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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

IRVING ALEXANDER RAMIREZ,

Defendant and Appellant.

(Alameda County
Superior Court
No. 151080)

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Alameda

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No. S155160

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	
v.	)	(Alameda County
	)	Superior Court
IRVING ALEXANDER RAMIREZ,	)	No. 151080)
Defendant and Appellant.	)	

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This appeal is from a final judgment of death following a trial and is authorized by Penal Code section 1239, subdivision (b).[1]

STATEMENT OF THE CASE

On November 1, 2005, a single-count information was filed in Alameda County Superior Court charging appellant, Irving Alexander Ramirez, with the murder of Nels Niemi on July 25, 2005, in violation of

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

section 187. (2 CT 473.)[2] The information alleged that the murder was committed with a firearm within the meaning of section 12022.53, subdivisions (a) through (d). (2 CT 474.) The information also alleged three special circumstance allegations: (1) the murder was committed in order to avoid lawful arrest (§ 190.2, subd. (a)(5)); (2) the victim was a peace officer killed in the lawful performance of his duties (§ 190.2, subd. (a)(7)); and (3) the victim was killed by means of lying-in-wait (§ 190.2, subd. (a)(15)). (2 CT 475.)

On November 2, 2005, the prosecution filed a notification that it was seeking the death penalty. (2 CT 480.) On the same day, appellant entered a plea of not guilty to the charge and denied all the special allegations. (2 CT 481.)

On February 21, 2007, appellant made a motion to exclude uniformed police officers as spectators at trial. (3 CT 614.) On February 26, 2007, the trial court denied the motion. (3 CT 645.)

On March 5, 2007, the lying-in-wait special circumstance allegation was stricken upon the prosecution's motion. (3 CT 724-725.) On the same day, the guilt phase commenced with jury selection. (3 CT 724-725.)

On April 19, 2007, the jurors and alternates were selected and sworn. (3 CT 827.)

On April 23, 2007, the prosecution began its case-in-chief (3 CT 829-831), which concluded on April 30, 2007 (3 CT 859).

On May 1, 2007, the prosecution filed a motion to modify CALCRIM No. 521 with language from section 189. (3 CT 861-864.) On

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[2] "CT" refers to the Clerk's Transcript on appeal. "RT" refers to the Reporter's Transcript.

May 3, 2007, the trial court granted the motion. (4 CT 894.)

On May 2, 2007, appellant requested to instruct either on its own or within CALCRIM No. 521 with CALJIC No. 8.71. (3 CT 867-868.) Appellant's request was denied by the trial court. (4 CT 894.)

On May 3, 2007, the prosecution filed an amended information omitting the lying-in-wait special circumstance allegation, charging appellant with second degree murder of a peace officer (§ 190, subd. (c)), and realleging the murder charge (§ 187, subd. (a)) and the other special allegations. (4 CT 890-892, 893-894.) On May 7, 2007, appellant again pleaded not guilty and denied all allegations. (4 CT 896.)

On May 7, 2007, the defense presented its case, and both parties rested. (4 CT 896.)

On May 8, 2007, defense counsel re-raised the motion to limit the number of uniformed police officers as spectators in the gallery. (4 CT 900.) The trial court denied the motion. (4 CT 900.)

On that same day, both sides presented argument, the jurors received their instructions and commenced their deliberations. (4 CT 900-901.)

On May 10, 2007, the jurors returned their verdicts, finding appellant guilty as charged of first degree murder and finding true all special allegations. (4 CT 906-908.)

On May 17, 2007, appellant filed a motion to exclude victim impact testimony from coworkers of Officer Niemi during the penalty phase. (4 CT 956-958.) On May 22, 2007, appellant filed a motion to exclude the admission of two stories written by Officer Niemi as victim impact evidence. (4 CT 964.) The trial court denied the motion to limit victim impact testimony and denied in part and granted in part the motion to admit short stories written by Officer Niemi. (4 CT 974.)

On May 22, 2007, appellant also filed a motion requesting the trial court to instruct on lingering doubt. (4 CT 969-970.) The trial court denied the motion. (4 CT 974.)

On May 29, 2007, appellant filed an additional motion to limit victim impact testimony from Officer Curt Barr. (4 CT 981.) On that same day, the trial court denied the motion. (4 CT 986.)

On May 29, 2001, the penalty phase of trial commenced with opening statements. (4 CT 986.) On May 30, 2007, both sides rested. (4 CT 989-990.)

On June 4, 2007, the jurors commenced their deliberations. (4 CT 1007.) The jurors deliberated the question of penalty for over four court days, during which they submitted 13 questions and other requests to the court. (4 CT 1002-1035.)

On June 11, 2007, the jurors returned a death verdict. (4 CT 1036-1037.)

On August 3, 2007, the court denied the automatic motion to modify the death verdict. (4 CT 1086.) On the same date, the court imposed a sentence of death on the sole murder conviction, to which it added a consecutive sentence of 25 years to life based on appellant's use of a gun to commit that crime pursuant to section 12022.53, subdivision (d). (4 CT 1087.)

STATEMENT OF FACTS

I. GUILT PHASE

On July 25, 2005, at about 11:00 p.m., appellant shot and killed San Leandro Police Officer Nels Daniel Niemi.[3] Appellant, intoxicated, had been celebrating his 23rd birthday. Officer Niemi, responding to a complaint about a group of juveniles loitering on the street, was checking the group's identification documents when, suddenly and without warning, appellant shot him in the head. Officer Niemi died at the scene. Appellant's guilt was not disputed in this case. The prosecution's theory was that appellant committed wilful, deliberate and premeditated first degree murder. (12 RT 2582.) The defense theory was that appellant, in a heightened emotional and intoxicated state and vulnerable to rash impulse, committed second degree murder because he shot Niemi without the cold calculus and careful and thoughtful weighing of consequences that premeditation and deliberation demands. (12 RT 2600-2603.)

A. The Prosecution's Case

A chain of events prior to the shooting led appellant, intoxicated and armed, to Doolittle Drive in San Leandro the night of July 25, 2005. Prior to July 25, Danny Heredia, brother to appellant's friend, Vicente Heredia, was assaulted. (9 RT 1902-1903; 10 RT 1958.)[4] Early in the day on July 25, menacing juveniles involved in the prior assault on Danny gathered in

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[3] Officer Nels Niemi was also referred to by his middle name "Dan" and "Daniel" during the trial. (9 RT 1811.)

[4] In order to avoid confusion because the Heredia brothers have the same last name, Vicente Heredia, is hereafter referred to as "Heredia," while his younger brother, Daniel, is hereafter referred to by his first name utilized by the witnesses, "Danny."

front of the Heredia house on Doolittle Drive. (10 RT 1992.)[5] Appellant drove to the Heredia house, loaned Heredia a gun to deal with the threatening situation, and left. (10 RT 1959-1963, 1994, 1996.) Officer Niemi, on duty that day, arrived on scene in the early evening and dispersed the group. (9 RT 1852-1854; 10 RT 1964.) Shortly thereafter, Danny was attacked again at a nearby park. (10 RT 1964.) In response, Heredia fired the gun loaned to him by appellant. (10 RT 1966.) When Heredia attempted to fire the gun again, it jammed. (10 RT 1967.)[6] Heredia returned to the Heredia house and called appellant about the jammed gun. (10 RT 1968-1969, 1997.) Another brother to Heredia and Danny, Frank Gonzales, learned about the assault at the park and arrived at the Heredia house. (9 RT 1901-1902.) After assessing the situation, Gonzales picked up his cousin, Miguel Rangel, who joined him at the Heredia house. (9 RT 1902-1906.)

1. Events Culminating in the Shooting

That same night, appellant drove to his friend Jose Luis Arteaga's house. (10 RT 2042-2043.) Testifying under a grant of immunity, Arteaga explained that the day of the shooting, July 25, 2005, was appellant's birthday. (10 RT 2042.) Appellant arrived at Arteaga's house in a white Thunderbird that belonged to a friend of appellant. (10 RT 2043-2044, 2066.)

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[5] Throughout trial, the house on Doolittle Drive was referred to as "Heredia's mother's house", but his mother's name does not appear in the trial transcripts. For the sake of convenience, her home, at trial referred to as both a house and an apartment, is referred to as "the Heredia house."

[6] Prior to trial, Heredia met with the District Attorney who told him that he would not be prosecuted for his gun use if he testified against appellant and told the "whole truth." (10 RT 1970.)

Appellant had been drinking all day, was already drunk, and was drinking from a Hennessy bottle, which was about half full. (10 RT 2044, 2075-2076, 2078-2079.) Arteaga had known appellant since childhood, had been with him numerous times when appellant was drunk, and was familiar with how appellant manifested intoxication. (10 RT 2076.) Appellant was "wasted" and "gone"– was more than tipsy, far more than having a "buzz on." (10 RT 2077.) Arteaga could not recall if appellant was slurring his words. (10 RT 2078.)

Appellant told Arteaga that Heredia's brother had been involved in a fight. Appellant and Arteaga set out to meet up with Heredia. (10 RT 2043.) Appellant started to drive, but his driving was very erratic, fast, and out of control. (10 RT 2044.) Appellant was making wide turns too fast for city streets and almost crashed. (10 RT 2044, 2076-2077.) Arteaga, who had not been drinking at all that night, told appellant to pull over so he could drive. (10 RT 2044, 2057, 2078.)

Arteaga followed appellant's directions to the Heredia house. (10 RT 2043-2045.) En route, appellant talked on the phone with Heredia about the gun, which had jammed. (10 RT 2049.) Appellant told Arteaga that "his brother got jumped" and that appellant wanted to find the people who jumped "his brother" and shoot them. (10 RT 2074.) Arteaga saw a shotgun in the back seat of the car; although he told police that he saw appellant loading a shotgun, he could not recall seeing appellant doing so. (10 RT 2045, 2048.) Arteaga also saw a dark handgun similar to Prosecution's Exhibit No. 33 in the car. (10 RT 2048.)

When appellant and Arteaga arrived at the Heredia house, they met Heredia outside. (10 RT 1972.) Heredia took them into the house to show them the gun. (10 RT 2050-2051.) Once inside, appellant "took the gun

apart" and "did something with it." (10 RT 1973, 2051.) Appellant said the gun had jammed because "'the bullets are messed up or something'" and put the gun in his pocket. (10 RT 1973, 2011, 2052.) The gun handled by appellant looked similar to Prosecution's Exhibit No. 32. (10 RT 2051.)

While Gonzales and Rangel waited outside on the street, Heredia emerged from the house with appellant and Arteaga. (9 RT 1908; 10 RT 1973, 2052-2053.) Outside, Heredia and appellant talked about going after the people who had jumped Danny. (10 RT 2054.)[7] The men talked about what happened to Danny, but there was no specific talk about retaliation. (9 RT 1948.)

a. Appellant's intoxication

In front of the Heredia house, appellant was drinking from a bottle of Hennessy (9 RT 1954; 10 RT 1976-1978, 2056; 9 RT 1909-1910), which was passed among the five men (9 RT 1939). Heredia, who had consumed four or five beers that day (10 RT 1976), also drank from the Hennessy bottle (10 RT 2079), which was "pretty empty" at that point (9 RT 1922).

Arteaga, Gonzales and Rangel all described appellant as obviously intoxicated. Although Gonzales did not see appellant fall down, vomit, or stagger (9 RT 1928), it was "pretty obvious" that appellant was drunk (9 RT 1927). Gonzales described appellant as slurring his words and blabbering. (9 RT 1923-1924, 1929.) Rangel could understand appellant (9 RT 1948), but there was no question that appellant was intoxicated, stumbling, unsteady on his feet, slurring and repeating his words, and mumbling (9 RT 1948, 1950-1951). Appellant was the only person that night who was

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[7] Heredia, however, could not remember what the men were talking about at that time. (10 RT 1973-1974.)

noticeably drunk (9 RT 1950).

In contrast to the testimony and police statements of Arteaga, Gonzales and Rangel, Heredia insisted at trial that appellant was not intoxicated and that he could not recall making statements to police describing appellant as intoxicated. (10 RT 2004.) Heredia testified that appellant was not really acting like he had been drinking. (10 RT 1978.) He did not notice anything about appellant's speech and could understand appellant. (10 RT 1978.)

After the shooting, Heredia spoke twice with the police, the first time the night of the shooting, and the second time a couple of days later. (10 RT 1978, 2006.) Heredia did not remember if the police asked him about appellant's intoxication. (10 RT 1978-1980.) Heredia could not recall his statement to the police that ". . . if I was – I was, like, drunk like this, I would still know what's going on." (10 RT 1980.)

On cross-examination, when confronted with a transcript of his statements to the police, Heredia denied any recollection of telling police that he called appellant because it was appellant's birthday and he wanted to drink with appellant. (10 RT 2000-2001.) Heredia could not recall telling police that appellant was "swerving all over the place" or that appellant was "unsteady on his feet" on the night of the shooting. (10 RT 2003.) Heredia also did not recall telling police that he did not remember ever seeing appellant as drunk as that night. (10 RT 2003-2004.) Heredia admitted on cross-examination that he and appellant were drinking Hennessy that night. (10 RT 2000.)

b. Officer Niemi's return to Doolittle Drive

While the group of five men was standing outside of the Heredia house on Doolittle Drive and passing the Hennessy bottle, the San Leandro

Police Department received another call at 10:50 p.m. complaining about a group of juveniles loitering and blocking a driveway on Doolittle Drive. (9 RT 1858.) Officer Niemi again responded to the scene, arriving at 10:57 p.m. (9 RT 1858.) Heredia estimated "maybe fifteen minutes at the most" passed between appellant inspecting the gun inside the house and Niemi arriving at the scene. (10 RT 2011-2012.)

Officer Niemi pulled up in a patrol car. (9 RT 1910; 10 RT 1974, 2055.) Through the open passenger window of the patrol car, Niemi asked the men if they were the same group that he had kicked out earlier. (9 RT 1910-1911.) Heredia responded that they were not the same people. (9 RT 1911.) Niemi said, "'you're not understanding me,'" got out of his patrol car, and walked over to the group. (9 RT 1911.) One of the men was holding appellant's bottle of Hennessy. (10 RT 2056.) Niemi asked if the group had been drinking. (9 RT 1911-1912; 10 RT 1975, 2057.) When appellant and Heredia responded that they had, Niemi asked them for their identification. (9 RT 1912, 1951; 10 RT 1975, 1981, 2057.)

Heredia gave his identification card first, next appellant gave his, and then Rangel gave his. (9 RT 1912; 10 RT 1981; 9 RT 1941-1942.) When asked for his identification, appellant said, "'yes, I have it.'" (9 RT 1927-1929.) It took about a minute for appellant to retrieve his identification card, and he fumbled with his wallet before he was able to give it to Officer Niemi. (9 RT 1912, 1924, 1952-1953; 10 RT 2010.)

According to Rangel, appellant and Officer Niemi were silent during this time. (9 RT 1953.) Gonzales, however, testified that Niemi seemed to recognize that appellant was drunk and remarked that appellant appeared to be having a hard time. (9 RT 1912, 1924.) Arteaga recalled Niemi saying something about appellant slurring his words and seeming drunk. (10 RT

2080.) When confronted with his statements to police, Arteaga did not recall telling the police that Niemi was being "'a little bit of a jerk'" to appellant. (10 RT 2082.) He also did not recall telling the police that Niemi was "'messing with'" appellant or that Niemi accused appellant of drinking half of the bottle. (10 RT 2082.)[8]

Officer Niemi spoke into his shoulder microphone, seemingly calling in the identification cards. (10 RT 2057-2058.) At 11:00 p.m., Niemi requested a "Code 8" – a non-urgent request for another unit to assist him. (9 RT 1859.)

c. The sudden shooting

Approximately two minutes after receiving the Code 8 call, the San Leandro Police Department received a call regarding an "officer down." (10 RT 2117.) According to all of the witnesses, the shooting happened suddenly and without warning. (9 RT 1926, 1951-1952, 1954; 10 RT 2014, 2085.) When Officer Niemi turned to collect Rangel's identification card, appellant suddenly pulled out a handgun and, without hesitation, shot Niemi in the head. (9 RT 1913, 1915.) Arteaga had no idea anyone was going to shoot. He did not see appellant draw a gun. There was no argument. The shooting was "just out of the blue." (10 RT 2086.)

Upon hearing the gunshot and seeing a flash, everyone immediately ran from the scene. (9 RT 1942; 10 RT 1981, 1983, 2058, 2060.) Heredia "freaked out" and ran to his car. (10 RT 1983.) Arteaga started running back and forth because he did not know what to do. (10 RT 2061.) Arteaga saw appellant standing over Officer Niemi as Niemi was kicking at appellant.

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[8] Arteaga testified that although these statements by him were in the transcript of his statements to police, he did not remember making them. (10 RT 2083.)

(10 RT 2061-2062, 2091.) Arteaga did not see appellant pick up or hold anything near Niemi. (10 RT 2091.) Arteaga ran and heard more shots. (10 RT 2062.) Arteaga heard appellant screaming "'Louie'" so he ran back to Heredia's car, and he and appellant jumped in. (10 RT 2062-2063.)

Rangel took off running to Gonzales's car. (9 RT 1945.) Gonzales also ran to his car. (9 RT 1916-1917.) Both Rangel and Gonzales heard four or five more gunshots as they ran to Gonzales's car. (9 RT 1916-1917, 1945.) Although they initially sped away, Gonzales made a u-turn and returned to the scene, where Rangel got out of the car and ran to Officer Niemi. (9 RT 1917-1918, 1945-1946.) Rangel, panicked and hysterical, picked up the Hennessy bottle and an identification card on the ground next to Niemi. He threw both aside. (9 RT 1946-1947.) Police officers arrived immediately thereafter. (9 RT 1918.)

2. Events Following the Shooting: Appellant's Actions and Admissions

As Heredia's car was moving, Arteaga got into the front seat, and then appellant climbed into the front seat, but moved to the back seat. (10 RT 1984-1985, 2089-2090.) Arteaga, appellant and Heredia were in a panic. (10 RT 2086.) Arteaga and Heredia repeatedly asked appellant why he had shot Officer Niemi. (10 RT 1986, 2065.) Arteaga testified that appellant answered, "I was done" more than once. (10 RT 2065.) When asked on cross-examination if he told police that appellant said, "I'm gonna get caught," Arteaga could not recall his statement to police. (10 RT 2087.) After having his recollection refreshed, Arteaga testified that he told the police that appellant said, "I'm gonna get caught," which to him means the same thing as "I was done." (10 RT 2088-2089.) Arteaga explained that "being done" was slang for being caught. (10 RT 2088.)

According to Heredia, appellant responded, "I was gone. I was gone. I was gonna go." (10 RT 1986.) Heredia testified that the expression referred to going to jail. (10 RT 1988.) When asked on cross-examination if he told police that appellant kept saying "I don't know" in response to questions from Heredia and Arteaga about why appellant shot Niemi, Heredia testified that he did not recall what he told police about what appellant said after the shooting. (10 RT 2008.)

Appellant told Heredia to drive toward the Dumbarton Bridge. (10 RT 1988.) Heredia exited the freeway just before the bridge and stopped the car at a marsh for about a minute. (10 RT 1989, 2064, 2094.) Appellant got out, threw something, and then returned to the car wearing only his boxers. (10 RT 1990, 2064, 2067.) Appellant had not sobered up by that time. (10 RT 2095.) Heredia drove appellant to appellant's house in Newark and then dropped off Arteaga, who walked home. (10 RT 1991, 2067-2068.)

Ashley Ewert was waiting for appellant when he arrived home that night. Nineteen at the time of the crime, Ewert had been seeing appellant for about a week prior to July 25, 2005. (12 RT 2333-2334.) On that day, appellant's birthday, Ewert and appellant had made plans to go out. (12 RT 2335-2336.) Unable to reach appellant by phone, Ewert went to his house and waited for him. (12 RT 2335, 2337-2338.) Ewert had talked with appellant on the phone around 5:15 p.m., and she could tell that appellant had already been drinking. (12 RT 2336, 2397.)[9]

Around 11:00 p.m., appellant came home wearing only boxers. (12

[9] Ewert denied that appellant sent her a text asking if she liked him drunk, stating that the transcript of her statement was inaccurate. (12 RT 2385.)

RT 2339.) He was frantic and flustered, grabbing random things, telling her that they had to get everything out and go. (12 RT 2340.) He "smell[ed] drunk," was "definitely drunk," was "stumbling" when trying to take off his boxers, and said he had drunk half a bottle of Hennessy and a half bottle of "Remy something." (12 RT 2374-2377, 2380-2381.) When Ewert first saw appellant, she asked him, "'What are you on?'" (12 RT 2379.) Nevertheless, Ewert characterized appellant as "coherent." He did not slur his words, vomit or fall down. (12 RT 2375-2376.) Appellant grabbed a can of Comet and took a shower. (12 RT 2340.) They left in Ewert's car, but did not discuss where they were going. (12 RT 2341.)

In the car, appellant wiped his hands and arms with alcohol swabs. He kept repeating that they had to go, stating, "'they're after me.'" (12 RT 2341.) Ewert asked appellant who was after him, but he responded that she did not want to know. (12 RT 2341.) At Ewert's insistence, appellant finally told her, "'I just shot a cop. I just killed a cop.'" (12 RT 2341-2342.) Appellant told her he was with Heredia, Arteaga and two other people. He asked her to take him to Arteaga's house and gave her directions. (12 RT 2342.) Although appellant was irrational and frantic, he was speaking clearly, telling Ewert how to get to different places, but was not speaking in complete sentences. (12 RT 2380-2381, 2388-2389, 2390.)

At Arteaga's house, appellant, without staggering, got out of the car and knocked on the garage. (12 RT 2343, 2376.) Arteaga came outside. (12 RT 2343.) Arteaga and appellant had a discussion about keeping their stories straight (10 RT 2069), and Arteaga gave appellant about twenty dollars (12 RT 2344; 10 RT 2068-2069).

Appellant got back in the car. (12 RT 2344.) According to Ewert, appellant described what happened in more detail:

> He told me that he was with Louie and Vicente, in front of Vicente's house, and that a police officer pulled up and asked for their I.D.s, and he gave him his I.D., and the police officer went to reach for his radio, and that he shot him once in the face, and then four more times, and then that he rolled over the police officer to try to find his I.D., and he grabbed what he thought was his I.D., and held the gun up to Vicente and told Vicente to drive. And they got into Vicente's Jeep and left.

(12 RT 2345.)[10] Appellant also said "that he had a search and seizure, and that if the police officer called in his name, he would be arrested, because he had two guns and drugs on him." (12 RT 2345.)

Seven months prior, a police officer had arrested appellant in Pleasanton. Appellant had been driving with a suspended license, possessed suspected methamphetamine, suspected cocaine, and a "meth smoking pipe." (9 RT 1843-1844.) During the arrest, appellant admitted that he had a suspended license, had "meth" in his front pocket, and was on probation for possession of drug paraphernalia with a "four-way" search clause. (9 RT 1838-1843, 1846-1847.) Appellant was cooperative and did not appear to be intoxicated or under the influence of anything during the arrest, and the officer arrested appellant without incident or resistance. (9 RT 1844, 1846-1847.)

Ewert testified on cross-examination that appellant was not in his right mind. (12 RT 2382.) She could not piece the whole story together – appellant told the story in "fragments" and did not make a lot of sense. (12 RT 2381-2382, 2392.) Appellant used incomplete sentences and seemed to have trouble staying awake. (12 RT 2381.) When appellant first told her

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[10] In fact, appellant's identification card was found at the scene of the shooting. (11 RT 2139.)

the story, it sounded like "they were in the car and shot at someone" or "it was all of them together." (12 RT 2392-2393.)

After leaving Arteaga's house, appellant and Ewert drove to a Safeway where at approximately 12:11 a.m. appellant stole an inhaler. (12 RT 2345-2346; P.Exh. No. 73.)[11] Appellant then stated that they had to go back to his house to retrieve a gun and bullets that were the same type of bullets used in the gun that killed Officer Niemi. (12 RT 2349.) They went to appellant's house where he obtained a cell phone box containing a gun and a ziplock bag full of bullets and washers. (12 RT 2349-2350.) At appellant's direction, Ewert drove over the Dumbarton Bridge and slowed down in the right lane, and appellant threw the bag and box out the window over the side of the bridge. (12 RT 2351.)

Appellant and Ewert headed back toward Newark. (12 RT 2352.) Appellant said that he needed to call someone "to take Louie and Vicente out." (12 RT 2352.) Appellant also pointed out the marsh area to Ewert where he had earlier thrown the gun, clothes and cell phone. (12 RT 2352.) Appellant told Ewert that saltwater "would get rid of the forensics." (12 RT 2352.) Appellant and Ewert next stopped at a Chevron station to get change for the phone and drove to a payphone next to a Taco Bell. (12 RT 2353.) Appellant did not complete a call. (12 RT 2353.) Appellant was so drunk that Ewert could not imagine how he could remember a telephone number. (12 RT 2384.)

Appellant and Ewert eventually checked into a Motel 8 in Newark. (12 RT 2354.) Appellant washed his hands and face again. (12 RT 2355.) Appellant was talking to himself, going over the things he had to get rid of,

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[11] Appellant suffered from asthma. (13 RT 2707.)

and asking for Ewert's advice. (12 RT 2356.) He wanted Ewert to drive him back to his car near the scene of the shooting. (12 RT 2356.) Appellant remembered that there was a bullet in his room that would match the bullet used in the shooting. (12 RT 2356.) They did not really carry on a conversation. Appellant was upset. Ewert could not remember if he was crying or not. (12 RT 2383, 2398-2399.)[12]

Appellant and Ewert slept and woke the next morning to television news about the shooting. (12 RT 2357.) Appellant's picture was displayed. (12 RT 2357.) Seeing the news, Ewert started "freaking out," but appellant asked her to stay with him and take him to his uncle's house. (12 RT 2358.) They left the motel, drove to a residence in Daly City, and then drove to two other residences. (12 RT 2360, 2362-2363.) At one point, appellant told Ewert he was going to Arizona or Tijuana to get plastic surgery and asked her to go with him. (12 RT 2364.)

After leaving appellant in Daly City, Ewert appeared in court in Pleasanton on a petty theft charge and was placed on probation for six months. (12 RT 2367.) She later spoke with several people including her father who picked her up and took her to an attorney's office. (12 RT 2366-2368.) Ewert acknowledged that the attorney informed her that she could be prosecuted as an accessory to the crime, but testified that no one promised that she would not be prosecuted. (12 RT 2378.)

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[12] On cross-examination, Ewert confirmed that at the preliminary hearing she had testified that when they arrived at the motel, appellant laid down on the bed, while she went to the bathroom; when she came back, appellant was almost asleep. (12 RT 2383.)

3. Physical Evidence and Appellant's Arrest

According to pathologist Thomas Rogers, M.D., Officer Niemi died of multiple gunshot wounds. (9 RT 1867.) One was an entry wound to the right side of the head, close to the lower jar. (9 RT 1869, 1895.) That head wound had a small amount of powder burn known as stippling (9 RT 1869), which indicated the gun was fired at close range (9 RT 1870). The wound was "through-and-through," and no bullet was recovered. (9 RT 1871.) There also were five bullet entry wounds to the chest, torso, and right thigh. (9 RT 1871, 1873-1876.) Rogers could not deduce the relative positions of the shooter and Niemi from the location of the wounds, but concluded that the front side of Niemi's torso had to have been exposed in some way. (9 RT 1895-1896.) He also found stippling on various places on Niemi's right hand and forearm. (9 RT 1894.)

A search of the crime scene by the San Leandro Police Department Evidence Response Team yielded appellant's identification card (11 RT 2139), seven bullet casings (11 RT 2152), a full bullet magazine found inches from Niemi's body (11 RT 2146, 2159-2162), and a Hennessy bottle (11 RT 2145, 2163-2164).

A search of appellant's home the morning after the murder recovered a bullet from a wall in a portion of the residence. (11 RT 2129-2131.) Appellant's former girlfriend, Kelly Moran, testified that about two months prior to July 25, 2005, she was with appellant at his house. (12 RT 2320-2321.) Moran testified that she did not remember what happened, but that while she was standing in appellant's room, near his bed, and appellant stood near the door, she heard a gunshot. (12 RT 2322.) Only she and appellant were in the room. (12 RT 2329-2330.) She ran out the door. She did not see appellant with a gun that day nor prior to that day. (12 RT 2322-

2323, 2329-2330.)

Police found evidence in three separate searches of the marsh area. In the first search, they found two keys and a remote control on the side of the road. (10 RT 2022.) In a second search, police retrieved a t-shirt, a silver semi-automatic handgun (P.Exh. No. 33), identification cards for Vicente Heredia and Miguel Rangel, some paperwork, blue jeans, and one tennis shoe. (10 RT 2028-2029, 2031, 2035.) Items taken from the pocket of the blue jeans included an inhaler and a knife. (10 RT 2030.) The magazine for a 10 millimeter handgun was empty; the gun was also empty. (10 RT 2036-2037.) In the third search, police found another handgun, Prosecution's Exhibit No. 32. (11 RT 2152-2155.)

Police learned that a friend had loaned appellant a white Thunderbird. (11 RT 2165-2166.) The car was still parked near the scene of the shooting (11 RT 2166), and the keys found at the marsh matched it (11 RT 2247-2248). A search of the car yielded a box of shotgun shells, a shotgun on the floorboard of the backseat (11 RT 2166-2167), a stun gun (11 RT 2168, 2174), a bottle of cologne (11 RT 2230), a folding knife with a three and one-half-inch blade, a hair brush, and a box holding a liquor bottle (11 RT 2237).

Appellant's prints matched the latent prints lifted from the cologne bottle and the shotgun shell recovered from the Thunderbird. (11 RT 2289, 2290, 2295, 2300-2301.) Further, the police concluded that seven casings found at the scene of the shooting, a bullet recovered from Officer Niemi's back, and the bullet slug recovered from a wall in appellant's home were fired from the 10 millimeter semiautomatic Colt pistol recovered from the marsh, Prosecution's Exhibit No. 33. (11 RT 2176, 2180-2181, 2195-2198, 2206-2207, 2212.)

On July 26, 2005, the Daly City Police SWAT team arrested appellant without incident. (12 RT 2401-2404.)

B. The Defense Case

1. Appellant Drank Heavily the Day of the Shooting

July 25 was appellant's 23rd birthday. (12 RT 2485, 14 RT 2909.) Angel Miranda, a friend of appellant, was living with his sister Alina and her husband Frank Vallejo in July of 2005. (12 RT 2472-2473.)[13] Miranda knew it was appellant's birthday and invited appellant over to his house. (12 RT 2474.) Appellant arrived around 2:30 p.m. or 3:00 p.m. (12 RT 2474.) Alina, a non-drinker, made a cake and threw a birthday barbecue for appellant (12 RT 2479, 2485), which appellant, Miranda, Alina, and Frank attended (12 RT 2469).[14]

When appellant arrived at the Vallejos' house, he had already been drinking. (12 RT 2475, 2485.) Appellant was upset because his mother had not acknowledged his birthday, so he had started drinking early in the day. (12 RT 2486.) Appellant was "kind of slurring . . . kind of not balanced . . . walking kind of funny, a little bit." (12 RT 2475.) When appellant arrived, he and Miranda immediately began drinking beer. (12 RT 2474.)

From the time of appellant's arrival, around 2:00 p.m. or 3:00 p.m., appellant and Miranda consumed about a case of beer, or 24 cans or bottles. (12 RT 2460, 2476.) At 4:15 p.m., Frank arrived home and joined them in drinking the case of beer. (12 RT 2460-2461, 2476.) Frank estimated that

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[13] Miranda testified that he had a felony conviction for assault with a deadly weapon. (12 RT 2481.)

[14] Because Alina and Frank Vallejo share the same last name, they will be referred to hereafter by their first names to avoid confusion.

appellant drank approximately six beers between 4:15 p.m. and the time appellant left the house. (12 RT 2460.) Appellant ate some rice around 6:30 p.m. or 7:00 p.m., but nothing else. (12 RT 2465-2466, 2489-2490.)

Around 7:00 p.m. or 8:00 p.m., Miranda and appellant left the house to get more beer. (12 RT 2475.) Miranda was drunk and drove. (12 RT 2481.) Miranda and appellant stopped at the Sun Pub in Hayward, drank "a couple of beers, played some pool, smoked a couple of joints." (12 RT 2476-2477.) Next to the bar was a liquor store where they bought either a 12- or an 18-pack of beer. (12 RT 2463, 2477.)

Back at the house, Miranda, Frank and appellant drank the pack of beer. (12 RT 2477.) Appellant and Miranda also returned with one bottle of Remy Martin and one bottle of Hennessy. (12 RT 2461.) Frank and appellant drank shots. (12 RT 2461.) Appellant had a minimum of two shots of Remy Martin and at least two shots of Hennessy. (12 RT 2462.) They would drink a shot, then "chug" beer. (12 RT 2462, 2478.) According to Frank, appellant constantly had a beer in his hand that night. (12 RT 2468.) In fact, every day, not just that day, that Frank saw him, appellant was drinking. (12 RT 2460.) Miranda testified that he never saw appellant vomit and could not remember if appellant fell down that night. (12 RT 2483.)

At some point in the evening, appellant received a phone call and said he had to leave. (12 RT 2463, 2479.) Appellant left the Vallejos' house around 9:00 p.m. or 9:15 p.m. (12 RT 2490.) Appellant took a bottle of hard liquor with him when he left the house. (12 RT 2468, 2478.) After drinking with appellant, Frank was drunk when he went to bed around 10:00 p.m. (12 RT 2469.)

Frank had not paid attention to whether appellant was drunk until

appellant indicated he was going to drive. (12 RT 2470.) Miranda told appellant that he should not drive because he was drunk. (12 RT 2479.) Frank, Alina and Miranda were concerned about appellant driving because appellant was drunk, slurring, stumbling, and his equilibrium was off. (12 RT 2463-2464, 2479, 2486-2488.) Appellant was loud, and it was hard to understand him. (12 RT 2487.) Alina had no doubt that appellant was too drunk to drive. (12 RT 2487-2488.)

2. Prosecution Witnesses' Inconsistent Prior Police Statements

District Attorney Inspector Mark Moreno testified for the defense that he was involved in two police interviews of Heredia. (12 RT 2451.) The first interview was on the night of the crime. (12 RT 2452.) In that interview, Heredia stated that he drove directly home after the shooting, and also told police that he had never handled a gun in his life. (12 RT 2452.) The second interview was on July 27, 2005, and was recorded. (12 RT 2452-2453.) In the second interview, Heredia again failed to mention that he had used a gun on the day of the shooting. (12 RT 2453.)

Moreno contradicted Heredia's testimony at trial. During the second interview, Heredia told police that when appellant arrived at the Heredia house that night, appellant said it was his birthday and that he wanted to "'get fucked up'" and "'let's get drunk.'" (12 RT 2454.) Heredia told police that when Officer Niemi pulled up, appellant had a bottle in his hand. (12 RT 2455.) Heredia also told police that appellant was "swerving all over the place, acting all drunk," and that he had never seen appellant that drunk. (12 RT 2455.) Heredia told police that appellant was the last person to give his identification card to Niemi. (12 RT 2455.) Heredia told police that Niemi said to appellant, "'oh, you're the drunk one.'" (12 RT 2456.)

Moreno testified that in the second interview Heredia described the conversation in the car after the shooting. (12 RT 2456.) Heredia told police that when he and Arteaga asked appellant why he had shot Officer Niemi, appellant said, "'I don't know. I don't know.'" (12 RT 2456.) At another point in the interview, Heredia stated that he asked appellant again, "'man, why did you shoot him?'" and appellant again replied, "'I don't know, I don't know, I don't know.'" (12 RT 2457.) Moreno testified that at yet a third point in the interview, Heredia told police that appellant was saying "'I don't know, I don't know. Just take me to my mom's, take me to my mom's, take me to my mom's.'" (12 RT 2457.) Moreno did not recall Heredia ever reporting to police that appellant said anything about being "gone" or "going." (12 RT 2457.) As reported by Heredia in the two police interviews, appellant's only response was, "I don't know" when asked why he shot Niemi. (12 RT 2457-2458.) After meeting with the District Attorney before trial, and receiving a promise that he would not be prosecuted for his gun use the day of the shooting if he testified against appellant (10 RT 1970), Heredia testified at trial that appellant made comments about being "gone" or "going." (10 RT 1986.)

The lead investigator for the San Leandro Police Department, Jeff Jouanicot, testified for the defense that he interviewed Ashley Ewert on July 27, 2005, with her attorney present. (12 RT 2446.) Contradicting Ewert's trial testimony, Jouanicot testified that when he asked Ewert about the first time she saw appellant on the night of July 25, Ewert responded:

> my thought was what are you [appellant] on? What are you on right now? Are you drunk? Are you, like, spun? He didn't answer me, but I knew for sure he was drunk. I could smell it so strongly. He was definitely very drunk. He was stumbling when we were in the room, so he was definitely drunk.

(12 RT 2447.)

Jouanicot also interviewed Arteaga after the shooting. (12 RT 2448.) Contradicting Arteaga's testimony at trial, Jouanicot testified that Arteaga told him that Officer Niemi seemed to focus his attention on appellant. Arteaga thought Niemi was "picking on" appellant. (12 RT 2448.) According to Jouanicot, Arteaga told him that Niemi said to appellant, "'you're drunk. You're slurring. You're slurring. You're the drunkest of them.'" (12 RT 2449.)

3. Expert Testimony about the Effects of Intoxication

John Treuting, Ph.D., testified as an expert in the field of forensic toxicology. (12 RT 2516-2521.) Treuting reviewed copies of trial transcripts of testimony from Arteaga, Gonzales, Rangel, Heredia, Frank Vallejo, Alina Vallejo, Miranda, and Ewert, as well as Heredia's and Ewert's statements to the police. (12 RT 2522.) Treuting also interviewed appellant. (12 RT 2522.) Finally, Treuting reviewed the toxicology report from the blood sample taken from appellant shortly after his arrest, approximately 16 hours after the shooting. (12 RT 2401-2404, 2522.) Treuting did not perform the analysis on the blood sample taken from appellant, so he could not assign a particular number to appellant's level of intoxication in relation to the legal limit of 0.08 percent. (12 RT 2524-2525.) Based on his review of all of this information, Treuting concluded that appellant was intoxicated at the time of the shooting. (12 RT 2524.)

According to Treuting, alcohol is a depressant whose primary action is on the brain and affects a person's mental status before it affects his physical status. (12 RT 2552.) As alcohol consumption increases, there is a

profound effect on coordination and senses. At three to four drinks, there is diminution of judgment and self control. (12 RT 2526.) With seven or eight drinks, alcohol can have a significant affect on memory, but there is individual variability. (12 RT 2532-2533.)

Treuting explained that alcohol does not have an instantaneous effect. Studies indicate that one drink on an empty stomach would take 20 or 30 minutes to absorb. (12 RT 2537.) Food delays absorption of alcohol, but does not eliminate it. (12 RT 2530.) Alcohol typically dissipates at a rate of 0.015 to 0.02 percent per hour, which is the equivalent of one drink per hour. (12 RT 2536.) If someone was drinking and then stopped, the blood alcohol level could be higher later than when he was drinking. (12 RT 2536-2537.) Treuting explained that the effects of the third or fourth drink remain and do not go away by the ninth drink. "All of these things are being acted on the brain because the alcohol is ubiquitous and goes to all parts of the brain." (12 RT 2549.) There is, however, a dramatic difference between a person drinking seven to eight drinks in an eight-hour time frame and drinking seven to eight drinks in an hour. The latter would have a more significant effect on the brain processes. (12 RT 2553-2554.) The more one drinks, the more profound the impact on the brain. (12 RT 2549.)

Treuting considered Arteaga's testimony that appellant drove, albeit "very erratic" (10 RT 2044), for a few miles, but it did not alter his opinion that appellant was intoxicated. Some people with up to a 0.4 percent alcohol intoxication level are physically capable of operating a car. (12 RT 2533-2534, 2547.) Some people can function normally, with no obvious outward signs, at 0.10 or 0.15 percent. (12 RT 2536.) Hand-eye coordination and mental faculties are two separate considerations; a person

can have some hand-eye coordination, but still be mentally confused and have difficulty processing information. (12 RT 2546.)

According to Treuting, the degree of intoxication would not necessarily affect someone's ability to repair a mechanical device. (12 RT 2550.) Treuting could not say what kind of hand-eye coordination would be required to shoot a large caliber handgun or semi-automatic weapon. (12 RT 2539.) Treuting agreed that if a person shot an officer six times and all the shots struck the officer, one interpretation could be that there was a degree of coordination. (12 RT 2539.) Another interpretation could be that it was an impulsive response. (12 RT 2539-2540.) He could not say whether shooting a person on the ground indicates an impulsive or coordinated action. (12 RT 2540.)

Treuting acknowledged that a person attempting to retrieve identification after the shooting to avoid detection indicates a "reasoning process." (12 RT 2540.) The fact that a person retrieving identification accidentally failed to retrieve his own identification could be an aspect of "mental confusion." (12 RT 2546.)

Treuting explained that there are studies about a "fight or flight syndrome" where norepinephrine, a neurotransmitter, is released and acts as a stimulant. (12 RT 2531.) The fight-or-flight response, or adrenaline rush, could be in response to a pending event or actual event. (12 RT 2548.) The adrenaline rush happens "very, very fast," and can decrease quickly too. (12 RT 2551.) This response could counteract the depressant effect of alcohol. (12 RT 2531.)

Responding to the prosecutor's questions on cross-examination, Treuting testified that if an intoxicated person were in a situation where he believed that he would be going to jail, did not want to go to jail, and

needed to make a decision (presumably about what to do), that could trigger a fight-or-flight response. (12 RT 2540-2541.) Treuting emphasized that the reaction depends on the individual person and the amount and timing of the drinking. (12 RT 2540-2541.) Although possible, Treuting did not think an adrenaline rush would cause fragmented speech. (12 RT 2548.) There are no scientific studies, however, that specifically address how adrenaline rush affects intoxicated people. (12 RT 2551.)

Based on his understanding of the amount of alcohol appellant consumed, Treuting testified that appellant would have experienced a lack of critical judgment, and that his cognitive functions would have been diminished. (12 RT 2528-2529.) Appellant's symptoms showed he was confused and his ability to process information was diminished in some respects. (12 RT 2528-2529.) There would also have been an affect on appellant's emotional response because an intoxicated state heightens the emotional state. (12 RT 2528.) Again, there is individual variability. (12 RT 2528.) For some individuals there is heightened fear, but other individuals may experience other manifestations, such as rage. (12 RT 2528-2529.) Impulsivity can occur. (12 RT 2529.) Treuting testified that based on the amount of alcohol appellant had drunk, he would expect these symptoms. (12 RT 2529.)

Treuting did not place any significance on the fact that appellant did not vomit. (12 RT 2529.) Treuting described appellant as a chronic drinker; there was evidence that appellant had been drinking since high school. (12 RT 2529.) A certain amount of tolerance develops. (12 RT 2529.) Chronic drinkers might show less outward effects from drinking than others. (12 RT 2533.) Treuting opined that because appellant was a chronic drinker, appellant would be less likely to become sick. (12 RT 2530.)

Treuting considered appellant's statement about his drinking in combination with the accounts of others for purposes of verification. (12 RT 2541.) He did not think appellant exaggerated his drinking. (12 RT 2542.) He did not rely solely on appellant's statements. (12 RT 2542.) Treuting testified that other information available to him, including the drug testing results, convinced him that appellant was being truthful in his interview regarding his intoxication. (12 RT 2544.)

Using a prosecution hypothetical, Treuting testified that eight drinks in eight hours would mean that at the end of the eight hours the person would have the effect of only one to two drinks. (12 RT 2555.) Treuting clarified, however, that the prosecution's hypothetical did not correspond to information he had reviewed about appellant. (12 RT 2555-2556.) In Treuting's opinion, at the time of the incident, appellant was intoxicated. (12 RT 2555.)

II. PENALTY PHASE

A. The Prosecution's Case In Aggravation

Apart from the crime itself and its impact on Officer Niemi's colleagues and family, the prosecution's only other aggravating evidence was an allegation of an uncharged criminal threat under section 190.3, factor (b). Newark Police Officer, Karl Geser, testified that he arrested appellant on April 3, 2001, for public drunkenness. (13 RT 2705-2707.) Appellant volunteered to Geser that he was drunk. (13 RT 2707.) Appellant was staggering so much that Geser had to keep him from falling. (13 RT 2707-2708.) Geser put appellant in the patrol car. (13 RT 2708.) While appellant was in the car, appellant became angry and kicked the passenger glass window out of its track, damaging the window, but not breaking the glass. (13 RT 2708, 2715.) On the way to the police station,

appellant became upset again and made threats to kill Geser and his family. (13 RT 2709.) Geser booked appellant for public intoxication and vandalism. (13 RT 2710.) Geser did not charge appellant for the threats. (13 RT 2714.) Appellant's threats did not cause Geser to fear for his own safety or that of his immediate family (13 RT 2714); Geser previously had been threatened after arresting people (13 RT 2711).

The prosecution also introduced evidence of the impact of the shooting on Officer Niemi's colleagues and family. Colleagues of Niemi described Niemi as having a comforting demeanor (13 RT 2719), he showed respect toward people who committed crimes (13 RT 2719), and was a wonderful person. (13 RT 2723.) Curt Barr, a fellow San Leandro Police Department Officer, testified that he stood and prayed over Niemi's body at the hospital. (13 RT 2717, 2722.) Former San Leandro Police Department Officer, Mario Marez, was so affected by Niemi's death that he resigned from the San Leandro Police Department. (13 RT 2724, 2728.) For Deborah Trujillo, another fellow San Leandro Police Department Officer, Niemi was a good friend who treated her fairly as a female officer. She testified about informing Niemi's family of his death. (13 RT 2739-2742.)[15]

Officer Niemi's family also testified at the penalty phase. Niemi's younger brother Jim Niemi recalled his early recollections of Niemi. (13 RT 2743.) Niemi played baseball, guitar, built models and loved to read. (13 RT 2743-2744.) Niemi was "cerebral" and less "on-the-go" than Jim. (13 RT 2744.) Their family was very close. (13 RT 2744.) Jim and his

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[15] This penalty phase evidence is set forward in more detail in Argument V.

wife knew Niemi would be a great father so they asked Niemi to be the godparent of their son and to raise their son if anything happened to them. (13 RT 2745-2746.) Jim screamed when he learned about Niemi's death. (13 RT 2747.) Jim felt his parents' pain as well as his own pain knowing that he would deal with the death of his parents alone and would not be able to grow old with his brother. (13 RT 2748-2749.)

Officer Niemi's mother testified about Niemi's life. (13 RT 2751-2755.) He was her first child. (13 RT 2752.) She and her husband were living in Guam when Niemi was born and returned to the United States when Niemi was four years old. (13 RT 2752-2753.) He was a good boy, quiet and liked to read. (13 RT 2754.) Niemi first expressed interest in becoming a police officer at 19 years old. (13 RT 2754-2755.) Niemi obtained a degree from California State University Sacramento in Communications. (13 RT 2754.) After graduating, Niemi's first job was in sales. He then became involved in computers in Silicon Valley. (13 RT 2755.) After the company he worked for fell apart, Niemi pursued his dream of becoming a police officer. (13 RT 2755-2756.) Niemi was extremely close to his dad; they were best friends. (13 RT 2756.) Niemi would call his parents on his way to work about three to four times a week. (13 RT 2758.) Sometimes he would drop by during the day just to see them. (13 RT 2758.) His dad was so affected by Niemi's death that he could not testify at the penalty phase. (13 RT 2757.) Niemi married his soulmate, Dionne, who had a son, Josh, by a previous marriage, and together they had a daughter, Gabrielle. (13 RT 2757.)

Officer Niemi's mother learned of his death in the middle of the night. (13 RT 2758.) Dionne came to her house to tell her, and when she asked Dionne if Niemi was dead, Dionne said, "yes." (13 RT 2758.) She

turned and walked back to her bedroom saying "no, no," as her whole body was shaking. (13 RT 2758.) Officer Trujillo came to her and told her it was true. (13 RT 2759.) She had to decide whether to see Niemi – she thought if she saw him it would be true. (13 RT 2759.) She and her husband dressed and went to the hospital in the police car. (13 RT 2759.) At the hospital they told her she could not touch her son because it was a crime scene. (13 RT 2759.) They pulled the sheet back, and she saw a bullet in Niemi's neck. She told the hospital staff that it was not her son. She had them pull back the sheet again and looked at his hair. Then she knew it was her son. (13 RT 2759.) They called Jim and told him. (13 RT 2759.) That day haunts her and the family's lives have become empty since Niemi's death. (13 RT 2760.) Her husband was involved in a club that paid money into an account for the family of any police officer or firefighter that is killed in the line of duty. (13 RT 2761.) Her husband had to resign from the club because the work reminded him of his son. (13 RT 2761.)

Dionne Niemi testified that her husband wanted to know the details of everything he was interested in, was intelligent, loved shooting, and was a big gun collector. (13 RT 2763.) Niemi was a good father and treated Josh like his own son. (13 RT 2763.) Children gravitated toward Niemi. (13 RT 2763.) They had a daughter together, Gabrielle. (13 RT 2764.)[16] They did a lot together as a family and would have sleepovers at Niemi's parent's house. (13 RT 2766.) When Niemi first mentioned becoming a police officer, she said no. (13 RT 2766.) Instead Niemi worked in computers. (13 RT 2767.) When the "dot com" industry fell apart, Niemi lost his job and became unemployed for a long time. (13 RT 2767.) It was

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[16] Referred to as "Gabbie" by Dionne and the prosecutor.

during this difficult time that he thought about law enforcement again. (13 RT 2767.) Niemi was happy when he got a job with the San Leandro Police Department. (13 RT 2767.) One of the few times Niemi ever cried was when he passed the physical agility test. (13 RT 2768.) Niemi talked about his police work all the time and would tell stories. (13 RT 2768.) He was also a prolific writer. (13 RT 2768.) The prosecution introduced a short story written by Niemi about responding to a police call and finding a missing newborn dead in a trash can. (13 RT 2768-2769.)

Dionne learned about Officer Niemi's death in the middle of the night. (13 RT 2771.) Officers Trujillo, Marez and another police officer were at her door. (13 RT 2770.) She did not understand and was shaking. (13 RT 2770.) She did not remember everything, but remembered leaning against the wall at Niemi's parent's house and saying, "'I'm sorry, I'm sorry, I'm so sorry.'" (13 RT 2771.) At the hospital she begged the staff to clean Niemi and to take the tubes out of him. (13 RT 2771.) They were not allowed to clean Niemi because it was a crime scene. (13 RT 2771.) She wished she had not seen Niemi covered in blood with a tube in him. (13 RT 2771.)

When Dionne returned home from the hospital she told her son Josh about Officer Niemi's death. (13 RT 2772.) He had just turned 15 years old the day before. (13 RT 2772.) Josh stared at her and cried and asked if Niemi would be okay. She told him no. She asked him to be strong and to be with her when she told Gabbie. (13 RT 2772.) After Gabbie woke up, while she was playing in her room, Dionne told her that her daddy had a bad accident. (13 RT 2772.) Gabbie immediately started crying and did not understand. She asked to see him and Dionne told her that she could not, that he died. Gabbie screamed and collapsed on the floor. (13 RT 2772-2773.)

Dionne explained that they scheduled the funeral so that it was not on the same day as her birthday. (13 RT 2773.) It was a series of the worst days of her life: the private viewing and the funeral procession. (13 RT 2773-2774.) They had to have a private viewing because they could not have an open casket due to his injuries. (13 RT 2773.) Dionne described the funeral procession with people lining the streets and holding signs for Officer Niemi. (13 RT 2774.) Gabbie asked if all those people "'love my daddy too.'" (13 RT 2774.) Gabbie did not attend the private viewing and never saw her father again after he left for work that day. (13 RT 2774.) At the end of the funeral service, Gabbie went up to the casket and laid her head on the side. Gabbie put her arm around the casket, closed her eyes and said goodbye. (13 RT 2775.)

After the funeral, Niemi's body was cremated. (13 RT 2775.) Dionne kept the ashes above the television. (13 RT 2776.) At some point, she and Gabbie were watching the movie Brother Bear, where one of the brothers dies and according to the Native American custom, the body is cremated. (13 RT 2776.) Gabbie started to ask questions and Dionne explained that she cremated Niemi's body. (13 RT 2776.) Gabbie became upset, but Dionne explained that Niemi was already in heaven when his body was cremated. (13 RT 2776.) Dionne told Gabbie about the vase above the television, she said, "'you see that pretty vase right there, that big black vase . . . well, that's daddy.'" (13 RT 2777.) They both started crying, and Gabbie said she wanted to hold her dad. Gabbie put the vase between them and they watched the rest of the movie with his ashes. (13 RT 2777.) Dionne thought that having her daddy there helped Gabbie. (13 RT 2777.)

In the aftermath of Officer Niemi's death, Gabbie became very withdrawn and difficult; she had trouble in school. (13 RT 2775.) But since then, and with counseling, Gabbie was doing well, but sometimes became overwhelmed with anger. (13 RT 2777.) Josh loved and idolized Niemi so much that he even wrote a school paper about him. In the aftermath of Niemi's death, Josh was not doing well. He was really angry, acting out in school, but was improving with counseling. (13 RT 2778.) As for Dionne herself, Niemi's death taught her not to waste a minute, "if you want to do something you better go do it." (13 RT 2778.)

B. The Defense Case In Mitigation

The defense presented mitigation evidence about appellant's family background, childhood and upbringing from nine relatives and two family friends.

1. Appellant's Early Childhood in El Salvador

In 1982, there was a serious conflict between guerillas and soldiers in Usulutan, El Salvador. (13 RT 2790.) The conflict created a tumultuous and dangerous situation with gunfire, dead mutilated bodies in the streets, and soldiers entering homes. (13 RT 2791, 2800, 2805, 2811.) Amidst this conflict, appellant was born to two young parents. (13 RT 2788.) Appellant's father, Cayetano de Jesus Ramirez, was 17 years old when he married appellant's mother, Maria Viscarra, also 17 years old and pregnant with appellant. (13 RT 2788-2789, 2799.) A year after appellant was born, Viscarra had another child, but the child was stillborn. (13 RT 2794, 2860.) This loss affected Viscarra greatly and caused her to be depressed. (13 RT 2799, 2830, 2861.) She also had problems with her husband, who cheated on her. (13 RT 2840.) In 1992, they had appellant's younger brother Jonathan. (13 RT 2830-2831, 2861.)

Appellant's paternal grandparents, Natividad Ramirez and Juana De Jesus Barahona De Ramirez ran a funeral home in El Salvador. (13 RT 2800.) Appellant's maternal grandfather, Salvador Viscarra, owned a clothing business, and had Maria Viscarra with his first wife Jesusa, who suffered from psychological problems. (13 RT 2800, 2804.) The senior Viscarra struggled with alcohol. (13 RT 2805.)

From the age of six months to one year old, appellant periodically stayed with his paternal grandparents. He later lived again with them from the age of five to seven years old. (13 RT 2789.) When appellant was six or seven years old, his mother moved to the United States, leaving appellant with his paternal grandparents. (13 RT 2789, 2839, 2855.) Appellant was "'sad, crying every day for her'" and asking "'where's Mama?'" (13 RT 2833.) Appellant's father left for the United States three months later, leaving appellant alone with his paternal grandparents. (13 RT 2829.)

Appellant feared the violence surrounding him in Usulutan. (13 RT 2790, 2792.) He was a sweet and kind child, obedient and affectionate. (13 RT 2801, 2818.) In El Salvador, he attended a private school. (13 RT 2794.) Appellant, however, was an active child which led to behavioral problems in school. (13 RT 2795.) Appellant had trouble with reading and spelling. He was intelligent and capable in math, but struggled with letters. (13 RT 2795.)

2. Appellant's Childhood and Adolescence in the United States

Appellant moved to the United States nine months after his mother's move. (13 RT 2855.) Two to three years after his arrival in the United States, when appellant was around eight years old, appellant's mother and father divorced. (13 RT 2831.) Appellant's mother had primary custody.

(13 RT 2831.) Appellant's father remarried in 1995 and had three other children. (13 RT 2822.)

Appellant continued to have difficulties in school, attending different schools in various cities as his mother moved around. (13 RT 2831-2832, 2835, 2858.) He had behavioral and learning problems and was isolated from other children because of them. (13 RT 2846, 2858.) When appellant was 12 years old, he was referred for testing for learning disabilities. (13 RT 2856.) It was then that he was diagnosed with attention deficit disorder and placed on medication. (13 RT 2856.) Appellant took his medication inconsistently for about three years and eventually stopped. (13 RT 2857.) Appellant dropped out of school at 17 years old. (13 RT 2858.)

Appellant's mother worked long hours as a nanny while appellant was in school (13 RT 2858-2859), and she often went out after work (13 RT 2841). Appellant was left at home alone after school. (13 RT 2859.) He developed problems with drinking and drugs starting at the young age of 12. (13 RT 2808, 2813-2814, 2859.) When a friend of appellant's family, Jose Douglas Morataya, looked for appellant during a family party, he was told by a neighbor that appellant, who was only 14 years old, was "smoking something with a group of men" who hung out on the street. (13 RT 2843, 2845.) At that same age, appellant was suspended from school for drinking. (13 RT 2855.) During that incident, appellant was so intoxicated that he had to be hospitalized. (13 RT 2855.) When appellant was 15 years old, he was discovered outside his school with a bottle of alcohol. (13 RT 2845.) Morataya intervened at the school at least once on appellant's behalf. (13 RT 2845.) There were several times when appellant's mother picked up appellant from school and noticed that he was drunk. (13 RT 2859.)

Appellant struggled in his relationship with his mother and father.

(13 RT 2814, 2819.) Although appellant was to see his father every other weekend (13 RT 2820, 2831), conflict between his father and mother often prevented visits with his father (13 RT 2820, 2831). Appellant was resentful of his parents because he felt they were not there for him, and he was lonely. (13 RT 2819.) Appellant's father did not intervene at school or help him with his problems with alcohol. (13 RT 2835.) Appellant and his mother fought often and frequently yelled at each other. (13 RT 2814, 2841.)

Appellant took care of his younger cousin, Danielle Gomez Ramirez, when she was a baby and always advised her not to drink or do drugs. (13 RT 2820, 2851.) Appellant was close to his younger brother Jonathan. (13 RT 2863.) Appellant was also very close to his step-brother Anthony. (13 RT 2825.)

July 25, 2005, the day of the shooting, was appellant's 23rd birthday. Breaking from a family tradition of celebrating birthdays together, appellant was alone. Appellant's family on his father's side was in El Salvador for Danielle Ramirez's quinceañera. (13 RT 2821.) Although appellant was designated to play an honored role in the quinceañera, he was not able to join them because he did not have papers to travel from and to the United States. (13 RT 2822.)

On his birthday, appellant also was fighting with his mother. Viscarra was angry with appellant because he had not wished her a happy birthday on her birthday on July 19, so she did not wish appellant a happy birthday that day. (13 RT 2859-2860.) And appellant was mad at her. (13 RT 2860.) According to Viscarra, appellant had a bad temper when he was drinking and would scream and throw things at her. (13 RT 2865.) Appellant's mother had told appellant earlier in the month that she wanted

him to move out of the house because of his drinking. (13 RT 2865.) She arrived home early that day, around 1:00 p.m., and saw that appellant had a bottle of Hennessy in his room and was drunk. (13 RT 2860.)

If sentenced to life in prison, all of appellant's family members were committed to maintaining contact with appellant through visits and letters. (13 RT 2796, 2808, 2827-2828, 2842, 2847, 2852, 2854.)

ARGUMENT

I. THE TRIAL COURT ERRED IN MODIFYING CALCRIM NO. 521

The only issue in this case was the degree of murder. Defense counsel did not dispute that appellant committed the murder, but only whether appellant deliberated the shooting. Defense counsel also did not dispute the special circumstance that Officer Niemi was killed in the lawful performance of his duties. Thus, whether the jury found appellant guilty of first degree deliberate and premeditated murder meant the difference between life and death eligibility. These circumstances underscore the importance of a clear instruction on deliberation for finding first degree deliberate and premeditated murder. The court, at the request of the prosecutor, modified the jury instruction on this issue to inform the jury that in finding deliberate and premeditated murder, it was not necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his act. Such an instruction did not convey a principle of first degree deliberate and premeditated murder that had any application to this case, and in the end, likely confused the concept of deliberation altogether. This modified instruction combined with the prosecutor's mischaracterization of premeditation and deliberation rendered the instruction ambiguous and lowered the prosecutor's burden of proof in violation of state law and the federal Constitution.

A. The Court Modified CALCRIM No. 521 To Tell The Jury That For Deliberate and Premeditated Murder It Is Not Necessary To Prove The Defendant Maturely And Meaningfully Reflected Upon The Gravity Of His Act

During trial, the parties met to discuss the guilt phase jury instructions. (12 RT 2496.) The prosecutor requested modification to the standard jury instruction on degrees of murder, CALCRIM No. 521. He asked to add the following language from section 189 to the instruction: "To prove that a killing was deliberate and premeditated, it is not necessary to prove that the defendant maturely and meaningfully reflected upon the gravity of his act." (12 RT 2498; 3 CT 861.) Defense counsel objected to the modification. (12 RT 2498.)[17] The trial court granted the prosecutor's requested modification. (12 RT 2498.) The trial court based its ruling on the grounds that the language was taken from the statute itself, and that in *People v. Smithey* (1999) 20 Cal.4th 936 ("*Smithey*"), this Court held that it was "not inappropriate" to give the modification. (12 RT 2498-2499.) The instruction given to the jury read as follows:

> If you decide that the defendant has committed murder, you must decide whether it is murder of the *first* or *second* degree.
>
> The defendant is guilty of *first* degree murder if the People have proved that he acted willfully, deliberately, and with premeditation.
>
> The defendant acted "willfully" if he intended to kill –

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[17] Although defense counsel objected to the prosecution's proposed modification, she did not state specific grounds for the objection on the record at the hearing. (12 RT 2498.) Nevertheless, this court may review any instruction which affects a defendant's substantial rights with or without a trial objection. (§ 1259; *People v. Johnson* (2015) 60 Cal.4th 966, 993.)

> in other words, with *express malice*.
>
> The defendant acted "deliberately" if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill.
>
> The defendant acted with "premeditation" if he decided to kill before committing the act that caused death.
>
> The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test, therefore, is not the length of time, but rather the extent of the reflection.
>
> **To prove the killing was deliberate and premeditated, it is not necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his act.**
>
> The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you may not find the defendant guilty of first degree murder.
>
> Any murder which is not proven to be of the first degree is murder of the second degree.

(12 RT 2571-2572; 4 CT 937, bold added, original italics.) The jurors did not receive a definition of "maturely and meaningfully reflected upon the gravity of his act."

The prosecutor referred to the language added to the premeditation and deliberation instruction at three different points in his closing arguments. (12 RT 2584-2585; 13 RT 2625.) In the end, the prosecutor defined the meaning of "maturely and meaningfully reflected upon the gravity of his act" as follows:

> Gravity means the seriousness of or the significance of. So it's not necessary for deliberation and premeditation for the person to reflect on the seriousness of the act meaningfully and maturely. They just have to know what it is they're doing, they don't have to reflect on how serious.

(12 RT 2584-2585.) Defense counsel, for his part, defined maturely and meaningfully reflected upon the gravity of his act as meaning that the "decision doesn't have to be a wise one." (12 RT 2605-2606.)

Following closing arguments, the jurors commenced their deliberations on May 8, 2007. (12 RT 2641.) They reached their verdict finding appellant guilty of first degree deliberate and premeditated murder on May 10, 2007. (12 RT 2646.)

B. The Trial Court Erred In Modifying CALCRIM No. 521 Because The Added Language, Although Contained In Section 189, Does Not Set Forth A Principle Of Law Applicable To This Case

The trial court modified the instruction with the language proposed by the prosecutor because the proffered language came directly from the statute and was approved by this Court in *Smithey*. (12 RT 2498.)[18] The trial court's rationale, however, was mistaken. As a general proposition, the fact that the language comes directly from the statute may be adequate to justify an instruction. (*Smithey*, *supra*, 20 Cal.4th at p. 980; *People v. Estrada* (1995) 11 Cal.4th 568, 574 [the language of a statute defining a crime is generally an appropriate basis for an instruction].) In this case,

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[18] Section 189 reads in relevant part: "All murder which is perpetrated by means of . . . or any other kind of willful, deliberate and premeditated killing . . . is murder of the first degree. All other kinds of murders are of the second degree. . . . To prove the killing was 'deliberate and premeditated,' it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act."

however, it is not. The additional language does not state a principle of law applicable to this case – a point not considered or addressed in *Smithey*.

In 1964, this Court introduced the concept of mature and meaningful reflection into the elements of premeditation and deliberation. In *People v. Wolff* (1964) 61 Cal.2d 795 (hereafter "*Wolff*"), a decision finding insufficient evidence of premeditation and deliberation by a 15-year-old schizophrenic boy, this Court held the test for premeditation and deliberation included considering the extent to which a defendant could "maturely and meaningfully reflect upon the gravity of his contemplated act." (*Id.* at p. 821.) This element looked not to the evidence of planning or preconceived design, but rather to the effect of the accused's "mental infirmity" as it "related to the degree of the murder." (*Ibid.*) The offense could be reduced to second degree murder, even though the killing was the result of lengthy and complex planning if, in the words of *Wolff*, "the extent of [the defendant's] understanding, reflection upon it and its consequences, with realization of the enormity of the evil, appears to have been materially–as relevant to appraising the quantum of his moral turpitude and depravity–vague and detached." (*Id.* at p. 822.)

The effect of *Wolff* was to create a higher bar for determining whether there was sufficient evidence of premeditation and deliberation by requiring a showing that a defendant was capable of understanding the evil of his act. "Mature and meaningful reflection was clearly the California Supreme Court's shorthand for applying the concept of diminished capacity to the elements of deliberation and premeditation." (*People v. Stress* (1988) 205 Cal.App.3d 1259, 1270; see, e.g., *People v. Bassett* (1968) 69 Cal.2d 122, 148 [where defendant asserted insanity defense based on paranoid schizophrenia, evidence was insufficient to prove he could maturely and

meaningfully reflect on the gravity of his act although evidence proved he carefully planned the murder of his parents]; *People v. Goedecke* (1967) 65 Cal.2d 850, 855, 857-858 [where defendant asserted a diminished capacity defense based on mental illness, evidence was insufficient with regard to "the quantum of reflection" required under *Wolff* for first degree murder of his father]; *People v. Nicolaus* (1967) 65 Cal.2d 866, 872-878 [where defendant asserted a diminished capacity defense based on mental impairment and intoxication and he "had the intent to kill and to a limited extent the ability to premeditate," evidence nonetheless was insufficient under *Wolff* to sustain first degree murder convictions].) *Wolff's* ruling thus became a principle of law embodied in jury instructions (*People v. Fain* (1969) 70 Cal.2d 588, 597) and "endorsed repeatedly by this [C]ourt in diminished-capacity murder cases where premeditation was an issue" (*People v. Cruz* (1980) 26 Cal.3d 233, 243).[19]

In 1981, the Legislature abolished the diminished capacity defense. (Stats. 1981, ch. 404, § 4, p. 1592 [enacting § 28].) At the same time, it also amended section 189 to add language as follows: "To prove the killing was 'deliberate and premeditated,' it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her acts." (Stats. 1981, ch. 404, § 7, p. 1593.) This language was a

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[19] The direct link between *Wolff* and the diminished capacity defense was reflected in former CALJIC No. 303-A, which read as follows: "Before you may find the defendant guilty of wilful, deliberate and premeditated murder of the first degree, you must determine that at the time the crime allegedly was committed he not only had sufficient mental capacity to form the specific intent to kill but also had *sufficient mental capacity to maturely and meaningfully deliberate, premeditate and reflect upon the gravity of his contemplated act* and to harbor malice aforethought." (Italics added.)

legislative abrogation of *Wolff, supra*, 61 Cal.2d 795. (*People v. Swain* (1996) 12 Cal.4th 593, 608 [the language of mature and meaningful reflection has "passed into history"].) The 1981 amendment stating that mature and meaningful reflection was no longer required for premeditation and deliberation was part and parcel of the legislative repudiation of the diminished capacity defense and made clear in the murder statute itself that no vestige of the defense remained.

The effect of abrogating *Wolff* was to return the law on premeditation and deliberation to its pre-*Wolff* definition. After the amendment to section 189, evidence of a defendant's mental condition was relevant to the question of premeditation and deliberation only if it showed that the defendant failed "to plan or weigh considerations for and against the proposed course of action." (*People v. Stress, supra*, 205 Cal.App.3d at pp. 1270-1271; see also *People v. Bobo* (1990) 229 Cal.App.3d 1417, 1434 [*Stress* accurately described the consequences of the Legislature's overruling of *Wolff*].) Thus, the added language, which was a corrective measure directed to this Court's judicially-created rule, is not necessary to inform the jury adequately about the elements the prosecution must prove for deliberate and premeditated murder. Unlike definitions of "willfully," "deliberately," and "with premeditation," the "maturely and meaningfully reflected" language does not explain what the jury must find for first degree murder, but is a gloss that specifies what is *not* required.

However, with the diminished capacity defense long gone, there is no need to refer to the abrogated "maturely and meaningfully reflected" principle in instructions on deliberate and premeditated murder. Even when the defense of diminished capacity existed, there was no requirement that the jury be instructed on mature and meaningful reflection outside the

context of a diminished capacity defense. (See *People v. Dunkle* (2005) 36 Cal.4th 861, 910-913 [in a case where the defense of diminished capacity still applied, there was no error in failing sua sponte to instruct in the "maturely and meaningfully reflected" language where there was no evidence of mental illness or diminished capacity].)

The standard jury instructions confirm this view. Since 1981, the Judicial Council has never added the "maturely and meaningfully reflected" language in section 189 to the instruction on deliberate and premeditated first degree murder. Despite numerous revisions of CALJIC and development and revision of CALCRIM, not a single published version of CALJIC No. 8.20 or CALCRIM No. 521 has included the statutory amendment that "[t]o prove the killing was 'deliberate and premeditated,' it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act." The only logical inference is that the drafters of jury instructions concluded, time and again, that the reference to mature and meaningful reflection in section 189 is not essential, or even useful, in defining deliberate and premeditated murder.

Appellant understands that in *Smithey* this Court approved an instruction that, as in this case, was modified at the request of the prosecutor to include the "maturely and meaningfully reflected" sentence in section 189.[20] While the trial court's reliance on *Smithey* in this case may have been understandable, it was mistaken. The ruling in *Smithey* must be understood in light of its facts. Smithey was charged with first degree

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[20] To appellant's knowledge, *Smithey* is the only decision by this Court addressing a challenge to the addition of the mature and meaningful reflection language, and there are no reported decisions in the courts of appeal addressing a challenge to this language after *Smithey* was decided.

deliberate and premeditated murder. He presented a dual defense of mental impairment and drug intoxication. Three defense experts testified that Smithey suffered "organic brain damage, generally diffuse brain dysfunction, and mild mental retardation," that he "had amnesia for certain periods of time on the day of the homicide," and that "[h]is mental disorders caused him to be totally out of control. Absent these disorders he would not have committed this particular crime." (*Smithey, supra,* 20 Cal.4th at p. 955.) The defense evidence thus could be understood by the jury to suggest that Smithey not only killed without premeditation and deliberation, but that it was because he lacked the mental capacity to premeditate and deliberate. As such, the prosecution reasonably may have been concerned that the jury might engage in a diminished capacity analysis of the mental disorder evidence, and sought to refer the jurors to the wording of section 189, indicating that mature and meaningful reflection was not required.

That, however, was not the situation here. Appellant's defense was a simple intoxication defense – an actuality and not a capacity defense. The jury was expressly instructed on the limited use of that defense (4 CT 938; 12 RT 2573), and thus, unlike in *Smithey*, there was not the slightest justification for instructing in the "maturely and meaningfully reflected" language. Rather, in this case, at the prosecutor's urging, the trial court reached out to remedy a problem that did not exist, and its modified instruction risked confusing the jury with a concept that has not applied to premeditation and deliberation for nearly 35 years. In this way, the trial court violated its duty "'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. Alexander* (2010) 49 Cal.4th 846, 921, quoting

People v. Saddler (1979) 24 Cal.3d 671, 681.)

C. The Modified Instruction Was Ambiguous And Likely Confused And Misled The Jury About The Mental State Required For Deliberate And Premeditated Murder

The trial court modified CALCRIM No. 521 in part because the "maturely and meaningfully reflected" language the prosecutor proposed was taken directly from section 189. (12 RT 2499.) As this Court stated long ago, "'An instruction in the language of a statute is proper only if the jury would have no difficulty in understanding the statute without guidance from the court.'" (*People v. Thomas* (1945) 25 Cal.2d 880, 895, quoting *People v. Albertson* (1944) 23 Cal.2d 550, 587 (conc. opn. of Traynor, J.).) In this case, the addition of the prosecutor's proposed language rendered CALCRIM No. 521 ambiguous, and there is a reasonable likelihood the jury misunderstood and misapplied the mental state required for deliberate and premeditated murder. (*People v. Moore* (2011) 51 Cal.4th 1104, 1140 [stating standard for potentially ambiguous instruction]; *Smithey*, *supra*, 20 Cal.4th at p. 963 [same], citing *Estelle v. McGuire* (1991) 502 U.S. 62, 72 & fn. 4.) In addressing this question, this Court considers the specific language in the instruction and the instructions as a whole (*Smithey*, *supra*, 20 Cal.4th at p. 963; see also *People v. Rogers* (2006) 39 Cal.4th 826, 881), and determines whether the instruction, understood as appellant asserts, states the applicable law correctly (*People v. Kelly* (1992) 1 Cal.4th 495, 525-526).

As set forth above in section A, the instruction defined the elements of premeditation and deliberation. The jury was fully and unambiguously instructed that "[t]he defendant acted 'deliberately' if he carefully weighed the considerations for and against his choice and, knowing the

consequences, decided to kill." (4 CT 936; 12 RT 2572.) The jury was also instructed that "[t]he defendant acted with 'premeditation' if he decided to kill before committing the act that caused death." (4 CT 936; 12 RT 2572.) The jury was told in the next paragraph of the instruction that the true test of premeditation and deliberation is "the extent of the reflection." (4 CT 937; 12 RT 2572.) But then, the jury was instructed: "To prove the killing was deliberate and premeditated, it is not necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his act." (4 CT 937; 12 RT 2572.) "Maturely and meaningfully reflected upon the gravity of his act" was not defined for the jurors. The jurors were instructed, however, that words and phrases not specifically defined were to be applied using their ordinary, everyday meanings. (4 CT 920; 12 RT 2561-2562.) Thus, the jurors would have understood the instruction on mature and meaningful reflection according to its common meaning.[21]

Commonly understood, the instruction that the defendant did not have to "maturely" and "meaningfully" reflect upon the gravity of his act would mean that his thinking could be immature and perfunctory. The term immature is synonymous with rash, impulsive and not considering the consequences. (See generally, *Roper v. Simmons* (2005) 543 U.S. 551, 553; see also, American Heritage Dict. (4th ed. 2006) pp. 1081 [defining "mature" as "worked out fully by the mind"].) The instruction that the defendant did not have to "meaningfully reflect on the gravity of his act" means that the defendant did not have to give the consequences of his act significant or serious thought. (See American Heritage Dict. (4th ed. 2006)

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[21] In *Smithey*, this Court also cast the phrase as one that is commonly understood by those familiar with the English language and not used in a technical sense peculiar to the law. (*Smithey*, *supra*, 20 Cal.4th at p. 981.)

pp. 767, 1086, 1467 [defining "meaningful" as "significant," defining "reflect" as "to think seriously," and defining "gravity" as "[g]rave consequence"].) Thus, the modified instruction told the jury that to prove the killing was deliberate and premeditated, it was not necessary to prove that appellant fully worked out and gave significant, serious thought to the considerations for and against his act, which necessarily included its consequences.

In its ordinary meaning, the added language regarding mature and meaningful reflection confused the concept of deliberation. The jury likely would have understood whether appellant carefully weighed the considerations for and against his act (deliberation) and whether he maturely and meaningfully reflected on the gravity of his act as asking essentially the same question. In common parlance, to weigh carefully considerations for and against an act is roughly equivalent to thinking fully, significantly and seriously about the consequences of that act. The jury was told it had to find that appellant did the former, but not the equivalent of the latter, thought process. Thus, under the modified instruction, the jurors were left to wonder where careful weighing left off and meaningful reflection began – or what was left of careful weighing without meaningful reflection. In this way, the jury was given confusing, if not directly contradictory, directives on the requirements for deliberation. The jurors were first instructed that to find that appellant deliberated, they had to find that he carefully weighed the considerations in making his choice to kill and that a key consideration was the "extent of reflection." Two paragraphs later, the jurors were then told appellant did not need to think carefully about the gravity, including the consequences, of his act. Instructing that the test of premeditation and deliberation is the "extent of reflection" on

appellant's act and then instructing that the prosecutor does not have to prove that appellant gave his act mature and meaningful consideration, was confusing and could be understood to undercut the concept of deliberation altogether.[22]

The other guilt phase instructions did not clarify the confusion created by the "maturely and meaningfully reflected" modification. None of the other instructions addressed the requirements for finding deliberation. Although the jury was given CALCRIM No. 625 on voluntary intoxication (4 CT 938; 12 RT 2573), it simply allowed the jury to consider intoxication in determining whether appellant acted with deliberation and premeditation, but did not further define those terms. Moreover, nothing in the other instructions offered any guidance on mature and meaningful reflection.

The arguments of counsel did not clear up the ambiguity in the instruction and may have added to the confusion. The prosecutor and the defense gave conflicting definitions of mature and meaningful reflection and in so doing, belied the assumption that the phrase had any firm, common meaning. Following instructions at the guilt phase, both counsel argued extensively about whether appellant deliberated and premeditated the murder. (12 RT 2579-2694; 13 RT 2613-2626 [prosecutor]; 12 RT 2595-2609 [defense].) Each addressed the instruction on mature and meaningful reflection. (12 RT 2584-2585; 13 RT 2625 [prosecutor]; 12 RT 2605-2606 [defense].)

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[22] Although the error claimed here must be judged based on the instructions and counsel's arguments at the guilt phase, we learn later, as outlined in Argument VII *ante*, that the jurors in the penalty phase submitted a question asking for the definition of "maturely and meaningfully reflected upon the gravity of his act." (Argument VII *ante*, p. 179; 4 CT 1023.)

The prosecutor exacerbated the confusion by trying to define the added language and, in so doing, erroneously described the elements of deliberation and premeditation. He began with a correct statement of the law:

> As the judge told you, first degree is willful, deliberate, premeditated murder. And as the judge told you, the defendant acted deliberately when he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The length of time is not determinative and a cold, calculated decision to kill can be reached quickly.

(12 RT 2583.) The prosecutor then gave the jury a hypothetical to illustrate that people routinely make willful, deliberate and premeditated decisions very quickly. He described a juror who is anxious about being late for jury duty and is having trouble finding a parking space. (12 RT 2583.) The juror is stopped at a red light but sees an open parking spot in the next block. (12 RT 2583-2584.) The prosecutor continued:

> So what does the juror do? The juror looks in the rearview mirror, looks both ways, looks ahead, sees no police cars, no cars coming, nobody in the intersection, hits the accelerator, goes up and gets in the parking space. That juror has made a willful, deliberate, premeditated decision to commit a crime, a violation of, if I remember right, 21453 of the Vehicle Code, running a red light.
>
> That was done in a very short period of time, but it's a willful, deliberate, premeditated decision. The juror has thought about the consequences, being late, getting a ticket, whatever, had made that – weighed those considerations and gone ahead and done that.
>
> Now, you might say, okay, that's a silly example because there's a very difficult jump from the seriousness of running a red light and seriousness of killing someone.
>
> I would say in a second example is exactly what Mr. Ramirez

> did when he was faced with being arrested and going to jail and decided that wasn't what he wanted to do and shot and killed Officer Niemi to avoid that consequence, like the juror avoid being late.
>
> You might say, though, that those aren't comparable because that's – the consequences of killing someone are so much greater than the consequences of going through a red light. But part of the instruction that the judge gives you is that in order to find that the killing was willful, deliberate, and premeditated, it is not necessary to prove that the defendant maturely and meaningfully reflected upon the gravity of his act.

(12 RT 2584.) At this point, the prosecutor's argument went off track:

> Gravity of his act, and that term gravity, is another one of the kinds of words that we don't use in the context necessarily all the time in our average language. Gravity means the seriousness of or the significance of. So it's not necessary for deliberation and premeditation for the person to reflect on the seriousness of the act meaningfully and maturely. *They just have to know what it is they're doing.* They don't have to reflect on how serious.

(12 RT 2585, italics added.)

This argument plainly misstated the law. To premeditate and deliberate a killing, a defendant does not simply "have to know what [he is] doing." That describes knowingly committing an act, which is the standard for a general intent crime. (*People v. Low* (2010) 49 Cal.4th 372, 385 [general criminal intent "requires the accused to knowingly perform the proscribed act, but does not involve any intent to commit a further act or achieve a particular effect"].) The prosecutor's formulation did not define the mental state – deliberate and premeditated murder – required for the charged first degree murder, but at most described the mental state – intent to kill – required for the lesser included second degree murder. (See *People*

v. Knoller (2007) 41 Cal.4th 139, 143, 151-152 [intentional killing without premeditation and deliberation is second degree murder]; *People v. Perez* (2010) 50 Cal.4th 222, 230 [firing toward victim at close range in a manner that could inflict mortal wound is sufficient to support inference of intent to kill].) As this Court has admonished, "it is improper for the prosecutor to misstate the law generally . . . and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements." (*People v. Marshall* (1996) 13 Cal.4th 799, 831, citations omitted.) Rather than clarify the confusion created by the added "maturely and meaningfully reflected" language, the prosecutor's argument, if followed, would nullify the premeditation and deliberation requirement.

Defense counsel's argument was not sufficient to correct or clarify the confusion generated by the modification. First, defense counsel argued that the "maturely and meaningfully reflected" language was confusing, which simply underscored the problem with the instruction. (12 RT 2605-2606.) Second, defense counsel disavowed knowing its definition and stated that his "guess" was that "it probably means that youth and ignorance is not a defense, that youngsters and fools can engage in the weighing process as much as smart people and older people can. And the ultimate decision doesn't have to be a wise one." (12 RT 2605-2606.) Defense counsel's tentative view in no way corrected the prosecutor's erroneous, argument, and so made it more likely the jurors would understand the added language in a way that undercut the deliberation requirement. In short, although defense counsel said the prosecutor still had to prove deliberation, the jurors were still left with a confusing instruction on what "deliberation"

meant. (12 RT 2605-2606.)[23]

When the trial court leaves the jurors to decide whether a defense attorney's interpretation of the law is correct or whether a prosecutor's contrary view of the law is correct, the contest is not a fair one:

> Defense counsel and the prosecuting officials do not stand as equals before the jury. Defense counsel are known to be advocates for the defense. The prosecuting attorneys are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige.

(*People v. Talle* (1952) 111 Cal.App.2d 650, 677, cited with approval in *People v. Thomas* (1992) 2 Cal.4th 489, 529; see *People v. Perez* (1962) 58 Cal.2d 229, 247 ["juries very properly regard the prosecuting attorney as unprejudiced, impartial and nonpartisan, and statements made by him are apt to have great influence"], abrogated on other grounds by *People v. Carrera* (1989) 49 Cal.3d 291, 321.) Here, of course, the prosecutor was not just any prosecutor. He was the elected District Attorney for the County of Alameda in which the jurors resided. (2 RT 66, 78, 109, 144, 196; 3 RT

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[23] Even where defense counsel's summation correctly states the law, when an instruction is susceptible of an interpretation inconsistent with the law and the prosecutor argues that incorrect interpretation to the jurors, it is reasonably likely that the jurors will accept the prosecutor's incorrect interpretation. (See *People v. Edelbacher* (1989) 47 Cal.3d 983, 1039 [even defense counsel's "thorough and forceful explication" of the correct law did not remedy mistaken impression left by combination of potentially misleading instruction and prosecutor's argument]; *People v. Crandell* (1988) 46 Cal.3d 833, 882-885 [combination of potentially misleading instruction and prosecutor's argument created reasonable likelihood jurors were misled as to meaning of instruction]; *People v. Roder* (1983) 33 Cal.3d 491, 503-504, fn. 13 [potential for juror confusion was highlighted by prosecutor's own description of the mandatory presumption in his closing argument].)

245, 339.) Hence, the prestige and credibility jurors confer upon all prosecutors applied with even greater force to this prosecutor.

When counsel argue two competing views of the law and the jury is given no clear instruction regarding which view is correct, jurors, as lay people, are ill-equipped to make that determination on their own. It is the trial court's duty to explain the law to the jury, not to place upon the jury the task of deciding which of two inconsistent views of the law is correct. (*People v. Thomas*, *supra*, 25 Cal.2d at p. 896 ["'[i]t is not proper if reasonable men might differ as to the construction of the statute, for it would delegate to the jury the function of statutory interpretation that belongs to the court'"].) Looking at all the instructions and the arguments of counsel, it is reasonably likely the ambiguous modified instruction confused the jury about, and led the jury to misapply, the element of deliberation required for first degree deliberate and premeditated murder.

This Court's holding in *Smithey* does not defeat appellant's claim. Although this Court concluded the circumstances in *Smithey* did not give rise to a reasonable likelihood that the jury misapplied the "maturely and meaningfully reflected" language, the circumstances in this case do. In *Smithey*, the Court found that the modified instruction on first degree deliberate and premeditated murder "made clear that reflection must have preceded commission of the crime and could not have been unconsidered or rash, but rather must have resulted from careful thought and a weighing for and against the chosen course of action." (*Smithey*, *supra*, 20 Cal.4th at p. 981.) Missing in *Smithey*, but present in this case, are the conflicting arguments of counsel about the significance of the "maturely and meaningfully reflected" addendum. Such arguments are not mentioned in the Court's decision. (See *id*. at pp. 980-982.) In fact, in *Smithey*, the

prosecutor made clear in his closing argument that while it was not necessary to prove the defendant maturely and meaningfully reflected on the gravity of his act, premeditation and deliberation required more than just malice or intent to kill. (See Exhibit A: *People v. Smithey*, Case No. S011206, [XX RT 3909].)[24] In contrast, here the prosecutor's mistaken statement of law conflating deliberation with intent to kill or even mere knowing increased the likelihood that the "maturely and meaningfully reflected" language confused and misled the jurors. (12 RT 2585.) Thus, here, unlike in *Smithey*, there was a real risk of convicting appellant of first degree murder on a finding of a mental state less than premeditation and deliberation. (See *Smithey*, *supra*, 20 Cal.4th at p. 980.)

In sum, the modified instruction was ambiguous. The arguments by counsel did not clarify, but likely compounded, the confusion, and no other instructions provided the jurors with a clear instruction on the meaning of "maturely and meaningfully reflected upon the gravity of the act." On this record, it is reasonably likely that the unnecessary phrase misled the jury about the mental state required for deliberate and premeditated murder.

D. The Effect Of The Ambiguous Instruction Was To Lower The Prosecutor's Burden Of Proof And Violate Appellant's Right To A Jury Trial On The Mental State Elements Of Deliberate And Premeditated Murder

The trial court's instructional error violated not only state law, but the federal Constitution as well. Similar to the state law standard, the test

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[24] By separate motion filed simultaneously with this brief, appellant requests that, pursuant to Evidence Code section 459, this Court take judicial notice of Reporter's Transcript, Volume XX, pages 3857, 3908-3909 in *People v. Smithey*, Case No. S011206.

for determining whether "an ambiguous instruction" amounts to federal constitutional error is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72, quoting *Boyde v. California* (1990) 494 U.S. 370, 380.) The modified CALCRIM No. 521 violated appellant's due process rights under the Fourteenth Amendment and his separate but related jury trial rights under the Sixth and Fourteenth Amendments.

Under the federal due process clause, a defendant cannot be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364.) The burden of presenting such proof rests with the prosecution. (*Id.* at p. 361.) Any dilution of the prosecution's burden of proof violates a defendant's due process rights. (*United States v. Gaudin* (1995) 515 U.S. 506, 523 [judge's refusal to allow the jury to decide element of crime violated due process]; *Carella v. California* (1989) 491 U.S. 263, 265 [jury instructions must not lessen prosecutor's burden of proof as to any essential fact or element].) This due process right is connected to the Sixth Amendment right to trial by jury. (*United States v. Gaudin*, *supra*, at p. 510; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"]; see *Cunningham v. California* (2007) 549 U.S. 270, 281 [Sixth Amendment requires that any fact exposing a defendant to a greater potential sentence must be found by a jury and established beyond a reasonable doubt].)

As explained above in section C and incorporated here, the sentence added to CALCRIM No. 521 – "To prove a killing was deliberate and

premeditated, it is not necessary to prove that the defendant maturely and meaningfully reflected upon the gravity of his act" (12 RT 2498) – injected ambiguity into the definition of deliberation, an essential element for proof of first degree deliberate and premeditated murder. As a result, the instruction likely confused the jurors and misled them to conclude that they did not need to find that appellant "carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill." (4 CT 937; 12 RT 2572.) There were no other instructions defining the mental state necessary for first degree deliberate and premeditated murder that would have corrected the misconception created by the contested modification. Further, the prosecutor's argument exacerbated the confusion about the mental state necessary for first degree deliberate and premeditated murder, and defense counsel's argument did not remedy the confusion.

Because the modified instruction was ambiguous and likely confused the jury about the correct definition of deliberation, there is a reasonable likelihood the jury convicted appellant of first degree murder without finding that appellant had the required mental state of deliberation in violation of his due process right to a jury finding beyond a reasonable doubt on every element of the crime. (*Byrd v. Lewis* (9th Cir. 2009) 566 F.3d 855, 861 [scope-of-consent instruction violated due process where it permitted jury to conclude that defendant's criminal intent to keep car beyond victim's permission need only be "clearly established" rather than proven beyond reasonable doubt]; *Martinez v. Borg* (9th Cir. 1991) 937 F.2d 422, 423 ["*Beeman* error is constitutional error because the jury did not have the opportunity to find each element of the crime beyond a reasonable doubt"]; *People v. Lee* (1987) 43 Cal.3d 666, 673-674 [instructions that appeared to require specific intent but eliminated such

intent under some circumstances are akin to instructions that remove the issue from the jury completely and violate federal due process].) Maintaining a clear distinction between the states of mind necessary for conviction of first degree deliberate and premeditated murder and second degree intentional murder is not simply a matter of statutory construction. It is a requisite of due process. Deliberation is a distinct element of first degree deliberate and premeditated murder, a point the modification in this case blurred. (See *Riley v. McDaniel* (9th Cir. 2015) 786 F.3d 719, 723 [Nevada murder instruction violated due process by relieving the prosecution of its burden of proving that defendant deliberated, as well as premeditated, the killing.].)

The modified instruction, which had the effect of denying appellant the opportunity to have the jury find each element of the crime beyond a reasonable doubt, also violated appellant's separate right to a jury trial under the Sixth and Fourteenth Amendments. Here, the ambiguous modified instruction on deliberation effectively removed a factual question from the jury, thus depriving appellant of an unanimous decision by the jury on deliberation, and therefore, his constitutional right to a jury trial. (*Neder v. United States* (1999) 527 U.S. 1, 12 [a jury instruction violates a defendant's Sixth Amendment right to a jury trial where the jury instruction omits or misdescribes an element of an offense].)

For all the above reasons, the modification of the instruction amounted to federal constitutional error.

E. The Error Requires Reversal Of The Entire Judgment

Where trial court error violates state law, reversal is required when appellant establishes a reasonable probability that he would have obtained a

more favorable result in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Where trial court error violates the federal Constitution, reversal is required unless the State proves the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 45.) Whether considered under the state law or federal constitutional standard, the error here was not harmless. The *Chapman* harmless error inquiry does not ask "whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered." (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279.) Rather, the reviewing court must determine "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Ibid*, original italics; see *Fahy v. State of Connecticut* (1963) 375 U.S. 85, 86-87 [relevant "question is whether there is a reasonable possibility that the error complained of might have contributed to the conviction"].) If even one juror could have entertained a reasonable doubt that the murder was committed with premeditation and deliberation (and thus, first degree), the error is prejudicial. (See *People v. Mason* (2013) 218 Cal.App.4th 818, 826 ["The error is not harmless because, even if a properly instructed jury would not have voted to acquit . . . , the views of some jurors may have been swayed resulting in a hung jury"]; *People v. Brown* (1988) 46 Cal.3d 432, 471, fn. 1 (conc. & dis. opn. of Broussard, J.) [a different verdict can also be a hung jury which is a more favorable verdict].)

The ambiguous instruction on first degree deliberate and premeditated murder addressed the central disputed issue in the case. Appellant's guilt of the shooting was conceded at trial. (12 RT 2597-2598.) The sole question for the jury was the degree of murder: whether appellant committed first degree deliberate and premeditated murder or intentional

second degree murder. The prosecutor's theory was that knowing he was on probation, appellant deliberated and premeditated the murder to avoid a search and rearrest. (12 RT 2585.) The prosecutor argued that in the time appellant had to take his identification card out of his wallet during the encounter with Officer Niemi, appellant considered his acts, i.e. deliberated, and chose to kill. (12 RT 2588.) The defense theory was that appellant did not deliberate the shooting because he was heavily intoxicated and the shooting was a rash and impulsive act. (12 RT 2600-2603.) "An error that impairs the jury's determination of an issue that is both critical and closely balanced will rarely be harmless." (*People v. McDonald* (1984) 37 Cal.3d 351, 376, overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 912.)

The modification of CALCRIM No. 521 undercut appellant's theory of defense. Whether appellant deliberated went to the heart of the defense. Indeed, it was his only defense. Defense counsel focused exclusively on deliberation in his closing argument. (12 RT 2595-2609.) He argued that the jurors could not find first degree murder because appellant did not deliberate the shooting. (12 RT 2600.) He argued that deliberation was a "weighing process, a thoughtful clear-headed consideration." (12 RT 2601.) Defense counsel urged that deliberation was inconsistent with appellant being so drunk that he could not talk normally, drive a car, or stand without swaying. (12 RT 2601.) He argued that these facts meant that appellant did not think clearly enough to weigh the consequences – the difference between a few weeks in jail for a probation violation against the consequences of killing a police officer. (12 RT 2601-2602.) He argued that the murder was not the result of deliberation (12 RT 2602), and that appellant's irrationality was inconsistent with deliberation (12 RT 2604).

Defense counsel further argued to the jurors that motive for committing the shooting was not the same as deliberation. (12 RT 2607.) Finally, defense counsel argued that appellant failed to deliberate because his reason was impaired, his critical judgment was impacted by and his ability to organize his thoughts was weakened due to appellant's consumption of alcohol. (12 RT 2609.) The ambiguous instruction, which at best confused the definition of deliberation and at worst negated the element entirely, cut directly against the defense theory.

The evidence of premeditation and deliberation was closely balanced. Each piece of evidence relied upon by the prosecution to prove deliberation, and thus, first degree murder, left room for doubt. As a preliminary matter, the prosecutor argued that appellant arrived armed at the Heredia house, ready to kill. (12 RT 2587.) Although appellant carried weapons (10 RT 1969, 1997, 2043), there was no evidence that appellant had a pre-existing plan to shoot Officer Niemi. Appellant had not met Niemi prior to the shooting and did not know he would encounter Niemi that night. Further, by all accounts, appellant shot Niemi "out of the blue" suggesting the shooting was not pre-planned or thought out. (10 RT 2077; 12 RT 2455; 9 RT 1923, 1948, 1954.)

With regard to the shooting itself, the evidence relating to deliberation was susceptible of conflicting inferences. During the two minutes between Officer Niemi calling in the identifications and the shooting, appellant was drunk and fumbling with his identification card. (9 RT 1912, 1952; 10 RT 2010.) The prosecutor relied on appellant's fumbling with his identification (12 RT 2588), and argued that when fumbling with his identification card appellant was formulating a plan to shoot (12 RT 2588), but this evidence was susceptible of an interpretation

that appellant was so intoxicated he had difficulty retrieving his identification properly and thus did not deliberate the shooting as argued by defense counsel. (12 RT 2605.)

The prosecutor further pressed his case for a finding of deliberation by emphasizing appellant's rational-appearing post-crime actions and decisions. (13 RT 2615-2616, 2619.) Each instance – destroying evidence and cleaning himself up (13 RT 2620-2621), talking to witnesses to coordinate their story (13 RT 2621), having the presence of mind to think about explaining his identification at the scene and remembering that he shot a bullet into the wall of his bedroom (13 RT 2624), and stealing an inhaler from Safeway (12 RT 2591-2593) – did not necessarily foreclose doubt about appellant's thinking during the actual shooting.

While the prosecutor relied on evidence that appellant had the presence of mind to collect the identification cards (12 RT 2590), appellant failed to collect his own identification leaving doubt that appellant really had the presence of mind to deliberate the shooting. Further, as to appellant's stealing an inhaler at Safeway, the prosecutor argued that appellant was operating with roughly the same alcohol level as at the shooting and was thus not so intoxicated that he could not deliberate the crime. (13 RT 2621-2622.) Appellant's actions at Safeway, however, occurred at least an hour after the shooting. (P.Exh. No. 73.) The defense expert on forensic toxicology, Dr. Treuting, testified that absent intake of alcohol, the level of intoxication would go down because the body would be continuing to eliminate the alcohol. (12 RT 2537.) In addition, Treuting explained that an adrenaline rush during the crime could counteract the depressant effect of alcohol. (12 RT 2531.) Thus, appellant's actions at Safeway did not necessarily reflect that he deliberated the shooting and thus

also left room for doubt.

The prosecution's case that appellant deliberated the shooting rested heavily on his alleged motive. According to the prosecution's theory, appellant understood the consequences of being found with weapons and drugs and, after carefully considering and examining the reasons for and against shooting Officer Niemi, shot him to avoid being arrested and sent back to jail. (12 RT 2345.) The evidence supporting the prosecution's motive theory included that: (1) appellant volunteered that he was on probation during an arrest eight months before the shooting and thus, the argument went, he would have known that he was on probation during the encounter with Niemi; (2) after the shooting, appellant told Ewert he had a "search and seizure" clause; and (3) appellant also told Ewert that if the officer called in his name, he would be arrested because he had two guns and drugs on him. (12 RT 2345.) Ewert's credibility, however, was open to doubt because she repeatedly contradicted herself during her testimony (12 RT 2381-2382) and may have been motivated by a desire to avoid prosecution as an accessory to the crime (12 RT 2378). In short, the motive evidence was not overwhelming, and reasonable jurors could have rejected the prosecution's theory.

Counterbalancing the motive evidence, there was substantial evidence that appellant's state of heavy intoxication impacted whether he deliberated his choices in the moments before the shooting. Although the prosecutor attempted to minimize the degree of appellant's intoxication, there was undisputed evidence of appellant's drinking alcohol on the night of the shooting. When appellant arrived at the Vallejos' house that afternoon, he had already been drinking since earlier in the day. (12 RT 2486.) Once at the Vallejos' house, appellant celebrated his birthday by

drinking heavily from at least 3:00 p.m. until 9:15 p.m. (12 RT 2474, 2490.) During that time, appellant and Miranda drank a case of beer, or 24 cans or bottles (12 RT 2460, 2476), left the Vallejos' house to buy more beer, and stopped at a bar where they drank "a couple of beers" and smoked "a couple of joints" (12 RT 2477). Upon returning to the Vallejos' house, appellant drank approximately six beers (12 RT 2460), two shots of Remy, and two shots of Hennessy with each shot followed by "chugging" a beer, and also drank from another 12-pack of beer (12 RT 2461-2462, 2463).[25] At the end of the evening at the Vallejos' house, appellant was drunk, slurring his words, not standing "too straight," and loud. (12 RT 2463-2464, 2479, 2487.) After leaving the Vallejos' house, appellant went to his friend Arteaga's house. There, Arteaga observed that appellant was drinking from a Hennessy bottle, "wasted" and far from just having a "buzz on." (10 RT 2044, 2075-2077.) Later that evening, when Arteaga and appellant left for the Heredia house, appellant's driving was so erratic that Arteaga had to take over driving. (10 RT 2044, 2076-2077.)

Prosecution witnesses, Gonzales and Rangel, agreed that at the Heredia house, the scene of the shooting, appellant was drunk, drinking from a bottle of Hennessy, and slurring his words. (9 RT 1922, 1923, 1924, 1927, 1954.) There was no question that appellant was intoxicated, stumbling, slurring, unsteady on his feet, repeating his words and mumbling just before the encounter with Officer Niemi. (9 RT 1948-1951.) Heredia also testified that appellant had brought a bottle of Hennessy and was drinking from the bottle. (10 RT 1976-1978.)

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[25] Frank Vallejo testified that they drank from a 12-pack of beer, but Angel Miranda testified that they purchased a 12- or 18-pack of beer and brought that back home. (12 RT 2477.)

When asked for identification by Officer Niemi, appellant fumbled with his wallet while retrieving his identification card. (9 RT 1912, 1952; 10 RT 2010.) Niemi appeared to recognize that appellant was drunk (9 RT 1924) and commented that appellant seemed to be having a hard time (9 RT 1912; 10 RT 2080). Appellant remained intoxicated immediately after the shooting. According to Arteaga, appellant had not sobered up when they were at the marsh (10 RT 2095), and according to Ewert, appellant was intoxicated when he arrived home (12 RT 2374-2375). Although on direct-examination Ewert agreed with the prosecutor that appellant was coherent (12 RT 2373) and did not vomit or fall down (12 RT 2375-2376), on cross-examination, she testified that appellant smelled very drunk, was stumbling and told her that he had drunk half a bottle of Hennessy and half a bottle of "Remy something" (12 RT 2377).

The defense expert, Treuting, testified that appellant was intoxicated at the time of the shooting. (12 RT 2524.) Based on the amount of alcohol appellant consumed that night, Treuting would expect that appellant experienced a lack of critical judgment, confusion, diminished cognitive functions and ability to process information, heightened emotional response, and impulsivity. (12 RT 2401-2404, 2525-2554.)

In arguing that appellant's level of intoxication was not so great as to hinder deliberation, the prosecutor emphasized that appellant could drive (13 RT 2616), give directions, load a shotgun (13 RT 2617-2618), and fix a gun (12 RT 2588). While Heredia testified that appellant "took apart" the gun (10 RT 1973, 2011), Heredia's failures of recollection and prior inconsistent statements undercut his reliability. (See e.g., 10 RT 1973-1974, 1978-1980, 2001-2001, 2003-2004, 2008.) Further, no other witnesses corroborated Heredia on this point. Arteaga testified that

appellant was "checking out the bullets" (10 RT 2052), permitting reasonable doubt as to whether this evidence showed appellant's mental functioning was not impaired by his intoxication.

The testimony regarding appellant's statements after the shooting (10 RT 1986) was susceptible of conflicting interpretations that left room for doubt about appellant's deliberation. According to Officer Moreno, who investigated Officer Niemi's murder, Heredia told the police that when he and Arteaga asked appellant immediately after the shooting why appellant had shot Niemi, appellant said, "I don't know. I don't know." (12 RT 2451, 2457.) Heredia was consistent in this account, telling police three different times that appellant responded "I don't know" when asked why he shot Niemi. (12 RT 2457.)

Heredia, testified for the prosecution that after the shooting, when asked why he shot Niemi, appellant responded, "I was gone. I was gone. I was gonna go." (10 RT 1986.) Heredia testified that he thought that the expression referred to going to jail. (10 RT 1988.) On cross-examination, however, Heredia testified that he did not know what he told police about what appellant said after the shooting. (10 RT 2008.) Contradicting Heredia, Officer Moreno testified that he did not recall at any point Heredia reporting to police after the shooting that appellant responded, "I'm going, because I was going" or "because I'm gone." (12 RT 2457.)

Prosecution witness Arteaga testified that appellant said, "I was done" more than once when he and Heredia asked why appellant had shot Officer Niemi. (10 RT 2065.) Arteaga clarified on cross-examination that in stating he was "done," appellant was using slang to say he was going to be caught. (10 RT 2088.) The testimony, however, did not clarify whether appellant's alleged statement that he was "done" meant he thought he was

going to be caught when Niemi arrived because he had guns and drugs on his person or caught because he had just shot a police officer. On the basis of appellant's statements after the shooting, a reasonable juror could question the prosecution's theory of motive and find that appellant did not deliberate the crime or at least could conclude there was reasonable doubt as to the essential element of deliberation.

As outlined above, the evidence of appellant's deliberation was far from overwhelming. The jurors, applying the reasonable doubt standard, could have gone either way on the factual issue. As the high court has stated: "[W]here the defendant contested the omitted element and raised evidence sufficient to support a contrary finding – [the reviewing court] should not find the error harmless." (*Neder v. United States* (1999) 527 U.S. 1, 19.) This Court has agreed. (See *People v. Mil* (2012) 53 Cal.4th 400, 417-419 [removal of an element or other question from the jury is prejudicial under beyond-a-reasonable-doubt standard where evidence on that element is in conflict or susceptible of conflicting inferences].) The question is not whether there was sufficient evidence to support a finding of deliberation, but "whether any rational fact finder could have come to the opposite conclusion" in the absence of the ambiguous instruction. (*Id.* at p. 418, original italics.) The extensive expert testimony presented by appellant, as well as the lay evidence of appellant's day-long intoxication, and appellant's statement immediately after the shooting, show that the killing may have been committed in a rash, impulsive rather than deliberated manner. The evidence in this case did not so strongly support deliberation that, had the jury been correctly instructed, no reasonable juror could have found otherwise.

The prosecutor's argument regarding deliberation exploited the confusing instruction, which is a further factor showing prejudice. (See *People v. Lang* (1989) 49 Cal.3d 991, 1034, abrogated on other grounds by *People v. Diaz* (2015) 60 Cal.4th 1176, 1189; *People v. Roder*, *supra*, 33 Cal.3d at p. 503, fn. 13.) The prosecutor essentially told the jury that the fact that appellant was not required to have "maturely and meaningfully reflected" on the gravity of his acts meant the jury could find that appellant committed first degree premeditated and deliberate murder so long as he just knew what he was doing. (12 RT 2585.) This argument, which grossly distorted the deliberation element, was not an insignificant passing remark; it fully capitalized on the ambiguous instruction the prosecutor had requested. "Evidence matters; closing argument matters; statements from the prosecutor matter a great deal." (*United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323; see *People v. Godinez* (1992) 2 Cal.App.4th 492, 504 [prosecutor's argument aggravated the instructional error by exploiting the misleading instruction].)

In sum, the instructional error strongly affected the central disputed issue in the case, which was closely balanced and left room for doubt about whether appellant deliberated the shooting, undercut appellant's theory of defense, and was exploited by the prosecution. Thus, under the federal standard, the State cannot prove the error was harmless beyond a reasonable doubt. And under the state standard, without the error, there is a reasonable probability that at least one juror would have had a reasonable doubt whether appellant deliberated the shooting and would not have voted for a first degree murder conviction.

II. THE TRIAL COURT ERRED IN REFUSING TO GIVE APPELLANT'S INSTRUCTION ON REASONABLE DOUBT AS TO THE DEGREE OF MURDER

Disregarding 70 years of established law, the trial court declined to instruct the jury explicitly as to reasonable doubt as to degree of murder and the jury's duty to give appellant the benefit of that doubt. The failure to instruct as appellant requested violated both state law and the federal Constitution. In a case where the degree of murder was the only issue, and there was room for reasonable doubt as to first degree murder, this error was especially harmful and hindered the jurors from giving effect to any doubt they may have had about first degree murder. Reversal of the entire judgment is required.

A. Appellant Requested An Instruction On Reasonable Doubt As To Degree Of Murder

As noted in Argument I, appellant was convicted of and found death-eligible on one count of first degree murder of a police officer. The prosecution proceeded solely on the theory that the murder was deliberate and premeditated first degree murder (12 RT 2582), and the jury was instructed on that theory, and only that theory, of first degree murder (12 RT 2561-2578; 4 CT 919-950.) Appellant's entire defense was that, due to being intoxicated, he shot Officer Niemi rashly and impulsively, but did not deliberate the shooting, and thus was guilty of no greater crime than second degree murder. (12 RT 2600-2603.) Although whether appellant deliberated the murder was sharply contested, the evidence would have permitted the jury to return a verdict of second degree, rather than first degree, murder. For this reason, the instruction telling the jury how to resolve doubts as to whether the homicide was first degree murder or second degree murder was crucial to an accurate and reliable determination

of appellant's guilt.

The jury was given the CALCRIM instructions. At a hearing on the proposed jury instructions, defense counsel requested that the trial court either instruct the jury under CALJIC No. 8.71 or incorporate the language of CALJIC No. 8.71 into CALCRIM No. 521 as follows:

> 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, as well as a verdict of not guilty of murder in the first degree.

(3 CT 867-868; 12 RT 2503.) The trial court denied the request, concluding that the instruction was already covered in the CALCRIM instructions. The trial court stated:

> We also -- oh, you requested a further instruction in the language of caljic 8.71, which tells the jury that if they're convinced -- if they're unanimously convinced beyond a reasonable doubt it's murder, but they unanimously agree there's a reasonable doubt whether it was first or second, they must give the defendant the benefit of the doubt and find it second. I know you like that language, but the CALCRIM instructions tell the jury that, not in those exact words, but I think the subject is adequately covered, and this would simply be repeating something that's already in there, so I'm not giving that.

(12 RT 2502-2503.)

Appellate review of instructional error is de novo. (*People v. Waidla* (2000) 22 Cal.4th 690, 733; *People v. Alvarez* (1996) 14 Cal.4th 155, 217.)

B. The Trial Court's Refusal To Instruct That The Jury Must Give The Defendant The Benefit Of Any Reasonable Doubt Whether The Murder Was First Degree Or Second Degree Violated Both State Law And The Federal Constitution

Under longstanding California law, "when the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense." (*People v. Dewberry* (1959) 51 Cal.2d 548, 555 ("*Dewberry*"); see *People v. Lee* (2011) 51 Cal.4th 620, 656 [quoting principle].) This rule is – and since 1872 has been – codified in section 1097.[26] As applied to murder, the rule makes clear both that the State has the burden of proving beyond a reasonable doubt that the murder was first degree rather than second degree, and that when there is reasonable doubt as to the degree of murder, the jury has a duty "to give defendant the benefit of the doubt and find him guilty of second degree murder." (*Dewberry*, *supra*, 51 Cal.2d at p. 554; see *People v. Morse* (1964) 60 Cal.2d 631, 657 [stating principle].)[27]

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[26] Since its adoption section 1097 has provided:

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

[27] The rule that a criminal defendant is entitled to the benefit of a jury's reasonable doubt with respect to all crimes with lesser degrees or related or included offenses is sometimes referred to as the "Dewberry principle" (see *People v. Friend* (2009) 47 Cal.4th 1, 55). However, with

(continued...)

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

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[27] (...continued)
regard to instructing on reasonable doubt as to the degrees of murder, that requirement was part of established California law before *Dewberry* extended it to reasonable doubt whether the homicide was murder or manslaughter. (See CALJIC No. 305-A (1946); CALJIC No. 305-A Revised (1958).)

due process clause].)

1. In Violation of Longstanding Law, the Jury Was Not Explicitly Instructed That it Must Give the Defendant the Benefit of Any Reasonable Doubt about the Degree of Murder

Appellant's jury was not instructed generally on the effect of reasonable doubt as to the degree of offense (§ 1097) or specifically on the effect of reasonable doubt as to the degree of murder. The trial court instructed the jury with CALCRIM No. 521, but refused to instruct on the *Dewberry* principle. Although the conversion table for CALJIC and CALCRIM instructions indicates that the substance of CALJIC No. 8.71 is now contained in CALCRIM No. 521 (Judicial Council of California Criminal Jury Instructions (2006-2007), Table 1 of Related Instructions: CALJIC to CALCRIM, p. TRI-4), CALCRIM No. 521 does not deliver the same message. The last portion of CALCRIM No. 521 given to appellant's jury stated:

> The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you may not find the defendant guilty of first degree murder.
>
> And any murder which is not proven to be of the first degree is murder of the second degree.

(12 RT 2572; 4 CT 937 [CALCRIM No. 521].)[28]

This language did state that the prosecution has the burden of proof

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[28] In CALCRIM No. 521, the paragraph placed last in the instruction to appellant's jury is the penultimate paragraph, preceding the paragraph that begins "The People have the burden of proving beyond a reasonable doubt . . . ."

on whether the killing was first degree or a lesser crime. But the given instruction did not explain the important consequences flowing from this principle: (1) the jurors could find beyond a reasonable doubt that the defendant was guilty of murder, but still could have a reasonable doubt as to the degree of murder; and (2) if the jurors had such a reasonable doubt as to the degree of murder, they had to give the defendant the benefit of that doubt by convicting him of second degree murder and acquitting him of first degree murder. In comparison, the language requested by defense counsel, articulated both points. (3 CT 867-868; see *ante*, at p. 72 [setting out the requested language of CALJIC No. 8.71].)[29]

Certainly, these principles about doubt as to the degree of murder may be implicit in CALCRIM No. 521's final paragraph on the prosecution's burden of proving first degree murder beyond a reasonable doubt. But the instruction requested by appellant, consistent with California law stretching back 70 years, did not leave the job of inferring them to the jury. (See, e.g., CALJIC No. 305-A (1946); CALJIC No. 305-A Revised

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[29] In 2011, after the trial in this case, this Court in *People v. Moore* (2011) 51 Cal.4th 386, 409, disapproved the language in CALJIC No. 8.71 requiring a unanimity of doubt, which had been added to the instruction in 1996, and the instruction has been amended to exclude that language. But the jury's duty to give the defendant the benefit of doubt as to the degree of murder remains California law. The instruction after *Moore* read and still reads:

> 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 the defendant the benefit of that doubt and find that the murder is of the second degree.

(CALJIC No. 8.71 (Fall 2015 Edition).)

(1970); CALJIC No. 8.71 Third Edition (1970); CALJIC No. 8.71 (Fall 2015 Edition). Instead, as made clear in *Dewberry*, these rules are so important that they require express statement to the jury. (See *Dewberry*, *supra*, 51 Cal.2d at p. 554.)[30]

The reason for requiring an explicit instruction on the benefit of the doubt principle as to the degree of murder lies in two factors – the consequences of conviction and the nature of doubt as to the degree of a crime. Obviously, conviction of a greater degree of an offense carries a more severe sentence. (See, e.g., §§ 459-461 [burglary] and § 212.5 [robbery].) In all criminal prosecutions, there is a fundamental public interest in juries returning accurate verdicts: a defendant should be punished for the crime he committed, not for a greater crime he did not commit. (See *People v. Breverman* (1998) 19 Cal.4th 142, 155 [sua sponte duty to instruct on lesser included offenses encourages a verdict no harsher or more lenient than evidence merits and thus protects jury's "'truth-ascertainment function'"].) With regard to murder, that concern carries added urgency because the distinction between first degree murder and second degree murder may spell the difference between a capital and noncapital conviction, even though an additional fact – a special circumstance – must

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[30] In *Dewberry*, the trial court gave both the general instruction as to reasonable doubt about the degree of the offense (*Dewberry*, *supra*, 51 Cal.2d at p. 554 [quoting CALJIC No. 115-A (1946)]) and the specific instruction as to reasonable doubt whether the murder was first or second degree (*ibid.* [setting out the instruction given under CALJIC No. 305-A (1946)]). The trial court also instructed on reasonable doubt whether the killing was manslaughter or justifiable homicide. (*Ibid.*) In *Dewberry*, the Court extended the requirement of an explicit instruction on reasonable doubt to the question whether the homicide was second degree murder or manslaughter. (*Id.* at p. 557-558.)

be proved to establish death eligibility. (§ 190.2; *People v. Bacigalupo* (1993) 6 Cal.4th 457, 468 [special circumstances performs narrowing function that determines death-eligibility].) As the high court has warned, the risk of unwarranted conviction of a greater rather than lesser homicide crime "cannot be tolerated in a case in which the defendant's life is at stake." (*Beck v. Alabama* (1980) 447 U.S. 625, 637.) Instruction on the *Dewberry* principle as set forth in the instruction requested by defense counsel guards against that risk.

This case illustrates the point. Appellant was charged with willful, deliberate and premeditated first degree murder with two special circumstance allegations – murder of a peace officer (§ 190.2, subd. (a)(7)) and murder to avoid arrest (§ 190.2, subd. (a)(5)). As noted previously, the only disputed question at trial was whether he deliberated and premeditated the killing. During the guilt-phase closing argument, defense counsel conceded that appellant was guilty of killing Officer Niemi (12 RT 2597), who was a police officer engaged in the performance of his duties (12 RT 2598). He told the jury that the issue was "the degree of murder" and conceded that appellant shot Niemi with an intent to kill. (12 RT 2598.)[31]

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[31] Defense counsel argued:

> Mr. Ramirez was responsible for the terrible, tragic death of Officer Niemi . . .
>
> The issue in this case is the degree of the murder. It has nothing to do with malice, express or implied. It has nothing to do with whether this is a murder. There's no question that Officer Niemi was a police officer in the performance of his duties . . . .
>
> Willful, simply means he intended to kill Officer

(continued...)

He did not concede, but did not press, the question of premeditation. (12 RT 2599.) However, he vigorously argued that the prosecution had not proved beyond a reasonable doubt that appellant deliberated the killing. (12 RT 2600-2610.) Therefore, under the facts of this case, the jury's fixing the degree of murder determined not just appellant's criminal liability, but whether he was death-eligible. A first degree murder conviction subjected him to a possible death sentence, while a second degree murder conviction would preclude the death penalty. Given that degree setting was the only contested issue in this case, it was imperative that the jury understand the effect of reasonable doubt on that question.

At the same time, applying the reasonable doubt principle to the question of the degree of murder is less obvious than applying it to the question whether the defendant is guilty or not guilty of a crime without degrees. If the prosecution does not prove all elements of the crime beyond a reasonable doubt, the jury must acquit. The prosecution has not overcome the defendant's presumption of innocence. The reasonable-doubt principle, however, is more subtle when the jury's choice is not between conviction or acquittal, but rather between degrees of guilt. If jurors find beyond a reasonable doubt that the defendant is guilty of murder, they may think that the prosecution has overcome the defendant's presumption of innocence and may not appreciate that the requirement of proof beyond a reasonable doubt still applies to its determination whether the murder is first degree or

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[31] (...continued)
> Niemi and I'm not making an issue of that. When you unload a gun into somebody, that's pretty good evidence of intent to kill. Not an issue.

(12 RT 2597-2598.)

second degree. To avoid that risk, for nearly three-quarters of a century California law has mandated that trial courts, like that in *Dewberry*, explicitly inform jurors that if they have a reasonable doubt as to the degree of murder, "they should give defendant the benefit of the doubt and find him guilty of second degree murder." (*Dewberry*, *supra*, 51 Cal.2d at p. 554; see CALJIC No. 8.71 [implementing the rule].)

Despite the longstanding and well-supported rule requiring the trial court to instruct the jury that it must give the defendant the benefit of the doubt as to the degree of murder, appellant's jury was not given this important instruction.

2. The Other Instructions Did Not Inform the Jury of its Duty to Give Appellant the Benefit of a Reasonable Doubt as to the Degree of Murder by Returning a Verdict of Second Degree Murder

Given the importance of the jury's degree determination and the risk that the jury may not have understood the effect of a reasonable doubt as to the degree of murder, it was imperative that the trial court expressly instruct the jury on its duty to give appellant the benefit of a reasonable doubt as to whether the murder was first degree or second degree. To be sure, "'[t]he correctness of jury instructions is to be determined from the entire charge to the jury and not from a consideration of parts of an instruction or from a particular instruction.'" (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016, quoting *People v. Burgener* (1986) 41 Cal.3d 505, 538.) In this case, the trial court was incorrect in concluding that reasonable doubt as to the degree of murder was "adequately covered" by the given instructions. (12 RT 2503.) None of them addressed the two points covered by the requested instruction, but omitted from CALCRIM No. 521.

First, although the jury was instructed on the general principle of proof beyond a reasonable doubt, CALCRIM No. 220 (4 CT 921), this instruction did not explain "the effect of reasonable doubt" as to the degree of murder, which has been required under state law for more than seven decades. (See *Dewberry*, *supra*, 51 Cal.2d at p. 557.) Thus, an instruction on reasonable doubt was not enough to convey that the jury could have a reasonable doubt as to the degree of murder and must give appellant the benefit of that doubt.

Second, the instruction on voluntary intoxication given in this case, CALCRIM No. 625, only addressed first degree murder. The instruction stated in pertinent part: "You may consider evidence of voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill or with deliberation and premeditation." (4 CT 938; 12 RT 2573.) Thus, this instruction did not inform the jury of its duty to give appellant the benefit of any doubt as to the degree of murder.

Third, the instruction on the union of act and intent, CALCRIM No. 252, did not address the reasonable-doubt-as-to-degree and benefit-of-the-doubt principles. (4 CT 946-947; 12 RT 2577.) CALCRIM No. 252 stated in pertinent part: "In order to be guilty of the crime of murder or these special allegations, a person must not only intentionally commit the prohibited act, but must do so with a particular mental state." (4 CT 946; 12 RT 2577.) CALCRIM No. 252 simply addressed the fact that a defendant must act with a particular mental state. It said nothing about what a juror was to do if she had a reasonable doubt as to the particular mental state required.

Fourth, the jury was not given any of the instructions that in *People*

v. Friend (2009) 47 Cal.4th 1, this Court found adequate to convey the principles set forth in CALJIC No. 8.71. In *Friend*, the instructions given by the trial court omitted CALJIC No. 8.71, but the jury was instructed with CALJIC No. 17.10, which stated that if the jury was not satisfied beyond a reasonable doubt that defendant was guilty of first degree murder, it could convict him of a lesser offense – and specified either second degree murder or voluntary manslaughter as the possible lesser offenses – if it was convinced beyond a reasonable doubt that he was guilty of that lesser offense. (*Id.* at pp. 55-56.) The Court also pointed to two other instructions: a modified CALJIC No. 8.79 on reasonable doubt as to the specific intent for the crime underlying felony murder, and a modified CALJIC No. 4.21, which discussed voluntary intoxication in the context of reasonable doubt whether the defendant formed the specific intent or mental state required for the crime. (*Id.* at p. 56.) These instructions informed the jury of "the general principle that if, from all the evidence, it had a reasonable doubt whether the defendant formed a specific intent or mental state, it must give him the benefit of that doubt and find he did not have that specific intent or mental state." (*Ibid.*)

In light of these instructions, the Court held "despite the court's omission of CALJIC No. 8.71, the jury would have understood that the *Dewberry* benefit of the doubt principle was equally applicable both to the choice between first and second degree murder, and the choice between murder and manslaughter." (*People v. Friend*, *supra*, 47 Cal.4th at p. 56; see also *People v. Gonzalez* (1983) 141 Cal.App.3d 786, 793-794 [CALJIC Nos. 17.10 and 17.11 express the *Dewberry* concept]; *People v. St. Germain* (1982) 138 Cal.App.3d 507, 520-522 [CALJIC No. 17.10 adequately conveys *Dewberry* principle].) Appellant's jury was not given the

CALCRIM counterparts to any of these instructions, so the conclusion reached in *Friend* cannot be reached here.[32]

Fifth, the instruction under CALCRIM No. 225, which addressed circumstantial evidence as to intent or mental state, did not convey the *Dewberry* principle contained in appellant's requested instruction. The instruction stated in pertinent part:

> If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the defendant did have the required intent or mental state and another reasonable conclusion supports a finding that the defendant did not, you must conclude that the required intent or mental state was not proved by the circumstantial evidence.

(4 CT 946-947; 12 RT 2577-2578.) This instruction provided a form of benefit-of-the-doubt rule when the jury considers "circumstantial evidence that the prosecution offers to prove a defendant's intent or mental state." (*People v. Contreras* (2010) 184 Cal.App.4th 587 [discussing instruction].) However, it did not tell the jury to give appellant the benefit of any reasonable doubt as to the degree of murder – the sole question in this case.

As shown above, the instructions read together did not tell the jurors

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[32] What appears to be the counterparts to CALJIC No. 17.10 and 17.11, are now CALCRIM Nos. 3517 and 3518, but these instructions are expressly for non-homicide offenses and were not given in this case. (Judicial Council of California Criminal Jury Instructions (2006-2007), Table 1 of Related Instructions: CALJIC to CALCRIM, p. TRI-10.) Further, additional counterparts to CALJIC Nos. 17.10 and 17.11, CALJIC Nos. 8.74 (Unanimous Agreement As To Offense – First Or Second Degree Murder Or Manslaughter) and 8.75 (Jury May Return Partial Verdict Homicide) are now CALCRIM Nos. 640 and 641, but these instructions address the procedure for completing the verdict forms in a homicide case, and were not given in this case.

that they must give appellant the benefit of any reasonable doubt as to the degree of murder and return a verdict of second degree murder. The trial court's refusal to instruct on the *Dewberry* principle as appellant requested is just as stark as the error found in *Dewberry* itself. As noted *ante* (see page 77, footnote 30), in *Dewberry* the trial court not only instructed on the "duty to convict [the defendant] only of the lesser offense" if the jury had reasonable doubt as to the degree of the crime, but also instructed specifically on the operation of the benefit of the doubt rule as to degrees of murder and as to whether the killing was manslaughter or justifiable homicide. (*Dewberry*, *supra*, 51 Cal.2d at p. 554.) This Court found that the trial court's refusal to instruct similarly with regard to reasonable doubt as to whether defendant was guilty of second degree murder and manslaughter was error because the omission "left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder." (*Id.* at p. 557.)

In *Dewberry*, an incomplete instruction about the benefit of the doubt rule – though only a partial omission – was held to be error because it risked that the defendant was wrongly convicted of second degree murder rather than manslaughter. In this case, there was total omission of an instruction on the benefit-of-the-doubt rule in deciding between guilt of first degree and second degree murder. The error here left the jury ignorant of its duty to convict only on the lesser offense, if it had reasonable doubt in making the only choice before it – whether defendant committed a death-eligible first degree murder or a non-death-eligible second degree murder. The trial court's refusal to give the requested benefit of the doubt instruction in this case is just as much error as was the trial court's refusal

to give the requested benefit-of-the-doubt instruction in *Dewberry*.

3. The Trial Court's Error Violated the Federal Constitution

Refusing to instruct the jury with the *Dewberry* principle also violated the federal Constitution. As outlined in section B, a defendant has the constitutional right not to be convicted except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. (*Winship*, *supra*, 397 U.S. at p. 364; accord, *Cage v. Louisiana*, *supra*, 498 U.S. at pp. 39-40.) Further, this burden of proof is on the prosecutor. (*Winship*, *supra*, 397 U.S. at p. 361.) In this case, the lack of a jury instruction on reasonable doubt as to the degree of murder and the duty of the jurors to give appellant the benefit of the doubt may have led the jurors to convict appellant on less than reasonable doubt as to every fact necessary to constitute first degree deliberate and premeditated murder in violation of this fundamental constitutional guarantee. In failing to instruct on the *Dewberry* principle, the trial court thus lightened the prosecutor's burden. By compromising the reasonable doubt standard and lightening the prosecution's burden of proof, the trial court's error violated appellant's due process and jury trial guarantees. (U.S. Const., 6th & 14th Amends.)

C. The Error Requires Reversal Of The Entire Judgment

In *Dewberry*, this Court applied the state law *Watson* standard of prejudice in assessing the instructional error. (*Dewberry*, *supra*, 51 Cal.2d at p. 558; *People v. Watson* (1956) 46 Cal.2d 818, 836 [where trial court error violates state law, reversal is required when appellant establishes a reasonable probability that he would have obtained a more favorable result in the absence of the error].) Federal constitutional error must be judged

under the *Chapman* standard of prejudice, which requires the State to prove the error harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Whether considered under the state law standard or the federal constitutional standard, the error here was not harmless.

The failure to instruct the jurors regarding reasonable doubt as to the degree of murder and their duty to give appellant the benefit of any such doubt was prejudicial. As set forth in Argument I, Section E *ante*, at pages 60-70 and incorporated by reference here, the sole disputed issue for the jury was the degree of murder, and the evidence allowed for at least one juror to entertain a reasonable doubt as to appellant's guilt of first degree murder. Thus, the error in this case had a direct bearing on the primary question the jury was to decide – a question that could subject appellant to a death sentence.

The prosecutor's case for first degree murder relied on appellant's motive (12 RT 2345), post-crime actions and statements (13 RT 2615-2616, 2619), and conflicting testimony regarding his degree of intoxication (12 RT 2588; 13 RT 2616-2617). Defense counsel focused exclusively on the lack of deliberation, arguing that appellant did not deliberate the crime because his reason, critical judgment and his thinking were impaired by his heavy consumption of alcohol prior to the shooting. (12 RT 2595-2609; see *People v. Randle* (2005) 35 Cal.4th 987, 1003-1004 [failing to instruct on doctrine of imperfect defense of others, central issue in case, was prejudicial], overruled on other grounds in *People v. Sarun Chun* (2009) 45 Cal.4th 1172.)

In contrast to the picture the prosecutor painted, a juror could have questioned the prosecution's evidence of deliberation. The prosecutor himself acknowledged in his closing argument that there was room for

doubt on the only contested issue – deliberation: "Officer Niemi was executed *but as far as the deliberation and premeditation, that may not be totally clear to you from just seeing what happened.*" (12 RT 2590, italics added.) As set forth in Argument I, Section E *ante*, at pages 60-70, this was a closely balanced case on deliberation. Each piece of evidence relied on by the prosecutor to show deliberation left ample room for doubt as to the degree of murder, and the evidence did not unerringly show that the shooting was first degree murder as opposed to second degree murder. Thus, failing to instruct that the jury must give appellant the benefit of a reasonable doubt as to the degree of murder by convicting him of second degree murder and acquitting him of first degree murder mattered greatly in this case.

In closing argument, defense counsel did not discuss the rule giving the defendant the benefit of a reasonable doubt as to the degree of murder. The prosecutor also did not address the possibility of doubt as to the degree of murder or what the jurors should do if they were convinced appellant committed murder, but were uncertain whether the evidence established first degree. Instead, the prosecutor's argument on the "maturely and meaningfully reflected" language in CALCRIM No. 521 (see Argument I, Section C *ante*, pp. 52-53), which conflated deliberation with "they just have to know what it is they're doing" (12 RT 2585), further compounded the confusion about what he must prove for first degree deliberate and premeditated murder and the harm to appellant resulting from the failure to instruct on the *Dewberry* principle. The combination of the prosecutor's argument equating deliberation with knowingly acting and the failure to inform the jurors about what they must do if they had a reasonable doubt as to the degree of murder, left the jurors without guidance on the application

of the bedrock reasonable doubt requirement to the central, disputed question at trial.

In sum, as set forth in Argument I, Section E *ante*, at pages 60-70, all the circumstances marshaled by the prosecutor in his closing argument to persuade the jurors that appellant had committed the charged murder with premeditation and deliberation still would have allowed a juror to entertain a reasonable doubt about whether appellant deliberated the murder or whether appellant, due to his intoxication, committed a rash, intentional, but not deliberated action. Under *Watson*, there is a reasonable probability that had the jury been instructed regarding the *Dewberry* principle, a juror could have given appellant the benefit of the doubt to which he was entitled, and vote for a lesser offense. Similarly, under *Chapman*, the State cannot prove the error harmless beyond a reasonable doubt. Appellant's conviction, special circumstance and special allegation findings and death sentence must be reversed.

III. THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION TO LIMIT UNIFORMED POLICE OFFICERS AS SPECTATORS DURING GUILT PHASE JURY INSTRUCTIONS AND CLOSING ARGUMENTS

Over appellant's objection, the trial court allowed 17 or 18 uniformed San Leandro police officers as spectators in the courtroom during the guilt-phase reading of jury instructions and closing arguments. The presence of so many uniformed police officers, who carried the authority of public officials, during a key juncture of the trial was inherently prejudicial. The trial court's refusal to take steps to balance the rights of appellant and the rights of the spectators and to eliminate any impermissible influence on the jury violated state law and appellant's federal constitutional rights to a fair trial, due process, and reliable guilt and penalty verdicts. Reversal of the entire judgment is required.

A. The Trial Court Denied Appellant's Repeated Requests To Limit Uniformed Officers As Spectators

Prior to the commencement of trial, defense counsel filed a motion requesting an order prohibiting police officers in uniform as spectators in the courtroom during trial. (3 CT 614-618.) Defense counsel asserted that several San Leandro police officers had been attending pretrial hearings and that their continued presence in uniform during the trial when jurors or potential jurors were present would affect appellant's right to a fair trial. (3 CT 614.) Additionally, defense counsel argued that there was a substantial likelihood that jurors would view the presence of uniformed police officers as implicit support for the prosecution and victim, and as "implicit advocacy for the jury to convict the defendant and condemn him to death," which would violate appellant's federal constitutional rights to a fair trial,

the presumption of innocence and the right to confront and cross-examine witnesses. (3 CT 615-616.) Defense counsel moved "that any police officer who as a spectator at any stage of the trial when a juror or prospective juror is present be ordered to wear civilian clothing and no visible badge or other sign of his or her occupation, and to refrain from exhibiting any support for or animus toward either party." (3 CT 615.)

At a brief hearing on the issue, the trial court denied the motion. (2 RT 37.) The trial court reasoned that such an order would not be necessary because the jurors would know immediately that the trial was about the murder of a police officer. (2 RT 38.) The trial court indicated that the parties could re-raise the issue if it became a problem at trial. (2 RT 39.)

At the conclusion of the guilt phase, before the trial court read jury instructions and before closing arguments by the parties, defense counsel again raised the issue of uniformed police officers as spectators in the courtroom. (12 RT 2610.) The uniformed police officers were present in the gallery throughout the morning session. (12 RT 2611.) The motion was made and considered off the record. (12 RT 2610-2611.) After the trial court read the jury instructions, the prosecutor gave his opening closing argument and defense counsel gave his closing argument, but before the prosecutor's rebuttal argument, defense counsel memorialized his renewed objection on the record. (12 RT 2610.)

Defense counsel stated for the record that the gallery was full of people and included 17 or 18 uniformed San Leandro police officers. (12 RT 2610.) Neither the prosecutor nor the trial court disputed this number. Defense counsel also explained that one juror was unable to use the stairs to get up to the jury room and had to go through the gallery. (12 RT 2610.) Defense counsel argued that the extensive presence of uniformed officers in

the gallery was coercive and should have been controlled – as requested by defense counsel earlier in the day – either by limiting the number of uniformed officers or somehow ameliorating their effect. (12 RT 2610.) Defense counsel argued it was unduly prejudicial to appellant to have so many uniformed officers in the gallery during instructions and closing arguments. (12 RT 2611.)

In response, the trial court stated that he did not observe any undue prejudice to appellant because it was well known that the case involved the murder of a police officer. (12 RT 2611.) The court further noted that the gallery was arranged so there were no uniformed police officers in the front row making them more prominent. (12 RT 2611.) Defense counsel corrected the trial court's description of where the uniformed officers were sitting. The front row on the defense side of the courtroom had a "fair amount" of uniformed police officers. (12 RT 2611.) The trial court agreed with defense counsel and clarified that the row directly behind the bailiff was fully occupied by uniformed police officers, but that there was nobody in the front row behind the alternate jurors. (12 RT 2612.) The trial court noted that he had changed that arrangement and placed appellant's family in the front row behind the bailiff and put non-uniformed people in the front row which had been vacant behind the jurors. (12 RT 2612.)

The trial court's corrected understanding of the location of the uniformed officers, however, did not change its ruling. (12 RT 2612.) The court concluded that the presence of uniformed police officers in the gallery was not unduly prejudicial to appellant. (12 RT 2612.) In addition, the trial court noted that it had witnessed no conduct which the court would consider "to be intimidating . . . or being intended to or having an effect of drawing attention to the uniforms in the courtroom." (12 RT 2612.) The trial court

found that the uniformed police officers had simply been present. (12 RT 2612.)

B. The Trial Court Abused Its Discretion In Permitting 17 Or 18 Uniformed Officers As Spectators

Under California law, it is the duty of the judge to control the courtroom proceedings during trial. (§ 1044.)[33] The trial court has broad discretion in this regard, and its discretion is upheld on appeal absent an abuse of discretion. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1269.)

The trial court in this case abused its discretion in permitting 17 or 18 uniformed police officers to remain in the gallery as the guilt phase drew to an end. The officers were present as spectators, not as courtroom security. Appellant does not dispute that the police officers, as members of the public, had a right to attend the trial. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1298 ["[t]he right to a public trial is not that of the defendant alone"].) The question is whether they should have been permitted to attend in their police uniforms. The error here was the trial court's failure to exercise its discretion by balancing the rights of the public, including the police officers, to attend trial and appellant's right to a fair trial. (*Id.* at pp. 1298-1299.) The trial court here did not see that there was anything to balance. It focused solely on the uniformed officers' right to attend the trial and disregarded any possible prejudice to appellant's fair trial rights from

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[33] Section 1044 states:

> It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.

having a dozen and a half of Officer Niemi's colleagues, clearly identified as police officers by their uniforms, in plain view of the jury at the close of the guilt phase. "A trial court's failure to exercise discretion is itself an abuse of discretion . . ." (*In re Marriage of Gray* (2007) 155 Cal.App.4th 504, 515.)

The trial court's reasons for denying appellant's renewed motion do not justify its refusal to take any ameliorative action. The court's first reason – "it's not a secret that this is a case involving the killing of a peace officer" (12 RT 2611) – was not responsive to the motion. Defense counsel's concern was not that the presence of the uniformed officers would reveal a fact the jury did not know. Rather, the concern was the implicit message the presence of so many uniformed officers conveyed to the jury.

The trial court's second reason answered this concern, but its ruling – that the presence of 17 or 18 uniformed San Leandro police officers in the gallery was not "unduly prejudicial to the defendant" (12 RT 2612) – was mistaken. To be sure, as the trial court found, there was no indication that the uniformed officers behaved inappropriately before the jury. (See 12 RT 2612.) But that is not dispositive. The objection was that the very fact of having 17 or 18 uniformed police officers in the courtroom in plain view of the jurors during jury instructions and closing arguments, when the jury was being charged with its decision-making and about to begin its deliberations, risked unduly influencing the jury to appellant's detriment. (See *State v. Gevrez* (Ariz. 1994) 148 P.2d 829, 833 ["The best witness in a trial sometimes never takes the witness stand; the greatest influence often comes from the unsworn person who is allowed to parade before the jury"].) That there was no improper conduct on the part of the uniformed officers did not eliminate the prejudice inherent in their presence.

There can be little doubt that the officers, dressed in their police uniforms, presented an unmistakable symbol of official, governmental authority. (See *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 206 [a uniform is one of the visible symbols of the formidable power given to police officers]; *State v. Jones* (Fla. 1986) 483 So.2d 433, 439 [with regard to sobriety checkpoints, court recognizes police uniforms as "[v]isible signs of authority"]; *Duncan v. State* (1982) 163 Ga.App. 148, 149 ["[t]he public knows the [police] uniform and the badge stand for the authority of the government"].) Looking out at the mass of uniformed officers in the courtroom, a reasonable juror likely would feel she was being scrutinized by the San Leandro police force. The unspoken message was not subtle: "We are watching what you do." There could be no question where the officers sympathies lay. Their very presence was a show of support for their slain colleague, Officer Niemi, that silently communicated to the jurors that they should convict appellant. Because defense counsel conceded that appellant was guilty of murder (12 RT 2597), the only decision for the jury was whether to convict appellant of death-eligible first degree murder or non-death-eligible second degree murder. And given the evidence, first degree deliberate and premeditated murder was not a foregone conclusion. (See Argument I, Section E *ante*, pp. 63-69.) In this context, the clear signal being sent by the presence of the uniformed officers was, as defense counsel indicated in his original motion, to convict appellant of first degree deliberate and premeditated murder and condemn him to death. (3 CT 614.) The Eleventh Circuit reached a similar conclusion in its habeas review of a Florida death judgment:

> The officers in this case were there for one reason: they hoped to show solidarity with the killed correctional officer. In part,

> it appears that they wanted to communicate a message to the jury. The message of the officers is clear in light of the extensive pretrial publicity. The officers wanted a conviction followed by the imposition of the death penalty. The jury could not help but receive the message.

(See *Woods v. Dugger* (11th Cir. 1991) 923 F.2d 1454, 1459, footnote omitted.)[34]

As this Court has stated: "It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment." (*People v. Lucero* (1988) 44 Cal.3d 1006, 1023 [recognizing that "the presumption of prejudice from jury contact with inadmissible evidence is even stronger in the context of a capital case" but holding no abuse of discretion in denying mistrial for isolated spectator outburst].) In denying appellant's motions outright, the trial court did not even attempt to balance appellant's interest in a trial free from impermissible influences and the competing interests of the police spectators to attend the trial. The court did not consider requesting or suggesting that the officers wear civilian clothes or limiting the number of officers in uniform. (See, e.g., *Phillips v. State* (Alaska Ct.App. 2003) 70 P.3d 1128, 1137-1138 ["appearance of law enforcement officers en masse in the spectator gallery posed a threat that the jurors would feel implicit pressure to return a verdict favorable to law enforcement interests or sentiment," but no error where trial court limited number of uniformed officers to five].) The seating arrangement did little to shield the jury from

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[34] This case too received extensive pretrial publicity. (See 2 RT 78 [trial court found the case received a significant amount of publicity but denied appellant's request for sequestered voir dire of the prospective jurors].)

the impact of the law enforcement presence. Uniformed officers occupied the front row on the defense side of the courtroom (12 RT 2611), and one juror still had to pass through the gallery with the uniformed officers to get to the jury room (12 RT 2610).

With regard to possible spectator misconduct, an admonition is generally assumed to cure the problem. (*People v. Hill* (1992) 3 Cal.4th 959, 1002, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; see *People v. Houston* (2005) 130 Cal.App.4th 279, 316 [trial court admonished jury twice upon being informed of spectators' display of victim's image which was considered sufficient to cure or mitigate against any inherent prejudice caused by claimed due process violations at trial].) Yet, the trial court did not say anything to the jurors about the obvious presence of 17 or 18 uniformed police officers in the courtroom. The only pertinent instruction the jury received was the standard directive not to let public opinion influence its decision. (4 CT 919; 12 RT 2561.) In sum, the trial court abused its discretion in denying appellant's renewed motion to limit the presence of uniformed officer in the courtroom on the day of jury instructions and closing arguments at the guilt phase.

This Court's holding in *People v. Cummings*, *supra*, 4 Cal.4th at p. 1298, does not require a different result. In *Cummings*, the defendant objected to the presence of an unspecified number of uniformed police officers in attendance at trial and argued that the trial court abused its discretion in permitting *any* uniformed officers to attend the trial as spectators. (*Ibid.*) Appellant's motion at trial and claim on appeal is not so broad or absolute. In *Cummings*, some of officers were dressed in uniforms identical to that worn by the motorcycle officer allegedly killed by the

defendant and codefendant, and officers occasionally occupied seats in the front row of the audience. (*Ibid.*) Addressing the issue, the trial court balanced Cummings's concerns with the officers' right to attend the public trial. The trial court suggested that officers attend trial wearing civilian clothing and that if more than two or three uniformed officers were present at the same time, the defense motion could be renewed. There was no evidence that more than three officers were present in the courtroom at once, and, unlike appellant, Cummings did not renew his objection. (*Ibid.*)

In *Cummings*, this Court held that the trial court did not abuse its discretion. (*People v. Cummings*, *supra*, 4 Cal.4th at p. 1298.) Of particular relevance for this case, the Court found that the trial court in *Cummings* did what the trial court here failed to do – it appropriately balanced the rights of those officers whose duty assignments precluded attendance in civilian clothes against the possibility that seeing a large number of uniformed officers among the spectators would influence the jury. (*Ibid.*) As noted previously, the trial court in this case did not attempt any remedial efforts. And perhaps not surprisingly, the problem persisted, and the number of uniformed officers totaled 17 or 18 at the end of the guilt phase. Still, notwithstanding appellant's renewed motion, the trial court refused to take any corrective action. Thus, in contrast to *Cummings,* where the court took steps to balance the competing interests, the trial court in this case abused its discretion in failing to limit the uniformed police officers in the courtroom or otherwise ameliorate the prejudicial environment in the courtroom.

C. The Presence Of The Uniformed Officers As Spectators During Trial Violated The Federal Constitution

The trial court's refusal to limit the number of uniformed police officers in the last days of appellant's guilt phase was not only an abuse of discretion under state law, but violated the federal Constitution. It is axiomatic that the due process clause of the Fourteenth Amendment guarantees a criminal defendant a fair trial (*Turner v. Louisiana* (1965) 379 U.S. 466, 471-472), and the Sixth Amendment assures him a trial by an impartial jury (*Irvin v. Dowd* (1961) 366 U.S. 717, 722). "An impartial jury is one in which no member has been improperly influenced . . . and every member is capable and willing to decide the case solely on the evidence before it." (*People v. Harris* (2008) 43 Cal.4th 1269, 1303, quoting *In re Hamilton* (1999) 20 Cal.4th 273, 293, internal citations and quotations omitted.) An essential component of a fair and impartial trial is a jury that proceeds under the presumption that the accused is innocent of the charges. (*Delo v. Lashley* (1993) 507 U.S. 272, 278; *Estelle v. Williams* (1976) 425 U.S. 501, 503.)

As United States Supreme Court Chief Justice Warren noted 50 years ago, due process requires the courts to safeguard against "the intrusion of factors into the trial process that tend to subvert its purpose." (*Estes v. Texas* (1965) 381 U.S. 532, 560 (conc. opn. of Warren, C.J.).) Specifically, the courts must guard against "the atmosphere in and around the courtroom [becoming] so hostile as to interfere with the trial process, even though . . . all the forms of trial conformed to the requirements of law . . . ." (*Id.* at p. 561.) In determining whether this occurred, a reviewing court must examine the totality of circumstances. (*Sheppard v. Maxwell*

(1966) 384 U.S. 333, 352.) To show the denial of a fair trial, a defendant must show actual or inherent prejudice. (*Holbrook v. Flynn* (1986) 475 U.S. 560, 572.) The test of inherent prejudice is "not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play.'" (*Holbrook v. Flynn, supra*, 475 U.S. at p. 570 [test announced in context of challenge to presence of uniformed officers in courtroom for security purposes], quoting *Estelle v. Williams* (1976) 425 U.S. 501, 505 .)[35]

For the reasons set forth in Section B *ante*, the presence of 17 or 18 uniformed police officers in the courtroom during the reading of the guilt phase instructions and the parties' closing arguments was inherently prejudicial because it presented "an unacceptable risk . . . of impermissible factors coming into play" in reaching the guilt-phase verdict. (*Holbrook v. Flynn, supra*, 475 U.S. at p. 570.) In *Holbrook v. Flynn*, the high court acknowledged the impact of uniformed police officers as spectators at trial: "We do not minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's chance of receiving a fair trial." (*Id.* at pp. 570-571.) That statement was made with regard to four police

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[35] In *Carey v. Musladin* (2006) 549 U.S. 70, the high court acknowledged that it had applied this standard to state-sponsored conduct, but not to private-actor conduct. (*Id.* at p. 76.) By virtue of wearing their police uniforms, the officers in this case appeared in their official capacities, not as private citizens. As explained in Section B *ante*, the threat to a fair trial lay in the fact that the officers, dressed in their police uniforms, presented a clear symbol of governmental authority in the courtroom at a critical juncture in the trial. Had the officers attended the trial in their civilian clothing as private actors, the problem would have been avoided, and there would have been no objection from defense counsel and no issue on appeal.

officers stationed in the front of the courtroom for security purposes during a six-defendant trial. In this case, where there were more than four times as many uniformed police officers and no security concern justifying their presence in the courtroom, the threat to a fair trial was real. By their substantial uniformed presence, the officers in effect told the jurors their actions were being followed by those who represented the full force of the law. In this way, the very presence of the 17 or 18 uniformed police officers during guilt phase instructions and closing arguments created an unacceptable risk of tainted deliberations resulting in an unfair and unreliable verdict.

Appellant's claim is supported by decisions from other jurisdictions. In *Ward v. State* (Fla.Ct.App. 2012) 105 So.3d 3, a case involving the murder of a police officer, the defendant alleged, as part of a claim of ineffective assistance of counsel, that "there were enough officers in the audience to make 'the courtroom look like a policeman's benefit.'" (*Id.* at p. 5.) The defendant pleaded that the officers' open show of support for their fallen comrade "'influenced the jury to convict [the] defendant out of fear and sympathy, rather than because the State had proven its case beyond a reasonable doubt.'" (*Ibid.*) The Florida appeals court found these claims were sufficient to show that the defendant's counsel was ineffective for failing to object to the presence of the uniformed officers, reversed the summary denial of relief on the claim and remanded for further proceedings. (*Ibid.*)

In *Shootes v. State* (Fla.Ct.App. 2009) 20 So.3d 434, a large number of uniformed officers, estimated between 25 and 70, attended the last day of trial in which the defendant was prosecuted for assault in shooting two officers during a narcotics raid. (*Id.* at p. 436.) While acknowledging that

the presence "of courtroom observers wearing uniforms, insignia, buttons, or other indicia of support for the accused, the prosecution, or the victim of the crime does not automatically constitute denial of the accused's right to a fair trial," the Florida appeals court found that "there are situations where the atmosphere in the courtroom might infringe on the defendant's right to a fair trial." (*Id.* at p. 438.) This was one.

In *Shootes*, the appellate court reversed the trial court's denial of defendant's motion for a new trial based on the presence of the uniformed officers. (*Id.* at p. 435.) The uniformed officers in *Shootes* were not present in the courtroom for security or to provide testimony and sat as a group. (*Id.* at p. 439.) Based on these factors, the court reached the conclusion that "[t]he appearance of the considerable number of JSO officers in various modes of official Sheriff's Office attire presented an unacceptable risk of impermissible factors coming into play." (*Id.* at p. 439.) Moreover, the court held that the presence of the uniformed police officers "creat[ed] an unacceptable risk that the jury's determination of the credibility of witnesses and findings of fact would be tainted by impermissible factors not introduced as evidence or subject to cross-examination." (*Shootes v. State*, *supra*, 20 So.3d at p. 440.)

To be sure, the 17 or 18 uniformed police officers present during the guilt phase instructions and closing arguments were fewer than the number of uniformed officers present in *Shootes*. Nevertheless, the circumstances surrounding appellant's trial require the same conclusion as that reached in *Shootes*. As in *Shootes*, the uniformed police officers in this case were not present to provide security, nor to testify as witnesses. Further, in at least one row, the officers sat as a group. (12 RT 2612.) Most importantly, however, appellant in this case faced greater consequences at trial. While

the defendant in *Shootes* faced prosecution on two counts of aggravated assault (*id.* at p. 435), here, appellant faced murder charges and the death penalty. With even more at stake for appellant, this Court, like the Florida court in *Shootes*, should find that the presence of uniformed officers created an unacceptable risk that the jury was tainted by impermissible factors.

In *Woods v. Dugger*, a capital case, the defendant was tried amidst extensive pretrial publicity for killing a corrections officer in a small Florida community with close ties to the prison. (*Woods v. Dugger, supra,* 923 F.2d. at pp. 1457-1458.) A large number of corrections officers, filling as much as half the courtroom, attended the trial in uniform. (*Id.* at p. 1458.) The officers were present only as spectators and were not a part of courtroom security. (*Id.* at p. 1460.) The Eleventh Circuit reversed the district court's denial of habeas relief, concluding that "the pretrial publicity combined with the large number of uniformed spectators rose to the level of inherent prejudice, thereby depriving the petitioner a fair trial." (*Ibid.*) Here, similar to *Woods*, the uniformed officers were not part of security and were not present to testify at trial. As in *Woods*, this case received significant amount of pretrial publicity. Moreover, Officer Niemi's murder was the first killing of a San Leandro police officer in 34 years (13 RT 2774) and was prosecuted personally by the elected District Attorney of Alameda County (2 RT 78). This Court should reach a similar conclusion as in *Woods* – the presence of the uniformed officers denied appellant a fair trial.

Other cases also support the conclusion that the attendance of 17 or 18 uniformed officers at the close of the guilt phase in a capital trial was inherently prejudicial to appellant. (See, e.g., *United States v. Johnson* (E.D.La. 2010) 713 F.Supp.2d 595, 617 [finding that trial court erred by

allowing 40 uniformed officers to attend the hearings, and that it "should have granted the defense motion and insisted that any appearances by law enforcement in the audience be in plain clothes"]; *Balfour v. State* (Miss. 1992) 598 So.2d 731, 756 ["we note that in capital murder cases where the victim was a member of law enforcement, the potential exists for a coercive atmosphere when uniformed law officers sit together in a group. Consequently, we discourage this practice."]; *People v. Grady* (N.Y.App. 2007) 40 A.D.3d 1368, 1374 [recognizing that uniformed police officers, who were seated in the back two rows of the courtroom and who stood in unison when their colleague, a victim of attempted murder, entered the courtroom to testify, "was not appropriate because such conduct may have the secondary effect of influencing the jury"].)

A courtroom gallery filled with 17 or 18 uniformed police officers at the guilt phase during jury instructions and closing arguments in a case involving a slain active duty police officer was inherently prejudicial: it exerted an impermissible outside influence on the jury and undercut appellant's presumption of innocence in violation of his right to a fair trial under the due process clause of the Fourteenth Amendment and his right to trial by an impartial jury under the Sixth Amendment to the United States Constitution.

In addition, the very presence of the 17 or 18 uniformed police officers during guilt phase instructions and closing arguments created an unacceptable risk of tainted deliberations resulting in an unreliable determination of appellant's guilt and special-circumstances liability. Because guilt of the special circumstance of killing a police officer in the lawful performance of his duties was conceded (12 RT 2598), the jury's guilt-phase verdict would be either second degree murder of a police

officer, resulting in life in prison or first degree murder, rending him eligible for the death penalty. It is axiomatic that the Eighth Amendment requires heightened reliability in capital-sentencing proceedings. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Mills v. Maryland* (1988) 486 U.S. 367, 383-384.) There is a corresponding need for reliability at the guilt phase of a capital trial, particularly in California where a defendant's death eligibility is decided. (See § 190.3; *Beck v. Alabama* (1980) 447 U.S. 625, 638.) The presence of the uniformed officers undermined the reliability of the guilt-phase verdicts in violation of the Eighth Amendment.

For all the above reasons, the presence of 17 or 18 uniformed San Leandro police officers toward the end of the guilt phase was inherently prejudicial and denied appellant a fair trial and a reliable determination of guilt and death-eligibility.

D. The Error Requires Reversal Of The Entire Judgment

"A denial of a fair trial can never be harmless because the right is so fundamental to our notion of due process." (*Woods v. Dugger*, *supra*, 923 F.2d at p. 1460, citing *Satterwhite v. Texas* (1988) 486 U.S. 249, 256.) In *Woods*, the Eleventh Circuit held that harmless error analysis was inapplicable to its finding that the presence of uniformed officers as spectators resulted in the denial of a fair trial and reversed without considering whether overwhelming evidence of guilt rendered the error harmless. (*Woods v. Duggar*, *supra*, 923 F.2d at p. 1460.) This Court should do the same. A "harmless unfair trial" would be a true oxymoron. But if harmless error analysis does apply, this Court should find the error

requires reversal.[36]

As discussed previously, where trial court error violates state law, reversal is required when appellant establishes a reasonable probability that he would have obtained a more favorable result in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Where trial court error violates the federal Constitution, reversal is required unless the State proves the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Whether considered under the state law or federal constitutional standard, the trial court's refusal to limit the number of uniformed police officers in the courtroom was not harmless.

To be forthright, it is difficult to assess the likely impact on the jury's guilt-phase verdict of the impermissible influence of nearly a score of uniformed officers sitting in view of the jury as they listened to the court's instructions and the parties' closing arguments. The very nature of inherent prejudice defies such measurement. But two factors tilt the balance toward a finding of prejudice. First, as set forth in Argument I, Section E, at pages 63-69 and Argument II, Section C, at pages 85-88, incorporated by reference here, the sole disputed issue for the jury was the degree of murder, which turned on whether appellant deliberated the killing. The prosecutor's case on deliberation was not overwhelming. The evidence on

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[36] It would be anomalous for the Court to conclude that an error rendered a trial fundamentally unfair and thus find constitutional error, but then hold that error was harmless beyond a reasonable doubt. The ruling – that the trial was fundamentally unfair but no new trial is required – would be internally inconsistent and illogical. Appellant is aware that some courts have engaged in a prejudice analysis after finding that admission of inflammatory evidence violated the fair-trial right of the due process clause. (See, e.g., *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1386.) To appellant's knowledge, this Court has not addressed this question.

this key element was closely balanced – each piece of evidence relied on by the prosecutor to prove deliberation left ample room for doubt for at least one juror to entertain a reasonable doubt as to appellant's guilt of first degree murder. Given the state of the evidence on the only contested question before the jury, the not-so-subtle message conveyed by the uniformed officers – convict appellant of the most serious crime and condemn him to death – cannot be dismissed as harmless.

Second, in his closing argument, the prosecutor exploited the presence of the uniformed officers in the courtroom. The prosecutor argued that Officer Niemi "was responding to a neighbor's call. He was doing what we all want our police officers to do when we have disturbances or problems in our neighborhood, come see what's going on." (12 RT 2586.) The prosecutor argued vigorously that "[w]hat [appellant] did was he turned this man, who was out there working for all of us, protecting all of us on our behalf, into this (indicating), for his own purely selfish reasons not to spend some time in jail. Ladies and gentlemen, first-degree murder with special circumstances." (12 RT 2594.) It would deny reality to pretend that the jurors did not connect this argument to the 17 or 18 uniformed officers seated in the front of the courtroom and realize that they, like Officer Niemi, put their lives on the line every day when responding to the public's calls for help. Whether conscious or not, a natural reaction would be to carry concern for those officers' safety into the jury room when the deliberations began.

Defense counsel tried to address the obvious situation. He argued "[t]o the extent you feel some public pressure, acknowledging that we have a gallery full of police officers, that's not appropriate. You're not here to send a message to anybody. And to the extent that you feel influenced by

that, I would not only reject it, I would resent it and ignore it. You've got a job to do and it has nothing to do with anything other than the evidence and the law in this case." (12 RT 2596.) The attempt may have been valiant, but there can be no confidence it was effective since closing arguments by counsel "are not a substitute for a proper jury instruction" from the court (*People v. Fudge* (1994) 7 Cal.4th 1075, 1111), and in general cannot cure a trial court's error in failing to instruct the jury (*People v. Vann* (1974) 12 Cal.3d 220, 227, fn. 6; see also, *People v. James* (2000) 81 Cal.App.4th 1343, 1364, fn. 10 [counsel's remarks are not used in harmless error analysis to determine where error was cured, but only to determine whether argument exacerbated instructional error].)

In sum, as set forth in Argument I, Section E, at pages 63-69 and Argument II, Section C, at pages 85-88, and incorporated here, all the circumstances marshaled by the prosecutor in his closing argument to persuade the jurors that appellant had committed the charged murder with premeditation and deliberation still could have allowed a juror to entertain a reasonable doubt about whether appellant deliberated the murder or whether appellant, due to his intoxication, committed a rash, intentional, but not deliberated action. There is a reasonable probability that had the environment in the courtroom been different, i.e., had the police spectators not been in uniform, a juror could have given appellant the benefit of the doubt to which he was entitled, as set forth in Argument II, and voted for second degree murder. Similarly, under *Chapman*, the State cannot prove the error harmless beyond a reasonable doubt. Appellant's conviction, special circumstance and special allegation findings and death sentence must be reversed.

IV. REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE GUILT PHASE VERDICTS

Assuming, arguendo, that the errors asserted in Arguments I-III, taken separately, do not require reversal, the synergistic effect of these errors should be evaluated cumulatively because together they undermine confidence in the fairness of the trial and the reliability of the resulting verdicts. (Cal. Const., art. I, § 15; U.S. Const., 8th & 14th Amends.; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect the trial with unfairness that the resulting verdict is a denial of due process]; *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927 ["[t]he 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"], citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 298; *People v. Hill* (1998) 17 Cal.4th 800, 844-848 [reversing entire judgment in capital case due to cumulative error].) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors]; see also *People v. Watson* (1956) 46 Cal.2d 818, 836 [state law standard of reversal for guilt-phase error].)

As discussed previously, in appellant's case, each of the guilt phase errors, standing alone, was sufficient to undermine the prosecution's case and the reliability of the jury's ultimate verdict, and none can properly be

found harmless under state law or the federal Constitution. (See Argument I, Section E, pp. 60-70; Argument II, Section C, pp. 85-88; Argument III, Section D, pp. 104-107.) When viewed cumulatively, the trial court's erroneous modification of CALCRIM No. 521, combined with its failure to instruct on reasonable doubt as to degree of murder, and the trial court's erroneous denial of appellant's motion to limit the number of uniformed police officers as spectators in the courtroom, effectively foreclosed a finding of second degree murder.

The synergistic relationship between the modified instruction CALCRIM No. 521 and the lack of an instruction on the jury's duty to give appellant the benefit of any doubt as to degree of murder was especially harmful. The jurors were given an instruction on the degree of murder – the only and central issue in the case – that was modified with language that undercut the concept of deliberation. Certainly, the prosecutor's argument encouraged that understanding of the modified instruction in stating that appellant just needed to know what he was doing to be convicted of first degree deliberate murder. With this misunderstanding of deliberation in mind, there would be no doubt as to the degree of murder. Further, having no instruction on the possibility that the jurors could find that appellant was guilty of murder, but have a doubt as to degree of murder, a juror who did doubt whether the prosecution proved appellant deliberated the killing would not know she was required to give appellant the benefit of that doubt. With these erroneous instructions, the jurors set out to their deliberations under the powerful presence of 17 or 18 uniformed police officers conveying the silent message to convict appellant. As a result, the prejudicial effect of these errors, viewed in combination, deprived appellant of his state and federal constitutional rights to a fair trial, due process and a

reliable determination of guilt and death eligibility in a capital trial. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 330-331; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *People v. Brown* (1988) 46 Cal.3d 432, 448.) Appellant's convictions and the special circumstance findings must therefore be reversed. (*People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital-murder conviction for cumulative error].)

V. THE TRIAL COURT ERRED IN ADMITTING INFLAMMATORY VICTIM IMPACT EVIDENCE

The victim impact evidence dominated the prosecution's case in aggravation. It comprised more than 90 percent of the aggravating evidence introduced at the penalty phase. (13 RT 2705-2710 [5 pages of non-victim impact testimony] and 13 RT 2717-2778 [61 pages of victim impact testimony].) The prosecution presented testimony from Officer Niemi's wife, mother and brother about his life, character and the effect of his murder on his family's lives. Appellant did not object to this evidence at trial, and he does not contest its admission on appeal.

The trial court, however, also admitted victim impact testimony from three of Officer Niemi's police colleagues and a story about a dead newborn baby authored by Niemi. This evidence was admitted over appellant's objection. The erroneous admission of the victim impact evidence not only violated state law, but exceeded the limits of *Payne v. Tennessee* (1991) 501 U.S. 808, 827 ("*Payne*"), rendering the penalty phase fundamentally unfair and the death sentence arbitrary and unreliable under the federal Constitution.

The error was not harmless under state law. In addition, the error in admitting the victim impact evidence was so unduly prejudicial that it rendered the penalty trial fundamentally unfair. The penalty phase evidence was roughly in equipoise. The murder of Officer Niemi was a terrible crime, and there was evidence of an outburst by an intoxicated appellant when previously arrested. This aggravating evidence, however, was balanced by appellant's youth, his lack of prior convictions, his problems with drugs and alcohol and his turbulent upbringing. Because this was a close case as to penalty, the erroneous admission of the inflammatory and

prejudicial evidence requires reversal of appellant's death sentence.

A. The Trial Court Admitted Testimony From Three Of Officer Niemi's Coworkers And A Story He Wrote About Finding A Dead Baby

1. The Parties' Motions and the Trial Court's Ruling

Prior to trial, the prosecutor filed a "Notice of Aggravation Evidence Pursuant to Penal Code Section 190.3," asserting his intention at the penalty phase to introduce testimony from Officer Niemi's family and work colleagues, Officer Curt Barr, Mario Marez and Officer Deborah Trujillo, as victim impact evidence. (3 CT 630; 13 RT 2661-2662.) In response, defense counsel filed a motion to exclude victim impact testimony from Niemi's coworkers. (4 CT 956.)

In his motion, defense counsel posited that under *Payne* and the Eighth and Fourteenth Amendments, the victim impact testimony should be limited to family members. (4 CT 957;13 RT 2666-2667.)[37] In addition, defense counsel argued that victim impact testimony from Officer Niemi's coworkers was unduly prejudicial under Evidence Code section 352 and violated appellant's right to a reliable penalty determination and due process under the Eighth and Fourteenth Amendments. (4 CT 956, 958; 13 RT 2667.) At the hearing on the issue, defense counsel also argued that while California authority permitted non-family members to testify about victim impact, the issue was not settled under federal law. (13 RT 2666.)

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[37] Defense counsel also contended that, although based on a misreading of *Payne*, this Court in *People v. Marks* (2003) 31 Cal.4th 197, extended victim impact evidence to include a witness who was not a family member, the witness was so close to the victim that the victim treated him like a son; thus, *Marks* permitted only close personal friends to offer victim impact testimony. (13 RT 2666; 4 CT 957.)

In response, the prosecutor noted he had reduced the number of police officer witnesses from seven to three (13 RT 2662) and argued that non-family members could testify as to victim impact under state law. (13 RT 2667-2668, citing *People v. Pollock* (2004) 32 Cal.4th 1153.)

The trial court denied appellant's motion and ruled that the three police officers would be permitted to testify. (13 RT 2669, 2671.) The trial court reasoned that as long as it is legitimate evidence of impact, it does not matter whether the witness is a member of the victim's family. (13 RT 2669, 2671.) The trial court found that the people with whom Officer Niemi worked could testify to show not only the kind of person he was, but the kind of police officer he was. (13 RT 2670-2671.) Further, the trial court found that the testimony was not cumulative. (13 RT 2671.)

After the trial court's ruling, defense counsel filed an additional request to exclude other testimony from Officer Curt Barr – that he spent time alone with Officer Niemi's body at the hospital and that he prayed over Niemi's body – as inflammatory and prohibited under relatively-recent decisions of this Court. (4 CT 981.) The trial court denied the motion, ruling that Barr's testimony showed the relationship between Barr and Niemi and thus demonstrated the impact of Niemi's death. (13 RT 2694.)

The prosecutor also proffered two stories written by Officer Niemi to be admitted as victim impact evidence. (13 RT 2673.) Defense counsel filed a motion seeking to exclude the two stories. (4 CT 964.) One story, entitled "Cold Phrase," was about three children screaming and burning to death as their mom fought to get to them. The second, untitled story was about Niemi finding a dead newborn baby when responding to a police call. (4 CT 964.)

At the hearing on the admissibility of the two stories, the prosecutor

asserted that the stories showed the kind of person and police officer that Officer Niemi was, as well as the impact of his death on his friends and relatives. (13 RT 2674, 2676.) In response, defense counsel objected that the stories would consume too much time, and be highly prejudicial under Evidence Code section 352 and the Eighth and Fourteenth Amendments. (13 RT 2675; 4 CT 964.)[38] Defense counsel argued that because the stories were very powerful, well-written and emotionally-loaded, they would sidetrack the jury from its duties and the proper issue at sentencing. (13 RT 2675.) The prosecutor agreed that the stories were powerful, but only in that they showed the kind of man that was lost and the impact of that loss on his family and those close to him. (13 RT 2676.)

The trial court first concluded the stories said something about Officer Niemi and the loss that was caused by his death. (13 RT 2677.) The trial court, however, thought that to admit both stories would be cumulative and that one story would be enough to establish what the prosecutor was seeking to establish. (13 RT 2677.) The trial court admitted the shorter untitled story and noted that the longer story, titled "A Cold Phrase," was more of a "tearjerker." (13 RT 2677.) The trial court added that the story could be read to the jury or placed into evidence, but could not be read by a witness who had an emotional connection with Niemi. (13 RT 2678.)

2. Testimony from Officer Niemi's Coworkers

At the penalty phase, Officer Curt Barr testified that he met Officer Niemi when Niemi joined the police department's field training program.

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[38] Defense counsel also raised foundational concerns, hearsay and relevance objections, which appellant is not challenging here. (13 RT 2674-2675, 2692-2693.)

(13 RT 2718.) Barr and Niemi had lockers close to each other and became close friends. (13 RT 2718.) Niemi was the best man at Barr's wedding. (13 RT 2719.) Before Niemi's death, he and Barr had plans to celebrate Dionne's birthday. (13 RT 2721.) On the day of Niemi's death, Barr ended his shift as Niemi's shift began, and the two chatted. (13 RT 2721.) Barr testified that he received a call that Niemi had been shot. (13 RT 2721.) He went to the hospital, met with Niemi's family and learned that Niemi was dead. (13 RT 2722.) When Niemi's family left, Barr asked to see Niemi's body again. (13 RT 2722.) He stood over his friend's body and prayed. (13 RT 2722.) Barr was assigned to be with Dionne the first week after Niemi's death. (13 RT 2722.) Barr had seen Niemi's daughter, Gabrielle, since Niemi's death and she told Barr that he looks like her "daddy." (13 RT 2723.) Barr's children from his first marriage also knew Niemi and still talk about him. (13 RT 2723.)

Officer Niemi's colleague, Mario Marez, testified that he met Niemi in 1998 at a gun store where Niemi worked. (13 RT 2725.) Marez told Niemi about a shooting club, which was a shared interest. (13 RT 2725.) Marez and Niemi had hobbies in common. (13 RT 2727.) Niemi was interested in handgun shooting and World War II aviation and also liked to work on his computer. (13 RT 2727.) Marez considered Niemi his "best buddy." (13 RT 2726.) Marez talked with Niemi about police work, and he encouraged Niemi to join the San Leandro Police Department. (13 RT 2726.) Marez threw a party for Niemi when he graduated from the Alameda Sheriff's Academy. (13 RT 2727.) Marez talked with Dionne about the work and explained that while the Los Angeles Police Department, where he previously worked, was dangerous, the San Leandro Police Department was different. (13 RT 2726.) He told Dionne that the

likelihood of her husband being shot or killed was very slim. (13 RT 2726.) Marez's conversation with Dionne still haunted him. (13 RT 2727.)

Marez was working the night Officer Niemi died. (13 RT 2727.) He received a call about an officer down, sped to the scene, and realized that it was Niemi. (13 RT 2728.) Marez was one of the first four officers on the scene and arrived prior to the ambulance. (13 RT 2728.) Over a year later, in October 2006, Marez resigned from the San Leandro Police Department. (13 RT 2728.) He resigned because of Niemi's death – he could not serve the public in the same way afterwards. (13 RT 2728.) At the time of trial, Marez worked for the U.S. Department of Health and Human Services in Atlanta as a computer forensics examiner. (13 RT 2728.) Marez testified that he thinks about Niemi every day, several times a day, and has regret and guilt over encouraging Niemi to join the police department. (13 RT 2729.) Marez testified: "I'm so sorry. I'm so sorry." (13 RT 2729.)

At the end of Marez's testimony, defense counsel asked the trial court to take a break. (13 RT 2729.) Outside the presence of jurors, defense counsel noted for the record that during his testimony, Marez collapsed crying in front of the jury while on the witness stand and that after his testimony, as he left the witness stand, Marez hugged the next penalty witness while both cried. (13 RT 2730.)[39]

Officer Deborah Trujillo was the next penalty witness. Trujillo testified that she and Officer Niemi started at the department on the same day. (13 RT 2732.) Trujillo and Niemi went through field training at the

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[39] Defense counsel urged the trial court to admonish the witnesses to not engage in that type of display in front of jurors. (13 RT 2730.) The trial court agreed with defense counsel and admonished the audience and witnesses outside the presence of the jurors. (13 RT 2730.)

same time. (13 RT 2733.) Trujillo and Niemi stayed in touch, and she knew Niemi's family. (13 RT 2734.) Trujillo described Niemi as open, loving, and nonjudgmental. (13 RT 2735.) Niemi helped Trujillo get through a difficult romantic break up. (13 RT 2734.) At the time that they met, Trujillo was one of only four women in the police department, but Niemi did not treat her differently (13 RT 2735-2736).

Trujillo was on patrol the night Officer Niemi was killed. (13 RT 2736.) She heard that an officer had been shot and sped to the scene, arriving before the ambulance. (13 RT 2737.) She blamed herself for not arriving at the scene faster. (13 RT 2737.) Trujillo testified about training she received that encouraged her to slow down when responding to a crime scene. She tried to listen to that training when driving to the scene of the shooting. She regretted, however, listening to that training, and felt that she did not get to Niemi in time. (13 RT 2737.) Trujillo testified about a related incident after Niemi's death:

> I was sitting in the courtyard finishing reports, and my beat partner, officer roseland (phonetic), had put out that he was watching a robbery in progress, which is a very dangerous call. He was by himself, and he was putting out that the suspects were inside the store. So I responded, knowing that I was the closest unit, and I drove as fast as I could.

(13 RT 2738.) She drove fast, ultimately crashing her car, because: "I was never going to regret not driving that fast again, and I was never going to lose another friend/colleague on the job." (13 RT 2738.) She was disciplined for driving too fast. (13 RT 2738.)

Before going to the hospital after the shooting, Trujillo, with two other officers, went to Dionne's house. (13 RT 2739.) Seeing that Officer Niemi was dead at the scene, Trujillo asked to inform Dionne. (13 RT

2739.) Trujillo and the other officers arrived at Dionne's house late at night and informed Dionne that Niemi had been murdered. (13 RT 2739.) Dionne refused to go to the hospital until they could inform Niemi's parents. (13 RT 2740.) They all drove to Niemi's parents' house in Alamo. (13 RT 2740.) Trujillo watched while another officer and Dionne walked into the house and told Niemi's mother that he was dead. (13 RT 2740.) Trujillo saw Niemi's mother yelling and accusing them of lying, so she went to her and held her hands. (13 RT 2741.) Niemi's mother asked Trujillo if Niemi was dead. She told Niemi's mother the truth. (13 RT 2741.) The officers, Dionne, and Niemi's parents all went to the hospital. (13 RT 2741.) Trujillo and Barr took shifts being with Dionne for a week and helped with funeral arrangements. (13 RT 2741.) Trujillo testified that there was a book that Niemi had written that they published for his family. (13 RT 2741.) She still saw Dionne and the children. (13 RT 2742.) Trujillo testified that her entire life had changed – nothing was the same. (13 RT 2742.)

3. The Story about Finding a Dead Baby

At the penalty phase, Dionne testified that her husband often talked about his work with the San Leandro Police Department and was a good storyteller. (13 RT 2768.) According to Dionne, Officer Niemi was a prolific writer. She found a story about his finding a dead baby in his computer when looking for another story written by him. (13 RT 2768-2769.) Dionne explained that if Niemi had a particularly hard call or there was something that touched him, he would write about it as a way of dealing with it in his mind. (13 RT 2769-2770.) The story was introduced in its entirety as follows:

Every day people touch our lives. Sometimes they have a profound effect on us and sometimes the effect is so small we never notice the change. Most of the time, however, it lies somewhere in between. This is one of those times, in between.

When I first met the baby boy he was only about a day old. His little hand, so small it would probably not grasp completely around my thumb, was curled into a tiny fist held tightly against his cheek. His legs were tucked into his chest and the hair on his head, so black and full, was still wet. Lying on his side, his head was cocked back and I couldn't see his tiny face because it was pressed so hard against the inside of the garbage can where we found him. The plastic bag which served as his last bed was pulled away and under the harsh light of my flashlight I could see his skin was no longer the healthy pink of a newborn child; instead it was a medium shade of gray as one might see on a pair of gym sweats or one of those old metal folding chairs. I stood there, waiting for a feeling, any feeling, but none came. To my surprise and relief I felt nothing save a dull anger, a muted frustration. My partner said it best; he had been at the scene of a fatal accident just the night before and stood by helplessly as a woman died. We spoke later and he said, "We have a job to do and this is part of it. We move on." And that was what I did. I moved on, did my job, and left the feelings alone for a while.

It started with a seventeen-year-old girl arriving at the hospital with blood between her legs and a severed umbilical cord still dangling, but no baby. She denied ever being pregnant. We were sent to her house for the obvious reason: to find the infant. On the way in we passed the two garbage cans set out on the curb for the morning's pickup. I saw them and, in hindsight, I think I already knew where to look. But that's not how it was done and we started inside. I found the clothes hidden under her bed, soaked in blood and wrapped in a plastic bag not unlike the one holding the infant and tossed in amongst the rotting food and old newspapers. We found the bloodstained mattress where she had probably brought the little boy into the world. We found the bloody toilet bowl

brush that had been used to clean the mess in the bathroom.

And then we found the baby. I will probably never forget the feeling as I was looking in a bedroom closet and I heard over the radio, "Have the ambulance respond now." That was all. Just a simple call for the ambulance waiting down the street. Like a switch turned off, I stopped my search, shut the door, turned and walked outside knowing the hard part was over.

I've often heard my friends complain about their newborn baby's crying into the night. I've always told them enjoy it now, because having a daughter of my own, I see how fast they grow and soon those tiny cries are replaced with words like "Mommy" and "Daddy" and "I don't want to go to bed now!" I try to tell my friends, enjoy those cries because when they stop it means your child is growing up.

Now I've seen the other side of that dark coin. I've seen what it's like when those cries stop only to be replaced by the silence and the stillness. He had been born alive, wrapped in a plastic bag and put out with the trash. In the cold, harsh light of my flashlight, I saw the silence.

We walk into the mess and the mire, we do our job as best we know, and then we walk out again. But we never leave without taking a little bit with us; it's called learning. We take a little piece of every situation with us that help us deal with the next time we are called on to walk back into the mess and the mire.

From this one I will take a little bit to carry with me so that when I see my little girl I make sure to give her an extra hug, or let her stay up just a minute longer. I will use it as a reminder to make sure and wave back when the children wave at me. I will use it to appreciate the life I have.

I only fear that this time I may have left a little bit of me back there, in that mess and that mire.

(P.Exh. No. 76; 13 RT 2779 [admitted into evidence].)

B. The Admission Of The Contested Victim Impact Evidence Was Reversible Error Under State Law

Under California law, victim impact evidence is admissible at the penalty phase under section 190.3, factor (a), as a circumstance of the crime, provided the evidence is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case. (*People v. Taylor* (2010) 48 Cal.4th 574, 645-646; *People v. Edwards* (1991) 54 Cal.3d 787, 835-836.) In weighing the evidence at the penalty phase, the trial judge lacks discretion to exclude all evidence on the ground that it is inflammatory or lacks probative value, but still retains discretion to exclude particular items of evidence because they are misleading, cumulative, or unduly inflammatory. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1205-1206, abrogated on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 554, fn. 5; Evid. Code, § 352 [evidence must be excluded if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, confusing the issues or misleading the jury].) The trial court's discretion under section 352 is more circumscribed at the penalty phase than guilt phase. (*People v. Salcido* (2008) 44 Cal.4th 93, 158.) Nonetheless, the trial court has discretion to exclude victim impact evidence that it determines would evoke an irrational or emotional response untethered to the facts of the case. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1180; see also *People v. Karis* (1988) 46 Cal.3d 612, 641, fn. 21.) On appeal, the ruling is reviewed for abuse of discretion. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.)

1. The Coworkers' Testimony Should Have Been Excluded under Evidence Code Section 352

The officers' testimony should have been excluded as unduly prejudicial. Although testimony from Officer Niemi's coworkers was probative of the kind of person Niemi was and the impact of his death, Niemi's family testified in some detail about who Niemi was as a person and the impact of the loss, lessening the probative value of testimony from coworkers. (See Statement of Facts *ante*, at pp. 29-34.) The testimony of Niemi's coworkers was also unnecessary because other evidence made the jury aware of the loss Niemi's colleagues suffered. As Dionne testified, Niemi's death marked the first time a San Leandro Police Officer had been killed in 34 years and many attended his funeral. She described the reaction of the community who supported their police officers:

> We did a funeral procession through San Leandro on our way to [the funeral] service. It was wonderful because the community everywhere we went there were citizens lined up on the street holding signs Officer Dan Our Hero. There were so many people. Every turn we made there were people lining the streets. This was the first time an officer has been killed in San Leandro in 34 years. That community isn't used to that and they support their officers. They're a very good community. It was wonderful to see that. We were going through town and Gabbie was looking out the window at all those people and she said, did all those people love my daddy too. It was beautiful.

(13 RT 2774.) The very presence of Niemi's uniformed coworkers during trial was a reminder of who Niemi was and of the loss to the law enforcement community. On the day of guilt phase closing arguments, 17 or 18 uniformed police officers were in the gallery. (12 RT 2610; see Argument III *ante*, pp. 89-92.)

In any event, the testimony from Officer Niemi's colleagues was

unduly prejudicial. After explaining his close friendship with Niemi, Barr testified that when he learned that Niemi was shot, he went to the hospital. At the hospital, Barr waited until everyone had left and asked the charge nurse if he could see Niemi's body again. The nurse allowed him to see Niemi again, so he went into the room where Niemi was and stood over his friend. Barr spent private time with Niemi, and prayed over him. (13 RT 2722.) Envisioning Barr standing over his close friend's body at the hospital as he prayed over him would likely inflame an unduly emotional response in the jury.

Marez's testimony centered on his own feelings of guilt. (13 RT 2726.) Marez testified that he suffered regret and guilt because he encouraged Officer Niemi to join the police department and essentially assured Dionne that Niemi would be safe. (13 RT 2726, 2729.) In fact, Marez quit being a police officer because of Niemi's murder. (13 RT 2724, 2728.) Marez collapsed crying on the stand and stated "I'm so sorry. I'm so sorry." (13 RT 2729-2730.) Leaving the witness stand, Marez hugged Trujillo and they both cried in front of the jury. (13 RT 2730.) Marez's testimony was particularly wrenching and injected into the jury's penalty calculus extraneous and highly prejudicial considerations that were untethered to the facts of the case.

Trujillo testified about the end of a romantic relationship that was very difficult for her (13 RT 2734-2735), discussed her difficulty as a female officer on the police force (13 RT 2735-2736), and about her own feelings of guilt in not responding to the scene of the shooting more quickly. (13 RT 2737.) Hearing about Trujillo's fear of losing another coworker, her personal hardships and her professional discipline unrelated to the shooting injected inflammatory facts into the penalty phase and may

have encouraged the jury to blame appellant for emotions and events that were quite attenuated from his act of killing Officer Niemi.

Trujillo's testimony, as the testimony from Barr and Marez, was evocative, and played on the emotions of the jury in making its "'moral assessment of . . . whether [appellant] should be put to death.'" (*People v. Edwards*, *supra*, 54 Cal.3d at p. 834, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 863-864.) As this Court has admonished, "[i]rrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invokes an irrational, purely subjective response should be curtailed." (*People v. Edwards*, *supra*, 54 Cal.3d at pp. 835-836.) Here, the testimony was more prejudicial than probative, and the trial court abused its discretion in admitting the testimony under Evidence Code section 352.

2. The Story about the Dead Baby Should Have Been Excluded under Evidence Code Section 352

Like the police officers' testimony, the story about Officer Niemi finding the dead newborn baby should have been excluded as unduly prejudicial. To the extent that the story was probative to show who Niemi was as a person, it was cumulative of other undisputed evidence, thus lessening its probative value. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 405-406 ["in many cases the prejudicial effect of such evidence would outweigh its probative value, because the evidence would be merely cumulative regarding an issue that was not reasonably subject to dispute"].) There is no question the story reflected Niemi's sensitivity, but that character trait was already established by other evidence. Niemi's brother, mother and wife testified about who Niemi was as a person with photographs depicting Niemi throughout his life. (13 RT 2743-2778.)

Niemi's family described him as cerebral (13 RT 2744), good from an early age (13 RT 2754), loving children (13 RT 2763), helping people (13 RT 2767), and sensitive (13 RT 2770). In addition to testimony about Niemi's character, Dionne testified that Niemi was a prolific writer who wrote about his experiences on the job to process them emotionally. (13 RT 2768.)

In addition, the impact of the loss had already been established by other evidence. Officer Niemi's family members testified directly about the impact of his death on their lives. (13 RT 2717-2778.) Niemi's brother testified about the painful impact Niemi's death had on him. (13 RT 2749.) Niemi's mother testified that Niemi's father was so affected by his death that he could not testify at the penalty phase. (13 RT 2757.) Niemi's mother explained that their lives have been empty since Niemi's death. (13 RT 2760.) Niemi's wife testified that her children were seriously impacted by Niemi's death. They struggled with their grief and anger. (13 RT 2777-2778.) As noted above in Section B.1., Dionne also testified about the impact of the loss on the community. (13 RT 2774.) Given the sum of all this evidence, the story about a dead baby did not add anything to the victim impact evidence already presented to the jury. It seems the only reason for the story was to evoke a gut-wrenching response from the jury, diverting its attention from the constitutionally-mandated task of deciding penalty "based on reason rather than caprice or emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358.)

The story about a dead baby was highly inflammatory. First, the story is about the most vulnerable of victims, a newborn baby who was abandoned shortly after birth – thrown out in a garbage can – which raises pity for the dead baby, anger at the mother, and empathy for Officer Niemi, when appellant was not connected to or responsible for the baby's death or

its effect on Niemi. The fact that the trial court excluded the first story entitled "A Cold Phrase" as more of a "tearjerker" (13 RT 2677) suggests that the trial court recognized the inflammatory and prejudicial effect of *both* stories.

Second, the written story was designed for maximum emotional impact. The story begins with Officer Niemi meeting a day old baby boy. Niemi describes a little baby with a tiny fist, legs tucked, a full head of black hair, that was still wet. Having established interest, the reader then discovers that the baby boy is the color of old metal folding chairs and dead in a garbage can. Playing on the reader's shock, the story then shifts to Niemi's partner standing helpless as a woman died the night before. Then, the story returns to the horror of the dead baby, and reveals that the baby's mother was a seventeen-year-old girl who arrived at the hospital with blood between her legs and a severed umbilical cord still dangling, but no baby. The story continues in this vein, encouraging disgust at the incident, empathy for and frustration at the nature of police work and anger at the mother. As this Court acknowledged, albeit in the analogous context of videotape, "the medium itself may assist in creating an [undue] emotional impact upon the jury." (*People v. Prince* (2007) 40 Cal.4th 1179, 1289 [recognizing that a victim-impact video may assist in creating an emotional impact upon the jury that goes beyond what the jury might experience viewing still photographs or listening to bereaved parents].) In essence, the story was akin to a letter from the murder victim and created an undue emotional impact upon the jury. (See Bandes, *Empathy, Narrative and Victim Impact Statements* (1996) 63 Univ. Chi. L.Rev. 361, 391 [discussing both the power and the strategic capabilities of the use of narrative].)

Third, the content of the story, which was completely unconnected to

the facts of this case, was sure to inflame the jury's emotions and was the kind of evidence that "'uniquely tends to evoke an emotional bias against a party as an individual.'" (*People v. Cowan* (2010) 50 Cal.4th 401, 475, citations omitted.) As this Court has explained:

> The prejudice which [Evidence Code section 352] is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence . . . Rather, the statute uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors.

(*People v. Zapien* (1993) 4 Cal.4th 929, 958, citations and internal quotation marks omitted.) The story was replete with repugnant, gut-wrenching, detail of a baby tossed in the garbage amongst rotting food and old newspapers. The risk was high that the outraged emotion of the story would spill over, and the jury would judge appellant based on a distressing incident that had nothing to do with him or his crime. Having received the story, the only outlet for the jury's likely revulsion was through their decision regarding penalty.

Further, the story detailed what Officer Niemi and other police officers suffer as part of their job. Niemi's partner watched a woman die after an accident and Niemi found a dead baby. These upsetting and stressful events were part of their job. This content from the story evokes a kind of sympathy for and anger about the occupational difficulties people admirably assume when they decide to become police officers. Such highly-charged emotions would be difficult for a jury to set aside in a case involving the murder of a police officer.

Fourth, the prejudicial effect of the story was exacerbated by the fact that although the jury knew the story was based on an actual event, the jury

did not know if anyone had been prosecuted for what happened. Even assuming that jurors understood that appellant was not legally responsible for the baby's death, they were urged to use the story unfairly to aggravate appellant's moral responsibility and may have done so. (See e.g., *Salazar v. State* (Tex.Crim.App. 2002) 90 S.W.3d 330, 337 [pictures of the victim's childhood create high chance of unconsciously leading the jury to punish the defendant as if he killed a young child, and are therefore unduly prejudicial].) Thus, the story not only evoked emotion untethered to the facts of the case, but was likely to evoke unreasoned and unreflective emotion that could not be placed in any usable perspective.

The story not only invited the jury to sentence appellant to death based on some imputed moral responsibility, but by its inflammatory nature, obscured the real focus of their sentencing deliberations. At a minimum, the story diverted the jury's attention from the task of determining appellant's sentence. (See *People v. Zapien*, *supra*, 4 Cal.4th at p. 992.) Instead of focusing on its proper role in determining appellant's sentence, the jury in reviewing the story was forced to contemplate the heinous acts of another person. Victim impact evidence can evoke a complex set of emotions directed toward the defendant, including a desire to purge a collective anger, deflecting from the jury's duty to consider the individual defendant and his moral culpability. (See Bandes, *Empathy, Narrative and Victim Impact Statements* (1996) 63 Univ. Chi. L.Rev. 361, 391.)

Finally, this Court's decision in *People v. Verdugo* (2010) 50 Cal.4th 263, does not defeat appellant's claim. In *Verdugo*, this Court found no error in playing songs the victim had recorded in Spanish and given to her father shortly before her murder. As this Court explained, the songs simply illustrated the close bond between the victim and her father – a relationship

the victim's mother described at length in her testimony. (*Id.* at p. 299 and p. 313 (conc. opn. of Moreno, J).) In this case, Dionne mentioned the story about the dead baby in her testimony, but, as the prosecutor stated before trial, for the express purpose of laying the foundation for its admission. (13 RT 2692.) Moreover, the highly inflammatory nature of the story about the dead baby differentiates this case from *Verdugo*. While admitting the story gave the jury a sample of Officer Niemi's writing, which Dionne mentioned in her testimony, such illustration was unnecessary or could have been accomplished with a different, much less evocative example. In fact, Dionne testified that Niemi wrote stories mostly about World War II. (13 RT 2768.) The story about the dead baby had no informational content that could contribute to a capital jury's sober and rational decision making, but was crafted to evoke a range of intense emotions from the reader. Whatever may be said about the potentially manipulative use of music (see *People v. Verdugo*, *supra*, 50 Cal.4th at p. 314 (conc. opn. of Moreno, J.), there is no indication that the few songs played for the jury in *Verdugo* contained either inflammatory content or emotionally-manipulative form similar to that of the story about Niemi finding the dead baby.

This Court has drawn no clear line between permissible and prejudicial victim impact evidence. (*People v. Edwards*, *supra*, 54 Cal.3d at pp. 835-836.) Thus, in policing the hazy boundary between admissible victim impact evidence and unduly prejudicial victim impact evidence, California trial courts have basically operated unguided. (See *Kelly v. California* (2008) 555 U.S. 1020 (separate statement of Stevens, J., on denial of cert.).) For this Court to hold that this story admitted in this case was not unduly prejudicial would permit the State to turn anything in any way related to the victim and his or her survivors into aggravating evidence

in support of a death sentence, which would risk rendering factor (a) unconstitutionally arbitrary, vague and overbroad (see *Tuilaepa v. California* (1994) 512 U.S. 967, 976 [upholding factor (a) against a facial challenge]) and would dilute the constitutionally-required nexus between the punishment and "the personal culpability of the criminal defendant." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319, abrogated on other grounds by *Atkins v. Virginia* (2002) 536 U.S. 304.) The trial court abused its discretion in admitting the story.

3. Because the Errors Were Not Harmless under State Law, Reversal of the Death Sentence Is Required

Under state law, reversal of the death verdict is required if there is a reasonable (i.e., realistic) possibility that the error affected the verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448 [adopting reasonable possibility standard for penalty phase error].) In the absence of the erroneously admitted evidence, there is a reasonable possibility that at least one juror would not have voted for the death penalty. Whether the prejudice resulting from coworkers' testimony and Officer Niemi's story about finding the dead baby are assessed separately or together, the error requires reversal of appellant's death sentence.

The murder of Nels Niemi was a terrible crime. Under section 190.2, the killing of any police officer in the performance of his duties is an aggravated murder. Indeed, this Court has called the murder of a police officer a "crime of the gravest order." (*People v. Jenkins* (2000) 22 Cal.4th 900, 943.) But that fact did not make a death sentence inevitable. (*Roberts v. Louisiana* (1977) 431 U.S. 633, 636-637 ["it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer"];

People v. Gay (2008) 42 Cal.4th 1195, 1227 [death verdict was not a foregone conclusion despite aggravating evidence that defendant murdered peace officer in the performance of his duties and had committed prior violent crimes, which were "unusually – and unnecessarily – brutal and cruel," and scant evidence in mitigation].) In this case, the mitigating circumstances and factors in this case closely balanced the prosecutor's case in aggravation.

Appellant's background was mitigating. Appellant's youth was marred by instability, neglect, and substance abuse. He was born into a violent time and place in El Salvador and left without both his mother and father for a period of time. (13 RT 2829, 2833.) His mother left him at age six years old to go to the United States. (13 RT 2789.) Shortly thereafter, his father left him to also move to the United States. (13 RT 2829.) Once reunited with his mother in the United States, the instability continued, with his mother moving several times and appellant having to attend many different schools. (13 RT 2831, 2835.) In addition, appellant's mother, providing for him as a single mother, often had to leave him alone after school to fend for himself as she worked long hours caring for other people's children. (13 RT 2859.) Appellant was further left without the presence of his father because of his mother's conflicted relationship with appellant's father. (13 RT 2820, 2831.) Of course, these events adversely affected appellant. (See, e.g., *Wiggins v. Smith* (2003) 539 U.S. 510, 534 [difficult childhood and "alcoholic, absentee mother" part of "powerful" mitigating evidence]; *In re Lucas* (2004) 33 Cal.4th 682, 735 [childhood abandonment significant mitigating evidence].) The neglectful relationship with his parents took its toll on appellant. He was resentful toward his parents because he felt they were not there for him and he was lonely. (13

RT 2819.) Appellant and his mother fought often. (13 RT 2835, 2841.) Prior to the shooting, appellant once again faced rejection by his mother when she had told him earlier in the month to move out of their home. (13 RT 2865.)

In addition to his neglect at home, appellant suffered at school. Appellant struggled with behavioral and learning problems and was isolated from other children because of his problems. (13 RT 2846, 2858.) Appellant's father did not intervene or help appellant with his problems at school. (13 RT 2835.) Appellant was eventually diagnosed with attention deficit disorder and placed on medication. (13 RT 2856.)

Appellant struggled with alcohol and substance abuse from an early age. After unsuccessfully taking medication for attention deficit disorder, appellant developed problems with drinking and drugs as early as age 12. (13 RT 2808, 2813, 2814, 2859.) By 14, he was "smoking something" with men from the street. (13 RT 2845.) Thereafter, appellant was suspended from school for drinking (13 RT 2845) and became a chronic drinker (12 RT 2530; 13 RT 2859.) Appellant dropped out of school at age 17. (13 RT 2858.)

Appellant emerged from a tumultuous, neglectful childhood as immature, uneducated and struggling with attention deficit disorder and alcohol and drug use. Appellant was young; he had just turned 23 years old the day of the shooting. (13 RT 2822.) The mitigating relevance of a capital defendant's youth has been echoed by numerous courts. (See, e.g., *Moore v. Balkcom* (11th Cir. 1983) 716 F.2d 1511, 1524 [age of 23 is mitigating]; *People v. Vasquez* (2012) 2012 IL App (2d) 101132, ¶69 [in aggravated DUI case, defendant's age of 23 is significant mitigating evidence]; *State v. Barber* (Tenn. 1988) 753 S.W.2d 659, 669 [jury was

entitled to find defendant's youth mitigating even when he was 29 years old].)

The circumstances of the crime were not exclusively aggravating. Despite the jury's verdict at guilt, the circumstances of the case also pointed to a sudden shooting motivated more by intoxication than any careful plan or weighing of consequences. As outlined in more detail in Argument I, Section E *ante*, at pages 63-69, and incorporated here, the evidence of deliberation was not overwhelming. Although the jury found that appellant deliberated and premeditated the murder, there was ample evidence that appellant, consistent with his history of struggling with alcohol abuse, was heavily intoxicated during the commission of the crime and did not know why he committed the shooting, leaving room for a reasonable doubt as to deliberation. Although the jurors did not have to accept these circumstances as excusing or justifying the crime, they could consider them mitigating particularly given appellant's youth, difficult and troubled background, and lack of prior convictions and prior violent crimes.

The aggravation in this case did not so far outweigh the mitigation such that no reasonable juror could have concluded that a sentence of life without the possibility of parole was the appropriate penalty. Notably missing from the prosecution's case were some major aggravating factors. Appellant, unlike many capital defendants, had no prior felony convictions, nor an extensive history of violent crimes. (See *People v. Lucero* (1988) 44 Cal.3d 1006, 1032 [penalty phase error required reversal in light of substantial mitigating evidence that, inter alia, defendant had no history of criminal violence or felony convictions]; compare, *People v. Allen* (1986) 42 Cal.3d 1222, 1246 [defendant had prior conviction for murder, was the mastermind of seven armed robberies in which some of the victims were

shot, and while in county jail called for a "death vote" for another inmate and directed brutal attack on him].) "The absence of prior violent criminal activity and the absence of prior felony convictions are significant mitigating circumstances in a capital case . . . ." (*People v. Crandell* (1988) 46 Cal.3d 833, 884, abrogated on other grounds by *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.)

Aside from the victim impact evidence, and the circumstances of the crime itself, the prosecutor's case for aggravation consisted of one prior aggravating incident. This one instance of prior criminal activity involved appellant's prior arrest for public drunkenness. (13 RT 2706-2711.) This incident, however, did not involve physical violence against the arresting officer. Instead, while very intoxicated, appellant kicked at and broke the alignment of the passenger window of the police car. (13 RT 2706-2708, 2715.) On the way to the police station appellant, still intoxicated, made threats to kill Officer Geser and his family. (13 RT 2709.) Officer Geser, however, did not take them seriously or feel in any way endangered and noted that such statements are not uncommon during an arrest. (13 RT 2711, 2714.) This prior aggravating incident thus was not in and of itself overwhelming. (See, e.g., *People v. Crandell*, *supra*, 46 Cal.3d at pp. 885-886 [penalty phase error required reversal where aggravating evidence, based solely on commission of underlying murders, kidnapping and assault with attempt to commit rape and multiple-murder special circumstance, was "not overwhelming" and crimes were "arguably an isolated and aberrant incident"].)

In urging a death sentence, the prosecutor placed a great deal of reliance on victim impact evidence, which was pivotal to the prosecutor's case for death. (*People v. Louis* (1987) 42 Cal.3d 969, 995 ["There is no

reason why we should treat this evidence as any less 'crucial' than the prosecutor – and so presumably the jury – treated it."], citation omitted.) The majority of the prosecutor's penalty phase presentation was victim impact evidence from Officer Niemi's colleagues and family. In addition to this testimony, which included photographs, the prosecutor introduced the story about the dead baby. (13 RT 2719-2778.) The story was a significant part of the victim impact evidence as demonstrated by the prosecutor's seizing upon the story in his closing argument and urging the jurors to read it during their deliberations:

> You may recall that when Dionne was testifying, was entered into evidence a document. The only thing you know about that document now is that it begins with the words, 'every day people touch our lives . . .' And it goes on to describe a description of events, and towards the end Dan Niemi wrote, 'From this one I will take a little bit to carry with me so that when I see my little girl I make sure to give her an extra hug or let her stay up a minute longer. I will use it as a reminder to make sure and wave back when the children wave at me. I will use it to appreciate the life I have.' When he wrote that, how could he possibly have anticipated how his life would come to an end and he wouldn't be able to hug his little girl and let her stay up an extra minute and wouldn't be able to wave back to those kids? I urge you when you go to deliberate and in order to learn a little bit more about what a man Dan Niemi was, take this into the jury room and read it.

(14 RT 2890-2891.)

The prosecutor, while dismissing any potential for mitigating factors, repeatedly emphasized the victim impact evidence. (14 RT 2899.) In fact, the prosecutor argued to the jurors that the victim impact evidence by itself warranted death for appellant. (14 RT 2897.) The prosecutor concluded his closing argument by urging the jurors to do justice to Officer Niemi's family, friends, colleagues and those in the community that he protected.

(14 RT 2901.) In advocating for death, the prosecutor implored the jury to stop from happening in this case what he argued can happen at many trials, that is, to have the true victim, here Niemi, cease to exist as an identifiable figure (14 RT 2890, 2900), and to think of appellant as the victim. (14 RT 2890, 2900.) The prosecutor argued that a convicted defendant, referring to appellant, can usurp the passion due to the victim and thereby steal both the victim's life and the victim's moral constituency. (14 RT 2900.)

Exacerbating the prejudicial effect of the victim impact testimony from Officer Niemi's coworkers and the story about finding a dead baby, the jury received no guidance on how to use the story or victim impact testimony from Officer Niemi's colleagues in its penalty deliberations. None of the penalty phase instructions provided to the jury addressed the limitations on the use of the testimony or story. "Allowing victim impact evidence to be placed before the jury without proper limiting instructions has the clear capacity to taint the jury's decision on whether to impose death." (*State v. Hightower* (N.J. 1996) 680 A.2d 649, 661.) Without some cautionary or guiding instruction, there was an increased risk that the evidence would taint the jury's deliberations in this case.[40]

Finally, objective indicia in the record demonstrate that the jurors viewed the question of penalty to be a close and difficult one. The penalty phase evidence took two days to present – a full day for the prosecution (13 RT 2692) and one day for the defense. (13 RT 2785.) The jurors began their deliberations on June 4, 2007 and reached a verdict on June 11, 2007, deliberating for more than four court days. (14 RT 2924; 4 CT 1036-1037.)

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[40] Defense counsel did not seek an instruction on victim impact evidence. Appellant only raises this point in arguing prejudice.

The length of the deliberations suggests the penalty decision was not simple or straightforward. (*People v. Beardslee* (1991) 53 Cal.3d 68, 113 [acknowledging possibility of a "close case on the question of penalty"]; *People v. Clark* (1992) 3 Cal.4th 41, 163 ["[t]he penalty question was not close, as the relative brevity of the jury deliberations indicates."], abrogated on other grounds by *People v. Edwards* (2013) 57 Cal.4th 658; *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 932 [lengthy penalty deliberations are one indication of close case]; *Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1163 ["the jury spent three days deliberating in the penalty phase, suggesting that the California jury saw this as a close case"].)

In addition to the length of penalty deliberations, the jury's ten written questions submitted during its deliberations indicated that the penalty decision was not clear-cut (4 CT 1002-1005, 1009, 1013-1017, 1021-1026, 1029-1036). (*People v. Filson* (1994) 22 Cal.App.4th 1841, 1852 [request for additional instructions indicate a close case]; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 ["[j]uror questions and requests to have testimony reread are indications the deliberations were close. [Citations.]"].) In fact, the trial court's answer to the jury's question regarding circumstances of the crime highlighted and unduly emphasized all of the victim impact evidence. (14 RT 2941; 4 CT 1012; see Argument VII, Section B *post*, pp. 166-170.) When, as here, the jury is troubled by the case, the appellate court is required to take heed. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [harmless error analysis requires the court to look at the impact of an error on the actual jury].)

With the aggravating and mitigating factors and circumstances so closely balanced and the prosecutor's heavy emphasis on the victim impact evidence, there is a reasonable possibility that, had the trial court excluded

the police officers' testimony and the story about the dead baby, "'at least one juror would have struck a different balance'" (*In re Lucas*, *supra*, 33 Cal.4th at p. 690, quoting *Wiggins v. Smith* (2003) 539 U.S. 510) and voted to spare appellant's life. "In a close case . . . any error of a substantial nature may require reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant." (*People v. Von Villa* (1992) 11 Cal.App.4th 175, 249.) Accordingly, the death judgment must be reversed.

C. The Admission Of The Contested Victim Impact Evidence Violated The Federal Constitution

Appellant understands that this Court has repeatedly rejected claims challenging its application of *Payne*, *supra*, 501 U.S. 808, and asserting that the admission of victim impact evidence violated the federal Constitution. (See, e.g., *People v. Marks* (2003) 31 Cal.4th 197, 235 [challenging application of *Payne*]; *People v. Fierro* (1991) 1 Cal.4th 173, 236 [same]; *People v. Verdugo* (2010) 50 Cal.4th 263, 298 [admission of victim impact evidence does not violate federal Constitution].) Appellant asks this Court to reconsider its reading of *Payne* and to hold that only evidence about the impact of the murder on the victim's family is admissible or to hold more narrowly that testimony from Officer Niemi's coworkers was inadmissible under *Payne*. In the alternative, he presents this claim for purposes of exhausting his state court remedies in the event he does not obtain relief from this Court and seeks habeas corpus review in federal court.

1. The Coworkers' Testimony Exceeded the Limits of *Payne*

In *Payne*, *supra*, 501 U.S. at p. 827, the United States Supreme Court held that the Eighth Amendment does not erect a per se bar to admission of

victim impact evidence during the sentencing phase of a capital trial. The victim impact evidence presented in *Payne* was limited to a single question eliciting brief testimony about the impact of the crime on the victim's young son who was in the same room when his mother and sister were killed and who also was attacked and suffered serious wounds. (*Payne*, *supra*, 501 U.S. at pp. 812-815.)

As defense counsel raised in his motion, testimony by coworkers was not contemplated by the United States Supreme Court in *Payne*, and the coworkers' testimony admitted in this case went beyond the limitations in *Payne*. In his opinion for the Court, Chief Justice Rehnquist summarized the issue before the Court as follows: "[w]e granted certiorari to reconsider [whether] the Eighth Amendment prohibits a capital sentencing jury from considering 'victim impact' evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family." (*Payne*, *supra*, 501 U.S. at p. 817.) Although Justice Rehnquist referred intermittently to the "loss to the victim's family and to society" (*id.* at p. 825), and "loss to the community" (*id.* at p. 823), these general phrases appeared in the context of Justice Rehnquist's opinion that *Booth* rested on an incorrect reading of relevant precedent. These brief references, when viewed in context, do not stand for the proposition that victim impact evidence encompasses general societal harm, much less harm to coworkers. To the contrary, *Payne's* explicit holding allowed evidence only about the family's loss: "A State may legitimately conclude that evidence about the victim and about the impact of the murder on the *victim's family* is relevant to the jury's decision as to whether or not the death penalty should be imposed." (*Id.* at p. 827, italics added.) Thus, the testimony of Niemi's colleagues was not authorized by *Payne*.

This Court, however, has interpreted *Payne* to permit evidence regarding "'the effect of [the victim's] loss on friends, loved ones, and the community as a whole.'" (*People v. Marks*, *supra*, 31 Cal.4th at p. 235, quoting *People v. Fierro* (1991) 1 Cal.4th 173, 236; see also *People v. Pollock*, *supra*, 32 Cal.4th at p. 1183.) In *Marks*, this Court held admissible testimony about the impact of the murder on an employee whom the victim treated like a son. (*People v. Marks*, *supra*, 31 Cal.4th at p. 235.) In *Pollock*, this Court held that evidence of the immediate harm caused by a defendant's criminal conduct is "not limited to the effect of the victims' deaths on the members of their immediate family; it extends also to the suffering and loss inflicted on close personal friends." (*People v. Pollock*, *supra*, 32 Cal.4th at p. 1183.) Indeed, permissible victim impact evidence admissible under factor (a) has been found by this Court to include people who may not even have known the victim. (*People v. Ervine* (2009) 47 Cal.4th 745, 792-793 [effects of murder on victim's community, including coworkers and coworkers' families]; *People v. Taylor*, *supra*, 48 Cal.4th at pp. 645-646 [director of after-school program where victim had volunteered testified about effect of victim's death on school's "community"].) Although this Court in *People v. Hartsch* (2010) 49 Cal.4th 472, has stated that *Payne* is not a case of limits, but one of breadth, stating that the sentencing authority is free "to consider a wide range of relevant material" (*id.* at p. 509, quoting *Payne*, *supra*, 501 U.S. at pp. 820-821), the effect of this interpretation of *Payne* has been to give prosecutors carte blanche in presenting and arguing every aspect of what might somehow be connected to the victim and the loss to others from the victim's death. As this case illustrates, the error in admitting victim impact evidence beyond the limitations of *Payne* renders a trial fundamentally unfair under the

Fourteenth Amendment. (*Payne*, *supra*, 501 U.S. at p. 825.)

In contrast to California, other states have disallowed this type of attenuated victim impact evidence. In Louisiana, the court in *State v. Wessinger* (La. 1999) 736 So.2d 162, held that the testimony of two longtime friends of the victim and two of the victim's coworkers should not have been admitted as victim impact evidence, recognizing that victim impact testimony from persons other than family members of the victim is improper based on Louisiana's Code of Criminal Procedure article 905.2, section A. (La. Code Crim. Proc. Ann. art. 905.2(A).) Oklahoma also only permits immediate family members to testify as victim impact witnesses. (*Lott v. State* (Okla.Crim.App. 2004) 98 P.3d 318, 346-348 [error to admit testimony of grandmother about impact of victim's murder].) New Jersey also places limitations on who may give victim impact testimony. (See *State v. Muhammad* (N.J. 1996) 678 A.2d 164, 175 [characterizing victim impact evidence as a "brief statement from the victim's family"].) These judicial and legislative judgments reflect an understanding of the risk of arbitrariness in defining "victim" broadly and the view that under *Payne*, victim impact evidence is restricted to the victim's survivors. (See *Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, 828 ["victim impact evidence is intended to provide a quick glimpse of a victim's characteristics and the effect of the victim's death on survivors."].)

Consistent with this properly limiting view of *Payne*, testimony from Officer Niemi's coworkers was not permissible victim impact evidence, and the trial court erred in admitting it.

2. The Coworkers' Testimony and the Story about the Dead Baby Rendered the Penalty Trial Fundamentally Unfair and the Death Sentence Arbitrary and Unreliable

Although the United States Supreme Court in *Payne* permitted victim impact evidence during the sentencing phase of a capital trial, the high court cautioned that the use of victim impact evidence was not without limit: "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*Payne*, *supra*, 501 U.S. at p. 825.)

The victim impact evidence presented in *Payne* was closely tied to the circumstances of the crime – the impact on a young child who the killer knew was present at the time the crime was committed and who was himself a victim. (*Payne*, *supra*, 501 U.S. at pp. 812-815.) In contrast to *Payne*, the testimony from coworkers and the story about the dead baby admitted in this case was removed from the crime and rendered the trial fundamentally unfair, violating appellant's rights to a fair trial under the due process clause of the Fourteenth Amendment to the United States Constitution. (*Payne, supra,* 501 U.S. at p. 831 (conc. opn. of O'Connor, J.); *Le v. Mullin* (2002) 311 F.3d 1002, 1015 [evidence that improperly encourages the jury to impose a sentence of death based on considerations of sympathy for the victims may constitute due process error].)

As discussed previously, if the error so corrupts the trial that it renders the trial fundamentally unfair, the error cannot be deemed harmless. (See Argument III.D. *ante*, at pp. 104-105.) The high court has recognized that the introduction of inflammatory evidence may deprive the defendant of his federal constitutional right to a fair trial. (See *Duncan v. Henry*

(1995) 513 U.S. 364, 366; *Estelle v. McGuire* (1991) 502 U.S. 62, 67.) The question is whether the inadmissible evidence "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" (*Darden v. Wainwright* (1986) 477 U.S. 168, 180, quoting *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.) The answer requires an "examination of the entire proceedings in [the] case." (*Donnelly v. DeChristoforo, supra*, 416 U.S. at p. 643; see *Estelle v. McGuire*, *supra*, 502 U.S. at p. 72 [judging challenged instruction in the context of the instructions as a whole and the entire trial record].) In this way, proof of the due process violation incorporates an assessment that the error mattered, i.e., that the error undermined confidence in the verdict. (See, e.g., *Kyles v. Whitley* (1995) 514 U.S. 419, 434 ["fair trial" is "a trial resulting in a verdict worthy of confidence"].) In the context of the claim here, the inquiry must take into account the unique nature of the penalty trial in which the jury is called upon – and given broad discretion – to make a reasoned moral determination whether to impose a death sentence. (See *Payne*, *supra*, 501 U.S. at p. 836, citing *Penry v. Lynaugh* (1989) 492 U.S. 302, 319-328 [capital sentence should be imposed as a "'reasoned moral response'"].) But, even assuming arguendo a *Chapman* analysis (*Chapman v. California* (1967) 386 U.S. 18, 24) is required, the State cannot prove the error harmless beyond a reasonable doubt.

Certainly, "not every trial error or infirmity . . . constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice.'" (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 642, quoting *Lisenba v. California* (1941) 314 U.S. 219, 236.) But this case does not involve a run-of-the-mill trial error. As set forth in Section B.3., above and incorporated here, the testimony from Officer Niemi's coworkers and the

story about a dead baby admitted in the penalty phase was both exceedingly prejudicial to appellant and absolutely pivotal to the prosecution's otherwise less than compelling case for death. The prosecutor emphasized this victim impact evidence in a case where the mitigating and aggravating factors and circumstances was closely balanced. Appellant's background was mitigating; he was young and had no prior felony convictions. There was only one instance of prior aggravating conduct that aligned with appellant's history of struggles with alcohol. Moreover, based on the length of deliberations and the many questions from the jury during deliberations, the jurors considered penalty a close case. Viewed in the context of the entire trial, the highly inflammatory testimony and story unfairly tainted appellant's penalty trial and erased any confidence in the penalty verdict rendering appellant's trial fundamentally unfair.[41]

In addition, the admission of the contested victim impact evidence also violated appellant's right to a reliable penalty determination. The Supreme Court has repeatedly recognized that death is a unique punishment, qualitatively different from all others. (See, e.g., *Gregg v. Georgia* (1976) 428 U.S. 153, 187.) Relying on this fundamental premise, the high court has emphasized the need for heightened reliability in death penalty cases. (See, e.g., *Gardner v. Florida*, *supra*, 430 U.S. at p. 357

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[41] Although the United States Supreme Court has declined to clarify the limitations of *Payne*, in *Kelly v. California* (2008) 555 U.S. 1020, Justice Souter would have granted the petition for a writ of certiorari on this question, and Justice Stevens issued a statement expressing his concern regarding a lack of limitations on victim impact evidence. Justice Stevens's statement acknowledged that the high court has left state and federal courts unguided, opting instead to "gestur[e]" toward the protection of the Due Process Clause."

[penalty phase]; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Under the Eighth Amendment, the high court has not hesitated to strike down state procedures which increase the risk that the factfinder will make an unreliable determination at the penalty phase of a capital trial. (See, e.g., *Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-330; *Lockett v. Ohio* (1978) 438 U.S. 586, 605-606.)

Here, the erroneous admission of testimony from Officer Niemi's colleagues and a story about a dead baby diverted the jury's attention from its proper role, and invited an irrational and purely subjective – hence unreliable – response and a verdict that was impermissibly based on passion. Thus, the victim impact evidence admitted in this case was incompatible with a rational or impartial penalty judgment. (See *Saffle v. Parks* (1990) 494 U.S. 484, 493 [death penalty must be reasoned moral response rather than emotional one].) The trial court's errors in admitting inflammatory victim impact evidence raise doubt about the reliability of appellant's death sentence in light of the heightened scrutiny which the Eighth Amendment places upon capital proceedings. (*Johnson v. Mississippi* (1981) 486 U.S. 578, 585; *Saffle v. Parks, supra*, 494 U.S. at p. 493 [state must attempt to ensure reliability and nonarbitrariness in penalty determination].)

For all the above reasons, appellant's death sentence should be reversed.

VI. THE TRIAL COURT ERRONEOUSLY AND PREJUDICIALLY DENIED APPELLANT'S REQUEST TO INFORM THE JURY THAT ANY LINGERING OR RESIDUAL DOUBT A JUROR HARBORED ABOUT HIS GUILT WAS A PERMISSIBLE MITIGATING FACTOR

Defense counsel requested an instruction that the jurors could consider any lingering or residual doubt they might have about appellant's guilt as a mitigating factor in selecting his sentence. The trial court denied the request. Its ruling and its rationale – that the instruction was not appropriate and was not required – were incorrect under longstanding state law, and, to the extent that they were supported by some of this Court's decisions, appellant asks that those decisions be reconsidered. In addition, the failure to inform the jury about lingering doubt violated appellant's federal constitutional rights. In light of the evidence presented about the crimes during the guilt phase, the arguments of counsel at the penalty phase, and the jury's questions during its penalty deliberations, the refusal to give the requested instruction cannot be dismissed as harmless error and requires reversal of the death sentence.

A. The Trial Court Refused Appellant's Instruction On Lingering Doubt

At the hearing on jury instructions, prior to opening the penalty phase, defense counsel requested an instruction informing the jury that it could consider its lingering doubts in determining the appropriate penalty. (13 RT 2685.) The requested instruction provided as follows: "In determining mitigating factors, the jurors may also consider any lingering doubt they may have concerning their verdict in the guilt phase." (4 CT

971.)[42] The prosecutor filed a written opposition to the motion. (4 CT 965-967.) The trial court denied defense counsel's request, stating that there was abundant case law indicating that the instruction is not required. (13 RT 2686.) The trial court also stated: "I think it's inappropriate to – for the court to invite the jury to question the verdict that they've reached." (13 RT 2686.) The trial court, however, did permit defense counsel to argue lingering doubt to the jurors. (13 RT 2686.)

In her penalty phase closing argument, defense counsel told the jurors:

> But if any of you still have perhaps not a reasonable doubt but some residual, minor, lingering doubt about Mr. Ramirez's state of intoxication, was he as drunk as he said . . . But if you have still some question, despite your verdict that's been given Mr. Ramirez, I'm going to ask you, that's a mitigating factor for you to look at in order to support a verdict of life in prison.

(14 RT 2914.) For his part, during penalty closing argument, the prosecutor did not directly address the issue of lingering doubt, but emphasized that appellant deliberated and premeditated the shooting and thus deserved death. (14 RT 2888-2895.)

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[42] The defense motion requesting the instruction read as follows: "The defense hereby requests the following additional special jury instruction: [¶] 'In determining mitigating factors, the jurors may also consider any lingering doubt they may have concerning their verdict in the guilt phase.' to consider the perceived financial cost of either penalty." (4 CT 971.) The extraneous language regarding financial cost appears to be an inadvertent error, as an instruction asking the trial court to instruct the jurors to disregard the financial cost of penalty was filed separately. (4 CT 972.) While defense counsel's motion to instruct the jurors with lingering doubt at the penalty phase contained this error, the intent was clear – to inform the jurors that they could consider any lingering doubt they had about their verdict in the guilt phase in determining penalty.

B. The Trial Court's Refusal To Deliver The Requested Instruction On Lingering Or Residual Doubt, A Relevant Mitigating Factor In California, Violated Both State Law And The Federal Constitution

The legal adequacy of the trial court's instructions is reviewed independently. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.)

1. Under State Law, the Trial Court Should Have Provided Defense Counsel's Correct, Properly-Limited Statement of the Law to the Jury

Under California law, from at least 1965 to the present, lingering or residual doubt has been deemed a relevant mitigating circumstance for a capital jury's consideration at the penalty phase in deciding between life or death. (See *People v. Gay* (2008) 42 Cal.4th 1195, 1221; *People v. Terry* (1964) 61 Cal.2d 137, 146 ("*Terry*"), overruled on other grounds in *People v. Laino* (2004) 32 Cal.4th 878, 891.) In some cases, trial courts forthrightly have informed the jurors about their power to rely on, and return a sentence less than death based on, this factor. (See *People v. Harrison* (2005) 35 Cal.4th 208, 255 [delivering instruction to jury]; *People v. Valdez* (2004) 32 Cal.4th 73, 129 [delivering similar instruction to jury, but defining lingering doubt]; *People v. Snow* (2003) 30 Cal.4th 43, 125 [delivering an instruction, approved by this Court, that was significantly longer than appellant's instruction, but similar in stating the jury could "consider as a mitigating factor residual or lingering doubt"]; *People v. Arias* (1996) 13 Cal.4th 92, 182-183 [delivering similar instruction, approved by this Court as a correct statement of law, as that rejected here]; *People v. Morris* (1991) 53 Cal.3d 152, 218-219 [delivering instruction that this Court characterized as "straightforward"].) Arbitrarily, in other cases,

such as the present one, the trial court has not provided similar guidance to the jury. (See, e.g., *People v. Edwards* (2013) 57 Cal.4th 658, 765 and cases cited therein; *People v. Ward* (2005) 36 Cal.4th 186, 219.)

In this case, the critical issue at trial was whether appellant had deliberated and premeditated the murder. While the jurors in the guilt phase determined beyond a reasonable doubt that appellant shot Officer Niemi with premeditation and deliberation, the evidence of appellant's intoxication before, during and after the shooting, coupled with contradictory testimony about appellant's statements immediately after the shooting, allowed for lingering doubt as to appellant's state of mind. Thus, appellant proffered a short and accurate instruction that informed the jury that lingering doubt was an acceptable circumstance in mitigation of punishment. (4 CT 971.) Appellant's request addressed the law, not the facts, addressed a point of law relevant to the issues, and stated the law accurately, thus meeting the fundamental requisites for an instruction. (5 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012), § 673, p. 1039.) Although a trial court may refuse a proffered instruction if it is an incorrect statement of law, is argumentative, is duplicative, or might confuse the jury (*People v. Gurule* (2002) 28 Cal.4th 557, 659), appellant's requested instruction contained none of these potential defects.

Here, the trial court's rationale for rejecting the proffered instruction was two-fold: (1) it was inappropriate to invite the jury to question the verdict they reached; and (2) the trial court was not required to instruct on lingering doubt. The trial court's first reason is wrong given this Court's repeated pronouncements that capital jurors may consider any residual doubts and return a life verdict based on those doubts. (See, e.g., *People v. Gay*, *supra*, 42 Cal.4th at p. 1221; *People v. Sanchez* (1995) 12 Cal.4th 1,

77 [confirming that the jury's consideration of residual doubt was proper and defendant could urge his possible innocence as a mitigating factor]; *People v. Johnson* (1992) 3 Cal.4th 1183, 1252 [same].) The trial court's second reason was inconsistent with this Court's decisions implicitly approving defense-requested instructions with similar, and even more extensive, instructions on lingering doubt than that requested in this case. (See, e.g., *People v. Gay*, *supra*, 42 Cal.4th at p. 1225; *People v. Valdez*, *supra*, 32 Cal.4th at p. 129, fn. 2; *People v. Snow*, *supra*, 30 Cal.4th at p. 125; *People v. Arias*, *supra*, 13 Cal.4th at pp. 182-183.)

Appellant readily acknowledges that despite the relevance of lingering doubt, this Court has held there is no requirement under state law that the jury specifically be instructed that it may consider lingering doubt as a mitigating circumstance, even if such an instruction is requested by the defendant. (See, e.g., *People v. Jackson* (2014) 58 Cal.4th 724, 769; *People v. Gray* (2005) 37 Cal.4th 168, 231-232; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219, abrogated on other grounds by *People v. Diaz* (2015) 60 Cal.4th 1176, 1190; *People v. Sanchez*, *supra*, 12 Cal.4th at p. 77.) Appellant urges this Court to reconsider and reverse the position taken in these cases.

The trial court had a statutory duty to provide correct statements of law to appellant's jury upon request. Under section 1093, subdivision (f), the judge "shall" charge the jury "on any points of law pertinent to the issues, if requested by either party[.]" (*Ibid.*; see also § 1127 [court must give requested instructions it "thinks correct and pertinent"].) The statutory command is mandatory and unmistakably clear. This Court recognized as much in *People v. Cox* (1991) 53 Cal.3d 618. In *Cox*, the Court determined that its earlier decision in *Terry*, *supra*, 61 Cal.2d 137, authorizing a capital

defendant to present evidence and/or argument relating to innocence or residual doubts about guilt, could not have addressed the trial court's duty to instruct on that concept because under the law at the time, "the jury received virtually no instruction at the penalty phase." (*People v. Cox*, *supra*, 53 Cal.3d at p. 678.) The Court rejected Cox's argument that the trial court should have delivered his requested lingering doubt instruction, finding the instruction was improperly framed. The Court, however, in reliance on sections 1093 and 1127, opined that a trial court might "be required to give a properly formulated lingering doubt instruction when warranted by the evidence." (*Id.* at p. 678, fn. 20.) Although the Court has subsequently retreated from the observation in *Cox* that a lingering doubt instruction may be warranted by the evidence as dictum (see, e.g., *People v. Hartsch* (2010) 49 Cal.4th 472, 512-513), it has never suggested that the language of the sections 1093 and 1127 was not mandatory, or that the statutes impose no duty to instruct a jury fully on the relevant law in a particular case.

The question, therefore, is whether other instructions, specifically CALCRIM No. 763, factors (a) and (k) conveyed and defined the concept of lingering doubt under the facts of appellant's case so that the jurors were fully instructed in the applicable law. To be sure, the Court previously has determined in other cases that a jury might find room for consideration of lingering doubt in one or both of those CALJIC No. 8.85 factors. (See, e.g., *People v. Thomas* (2012) 53 Cal.4th 771, 826-827 [confirming that factors (a) and (k) adequately cover the concept of lingering doubt]; *People v. Hamilton* (2009) 45 Cal.4th 863, 912 [finding that factor (a) includes residual doubt evidence]; *People v. Boyce* (2014) 59 Cal.4th 672, 708-709 and *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1272-1272 [both

reaffirming that the factor (k) instruction sufficiently encompasses the concept of lingering or residual doubt].) However, the plain language of CALCRIM No. 763 on factors (a) and (k) suggests otherwise, and, therefore, appellant respectfully requests that this rationale be reexamined and discarded.

Although lingering doubt is a relevant mitigating factor under state law, the instructions in appellant's case made no mention of it, even though lingering doubt was a key concept at the penalty phase. The instructions given on the aggravating and mitigating factors, CALCRIM No. 763, were neither conflicting nor ambiguous on this point. There simply was no instruction on whether lingering or residual doubt was a mitigating factor. In *Franklin v. Lynaugh* (1988) 487 U.S. 164, 174, a plurality of the United States Supreme Court observed that lingering doubt was neither a "circumstance of the offense" nor related to "any aspect" of a capital defendant's "character" or "record." In *People v. Cox*, *supra*, 53 Cal.3d at p. 676, this Court agreed. Indeed, the trial court here opined that lingering doubt was not appropriate for the jury to consider, although it permitted defense counsel to present argument on it. (13 RT 2686.) If the high court, this Court, and, inferentially, the trial court found that lingering doubt did not fit neatly into the sentencing factors, there is no reason to believe that appellant's jury, reached a contrary conclusion and expanded the instructions on its own to incorporate that principle, particularly given its confusion about the term "circumstances of the crime" in factor (a) (4 CT 1012) and the circumstances it could consider under factor (k) (4 CT 1016-1017), concepts essential to understanding the sentencing charge. (See

Argument VII.B. *post*, pp. 166-168.)[43]

For the same reasons that it was error not to give the requested lingering doubt instruction, without that instruction, there was a reasonable likelihood the jurors did not understand they could consider lingering doubt in deciding the appropriate punishment for appellant. As justices of this Court have acknowledged:

> [T]he trial court is obligated to give an express instruction (on lingering doubt) when there is a reasonable likelihood that, in the absence of such an advisement, the jury will labor under a misconception in this regard. A reasonable likelihood would compel a finding of error [Citation]. Error, of course, must be avoided.

(*People v. Johnson*, *supra*, 3 Cal.4th at p. 1261 (conc. opns. of Mosk, J., joined by Kennard, J.).)[44] As previously explained, the instructions on

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[43] In some cases, this Court has noted that in *Franklin v. Lynaugh, supra*, 487 U.S. at p. 174, the high court determined there was no federal constitutional right to a residual doubt instruction and has ruled that the same result obtains under state law. (*People v. Rogers* (2013) 57 Cal.4th 296, 348; *People v. Cox*, *supra*, 53 Cal.3d at pp. 676-677.) However, in *Franklin*, and again in *Oregon v. Guzek* (2006) 546 U.S. 517, the United States Supreme Court declined to resolve whether the Eighth Amendment affords capital defendants the right to seek a sentence less than death on the basis of lingering or residual doubt. (*Id.* at p. 525.) Without recognizing lingering doubt as a relevant mitigating circumstance, there was no basis for a federal constitutional requirement for an instruction. In contrast, in California, as a matter of substantive capital jurisprudence since *Terry* was decided in 1964, "a capital jury may consider residual doubts about a defendant's guilt." (*People v. Musselwhite*, *supra*, 17 Cal.4th at p. 1272.) Consequently, the question of whether an instruction is required is not answered logically or legally by reference to *Franklin*.

[44] Although not cited on this precise point, Justice Mosk's concurring opinion in *Johnson* regarding the law of lingering doubt has been subsequently cited repeatedly with approval by the majorities of this

(continued...)

factors (a) and (k) did not address lingering doubt, and the jurors were not likely to understand those instructions to encompass that concept as applied to whether appellant deliberated and premeditated the shooting. In addition, the jurors would not have understood factor (h) to encompass lingering doubt. While the instruction told the jury to consider a defendant's capacity to appreciate the criminality of his conduct or follow the requirements of the law, nothing in it suggested that the jury could consider any lingering doubt it had about appellant's mental state as a circumstance in mitigation of punishment. Moreover, the attorneys' arguments could not and did not compensate for the instructional omission. This was not a case where both defense counsel and the prosecutor told the jury that under the law it could consider lingering doubt. (See, e.g., *People v. Davenport* (1995) 11 Cal.4th 1171, 1210 [both sides discussed lingering doubt in their closing argument]; *People v. Robinson* (2005) 37 Cal.4th 592, 653 [same].)[45] Plainly put, the instructions, taken as a whole, did not adequately inform the jurors of the scope of their sentencing authority: the instructions did not address the mitigating role of residual doubt in the jury's penalty deliberations.

2. The Trial Court's Failure to Give Any Instruction on Lingering or Residual Doubt Violated the Federal Constitution

The trial court's failure to instruct on lingering doubt violated the federal Constitution in multiple ways. This holds true whether the rejection

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[44] (...continued)
Court. (See *People v. Berryman* (1993) 6 Cal.4th 1048, 1104; *People v. Gay*, *supra*, 42 Cal.4th 1195, 1220.)

[45] As explained in Argument VII, Section C *post*, at pages 170-179, and incorporated here, the jury may have understood that it could not consider the persuasiveness of counsel argument in its penalty deliberations.

of appellant's instruction is viewed directly as error or as rendering the given instructions ambiguous and creating a reasonable likelihood that the jury applied them in a way that violated the federal Constitution. (See *Boyde v. California* (1990) 494 U.S. 370, 380.) First, under state law, appellant had a statutory right to have the jury exercise its discretion and "fix his punishment in the first instance" at either life in prison without parole or death (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 347) and to do so based on both statutory and judicially-recognized mitigating factors. *Hicks* held that a defendant, entitled by state statute to have jury decide his punishment, was deprived of federal due process by incorrect instructions that failed to state the jury's authority to impose any sentence of not less than ten years. Although the jury here, unlike the jury in *Hicks*, was instructed on all the punishment options provided by state law, its sentencing discretion was unfairly cabined by the trial court's failure to let the jurors know that under state law lingering doubt was a mitigating factor and a basis for choosing life without parole over a death sentence. In this way, appellant's jury, much like the jury in *Hicks*, was hindered from exercising its sentencing authority to the full extent allowed under state law.

Second, the due process clause of the Fourteenth Amendment was violated by the trial court's failure to heed the "the statutory mandate" (*People v. Cox*, *supra*, 53 Cal.3d at p. 678, fn. 20), embedded in section 1093 and a similar admonition about instructional duties in section 1127. (See *Sandin v. Conner* (1995) 515 U.S. 472, 484 [setting forth the test for evaluating whether a state prison regulation creates a liberty interest protected by the due process clause].) Although *Sandin* involved prison regulations, its ruling applies to state statutes as well. (See *Marsh v. County of San Diego* (9th Cir. 2012) 680 F.3d 1148, 1155-1156 [applying *Sandin* to

Code Civ. Proc., § 129 and noting that "once a state creates a liberty interest, it can't take it away without due process."].) In the context of a capital sentencing proceeding, sections 1093 and 1127 secure for the capital defendant his substantive right to a reliable sentencing by a jury with knowledge of the full range of its discretion, and guide the trial court in evaluating the circumstances under which requested instructions must be provided to the jury. The statutes also prescribe for the trial court what it must do if the requested instructions are proper. In this way, the statutes both protect a "substantive end" and are sufficiently mandatory in nature to create a liberty interest protected by the due process clause. (*Marsh v. County of San Diego*, *supra*, at pp. 1155-1156.)

Third, a jury charge may be impermissibly vague in violation of the Eighth and Fourteenth Amendments by failing "adequately to inform" the jury what it "must find to impose the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362.) In such a situation, the jury receives inadequate guidance about the meaning of the applicable state sentencing factors, and the vice of such an omission is that the resulting death sentence is impermissibly arbitrary and capricious. (*Id.* at p. 362.) Although sentence-selection factors are subject to a more deferential scrutiny than death-eligibility factors (*Tuilaepa v. California* (1994) 512 U.S. 967, 973), sentencing factors must have some "'common-sense core of meaning . . . that criminal juries should be capable of understanding'" (*ibid.*, citation omitted). At a minimum, the instructions must tell "the jury to consider a relevant subject matter and [do] so in understandable terms." (*Id.* at p. 976.) In the present case, as explained in Section B.1. *ante*, the instructional omission left to chance and caprice whether appellant's jury understood and applied the concept of residual doubt, a mitigating factor

embedded in the state's jurisprudence and which appellant was entitled to have them consider. The lack of definition and guidance in the instructions here violated the precepts described in *Maynard* and *Tuilaepa.*

Fourth, although appellant may not have been entitled to have a jury consider lingering doubt as a matter of federal constitutional law, he was so entitled under state decisional law. It was, simply put, a mitigating factor that he was entitled to have his jury consider under state law. A residual doubt over whether appellant committed a capital murder is by definition, as *Terry* recognized, something that might serve as the basis for a life verdict. (See *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5 [excluding evidence of petitioner's good behavior in jail awaiting trial violated his right to place before the sentencer relevant evidence in mitigation of punishment].) Consequently, he was entitled to instructions that allowed the jury to give meaningful consideration and full effect to his evidence, theory, and argument explaining and applying that factor. (See *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 246; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112 [confirming that the sentencer must be permitted to consider "any relevant mitigating factor"].) Without such an instruction, as outlined in Section B.1. above, there was a reasonable likelihood the jurors did not understand they could consider lingering doubt. (*Boyde v. California, supra,* 494 U.S. at p. 380 [applying reasonable likelihood standard to ambiguous instruction].)

Fifth, the failure to instruct the jury on lingering doubt deprived appellant of his due process right to present a defense. Most of the rights encompassed within the right to present a defense apply at the penalty phase of a capital trial. (See *Simmons v. South Carolina* (1994) 512 U.S. 154, 160-169; *id.* at p. 174 (conc. opn. of Ginsburg, J.).) California is one of

those jurisdictions which "have recognized the legitimacy of a lingering-doubt defense in the penalty phase of a capital trial." (*People v. Gay*, *supra*, 42 Cal.4th at p. 1227 ["'residual doubt is perhaps the most effective strategy to employ at sentencing.'"].) Having established the state-law existence of a lingering doubt defense, a state must ensure that its relevance is conveyed to the trier of fact. (*Tyson v. Trigg* (7th Cir. 1995) 50 F.3d 436, 448 [the right to present a defense "would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense"].) Thus, a state court's failure to correctly instruct the jury on the defense may deprive the defendant of his due process right to present a defense. (See *Barker v. Yukins* (6th Cir. 1999) 199 F.3d 867, 875-876 [granting habeas relief under AEDPA where the erroneous self-defense instruction deprived the defendants of a meaningful opportunity to present a complete defense].) Defense counsel argued to the jury that they could consider any lingering doubt about appellant's intoxication as a mitigating factor, but because of the trial court's refusal to instruct on lingering doubt, she could not point to legal grounds on which the jury could consider lingering doubt if it agreed with her argument. To give force and meaning to defense counsel's theory of defense, the jury needed an instruction on lingering doubt.

Although appellant did not assert these federal constitutional claims at trial, they are cognizable on appeal.[46] As this Court has recognized "'[a]s a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a

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[46] Defense counsel filed a pre-trial motion to federalize all objections that was denied by the trial. (3 CT 619; 2 RT 20-21.)

claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would determine the claim raised on appeal.'" (*People v. Partida* (2005) 37 Cal.4th 428, 436, quoting *People v. Yeoman* (2003) 31 Cal.4th 93, 117; accord, *People v. Bonilla* (2007) 41 Cal.4th 313, 353, fn. 18.) The same principal applies here. Appellant's federal constitutional claims simply restate under alternative federal principles the legal consequences of the trial court's refusal to instruct on lingering doubt. No other information is required for adjudication of these claims, and therefore the claims are preserved for appeal. (See *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 1.)

C. The Error Requires Reversal Of The Death Judgment

The effect of the trial court's failure to give the requested instruction on lingering or residual doubt on the penalty verdict should be assessed in the context of the "broad discretion" entrusted to a jury in the penalty phase, the "highly subjective" judgment each juror must make, and the gravity of the consequence of a flawed verdict. (*Turner v. Murray* (1986) 476 U.S. 28, 33-35, 37; see also *People v. Nunez* (2013) 57 Cal.4th 1, 61 [acknowledging each juror's "profoundly personal" and "qualitatively different" assessment of mitigating and aggravating factors].) Whether the instructional error is one of state law or federal constitutional law, it is not harmless. (See *People v. Brown* (1988) 46 Cal.3d 432, 447-448 [stating the "reasonable possibility" test for state law errors affecting the penalty verdict which places burden of proof on the defendant]; *Chapman v. California* (1967) 386 U.S. 18, 24 [stating "harmless beyond a reasonable doubt" standard for federal constitutional error which places the burden of proof on

the prosecution].)

Given the facts of this case, residual doubt was likely to be a question on the jurors' minds. First, the defense at the guilt phase was that appellant did not deliberate the killing, but that the shooting was a rash and impulsive act driven by heavy intoxication. The prosecutor for his part argued at length that the murder was deliberate and premeditated. Although the jury found that appellant deliberated and premeditated the shooting, there was evidence of appellant's intoxication before, during and after the shooting that could have cast doubt on whether he deliberated the murder (9 RT 1923-1927, 1948-1951; 12 RT 2524), and appellant's statements after the shooting that indicated that he did not plan or deliberate in shooting Officer Niemi (12 RT 2456-2457). At the penalty phase, the prosecutor argued for death based on appellant's premeditation and deliberation of the murder. (14 RT 2888, 2893, 2895.) Defense counsel argued about appellant's mental state, especially the extent of his intoxication and told the jurors they could consider any lingering doubt about appellant's degree of intoxication. (14 RT 2902, 2908, 2912, 2914.) Thus, whether and the extent to which appellant deliberated and premeditated the shooting was placed squarely before the jury at the penalty phase. In fact, during their deliberations, the jury asked for a definition of "maturely and meaningfully reflected on the gravity of his act," possibly reflecting the jury's consideration of lingering doubt. (4 CT 1023; see Argument VII.D. *post*, pp. 179-195.)

Second, as previously discussed, the jury's mid-deliberation questions to the trial court indicate the jurors wrestled with their sentencing decision. (See Argument V.B.3. *ante*, pp. 130-138.) The jurors deliberated for more than four court days and submitted ten written questions. Their

questions showed the jury struggling to understand and weigh mitigating factors and aggravating factors.

Third, the attorneys' closing arguments did not ameliorate the error. While defense counsel informed the jurors that they could consider lingering doubt, the prosecutor was silent on this topic. Closing arguments by counsel "are not a substitute for a proper jury instruction" from the court. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1111.) This is particularly true where, as here, the trial court informs the jurors that the only correct law was that which it provided. (4 CT 1043 [penalty phase direction to follow the law as the trial court explains it].) In this case, no instructions supported defense counsel's argument. (See Argument VII.C. *post*, pp. 170-179 [jury effectively instructed not to consider the persuasiveness of counsel's argument in their penalty deliberations].) Residual doubt is a compelling reason to choose life over death. (See Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* (1998) 98 Colum. L.Rev. 1538, 1563 [in study of 153 jurors in 41 capital murder trials, 77.2 percent said residual doubt about the defendant's guilt did or would make the juror less likely to vote for death, making it "the most powerful 'mitigating' fact"].) But nothing in the initial instructions, the court's answers to the jury's questions or counsel's argument would have led any juror to understand that they could give effect to any lingering doubt they had in choosing between life and death as appellant's punishment.

Finally, as outlined in Argument V, Section B.3. *ante*, at pages 130-138, and incorporated here, the aggravation did not so far outweigh the mitigation that no reasonable juror could have concluded that a sentence of life without the possibility of parole was the appropriate penalty. Appellant did not have an extensive history of violent crime, in fact, he had no prior

felony convictions. To counter the aggravating evidence, appellant presented mitigation evidence from numerous members of his family who described the fearful circumstances of his crucial, early years, separation from his mother when he was five to six years old, and evidence about appellant's troubled childhood and adolescence. (See Statement of Facts *ante*, at pp. 34-38.)

In short, and for reasons more fully outlined in Argument V, Section B.3. *ante*, at pages 130-138, a death sentence was not inevitable. Viewed from the jurors' perspective, the question of punishment was close and if the jury had been clearly advised of the role of residual doubts, there is reasonable possibility that "at least one juror would have struck a different balance" (*In re Lucas* (2004) 33 Cal.4th 682, 690, quoting *Wiggins v. Smith* (2003) 539 U.S. 510, 123) and would not have voted for death, and, under the federal prejudice standard, the State cannot prove the error harmless beyond a reasonable doubt. Accordingly, the Court should reverse the death judgment.

VII. THE DEATH JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT'S ERRONEOUS INSTRUCTIONS IN RESPONSE TO THE JURY'S MID-DELIBERATION QUESTIONS UNDERCUT THE JURY'S CONSIDERATION OF THE MITIGATING CIRCUMSTANCES

The jurors took seriously their responsibility to determine the appropriate penalty for appellant. They asked a total of ten questions during their four-day deliberations. Their questions indicate that they read the instructions closely and wrestled with the concepts of aggravating and mitigating factors, which is fundamental to a fair and reliable penalty determination. The trial court's instructions in response to four of these inquiries misled the jurors as to what they could consider as mitigation, undermining confidence in their death verdict, violating both state law and the federal Constitution and requiring reversal of appellant's death sentence.

A. The Jury's Questions During Penalty Phase Deliberations And The Trial Court's Duty To Respond

On June 4, 2007, in the afternoon, the jury commenced its penalty phase deliberations. (4 CT 1007.) The jury deliberated over four court days, from June 4, 2007 to June 11, 2007. (4 CT 1007, 1036.) During their deliberations, the jurors submitted ten written questions. (4 CT 1004, 1012, 1014, 1016, 1021, 1023, 1025, 1029, 1031, 1033.) They also requested individual copies of instructions, all evidence admitted during the penalty phase, and all photographs admitted at the guilt phase. (4 CT 1002-1003, 1013.) The trial court responded in writing to all the jury's questions. (4 CT 1005, 1012, 1015, 1017, 1022, 1024, 1026, 1030, 1032, 1034, 1035.)

The trial court held discussions regarding proposed responses to the

jury's questions off-record and then summarized the discussions after the jury was instructed. Because the discussions regarding the jury questions were not always on the record, and the memorialization of the discussions was not always contemporaneous, there is no complete record of objections and the trial court's rulings. (See § 190.9, subd. (a)(1) ["[i]n any case in which a death sentence may be imposed, all proceedings conducted in the superior court, including all conferences and proceedings, whether in open court, in conference in the courtroom, or in chambers, shall be conducted on the record with a court reporter present"].)

Appellant challenges the trial court's responses to four of the jury's questions: (1) the trial court's instruction defining "circumstances of the crime" (4 CT 1012); (2) the trial court's instruction regarding arguments of counsel (4 CT 1026); (3) the trial court's instruction regarding mature and meaningful reflection (4 CT 1024); and (4) the trial court's instruction regarding prior felony convictions (4 CT 1032).

A trial court's obligation to respond to jury questions during deliberations is governed by section 1138, which states in relevant part: "After the jury have retired for deliberation, . . . if they desire to be informed on any point of law arising in the case, . . . the information required must be given . . . ." This language "imposes on the court the 'primary duty to help the jury understand the legal principles it is asked to apply.'" (*People v. Cleveland* (2004) 32 Cal.4th 704, 755, citation omitted.) "Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) The trial court must consider how it can best aid the jury, deciding as to each jury question whether it should

give a further explanation or reiterate the instructions already given. (*Ibid.*) A reviewing court applies "the abuse of discretion standard of review to any decision by a trial court to instruct, or not to instruct, in its exercise of its supervision over a deliberating jury." (*People v. Waidla* (2000) 22 Cal.4th 690, 745-746.)

B. The Trial Court's Definition of Circumstances Of The Crime Was Incomplete, Imbalanced And Favored The Prosecution

On June 5, 2007, in the afternoon, the jury submitted a written note asking for "a definition of 'an element of a crime' as included in the definition of an 'aggravating circumstance.' In addition, we request a definition of 'circumstances of the crime' as included in Factor A." (4 CT 1012; 14 RT 2935.) Appellant does not dispute the trial court's instruction regarding the first part of the jury's question, but does challenge the trial court's instruction regarding the second part of the jury's question, a definition of "circumstances of the crime" in factor (a).[47]

The prosecutor proposed that the trial court respond with the following definition of circumstances of the crime:

> The definition of circumstances of the crime as used in factor (A) includes the activities leading up to the commission of the crime, the manner in which the crime was committed, the activities following the commission of the crime, and the impact of the murder on the victim's family and friends, including their pain and suffering.

(14 RT 2940.) At end, the trial court responded in writing to the jury's

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[47] The first part of the trial court's response stated: "The elements of a crime" are those things that must be proven in order to establish that a crime was committed. In this case, the "elements" of first-degree murder are (1) the unlawful killing of a human being (2) with malice aforethought, which is (3) willful, (4) deliberate, and (5) premeditated." (4 CT 1012.)

question asking for a definition of "circumstances of the crime" as follows:

> "Circumstances of the crime," means the manner in which the crime was committed and the events immediately surrounding its commission, as well as those leading up to and following the commission of the crime. This includes the harmful impact of the crime on the victim's family and friends.

(4 CT 1012.) Defense counsel objected to the trial court's proposed response, arguing that the response equated the circumstances of the crime with aggravating circumstances. (14 RT 2941, 2945.) Defense counsel reminded the trial court that it had already instructed the jurors that words and phrases not specifically defined should be applied using their ordinary everyday meaning. (14 RT 2941.)

The trial court's instruction on circumstances of the crime was erroneous because it was incomplete. The trial court's instruction told half of the story. By singling out a specific aggravating circumstance, victim impact, the trial court left the jurors with the message that the circumstances of the crime are aggravating, although the circumstances of the crime can be mitigating as well. Under well-established state law, circumstances of the crime can be aggravating or mitigating: "[t]heir character depends on the greater or lesser blameworthiness they reveal." (*People v. Gallego* (1990) 52 Cal.3d 115, 208, fn. 1 (con. opn. of Mosk, J.); see *People v. Coddington* (2000) 23 Cal.4th 529, 640 [all circumstances of the crime may be considered un factor (a)], overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; *People v. Redd* (2010) 48 Cal.4th 691, 756 [instruction properly conveyed that the circumstances of the homicide could be considered as aggravating or mitigation].) Although there is no obligation to instruct specifically on mitigating circumstances (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1297), an

instruction to the effect that circumstances of the crime can be mitigating is a proper statement of the law. (*People v. Bonillas* (1989) 48 Cal.3d 757, 791-792.)

The trial court's instruction was also erroneous because in singling out an aggravating aspect of the circumstances of the crime in its instruction, the trial court necessarily favored the prosecution. There is no obligation to define commonly understood terms such as "circumstances of the crime." (*People v. Whalen* (2013) 56 Cal.4th 1, 85.) However, once the trial court endeavored to define the phrase, it had a duty to instruct with absolute impartiality. (*People v. Moore* (1954) 43 Cal.2d 517, 526.) Rather than wait for a specific inquiry about victim impact evidence, the trial court attempted pro-actively to remedy a perceived problem with CALCRIM No. 763 and did so in an impermissibly pro-prosecution manner. The instruction given by the trial court highlighted the victim impact evidence and told the jury, in essence, to pay specific attention to the harmful impact of the crime on the victim's family, colleagues and friends. Focusing on one specific aggravating circumstance created a pro-prosecution instruction that violated the rule that trial courts should keep jury instructions balanced and impartial. (See *People v. Mackey* (2015) 233 Cal.App.4th 32, 106 [reaffirming general principle].)

Further, by specifically identifying victim impact evidence in the definition of circumstances of the crime, the instruction improperly supported the prosecution's penalty phase argument that the jury could impose the death penalty based on the victim impact evidence alone. (14 RT 2897.) During its penalty argument, the prosecutor again and again emphasized the victim impact evidence. As discussed more fully in Argument V, Section B.3. *ante*, at pages 130-138, and incorporated by

reference here, the major part of the prosecution's penalty phase presentation was victim impact evidence from Officer Niemi's colleagues and family. In addition to this testimony, which included photographs, the prosecutor introduced a story written by Niemi about a dead baby. (13 RT 2719-2778.) In advocating for death, the prosecutor told the jurors to consider the impact on Niemi's children and to remember Niemi's daughter "Gabbie" embracing his coffin at the end of the funeral. (14 RT 2897.) The prosecutor told the jurors to consider the harm to the community (14 RT 2897) and urged the jurors to do justice to Niemi's family, friends, colleagues and those in the community that he protected (14 RT 2901). The prosecutor implored the jury to consider the victim impact evidence to prevent Niemi from ceasing to exist as an identifiable figure. (14 RT 2890, 2900.)

By referring the jurors back to a single category of penalty-phase evidence – the harmful impact of the crime on Niemi's family and friends – during the jury's deliberations, the trial court's instruction impliedly endorsed the prosecutor's case for death. In doing so, "[t]hese instructions are objectionable as singling out and bringing into prominence before the jury certain isolated facts and thereby, in effect, intimating to the jury that special consideration should be given to those facts." (*In re Martin's Estate* (1915) 170 Cal. 657, 672.) This was improper. "When a question shows the jury has focused on a particular issue, or is leaning in a certain direction, the court must not appear to be an advocate, either endorsing or redirecting the jury's inclination." (*People v. Moore* (1996) 44 Cal.App.4th 1323, 1331.) In answering the jury's question as focused on victim impact, the trial court did just that. "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of

great weight, and that his lightest word or intimation is received with deference, and may prove controlling." (*Starr v. United States* (1894) 153 U.S. 614, 626.)

For all these reasons, the trial court abused its discretion.

C. The Trial Court's Instruction About Arguments Of Counsel, Taken In Context With The Other Instructions, Was Ambiguous And Likely Misled The Jurors To Believe They Could Not Consider The Quality Of Counsel's Argument In Deciding The Appropriate Penalty

On June 7, 2007, in the morning, the jury asked: "From section 766 (weighing process) can the quality of 'the arguments of counsel' be considered as a mitigating circumstance?" (4 CT 1025.) The trial court instructed the jury in writing: "In reaching your decision, you must consider and weigh the aggravating and mitigating circumstances or factors shown by the evidence. [¶] Statements of counsel are not evidence. [¶] The answer is no." (4 CT 1026; 14 RT 2956.) The discussion between the trial court and counsel regarding the trial court's proposed response occurred off-record. (14 RT 2955-2957.) At the hearing to summarize the off-record discussions, defense counsel stated her objection to the court's response:

> It's my position that factor (K) allows basically anything to be considered in mitigation. It was my belief, true or not, that they were referring to my argument, as I don't believe Mr. Orloff said anything in his closing that the jurors might consider mitigating. And under factor (K), I think they are entitled, if anything I said caused them to feel some sympathy, or mercy for Mr. Ramirez, that they are allowed to consider that. It's not evidence. I don't argue with that, but I think anything can be seen by the jury as mitigation, including something I may have said. So I recall I did not agree with the Court's response to the jurors on that.

(14 RT 2956.) The trial court read the jury's question differently and

concluded that the jury's question was "not directed at content, the issues raised, or points raised in the argument." (14 RT 2957.) The trial court acknowledged that he repeated some of the instructions he had already given to the jury, but believed his response was an accurate statement of the law. (14 RT 2957.) The prosecutor agreed with the trial court. (14 RT 2957.)

The trial court's instruction, although not a misstatement of the law, was confusing when considered in the context of the other instructions and likely misled the jury to understand that, because the arguments by counsel were not evidence, they could not consider the quality of counsel's argument in reaching the penalty decision. As noted in Argument I, where the instruction is misleading and therefore subject to an erroneous interpretation, the proper inquiry for this Court is whether there is a "'reasonable likelihood that the jury . . . understood the charge,' in a manner that violated defendant's rights." (*People v. McPeters* (1992) 2 Cal.4th 1148, 1191, superseded by statute on other grounds as stated in *People v. Boyce* (2014) 59 Cal.4th 672, 707, quoting *People v. Benson* (1990) 52 Cal.3d 754, 801.) In addressing this question, this Court considers the specific language in the instruction and the instructions as a whole. (*People v. Warren* (1988) 45 Cal.3d 471, 487.)

Closing summation is essential to the right of effective assistance of counsel and to the fair operation of the adversary system. The right to assistance of counsel ensures the defendant in a criminal trial the opportunity to participate fully and fairly in the adversary fact-finding process. (*Herring v. New York* (1975) 422 U.S. 853, 858.) Within the constitutional right to assistance of counsel is the right for defense counsel to make a closing argument to the jury. (*United States v. Bell* (9th Cir.

2014) 770 F.3d 1253, 1257.) There can be no question that arguments of counsel play a pivotal role at the penalty phase because they inform the jurors' life or death decision. In apparent recognition of their importance to the penalty determination, in 1978 the electorate added the jury's consideration of counsel arguments to the penalty determination process. (§ 190.3.)[48] The prior statute did not contain a comparable directive. (See former § 190.3, Stats. 1977, ch. 316, § 11, pp. 1258-1259; see *People v. Easley* (1983) 34 Cal.3d 858, 881, fn. 13, and 882, fn. 14 [setting forth both provisions].)[49]

Closing argument at the penalty phase is the lens through which the jurors can view the evidence in deciding what constitutes an aggravating or a mitigating factor, and what weight, if any, to give the aggravating and mitigating evidence. As the United States Supreme Court has stated with regard to counsel's summation in general:

> For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of

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[48] Section 190.3 currently provides in pertinent part:

> After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances.

[49] Under the 1977 statute, section 190.3, provided in pertinent part:

> After having heard and received all of the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be death or life imprisonment without the possibility of parole.

> the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt. It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case.

(*Herring v. New York*, *supra*, 422 U.S. at p. 862.) There can be little doubt that the quality of closing argument also matters in the penalty phase of a capital case. How well counsel marshals the evidence, how persuasively she argues the balance of aggravation and mitigation, can spell the difference between life and death for the defendant.

The trial court's response may have been accurate in telling the jury that arguments of counsel are not evidence and cannot be considered as a mitigating circumstance. The trial court's response, however, was problematic because, fairly read, the jury's question – asking specifically "can the *quality* of 'the arguments of counsel' be considered as a mitigating circumstance" – shows the jury was trying to figure out whether it could consider the persuasiveness of defense counsel's arguments in its penalty deliberations. As defense counsel noted in her objection to the court's answer, the jury's question addressed her argument, not that of the prosecutor who did not argue any mitigating circumstances or sympathy or mercy for appellant. (14 RT 2957.) The trial court should have instructed the jury that although counsel argument is not a mitigating circumstance or factor in and of itself, the jury must consider counsel's arguments and their persuasiveness, in other words, the quality of counsel's arguments, in determining which circumstances or factors were mitigating (or aggravating), the relative weight to assign them in light of the evidence, and

the appropriate penalty.

The jury's question was understandable. On a commonsense level, most jurors likely would assume that they could consider the quality of counsel's arguments in their penalty decision-making. After all, they might reason, why would the attorneys give summations if the jurors could not assess their persuasiveness in selecting the penalty? The penalty deliberations, however, were guided by detailed instructions, which did not make clear how the quality of counsel's arguments were to be considered in the jury's deliberations. Had the jury understood the role of counsel's argument, it is not likely to have asked the question it raised. (See *People v. Loza* (2012) 207 Cal.App.4th 332, 355 [jury's questions demonstrated it did not understand principle addressed in instructions].)

With regard to the function of counsel's argument, the instructions likely appeared as conflicting. The jury first received CALCRIM No. 222, which instructed that "[n]othing the attorneys say is evidence." (4 CT 1045.) The jury also received CALCRIM No. 763, which instructed that "[i]n reaching your decision, you must consider and weigh the aggravating and mitigating circumstances or factors shown by the evidence." (4 CT 1050.) Reasonably read, these two instructions informed the jurors that because arguments by counsel are not evidence, they could not be factored into their penalty decision. On the other hand, the jury also received CALCRIM No. 766, which instructed that the jury "must consider the arguments of counsel." (4 CT 1056.) In addition, when the jury asked an earlier question about factor (k), the trial court had instructed that the jurors could take into account anything they considered to be a mitigating factor,

regardless of whether it was one of the other listed factors. (4 CT 1017.)[50] Reasonably read, these two other instructions suggested that the jurors could consider counsel's arguments (and the quality of their arguments) in reaching a penalty decision.

The confusion created by the instructions on this issue was not resolved by the other penalty instructions. None of them informed the jury of the part the quality of counsel's argument could play in assessing the appropriate punishment. Although, as noted above, CALCRIM No. 766 instructed the jury to consider counsel argument, this directive came before, rather than after, the next paragraph, which started with the mandate about what the jury must consider "in reaching your decision." (4 CT 1056.)[51]

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[50] The jury asked: "Does the law allow the jury to consider any of the circumstances of the arrest in Pleasonton [sic] on December 10, 2004 as a mitigating factor as defined in section 763 Factors to consider in factor (k). What was the limiting instruction?" (4 CT 1017.)

[51] CALCRIM No. 766 reads as follows:

> You have sole responsibility to decide which penalty the defendant will receive.
>
> You must consider the arguments of counsel and all the evidence presented during both phases of the trial.
>
> In reaching your decision, you must consider, take into account, and be guided by the aggravating and mitigating circumstances. Each of you is free to assign whatever moral or sympathetic value you find appropriate to each individual factor and to all of them together. Do not simply count the number of aggravating and mitigating factors and decide based on the higher number alone. Consider the relative or combined weight of the factors and evaluate them in terms of their relative convincing force on the question of punishment.
>
> Each of you must decide for yourself whether aggravating or mitigating factors exist. You do not all need to

(continued...)

CALCRIM No. 766 did not make clear how counsel argument intersected with the jury's considering, taking into account and being guided by the aggravating and mitigating circumstances and factors in reaching a penalty decision. The heart of the instruction – the third through fifth paragraphs – focused on the jury's evaluation of the aggravating and mitigating circumstances and factors. It made no other mention of the arguments of counsel.

Further, neither the prosecutor nor defense counsel addressed how the jury should consider their closing arguments in its penalty decision. In short, the jurors were given no guidance how they could use closing arguments. The instructions, read together, were confusing, and reasonable jurors likely understood them as conflicting and unresponsive to their question whether they could consider the quality of counsel argument as a

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[51] (...continued)
agree whether such factors exist. If any jury individually concludes that a factor exists, that jury may give the factor whatever weight he or she believes is appropriate.

Determine which penalty is appropriate and justified by considering all the evidence and the totality of any aggravating and mitigating circumstances. Even without mitigating circumstances, you may decide that the aggravating circumstances, are not substantial enough to warrant death. To return a judgement of death, each of you must be persuaded that the aggravating circumstances both outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.

In making your decision about penalty, you must assume that the penalty you impose, death or life without the possibility of parole, will be carried out.

To return a verdict of either death or life without the possibility of parole, all 12 of you must agree on that verdict.

(4 CT 1056-1057.)

mitigating factor. In light of the confusing instructions, there is a reasonable likelihood that the jurors understood the judge's "the answer is no," given without explaining the role of arguments by counsel, as meaning they could not consider the quality of the arguments in assessing the evidence or in weighing the aggravating and mitigating circumstances and factors in reaching their verdict.

Finally, the trial court's response to a question asked by the jury later in the deliberations increased the likelihood that the jury understood that, because the arguments of counsel were not evidence, their quality could not be considered. In response to the jury's question about the quality of arguments of counsel, the trial court made clear that the jury was to consider circumstances or factors shown by the evidence or supported by the evidence. After this question, the jury asked about factor (k).[52] In its response, the trial court again stated: "Your consideration of mitigating factors must be based upon the evidence presented." (4 CT 1034.) The trial court withdrew this response to the jury, but nevertheless repeated: "As I told you at the beginning of Instruction 763, you must consider and weigh the aggravating and mitigating circumstances or factors shown by the evidence." (4 CT 1035.) This repeated emphasis by the trial court mattered. "Such continual repetition tends to give undue emphasis to the particular point to which [the instructions] may relate, and operates to confuse the jury in their consideration of the evidence." (*People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013.) In the absence of any explanation of the role of counsel's arguments, the trial court's recurring instruction that

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[52] The jury asked: "Must a circumstance to be considered for 'factor k' (763 Factors to consider) be suported [sic] by evidence (222 Evidence)?" (4 CT 1033.)

the jury needed to consider circumstances or factors shown by the evidence, while legally correct, increased the likelihood that the jury would have understood that, because it was not evidence, the quality of counsel's arguments could not be contemplated in making the penalty decision.

During closing argument at the penalty phase, defense counsel urged the jurors to consider appellant's intoxication during the commission of the crime (14 RT 2908, 2912-2914), his young age (14 RT 2908-2909), his lack of prior felony convictions (14 RT 2907), appellant's usefulness to his cousin and younger brothers (14 RT 2911), and appellant's history of problems with alcohol since a young age that went unaddressed (14 RT 2917-2918) as mitigating circumstances that supported a penalty of life in prison without the possibility of parole rather than death. The jurors parsed the language of the instructions carefully and asked detailed, nuanced questions about instructions relating to what it could consider in mitigation. The jurors could have found that defense counsel's argument was persuasive and incorporated that into their deliberations about mitigating factors and their weight, if any, in the sentencing equation or whether appellant deserved their mercy. However, the jurors likely understood the trial court's answer as directing them not to do so. Without considering the quality of counsel arguments, the jury, while still able to decide the weight to assign the sentencing factors, would be deprived of an essential ingredient in our adversary system – the parties' perspective on how the jury should view and weigh them in light of the evidence. (See *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1230 [jurors arrive at their decisions about the appropriate penalty through the subjective assignment of weights to the penalty phase evidence], superseded by statute on another ground, as stated in *In re Steele* (2004) 32 Cal.4th 682, 691.)

In sum, the trial court's response to the jury's question about the quality of arguments of counsel was an abuse of discretion.

D. The Trial Court Erred In Failing To Define And Instruct The Jury On The Phrase "Maturely and Meaningfully Reflected Upon The Gravity Of His Act," As The Jury Requested, And Likely Misled The Jurors To Believe They Could Not Consider This Aspect Of Appellant's Mental State In Deciding The Appropriate Penalty

On June 7, 2007, the fourth day of penalty deliberations, the jury asked: "From the definition of first degree murder, what does 'maturely and meaningfully reflected upon the gravity of his act' mean? [¶] What is the definition of 'maturely', in the above? [¶] What is the definition of 'meaningfully,' in the above?" (4 CT 1023.) The trial court gave the jury the following written response:

> As I instructed you on Monday, you must disregard all of the instructions I gave you in the earlier phase of the trial, and follow only the new instructions given in this phase of the trial. [¶] The new instructions do not include the instruction regarding "mature and meaningful reflection."

(4 CT 1024.)

At the hearing to memorialize the off-record discussions about the trial court's response, defense counsel stated that she submitted to the trial court's response. (14 RT 2957-2958.) The parties briefly discussed a related question, not at issue on appeal: whether the trial court should have responded that mature and meaningful reflection is not one of the elements of first degree deliberate and premeditated murder. (14 RT 2958-2959.) Defense counsel asked the trial court not to so instruct the jurors (14 RT 2958), while the prosecutor wanted the court to give that instruction (14 RT 2959). The trial court decided not to give the prosecutor's requested

instruction and reasoned that if the jury continued to be confused on this point, they would send a note. (14 RT 2959.)

As set forth in Argument I *ante*, at pages 39-60, the trial court erred in granting the prosecutor's request to modify CALCRIM No. 521 to add the following sentence: "To prove the killing was deliberate and premeditated, it is not necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act." In this case, that additional language was irrelevant, was confusing and, as commonly understood, was inconsistent with the requirement of deliberation. Having instructed the jury at the guilt phase with that inapplicable, but undefined, point of law, the trial court compounded its mistake at the penalty phase by directing the jurors to disregard that same principle, which *was* relevant at that phase, and refusing to define its key words whose meaning very understandably eluded them. As the jury itself intuited, whether appellant "maturely and meaningfully reflected on the gravity of his act" was relevant to its sentencing decision. Although not re-instructed on this language, some jurors remembered it and may have reconsidered that, in light of the fuller picture of appellant presented at the penalty phase, the phrase had a meaning that was potentially mitigating – either in raising a lingering doubt about deliberation, or, even if not, reducing appellant's moral culpability. But the phrase was never defined. Instead, the jury was told to ignore it.

1. The Instructions and Arguments of Counsel Suggested but Did Not Inform the Jury That it Could Consider Whether Appellant "Maturely and Meaningfully Reflected" and Did Not Define Those Terms

The jury's questions regarding the phrase "maturely and meaningfully reflected on the gravity of his act" were not surprising given

the guilt phase instructions and arguments and other penalty phase instructions and arguments. As explained in Argument I, at the close of the guilt phase of trial, the jurors were instructed on the elements of first degree murder. (4 CT 936 [CALCRIM No. 521].) The jury was also instructed that the "maturely and meaningfully reflected" principle was not part of the mental state it had to find for first degree murder. (3 CT 861.) At the guilt phase, both counsel argued extensively in their closing arguments about the sole contested issue in the case – whether appellant deliberated the murder. (12 RT 2579-2694; 13 RT 2613-2626 [prosecutor]; 12 RT 2595-2609 [defense counsel].) In so doing, each addressed the "maturely and meaningfully reflected" instruction. (12 RT 2585, 2605-2606.)

The number of questions from the jury during the penalty deliberations indicates that at least some jurors read the instructions closely. From a careful reading of the instructions, the jurors likely inferred that consideration of the concept of mature and meaningful reflection was encouraged by the penalty phase instructions as well. The instructions, however, neither expressly instructed that the jury could take that principle into account nor defined it. The jury was given CALCRIM No. 763 setting out the factors to consider in reaching their penalty determination. Under this instruction, the jury was told that an aggravating circumstance or factor was something beyond the elements of the crime. (4 CT 1050.) Not having CALCRIM No. 521 at its disposal during the penalty deliberations, the jury asked for a definition of elements of the crime. (4 CT 1012.) The trial court responded that the elements of first degree murder are "(1) the unlawful killing of a human being (2) with malice aforethought, which is (3) willful, (4) deliberate, and (5) premeditated." (4 CT 1012.) Since the trial court included the concept of mature and meaningful reflection in the

instruction regarding the elements of first degree deliberate and premeditated murder at the guilt phase, it is likely the trial court's definition of elements of the crime triggered the jury's memory of the concept during its penalty deliberations. The fact that the jury's note quoted the language from the guilt phase verbatim indicates that at least one juror thought that it was a relevant consideration at the penalty phase.

CALCRIM No. 763 also instructed the jurors that in considering factors for and against the death penalty, they could consider the circumstances of the crime. When asked by the jury to define "circumstances of the crime," the trial court instructed the jury that "the circumstances of the crime means the *manner* in which the crime was committed and the events immediately surrounding its commission, as well as those leading up to and following the commission of the crime . . ." (4 CT 1012, italics added.) Whether appellant maturely and meaningfully reflected on the gravity of his act could have been encompassed in the jury's consideration of the manner in which the crime was committed. (*People v. Dykes* (2009) 46 Cal.4th 731, 802 & fn. 18 [manner in which a crime is committed includes defendant's mental state which may be considered as a circumstance of the crime under factor (a)].)

In addition, CALCRIM No. 763 instructed the jurors that they could consider any circumstance related to the crime that lessens the gravity of the crime under factor (k). (4 CT 1052 [CALCRIM No. 763].) Whether appellant killed without mature and meaningful reflection may have lessened the gravity of the crime and therefore could have been considered under factor (k). Further, CALCRIM No. 763 instructed the jury that under factor (h) they could consider whether, at the time of the offense, the defendant's capacity to appreciate the criminality of his conduct or to

follow the requirements of the law was impaired as a result of mental disease, defect, or intoxication. (4 CT 1052.) Whether appellant maturely and meaningfully reflected was related to his capacity to appreciate the criminality of his conduct, which was impaired by his intoxication, and thus could have been considered under factor (h). Finally, CALCRIM No. 763 instructed the jury that they could consider appellant's age at the time of the crime of which he was convicted under factor (i) (4 CT 1052), which is directly related to the principle of mature reflection. All of these facets of CALCRIM No. 763 suggested to the jurors that they could consider whether appellant maturely and meaningfully reflected on the gravity of his act. But nothing in the instructions expressly told the jury it could consider this concept or what the phrase meant.

In addition to the penalty instructions, the arguments by counsel told the jurors that they could consider the facts and circumstances of the crime and appellant's capacity to appreciate criminality in reaching their penalty decision. (14 RT 2912-2914, 2919 [defense]; 14 RT 2888-2893 [prosecutor].) Further, the arguments of counsel discussed the relevance of appellant's age. The prosecutor argued age "has very little to do with this case" (14 RT 2893-2894), while defense counsel argued that age, referring to appellant's immaturity, was a mitigating factor (14 RT 2908-2909). These sentencing factors reasonably would include whether appellant maturely and meaningfully reflected before pulling the trigger and killing Officer Niemi, but as with the jury instructions, the arguments by counsel did not directly address or define the concept at the penalty phase. Thus, the jurors asked for a definition of mature and meaningful reflection, which they did not and would not find in the directives already given to them.

2. The Trial Court Abused its Discretion in Instructing That the Jury Could Not Consider, as Part of Appellant's Mental State During the Murder, Whether He "Maturely and Meaningfully Reflected upon the Gravity of His Act"

The jury's instinct, as seen in its question to the trial court, was correct. The concept of mature and meaningful reflection, which the trial court mistakenly injected into the guilt phase, was actually relevant at the penalty phase. As explained in Argument I, in 1981, the Legislature amended section 189 to add: "To prove the killing was 'deliberate and premeditated' it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act." (Stats. 1981, ch. 404, § 7, p. 1593.) In doing so, however, the Legislature did not render the concept irrelevant at the penalty phase, particularly when it had been injected into the trial at the guilt phase. Whether appellant engaged in mature and meaningful reflection was relevant to the jury's choice between the sentences of life and death because appellant's immaturity and impaired thinking during the murder were circumstances going to his moral culpability.

Not surprisingly, a defendant's "culpable mental state" may be considered as a circumstance of the crime under section 190.3, factor (a). (*People v. Dykes*, *supra*, 46 Cal.4th at p. 802; *People v. Ramos* (1997) 15 Cal.4th 1133, 1164 [defendant's state of mind contemporaneous with murder is relevant under factor (a) as bearing on circumstances of the crime].) In *Dykes*, the jury found the defendant guilty of first degree murder of one victim based upon a felony-murder theory, but did not find true an allegation that the attempted murder of a second victim was willful,

deliberate and premeditated. (*People v. Dykes*, *supra*, 46 Cal.4th at p. 800.) The jury, apparently uncertain whether at the penalty phase it was permissible to consider such mental elements, asked the trial court regarding the first victim: "are we now permitted to look at the willful, premeditated and deliberate nature of this killing under factor A?" (*Id.* at p. 800.) The trial court responded to the jury's question in the affirmative. This Court affirmed the correctness of the trial court's response, holding that a jury may consider, as part of its evaluation of a defendant's culpability and its moral and normative decision concerning the appropriate penalty, the defendant's state of mind with respect to the murder. (*Id.* at p. 802.)

Here, the trial court, responding to an analogous inquiry from the jury, instructed that the jury could not consider mature and meaningful reflection, i.e., an aspect of appellant's state of mind with respect to the murder. This answer ignored well-established law. Whether a defendant engaged in mature and meaningful reflection can, by its presence, be potentially aggravating under factor (a), or, by its absence, be potentially mitigating under factors (a) and (k). (See *People v. Guerra* (2006) 37 Cal.4th 1067, 1154 [factor (a) allows prosecutor and defense counsel to present evidence of all relevant aggravating and mitigating matters including defendant's mental and physical condition]; *People v. Wright* (1990) 52 Cal.3d 367, 443-444 [factor (k) is a catch-all category which allows jurors to consider in mitigation defendant's less-than-extreme mental or emotional disturbance].) Just as the jury in *Dykes*, after convicting the defendant under a felony-murder theory, was entitled to consider whether he premeditated and deliberated the murder as a relevant, potentially aggravating factor, appellant's jury, after convicting him of deliberate and

premeditated murder, was entitled to consider whether he maturely and meaningfully reflected on the gravity of his act as a relevant, potentially mitigating factor that could have influenced its assessment of the appropriate penalty.

At best, the trial court's response – to follow only the new instructions which "do not include the instruction regarding 'mature and meaningful reflection'" – rendered the penalty instructions ambiguous, and there is a reasonable likelihood the jury understood the trial court's answer to preclude consideration of whether appellant "maturely and meaningfully reflected" upon the gravity of shooting Officer Niemi. (See *People v. McPeters*, *supra*, 2 Cal.4th at p. 1191 [stating standard of review for ambiguous instructions].) The arguments by counsel did not clarify the confusion. Defense counsel attempted to persuade the jury that although the jury had found appellant guilty of first degree deliberate and premeditated murder, there was still room to consider appellant's thinking during the commission of the murder. (14 RT 2908-2915.) As noted above, defense counsel argued that appellant's age, in other words, his immaturity, was relevant to the penalty decision. (14 RT 2908-2909.) This argument, however, did not make clear that the jury could consider whether appellant "maturely and meaningfully reflected" in selecting the appropriate sentence. For his part, the prosecutor argued in his closing penalty argument that appellant "fully appreciated the criminality of his conduct" (14 RT 2893) and that appellant's age was not relevant to penalty (14 RT 2893-2894). Moreover, even if counsel's arguments were taken into account by the jury, they were insufficient to counteract the trial court's erroneous instruction, particularly since the jury was told that the court's instructions were controlling. (4 CT 1043 [CALCRIM No. 761]; see

People v. Cain (1995) 10 Cal.4th 1, 34 [the jury is presumed to follow the trial court's instructions]; *People v. Baldwin* (1954) 42 Cal.2d 858, 871 [it is well settled the court and not counsel must explain to the jury the rules of law that apply to the case], superseded by statute on other grounds as stated in *Kaplan v. Superior Court* (1971) 6 Cal.3d 150, 159, fn. 5.)

The trial court's error related to the jury's fundamental task of deciding whether appellant deserved to live or die. The principle of mature and meaningful reflection went directly to "the quantum of [appellant's] personal turpitude and depravity." (See *People v. Wolff* (1964) 61 Cal.2d 795, 822.) Not all first degree murders are the same. Deliberate and premeditated murders, like all murders, lie upon a spectrum, with a sudden, unplanned shooting or stabbing at one end, and a long-plotted and carefully planned killing at the other. While all result in equal criminal responsibility, and many may result in a special circumstances finding, some may reflect a higher grade of depravity or culpability than others. As this Court has noted, "While all murders are morally repugnant, some are worse than others." (*People v. Jackson* (2009) 45 Cal.4th 662, 700; see *People v. Gonzalez, supra*, 51 Cal.3d at p. 1277, fn. 6, (dis. opn. of Broussard, J.) [in deciding whether to impose the death penalty, the jury is free to determine where the case falls in the spectrum of murders].)

Recognizing that not all murders are the same, the law has reserved the death penalty for the "worst of the worst" murderers. "Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (*Roper v. Simmons* (2005) 543 U.S. 551, 568, quoting *Atkins v. Virginia* (2002) 536 U.S. 304, 319].) Although this term often is used with regard to defining death eligibility

(see *Glossip v. Gross* (2015) 135 S.Ct. 2726, 2751 (dis. opn. of Thomas, J.), at sentencing the jury decides if a person who has committed a death-eligible murder should be put to death or spared. In this sense, the jury – in balancing the aggravating circumstances against the mitigating circumstances – also decides if the defendant is among the "worst of the worst" murderers. Here, in making this determination, the jury was entitled to consider whether appellant "maturely and meaningfully reflected" when, impaired by intoxication, he shot Officer Niemi. A defendant who does not maturely and meaningfully reflect on the gravity of his act does not exhibit the same personal depravity as a defendant who does. (*People v. Wolff, supra*, 61 Cal.2d at p. 822.)

Finally, although the shooting in this case occurred on appellant's 23rd birthday, beyond the age of recognized juvenile status, his maturity was still a relevant penalty factor that was closely connected to the concept of mature and meaningful reflection. (See *People v. Lucky* (1988) 45 Cal.3d 259, 302 [the word "age" in factor (i) is refers to "any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty"].) Accordingly, under the rubric of mature and meaningful reflection, the jurors would have been able to assess appellant's moral culpability based on his immaturity, rashness and impulsivity. As the United States Supreme Court has recognized, albeit in the context of offenders under 18 years of age, maturity does impact a defendant's deathworthiness. "The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." (*Roper v. Simmons, supra,* 543 U.S. at pp. 570-574, quoting *Johnson v. Texas* (1993) 509 U.S. 350,

367-368.) The trial court's answer that "mature and meaningful reflection" was not part of the penalty instructions essentially directed the jury not to undertake this pertinent inquiry.

In sum, the trial court abused its discretion by conveying to the jury that it could not consider whether appellant "maturely and meaningfully reflected upon the gravity of his act."

3. The Trial Court Abused its Discretion in Not Defining "Maturely and Meaningfully Reflected"

Although the penalty instructions, followed by the arguments of counsel at least pointed to whether appellant "maturely and meaningfully reflected" on the gravity of his act as a relevant sentencing factor, without an instruction defining the concept, either at the guilt or the penalty phase, the jury was forced to ask the trial court to define the phrase's meaning as well as its key terms – "maturely" and "meaningfully." As explained in Section A above, a trial court is required to instruct a deliberating jury on "any point of law arising in the case" if the jury so requests. (§ 1138.) The trial court retains discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for additional information. (*People v. Beardslee*, *supra*, 53 Cal.3d at p. 97.)

Having inserted the concept into the guilt phase at the prosecutor's request (see 12 RT 2498; 4 CT 937), the trial court should have defined "maturely and meaningfully reflected on the gravity of his act" when the jury re-raised the issue at penalty and directly asked for a definition. The jury's question showed that at least one juror was reading the instructions carefully, and despite having been given the standard penalty phase instruction that terms not defined have their ordinary meaning, still asked

for a definition of maturely and meaningfully. (See 4 CT 1043 [CALCRIM No. 761].) The jury's question itself is the best evidence that it did not understand the term "maturely and meaningfully reflected." (*Shafer v. South Carolina* (2001) 532 U.S. 36, 53 [jury's question "left no doubt" that it did not clearly understand from trial court's original instructions what "a life sentence" meant]; *Simmons v. South Carolina* (1994) 512 U.S. 154, 178 [jury's question asking if parole was available proved that they did not know whether or not a life-sentenced prisoner will be released from prison].) When the jury asks for the definition of terms, it no longer can be presumed that the jury understands their meaning. (*People v. Loza*, *supra*, 207 Cal.App.4th at p. 355 [jury's questions demonstrated it did not understand principle addressed in instructions].)

In refusing to define "maturely and meaningfully" as the jury requested, the trial court did not fulfill its duty to help the jury understand a legal principle relevant to its penalty decision. Similar failures by trial courts to define applicable terms at the jury's request in noncapital trials have been held to be error. (See *People v. Miller* (1981) 120 Cal.App.3d 233, 236 [prejudicial error when the jury asked for clarification of the term "great bodily injury" during deliberations and the trial court failed to instruct on the meaning of the term]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1014 [harmless error where the trial court failed to define "sustained" after the jury requested a definition during deliberations].) The same conclusion should be reached here where the trial court failed to clarify the meaning of pertinent terms for the jury during its sentencing deliberations at a capital trial.

As set forth in Argument I, Section C *ante*, at pages 49-50, the concept of a defendant "maturely and meaningfully reflected upon the

gravity of his act" may not be easy to define. But that does not relieve the trial court of its duty to elucidate this relevant, legal principle, which it placed before the jury. At a minimum, the trial court should have instructed the jury that mature and meaningful reflection refers to the quality and character of the defendant's thinking in committing the murder, which takes into account his general mental condition (*People v. Stress* (1988) 205 Cal.App.3d 1259, 1269) and reflects on "the quantum of his moral turpitude and depravity" (*People v. Wolff*, *supra*, 61 Cal.2d at p. 822).

The discretion given to the trial court to fashion a satisfactory supplementary explanation assumes that whatever the trial court ultimately says will attempt to resolve the jurors' uncertainty with a correct and considered response. (See *People v. Beardslee*, *supra*, 53 Cal.3d at p. 97 [trial court's decision not to explain instructions for fear of criticism by appellate court was an abuse of discretion].) That did not happen here. Failing to recognize that whether appellant "maturely and meaningfully reflected on the gravity of his act" was relevant to the jury's penalty decision, the trial court told the jurors to follow only the instructions given at the penalty phase and explicitly stated those instructions did not include the principle about which they sought clarification. The trial court's failure to define mature and meaningful reflection – a concept pertinent to their sentencing decision – was thus an abuse of discretion.

People v. Murtishaw (1989) 48 Cal.3d 1001 does not require a different result. *Murtishaw* was a penalty retrial where the jurors were made aware of the circumstances of the crime, but were not charged with deciding whether the defendant had committed murder. During the penalty deliberations, the jury asked for a definition of first degree murder. The trial court refused and told the jury:

> You must accept as an established fact that defendant is guilty of first degree murder. As far as penalty is concerned, you have all of the instructions upon which you are to determine whether it is to be death or life in prison without the possibility of parole. I cannot instruct you further on this subject.

(*Id.* at p. 1021.) Finding no error, this Court explained that the trial court did not need to define first degree murder because "it was not a general principle of law necessary to the jury's proper understanding of the case" and "[t]he only relevance of guilt phase evidence was whether the penalty jury might find factors in aggravation or mitigation from circumstances of the crime." (*Id.* at p. 1023.) Here, by contrast, the trial court put the principle of mature and meaningful reflection, undefined, before the jury at the guilt phase where it was confusing and not applicable, but refused to define the phrase at the penalty phase where it was relevant in assessing appellant's state of mind as a circumstance of the crime and potential mitigation. Unlike the elements of murder addressed in *Murtishaw*, whether appellant "maturely and meaningfully reflected on the gravity of his act" was directly relevant to appellant's moral culpability, to the assessment that lay at the heart of the jury's penalty choice. As such, the jury was entitled to know what "maturely and meaningfully reflected" meant, and the trial court abused its discretion in refusing to provide a definition.

4. This Claim Is Cognizable on Appeal

Generally, when the trial court responds to a question from a deliberating jury with a correct and pertinent statement of the law, a defendant's failure to object to the trial court's wording or to request clarification results in forfeiture of the claim on appeal. (*People v. Hughes*

(2002) 27 Cal.4th 287, 402 [claim waived where defense counsel agreed with trial court that informing jury of the consequences of a deadlock would be improper]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193 [waiver where defendant suggested and consented to response given by the trial court].) That general rule, however, does not bar review of appellant's claim on appeal, even though defense counsel did not object, but submitted, to the trial court's response. (14 RT 2958-2959.)

The court's response was literally correct in stating that "[t]he new instructions do not include the instruction regarding 'mature and meaningful reflection'" (4 CT 1023), but it did not correctly convey the law that the jurors could consider whether appellant maturely and meaningfully reflected on the gravity of his acts. On the contrary, the court's answer, reasonably read in context of the other instructions, directed the jury not to consider this aspect of appellant's state of mind as a relevant sentencing consideration. (See Subsection 2 *ante*.) Thus, the instruction regarding mature and meaningful reflection was not a correct statement of the law. A trial court's response to a mid-deliberation question on a point of law, which is the last word the jurors hear on a matter that puzzles them, is no less an instruction than those given in the trial court's pre-deliberation charge to the jury. Where, as here, the trial court misadvises the jury in responding to a question during deliberations, the defendant's failure to object or request an elaboration of the response does not forfeit the claim. (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1047 [no waiver where court incorrectly responded to the jury's question].) The lack of an objection does not prevent review because the trial court's instructional error affected appellant's substantial rights to have the jury consider all relevant mitigating circumstances or factors in its penalty decision. (§ 1259;

People v. Hill (1992) 3 Cal.App.4th 16, 24 [applying § 1259 to review of trial court's response to jury question where counsel did not object]; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 249-251, fn. 4 [same].)

Defense counsel's failure to object to the trial court's instruction is not invited error. Invited error will be found only if counsel expresses a deliberate, tactical purpose in resisting or acceding to the complained-of instruction. (*People v. Souza* (2012) 54 Cal.4th 90, 114.) Defense counsel did not express such a deliberate, tactical reason, but simply submitted to the trial court's instruction. (14 RT 2959.) Thus, the record shows no tactical reason for failing to object and therefore invited error does not apply. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1330.)

Similarly, defense counsel's request that the trial court not instruct that mature and meaningful reflection is not an element of the crime, which the court honored, does not transform defense counsel's failure to object to the instruction the court gave about mature and meaningful reflection into invited error. To be sure, defense counsel stated a tactical reason for objecting to an instruction that whether appellant maturely and meaningfully reflected on the gravity of his act is not an element of the crime. She did not want the jury to interpret "maturely and meaningfully reflected" as aggravating. (14 RT 2958.) That request, however, did not invite the error in giving the instruction on mature and meaningful reflection that completely withdrew this consideration from the jury. (See *Caldwell v. Mississippi* (1985) 472 U.S. 320, 337 ["Assuming . . . that the defense counsel's argument invited error, it did not invite this error"].) The very fact that defense counsel clearly expressed her tactical reason for objecting to one proposed response to the jury's question, but did not follow the same strategy, and instead "submitted" as to the trial court's actual response (14

RT 2959), shows she did not invite the error pressed here.

E. The Trial Court's Instruction Regarding The Lack Of Prior Felony Convictions Was Confusing, And Likely Misled The Jury To Think That It Could Not Consider And Give Effect To The Absence Of Prior Felony Convictions

Appellant had no felony convictions prior to the murder conviction in this case. The jury was instructed in CALCRIM No. 763 that under factor (c) it must consider: "Any felony of which a defendant has been convicted other than the crime of which he was convicted in this case." (4 CT 1051; 14 RT 2882.) Shortly after the death verdict in this case, the Judicial Council changed the factor (c) instruction from the version used at appellant's trial to direct the jury to consider: "Whether or not the defendant has been convicted of any prior felony other than the crimes of which the defendant was convicted in this case or the absence of any prior felony convictions." (CALCRIM No. 763 (2006-2007 edition).)[53] The instruction was changed to reference the absence as well as the presence of a prior felony conviction in factor (c), and to clarify the language for factor (k). (Judicial Council of Cal., Advisory Com. Rep., Jury Instructions: Approve Publication of Revisions and Additions to Criminal Jury Instructions (May 1, 2007) pp. 3, 16, 92.) The instruction and circumstances in this case illustrate the confusion that prompted the change to CALCRIM No. 763's definition of factor (c).

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[53] The jury rendered the death verdict in this case on June 11, 2007. (4 CT 1036-1037.) The Advisory Committee on Criminal Jury Instructions recommended that the Judicial Council, effective June 29, 2007, approve for publication under rule 2.1050(d) of the California Rules of Court the new and revised criminal jury instructions prepared by the advisory committee.

During penalty deliberations on Thursday afternoon, June 7, 2007, the jury wrote three different questions. (4 CT 1029, 1031, 1033.) The jurors sent the questions to the court via the bailiff and requested to leave as soon as they had an opportunity to read the trial court's response. (14 RT 2963.) First, the jury asked: "Did the People and defense stipulate no previous felony convictions?" (4 CT 1029.) Second, the jury asked: "Must we dismiss factor (c) due to the lack of evidence of other felony convictions?" (4 CT 1031.) Third, the jury asked: "Must a circumstance to be considered for 'factor k' (763 Factors to Consider) be supported by evidence (222 Evidence)?" (4 CT 1033.)

The trial court's written response to the first question stated: "There is no evidence of prior felony convictions. You must therefore assume there are none." (4 CT 1030.) The trial court's written response to the second question, which appellant challenges here, stated: "You may attach whatever significance you find appropriate to the lack of evidence of a prior felony conviction under factor (c)." (4 CT 1032.) Finally, the trial court's written response to the third question stated:

> Your consideration of mitigating factors must be based upon the evidence presented. However, you are not limited to considering mitigating circumstances which are proven by the evidence. For example, you may consider sympathy or compassion for the defendant as a mitigating factor.

(4 CT 1034.) The jurors read the responses, but did not deliberate further that day. (4 CT 1034.) The trial court continued the proceedings until the following Monday. (4 CT 1028.)

On the Monday, June 11, 2007, following the three-day break, the trial court began the proceedings by meeting with the jurors before their deliberations. (4 CT 1036; 14 RT 2963.) The trial court gave the jurors a

new response to their third question on Thursday afternoon. (4 CT 1035; 14 RT 2966.) That response stated:

> Factor (k) includes two categories of things you may consider in making your decision:
>
> (1) Sympathy or compassion for the defendant; and
>
> (2) Anything you consider to be a *mitigating factor*, regardless of whether it is one of the other listed factors.
>
> I assume your question relates to the second of these two categories – mitigating circumstances or factors.
>
> As I told you at the beginning of Instruction 763, you must consider and weigh the aggravating and mitigating circumstances or factors *shown by the evidence*.

(4 CT 1035, original italics.) After the trial court gave the jurors this new response, they continued deliberating. (4 CT 1036; 14 RT 2966.)

Meanwhile, the attorneys and the trial court summarized their discussions regarding the trial court's responses to the three questions asked on Thursday, June 7. (4 CT 1036; 14 RT 2967-2975.) Regarding the trial court's response to the jury's question whether there was a stipulation as to no prior felony convictions, defense counsel had no objection. (14 RT 2969.) Regarding the trial court's response to the jury's question whether it had to dismiss factor (c), defense counsel reminded the trial court that appellant's position was that the lack of felony convictions is a mitigating circumstance. (14 RT 2969.) The trial court stated:

> It's not my job to tell them what is or isn't mitigating or aggravating circumstance. But I wanted to let them know that they might -- well, in a roundabout way, they might find that to be a mitigating circumstance, depending on how they look at it, but don't necessarily dismiss it.

(14 RT 2969-2970.) The prosecutor had no comment. (14 RT 2969-2970.)

Based on the trial court's response to the jury's question asking whether it had to dismiss factor (c), coupled with the other instructions

given by the trial court, there is a reasonable likelihood that the jurors did not understand they could consider and give mitigating effect to the absence of prior felony convictions. (See *People v. McPeters*, *supra*, 2 Cal.4th at p. 1191 [setting out reasonable-likelihood standard for ambiguous instructions].) In addressing this question, this Court considers the specific language in the instruction and the instructions as a whole. (*People v. Warren*, *supra*, 45 Cal.3d at p. 487.)

Section 190.3 states that in deciding whether or not to impose the death penalty, the jury must consider "[t]he presence or absence of any prior felony conviction." (§ 190.3, factor (c).) Prior to appellant's trial, and the introduction of CALCRIM instructions, juries were instructed on factor (c) to consider: "The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings." (CALJIC No. 8.85.) The instruction on factor (c) given to the jury in this case, however, did not include consideration of the absence of prior felony convictions. Thus, the instruction given to appellant's jury did not make clear that the jurors could consider and give effect to the absence of prior felony convictions, but only told the jurors to consider the presence of prior felony convictions.

In addition to factor (c) in CALCRIM No. 763, the jury was also instructed by CALCRIM No. 763 that the jury must consider, weigh, and be guided by specific factors, and that "[i]f you find there is no evidence of a factor, then you should disregard that factor." (4 CT 1050.) Here, there was no evidence regarding prior felony convictions. Thus, the fact that appellant did not have a felony record was not shown by the evidence, permitting the jurors to disregard this potentially mitigating factor. This conundrum of proving a negative was recognized by the Superior Court of

Los Angeles, in commenting on CALCRIM No. 763, albeit under factor (b).[54]

During closing arguments, both counsel argued about the absence of prior felony convictions. The prosecutor argued:

> The next factor is whether the defendant had been convicted of a felony crime preceding this. I would suggest to you that that is not a significant factor one way or another. If someone had a lot of previous felony convictions that may be. If they didn't, particularly if they hadn't been an adult for all that long, it may be slightly mitigating but it's not a major factor in this case.

(14 RT 2892.) Defense counsel argued:

> Whether or not the defendant is engaged in violent criminal activity other than the crime for which you convicted him, Mr. Orloff kind of poo-pooed that. Oh, that's not important. How many defendants, ladies and gentlemen, who get to sit in that seat have ten prior felonies, burglaries, robberies, using a weapon? If someone at 25 is a violent person, it's going to be part of their history and you're going to hear about it. I submit to you, a mitigating factor of Mr. Irving Alexander Ramirez is there are no prior felonies, not one.

(14 RT 2907-2908.) Having heard argument from counsel, however, the jury had also been instructed that "[n]othing that the attorneys say is evidence." (14 RT 2878; 4 CT 1045 [CALCRIM No. 222].) CALCRIM

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[54] In its comments to the Judicial Council on CALCRIM, the Superior Court of Los Angeles County recognized that the language of CALCRIM No. 763 created a potential problem: "Paragraph four of (4) states: 'If you find there is no evidence of a factor, then you should disregard that factor.' There is a potential problem because under factor (b) there is rarely evidence that the defendant does not have a prior felony conviction. Usually, there is simply no evidence of a prior felony conviction. Technically, lack of evidence is not evidence of the contrary . . . ." (Judicial Council of Cal., Advisory Com. Rep., Jury Instructions: Approve Publication of Revisions and Additions to Criminal Jury Instructions (May 1, 2007) pp. 16-17.)

No. 222 also instructed the jury that "[i]f, during the trial, the People and the defense agreed – or "stipulated" – to certain facts, it means that they both accept those facts. Because there is no dispute about those facts you must accept them as true." (4 CT 1046 [CALCRIM No. 222].) From arguments by counsel and the trial instructions regarding stipulations, the jury's question, "Did the People and defense stipulate no previous felony convictions?" (4 CT 1029) – essentially asking if there was evidence of no prior felony convictions – logically arose. The question suggests that the jury was trying to figure out if there was evidence, in the form of a stipulation, to support the absence of prior felony convictions. The trial court responded: "There is no evidence of prior felony convictions. You must therefore assume there are none." (4 CT 1030.) The trial court, however, did not inform the jurors that they must consider the absence of prior felony convictions even without affirmative proof.

The trial court answered the jury's next question: "Must we dismiss factor (c) due to the lack of evidence of other felony convictions?" by stating that the jury could give it whatever "significance" the jury found appropriate to the lack of evidence of a prior felony conviction. (4 CT 1031-1032.) The trial court's response did not answer the jury's question and did not instruct the jurors that they must consider the absence of prior felony convictions. This was a jury that appeared to parse the instructions closely and read them literally. The trial court's instruction effectively told the jurors to do whatever they wanted. Although "attach whatever significance" could have meant to give or not give the lack of prior felony convictions mitigating weight, as the court may have intended, that message was not made clear by this response or the instructions.

The jurors then looked at factor (k), perhaps to consider the absence

of prior felony convictions as a mitigating factor. Within the same time frame as its questions about prior felony convictions, the jurors asked: "Must a circumstance to be considered for 'factor k' (763 Factors to Consider) be supported by evidence (222 Evidence)?" (4 CT 1033.) The trial court's first response seemed to suggest that the jurors could consider the absence of prior felony convictions even though there was no affirmative proof, but it did not entirely make the matter clear. The trial court responded: "Your consideration of mitigating factors must be based upon the evidence presented. However, you are not limited to considering mitigating circumstances which are proven by the evidence. For example, you may consider sympathy or compassion for the defendant as a mitigating factor." (4 CT 1034.) The response, however, did not include the lack of prior convictions with these examples. The trial court provided the jurors with all of these responses on Thursday, June 7 at 4:26 p.m. (4 CT 1028.) The jurors read the responses and then retired for the evening. (14 RT 2963.) The trial court continued the trial to Monday, June 11. (4 CT 1028.)

On Monday, June 11, the trial court addressed the jurors before they began their deliberations for the day. The trial court re-read all three of the jury's questions and the responses and explained that it was troubled by its response to the jury's third question. (14 RT 2963-2965.) The court characterized its response as unclear and confusing. (14 RT 2964-2965.) The trial court then read the new response to the third question and gave the new response in writing to the jurors. This response told the jurors that they could weigh aggravating and mitigating circumstances or factors *shown by*

the evidence. (4 CT 1035; 14 RT 2966, original italics.)[55] Based on the trial court's response, the jury likely would have understood that, to be mitigating, a clean record must be "shown by the evidence" and that they could not consider the absence of prior felony convictions under factor (k) without affirmative evidence. (See *People v. Homick* (2012) 55 Cal.4th 816, 873 [jury presumed to understand and follow instructions.) The jurors were excused to continue deliberating at 9:55 a.m. (4 CT 1036.) Thirty minutes after this instruction from the trial court, at 10:20 a.m., the jury reached a death verdict. (4 CT 1036.)

None of the other instructions counteracted the lack of clarity in the trial court's instruction whether the jury should dismiss factor (c), but instead they added to the confusion. When the jurors asked earlier in their penalty deliberations whether the law allowed them to consider, as a mitigating factor, the circumstances of appellant's arrest in Pleasanton, which the prosecutor had introduced at the guilt phase to show that appellant knew that he was on probation, the trial court instructed that factor (k) permitted them to take into account anything they considered to be a mitigating factor. (4 CT 1017.)[56] But when the jurors asked about considering the quality of counsel argument under CALCRIM No. 766, the

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[55] The trial court did state in its response that the jury may consider sympathy or compassion for the defendant. (4 CT 1035.)

[56] The jury asked: "Does the law allow the jury to consider any of the circumstances of the arrest in Pleasanton on Dec. 10, 2004 as a mitigating factor as defined in section 763 Factors to consider in factor (k). [¶] What was the limiting instruction?" The trial court's full response stated: "Since factor (k) permits you to take into account anything you consider to be a mitigating factor, regardless of whether it is one of the other listed factors, the answer to the first question is 'yes.' Therefore, an answer to the second question is unnecessary." (4 CT 1017.)

trial court instructed the jurors that they should consider and weigh only those circumstances or factors *shown by the evidence.* (4 CT 1026, italics added; see also Section C *ante*.) These responses reinforced the general directive that the jury could only consider circumstances or factors shown by the evidence. It is reasonably likely the jury understood the instructions as requiring them to not consider and give effect to the lack of prior felony convictions under factor (c) because it was unsupported by the evidence.

In evaluating the reasonable likelihood that the jury understood its charge in a manner that violated appellant's rights, a reviewing court may consider the arguments of counsel. (*People v. McPeters*, *supra*, 2 Cal.4th at p. 1191.) As noted above, both counsel addressed the absence of prior felony convictions in their closing penalty arguments, arguing that it was a mitigating factor of varying weight, but counsel's arguments did not clarify the confusion. (14 RT 2892 [prosecutor]; 14 RT 2907-2908 [defense counsel].) Having heard arguments from counsel, the jury was still confused about how to deal with factor (c). Moreover, the trial court had already effectively instructed the jurors that they could not consider the quality of counsel argument in their penalty decision (see Section C *ante*), and that instructions from the trial court were controlling (4 CT 1043 [CALCRIM No. 761]). It is the trial court's duty to explain the law to the jury, not to place upon the jury the task of deciding which of two inconsistent views of the law is correct. (*People v. Thomas* (1945) 25 Cal.2d 880, 896 ["'[i]t is not proper if reasonable men might differ as to the construction of the statute, for it would delegate to the jury the function of statutory interpretation that belongs to the court'"].)

Even if somehow the jurors understood they could consider the absence of prior felony convictions, the jurors would not likely have

understood that they could disregard factor (c) as an aggravating factor where there was no evidence of prior felony convictions, but still consider it or weigh it as a mitigating factor. Although the trial court was not required to instruct specifically on which factors may be aggravating or mitigating (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509), the trial court still had the duty to inform the jury of its responsibility to consider the specific factors under section 190.3. The trial court should have instructed the jury that although there was no evidence of prior felony convictions, the jury was nonetheless free to consider the absence of prior felony convictions under factor (c) and give it whatever mitigating weight, if any, the jury thought it deserved.[57]

It is reasonably likely based on all of the instructions and circumstances in this case that the jury understood the instruction in a way that precluded them from considering and giving effect to "a significant mitigating circumstance." (*People v. Crandell* (1988) 46 Cal.3d 833, 884; see *People v. Easley, supra,* 34 Cal.3d at p. 878, fn. 10 [quoting and following mitigation rule of *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Based on the timing of the jury's question and verdict, this Court cannot

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[57] To be sure, in *People v. Pollock* (2004) 32 Cal.4th 1153, this Court held that a trial court need not instruct that the absence of prior felony convictions is necessarily mitigating where a jury is instructed that it may consider the absence of prior felony convictions and any "'aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death.'" (*Id.* at p. 1194.) This Court held that with these instructions, the jury will necessarily understand that it may consider in mitigation a defendant's lack of prior felony convictions. (*Ibid.*) The jury in this case, however, did not benefit from these instructions, and as explained above, it is reasonably likely the jurors did not understand they could consider the absence of prior felony convictions where there was no evidence of the absence.

assume the question was unimportant. The question was the final point troubling the jury. After the trial court's response, the jury reached a verdict within twenty minutes. (4 CT 1036.) The trial court's answer was an abuse of discretion.

F. The Trial Court's Instructional Errors Had The Additional Legal Consequence Of Violating Appellant's Federal Constitutional Rights

Although not asserted at trial, appellant's federal constitutional claims are cognizable on appeal. As this Court has recognized:

> 'As a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would determine the claim raised on appeal.'

(*People v. Partida* (2005) 37 Cal.4th 428, 436, quoting *People v. Yeoman* (2003) 31 Cal.4th 93, 117 [reviewing defendant's argument that error in admitting evidence over his Evidence Code § 352 objection had additional legal consequence of violating due process].) This rule applies here.

Appellant's federal constitutional claims simply restate under alternative federal principles the legal consequences of the trial court's instructions – no different facts or legal standards are required for adjudication of these claims. Therefore, his claims are preserved for appeal. (See *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17 [applying *Partida*], accord, e.g., *People v. Thornton* (2007) 41 Cal.4th 391, 434, fn.7 [reviewing federal constitutional claims under *Partida* principle].)

1. All the Trial Court's Responses Violated the Heightened-Reliability Requirement and the Mitigating-Evidence Principle of the Eighth and Fourteenth Amendments

It is well established that the Eighth and Fourteenth Amendments to the federal Constitution require a fair and reliable sentencing determination. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 584 [Eighth Amendment "gives rise to a special 'need for reliability'" in capital cases], citing *Gardner v. Florida* (1977) 430 U.S. 349, 363-364 (conc. opn. of White, J.) and *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Within the mandate of a fair and reliable sentencing determination is the associated principle of an individualized sentencing decision requiring that the jury must consider and give effect to relevant mitigating evidence. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 317-319, abrogated on other grounds by *Atkins v. Virginia* (2002) 536 U.S. 304, 314; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110.) Although a state may structure consideration of mitigating evidence, it cannot prevent the sentencer from giving effect to the mitigating evidence. (*Buchanan v. Angelone* (1998) 522 U.S. 269, 276.) An instruction that erects a barrier to the sentencer's ability to consider and give full meaningful effect to relevant mitigation violates the Eighth and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367, 374-376.) The standard for determining whether ambiguous jury instructions satisfy these principles is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California* (1990) 494 U.S. 370, 380.)

There is a reasonable likelihood that trial court's responses here erected an unconstitutional barrier that hindered the jury from considering

and giving effect to appellant's mitigation. The jury's repeated questions show it was grappling with the task of sorting out the aggravating and mitigating circumstances in the case. Each of its questions related to what it could consider in mitigation. And the trial court's answers, whether considered individually or together, likely precluded the jury from fully considering and giving effect to the mitigating evidence and circumstances that would support a life-without-parole sentence.

First, for the same reasons that the trial court's instruction on the circumstances of the crime violated state law, it violated both the Eighth Amendment's heightened reliability requirement and its mitigation principle. The instruction unduly favored the prosecution by highlighting the victim impact evidence, a major part of its case for death, and at the same time failed to inform the jurors that aspects of the circumstances of the crime also could be considered mitigating. Neither is acceptable when life is at stake. (See *Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 118 (conc. opn. of O'Connor, J.).) Appellant had proffered circumstances of the offense, namely his heavy intoxication, as a mitigating circumstance. The jury must not be precluded from considering, as a mitigating factor, any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 110.)

Second, the trial court's instruction on the quality of counsel's arguments likely prevented the jurors from considering and giving effect to defense counsel's closing argument as they assessed and weighed the aggravating and mitigating evidence. For all the same reasons that this instruction violated the state law, there is a reasonable likelihood the misleading instruction amounted to Eighth Amendment error as well. (See Section C *ante*.) Appellant presented substantial evidence regarding his

lack of any criminal history despite the hardship of being raised initially without his parents in a war torn foreign country, his suffering from learning differences throughout his childhood, and his struggle with alcoholism from an early age, including his intoxication during the commission of the crime. All this evidence, which established mitigating circumstances and factors under section 190.3, was framed within defense counsel's argument. The jurors, however, likely understood the trial court instruction on counsel arguments to prohibit them from factoring defense counsel's view and interpretations into their consideration of the evidence and weighing of aggravating and mitigating circumstances and factors. Without being able to take into account defense counsel's argument, the jury was likely precluded from giving full consideration and effect to the mitigating value of evidence presented during the sentencing determination in violation of appellant's Eighth and Fourteenth Amendment rights.

Third, the instruction on mature and meaningful reflection impeded the jurors from fully considering appellant's mental state in assessing the circumstances of the crime and appellant's relative moral culpability. For all the same reasons this instruction violated the state law, there is a reasonable likelihood the misleading instruction amounted to Eighth and Fourteenth Amendment error as well. (See Section D *ante*.) The high court recognized in *Penry v. Lynaugh* (*Penry 1*), albeit in the context of mental retardation, that there can be something beyond "deliberation" that is relevant to a defendant's moral culpability: "[p]ersonal culpability is not solely a function of a defendant's capacity to act 'deliberately.'" (*Penry v. Lynaugh* ("*Penry 1*"), *supra*, 492 U.S. 302, 322-323.) In *Penry 1*, the high court found problematic the absence of jury instructions defining "deliberately" in a way that would clearly direct the jury to consider fully

Penry's mitigating evidence as it bore on his personal culpability. (*Id.* at p. 321.) Here, the trial court's refusal to define the term "maturely and meaningfully reflected on the gravity of his act," and its instruction that "[t]he new instructions do not include the instruction regarding 'mature and meaningful reflection'" (4 CT 1024), were likely understood by the jury to mean that it could not consider mature and meaningful reflection in deciding appellant's sentence. A juror who believed that appellant's immaturity and impaired mental state during the crime diminished his moral culpability, notwithstanding his conviction of first degree murder, would be hindered in giving effect to that conclusion. As a result of the trial court's instruction, this Court cannot be sure that the jury was able to give effect to all of appellant's mitigating evidence.

Fourth, the trial court's instruction regarding the lack of prior felony convictions prevented the jury from considering and giving effect to the absence of prior felony convictions. For all the same reasons this instruction violated the state law, there is a reasonable likelihood the misleading instruction amounted to federal constitutional error as well. (See Section E *ante*.) The lack of prior felony convictions is part of appellant's character and record which must be considered by the jury. (*Lockett v. Ohio* (1978) 438 U.S. 586, and *Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 110.) Preventing jurors from giving effect to aspects of the defendant's character and record creates an unconstitutional risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 605.) The Constitution does not require a specific set of instructions on mitigating circumstances. (See *Zant v. Stephens* (1983) 462 U.S. 862, 890.) Nonetheless, "the jury instructions – taken as a whole – must clearly inform

the jury that they are to consider any relevant mitigating evidence." (*California v. Brown* (1987) 479 U.S. 538, 545 (O'Connor, J., concurring.).) The instruction in this case – effectively that the jury could do whatever it wanted with the lack of prior felony convictions – was simply insufficient to inform the jury of its duty to consider this factor when the court repeatedly stressed that the penalty jury could only consider "evidence." Although the trial court's instruction did not absolutely preclude consideration of relevant mitigating evidence, neither did it "clearly inform" the jurors that they were required to consider such evidence. This situation creates an unacceptable risk that the jury did not consider "'factors which may call for a less severe penalty.'" (See *Penry v. Lynaugh*, *supra*, 492 U.S. at p. 328.)

As set forth in the preceding arguments, each instructional error violated the Eighth Amendment and Fourteenth Amendments heightened reliability requirement and its mitigation principles. Even if that were not the case, the instructional errors cumulatively violated these principles. (See *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764 [repeated prosecutorial misconduct infected the trial].) This Court must assess the combined effect of all the errors, because the jury's consideration of all the penalty factors results in a single general verdict of death or life without the possibility of parole.

2. The Trial Court's Responses Also Violated the Other Federal Constitutional Guarantees

a. The instruction on circumstances of the crime violated the due process clause of the Fourteenth Amendment

The trial court's incomplete and one-sided instruction on the circumstances of the crime also resulted in a violation of appellant's right to due process of law under the Fourteenth Amendment. In *Wardius v. Oregon* (1973) 412 U.S. 470, the United States Supreme Court warned that trial rules which provide nonreciprocal benefits to the state violate due process when the lack of reciprocity interferes with the defendant's ability to secure a fair trial. Noting that the due process clause speaks to "the balance of forces between the accused and his accuser" (*id.* at p. 474, fn. 6), the high court held that "in the absence of a strong showing of state interests to the contrary," there "must be a two-way street" as between the prosecution and the defense (*id.* at p. 475). Although *Wardius* involved reciprocal discovery rights, the high court has long recognized this due process balancing principle in the context of jury instructions. (*Reagan v. United States* (1895) 157 U.S. 301, 310 [jury instructions "should be impartial between the government and the defendant."].) Here, the trial court's instruction defining circumstances of the crime to pinpoint victim impact focused the jury's attention on evidence favorable to the prosecution's case for death, placing the trial court's imprimatur on the prosecution's case for death and thus conferring an unfair advantage on the prosecution in violation of appellant's Fourteenth Amendment right to due process.

b. The instruction on the quality of the argument of counsel infringed on the Sixth Amendment right to counsel

In addition, with regard to the trial court's instruction on arguments by counsel, the instruction violated appellant's Sixth and Fourteenth Amendment right to counsel. The right to have counsel give closing argument is a well-established. As set forth above in Section C, and incorporated here, "[t]he constitutional right to assistance of counsel includes the right for defense counsel to 'make a closing summation to the jury.'" (*United States v. Bell, supra,* 770 F.3d at p. 1257, quoting *Herring v. New York* (1975) 422 U.S. 853, 858.) Here, closing argument was a critical part of the sentencing determination because it was counsel's "last clear chance" to persuade the jurors that her client's life should be spared. (See *Herring v. New York, supra,* 422 U.S. at p. 862.) The trial court's instruction on counsel argument, effectively instructing that the jurors could not consider counsel argument, was akin to not having had counsel argument in the first place. This effectively denied appellant representation by counsel at a critical state of the sentencing trial and calls into question the reliability of his death judgment. (*United States v. Cronic* (1984) 466 U.S. 648, 659 ["if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable"]; *United States v. Swanson* (9th Cir. 1991) 943 F.2d 1070, 1074 [the lack of closing argument by counsel causes "a breakdown in our adversarial system of justice . . . that compels an application of the *Cronic* exception to the *Strickland* [prejudice] requirement"].)

c. The instruction precluding consideration of mature and meaningful reflection violated the due process right to present a defense

Finally, the trial court's instruction precluding consideration of mature and meaningful reflection also effectively prevented an important part of appellant's theory of defense, his case for life, from going to the jury. A hallmark of due process is the right of an accused to present his own defense at guilt. (*Holmes v. South Carolina* (2006) 547 U.S. 319, 324-327.) Capital sentencing proceedings, too, must "satisfy the dictates of the Due Process Clause." (*Clemons v. Mississippi* (1990) 494 U.S. 738, 746.) Accordingly, most of the rights encompassed within the right to present a defense apply at the penalty phase of a capital trial. (See *Simmons v. South Carolina,, supra,* 512 U.S. at pp. 160-169; *id.* at p. 174 (conc opn. of Ginsburg, J.); *Green v. Georgia* (1979) 442 U.S. 95, 95-97.) Here, appellant's theory of defense, his case for life, was that he was intoxicated during the shooting, in other words, he could not maturely and meaningfully reflect on the gravity of his act. Thus, the trial court's failure to instruct the jury on mature and meaningful reflection likely deprived appellant of his due process right to present a defense.

For all these reasons, there is a reasonable likelihood that the trial court's instructional errors violated appellant's federal constitutional rights.

G. The Trial Court's Instructional Errors Require Reversal Of The Death Judgment

Whether the trial court's instructional errors are considered under state law or federal constitutional law, they are not harmless. (See *People v. Brown* (1988) 46 Cal.3d 432, 447-448 [stating the "reasonable possibility" test for state law errors affecting the penalty verdict which places burden of

proof on the defendant]; *Chapman v. California* (1967) 386 U.S. 18, 24 [stating "harmless beyond a reasonable doubt" standard for federal constitutional error which places the burden of proof on the prosecution].) Each of the trial court's instructional errors was prejudicial. Even if not held to be individually prejudicial, the trial court's erroneous answers to the jury's questions cumulatively altered the outcome in this case. As this Court has said, "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) Thus, even in a case with strong prosecution evidence, reversal may be obtained 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.) The trial court's instructions, whether considered individually or together, affected the penalty verdict and were perhaps dispositive for one or more jurors.

For the reasons outlined in Argument V, Section B.3. *ante*, at pages 130-138, and incorporated here, the instructional errors were prejudicial. This was a case where the mitigating circumstances and factors closely balanced the prosecutor's case in aggravation. Appellant was young, emerged from an unstable childhood characterized by neglect and problems with alcohol and drug use that started early in his life. He did not find refuge in school as his problems continued there as well, and for a while went undiagnosed. Appellant became a chronic drinker and ultimately left school at 17 years old. Despite his circumstances, he did not have prior felony convictions. The day of the shooting, he was heavily intoxicated and 23 years old. The evidence permitted the jurors to entertain a lingering doubt about whether appellant deliberated the murder. As outlined in detail

in Argument I, Section E *ante*, at pages 63-69, and incorporated here, the evidence on this key issue was not overwhelming.

The aggravation in this case, however, did not so far outweigh the mitigation that no reasonable juror could have concluded that a sentence of life without the possibility of parole was the appropriate penalty. As aggravating evidence, the prosecutor introduced victim impact evidence in the form of testimony from three of Officer Niemi's colleagues, Niemi's mother, brother, and wife. (13 RT 2719-2778.) In addition to this testimony, which included photographs of Niemi throughout his life, the prosecutor introduced an essay written by Niemi about a dead infant. (13 RT 2719-2778.)[58]

Aside from the victim impact evidence, and the circumstances of the crime itself, the prosecutor's case for aggravation consisted of one prior aggravating incident – an uncharged threat of violence by an intoxicated appellant after arrest that was not perceived seriously by the arresting officer (13 RT 2711, 2714). With the aggravating and mitigating factors and circumstances so closely balanced, there is a reasonable possibility that the jury would have rendered a different verdict had the instructional errors not occurred. "In a close case . . . any error of a substantial nature may require reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant." (*People v. Von Villa* (1992) 11 Cal.App.4th 175, 249.)

The instructional errors addressed the issues that were raised by the evidence and closing arguments, and which concerned the jurors:

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[58] As outlined in more detail in Argument V, Section C.2. *ante*, at pages 142-145, some of this evidence was unduly inflammatory and rendered the penalty trial fundamentally unfair.

circumstances of the crime, arguments by counsel, mature and meaningful reflection and prior felony convictions. For example, the prosecutor argued extensively for death based on the circumstances of the crime. In fact, the prosecutor argued that the circumstances of the crime was the factor that mattered the most in the weighing of aggravating factors. (14 RT 2894, 2895.) The prosecutor argued that appellant deserved death because he deliberated and premeditated the crime; that appellant was looking for trouble, willing to shoot someone and made the choice to kill Officer Niemi. (14 RT 2888-2890.) In discussing factor (a), the prosecutor also argued about the victim impact evidence and said it warranted death for appellant. The prosecutor discussed the story written by Niemi, the impact on Niemi's family and colleagues (14 RT 2890-2891, 2895-2898); and that the penalty decision was important to society, Niemi's friends and relatives (14 RT 2887). In discussing the lack of a prior felony conviction, the prosecutor argued that it was not a "major factor" in this case. (14 RT 2892.) The prosecutor argued that appellant appreciated the criminality of his conduct and was "fully capable of following the requirements of the law but chose not to for his own selfish reasons." (14 RT 2893.) Further, the prosecutor argued that age was also not a mitigating factor in the case. (14 RT 2893-2894.) Finally, addressing argument by defense counsel, the prosecutor told the jurors that defense counsel would just shift the focus "to try to get you to focus on the defendant." (14 RT 2899.)

Defense counsel too discussed the circumstances of the crime in her penalty closing argument. In doing so, she argued that the factors for the jury to consider were important, and repeatedly argued that the jurors could consider, although they found that the murder was deliberate and premeditated, that appellant was intoxicated when he committed the

murder. (14 RT 2907.) Defense counsel argued that appellant's capacity to appreciate the criminality of his conduct or follow the requirements of the law was impaired as a result of intoxication; that appellant was not in his right mind when he attempted to grab identifications on the ground; and that the jurors could consider any lingering doubt they had about appellant's state of intoxication and its impact on his decision making. (14 RT 2908, 2912-2914.) Further, defense counsel argued that appellant's immaturity was a mitigating factor in the case. (14 RT 2908-2909.) Defense counsel also told the jurors that they could consider the lack of prior felony convictions and that it was an important and mitigating factor. (14 RT 2907.)

The trial court's instructions impacted the jury's consideration of these issues. It has long been recognized that erroneous supplemental instructions given in response to inquiries from the jury are especially likely to be prejudicial because they deal with the very issues which the jurors have focused on in the case. (*People v. Beeman* (1984) 35 Cal.3d 547, 562-563 [the questions asked indicated the jury's deliberations were focused on the very issue upon which the defense rested and upon which the court's instructions were inadequate]; see also *United States v. Stephens* (5th Cir. 1978) 569 F.2d 1372, 1374 [when the jury has zeroed in on a critical issue, accurate instructions take on maximum importance].) Moreover, these supplemental instructions will in all likelihood be perceived by the jurors as the most important instructions in the case. (*People v. Woppner* (1859) 14 Cal. 437, 438; *United States v. Carter* (5th Cir. 1974) 491 F.2d 625, 633 [the judge's last word is apt to be the decisive word]; *United States v. Workcuff* (D.C. Cir. 1970) 422 F.2d 700, 702 [jury likely to attach "particular significance" to supplemental instructions].)

Based on the closely balanced mitigating and aggravating factors and circumstances, each of the trial court's erroneous instructions tipped the scales toward aggravation. First, the trial court's instruction regarding circumstances of the crime was prejudicial in that it added weight to the aggravating factors by focusing the jurors on victim impact evidence as a circumstance of the crime, paralleling the prosecutor's closing argument, but failed to correct that imbalance by also informing the jurors that the circumstances of the crime could be mitigating as well. (See *LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 876; *People v. Louis* (1987) 42 Cal.3d 969, 995 ["There is no reason why we should treat this evidence as any less 'crucial' than the prosecutor – and so presumably the jury – treated it."].) At the same time that the trial court directed the jury to consider victim impact under factor (a), it had denied a counterbalancing instruction requested by appellant that lingering doubt could be considered and was potentially mitigating under factor (a). (See Argument VI post, pp. 146-163.) Under state law, both considerations are relevant to the circumstances of the crime. In granting the prosecutor's requested instruction but denying appellant's requested instruction, the trial court bolstered the prosecution's case while undercutting appellant's case. Thus, the trial court's response had a prejudicial, partisan effect.

Second, the trial court's instructions on the quality of counsel argument, mature and meaningful reflection, and prior felony convictions precluded consideration of mitigating factors and circumstances, which inversely added weight to aggravation. The trial court's instruction on the quality of arguments by counsel was prejudicial because if the jurors understood that they could not consider the persuasiveness of defense counsel's argument in reaching their penalty decision, the jurors would not

have known how they could consider within the factors enumerated in CALCRIM No. 763 the extent and impact of appellant's intoxication. In addition, the jurors would not have known they could consider any lingering doubts as to the extent and quality of appellant's premeditation and deliberation and the mitigating weight of the absence of prior felony convictions in deciding instead for life. Finally, although the instructions directed that the jury shall consider argument of counsel in the penalty determination, there is a powerful and unquantifiable effect that argument from counsel could have on the jury's weighing of the aggravating and mitigating factors that may have been precluded by the trial court's response.

Third, the trial court's instruction on mature and meaningful reflection was also prejudicial in that if the jury understood that it could consider mature and meaningful reflection in its penalty decision, such a circumstance could have added mitigating weight to the weighing of mitigating and aggravating factors and circumstances. Whether appellant maturely and meaningfully reflected on the gravity of his act due to his intoxication was relevant to his moral culpability, reflecting an immature and impulsive act rather than deliberate and premeditated first degree murder that potentially would have weighed in favor of life instead of death.

Fourth, the trial court's instruction regarding prior felony convictions was prejudicial because it precluded the jury from considering a significant mitigating factor: the absence of prior felony convictions. This factor alone could have altered the jury's weighing of aggravating and mitigating circumstances and tipped the scales in favor of life.

As outlined fully in Argument V, Section B.3. *ante*, at pages 130-

138, the penalty decision was close. The jurors struggled in their penalty determination, deliberating for more than four court days and submitting ten written questions. The jury's mid-deliberations questions to the trial court indicated that the jurors wrestled with consideration and weighing of mitigating circumstances and factors. In addition to the questions the jury asked about circumstances of the crime, arguments by counsel, mature and meaningful reflection and prior felony convictions, the jurors asked whether the law allowed them to consider any of the circumstances of appellant's arrest in Pleasanton as a mitigating factor under factor (k). (4 CT 1016.) The jury also asked whether circumstances to be considered under factor (k) had to be supported by the evidence. (4 CT 1033.) The sum of the jury's questions shows that the question of the appropriate penalty was likely close and not clear-cut.

Without proper instructional guidance, the jury was unable to fairly assess and weigh the mitigating circumstances and factors in the case. Had the trial court properly instructed the jury in response to their questions, there is a reasonable possibility that "'at least one juror would have struck a different balance'" (*In re Lucas*, *supra*, 33 Cal.4th at p. 690, quoting *Wiggins v. Smith* (2003) 539 U.S. 510) and voted to spare appellant's life. Certainly, respondent cannot prove beyond a reasonable doubt that the instructional errors had no influence on the jurors' death verdict. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Accordingly, the death judgment must be reversed.

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

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly" presented for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257, abrogated on other grounds by *People v. McKinnon* (2011) 52 Cal.4th 610.)

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

A. Section 190.2 Is Impermissibly Broad

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

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

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

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

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALCRIM No. 763; 4 CT 1050-1053; 14 RT 2881-2884.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, including the harmful impact of the crime. In this case, for instance, the jurors were able to consider testimony from Officer Niemi's colleagues and a story written by Niemi about a dead newborn baby as victim impact evidence under factor (a). (See Argument V *ante*.)

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not

required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner almost all features of every murder and every form of victim impact evidence can be and has been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Appellant urges the court to reconsider this holding.

C. The Death Penalty Statute And Accompanying Jury Instructions Fail To Set Forth The Appropriate Burden Of Proof

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

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (CALCRIM Nos. 764, 765; *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see

People v. Hawthorne (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. More specifically, appellant's jury was not told that it had to find beyond a reasonable doubt that the crime proffered as factor (b) evidence involved the use or attempted use of force or violence or the express or implied threat to use force or violence. (4 CT 1054-1055 [CALCRIM No. 764]; 14 RT 2884-2885.)

Blakely v. Washington (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604, and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478 require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (4 CT 1056-1057 [CALCRIM No. 766]; 14 RT 2885-2886.) Because these additional findings were required before the jury could impose the death sentence, *Blakely*, *Ring*, and *Apprendi* require that each of these findings be made beyond a reasonable doubt. The trial court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of

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

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected appellant's claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair, supra,* 36 Cal.4th at p. 753.) Appellant requests that the Court reconsider this holding.

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

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the

Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALCRIM Nos. 763 and 766, the instructions given in this case fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

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

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

a. Aggravating factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 290, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona*, *supra*, 536 U.S. 584. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal Constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see

Monge v. California (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

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

b. Unadjudicated criminal activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (4 CT 1054-1055 [CALCRIM No. 764]; 14 RT 2884-2885.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This

Court has routinely rejected this claim. (*People v. Anderson*, *supra*, 25 Cal.4th at pp. 584-585.) Here, the prosecution presented evidence regarding unadjudicated criminal activity allegedly committed by appellant (13 RT 2705-2715) and the jury was instructed that each juror could decide for him or herself whether appellant had committed the alleged crime. (4 CT 1054-1055 [CALCRIM No. 764]; 14 RT 2884-2885.)

The United States Supreme Court's decisions in *Cunningham v. California* (2007) 549 U.S. 270, *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

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

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

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances both outweigh the mitigating circumstances and are also so substantial in comparison with the mitigating circumstances that a sentence of death is appropriate and justified." (4 CT 1057 [CALCRIM No. 766]; 14 RT 2886.) 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* (1988) 486 U.S. 356, 362.)

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

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

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALCRIM No. 766 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense

theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP (life without the possibility of parole) verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

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

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 293-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California*, *supra*, 494 U.S. at p. 380.) In addition to the erroneous instructions in the penalty phase (see Arguments VI and VII *ante*), that occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity

was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

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

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

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

(1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (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, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing To Require That The Jury Make Written Findings Violates Appellant's Right To Meaningful Appellate Review

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

Cal.4th 566, 619.) Appellant urges the court to reconsider its decisions on the necessity of written findings.

E. The Instructions To The Jury On Mitigating And Aggravating Factors Violated Appellant's Constitutional Rights

In addition to the erroneous instructions outlined in Arguments VI and VII *ante*, the following instructions to the jury on mitigating and aggravating factors also violated appellant's constitutional rights.

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

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALCRIM No. 763; § 190.3, factors (d) and (g); (4 CT 1051-1052; 14 RT 2881-2884) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. at p. 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Appellant is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

Some of the sentencing factors set forth in CALCRIM No. 763 were inapplicable to appellant's case. (See, e.g., CALCRIM No. 763, factors (d) [whether the defendant was under the influence of extreme mental or emotional disturbance when he committed the crime of which he was convicted in this case]; (e) [whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act] and (f) [whether the defendant reasonably believed the circumstances morally justified or extenuated his conduct]; 4 CT 1051-1052; 14 RT 2881-2884.)

The trial court failed to omit those factors from the jury instructions, likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 36 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

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

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALCRIM No. 763 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALCRIM No. 763 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289, abrogated on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

Appellant's jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236; see also Argument VII *ante*.)

F. 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 failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the court to reconsider its failure to require inter-case proportionality review in capital cases.

G. The California Capital Sentencing Scheme Violates The Equal Protection Clause

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

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rules 4.421 & 4.423.) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances

apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that the Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider.

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

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

IX. REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF PENALTY ERRORS THAT COLLECTIVELY UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Assuming, arguendo, that the errors asserted in Arguments V-VIII, taken separately, do not require reversal, the effect of these errors should be evaluated cumulatively because together they undermine confidence in the fairness of the trial and the reliability of the resulting death judgment. The law supporting this claim is set forth in Argument IV *ante*, at page 108, and incorporated by reference here. Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt.

In appellant's case, each of the penalty phase errors, standing alone, was sufficient to undermine the prosecution's case and the reliability of the jury's ultimate verdict, and none can properly be found harmless beyond a reasonable doubt. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-282; *Chapman v. California* (1967) 386 U.S. 18, 24.) When viewed cumulatively, the trial court's erroneous admission of the victim impact testimony from Officer Niemi's coworkers and a story about a dead baby written by Niemi, the trial court's erroneous refusal to instruct on lingering doubt and the trial court's erroneous responses to the jury's mid-deliberations questions was unduly prejudicial and relieved the jury of its obligation to consider and give effect to mitigating factors and circumstances. As a result, these errors, viewed separately or in combination, deprived appellant of his state and federal constitutional rights to the Eighth and Fourteenth Amendments heightened reliability requirement and its mitigation principles.

Moreover, these errors were exacerbated by the other defects in California's capital-sentencing scheme which, as set forth in Argument VIII, increased the risk that the jury's death verdict was imposed in an arbitrary and unreliable manner. In this way, the errors at the penalty phase – even if individually not found to be prejudicial – precluded the possibility that the jury reached an appropriate verdict in accordance with the Eighth and Fourteenth Amendment requirements of a fundamentally fair, reliable, non-arbitrary and individualized sentencing determination. Accordingly, the combined impact of the penalty phase errors in this case requires reversal of appellant's death sentence.

In addition, the death judgment must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing penalty phase].) In this context, this Court has expressly recognized that evidence that may not affect the guilt determination can have a prejudicial impact on the penalty trial. (*People v. Brown* (1988) 46 Cal.3d 432, 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]; accord, *Arizona v. Fulminante* (2000) 499 U.S. 279, 301-302 [erroneous introduction of evidence at guilt phase had prejudicial effect on sentencing phase of capital murder trial]; *United States v. McCullough* (10th Cir. 1996) 76 F.3d 1087, 1101-1102 [erroneously admitted confession harmless in guilt phase but prejudicial in penalty phase].)

In the present case, there is at least a reasonable possibility that the cumulative guilt phase errors, singly and in combination, had a prejudicial effect upon the jury's consideration of the evidence presented at the penalty phase, as well as the jury's ultimate decision to return a death sentence. At the guilt phase the jurors did not have proper instructions on deliberation or reasonable doubt as to second degree murder and their duty to give appellant the benefit of any doubt as to degree of murder. These instructional errors combined with the prejudicial environment at trial resulted in a first degree murder finding which made appellant death eligible. Without the guilt phase errors, there was a reasonable possibility that the jurors would not have found first degree murder and thus that appellant was death eligible. In short, without the guilt phase errors, there may not have been a penalty phase. Further, operating without the understanding that they could find they had a reasonable doubt as to the degree of murder would have impacted the jury's assessment of appellant's moral culpability at penalty.

Reversal of the death judgment is therefore mandated here because it cannot be shown by the State that the guilt phase and penalty phase errors, individually, collectively, or in combination had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341; *Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Brown*, *supra*, 46 Cal.3d at p. 466.)

CONCLUSION

For all of the reasons stated above, the entire judgment – the convictions, the special circumstance findings, the sentencing enhancements, and the sentence of death – must be reversed.

Dated: December 17, 2015

Respectfully Submitted,
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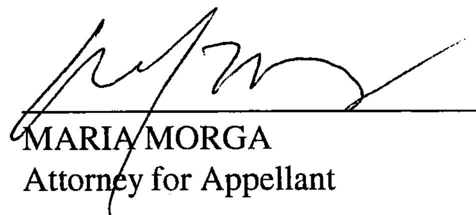
CERTIFICATE OF COUNSEL
(Cal. Rules of Court, Rule 8.630(b)(2))

I, MARIA MORGA, am the Deputy State Public Defender assigned to represent appellant IRVING ALEXANDER RAMIREZ in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates is 70,169 words in length.

Dated: December 17, 2015



MARIA MORGA
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Irving Alexander Ramirez* California Supreme Ct. No. S155160
(Alameda County Superior Ct. No. 151080)

I, Marcus Thomas, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, 10th Floor, Oakland, California 94607. On this day, I served a copy of the following document(s):

APPELLANT'S OPENING BRIEF

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The envelopes were addressed and mailed on December 18, 2015, as follows:

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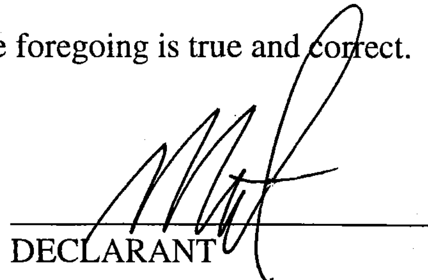
I declare under penalty of perjury that the foregoing is true and correct. Signed on December 18, 2015, at Oakland, California.



DECLARANT