No. S153881

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CUITLAHUAC TAHUA RIVERA, Defendant and Appellant.	Colusa County Superior Court Case No. CR 46819 Hon. S. William Abel, Judge Automatic Appeal From A Judgment and Sentence of Death

Appellant Cuitlahuac Tahua Rivera's Opening Brief

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DEATH PENALTY

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Appellant Cuitlahuac Tahua Rivera's Opening Brief

Statement of the Judgment

This is an appeal from a judgment of death following a jury verdict finding appellant Cuitlahuac Tahua Rivera guilty of the first degree murder of peace officer Stephan Gray (Pen. Code, §§ 187, subd. (a), 189, count 1), unlawful possession of a firearm by a felon on April 15, 2004, and April 11, 2004 (Pen. Code, § 12021(a)(1), counts 2 and 7, respectively), shooting at an occupied vehicle relating to Aaron McIntire and Kimberly Bianchi (Pen. Code, § 246, counts 3 and 4, respectively), and assault with a semiautomatic firearm

on Aaron McIntire and Kimberly Bianchi (Pen. Code, § 245, subd. (b), counts 5 & 6, respectively), with jury true findings, among other things, that the murder was of a peace officer engaged in the performance of his duties (Pen. Code, § 190.2, subd. (a)(7)) and was committed to avoid or prevent lawful arrest or escape from lawful custody (Pen. Code, § 190.2, subd. (a)(5)).[1] The jury found not true the gang special circumstance allegation (Pen. Code, § 190.2, subd. (a)(22)). (CT 47:13571-13604; RT 11:2386-2433.)

Introduction

Peace Officer Stephan Gray was shot and killed following a traffic stop of a vehicle driven by appellant's girlfriend, Jamilah Peterson. (RT 6:1256-1258.) Gray initiated the stop of the vehicle for no apparent lawful reason. The vehicle was being driven safely and there were no traffic violations. (RT 6:1243, 1246-1253.)

As Gray initiated the stop, appellant, who was a passenger in the vehicle and had prior contact with Gray, expressed frustration that Gray was always harassing him, telling Peterson, "Why is he always bothering me? Why is he harassing me? Why don't (sic) he just leave me alone?" (RT 6:1242; see RT 6:1236-1237, 6:1272, 7:1294-1295.)

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[1] References to rules are to the California Rules of Court, "RT" designates the Reporter's Transcript, and "CT" designates the Clerk's Transcript. Volume and page references are in the format "volume:page."

Gray told appellant to exit the vehicle. Appellant complied, but then ran. (RT 6:1246-1247.) Appellant was on parole, but at the time was neither under arrest nor in Gray's lawful custody. (RT 6:1253.) Gray yelled at appellant, telling him that he could not get away, and then pursued him on foot. (RT 6:1255.) As appellant was running away he pulled a handgun from his waistband and fired two shots in Gray's direction, inflicting a mortal wound. (RT 5:1065-1067, 6:1256-1258.)

The case went to trial after appellant declined the prosecution's apparent willingness to accept a plea in exchange for a sentence to life without the possibility of parole. (RT Pretrial Proceedings II:523-524.)

At trial, the prosecution sought to portray the shooting as one committed to further the activities of a criminal street gang (Pen. Code, § 190.2, subd. (a)(22)). (CT 3:551-552.) But the shooting arose from appellant's subjective perception of unjustified and continued harassment by Gray, a purely personal matter unrelated to any gang. The jury rejected the prosecution's portrayal of the shooting, finding *not true* the criminal-street-gang special circumstance allegation (Pen. Code, § 190.2, subd. (a)(22)). (CT 47:13571-13604; RT 11:2386-2433.)

Gray was shot in a hasty, unplanned manner as appellant was fleeing on foot (i.e., trying to get away from Gray), thereby revealing an unconsidered,

impulsive act that is insufficient to elevate even an intentional killing to first-degree deliberate and premeditated murder. (*Post*, Arg. 1.) The weak evidence of premeditation and deliberation was compounded, to appellant's detriment, by erroneous jury instructions on consideration of second degree murder, and the failure to instruct the jury that appellant's feeling of subjective provocation from the perceived pattern of harassment could reduce premeditated first degree murder to second degree murder. (*Post*, Args. 2, 3 & 4.) The erroneous jury instructions, either individually or cumulatively, warrant reduction of the offense to second degree murder.

The jury returned a true finding on the special circumstance allegation of murder to prevent arrest or escape from lawful custody despite evidence that he was neither under arrest nor in Gray's lawful custody at the time. (Pen. Code, § 190.2, subd. (a)(5)). (RT 11:2388; CT 47:13592.) The trial court prejudicially erred by instructing the jury on the invalid legal theory of escape from lawful custody, thereby requiring reversal of the true finding on the special circumstance allegation. (*Post*, Arg. 5.)

The capital murder conviction should be reversed for two additional reasons: (1) egregious prosecutorial misconduct during guilt-phase closing argument (*post*, Arg. 9); and, (2) prejudicial error in admitting evidence of

appellant's uncharged misconduct involving Mohammed, Gonzalez and Bradley (*post*, Arg. 11).

As to penalty, the death judgment should be reversed for prejudicial error in admitting the fact that appellant sustained juvenile adjudications at ages 15 and 16, and was committed a ward of the juvenile court, for brandishing a deadly weapon and making criminal threats. The prosecution failed to present evidence of the underlying conduct giving rise to the adjudications, and only presented the irrelevant, non-criminal fact of the adjudications, usurping the jury's function of finding this evidence to be true beyond a reasonable doubt before they could consider it as aggravating evidence. (*Post*, Arg. 13.) Although an adult when the instant offenses were committed, appellant was very young (21 years of age) and his criminal record was de minimis–i.e., he had not suffered a single prior conviction for an offense involving physical harm, or threat of physical harm, to anyone. (*Post*, § D.1. [Penalty phase–the prosecution's case, Prior felony convictions].) During closing summation, the prosecutor urged the jury to return a death verdict on the basis of appellant's juvenile adjudications. (RT 13:2888-2889, 2931.)

Balanced against evidence in mitigation for a life sentence (*post*, § E. [Statement of Facts, Penalty phase–defense evidence]), the prosecution's use

of the juvenile adjudications and wardship to show appellant's post-adjudication failure to have been rehabilitated, as a basis for the death verdict, warrants remand for a new penalty trial because the prosecution will be unable to prove beyond a reasonable doubt that the evidence did not contribute to the verdict. (See *People v. Roder* (1983) 33 Cal.3d 491, 505 [error not harmless under *Chapman* because, in part, "the prosecutor relied on the [erroneous] presumption in his closing argument"]; *Depetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, 1063 [prosecutor's reliance on error in closing argument is indicative of prejudice].)

Several additional penalty phase errors, either individually or cumulatively, warrant remand for a new penalty trial. These errors include (1) erroneous admission of appellant's postcrime statement made while in pretrial confinement (*post*, Arg. 14), (2) erroneous admission in aggravation of non-violent conduct committed by appellant while in pretrial confinement (*post*, Arg. 15), (3) use of an invalid sentencing factor–the special circumstance allegation of murder to prevent arrest or escape from lawful custody (*post*, Arg. 16), and (4) the trial court's refusal to instruct on lingering doubt in connection with whether the killing was premeditated (*post*, Arg. 17).

Statement of Appealability

This appeal is automatic. (Cal. Const., art. VI, § 11, subd. (a); Pen. Code, § 1239, subd. (b).)

Statement of the Case

On May 2, 2005, the Merced District Attorney filed a first amended information, subsequently amended by interlineation (CT 47:13559, 48:13743), charging appellant with first degree murder of Stephan Gray (Pen. Code, §§ 187, subd. (a), 189, count 1), unlawful possession of a firearm by a felon on April 15, 2004, and April 11, 2004 (Pen. Code, § 12021(a)(1), counts 2 and 7, respectively), shooting at an occupied vehicle relating to Aaron McIntire and Kimberly Bianchi (Pen. Code, § 246, counts 3 and 4, respectively), and assault with a semiautomatic firearm on McIntire and Bianchi (Pen. Code, § 245, subd. (b), counts 5 & 6, respectively). (CT 3:551-558.)

It was alleged that the murder was (1) of a peace officer engaged in the performance of his duties (Pen. Code, § 190.2, subd. (a)(7)), (2) committed to further the activities of a criminal street gang (Pen. Code, § 190.2, subd. (a)(22)), and (3) committed to avoid or prevent lawful arrest or escape from lawful custody (Pen. Code, § 190.2, subd. (a)(5)). (CT 3:551-552.)

It was alleged in connection with count 1 that Gray was a peace officer killed while engaged in the performance of his duties, and appellant knew, or reasonably should have known, that Gray was a peace officer engaged in the performance of his duties, and appellant (1) intended to kill Officer Gray, (2) intended to inflict great bodily injury on Officer Gray (Pen. Code, § 12022.7), and/or (3) personally used a firearm in the commission of the offense (Pen. Code, § 12022.5). (CT 3:552.)

It was further alleged as follows: (1) each offense was committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)); (2) in connection with count 1, appellant intentionally and personally discharged a firearm proximately causing great bodily injury or death (Pen. Code, § 12022.53, subd. (d)); (3) in connection with count 3, appellant intentionally and personally discharged a firearm (Pen. Code, § 12022.53, subd. (d));[2] (4) in connection with count 4, appellant intentionally and personally discharged a firearm (Pen. Code, § 12022.53, subd. (c)); (5) in connection with counts 3 through 6, inclusive, appellant carried on his person or in his vehicle a firearm

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[2] The information charged a violation of subdivision (c), but was subsequently amended by interlineation to charge a violation of subdivision (d), although the language of the enhancement continued to state only that appellant intentionally and personally discharged a firearm (i.e., not that the discharge proximately caused serious bodily injury), as reflected in the verdict. (CT 3:554, 47:13559-13560, 47:13595; RT 11:2209-2210.)

together with a detachable shotgun magazine, a detachable pistol magazine, a detachable magazine, or a belt-feeding device, during the commission of a street gang crime (Pen. Code, § 186.22), within the meaning of Penal Code section 12021.5, subdivision (b); (6) in connection with counts 5 and 6, appellant personally used a firearm (Pen. Code, § 12022.5, subd. (a)(1)); and, (7) in connection with each offense, appellant suffered prior felony convictions on February 13, 2001, for unlawful possession of a firearm (Pen. Code, § 12021, subd. (e)) and on October 1, 2001, for possession for sale of cocaine base (Health & Saf. Code, § 11351.5), for which he served a separate prior prison term within the meaning of Penal Code section 667.5, subdivision (b). (CT 3:551-558.)

Appellant entered pleas of not guilty to the charges and denied the enhancement allegations. (CT Pretrial I:292.)

Trial commenced with jury selection on March 13, 2007. (CT 10:2888.) On April 17, 2007, the trial and alternate jurors were impaneled and sworn. (CT 46:13073.)

The jury began deliberations on May 2, 2007. (CT 47:13559-13564; RT 11:2368.) The following day appellant was convicted as charged and the special circumstance and enhancement allegations were found true, except the

gang special circumstance allegation was found not true. (CT 47:13571-13604; RT 11:2386-2433.)

The penalty phase began on May 9, 2007. (CT 48:13675; RT 11:2445-2479.) Deliberations began on May 18 and concluded on May 22 with a jury verdict of death. (CT 48:13743-13751, 13765; RT 14:3012-3013.)

Appellant filed a motion to set aside the death verdict and a motion for new trial. (CT 49:13954-13980.) The trial court denied both motions on June 21, 2007, and sentenced appellant to death on count 1.[3] (CT 49:13993-14006; RT 14:3023, 3045-3050.)

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[3] Appellant was sentenced on the noncapital counts and enhancements as follows: (1) count 2 (the principal term), unlawful possession of a firearm by a felon, two years plus three years for the gang enhancement, consecutive; (2) count 3, shooting at an occupied vehicle relating to McIntire, 15 years-to-life plus 25 years-to-life for the "firearm discharge causing serious bodily injury" enhancement, consecutive, plus a stayed term of one year for the Penal Code section 12021.5, subdivision (b) enhancement; (3) count 4, shooting at an occupied vehicle relating to Bianchi, 15 years-to-life plus 20 years for the firearm discharge enhancement, consecutive, plus a stayed term of one year for the Penal Code section 12021.5, subdivision (b) enhancement; (4) counts 5 and 6, 19 years on each count, stayed pursuant to Penal Code section 654; (5) count 7, unlawful possession of a firearm by a felon, eight months plus one year for the gang enhancement, consecutive; and (6) one year for the Penal Code section 667.5, subdivision (b) prior prison term enhancement, consecutive. (RT 14:3056-3064; CT 49:14007-14010.)

Statement of Facts

A. Guilt phase–the prosecution's case.

(1) Introduction.

The prosecution presented evidence that on April 15, 2004, Merced Police Officer Stephan Gray was shot and killed during a traffic stop to conduct a parol search of appellant, a member of the Merced Gangster Crips ("MGC"). (RT 6:1256-1258.) Appellant, a passenger in a Mazda Protegé driven by his girlfriend Jamilah Graham Peterson, exited the vehicle at Gray's request and then ran. (RT 6:1246-1247.) Gray gave chase on foot. While running away appellant pulled a handgun from his waistband, turned toward Gray, and fired twice over his (appellant's) shoulder, striking Gray in the arm and chest. (RT 5:1065-1067, 6:1256-1258.)

Four days earlier, Aaron McIntire and Kimberly Bianchi were driving through a Merced neighborhood when they encountered three men in Peterson's Mazda Protegé at an intersection. (RT 9:1640-1645, 1652, 1653, 1668-1669, 1674-1677, 1732.) The men gave a threatening look and threw up their hands as if there was a problem (RT 9:1677-1678.) McIntire responded by throwing up his hand. (RT 9:1677-1678.) The driver, identified as appellant, pointed a handgun out of the window and fired three shots at them, striking their vehicle and hitting McIntire in the ankle. (RT 9:1678-1681,

1692, 1695, 1712, 1750-9:1751.) Ballistics testing revealed that the same handgun was used in the shooting of Officer Gray. (RT 9:1774, 1778, 1787-1792, 1794-1797.)

(2) The McIntire/Bianchi shooting on April 11, 2004, counts 3 through 7.

In the afternoon on April 11, 2004, McIntire was driving his girlfriend Bianchi in a silver vehicle near John Muir Elementary School when they came to a stop and saw a teal green vehicle being driven by appellant, and occupied by an Hispanic male and an African-American male, all of whom were throwing up their hands as if there was a problem. (RT 9:1640-1645, 1652, 1653, 1668, 1674-1677, 1732.)

McIntire saw the men looking at him in a threatening manner, and threw up his hands to indicate he did not know what they were doing. (RT 9:1677-1678.) As Bianchi continued looking at the vehicle, she saw appellant display a handgun and fire three shots at them. (RT 9:1648-1649, 1653.) At the same time, McIntire saw appellant hanging out the driver's window pointing a handgun at him; he then heard three gunshots in rapid succession. (RT 9:1678-1681, 1692, 1695, 1712, 1750-1751.)

McIntire sustained a gunshot wound to the ankle, which was bleeding. (RT 9:1651, 1681-1682.) Neither Bianchi nor McIntire were involved with gangs. (RT 9:1647, 1677.) Bianchi and McIntire testified that the vehicle

from which the gunshots were fired was the one pictured in People's Exhibit 23–i.e., the Mazda Protegé carrying appellant on April 15th when stopped by Officer Gray.[4] (RT 9:1669, 1686.)

Officer Francis Bazzar responded to the scene of the shooting and recovered three cartridge casings. (RT 9:9:1724.) McIntire's vehicle sustained bullet holes in the lower portion of the driver's door and in the left side of the rear bumper, and a bullet was recovered from the floorboard behind the passenger seat. (RT 9:1725-1726.)

Peterson testified that on April 11th she and appellant were at a family gathering at Applegate Park. (RT 6:1260.) At one point, appellant left the park in Peterson's vehicle, accompanied by Gustavo Reyes and Peterson's stepfather Anton Martin (also known as Tim). (RT 6:1261-1262.) Appellant was driving. (RT 6:1260-1261.)

Comparison of the bullet and three expended shell casings from the McIntire/Bianchi shooting to the .45-caliber bullet from Gray's body and the two expended shell casings found at the scene of Gray's shooting revealed that

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[4] On cross-examination, Officer Francis Bazzar testified that he interviewed two eyewitnesses, Mr. Holtz and Ms. Soto, both of whom described a silver vehicle speeding away from the scene of the shooting. (RT 9:1734-1735.) Holtz stated there were three Hispanic male adults in the vehicle. (RT 9:1734.) Soto stated there were up to five Hispanic males in the vehicle. (RT 9:1735.)

the cartridge casings and the bullets were all fired from the same .45-caliber semiautomatic pistol. (RT 9:1774, 1778, 1787-1792, 1794-1797.)

(3) The shooting of Officer Gray on April 15, 2004, counts 1 and 2.

(a) The traffic stop.

Peterson was driving her Mazda Protegé, with appellant in the front passenger seat and their two-year-old daughter in the back, when they came to a four-way stop in a residential neighborhood and saw Officer Gray's vehicle.[5] (RT 6:1228, 1231, 1240, 1246.) Appellant and Peterson saw Officer Gray. (RT 6:1240-1241.) Peterson proceeded south with Gray following. (RT 6:1240-1241.)

Appellant told Peterson, "Mother-fucker, why did – Why is he always bothering me? Why is he harassing me? Why don't (sic) he just leave me alone?" (RT 6:1242.) Peterson stated they had nothing to worry about because she had a driver's license and auto insurance. (RT 6:1243.) She did not know whether appellant had a gun. (RT 6:1243-1244.) Appellant called Anton Martin and asked him to met them at their location on Glen Avenue.

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[5] They were going to a local hangout called The Hut, which is frequented by gang members and where there is gambling and drugs. (RT 6:1228, 6:1231, 9:1824.) They had come from Peterson's mother's apartment, where appellant had spoken with Reyes, Gerard Roberts aka Cane, Freddie Mays, Ponco, and Clint Ward. (RT 6:1215, 1221, 1223-1224.)

(RT 6:1244.) Appellant placed a second call to Ward, asking him to come get him. (RT 6:1246, 1248.)

Peterson pulled over after Gray activated his emergency lights. (RT 6:1246-1247.) It was still light outside. (RT 6:1251.) She exited the vehicle to ask Gray why he was pulling them over. (RT 6:1250-1251.) Gray told her to get back inside the vehicle. She complied. (RT 6:1252.)

Gray walked around to the passenger side, and appellant was still on the phone. (RT 6:1252.) Gray asked appellant to end the call. Appellant complied. (RT 6:1252.) He asked appellant when he last saw his parole officer, to which appellant responded, "On Monday." (RT 6:1253.) Peterson then heard someone on the police dispatch radio state that appellant was clear, meaning that he did not have any outstanding warrants. (RT 6:1253.) Gray told appellant to get out of the vehicle because he was going to search him. (RT 6:1253.) Gray was polite and professional. (RT 6:1254.)

(b) Appellant's prior contact with Officer Gray.

Peterson testified that Gray came by their house on one occasion to speak with appellant. (RT 6:1236-1237, 7:1293.) Gray was always professional, but he lectured appellant about family responsibilities and staying out of trouble. (RT 1236.) Gray told appellant that he was keeping an eye on him and that if he saw appellant doing anything he would get him. (RT

6:1237.) Appellant told Peterson that he resented Gray for interfering in his life. (RT 6:1272.)

The car Peterson was driving, a 2001 Mazda Protegé, was one she recently purchased after appellant abandoned her other car on the side of the road. (RT 6:1231-1232.) Appellant told her that he abandoned it because he thought Officer Gray was following him; he ran from the car rather than being stopped by Gray. (RT 6:1232.) Appellant told her that Gray was always harassing him. (RT 6:1236.) Several weeks prior to the shooting, she spoke with Gray about having the vehicle returned to her, but Gray refused, stating he would have to speak with appellant first. (RT 6:1233, 1238.)

Peterson also testified that appellant told her that he had a prior physical altercation involving Gray, in which appellant was hospitalized. (RT 7:1294-1295.)

(c) The shooting–eyewitness testimony.

Peterson testified that appellant complied with Gray's request to exit the vehicle, but as Gray was getting ready to conduct the search appellant pushed him away and ran. (RT 6:1255.) She heard Gray say, "I don't know why you're running. You're going to get caught anyway." (RT 6:1255.) Gray gave chase. (RT 6:1256-1257.) She saw a flash from a gun but could not recall hearing any gunshots. (RT 6:1257, 7:1338.) The gun was under

appellant's arm, and appellant's back was to her when appellant fired. (RT 7:1312-1313, 1333, 1337.) Appellant continued running after Gray fell. (RT 6:1257.) She never saw appellant turn around toward Gray. (RT 6:1257-1258.)

Yolanda Cabanas was sitting on a bench across the street from her home on Glen Avenue speaking with her neighbor. (RT 6:1145-1146.) She noticed that a police vehicle had stopped a small green car. (RT 6:1149-1150.) The driver of the green car was a young black woman. (RT 6:1150.) The women got out of the car, but the officer told her to get back inside. (RT 6:1151.) The woman complied. (RT 6:1152.)

Cabanas then heard two men speaking and arguing, but her view of the passenger seat of the green vehicle was obstructed. (RT 6:1152-1153.) She then saw a man running. (RT 6:1154, 1161.) As he was running, he looked over his left shoulder, lifted up his sweats, pulled a gun out, and turned 90 to 180 degrees back toward the officer. (RT 6:1161-1162, 1165-1166.) Cabanas was about 30 feet away from the gunman, whom she identified as appellant. (RT 6:1165, 1167.) The officer did not have a weapon drawn. (RT 6:1170.)

Cabanas heard a gunshot, but the officer continued running toward appellant. (RT 6:1171.) She heard another gunshot a second or so later and saw that the officer was so close it appeared he was going to fall on top of

appellant. (RT 6:1171, 1174, 1180.) When the gun fired, Cabanas saw appellant's hands on the gun and saw smoke come from the gun. (RT 6:1173, 1180-1181.) Appellant was approximately six feet away from the officer when the shots were fired. (RT 6:1178-1179.) It appeared that appellant was aiming the gun toward the officer when it was fired. (RT 6:1174.) No words were spoken between the two during the chase. (RT 6:1170.) Appellant was wearing a light colored grayish sweatshirt with a black cloth tied around his head. (RT 6:1173.) The tip of the gun was chrome or silver. (RT 6:1173.)

Natasha Velasquez was traveling through the area in a vehicle when she saw the parked police car with its overhead lights on and a foot chase. (RT 6:1189-1193, 1208.) It was still daylight. (RT 6:1212.) She first saw an African-American police officer wearing a uniform standing on the grass speaking with someone. (RT 6:1193-1194.) She then saw an Hispanic man running south and the officer running after him. (RT 6:1194, 1199.) The man turned his upper torso around toward the officer and pointed toward the officer. (RT 6:1195-1196.) She then heard gunshots and saw the officer fall to the ground. (RT 6:1194.) The gunman continued to run. (RT 1195.) After the shooting, Velasquez saw an African-American female in the green car that the officer had pulled over. (RT 6:1201.) The female African-American,

whom she recognized from school as Jamilah, got out of the car slowly and looked shocked. (RT 6:1201-1203.)

Michael Clary was inside his house when he saw an unmarked police car making a traffic stop 35 feet from his house. (RT 7:1348.) He heard two gunshots. (RT 7:1348-1349.) He went outside shortly thereafter and heard a young black woman (Peterson) say, "I didn't think he'd do it." (RT 7:1350-1351.)

Donna Clary saw an unmarked car with a light on in the back, and a uniformed officer on the passenger side of a small car, bent over looking into the car. (RT 7:1357.) The officer was at the side of the small car for a of couple minutes. (RT 7:1357.) A few moments later she heard two or three gunshots. (RT 7:1357-1358.) She saw a young black women walking toward the back of the car, and heard the woman say, "I can't believe that he shot him." (RT 7:1359.)

(d) The scene of the shooting and search of the area.

Officer Sean Greene of the Merced Police Department gang unit testified that on April 15, 2004, at approximately 7:15 p.m., he was on patrol when he heard Gray, also a member of the gang unit, state over the radio that

Gray was making a traffic stop of Tao Rivera (appellant).[6] (RT 5:954-957, 960.)

Greene was dispatched to Gray's location, about a mile away, after Gray failed to respond to requests from dispatch for status updates, and after it was reported that gunshots were heard in the area where Gray was making the traffic stop. (RT 5:960-962; see CT 2:308-309, 396-397.) When he arrived, Gray's marked patrol vehicle and a small green Mazda Protegé were parked south of East 20th Street. (RT 5:963-965, 1000-1001, 1034.) A large crowd was gathered at the scene near Gray's body, but no one was attending to him. (RT 5:968-969.)

Gray was lying face down on the sidewalk. (RT 5:965.) He was breathing and had a pulse, but did not speak. (RT 5:966, 968, 1003.) He had a large gash on his forehead, and there was a large pool of blood under his head and upper torso. (RT 5:965-966; People's Exh. 3.) There was a bullet hole to Gray's right chest, above his protective vest. (RT 5:1004-1005.)

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[6] Greene was familiar with appellant, having accompanied Gray approximately seven months earlier to conduct a parole search of appellant's residence at the Reefs Apartments. (RT 5:958, 979.) It was an amicable parole search, and appellant was not restrained or taken into custody. (RT 5:959.) They talked with appellant about fellow MGC gang member Freddie Mays. (RT 5:987.) At the time, Greene and Gray were wearing the Class B uniform similar to the one worn by Gray in People's Exhibit 1. (RT 5:959.)

Gray was wearing a Class B uniform (i.e., the regular duty uniform), identifying him as a police officer. (RT 5:957; People's Exh. 1.) Greene and other officers at the scene removed Gray's duty weapon, magazines, and weapons belt. (RT 5:968, 995.) The duty weapon was in the holster and snapped secure, and thus it did not appear that the gun had been drawn. (RT 5:969, 994.) Gray had pepper mace and an expandable baton impact weapon, but neither appeared to have been prepared for use. (RT 5:969-970, 1048.)

While Greene was attending to Gray, a young Hispanic female was standing nearby. (RT 5:1009.) She was very hysterical, and was crying and screaming. (RT 5:1013.) She stated that she was familiar with Officer Gray. (RT 5:1013.)

A search of the area uncovered a spent brass shell casing and a spent aluminum .45-caliber casing about ten yards south of Gray's body. (RT 5:971, 973-974, 1043, 1049-1050; People's Exhs. 7 & 8.) The gun used in the shooting was not recovered. (RT 6:1118.)

(e) Appellant's movements near the scene of the shooting.

Daniel Flores testified that sometime after 7:15 p.m. on April 15th appellant came into his house on Orchard Lane, which runs parallel to Glen Avenue, entering through the unlocked front door. (RT 7:1363-1365.) Flores did not know appellant personally, but had previously seen him in the

neighborhood. (RT 7:1365, 1375.) Appellant asked Flores to sit down and give him some clothes. (RT 7:1366.) Appellant was wearing a white t-shirt. Flores did not see a gun. (RT 7:1366, 1368, 1379.) Flores did not know what was going on, but did not ask because he could hear emergency sirens. (RT 7:1367-1368.)

Flores's roommate, Ricardo Munoz, arrived at the house approximately five minutes later, while appellant was still there, and asked what was going on. (RT 7:1368-1372, 1383-1384.) Flores did not respond. (RT 7:1374.) Flores gave appellant a pair of dark gray sweat pants, and possibly a t-shirt, which appellant put on over the clothes he was wearing. (RT 7:1373.) Flores went inside his bedroom and appellant left the house sometime thereafter. (RT 7:1379-1380.) Flores had just moved into the house two months prior, and was not involved in gangs. (RT 7:1369.)

Munoz testified that he arrived at the house at approximately 7:15 p.m., and saw Flores and appellant inside. (RT 7:1383-1384.) He did not know what was going on or why appellant was there. (RT 7:1387-1388.) Munoz had seen appellant before but did not know him personally. (RT 7:1384-1385.) Munoz was not involved in gang activity, although he had spoken with Clint Ward and knew that Ward was associated with MGC. (RT 7:1384-1386, 1403-1406; People's Exh. 21.)

Munoz gave appellant a shirt. (RT 7:1390.) Appellant asked Munoz for a ride out of the area, but Munoz told appellant there was a police vehicle blocking his vehicle. (RT 7:1391.) Munoz gave appellant his cellular telephone, which was returned to him the following day by Ward. (RT 7:1395, 1402, 1405.) Appellant left after about 20 minutes. (RT 7:1393.) Munoz did not see appellant with a weapon. (RT 7:1400.)

Appellant left Flores's house and was seen later that evening with Ward at a liquor store on East Main Street. (RT 7:1418-1423.) The liquor store is around the corner from Flores's residence. (RT 7:1424.)

(f) Travel to San Diego and subsequent arrest in Merced.

A few days after the shooting, LaDonna Davis-Turner and Dabreka Thompson were in Merced for a wedding when several people (including Roberts, Reyes, Tyrone Johnson aka T-Murder, and Serena Winzer) asked them to take appellant to San Diego, where Davis-Turner and Thompson were attending college. (RT 7:1444, 1446, 1451-1455, 1462-1464, 1509, 1513.) They both knew appellant; Davis-Turner was romantically involved appellant in high school. (RT 7:1481, 1511.) Davis-Turner and Thompson reluctantly agreed to take appellant to San Diego. (RT 7:1462-1464, 1514-1515.)

A day or so later (i.e., the day they were to travel to San Diego), Roberts and Winzer gave Davis-Turner an envelope containing money and a

letter. (RT 7:1466-1468.) She drove to a pre-determined location in Fairmead, accompanied by Thompson. (RT 7:1472, 1516, 1517.) Appellant and Reyes pulled-up in a small white car and then appellant, holding a small plastic grocery bag, got into Davis-Turner's car. (RT 7:1472-1473.)

They drove to San Diego and stayed at Davis-Turner's apartment for several days. (RT 7:1473-1481, 1483-1484, 1486, 1521.) Neither Davis-Turner nor Thompson saw a gun in appellant's possession. (RT 7:1475, 1497, 1518-1519, 1525-1526.) Davis-Turner testified that appellant spoke negatively about Gray, stating at one point, "I hate Officer Gray. I hate Officer Gray. Fuck Officer Gray." (RT 7:1493-1494.)

A few days after their arrival in San Diego, Davis-Turner and appellant were returning to the apartment from a movie when they saw police activity at the apartment. (RT 7:1489-1490.) They spent that night at a motel as appellant refused to surrender. (RT 7:1490-1492.) The following day she dropped appellant off at a nearby apartment complex and did not return to get him. (RT 7:1490-1492.)

Davis-Turner contacted the police in San Diego and made arrangements to meet appellant so he could be arrested. (RT 7:1502-1503.) Using a ruse, she contacted mutual friends requesting to see appellant, and then returned to Merced to meet him. (RT 7:1502-1503.) Once back in Merced, she met

appellant on May 2, 2004, on the ruse that she was going to take him back to San Diego, but appellant was arrested instead. (RT 7:1449, 1502-1504, 1533, 1554-1555.)

(g) Autopsy.

An autopsy showed that Gray sustained two gunshot wounds. One was a non-fatal wound consistent with a bullet fired from a large caliber handgun, entering on the back of the left upper arm approximately nine inches from the top of the shoulder and exiting on the left forearm. (RT 5:1060-1062, 1064.) The wound was consistent with Gray being struck by a bullet when his arm was extended in an upward manner. (RT 5:1063.) The bullet exited Gray's body and was not recovered. (RT 5:1063.)

A second, fatal wound was sustained to the top of the right chest, with the bullet traveling through the large subclavian artery and right upper lobe of the lung, and striking the third and fourth thoracic vertebrae in the spinal column, severing the spinal cord. (RT 5:1065-1067.) The bullet, a yellow metal jacket large caliber round, was recovered from Gray's body. (RT 5:1068; People's Exh. 14.)

Gray sustained facial abrasions consistent with an unprotected fall to the ground. (RT 5:1067.)

Toxicology tests revealed the presence of pseudoephedrine (allergy medication) in Gray's blood, at a level higher than is considered therapeutic, but not at a toxic level, and not at a level that would impair Gray's judgment or abilities. (RT 5:1070.)

(h) Police investigation and stipulations.

Gray was shot with a 45-caliber gun. (RT 6:1124.) Based on the bullet recovered from Gray's body, the gun was a 1911 Colt or similar firearm. (RT 6:1131.)

Appellant's fingerprints were found on the outside passenger side of Peterson's vehicle, and above the door and window of the vehicle. (RT 6:1130.)

Appellant's fingerprints were found on a deodorant can located inside a bag in San Diego, which also contained a .40-caliber handgun and a letter from a member of MGC. (RT 6:1136.)

The parties stipulated that (1) on April 15, 2004, Gray was a peace officer employed by the City of Merced, (2) the green backpack and its contents (People's Exh. 29) were seized from the San Diego apartment of Davis-Turner and Thompson on April 24, 2004,[7] (3) the .40-caliber handgun

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[7] Davis-Turner identified People's Exhibit 29 as the backpack appellant was using while in San Diego. (RT 7:1488.)

(People's Exh. 30) was found in the green backpack (People's Exh. 29) when it was seized on April 24, 2004, (4) the .40-caliber handgun (People's Exh. 30) was not used in the killing of Gray, nor was it used in the shooting of McIntire and Bianchi, (5) a deodorant container was seized from the green backpack (People's Exh. 29), and latent fingerprint expert Richard Kinney would testify a latent fingerprint impression of appellant's right index finger was found on the container,[8] (6) a letter addressed to "homie" (People's Exh. 28) was found in the green backpack (People's Exh. 29), and Richard Kinney would testify that two latent fingerprint impressions of the left thumb of Gerard Roberts were found on it, and (7) the Charles Daly .45-caliber handgun in the possession of Jenson Scott on July 14, 2004, was not the gun that killed Gray and was not the gun that was used in this shooting of McIntire and Bianchi. (RT 10:1941-1943; CT 46:13298-13299.)

(4) Appellant's interview by the police and out-of-court statements.

Appellant was arrested without incident a few miles south of Merced and interviewed in custody that same day. (RT 5:1087-1089.) A videotape of the interview was played to the jury. (RT 5:1095, 5:1098-1099, 6:1112-1113; CT 46:13121, 47:13317-13405.)

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[8] Appellant's fingerprints were found inside the apartment. (RT 7:1550.)

Appellant stated he knew Gray, having been previously arrested by him once or twice. (CT 47:13318.) Gray knew appellant was on parole. (CT 47:13319.) Appellant was traveling as a passenger in a vehicle being driven by his girlfriend, Jamilah Graham (i.e., Peterson), when Gray pulled them over. (CT 47:13319.) Their infant daughter was in the back seat. (CT 47:13319.) Appellant stated that Gray had searched him and was going to let him go when "somebody came from across the street, started shootin', [and] I just took off." (CT 47:13319; see CT 47:13331.) Appellant did not have a gun at the time. (CT 47:13319, 13329-13330.) Appellant fled because he was scared; he stayed in the Merced area until arrested. (CT 47:13336-13340, 13346.) Appellant did not know whether the gunman was shooting at him or at Gray.[9] (CT 47:13320-13321.)

Peterson testified that after the shooting, but before appellant was arrested, appellant's stepbrother Ponque Salvador Arroyo told her that appellant had stated that "he was going to do something to Gray because he

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[9] Detective Sterling testified that during the course of the investigation several people stated that a female was being pursued by Gray, not a male. (RT 6:1122.) Sterling interviewed Peterson, but was interrupted several times when two witnesses at the police station were saying that a women shot Gray. (RT 10:1948-1949.) The two witnesses observed a portion of the traffic stop and attributed feminine features to the shooter. (RT 10:1950.)

was tired of Gray harassing him." (RT 7:1442.) Arroyo testified he never made such a statement to Peterson. (RT 7:1440.)

(5) Gang testimony and appellant's affiliation with the MGC gang.

At the time of the shooting, Officer Gray was assigned to the Gang Violence Suppression Unit, charged with monitoring MGC members and reviewing patrol reports, identify gang members, and maintaining intelligence on local criminal street gangs. (RT 5:1014, 9:1824-1825.) Smith testified that he and Gray discussed appellant being a member of MGC. (RT 5:1017-1018.)

Prosecution gang expert Sergeant Thomas Trindad testified that MGC is one of several gangs operating in Merced, having been established in the 1980s and engaging in violence to support the sale of drugs, which is a primary activity of the gang. (RT 9:1807-1808, 1820-1824; see RT 7:1558-1560, 1564-1568 [testimony of Special Agent Dean Johnston].)

In April 2004, MGC had approximately 130 members and associates, of which 86 were members. (RT 9:1829.) MGC is predominantly an African-American street gang, but includes white and Hispanic members. (RT 9:1827-1828.) The Bloods and Norteños gangs were at times rivals to MGC. (RT 9:1827-1828, 1859-1860.)

Raymond Slaton was the leader of MGC in April 2004. (RT 9:1833.) Appellant was a member of MGC, known by the gang names Bullet and

Trigger.[10] (RT 9:1830, 1835; see CT 47:13351, 13385 [appellant's admission during interrogation to being a former member of MGC].) Other members included Roberts, Reyes, Scott, Johnson, and Mays. (RT 5:987, 9:1835-1836.) Ward was an associate of MGC, but not a documented member. (RT 9:1835.)

The prosecution presented evidence of several predicate offenses committed by MGC gang members, including, among others, appellant's conviction for the offenses of possession for sale of rock cocaine and unlawful possession of a firearm (People's Exh. 51), MGC gang member Jermaine Ewing's conviction for the offense of possession for sale of cocaine, and MGC gang member Teotis LaMark Robertson's conviction for the offense of robbery (People's Exh. 54). (RT 9:1836-1847.)

In connection with the McIntire/Bianchi shooting, Officer Bazzar testified that Applegate Park, the area where the shooting occurred, is within MGC gang territory. (RT 9:1729-1731.) Officer Trindad testified that in gang culture McIntire's action of throwing up his hand in response to a gang member doing so is a sign of disrespect to the gang, which would be answered with violence. (RT 9:1853, 1855.) Trindad testified that considering

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[10] Peterson testified she is familiar with MGC. (RT 6:1224.) According to Peterson, MGC gang members are involved in the sale of narcotics and have a reputation for violence. (RT 6:1228.) Appellant, Reyes, Roberts, and Mays are members of MGC. (RT 6:1224-1225, 1229, 1269-1271.) Appellant regularly associated with members of MGC. (RT 6:1227.)

hypothetical facts consistent with the McIntire/Bianchi shooting, the shooting benefitted MGC by enhancing the gang's reputation and control in the community. (RT 10:1931-1932.)

Trindad testified that considering hypothetical facts consistent with the shooting of Officer Gray, the shooting benefitted MGC by increasing the power and reputation of the gang within the community. (RT 10:1930-1931.)

Special Agent Dean Johnston testified that during the search for appellant he intercepted several telephone phone calls to and from appellant and MGC members, including member Johnson and associate members Anitra McKinney and Winzer. (RT 7:1549, 1551-1554, 1564.) In one call originating from San Diego on April 22, 2004, appellant told Johnson that he felt the police knew where he was located. (RT 7:1545-1547.) Johnson told appellant not to say where he was and that he would come up with a plan to help him. (RT 7:1547.)

(6) Prior uncharged misconduct.

Adel Mohammed testified to an incident in 2000 or 2001 when he and his friend Larry Gonzalez were in a vehicle and appellant was in a separate vehicle. Gonzalez and appellant were giving each other dirty looks and exchanging words. (RT 7:1425-1426, 1434-1436.) There were a couple other people with appellant, including Peterson. (RT 7:1426, 1429.) Appellant

displayed a gun and pointed it at both of them. (RT 7:1427-1428.) They left shortly thereafter without incident. (RT 7:1428.)

Marlon Bradley testified to an incident on September 30, 2000. (RT 9:1629.) He had known appellant since childhood as they lived in the same neighborhood and were friends at one time. (RT 9:1628.) Bradley was not involved with gangs, but knew appellant to be a member of MGC, a rival to the Bloods gang. (RT 9:1628.) MGC members identify with the color blue, whereas Bloods members identify with red. (RT 9:1628.)

On September 30, 2000, Bradley's brother was at a party where there had been a problem and had just returned to their house. (RT 9:1629-1630.) Bradley and his brother, together with friend Calvin Huffman, went outside and saw appellant and Roberts. (RT 9:1630-1632.) Roberts stated, "Hit them niggers." (RT 9:1630-1631, 1637.) Appellant started shooting a revolver, firing six bullets in their direction, but not striking anyone. (RT 9:1632-1633, 1637.) Bradley ran inside. (RT 9:1633.) He and his brother and Huffman did not have any weapons. (RT 9:1633.)

Peterson testified to the same shooting incident involving the Bradley brothers, stating that in the year 2000 there was a shooting involving Merced Bloods gang members. (RT 6:1265.) Roberts told her in September 2000 that

he had been at a party and had taken care of some Bloods. (RT 6:1265, 7:1324-1325.) The Merced Bloods are a rival gang to MGC. (RT 6:1265.)

(7) Appellant's prior felony convictions.

Appellant suffered prior a felony conviction on February 13, 2001, for unlawful possession of a firearm (Pen. Code, § 12021, subd. (e)) and on October 1, 2001 for possession for sale of cocaine base (Health & Saf. Code, § 11351.5). (CT 46:13302-13314; RT 6:1142, 9:1836-1837, 10:1939-1940; People's Exhs. 51 & 75.)

B. Guilt phase–defense evidence.

Trial defense counsel conceded during closing summation that appellant shot and killed Gray, but argued that appellant did not premeditate the killing. (RT 11:2296-2297, 2309-2313, 2334.) Counsel argued that the shooting was not gang-related. (RT 11:2330, 2332.) Counsel also argued that appellant was not involved in the McIntire/Bianchi shooting. (RT 11:2325-2327.)

(1) The shooting of Officer Gray was not gang-related.

Defense gang expert Professor Jose Lopez testified that not every crime committed by a gang member is a gang-related offense. (RT 10:1955, 1061, 1066-1067.) The killing of a police officer is one of the "biggest taboo for

gangs" because it brings pressure on the gang and interferes with gang business. (RT 10:1967-1968, 1981.)

Although MGC was a criminal street gang at the time Gray was shot, and although appellant was a member of the gang, the shooting of Gray was not gang-related. (RT 10:1971, 2052.) Lopez's opinion was based on the manner of the shooting, especially considering it occurred quickly and after appellant ran and Gray gave chase. (RT 10:1071-1072.) The shooting would not increase a gang member's reputation because it would ultimately lead to the destruction of the gang, which occurred in this case. (RT 10:1972-1973.)

Lopez is aware of a photograph of graffiti in a neighborhood in Merced, showing "cop killa" and "MGC," which was taken after Gray was killed. (RT 10:2012-2013; People's Exh. 79.) Lopez did not know who wrote the graffiti, but testified it was his opinion that "gang members are offended by the shooting of a cop." (RT 10:2013.)

(2) Impeachment of eyewitnesses to the McIntire/Bianchi shooting.

The defense impeached Bianchi's testimony identifying appellant. Bianchi admitted that she first identified the driver as having long puffy hair, whereas the prosecution's evidence shows that appellant did not have long puffy hair. (RT 9:1645, 1663-1664; see CT 46:13152 [People's Exh. 22,

photograph of Reyes,[11] Hispanic male with longer black hair and a beard], 46:13210 [People's Exh. 33, photograph of appellant].) Bianchi was unable to identify appellant's photograph in a six-pack display shortly after the shooting. (RT 9:1658-1664; CT 46:13282, 13287.) Bianchi could not positively identify appellant at the preliminary hearing, although he was the only defendant in the courtroom. (RT 9:1665-1666.)

The defense impeached McIntire's testimony identifying appellant. McIntire stated that the gunman was driving a Corolla, Tercel, or Escort; McIntire never mentioned the presence of a Mazda Protegé. (RT 9:1699-1701, 1736.) McIntire could not positively identify appellant at the preliminary hearing, yet appellant was the only defendant in the courtroom. (RT 9:1700.)

C. Guilt phase–the prosecution's rebuttal case.

Sergeant Trindad testified that he took the photograph of the graffiti in Merced a couple days before the preliminary hearing in December 2004, but contrary to Lopez's testimony the photograph does not show "MGC" but, rather, shows "MGB," which stands for Merced Ghetto Boys. (RT 10:2090-

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[11] Peterson testified that Reyes and appellant are similar in appearance, except Reyes is slightly taller and has more hair. (RT 7:1320.)

2091.) The initials "MGB" were lined-out, as shown on the photograph. (RT 10:2090; CT 47:13407; People's Exh. 79.)

D. Penalty phase–the prosecution's case.

(1) Prior felony convictions.

Appellant suffered prior felony convictions for unlawful possession of a firearm (Pen. Code, § 12021, subd. (e), February 13, 2001) and possession for sale of cocaine base (Health & Saf. Code, § 11351.5, October 1, 2001). (CT 46:13302-13314; People's Exh. 75.)

(2) Juvenile adjudications.

Appellant was adjudicated a ward of the juvenile court for making criminal threats, a felony offense to which he pled no contest on August 19, 1998. (RT 12:2581-2582, 13:2720; CT 48:13728-13732 [People's Exh. 97].) In the same proceeding, appellant was also adjudicated a ward of the court for brandishing a deadly weapon. (RT 13:2720; CT 48:13728-13732.)

Appellant was adjudicated a ward of the juvenile court on January 25, 1999, for two counts of felony threatening public school officials. (RT 12:2582, 13:2720; CT 48:13728-13732.)

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(3) Other crimes evidence.

The prosecution pointed to the jury's verdicts in this case finding appellant guilty of the offenses involving McIntire and Bianchi (counts 3 through 7, inclusive). (RT 12:2556-2557.)

The prosecution pointed to prior uncharged misconduct introduced at the guilt phase, including (1) the assault with a firearm on Marlon Bradley (Pen. Code, § 245) and (2) dissuading a witness by force or threat (Pen. Code, § 136.1) and brandishing a firearm (Pen. Code, § 417) involving Larry Gonzalez and Adel Mohammed. (RT 13:2857.)

The prosecution presented Sergeant Barbara Carbonaro's testimony that on April 18, 2006, while appellant was in custody in Merced, he flooded his jail cell with water from the toilet. (RT 12:2566-2567.) Appellant was angry that he was not housed in general population. (RT 12:2567.) Appellant stated "he thought that this was unfair. Everybody else gets a chance and that just because some pig got killed he was there." (RT 12:2568.) Appellant was removed from the cell for cleaning. (RT 12:2573-2575.)

(4) Victim impact.

Former Merced Chief of Police Mark Dossetti testified that Gray was an energetic and motivated officer. (RT 12:2587.) Gray was moved to the gang unit in early 1999. (RT 12:2586-2587.) His performance as a gang

officer was outstanding. (RT 12:2589.) Dossetti was notified of the shooting and arrived at the hospital when Gray was dead. (RT 12:2591.) Gray was the first Merced police officer killed while on duty. (RT 12:2592.)

The police department was emotionally impacted by Gray's death. (RT 12:2593-2596.) Memorials were placed throughout the department and on people's desks. (RT 12:2600-2601.) His funeral was held at the local Catholic church, which holds the most people, and it was overflowing with more than 1,200 people in attendance from across the country. (RT 12:2597.) There was a funeral procession, which passed down one of the main streets of Merced. (RT 12:2598.) Over the three to four miles from the church to the cemetery, the streets were lined with people from the community, holding up signs in support of Gray, the family, and the police department. (RT 12:2598-2599.)

Sergeant Chris Goodwin testified that Gray was a motivated, professional officer, and his good friend. (RT 12:2609-2610.) Gray was very knowledgeable about gang members in Merced, and had good recall of historical information in police reports and search warrants. (RT 12:2610.) Goodwin saw Gray's body in the emergency room with an American flag draped over it and Gray's wife Michelle crying over the body. (RT 12:2616-2617.) He escorted Gray's body to the morgue. (RT 12:2617.)

Goodwin participated in Gray's funeral, escorting the family and speaking at the funeral. (RT 12:2618.) Goodwin has not recovered from the death. (RT 12:2622.) He has a tie clip to memorialize Gray and has a tattoo on his back with the American flag and Gray's badge number. (RT 12:2622.)

Gray's brother, Tony Gray, testified that he is one of four siblings. (RT 12:2624.) He was close to his brother. Their bond grew as they got older. (RT 12:2625-2627.) His brother helped around the house when they were at home. He was very athletic and involved in high school sports. (RT 12:2627-2628.) He recalled the day when his brother decided to become a police officer, after seeing someone steal a watch. (RT 12:2630.) His mother worried about his brother becoming a police officer because of the danger. (RT 12:2631-2632.) When he arrived at the hospital and saw his mother and brother, he knew that his brother had died. (RT 12:2634.) His brother's death has adversely affected him, causing him to twice attempt suicide and leaving him severely depressed. (RT 12:2635-2638.)

Gray's daughter, Landess Gray, testified that she was 13 when he died, and is now a sophomore in high school. (RT 12:2640.) She was home when her stepmother, Michelle Gray, received the call on the evening of the shooting. (RT 12:2641.) Her mother was crying and yelling, "No. No." (RT 12:2641.) Minutes later her mother told her that her dad was gone. (RT

12:2641.) She ran to her room and stood in the closet crying for a long time. (RT 12:2641.) His death has caused her confusion, anger and unhappiness, for which she has sought psychiatric counseling. (RT 12:2642-2643.) She loved her father very much and has fond memories of him, as he was funny and could always make her laugh. (RT 12:2644-2649.)

Gray's mother, Lonather Gray, testified that he was one of four children. (RT 12:2651.) He was a good child, good student and received good grades in school. (RT 12:2654-2655.) He played sports in school, including track and basketball, and was never in trouble. (RT 12:2655-2656.) She was shocked when he wanted to be a police officer because her great grandfather was a police officer who was killed while on duty. (RT 12:2656-2657.) She saw her son at the hospital on a table with an American flag draped over him. (RT 12:2662.) Her life has been horrible since his death. (RT 12:2663.)

Gray's widow, Michelle Gray, testified that he was a very good husband and an excellent father to their children. (RT 12:2667-2675, 2677-2681.) In April 2004 they had gone through a difficult period in their marriage and she suggested a career change. (RT 12:2675.) He was spending a lot of time as a gang officer, and she felt it was time for him to move on. (RT 12:2676.) They were planning a 10-year wedding anniversary trip to Jamaica when he died. (RT 12:2676.) She was greatly impacted by his death, and was

active in the passage of The Officer Stephan Gray Memorial Act, a tax measure to earmark funds for additional law enforcement and fire personnel. (RT 12:2684-1293.)

E. Penalty phase–defense evidence.

(1) Clinical assessment of mental health issues adversely affecting appellant.

Dr. Avak Howsepian, a medical doctor with an additional doctorate degree in psychiatry, interviewed appellant numerous times and spoke with appellant's family and relatives. (RT 13:2728-2729, 2734, 2787.) Among other psychiatric disorders, Dr. Howsepian testified that appellant suffered from post traumatic stress disorder, impulse control disorder not otherwise specified, and psychotic disorder. (RT 13:2734, 13:2752.)

Appellant's post traumatic stress disorder arose from a series of traumatic events starting very early in life. (RT 13:2735.) At age 3 or 4, appellant was an eyewitness to a traffic accident, personally observing a motorcyclist being killed. (RT 13:2738-2739.) The trauma experienced by appellant caused him to become afraid and have problems sleeping. (RT 13:2739-2741.) The trauma was exacerbated by the fact that appellant did not have a father in his life, as his father left his mother before he was born. (RT 13:2741.)

Later, appellant's mother brought a man into their lives, Jose Arroyo, who became a surrogate father to appellant. (RT 13:2742.) But Arroyo betrayed the trust of the family by attacking appellant's mother when appellant was 10 years old, which was a very traumatic experience for appellant. (RT 13:2742.) Appellant tried to protect his mother by staying home from school. (RT 13:2742.)

Appellant also had to protect his mother from his own brother, Oswaldo, who suffered significant mental health problems and was placed in a facility in Los Angeles because he was unable to care for himself. (RT 13:2742.) On one occasion appellant's brother physically attacked their mother. (RT 13:2742.) Appellant intervened to protect her. (RT 13:2742.)

Appellant was bullied in school, on almost a daily basis, and was taught by his mother to fight back. (RT 13:2743.)

Appellant also had a history of suffering from psychotic disorder. (RT 13:2752.) Dr. Howsepian testified, in part:

> He also has a history of a psychotic disorder in my opinion. The ways in which he acted during his interactions with Officer Gray and shortly thereafter were of such intense paranoid quality that I would consider them to have been psychotic in nature, that he was divorced from reality, detached from reality in how paranoid he was of Officer Gray. [RT 13:2752.] [¶]
>
> . . . I think the paranoia toward Officer Gray was so intense that there was a detachment from reality. This was I

> think evident not only in his actions at the time but also later during his interrogation in which he was saying things that seemed to me to be an effect of who was interviewing him, Detective Sterling. He seemed to be way out there concerning the Merced Police Department and how – what kind of corruption there was in that department and how the FBI was investigating them. He said a number of things that were just flat out false, but yet he had built all this stuff into a delusional system that he was relating to the detective during his interrogation. [RT 13:2753.]

Dr. Howsepian further testified that at the time of the offense appellant was suffering from a psychotic disorder, causing him to be paranoid and altering his perception of reality. (RT 13:2754-2756.)

(2) Character witnesses.

Appellant's niece, Esperanza Yadira Rivera, testified that he was the best uncle and always interacted with her and the family. (RT 13:2796-2797.) He was a positive influence in her life. He talked to her about careers, staying out of trouble, and the importance of getting good grades in school. (RT 13:2797-2800, 2817.) Appellant continues to be a very positive influence in her life. (RT 13:2802-2803.)

Appellant's sister, Marcela Arroyo, testified about the good memories she has of her brother. (RT 13:2806-2808.) He had a positive impact on her. He was always encouraging her to stay in school, and now she is in college. (RT 13:2809.) He was like a second father figure to her. (RT 13:2820.) Appellant continues to be a positive influence in her life. (RT 13:2820.)

Marcela Arroyo testified about an incident where appellant was riding in a van driven by their grandfather and there was an accident causing the van to flip over. (RT 13:2816.) Appellant saved their grandfather's life by pulling him out of the vehicle. (RT 13:2816-2817.)

Appellant's mother, Erika Rivera, testified that he was born in September 1982 into a fractured and financially poor family. (RT 13:2822-2827, 2835.) His father left them when she was two months pregnant, while living in Merced. (RT 13:2827-2828.) Appellant looked for his father, but never found him. (RT 13:2828-2829.)

She was romantically involved with Jose Arroyo, who lived with them for seven or eight years. (RT 13:2829.) She recalled when appellant was nine years old Arroyo became aggressive toward her and appellant intervened to protect her. (RT 13:2830-2831.) Appellant also protected her from her oldest son, Oswaldo, who is mentally ill. (RT 13:2831-2832.)

Erika Rivera testified that appellant is a good person, and tried to be a father figure to her other children to assist her in raising them. (RT 13:2835.) Appellant has a daughter with whom he spent a lot of time. (RT 13:2828, 2835.) Appellant still corresponds with his daughter. (RT 13:2836.)

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Guilt Phase and Special Circumstance Issues

1. The evidence is insufficient as a matter of law to sustain the finding that appellant committed the murder in count 1 with premeditation and deliberation, requiring reduction of the offense to second degree murder.

A. Introduction and summary of argument.

Appellant was found guilty in count 1 of the first degree murder of Stephan Gray. (CT 47:13582, 13591; RT 11:2387.) There is insufficient evidence to elevate the intentional killing of Gray from second degree murder to a first degree killing committed with premeditation and deliberation.

In order to find appellant guilty of that charge, the jury was required to conclude that his acts were the result of """careful thought and weighing of considerations""" rather than an """unconsidered or rash impulse""" as he was running away from Gray. (*People v. Manriquez* (2005) 37 Cal.4th 547, 577; see *People v. Anderson* (1968) 70 Cal.2d 15, 26-27; see also CALJIC No. 8.67.) That standard is not met by showing only that appellant acted willfully and with specific intent to kill. "By conjoining the words 'willful, deliberate, *and* premeditated' in its definition and limitation of the character of killings falling within murder of the first degree the Legislature apparently emphasized its intention to require as an element of such crime substantially more reflection than may be involved in the mere formation of a specific intent to kill." (*People v. Thomas* (1945) 25 Cal.2d 880, 900, italics added.)

The prosecution presented no evidence of a plan by appellant to kill Gray. Appellant was not looking for Gray. The traffic stop was initiated by Gray, thereby showing that the encounter was unplanned. (RT 6:1240-1252.)

The purported gang motive for the killing was entirely speculative. There was no evidence that any gang was trying to kill Gray. Appellant was not in the presence of any gang members when the killing occurred. Nor was he in gang territory. No gang epithets were uttered, nor gang signs used. The jury found not true the gang special circumstance, which required a finding that the murder was carried out to further the activities of a criminal street gang. (*Post*, § 7.)

Finally, although the method of killing–shots fired at close range–might support a specific intent to kill (second degree murder), the hasty manner in which the shooting occurred shows unconsidered, impulsive conduct, which is woefully insufficient to support the requisite finding of willful, deliberate, and premeditated first degree murder.

B. Standard of review.

Faced with a challenge to the sufficiency of the evidence, the court reviews "the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, *evidence which is reasonable, credible, and of solid value* – such that a reasonable trier of fact

could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578, italics added; *People* v. *Samuel* (1981) 29 Cal.3d 489, 505 [evidence relied upon must be "reasonable in nature, credible and of solid value"].)

"The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." (*Ibid.*, citing *People v. Stanley* (1995) 10 Cal.4th 764, 792-793.)

"'Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises the possibility, and this is not a sufficient basis for an inference of fact.'" (*People v. Reyes* (1974) 12 Cal.3d 486, 500, citing *People v. Redmond* (1969) 71 Cal.2d 745, 755.) Nor can "substantial evidence" be based on speculation:

> We may speculate about any number of scenarios that may have occurred on the morning in question. A reasonable inference, however, "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference

> drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.

(*People v. Morris* (1988) 46 Cal.3d 1, 21 (citations omitted).)

Moreover, in capital cases it is well recognized that heightened verdict reliability is required at both the guilt and penalty phases of trial. (*Beck v. Alabama* (1980) 447 U.S. 625, 627-646; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 76, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

C. The prosecution failed to sustain its burden of proving that appellant committed the murder with premeditation and deliberation.

In assessing the sufficiency of the evidence as to the element of premeditation and deliberation, "'[t]he true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly, but the express requirement for a concurrence of deliberation and premeditation excludes . . . those homicides . . . which are the result of mere unconsidered or rash impulse hastily executed.'" (*People v. Velasquez* (1980) 26 Cal.3d 425, 435, vacated and remanded on other grounds in *California v. Velasquez* (1980) 448 U.S. 903.) A killing is deliberate and premeditated only if the killer acted as a result of careful thought and weighing the considerations, as with a

deliberate judgment or plan, carried on coolly and steadily according to a preconceived design. (*People v. Anderson, supra,* 70 Cal.2d at p. 26.)

Anderson prescribes a tripartite test for assessing the sufficiency of the evidence to support premeditation and deliberation: (1) the defendant's planning activity prior to the homicide; (2) his motive to kill, as gleaned from his prior relationship or conduct with the victim; and (3) the manner of the killing, from which it might be inferred the defendant had a preconceived design to kill. (*Id.* pp. 26-27; *People v. Wharton* (1991) 53 Cal.3d 522, 546.) "*Anderson* does not require that these factors be present in some special combination or that they be accorded a particular weight, nor is the list exhaustive. *Anderson* was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse." (*People v. Pride* (1992) 3 Cal.4th 195, 247; *People v. Thomas* (1992) 2 Cal.4th 489, 516-517.)

In this case, there is insufficient evidence of each factor described in *Anderson*. First, there is no evidence of planning activity. There was no evidence that appellant discussed the murder of Gray prior to the killing. Nor was there evidence that appellant discussed a killing of a police officer. There was no evidence that the weapon appellant possessed was unique, which might

indicate planning activity (i.e., a hand-crafted, fabricated weapon); instead, the weapon used was a handgun that discharged standard .45-caliber ammunition. (RT 971-974, 1043, 1049-1050.)

The prosecution did not present any evidence that the timing of the killing coincided with another relevant event, suggesting that the killing was a random occurrence, rather than a pre-planned event. Nor was Gray moved from one location to another to facilitate the killing, suggesting that the act of shooting Gray was spontaneous, not pre-planned. (See *People v. Hovey* (1988) 44 Cal.3d 543, 556 [that defendant armed himself with a knife, kidnaped and bound his victim, and took her to a secluded location constituted substantial evidence of a prior plan to kill].)

In contrast to the planning activity found in *Hovey*, which involved substantial movement of the victim, appellant did not move Gray to facilitate a killing. Nor was there evidence that appellant stalked Gray, or that there was any appreciable period of time between when appellant first encountered Gray and when the shots were fired. Lack of planning activity also is shown in the fact that appellant did not shoot Gray upon exiting Peterson's vehicle, but only fired upon Gray in response to Gray giving chase on foot, thereby supporting an inference that the shooting was a rash impulse hastily executed without reflection. (RT 6:1171, 1174, 1180, 1194-1199, 1255-1257.)

The prosecution presented no evidence that appellant knew that Gray was going to conduct a traffic stop of Peterson's vehicle. The traffic stop and contact was initiated by Gray, and came as a complete surprise to appellant, thereby showing that appellant did not plan the encounter with Gray. (RT 6:1246-1247.)

As for motive, Sergeant Trindad testified that the killing was gang-related, a shooting by an MGC gang member that would benefit MGC by increasing the power and reputation of the gang within the community. (RT 10:1930-1931.) But the jury rejected any notion that the murder was carried out to further the activities of a criminal street gang, finding not true the gang special circumstance allegation. (CT 47:13591.) Nor did the prosecution present evidence that any gang was trying to kill Gray and/or another peace officer.

Contrary to the prosecution's theory that the killing was gang-related, the prosecution's evidence shows that the shooting arose from appellant's feeling that Gray was harassing him, a purely personal matter unrelated to any gang involvement. As Gray was initiating the traffic stop, appellant complained to Peterson, "Mother-fucker, why did – *Why is he always bothering me*? *Why is he harassing me*? *Why don't (sic) he just leave me alone*?" (RT 6:1242, italic added.) Appellant was not with any gang

members, nor was he making any gang signs and/or speaking any gang epithets during the encounter with Gray.

Finally, as for the manner of killing, the evidence showed that appellant fired two shots at Gray from over appellant's shoulder while running away from Gray. The hasty, awkward manner of the shooting belies a preconceived design to kill. (See *People v. Ratliff* (1986) 41 Cal.3d 675, 695-696 [shooting at close range does not necessarily demonstrate an intent to kill].) A shooting at close range, therefore, could support an instruction, where applicable, on the lesser included offense of involuntary manslaughter and/or the lesser related offense of assault with a deadly weapon. (See *People v. Woods* (1991) 226 Cal.App.3d 1037, 1051-1052.)

The manner of killing–two shots fired while running away–stands in contrast to the type of evidence routinely upheld by this Court as sufficient to show a premeditated, deliberate killing, i.e., where the victim is stabbed and beaten repeatedly. In *People v. Hovey, supra*, this Court stated:

> . . . [T]he evidence indicated that defendant stabbed or beat Tina repeatedly in the head. As in *Alcala*, where the victim was "all cut up," such a brutal method of injuring his victim, coupled with the foregoing evidence of planning and motive, "supports the inference of a calculated design to ensure death, rather than an unconsidered 'explosion' of violence. [Citation.]"

(*People v. Hovey, supra*, 44 Cal.3d at pp. 556-557, citing *People v. Alcala, supra*, 36 Cal.3d at p. 627.)

Moreover, the manner of killing alone will not support a conviction for premeditated and deliberate first degree murder. As this Court stated in *Anderson*, an appellate court will sustain a conviction where there exists evidence of all three elements (planning, motive, and manner of killing indicating a preconceived design to kill in a certain way), where there is "extremely strong" evidence of prior planning activity, or where there exists evidence of a motive to kill, coupled with evidence of either planning activity or a manner of killing which indicates a preconceived design to kill. (*People v. Anderson*, *supra*, 70 Cal.2d at pp. 26-27.)

Appellant recognizes that deliberation and premeditation can occur in a brief period of time. (*People v. Thomas* (1945) 25 Cal.2d 880, 900 ["The true test is not the duration of time as much as it is the extent of the reflection . . ."].) Yet, it is well established that even the brutality of a killing alone cannot itself support a finding that the killer acted with premeditation and deliberation.

> If the evidence showed no more than the infliction of multiple acts of violence on the victim, it would not be sufficient to show that the killing was the result of careful thought and weighing of considerations.

(*People v. Caldwell* (1965) 43 Cal.2d 864, 869; see *People v. Tubby* (1949) 34 Cal.2d 72, 78.)

Moreover, this Court has

> repeatedly pointed out that the legislative classification of murder into two degrees would be meaningless if "deliberation" and "premeditation" were construed as requiring no more reflection than may be involved in the mere formation of a specific intent to kill.

(*People v. Wolff* (1964) 61 Cal.2d 795, 821; *People v. Caldwell, supra,* 43 Cal.2d at p. 869; *People v. Thomas, supra*, 25 Cal.2d at p. 898.)

Consistent with this principle, for a killing with malice aforethought to be first rather than second degree murder, "'[the] intent to kill must be . . . formed upon a pre-existing reflection,' . . . [and have] been the subject of actual deliberation or forethought . . . ." (*People v. Thomas, supra*, 25 Cal.2d at pp. 900-901.) The Court has therefore held that "[a] verdict of murder in the first degree . . . [on a theory of a wilful, deliberate, and premeditated killing] is proper only if the slayer killed 'as a result of careful thought and weighing of considerations; as a deliberate judgment or plan; carried on cooly and steadily, [especially] *according to a preconceived design*.'" (*People v. Caldwell, supra*, 43 Cal.2d at p. 869, citation omitted, italics added.)

The evidence is insufficient to support the finding that appellant acted with premeditation and deliberation. The circumstances of the shooting show an absence of planning activity and a lack of a gang motive to kill–all reflecting the *absence* of premeditation and deliberation. The jury's finding

that the murder of Gray was committed deliberately and with premeditation must be reversed for insufficient evidence and appellant's conviction in count 1 reduced to second degree murder. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 318 [a conviction unsupported by substantial evidence denies a defendant due process of law]; *People v. Bean* (1988) 46 Cal.3d 919, 932; Cal. Const., art. 1, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.)

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2. The trial court prejudicially erred by giving a flawed version of CALJIC No. 8.71 regarding consideration of second degree murder, requiring reduction of the offense in count 1 to second degree murder.

A. Introduction.

Appellant was convicted in count 1 of first degree murder of Stephan Gray. (RT 11:2387; CT 47:13582, 13591.)

The trial court instructed the jury on both express malice second degree murder and premeditated first degree murder. (RT 11:2311-2233, 2235; CT 48:13814-13817.)

But the trial court gave a flawed version of CALJIC No. 8.71 [Doubt Whether First or Second Degree Murder], which suggested that a juror was to give the defendant the benefit of the doubt as to the degree of the offense only if *all jurors unanimously* had a reasonable doubt as to the degree, thereby making first degree murder the de facto default finding. (RT 11:2232-2233; CT 48:13820; see *People v. Moore* (2011) 51 Cal.4th 386, 409-411.)

In accordance with the instructions on second degree murder, the jurors reasonably could have found that the killing of Gray was an intentional killing, but committed without the requisite premeditation and deliberation necessary to elevate it to first degree murder.

The instructional error requires reduction of appellant's conviction in count 1 to second degree murder because (1) the instruction lowered the

prosecution's burden of proof by making first degree murder the de facto default finding and (2) the instruction deprived appellant of the assurance that the jurors unanimously found that the prosecution proved, beyond a reasonable doubt, every fact necessary to constitute the crime of first degree murder. (*Post*, § 2.E.)

B. Standard of review.

Instructional error is reviewed de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.) The challenged instruction is viewed "in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner." (*People v. Houston* (2012) 54 Cal.4th 1186, 1229.)

C. The issue is cognizable on appeal.

Appellant may raise the issue on appeal despite his failure to object below because the instruction affected his substantial rights. (Pen. Code, § 1259; *People v. Cleveland* (2004) 32 Cal.4th 704, 750.)

It is the trial court's duty to instruct on general principles of law relevant to the issues raised by the evidence. This is true even absent a request for an instruction by the defendant. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) "'The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and

which are necessary for the jury's understanding of the case.' []" (*Ibid.*) The court has a corresponding duty, however, "'to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.' []." (*People v. Saddler* (1979) 24 Cal.3d 671.)

The defendant is generally entitled upon request to a "pinpoint" instruction, which charges the jury on how to relate the evidence supporting a particular defense to the prosecution's general burden of proving guilt beyond a reasonable doubt. (*People v. Earp* (1999) 20 Cal.4th 826, 886.) Although the trial court need not give an argumentative or confusing pinpoint instruction, it should modify an otherwise correct one rather than deny it outright. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1110.)

A defendant has a constitutional right to have the jury "'determine every material issue presented by the evidence.' []" (*People v. Flood* (1998) 18 Cal.4th 470, 480.) "Under established law, instructional error relieving the prosecution of the burden of proving beyond a reasonable doubt every element of the charged offense violates the defendant's rights under both the United States and California Constitutions." (*Id.* at pp. 479-480; see also *In re Winship* (1970) 397 U.S. 358, 364.)

Incorrect jury instructions may deprive a defendant of his right to due process. However, "not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation." (*Middleton v. McNeil* (2004) 541 U.S. 433, 437.) Individual instructions may not be assessed in isolation, "but must be viewed in the context of the overall charge." (*Ibid.* [internal quotation marks and citations omitted]; see also *People v. Letner* (2010) 50 Cal.4th 99, 182.) The high court explains that "[i]f the charge as a whole is ambiguous, the question is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." (*Middleton v. McNeil, supra*, 541 U.S. at p. 437 [internal quotation marks and citations omitted]; *People v. Letner, supra*, 50 Cal.4th at p. 182.)

D. The trial court erred by giving a flawed version of CALJIC No. 8.71 regarding consideration of second degree murder.

The trial court gave the 1996 revised version of CALJIC No. 8.71, which instructed the jurors as to what they should do if they agreed appellant had committed murder but had doubts about whether it was in the first or second degree. The version of CALJIC No. 8.71 given in appellant's trial stated:

> 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. [RT 11:2232-2233; CT 48:13820, italics added.]

This version of 8.71 is flawed because it suggested that a juror was to give the defendant the benefit of the doubt as to the degree of the offense only if *all jurors unanimously* had a reasonable doubt as to the degree, thereby making first degree murder the de facto default finding, depriving appellant of the benefit of the judgment of individual jurors, and diminishing the prosecutor's burden of proof.

This Court recognized the confusion this instruction could engender in *People v. Moore, supra*, 51 Cal.4th at pp. 409-411. The Court stated:

> 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 the jurors about the role of their individual judgments in deciding between first and second degree murder, and between murder and manslaughter.

(*People v. Moore, supra*, 51 Cal.4th at p 411.)

The standard instruction subsequently was revised. As now written, CALJIC No. 8.71 cannot lead to a first degree murder verdict if any individual juror has a reasonable doubt as to the degree of murder. It currently states:

> *If any juror* is convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but has a reasonable doubt whether the murder was of the first or of the

> second degree, that juror must give defendant the benefit of that doubt and find that the murder is of the second degree.

(CALJIC No. 8.71 (Fall 2011 Revision), italics added.)

Here, the trial court erred by giving the flawed version of CALJIC No. 8.71 regarding consideration of second degree murder because it contained a confusing unanimity requirement, and thus was an incorrect statement of the law and dangerously misleading.

E. The instructional error was prejudicial because it lowered the prosecution's burden of proof by making first degree murder the de facto default finding and it deprived appellant of the assurance that the jurors unanimously found that the prosecution proved, beyond a reasonable doubt, every fact necessary to constitute the crime of first degree murder, requiring reduction of appellant's conviction in count 1 to second degree murder.

Jury instructions provide essential guidance to the jury. (*Carter v. Kentucky* (1981) 450 U.S. 288, 302; *Bollenbach v. United States* (1946) 326 U.S. 607, 612.)

> Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law.

(*Carter v. Kentucky, supra*, 450 U.S. at p. 302.)

A correctly worded unanimity instruction vindicates federal and state constitutional rights. A criminal defendant has a federal constitutional right to due process and to a jury verdict that is unanimous as to the act for which he is being convicted. (*United States v. Frega* (9th Cir. 1999) 179 F.3d 793, 810;

United States v. Gordon (9th Cir. 1988) 844 F.2d 1397, 1400-1401; *United States v. Echeverry* (9th Cir. 1983) 698 F.2d 375, 377; U.S. Const., 6th, 8th & 14th Amends.) Unless a correct unanimity instruction is given where appropriate, there is no assurance that the jurors unanimously found that the prosecutor proved, beyond a reasonable doubt, every fact necessary to constitute the crime with which the defendant is charged. (*In re Winship, supra*, 397 U.S. at p. 364.)

Moreover, failure to adequately instruct the jury upon matters relating to proof of any element of the charge, as here, violates the defendant's federal (5th, 6th and 14th Amendments) and California (Art. I, § 15 and § 16) constitutional rights to trial by jury and due process. (See *Carella v. California* (1989) 491 U.S. 263, 270 ["misdescription of an element of the offense . . . deprives the jury of its factfinding role" and thus is "not curable by overwhelming record evidence of guilt"] (conc. opn. of Scalia, J.); *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *United States v. Gaudin* (1995) 515 U.S. 506, 510; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *People v. Flood, supra*, 18 Cal.4th at p. 490; *People v. Lee* (1987) 43 Cal.3d 666, 673-674 [erroneous instructions defining the elements of a crime violate the due process clause of the 14th Amendment]; *Rose v. Clark* (1986) 478 U.S. 570, 580-581 [the failure to adequately instruct upon an element of the offense

violates the Sixth Amendment right to trial by jury as applied to the states through the Fourteenth Amendment and the Fourteenth Amendment right to due process]; *People v. Hernandez* (1988) 46 Cal.3d 194, 211.)

The error also violated the Eighth Amendment, which requires heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama, supra*, 447 U.S. at pp. 633-646; *Kyles v. Whitley, supra*, 514 U.S. at p. 422; *Burger v. Kemp, supra*, 483 U.S. at p. 785; U.S. Const., 8th & 14th Amends.)

Accordingly, because the instructional error lowered the prosecution's burden of proof by making first degree murder the de facto default finding, and because the instructional error deprived appellant of the assurance that the jurors unanimously found that the prosecution proved, beyond a reasonable doubt, every fact necessary to constitute the crime of first degree murder, the trial court's failure to correctly instruct on these principles violated appellant's federal constitutional rights to trial by jury and due process.

The standard of prejudice for the deprivation of a federal constitutional right is the *Chapman* harmless error analysis, which requires reversal of appellant's convictions unless the state can prove that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Under this test, the appropriate inquiry is "not whether, in a trial that occurred

without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279.)

Appellant explained that the evidence is insufficient as a matter of law to sustain a finding of premeditation and deliberation. (*Ante*, § 1.) Deliberation and premeditation require a level of reflection greater than that required to merely form the intent to kill. (*People v. Anderson, supra*, 70 Cal.2d at p. 26.) To establish deliberation and premeditation, the intent to kill must be formed upon a preexisting reflection and result from careful thought and weighing the considerations, as with a deliberate judgment or plan, carried on coolly and steadily according to a preconceived design. (*Ibid.*) Planning, motive, and an exacting method of attack are factors which can assist in the determination of deliberation and premeditation; however, these factors are not a prerequisite to a deliberation and premeditation finding, nor are they exclusive. (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.)

The evidence shows that appellant neither initiated the encounter with Gray nor fired upon Gray at first opportunity when exiting Peterson's vehicle. (RT 6:1240-1257.) Instead, the record reveals that this unplanned encounter with Gray ended as a deadly encounter only after Gray chased appellant and appellant hastily drew a firearm and discharged two rounds while running

away. (RT 6:1154-1166, 1255-1257.) The record thus reveals rash, impulsive conduct by appellant–i.e., one showing an intent to harm or perhaps even an intent to kill, but entirely devoid of solid, credible evidence of premeditation *and* deliberation sufficient to elevate the killing to first degree murder.

Moreover, an appellate court cannot consider the weight of the prosecution's evidence on harmless error review of an instructional error that lowers the prosecution's burden of proof. (See *People v. Aranda* (2012) 55 Cal.4th 342, 368; *Sullivan v. Louisiana, supra*, 508 U.S. at p. 281.)

In view of the evidence, one of the twelve jurors could have found that the killing was intentional, but still have entertained a reasonable doubt whether appellant acted with the requisite premeditation and deliberation necessary for a verdict of first degree murder. (See *People v. Ratliff, supra*, 41 Cal.3d at p. 695 [even a shooting at close range does not necessarily demonstrate an intent to kill].) The prosecution thus will be unable to prove that the instructional error–which suggested that a juror was to give appellant the benefit of the doubt as to the degree of the offense only if *all jurors unanimously* had a reasonable doubt as to the degree–was harmless beyond a reasonable doubt.

> "[W]e cannot affirm a non-unanimous verdict simply because the evidence is so overwhelming that the jury surely would have been unanimous had it been properly instructed on unanimity."

(*United States v. Russell* (3d. Cir. 1998) 134 F.3d 171, 181, quoting *United States v. Edmonds* (3d Cir. 1996) 80 F.3d 810, 824.)

The prejudice suffered by appellant was compounded by the erroneous acquittal-first instruction on count 1, which required unanimous agreement of reasonable doubt whether the offense was first or second degree murder before the jury could return a verdict of second degree murder. (*Post*, Arg. 3.)

Appellant's conviction in count 1 must be reduced to second degree murder for instructional error.

/ / /

3. The trial court prejudicially erred by giving an acquittal-first instruction on count 1, requiring reduction of the offense to second degree murder.

A. Introduction.

The jury was instructed on count 1 that if it found beyond a reasonable doubt that the crime of murder was committed, then it could find appellant guilty of either first degree murder or of the lesser offense of second degree murder. (RT 11:2311-2233, 2235; CT 48:13814-13817.) The instructions required the jury to find appellant not guilty of first degree murder before it could return a verdict on second degree murder. (RT 11:2232-2233; CT 48:13820.) The court instructed the jury, in part:

> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by the 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. [RT 11:2232-2233.]

As explained below, the instruction violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, trial by jury, and full, fair, and reliable jury consideration of lesser included offenses in a capital case.

B. Standard of review.

Instructional error is reviewed de novo. (*People v. Cole, supra*, 33 Cal.4th at p. 1210.) The challenged instruction is viewed "in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner." (*People v. Houston, supra*, 54 Cal.4th at p. 1229.)

C. Requiring a capital case jury to unanimously acquit on the greater offense before being permitted to convict of a lesser included offense violates due process, the right to jury trial, and Eighth Amendment guarantees.

Appellant recognizes that this Court has held that a jury must unanimously agree to acquit a defendant of a greater charge before returning a verdict on a lesser charge. (*People v. Fields* (1996) 13 Cal.4th 289, 310-311.) The Court should reconsider the holding, however, as it precludes full jury consideration of lesser included offenses, and thereby implicates the due process and jury trial guarantees of the Fifth, Sixth and Fourteenth Amendments and the Eighth Amendment's requirement for heightened reliability in capital cases.

Reconsideration of the holding in *Fields* is particularly warranted in this case because the trial court gave a flawed version of CALJIC No. 8.71 [Doubt Whether First or Second Degree Murder], which suggested that a juror was to give the defendant the benefit of the doubt as to the degree of the offense only

if *all jurors unanimously* had a reasonable doubt as to the degree, thereby making first degree murder the de facto default finding. (*Ante*, Arg. 2.)

"Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction." (*Beck v. Alabama, supra,* 447 U.S. 625, 634, quoting *Keeble v. United States* (1973) 412 U.S. 205, 212-213.) Because "[s]uch risk cannot be tolerated in a case in which the defendant's life is at stake" (*id.* at p. 637), the United States Supreme Court has held that a defendant accused of capital murder has a due process and Eighth Amendment right to lesser included offense instructions. (*Id.* at pp. 637-638.) "[P]roviding the jury with the 'third option' of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard." (*Id.* at p. 634.) An instruction that the jury cannot convict on the lesser charge unless it first unanimously votes to acquit on the greater charge prevents a capital case jury from making use of lesser included offense instructions in the way contemplated by *Beck,* and subjects jurors to the same pressure to ignore the reasonable doubt standard that they would face if no lesser included offense instruction were given at all.

The unanimity requirement prevents the jury from giving effect to lesser included offense instructions because it encourages false unanimity and

coerced verdicts. "Members of the jury who have substantial doubts about an element of the greater offense, but believe the defendant guilty of the lesser offense, may very well choose to vote for conviction of the greater rather than to hold out until a mistrial is declared, leaving the defendant without a conviction of any charge." (*Jones v. United States* (D.C. 1988) 544 A.2d 1250, 1253; see also *United States v. Tsanas* (2nd Cir. 1978) 572 F.2d 340, 346; *Cantrell v. State* (GA 1996) 469 S.E.2d 660; *State v. Ferreira* (HI 1990) 791 P.2d 407, 411-412 [jury need not unanimously reject the greater charge in order to consider the lesser included offense, and an instruction requiring this procedure is reversible error].)

In *United States v. Tsanas, supra*, 572 F.2d 340, Judge Friendly recognized the reality that an acquittal-first instruction may result in "the defendant . . . being convicted on the greater charge just because the jury wishes to avoid a mistrial . . . ." (*Id.* at p. 346.) This is so because, "[i]f the jury is heavily for conviction on the greater offense, dissenters favoring the lesser may throw in the sponge rather than cause a mistrial that would leave the defendant with no conviction at all, although the jury might have reached sincere and unanimous agreement with respect to the lesser charge." (*Ibid.*)

This view was also expressed by in *United States v. Jackson* (9th Cir. 1984) 726 F.2d 1466, where the Ninth Circuit explained that if the jury must

unanimously agree on acquittal on the greater offense before returning a conviction on a lesser included offense, there is a risk that jurors who have a doubt that the defendant is guilty of the greater offense, but who are convinced the defendant is guilty of some offense, will likely resolve their doubts in favor of convicting the defendant of the greater offense, rather than holding out and not convicting the defendant of anything at all. (*Id.* at pp. 1469-1470; see also *Catches v. United States* (8th Cir. 1978) 582 F.2d 453, 459 [referring to Judge Friendly's opinion in *Tsanas* as a "well-reasoned rule"].)

The acquittal-first rule was criticized and abandoned by the Arizona Supreme Court in *State v. LeBlanc* (AZ 1996) 924 P.2d 441 because it encourages "false unanimity" and "coerced verdicts." (*Id.* at 442.) The court stated that "requiring a jury to do no more than use reasonable efforts to reach a verdict on the charged offense is the better practice and more fully serves the interest of justice and the parties." The court concluded that the jury should be instructed that it may deliberate on and return a lesser offense "if it either (1) finds the defendant not guilty on the greater charge, or (2) after reasonable efforts cannot agree whether to acquit or convict on that charge." (*Ibid.*)

The unanimity requirement also prevents the jury from giving effect to lesser included offense instructions because it gives an unfair advantage to the prosecution. (*Cantrell v. State, supra*, 469 S.E.2d at p. 662 [acquittal-first

instruction "gives the prosecution an unfair advantage"].) This is so because the acquittal-first rule is based on "the desire to avoid lending encouragement to jurors who are irrationally holding out for a lesser charge" while at the same time the rule "lends support to jurors who are irrationally holding out for a greater charge." (*People v. Helliger* (NY 1998) 691 NY.S.2d 858, 865.)

> Rationality does not necessarily favor one side or the other when there is disagreement. When a court submits a greater and a lesser a legal determination has been made that either position could be rationally based. A court may only submit a lesser offense when "there is a reasonable view of the evidence which would support a finding that the defendant committed such lesser but did not commit the greater." [Citation.] There is no legal presumption that one position is more rational than the other. In cases where lenity is not the primary or only evil to be avoided, it may be wise for Court to read the statute to the jury, as the Legislature has directed, and advise them that they may convict upon any of the counts submitted . . . .

(*Ibid.*; see also *Jones v. United States* (DC 1988) 544 A.2d 1250, 1253-1254 [acquittal-first instruction which requires jury to take affirmative step by rendering acquittal of greater offense before it may consider lesser offense improperly interferes with jury's deliberations by encouraging jury to favor conviction of greater offense].)

Accordingly, the acquittal-first instruction violates the settled principle that "[t]here should be absolute impartiality as between the People and the

defendant in the matter of instructions." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527; *Reagan v. United States* (1895) 157 U.S. 301, 310.)

D. Reduction of the offense to second degree murder is required for structural error; alternatively, the prosecution will be unable to prove that the instructional error was harmless beyond a reasonable doubt because the evidence does not necessarily support a conviction for the greater offense of first degree murder.

Because an acquittal-first instruction influences the jury's deliberative process and undermines both the fairness and the reliability of its verdict, and because it lowers the prosecution's burden of proof on the greater offense, it affects basic structural rights. (See, e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310; *People v. Cahill* (1993) 5 Cal.4th 478, 493, 501-502.) As the Court can only speculate about the jury's deliberation process, the giving of this instruction does not lend itself to harmless error analysis; appellant's conviction in count 1 for first degree murder must be reduced to second degree murder. (*Ibid.*)

Alternatively, instructional error which violates only state law requires reversal if "it is reasonably probable that a result more favorable to the [defendant] would have been in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Blakeley* (2000) 23 Cal.4th 82, 85.)

Where the error violates appellant's rights under the federal Constitution reversal is required under *Chapman v. California, supra*, 386

U.S. at p. 24 unless the error was harmless beyond a reasonable doubt. Under this test, the appropriate inquiry is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279.)

Assuming harmless-error review should be undertaken, reduction of the first degree murder conviction in count 1 to second degree murder is still required. Where, as here, an instructional omission lowers the prosecution's burden of proof the court does not consider the weight of the prosecution's evidence on harmless error review . (See *People v. Aranda, supra*, 55 Cal.4th at p. 368.) Giving an acquittal-first instruction in a capital case on the charge of first degree murder does precisely that. (*Ante*, § 3.C.)

The prejudice was compounded because the jury was also instructed with a flawed version of CALJIC No. 8.71, which suggested that a juror was to give the defendant the benefit of the doubt as to the degree of the offense only if *all jurors unanimously* had a reasonable doubt as to the degree. (*Ante*, Arg. 2.) The flawed version of CALJIC No. 8.71, together with the acquittal-first instruction, made first degree murder the de facto default finding.

Moreover, the prosecution failed to sustain its burden of proving that appellant committed the murder of Gray with premeditation and deliberation.

(*Ante*, § 1.) In view of the weakness of the evidence in support of the first degree murder conviction in count 1 (*ante*, § 1.C), there is a reasonable probability of a result more favorable to appellant in the absence of the error (i.e., a conviction for second degree murder–an intentional but unpremeditated murder). For the same reason, the prosecution could not possibly prove beyond a reasonable doubt that the instructional error did not contribute to the verdict. Appellant's first degree murder conviction in count 1 cannot be deemed "surely unattributable to the" erroneous acquittal-first instruction. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.)

Appellant's conviction in count 1 for first degree murder must be reduced to second degree murder.

/ / /

4. The trial court prejudicially erred in failing to instruct that subjective provocation may reduce premeditated first degree murder to second degree murder, requiring reduction of the offense in count 1 to second degree murder.

A. Introduction and summary of argument.

Appellant was convicted in count 1 of first degree murder of Stephan Gray, which required a finding of premeditation and deliberation. (RT 11:2387; CT 47:13582, 13591; see *People v. Caldwell, supra*, 43 Cal.2d at p. 869.)

The jury was instructed on first degree murder (i.e., express malice with premeditation and deliberation) and second degree express-malice murder. (RT 11:2311-2233, 2235; CT 48:13814-13817, 13820.)

Despite weak evidence of premeditation and deliberation (an essential element of premeditation and deliberation) (*ante*, § 1), and despite substantial evidence that the shooting was in direct response to appellant's perception that the traffic stop and search were part of a pattern of harassment–thus provoking appellant's conduct (*post*, § 4.C.)–the trial court failed to instruct that subjective provocation can reduce premeditated murder to second degree murder.

The trial court should have instructed sua sponte, in language similar to CALCRIM No. 522,[12] that subjective provocation can negate a finding of premeditation and deliberation. (*Post*, § 4.B.)

Appellant was prejudiced by the failure to instruct on subjective provocation relating to the element of premeditation and deliberation because (1) the prosecution's evidence of premeditation and deliberation was weak and insufficient (*ante*, § 1) and (2) appellant presented substantial, persuasive evidence that the shooting was provoked by a perception that Gray was continually harassing him, giving rise to a subjective state of provocation negating premeditation and deliberation. (*Post*, §§ 4.C. & 4.D.; see *People v. Padilla* (2002) 103 Cal.App.4th 675, 678 [the standard for provocation negating premeditation and deliberation is a subjective one].)

B. The issue is cognizable on appeal.

The trial court has a duty to instruct on the general principles of law relevant to the issues raised by the evidence. (*People v. Earp, supra*, 20 Cal.4th 826, 885.) "Included within this duty is the '. . . obligation to instruct on defenses, . . . and on the relationship of these defenses to the elements of

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[12] CALCRIM No. 522 states, in part, "Provocation may reduce a murder from first degree to second degree . . . . The weight and significance of the provocation, if any, are for you to decide. If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder."

the charged offense . . .' where '. . . it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense . . . .' [Citation.]" (*People v. Stewart* (1976) 16 Cal.3d 133, 140; *People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1054 [trial court must instruct on defense "if substantial evidence supports the defense"]; but see *People v. Rogers* (2006) 39 Cal.4th 826, 877-880; *People v. Middleton* (1997) 52 Cal.App.4th 19, 31-33, disapproved on other grounds in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752 [no sua sponte duty to instruct on CALCRIM No. 522 provocation and the effect on the degree of murder].)

Failure to adequately instruct the jury upon matters relating to proof of any element of the charge in a capital case, as here, violates the defendant's federal (6th, 8th, and 14th Amendments) and California (Art. I, § 15) constitutional rights to trial by jury, due process, and a reliable death verdict. (See *Carella v. California* (1989) 491 U.S. 263, 270 ["misdescription of an element of the offense . . . deprives the jury of its factfinding role" and thus is "not curable by overwhelming record evidence of guilt"] (conc. opn. of Scalia, J.); *United States v. Gaudin* (1995) 515 U.S. 506, 510; *Rose v. Clark* (1986) 478 U.S. 570, 580-581 [the failure to adequately instruct upon an element of the offense violates the Sixth Amendment right to trial by jury as applied to the

states through the Fourteenth Amendment and the Fourteenth Amendment right to due process].)

Moreover, the issue raised herein is cognizable on appeal because it affects appellant's substantial rights. An instructional error that affects a defendant's substantial constitutional rights may be reviewed on appeal despite the absence of an objection. (Pen. Code, § 1259; *People v. Prieto* (2003) 30 Cal.4th 226, 247; *People v. Williams* (2010) 49 Cal.4th 405, 457; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7; *People v. Gamache* (2010) 48 Cal.4th 347, 375, fn. 13 ["to the extent this claim of instructional error is meritorious and contributed to [their convictions], we will review it."].) "Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim – at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was." (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) A claimed error will have affected the defendant's substantial rights if it resulted in a miscarriage of justice, making it reasonably probable the defendant would have obtained a more favorable result in the absence of the error. (*Ibid.*; *People v. Baca* (1996) 48 Cal.App.4th 1703, 1706.)

C. The trial court erred by failing to instruct that subjective provocation can reduce premeditated murder to second degree murder.

This Court has long held that the existence of provocation may "raise a reasonable doubt that the defendant formed the intent to kill upon, and carried it out after, deliberation and premeditation." (*People v. Valentine* (1946) 28 Cal.2d 121, 132.)

There is no objective standard for provocation in considering the degree of murder; instead, the jury must apply a *subjective standard of provocation* when considering whether the evidence is sufficient to reduce premeditated murder to second degree murder. (See *People v. Padilla, supra*, 103 Cal.App.4th at p. 678 [holding that subjective test applies]; *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295-1296 [rejecting the People's contention that "the jury must apply an objective standard of provocation to reduce first degree murder to second degree murder, just as to reduce murder to manslaughter."].)

The trial court instructed the jury on express malice murder and deliberation and premeditation in the language of CALJIC Nos. 8.10, 8.11, 8.20, 8.30, 8.70, and 8.71. (CT 48:13814-13820; (RT 11:2311-22335.) The trial court did not instruct on provocation.

There was substantial evidence that appellant acted upon adequate subjective provocation so as to negate premeditation and deliberation in connection with the shooting of Gray (count 1). Appellant had prior contacts with Gray. One prior contact left appellant hospitalized. (RT 7:1294-1295.) Appellant felt that he was being harassed by Gray. (RT 6:1236, 1242.) Peterson testified that appellant told her that he had a prior physical altercation involving Gray, resulting in appellant being hospitalized. (RT 7:1294-1295.) Peterson also testified that Gray came by their house on one occasion to speak with appellant. (RT 6:1236-1237, 7:1293.) Gray told appellant that he was keeping an eye on him and that if he saw appellant doing anything he would get him. (RT 6:1237.) Peterson testified for the prosecution on direct examination, in part:

Q: Did he [i.e., Gray] say, "I'm going to get you"?

A: No. He said if he caught -- if he heard him doing anything or if he seen him doing anything, then, you know, *he would come get him*.

Q: Let him know he was going to be *keeping an eye on him*, and if he screwed up, *he was going to be there*?

A: Yeah.

Q: Okay. And how long would you say Officer Gray was at your house?

A: For a little while because he told Tahua that and *then he had searched the house* because I guess he had -- the whole reason

> him coming was because Freddie -- they were looking for Freddie or something. [RT 6:1237, italics added.]

Even the prosecutor acknowledged the persuasive evidence of appellant's emotion at the time of incident, arguing that appellant had come "*to an angry boil* shortly after he realized Officer Gray had pulled in behind them and was going to pull them over." (RT 11:2267, italics added.)

Appellant perceived that Gray was harassing him, and thus was angry at Gray. (RT 6:1236, 1272.) On one occasion, appellant was driving Peterson's vehicle and was being followed by Gray. Appellant abandoned the vehicle rather than being stopped by Gray (RT 6:1232.) The vehicle was impounded and Gray refused to return it to Peterson, telling Peterson that appellant would need to speak with him first. (RT 6:1233, 1238.)

The substantial nature of the evidence to support an instruction on provocation is shown by the fact that moments before the shooting, when Gray initiated the traffic stop of Peterson, appellant expressed anger that Gray was harassing him. As Gray was initiating the traffic stop, appellant complained to Peterson:

> "Mother-fucker, why did – Why is he always bothering me? Why is he harassing me? Why don't (sic) he just leave me alone?" [RT 6:1242.]

Appellant's subjective feeling that he was being harassed by Gray was consistent with the fact that Gray expressed no purpose in stopping Peterson's

vehicle–i.e., Peterson had not violated any traffic laws and there was no warrant for the arrest of either Peterson or appellant. (RT 5:977-978, 6:1246-1251, 6:1253.) Moreover, appellant's subjective feeling that Gray was harassing him at the time of the shooting was consistent with appellant's previous statements to Peterson that "Officer Gray was always harassing him[.]" (RT 6:1236.)

When the issue on appeal is the failure of the trial court to give an instruction favorable to the defense, as here, the evidence is not viewed in the light most favorable to the judgment. (See *People v. King* (1978) 22 Cal.3d 12, 15-16 [appellate review "of the evidence introduced at trial is necessarily one emphasizing matters which would justify such instruction, rather than the customary summary of evidence supporting the judgment."].)

There was substantial evidence warranting the instruction at issue here because there was solid evidence that appellant acted upon adequate subjective provocation negating premeditation and deliberation. (See *People v. Lewis* (2001) 25 Cal.4th 610, 646 ["The testimony of a single witness, including the defendant, can constitute substantial evidence requiring the court to instruct"]; *People v. Breverman, supra*, 19 Cal.4th at p. 177 ["In deciding whether evidence is 'substantial,' . . . a court determines only its bare legal sufficiency, not its weight"].)

D. The instructional error denied appellant the constitutional rights of jury trial and due process, and resulted in prejudicial error requiring reduction of appellant's conviction on count 1 to second degree murder because appellant presented substantial, persuasive evidence of provocation based on a subjective standard.

When the trial court fails to instruct the jury to make a factual determination necessary for guilt–as here where the jury was required to apply a *subjective standard of provocation* when considering whether the evidence was sufficient to reduce first degree attempted murder to second degree attempted murder–the error results in a deprivation of both due process and the Sixth Amendment right to jury trial. (See *In re Winship, supra*, 397 U.S. at p. 364; U.S. Const. 5th, 6th & 14th Amends.)

The standard of prejudice for the deprivation of a federal constitutional right is the *Chapman* harmless error analysis, which requires reversal of appellant's convictions unless the prosecution demonstrates that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Under *Chapman* the appropriate inquiry is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279; *People v. Sakarias* (2000) 22 Cal.4th 596, 625 ["We may affirm the

jury's verdicts despite the error if, but only if, it appears beyond a reasonable doubt that the error did not contribute to the particular verdict at issue."]).

Reduction of appellant's conviction to unpremeditated second degree murder is required because the error cannot be said to be harmless. (*Chapman v. California, supra*, 386 U.S. 18, 24.)

Preliminarily, the prosecution's evidence of a deliberate and premeditated killing was weak and insufficient (*ante*, § 1.), and thus an instruction on subjective provocation could easily have tipped the scale of proof beyond a reasonable doubt in appellant's favor. (See *Yates v. Evatt* (1991) 500 U.S. 391, 403-404 [an instructional error may be found to be harmless where it is shown beyond a reasonable doubt that the error was "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record"].) When a case is close, a small degree of error in the lower court should, on appeal, be considered enough to have influenced the jury to wrongfully convict the appellant. (*People v. Wagner* (1975) 13 Cal.3d 612, 621; *People v. Collins* (1968) 68 Cal.2d 319, 332.)

> In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.

(*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.)

If the jury had been instructed that it could consider subjective provocation in evaluating whether appellant acted with premeditation and deliberation, the evidence could well have persuaded the jury to find that appellant's actual perception that Gray was harassing him provoked the shooting, resulting in appellant having committed not a first degree murder but a second degree murder.

The primary contested issue on count 1 was whether appellant acted with premeditation and deliberation. Trial defense counsel candidly told the jury during closing argument, "I told you in the beginning my client shot Officer Gray." (RT 11:2296.) Counsel argued at length that the murder was not premeditated. (RT 11:2308-2315, 2334, 2339 ["You know, when we started this case I said to you that this is an issue of premeditation . . . ."].) Counsel argued, in part:

> Ladies and gentlemen, if this was premeditated murder, as the Government wants you to believe, answer these questions. Why, if he picked up the gun from the gang-bangers to kill Officer Gray, why didn't he go out looking for Officer Gray? That's premeditated. He wants to kill him. Why didn't he go looking for him? Is that what he did? No.
>
> If this is premeditation that he's going to kill Officer Gray because he's got this gun and he's going to go to prison and he made that decision when the flashing lights came up behind the car, why didn't he shoot Officer Gray when he walked up to the window? He wouldn't have to make any calls. He wouldn't have to run. He's in a car. He can get away. . . . . Because it wasn't premeditated. [RT 11:2309.]

The high court has observed that the "[d]ischarge of the jury's responsibility for drawing appropriate conclusions from the testimony depend[s] on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria." (*Bollenbach v. United States* (1946) 326 U.S. 607, 612 [involving a court's erroneous charge to the jury in answer to a jury's question].)

Nor is the outcome to be left to the discerning eye of the reviewing court. "In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however, justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." (*Id.* at p. 615.)

> A jury . . . is not an unguided missile free according to its own muse to do as it pleases. To accomplish its constitutionally-mandated purpose, a jury must be properly instructed as to the relevant law and as to its function in the fact-finding process, and it must assiduously follow these instructions.

(*McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833, 836.)

There was substantial evidence from which the jury could have inferred that appellant acted under subjective provocation sufficient to negate premeditation and deliberation and thereby reduce first degree murder to second degree murder. If the jury had been instructed that it could consider

appellant's subjective provocation in evaluating whether appellant acted with premeditation and deliberation, then the evidence could well have persuaded the jury to find that subjective provocation resulted in appellant having committed not a first degree murder but a second degree murder. The error cannot be declared harmless beyond a reasonable doubt.

The judgment of conviction of premeditated murder should be reduced to second degree murder for instructional error. (See *In re Bower* (1985) 38 Cal.3d 865, 880.)

/ / /

5. The jury was instructed on an invalid theory in connection with the special circumstance allegation of murder to prevent arrest or escape from lawful custody (Pen. Code, § 190.2, subd. (a)(5)), requiring that the true finding thereon be vacated.

A. Introduction.

Appellant was charged with the special circumstance of committing the murder in count 1 "for the purpose of avoiding or preventing a lawful arrest, *or perfecting or attempting to perfect an escape from lawful custody*," a violation of Penal Code section 190.2, subdivision (a)(5). (CT 3:552, italics added.)

The jury was instructed that it could find the special circumstance true upon a finding that either (1) the murder was committed to avoiding or preventing a lawful arrest or (2) the murder was committed to perfect or attempt to perfect an escape from lawful custody. (RT 11:2238; CT 48:13823.)

The jury found true the special circumstance allegation that the murder was committed to prevent arrest *or escape from custody*, a violation of Penal Code section 190.2, subdivision (a)(5). (RT 11:2388; CT 47:13592.)

B. Standard of review.

Instructional error is reviewed de novo. (*People v. Cole, supra*, 33 Cal.4th at p. 1210.) The challenged instruction is viewed "in the context of the instructions as a whole and the trial record to determine whether there is a

reasonable likelihood the jury applied the instruction in an impermissible manner." (*People v. Houston, supra*, 54 Cal.4th at p. 1229.)

C. The issue is cognizable on appeal.

Although defense counsel did not object to the instructions at issue here, appellate review is necessary because the instructions affected appellant's substantial rights. (Pen. Code, § 1259; *People v. Vines* (2011) 51 Cal.4th 830, 885, fn. 30.)

The trial court has a sua sponte duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689; see *Kelly v. South Carolina* (2002) 534 U.S. 246, 256 [the trial judge has a duty to charge the jury on all essential questions of law, whether requested or not].)

D. Escape from lawful custody is an invalid theory because appellant was not in custody.

The jury found true the special circumstance allegation, finding that "the defendant committed this murder for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting to perfect an escape from lawful custody" within the meaning of the Penal Code section 190.2, subdivision (a)(5). (RT 11:2388; CT 47:13592.)

The amended information alleged that the murder was committed "for the purpose of avoiding or preventing a lawful arrest, *or* perfecting or attempting to perfect an escape from lawful custody," a violation of Penal

Code section 190.2, subdivision (a)(5). (CT 3:552, italics added.)

The jury was instructed in the language of the statute without explanation of its terms, as follows:

> To find that the special circumstance referred to in these instructions as murder to prevent arrest or to perfect an escape is true, the following facts must be proved:
>
> 1. The murder was committed for the purpose of avoiding or preventing a lawful arrest [hereinafter, "**Theory #1**"]; *or*
>
> 2. The murder was committed to perfect, or attempt to perfect, an *escape from lawful custody* [hereinafter, "**Theory #2**"]. [RT 11:2238, italics added; CT 48:13823.]

Theory #2–escape from lawful custody–is an invalid theory because at the time of the murder appellant was neither under arrest nor charged with an offense, nor was he in jail or prison, and thus he was not in custody. (RT 5:977-978, 6:1246-1251, 6:1253; see Pen. Code, § 4532 [escape from custody]; *People v. Diaz* (1978) 22 Cal.3d 712, 716-717; *People v. Cruz* (2008) 44 Cal.4th 636, 677-678 [at the time of the shooting and escape, defendant was in custody, having been arrested for public intoxication]; *People v. Bigelow* (1984) 37 Cal.3d 731, 752 [escape from prison]; compare *Workman v. Bell* (6th Cir. 1998) 160 F.3d 276, 289-290 [sufficient evidence of "custody" to support the jury's finding of the escape from lawful custody aggravating factor where the police officer-victim grabbed petitioner as

petitioner attempted to flee the scene of the robbery, the two men fell, and another officer then grabbed petitioner and also struggled with him].)

Appellant fled on foot prior to any attempt by Gray to arrest him, and he did not submit to the show of authority. (RT 6:1154-1166, 1194-1196, 1246-1254.) Appellant thus was not even "seized" within the meaning of the Fourth Amendment. (See *California v. Hodari D.* (1991) 499 U.S. 621, 625-626, 629 [person who flees after an officer communicates that the suspect is not free to leave is not seized unless the officer physically touches the suspect or the suspect submits to the show of authority].)

Accordingly, and as a matter of law, appellant was not in custody when the murder was committed.

E. The prosecution will be unable to prove beyond a reasonable doubt that the jury based the true finding on a valid theory, requiring that the true finding thereon be vacated.

The failure to adequately instruct the jury upon matters relating to proof of any element of the charge, as here, violates the defendant's federal (5th, 6th and 14th Amendments) and California (Art. I, § 15 and § 16) constitutional rights to trial by jury and due process. (See *Carella v. California, supra*, 491 U.S. at p. 270 (conc. opn. of Scalia, J.); *Rose v. Clark, supra*, 478 U.S. at pp. 580-581; *Sullivan v. Louisiana, supra*, 508 U.S. at p. 279; *United States v.*

Gaudin, supra, 515 U.S. at p. 510; *Apprendi v. New Jersey, supra*, 530 U.S. 466; *People v. Flood, supra*, 18 Cal.4th at p. 490.)

The error also violated the Eighth Amendment, which requires heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama, supra*, 447 U.S. at pp. 633-646; *Kyles v. Whitley, supra*, 514 U.S. at p. 422; *Burger v. Kemp, supra*, 483 U.S. at p. 785; U.S. Const., 8th & 14th Amends.)

In *People v. Green* (1980) 27 Cal.3d 1, this Court stated that

> when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand.

(*Id.* at p. 69.)

In *Green*, this Court stated that the above-quoted rule applied not only when one of the theories was legally incorrect, but also when one of the theories of guilt was factually defective. (*Id.* at pp. 69-71.)

The rule in *Green* was subsequently modified in *People v. Guiton* (1993) 4 Cal.4th 1116, distinguishing between a theory of conviction that is legally inadequate and one that is factually inadequate. (*Id.* at p. 1128.) A conviction based on a legally inadequate theory will be reversed unless "it is possible to determine from other portions of the verdict that the jury

necessarily found the defendant guilty on a proper theory." (*Id.* at p. 1130.) A conviction based on a factually inadequate theory will be affirmed "unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory." (*Ibid.*)

In *People v. Chun* (2009) 45 Cal.4th 1172, overruling prior case law, this Court held that the trial court erred in its instructions on felony murder. (*Id.* at p. 1200.) In considering the issue of prejudice, the court reaffirmed that "a reviewing court must conclude, beyond a reasonable doubt, that the jury based its verdict on a legally valid theory." (*Id.* p. 1203.) The court explained, however, that *Guiton* did not involve "the situation of a jury having been instructed with a legally adequate and a legally inadequate theory," and thus *Guiton* did "'not decide the exact standard of review' in such circumstances." (*Id.* at p. 1203, quoting *People v. Guiton, supra*, 4 Cal.4th at pp. 1130, 1131.)

The court then turned to the concurring opinion of Justice Scalia in *California v. Roy* (1996) 519 U.S. 2, where Justice Scalia stated: "'The error in the present case can be harmless only if the jury verdict on other points effectively embraces this one or it is impossible, upon the evidence, to have found what the verdict *did* find without finding this point as well.'" (*People v. Chun, supra*, 45 Cal.4th at p. 1204, italics in original.) *Chun* applied this test

to the evidence before it and found that the error was harmless. As the court explained: "No juror could have found that defendant participated in this shooting, either as a shooter or as an aider and abettor, without also finding that defendant committed an act that is dangerous to life and did so knowing of the danger and conscious disregard for life—which is a valid theory of malice. In other words, on this evidence, no juror could find felony murder without also finding conscious-disregard-for-life malice." (*Id.* at p. 1205.)

The rule to be applied to determine whether an instructional error allowing the jury to convict on an unlawful theory of guilt requires reversal is, as stated by the high court, as follows:

> With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury when reaching the verdict.

(*Mills v. Maryland* (1988) 486 U.S. 367, 376; see also *Keating v. Hood* (9th Cir. 1999) 191 F.3d 1053, 1062.)

The jury returned a verdict phrased in the disjunctive, as follows: "We, the jury, further find that the defendant committed this murder for the purpose of avoiding or preventing a lawful arrest, *or perfecting or attempting to perfect an escape from lawful custody*, within the meaning of the Penal Code Section

190.2(a)(5), Special Circumstance 3 to Count 1 of the Information, true." (RT 11:2388, italics added; CT 47:13592.)

The verdict reveals that the jury may have found the special circumstance allegation true based on Theory #1 or Theory #2 or both. (See *Houge v. Ford* (1955) 44 Cal.2d 706, 712.) It is impossible to determine from the other verdicts that the jury necessarily found appellant guilty on the basis of Theory #1 because none of the other verdicts required a finding that the murder was committed for the purpose of avoiding or preventing a lawful arrest.

The error here is one involving a legally inadequate theory because as a matter of law the conduct in question "fails to come within the statutory definition of the crime" as defined in Theory #2. (*Griffin v. United States* (1991) 502 U.S. 46, 59.) In other words, a true finding on the special circumstance of murder committed while completing or attempting to complete an escape from lawful custody could not be returned in this case because appellant was not in custody. (RT 5:977-978, 6:1246-1251, 6:1253; see Pen. Code, § 4532; *People v. Diaz, supra*, 22 Cal.3d at pp. 716-717; *People v. Cruz, supra*, 44 Cal.4th at pp. 677-678; *People v. Bigelow, supra*, 37 Cal.3d at p. 752; *California v. Hodari D., supra*, 499 U.S. at pp. 625-626, 629.)

That the error is one of legal inadequacy also is shown in the fact that "the jury cannot reasonably be expected to divine . . . [the] legal inadequacy [of Theory #2]." (*People v. Perez* (2005) 35 Cal.4th 1219, 1233.) The court never defined the word "custody," and thus the jury may have reasonably believed that appellant was fleeing Gray's lawful custody because Gray had stopped Peterson's vehicle and was confronting appellant, a parolee. In other words, a reasonable person might assume that a defendant–in the presence of a uniformed police officer asking questions and preparing to conduct a parole search–was in the lawful custody of the officer. (See *In re Tony C.* (1978) 21 Cal.3d 888, 895 ["many persons . . . do not feel free to leave at will when a uniformed police officer indicates a desire to talk with them"].) Such an understanding is reinforced by the very fact that the court instructed the jury on escape from custody, thereby signaling to the jury that the facts might support an in-custody finding.

> It has long been the law that it is error to charge the jury on abstract principles of law not pertinent to the issues in the case. [Citation.] The reason for the rule is obvious. Such an instruction tends to confuse and mislead the jury by injecting into the case matters which the undisputed evidence shows are not involved. . . . .

(*People v. Jackson* (1954) 42 Cal.2d 540, 546-547; see *People v. Rowland* (1992) 4 Cal.4th 238, 282 [error for a court to give an irrelevant instruction].)

To the layperson untrained in the law the subtle distinction between a detention (not involving custody) and an arrest is elusive. (See Pen. Code, § 834 [defining arrest as "taking a person into custody, in a case and in the manner authorized by law"]; Pen. Code, § 835 [an arrest is made by "an actual restraint of the person, or by submission to the custody of an officer"]; *In re Tony C., supra*, 21 Cal.3d at p. 895 [a detention occurs "if the suspect is not free to leave at will–if he is kept in the officer's presence by physical restraint, threat of force, or assertion of authority"]; see also *California v. Beheler* (1983) 463 U.S. 1121, 1125 ["Custody," for the purpose of triggering the Fifth Amendment right to counsel, is formal arrest or the loss of freedom of movement to the same degree as formal arrest].)

In view of the fact that the jury was instructed on a legally inadequate theory, reversal of the true finding is required for a denial of due process, jury trial, and the right to a reliable penalty determination because it is impossible to determine from other portions of the verdict that the jury necessarily found true the special circumstance allegation on a proper theory. (See *People v. Guiton, supra,* 4 Cal.4th at p. 1130; *People v. Perez, supra*, 35 Cal.4th at p. 1233; U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15 & 17.)

Moreover, even if the error is characterized as one involving a factually inadequate theory, the error was prejudicial. The verdict reasonably did not rest on Theory #1 because it was undisputed that Gray was not attempting to make an arrest when appellant fled, and thus it would be speculative whether the murder was committed for the purpose of avoiding or preventing a lawful arrest. On the other hand, Gray had stopped Peterson's vehicle and was speaking with appellant when appellant fled, thereby giving rise to a reasonable probability that the jury found that appellant was in custody when confronted by Gray, and thus the murder was committed to perfect or attempt to perfect an escape from lawful custody. Reversal of the true finding is required for a denial of due process, jury trial, and the right to a reliable penalty determination. (See *People v. Perez, supra*, 35 Cal.4th at p. 1233; U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15 & 17.)

The instructional error was compounded by the fact that the jury was not instructed that it must unanimously agree on the theory of liability. (See RT 11:2238; CT 48:13823.) Some jurors may have based their verdict on Theory #1 while others may have based their verdict on Theory #2.

> We have noted that instructing the jury on a legally erroneous theory in a case in which it is also instructed on a legally correct theory is *particularly damaging when the jurors are not required to agree unanimously on the theory of conviction; in such cases, the possibility that even one juror*

might have relied upon the legally erroneous theory requires invalidation of the conviction.

(*Keating v. Hood, supra*, 191 F.3d at p. 1063, italic added.)

The true finding on the special circumstance allegation of murder to prevent arrest or escape from lawful custody must be vacated.

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6. The peace-officer-killing special finding on count 1 must be stricken because it does not apply to a conviction for first degree murder.

In connection with count 1, express-malice first degree murder, the jury returned a true finding on the peace-officer-killing enhancement, pursuant to Penal Code section 190, subdivision (c). (CT 47:13592.)

Section 190, subdivision (c) states in part: "Every person guilty of murder in the *second degree* shall be punished by imprisonment in the state prison for a term of life without the possibility of parole if the victim was a peace officer . . . ." (Italics added.)

The peace-officer-killing enhancement applies to a conviction for second degree murder. (Pen. Code, § 190, subd. (c); CALJIC No. 8.36, Special Finding–Second Degree Murder of Peace Officer.)

The jury was instructed that the peace-officer-killing enhancement applies to a conviction for second degree murder. (CT 47:13818 ["If you find the defendant guilty of second degree murder, you must determine whether: 1. The person murdered was a peace officer . . . ."]; RT 11:2235-2236 ["if you find the defendant guilty of second degree murder, you must determine whether . . . ."].)

Appellant was convicted of first degree murder on count 1. (CT 47:13582, 13591; RT 11:2387.) There was no finding on the offense of

second degree murder, and thus the true finding attached thereto must be stricken as superfluous. (See *People v. Halvorsen* (2007) 42 Cal.4th 379, 422 [striking superfluous multiple-murder special-circumstance finding].)

Moreover, second degree murder is a lesser included offense of express-malice first degree murder. (*People v. Seaton* (2001) 26 Cal.4th 598, 672.) Multiple convictions are prohibited where one offense is necessarily included in another. (*People v. Sanders* (2012) 55 Cal.4th 731, 736; *People v. Pearson* (1986) 42 Cal.3d 351, 355; *People v. Greer* (1947) 30 Cal.2d 589, 604.) "'If the evidence supports the verdict as to a greater offense, the conviction of that offense is controlling, and the conviction of the lesser offense must be reversed.'" (*People v. Pearson, supra*, 42 Cal.3d at p. 355, quoting *People v. Moran* (1970) 1 Cal.3d 755, 763.) By parity of reasoning, any enhancement attaching to a lesser included offense must be stricken.

A conviction unsupported by substantial evidence denies a defendant due process of law. (See *Jackson v. Virginia, supra*, 443 U.S. at p. 318; Cal. Const., art. 1, §§ 7, 15 & 17; U.S. Const., 5th & 14th Amends.) The error also violated the Eighth Amendment, which requires heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama, supra*, 447 U.S. at pp. 633-646; *Kyles v.*

Whitley, supra, 514 U.S. at p. 422; *Burger v. Kemp, supra*, 483 U.S. at p. 785; U.S. Const., 8th & 14th Amends.)

The peace-officer-killing special finding must be stricken.

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7. The true findings on the gang enhancement in counts 1 and 2–murder and unlawful possession of a firearm–must be vacated because the evidence is insufficient to prove that the shooting of Gray was both gang related and committed with the specific intent to promote, further, or assist in any criminal conduct by gang members.

A. Introduction and summary of argument.

In connection with the shooting of Gray, the jury found true that the offenses of murder (count 1) and unlawful possession of a firearm (count 2) were committed for the benefit of, at the direction of, and in association with a criminal street gang within the meaning of Penal Code section 186.22, subdivision (b)(1).[13] (CT 47:13571-13604; RT 11:2386-2433.)

The gang enhancement applies "only to gang-related offenses" (i.e., offenses committed for the benefit of, at the direction of, or in association with any criminal street gang–the first prong) and requires "the defendant to act with the specific intent to promote, further, or assist any criminal conduct by gang members" (i.e., the second prong). (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130, fn. 5.)

The evidence is woefully insufficient to sustain either prong of the enhancement, and both prongs were required to have been proven true beyond

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[13] The jury also found true the gang enhancement as to counts 3 through 7, involving the separate incident on April 11, 2004, a matter not at issue here.

a reasonable doubt. (*Ibid.*) There was evidence appellant was a gang member, but "[n]ot every crime committed by gang members is related to a gang." (*People v. Albillar* (2010) 51 Cal.4th 47, 60.) Nor is a crime committed by a gang member out of personal animosity committed with the requisite specific intent to promote, further, or assist any criminal conduct by gang members. (See *People v. Nunez and Satele* (2013) 57 Cal.4th 1, 40 [vacating the gang enhancement true findings for instructional error and stating, "Both defendants in this case were indisputably members of a criminal street gang . . . , but, as discussed below, the evidence did not clearly show that the murders were gang related."].)

The shooting occurred during an unplanned encounter with Gray. Appellant was not in the presence of any gang members. Only appellant's girlfriend Peterson and their daughter were present. (RT 6:1228, 1231, 1240, 1246.) No gang signs were displayed or gang epithets uttered prior to or during the encounter. (RT 6:1146-1173, 1189-1195, 1246-1258.)

When Gray initiated the traffic stop, appellant complained to Peterson about being continually harassed by Gray. (RT 6:1242.) There was no mention of any gang. (RT 6:1242-1250.) This evidence reveals that the shooting resulted from appellant's anger at Gray for perceived unjustified harassment–a purely personal matter entirely unrelated to any gang.

The fact that this was an unplanned encounter, *initiated by Gray* and not appellant, together with the fact that the shooting related to appellant's personal animosity toward Gray, and further considering that no gang was promoted during the shooting (e.g., no gang signs displayed and no gang epithets uttered), defeats any notion that the shooting and possession of a firearm were gang-related crimes committed with the specific intent to promote, further, or assist any criminal conduct by gang members.

The evidence thus is woefully insufficient to sustain the requisite dual findings that the offenses in counts 1 and 2 were gang related and committed by appellant with the specific intent to promote, further, or assist in any criminal conduct by gang members.

B. Standard of review.

The same standard of review applies to a claim of insufficiency of the evidence to support a gang enhancement as applies to a claim of insufficiency of the evidence to support a conviction. (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.)

In considering a challenge to the sufficiency of the evidence to support a conviction or an enhancement, the entire record is reviewed in the light most favorable to the judgment to determine whether it contains substantial evidence–that is, *evidence that is reasonable, credible, and of solid*

value–from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Wilson* (2008) 44 Cal.4th 758, 806, italics added; *Jackson v. Virginia, supra*, 443 U.S. at pp. 317-320.) The requisite qualitative nature of the evidence is that which is sufficient to permit the trier of fact to reach a "subjective state of near certitude of the guilt of the accused . . . ." (*Id.* at p. 315.)

A conviction based on unreliable and/or untrustworthy evidence violates the constitutional guarantee of due process. (See *White v. Illinois* (1992) 502 U.S. 346, 363-364; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646; *Thompson v. City of Louisville* (1960) 362 U.S. 199, 204.)

In a capital case, a conviction based on unreliable and/or untrustworthy evidence also violates the requirement of heightened verdict reliability at both the guilt and penalty phases of trial. (See *Beck v. Alabama, supra*, 447 U.S. at pp. 633-646; *Kyles v. Whitley, supra*, 514 U.S. at p. 422; *Burger v. Kemp, supra*, 483 U.S. at p. 785; U.S. Const., 5th, 8th & 14th Amends.)

C. The evidence is insufficient to sustain the gang enhancement true findings in connection with the murder of Gray and accompanying possession of a firearm, counts 1 and 2, respectively.

Section 186.22, subdivision (b)(1) provides enhanced punishment for certain gang-related crimes. To subject a defendant to the penal consequences

of section 186.22, subdivision (b)(1),[14] the prosecution must prove that the crime for which the defendant was convicted was "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (*People v. Gardeley* (1996) 14 Cal.4th 605, 616-617.)

Collateral effects of the crime, including respect or fear of the gang and revenge, have been found to constitute a "benefit" to the gang. (See *People v. Gardeley, supra*, 14 Cal.4th at p. 619; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1384.) A specific intent to promote, further, or assist in any criminal conduct by gang members is required, but a specific intent to benefit the gang is not. (*People v. Morales* (2003) 112 Cal.App.4th 1176.)

If a gang member commits a crime for a personal reason rather than for a gang reason, then the crime would not qualify under section 186.22, subdivision (b)(1). When a gang member shoots someone during a personal dispute, for example, the offense would not be for the benefit of the gang. (See *People v. Olguin, supra*, 31 Cal.App.4th at p. 1382.) On the other hand, for example, if a shooting is precipitated by crossing out gang graffiti,

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[14] Section 186.22, subdivision (b)(1) provides in relevant part: "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ."

replacing it with the name of another gang, and then shouting that gang's name to rival gang members, the evidence would support a finding the shooting was committed for the benefit of the gang. (*Id.* at pp. 1382-1383.)

(1) The evidence is insufficient to sustain a finding that the offenses were gang related.

(i) The prosecution failed to adduce sufficient evidence that the shooting was committed by appellant to "benefit" the gang.

The first prong of the gang enhancement requires the prosecution to prove that the underlying felony was gang-related–i.e., that it was "committed for the benefit of, at the direction of, or in association with any criminal street gang." (Pen. Code, § 186.22, subd. (b); *People v. Livingston* (2012) 53 Cal.4th 1145, 1170; *People v. Albillar, supra*, 51 Cal.4th at p. 60.)

There are two ways to accomplish this. The prosecution can show that the defendant committed the crime for the "benefit" of the gang. (See *People v. Gardeley, supra*, 14 Cal.4th at p. 19.) Alternatively, it can prove that the underlying felony was committed in association with the gang or at the direction of its members. (*People v. Albillar, supra*, 51 Cal.4th at p. 60; *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1332.)

There was no evidence that the shooting of Gray and associated firearm possession were committed for the benefit of the gang. There was no mention of any gang prior to, or during, the shooting. (*Ante*, § 7.A.) There was no

evidence that any gang planned the encounter with Gray–evidence which would suggest that the encounter was designed to benefit the gang–as this was a chance encounter initiated by Gray at a time when appellant was not with other gang members and not in gang territory. (*Ante*, § 7.A.)

Nor does not fact that appellant called Martin and Ward prior to exiting the vehicle support a reasonable inference that the shooting was committed by appellant to benefit the gang. (RT 6:1244, 1246, 1248.) There was no evidence that Martin (Peterson's step-father) was a gang member. (See RT 11:2282 [prosecutor's closing argument].) Ward was an associate of MGC, but not a documented member. (RT 9:1835.) There was nothing in the conversation with Ward suggesting that appellant was going to shoot Gray. Nor was there anything in the conversation with Ward suggesting that the shooting of Gray would benefit the gang. (See RT 6:1246, 1248.)

During closing summation, the prosecutor encouraged the jury to speculate about the reasons for the calls, telling the jury that the calls were made to obtain a get-away driver. (RT 11:2278-2279.) But there was no evidence to support such an inference. The calls may have been made out of concern that Peterson's vehicle would be impounded, as it was in a prior incident involving appellant, leaving Peterson and their daughter on the roadside. (RT 6:1233, 1238; see *Reese v. Smith* (1937) 9 Cal.2d 324, 328 [a

doubtful or uncertain fact must inure to the detriment of the party with the burden of proof on the issue].)

Moreover, evidence which merely raises a suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises the possibility, and this is not a sufficient basis for an inference of fact. (*People v. Reyes, supra*, 12 Cal.3d at p. 500; *People v. Morris, supra*, 46 Cal.3d at p. 21.) Although inferences may constitute substantial evidence in support of a judgment, they must be the probable outcome of logic applied to direct evidence; mere speculative possibilities or conjecture are infirm. (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633; *Louis & Diederich, Inc. v. Cambridge European Imports, Inc.* (1987) 189 Cal.App.3d 1574, 1584-1585; *People v. Berti* (1960) 178 Cal.App.2d 872, 876.)

Substantial evidence shows that the shooting was committed by appellant for purely personal reasons. Moments before the shooting, appellant complained to Peterson that Gray was always harassing him, thereby showing that appellant's hasty decision to shoot Gray was motivated by the anger and provocation appellant felt from Gray's actions in stopping Peterson's vehicle when there had been no traffic violation. (*Ante*, § 7.A.)

Appellant recognizes that the prosecution's gang expert witness, Sergeant Trindad, testified on re-direct examination that in his opinion the shooting of Gray by an MGC gang member "did benefit that criminal street gang."[15] (RT 10:1931.) Trindad testified, in part, "I come to that conclusion based upon training and experience again in investigating gang-related crimes. It did, in fact, enhance the reputation of the individual as well as the gang. It gave them a sense of power and control and also caused the community to fear them." (RT 10:1931-1932.) But the after-the-fact effect that the killing enhanced the reputation of the individual for violence, and by association the individual's gang, would always be present in any crime of violence, and thus Trindad's generic testimony is insufficient to support the gang-related prong. (See *People v. Ochoa* (2009) 179 Cal.App.4th 650, 661-663.)

> The opinion of an expert can provide sufficient support for a factual finding, but the value of an expert's testimony lies not in the expert's ability to articulate the ultimate fact, but in the material from which the opinion is fashioned and the reasoning by which the expert progresses to his or her conclusion. (*People v. Lawley* (2002) 27 Cal.4th 102, 132.) A conviction "in our system of justice, cannot be made to depend on whether or not the witnesses against [the defendant] correctly recite by rote a

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[15] The court belatedly struck Trindad's earlier testimony on direct examination about whether the shooing benefitted the gang and appellant's intent in connection therewith. (RT 9:1854-1855 [Trindad's testimony], 10:1928-1930 [Trindad's testimony's stricken and jury instructed to disregard].)

> certain ritual formula." (*People v. Bassett* (1968) 69 Cal.2d 122, 140.)

(*People v. Albillar* (2010) 51 Cal.4th at p. 72 (conc. & dis. opn. of Werdegar, J.)

In *People v. Ochoa, supra*, the defendant challenged the sufficiency of the evidence to support the gang benefit element of the gang enhancement allegations attached to carjacking and felon in possession of a firearm counts. (*Id.* at p. 652.) Ochoa, a gang member, had acted alone in committing a carjacking with a shotgun. (*Id.* at p. 653.) The offense had not occurred in Ochoa's gang's territory. (*Id.* at p. 662.) The appellate court found the evidence insufficient to sustain the benefit element of the gang enhancement, noting that "nothing in the circumstances of the instant offenses sustain[s] the expert witness's inference that they were gang related." (*Id.* at pp. 661-662.) "[The gang expert's testimony] was based solely on speculation, not evidence. An appellate court cannot affirm a conviction based on speculation, conjecture, guesswork, or supposition." (*Id.* at p. 663.)

Similarly, there is nothing in the circumstances of the shooting of Gray to sustain Trindad's inference that the crime was gang related. Appellant was acting alone, the crime occurred outside of the gang's territory, and the evidence showed that the shooting resulted from appellant's anger at Gray for perceived unjustified harassment–a purely personal matter entirely unrelated to

any gang. (*Ante*, § 7.A.; see *Briceno v. Scribner* (9th Cir. 2009) 555 F.3d 1069, 1078 [mere membership in a gang does not satisfy the requirement]; see also *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199 [reversing for failure to find substantial evidence to support gang enhancement and stating that "appellant's criminal history and gang affiliations cannot solely support a finding that a crime is gang-related under section 186.22"].)

In contrast to the instant case, where courts have found sufficient evidence to sustain a gang enhancement, they have done so based on evidence that the crime was committed to protect a gang's territory or because gang signs, monikers, or graffiti were involved in the crime. (See *Briceno v. Scribner, supra*, 555 F.3d at p. 1081 [noting a theme in California gang-related cases where "the defendant either committed the crime to protect gang 'turf' or brandished gang signs or a gang moniker during the attack"]; see also *People v. Olguin, supra*, 31 Cal.App.4th at pp. 1382-1383 [finding sufficient evidence to sustain a verdict that the shooting was for the benefit of, at the direction of, and in association with a criminal street gang where it was precipitated by crossing out gang graffiti, replacing it with the name of another gang, and then shouting that gang's name to rival gang members].)

(ii) The prosecution failed to adduce sufficient evidence that the shooting was committed by appellant in association with the gang or at the direction of its members.

To prove that a crime was committed "in association with any criminal street gang," it is sufficient to show that it was perpetrated by the defendant and another gang member. (*People v. Albillar, supra*, 51 Cal.4th at p. 60; *People v. Martinez, supra*, 158 Cal.App.4th at p. 1332.)

In *People v. Albillar, supra*, 51 Cal.4th 47, the defendant and two fellow gang members committed a rape in "association" with the gang because (1) they "actively assisted each other in committing" the crime, (2) their "common gang membership ensured that they could rely on each other's cooperation," (3) "the gang's internal code ensure[d] that none of them would cooperate with the police," and (4) the "gang's reputation ensure[d] that the victim did not contact the police." (*Id.* at p. 62.)

In contrast to *Albillar*, where defendant and two fellow gang members committed the rape–thereby showing that the crime was committed "in association with any criminal street gang"–appellant was acting alone in connection with the shooting (count 1) and simultaneous possession of a firearm (count 2).

In *People v. Morales* (2003) 112 Cal.App.4th 1176, an appeal involving convictions for robbery and attempted murder where defendant and his

codefendant gang members committed the robbery, the defendant argued that the evidence was insufficient to support the gang enhancements. (*Id.* at p. 1197.) The appellate court observed that a gang expert, who was asked a hypothetical question based on the facts of the case, testified that the crimes described in the question were committed for the benefit of, at the direction of, and/or in association with a street gang. (*Id.* at pp. 1197-1198.) The court stated that "[a]rguably, such evidence alone would be insufficient, even when supported by expert opinion, to show that a crime was committed for the benefit of a gang." (*Id.* at p. 1198.) The court noted, however, that the gang enhancement also applies when a crime is committed in association with a gang. "Thus, the typical close case is one in which one gang member, acting alone, commits a crime. Admittedly, it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang." (*Ibid.*) The court concluded that was not the situation before it. (*Id.* at p. 1197 [codefendant gang members committed underlying robbery; gang expert testified that gang members "back each other up"].)

In contrast to *Albillar* and *Morales*, there was no evidence here that the shooting was perpetrated by appellant *and another gang member*. When Gray initiated the traffic stop of Peterson's vehicle, only appellant, Peterson, and their daughter were inside the vehicle. (RT 6:1228-1231, 1240, 1246.) There

was no evidence that Peterson was a gang member. The crimes thus were not committed "in association with any criminal street gang." (See *People v. Martinez, supra*, 158 Cal.App.4th at p. 1332 [defendant committed charged robbery with another "King Kobra" gang member]; *People v. Galvez* (2011) 195 Cal.App.4th 1253 [defendant and fellow gang members beat witness]; *People v. Leon* (2008) 161 Cal.App.4th 149, 162 [auto burglary committed by two gang members].)

(2) The evidence is insufficient to sustain a finding that the offenses were committed with the specific intent to promote, further, or assist in any criminal conduct by gang members.

The second prong of the gang enhancement requires the prosecution to prove that the offenses were committed "with the specific intent to promote, further, or assist in any criminal conduct by gang members." (Pen. Code, § 186.22, subd. (b)(1); *People v. Albillar, supra*, 51 Cal.4th at p. 59.)

The prosecution did not elicit any admissible testimony from Trindad, the prosecution's gang expert witness, that appellant harbored the requisite specific intent in connection with the shooting of Gray. Nor did the prosecution elicit testimony from Trindad that a hypothetical person considering facts of the instant case would have committed counts 1 and 2 with the specific intent to promote, further, or assist in any criminal conduct by

gang members. (See RT 9:1854-1855 [Trindad's testimony], 10:1928-1930 [Trindad's testimony's stricken and jury instructed to disregard].)

Nor does the circumstantial evidence support the jury's finding of specific intent. Appellant was not roaming gang territory or seeking an encounter with Gray when the shooting occurred; Gray initiated the contact with appellant. 6:1246-1254.) There was no showing that appellant was involved in gang-related business or activities when Gray stopped Peterson's vehicle. Moreover, appellant never displayed gang signs or utter gang epithets, either at the time of the encounter with Gray or before or after the encounter. (RT 6:1146-1173, 1189-1195, 1246-1258.)

In *In re Frank S., supra*, 141 Cal.App.4th 1192, concerning the sufficiency of the evidence to support the specific intent element of a gang enhancement, Frank was stopped by police after he ran a red light on his bicycle. He gave a false name, and the officer found a concealed knife, a bindle of methamphetamine, and a red bandana in Frank's possession. (*Id.* at p. 1195.) Frank admitted that he carried the knife to protect himself against "'Southerners,'" as he was allied with northern street gangs. (*Id.* at p. 1195.) The gang expert was permitted to testify that Frank had possessed the knife to protect himself, and she opined that gang members use knives to protect themselves from rival gang members and to assault rival gang members. (*Id.*

at pp. 1195-1196.) The appellate court held that the expert should not have been permitted to testify "that a specific individual possessed a specific intent." (*Id.* at p. 1197.) The appellate court concluded that the expert's testimony was "the only evidence" of Frank's intent, and thus the true finding on the enhancement allegation was not supported by substantial evidence. (*Id.* at pp. 1197-1199.)

In *People v. Ramon* (2009) 175 Cal.App.4th 843, like *Frank S.*, in connection with the sufficiency of the evidence to support the specific intent element of a gang enhancement, Ramon, a gang member, was stopped by police in his gang's territory while driving a stolen truck. A fellow gang member was his passenger, and an unregistered firearm was found under the driver's seat. (*Id.* at pp. 846-847, 849.) The prosecution's gang expert testified that the stolen truck and the unregistered firearm could be used to commit gang crimes. (*Id.* at p. 847.) He offered an opinion that possession of a gun and driving of a stolen truck in gang territory therefore benefitted the gang and that the perpetrators of these offenses would intend to promote the gang. (*Id.* at p. 848.) The expert testified that stolen trucks and firearms were "tools" that the gang needed to commit other crimes. (*Ibid.*)

Ramon argued on appeal that the facts of his offenses plus the fact of his gang membership and presence in gang territory were insufficient to

support the expert's opinion on benefit and intent. (*Id.* at pp. 849-850.) The appellate court agreed, stating in part:

> These facts, standing alone, are not adequate to establish that Ramon committed the crime with the specific intent to promote, further, or assist criminal conduct by gang members. While Ramon may have been acting with this specific intent, there is nothing in the record that would permit the People's expert to reach this conclusion. [*Id.* at p. 851.]

The appellate court thus concluded that the gang expert's opinion "cannot constitute substantial evidence to support the jury's finding on the gang enhancement." (*Id.* at p. 852.) "While the People's expert's opinion certainly was one possibility, it was not the only possibility. And, as stated *ante*, a mere possibility is not sufficient to support a verdict." (*Id.* at p. 853.)

As noted above, the prosecution failed to elicit any admissible testimony from Trindad on the subject of specific intent in connection with the shooting of Gray. Nor does the circumstantial evidence support the jury's finding of specific intent. (*Ante*, § 7.A.)

In view of the fact that the evidence shows that the shooting was a personal, non-gang-related response to appellant's anger that Gray was harassing him, and the fact that there was no gang expert testimony on the subject of a specific intent, the evidence is insufficient as a matter of law to sustain a finding that appellant committed the murder (count 1) and associated firearm possession (count 2) "with the specific intent to promote, further, or

assist in any criminal conduct by gang members." (See *People v. Albillar, supra*, 51 Cal.4th at p. 59.)

A true finding on an enhancement unsupported by substantial evidence in a capital case, as here, results in a denial of the constitutional rights to due process, a fair and reliable jury trial, and the requirement of heightened verdict reliability at both the guilt and penalty phases of trial. (See *Jackson v. Virginia, supra*, 443 U.S. at p. 318; *Beck v. Alabama, supra*, 447 U.S. at pp. 633-646; *Kyles v. Whitley, supra*, 514 U.S. at p. 422; *Burger v. Kemp, supra*, 483 U.S. at p. 785; U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15 & 17.)

The gang enhancement findings as to counts 1 and 2 must be vacated.

/ / /

8. The trial court failed to instruct the jury on all of the elements of assault for purposes of the offense of assault with a semiautomatic firearm on McIntire and Bianchi, requiring reversal of counts 5 and 6.

A. Introduction.

Appellant was convicted of assault with a semiautomatic firearm on McIntire and Bianchi in connection with counts 5 and 6, respectively, a violation of Penal Code section 245, subdivision (b). (RT 11:2395, 2397; CT 47:13599, 13601.)

The jury was instructed in the language of CALJIC No. 9.02.1, as follows:

> Defendant is accused in Counts V and VI of having violated Section 245 subdivision (b) of the Penal Code, a crime.
>
> Every person who commits an assault upon the person of another with a semiautomatic firearm is guilty of a violation of Penal Code Section 245 subdivision (b), a crime.
>
> In order to prove this crime, each of the elements must be proved:
>
> First, a person was assaulted;
>
> Second, the assault was committed with a firearm. [RT 11:2243; CT 48:13828.]

The trial court did not give former CALJIC No. 9.00 (Assault–Defined) or a similar instruction defining assault.[16] Nor did the court give former CALJIC No. 9.01 (Assault–Present Ability to Commit Injury Necessary) or a similar instruction defining present ability.[17]

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[16] CALJIC No. 9.00 provides:

> In order to prove an assault, each of the following elements must be proved:
>
> 1. A person willfully [and unlawfully] committed an act which by its nature would probably and directly result in the application of physical force on another person;
>
> 2. The person committing the act was aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result of this act that physical force would be applied to another person; and
>
> 3. At the time the act was committed, the person committing the act had the present ability to apply physical force to the person of another.
>
> The word willfully'' means that the person committing the act did so intentionally. However, an assault does not require an intent to cause injury to another person, or an actual awareness of the risk that injury might occur to another person.
>
> To constitute an assault, it is not necessary that any actual injury be inflicted. However, if an injury is inflicted it may be considered in connection with other evidence in determining whether an assault was committed [and, if so, the nature of the assault].

[17] CALJIC No. 9.01 provides:

> A necessary element of an assault is that the person

The instructional error removed substantially all of the elements of the offense from the jury's consideration and thus resulted in structural error, requiring per se reversal. (Post, § 8.E.) Alternatively, the instructional error was prejudicial, requiring reversal of the convictions on counts 5 and 6, because the factual issue posed by the omitted instruction was not necessarily resolved adversely to appellant under other instructions. (Post, § 8.E.)

B. Standard of review.

Instructional error is reviewed de novo. (*People v. Cole, supra*, 33 Cal.4th at p. 1210.) The challenged instruction is viewed "in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner." (*People v. Houston, supra*, 54 Cal.4th at p. 1229.)

C. The issue is cognizable on appeal.

The trial court has a sua sponte duty to correctly instruct the jury, and its instructions and comments to the jury are properly reviewed on appeal without objection below. (Pen. Code, § 1259; *People v. Brown* (2003) 31 Cal.4th 518,

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committing the assault have the present ability to apply physical force to the person of another. This means that at the time of the act which by its nature would probably and directly result in the application of physical force upon the person of another, the perpetrator of the act must have the physical means to accomplish that result. If there is this ability, present ability exists even if there is no injury.

539.) The trial court's sua sponte duty to correctly instruct the jury necessarily includes correct instruction on all essential elements of the charged offense. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1012; *People v. Wickersham* (1982) 32 Cal.3d 307, 323, overruled on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 200-201.)

In cases charging assault, aggravated assault, or assault with a firearm, the trial court has a duty to define assault sua sponte. (See *People v. Simington* (1993) 19 Cal.App.4th 1374, 1380-1381; *People v. Valenzuela* (1985) 175 Cal.App.3d 381, 393, overruled on other grounds in *People v. Flood, supra*, 18 Cal.4th at p. 490, fn. 12.)

Morever, although trial defense counsel did not object at trial to the instructions on assault with a firearm and the court's failure to instruct on the essential elements of the offense of assault, this Court should nonetheless review the instructions because they affected appellant's substantial rights. (Pen. Code, § 1259; *People v. Vines, supra*, 51 Cal.4th at p. 885, fn. 30.)

D. The failure to define the elements of assault for purposes of the offense of assault with a semiautomatic firearm violated appellant's constitutional rights.

"[T]he 'Fifth Amendment right to due process and Sixth Amendment right to jury trial . . . require the prosecution to prove to a jury beyond a reasonable doubt every element of a crime.' [Citations.]" (*People v. Cole,*

supra, 33 Cal.4th at p. 1208; *Neder v. United States* (1999) 527 U.S. 1, 15; *Estelle v. McGuire* (1991) 502 U.S. 62, 69; *In re Winship, supra*, 397 U.S. at p. 364; U.S. Const., 5th, 6th & 14th Amends.)

Failure to instruct on all essential elements of the charge also violates the Eighth Amendment, which requires heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama, supra*, 447 U.S. at pp. 633-646; *Kyles v. Whitley, supra*, 514 U.S. at p. 422; *Burger v. Kemp, supra*, 483 U.S. at p. 785; U.S. Const., 8th & 14th Amends.)

To return a verdict of guilty on counts 5 and 6–assault with a semiautomatic firearm–the prosecution was required to prove that "a person was *assaulted*" and that "the assault was committed with a firearm." (RT 11:2243, italics added; CT 48:13828; Pen. Code, § 245, subd. (b).)

An assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (Pen. Code, § 240; *People v. Williams* (2001) 26 Cal.4th 779, 784.)

"An assault has three elements: (1) an attempt to apply force, (2) unlawfully, (3) where the defendant has the ability to do so." (*People v. Rivera* (1984) 157 Cal.App.3d 736, 742.)

The court did not define any of the three elements of assault.

E. Reversal of appellant's convictions on counts 5 and 6 is required for structural error; alternatively, reversal is required under the constitutional standard.

In connection with the charge of assault with a semiautomatic firearm in counts 5 and 6, the trial court omitted instruction on all of the essential elements of the underlying offense of assault. (*Ante*, § 8.D.)

The failure to instruct on a *single* element of an offense is federal constitutional error to be reviewed for harmlessness under *Chapman v. California*, *supra*, 386 U.S. 18. (*Neder v. United States*, *supra*, 527 U.S. at p. 1; *People v. Flood*, *supra*, 18 Cal.4th at pp. 490, 502-503). In addressing whether harmless error analysis is appropriate where more than a single element is left unaddressed, this Court has held that failure to instruct on substantially all the elements of an offense is reversible *per se* under the federal Constitution. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1315.)

In *People v. Cummings*, *supra*, Cummings and codefendant Gay were convicted of killing a police officer and sentenced to death. (*Id.* at p. 1255.) The shooting was motivated by the defendants' desire to avoid capture for a series of robberies. (*Id.* at pp. 1257-1258.) Gay also was convicted of 11 counts of robbery, one count of attempted robbery, and one count of conspiracy to commit robbery. (*Id.* at p. 1255.) Despite these 13 counts related to robbery, the trial judge failed to instruct the jury on four of the five

necessary elements of robbery; the court only instructed on the intent to permanently deprive the owner of the property. (*Id.* at pp. 1311-1312.) Because the jury lacked instruction on substantially all the elements of robbery, the Court concluded that under the federal Constitution the instructional error was not amenable to harmless error analysis, and reversed the conviction on each count of robbery. (*Id.* at p. 1315.)

By failing to instruct on all three of the necessary elements of assault, and only instructing on the semiautomatic-firearm element, the trial judge failed to instruct the jury on three of the four necessary elements of assault with a semiautomatic firearm. The jury was left to return a verdict of guilty without consideration of whether the prosecution had proven each of the elements of the offenses on counts 5 and 6 beyond a reasonable doubt.

Analogous to the situation in *People v. Cummings*, *supra*, 4 Cal.4th 1233, the failure to instruct on three of the four necessary elements improperly lowered the prosecutions burden of proof and vitiated all of the jury's findings on the offense of assault with a semiautomatic firearm, thereby warranting per se reversal of appellant's convictions in counts 5 and 6 for structural error. (See *Sullivan v. Louisiana, supra*, 508 U.S. at pp. 277-282 [defective reasonable doubt instruction constituted structural error and was thus reversible per se]; *People v. Cummings, supra*, 4 Cal.4th at pp. 1311-1315; see also

Hedgpeth v. Pulido (2008) 555 U.S. 57, 59 (per curiam) ["harmless-error analysis applies to instructional errors so long as the error at issue does not categorically '"vitiat[e] all the jury's findings."'"]; *Arizona v. Fulminante, supra*, 499 U.S. at p. 294.)

Alternatively, "a trial court's failure to instruct on an element of a crime is federal constitutional error that requires reversal of the conviction unless it can be shown beyond a reasonable doubt that the error did not contribute to the jury's verdict." (*People v. Cole, supra*, 33 Cal.4th at p. 1208; *People v. Chun, supra*, 45 Cal.4th at p. 1201; *Neder v. United States, supra*, 527 U.S. at pp. 9-10 [harmless-error analysis applied where court omitted instruction on element of charged offense]; *Sullivan v. Louisiana, supra*, 508 U.S. at pp. 277-278.)

The prosecution will be unable to prove beyond a reasonable doubt that the jury's verdict was unaffected by the instructional error. Instruction on the essential elements of assault was necessary to the jury's understanding of the charge because an assault has a technical meaning not commonly understood by laypersons. (*People v. McElheny* (1982) 137 Cal.App.3d 396, 403-404, citing *People v. Anderson* (1966) 64 Cal.2d 633, 639-640.) An aggravated assault or a section 245 violation "'is nothing more than an assault where there is used either a deadly weapon or any means of force likely to produce "great"

bodily injury.' [Citation.]" (*People v. Smith* (1997) 57 Cal.App.4th 1470, 1481.) The same is true of an assault with a semiautomatic firearm, as here, which is nothing more than an assault where a semiautomatic firearm is used. (RT 11:2243; CT 48:13828; see *People v. Williams, supra,* 26 Cal.4th at pp. 787-788.)

As instructed, the jury was never called upon to make the crucial determination whether appellant committed an assault as charged in counts 5 and 6. It is thus impossible to conclude beyond a reasonable doubt that with proper instructions the jury would have reached the same guilty verdict because the factual issue posed by the omitted instructions was not necessarily resolved adversely to appellant under other proper instructions. (See *People v. Sedeno, supra*, 10 Cal.3d at p. 721, disapproved on other grounds in *People v. Flannel, supra*, 25 Cal.3d at p. 684, fn. 12; *People v. Castaneda* (2011) 51 Cal.4th 1292, 1328.) No other instructions required the jury to determine whether appellant had committed an assault on McIntire and Bianchi.

Appellant's convictions in counts 5 and 6 cannot be deemed "surely unattributable to the" instructional error. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) Reversal of appellant's convictions in counts 5 and 6 is required.

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9. The prosecutor committed egregious misconduct during guilt-phase closing argument, requiring reversal of appellant's convictions for a violation of the constitutional rights to due process, effective assistance of counsel, and a fundamentally fair jury trial.

A. Introduction, procedural background, and summary of argument.

The prosecutor secured convictions for first degree murder (Pen. Code, §§ 187, subd. (a), 189, count 1), unlawful possession of a firearm by a felon on April 15, 2004, and April 11, 2004 (Pen. Code, § 12021(a)(1), counts 2 and 7, respectively), shooting at an occupied vehicle relating to Aaron McIntire and Kimberly Bianchi (Pen. Code, § 246, counts 3 and 4, respectively), and assault with a semiautomatic firearm on Aaron McIntire and Kimberly Bianchi (Pen. Code, § 245, subd. (b), counts 5 & 6, respectively), with true findings, among other things, that each offense was committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)), and that the murder was of a peace officer engaged in the performance of his duties (Pen. Code, § 190.2, subd. (a)(7)) and was committed to avoid or prevent lawful arrest or escape from lawful custody (Pen. Code, § 190.2, subd. (a)(5)). (CT 47:13571-13604; RT 11:2386-2433.)

During closing guilt-phase argument, the prosecutor committed egregious misconduct by repeatedly arguing matters outside the evidence, vouching for prosecution witnesses, appealing to passion, using the prestige of

the prosecutor's office, and misleading jurors into diluting their role and responsibility. The prosecutor committed the following misconduct:

(1) Implying unethical conduct by defense expert witness Professor Lopez, the prosecutor argued, "That's not research. That's not an investigation. *That's taking money and trying to arrive at a conclusion that the money was paid to secure.*" (RT 11:2281, italics added.)

(2) Urging the jury to convict appellant in order to protect community values, the prosecutor argued, "We would ask you, Ladies and Gentlemen, to *bring a verdict into this courtroom that honors its more than 150-year tradition of justice.*" (RT 11:2285, italics added.)

(3) Urging the jury to convict appellant based on unsworn testimony and vouching for the trial witnesses, and then using the prestige of the prosecutor's office to assure the jurors that corroborating evidence exits, the prosecutor argued, "Members of the Jury, this case has gone faster than we anticipated because frankly, and sadly, the facts just aren't very complex. *Many of the witnesses we could have called would have been repetitive, and Mr. Bacciarini and I are completely satisfied that you understand what happened in both shootings.*" (RT 11:2284, italics added.)

(4) Urging the jury to convict appellant because the penalty being sought is death, the prosecutor argued, "[O]ne of the most important acts of

citizenship that any person can be asked to perform is now being performed by you in your service as jurors; and more so, in a *murder trial in which the penalty being sought is death.* (RT 11:1158-1159, italics added.)

(5) Appealing to passion and fear, and misstating the law, the prosecutor argued, "The fact is, Ladies and Gentlemen, *gangsters don't deserve second-degree murder* because they already come from a murder mindset. Murder is already part of their culture. It was already part of the defendant's lifestyle, part of who he is." (RT 11:2276, italics added.) The prosecutor continued during closing rebuttal, "*Gang members . . . don't get second-degree murder, they don't deserve second-degree murder.* (RT 11:2360, italics added.)

At a sidebar conference immediately following the prosecutor's closing argument, defense counsel objected to the statements identified in the first three categories above, and requested that the jury be admonished to disregard the statements. (RT 11:2287-2288.) The prosecutor responded, "Your Honor, I'm not sure that those are acts of prosecutorial misconduct. And even if they were, you need to object so we can fix them right then. You can't lay in wait and then string objections on after the closing. You've got to object." (RT 11:2288.) The prosecutor also stated:

> Not only that, factually it's not accurate, your Honor. With respect to Professor Lopez, I mentioned the fact that he was

> paid, that he was paid $10,000, that he didn't do a good job with his research. All right. With respect to the tradition, I talked about the tradition not of the Merced Police Department; I talked about tradition of justice in the courtroom. That's completely proper. There's no misconduct with that. And, three, the Court itself says all witnesses -- not all witnesses are going to be called in a trial. I didn't say that there was more evidence; I said that there was duplicative evidence. That's not misconduct. [RT 11:2288-2289.]

Implicitly finding that the defense objection was timely, the trial court overruled each objection, stating, "Okay. I reviewed and considered the three issues raised by the defense. I re-read the transcript over the lunch hour. I don't think any of those justify a curative instruction. You made your record. . . . Request is denied." (RT 11:2293.)

As explained below, the prosecutor committed egregious misconduct during guilt-phase closing argument by arguing matters outside the evidence, vouching for prosecution witnesses, appealing to passion and fear, misstating the law of first degree murder, using the prestige of the prosecutor's office, and suggesting unethical conduct by a defense expert witness, requiring reversal of appellant's convictions for a violation of the constitutional rights to due process, effective assistance of counsel, a fundamentally fair jury trial and penalty determination. (*Post*, § 9.C.)

Reversal of appellant's convictions is required because the egregious misconduct cannot be proven harmless beyond a reasonable doubt and it is

reasonably probable that a more favorable result would have been reached absent the error. (*Post*, § 9.D.)

B. Standard of review.

The standard governing review of claims of prosecutorial misconduct are well established. (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1275.) "When a prosecutor's intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated. Prosecutorial misconduct that falls sort of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury." (*People v. Panah* (2005) 35 Cal.4th 395, 462.)

To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood that the jury understood or applied the comments in an improper or erroneous manner. (*People v. Gamache* (2010) 48 Cal.4th 347, 371.)

C. The prosecutor committed egregious misconduct during guilt-phase closing argument.

Prosecutors are allowed "wide latitude in penalty phase argument, *so long as the beliefs they express are based on the evidence presented.*" (*People v. Cook* (2006) 39 Cal.4th 566, 613, italics added; see *People v. Valdez* (2004)

32 Cal.4th 73, 133 [prosecutor's conclusions "may not assume or state facts not in evidence [citation] or mischaracterize the evidence"].)

A claim of prosecutorial misconduct is not defeated by a showing of the prosecutor's subjective good faith; nor need a defendant show that the prosecutor acted in bad faith or with appreciation for wrongfulness of his conduct. (*People v. Price* (1991) 1 Cal.4th 324, 447.)

> . . . . "What is crucial to a claim of prosecutorial misconduct is not good faith *vel non* of the prosecutor, but potential injury to the defendant."

(*People v. Ashmus* (1991) 54 Cal.3d 932, 976, citing *People v. Benson* (1990) 52 Cal.3d 754, 793.)

Moreover, every defendant has a right to a fair trial. (Cal. Const., art. I, § 15; U.S. Const., 5th, 6th & 14th Amends.) In this regard, "[p]rosecutors . . . are held to an elevated standard of conduct." (*People v. Hill* (1998) 17 Cal.4th 800, 819) "'A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state.'" (*Id.* at p. 820, citing *People v. Kelley* (1977) 75 Cal.App.3d 672, 690.) The prosecutor's duty is to ensure that justice is done, not to secure convictions. (*Berger v. United States* (1934) 295 U.S. 78, 88; *In re Ferguson* (1971) 5 Cal.3d 525, 531.)

(1) The prosecutor committed misconduct by arguing the existence of facts not admitted into evidence to bolster the prosecution's case.

A prosecutor engages in misconduct by implying the existence of facts not in evidence, amounting to unsworn testimony in violation defendant's rights to due process, jury trial, confrontation, and effective assistance of counsel. (*People v. Bolton* (1979) 23 Cal.3d 208, 212-213; see *People v. Herring* (1993) 20 Cal.App.4th 1066, 1076-1077 [prosecutor's implication he knew facts not in evidence amounted to unsworn testimony and required reversal]; *People v. Kirkes* (1952) 39 Cal.2d 719, 724 ["statements of facts not in evidence by the prosecuting attorney in his argument to the jury constitute misconduct"].)

The prosecutor committed misconduct by telling the jurors, "Members of the Jury, this case has gone faster than we anticipated because frankly, and sadly, the facts just aren't very complex. *Many of the witnesses we could have called would have been repetitive*, and Mr. Bacciarini and I are completely satisfied that you understand what happened in both shootings." (RT 11:2284, italics added.) The prosecutor explicitly stated that there were many more witnesses supporting the prosecution's case. This was an argument outside the record, as the unspecified witnesses never testified at trial. By urging the jurors to convict appellant based on unsworn statements of unidentified

witness, the prosecutor deprived appellant of the constitutional rights to jury trial, due process, and confrontation. (See *United States v. Molina* (9th Cir. 1991) 934 F.2d 1440, 1446 ["The prosecutor's assertions that there were as many as nine other law enforcement officials who would support [testifying law enforcement agents'] testimony is an improper reference to inculpatory evidence not produced at trial."]; *United States v. Francis* (6th Cir. 1999) 170 F.3d 546, 551 [improper "bolstering occurs when the prosecutor implies that the witness's testimony is corroborated by evidence known to the government but not known to the jury.']; *People v. Woods* (2006) 146 Cal.App.4th 106, 113 ["prosecutor may not suggest the existence of 'facts' outside of the record by arguing matters not in evidence"]; U.S. Const., 5th, 6th & 14th Amends.)

Securing convictions by use of such tactics amounts to egregious misconduct by a prosecutor, particularly in a capital case where due process demands heightened reliability of the verdicts rendered. (See *Beck v. Alabama, supra*, 447 U.S. at pp. 633-646; *Kyles v. Whitley, supra*, 514 U.S. at p. 422; *Burger v. Kemp, supra*, 483 U.S. at p. 785; U.S. Const., 6th, 8th & 14th Amends.)

(2) The prosecutor committed misconduct by vouching for the witnesses, which bolstered the testimony in support of the prosecution's case.

A prosecutor engages in misconduct by expressing a personal opinion "to bolster the testimony which was in support of the People's case." (*People v. Perez* (1962) 58 Cal.2d 229, 246.)

The prosecutor committed misconduct by telling the jurors, "Many of the witnesses we could have called would have been repetitive, and *Mr. Bacciarini and I are completely satisfied that you understand what happened in both shootings*." (RT 11:2284, italics added.) The prosecutor was telling the jurors that both prosecutor's were personally "completely satisfied" with the evidence presented "in both shootings" and thus found it unnecessary to bring in all the additional witnesses to the shootings.

The jury's central function is to assess the credibility of witnesses. (*People v. Cudjo* (1993) 6 Cal.4th 585, 637-643, fn 1 (Kennard, J., dissenting.) The prosecutor usurped this function of assessing the credibility of witnesses by vouching for the credibility of its witnesses.

The prosecutor's improper use of unsworn testimony to enhance its chances of convincing jurors to return a guilty verdict was compounded by the prosecutor vouching for the merits of the case. Of course, whether the two prosecutors were completely satisfied with the state of the evidence they

presented is entirely irrelevant to the jury's deliberative process because the constitution guarantees of due process and jury trial require that twelve jurors unanimously have an abiding conviction in the truth of their verdicts. (See U.S. Const., 5th, 6th & 14th Amends.)

(3) The prosecutor committed misconduct by appealing to passion and fear.

A prosecutor engages in misconduct by appealing to the sympathy and fears of the jury during the guilt phase of a criminal trial. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1250; *People v. Redd* (2010) 48 Cal.4th 691, 742; *United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142, 1149.)

> "[P]rosecutors may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence." [Citations.] Similarly, prosecutors may not "point to a particular crisis in our society and ask the jury to make a statement" with their verdict. [Citations.] Nor can prosecutors comment on "the potential social ramifications of the jury's reaching a . . . verdict."

(*United States v. Sanchez* (9th Cir. 2011) 659 F.3d 1252, 1256-1257 [decrying prosecutor's "send a memo" to the drug cartels to tell their couriers just to claim duress upon arrest].)

The prosecutor committed misconduct by explicitly requesting that the jurors "*bring a verdict into this courtroom that honors its more than 150-year*

tradition of justice." (RT 11:2285, italics added.) It was ambiguous to the jurors whether the prosecutor was referring to the 150-year tradition of justice at the Merced Police Department or the 150-year tradition of justice at the Colusa Courthouse.[18] In either case, the prosecutor was telling the jurors that 150 years of justice weighed on their shoulders in this case, suggesting that a verdict adverse to the position advanced by the prosecution would dishonor that 150-year tradition of justice. This argument was based on facts not in evidence and distracted the jurors away from their real duty; it encouraged a verdict based on passion. Regardless of the century and a half tradition of justice–for which all men and women of common decency are very proud and grateful–the issue for appellant's jury was justice in this case and this case alone.

The prosecutor committed misconduct by bringing the potential death penalty to bear during the guilt phase by telling the jurors, "[O]ne of the most important acts of citizenship that any person can be asked to perform is now being performed by you in your service as jurors; and more so, in a *murder trial in which the penalty being sought is death.* (RT 11:1158-1159, italics added.) Of course, the jury was death-qualified and thus understood that this

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[18] The prosecutor stated, outside the presence of the jury, that he was referring to the "tradition of justice in the courtroom." (RT 11:2288.)

was a death penalty case. But reminding the jurors of the importance of their service in this "murder trial in which the penalty being sought is death" (RT 11:1158) would serve to encourage a verdict based on passion; it also would distract the jury because the death penalty was not then at issue.

The prosecutor committed misconduct by twice telling the jurors that gang members should always be convicted of first degree premeditated murder, not second degree murder. The prosecutor argued, "The fact is, Ladies and Gentlemen, *gangsters don't deserve second-degree murder* because they already come from a murder mindset. Murder is already part of their culture. It was already part of the defendant's lifestyle, part of who he is." (RT 11:2276, italics added.) The prosecutor continued during closing rebuttal, "*Gang members . . . don't get second-degree murder, they don't deserve second-degree murder.* (RT 11:2360, italics added.) These arguments encouraged the jury to evaluate the case based on their fear of gangs and gang members.

The prosecutor's arguments encouraged the jury to evaluate the case based on fear and on an emotional reaction to a societal problem involving gangs and the death penalty rather than on the evidence. (See *United States v. Sanchez, supra*, 659 F.3d at pp. 1256-1257; *United States v. Weatherspoon, supra*, 410 F.3d at pp. 1149-1150.)

An appeal to the jurors' fear at the guilt phase of trial is prosecutorial misconduct. (See *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250.) Further, a prosecutor should not refer to facts not in evidence. (*People v. Hill* (1998) 17 Cal.4th 800, 823.)

The prosecutor's arguments distracted the jury away from their real duty, which was to fairly determine whether the prosecution had proven each element of each offense and enhancement beyond a reasonable doubt. (See U.S. Const., 5th, 6th & 14th Amends.)

(4) The prosecutor committed misconduct by misstating the law on first degree premeditated murder.

It is prosecutorial misconduct to misstate the applicable law during argument to the jury. (*People v. Huggins* (2006) 38 Cal.4th 175, 253, fn. 21; *People v. Otero* (2012) 210 Cal.App.4th 865, 870.)

The prosecutor committed misconduct by twice telling the jurors that gang members should always be convicted of first degree premeditated murder, not second degree murder. The prosecutor argued, "The fact is, Ladies and Gentlemen, *gangsters don't deserve second-degree murder* because they already come from a murder mindset. Murder is already part of their culture. It was already part of the defendant's lifestyle, part of who he is." (RT 11:2276, italics added.) The prosecutor continued during closing rebuttal,

"*Gang members . . . don't get second-degree murder, they don't deserve second-degree murder.* (RT 11:2360, italics added.)

These arguments shifted the proper focus away from whether appellant subjectively premeditated and deliberated the intentional killing of Gray.

> First degree murder, like second degree murder, is the unlawful killing of a human being with malice aforethought, but has the additional elements of willfulness, premeditation, and deliberation which trigger a heightened penalty. [Citation.] *That mental state is uniquely subjective and personal.* It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death.

(*People v. Chiu* (2014) 59 Cal.4th 155, 166, italics added; *People v. Koontz* (2002) 27 Cal.4th 1041, 1080.)

By urging the jury to reject a verdict of second degree murder for all gangsters in all cases, the prosecutor was implicitly misstating the law and encouraging the jury to use an objective standard in evaluating whether appellant premeditated and deliberated the killing of Gray.

The prosecutor's misstatement of the law of first degree murder constituted misconduct. (See *People v. Boyette* (2002) 29 Cal.4th 381, 435 [prosecutorial misconduct to misstate the applicable law during argument to the jury]; *United States v. Roberts* (1st Cir. 1997) 119 F.3d 1006, 1011.)

The prosecutor's argument–encouraging the jury to apply an objective standard to whether appellant premeditated the intentional killing instead of determining whether he actually formed the requisite mental state–lessened the prosecution's burden of proving first degree murder beyond a reasonable doubt, thereby violating federal due process. (See *Jackson v. Virginia, supra*, 443 U.S. at pp. 317-320; *In re Winship, supra*, 397 U.S. at pp. 362-363; see U.S. Const., 5th, 6th & 14th Amends.)

(5) The prosecutor committed misconduct by suggesting unethical conduct by the defense expert witness.

Although a prosecutor may "remind the jurors that a paid witness may accordingly be biased" (*People v. Arias* (1996) 13 Cal.4th 92, 162), a prosecutor engages in misconduct by suggesting unethical conduct by a defense expert witness because such a suggestion amounts to the use of deceptive or reprehensible methods for purposes of persuasion. (See *State v. Hughes* (1998) 193 Ariz. 72, 84-86 [in connection with argument that the defense expert returned result that he was paid to return, it is improper for the prosecutor to imply unethical conduct on the part of an expert witness]; *Darden v. Wainwright* (1986) 477 U.S. 168, 181; *People v. Cash* (2002) 28 Cal.4th 703, 733.)

The prosecutor committed misconduct when urging the jurors to disregard defense expert witness Professor Lopez's testimony, stating, "That's

not research. That's not an investigation. *That's taking money and trying to arrive at a conclusion that the money was paid to secure.*" (RT 11:2281, italics added.) The prosecutor was insinuating that Professor Lopez was engaged in professionally unethical conduct–i.e., arriving at an unsupportable opinion and/or conclusion for service performed based on payment of money paid for those services.

By engaging in this egregious misconduct, the prosecutor effectively impeached Dr. Lopez's credibility. (See *People v. Lucero* (1988) 44 Cal.3d 1006, 1031; *People v. McGreen* (1980) 107 Cal.App.3d 504, 517-518 [defendant prejudiced by prosecutor's suggestion of ethics violation by expert witness], overruled on other grounds in *People v. Wolcott* (1983) 34 Cal.3d 92, 99-100; compare *People v. Perry* (1972) 7 Cal.3d 756, 790 [misconduct to suggest defense counsel acted in bad faith or unethically, or committed trickery].)

Securing convictions by use of such tactics amounts to egregious misconduct by a prosecutor, particularly in a capital case where due process demands heightened reliability of the verdicts rendered. (See *Beck v. Alabama, supra*, 447 U.S. at pp. 633-646; *Kyles v. Whitley, supra*, 514 U.S. at p. 422; *Burger v. Kemp, supra*, 483 U.S. at p. 785; U.S. Const., 6th, 8th & 14th Amends.)

D. The egregious misconduct warrants reversal of appellant's convictions because the error cannot be proven harmless beyond a reasonable doubt and it is reasonably probable that a more favorable result would have been reached absent the error.

Under California law, a prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, requiring reversal, even when those actions do not result in a fundamentally unfair trial. (*People v. Friend* (2009) 47 Cal.4th 1, 29.) "A finding of misconduct does not require a determination that the prosecutor acted in bad faith or with wrongful intent." (*People v. Kennedy* (2005) 36 Cal.4th 595, 618, citation omitted.)

"'A defendant's conviction will not be reversed for prosecutorial misconduct' that violates state law, however, 'unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.' [Citation.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1070-1071.)

Prosecutorial misconduct violates the federal Constitution where the misconduct so infects the trial with unfairness as to make the resulting conviction a denial of due process. (*Darden v. Wainwright, supra*, 477 U.S. at p. 181.) Where there is a violation of the federal Constitution, as here, reversal is required under *Chapman v. California, supra*, 386 U.S. at p. 24 unless the error was harmless beyond a reasonable doubt. (See *People v. Sengpadychith*

(2001) 26 Cal.4th 316, 326 [*Chapman* asks whether the prosecution has "prove[d] beyond a reasonable doubt that the error ... did not contribute to" the verdict].)

The numerous and varied instances of egregious prosecutorial misconduct identified above during guilt-phase closing argument amounted to deceptive or reprehensible methods to persuade the jury, thereby requiring reversal of all of appellant's convictions without a showing that those actions resulted in a fundamentally unfair trial. In connection with counts 3 through 7, relating to the drive-by shooting of McIntire and Bianchi, the inconsistent and impeached testimony of both McIntire and Bianchi rendered the evidence pointing to appellant as the gunman weak and unreliable. (*Ante*, Statement of Facts, § B.2) In connection with count 1, relating to the shooting of Gray, there was no solid, credible evidence that appellant committed the murder with premeditation and deliberation; nor was the evidence sufficient to sustain findings on the gang enhancement. (*Ante*, §§ 1 & 7, respectively.)

Moreover, although defense counsel told the jury that appellant shot and killed Gray (and did not argue against a conviction for second degree murder and unlawful possession of a firearm), appellant pled not guilty to these offenses, and thus at all times the prosecutor was required to prove these offenses beyond a reasonable doubt with competent evidence and by proper

argument. (See *People v. Roldan* (2005) 35 Cal.4th 646, 705-706, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, & fn. 22.) The prosecutor's use of deceptive or reprehensible methods to persuade the jury thus also requires reversal of counts 1 and 2.

"[A] prosecutor's closing argument is an especially critical period of trial, for purposes of a misconduct claim." (*People v. Pitts* (1987) 223 Cal.App.3d 606, 809.) Since the prosecutor's closing argument comes from an official representative, it carries great weight and must therefore be reasonably objective. (*Ibid.*)

> No doubt some prosecuting officials feel restive because of the necessity of proceeding step by step in the manner provided by law in the handling of prosecutions, and seek to substitute their fixed belief in the guilt of the accused for the proof required by law. ... *If an accused, even a guilty accused, cannot be convicted except by a violation of these principles, then he should not and cannot be lawfully convicted.*

(*People v. Talle* (1952) 111 Cal.App.2d 650, 678, italics added.)

The numerous and varied instances of egregious prosecutorial misconduct identified above during guilt-phase closing argument rendered appellant's trial fundamentally unfair. The prosecutor used the fact that this was a death penalty case, implicitly encouraging the jurors to return convictions on all counts. (RT 11:1158-1159.) The prosecutor placed the weight of the 150-year tradition of either the Merced Police Department or the

Colusa Courthouse, or both, on the jurors' shoulders, further implicitly encouraging the jurors to return convictions on all counts. (RT 11:2285.) The prosecutor assured the jurors that there were plenty of other witnesses to the crimes, but yet both prosecutors were personally satisfied with the strength of the evidence actually presented at trial, encouraging the jurors to return convictions on all counts based on these assurances by the prosecutor. (RT 11:2284.) The prosecutor attacked the ethics of the sole defense expert witness, Dr. Lopez, encouraging the jury to disregard his testimony that the offenses were not gang related. (RT 11:2281.) The prosecutor misstated the law of first degree murder and encouraged a verdict on the only death eligible offense (count 1) by appealing to passion and fear of "gangsters" and what "gangsters" in general do or do not "deserve" to be convicted of. (RT 11:2276, 2360.)

In view of the egregious prosecutorial misconduct, reversal of appellant's convictions is required for a denial of due process, a fundamentally fair jury trial, and the right to effective assistance of counsel. (See *Beck v. Alabama, supra*, 447 U.S. at pp. 633-646; *Kyles v. Whitley, supra*, 514 U.S. at p. 422; *Burger v. Kemp, supra*, 483 U.S. at p. 785; U.S. Const., 6th, 8th & 14th Amends.)

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10. Appellant requests review of the sealed transcripts of the trial court's *Pitchess* hearings and a determination of whether the trial court improperly withheld relevant documents from the personnel file of Officer Stephan Gray.

A. Introduction and procedural background.

Appellant requests that this Court review the sealed record of the trial court discovery rulings pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 to determine whether the trial court abused its discretion by failing to order full disclosure of all relevant information. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1232.)

(1) The original motion.

On April 21, 2005, appellant filed a pretrial discovery motion pursuant to *Pitchess v. Superior Court, supra*, 11 Cal.3d 531, requesting documents from the prosecution relating to Officer Stephan Gray and involving evidence or complaints of "excessive force, aggressive conduct, unnecessary or excessive violence, unnecessary force, planting of evidence, false arrest, false statements in reports, false claims of probable cause, detaining people without legal cause, interfering in the domestic relationships of citizens, or any other evidence of or complaints of dishonesty . . . ." (CT 3:516-225.)

The motion listed seven categories of documents, including (1) "Copies of all records, reports, or investigative reports filed, pending, completed or otherwise made, and all other writings, pertaining to any of the

above-mentioned conduct by the named officer, including but not limited to documentation of citizen complaints of such conduct;" (2) "Names, addresses and phone numbers of all persons who have complained to the Merced Police Department about any of the above-mentioned conduct by the named officer;" (3) "Copies or transcripts of any tape recorded statements by any persons, including the named officer, which were taken in connection with any investigations filed, pending, completed or otherwise made, regarding any complaints of the above-mentioned conduct;" (4) "Names, addresses and phone numbers of persons giving such recorded statements, including, but not limited to, persons involved in the case at bar;" (5) "The fact of whether discipline was imposed on the officer listed above in any incident involving the above-mentioned conduct;" and, (6) "Any information contained in personnel or internal investigation files which indicates or identifies previous employment or experience by the above-listed officer in law enforcement related work." (CT 3:524-255.)

The *Pitchess* motion was supported by defense counsel's declaration, stating: "*[Defendant] . . . has had contacts in the past where Officer Gray has, without cause, used excessive force and violence against him.* Furthermore, defendant has, and at the time of the incident had, knowledge that *Officer Gray had, on past occasions, used physical violence and inflicted great bodily injury*

upon others and had engaged in tactics of intimidation, evidence planting and the filing of false police reports in and during the course of his duties." (CT 3:520, italics added.)

The *Pitchess* motion also was supported by defense counsel's declaration, stating: "Testimony was adduced at the Preliminary Examination in this matter that Officer Gray had, on more than one occasion, contacted the mother of defendant's child and actively encouraged her to disassociate herself from the defendant. This habit and custom of stopping girlfriends of people he suspected to be gang members, and attempting to interfere with their domestic relationships is of key importance in the case herein given the charged Special Circumstances Numbers 1 and 3, both of which require that the officer be 'lawfully' engaged in the 'performance of duty'. *The fact that Officer Gray had a custom or habit of stopping girlfriends of other people he suspected to be gang members and had done so in the past to defendant's girlfriend bears directly on the element of whether he was lawfully in the performance of his duties at the time he made the vehicle stop on the vehicle driven by the defendant's girlfriend in which the defendant happened to be a passenger since if that was the reason for the stop, the stop would constitute an illegal detention.*" (CT 3:521, italics added, underline in original.)

The *Pitchess* motion also was supported by defense counsel's declaration, stating: "I am informed and believe that on occasion arrestees, or the attorney, friends, or relatives of arrestees, make complaints to the arresting agencies concerning the conduct of its officers. *These complaints include allegations of acts of inaccuracy and dishonesty. I believe the material sought may contain complaints of a like nature against the aforementioned Merced Police officer.*" (CT 3:522, italics added.)

An opposition memorandum was filed on April 28, 2005, arguing that the motion should be denied as defective for failing to provide proper notice of the motion and for failure to include relevant police reports. (CT 3:541-544.)

Defense counsel filed a response to the opposition memorandum, agreeing to continue the hearing on the motion to provide adequate notice and stating that police reports were not required to be attached, but would be provided upon request. (CT 3:560-562.)

A hearing was held on the motion on May 2, 2005, but was continued to permit additional time and for defense counsel to file police reports in support of the motion. (RT Pretrial Proceeding II:310-316; CT 3:565.)

(2) The amended motion, *Pitchess* hearing, and first in camera review.

On May 10, 2005, appellant filed an amended pretrial discovery motion pursuant to *Pitchess v. Superior Court, supra*, 11 Cal.3d 531, attaching certain

police reports thereto, but otherwise making the same averments, and supported by a similar declaration, as set forth in the original motion. (CT 3:613-705.)

An opposition memorandum was filed on May 12, 2005, arguing that the motion should be denied for a failure to show good cause for disclosing the records sought. (CT 3:541-547.)

The trial court granted the *Pitchess* motion at a hearing on May 31, 2005, finding appellant had shown good cause for an in camera review of Gray's personnel file. (RT Pretrial Proceedings II:343-345; CT 4:791.) The court ordered the production of the "entire personnel file." (RT Pretrial Proceedings II:345.)

After conducting an in camera review on June 6, 2005, the trial court granted the motion in part and denied the motion in part, as reflected in the sealed transcript of the hearing and the sealed envelope containing confidential material. (CT S-0002 through S-0038 [sealed transcript]; CT S-0001 [envelope with sealed confidential contents]; CT 4:795 ["Envelope with Contents of Personnel Record/Affidavit, pp. 796-799, Confidential"].)

(3) The City of Merced's request to reopen the in camera review, and the second in camera review.

On July 27, 2005, the City of Merced filed a motion for reconsideration and request to reopen the in camera review conducted on June 6, 2005. (CT

4:812-819.) The request to reopen the in camera review stated, "On June 6, 2005, the court held an in camera hearing to review the relevant confidential personnel files of Officer Stephan Gray." (CT 4:813.) The request further stated, "Due to the constitutional and statutory privacy rights of Officer Gray and the confidentiality of these proceedings, the City is not at liberty to disclose what further information needs to be placed in the record. However, it may be stated that such information concerns the files discussed during the hearing. A need to clarify an issue that arose during the hearing with regards to Officer Gray's personnel file also needs to be clarified. Such proceeding would be relatively brief and the City can more fully explain the issues at that time. [Defense counsel] Mr. McKechnie has indicated that he has no objection to reopening the in camera hearing." (CT 4:814-815.)

On August 30, 2005, the court held a second in camera hearing, as reflected in the sealed transcript of the hearing and the sealed envelope containing confidential material. (RT Pretrial Vol. II:380 ["The transcript for the above-entitled hearing is a sealed record and has been filed separately as pages 381-389"]; RT Pretrial Vol. II:381-389 [sealed transcript of in camera hearing]; CT 4:859 ["Envelope with Court's Exhibits 1, 2, & 3 from *Pitchess* Motion, pp. 860-1030, Confidential"].)

On September 14, 2005, the court informed defense counsel that a second in camera hearing was held on August 30, 2005. (RT Pretrial Vol. II:391.) No additional discovery was provided to the defense. (RT Pretrial Vol. II:391-392.)

B. Request for independent review of the sealed transcript of the trial court's in camera *Pitchess* hearings on June 6 and August 30, 2005.

The trial court procedure involves the custodian of the personnel records bringing "all potentially relevant" materials to the court. (*People v. Mooc, supra*, 26 Cal.4th at pp. 1228-1229.) The court reviews the files in camera with a court reporter present. (*Ibid.*) The custodian should state for the record what other documents contained in the file were not presented to the court and why those were deemed irrelevant or otherwise nonresponsive to the *Pitchess* motion. (*Id.* at p. 1229.) The court then makes a record of what it has reviewed. (*Ibid.*)

On June 6, 2005, the court held an in camera hearing wherein the court granted the *Pitchess* motion in part and denied the motion in part, as reflected in the sealed transcript of the hearing and the sealed envelope containing confidential material. (CT S-0002 through S-0038 [sealed transcript]; CT S-0001 [envelope with sealed confidential contents]; CT 4:795 ["Envelope with Contents of Personnel Record/affidavit, pp. 796-799, Confidential"].)

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This Court reviews the trial court's ruling on the *Pitchess* motion for abuse of discretion. (*People v. Prince* (2007) 40 Cal.4th 1179, 1286; see also *People v. Hughes* (2002) 27 Cal.4th 287, 330 [a trial court's ruling on a motion for access to law enforcement personnel records is subject to review for abuse of discretion]; *People v. Mooc, supra*, 26 Cal.4th at p. 1232 [when the trial court reviews an officer's files in camera and then denies disclosure of information, the reviewing court should examine the materials to determine whether the lower court abused its discretion].)

A failure to comply with our California Court's requirements in connection with a *Pitchess* motion is considered an abuse of discretion (*People v. Johnson* (2004) 118 Cal.App.4th 292; *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39), warranting conditional reversal of the judgment and remand

for further proceedings regarding prejudice. (*People v. Gaines* (2009) 46 Cal.4th 172, 176.)

(1) Request for review whether the trial court's in camera hearings complied with applicable law.

Appellant requests that this Court conduct an independent review whether the trial court's in camera review process complied with applicable law, including the following requirements:

(1) whether the custodian of records was placed under oath at the hearing;

(2) whether the custodian of records satisfied the obligation "to bring to the trial court all 'potentially relevant' documents to permit the trial court to examine them for itself" (*People v. Mooc, supra*, 26 Cal.4th at pp. 1228-1229);

(3) whether the custodian of records was able to "state during the in camera review and for the record what documents or category of documents the custodian did not produce and why" (*id.* at p. 1229); and,

(4) whether the trial court made a record of what documents it examined to permit appellate review–i.e., by photocopying the records the custodian produced and placing them in a confidential file or, alternatively, by

making a list of or stating for the record the documents it examined. (*Sisson v. Superior Court* (2013) 216 Cal.App.4th 24, 38; *People v. Mooc, supra*, 26 Cal.4th at pp. 1229-1230.)

If this Court's independent review of the transcripts of the in camera hearings show the trial court failed to comply with *People v. Mooc, supra*, 26 Cal.4th 1216 in any material respect, then the Court should order the case remanded for the trial court to conduct the reviews consistent with the procedures described in *People v. Mooc, supra*, 26 Cal.4th 1216. (See *Sisson v. Superior Court, supra*, 216 Cal.App.4th at pp. 39-40.)

(2) Request for review whether the trial court abused its discretion by denying, in part, disclosure of information.

When the trial court reviews an officer's files in camera and then denies disclosure of information, the reviewing court should examine the materials to determine whether the lower court abused its discretion. (*People v. Mooc, supra*, 26 Cal.4th at p. 1232.)

Accordingly, appellant respectfully requests that this Court conduct an independent review of the materials identified above to determine whether the trial court abused its discretion.

/ / /

11. The trial court prejudicially erred in admitting irrelevant, highly prejudicial evidence of appellant's uncharged conduct involving Mohammed, Gonzalez and Bradley several years prior to the instant offenses, requiring reversal of appellant's convictions.

A. Introduction and procedural background.

At the guilt phase of appellant's trial, the prosecution sought to admit several incidents of uncharged misconduct committed several years prior to the instant offenses, involving appellant's use a firearm against Mohammed, Gonzalez and Bradley. (RT 5:899-904; see *ante*, § A.6. [Statement of Facts].) The prosecutor stated:

> Yes, Your Honor, a couple of issues that left some of them resolved. One issue is the admissibility of gang evidence. We would tend to offer the defendant's assault with a firearm in 2000 on Adel Mohammed and Larry Gonzales *as predicate acts*, intend to offer his shooting at Marlon Bradley and Edward Bradley as predicate acts, and we would intend to mention those items in opening statement. [RT 5:899, italics added.]

The prosecutor continued, "Your Honor, those are the predicate offenses that we have to prove. The law is clear that he needs predicate acts including the murder of Officer Gray as one of the predicate acts we need to prove." (RT 5:901-902.)

Defense counsel objected to admission of the evidence on the grounds that it was not relevant because the defense was stipulating that MGC was a criminal street gang and the prejudicial impact outweighed any probative value. (RT 5:900-902.) Counsel stated, in part:

> They have nothing to prove, Honor. Predicate acts goes to whether or not they're a criminal street gang, and they're required to prove predicate acts in order to show that. We've stipulated that they're a criminal street gang. If want to show that the gang does things like they do, that's fine, but it's more prejudicial than to talk about anything they're alleging or mini trials over events that they're alleging as predicate acts involving my client. [RT 5:902.]

Defense counsel continued:

> He's wanting to prove bad acts on the part of my client in order to bootstrap into the killing of Officer Gray. What occurred in the bad acts comes in if he wants to show something that's relevant. Showing that it's a criminal street gang, that they commit bad acts, that Mr. Rivera committed bad acts are issues for a penalty phase trial, not for a guilt phase trial where we're talking about what are the elements they have to prove. They have to prove that this particular incident was done at the behest of and in the furtherance of the gang. Not that other incidences were. [RT 5:903.]

The court stated that the prosecution was not required to accept a stipulation from the defense, and then summarily ruled that "they get to use it." (RT 5:904.)

During opening statement to the jury, the prosecutor gave an overview of the anticipated testimony of Mohammed and Bradley and the

> Expert testimony will explain how -- although not charged in this case, you will hear evidence of two earlier incidents involving the defendant, the defendant's gang and guns. One in 2001 in which he pulled, again, on two young men in a liquor store, a liquor store parking lot. One of the men -- one of the victims in that incident is the same young Arab whose store the defendant ran into shortly after he killed Officer Gray.

> The other incident from a year before that in 2000 involves a conflict with rival members of the Merced Gangster Bloods in which the defendant again was the shooter this time firing multiple shots at a group of men in a residential neighborhood in Merced. The victims not hit in this shooting weren't an innocent young couple but members of a rival gang. So the evidence we will produce in this case will show that Tao Rivera aka Trigger and Bullet, a validated member of the Merced Gangster Crips, had shot at rival gang members in 2000, brandished a gun at two young men in a liquor store parking lot in 2001, fired three shots at a young couple on Easter Sunday, April 11th, 2004, and finally and most tragically downed Officer Stephan Gray four days later on April 15, 2004. [RT 5:940-941.]

The prosecution subsequently presented the testimony of Mohammed, Bradley and Peterson on the subject of appellant's prior uncharged misconduct. (*Ante*, § A.6. [Statement of Facts]; RT 7:1417-1436 [Mohammed's testimony], 9:1627-1639 [Bradley's testimony], 6:1264-1266, 1321 [relevant portions of Peterson's testimony]. Mohammed testified to an incident in 2000 or 2001 when he and his friend Larry Gonzalez were in a vehicle and appellant purportedly displayed a gun and pointed it at both of them. (RT 7:1427-1428.) Bradley testified to an incident in September 2000 when he and two other people were outside his residence. Bradley saw appellant, an MGC gang member, and Roberts standing outside, and then heard Roberts tell appellant to "hit" them. (RT 9:1628-1631, 1637.) Appellant fired six bullets from a revolver in their direction, but did not strike anyone. (RT 9:1632-1633, 1637.)

Peterson testified to an unspecified shooting incident involving appellant and Bradley in September 2000. (RT 6:1264-1266.)

The evidence was purportedly offered to show intent, motive, knowledge, and gang-related activity. The court instructed the jury, in part, that evidence of uncharged crimes

> may be considered by you only for the limited purpose of determining if it tends to show: the existence of the intent which is a necessary element of the crime charged; a motive for the commission of the crime charged; the defendant had knowledge of the nature of things found in his possession; the defendant had knowledge of or possessed the means that might have been useful or necessary for the commission of the crime charged; that the crime or crimes charged were committed for the benefit of, at the direction of or in association with a criminal street gang with the specific intent to promote, further or assist in any criminal conduct by gang members. . . . [CT 48:13800, CALJIC No. 2.50; RT 11:2224-2225.]

As explained below, the evidence was inadmissible and it was not relevant to show intent, motive, knowledge, or relevant gang-related activity. Moreover, the prejudicial impact was severe, thereby requiring exclusion of the evidence under Evidence Code sections 352 and 1101, subdivision (a). Admission of the evidence deprived appellant of the right to a fundamentally fair trial in violation of his constitutional right to due process. (Cal. Const., art. I, § 15; U.S. Const., 5th & 14th Amends.)

B. Standard of review.

A trial court's determination of the admissibility of evidence of uncharged crimes is generally reviewed for an abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 369; *People v. Ochoa* (2001) 26 Cal.4th 398, 437-438; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

But where, as here, the court's ruling implicates a constitutional right the trial court's ruling is independently reviewed. (See *People v. Seijas* (2005) 36 Cal.4th 291, 304 [discussing standard of review in connection with constitutional right of confrontation].)

C. Appellant's prior uncharged misconduct involving use of a firearm.

The prosecution presented extensive testimony about appellant's use of a firearm in two separate incidents years prior to the charged offenses.

(1) Incident involving Mohammed and Gonzalez in 2000 or 2001.

Adel Mohammed testified to an incident in 2000 or 2001 when he and his friend Larry Gonzalez were in a vehicle and appellant was in a separate vehicle. (RT 7:1417-1436.) Gonzalez and appellant were giving each other dirty looks and exchanging words. (RT 7:1425-1426, 1434-1436.) There were a couple other people with appellant, including Peterson. (RT 7:1426, 1429.)

Appellant displayed a gun and pointed it at both of them. (RT 7:1427-1428.) They left shortly thereafter without incident. (RT 7:1428.)

(2) Incident involving Bradley in September 2000.

Marlon Bradley testified to an incident on September 30, 2000. (RT 9:1627-1639.) He had known appellant since childhood as they lived in the same neighborhood and were friends at one time. (RT 9:1628.) Bradley was not involved with gangs, but knew appellant to be a member of MGC, a rival to the Bloods gang. (RT 9:1628.) MGC members identify with the color blue, whereas Bloods members identify with red. (RT 9:1628.)

On September 30, 2000, Bradley's brother was at a party where there had been a problem and had just returned to their house. (RT 9:1629-1630.) Bradley and his brother, together with friend Calvin Huffman, went outside and saw appellant and Roberts. (RT 9:1630-1632.) Roberts stated, "Hit them niggers." (RT 9:1630-1631, 1637.) Appellant started shooting a revolver, firing six bullets in their direction, but not striking anyone. (RT 9:1632-1633, 1637.) Bradley ran inside. (RT 9:1633.) He, his brother and Huffman did not have any weapons. (RT 9:1633.)

Peterson testified to the same incident involving the Bradley brothers, stating that in the year 2000 there was a shooting involving Merced Bloods gang members. (RT 6:1264-1266, 7:1340-1341.) Roberts told her in

September 2000 that he had been at a party and had taken care of some Bloods. (RT 6:1265, 7:1324-1325.) The Merced Bloods are a rival gang to MGC. (RT 6:1265.)

Sergeant Trindad testified he had learned that appellant shot at Bradley on September 30, 2000. (RT 9:1832, 1904.) On cross-examination, defense expert witness Dr. Lopez testified that law enforcement was aware of appellant's involvement in the shooting in September 2000. (RT 10:2001, 2004.) Dr. Lopez also testified on cross-examination that in his opinion the altercation in September 2000 between member of Merced Bloods and Merced Crips would have been gang related. (RT 10:2004, 2042.)

D. The admission of the extensive evidence of appellant's uncharged misconduct involving use of a firearm years before the charged offenses constituted an abuse of discretion under state evidentiary rules.

Evidence Code section 210 provides, "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." All relevant evidence is admissible unless excluded under the federal or California Constitution or by statute. (*People v. Carter* (2005) 36 Cal.4th 1114, 1166.) The test of relevance is whether the evidence tends "'"logically, naturally, and

by reasonable inference" to establish material facts such as identity, intent, or motive. [Citations.]'" (*Ibid.*)

Evidence of a defendant's criminal disposition is inadmissible to prove he committed a specific criminal act. (Evid. Code, § 1101; *People v. Williams* (1997) 16 Cal.4th 153, 193.) Propensity evidence violates due process and renders a trial fundamentally unfair. (Cal. Const., art. I, § 15; U.S. Const., 5th & 14th Amends.). Admission of evidence of a defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the charged offense. (*People v. Williams* (1997) 16 Cal.4th 153, 193.) However, "in a gang-related case, gang evidence is admissible if relevant to motive or identity, so long as its probative value is not outweighed by its prejudicial effect." (*Ibid.*) "[E]ven where gang membership is relevant, because it may have a highly inflammatory impact on the jury, trial courts should carefully scrutinize such evidence before admitting it. [Citation.]" (*Ibid.*)

Evidence of gang membership, and the conduct associated with that membership, is relevant only if such evidence tends logically, naturally, and by reasonable inference to establish a motive in a gang-related crime or to fortify the testimony of witnesses who have identified the defendant as a participant in

the crime. (*People v. Champion* (1995) 9 Cal.4th 879, 922; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 588.)

Evidence Code section 1101, subdivision (b), provides an exception to the general rule of inadmissibility, permitting admission of such evidence "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than [the defendant's] disposition to commit such [crimes or bad acts]." But even if the other crimes evidence is relevant to prove one of the facts specified in Evidence Code section 1101, subdivision (b), it must also satisfy the admissibility requirements of Evidence Code section 352, that is, its "probative value [must not be] 'substantially outweighed by the probability that its admission [will] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404, quoting Evid. Code, § 352.)

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . .." The trial court's ruling is reviewed under an abuse of discretion standard. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1118; *People v. Cudjo, supra*, 6 Cal.4th at p. 609.)

Evidence of prior crimes is inherently prejudicial. (*People v. Carpenter* (1997) 15 Cal.4th 312, 380; *People v. Ewoldt, supra*, 7 Cal.4th at p. 404.) The prejudice arises from the danger that the jury, relying on the prior crime, will impermissibly infer that the defendant is a person of bad character with a propensity to commit crimes. (See Evid. Code, § 1101, subd. (a).)

Given the highly prejudicial nature of the uncharged misconduct involving appellant's use of a firearm years before the instant offenses, its admission could be upheld only if it has "substantial probative value. If there is any doubt, the evidence should be excluded." (*People v. Thompson* (1980) 27 Cal.3d 303, 318; see *People v. Ewoldt, supra*, 7 Cal.4th at p. 404.) That standard is not met here.

"'[H]ow much "probative value" proffered evidence has depends upon the extent to which it tends to prove an issue by logic and reasonable inference (degree of relevancy), the importance of the issue to the case (degree of materiality), and the necessity of proving the issue by means of this particular piece of evidence (degree of necessity).'" (*People v. Thompson*, *supra*, 27 Cal.3d at p. 318, fn. 20, quoting *People v. Delgado* (1973) 32 Cal.App.3d 242, 249.)

Although the prosecutor purported to seek admission of the evidence to prove "predicate acts" (RT 5:899), the prosecutor proved the requisite

predicate offenses involving the MGC gang with other evidence (*ante*, § 5 [Statement of Facts]), and instead impermissibly used the uncharged criminal activity to prove that appellant premeditated the murder of Gray. The prosecutor argued in closing summation:

> *How long do you think it took this individual to decide to kill*? How long do you think it took for him to decide to fire three shots at Aaron McIntire and Kimberly Bianchi four days before? *How long do you think it took for him to fire six shots at Marlon Bradley three-and-a-half years before that*? The Defense will undoubtedly try to focus your *premeditation analysis* from the moment the defendant pushed Officer Gray and took off running. [RT 11:21276, italics added.]

The prosecutor again mentioned the Bradley shooting in connection with an argument on premeditation and deliberation (RT 11:2359-2360), stating, "We're not even talking one shot, Ladies and Gentlemen; were talking two shots. You got to pull that trigger twice. He had to pull it three times with Bianchi and McIntire, *like he had to pull it six times with Marlon Bradley*." (RT 11:2360, italics added.)

Although the jury was presented with extensive evidence of appellant's prior uncharged acts involving use of a firearm, the jury was never instructed on what offenses, if any, were committed by appellant in connection therewith. For example, the jury was instructed, in part, "Evidence has been introduced for the purpose of showing that the defendant committed *crimes other than that for which he is on trial* . . . ." (RT 11:2224, italics added.) The jury was

never instructed on the elements of any possible offenses arising out of this evidence. Accordingly, there was no basis for the jury to determine whether appellant's prior uncharged activities gave rise to a criminal offense.

Evidence of the uncharged offenses was entirely irrelevant. The evidence was not used to prove the predicate offenses of the gang special circumstance or gang enhancement. It was an abuse of discretion to admit the evidence under Evidence Code section 352 because any probative value was substantially outweighed by the prejudicial impact. The jury was likely to use the evidence as proof that appellant discharged the firearm at McIntire and Bianchi, and that the shooting of Gray was committed with the specific intent to kill Gray (second degree express-malice murder) and further committed with premeditation and deliberation (first degree murder), as the prosecutor argued in closing summation.

An abuse of discretion is further shown in the fact that the court never engaged in a weighing of prejudice against probative value, instead simply stating that the evidence would be heard. (RT 5:904; see *People v. Falsetta* (1999) 21 Cal.4th 903, 917 [trial courts "must engage in a careful weighing process under section 352"].)

The trial court failed to consider that–because prejudice is often inherent in evidence of prior offenses–uncharged offenses should be admitted

only if they have substantial probative value. (*People* v. *Thompson*, *supra*, 27 Cal.3d at p. 318.) Indeed, the exercise of discretion to admit or exclude evidence pursuant to Evidence Code section 352 should favor the defendant in cases of doubt because in comparing prejudicial impact with probative value the balance "is particularly delicate and critical where what is at stake is a criminal defendant's liberty." (*People v. Lavergne* (1971) 4 Cal.3d 735, 744; *People v. Murphy* (1963) 59 Cal.2d 818, 829; *People v. Daniels* (1991) 52 Cal.3d 815, 856 [prior crime should be excluded if its probative value not clear]; *People v. Alcala* (1984) 36 Cal.3d 604, 631 [other crimes evidence to be examined with care and all doubts about probativeness to be resolved in favor of the accused].) It was an abuse of discretion for the court to permit the prosecution to admit evidence of the uncharged misconduct involving appellant's use of a firearm years prior to the instant offenses.

E. The admission of damaging evidence of appellant's prior firearm use violated due process and deprived appellant of a fundamentally fair trial, requiring reversal of his convictions.

The admission of evidence of appellant's uncharged misconduct involving use of a firearm years before the charged offenses undermined his defense of factual innocence in connection with counts 3 through 7, and it undermined his defense to first degree murder in count 1 (i.e., lack of

premeditation and deliberation), thereby depriving him of due process and a fundamentally fair trial.

The Due Process Clause of the United States Constitution prohibits state procedures which, as here, offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. (*Reno v. Flores* (1993) 507 U.S. 292; *Medina v. California* (1992) 505 U.S. 437.) The Due Process Clause may fairly be said to prohibit any procedures which undermine the ultimate integrity of the fact finding process. (*Ohio v. Roberts* (1980) 448 U.S. 56, 64 ; *Chambers v. Mississippi* (1973) 410 U.S. 284, 295.)

The Due Process Clause requires that proof of a criminal charge be beyond a reasonable doubt. (*In re Winship, supra*, 397 U.S. 358.) Due process does not permit a conviction based on no evidence, or on evidence so unreliable and untrustworthy that it may be said the accused had been tried by a kangaroo court. (*California v. Green* (1970) 399 U.S. 149, 186, fn. 20.)

In view of the foregoing principles, the admission of prior acts to show a propensity to commit a crime and to allow a jury to convict upon such evidence would amount to a denial of the right to due process of law and the right to a fair trial. Evidence of prior crimes introduced for no other purpose than to show criminal disposition is violative of the Due Process Clause.

(*Spencer v. Texas* (1967) 385 U.S. 554, 574-575 [Warren, C.J., conc. and dissenting opn.])

The right not to be tried on evidence of character, unless the defendant himself puts his character at issue, is a principle of justice so rooted in the traditions and conscience of the American people that it is ranked as fundamental. This Court has cited this principle repeatedly throughout the judicial history of the state. It is well established that evidence of other crimes is inadmissible to prove the accused had the propensity or disposition to commit the crime charged. (*People v. Guerrero* (1976) 16 Cal.3d 719, 724; *People v. Terry* (1970) 2 Cal.3d 362, 396.) In *People v. Kelley* (1967) 66 Cal.2d 232, this Court stated:

> The general rule is that evidence of other crimes is inadmissible when it is offered solely to prove criminal disposition or propensity on the part of the accused to commit the crime charged, because the probative value of the evidence is outweighed by its prejudicial effect. The purpose of the rule is to avoid placing the accused in a position of having to defend against crimes for which he has not been charged and to guard against the probability that evidence of other criminal acts having little bearing on the question whether defendant actually committed the crime charged would assume undue proportions and unnecessarily prejudice defendant in the minds of the jury, as well as promote judicial efficiency by restricting proof of extraneous crimes.

(*Id.* at pp. 238-239.)

Moreover, courts have recognized that character evidence "is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." (*Michelson v. United States* (1948) 335 U.S. 469, 475-476; see also *United States v. Vizcarra-Martinez* (9th Cir. 1995) 66 F.3d 1006, 1013-1014 [commenting that other crimes evidence is disfavored, because the accused must be tried on the basis of evidence of the charged offense, not for who he is or for prior uncharged wrongdoing]; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384.) Because a rule permitting propensity evidence is directly contrary to the established rule in almost every jurisdiction in the United States, and fails to guard against the danger that juries will convict a defendant on the bases of his character rather than the facts of the alleged offense, appellant's conviction should be reversed.

The prosecution will be unable to prove that the error in admitting evidence of appellant's uncharged misconduct was harmless beyond a reasonable doubt. The prosecution's evidence was damaging because it encourage the jury to view the charged offenses as part of a pattern of misconduct involving appellant's use of a gun. In connection with the capital offense in count 1, the evidence was entirely irrelevant to the issue

whether–assuming appellant formed the specific intent to kill Gray–appellant further acted upon careful deliberation and premeditation.

The error in admitting the other crimes evidence in violation of Evidence Code sections 352 and 1101 impermissibly deprived appellant of due process under the federal Constitution, and deprived appellant of a fundamentally fair trial, by allowing the jury to consider evidence proving nothing more than the propensity to commit a crime. Reversal of appellant's convictions is warranted under *Chapman v. California, supra*, 386 U.S. at p. 24 because the prosecution cannot prove that the error was harmless beyond a reasonable doubt.

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12. The cumulative effect of the guilt phase errors requires reversal of appellant's convictions for a denial of the constitutional rights to due process and a fair and reliable jury trial.

Appellant's convictions should be reversed due to the cumulative prejudice caused by numerous errors, separately identified in Arguments 1 through 11, inclusive, *ante*, which operated together, and in any combination of two or more, to deny appellant the due process right to a fundamentally fair and reliable trial. (Cal. Const., art. 1, §§ 7, 15, 16 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.)

"The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair." (*Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927, citing *Chambers v. Mississippi, supra*, 410 U.S. at pp. 298, 302-303 [combined effect of individual errors "denied [Chambers] a trial in accord with traditional and fundamental standards of due process" and "deprived Chambers of a fair trial"]; see *Montana v. Egelhoff* (1996) 518 U.S. 37, 53 [*Chambers* held that "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation"]; *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn. 15 ["[T]he cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness . . . ."].)

"[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. [Citations.]." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) Thus, even in a case with strong government evidence, reversal is appropriate when "the sheer number of . . . legal errors raises the strong possibility the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone." (*Id.* at p. 845; see also *Gerlaugh v. Stewart* (9th Cir. 1997) 129 F.3d 1027, 1043; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476.)

Even if this Court determines that some of the errors raised in the preceding sections of this brief do not alone rise to the federal level, the cumulative effect of the combination of federal constitutional and other trial errors must still be reviewed under *Chapman v. California, supra*, 386 U.S. at p. 24. (See *People v. Woods* (2006) 146 Cal.App.4th 106, 117 [because some errors were of federal constitutional magnitude, cumulative effect of misconduct is assessed under the *Chapman* standard; respondent has the burden of proving beyond a reasonable doubt that the error did not contribute to the verdict].)

It is well recognized that cumulative prejudice flowing from state law error can result in the denial of a fair trial under the federal due process clause.

This can occur, as here, "where the violation of a state's evidentiary rule has resulted in the denial of fundamental fairness, thereby violating due process . . . ." (*Cooper v. Sowders* (6th Cir. 1988) 837 F.2d 284, 286; see also *Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, fn. 6.)

When a case is close a small degree of error in the lower court should, on appeal, be considered enough to have influenced the jury to wrongfully convict the appellant. (*People v. Wagner* (1975) 13 Cal.3d 612, 621; *People v. Collins* (1968) 68 Cal.2d 319, 332.) "Where a trial court commits an evidentiary error, the error is not necessarily rendered harmless by the fact there was other, cumulative evidence properly admitted." (*Parle v. Runnels, supra*, 505 F.3d at p. 928; see (1973), *Krulewitch v. United States* (1949) 336 U.S. 440, 444-445 [holding that, in a close case, erroneously admitted evidence – even if cumulative of other evidence – can "tip[] the scales" against the defendant]; *Hawkins v. United States* (1954) 358 U.S. 74, 80 [concluding that erroneously admitted evidence, "though in part cumulative," may have "tip[ped] the scales against petitioner on the close and vital issue of his [state of mind]"].)

Here, there is a substantial record of serious errors that cumulatively violated appellant's due process rights under *Chambers v. Mississippi, supra*, 410 U.S. 284. Against the backdrop of the insufficiency of the evidence to

sustain the finding that appellant committed the murder in count 1 with premeditation and deliberation (*ante*, § 1) and the true findings on the gang enhancements as to counts 1 and 2 (*ante*, § 7), the trial court:

- gave a flawed version of CALJIC No. 8.71 regarding consideration of second degree murder (*ante*, § 2);
- prejudicially erred by giving an acquittal-first instruction on count 1 (*ante*, § 3);
- prejudicially erred in failing to instruct that subjective provocation may reduce premeditated first degree murder to second degree murder (*ante*, § 4);
- instructed the jury on an invalid theory in connection with the special circumstance allegation of murder to prevent arrest or escape from lawful custody (*ante*, § 5);
- permitted the jury to return an inapplicable peace-officer-killing special finding on count 1 (*ante*, § 6);
- permitted egregious prosecutorial misconduct during guilt-phase closing argument (*ante*, § 9);
- failed to compel the disclosure of relevant discovery in connection with the *Pitchess* motion (*ante*, § 10); and

- prejudicially erred in admitting irrelevant, highly prejudicial evidence of appellant's uncharged conduct involving Mohammed, Gonzalez and Bradley several years prior to the instant offenses (*ante*, § 11).

In connection with the finding that appellant committed the offenses in counts 3 through 7, the trial court:

- failed to instruct the jury on all of the elements of assault for purposes of the offense of assault with a semiautomatic firearm on McIntire and Bianchi (*ante*, § 8);
- permitted egregious prosecutorial misconduct during guilt-phase closing argument (*ante*, § 9);
- failed to compel the disclosure of relevant discovery in connection with the *Pitchess* motion (*ante*, § 10); and
- prejudicially erred in admitting irrelevant, highly prejudicial evidence of appellant's uncharged conduct involving Mohammed, Gonzalez and Bradley several years prior to the instant offenses (*ante*, § 11).

In view of the substantial record of the cumulative errors described above, the prosecution cannot prove beyond a reasonable doubt that there is no "reasonable possibility that [the combination and cumulative impact of the

guilt phase errors in this case] might have contributed to [appellant's] conviction." (*Chapman v. California, supra,* 386 U.S. at p. 24.)

Appellant's convictions should be reversed.

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Penalty Phase and Sentencing Issues

13. The trial court erroneously admitted evidence that appellant sustained juvenile adjudications and was committed a ward of the juvenile court at ages 15 and 16, requiring reversal of the death judgment.

A. Introduction and procedural background.

Prior to the start of the penalty trial, the prosecutor stated an intention to present evidence that appellant was adjudicated a ward of the juvenile court when 15 and 16 years of age for committing several felony offenses, including making criminal threats, brandishing a deadly weapon, and threatening public school officials. (RT 11:2458.)

Defense counsel objected, arguing that juvenile adjudications are not criminal convictions and are inadmissible to prove underlying felony conduct beyond a reasonable doubt.[19] (RT 11:2459.) Defense counsel also objected to admission of evidence that appellant was a ward of the juvenile court. (RT 11:2490-2491.)

The trial judge stated he would hold an Evidence Code section 402 hearing (RT 11:2460), but noted tentative agreement with the defense, stating,

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[19] The defense filed an in limine motion to exclude evidence of appellant's juvenile adjudications on the ground that juvenile adjudications do not constitute criminal convictions under factor (c). (CT 48:13683-13687.)

"That's my understanding of the law. *They can't get the documents in.* They've got to have witnesses to testify to the events." (RT 12:2489, italics added.)

At the 402 hearing, the prosecutor stated an intention to have "the supervising probation officer testify as to his status as a ward for those felony adjudications for crimes of violence or threatened violence" and to "introduce a certified copy of his criminal history . . . to show the facts of those adjudications." (RT 12:2541.) Defense counsel renewed his objection to this evidence. (RT 12:2541.)

The trial judge, reversing his initial agreement with the defense, held that evidence of juvenile adjudications was inadmissible under factor (c) but admissible under factor (b). (RT 12:2542-2543, 12:2546.)

Pursuant to the court's order, during the penalty phase the prosecution presented the testimony of Supervision Probation Officer Jeff Kettering and certified records of appellant's juvenile adjudications. (RT 12:2581-2582, 13:2720; CT 48:13728-13732 [People's Exh. 97].) The evidence only established the following facts:

(1) appellant was adjudicated a ward of the juvenile court in August 1998 when he was 15 years old for committing the felony offenses of making

criminal threats (Pen. Code § 422) and brandishing a deadly weapon (Pen. Code, § 417, subd. (a)(1)), for which he was committed to juvenile hall; and,

(2) appellant was continued as a ward of the juvenile court in January 1999 when he was 16 years old for committing two counts of felony threatening public school officials (Pen. Code, § 71). (RT 12:2581-2582, 13:2720; CT 48:13728-13732 [People's Exh. 97].)

B. The trial court erroneously admitted evidence that appellant sustained juvenile adjudications and was committed a ward of the juvenile court.

The trial court admitted, over defense objection, evidence of appellant's juvenile adjudications and juvenile court wardship as factor (b) criminal activity. (RT 12:2542-2543.)

Juvenile adjudications are not criminal convictions and thus are inadmissible under Penal Code section 190.3, factor (c). (*People v. Hayes* (1990) 52 Cal.3d 577, 632-633.)

Nor are juvenile adjudications admissible under Penal Code section 190.3, factor (b).[20] (*People v. Taylor* (2010) 48 Cal.4th 574, 652.)

> [W]e have long held that although *the fact of a juvenile adjudication is inadmissible as a factor in aggravation*, juvenile

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[20] Section 190.3, factor (b) provides that the jury may take into account "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence."

> criminal activity involving force or violence is admissible as aggravating evidence under factor (b).

(*People v. Taylor, supra*, 48 Cal.4th at p. 652, italics added; see *People v. Lewis* (2001) 26 Cal.4th 334, 378; *People v. Lucky* (1988) 45 Cal.3d 259, 295; but see *People v. Combs* (2004) 34 Cal.4th 821, 860 [holding that "[a]lthough evidence of violent juvenile adjudications is not admissible under section 190.3, factor (c), such evidence is admissible under factor (b)."].)

Here, only evidence of *the fact of the juvenile adjudications* was admitted. (RT 12:2581-2582, 13:2720; CT 48:13728-13732 [People's Exh. 97].) There was no evidence of the underlying conduct giving rise to the adjudications.

C. Evidence of appellant's juvenile adjudications and wardship impermissibly lowered the prosecution's burden of proof and was insufficient as a matter of law to prove the requisite criminal activity.

Even if this Court finds, contrary to the holding in *People v. Taylor, supra*, 48 Cal.4th at p. 652, that the fact of appellant's juvenile adjudications is admissible as a factor in aggravation, then admission of such evidence–absent proof of the conduct giving rise to the adjudications–impermissibly lowered the prosecution's burden of proof of the "other crimes" evidence under Penal Code section 190.3, factor (b), and was insufficient as a matter of law to prove the requisite criminal activity.

The prosecution did not introduce any evidence of the underlying conduct giving rise to the juvenile adjudications and wardship, just the fact of the juvenile adjudications and wardship. (RT 12:2581-2582, 13:2720; CT 48:13728-13732 [People's Exh. 97].)

Evidence is admissible under Penal Code section 190.3, factor (b) only if it is relevant to prove commission of a crime involving force or violence or an express or implied threat to use force or violence. (*People v. Boyd* (1985) 38 Cal.3d 762, 774.) The jury may not rely on evidence of such uncharged crimes of violence as an aggravating factor unless the crimes are proved beyond a reasonable doubt. (*People v. Taylor, supra*, 48 Cal.4th at p. 655; *People v. Davenport* (1985) 41 Cal.3d 247, 280-281; *People v. Robertson* (1982) 33 Cal.3d 21, 53-54.)

Welfare & Institutions Code section 203, provides:

> An order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, *nor shall a proceeding in the juvenile court be deemed a criminal proceeding*. [Italics added.]

"It is not the adjudication, but the conduct itself, which is relevant." (*People v. Lucky, supra*, 45 Cal.3d at 295-296, fn. 24; see *People v. Burton* (1989) 48 Cal.3d 843, 861-862; *People v. Roldan* (2005) 35 Cal.4th 646, 737.)

It follows that if a juvenile adjudication is neither relevant, nor constitutes a criminal conviction, nor was part of a criminal proceeding, then

the fact of the adjudication alone cannot prove violent felony criminal activity beyond a reasonable doubt. Absent evidence that the underlying conduct giving rise to the juvenile adjudication was *prior violent criminal conduct*–and there was no such evidence here–evidence of the juvenile adjudication is insufficient as a matter of law to sustain the prosecution's burden of proving the requisite criminal activity under Penal Code section 190.3, factor (b), beyond a reasonable doubt. (See *People v. Taylor, supra*, 48 Cal.4th at p. 655 [prosecution has burden of proving uncharged crimes of violence beyond a reasonable doubt]; *Jackson v. Virginia, supra*, 443 U.S. at p. 318 [a conviction unsupported by substantial evidence denies a defendant due process of law].)

Moreover, by presenting only the fact of the juvenile adjudication to the jury as "other crimes" evidence, and instructing the jury that "other crimes" evidence is required to be proven beyond a reasonable doubt (RT 13:2857-2858), the jury was permitted to find that the fact of the adjudication alone was sufficient to meet the beyond-a-reasonable-doubt standard, thereby impermissibly lowering the prosecution's burden of proving the requisite criminal activity under Penal Code section 190.3, factor (b), beyond a reasonable doubt. (See *Sandstrom v. Montana* (1979) 442 U.S. 510, 523-524.)

The jury's reliance on appellant's juvenile adjudications and his post-adjudication failure to have been rehabilitated as a basis for a death

verdict deprived appellant of the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd, supra*, 38 Cal.3d at pp. 772-775), thereby violating appellant's constitutional rights to jury trial, due process, and a fair and reliable penalty determination. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law]; U.S. Const., 5th, 6th, 8th & 14th Amends.)

D. In view of evolving standards in Eighth Amendment jurisprudence, the jury's consideration of appellant's prior juvenile record requires reversal of the death judgment for a violation of the Eighth and Fourteenth Amendments.

While appellant recognizes that this Court has held that prior violent conduct committed when a defendant was a juvenile may be admitted as evidence of criminal activity involving the use or attempted use of force or violence (*People v. Roldan, supra*, 35 Cal.4th at p. 737 and *People v. Lucky, supra*, 45 Cal.3d at pp. 294-295), he respectfully requests reconsideration of these decisions.

This Court addressed the United States Supreme Court's decision in *Roper v. Simmons* (2005) 543 U.S. 551, which held that the Eighth Amendment's prohibition against cruel and unusual punishment precludes execution of an individual who committed capital crimes while under the age of 18 years, explaining that the decision says nothing about the propriety of

permitting a capital sentencing jury, trying an adult defendant, to consider the defendant's prior violent conduct committed as a juvenile. (*People v. Lee* (2011) 51 Cal.4th 620, 648-649; *People v. Taylor* (2010) 48 Cal.4th 574, 653-654.)

In view of evolving standards in Eighth Amendment jurisprudence, as set forth in a trio of cases from the United States Supreme Court addressing application of the Eighth Amendment to harsh penalties imposed on juveniles (i.e., *Roper v. Simmons, supra*, 543 U.S. 551, *Graham v. Florida* (2010) 560 U.S. 48, and *Miller v. Alabama* (2012) 132 S.Ct. 2455), the jury's consideration of appellant's prior juvenile record requires reversal of the death judgment for a violation of the Eighth and Fourteenth Amendments.

The high court has repeatedly recognized that there are substantial differences between juveniles and adults, differences which preclude applying traditional concepts of deterrence to juveniles. In *Roper v. Simmons, supra*, 543 U.S. 551, the high court held that the death penalty could not be imposed on defendants who were under the age of eighteen at the time of the crime. In reaching this result, the court noted that as compared to adults, teenagers have "[a] lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures"; and their character "is not as well formed." (*Id.* at pp. 569-570.) Based on

these basic differences, the Court concluded that "it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles . . . ." (*Id.* at p. 571.) This was "of special concern" precisely because "the same characteristics that render juveniles less culpable than adults suggest as well the juveniles will be less susceptible to deterrence." (*Ibid.*) The court noted what every parent knows–"the likelihood that the teenage offender has made . . . [a] cost-benefit analysis . . . is so remote as to be virtually nonexistent." (*Id.* at p. 572.)

In *Graham v. Florida, supra*, 560 U.S. 48, the high court again recognized that traditional concepts of deterrence do not apply to juveniles. There, the court addressed the question of whether juveniles could receive a life without parole term for a non-homicide offense. The court cited scientific studies of adolescent brain structure and functioning which again confirmed the daily experience of parents everywhere that teenagers are still undeveloped personalities, labile and situation-dependent, impulse-driven, peer-sensitive, and largely lacking in the mechanisms of self-control which almost all of them will gain later in life. Because "their characters are not as well formed," the court found that "it would be misguided to equate the failings of a minor with those of an adult." (*Id.* at p. 68.) The court held that deterrence did not justify a life without parole sentence because–in contrast to adults–juveniles' "'lack of

maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions . . . .'" (*Id.* at p. 72.)

In *Miller v. Alabama, supra*, 132 S.Ct. 2455 the court again addressed the concept of deterrence in connection with juveniles. There, the high court addressed the question of whether a life without parole term imposed on a juvenile constituted cruel and unusual punishment even for a homicide. Ultimately, the Court "[did] not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles . . . ." (*Id.* at p. 2469.) Instead, the court reversed the life without parole terms imposed in both of the cases before it by finding that the schemes under which they were imposed were improperly mandatory. (*Id.* at p. 2460.)

But in reaching this more limited decision, it is important to note that the court fully embraced the view of deterrence expressed in both *Roper* and *Graham*. As it had in both *Roper* and *Graham*, the court again recognized that because of the "immaturity, recklessness and impetuosity" with which juvenile's act, they are less likely than adults to consider consequences and, as such, deterrence cannot justify imposing a life without parole term on a juvenile. (*Miller v. Alabama, supra*, 132 S.Ct. at p. 2465.)

The high court's rationale in these cases directly undercuts the use of juvenile criminal activity to aggravate penalty in a capital case because the cases establish that juveniles and adults should not be treated the same when it comes to assumptions about deterrence.

In view of what the high court has said regarding children and deterrence, there are two reasons the traditional rationale for admission of criminal conduct at a capital penalty phase makes little sense when applied to juvenile conduct. First, in connection with a juvenile conduct, the decision to commit the prior crime itself was made by a juvenile who was not deterred by the criminal sanction applicable to that crime precisely because of a "lack of maturity and underdeveloped sense of responsibility." (*Graham v. Florida, supra*, 560 U.S. at p. 68.) Second, *Roper*, *Graham* and *Miller* all recognize that expecting deterrence with respect to a juvenile–as the state may legitimately expect from an adult–is a "misguided [attempt] to equate the failings of a minor with those of an adult." (*Graham v. Florida, supra*, 560 U.S. at p. 68.)

Nor is the analysis altered by the fact that appellant was an adult when the offenses were committed in the instant case. Aggravating the capital murder here by relying on the fact that when appellant was a child he was not deterred from committing crimes by the criminal sanction available for that

crime, implicates the precise concerns about ignoring the impact of youth on the "lack of maturity and . . . underdeveloped sense of responsibility" which juveniles possess and which renders them "less culpable than adults . . . [and] less susceptible to deterrence." (*Roper v. Simmons, supra*, 543 U.S. at p. 569-572.)

Eighth Amendment jurisprudence always "looks beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" (*Graham v. Florida, supra*, 560 U.S. at p. 58; accord, *Roper v. Simmons, supra*, 543 U.S. at p. 561; *Trop v. Dulles* (1958) 356 U.S. 86, 101.) The analysis requires a review of "objective indicia of society's standards, as expressed in legislative enactments . . . ." (*Graham v. Florida, supra*, 560 U.S. at p. 48; accord, *Roper v. Simmons, supra*, 543 U.S. at p. 563.) With these objective indicia in mind, the court must then bring its independent judgment to bear on the constitutional question. (*Graham v. Florida, supra*, 560 U.S. at pp. 48-49; *Roper v. Simmons, supra*, 543 U.S. at p. 563.)

The objective criteria consistently point in the same direction. Legislation from around the country establishes a clear nationwide consensus recognizing that because of their more limited decision-making capabilities in weighing future consequence, juveniles must be protected from making decisions that can adversely impact the rest of their life. For example, "[i]n

recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent." (*Roper v. Simmons, supra*, 543 U.S. at p. 569.) Every state prohibits the sale of alcohol to juveniles. (See, e.g., *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 589.) Every state precludes juveniles from using tobacco products. (See *Clay v. American Tobacco Co.* (S.D. Ill. 1999) 188 F.R.D. 483, 486 [noting that every state prohibits sale of tobacco products to minors].)

There is a basic, common strand–a national consensus–reflected by these consistent legislative judgments. Legislatures throughout the country recognize that as a class, juveniles are simply not developed enough to make the kinds of decisions which can impact the remainder of their life–such as the decision to take up smoking, to drink, to vote, to marry without parental consent. In turn, *Roper* and *Graham* recognized that the common concerns about maturity which animated these otherwise diverse legislative enactments are a key factor in assessing the constitutionality of a practice that involves juveniles. Significantly, *Roper* and *Graham* do not stand alone in recognizing the special fragility of juveniles and the implication of this recognition in assessing the protection juveniles should be given. (See, e.g., *J.D.B. v. North Carolina* (2011) 131 S.Ct. 2394, 2403 ["[T]he common law has reflected the

reality that children are not adults" and has erected safeguards to "secure them from hurting themselves by their own improvident acts."]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115-116 ["Our history is replete with laws and judicial recognition that minors . . . generally are less mature and responsible than adults."].)

In sum, allowing the prosecution to aggravate a capital sentence by relying on appellant's conduct as a juvenile violates the principles illuminating the high court's decisions in *Miller*, *Graham*, and *Roper*, and contravenes the national consensus recognizing that juveniles are simply not mature enough to make decisions which impact the rest of their lives. The practice cannot be squared with due process and Eighth Amendment guarantees.

E. The death judgment must be reversed because the prosecution will be unable to prove beyond a reasonable doubt that evidence of appellant's juvenile adjudications and wardship did not contribute to the verdict.

Because evidence of appellant's juvenile adjudications and wardship at the penalty phase violated his jury trial, due process and Eighth Amendment rights, reversal is required unless the state can prove that the error was harmless beyond a reasonable doubt. (See *People v. Robertson* (1989) 48 Cal.3d 18, 62 [federal constitutional error requires reversal of the death judgment unless it can be demonstrated that the error is harmless beyond a

reasonable doubt]; *Chapman v. California, supra*, 386 U.S. at p. 24.) The prosecution will be unable to carry its burden for three reasons.

First, although the circumstances of this capital crime were undeniably tragic (as in all capital murders), this case does not present the type of repetitive crimes the Court often sees giving rise to a death sentence. (See, e.g., *In re Carpenter* (1995) 9 Cal.4th 634 [defendant sentenced to death for murdering five people]; *People v. Bittaker* (1989) 48 Cal.3d 1046 [defendant sentenced to death for kidnaping, raping, sodomizing and murdering five teenage girls]; *People v. Bonin* (1989) 47 Cal.3d 808 [defendant sentenced to death after murdering ten people].) In contrast to these egregious cases, this case involves a single homicide. The fact that the victim in this case was a peace officer also should not change the calculus as evidenced by the fact that before trial the prosecution was apparently willing to accept a plea in exchange for a sentence to life without the possibility of parole. (RT Pretrial Proceedings II:523-524.)

Second, this case does <u>not</u> involve the type of defendant the Court often sees in death penalty cases. (See, e.g., *People v. Ray* (1996) 13 Cal.4th 313, 330-331 [defendant had two prior murder convictions]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 567 [defendant convicted of murder in 1985 had killed his three children in 1964 and had been on death row for these prior

homicides]; *People v. Hendricks* (1987) 43 Cal.3d 584, 588-589 [defendant had two prior murder convictions].) Here, appellant had been convicted of only two prior offenses–unlawful possession of a firearm and possession for sale of cocaine base–which resulted in no violence and no physical injury. (CT 46:13302-13314; People's Exh. 75.)

Third, appellant presented a significant case in mitigation for a life sentence, consisting of evidence that his conduct was influenced by the violence and abuse he suffered in childhood and by serious mental health issues. (*Ante*, Statement of Facts, § E(1).) Appellant presented persuasive evidence showing his favorable prospects for rehabilitation in prison, including extensive evidence of his good character. (*Ante*, Statement of Facts, § E(2).)

In assessing all this evidence in mitigation, and in determining if the state can prove the error here harmless beyond a reasonable doubt, it is important to note that the question is not whether the jury would have unanimously imposed a life sentence absent the error. Instead, the question is whether on this record a *single juror* could reasonably have imposed a life sentence. (See *People v. Soojian, supra*, 190 Cal.App.4th at p. 521; *People v. Bowers, supra*, 87 Cal.App.4th at pp. 735-736; *People v. Brown, supra*, 46 Cal.3d at p. 471, fn. 1 [conc. op. of Brossard, J.] [noting that a "hung jury is a more favorable verdict" than a guilty verdict].)

Moreover, during closing argument, the prosecutor urged the jury to use appellant's juvenile adjudications to return a death verdict. The prosecutor argued, in part:

> But factor (b) also includes the defendant's criminal activity as a juvenile. As you have heard, the *defendant was found to have committed* two separate acts of threatening a school official as a juvenile. He was also found to have made a violent criminal threat against someone and was found to have brandished a weapon during that incident. *That's four separate acts involving the threat of force or violence as a juvenile.* Once more, members of the jury, there is simply no other reasonable conclusion than *factor (b) should be considered a fact in aggravation.* [RT 13:2888-2889, italics added; see also RT 13:2931 (arguing juvenile conduct).]

In connection with a prosecutor's closing argument to the jury, this Court and other courts have recognized what logic dictates–i.e., the prosecutor's reliance in closing argument on erroneously admitted evidence is a strong indication of prejudice. (See e.g., *People v. Guzman* (1988) 45 Cal.3d 915, 963 [finding no *Boyd* error but noting it was significant that "the prosecution made no effort to capitalize on the testimony"]; *People v. Roder, supra*, 33 Cal.3d at p. 505 [error not harmless under *Chapman* because, in part, "the prosecutor relied on the [erroneous] presumption in his closing argument"]; *People v. Martinez* (1986) 188 Cal.App.3d 19, 26 [error not harmless under *Chapman* based, in part, on prosecutor's closing argument]; *People v. Frazier* (2001) 89 Cal.App.4th 30, 39 ["reasonable doubt [under

Chapman] is reinforced here by the prosecutor's use of the propensity instruction in closing argument"]; *People v. Younger* (2000) 84 Cal.App.4th 1360, 1384 ["Our conclusion that there is such reasonable doubt is reinforced by the prosecutor's use of the instruction in her closing arguments."]; *People v. Brady* (1987) 190 Cal.App.3d 124, 138 ["argument of the district attorney, if anything, compounded the defect"]; *Depetris v. Kuykendall, supra*, 239 F.3d at p. 1063 [prosecutor's reliance on error in closing argument is indicative of prejudice].)

It is thus likely that the jury viewed the evidence as did the prosecutor when he argued the case to the jury–i.e., attributing appellant's "four separate acts involving the threat of force or violence as a juvenile" as a significant factor in aggravation. (RT 13:2889.)

On this record the prosecution will be unable to prove beyond a reasonable doubt that jury's consideration of appellant's prior juvenile adjudications and wardship did not contribute to the death verdict, thereby violating appellant's rights to due process, jury trial, and a fair and reliable penalty determination. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16 & 17; see *Chapman v. California, supra*, 386 U.S. at pp. 20-21; *Arizona v. Fulminante, supra*, 499 U.S. at p. 296; *People v. Cowan, supra*, 50 Cal.4th at p. 491.) Reversal of the death judgment is required.

14. The trial court prejudicially erred by admitting appellant's postcrime statement that he was unfairly being held in isolation in the Merced County jail because "some pig got killed," requiring reversal of the death judgment.

A. Introduction and procedural background.

Officer Gray was killed on April 15, 2004. The prosecution presented evidence that 24 months later, on April 18, 2006, appellant was upset that he was being held in isolation at the Merced County jail, where he was awaiting trial in this case. (RT 12:2565-2568.) Sergeant Barbara Carbonaro testified that appellant flooded his jail cell and stated, "Everybody else gets a chance [to be in general population] and that *just because some pig got killed he was there.*" (RT 12:2568, italics added.)

The prosecutor sought admission of the statement, stating, "We have Barbara Carbonaro–Sergeant Carbonaro from the Merced County Sheriff's Office who will testify to an incident in jail wherein the defendant flooded his cell because he was upset apparently about not getting some yard time and made the comment of '[a]ll this because some fucking pig died.'" (RT 11:2457.)

Defense counsel objected to admission of the statement on the grounds that it was irrelevant and unduly prejudicial. (RT 11:2457-2458; CT 44:12708-12711.) Defense counsel further questioned whether the statement was even made, stating, "I have the film of the incident with the removal unit. *My client*

didn't fight them. He laid on the floor and was peacefully taken out. He was forcibly but peacefully taken out. There is nothing on this videotape of a statement such as this." (RT 12:2486-2487, italics added.)

At a subsequent Evidence Code section 402 hearing, defense counsel renewed his objection to the statement, noting that lack of remorse is inadmissible in aggravation, and admission of such evidence violates "defendant's constitutional rights to due process of law, a fair jury trial and a reliable penalty determination . . . ." (CT 44:12710; see RT 12:2536.) The prosecutor argued that the statement showed lack of remorse, which was admissible "as an aggravating circumstance under factor (a)"–i.e., a circumstance of the crime. (RT 12:2537.)

The trial court ruled that the statement was admissible to show appellant's attitude towards the victim as a circumstance of the crime under Factor (a). The court stated, in part, "It can come in under (a). Circumstances of the crime *showing his attitude towards the victim.*" (RT 12:2538, italics added.)

Sergeant Carbonaro subsequently testified that two years after the offense, while appellant was in the Merced County jail awaiting trial, appellant stated, "Everybody else gets a chance and that just because some pig got killed he was there." (RT 12:2568.)

B. The statement was erroneously admitted because it was irrelevant to any statutory sentencing factor and the probative value, if any, was substantially outweighed by the prejudicial nature of the evidence, thereby violating state law and depriving appellant of the constitutional rights to due process and a fundamentally fair sentencing determination.

This Court has repeatedly held "that *postcrime* evidence of remorselessness . . . does not fit within any statutory sentencing factor, and thus should not be urged as aggravating." (*People v. Nelson* (2011) 51 Cal.4th 198, 224, orig. italics; *People v. Pollock* (2004) 32 Cal.4th 1153, 1184; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1232.)

A prosecutor is not permitted to present aggravating evidence that is irrelevant to the factors in aggravation listed in Penal Code section 190.3. (*People v. Boyd, supra*, 38 Cal.3d at pp. 772-776.) "[E]vidence of a defendant's background, character, or conduct that is not probative of any specific sentencing factor is irrelevant to the prosecution's case in aggravation and therefore inadmissible." (*People v. Nelson* (2011) 51 Cal.4th 198, 222; *People v. Boyd, supra*, at pp. 773-774.) Under section 190.3, aggravating factors include the circumstances of the capital offense, other violent criminal conduct by the defendant, and the defendant's prior felony convictions. (Pen. Code, § 190.3, factors (a)-(c).) These three factors, and the defendant's age at the time of the crime (Pen. Code, § 190.3, factor (i)), are the only factors that may be considered in aggravation of penalty. (*People v. Coffman and Marlow*

(2004) 34 Cal.4th 1, 108-109, but see *id.* at p. 109 [evidence presented by the prosecution to rebut defense evidence in mitigation need not relate to an aggravating factor].)

Appellant recognizes that "[w]hether a defendant murdered without remorse 'bears significantly on the moral decision whether a greater punishment, rather than a lesser, should be imposed. [Citation.]'" (*People v. Nelson* (2011) 51 Cal.4th 198, 224, citing *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1232; accord, *People v. Ramos* (1997) 15 Cal.4th 1133, 1164.) "'Evidence that reflects directly on the *defendant's state of mind contemporaneous with the capital murder* is relevant under section 190.3, factor (a), as bearing on the circumstances of the crime. [Citations.]'" (*People v. Nelson, supra*, 51 Cal.4th at p. 224, italics added, citing *People v. Guerra* (2006) 37 Cal.4th 1067, 1154.) But it "bears repeating," as this Court has held,

> that it is evidence of the defendant's state of mind at the time of the murder that is admissible under factor (a). We have held that *postcrime* evidence of remorselessness, for example, does not fit within any statutory sentencing factor, and thus should not be urged as aggravating.

(*People v. Nelson, supra*, 51 Cal.4th at p. 224, orig. italics.)

Nor was appellant's postcrime statement admissible on the alternate theory, which was never advanced by the prosecution, that it showed evidence of consciousness of guilt. (See *People v. Jackson* (2014) 58 Cal.4th 724, 753-

754 [defendant's postcrime statement about shooting the arresting officer was not admissible at the penalty phase to show lack of remorse but was admissible as consciousness of guilt].) Appellant's statement did not constitute evidence of consciousness of guilt because it did not infer special knowledge of the crime, it was not a false statement, and it did not reflect an attempt to suppress and/or fabricate evidence. (See *People v. Russell* (2010) 50 Cal.4th 1228, 1253-1255; *People v. Dabb* (1948) 32 Cal.2d 491, 495, 500; *People v. Kimble* (1988) 44 Cal.3d 480, 495-498 [false statement made by defendant at time of arrest shows consciousness of guilt]; CALCRIM No. 362 [Consciousness of Guilt: False Statements]; CALCRIM No. 371 [Consciousness of Guilt: Suppression and Fabrication of Evidence].) Instead, the statement only indicated that an officer had been killed (a matter of public knowledge and a crime for which appellant was pending trial) and that appellant felt he was being mistreated because of that fact.

Relevant evidence "means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; *People v. Contreras* (2013) 58 Cal.4th 123, 152.)

> . . . Since the jury must decide the question of penalty on the basis of the specific factors listed in the statute, the quoted language must refer to evidence relevant to those factors. Evidence of defendant's background, character, or conduct

> which is not probative of any specific listed factor would have no tendency to prove or disprove a fact of consequence to the determination of the action, and is therefore irrelevant to aggravation.

(*People v. Boyd, supra*, 38 Cal.3d at pp. 773-774.)

The "pig" statement was irrelevant to aggravation under *People v. Boyd, supra*, 38 Cal.3d 762, and thus it improperly admitted. (*Id.* at pp. 771-776.)

The trial court also abused its discretion under Evidence Code section 352. Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . .." The trial court's ruling is reviewed for abuse of discretion. (*People v. Barnett, supra*, 17 Cal.4th at p. 1118; *People v. Cudjo, supra*, 6 Cal.4th at p. 609.)

"'[H]ow much "probative value" proffered evidence has depends upon the extent to which it tends to prove an issue by logic and reasonable inference (degree of relevancy), the importance of the issue to the case (degree of materiality), and the necessity of proving the issue by means of this particular piece of evidence (degree of necessity).'" (*People v. Thompson, supra*, 27 Cal.3d at p. 318, fn. 20, quoting *People v. Delgado, supra*, 32 Cal.App.3d at p. 249.)

Appellant's statement, made two years after Officer Gray was killed, was not probative of any statutory sentencing factor. (See *People v. Nelson,*

supra, 51 Cal.4th at p. 224.) Yet the prosecutor used the statement as evidence in aggravation, urging the jury to view appellant as a terrible person worthy of execution. The prosecutor told the jury in opening statement:

> You're also going to hear about an incident in the Merced County jail after the defendant's arrest for Officer Gray's murder. *To give you some idea of how the defendant felt about Stephan Gray*, the man that he had murdered, the family, the victims, the friends that he had left behind, the defendant is unhappy because he's not getting his yard privileges, so he floods his cell. Well, sheriff's personnel have to come in and deal with this, and you're going to hear from one of the sergeants in the Merced County jail who came to his cell to find out what was going on. *The defendant was angry, wasn't getting what he wanted and that his statement to her was "all this because some pig got killed." That's the person that we're dealing with, ladies and gentlemen.* [RT 12:2559, italics added.]

The trial court utterly failed to engage in an Evidence Code section 352 analysis, instead simply finding that the statement was relevant and admissible. (RT 12:2538.) A meaningful analysis of the evidence under section 352 would have resulted in exclusion of the statement because (1) the statement was irrelevant to any statutory sentencing factor and (2) the word "pig"–when used to describe a peace officer–is highly inflammatory, and thus the prejudicial nature of the evidence greatly outweighed any probative value. The trial court's failure to conduct a section 352 analysis was an abuse of discretion, rendering the decision to admit the statement arbitrary and capricious.

The admission of the statement in violation of California law also violated federal constitutional guarantees, including appellant's rights to due process and a fair penalty trial. (See *Estelle v. McGuire, supra*, 502 U.S. at p. 70; *Dawson v. Delaware* (1992) 503 U.S. 159, 164-168 [introduction of irrelevant character evidence at capital sentencing proceedings constitutes constitutional error]; U.S. Const., 5th, 8th & 14th Amends.)

The admission of evidence from which no legitimate inference can be drawn violates the federal constitutional guarantee of due process, especially when, as here, the evidence is inflammatory. (See *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920; *McKinney v. Rees, supra*, at pp. 1385, 1386.) Error that renders a trial fundamentally unfair violates due process guarantees. (*Donnelly v. DeChristophoro, supra*, 416 U.S. at p. 645.) Furthermore, in a capital case the Eighth Amendment demands a heightened degree of "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Here, the evidence of appellant's statement was not relevant to any legitimate disputed issue, and it was highly prejudicial, inflammatory evidence. The erroneous admission of the statement rendered the penalty phase trial unreliable and fundamentally unfair, thereby depriving appellant of his constitutional rights under the Eighth and Fourteenth Amendments.

Accordingly, the trial court plainly erred in ruling that appellant's statement was admissible at the penalty phase trial.

C. The prosecution will be unable to prove beyond a reasonable doubt that the error in admitting the statement did not affect the verdict because the prosecution used the statement to secure the death verdict and the jury requested readback of the statement during deliberations, reflecting that the statement impacted the verdict.

The federal constitutional error at issue here requires reversal of the death judgment unless it can be demonstrated that the error is harmless beyond a reasonable doubt. (*People v. Robertson, supra*, 48 Cal.3d at p. 62; see *Chapman v. California, supra*, 386 U.S. at pp. 20-21.) State law error at the penalty phase of a capital case requires reversal when there is a "reasonable (i.e., realistic) possibility" the error affected the verdict (*People v. Brown* (1988) 46 Cal.3d 432, 447-448), which is "'the same, in substance and effect,' as the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California, supra*, 386 U.S. at p. 24 . . . ." (*People v. Cowan* (2010) 50 Cal.4th 401, 491.)

The statement affected the death verdict. The prosecutor highlighted the statement in opening statement, telling the jury that appellant was upset with conditions of pretrial confinement and stated, "[A]ll this because some pig got killed." (RT 12:2559.) In connection with the "pig" comment, and highlighting the inference of bad character shown by the statement, the

prosecutor told the jury, "That's the person that we're dealing with, ladies and gentlemen." (RT 12:2559.)

The prosecutor presented the statement through the testimony of Sergeant Carbonaro, whose sole purpose was to present the statement to the jury. Sergeant Carbonaro testified on direct examination, in part:

Q: Were you involved in an incident with the defendant?

A: Yes, I was. [¶]

Q: And what happened?

A: Inmate Rivera was causing a disturbance. He was flooding out his cell. My staff called me to the area where he was being held, and he was bailing water out of the toilet and flooding out the hallway -- his cell and the hallway. It was running out into the hallway.

Q: Did he give you any indication as to why he was doing that?

A: He was angry because he could not be rehoused. He wanted to be rehoused down in general population.

Q: *And did he say anything about a police officer*?

A: *Yes, he did.* He was angry. *He made a statement* that he didn't -- he thought that this was unfair. *Everybody else gets a chance and that just because some pig got killed he was there.*

Q: *Did you take that as a reference to Officer Gray*?

A: *Yes, sir, I did.* [RT 12:2566-2567, italics added.]

The prosecutor persuasively urged the jury to return a death verdict, based in material part on the statement. The prosecutor argued during closing argument:

> And *even more shocking*, ladies and gentlemen, is two years after he's murdered Stephan, two years after he's had an opportunity to dwell and reflect on what he's wrought, he tells Sergeant Carbonaro during a fit of anger because he isn't getting his way in the jail, he wants to go to the main block, bear that in mind, "*All this because some pig got killed.*"
>
> *That is a loathsome statement of utter contempt* for Stephan, for his family, his friends and law enforcement, people sworn to protect all of us, including him. *If that doesn't tell you who he is, nothing does.* Factor (a), ladies and gentlemen, cannot be characterized as anything but a factor in aggravation. [RT 13:2893-2894, italics added.]

The prosecutor used the statement yet again during closing summation, urging the jury to return a death verdict based on appellant's statement that "a pig got killed." (RT 13:2936 ["What you've heard instead is, '[a]ll this because a pig got killed'"].)

In connection with a prosecutor's closing argument to the jury, our courts have recognized what logic dictates–i.e., the prosecutor's reliance in closing argument on erroneously admitted evidence is a strong indication of prejudice. (See e.g., *People v. Guzman* (1988) 45 Cal.3d 915, 963 [finding no *Boyd* error but noting it was significant that "the prosecution made no effort to capitalize on the testimony"]; *People v. Roder, supra*, 33 Cal.3d at p. 505

[error not harmless under *Chapman* because, in part, "the prosecutor relied on the [erroneous] presumption in his closing argument"]; *People v. Martinez, supra*, 188 Cal.App.3d at p. 26 [error not harmless under *Chapman* based, in part, on prosecutor's closing argument]; *People v. Frazier, supra*, 89 Cal.App.4th at p. 39 ["reasonable doubt [under *Chapman*] is reinforced here by the prosecutor's use of the propensity instruction in closing argument"]; *People v. Younger, supra*, 84 Cal.App.4th at p. 1384 ["Our conclusion that there is such reasonable doubt is reinforced by the prosecutor's use of the instruction in her closing arguments."]; *People v. Brady, supra*, 190 Cal.App.3d at p. 138 ["argument of the district attorney, if anything, compounded the defect"]; *Depetris v. Kuykendall, supra*, 239 F.3d at p. 1063 [prosecutor's reliance on error in closing argument is indicative of prejudice].)

The fact that the prosecutor repeatedly used appellant's statement in urging the jury to return a death verdict is particularly telling because it reveals that the prosecution cannot now prove beyond a reasonable doubt that the statement did not contribute to the verdict. This is so because *Chapman* requires an analysis of the impact of the error on appellant's jury; the appropriate inquiry is "not whether, in a trial that occurred without the error, a . . . verdict would surely have been rendered, but whether the . . . verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan*

v. Louisiana, supra, 508 U.S. at p. 279, italics added.) As argued by the prosecutor, appellant's statement was "shocking." (RT 13:2893.) It was a "loathsome statement of utter contempt for Stephan, for his family, his friends and law enforcement, people sworn to protect all of us, including him." (RT 13:2893-2894.)

Evidence of lack of remorse is extremely powerful in capital penalty phase proceedings. (Eisenberg, Garvey & Wells, *But Was he Sorry? The Role of Remorse in Capital Sentencing*, 83 Cornell Law Review 1599, 1637; Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell Law Review 1558, 1559.)

The record reveals that the jury considered the statement material to its sentencing decision. During deliberations, the jury requested readback of Sergeant Carbonaro's testimony about the "pig" statement. (RT 14:3008-3009.) The trial judge told the jury, in part:

> You asked for a re-read of the testimony of the supervising jailer read back to the jury, only the portion where the defendant had flooded his cell what he said. Now, we think you're referring to Carbonaro of the Merced Police Department. We have the testimony where she's directed to April the 15th, 2006, where a cell was flooded and what was said.
>
> The reporter will read that back to you. That begins in the transcript on page 2567, line 6 is the question, and that portion ends on page 2568 on line 8. The court reporter will read that back. She'll read it as many times as you want. You can't talk

while she's in here. You can't ask her questions, and she can't read anything else but that. [RT 14:3009.]

The record reflects that on the third day of deliberations, May 22, 2007, at 1:24 p.m., the court reporter read-back the testimony of Sergeant Carbonaro, as indicated above, which included her testimony about the "pig" statement. (RT 14:3009; CT 48:13768.) The jury returned then a death verdict that very afternoon. (CT 48:13768; RT 14:1310-1311.)

A request for readback of trial testimony, as here, is an indication that the case was close. (See *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 490 [when considering the prejudicial nature of the error, "we consider whether the jury asked for a rereading of the erroneous instruction or of related evidence"]; *People v. Williams* (1971) 22 Cal.App.3d 34, 38-40 [request for read back of critical testimony]; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 [request for review of evidence, such as read back of testimony, is an indicator that the case was close and any error a tipper of the scales].)

The closeness of the case also is shown by the jury's earlier request during deliberations for readback of significant defense evidence in mitigation for a life sentence. The jury requested readback of "the testimony of the psychiatrist during the presentation by the defense in regards to the defendant's head injury." (RT 13:2950.) The court reporter read back those portions of Dr. Howsepian's testimony dealing with the trauma experienced by appellant

when he was three or fours years of age and the head injury appellant suffered when he was 16 years old during an altercation where Gray struck appellant, causing appellant to be admitted to the hospital. (RT 13:2960.) The readback included the following testimony of Dr. Howsepian:

> Q: Now, you were starting to go into the specific instances that you feel are trauma that Mr. Rivera has dealt with. Can you go into that. [¶]
>
> A: . . . . [¶] And, again, one has to add to all this the why he's in court today. The incident with Gray when he was 16 years old set up a kind relationship with Officer Gray that had heightened suspicion toward Officer Gray involved Mr. Rivera into an altercation with a man when Rivera was 16. Officer Gray was called to the scene, and Mr. Rivera ended up taking a swing and he says unintentionally struck Mr. Gray who was trying to break up this altercation with another man. Gray picked up or pushed or there was some contact that caused Mr. Rivera to fall down strike his head on the ground and to be taken to emergency room afterwards and –
>
> Q: Did you see any documentation regarding that?
>
> A: I did. Yeah. I have the medical records in front of me, in fact, from that emergency room visit of Mr. Rivera in which he struck his head following this incident with Officer Gray at the age of 16. [RT 13:2738, 2743-2744.]
>
> Q: These diagnoses -- well, you also said those are your two main diagnoses but that you've made some other ones as well.
>
> A: . . . . And then he was -- because of the head injury during his altercation with Officer Gray when he was 16, he had a mild brain injury, a traumatic brain injury mild in severity. He never lost consciousness, but he doesn't remember certain of what happened with him there, and he did hit head and complain of

> significant head pain there was some scalp swelling according to the emergency room. [RT 13:2751-2753.]

In connection with the readback of the testimony of the defense psychiatrist, the jury also requested the "legal definition of what constitutes mental or emotional disturbance as referred to in factor (d)" and the "legal definition of mental disease or defect as referred to in factor (h)." (RT 13:2950.) The court referred the jury back to the original jury instructions, telling the jury, "You have all the definitions that we can provide you in the instructions." (RT 13:2959.)

In view of the closeness of this case, the prosecutor's repeated use of the statement, the jury's request for readback of the statement shortly before returning the death verdict, and the powerful nature of evidence of lack of remorse, the prosecution will be unable to prove beyond a reasonable doubt that the death verdict was surely unattributable to the error in the admission of the statement. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.)

The death verdict must be reversed.

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15. The trial court prejudicially erred by permitting the prosecution to introduce inadmissible testimony in aggravation that while in pretrial confinement appellant caused a disturbance by flooding his cell.

A. Introduction.

At the penalty phase trial, the prosecution introduced Sergeant Carbonaro's testimony that while incarcerated awaiting his capital trial appellant caused a disturbance by flooding his cell with water from the toilet and then had to be removed from the cell. (RT 12:2565-2568.)

Defense counsel objected to admission of the testimony on the grounds that it was irrelevant and unduly prejudicial. (RT 11:2457-2458; CT 44:12708-12711.) Defense counsel explained that there "is no crime." (RT 11:2457.) Counsel further explained that appellant did not hit anyone during the incident, but merely "laid on the floor and was peacefully taken out. He was forcibly but peacefully taken out." (RT 12:2487.)

The trial court ruled that Sergeant Carbonaro's testimony was admissible in aggravation. (RT 11:2457-2458, 12:2538; CT 44:12708-12711.)

Sergeant Carbonaro subsequently testified that two years after the offense, while appellant was in the Merced County jail awaiting trial, appellant "was causing a disturbance. He was flooding out his cell. My staff called me to the area where he was being held, and he was bailing water out of the toilet

and flooding out the hallway–his cell and the hallway. It was running out into the hallway." (RT 12:2567; see RT 12:2571.)

Sergeant Carbonaro testified about the procedure for removing an inmate from his or her cell:

Q: Sergeant, would you please tell the jury what the SERT team is.

A: It's a special team that is trained to remove inmates in a situation where they're causing a disturbance. They come in and they take them out of the cell.

Q: Is it a situation where they believe or you believe that the inmate may pose a risk of harm to jail personnel, himself --

A: That's correct.

Q: -- or others?

A: That's correct. They're geared up with additional equipment such as mace, canisters, beanbag shotguns, a shield. They can go in and immobilize an inmate without harm to them versus me going in in just my uniform. [RT 12:2573.]

Sergeant Carbonaro further testified that appellant had to be removed from his cell, but appellant did not hit anyone during the process:

Q: Did Mr. Rivera resist the team physically?

A: He resisted coming out of his cell, yes.

Q: Did he use force against the SERT team?

A: He -- he had --

Q: Did he lie down basically?

A: Eventually.

Q: Did he strike any SERT team members?

A: Not to my knowledge. [RT 12:2574-2575.]

B. The trial court prejudicially erred in permitting the prosecutor to elicit testimony from Sergeant Carbonaro that was inadmissible in aggravation.

The trial court erred in allowing the prosecutor to elicit the testimony from Sergeant Carbonaro, which is described above, as an aggravating factor under Penal Code section 190.3, factor (b), thereby requiring reversal of the death verdict for a violation of section 190.3 and appellant's state and federal constitutional rights to due process and to a fair and reliable determination of penalty. (Cal. Const., Art. I, §§ 7, 15, 17; U.S. Const., 5th, 8th, and 14th Amends.)

Our California statutory scheme allows, in aggravation, consideration of "the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence . . . ." (Pen. Code, § 190.3.) The requisite "criminal activity" must amount to conduct that violates a penal statute. (*People v. Boyd, supra*, 38 Cal.3d at p. 772.) The necessary "force or violence" must be directed toward persons, not merely property. (*Id.* at p. 776; *People v. Gallego* (1990) 52 Cal.3d 115, 196.) Further, the jury may not rely

on evidence of such uncharged crimes of violence as an aggravating factor unless the crimes are proved beyond a reasonable doubt. (*People v. Robertson* (1982) 33 Cal.3d 21, 53-54.)

Sergeant Carbonaro's testimony about the disturbance appellant caused by flooding his cell with water from the toilet, and his physical extraction from the cell (which was a forcible extraction, but was non-violent), did not even amount to criminal activity. Indeed, the prosecution never even asserted that appellant's conduct violated a criminal statute. At most, appellant's conduct in flooding his cell amounted to unspecified property damage. Accordingly, the evidence was woefully insufficient to prove that appellant committed a crime involving violence or the threat of violence, and thus the evidence was inadmissible and irrelevant under section 190.3 and this Court's decision in *People v. Boyd, supra*, 38 Cal.3d at p. 774.

The uncharged conduct that Sergeant Carbonaro described was not an aggravating circumstance under factor (b) because the conduct did not prove *violent criminal* conduct. "To be admissible under [factor (b)], a threat to do violent injury must . . . be directed against a person or persons, not against property." (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1013.) Accordingly, appellant's conduct as described by Sergeant Carbonaro was not an aggravating circumstance under factor (b).

C. The error in admitting Sergeant Carbonaro's testimony about the disturbance caused by appellant when he flooded his jail cell with water from the toilet and had be physically extracted from the cell cannot be proven harmless beyond a reasonable doubt.

A trial court's error allowing the jury to hear inadmissible aggravating evidence is reversible unless the prosecution can prove, beyond a reasonable doubt, that the error was harmless. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

Sergeant Carbonaro's testimony affected the death verdict. The prosecutor highlighted the evidence in opening statement, telling the jury that appellant was upset with conditions of pretrial confinement and "so he floods his cell." (RT 12:2559.)

The record reveals that Sergeant Carbonaro's testimony was material to the jury's sentencing decision. During deliberations, the jury requested readback of Sergeant Carbonaro's testimony. (RT 14:3008-3009.) The trial judge told the jury, in part:

> You asked for a re-read of the testimony of the supervising jailer read back to the jury, only *the portion where the defendant had flooded his cell* what he said. Now, we think you're referring to Carbonaro of the Merced Police Department. We have the testimony where she's directed to April the 15th, 2006, *where a cell was flooded* and what was said. [RT 14:3009, italics added.]

The record reflects that on the third day of deliberations, May 22, 2007, at 1:24 p.m., the court reporter read-back the testimony of Sergeant Carbonaro, as indicated above, which included her testimony about appellant flooding his cell with water from the toilet and having to be extracted from the cell. (RT 14:3009; CT 48:13768.) The jury returned then a death verdict that very afternoon. (CT 48:13768; RT 14:1310-1311.)

A request for readback of trial testimony, as here, is an indication that the case was close. (See *Weiner v. Fleischman, supra*, 54 Cal.3d at p. 490 [when considering the prejudicial nature of the error, "we consider whether the jury asked for a rereading of the erroneous instruction or of related evidence"]; *People v. Williams, supra*, 22 Cal.App.3d at pp. 38-40 [request for read back of critical testimony]; *People v. Pearch, supra*, 229 Cal.App.3d at p. 1295 [request for review of evidence, such as read back of testimony, is an indicator that the case was close and any error a tipper of the scales].)

Moreover, appellant presented a substantial case in mitigation for a life sentence, which included evidence that his conduct was influenced by the violence and abuse he suffered in childhood and by serious mental health issues. (*Ante*, Statement of Facts, § E(1).) Appellant presented persuasive evidence showing his favorable prospects for rehabilitation in prison, including extensive evidence of his good character. (*Ante*, Statement of Facts, § E(2).)

In assessing all this evidence in mitigation, and in determining if the state can prove the error here harmless beyond a reasonable doubt, it is important to note that the question is not whether the jury would have unanimously imposed a life sentence absent the error. Instead, the question is whether on this record a *single juror* could reasonably have imposed a life sentence. (See *People v. Soojian* (2010) 190 Cal.App.4th 491, 521; *People v. Bowers* (2001) 87 Cal.App.4th 722, 735-736; *People v. Brown* (1988) 46 Cal.3d 432, 471, fn. 1 [conc. op. of Brossard, J.] [noting that a "hung jury is a more favorable verdict" than a guilty verdict].)

Sergeant Carbonaro's testimony about appellant's misconduct while awaiting trial in this case served to reinforce the idea that appellant could not control his behavior. Accordingly, there is a reasonable possibility that the improper aggravation evidence affected the verdict, thereby requiring reversal of the death verdict.

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16. The death judgment must be reversed because the jury's use of an invalid sentencing factor–the special circumstance allegation of murder to prevent arrest or escape from lawful custody–rendered the sentence unconstitutional.

Appellant explained in Argument 5, *ante*, that the true finding on the special circumstance allegation of murder to prevent arrest or escape from lawful custody must be vacated. (*Ante*, Arg. 5.) Although the jury also found true the special circumstance of murder of a peace officer engaged in the performance of his duties, the reliability of the death judgment would be severely undermined if it were allowed to stand, and thus the death judgment should be reversed and the case remanded for a new penalty trial. (U.S. Const., 5th, 8th & 14th Amends.; Cal. Const. art. 1, § 17.)

In *Brown v. Sanders* (2006) 546 U.S. 212, the United States Supreme Court articulated the following standard for determining prejudice when an aggravating factor is reversed:

> An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances. [*Id.* at p. 220 (emphasis in original).]

The high court held that this test is *not* an inquiry based solely on the admissibility of the underlying evidence because "[i]f the presence of the invalid sentencing factor allowed the sentencer to consider evidence that would

not otherwise have been before it, due process would mandate reversal without regard to the rule we apply here." (*Id.* at pp. 220-221.)

The issue that the high court confronted in *Brown v. Sanders, supra*, was "the skewing that could result from the jury's considering as aggravation properly admitted evidence that should not have weighed in favor of the death penalty." (*Id.* at p. 221.) As the high court explained, "such skewing will occur, and give rise to constitutional error, only where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor." (*Ibid.*)

In *Brown v. Sanders, supra*, in connection with a home-invasion robbery where defendant and his companion invaded a home where they bound and blindfolded the male inhabitant and his girlfriend, the jury found true four special circumstances (robbery-murder, burglary-murder, witness-killing, and "heinous, atrocious, or cruel" murder), each of which independently rendered him eligible for the death penalty. (*Id.* at p. 214, 223-224.) The jury then weighed a list of sentencing factors, including the circumstances of the crime, and sentenced defendant to death. (*Ibid.*) On appeal, the Court declared two of the special circumstances invalid (burglary-murder and "heinous, atrocious, or cruel" murder). (*Id.* at pp. 214-215, 223.) The Court upheld the death judgment, however, because (1) the jury properly considered the two

remaining special circumstances (eligibility factors) and (2) the facts and circumstances admissible to establish the "heinous, atrocious, or cruel" murder and burglary-murder special circumstances were also properly adduced as aggravating facts bearing upon the "circumstances of the crime" sentencing factor. (*Id.* at pp. 214-215, 223.) Following reversal by the Ninth Circuit Court of Appeals, the high court reversed, stating:

> . . . [T]he jury's consideration of the invalid eligibility factors in the weighing process did not produce constitutional error because *all of the facts and circumstances admissible to establish the "heinous, atrocious, or cruel" and burglary-murder eligibility factors were also properly adduced as aggravating facts bearing upon the "circumstances of the crime" sentencing factor. They were properly considered whether or not they bore upon the invalidated eligibility factors.*

(*Id.* at p. 224, italics added.)

Here, the jury found true two special circumstances–i.e., murder to prevent arrest or escape from lawful custody and murder of a peace officer engaged in the performance of his duties. (CT 47:13571-13604; RT 11:2386-2433.) Although the invalid special circumstance still leaves one eligibility factor (i.e., murder of a peace officer engaged in the performance of his duties), reversal of the death judgment is required because the jury should not have given any aggravating weight to the facts and circumstances that the murder was to prevent arrest or escape from lawful custody. Appellant was not

in custody at the time of the killing (*ante*, Arg. 5), and thus he could not, as a matter of law, have acted to prevent arrest or escape from lawful custody.

The jury's consideration of the erroneous fact that appellant was in lawful custody at the time of the killing–which was used to aggravate the killing and enhance the prosecution's case for a death verdict–unconstitutionally skewed the jury's penalty determination, depriving appellant of due process and a reliable penalty determination. (U.S. Const., 5th, 8th & 14th Amends.; *Brown v. Sanders* (2006) 546 U.S. at pp. 220-221 [if "the presence of the invalid sentencing factor allowed the sentencer to consider evidence that would not otherwise have been before it, due process would mandate reversal without regard to the rule we apply here."].)

Prejudice also is shown by the fact that the jury was instructed that it "*shall consider*, take into account and be guided by . . . the circumstances of the crime for which the defendant was convicted in the present proceeding and *the existence of any special circumstances found to be true* . . . ." (RT 13:2846, italics added.) The jury is presumed to have understood and followed this instruction. (See *People v. Gray* (2005) 37 Cal.4th 168, 217.)

Moreover, the prosecutor used the true findings on both special circumstances to persuade the jury to return a death verdict. (RT 12:2554 [opening statement], 13:2889 [closing argument].)

In view of the facts set forth above, the delicate weighing of aggravating and mitigating circumstances that appellant's jury was required to undertake was necessarily skewed to appellant's disadvantage, thereby vitiating the jury's finding that the aggravating circumstances were so substantial in comparison with the mitigating circumstances that death was warranted. Accordingly, the invalid sentencing factor renders appellant's sentence unconstitutional, in violation of due process and the Eighth Amendment guarantee of a reliable penalty determination. (U.S. Const., 5th, 8th & 14th Amends.; Cal. Const. art. 1, § 17; see *Brown v. Sanders, supra*, 546 U.S. at p. 220.)

The death judgment must be reversed.

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17. The trial court's refusal to instruct on lingering doubt violated appellant's constitutional rights, requiring reversal of the death judgment.

Appellant requested the following instruction at the penalty phase trial:

> A juror who voted for conviction at the guilt phase may still have a lingering or residual doubt as to whether the defendant premeditated and deliberated the murder of Officer Gray. Such a lingering or residual doubt, although not sufficient to leave you with a reasonable doubt at the guilt phase, may still be considered as a mitigating factor at the penalty phase. Each individual juror may determine whether any lingering or residual doubt is a mitigating factor and may assign it whatever weight the juror feels is appropriate. [CT 48:13649.]

The trial court refused to give this instruction, stating that defense counsel was permitted to argue lingering doubt but the court was not required to give an instruction on lingering doubt. (RT 12:2509-2513, 2531.)

Appellant was entitled to the instruction. The trial court's failure to give any such instruction was prejudicial and not only violated state law, but also denied appellant's state and federal constitutional rights, and resulted in preclusion of the jury's ability to give effect to all available factors in mitigation and resulted in fundamentally unfair penalty phase proceedings.

Appellant's proposed instruction appropriately explained the concept of lingering doubt of guilt which the jurors could consider in expressing their "reasoned moral response" to mitigating evidence presented at the penalty phase. (See *Penry v. Lynaugh* (1989) 492 U.S. 302, 319, quoting *California v.*

Brown (1987) 479 U.S. 538, 545 (conc. opn. of O'Connor, J.); accord, *Brewer v. Quarterman* (2007) 550 U.S. 286, 289-291.)

The trial court's refusal to give appellant's proposed lingering doubt instructions violated appellant's right to present a defense. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15; *California v. Trombetta* (1984) 467 U.S. 479, 485; *Chambers v. Mississippi, supra*, 410 U.S. at pp. 302-303; *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098-1099).

The trial court's refusal to give appellant's proposed lingering doubt instructions also violated appellant's right to a fair and reliable determination of penalty (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama, supra*, 447 U.S. at p. 638) and his right to a fundamentally fair trial secured by due process of law (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 15; *Estelle v. McGuire, supra*, 502 U.S. at p. 72; *Estelle v. Williams* (1976) 425 U.S. 501, 503).

The court's refusal to give the proposed instruction also violated appellant's right to trial by a properly instructed jury (U.S. Const., 5th, 14th Amends.; Cal. Const., art. I, § 16; *Carter v. Kentucky* (1981) 450 U.S. 288, 302) and violated federal due process by arbitrarily depriving him of his state right to requested instructions supported by the evidence. (U.S. Const., 14th

Amend.; *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346; *Fetterly v. Paskett* (9th Cir. 1991) 997 F.2d 1295, 1300.)

The error requires reversal of the penalty judgment. This Court has recognized that lingering doubt as to guilt can play a part in the jury's assessment of penalty and that defense counsel has a right to argue lingering doubt as a consideration in determining punishment. (See *People v. Cox* (1991) 53 Cal.3d 618, 677-678.) Although this Court has held that a lingering doubt instruction is not required by either the state or federal constitutions, it has recognized that such instruction may be required by the evidence in any given case. (See *People v. Fauber* (1992) 2 Cal.4th 792, 863-865; *People v. Cox, supra*, 53 Cal.3d. at p. 678, fn. 20.) Appellant respectfully contends that this Court is incorrect in holding that a lingering doubt instruction is not constitutionally required. This Court's position that there is no constitutional right to an instruction on lingering doubt is based on the perception that CALJIC No. 8.85 adequately alerts the jury that it can consider lingering doubt in its determination of penalty. (*People v. Lawley* (2002) 27 Cal.4th 102, 166; *People v. Osband* (1996) 13 Cal.4th 622, 716.)

Specifically, this Court has held that factors (a) and (k), set forth in CALJIC No. 8.85, are adequate for a jury to give effect to lingering doubt. (*People v. Osband, supra*, 13 Cal.4th at p. 716.) This holding should be

reconsidered as neither factor provides any direction, as the Eighth Amendment requires, for the jury to address residual doubts as to the defendant's guilt. (See *Gregg v. Georgia* (1976) 428 U.S. 153.) Factor (a) concerns the circumstances of the crime and the special circumstances found to be true. (CALJIC No. 8.85.) Factor (a) directs a juror to take into account and be guided by the crime itself. It does not direct the juror to consider residual doubt about the person convicted. In addition, it does not lend itself to consideration of a lingering doubt of guilt. Factor (k) directs the jury to consider any circumstance which may extenuate the gravity of the crime even if it not a legal excuse for the crime. (CALJIC No. 8.85.) Like factor (a), factor (k) does not lend itself to consideration of a lingering doubt of guilt. Factor (k) directs the jury to consider any aspect of the defendant's character or record, but this does not relate to residual doubt of guilt. Instead, it leads the jury to other considerations, since an aspect of the defendant's character or record, by its own terms, has nothing to do with the crime.

The specific instruction proposed by appellant would have provided a method for the jury to give effect to any such lingering doubt. Because California's "standard" instructions do not adequately permit or direct the jury to consider lingering doubt, the failure to give any such instruction, such as the ones proposed by appellant, is a violation of appellant's due process and

Eighth Amendment rights. (*Boyde v. California* (1990) 494 U.S. 370, 377 [Eighth Amendment requires that jury be able to consider and give effect to all of a capital defendant's mitigating evidence]; *Penry v. Johnson* (2001) 532 U.S. 782, 797 [it is constitutionally insufficient merely to tell the jury it may "consider" mitigating circumstances].)

In *Lockett v. Ohio* (1978) 438 U.S. 586, 604, the high court held that states cannot exclude anything from the sentencer's consideration that might serve "as a basis for a sentence less than death." (See *Brewer v. Quarterman, supra*, 550 U.S. at pp. 289-291; *Abul-Kabir v. Quarterman* (2007) 550 U.S. 233, 251-253; *Penry v. Lynaugh, supra*, 492 U.S. 323; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 394, 398-399.)

Here, the instruction requested was appropriately phrased, unlike instructions on lingering doubt which have been rejected by this Court. (See *People v. Thompson* (1988) 45 Cal.3d 86, 134 [inviting readjudication of the offense].) This Court stated:

> Had the requested instructions actually asked the jury to consider any lingering doubts about defendant's intent to kill, despite the sufficiency of evidence to support their special finding, we might seriously consider whether refusal to give such instruction was error.

(*People v. Thompson, supra*, 45 Cal.3d at p. 134.)

Unlike the instructions this Court referenced in *People v. Thompson, supra*, appellant's proposed instruction did *not* "invit[e] readjudication of matters resolved at the guilt phase." (*Id.* at p. 135.) Instead, appellant's proposed instruction properly called the jury's attention to the issue of residual doubt, and merely permitted them to consider any such doubt they may have had. The requested instruction was neutrally phrased.

Appellant was prejudiced by the failure to provide this instruction. Trial defense counsel argued the concept of lingering doubt in connection with whether the killing was a "premeditated act." (RT 13:2922-2923.) Counsel argued, in part:

> You're all individuals; you all have your own opinions. For some this is, the decision you're going to have to make in a little while, is going to be easy, for some it's going to be difficult. I'm sure that there were a few of you, maybe one, maybe two, maybe none, but there may have been some of you who really had to struggle with the issue of whether this was a premeditated act.
>
> And what the lingering doubt thing is about is that, all right, you know, am I really, really serious about beyond a reasonable doubt, it's beyond doubt, beyond any doubt, because this is not -- this is a decision that you're being asked to make, that you're going to have to live with for the rest of your lives, for the rest of his life, until they take him in, strap him down and pump him full of death. And even after then you all are going to have to sit there and remember that and live with that. So if there's any lingering doubt, that is also a reason that you can use as a mitigating factor to impose a sentence of less than death. [RT 13:2922-2923.]

But argument of counsel does not substitute for a correctly instructed jury. (*People v. Morales* (2001) 25 Cal.4th 34, 47.) Indeed, argument of counsel "unsupported by an instruction to which the defendant is entitled, may be more harmful than helpful." (*United States v. Duncan* (6th Cir. 1988) 850 F.2d 1104, 1118; *Wright v. United States* (9th Cir. 1964) 339 F.2d 578, 580.) Under these circumstances, the failure of the trial court to instruct the jury on lingering doubt cannot be deemed harmless beyond a reasonable doubt.

Reversal of the death judgment is warranted.

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18. California's death-penalty statute, as interpreted by this Court and applied at appellant's trial, violates the United States Constitution and international law.

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

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

A. The broad application of section 190.3, factor (a), violated appellant's constitutional rights.

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See RT 13:2846.) Prosecutors throughout California have argued that the jury could weigh in aggravation

almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts that cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court never has 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].) Instead, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." (See *Tuilaepa v. California* (1994) 512 U.S. 967, 986-988 (dis. opn. by Blackmun, J.) [noting California prosecutors' extensive, contradictory use of factor (a)].) As a result, California's capital-sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were sufficient, by themselves and without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363.) Appellant is aware

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

B. The death-penalty statute and accompanying jury instructions fail to set forth the appropriate burden of proof.

(1) Appellant's death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt.

California law does not require that a reasonable-doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (CALJIC Nos. 8.86 and 8.87; see *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1998) 16 Cal.4th 1223, 1255; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty-phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (See RT 13:2947.) *Apprendi v. New Jersey, supra*, 530 U.S. at p. 478, *Blakely v. Washington, supra*, 542 U.S. at pp. 303-305, *Ring v. Arizona*

(2002) 536 U.S. 584, 604, and *Cunningham v. California* (2007) 549 U.S. 270, 280-282, 293, require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and, (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (RT 13:2946-2947.) Because these additional findings were required before the jury could impose the death sentence, *Ring, Apprendi, Blakely*, and *Cunningham* require that each of these findings be made beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson, supra*, 25 Cal.4th 543, 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). This Court has rejected the argument that *Apprendi*, *Blakely*, and *Ring* impose a reasonable-doubt standard on California's penalty-phase proceedings.

(*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges this 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 contends that the sentencer of a person facing the death penalty is required by the due process clause and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt that the factual bases for its decision are true, and that death is the appropriate sentence. This Court previously has rejected the claim that either the Fourteenth Amendment or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair*, *supra*, 36 Cal.4th at p. 753.)

Appellant requests that this Court reconsider its holding. Without a standard identifying that death had to be the appropriate penalty beyond a reasonable doubt, this Court can have no confidence in either the strength or the reliability of the ultimate verdict. Accordingly, the judgment must be set aside.

(2) Some burden of proof is required, or the jury should have been instructed that there was no burden of proof.

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

The instructions given here (RT 13:2844-2858, 2942-2948) fail to provide the jury with the guidance required for administration of the death penalty to meet constitutional minimum standards and consequently violate the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the task is largely moral and normative, and thus is unlike other sentencing. (*People v.*

Lenart (2004) 32 Cal.4th 1107, 1136-1137.) This Court also has rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that fact to the jury. (See *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.

Imposing a death sentence violates the Sixth, Eighth, and Fourteenth Amendments when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina, supra*, 428 U.S. at p. 305.) This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d

719, 749.) This 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 *Ring*'s reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., § 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 because providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with

regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury. Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

(4) 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 are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (RT 13:2947.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and

directionless. (See *Maynard v. Cartwright, supra*, 486 U.S. at p. 362.) This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (See *People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) Appellant asks this Court to reconsider that opinion.

(5) The instructions failed to inform the jury that the central determination is whether death is the appropriate punishment.

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (See *Woodson v. North Carolina, supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them that they may return a death verdict if the aggravating evidence "warrants" death rather than life without parole. (RT 13:2947.) 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* (1983) 462 U.S. 862, 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 violate the Eighth and Fourteenth Amendments to the federal Constitution. The Court has

previously rejected this claim. (See, e.g., *People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

(6) The penalty jury should be instructed on the presumption of life.

The presumption of innocence is a core constitutional and adjudicative value essential to protect the accused in a criminal case. (See *Estelle v. Williams, supra*, 425 U.S. at p. 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1993) 507 U.S. 272.) The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., 8th & 14th Amends.), and his right to the equal protection of the laws (U.S. Const., 14th Amend.).

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital

cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, California's death penalty law is remarkably deficient in the protections needed to ensure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required in all cases.

C. The instructions to the jury on mitigating and aggravating factors violated appellant's constitutional rights.

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. The trial court failed to omit those factors from the jury instructions (RT 13:2846-2849), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

D. The prohibition against inter-case proportionality review guarantees arbitrary and disproportionate impositions of the death penalty.

The California capital-sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other

similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The lack of any other procedural protections in the California capital sentencing scheme constitutionally compels review for inter-case proportionality. This court's decisions in *Fierro; Pulley v. Harris* (1984) 465 U.S. 37, 42, 50-51; and *People v. Butler* (2009) 46 Cal.4th 847, 885 should be reconsidered.

E. California's capital-sentencing scheme violates the Equal Protection Clause.

The California death-penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes, in violation of the equal protection clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants. In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence. (*People v. Sengpadychith, supra*, 26 Cal.4th at p. 325.) In a capital case, there is no burden of proof at all, and the jurors need not agree on which aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that this

Court has rejected these equal protection arguments (see *People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asserts that there is no rational basis for the distinctions made and asks the Court to reconsider its ruling.

F. California's use of the death penalty as a regular form of punishment falls short of international norms.

This Court has rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency (*Trop v. Dulles, supra*, 356 U.S. at p. 101)." (See *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, as well as decisions of the United States Supreme Court citing international law in prohibiting the imposition of capital punishment under various circumstances (see *Roper v. Simmons* (2005) 543 U.S. 551, 554 [prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles]; *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21 [noting that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved," citing the Brief for European Union as Amicus Curiae]; *Enmund v. Florida* (1982) 458 U.S. 782, 796, fn. 22 [noting that

"'[T]he climate of international opinion concerning the acceptability of a particular punishment' is an additional consideration which is 'not irrelevant.' [Citation.]"]), appellant urges this Court to reconsider its previous decisions. Even if the death penalty as a whole does not violate international law, appellant submits that his trial violated specific provisions applicable to his trial. These rights include the right to an impartial tribunal, which demands that each of the decision-makers, including the jury, be unbiased. (*Collins v. Jamaica* (1991) IIHRL 51, Communication No. 240/1987 [impartial juries]; see also International Covenant on Civil and Political Rights [ICCPR] (June 8, 1992) 999 U.N.T.S. 171, article 14(1) [criminal defendants entitled to fair hearing by impartial tribunal].) It also encompasses standards that require prosecutors to "perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system." (*Guidelines on the Role of Prosecutors*, Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders (1990).) Finally, international law encompasses a right to a fair trial that includes specific rights but is broader than any one provision of national or international law. (Article 10 of the Universal Declaration; Article 14(1) of the ICCPR; Article 6(1) of

the European Convention; Article XXVI of the American Declaration; and, Article 8 of the American Convention.)

G. The cumulative impact of the deficiencies in California's capital sentencing scheme render California's death penalty law constitutionally infirm.

The cumulative impact of the deficiencies in California's capital sentencing scheme render California's death penalty law constitutionally infirm. (See *Taylor v. Kentucky, supra,* 436 U.S. 478, 487, fn. 15; Cal. Const., art. 1, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.).

This Court's opinion in *People v. Garcia* (2011) 52 Cal.4th 706, 765 should be reconsidered.

/ / /

19. The errors in this case in both the guilt and penalty phases of trial, individually and cumulatively, or in any combination thereof, require reversal of the death judgment for a violation of the state and federal Constitutions.

The death judgment must be evaluated in light of the cumulative effect of the multiple errors occurring at both the guilt and penalty phases of appellant's trial. (*Taylor v. Kentucky, supra,* 436 U.S. 478, 487, fn. 15; *People v. Hill, supra,* 17 Cal.4th 800, 844-845; *Phillips v. Woodford* (9th Cir. 2001) 267 F.3d 966, 985, citing *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; Cal. Const., art. 1, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.).

"The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair." (*Parle v. Runnels, supra,* 505 F.3d at p. 927, citing *Chambers v. Mississippi, supra*, 410 U.S. at pp. 298, 302-303 [combined effect of individual errors "denied [Chambers] a trial in accord with traditional and fundamental standards of due process" and "deprived Chambers of a fair trial"]; see also *Montana v. Egelhoff, supra*, 518 U.S. at p. 53[stating that *Chambers* held that "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation"); *Taylor v. Kentucky, supra*, 436 U.S. at p. 487, fn.15 ["the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"].)

Evidence that may otherwise not have affected the guilt determination can have a prejudicial impact on the penalty trial. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

There is a substantial record of serious errors that individually and cumulatively, or in any combination, violated appellant's due process rights under *Chambers v. Mississippi, supra*, 410 U.S. 284 and require reversal of the death judgment.

The numerous and substantial errors identified above in the guilt phase of the trial, as set forth in Arguments 1 through 11, inclusive, including the cumulative effect of the errors in the guilt phase of trial (Argument 12), which arguments are incorporated herein by reference, deprived appellant of a fair and reliable penalty determination. (See *Woodson v. North Carolina, supra*, 428 U.S. at p. 304; *Zant v. Stephens, supra*, 462 U.S. at p. 879; *Payne v. Tennessee* (1991) 501 U.S. 808, 825-830; Cal. Const., art. 1, §§ 7, 15 & 17; U.S. Const. 5th, 6th, 8th & 14th Amends.)

In addition to the substantial guilt phase errors identified above, the jury was permitted to hear and consider inadmissible evidence in aggravation, including evidence of appellant's prior juvenile adjudications and wardship, which included evidence that (1) in 1998 appellant was adjudicated a ward of the juvenile court for making criminal threats and brandishing a deadly weapon and (2) in 1999 appellant was adjudicated a ward of the juvenile court for two counts of felony threatening public school officials. (*Ante*, § 13.)

The jury's consideration of appellant's postcrime statement that he was unfairly being held in isolation in the Merced County jail because "some pig got killed," which was inadmissible postcrime remorselessness, requires reversal of the death judgment for a violation of California law and the federal constitutional guarantees of due process and a fair and reliable penalty determination. (*Ante*, § 14.)

Inadmissible aggravating evidence also consisted of Sergeant Carbonaro's testimony about the disturbance caused by appellant when he flooded his jail cell with water from the toilet and had be physically extracted from the cell, which was inadmissible non-statutory aggravating evidence, requiring reversal of the death judgment for a violation of the constitutional guarantees of due process and a fair and reliable penalty determination. (*Ante*, § 15.)

Inadmissible aggravating evidence also consisted of the jury's use of an invalid sentencing factor–the special circumstance allegation of murder to prevent arrest or escape from lawful custody–which rendered the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process. (*Ante*, § 16.)

Moreover, the jury was prevented from fully considering relevant evidence in mitigation because the trial court refused to instruct the jury on lingering doubt in connection with the finding that the murder of Gray was deliberate and premeditated. (*Ante*, § 17.)

Thus, even if the Court were to hold that not one of the errors was prejudicial by itself, the cumulative effect of these errors sufficiently undermines confidence in the integrity of the penalty proceedings in this case. These numerous constitutional violations compounded one another, and created a pervasive pattern of unfairness that violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights by resulting in a penalty trial that was fundamentally flawed and a death sentence that is unreliable.

This was a close case on the issue of penalty as evidenced by appellant's case in mitigation, which showed that he suffered from serious mental health issues and was adversely influence by the violence and abuse he suffered in childhood. (*Ante*, Statement of Facts, § E(1).)

Appellant also presented good character evidence, which included the testimony of numerous witnesses knowledgeable about him. (*Ante*, Statement of Facts, § E(2).) Their testimony supported a life sentence because it showed that appellant's conduct was influenced by circumstances in life beyond his control, and that appellant is a good and caring person with redeeming qualities. (*Ante*, Statement of Facts, § E(2).)

The closeness of the case also is demonstrated by the jury's focus during deliberations on appellant's case in mitigation, as evidenced by the request for readback of "the testimony of the psychiatrist during the presentation by the defense in regards to the defendant's head injury" (RT 13:2950) and the request for further instructions on the "legal definition of what constitutes mental or emotional disturbance as referred to in factor (d)" and the "legal definition of mental disease or defect as referred to in factor (h)." (RT 13:2950.)

A request for readback of trial testimony, as here, is an indication that the case was close. (See *Weiner v. Fleischman, supra*, 54 Cal.3d at p. 490 [when considering the prejudicial nature of the error, "we consider whether the jury asked for a rereading of the erroneous instruction or of related evidence"]; *People v. Williams, supra*, 22 Cal.App.3d at pp. 38-40 [request for read back of critical testimony]; *People v. Pearch, supra*, 229 Cal.App.3d at p. 1295

[request for review of evidence, such as read back of testimony, is an indicator that the case was close and any error a tipper of the scales].)

It simply cannot be said that the combined effect of two or more of the errors detailed above had "no effect" on at least one of the jurors who determined that appellant should die by execution. (See *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.) Appellant's death sentence must be reversed due to the cumulative effect of the errors in this case.

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Conclusion

For the reasons set forth above, appellant Cuitlahuac Tahua Rivera respectfully requests reversal of his convictions and death judgment.

Respectfully submitted,

Dated: 1-26-2015 By: _____

Stephen M. Lathrop
Attorney for Defendant/Appellant
Cuitlahuac Tahua Rivera

Certificate of Compliance

I hereby certify under penalty of perjury that there are 58,677 words in this brief.

Respectfully submitted,

Dated: 1-26-2015 By: _____

Stephen M. Lathrop
Attorney for Defendant/Appellant
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Proof of Service

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 904 Silver Spur Road #430, Rolling Hills Estates, CA 90274. On January 26, 2015, I served the following document(s) described as **Appellant Cuitlahuac Tahua Rivera's Opening Brief** on the interested party(ies) in this action by placing _ the original or X a true copy thereof enclosed, in (a) sealed envelope(s), addressed as follows:

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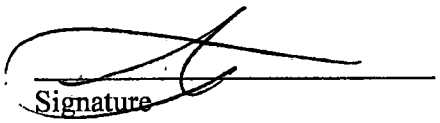

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