes at the Yellows. For these reasons, the testimony of other members of his family at the penalty phase could not render the instructional error harmless beyond a reasonable doubt.

Early in her closing argument at the penalty phase, the prosecutor addressed the physical effects Armando suffered as a result of being shot by

appellant, but argued that the damage he had caused to Armando's life was "probably" even more far-reaching than mere physical pain. (17 RT 2991.) Thereafter, she elected to conclude her summary of the aggravating evidence with a discussion of Armando's testimony where she emphasized how the experience of coping in the aftermath of his brother's murder had devastated Armando, set back his recovery from methamphetamine abuse, and resulted in his inability to stay out of jail. (17 RT 2999.) Her argument then segued into a plea for death as the only appropriate penalty. (17 RT 2999-3001.) Thus, the prosecutor's closing argument itself undercuts any possible notion that the instructional error here was harmless beyond a reasonable doubt. "[T]he likely damage is best understood by taking the word of the prosecutor . . . ." (*Kyles v. Whitley* (1995) 514 U.S. 419, 444; *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323; *People v. Roder* (1983) 33 Cal.3d 491, 505.)

Finally, in light of the mitigating evidence presented, the State cannot show that the instructional omission here, pertaining to the jury's evaluation of the aggravating evidence, was harmless beyond a reasonable doubt. Not only did the mitigating evidence chronicle the pitiful circumstances of appellant's upbringing, it also highlighted his affection for, and kindness to, young children – not only his own and Small's, but even those in the Torres family living with Rafaela Navarrete – and demonstrated that the violent crimes committed on August 8, 2005, were an aberration, given appellant's generally non-violent history, and both impulsive and drug-induced.

Since the prosecution cannot establish that these federal constitutional errors in unfairly buttressing Armando's credibility were harmless beyond a reasonable doubt (see *Chapman v. California*, *supra*,

386 U.S. at p. 24), the penalty judgment must be reversed. This Court's holdings in *Carter* and *Blacksher* that similar penalty phase instructional errors were harmless beyond a reasonable doubt under the federal standard of review of constitutional error are inapposite because both cases are factually distinguishable. (See *People v. Blacksher*, *supra*, 52 Cal.4th at p. 846; *People v. Carter*, *supra*, 30 Cal.4th at p. 1222.)

This Court's opinion in *Carter* contains no discussion of any claim that the omission of CALJIC No. 2.20 in its entirety at the penalty phase was prejudicial. Rather, this Court only undertook to examine why the omission of CALJIC Nos. 1.02, 2.00, 2.80, and 3.01 were not prejudicial. (*People v. Carter*, *supra*, 30 Cal.4th at pp. 1220-1222.) As such, there is nothing to be gleaned from *Carter* insofar as a prejudice analysis is concerned. Certainly, the *Carter* court's ruling finding that the omission of any of the instructions for assessing witness credibility was harmless beyond a reasonable doubt is not dispositive of the argument appellant makes here. The interplay between the omitted generic instructions and the evidence in that case is nowhere as distinctive as in the case at bar, where the significance of the fact that a witness important to the prosecution had previously been convicted of a felony involving moral turpitude was withheld from the jurors. (*People v. Castro* (1985) 38 Cal.3d 301, 314 [moral turpitude involves "the general readiness to do evil"]; see also *People v. Olmedo* (1985) 167 Cal.App.3d 1085, 1096-1097 [explaining rationale of *Castro*'s rule].)

In *Blacksher*, the defendant claimed that the testimony of his ex-girlfriend at the penalty phase, who asserted that defendant had raped and beaten her, "was allowed to go before the jury 'unimpeached' because it was not instructed to consider her prior felony convictions in assessing

her credibility" pursuant to CALJIC No. 2.23. (*People v. Blacksher, supra*, 52 Cal.4th at p. 846.) In rejecting the claim that this instructional error was prejudicial, this Court enumerated a number of factors in concluding that the witness's prior felony convictions were of marginal value in assessing credibility. First, Blacksher had a full opportunity to cross-examine the witness but made no effort to impeach her version of the events. Second, there was no evidence the witness testified in exchange for any reward or immunity in relation to her prior criminality. Finally, the witness's testimony was detailed, vivid, and otherwise credible. (*Ibid.*)

In contrast to the picture this Court painted in *Blacksher*, at appellant's trial his counsel actively sought to impeach Armando's version of the events at the guilt phase by pointing out that Armando had given inconsistent accounts to the police and by eliciting his admission that he had smoked methamphetamine immediately prior to the shootings at the Yellows. Additionally, at the penalty phase, defense counsel elicited Armando's admission that he was in custody for crimes involving great bodily injury and the use of a firearm, drugs, and "a strike." (15 RT 2637.) Such testimony suggested that Armando believed he stood to benefit by testifying as a prosecution witness. Finally, Armando's testimony at either phase of the trial cannot be described as sufficiently "detailed, vivid, and appeared otherwise credible" (*People v. Blacksher, supra*, 52 Cal.4th at p. 846) so as to excuse the trial court's error in failing to fully instruct the jury pursuant to CALJIC No. 2.20. These distinguishing circumstances also demonstrate a reasonable possibility that the trial court's error affected the jury's verdict, so that prejudice has been demonstrated under state law as well. (*Ibid.*)

At the penalty phase of a capital case, where the jury has broad

discretion in weighing the aggravating and mitigating evidence, every instruction regarding the believability of a witness is important to ensure a defendant receives a fair trial resulting in a reliable sentence. (*Simmons v. South Carolina*, *supra*, 512 U.S. at pp. 168-170; *Boyde v. California* (1990) 494 U.S. 370, 380; *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 342 (conc. opn. of O'Connor, J.).) Here, Armando's testimony provided the most direct evidence bearing on the jurors' understanding of appellant's conduct at the Yellows, and as set forth previously, the death of Susano and its effect on Armando may well have been the determinative factor in the jurors' decision to impose the death penalty. Where as here, the instruction to the jury was constitutionally defective, the error cannot be deemed harmless beyond a reasonable doubt and the death judgment must be reversed. (*United States v. Partin*, *supra*, 493 F.2d at pp. 761-762 [holding that in the case of the trial court's failure to instruct on witness credibility factors, an appellate court "cannot paper this over with the doctrine of harmless error"].)

V.

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

Many features of California's capital sentencing scheme violate the United States Constitution. However, this Court 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 would 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 to California's sentencing scheme in order to urge reconsideration of these claims and to preserve them for federal review. Should the Court decide to reconsider any of these claims, appellant requests leave to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad

To pass constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few murder 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 criterion 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, section 190.2 listed 22 special circumstances which in total made 33 factually distinct murders eligible for the death penalty.

Given this large number of special circumstances, California's statutory scheme failed to identify the few cases in which the death penalty might have been appropriate, and instead made almost everyone convicted of first degree murder eligible for the death penalty. This Court has routinely rejected these challenges to the statute's lack of meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down section 190.2 and the current statutory scheme because they are so over-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application Of Penal Code Section 190.3(a) Violated Appellant's Constitutional Rights

Section 190.3, factor (a), directed appellant's jurors to consider in aggravation the "circumstances of the crime." (See 65 CT 17395-17396; 17 RT 2974-2976 [CALJIC No. 8.85].) In capital cases throughout California, prosecutors have urged juries to weigh in aggravation almost every conceivable circumstance of a crime, even those that, from case to case, are starkly opposite. In addition, prosecutors use factor (a) to embrace the entire spectrum of factual circumstances inevitably present in any homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the alleged motive for the killing, the location of the killing, and the

impact of the crime on the victim's surviving relatives.

Here, the centerpiece of the prosecutor's case in aggravation was the impact of the crimes on the victims and their families. The prosecutor also stressed that the victims' age – Mario Lopez was a "grandfather" (17 RT 2990) and Susano Torres was only a "16 year old" (17 RT 2991) – should be considered in aggravation. Likewise, she argued that appellant's age at the time of crimes – 35 – was aggravating; in her words, by the time a person reached that age, society must say "enough is enough." (17 RT 2985.)

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factor" has been applied in such a random and arbitrary manner that almost every feature of every murder can be and has 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 jurors to assess death upon no basis other than that the particular set of circumstances surrounding the 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 this Court has repeatedly rejected the claim that permitting the jurors to consider the "circumstances of the crime" within the meaning of section 190.3, factor (a), results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595,

641, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Appellant urges the Court to reconsider this holding.

C. California's Death Penalty Statute And The CALJIC Instructions Given In This Case Failed To Set Forth The Appropriate Burden Of Proof And The Requirement Of Unanimity

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

California law does not require, and at the time of the offense charged against appellant did 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. 8.86 and 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"].) The jurors were not told they had to find beyond a reasonable doubt either the existence of any aggravating circumstances or that the aggravating circumstances outweighed the mitigating circumstances, before determining whether or not to impose a death sentence. (65 17395-17396; 17 RT 2974-2976 [CALJIC No. 8.85], 65 CT 17408-17409; 17 RT 3010-3011 [CALJIC No. 8.88].)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604 and *Cunningham v. California* (2007) 549 U.S. 270, 281 now require that any fact used to support an increased sentence (other than a prior conviction) be submitted to the jurors and proved beyond a reasonable

doubt. In order to impose the death penalty in this case, appellant's jurors had to first make several factual findings: (1) that aggravating circumstances were present; (2) that the aggravating circumstances outweighed the mitigating circumstances; and (3) that the aggravating circumstances were so substantial as to make death an appropriate punishment. (65 CT 17408-17409; 17 RT 3010-3011 [CALJIC No. 8.88].) Because these additional findings were required before the jurors could impose the death sentence, *Apprendi*, *Blakely*, *Ring*, and *Cunningham* require that each of these facts be found, by the jury, to have been established beyond a reasonable doubt. The court failed to so instruct the jurors in this case 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, overruled on another ground by *People v. Breverman* (1998) 19 Cal.4th 142, 149; 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, disapproved on another ground in *People v. Riccardi* (2012) 54 Cal.4th 758, 819-821). The Court has rejected the argument that *Apprendi* and *Ring* impose a reasonable doubt standard on California's 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 *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Setting aside the applicability of the Sixth Amendment to

California's penalty phase proceedings, appellant also contends due process and the prohibition against cruel and unusual punishment mandate that the jurors in a capital case 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 the claim that either the Fourteenth Amendment or the Eighth Amendment requires the jurors be instructed that to return a death sentence they must find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances and that death is the appropriate penalty. (*People v. Blair*, *supra*, 36 Cal.4th at p. 753.) Appellant requests the Court reconsider this holding.

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

Evidence Code section 520, which provides that the prosecution always bears the burden of proof in a criminal case, creates a legitimate expectation as to the way a criminal prosecution will be decided under state law, 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 jurors should have been instructed, but were not, that the state had the burden of persuasion regarding the existence of any and all circumstances in aggravation, the determination whether aggravating circumstances outweighed mitigating circumstances, and the appropriateness of the death penalty, and that it was presumed life without parole was the appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given in this case (65 CT 17395-17396, 17408-17409), fail to provide the jurors with the guidance legally necessary for the imposition of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. The prosecutor in turn argued there was no burden of proof at the penalty phase, excepting factors (b) and (c), thereby exacerbating the problem. (17 RT 2987.) This Court has held 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 therefore 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 fact 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 Regarding Aggravating Circumstances

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 jurors, ever found a single set of aggravating circumstances that rendered death the appropriate penalty. (See *Ballew v. Georgia* (1978) 435

U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating circumstances 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 that 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 appellant's jurors to unanimously find any and all aggravating circumstances were established also violated the equal protection clause of the Fourteenth Amendment. In California, when a criminal defendant has been charged with certain special allegations that may increase the severity of his sentence, the jurors must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., § 1158a.) Because 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 to a capital defendant violates the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Y1st* (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), by its inequity violates the equal protection clause of the Fourteenth Amendment and by its irrationality violates both the Fourteenth Amendment due process clause and Eighth Amendment cruel and unusual punishment clause, 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.

D. California's Death Penalty Statute And The CALJIC Instructions Given In This Case On Mitigating And Aggravating Circumstances Violated Appellant's Constitutional Rights

1. The Instructions Given Failed to Inform the Jurors That the Central Sentencing Determination Is Whether Death Is the Appropriate Penalty

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 did not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. (65 CT 17408-17409.) These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate. (See *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.) On the other hand, jurors find death to be "warranted" when they find the existence of a

special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions here violated the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this challenge to CALJIC No. 8.88. (*People v. Arias, supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

2. The Use of Adjectives in the List of Potential Mitigating Circumstances Is Impermissibly Restrictive

The inclusion in the list of potential mitigating circumstances of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; § 190.3, subd. (g); 65 CT 17395-17396) impeded the jurors' consideration of mitigation, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367, 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Appellant is aware the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

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

The question whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances [were] so substantial in comparison with the mitigating circumstances that it warrant[ed] death instead of life without parole." (65 CT 17408-17409; 17 RT 3010-3011 [CALJIC No. 8.88].) 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 violated 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 the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) Appellant requests this Court reconsider that opinion.

4. The Jurors Should Not Have Been Instructed on Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case because no evidence was presented to support them – specifically, factor (e) ("Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act"), factor (g) ("Whether or not the defendant acted under extreme duress or under the substantial domination of another person"), and factor (j) ("Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor"). (65 CT 17395-17396; 17 RT 2974-2976.) The trial court failed to omit those factors from the jury instructions (*ibid.*), likely confusing the jurors and preventing them from making a 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* (2006) 39 Cal.4th 566, 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury instructions.

5. The Jurors Should Have Been Instructed That Statutory Mitigating Circumstances Were Relevant Solely As Potential Mitigation

In accordance with customary state court practice, nothing in the instructions given in appellant's case advised the jurors 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 jurors' appraisal of the evidence. (65 CT 17395-17396; 17 RT 2974-2976.) This 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 mitigating circumstances. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289.) Appellant's jurors were not instructed that a "not" answer as to any of these "whether or not" sentencing factors did not establish an aggravating circumstance. Consequently, the jurors were free to aggravate appellant's sentence based on non-existent or irrational aggravating circumstances, 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.) As such, appellant asks the Court to reconsider its holding that the court need not instruct the jury that certain sentencing factors are only relevant as potential mitigation.

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

Section 190.3 directs the jury in a capital case to impose a sentence

of life imprisonment without possibility of parole if 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 by the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Here, the trial court gave CALJIC No. 8.88, which did not address this proposition, but only informed the jurors of the circumstances that permitted the rendering of a death verdict. (65 CT 17408-17409; 17 RT 3010-3011.) Because it fails to conform to the mandate of section 190.3, the instruction violated appellant's right to due process of law. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that because CALJIC No. 8.88 tells the jurors that death can be imposed only if they find aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits 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 appropriate, but failing to explain when a life without 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.)

7. The Instructions Given Erroneously Precluded the Jurors from Considering Sympathy for Appellant's Family and Limited Their Consideration of the Impact His Execution Would Have on Them

The jurors in this case were instructed, pursuant to CALJIC No. 8.85, factor (k), that they could not consider sympathy for appellant's family as a factor in mitigation and should disregard evidence of the impact of appellant's execution on his family unless it "illuminate[d] some positive quality of the defendant's background or character." (65 CT 17395-17396; 17 RT 2974-2976.)

The prohibition against the jurors' consideration of sympathy for defendant's family and the limitation on its consideration of the impact appellant's execution would have on them deprived appellant of his Eighth and Fourteenth Amendment right to have the jurors consider "as a mitigating factor, any aspect of a defendant's character or record *and any of the circumstances of the offense* that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 604, italics added; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112-114.) A defendant need not demonstrate a nexus between the mitigating circumstances and the crime. (*Tennard v. Dretke* (2004) 542 U.S. 274, 289; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5.) The threshold of relevance for admitting mitigation is low. (*Tennard v. Dretke*, *supra*, 542 U. S. at p. 285.) Thus, a state cannot bar "'the consideration of . . . evidence if the sentencer could reasonably find that it warrants a sentence less than death.'" (*Ibid.*, quoting *McKoy v. North Carolina*, *supra*, 494 U.S. at p. 441; see also *People v. Gonzales* (2012) 54 Cal.4th 1234, 1287.) Under this standard, appellant's jurors should not have been precluded from

considering sympathy for appellant's family or have been limited in their consideration of the impact of appellant's execution.

Considerations of fairness and parity, under the due process clause, further support a capital defendant's entitlement to have the jurors consider sympathy for his family and the impact of his execution on them. In *Payne v. Tennessee* (1991) 501 U.S. 808, in which the Supreme Court held that testimony as to the impact of a murder on the victim's family was relevant and admissible in aggravation, the underlying premise of the majority opinion is that capital sentencing requires an even balance between evidence available to the defendant and evidence available to the state. (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 820-826.) In his concurring opinion, Justice Scalia explicitly noted that because the Eighth Amendment required the admission of all mitigating evidence on the defendant's behalf, it could not preclude victim impact evidence because "the Eighth Amendment permits parity between mitigating and aggravating factors." (*Id.* at p. 833.) Parity means that if the state may introduce victim impact and sympathy evidence, the defendant should not be precluded from introducing comparable evidence.

The instruction given in appellant's case prohibiting the consideration of sympathy for his family and limiting the consideration of execution impact evidence is also inconsistent with Penal Code section 190.3, which provides in pertinent part that: "In the proceedings on the question of penalty, evidence may be presented by both the people *and the defendant* as to *any* matter relevant to aggravation, mitigation *and sentence*, ..." (§ 190.3, italics added.) The impact of the defendant's execution on his family, as such, is relevant to the "sentence." Because CALJIC No. 8.85 fails to conform to the mandate of section 190.3, the instruction

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

Appellant recognizes this Court has upheld the giving of the instruction appellant challenges here. (*People v. Ochoa* (1999) 19 Cal.4th 353, 454-456; *People v. Bemore* (2000) 22 Cal.4th 809, 855-856.) Appellant urges the Court to reconsider its analysis. For one thing, while the Supreme Court's decision in *Payne* predated this Court's decisions in *Ochoa* and *Bemore*, the trials in *Ochoa* and *Bemore* occurred before *Payne* was decided; thus the juries in those cases were not permitted to consider *either* sympathy for the victim's family, *or* sympathy for the family of the defendant. (*People v. Ochoa*, *supra*, 19 Cal.4th at pp. 454-455, fn. 9; *People v. Bemore*, *supra*, 22 Cal.4th at p. 856, fn. 21.) Thus, the parity concerns addressed in *Payne* were not implicated. In any event, appellant maintains *Ochoa* and *Bemore* were wrongly decided as a matter of federal constitutional law and urges their reconsideration.

8. The Jurors Should Have Been Instructed on the Presumption That Life Without Possibility of Parole Was the Appropriate Sentence

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.) At the penalty phase of a capital case, the presumption that life without possibility of parole is the appropriate penalty 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 that life without possibility of parole is the appropriate sentence. (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* (1993) 507 U.S. 272.)

The trial court's failure to instruct the jurors that the law favors life and presumes the sentence of life imprisonment without possibility of parole to be the appropriate sentence violated appellant's Eighth Amendment right to be free from cruel and unusual punishment and to have his sentence determined in a reliable and non-arbitrary manner, and his Fourteenth Amendment right to due process and the equal protection of the laws.

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 subsections of this argument demonstrate, this state's death penalty law is fundamentally deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

E. Failing To Require The Jurors To Make Written Findings Violated Appellant's Right To Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), the jurors in this case were not required to make any written findings at 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, as well as his right to meaningful appellate review to ensure 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*, *supra*, 39 Cal.4th at p. 619.) Appellant urges the Court to reconsider its decisions on the necessity of written findings.

F. The Prohibition Against Intercase Proportionality Review Guarantees Arbitrary And Disproportionate Imposition Of The Death Penalty

California's capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between appellant's and other similar cases regarding the relative proportionality of the sentence imposed, i.e., intercase proportionality review. (*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 in violation of the defendant's right to equal protection or to due process. For this reason, appellant urges the 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 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 circumstances 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.) At the penalty phase of 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 the Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but asks the Court to reconsider them.

H. California's Imposition Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms

This Court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty, violates international law, the Eighth and Fourteenth Amendments and "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*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.

VI.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINE THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

As set forth with regard to the guilt phase trial, even assuming that none of the errors there, by itself, is prejudicial, the cumulative effect of these errors undercuts confidence in the fairness of that trial and the reliability of the jury's guilt verdicts, finding of special circumstance, and determination that death is the appropriate sentence for appellant, and warrants reversal of the judgment. (See Argument III, *ante*, which is incorporated here.) Per se reversal of all the murder verdicts is required separately by the instructional errors addressed in Argument I, *ante*. But even if the instructional error addressed in Argument I, *ante*, does not require automatic reversal, the prejudice from the constitutionally-defective instructions, either alone or in combination with the prejudice resulting from the instructional error addressed in Argument II, *ante*, unfairly impeded appellant's chances of non-capital second degree murder convictions.

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1243-1244 [cumulative effect of penalty phase errors prejudicial under state or federal constitutional standards]; *People v. Brown* (1988) 46 Cal.3d 432, 463 [applying reasonable possibility standard for reversal based on cumulative error].)

In this case, as set out in Argument I, *ante*, appellant's capital

murder convictions must be reversed because the trial court delivered CALJIC Nos. 8.71 and 8.72 – two constitutionally defective guilt phase instructions containing a unanimity-of-doubt requirement which subverted the reasonable doubt standard, thereby lowering the State's burden of proof for murder and first degree murder. The trial court also erroneously declined to deliver CALJIC No. 8.73.1 at appellant's request, which would have instructed the jury that it should consider any evidence that appellant suffered from a hallucination which contributed as a cause of the homicide on the issue of whether he killed with or without deliberation and premeditation. (See Argument II, *ante*.) This error precluded defense counsel from urging the jury to use such evidence to negate an element of the charged offenses. Together, these errors had a synergistic effect as to the first degree murder convictions. (See Argument III, *ante*.) Considered alone or in combination, they require reversal of appellant's conviction and they adversely affected the jury's sentencing determination.

These errors were in turn exacerbated by the instructional error committed at the penalty phase when the trial court deleted an appropriate paragraph from CALJIC No. 2.20, pertaining to the jury's evaluation of witness credibility. (See Argument IV, *ante*.) Finally, numerous defects in California's death penalty statute and the CALJIC instructions given also warrant relief. (See Argument V, *ante*)

In this way, the errors at the guilt phase and the penalty phase – even if individually not found to be prejudicial – preclude the possibility that the jury reached an appropriate verdict in accordance with the state death penalty statute or the federal constitutional requirements of a fundamentally fair, reliable, non-arbitrary and individualized sentencing determination. Reversal of the death judgment is mandated because it cannot be shown that

the errors, individually, or collectively, had no effect on the 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* (1985) 472 U.S. 320, 341.) The cumulative effect of all of the errors set out herein requires a reversal of the entire judgment.

CONCLUSION

For all of the foregoing reasons, the judgment must be reversed.

DATED: July 3, 2014

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

HARRY GRUBER
Senior Deputy State Public Defender
Attorneys for Appellant

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(b)(1)(A))

I, Harry Gruber, am the Senior Deputy State Public Defender assigned to represent appellant, Louis Mitchell, Jr., in this automatic appeal. I directed a member of our staff to conduct 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 is 41,662 words in length, excluding the tables and certificate.

Dated: July 3, 2014

Harry Gruber
Senior Deputy State Public Defender

DECLARATION OF SERVICE

Case Name: *People v. Louis Mitchell, Jr.* Supreme Court No. S147335
Sup. Court No. FSB 051580

I, Jill Shaw, declare that I am over the age of 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, 10th Floor, Oakland, California 94607. I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

The Honorable Brian S. McCarville
Attn: Karen Mueller
San Bernardino Superior Court
401 N. Arrowhead Ave.
San Bernardino, CA 92415

Robert Bulloch
Deputy District Attorney
316 N. Mountain View Ave.
San Bernardino, CA 92415

Office of the Attorney General
Attn: Marissa A. Bejarano
110 West "A" St., Suite 1100
San Diego, CA 92101

Capt. Alan Spears
1148 3rd Ave. Box 38
Chula Vista, CA 91910

California Appellate Project
101 2nd St., Suite 600
San Francisco, CA 94105

Louis Mitchell, Jr. P-88192
CSP-SQ
San Quentin, CA 94974

Each said envelope was then, on July 3, 2014, sealed and deposited in the United States mail at Oakland, California, the city in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury that the foregoing is true and correct.

Signed on July 3, 2014, at Oakland, California.

Jill Shaw