No. S165195

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

ANTHONY NAVARRO

Defendant and Appellant.

Automatic Appeal from the Superior Court
of Orange County
Case No. 02NF3143
Honorable Francisco Briseño, Judge

APPELLANT'S OPENING BRIEF

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INTRODUCTION

This is a case of likely innocence in which it should have been easy for the jury to find reasonable doubt and acquit. The fact that appellant was convicted is attributable to a long series of trial court errors on evidentiary matters and the court's meddling in appellant's right to present a defense. The result was a travesty of due process and a remarkably unfair trial.

Appellant was a member and shot-caller in the Pacoima Flats gang, a gang affiliated with the Mexican Mafia. However, he was also secretly acting as an informant for the FBI, ATF, and local law enforcement agencies. In 2002, a Buena Park woman named Debbie Perna decided to have her brother, David Montemayor, killed, because she believed he was embezzling from the company and driving it to ruin. One of the business's employees, Mira Corona, was a "runner" or go-between who regularly visited and passed on instructions for a major Mexican Mafia leader in Pelican Bay State Prison. Perna asked Corona to solicit appellant to murder her brother in exchange for the cash that Montemayor was skimming and had supposedly stashed in coffee cans in his garage.

Corona met with appellant and made the solicitation. However, there is no evidence that appellant ever agreed to commit the killing or

have the killing committed. Indeed, the evidence showed that he instead took a note with the victim's address from Corona and promptly informed two of his law enforcement handlers that the killing was to take place. The LAPD detective he went to second told appellant to get more information and report back to him.

Meanwhile, members of the Pacoima Flats gang and the Mexican Mafia had begun to suspect that appellant was an informer. Appellant had recently been arrested on a firearm possession charge that would have been a Third Strike offense, but was almost immediately released from custody. He then informed his wife, Bridgette Navarro, a woman with extensive Mexican Mafia and local gang connections of her own, that he was an informant for law enforcement. In Mexican Mafia gang culture, informants not only forfeit their own lives but also the lives of their families; thus, Bridgette Navarro now knew that her own life was in danger. During the same period, appellant commenced divorced proceedings, and Bridgette became aware was having an extramarital affair. She also became friendly with Mira Corona. Appellant, fearing for his life, left Buena Park and moved to Las Vegas where other members of his family lived.

On October 2, 2002, when appellant was in Las Vegas, three members of the Pacoima Flats gang killed David Montemayor and were

apprehended after a high speed chase. The car in which they were riding was registered to appellant's address on Sunrose Place in Santa Clarita, though not to appellant himself. One of the three perpetrators also left a rental car rented in his own name in front of appellant's house, and several calls were made by one of the perpetrators to one of the many cell phones appellant used during that period of time.

The evidence at trial presented the jury with two diametrically opposed stories. According to the prosecution, appellant was recruited for the killing by Mira Corona and agreed to have three members of his Pacoima Flats "crew" kill Montemayor for the cash in the garage. While acknowledging that appellant was a law enforcement informant, the prosecutor suggested that he informed mostly for his own benefit. The prosecutor admitted that appellant told his handlers of the proposed hit, but argued that he never provided them with enough information to take action because he was playing both sides. The prosecutor contended that telephone records of one of the many cell phones appellant had purchased for his "crew" showed that appellant was in contact with one of the perpetrators around the time of the killing. From this evidence, the prosecutor argued that appellant had sent the three men down to intercept Montemayor as he opened his business, take him back to his residence,

shoot him, and take the money. The plot was foiled when Montemayor instead drove away past and away from his residence, after which the perpetrators shot and killed him, resulting in a televised car chase and their eventual apprehension.

The defense, however, argued that appellant never made any such agreement with Corona and instead was in the process of completing a move to Las Vegas, where his mother, sister, and father lived. He was involved in divorce proceedings with his wife, Bridgette, who was angry at appellant both because he was an informant and because she was jealous of appellant's girlfriend. According to the defense, appellant was in the process of leaving the gangster life, and had left behind at his residence, and, in the hands of Bridgette, the cell phones the prosecution sought to use to connect appellant with the killings. Moreover, Mira Corona had become a friend of Bridgette's, and the Mexican Mafia leaders for whom she was a runner had told her in a letter not to trust appellant.

The defense also focused on the fact that appellant had told two of his law enforcement handlers about the impending hit on David Montemayor. Although he had not been able to supply enough details for them to take preventive action, no one in his right mind would tell the police about an impending hit if he himself were involved in it. Moreover,

as several law enforcement officers and a gang expert testified, no gang shot-caller would have ever allowed his crew to use a vehicle registered to his house for a killing, or leave a car rented to one of the crew members sitting in front of it.

The defense theory was that it was Mira Corona and Bridgette who were in contact that morning with the perpetrators, and they planned to set up appellant to take fall if the perpetrators were caught or if the license of the car they were using was recorded. The defense argued that because appellant had by then become known in the gang culture as a probable snitch, his so-called "crew" would never have embarked on a murder on his behalf. Instead, the attempted hit was arranged in such a way as to implicate appellant in the crime.

Both stories were complex, based on circumstantial evidence, and required the jury to make difficult decisions. However, appellant was entitled to be judged by a standard of proof beyond a reasonable doubt as to every element required to constitute the crime. As appellant will show, the prosecution failed to prove, with either direct or circumstantial evidence, that appellant ever agreed to commit the alleged killing. Because the entire prosecution case turned on proving appellant conspired to kill Montemayor, the judgment against him must be reversed. Alternately, the

trial court's persistent evidentiary errors in favor of the prosecution, restrictions on the presentation of the defense, and failure to rein in the prosecutor's misconduct, resulted in a trial utterly lacking in fairness and due process.[1]

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[1] It should also be noted that the record on appeal reveals numerous instances of ineffective assistance of counsel. However, because of this court's preference for having those issues raised on habeas corpus (*People v. Pope* (1979) 23 Cal.3d 412 and its progeny), and the near impossibility of separating out those instances which could be raised on appeal, appellant will reserve those issues for presentation in his habeas corpus petition.

STATEMENT OF THE CASE

This case involves the killing of David Montemayor in Buena Park on October 2, 2002, by three men initially charged by felony complaint two days later, on October 4, 2002. The three perpetrators were Armando Macias, Alberto Martinez, and Gerardo Lopez. (1 CT 1-4.) Appellant Anthony Navarro was added to the complaint on October 21 (1 CT 7-12), and Deborah Perna and Mira Corona were added the following day on October 22, 2002. (1 CT 15-20.)

Appellant was formally arraigned on December 13, 2002 and pleaded not guilty to all counts, allegations, enhancements and prior crimes. (1 CT 29.) Appellant was held to answer following a preliminary hearing which took place over four court days beginning on October 8, 2003. (1 CT 53-63.) The initial information was filed on October 20, 2003, and charged appellant, Macias, Martinez, and Perna with the Montemayor murder. (1 CT 64-70.)

Following a motion filed by the prosecution, appellant's trial was severed from those of his remaining co-defendants on February 9, 2006. (2 CT 326; see also 1 RT 251-252; 2 CT 400).

On August 13, 2007, shortly before appellant's trial, a Fifth Amended Information was filed charging appellant with murder in Count 1

and conspiracy to commit murder in Count 2, along with criminal gang and other enhancements, special circumstance allegations, and prior conviction allegations, as set out in full in the footnote below.[2] (6 CT 1551-1556.)

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[2] The Information charged appellant as follows (all statutory references are to the Penal Code):

–Count 1: Murder (§187(a)) of David Montemayor on October 2, 2002

–Special Circumstances:

–Felony Murder (§190.2(a)(17)(A))/Robbery (§211/212.5)

–Felony Murder (§190.2(a)(17)(B))/Kidnapping (§§207,209,209.5)

–Murder Committed for Criminal Gang Purpose (§190.2(a)(22))

–Serious Felony Enhancement (§1192.7(c)(1))

–Count 2: Conspiracy to Commit Murder (§182(a)(1))

–7 Overt Acts

–Enhancements:

–Gang enhancement on Counts 1 & 2 (§186.22(b)(1)

–For purposes of §12022.53(d), (e)(1) (Gang Member's Vicarious Discharge of Firearm Causing Death), and within meaning of §§1192.7 and 667.5, Navarro was a principal in the commission of felony for benefit, etc. of criminal street gang w/in meaning of §186.22(b)

–Prior Convictions

–Previous serious felony conviction (§211), (§667(a)(1), §1192.7(c)), May 31, 1996.

–Separate Prison Term for felony (211) on May 31, 1996 (§667.5(b))

–Previous serious felony conviction (192.1) on Dec. 5, 1984 (§667(a)(1), 1192.7(c)).

(continued...)

Three special circumstances were alleged against appellant: robbery felony murder (§190.2, subd. (a)(17)(A)), kidnaping felony murder (§190.2, subd. (a)(17)(B)), and murder committed for a criminal gang (§190.2, subd. (a)(22)).

On July 16, 2004, appellant filed a sealed motion[3] seeking to dismiss the case on the grounds of prosecutorial misconduct and a violation of due process due to the prosecution's failure to acknowledge at the preliminary hearing that appellant had discussed the impending hit on Montemayor with two of his law enforcement "handlers" months before the event. (1 CT 155-170.) The motion was heard and denied on December 10, 2004. (1 CT 221.)

On November 8, 2005, appellant filed a motion to discover the identity of an FBI informant. (2 CT 327-330.) The motion was denied on February 29, 2006. (2 CT 403.) On April 4, appellant filed a petition for

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[2] (...continued)
–Separate prison term for felony (192.1) on Dec. 5, 1984 (§667.5(b))
–Two or more prior and serious felonies (§§667(d), (e)(2)(A), 1170.12(b), (c)(2)(A)):
1. §192.1 on December 5, 1984.
2. §211 on May 31, 1996.

[3] Pursuant to appellant's motion to unseal, filed August 26, 2013, this Court ordered unsealed all but one part of the record. (Order, Nov. 13, 2013.) Accordingly, citations to the record do not specify whether or not they were initially sealed by the trial court.

writ of prohibition on this issue in the Court of Appeal. (2 CT 405-430.) On September 27, the Court of Appeal denied the writ. (3 CT 772-778). On November 3, 2006, appellant filed a petition for review in this Court. (4 CT 785-821; *see* Docket No. S147836.) On January 17, 2007, this Court denied the petition for review. (Docket No. S147836.)

Jury selection proceedings commenced on August 13, 2007. (6 CT 1565.) The jurors were sworn on August 23 (6 CT 1634), and the trial began on September 6. (7 CT 1705.) On October 16, at 4:40 p.m., after 16 days of trial, the jury retired to deliberate on guilt. The following day, the jurors requested a video of the police interview with Edelmira Corona (7 CT 1804), and in the late morning of the next day, October 18, informed the court that they had reached their verdicts of guilt on both counts, as well as true findings on the three special circumstances as well as the various enhancement allegations. (7 CT 1787, 1949-1950.)

The penalty phase commenced with opening arguments on October 25, 2007. (8 CT 1987.) The jury began their deliberations on November 13

(8 CT 2020), and returned their verdict of death on November 15, 2007.[4] (8 CT 2124.)

On July 11, 2008, appellant's motions for a new trial and for reduction of sentence were heard and denied, and judgment was rendered, as follows.

As to Count 1, the court imposed the death sentence, plus an additional 25 years to life for the enhancement pursuant to section 12022.53, subdivisions (d) and (e)(1), to be served consecutively. For two prior conviction allegations under section 667, subdivision (a)(1), the court imposed five years each. Two prior crimes under section 667.5, subdivision (b) were stricken. With respect to Count 2, the court imposed 25 years to life but stayed the sentence pursuant to section 654. The court struck Count 3 and the gang enhancements to Counts 1 and 2, pursuant to section 186.22, subdivision (b)(1). Appellant's sentence therefore totaled death plus 35 years to life. Although the court did not hold a hearing on defendant's ability to pay restitution, the court imposed a restitution fine of $10,000

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[4] Twenty minutes after the jury retired to deliberate, at 4 p.m., they submitted the following question to the court: "If we cannot agree on the death penalty unanimously, then is life without the ability of parole the automatic default option or must we unanimously agree on life without the ability of parole." (8 CT 2118; 9 CT 2021.) The court answered the following day that the verdict as to either punishment must be unanimous. (8 CT 2119; 9 CT 2022.)

pursuant to section 1202.4, subdivision (f), and a restitution fine payable to the Victim's Compensation and Claims Board of $10,443.80. (8 CT 2263-2264; Abstract of Judgement: 8 CT 2274.)

This appeal is automatic.

GUILT PHASE STATEMENT OF THE FACTS

A. INTRODUCTION

On October 2, 2002, David Montemayor was shot and killed in a car near the intersection of Pinyon and Locust in Buena Park, California, by three men: Alberto Martinez, Gerardo Lopez, and Armando Macias. The three were members of a San Fernando Valley gang, the Pacoima Flats gang, which was associated with the Mexican Mafia, also known as the EME. Appellant Anthony Navarro was a long-time member of the Pacoima Flats gang and a "shot-caller" with his own "crew" of gang members, and also had become an associate, though not a "made" member, of the Mexican Mafia. However, appellant was neither present at the scene nor directly involved in the Montemayor killing.[5]

Appellant was secretly working as an informant for the FBI and other law enforcement agencies, including the Los Angeles Police Department, and was suspected by others in the gang of being a snitch. Moreover, there was evidence that he owed money to the Mexican Mafia. Whether because of the money owed or suspicions that he was a snitch, one of the EME shot-callers in Pelican Bay State Prison had put out a "green

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[5] Appellant's gang moniker was "Droopy." (17 RT 3204.)

light" on him. A "green light" is an authorization for gang members to kill another member of the gang.

The prosecution's theory was that one of Montemayor's employees, a woman named Edelmira, or "Mira," Corona, was pressured by Montemayor's sister to have him killed. In return, Montemayor's sister had let it be known that whoever killed her brother could have the cash that Montemayor had stolen from the company and hidden in his garage. Under the prosecution theory, Corona had solicited appellant to carry out the murder/robbery, and he eventually sent Martinez, Macias and Lopez to commit the murder.

The defense theory was that while appellant initially accepted a note from Corona containing Montemayor's address and phone number, he instead reported the impending hit to his law enforcement handlers. When Corona later asked appellant about getting it done, he told her he had lost the address she had given him. In addition, Corona was a "runner" for EME leaders at Pelican Bay State Prison, one of whom had told her in a letter not to trust appellant, and she testified that she did not again give him the information about Montemayor. The defense sought to show that Corona, in concert with appellant's wife, whom he was divorcing, actually

sent the three perpetrators to kill Montemayor while at the same time implicating appellant, the suspected snitch.

The facts concerning the killing of David Montemayor are not contested by appellant, nor are they crucial to this appeal. Accordingly, they will be summarized only briefly below. However, the evidence regarding appellant's connection, or lack thereof, to the killing is of great significance to this appeal, and that evidence will be summarized in detail.

B. THE KILLING OF DAVID MONTEMAYOR

David Montemayor, who lived in Buena Park, managed a trucking company called Interfreight Transport (hereinafter, "Interfreight") in nearby Rancho Dominguez. The company was owned by Montemayor and his parents, Pete and Karen Montemayor, who had retired in mid-2002 and left their son in charge of day-to-day operations. (13 RT 2386; 16 RT 2934-2937.) David Montemayor was an amputee who had lost one of his arms when he was 18 years old. (13 RT 2393.)

Montemayor's sister, Deborah Perna, also worked at Interfreight as office manager, accountant, and front-desk receptionist. (13 RT 2387-2388.) Perna disliked her brother and believed, apparently correctly, that Montemayor was embezzling money from the company by keeping the proceeds from certain shipments for himself. Montemayor was rumored to

keep the cash he generated from this embezzlement scheme in a coffee can in his garage. (14 RT 2554.)

Montemayor usually left his house at about 6 a.m. and arrived at Interfreight at about 6:15 to open up. On October 2, 2002, he left the house at his usual time. (13 RT 2389-2389.) However, at about 7 a.m., Montemayor's wife, Susan, received a call from Interfreight employee George Tello asking if Montemayor was home. (13 RT 2390-2391.) Tello had arrived that morning to find that the business had been opened but that Montemayor was not there. (14 RT 2546-2548, 2550-2551.)

At about 6:50 a.m., Montemayor's neighbor, Martin Torrez, was driving home from his night-shift work. (14 RT 2585-2586.) When he was about a mile from his house, Torrez noticed Montemayor's white Ford Expedition driving directly behind him, and another truck or SUV was following close behind the Expedition. The Expedition and the truck behind it both followed Torrez as he turned onto his street, but when Torrez pulled into his driveway, the other two vehicles drove past. As Torrez walked to the end of his driveway to pick up his newspaper, he saw the taillights of the two vehicles at the end of the cul-de-sac. (14 RT 2586-2692.)

After Torrez went inside, the two vehicles apparently left the cul-de-sac, because some minutes later, shortly before 7 a.m., they had made their way to near the intersection of Pinyon and Locust in Buena Park. Joseph Mathai, who was at his home near the intersection, heard three or four gunshots in rapid succession. Mathai looked out his window and saw his neighbors running out of their homes shouting, "Call the police! Call the police!" Mathai called the police and relayed what he was hearing his neighbors saying outside. Part of what he heard was a description of a camper truck like a Ford Bronco or Chevy Blazer, so he relayed that description to the police on the phone. (14 RT 2595-2597.)

Detective Greg Pelton arrived at the scene a few minutes after 7 a.m. and found Montemayor, dead, under a blanket near his Expedition. (13 RT 2493-2495.) Guns and shell casings were also found nearby. (13 RT 2497, 2500-2503.)

Meanwhile, the Buena Park Police dispatcher put out a call which described the suspect vehicle as a "black over blue" Blazer or Bronco with a license plate that started with "3L" and reported that the vehicle had last been seen driving northbound on Beach Boulevard. (13 RT 2402, 2404.) Buena Park Police Detective Shawn Morgan and his partner were on Beach Boulevard when they heard the call but saw no similar vehicle. As Morgan

approached Interstate 91, he saw a patrol car getting onto the westbound Interstate 91 on-ramp, so Morgan decided to take the eastbound ramp. As he crested the top of the on-ramp, he spotted a black-over-blue Chevy Blazer driving down an embankment onto the on-ramp to the southbound I-5. (13 RT 2406.)

Morgan and other officers pursued the car, and a lengthy, high-speed chase followed. (See 13 RT 2406-2424.) During the chase, Detective Morgan saw two guns thrown out of the vehicle; one of the guns shattered into pieces and the other bounced across the road and onto the shoulder. (13 RT 2414.) The chase ended in the City of Orange when an officer used a maneuver to force the Blazer to spin out of control and crash into a telephone pole. The driver, Alberto Martinez, and his two passengers, Gerardo Lopez and Armando Macias, were placed under arrest. (13 RT 2425, 2431-2433.) Police searched the Chevy Blazer. Inside, they found a speaker box spray-painted with the name "Droopy." (17 RT 3090.)

The guns Morgan saw being thrown from the vehicle were retrieved by Buena Park Police Detective Chris Brisbing. They were a Baretta .380 caliber semi-automatic pistol and a loaded Narinco 9 mm. semi-automatic pistol. (Exs. 23, 24; 13 RT 2484-2489.) The Baretta was missing its grips and its magazine, which were later found by the side of the road. (13 RT

2486-2488.) Detective Greg Pelton also retrieved another pistol in roughly the same area, a Smith and Wesson stainless steel five-shot revolver, in which he found four expended shells and one live round. (13 RT 2500-2504.) It was stipulated that the bullet found in Montemayor's brain and one recovered from the crime scene were from the Smith and Wesson; and another bullet and five spent casings recovered from the scene were fired from the Beretta. (17 RT 3092.)

Not long after the arrest, at about 8:53 a.m., Sheriff's Deputy Jeffrey Maag took a call from appellant's wife, Bridgette Navarro, who reported that the Blazer had been stolen from their residence on Sunrose in Santa Clarita. (16 RT 2940-2041.) It was later established that the Blazer was registered to Danny Chaidez, who also lived at appellant's residence on Sunrose. (13 RT 2465, 17 RT 3091.)

C. THE ALLEGED CONNECTIONS TO APPELLANT

1. MIRA CORONA

(a) Direct Examination of Corona

Edelmira (Mira) Corona was employed as a part-time bookkeeper at Interfreight and worked under Debbie Perna and David Montemayor. She witnessed Perna accuse Montemayor of stealing money from the company, and said the pair had frequent arguments about this. (14 RT 2629-2930.)

Around May, 2002, Perna became "more mean," and the pair began arguing about "anything, phone conversations, billing, schedules, vacation paid, anything." Perna told Corona that she wanted her brother either dead or away from the company and asked Corona if she knew anyone who could have him killed. (14 RT 2632, 2635-2636.) Corona just laughed and said "no." (14 RT 2636.)

Perna continued to raise the subject with Corona, and the last time she did so, she gave Corona a note on which she had written her brother's address and asked Corona again to have somebody kill him. (Ex. 3; 14 RT 2637, 2643-2644.) Specifically, she asked Corona to give the note to a friend of Corona's who had fixed her car in the Interfreight parking lot, whom Perna identified as "the guy with the tattoos." Corona again laughed and said she didn't know which guy Perna was talking about. (14 RT 2645) Corona put the note in a file drawer and forgot about it, but a couple of weeks later Perna was going through some papers, found the note, and asked Corona why she hadn't given it to her friend. (14 RT 2649.) Corona said she was not going to give it to her friend, put the note in her purse, and forgot about it. (14 RT 2650).

In July, 2002, Corona and her then-boyfriend, Joe Martinez, went to Pelican Bay State Prison in Crescent City to visit Felipe Vivar, a Mexican

Mafia leader nicknamed "Chispa." On the return trip, Martinez was arrested in Oakland, California. (14 RT 2660-2662.) Martinez previously had been interested in buying a truck from appellant, so after his arrest Corona contacted appellant, told appellant that Martinez had been arrested, and arranged to meet with him to talk about buying the truck. (14 RT 2667-2668.) When they met at her house, appellant gave Corona the keys to the truck so she could try it for a while, and also gave her $200 to send to Martinez for his prison canteen purchases. (14 RT 2269-2671.) After Corona had driven it for a couple of weeks, the truck was stolen. (14 RT 2671-2672.)

In early August, 2002, appellant came to Interfreight to bring Corona some drugs, and while he was there Corona introduced him to Perna. Shortly thereafter, Perna suggested that Corona ask appellant to kill her brother and also asked her to give him the note. (14 RT 2654-2656.) When Corona met appellant later, he told Corona that Perna had been flirting with him and asked her what was up. (14 RT 2673-2674.) Corona told appellant that Perna was crazy. She said Perna had seen all his tattoos and had asked her to hire him to kill her brother. Appellant just laughed. (14 RT 2674.)

On August 16, Corona and appellant went together to Crescent City so she could again visit Felipe Vivar and also visit Martinez, who by that

time was in Humboldt County Jail. (14 RT 2679-2680.) During the trip, Perna called Corona's cell phone and asked Corona who she was with. When she said she was with appellant, Perna asked whether Corona had mentioned killing David to him. Corona told appellant what Perna had said, and appellant asked for Montemayor's address. However, Corona did not have the address with her. (14 RT 2696-2697.)

About a week after their return from Pelican Bay, Corona met with appellant and her uncle at a McDonald's on Soto Street in Los Angeles so that appellant could speak with him about another truck appellant was attempting to sell. While they were waiting for her uncle to arrive, appellant asked Corona for the note containing Montemayor's address and Corona gave it to him.[6] (14 RT 2696-2698.) The note was in Perna's handwriting, but either she or appellant wrote "one hand" on it the day Corona gave appellant the note, an apparent reference to the fact that Montemayor was an amputee. (Ex. 3; 14 RT 2700-2703.) The word

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[6] Corona's testimony on this point contradicted what she had said on earlier occasions. When interviewed by the police on October 18, 2002, Corona said that appellant got the note from her desk the day that he visited Interfreight. (9 CT 2332.) Later, she said that she introduced appellant to Debbie Perna when he brought some drugs to Interfreight, and said that he got the note from Corona's desk at that time. (9 CT 2335-2337.) She also told police that she did not know any of the three perpetrators, but there was defense evidence that she and Macias were lovers. (9 CT 2337; 19 RT 3656.)

"manitas," which means "little hands" in Spanish, also appeared on the note, but Corona did not know the significance of that word. (14 RT 2703-2704.) Corona also told appellant that Perna had said he could keep anything he found in the house, in particular the cash Montemayor had hidden in coffee cans in the garage. (14 RT 2725-2707.)

During a later phone call, Corona asked appellant about the note. Appellant told Corona he had lost it and asked her to get it for him again, but Corona never did so. (14 RT 2710-2712.) In early September, Perna asked Corona when appellant was going to kill Montemayor. Corona told her appellant had lost the note and wasn't doing anything about it. (14 RT 2712-2713.) Perna became angry and left, but continued to press Corona to find someone to kill Montemayor. (14 RT 2713.)

Corona never again spoke with appellant about killing Montemayor. (27 RT 2714.) She left Interfreight on September 17, 2002, when she was placed on disability for scoliosis, and though she and Perna continued to speak by phone, the subject of having Montemayor killed did not again come up. (14 RT 2640, 2716-2717.)

Corona learned of Montemayor's death while on a visit to Joe Martinez at San Quentin State Prison on October 2, 2002. She called Perna, but after that Perna did not want her to come to the business, and

avoided speaking with her on the phone. (14 RT 2717-2718.) Corona and appellant never spoke about Montemayor again. (14 RT 2718-2719.)

(b) Cross-Examination

On cross-examination, Corona admitted that the prosecution had offered her a plea agreement in exchange for her testimony. Under the terms of the agreement, if she testified truthfully, Corona would plead guilty to manslaughter and serve 14 years in prison, rather than the life term she would face if convicted of murder. (15 2725, 2727-2728.)

Corona also admitted to lying, repeatedly, in her statements to the police (15 RT 2730-2731, 2797-2798), and in her testimony at the Perna trial. (15 RT 2809-2811, 2814-2817, 2836.) Moreover, while she denied being a runner from the Mexican Mafia (15 RT 2760), she admitted having traveled to Pelican Bay State Prison to visit EME leaders Felipe Vivar and Arturo Padua on four separate occasions in July, August, and October, 2002.[7] (15 RT 2792-2795; Defense Ex. C.)

Regarding the killing of Montemayor, Corona claimed not to know how her name and phone number were found at Armando Macias's house,

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[7] The defense gang expert, Richard Valdemar, confirmed that, despite her denial, Corona's trips to Pelican Bay State Prison to visit to Mexican Mafia leaders were consistent with her being a runner for them. (25 RT 4432, 4435-4436.) Corona knew, however, that if you speak about the Mexican Mafia in court, you can be killed. (15 RT 2852.)

nor why her phone records showed numerous calls to Macias's phone. She claimed that her call to Macias's phone on the morning of the killing was simply a response to a call from him. (15 RT 2888, 2890-2892.) She testified that she had received three calls that morning, but each time she answered the caller hung up, and each time she attempted to redial the person who had called her. On the third try the call was connected and she heard music and voices in the background. She said "hello: and held on for over a minute but no one ever answered. She said she did not know that the calls had been placed by Macias. (15 RT 2892-2895.) She could not explain why phone records for Macias's phone did not show that he had placed the calls to her. Corona also claimed not to know why she received four calls from Macias's phone number on September 13 and 15.

2. APPELLANT'S ARREST

Buena Park Police Detectives Shawn Morgan and Greg Pelton were conducting surveillance on appellant's home on Sunrose Place in the Canyon Country district of Santa Clarita on October 17, 2002. Early that afternoon, they saw a blue Lexus GS300 with tinted windows back out of the garage. (13 RT 2435). Appellant was driving the car, and a man named Danny Chaidez was sitting in the right front seat. (13 RT 2436-2437.) The detectives followed the Lexus onto the Northbound 14 freeway, where the

car accelerated to over 100 miles per hour. The Lexus eventually exited the freeway at Crown Valley and pulled into an AM/PM Mini-Mart. The detectives followed and pulled in perpendicular to the Lexus just as the driver was getting out of the car. (13 RT 2436.)

Detective Pelton spoke with appellant, who confirmed that he was an "elder" in the Pacoima Flats gang, and that he knew some members of the Mexican Mafia. (13 RT 2515-2516.) Pelton told appellant he had left his card with appellant's wife. Bridgette, and asked her to have appellant call him. He asked appellant why he had not called, and appellant said he had never received the message. (13 RT 2514.)

Detective Morgan searched the vehicle. (13 RT 2440.) In the glove compartment he found a "small like notepad piece of paper" bearing a "Labor Ready" company logo and the handwritten words "manitas todo" and, in the lower right-hand corner, "one-hand." (Ex. 3; 13 RT 2441, 2443-2444.) The note also contained the handwritten home address and phone number of David Montemayor. (13 RT 2442-2443.) In a CD "jewel case" Morgan found a photograph of Mira Corona. On the outside of the jewel case were the words, "Droopee," "Lil Pirate," and "Pacoima." (13 RT 2444-2447; 14 RT 2567.)

3. OTHER EVIDENCE CONNECTING APPELLANT TO THE PERPETRATORS

(a) The Vehicles Connected to the Killing

The prosecution presented evidence showing that two vehicles connected to the Montemayor killing were linked to appellant's Sunrose Place residence. As previously noted, the Chevrolet Blazer actually used in the crime was registered to Danny Chaidez, who lived at the Sunrose residence. (13 RT 2465, 17 RT 3091.) The second car was a rented Chevrolet Cavalier which was found parked in front of the Sunrose Place residence on October 4. The car was rented to Armando Macias. (13 RT 2575-1476; 17 RT 3090.)

(b) Evidence of Gang Connections

There was a plethora of other evidence introduced to show appellant's relationship to the shooters through their common Pacoima Flats gang ties.

(i) The Remick House

Cris Jakubecy lived across the street from appellant's home when he lived on Remick Avenue in Sun Valley from October, 2001, to late April, 2002. (16 RT 2950-2951.) She reported seeing many "unsavory" characters coming and going, parking their cars on the lawn with "for sale" signs. (16 RT 2951.) Jakubecy took a number of photographs of the so-

called unsavory characters, including appellant, which the prosecution introduced into evidence. (Exs. 47-53; 16 RT 2961-2966.)

(ii) The Sunrose Place Residence

In a search pursuant to a warrant of appellant's Sunrose Place residence, Detective Pelton found a number of documents, including a page with phone numbers linked to gang monikers, a page that said "Soy Droops PF,"[8] a note page with a phone number listed for "Myra" and a piece of paper that said "Felipe Vivar, Crescent City SHU" along with a Department of Corrections "C-number." (Exs. 54-59, 16 RT 2974-2984.)

The first page of Exhibit 54, a "personal organizer," contained the names "Anthony" as well as "PF," "Pakoima [sic] Flats," "Droopy," "Pacas," and "EFE," all of which Pelton identified as gang indicia. (16 RT 2975-2976; Ex. 54, p. 1.) The phone listings in the organizer included listings for such names as "Primo," "Lizard," "Wolf," "Weasel," and "Payaso." (16 RT 2977.) Exhibit 55 was a letter to appellant from Tomas Grajeda, later identified as a Mexican Mafia member. (16 RT 2978-2979; 20 RT 3683-3684.) Exhibit 56 contained papers found within a CD jewel

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[8] "Soy" is Spanish for "I am," and "Droops" was one of the many forms of "Droopy," appellant's gang moniker, found among his and his associates' possessions. (*E.g.*, 17 RT 3202.) "PF" was one of the designators for the Pacoima Flats gang. (*E.g.*, Ex. 107, discussed at 27 RT 1460.)

case, including more phone numbers, for, *inter alia*, "Casper" and "Lil Pirate," as well as others not related to this case. (16 RT 2980-2981.) That list of numbers also contained the same number for "Myra" – a number later linked to Edelmira Corona – as Exhibit 54. (16 RT 2981.) Other gang indicia and names were found.[9] (16 RT 2982-2984) Finally, Exhibit 59 was paperwork showing Felipe Vivar's prison address found in a subsequent search, on October 17, 2007. (16 RT 2985.)

Detective Pelton also testified that many of Bridgette Navarro's relatives were gang members, and that, when the initial warrant was served on the Sunrose residence on October 4 at 6 a.m., appellant was not there. (16 RT 2873, 3003, 3008.)

Detective Nathaniel Booth assisted in the October 4, 2002 search of the Sunrose residence. Through him, the prosecution introduced a series of photos taken inside the garage, in particular photographs of grafitti-style writing on the walls, mostly of gang monikers. (16 RT 3056-3060; Exs. 76-85.) For example, Exhibit 77 depicted a wall on which there were the graffiti-style spray-painted names "Droops," "Crook," "Pirate," "PF." (16 RT 3057.) Exhibit 78 showed a wall with the following names written in

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[9] Exhibit 57 includes some random sheets of paper with graffiti-style gang markings; Exhibit 58 contains a photograph of a car, and photocopies of business cards on which gang indicia are hard to find.

pen: "Lil Droops," "Lil Pirate," "Blackie," "Chito," "Crook," "Lil Pirate" (again), and "VPF gang." (16 RT 3057-3058.)

The garage also contained a freshly-painted Chevrolet Monte Carlo with the name "Droops" written on the rear-view mirror, and, in the glove compartment, a traffic ticket issued to appellant. (16 RT 3062-2065, Exs. 88-89, 91.) Inside the house, Detective Booth found a DMV Certificate of Title for the Chevy Blazer used in the crime in the name of Danny Chaidez. (16 RT 3061-3062; Ex. 87.)

(iii) Others' Residences

On November 25, 2002, Detective Pelton searched appellant's sister Sandra's residence on Bonita Avenue in Las Vegas. (16 RT 2985; 19 RT 3583-3584.) There, he found more items bearing gang indicia and references to "Bridgette" and "Tony," and letters addressed to appellant. (16 RT 2985-2991, 1310.)

On October 3, 2002, Pelton searched the residence of Alberto Martinez in Val Verde.[10] Pelton described several exhibits which included a pager number for Droopy and several photographs showing gang indicia. (16 RT 2996-3001; Exs. 66-71.)

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[10] Val Verde is southwest of Castaic, and about 14 miles due west of appellant's Sunrose Place address.

On October 3, 2002, Detective Morgan helped serve a search warrant on 1611 Renee Street in Lancaster, where he found items belonging to Armando Macias and a photograph of Macias with Alberto Martinez. (13 RT 2454-2456.) A number of other photographs depicted what appeared to be gang members, but none included appellant, his wife, Gerardo Lopez, Daniel Chaidez,[11] or of Edelmira Corona. (13 RT 2458.) Present at the residence was Craig Juarez, Sr., who was married to Macias' sister. (13 RT 2455, 2460.)

On October 3, 2002, former Buena Park Police Detective Mike Riley helped search Gerardo Lopez's residence at 10861 Telfair Avenue in Pacoima and, in particular, a garage at that location which had been converted into a living space. The search disclosed documents and other writings (such as on a light switch) containing gang monikers in graffiti-style script. (17 RT 3105-3109, 3211; Exs. 115-118.)

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[11] Chaidez, whom appellant met through his wife, lived in back of appellant's house on Remick Avenue in Sun Valley, and in the Sunrose Place residence. (18 RT 3370-3371.) He was not a gang member; rather, he was a member of a "tagging crew" that specialized in writing on walls. (22 RT 4126-4127.)

(c) The Cell Phones

(i) Evidence from Prosecution's Case-in-Chief

The prosecution sought to connect appellant to the three perpetrators and the crime through evidence of cell phones appellant obtained and distributed among his gang cohorts and family. Some of these phones were registered in the name of a former house-mate, others in the name of appellant's girlfriend.

Daniel Johnston lived at the Sunrose Place address in 2002 while he was doing work on appellant's vehicles. (16 RT 3030) On July 9, 2002, as a prelude to starting a business with appellant to put hot-rod drive-trains into cars, he obtained five cell phones with five successive phone numbers. He kept the number (661) 816-8564 for himself, and gave the remaining four phones (with numbers ending in 63, 65, 66, and 67) to appellant.[12] (16 RT 3031-3033.) About two months later, he stopped associating with appellant, but did not cancel the phones. By late summer the phones were registered to the Sunrose Place address, but Johnston did not have the account changed to that address and did not authorize anyone to change a number on the account. (16 RT 3033-3035.)

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[12] One of these phone numbers was later changed to 482-1600, which became central to the prosecutions case, as described below.

The parties stipulated that a cell phone found near the spot where Armando Macias was apprehended, and which had his fingerprints on it, was registered to Sarah Ochoa (appellant's girlfriend), as were three other cell phone numbers. (17 RT 3084-3085.)[13]

On October 2, Nextel Customer Service received a phone call from a woman identifying herself as "Ms. Johnston," who was calling from the number (661)251-5779 and was seeking to change the number for the phone assigned as (818) 482-1600 (hereafter, the 1600 number, or phone). This was one of phones registered to David Johnston at the Sunrose Place address. Nextel changed the number. (17 RT 3086.) Records of a cell phone linked to Mira Corona show that, on the morning of October 2, 2002, the 1600 phone attempted three calls to the phone found in the possession of Armando Macias. These three calls were listed as occurring at 6:31 a.m. and all of them failed to connect. At 6:38 a.m., a fourth call was made and connected. The call lasted 56 seconds. (17 RT 3087-3088.)

(ii) Evidence from the Cross-Examination of Appellant

Much of the prosecution's case was based on its cross-examination of appellant during the presentation of the defense case. The cross

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[13] Macias's phone had the number (818) 266-8145. The other three were (818) 266-6504, (818) 612-8898, and (818) 968-0683.

examination particularly focused on cell-phone calls made to and from the aforementioned 1600 number. The prosecution first established that appellant had written a letter to Jonathan Mulrosky, also known by the gang moniker "Casper," in which appellant stated that this was his phone number. The letter, which was never mailed, was found in the search of appellant's Sunrose Place residence.[14] (Ex. 93; 18 RT 3388, 20 RT 3854.) The prosecutor next established that the 1600 number had been changed from another number on September 24, 2002, and was then changed again – by the call from "Ms. Johnston" – on October 2, 2002. (19 RT 3566-3567; 3563-3564.)

Although appellant stated that once he had left the Sunrose house, he had left all the phones behind with his estranged wife, Bridgette (19 RT 3507), the prosecutor sought to create the inference that the phone assigned the 1600 number was still appellant's phone on the day of the crime.[15]

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[14] The letter is undated, merely stating at the top, "MONDAY NIGHT." The prosecutor tried to pin appellant down as to when it was written, but appellant could not remember. (Ex. 93, p. 1; 18 RT 3458-3459.)

[15] The date prior to the crime on which appellant had left the Sunrose house is not clear from the record. Appellant said he told Detective Rodriguez in the Summer of 2002 that he was moving to Law Vegas. (22 RT 4139.) Rodriguez confirmed he was told of the move, but without reference to the date. (23 RT 4244.) Appellant mother, Rosalinda Razo, testified for the defense that appellant had been in the process of moving to

(continued...)

Phone records from that day showed there were eight calls to that number in the half hour before Montemayor was shot, and eight more in the half hour after. (18 RT 3458-3459, Ex. 100.)

The cell phone records for the 1600 phone number showed there were two phone calls to that number from Corona's number on the evening of October 1. (19 RT 3570.) The prosecutor then referred to records from another of the Johnston phones (818-335-4995) and focused on two calls: one made from that number to what appellant said was no longer the number of his cousin, "Sammy Boy"; and a call received on that phone from the 1600 number. (19 RT 3575-3576) Another call was placed from the 4995 phone to one of the several numbers registered on the account in his girlfriend Sarah Ochoa, which the prosecutor characterized as Sarah Ochoa's number.[16] (19 RT 3576-3577.) There were several more calls that

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[15] (...continued)
Las Vegas in the Summer months of 2002 (26 RT 4688), and had been in Las Vegas for about two weeks when the crime was committed. (26 RT 4689-4690.)

[16] Outside the presence of the jury, the defense offered to prove that Bridgette Navarro had stolen Sarah Ochoa's credit-card statement from her mailbox and used it to purchase the several cell phones, including the phone used by Macias on the day of the crime, which were registered in Ochoa's name. Appellant offered to present the police report written when Ochoa reported the fraudulent use of the card. (21 RT 4077-4079.) The defense also offered to have Ochoa testify as to the calls reflected on the bill for that phone number, and also that she heard from others that
(continued...)

night, including calls to Macias's and Martinez's numbers, call a 2:33 a.m., October 2 call to Mira Corona placed at 2:33 a.m. on October 2, further calls to Sammy Boy and Macias made at 3:51 a.m. on October 2, and other calls to Mira Corona and Bridgette Navarro. Appellant denied having made any of these calls, and said he was probably asleep at his sister's residence in Las Vegas when the later calls were placed. (19 RT 3579-3584.) He similarly denied making or receiving any of 18 calls which phone records showed had been made on the morning of October 2, beginning at 6:08 a.m. (19 RT 3584-3586.)

Without going into further detail here, the prosecutor continued to ask appellant about phone calls to and from the 1600 number on the day of the murder. (19 RT 3559 *et seq.*; 3607 *et seq.;* 21 RT 4044-4047.) Appellant responded to all of these questions that by October 2, he was no longer in possession of any of those phones and had nothing to do with any of the changes to the phone numbers. (19 RT 3566-3567.) The prosecutor's cross-examination focused on the fact that the 1600 number

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[16] (...continued)
Bridgette Navarro was laughing about having stolen and used Ochoa's card number. (21 RT 4081.) The prosecutor objected on hearsay grounds, and the court ruled that the matter could not be brought up without a further offer of proof of admissible evidence. (21 RT 4081-4082.) No further evidence on the matter was presented.

was only in existence from September 24 to October 2, and reasoned that the letter to "Casper" Mulrosky, which was found in the Sunrose Place residence and in which appellant claimed ownership of that number, therefore had to have been written during that nine-day window. (19 RT 3567; 21 RT 3994-3997.) Appellant responded that while he may have had that phone number for a few days, he left all the phones behind when he moved out of the Sunrose house. He also pointed out that the letter to "Casper" had never been sent. (21 RT 3996-3997.)

(d) Other Evidence

A wallet taken from Alberto Martinez at the time of his arrest contained a handwritten note that appeared to bear appellant's name and AAA membership number. (17 RT 3111-3112.) The parties later stipulated that the AAA number was indeed appellant's. (18 RT 3253.)

Forensic evidence showed that fingerprints found on a four-page letter found on a clip-board at the Sunrose Place residence and signed "Dee" were appellant's fingerprints. (17 RT 3257-3258, 3271-3271, 3278, 3280; Exh. 93.) There was, however, no way to tell when the prints were placed on the letter. (18 RT 3281.) Like the letter to "Casper," this letter was apparently never sent.

4. THE PROSECUTION'S GANG EXPERT

The prosecution re-called Buena Park Police Detective Nate Booth to testify as its gang expert. Although he was only a detective for the Buena Park Police Department, Booth claimed, over defense objection, that he could describe the structure of Hispanic gangs throughout Southern California.[17] Booth testified that these Hispanic gangs were loosely organized under the umbrella of the Mexican Mafia, or "EME," and encompassed many gangs in the area. (17 RT 3150-3151.) Hispanic street gangs, Booth said, are connected to specific neighborhoods or territories, which are known as "turfs." Thus, the gang name "Pacoima Flats" or "Pacoima" or "Paca" incorporates the name of the town in which the gang's territory is located. (17 RT 3155). When a rival gang enters another gang's territory wearing the other gang's "colors" or disrespecting members of the turf's gang, it is seen as an attack and can precipitate violence. (17 RT 3156.)

Joining gangs usually involves getting "jumped in," beaten by fellow gang members to demonstrate one's toughness.[18] (17 RT 3157.) Getting

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[17] The defense objection was that asking Booth to describe Southern California gang structure went beyond the *voir dire* as to expertise that the court had not yet ruled upon. (17 RT 3149-3150.)

[18] Booth also listed other ways of getting into to gang, without (continued...)

out of a gang usually involves either death or an extended beating that may leave the departing member close to death or injured for life. (17 RT 3167.)

Respect and status within a gang are gained by committing violent acts, including killing people, committing armed robberies, beating or attacking rivals, or attacking citizens for money or to instill fear within the community. (17 RT 3158.) Respect from rival gangs is gained by never backing down from a challenge or by committing acts of vandalism, such as going into a rival gang's turf, spray painting or "tagging," and then being attacked for it.[19] (17 RT 3159.)

Booth said it was common for gang members to brag to their homies, or fellow gang members, about their criminal exploits, and that it is therefore common for gang members to know about each other's criminal acts. (17 RT 3164-3165.) Other gang members also need to know when a member commits an act of violence against a rival gang in order to be ready

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[18] (...continued)
explaining them: getting walked in (through a relative), or "crimed" in, paying in, or, for a female, "sexed" in. (17 RT 3157, 3166-3167.)

[19] At this point the defense objected on Evidence Code section 352 grounds, contending that this was not a typical gang case and that most of this general gang information was not germane to this case and would inflame the jury. The court overruled the objection. (17 RT 3161-3163.) Another section 352 objection was raised when Booth was asked to define the terms "claiming" and "hit up." The court also overruled this objection. (17 RT 3168, 3170-3171.)

for retaliation. (17 RT 3165.) Indeed, a gang will incur a loss or respect if it does not almost immediately retaliate in a manner more violent than the original provocative act. (17 RT 3165-3166.)

Older gang members, Booth said, function as supervisors or "shot-callers," and it is the younger members who are the "doers."[20] (17 RT 3173-3174.)

Booth finished up his general discussion of Hispanic gangs by explaining gang monikers, graffiti, tattoos, and "roll calls," or lists of gang members, such as those found on the walls of Navarro's garage. (17 RT 3176-3181.) More specifically as to the Pacoima Flats gang, Booth said the gang also used the alternate names "Paca Flats," "P Flats," "the Flats," "Pacoima," "PF," and "P." (17 RT 3181.) He said their territory consisted of four square blocks in Pacoima (17 RT 3182), and that the gang had about 250 active members (17 RT 3183).

For purposes of Penal Code section 186.22, subdivision (e), the criminal street gang enhancement statute, Booth testified that the Pacoima Flats gang engaged in the commission of homicides, drive-by-shootings, assaults with a deadly weapon, and narcotics sales. (17 RT 3184.)

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[20] On this point, Booth was contradicted by the defense gang expert, as described *post,* at page ***.

Booth said that after investigation and viewing appellant's tattoos, he was, in Booth's opinion, a Pacoima Flats member, and that his tattoo "Sur" (the Spanish word for "south") indicated affiliation with the Mexican Mafia. (17 RT 3194-3196.) Booth also described the monikers in the roll call found on appellant's garage wall, stating the monikers "Droops" and "Droopy" referred to appellant, "Crook" to Martinez, and "Pirate" to Macias. (17 RT 3202-3203.) Finally, Booth offered his opinion that all three of the perpetrators – Macias, Martinez, and Lopez – were Pacoima Flats gang members, and that if the prosecution theory was correct, the crime was done for the benefit of the gang. (31 RT 3214, 3215-3221.)

On cross-examination, Booth agreed with defense counsel that the defense gang expert, Richard Valdemar, was one of the leading experts on the Mexican Mafia. (17 RT 3225.) Booth also agreed that there is a third way to leave a gang – by debriefing with law enforcement authorities. (17 RT 3231-3232.) In addition, Booth agreed that the worst thing for a gang member to do is to become a snitch, or rat, and that doing so puts a gang member in danger of his life. (17 RT 3235-3236; see *post* at pp. ***[valdemar].) Booth also agreed that if three gang members assaulted another purported gang member in a holding cell, the latter would not be a

member in good standing, and that the attack would be consistent with the attacked gang member being an informant. (17 RT 3246-3247.)

B. THE GUILT PHASE DEFENSE CASE

1. INTRODUCTION

The defense case rested on the following theory, which ran directly counter to the prosecution's narrative: (1) that appellant was leading a double life as a gang shot-caller and as an informant, and in fact had told two of his law enforcement handlers about the impending hit on Montemayor; (2) that by the time of the crime, both his wife Bridgette and appellant's fellow gang members, including the perpetrators of the Montemayor murder, knew that appellant was an informant, and the three would not have committed the Montemayor killing at his request; (3) that no gang shot-caller would have allowed the perpetrators to use a vehicle that was registered at the shot-caller's address or permitted one of them to leave a car rented to one of the perpetrators in front of his own house; (4) that at the time of the Montemayor killing, appellant was no longer living at the Sunrose Place residence, was in the process of moving to Las Vegas, and had left all of the cell phones behind and under the control of Bridgette Navarro; (5) that Bridgette, whose entire family was involved with the Mexican Mafia and its associated gangs, was angry with appellant because

he had admitted to her that he was an informant, and was both jealous and angry with appellant because of his adulterous relationship with Sarah Ochoa; and (6) that Bridgette Navarro and Mira Corona set up and the murder of Montemayor in such a way as to implicate appellant.

Of the foregoing points, the third point regarding shot-callers' practices regarding vehicles used in crimes was factually uncontested, and several law enforcement and gang experts confirmed that no shot-caller would have permitted cars connected to himself to be used in gang crimes. Instead, such crimes are done in "G-rides," cars stolen for the purpose, so that even in the event of an arrest the vehicle used cannot be traced back to the gang or the shot-caller. (22 RT 4100-4101, 23 RT 4314-4315.) As Detective Rodriguez testified, if a shot-caller were suspected of being an informant and were "green-lighted" by the Mexican Mafia, it would not be inconsistent for gangsters seeking to implicate the informant in the crime to use a car that could be traced back to the informant. (23 RT 4315-4316.)

2. APPELLANT'S TESTIMONY

(a) Background

Appellant testified that he had been born in 1966, grew up in the Pacoima projects, and was jumped into the Pacoima Flats gang when he

was 12 years old. (18 RT 3317-3318.) At that time, the gang was one of the biggest gangs in Pacoima. (18 RT 3318.)

Appellant said he had been convicted of manslaughter at age 14 and was sent to the Youth Authority until he was 18, at which time he was transferred to prison. (18 RT 3319-3320.) He was paroled in October, 1988, and was thereafter convicted of joy-riding as part of a group on two occasions. (18 RT 3320-3321.) In 1995, he was convicted of robbery for stealing a dog and was sentenced to four years in prison. In prison, he was sent to the Security Housing Unit (SHU) as an associate of the Mexican Mafia. He ran with Mexican Mafia members and had relatives that belonged to the gang. (18 RT 3321.)

Asked about the roll calls of gang members on the walls of his garage, appellant explained that he allowed gang members to write on the garage walls because it make them more comfortable to be there. He testified that he allowed gang members to hang around his house and use his cell phones because he wanted to know what was going on in the gang. (18 RT 3370.)

(b) Appellant's Activities as an Informant

When appellant was paroled following his robbery conviction, he was approached by Dan Evanilla of the Department of Corrections' Special

Services Unit. Evanilla asked appellant if he wanted to work as an informant for Evanilla or the FBI. Appellant agreed to become an informant because the Mexican Mafia had just killed his cousin, Adrian. (18 RT 3324-3325.) Appellant signed a contract with the FBI and was assigned the code-name, "Alaska". He called his handlers "Manitas" in order to fool fellow gang members who might be nearby. Appellant said the phase "manitas todo" which was found on the note from Corona containing Montemayor's address meant "give him everything." (18 RT 3339.)

Appellant said that he began working with the FBI in Los Angeles in April 2000, and stopped working for that office of the Bureau in late October, 2000. (19 RT 3624-3625.) He began working for the FBI in San Diego in late November, 2000, and continued until mid-November, 2001. (19 RT 3626.) Thereafter, appellant signed on with the Bureau of Alcohol, Tobacco, and Firearms in Los Angeles and worked for that agency from April, 2002 to the end of May, 2002, at which point ATF Agent James Starkey informed him that they did not like what they were hearing about his criminal activities and terminated appellant from the ATF. (19 RT 3627-3629.) Starkey's partner on a joint multi-jurisdictional task force was Los Angeles Police Detective Rod Rodriguez, and appellant continued to

keep in touch with Rodriguez. (19 RT 3628-3629.) Indeed, even after his termination by the ATF, appellant kept in touch with Starkey, calling him about once a month. (19 RT 3630.)

In 2000, Navarro attended several meetings of the Mexican Mafia while wearing a listening device and a camera. The device looked like a pager but continued to function even after its batteries were removed at the meetings. (18 RT 3326.) Appellant said that his attendance at these meetings had been quite frightening, because the worst thing a gang member can do is to become a rat. Being an informant carries the death penalty not only for the informant himself but also for his family. (18 RT 3326-3327.)

Among the activities appellant had performed for the FBI, ATF, and LAPD were providing information on the Arreano-Felix cartel from Tijuana (18 RT 3327-3328.); tape recording a statement by a gang member named Frankie Rodriguez in which Rodriguez admitted committing a murder in the Los Angeles County jail; recording about 60 cassette tapes of messages from the Mexican Mafia about killings that were going to occur in the Los Angeles area (18 RT 3328); and intercepting and relaying to law

enforcement a message regarding a planned killing of LAPD Detective Carlos Sanchez.[21] (18 RT 3329.)

At some point, the Los Angeles office of the FBI learned of talk on the street that appellant was an informant and terminated him, giving him $8,000 to relocate. (18 RT 3330-3331.) However, appellant did not relocate but instead went to work for the FBI's San Diego office, which is when he worked on matters concerning the Arreano-Felix cartel. (19 RT 3626; 20 RT 3711.)

Appellant testified regarding "collecting rent," a Mexican Mafia term for a tax imposed on all of the gangs, cliques, and neighborhoods under their control. The rent is essentially extortion money because gangs or members who don't pay the rent can be "green-lighted." Appellant pretended to be taxing approximately 30 groups in Pacoima, but the money was actually supplied by the FBI, whereupon appellant turned it over to Tomas Grajeda, a notorious Mexican Mafia member whose moniker was "Wino." (18 RT 3331-3333.)

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[21] Det. Sanchez was an early handler of Navarro, at the LAPD's Foothill Division, whom he helped to catch suspects involved in a murder. Later, Sanchez took Navarro's Harley motorcycle under a threat of making up a story about him. Navarro told Detective Rodriguez (who became his LAPD handler) about this, and after an internal affairs investigation, Sanchez was terminated. (18 RT 3329-3330, 3340.)

In one of the Mexican Mafia meetings appellant recorded for the FBI, he was assigned the territory in which to collect taxes as a *llavero*, or "key-holder," the gang members who effectively hold the key to the neighborhood. (18 RT 3333-3334.) During the 2002-2002 period, when appellant was working with law enforcement, appellant's status as the *llavero* of his neighborhood enabled him to gather information for the authorities. (22 RT 4127.) Even after he was arrested, he continued to hold himself out as *llavero* in order to avoid being discovered as an informant, even though he continued informing while he was in jail. (22 RT 4127-4128.)

In 2002, Navarro lived first in a house on Remick Avenue in Sun Valley and then lived off and on at the Sunrose Place residence. While at the Remick Avenue house, he provided LAPD Detective Rodriguez with information on two of the men who came to the house, Anthony Valles ("Villain") and Jeffrey Bueno ("Spanky"), both of whom were then arrested. (18 RT 3344-3347.) He also provided information about Juan de Leon ("Bad Boy"), who had committed three homicides at a house party and then fled. Detectives Rodriguez and Sanchez called appellant, who contacted "Bad Boy" and persuaded him to turn himself in. (18 RT 3347.) Because everyone thought appellant was the Mexican Mafia *llavero* for the

neighborhood, and therefore might want "a piece of the action," appellant was also able to give ATF Agent Starkey information about where to find a large cache of guns. (18 RT 3347-3348.)

During this period appellant bought a large number of cell phones. In 2002, there were about nine cell phones at his house and he permitted the people who came to the house to use them. This practice helped appellant to know where his fellow gang members were and what they were doing. (18 RT 3349-3350.)

In order to maintain his image as a shot-caller, appellant also sold some drugs. (18 RT 3348.) Appellant explained that during the time he was working for the LAPD he was selling small amounts of methamphetamine. The benefit he got for giving information to the police was that they "never really sweated on what I was doing." In fact, he was arrested in March, 2002, on a concealed weapon charge – a third strike – but was never charged for that offense.[22] (18 RT 3382-3383.)

On cross-examination, the prosecutor questioned appellant about drug-selling because it appeared to contradict his agreements with the

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[22] As later became clear through the penalty phase testimony of others, it was this incident and his near-immediate release which raised the suspicions of his fellow gang members that appellant was an informant. See, e.g., 33 RT 5891.)

federal agencies with which he was working. Asked about whether he reported his sales to FBI Special Agent Curran Thomerson, appellant said that Thomerson knew about it and told him that as long as he did not get arrested, it was fine, despite Thomerson's testimony to the contrary.[23] (21 RT 3970-3971.) Similarly, the prosecutor noted that appellant was selling drugs while at the Remick Avenue house, in apparent contradiction with his agreement with ATF Agent Starkey. Appellant said he did not lie to Starkey about this because the subject never came up. (21 RT 3972-3973.) He said he also did not discuss his drug sales with Detective Rodriguez. (21 RT 3974.)

(c) Gang Suspicions About Appellant's Being an Informant

By the time of the Montemayor killing, appellant's fellow gang members knew or suspected that he was a law enforcement informant. Gang suspicions about appellant's role as an informant grew directly out of the March 15, 2002, arrest in which a gun was found in a secret compartment of appellant's car.[24] (18 RT 3441.) The offense would

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[23] This portion of the cross-examination of appellant took place after Thomerson's testimony, described *post.*

[24] In the penalty phase, Officer Jeff Smith testified that, on March 15, 2002, he made a vehicle stop on a blue Lexus driven by Navarro, which had only paper license plates. (31 RT 5530) During a search of the (continued...)

normally have been a third strike, but appellant was booked and released that same night. When Bridgette Navarro came to pick him up at the jail, appellant told her for the first time that he was an informant. (18 RT 3448.) More significantly, because he had been released on $2,500 bail and was never formally charged, the people around him at the Remick Avenue house began to consider him a possible informant. (18 RT 3449-3450.)

Even before his arrest and release in March, 2002, the FBI had terminated him as an informant because word on the street was that he was informant and had been green-lighted. (20 RT 3713-3714) According to appellant, when the FBI told him about that he tried to quash the rumors, but was targeted and shot at three times. The first time was was on the 210 Freeway. The second time, he lent a car to a friend, who was driving with her daughter in the car when shots were fired at the car and she was struck by a bullet. (18 RT 3355-3356.) Finally, in the summer of 2002, appellant was himself shot at and ended up in the hospital. (18 RT 3356.)

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[24] (...continued)
car at the police impound lot, he found a .380 semi-automatic handgun secreted in a pop-up compartment concealed under where the driver's heals rest when his feet are on the pedals. (31 RT 5533-5534.) Although Navarro denied knowing anything about the gun, Officer Smith filed a complaint, but no charges were filed.

(d) Appellant's Contacts with Mira Corona

Appellant first met Corona in April, 2002,[25] in Branford Park, the Pacoima Flats gang's "hang out" in nearby Arleta. (18 RT 3341, 19 RT 3514.) He said he had received a page asking him to come to Branford Park, where Macias introduced him to Corona. (18 RT 41-3343.)

Corona told appellant that she was the daughter of Felipe "Chispa" Vivar and that she was running things for her father out of Pico Rivera and all the way to Hollywood, and Chispa wanted appellant to do some things for him.[26] Specifically, Corona said, her father wanted him to do a hit in Orange County. Corona also told appellant that he owed some "rent" money to the Mexican Mafia. Appellant questioned whether Corona really was who she claimed to be, but someone with her vouched for her legitimacy. Appellant continued to resist, however, because he did not want to take orders from someone he did not know. He told Corona he would not do as she asked because she was female. She wrote down

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[25] Initially, appellant agreed with his counsel that the Branford Park meeting with Corona was in early Summer, 2002. (18 RT 3341.) On cross, he stated he believed their first meeting had actually occurred in April, "give or take." (19 RT 3515.)

[26] There was no evidence in the record that Corona was actually Chispa's daughter. Appellant learned from his handlers that she was not Chispa's daughter, but merely one of his runners. (18 RT 3357-3358.)

Chispa's address and told appellant to write him. Appellant did write, but did not get a response. (18 RT 3352-3353.)

When he was no longer working for the FBI in Los Angeles, and therefore was no longer receiving funds from the FBI with which to pay rent to the Mexican Mafia, appellant was "green-lighted" because the gang's shot-callers thought he was keeping their rent money. (18 RT 3355.) After he was shot at on the 210 Freeway in June, 2002, appellant arranged a second meeting with Corona at a McDonald's in Los Angeles to get her help in clearing the green light against him. (19 RT 3515.) To secure Corona's help, appellant gave her a truck and $7,000. With her at the meeting was a man she referred to as her uncle. (18 RT 3359; 19 RT 3517-3518.)

Appellant said it was at the McDonald's meeting that Corona gave him the note bearing Montemayor's address and asked him to get someone to do the killing. (19 RT 3518, 21 RT 4073.) He threw the note in his glove compartment, and forgot where it was until Officer Morgan found it there on October 17, the day he was arrested for the Montemayor murder. (19 RT 3519-3520.)

Appellant testified that he made the trip with Corona to Pelican Bay in the latter part of July or early August, 2002, in order to get more

information about the requested hit and also to try to get the Mexican Mafia green light against him removed. (18 RT 3366-3367.) On the way back, Corona told him about the money allegedly hidden in coffee cans in Montemayor's garage, but appellant did not want his own gang involved because he did not believe what Corona was telling him. (18 RT 3368.) When he asked her during the trip for the name of the intended victim, she would not give it to him. (19 RT 3530, 3533.) Later, after he reported the intended hit to Rodriguez and Rodriguez asked for more information, appellant asked Corona again for more information and she said she would get back to him, but never did. (18 RT 3368-3369.) Contrary to Corona's testimony, appellant said he had never been to the Montemayor trucking company. (18 RT 3369.)

Corona paged him a couple of weeks after the trip, but appellant was trying to avoid her because Rodriguez wanted the name of the intended victim and she would not give him a name. (19 RT 3537-3540.) When he finally answered Corona's page, she asked him why he was avoiding her calls. He told her he was busy and had lost the address she gave him. (19 RT 3545-3547, 3554.)

Regarding the picture of Corona found in the CD case in his glove compartment, appellant said he had no idea how it got there but noted that

during the trip to Crescent City, Corona had been the one playing the CD's. Appellant surmised that she left the photograph there by accident. (20 RT 3797.)

(e) Appellant's Contacts with His Handlers About the Impending Crime

When Corona asked appellant to kill Montemayor, he called ATF Agent Starkey, who told him to call Detective Rodriguez because Starkey was in the middle of another investigation. (18 RT 3361.) Accordingly, appellant went to the Foothill station to see Rodriguez and told him how he met Corona and what she wanted him to do in Orange County. However, appellant had misplaced the note that she gave him with the victim's name and address, and Rodriguez told him to find out the intended victim's name. (18 RT 3362-3363.)

Later, when Rodriguez again asked him for a name, he did not know it.[27] Neither did he know at the time Corona's last name; he only knew her as Mira, "the girl who said she was Chispa's daughter," (19 RT 3527-3528.)

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[27] Despite references to the note's containing Montemayor's name, it contained only his address and phone number. (Ex. 3; 13 RT 2442-2443.)

(f) Appellant's Deteriorating Relationship with Bridgette

Regarding his relationship with his wife, Bridgette,[28] appellant said he had filed for divorce about April, 2002, just before he left the Remick Avenue house, but the divorce was never finalized.[29] By October 2, 2002, however, appellant did not live at the Sunrose Place residence; by then he was living in Las Vegas. He said he went to the Sunrose house from time to time after that to see his son and stepdaughter, but the only personal item of his that remained there was his Chevrolet Monte Carlo. (18 RT 3372.)

Bridgette had a number of uncles in the Mexican Mafia, and her whole family was involved in gangs – her cousins, her nephews, the whole family, who were well known throughout the Valley. (22 RT 4101-4104.).

Appellant told Bridgette he was an informant on March 15, 2002 (the day he was arrested and released after a gun was found hidden in his car). (18 RT 3448). On May 31, Bridgette went to Starkey and reported to him that appellant was dealing drugs and carrying a gun. (21 RT 3876-3878.)

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[28] Bridgette was killed in a car accident on May 8, 2005. (19 RT 3611.)

[29] In response to cross-examination regarding letters Navarro sent to Bridgette after his arrest, indicating that he would not go through with the divorce, and still loved her, Navarro answered that he still did love her, they simply did not get along. (19 RT 3614-3615; Exs. 145, 146.)

Bridgette knew of appellant's priors and also knew he could go to prison for the rest of his life if arrested. (22 RT 4104.) However, by then she was angry with appellant for becoming an informant, and was also jealous of appellant's relationship with Sarah Ochoa. (22 RT 4104-4105.) Some days appellant came home and found Bridgette going through his things, including his phone book. (22 RT 4114-4115.)

When appellant called Starkey to report receiving the note from Mira Corona, he was unaware that Bridgette had been to see Starkey and appellant's parole officer, Dan Evanilla. She had also called Sarah Ochoa and gone to her home. Bridgette had become jealous and bitter and, in appellant's opinion, had "like five different personalities." (21 RT 4074-4076.)

(g) The Two Vehicles Related to the Crime

Appellant denied that he had ever told any of the perpetrators to take a car that belonged to his house-mate and was registered to his address, or to leave their rental car in front of his house, and then commit a crime. (22 RT 4173.) He said that no gangster would tell underlings to take a car linked to the supposed shot-caller, just as no shot-caller would permit an underling to take a phone that could be traced to the shot-caller and call the shot-caller with that phone while committing a crime. (22 RT 4174.)

With respect to the rental car that Macias had left in front of the Sunrose Place residence on the day of the crime, appellant explained that he knew how to break into and start cars without a key. He said if he had known Macias's rented vehicle was in front of the Sunrose Place house, he could easily have moved it. (22 RT 4099-4100.)

(h) The Cell Phones

Regarding the cell phones in general, appellant said that at any one time, there were between six and eight phones at the Sunrose Place residence and anyone could use them. (22 RT 4099.) By the time of trial, however, Navarro could not remember why the cell phones ended up in accounts registered to Daniel Johnston and Sarah Ochoa. (18 RT 3369-3370.)

Appellant said that when he was arrested he no longer had any of the phones. He testified:

> I didn't want the phones anymore, because there was too much drama going on, and then I gave up the phones. I had gave the money for the bill and that was that. And then before I knew it, Bridgette had a phone. Danny Chaidez had a phone, Spanky had a phone, Macias had a phone. They all had phones. (18 RT 3378.)

Appellant said that although he did at one time have the 1600 cell phone mentioned in the letter to "Casper" that was found in the search of the Sunrose Place residence (Ex. 93), by October, 2002 he no longer had

either the phone or pager numbers referenced in the letter. By that time he had obtained a Nokia phone and no longer used Nextel as the service provider. (18 RT 3386.)

(i) Mira Corona and Bridgette Navarro's Relationship

Appellant testified that Mira Corona became friends with Bridgette and often came to their house. He said that after he filed for divorce and went to the house to see his son, Corona was always there; on one occasion he found her asleep in the guest room. (18 RT 3361.) This was corroborated by Corona, during her cross-examination, when she acknowledged that she had been at their house several times, and that she spoke with Bridgette on the phone many times.[30] (14 RT 2849-2850.)

(j) The Day of the Crime

Appellant denied that he ordered Macias, Martinez and Lopez to go to Orange County and attack Montemayor and did not know they were going to do it. (18 RT 3374.) He first became aware of the robbery-murder

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[30] Corona initially tried to minimize her relationship with Bridgette. Although she admitted she had been to the Sunrose Place residence several times, she at first denied both that she went there just to visit Bridgette and that she called Bridgette often. (15 RT 2949-2850.) When defense counsel pointed out that she told the police she spoke with Bridgette many times, Corona then admitted she spoke with her often. (15 RT 2850.)

while in Las Vegas, when he was watching television at his father's house and the car chase came on as breaking news. (18 RT 3379; *see* Ex. 5.[31]) Appellant said he recognized the car and called his mother at his sister's house in Las Vegas to tell her to look at the TV. (18 RT 3379-3380.) The chase sequence was repeated several times that day on television, and appellant he saw it with his brother Moses, his sister, her father, and then later with his sister, mother, and nieces and nephews. (18 RT 3380.)

Appellant also said he did not know how his AAA number came to be in Martinez's possession. He had given the number to Chaidez, who lived at the Sunrose Place residence, because a truck Chaidez drove broke down frequently, but he did not know how Martinez obtained it. Appellant said that Chaidez kept the number in the truck's ashtray. (18 RT 3384.)

(k) The Three Perpetrators' Attack on Appellant

After they were arrested, appellant wrote letters to the three perpetrators in order to remain on friendly terms with them and to avoid being seen as an informant. For the same reasons, he asked his girlfriend to place money in their accounts at the jail. (18 RT 3374-3375.) However, it became clear that his efforts to remain on good terms were unsuccessful

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[31] Exhibit 5 is a video of the car chase as it appeared on television.

when, in February, 2003, in the North Justice Center holding cell, the three men attacked him.[32] (18 RT 3375-3376; 21 RT 3956.) Macias and Lopez stabbed him eleven times while Martinez stood by the toilet to flush down the knives when they were done.[33] Appellant sustained permanent nerve damage in his left arm as a result of the attack. During the attack, the three men called appellant "a fucking rat," and after the deputies had laid him down and opened his shirt to see the stab wounds, Corona, who was nearby, said to him: "That's what you get for being a rat."[34] (18 RT 3376-3378.)

2. LAW ENFORCEMENT TESTIMONY CORROBORATING APPELLANT'S TESTIMONY

Four of appellant's law enforcement handlers substantiated his testimony.

(a) FBI Agent Curran Thomerson

FBI Special Agent Curran Thomerson substantiated appellant's testimony regarding his work with the FBI. Thomerson was testifying from the complete FBI log (Defense Ex. "I"), which included entries by other

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[32] The North Justice Center is one of the courthouses in Orange County.

[33] The stabbing incident was confirmed by one of the guards who witnessed it, Deputy Sheriff Darren Johns. (21 RT 3954-3957.)

[34] It is not clear whether Corona was nearby because the women's holding cell was next to the men's, or appellant had been removed from the holding cell by then and was near the women's holding cell.

agents.[35] Appellant began as an informant with the Los Angeles Office in April, 2000, and formally closed out in the late Fall of 2000, though he continued to provide information thereafter. (20 RT 3683-3686.) Indeed, in March, 2001, he provided information concerning a Mexican Mafia plot to kill LAPD Detective Sanchez. (20 RT 3886-3887.) On many other occasions, appellant informed the FBI of murder plots. (20 RT 3696-3697.)

Thomerson also confirmed appellant's testimony that he had turned over at least three tape-recorded meetings he had with Frankie Rodriguez and other Mexican Mafia members. (20 RT 3704-3705; Ex. I.) In addition to infiltrating such meetings, Navarro gave the FBI names, phone numbers, and in some instances gang monikers of various Mexican Mafia members. (20 RT 3710.) In fact, between April of 2000 and sometime in 2001, there were 64 entries in the Bureau's log of contacts with appellant. Thomerson testified that appellant was an active informant who called the office regularly. He said the log documented five to six occasions when appellant told his handlers about a murder plot, including the murder plot against the police officer. (20 RT 3710-3711.)

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[35] Agent Stephen Rees, who was not available to testify for the guilt trial, testified in the penalty phase. His penalty phase testimony is described *post* at pages ****.

Thomerson also confirmed that appellant had worn wires to Mexican Mafia meetings and that this activity could have gotten appellant or members of his family killed. (20 RT 3684-3685, 3687.) In addition to wearing wires to Mexican Mafia meetings on five or six occasions, appellant gave the FBI weekly reports on the names and addresses of Mexican Mafia members and once tape recorded a gangster confessing to a murder in the county jail. For all of these activities during his period with the FBI, appellant was paid a total of $17,000, and was also given an apartment in HUD-controlled housing in Saugus.[36] (20 RT 3710-3711, 3748-3750, 3722-3723.)

Thomerson also confirmed that appellant stopped working for the Los Angeles office of the FBI because they had heard on the street that he had been "green-lighted" for being a suspected informant. Thomerson then introduced appellant to Agent Rees of the Bureau's San Diego office, and appellant worked for Rees until November of 2001. (20 RT 3713-3714, 3722-3723.) During this time, he informed on Tijuana's Arrellano Felix cartel. Thomerson described this as very dangerous work. (20 RT 3711-3713.)

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[36] This is the only mention in the record of an apartment in Saugus. Appellant may have lived there during the period between his release from prison and his move to the Remick Avenue house.

On cross-examination, Thomerson said that some informants stop their criminal activities altogether while others stay involved in them. (20 RT 3715-3716.) He said the authorities can't keep close watch and, in his opinion, "Every good informant probably still has his hand in the cookie jar." (20 RT 3716.) Carrying a gun, however, is never an authorized activity for an informant. (20 RT 3717.)

Thomerson said the Bureau did authorize Navarro to collect "rent," though this was beyond the scope of what is usually allowed, but Thomerson said these collections never actually took place. Instead, Thomerson confirmed appellant's testimony that on three occasions the Bureau provided him with cash to pay his superiors in the gang as if he had actually collected the rent. (20 RT 3726-3727.)

Regarding appellant's credibility, Thomeson said much of his information was passed on to local law enforcement and Thomerson therefore could not verify its accuracy. However, Thomerson said that in 2000, the information appellant provided was considered for the most part to be credible. (20 RT 2758-3761.) There was no report that he was giving them bad information or that he was unreliable. (20 RT 3761.) In addition, Thomerson noted that appellant did not just inform on only one or two people. To the contrary, he reported the names and addresses of many,

many people. Similarly, appellant did not just give the Bureau the names of one or two Mexican Mafia members; he provided the Bureau with information on the gang's their entire organization. (20 RT 3765.)

(b) ATF Agent James Starkey

James Starkey, an agent of the federal Alcohol, Tobacco, Firearms and Explosives Agency[37] (hereafter, ATF), testified that he had signed appellant as a confidential informant at about the end of March, 2002. (21 RT 3873-3875.) Before doing so, Starkey spoke with several police agencies and determined that appellant was considered a very reliable, informant. (21 RT 3875-3876.) However, appellant was terminated on May 31, 2002, after his wife, Bridgette Navarro, told Starkey that appellant was dealing narcotics and carrying a gun.[38] (21 RT 3876-3878, 3844, 3887.) Starkey did not investigate Bridgette's allegations because appellant had never shown any indications that he was using drugs. (21 RT 3920, 3929-3930.) Starkey also did not investigate Bridgette Navarro's assertion

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[37] The Bureau of Alcohol, Tobacco, and Firearms was an agency of the U.S. Treasury Department until 2002, when it transferred to the Department of Justice and renamed the Bureau of Alcohol, Tobacco, Firearms, and Explosives as part of the Homeland Security Act of 2002. However, in the record, the Bureau continues to be referred to by the earlier acronym, "ATF."

[38] Starkey also testified that Navarro was terminated because not all of his information was reliable. He could not, however, remember any specific information that was unreliable. (21 RT 3883-3884.)

that appellant was carrying a gun because he knew that a hit on appellant had been ordered by the Mexican Mafia shot-caller for the East Valley. (21 RT 3943-3946).

On cross-examination, the prosecutor again noted that appellant's informant contract included an agreement not to participate in any illegal activities except as necessary for an investigation as allowed by the ATF. (21 RT 3892-3894; Ex. 149.) Agent Starkey testified that he did not authorize appellant to engage in a conspiracy to sell drugs, though he might have if he had been asked and if the transactions were closely monitored. (21 RT 3894.) Appellant was never authorized by the ATF to carry a gun, and that is one of the reasons he was terminated. (21 RT 3901.) Nevertheless, the memorandum that accompanied appellant's original contract stated that Starkey did not consider him to be either a danger to the public or a flight risk and, as previously noted, he had previously provided information that had been corroborated and shown to be reliable. (21 RT 3910-3911; Ex. 149.)

(c) ATF Agent Jason Hammond

ATF Special Agent Jason Hammond met appellant at the Orange County jail in October of 2003. Detective Rodriguez had told Hammond that appellant might have information for him on a firearms trafficking case

in the Valley. (22 RT 4088-4089.) Hammond showed appellant some photos, and appellant provided background information on the people in the photos, but Hammond did not ask for specific help on that case. Appellant also provided specific information on a person from Van Nuys involved in firearm trafficking, and Hammond opened an investigation based on that information. The investigation led to one undercover gun purchase and a subsequent search warrant which turned up another gun. (22 RT 4089-4092.) Hammond said appellant had continued to give information to Hammond over the course of five meetings at the jail, some of which had been helpful. (22 RT 4090.) Near the end of 2003, appellant supplied the names of a hit man and a potential victim and the alleged hit man was arrested for a parole violation. (22 RT 4091-4092.) Appellant never asked for help in connection with the Montemayor charges against him, nor for money. The only favor he requested was for additional phone calls from the jail. (22 RT 4090.) Hammond could not recall any instances of appellant being deceptive. (22 RT 4091.)

(d) Detective Rodney Rodriguez

Los Angeles Police Detective Rodney Rodriguez worked at the Foothill Division in the Valley. In 2002 he was in charge of cold cases and predator apprehension. (23 RT 4202-4203.) Prior to that, he worked the

gang detail and worked with gang informants. (23 RT 4204.) At the time he met appellant, in 2001 or 2002, appellant was already an informant. (23 RT 4205-4206.) Rodriguez's understanding was that appellant was a shot-caller in the gang and the he promoted himself as a shot-caller to Pacoima gang members. Appellant's position in the gang placed him in a unique position to gather information. (23 RT 4207.)

Rodriguez substantiated appellant's testimony in three specific ways. First, he confirmed that shot-callers commonly provided cell phones to gang members. Second, he said it was not uncommon for a shot-caller to get the cell phones registered in another's name but have the bills sent to his address so that he could keep track of their use. (23 RT 4211-4212.) Third, he said it was common for an informant who was acting as a shot-caller to allow gang members to write their names in his garage. (23 RT 4211-4212.)

Rodriguez also explained that gangsters use a "g-ride," or gangster ride, to commit their crimes. It is a stolen car so that cannot be traced back to the gang. (23 RT 4212.)

Appellant spoke with Rodriguez frequently three-to-four times a week, and was involved in several cases with Rodriguez. In one instance, appellant had informed Agent Sanchez of a hit man who was going to

retaliate for a double homicide among rival gangs, and Sanchez was able to deploy uniformed officers who saw the vehicle appellant described on the street, arrested the driver, and recovered an AK-47 automatic weapon that appellant had said would be found in the car. (23 RT 4218.)

Appellant was also responsible for the arrest of Anthony Valles, known as "Villain," whom he described as driving a gold-colored Chevrolet Tahoe SUV with 22-inch chrome wheels and carrying an AR-15 firearm and two nine millimeter handguns. Appellant had reported that Valles was on a three-day methamphetamine high and very dangerous. After a couple of days, Rodriguez spotted the vehicle, called in a black-and-white unit, and following a chase arrested Valles with an AR-15 and two handguns, along with some narcotics. (23 RT 4218-4220.)

Regarding what appellant told him about the impending hit in Orange County, Rodriguez testified that in July, 2002, Navarro came into the station and asked Rodriguez about whether he could handle a kidnapping-for-ransom or murder-for-hire case. In a later call initiated by Rodriguez on another matter, appellant gave him further information. Rodriguez remembered mention of the "Big Homies" – the EME shot-callers – but appellant was not able to give him the names of the victim or the suspect (Corona). (23 RT 4220-4222.) They spoke often, and

appellant spoke with him about this event in Orange County more than once. (23 RT 4243).

Detective Rodriguez confirmed that would not make sense for a gangster to use a car that could be traced back to the shot-caller who had ordered a hit because the gang member would be placing himself in danger with the shot-caller. The penalty for committing a crime in such a way as to implicate the shot-caller might be death. (23 RT 4214.) On the other hand, it would be consistent for a gangster to take a vehicle that could be traced back to a person he wanted to get rid of. (23 RT 4216.)

Rodriguez also confirmed that appellant would not have left a car rented in Macias' name in front of the house. In Rodriguez's opinion, given his extensive conversations with appellant about cars, appellant had the ability to hot-wire and move the car. (23 RT 4318-4319.) He again emphasized that a shot-caller would not have sent a soldiers to commit a crime in a car belonging to his roommate and registered to his house. To have done so would have been ridiculous. (23 RT 4319-4320.) He said that even if appellant had been elsewhere but still involved in the killing, it would have been equally ridiculous, once he knew the police knew of the crime, not to have had someone move the car from in front of his residence. (23 RT 4320.) Appellant, he said, was a very bright guy. (23 RT 4322.)

Regarding Bridgette's call to Nextel to change the phone number on the 1600 phone, Rodriguez said it would have made no sense for appellant to have his wife change that number to another number but give as his contact number his own home phone number.[39] (23 RT 4321.)

Regarding the cell phones, Detective Rodriguez testified that during the period when he was receiving frequent calls from appellant, appellant used several phone numbers. He testified that "you never knew what number he was calling from." Appellant used a different number each time. (23 RT 4258.)

3. DEFENSE GANG EXPERT RICHARD VALDEMAR

Richard Valdemar was a recognized expert on gangs in general and Mexican Mafia related gangs in particular, having ended his career on a joint task force that succeeded in convicting 22 of 23 RICO[40] defendants in 1995, and having testified as a gang expert in thousands of cases.[41] (25 RT 4421-4427.) One of the members of the task force was FBI Special Agent

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[39] Whether or not Bridgette gave Nextel the Sunrose house phone number as a contact number, the phone was registered to that address. (Stipulation, Ex. 133, read to jury at 17 RT 3086.)

[40] "RICO" is the acronym for the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968.

[41] As above noted, Detective Booth, the prosecution's gang expert, considered Valdemar one of the leading experts on the EME. (17 RT 3326.)

Curran Thomerson, and in that work, Valdemar knew of appellant as an informant working with the task force. (25 RT 4427-4428.)

In addition to testifying in general regarding Mexican-Mafia-affiliated gangs (25 RT 4428-4430), Valdemar explained that a "green light" was an authorization to assault or kill. (25 RT 4430.) If a person is green-lighted, that information is disseminated rapidly throughout the gangs, primarily through kites that travel through the gang members who are in custody, and then via telephone to a third party, usually a female, who takes the green light list and disseminates it to the local gang members, their shot-callers, and to other state prisons, including Pelican Bay. (25 RT 4430-4431)

A "runner" is a person whom the Mexican Mafia uses to transmit especially important information too sensitive to be included in a written communication. The runner is a trusted individual, loyal to a particular Mexican Mafia member, who is given the authority to transmit information to other Mexican Mafia members and associates. This is an important rule, said Valdemar, because members of the Mexican Mafia do not discuss their business outside their membership, so a runner has to have special authoritizaton to do so. (25 RT 4432.) Since visitors to a Security Housing Unit (SHU) in the prison system cannot have a felony record or be on

probation or parole, Mexican Mafia members employ women who are not active in illegal gang activities as their runners. (25 RT 4435.)

Valdemar also substantiated appellant's testimony on several points. He explained that it was consistent with the role of an informant to continue to associate with gang members and otherwise conduct himself as a gang member because that is the only way to collect the information needed by law enforcement. (25 RT 4444.) It is also common practice for informants to ingratiate themselves with other gang members by providing cell phones, cars, or other goods and services to them. Cell phones are particularly interesting to law enforcement not only to monitor the activities and locations of gang members, but also to help ensure the informant's acceptance into the group. (25 RT 4445.)

Valdemar also said it was consistent with gang practices for an informant who holds himself out as a shot-caller to allow gang members to hang out at his house, and allow them to write, or to himself write, their gang names and slogans in his garage. (25 RT 4450-4451.)

Valdemar was asked to interpret the meaning of a paragraph in the letter "Chispa" gave to Corona on Corona's and appellant's joint trip to Pelican Bay. (25 RT 4513-4514; Defense Ex. E.) Valdemar's view was that the passage was a warning to Corona not to trust Navarro. He further

said it would be against Mexican Mafia rules for a runner to disregard an order not to trust appellant, and that she could face severe consequences if she disobeyed. (25 RT 4550-4551.)

Regarding the vehicle used in the crime and the rental car left in front of appellant's residence, Valdemar opined that if three gang members committed a crime with a car borrowed from the shot-caller's residence and left behind another car rented in the name of one of the perpetrators, they would have done so only if they intended to implicate the person they borrowed the car from. (25 RT 4447.) He said the way the cars were used in this case was not consistent with Sureño gang practice, and that gang members who used cars that could be connected so easily to a shot-caller could expect to be punished or even killed by that shot-caller. (25 RT 4448.)

Valdemar also disagreed with the prosecution assertion, through Detective Booth's testimony, that in Sureño gangs the higher gangsters rise in the hierarchy, the more they order their inferiors to commit gang crimes. To the contrary, he said, the failure of a shot-caller to appear at a violent incident he had ordered would be perceived as weakness. (25 RT 4487-4488.) Each violent act increases standing within the Mexican Mafia, and

shot-callers therefore participate in almost all acts of violence. (25 RT 4488.)

Regarding the attack on appellant in the courthouse holding cell, Valdemar testified that when a person in custody has a "green light" on them, it is common for a three-man hit team to attack them, either during their transfer to or from court or, as happened here, while in a holding facility awaiting transfer. One team member typically serves as the lookout and places himself in the way of responding officers. The second team member is the hit man, usually a younger member seeking to make his "bones," or acquire status within the gang. The third team member is typically a more seasoned, experienced gang member, called a "layoff man" or "pipe man," who is not involved directly in the hit unless the hit man runs into trouble during the attack. (25 RT 4451.) Valdemar said that the attack in this case was consistent with the carrying out of a green light. (25 RT 4452.) He had seen that pattern many, many times before. (25 RT 4453.)

4. OTHER EVIDENCE

(a) Appellant's Mother

Appellant's mother, Rosalinda Razo, confirmed that appellant was in Las Vegas on the day of the crime. She was living in Las Vegas in 2002

and confirmed that during the summer months appellant was in the process of moving there, bringing his personal belongings and cars to her house and looking for a place to rent or buy. (26 RT 4688.) She said he was in Las Vegas on the October morning when he called and told her to turn on the TV and said he knew the person the police were chasing. (26 RT 4688-4689.)

Razo also confirmed that Bridgette had called her several times during that same period of time. She said Bridgette called her often and sometimes called all day and part of the night looking for appellant.[42] (26 RT 4692-4693.)

(b) Deborah Almodovar

Deborah Almodovar testified that she had been in jail with Mira Corona in November, 2002, and that Corona had told her she was in jail because some lady hired her to "do something" to the lady's brother; and that Pirate (Macias), who was Corona's lover, had come down to Orange County to do it. (19 RT 3647-3648.)

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[42] This was consistent with appellant's testimony on cross-examination that a 14-minute phone call on the afternoon of October 2, from the 1600 phone to his mother's number, probably came from Bridgette. (19 RT 3607.)

On cross-examination, Almodovar testified that there was a system of communication between the men's and women's floors of the jail through the bathroom pipes, and that Almodovar's boyfriend, Nathan Hale, knew appellant. However, she denied the prosecutor's suggestion that Hale had told her appellant had a problem and needed a witness. (19 RT 6352.) She admitted that she had three-way telephone conversation with appellant and Sarah Ochoa after her release from jail. (19 RT 3657.) She also said she was happy to help appellant because he was a good friend of her boyfriend, Hale. (19 RT 3658-3659.)

C. PROSECUTION REBUTTAL

The prosecution called two witnesses to impeach appellant on peripheral matters that had come out in cross-examination.

The first rebuttal witness was Los Angeles Police Sergeant Dan Randolph, who, in 1995, had arrested appellant on a Vehicle Code violation and also discovered there were misdemeanor warrants out for him. (26 RT 4616.) Randolph said appellant had asked if he could provide information in exchange for "any consideration that might be possible," and told Randolph, who was then only an officer, that he could provide enough information to make Randolph a sergeant. (26 RT 4617, 4619.)

The second rebuttal witness was a court interpreter, Fannie Draiem, who was called by the prosecutor to translate the third page of a letter from appellant to a man identified only as "Niño," (25 RT 4654-4655; Exh. 151 [letter]; Exh. 155 [translation].) The prosecutor had introduced the letter, which had been sent by appellant to Bridgette Navarro from the Orange County Jail in September, 2002, during his cross-examination of appellant. Appellant had mailed the letter to Bridgette with a request that she send it on to "Niño" without disclosing that appellant was in the county jail. (21 RT 4031-4032.) Appellant had disputed the prosecutor's interpretation of some of the Spanish phrases in the letter. (21 RT 4027-4041.)

While the interpreter's literal translation appeared to support the prosecutor's interpretation that the letter was a solicitation to commit violence (26 RT 4655), the interpreter also largely agreed with appellant that several of the phrases in the letter could not be perfectly translated. Thus, the phrase "mandalo a la verga" meant something like "go to hell" or "screw himself," but had no precise equivalent in English. (26 RT 4673.) The phrase Draiem translated as "I will support you to fuck them up" did

not contain the word for "chinga," the Spanish word for "fuck," but could be translated as "tell them to go fuck themselves."[43] (26 RT 4674.)[44]

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[43] Appellant is here departing from the usual format for opening briefs. In order to keep the focus on the guilt phase, the penalty phase statement of facts appears at the beginning of that section of the brief, commencing *post*, at page ***.

[44] Appellant will here depart from the usual order of presentation in opening briefs. In order not to divert attention from the guilt phase, the penalty phase statement of facts will be found in that portion of the brief, commencing at page ***.

GUILT PHASE ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE OF APPELLANT GUILT OF PARTICIPATION IN THE CONSPIRACY TO ROB AND MURDER MONTEMAYOR

Appellant was charged and convicted of murder (Count 1) and conspiracy to commit murder (Count 2). (6 CT 1551-1556; 7 CT 1949.) The prosecution's theories regarding the murder count were all predicated upon appellant's alleged involvement as a participant in a conspiracy. (29 RT 5086-5087.) However, there was insufficient evidence that he ever actually entered into the conspiracy to kill David Montemayor. Moreover, there was evidence that showed that even if he had entered into a conspiracy at some point, he clearly withdrew from the conspiracy when he informed a law enforcement officer of the pending plot against David Montemayor.

In reviewing a claim of insufficiency of the evidence to sustain a criminal conviction, the Fourteenth Amendment to the United States Constitution requires a reviewing court to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the [allegations] beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443

U.S. 307, 317-319; *People v. Johnson* (1980) 26 Cal.3d 557, 576; *People v. Ochoa* (1998) 19 Cal.4th 353, 444; *People v. Osband* (1996) 13 Cal.4th 622, 690; *People v. Rowland* (1992) 4 Cal.4th 238, 271.)

In passing on a claim of insufficient evidence, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson, supra*, 26 Cal.3d, at p. 578.)

However, the "substantial evidence" standard does not mean that any evidence will be sufficient to support a verdict. To be "substantial," evidence must be "reasonable, credible, and of solid value." (*Ibid.*) The evidence must be "valid evidence, not evidence of no probative value." (*Dong Haw v. Superior Court* (1947) 81 Cal.App.2d 153.)

When the evidence on a particular issue is circumstantial, the court must scrutinize that evidence even more closely to determine whether a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Kunkin* (1973) 9 Cal.3d 245, 250.) "[A] finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory

that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion." (CALJIC No. 2.01; 8 CT 2041.) "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence, it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People v. Redmond* (1969) 71 Cal.2d 745, 755; *People v. Kunkin* (1973) 9 Cal.3d 245, 250.)

Although the court must review the record in the light most favorable to the judgment, it may not ignore evidence merely because it is favorable to the defense. Instead, "upon judicial review all the evidence is to be considered . . . ." (*Jackson v. Virginia, supra*, 443 U.S. at p. 319, emphasis in original.) Moreover, if evidence is to be held legally "substantial," it must be sufficient to prove the alleged offense or special circumstance beyond a reasonable doubt. As the United States Supreme Court has held, "the 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." (*In re Winship* (1970) 397 U.S. 358, 364.)

Tested under the foregoing standard, the evidence presented at appellant's trial was manifestly insufficient to support appellant's conviction of murder in Count 1 or of conspiracy to murder in Count 2.

A. ALL FIVE OF THE PROSECUTION'S FIRST-DEGREE MURDER THEORIES DEPENDED UPON APPELLANT BEING A PARTICIPANT IN THE CONSPIRACY TO MURDER, ROB, AND/OR KIDNAP DAVID MONTEMAYOR

The prosecution explicitly sought appellant's conviction on five theories: conspiracy (29 RT 5084-5089); aiding and abetting (29 RT 5090-5091); felony murder/robbery (29 RT 5091-5092); felony murder/kidnapping (29 RT 5091-5093); and simple conspiracy to rob or kidnap in which murder was a natural and probably consequence (29 RT 5092-5093). The first and fifth theories were explicitly predicated on appellant as a co-conspirator. As the prosecutor also said, however, both felony murder theories also relied on appellant being a co-conspirator in a plot to kill Montemayor. Regarding the robbery, the prosecutor argued:

> This is the third theory. Again, if you find the defendant was actually a conspirator and not just a pretend conspirator, you'll find that the elements are met that this was – this was the conspiracy, and the purpose of the conspiracy was this attempted robbery. (29 RT 5092.)

While he did not mention conspiracy in his one-paragraph discussion of the felony murder/kidnapping theory (29 RT 5092), the jury must have

understood from his earlier comments regarding the robbery felony murder theory that appellant's participation in the kidnapping, if any, was as a co-conspirator.

Regarding the aiding and abetting theory, while conspiracy was not made explicit, the prosecutor did state, "[t]he question is, was the defendant going along with the plot or trying to stop this plot." (29 RT 5090.) In short, the prosecutor's theory of aiding and abetting turned upon appellant's involvement as a co-conspirator "going along with the plot."

However, the evidence does not support the conclusion that appellant ever actually entered into a conspiracy to kill David Montemayor. At most, the circumstantial evidence permits a suspicion that he might have entered into a conspiracy at some point, but a suspicion is not sufficient evidence to convict beyond a reasonable doubt. Moreover, the evidence that appellant informed law enforcement of the plot was sufficient to establish that even if appellant had at some point been involved in a conspiracy to murder, he withdrew from it by taking an action to defeat the conspiracy.

The two questions regarding conspiracy discussed below are (1) did appellant ever entire into the conspiracy, and, if so, (2) did he withdraw prior the crime. The answer to the first question is no, and to the second, yes.

B. THERE WAS INSUFFICIENT EVIDENCE TO SHOW THAT APPELLANT EVER AGREED TO TAKE PART IN THE CONSPIRACY; HOWEVER, THERE WAS SUFFICIENT EVIDENCE TO SHOW THAT IF EVEN IF HE HAD ENTERED THE CONSPIRACY AT SOME POINT, HE WITHDREW FROM IT

The government's case was bereft of direct evidence of appellant's involvement in either the murder or the conspiracy to murder David Montemayor, and instead was built on a patchwork of circumstantial evidence. As such, appellate review of the sufficiency of the evidence is governed by the requirement that the evidence must do more than merely raise a strong suspicion of guilt (*People v. Kunkin, supra*, 9 Cal.3d at p. 250; *People v. Redmond, supra*, 71 Cal.2d at p. 755), and that it also "cannot be reconciled with any other rational conclusion." (CALJIC No. 2.01; CT 873.) The evidence in this case cannot meet these tests.

To begin with, there is no evidence that appellant ever entered into the conspiracy. Even assuming the truth of Mira Corona's version of events, he did no more at the outset than ask her to bring the note containing the victim's address and telephone number to the McDonald's and, once there, asked her for it and took it from her. (14 RT 2698.) Nowhere did she indicate that appellant actually agreed to kill Montemayor or have him killed.

Respondent may argue, as the prosecutor did below, that appellant's association with the perpetrators was enough to establish guilt. However, mere association alone cannot furnish the basis for a conspiracy; there must be evidence of an agreement. (*Simmonds v. Superior Court* (1966) 245 Cal.App.2d 704, 708.) While the agreement may be proved by circumstantial evidence (*People v. Zoffel* (1939) 35 Cal.App.2d 215, 225), there has to be some manifestation or communication of assent, "some evidence from which the unlawful agreement can be inferred . . . ." (*Lavine v. Superior Court* (1965) 238 Cal.App.2d 540, 543.)

Evidence of the further communications between Corona and appellant are similarly insufficient to establish the element of agreement. Corona's testimony was that the trip to Crescent City preceded the meeting at McDonald's, and when Debbie Perna called her on that trip and appellant asked Corona for the address, she did not have it. She gave him the note subsequently at McDonald's, and the only communication they had after that was in a phone call when he told her he had lost the note. Corona testified that she never asked Perna for it again. (14 RT 2712.)

Far from establishing an agreement to kill Montemayor or have him killed, this evidence actually contradicts the prosecution's theory of conspiracy. Not only is there no direct testimony or evidence of any assent

or agreement by appellant, but when appellant told Corona he had lost the address, she never made an effort to obtain it again and that, according to Corona's testimony, was the end of it.

The best that can be said for this evidence was that appellant's act of asking for the note with the address on it could raise a suspicion that he might have been willing to consider entering into a conspiracy, or perhaps that he wanted Corona to think he was entertaining the idea. However, his conduct equally consistent with the theory that he was acting as an informant and obtaining evidence his law enforcement handlers could use in preventing a murder from taking place. It is also consistent with his responding to Detective Rodriquez's request that he find out who the intended victim was, and thus can be reconciled with another rational, non-criminal, conclusion. (CALJIC 2.01.)

Appellant's testimony offered a different version of the timing of these events. He recalled that the McDonald's meeting occurred before the trip to Pelican Bay. (19 RT 3521.) According to appellant, he first obtained the note at the McDonald's meeting and placed it in his glove compartment. When he later asked for the address from Corona, both on the trip to Crescent City and again later on the phone, he was seeking the name of the intended victim under instructions from Rodriguez, but she

would not give him the name. (19 RT 3539-3540.) Then, when Corona finally reached him and asked if he was going to do the hit, he told her he had lost the address. (19 RT 3554.)

No matter how the jury put resolved these inconsistencies– whether they believed Corona's version that she did not ask Perna for the address again, or whether they believed appellant's contention that he wanted the name only to enable him to pass it onto Rodriguez and that officer's instructions – there was no evidence that appellant ever agreed to murder, rob, or kidnap David Montemayor. The evidence was just as consistent with appellant's story as it was with Corona's. More important, both stories are in a agreement on the crucial fact that by mid-to-late summer of 2002, several weeks or perhaps even months prior to the killing, neither party was interested in appellant's further involvement in the robbery, kidnapping, or murder of David Montemayor

The prosecution's reliance on the cell phone records, and in particular the cell phone with the 1600 number – was similarly unavailing. While it was true that there were a series of phone calls to and from that number that appeared related to the crime and the perpetrators, there was no evidence that appellant was using, or even was near enough to use, that phone on that day. The prosecutor did show that sometime during a nine-

day period leading up to the day of the crime, appellant wrote a letter – never mailed – stating that the 1600 number was his phone number. There was evidence that appellant had many cell phones and permitted many others to use them. Thus, even if the jury did not believe he was in Las Vegas, or concluded that he could have directed the crime from there, there is no evidence to place that phone in his hands on that day. At most, the evidence again results in nothing more than a suspicion, and a mere suspicion– even a strong suspicion– is not enough to sustain a conviction. (*People v. Kunkin, supra*, 9 Cal.3d at p. 250; *People v. Redmond, supra*, 71 Cal.2d at p. 755). Moreover, the evidence can be reconciled with the conclusion that on that day the phone was actually in the hands of Bridgette or someone else at the residence at a time when appellant was absent. (CALJIC No. 2.01.)

The prosecutor suggested that appellant's involvement was established by evidence that the Sunrose Place house was used as the "launching pad for this murder mission." (28 RT 4987.) However, the evidence failed to show that appellant had any connection with or knowledge of the supposed "mission." Once again, there is simply no evidence of agreement or assent. Moreover, from a review of the entire record (Jackson v. Virginia, supra, 443 U.S., at p. 319), the far stronger

inference from the fact that Macias's rented car was found in front of the Sunrose Place house, and the fact that the Blazer used for the drive-by was registered there, is that the evidence is not consistent with appellant's involvement. As the expert and law enforcement witnesses testified, no gang shot-caller would have permitted such obvious connections with his own residence if he was actually aware that the cars would be used in the commission of a crime.

None of the remaining prosecution circumstantial evidence provides the missing evidence of agreement. The prosecutor told the jury that appellant's guilt was shown by (1) Corona's connection to the victim, (2) appellant's connections to the perpetrators, (3) the connections of appellant to Corona, and (4) appellant's allegedly having lied on the stand. (28 RT 4967-4968.) However, even assuming the truth of the prosecutor's argument, none of this evidence established a conspiracy absent substantial evidence that appellant entered into agreement with Corona or actually ordered the perpetrators to do the deed. There was simply no such evidence.

Finally, in order for appellant to be found guilty under a theory of conspiracy, there had to be evidence of specific intent both to agree to commit the crime and to commit the crime. (*People v. Jurado* (2006) 38

Cal.4th 72, 123; CALJIC 6.10; 8 CT 2071.) It defies logic to contend that appellant intended either to enter into an agreement to commit the crime or to commit that crime when he told two of his handlers that he had been solicited to commit it. As appellant will explain in greater detail in the next section, that communication would have constituted an effective withdrawal from any conspiracy even if appellant had actually entered into one. However, no informant would tell his handlers of an impending crime in which he himself planned to participate and thereafter go out and commit it, or have his underlings commit it, because doing so would inevitably lead to his own arrest and conviction. Thus, the testimony of law enforcement officers and gang experts clearly shows that appellant never agreed or intended to agree to enter into a conspiracy to kill David Montemayor. Once again, when reviewed in light of the entire record, as this court must do, the evidence actually points to innocence.

C. EVEN IF THE EVIDENCE HAD BEEN SUFFICIENT TO SHOW THAT APPELLANT ENTERED INTO A CONSPIRACY, INFORMING LAW ENFORCEMENT OF THE PLOT CONSTITUTED A WITHDRAWAL FROM THE CONSPIRACY

Assuming *arguendo* that there had been sufficient evidence that appellant entered into an agreement to kill David Montemayor, he withdrew from that conspiracy prior the crime.

California law requires that a co-conspirator wishing to withdraw from a conspiracy must effectively communicate that withdrawal to his co-conspirators in order for the withdrawal to be considered effective. (CALJIC 6.20; *People v. Prieto* (2003) 30 Cal.4th 226, 251, fn. 9; *People v. Sconce* (1991) 228 Cal.App.3d 693, 701, quoting *People v. Crosby* (1962) 58 Cal.2d 713, 730-731. However, in nearly all other jurisdictions in which the question has arisen, including federal circuits and the United States Supreme Court, a conspirator may also withdraw from a conspiracy by communicating the plot to law enforcement.

For example, in *U.S. v. U.S. Gypsum* (1978) 438 U.S. 422, the United States Supreme Court held that in order to withdraw from a conspiracy, a defendant must either affirmatively notify the other members of the conspiracy of his withdrawal or "make disclosures of the illegal scheme to law enforcement officials." (Id. at pp. 463-464.) Appellant plainly did so and was instructed by Officer Rodriguez to obtain more information. While appellant maintains there is no evidence that he was ever involved in a conspiracy to kill David Montemayor, under U.S. Gypsum, his communication of the plot to a law enforcement official was sufficient to constitute appellant's withdrawal if he had actually been involved in any such conspiracy.

Appellant acknowledges that he has found no California case explicitly stating the rule a person may withdraw from a conspiracy by communicating the pending plot to law enforcement. However, he has also found no case rejecting such an argument, and thus it would appear that the issue is one of first impression in California. Appellant's research suggests that the rule is widely recognized in other jurisdictions, including as noted above the United States Supreme Court, because of the rule's obvious public policy benefits. (*E.g., U.S. v. Spotted Elk* (8th Cir. 2008) 548 F.3d 641, 673; *U.S. v. Jackson* (8th Cir. 2002) 345 F.3d 638, 648; *United States v. Parnell* (10th Cir. 1978) 581 F.2d 1374, 1384, *cert. denied*, 439 U.S. 1076 (1979); *United States v. Borelli* (2d Cir. 1964) 336 F.2d 376, 388, *cert. denied* 379 U.S. 960 (1965).) The rule not only assists law enforcement in solving crime but actually promotes crime prevention. Indeed, the rule that communication of a conspiracy to law enforcement constitutes a withdrawal from that conspiracy promotes the prevention and solution of crime far more effectively than a rule that requires communication to co-conspirators in order to withdraw from a conspiracy.

By contrast, permitting conspirators to withdraw only by communicating that intent to co-conspirators does nothing whatsoever to solve or prevent crime; indeed, it permits the remaining conspirators to

continue with and carry out their original criminal plot without the withdrawing conspirator. Indeed, if the California rule is that conspirators may only withdraw from conspiracies by communicating their withdrawal to co-conspirators, the rule is absurdly unrealistic, particularly in the street gang context.

The foregoing point is well-illustrated in this case. If appellant had actually been involved in a conspiracy to kill David Montemayor, he could not possibly have communicated withdrawal from any such conspiracy and survived. As discussed by both prosecution and defense gang experts, gang members are expected to "put in work," i.e., to commit acts of violent, on behalf of the gang. Their status within the gang is determined almost entirely by their willingness to commit crimes, and for an active gang member to inform his fellow gang members that he wants to withdraw from a plan to commit a particular act of violence to which he has previously committed would result in a loss of face, at best, and potentially serious injury or death in retaliation for disloyalty, at worst.

Moreover, appellant was suspected by his fellow gang members of being an informant from the time that he was arrested on firearm possession charges which would have constituted a Third Strike offense, but was instead almost immediately released. From that point on, his life and the

lives of his family members were in danger. As the gang experts testified, the punishment for being an informant is not merely the death of the informant but the death of the informant's family members as well. If appellant had actually been involved in a conspiracy with fellow gang members to kill David Montemayor and had attempted to withdraw from that conspiracy by communicating his intent to withdraw to his co-conspirators, he would have virtually confirmed his informant status and exposed himself and his family to almost certain death. The realities of street gang membership thus make the likelihood that conspirators will tell their co-conspirators of their intent to withdraw vanishingly small. By contrast, a conspirator's use of the alternative method of withdrawal recognized in other jurisdictions and the United States Supreme Court is likely to result in the prevention of crime, and by going to the police with information, a gang member may not only withdraw from the conspiracy– and the gang– but seek law enforcement protection against retaliation. Public policy considerations are thus much better served by the recognition of the rule in U.S. Gypsum.

In this case, informing Officer Rodriguez of the plot, appellant performed an act which would have undermined any such conspiracy and would have prevented its fulfillment. Moreover, evidence of his

withdrawal from any pending conspiracy would also have been established by other steps he took which are both completely inconsistent with the idea that appellant remained in a conspiracy and are also consistent with both non-participation in and withdrawal from a conspiracy. It was clear from the evidence that appellant had begun making arrangements to move away from the gang's turf to Las Vegas. Not only appellant himself, but also his mother, his brother, and Detective Rodriguez, all testified that appellant was in the process of moving when the crime occurred. (18 RT 3372, 3379; 19 RT 3579-3584; 23 RT 4329; 26 RT 4688-4690. This fact was also corroborated by prosecution witness and Buena Park Police Detective Pelton, who searched appellant's sister's house in Las Vegas and found items bearing gang indicia and references to "Bridgette" and "Tony," and also letters addressed to appellant. (16 RT 2985-2991, 1310.) In short, while the evidence was insufficient to establish that appellant was a member of any conspiracy to kill David Montemayor, the evidence presented clearly showed that even if he had been a conspirator at some point, he had withdrawn by the time he told Officer Rodriguez of the plot.

Appellant thus submits that although the case may be one of first impression, California law should be consistent with that of the other jurisdictions noted above and recognize that a conspirator may withdraw

from a conspiracy not merely by communicating his intent to withdraw to other conspirators but also by communicating the plot to law enforcement. Indeed, recognizing such a rule better serves the public policy interests, and failing to recognize such a rule would put "confining blinders on the jury's freedom to consider evidence regarding the continuing participation . . . in the charged conspiracy." (*U.S. Gypsum, supra*, at p. 464; see also *U.S. v. Jackson, supra*, 345 F.3d at p. 648 and cases there cited [reporting the conspiracy to the authorities is sufficient to indicate withdrawal].)

D. EVEN VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, THERE WAS INSUFFICIENT EVIDENCE THAT APPELLANT TOOK PART IN THE CRIME, EITHER AS A CO-CONSPIRATOR OR AS AN AIDER AND ABETTOR

The Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution prohibits conviction in criminal cases unless the prosecution has proved every element of the offense beyond a reasonable doubt. (In re Winship, supra, 397 U.S. 358.) The question on review is whether, after reviewing the whole record, there was sufficient evidence upon which a rational jury could have found the essential elements of the allegations beyond a reasonable doubt. (People v. Johnson, supra, 26 Cal.3d, at p. 578.)

In this case, the prosecution evidence rested on an unsound construct of inferences which failed to provide any proof that appellant ever explicitly agreed to carry out the crime. He did nothing more than take the note and put it in his glove box, and when he later sought the intended victim's name and address, it was at the request of his law enforcement handlers. Moreover, there was no evidence whatsoever that appellant ever communicated any information to the three perpetrators regarding Montemayor, the cash in his garage, or the request that he be murdered.

Viewing the record as a whole, it simply beggars belief that appellant was an active participant when (1) he had informed his handlers of the impending crime; (2) he was in the process of moving to Las Vegas; (3) no shot-caller would have allowed a vehicle registered to his own address to be used in the crime, and a car rented to one of the perpetrators to be left in front of his residence; (4) from the time of his release from the felon-in-possession charge he was suspected by other gang members of being an informant; (5) appellant told his wife, who herself had extensive gang ties and understood what happens to informants in the Mexican Mafia, that he was an informant; (6) appellant's wife was jealous and angry enough to have reported third-strike criminal activity by appellant to Agent Starkey; (7) appellant's wife had become friends with Mira Corona, who may have

been the lover of one of the perpetrators, Armando Macias; and (8) suspicion about appellant's informant status would have prevented the perpetrators from following any orders to commit a crime given by him.

Indeed, that the jury did not find reasonable doubt and returned a guilty verdict can only be explained by the numerous errors that occurred in this case, errors which are discussed in greater detail below.

II. THE TRIAL COURT RULINGS WHICH EFFECTIVELY FORCED THE DEFERRAL OF THE DEFENSE OPENING ARGUMENT CONSTITUTED PREJUDICIAL ABUSES OF DISCRETION AND VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS, TO COUNSEL AND TO PRESENT A DEFENSE

The trial court made a series of inexplicable rulings that restricted what the defense could say in their opening statement, and ultimately requiring that the defense defer its opening statement until the beginning of the defense case. This resulted in a stunning denial of due process and appellant's rights to effective counsel and to present a defense, in derogation of appellant's rights under the U.S. Constitution, Amendments Five, Six, Eight, and Fourteen, and the California Constitution, Article 1, sections 7, 15.

Appellant can find no precedent for this. Of the many trial court errors in this case which amount to improper control of the defense, this is the one which most fatally and prejudicially affected the outcome.

A. THE COURT IMPROPERLY LIMITED WHAT THE DEFENSE COULD TELL THE JURY IN ITS OPENING STATEMENT, AND FORCED THE DEFENSE TO DEFER OPENING STATEMENT UNTIL THE START OF THE DEFENSE CASE

During the *in limine* hearings leading up to trial, it became clear that the trial court intended to limit what defense counsel could present to the jury in its opening argument. This arose because of the defense desire not

to disclose in advance to the District Attorney that defendant would take the stand; the prosecutor's assertion of hearsay objections to statements of the defendant to his handlers which were manifestly not hearsay; the trial court's refusal to recognize or rule that the statements in issue were not hearsay; the trial court's resulting limitations on what the defense could present in its opening statement at the beginning of trial; and its rulings that resulted in the defense being prevented from presenting an opening statement at the beginning of the trial.

In a June 29, 2007, pleading entitled "People's List of Anticipated 402 Motions," the prosecution objected on hearsay grounds to the admission of any statements by appellant's law enforcement handlers "that, sometime before the charged murder, defendant told his handling Agent(s) that a contract hit was going to be committed in Orange County." (5 CT 1284, ¶4.)

In an August 27, 2007 *in limine* hearing, the prosecutor expanded the basis of his objection to include irrelevance. (10 RT 1956-1957.) Asked to address just the hearsay portion of the objection, defense counsel correctly noted that the statements were not hearsay because they would not be introduced for the truth of the statements' content, but rather to show the defendant's state of mind. (10 RT 1959-1960.) Later, defense counsel

further explained why the statements were not hearsay: They would be introduced not to prove that people were trying to get appellant to commit a murder in Orange County, but to show that he was alerting the police to the conspiracy and therefore was not a part of the conspiracy itself. (10 RT 1970.)

During an in camera conference with the defense, the judge noted that if, for example, Alcohol, Tobacco, and Firearms agent James Starkey were the first witness, the statement to him that there was going to be a murder in Orange County "may be ruled out in terms of Starkey coming on when he's the first witness, but if your client takes the stand and he testifies to words to that effect, and you want to try to call Starkey to corroborate his testimony, that's a different issue. [¶] I need to take these in piecemeal order because I don't know whether defendant [will] or will not take the stand until such time as he actually get sworn in." (10 RT 1984.) As will be discussed below, this was error; the statements were admissible whether or not appellant took the stand.

Then, on August 29, 2007, the trial court indicated that it wanted summaries of opening arguments from both sides. (11 RT 2006.)

In further *in limine* hearings on August 30, 2007, the court indicated that, subject to developments during the presentation of the prosecution

case, the statements of Agent Starkey, Detective Rodriguez, and appellant's mother regarding what he told them in advance about the Montemayor killing were inadmissible. The court further stated, "I want this to be clear, in your opening statement I do not want counsel for defendant to refer to any alleged statement by the defendant to Starkey or Rodriguez and to his mother." (11 RT 2120.) At that point, the defense asked to go *in camera*. (*Ibid.*)

During the subsequent *in camera* proceedings,[45] defense counsel reminded the court that they intended to call appellant as their very first witness. Counsel explained:

> Now, the court is saying, I know the court is making this ruling without the benefit of my client testifying. But he is going to testify, and in my opening statement . . . I don't intend to refer to directly who is going to provide that information, but merely that his . . . handlers were told about the alleged plot, the handler, and he agreed to try to find further information for his handlers so that he could aid them in investigation. (11 RT 2123-2124.)

The trial court noted that until defendant took the stand, the court did not know whether he would or would not testify as defense counsel

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[45] These proceedings, and many which followed, were initially sealed, to prevent the prosecutor from learning of the defense plans to have Navarro testify. On appellant's motion, this court ordered all but a small portion of the sealed proceedings and documents unsealed. (Order, November 13, 2013.)

indicated. (11 RT 2124.) The court explained that the prosecution had objected to the admission of those statements and that it was not appropriate to make a final ruling on that objection at that time because the court could not tell the District Attorney that the defense planned for appellant to take the stand. (11 RT 2124-2125.) When counsel again argued that the statements were not hearsay, the court replied that it would not rule on the objection until Starkey or Rodriguez were on the stand and the prosecutor had a chance to weigh in on the matter. (11 RT 2126.)

Halpern then asked whether the judge would rule on the issue in advance if the defense were to reveal to the District Attorney that defendant was going to testify. The judge said he would not interfere with the Halpern's tactical decision regarding whether or not to disclose his strategy to the opposing party, but again stated that there were many aspects to the issue and that he would not rule in advance. (11 RT 2127-2128.) The judge said he would allow Halpern to say in his opening statement that after appellant was contacted by Corona, he then contacted Starkey and Rodriguez. However, the court would not permit counsel to reveal the content of the conversations. (11 RT 1028.)

The following colloquy ensued:

> MR. HALPERN: Then why can't I say this is what I expect the evidence to reveal[?] If I'm wrong, I'm wrong.

THE COURT: But this is a viable issue that the court will rule on at the time it comes up, and it may come up when, in the People's case-in-chief. It may come up when you present Starkey or Rodriguez.

MR. HALPERN: Why can't we rule on it prior to the opening statement so we can know what evidence is going to be admissible and not admissible?

THE COURT: Because at this juncture we still have to talk to Starkey.

MR. HALPERN: No. When my client is testifying. Why can't we make a ruling in open court with Mr. Wagner, if my client chooses to testify, will we be precluded from discussing his conversations with regard to the alleged murder plot?

THE COURT: I can't read minds. I don't know what Wagner is going say or do if you reveal to him that your client is going to take the stand and testify. Is that going to put them in a position where they are not going to object? I don't know.

MR. HALPERN: Okay, Well if they object – the point is, I want to have a court ruling on it so when I can then speak about that in my opening statement. In other words, Mr. Wagner comes in right now, I say Your Honor, I want to have ruling, ruling as to – from the court, direction from the court if my client were to take the witness stand and were to testify to the fact he had gone to . . . the ATF, and had reported the conversation he had with Ms. Corona, is the court going to allow that or disallow it upon objection. I don't see how you can disallow it, but I mean, I can't fathom an objection, honestly. (11 RT 2129-2130.)

The court was unmoved. "There may be some other factors raised by the opposing party that I still may be in a position where I can't make a

ruling and will still be asking you not to put that into your opening statement." (11 RT 2130.) The *in camera* hearing concluded as follows:

> THE COURT: So am I to assume that the court's indication to not put the statements of the defendant into your opening statement, is that satisfactory to you, noting your objection?
>
> MR. HALPERN: Noting my objection, yes. (11 RT 2131.)

At the next hearing, on September 4, 2007, each party's opening statement outlines were filed, the defendant's under seal. (7 CT 1685, 1688.) The court held a further *in camera* hearing in which it essentially forced the defense to delay its opening argument. The court stated that much of the evidence in the defense opening-statement outline (Court's Exhibit 89) depended on appellant's testimony, and that since the prosecution was unaware of the scope of appellant's proposed testimony they prosecutor would likely object during the defense opening statement. (12 RT 2292-2293.) The court then stated that "in order not to interfere with the contents, the scope of your opening statement, I'm prepared to defer your opening statement until the prosecution completes their case in chief, and I needed to advise you of that." (12 RT 2293.) The only other alternative, the trial court said, would be for the defense to disclose to the district attorney now and in the opening statement their plans to call

appellant and indicate the contents of his proposed testimony. (*Ibid.*)

After conferring with co-counsel Norman Kallen, Mr. Halpern pointed out that the remedy for unproven matters asserted in opening statement lies in opposing counsel's closing argument, and that the defense should not have to reveal their intention to put appellant on the stand. (12 RT 2294-2295.)

The court rejected this argument, saying that if the defense wanted to make an opening statement which included references to the evidence in question, it would have to defer that statement until after the prosecution had rested. The judge indicated that his ruling was, and would continue to be, that sufficient foundation had not been laid for the defense to present evidence of appellant's statements to his handlers in advance of the Montemayor killing. (12 RT 2295-2296.)

Halpern responded:

> Once again, Your Honor, I don't believe, whether -- it's not objectionable, my stating to the jury that I believe this is what the evidence will reveal. There is no objectionable -- any grounds to object. We don't have to show a foundation for that.
>
> The court is well aware we intend to put the defendant on the witness stand in any event. Many of the things that he is saying, that he will be testifying to, will be corroborated or be testified to by others than the defendant. Almost everything he says is going to be – someone else will be testifying to what he is saying. So it's not -- even if we

didn't put him on the witness stand, the outline of what I was going to tell the jury would be told to them.

Also, tactically, it's my and Mr. Kallen's thoughts that it is critical to the defense that we put our opening statement on before the presentation of the People's case so that the jury can, when they are listening to the evidence, will have an idea, put it in context with what the defense is going to be, and that it would lose its effect if it were done after the presentation of the People's case. I can't see where in any point anything that I would say would be objectionable.

I understand the court's tentative ruling is if we -- the only way the court will allow us to put on an opening statement prior to the commencement of evidence is if we tell the jury in advance that the defendant intends to testify. I don't -- in all due respect, I think the court is in error in that thought. (12 RT 2296-2298.)

The court then asked how the defense intended to prove another matter included in the opening statement outline, i.e., that appellant was encouraged by his handlers to buy phones, cars, and other items as gifts for other gang members in order to stay in good graces with the gang. Halpern stated that even if appellant did not testify, the defense expert or one or more of the law enforcement officers would testify that this was common custom and habit for an informant. The court noted, however, that in discussions with the district attorney about the lack of defense discovery on the issue (see 12 RT 2299), the defense had been unable to explain which expert would so testify. (12 RT 2298.) The judge said that, while he was aware "that the defendant when called was going to testify consistent with that. . . . if you want to make your opening statement, we need to delete

that." (12 RT 2298-2299.) Counsel responded, "If the court is going to force me, I will tell, and I want it on the record I'm doing it out of – to this court's ruling, I will tell the D.A. now that the defendant is going to testify." (12 RT 2299.)

After discussion of other issues, the court suggested that Halpern give the page of the outline they had been discussing[46] to the prosecutor in order to find out if he had any objections so the court could rule on them before the planned opening arguments the following day. (12 RT 2301.) Mr. Kallen weighed in:

> MR. KALLEN: Your Honor, in terms of the court's observations, the making of an opening statement is a tactical decision by the defense, and if, in fact, the defense makes certain representations to the jury, and if, for whatever reasons, are unable to provide the jury with that information because of failure to meet the foundational elements in the evidence code or witnesses' fail to appear, then the defense will suffer because the prosecution undoubtedly will highlight that for the benefit of the jury.
>
> THE COURT: Well, I understand that aspect of it. My concern -- I distinguish that situation from the situation where, but for the defendant taking the stand, there has been 402 hearings conducted in the presence of both parties, the court has ruled that based on the assumption that other witnesses are going to testify as opposed to the defendant, these matters cannot be used in your opening statement and cannot be brought in front of the attention of the jury unless

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[46] From the record, it appears that the page in question was page four of the outline, Court's Exhibit 89. (8 CT 1692.)

there is a hearing outside their presence by one side or the other.

The topics that are raised up in page 4 are on the line concerning those 402 rulings, and so if I allowed you to do that, if I allowed you to do that without allowing the D.A. to be heard, then I'm basically, what, voiding all the work that we have just done.

. . . . .

MR. KALLEN: What the court alluded to, at least my understanding was, we would be precluded from offering that evidence unless we met certain foundational requirements. And without stating on the record, I believe the court is recognizing, that the person who would have to testify with respect to the items that we will talk about would be the defendant.

If the defendant did not testify, then our witnesses would not be able to introduce that form of evidence. Am I correct? And if that's correct, then even though we are not stating that the defendant is going to testify, if we -- if he refuses to testify, then obviously the information the court is concerned about will not be presented to the jury.

But if he does testify, then those witnesses we intend to call to confirm the representations or the testimony of our client will, in fact, get to the jury.

It's our responsibility to present appropriate competent evidence to support the allegations -- excuse me, to support the representations we are making to the jury in the opening statement. If we fail, we suffer, because we have not met our -- the evidentiary requirements to establish the information that we are giving the jury.

Why should we be precluded from advising the jury that this is what we believe the evidence will show in these proceedings in order to balance with the jury so that they do not hear just the prosecution, but when they hear the evidence, they will be able to weigh testimony of prosecution witnesses and recognize that the defense has yet to be heard, but that the defense intends to introduce testimony to refute what the prosecution is contending.

MR. HALPERN: In addition, also, they would be able to understand the cross-examination of the witnesses as to what -- where we are going with the cross-examination based upon the outline that was given to them in the opening statement.

Also, your honor, for instance, if the jury – if the District Attorney knew that the defendant was going to testify, how would he change his opening statement, could he bring in -- could he tell the jury the defendant had been convicted twice before of serious felonies, that he could be impeached with felonies? The answer is no, because they can't be told that until such time that the defendant actually does testify. And, in fact, I could tell the jury he's going to testify and at a later time choose not to put him on the witness stand and not have him testify.

THE COURT: Exactly. That's the problem.

MR. HALPERN: But I do have a right to give my opening statement at the beginning of the case.

THE COURT: No. That's where we disagree. The court has the authority, without jeopardizing your right to call your client, without interfering with your tactical decisions, to control how the matter is tried and proceeded. So long as you get a chance to make an opening statement and so long as you get to bring on your witnesses, including your client, the court is not interfering with your rights as a litigant in these matters. And so --

MR. HALPERN: But Your Honor, it's critical to the defense to give this, and to give our opening statement at the beginning of the case. It's not just a tactical or what we think would be better, it would be absolutely critical, because there is a line of cross-examination, particularly of Ms. Corona, that's going to go, and won't make any sense to the jury unless they know where I'm going with it, and will easily be forgotten as it's being heard because it has no context.

THE COURT: Well, I'm going to make this clear. You do not need to disclose to the prosecution under the court's direction the question of whether your client will or will not take the stand. We discussed this before, and have pointed out and made this part of the record, the defendant has the absolute right to take the stand, and he has the absolute right not to take the stand, regardless of what advice that you may provide to him. Until such time as he actually raises his hand and takes the oath, we do not know if he's going to testify or not.

The District Attorney in many of the 402 hearings has objected to certain proffered evidence on your part, either for lack of foundation or violation of the hearsay, et cetera, et cetera. The court has made explicit rulings that you could not refer to some of those subject matters in the presence of the jury unless there is another hearing outside the presence of the jury to determine whether you've laid the foundation or whether you have the exception to the hearsay matter, and things of that nature.

So to allow you then to put that into the opening statement would vitiate everything that we've worked through. So -- and I know that the court has the judicial authority to control the manner of the proceedings without, what, interfering with any of your absolute rights, and without causing you to have a premature disclosure.

The items mentioned to you on page 4 may be the areas that are the most difficult, and if you're prepared to disclose that to the district attorney to see if he has any objections, without telling him about if the defendant is or is not testifying, so that we can make a determination outside the presence of the jury if there is sufficient foundation for you to admit that, then that's a separate matter. But I won't even go there in view of the fact that you asked the court not to disclose the nature of your opening statement, which the court has not done so up to this point in time.

. . . . .

MR. KALLEN: I believe the court will advise the jury that opening statements are not evidence.

THE COURT: I will.

MR. KALLEN: It's just a road map. So even though the defense in its opening statement makes certain representations to the jury, the jury does not accept those representations as evidence. The only way that the representations get to the jury is if we put on witnesses who can confirm what we are representing to the jury. And if we fail to do that, then quite honestly, the prosecution is going to comment to the jury.

MR. HALPERN: Your Honor --

THE COURT: That's an alternative the court has, but it's not one I'm going to use, because I have a better alternative. I don't even have to have the problem. *I'll just simply defer your opening statement until you start your case.* You're not deprived of any right. You get to put on all the evidence that you're able to harbor together, and including putting on your client. (12 RT 2301-2308; emphasis added.)

Having little choice in the matter, counsel agreed to the court's suggestion that they show page 4 of their opening statement outline to the prosecutor.[47] However, even agreeing to do so did not placate the trial judge, who again advised the defense: "I want you to understand that based on those discussions out here in open court, you still may be in the situation where some of the matters may not be referred to before the jury during the opening statement." (12 RT 2308-2309.)

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[47] Because of what followed, this was never done.

Attorney Halpern asked whether the defense could make an opening statement at the beginning of the trial if they chose to reveal that their client would testify. However, while the court had previously suggested that this might be acceptable, the court now indicated that the defense would then have to disclose its opening statement to the prosecution in advance. "[Y]ou have to understand," the court said, "if you disclose to the D.A. that your client is going to testify, then I'm going to show him your opening statement so that we can find out if there is any objections to the proposed testimony." (12 RT 2310.) The court asked counsel to think about it, and think about revealing page 4 to the prosecutor, though both the court and counsel appeared to agree that doing so would make clear to the prosecutor that the defendant would testify. (12 RT 2311-2312.)

After lunch, Mr. Kallen informed that court that, in light of its rulings, the defense would reserve its opening statement until after the prosecution case-in-chief. (12 RT 2327-2328.)

Whether the deferral of the opening statement is considered a direct ruling by the trial court (see italicized sentence above, from 12 RT 2308), or the defense being forced to do so by the groundless and unconscionable limitations placed on their opening statement, this was judicial error of the first magnitude.

B. THE TRIAL COURT'S INSISTENCE THAT THE DEFENSE EITHER DISCLOSE THAT THE DEFENDANT WOULD TESTIFY OR NOT INCLUDE VITAL INFORMATION IN ITS OPENING STATEMENT, FORCING IT TO DEFER IT, WAS PREJUDICIAL ERROR

There is no question that a trial judge has a significant degree of control over the conduct of the trial. Penal Code section 1044 provides that the judge has a duty "to control all proceedings during 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." However, in this case, what the defense sought to argue was both relevant and material.

Section 1093, subdivision (b), establishes the order of proceedings in criminal trials. The subdivision provides that, after an opening statement, or the opportunity for an opening statement by the district attorney, "the defendant or his or her counsel may then make an opening statement, or may reserve" it until after the prosecution's case. Note that the statutory language refers to *defendant* or *counsel* making this decision. However section 1094 provides, "When the state of the pleadings requires it, or in any other case, for good reasons, and in the sound discretion of the court, the order prescribed in Section 1093 may be departed from." In this case, there was no sound, good, or valid reason to overcome the defendant's clear

preference not to defer his opening statement. As discussed below, the statements by appellant to his handlers, which triggered the court's ruling, were simply not hearsay

There are cases which discuss the extent of a trial court's discretion under section 1044 with respect to closing argument. (*E.g., People v. Vance* (2010) 188 Cal.App.4th 1182, 1201-1202, [failure to remedy prosecutor's closing-argument misconduct]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1386-1388 [prosecutor's closing argument]. However, appellant has found no case in which a trial court required the defense to defer its opening argument until the conclusion of the prosecution case.

To the contrary, the case law strongly indicates that the court's discretion should be exercised in favor of ensuring the defendant a fair trial. "In exercising its discretion under section 1044, a trial court must be impartial and must assure that a defendant is afforded a fair trial." (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1334, citing *People v. Blackburn* (1982) 130 Cal.App.3d 761, 764.) The latter case quotes *People v. Mahoney* (1927) 201 Cal. 618, 626 for the following proposition: " 'Every defendant [charged with a criminal offense] is entitled to a fair trial on the facts and not a trial on the temper or whimsies of the judge who sits in his case.' "

In *People v. Ashley*, this Court upheld a trial court's refusal to allow a *pro per* defendant to refer to matters in his opening statement which had been ruled inadmissible. (*People v. Ashley* (1963) 59 Cal.2d 339.) However, Ashley had been the subject of an earlier section 1368 sanity hearing in which he had been adjudged insane and transferred to Atascadero State Hospital until his sanity was restored.[48] (*Id.* at pp. 347-349.) When he returned to court two years later, Ashley refused the appointment of counsel and, after the prosecution's case-in-chief was concluded, presented a rambling and incoherent opening statement and testimony. (*Id.* at pp. 350-354.) The trial court limited parts of the argument which referred to inadmissible evidence, and Ashley was convicted. In an *in propria persona* brief before this Court, Ashley argued that the trial court committed error in limiting his opening statement. Without any further detail on what was involved, this court's opinion stated only that the defendant was "attempting to refer to matters not admissible in evidence, and the court properly told him this he could not do." (*Id.* at p. 361.)

Ashley is not controlling here. First, the case involved unique circumstances in which a *pro per* defendant who had previously been

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[48] At that time, Penal Code section 1368 referred to the defendant's "sanity" rather than to his "mental competence," as the current version of the section does.

diagnosed as schizophrenic and adjudged incompetent made a rambling and incoherent argument in which he argued, inter alia, that because he was "the best professional soldier on the earth, it is impossible for me to become insane" and "it is impossible for me to be wrong." (*Ashley, supra*, 59 Cal.2d at p. 352.) Although the case has been on the books for half a century, appellant has found no subsequent cases in which *Ashley* was ever cited to support a trial court's limitation on opening statements. Thus, the circumstances of the case and its subsequent history both suggest the case must be limited to its facts. Moreover, this court's summary discussion merely states that Ashley's opening statement "went far afield from what is proper in an opening statement," but does not specify the nature of the inadmissible material. (*Ibid.*) Furthermore, the opinion described Ashley's *pro per* appellate brief (which he submitted despite having counsel appointed for his appeal) as "rambling, incoherent, and difficult to follow" (*Id.* at p. 358), and it is therefore not clear whether the question of the propriety of the trial court's limitations on opening statement was ever competently researched and argued. Indeed, this court's opinion suggests that the inadmissible matters excluded by the judge had no relevance or materiality to the case. By contrast, in this case counsel had: (1) shown that the evidence at issue was non-hearsay and thus both admissible and

relevant; (2) informed the judge of the defense's intention to call the defendant, making the evidence in question admissible as non-hearsay for this separate reason; (3) asserted a tactical reason for seeking to refer to these proper matters in opening statement, even at the risk of not ultimately making their proof; and (4) vigorously and repeatedly asserted their desire to make their opening statement at the start of trial.

The defense's tactical decision to summarize what they expected the evidence to show in advance of trial was both meritorious and sound defense strategy. While there may be situations in which counsel may competently decide to defer the opening statement (*e.g.*, *People. v. Pangelina* (1984) 153 Cal.App.3d 1, 6; *People v. Hayes* (1971) 153 Cal.App.3d 459, 472), this is not such a case. Indeed, a 2010 draft of proposed revisions to the American Bar Association Criminal Justice Standards for the Defense Function, Standard 4-7.4, Opening Statements, indicates the importance of making an opening statement at the outset of the case.

> (a) Defense counsel should be aware of the importance of an opening statement. *Absent extraordinary reason, an opening statement should always be given at the beginning of the trial and not be deferred.* Any decision to defer the opening statement should be fully discussed with the client, and a record of such decision should be made. The opportunity to give an opening statement should never be waived, even if deferred.

> (b) Defense counsel's opening statement should be specific regarding the facts and context of the client's case, and should, among other things, alert the jury to known flaws in the government's case and present the jury with the defense theory of the case. ("Symposium: A Roundtable Discussion of the ABA's Standards for Criminal Litigation: The Role of Reporter for a Law Project" (2011) 38 Hastings Const. L.Q. 747, 798; emphasis added.)

In a treatise on opening statements, the author explains why this is so important:

> Jurors do not wait until the end of the trial to formulate their opinions about who wins and who loses.
> . . . . .
> . . . Think of a trial as a series of juror preferences. Jurors consistently prefer something, one witness to another, one document to another, one lawyer to another, and one begging to the other! (Dominic J. Gianna, *Opening Statements 2d: Winning in the Beginning by Winning the Beginning* (West, 2004), at p. 1-3.)

Gianna cites well-known studies of juries by Kalven and Zeisal in the 1960's and repeated in the 1980's. (*See* Kalven & Zeisel, *The American Jury* (1966).) These studies, according to Gianna,

> tell us . . . that a good percentage of the American population prefers to view a contest, a conflict – or a case, from one point of view or another. When that happens listening begins. . . . When you decide to see the trial from the points of view of one of the parties, comprehension takes hold. When that happens, that is, when the jurors form a point of view from which to view the case, when they have picked "the winner," the evidence falls into place in line with that point of view. Jurors readily accept the facts that fit in with their point of view, *and for the most part, do not leave that*

> *point of view* . . . and they reject facts, evidence, that is contrary to the point of view they have adopted. If jurors are polled at the end of the openings statement, up to 75-80% have "preferences" and those preferences, for the most part, but not always, do not change. (*Id.* at pp. 1-6 - 1-7; emphasis added.)

In this case, the trial court's error in forcing the defense to defer its opening statement prevented counsel from having a fair opportunity to persuade at least one juror to adopt, or even to consider, its point of view prior to the presentation of the People's case. This meant that the prosecution was allowed to present its entire case before the jury was even aware that the defense had an competing, and compelling, narrative to offer– an alternative lens through which the jurors might view the evidence.

The trial court initially appeared to be concerned about the content of the defense opening statement because the prosecutor would object on hearsay grounds to statements of law enforcement regarding what appellant told them about the impending crime. However, the court's concerns were baseless. First, the statements simply were not hearsay. Statements to Starkey and Rodriguez about a planned a robbery-murder in Orange County (21 RT 3878-3880; 23 RT 4220-42223) were not introduced for the truth of the matter asserted; they were introduced to show that appellant reported what Perna and Corona told him to Starkey and Rodriguez, thereby

demonstrating that he was not a part of the conspiracy to kill Montemayor.

Second, the trial court knew that the defense intended for Navarro to take the stand. If appellant actually did so, the statements would not have been hearsay because the declarant would have been testifying as to his own statements and would have been available for cross-examination. The mere possibility that he might not testify as the defense expected was no different in kind than the possibility that any witness or piece of evidence the defense intended to present might not in the end turn out as expected. However, as both defense counsel correctly noted, that is a risk that applies to any witness or evidence to which the defense might refer in an opening statement, and the proper remedy when there are defects in the defense case is the prosecutor's closing argument. Certainly, the defense cannot be prevented from making an opening statement simply because of the possibility that the actual evidence might not be what the defense expects before trial actually begins.

C. THE STATEMENTS IN ISSUE WERE NOT HEARSAY

As noted above, the statements to appellant's handlers about the impending crime were not hearsay.

The entire question and rulings regarding the defense opening statement arose with the prosecution's assertion that the statements

appellant made to his law enforcement his handlers about the impending Montemayor killing in Orange County were hearsay. Later, he expanded his objection to include relevance. However, these statements were clearly relevant and non-hearsay. Thus, without regard to whether the defense decided to put appellant himself on the stand, the statements were perfectly admissible and constituted proper matter for an opening statement.

Evidence Code section 1200, subdivision (a), defines hearsay evidence as "evidence of a statement that was other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." As one of California's foremost authorities on evidence has stated, "[i]f a declarant's statement is offered to prove some fact other than the truth of the matter stated or asserted by the statement, it is not hearsay." (B. Jefferson, *The Hearsay Rule – Determining when Evidence is Hearsay or Nonhearsay and Determining Its Relevance as One of the Other* (1999) 30 U.West. L.A. L. Rev. 135, 139 [hereinafter, "Jefferson"]; Evid. Code § 1200, subd. (a).)

Under Justice Jefferson's analysis, appellant's statements fall into one or more of three non-hearsay categories of statements:

> (1) a Declarant's Statement Offered to Prove Information, Knowledge, or Belief on the Part of the Person to Whom the Statement is Made; or (2) a Declarant's Statement Stating Facts Other than Declarant's State of Mind but Offered to

> Prove, by Inference, Declarant's State of Mind and Declarant's Conduct in Conformity Therewith; or (3) a Declarant's Statement Offered to Prove the Making of the Statement as a Relevant Fact in the Action. (*Id.* at p. 142 [initial capitals in original].)

The statements at issue could be said to prove that appellant's handlers knew of the impending hit. However, the statements would arguably be of questionable relevance under that theory because the defense was not seeking to show what the handlers knew or believed. It could also be argued that the statements qualified as nonhearsay under the third category because it was a relevant fact for the defense that appellant told his handlers about it the proposed crime. However, the category under which the statements in this case most clearly fall is the second category. The statements were offered to prove, by inference, appellant's state of mind as a non-conspirator; far from being inclined to accept and act on the solicitation, appellant instead reported the conspirators to law enforcement officers. That state of mind was not merely relevant but crucial to the defense case.

In short, however the statements are analyzed, they simply are not hearsay. The proposed testimony, which was ultimately presented to the jury, by ATF Agent Starkey and Detective Rodriguez was that appellant told them he had been solicited to commit a murder in Orange County. The

statements were not offered to prove the truth of the matter stated, only that he made those statements. They were not hearsay, and both the prosecutor and the court were wrong in concluding otherwise. (*See also, People v. Mayfield* (1997) 14 Cal.4th 668, p. 741 [pleas for help "were not hearsay because they were not admitted for the truth of the matter stated"]; *People v. Lo Cicero* (1969) 71 Cal 2d 1186, 1189-1190 [statement of dealer to defendant that undercover detective wanted drugs and dealer had them not hearsay, because offered not for truth of them but to prove the words spoken by the dealer to the defendant.]; *People v. Gonzales* (1968) 68 Cal 2d 467, 471 [content of telephone call between informer and defendant, reported by police testimony, was not hearsay because it was offered to show that the conversation took place, not to prove the truth of the matters asserted; [49]

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[49] Contrary to defense counsel's contention, appellant's statements to his law enforcement handlers did not fall within the state-of-mind exception to the hearsay rule, but were clearly non-hearsay for other reasons. As Justice Jefferson explained in the article referenced in the text:

> There is a great difference between a declarant's statement which asserts a person's state of mind and a statement asserting other facts. To constitute a statement asserting a person's state of mind, the statement must directly assert that the person - whether declarant or other person - has a particular state of mind, e.g., intent, fear, anger or belief. (*Id.* at p. 141.)

The proffered testimony of the handlers was also, quite clearly, relevant, for the reasons just discussed; since he reported the impending hit to Starkey and Rodriguez, the statements had a strong tendency to prove that appellant did not intend to commit the murder. No asserted gangland shot-caller would send his underlings to commit a crime after he had told his handlers that he had been solicited to commit it.[50]

Nor did it make any difference, as the trial judge repeatedly asserted, whether or not appellant actually took the stand. Although his testimony would have made the statements through his handlers admissible under a different theory, the statements were not hearsay whether he testified or not. They were also equally reliable whether or not appellant testified, and, given the testimony's source – two law enforcement officers testifying to two similar statements at about the same time – the statements certainly could not have been excluded as inherently unreliable. The trial judge was simply wrong in relying on this supposed hearsay to prevent the defense from making its opening statement before the jury had been prejudiced by hearing the prosecution's view of the facts without first learning that the

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[50] The converse inference, which the prosecutor sought to suggest, was that Navarro told his handlers just enough to get himself off the hook, but not enough to incriminate him or to truly warn the victim or Orange County law enforcement. That this is a possible inference, however, does not render the evidence inadmissible.

defense took a very different, and entirely more plausible view of the evidence.

D. THE COURT'S ERROR WAS A PREJUDICIAL ABUSE OF DISCRETION, AND REVERSAL IS NECESSARY

This was more than simple hearsay error. It was more than an abuse of discretion (although it was surely that). Rather, the court, in a blatant exercise of judicial overreach, unconstitutionally meddled in the presentation of the defense case. Indeed, as shown below, it did so not for the last time, but most egregiously here. The result was prejudicial interference with appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to assistance of counsel, and to present a defense.

As appellant has shown in the foregoing discussion, the right to present an opening statement at the beginning of trial is a crucial palliative to the uncontradicted presentation of the prosecution's case, a balance which allows the defense case, when presented, to have a chance of raising a reasonable doubt. Because of the trial court's distortion of the trial process, the standard of error to be applied is the federal standard, and the state cannot show that is was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Beyond the constitutional violations, the court's rulings – both as to the asserted hearsay and the variance of the order of presentation, certainly were a prejudicial abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113); *People v. Rowland* (1992) 4 Cal 4th 238, 264.)

Over a century ago, this Court described the difficulty in defining exactly what is meant by abuse of judicial discretion, though "it is fairly deducible from the cases that one of its essential attributes is, that it must plainly appear to effect injustice." (*Clavey v. Lord* (1891) 87 Cal. 413, 419.) More recently, it was said thusly: "Although precise definition is difficult, it is generally accepted that the appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered." (*In re Marriage of Connely* (1979) 23 Cal.3d 590, 597-598; *People v. Benvenides* (2005) 35 Cal.4th 69, 88.) It has also been said that discretion is abused only when the trial court's ruling is arbitrary, whimsical, or capricious. (*People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1614; see *People v. Giminez* (1975) 14 Cal.3d 68, 72 ["capricious disposition or whimsical thinking"].)

Whatever the standard, the trial court, in the constellation of errors described here, abused its discretion, leading to injustice. The statements complained of were not in any sense hearsay; they were not objectionable;

and as made clear in the discussion above, a defense opening statement is crucial in preventing a jury from forming an irredeemable bias in favor of the People during the presentation of their case. To argue otherwise is to abandon common sense regarding human – and jury – behavior. Perhaps most telling, appellant's research was unable to uncover any prior California case in which the trial court had required deferral of, or by its rulings forced counsel to defer, the defense opening statement. Indeed, if all it took to prevent the presentation of a defense opening argument at the beginning of trial were threats by the prosecutor to raise hearsay objections, it would by now be standard practice to do so.

The state standard for prejudice is whether it is reasonably probable – defined as a reasonable chance, more than an abstract possibility – that the jury would have reached a different result absent the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 918; *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)

Deferral of the opening statement was devastating. The reason is explained in the in the proposed 2010 revisions to the Standards on the Defense Function, discussed *ante* at p. ***. If the jury hears only what the prosecution thinks the evidence will show, that's what they would be

looking for when they heard the evidence against appellant. After that, it would be virtually impossible to get them to unlearn what they have heard and listen to the defense case with an open mind. Instead, they were expecting the defense to disprove what they think the prosecution has already proved – a burden no defendant can bear. And if they did not understand the defense theory in advance, the defense cross-examination of prosecution witnesses like Corona was necessarily less effective, if not entirely ineffective.

To say that this was factually close case understates the matter; indeed, while there was at best marginal evidence of his agreement to take part in the conspiracy, there was ample evidence that he was not involved, was set up, and would never have allowed the crime to commence in the manner that it did.

The court's errors far surpass either the federal or state standards of prejudice, grossly interfered with appellant's constitutional rights to effective counsel and to present a defense, and the case on these grounds alone should be reversed.

III. THE TRIAL COURT'S OVERLY LITERAL INTERPRETATION OF PENAL CODE SECTION 1054.3 AND *ROLAND V. SUPERIOR COURT* RESULTED IN A VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE

The trial court improperly excluded the critically important testimony of a defense witness as an apparent sanction for defense counsel's purported failure to provide adequate discovery to the prosecution regarding the content of a law enforcement witness's expected testimony. Not only did the court err in its ruling, but the sanction the court imposed effectively punished appellant for his counsel's supposed error and thereby prevented appellant from presenting a complete defense. The court's ruling and its wholly unwarranted sanction excluding critical defense testimony violated appellant's right to due process of law under the Fifth and Fourteenth Amendments, his Sixth Amendment right to counsel, and his Eighth Amendment right to a reliable guilt and penalty judgment, and reversal is required.

A. FACTUAL BACKGROUND

1. Pre-trial Discussions Regarding Discovery of Oral Statements

Appellant's trial took place in the fall of 2007, and the parties were therefore required to comply with the reciprocal discovery provisions of Penal Code section 1054.3, which had been added to the Penal Code as

part of Proposition 115 in 1990. That section states, in pertinent part, as follows:

> (a) The defendant and his or her attorney shall disclose to the prosecuting attorney:
>
> > (1) The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial. (Pen. Code §1054.3.)

Three years prior to appellant's trial, the Court of Appeal for the Third Appellate District decided the case of *Roland v. Superior Court* (2004) 124 Cal.App.4th 154 (hereafter, "*Roland*"). *Roland* held that the foregoing portion of section 1054.3 required the defense to provide the prosecution not only with pretrial discovery of any written or recorded statements of its witnesses, but also relevant *oral* statements made to the defense by any witness the defense intended to put on the stand. (*Id.*, 124 Cal.App.4th at pp. 166-168.)

On several occasions during the months leading up to appellant's trial, the trial court discussed with counsel the reciprocal discovery requirements of section 1054.3 and the *Roland* requirement that the defense

was required to disclosed both written and oral statements to the prosecution. In a status hearing on May 29, 2007, the court advised defense attorney Russell Halpern that:

> [I]f you or your investigator have talked personally to a witness and have received some different or supplemental information as a result, then you need to disclose that to the opposing party. . . . [¶] [W]e are asking you to be mindful of the *Rowland* (*sic*) case that requires you by law to provide the information that's enumerated or that's set out in that case. (4 RT 628.)

At the next status hearing, in response to the prosecutor's assertion that, in the absence of a written report, he was entitled at least to a summary "that recites all statements of this witness[,]" the court instructed defense counsel that, as to oral communications, "I do not want a summary, I want a statement reduced to writing." (4 RT 664, 666.)

At a subsequent hearing, the prosecutor complained of the lack of discovery the defense had disclosed at that point and contended that even if a written report was not forthcoming, *Roland* required that he "be given a summary that recites all relevant statements of [appellant's gang expert] witness." (4 RT 664.) However, the judge instructed Halpern that the prosecutor was entitled to more than the summary he had requested:

> If you have talked to a witness yourself or you were present when your investigator conducted the interview and that witness made certain statements to you, I do not want a summary, I want a statement reduced to writing. So please

> comply with both Penal Code section 1054.3 and the *Roland* case. (4 RT 666.)

On August 9, the prosecutor again complained to the court regarding the lack of discovery he had received from the defense. (4 RT 786-789.) The judge then held an *ex parte* proceeding with the defense in chambers and explained his interpretation of *Roland*:

> My understanding of *Roland* is that if you verbally interview a witness or you have an investigator interview a witness, and you make a further determination based on that interview you're going to call that person during the guilt phase or during the penalty phase, you make that decision, and you failed to give that, *the contents, not a summary*, your best tape recording or written report of what they said to you, if you fail to provide that to the opposing party, and they bring a motion in front of this court to find your willful failure to comply and the court makes that decision, then that witness may not be called to the stand and you may not refer to the contents of that during your opening statement or your closing argument. (4 RT 791-792; emphasis added.)

By way of example, the court stated that if Halpern had conducted an interview with appellant's mother prior to trial and had not taken notes, and if all defense counsel could remember of the conversation was that appellant's mother thought the defendant was in Las Vegas on a given date, and if that was all he disclosed to the prosecution, the judge would not permit him to question her about anything else on direct examination. (4 RT 794-795.)

The court's discovery compliance deadline fell on August 17, 2007. Six days later, in a hearing on August 23, the issue of appellant's mother's testimony arose again. Although defense counsel had provided an oral summary of her testimony (9 RT 1790-1791), the judge warned that he would bar the witness entirely unless Halpern provided the prosecutor with the witness's actual statements, stating that "[t]his person is not going to testify unless you comply with the prior court directive. At this stage, this person will not testify in the guilt phase because you have not complied with *Roland*." (9 RT 1793.) The court said that, without regard to where the information had come from, if the defense wanted appellant's mother to testify it must comply with *Roland*, find out what she was going to say, and give her statements to the prosecutor immediately. (9 RT 1795.) Moreover, the court warned Halpern that "you need to be specific as to which questions you're going to ask her and what you anticipate she is going to testify to." (9 RT 1800.)

Later in the hearing, the court renewed its demand for specificity:

> Mr. Halpern, listen to me carefully. If what you have provided the district attorney provides the content and scope of what this potential witness said to you in an oral interview, and you plan to call that witness to the stand, then be aware that that's what the witness will testify if she's allowed to testify and not beyond that. (9 RT 1821.)

2. The Trial Court's Rulings Excluded Critical Defense Testimony

In his direct testimony, appellant testified that he had gone to the Foothill Division station and told Detective Rodriguez about the impending hit in Orange County. He told Rodriguez "Everything that happened, how I met this girl, what she said she was, and what she wanted to happen in Orange County. (18 RT 3362.) During Rodriguez' testimony, the defense sought to corroborate that appellant told him during the pre-crime conversations both about the woman (Corona) and the involvement of the Big Homies (the EME leaders).

(a) Rodriguez Direct Examination

During his direct examination for the defense, Detective Rodriguez testified that appellant had contacted him sometime in July, 2002, and asked whether Rodriguez wanted to investigate a possible kidnap-for-ransom or murder-for-hire plot. (23 RT 4221-4222.) Rodriguez recalled that appellant had told him the case involved "Big Homies," which he explained meant "shot-callers" or highly placed members of the Mexican Mafia. (23 RT 4221-4222.) Rodriguez said he told appellant to get more information and provide him more details about the plot. (23 RT 4221-4222.)

Mr. Halpern then asked Rodriguez whether, having spoken recently with associate counsel Stacie Halpern, Rodriguez recalled whether appellant had told Rodriguez that a woman was harassing him and trying to get him involved in the matter. (23 RT 4223.) The prosecutor objected on vagueness grounds and the court sustained the objection. Mr. Halpern then attempted various reformulations of the question, but the court again sustained a series of objections for vagueness. (23 RT 4223-4224.) The court then dismissed the jury. (23 RT 4224.)

Asked for an offer of proof, Mr. Halpern explained that notes from an interview three years prior indicated that Detective Rodriguez had mentioned recalling at that time that appellant not only mentioned "the Big Homies" but also that a woman was trying to bring him down to Orange County to "do something." (23 RT 4224-4225.) The prosecutor stated that he had not received any discovery about this, and the judge noted that this information had not been in the two Rodriguez witness statement reports reviewed by the court and counsel that morning. Defense counsel said that he did not know whether the statements were in the reports themselves, but said he had spoken with the prosecutor many times about what Rodriguez would testify. (23 RT 4225.)

After a whispered conversation with associate counsel Stacie Halpern, defense counsel explained that Rodriguez had told him the previous evening that "somebody," not a woman, was trying to get appellant to commit the Orange County crime, and that either Rodriguez or appellant himself had previously told Halpern that this "somebody" was a woman. (23 RT 4226-4227.) Counsel insisted that he had done his best not to hide anything and to disclose everything that Rodriguez had told him. The court, however, did not "accept that representation." (23 RT 4227.) Because the two witness statements did not include references to the fact that a woman was attempting to get appellant involved with the kidnap or murder plot, and because the court did not accept counsel's representation of good-faith error, the court prohibited Halpern from inquiring into this area. (23 RT 4228-4229.) Halpern then moved for a mistrial, but the court denied the motion. (23 RT 4229-4230.)

Later, Halpern objected again and argued that the court should not exclude the evidence because even if the failure to disclose the information had been an error, excluding the evidence would punish appellant for counsel's own error. Halpern noted that the court had several other alternatives, including instructing the jury that the discovery had been

provided to the prosecution after the deadline, or finding counsel in contempt and fining him. (42 RT 4236.)

(b) Rodriguez Re-Direct

The *Roland* issue arose again during Halpern's redirect questioning of Rodriguez.

In his cross-examination, the prosecutor had asked Rodriguez a series of questions regarding whether appellant had provided Rodriguez with more specific information about the kidnap-for-ransom plot, such as whether appellant had mentioned the name of the intended victim or the name "Mira," or whether appellant told Rodriguez he heard the information from the daughter of a Mexican Mafia shot caller. To all of these questions, Rodriguez had responded, "No." (23 RT 4282-4288.)

On redirect, Halpern asked whether Rodriguez recalled talking to appellant about the kidnap for ransom plot prior to his arrest in 2002. When Rodriguez said he did, Halpern asked whether Rodriguez recalled names, places, or other information appellant had told him about the matter, and the prosecutor objected on hearsay grounds. The court then dismissed the jury but kept Rodriguez on the stand. When the jury had left, the court asked the witness whether he recalled speaking with appellant at the jail shortly after his arrest in 2002 and if so what appellant had said. Rodriguez

said that appellant had reminded him of a previous conversation they had in which appellant had told Rodriguez about a woman who was trying to get him involved in a kidnap for ransom matter on behalf of the Big Homies. When Rodriguez said he remembered, appellant told him that was the matter for which he had been arrested. (23 RT 4296-4297.) Rodriguez now remembered that appellant talked about a female and the Big Homies. (23 RT 4299.)

The prosecutor then renewed his hearsay objection, arguing that the defense was seeking to introduce the statement for the truth of the statement's content. (23 RT 4298.) Halpern argued the statements were prior consistent statements, but the prosecutor countered that the statement did not qualify as a prior consistent statement because the motive to fabricate had arisen prior to the making of the statement, citing *People v. Hitchings* (1997) 59 Cal.App.4th 915, and Evidence Code sections 791 and 1236. (23 RT 4299-4300.)

Halpern then made an offer of proof that when he had spoken to Rodriguez in the hallway during a previous break, Rodriguez told him that he could now recall several facts appellant had told him when they met in jail shortly after his arrest. During that post-arrest meeting, appellant had told Rodriguez that a woman brought him down to Orange County to get

him involved in the kidnap for murder plot, and that the plot involved the Big Homies. (23 RT 4303.)

Halpern explained that he wanted to ask Rodriguez whether appellant might have told Rodriguez any of these facts in July, 2002, prior to his arrest. Halpern said he expected Rodriguez would testify that he was not sure, but that when Navarro told him these facts during the jail meeting, they did not seem inconsistent or false. (23 RT 4303-4304.)

The court responded that "I'm simply going to rule at this point in time not to allow that in." (23 RT 4304.) The court indicated it would reconsider its ruling after the court and parties had reviewed *Hitchings* and the Evidence Code sections cited by the prosecutor. Halpern then asked whether he could ask the witness if he could be sure appellant had not previously told him a woman was trying to get him involved in a murder in Orange County and that the case involved the Big Homies. The court replied, "Well, that other part you have a *Roland* problem. We discussed that this morning. And this part here, which has to do with a statement that defendant made to this witness post his arrest is the area you're seeking to introduce as a prior consistent statement to his in-court testimony, and that's the fine area that we are looking at." (23 RT 4305.)

Halpern said he merely wanted to ask whether the witness wanted to reconsider his redirect testimony. The court replied, "that falls within the ambit of our prior discussion concerning your compliance with *Roland.*" (23 RT 4305.) Halpern protested that the witness had only just told him, for the first time ten minutes previously, that when appellant had told him about the kidnap for ransom case in jail Rodriguez did not think it was the first time appellant had told him about the case. (23 RT 4306-4307.) However, the court reaffirmed its ruling, pending further legal discussions. (23 RT 4307.) Halpern then asked if he could ask Rodriguez whether he wished to modify his earlier testimony in any way, but the Court again disallowed it. (23 RT 4308.) Halpern: "Your Honor, with all due respect, the court is restricting me from asking the witness whether he made a mistake in his earlier testimony." The court did not respond. (23 RT 4309.) After the recess, Mr. Halpern again sought permission to counter the prosecution's series of questions on cross-examination, but the court said he would consider all this in an Evidence Code section 402 hearing at the end of the day. (23 RT 4310-4313.)

In that 402 hearing, the court questioned Rodriguez about whether there were any other contacts with appellant on the subject of the crime other than the two before the crime and the one shortly after appellant's

arrest. Rodriguez said there could have been a third pre-crime conversation, but he only remembered two. (23 4340-4341.) There was no further questioning about Rodriguez's current recollection (for which, see 23 RT 4299; *ante,* p. ****) or how he had come by it.

After Rodriguez was excused from the hearing, Halpern then explained that the reason Rodriguez believed he had previously heard what appellant had told him during their conversation at the county jail was that for a woman to have transmitted an order from a shot caller to appellant was a very unusual event. In the culture of the Mexican Mafia and street gangs, women do not usually give orders. When appellant told him that the woman had transmitted an order from the Big Homies, Rodriguez felt certain that the defendant had told him about this unusual event at an earlier time, and the earlier time could only have been in July. (23 RT 4346-4347.)

Two court days later, Halpern sought to re-call Rodriguez to ask whether he recalled telling appellant during their post-arrest interview in the jail that he recalled that appellant had previously told him about the woman from Orange County seeking to get him involved in the kidnap for ransom plot on behalf of the Big Homies. Halpern explained that this question did not call for a hearsay statement or prior consistent or

inconsistent statement of appellant because he would be asking Rodriguez only about statements Rodriguez himself had made. (25 RT 4551-4553.)

The court asked whether Rodriguez had taken notes at the jailhouse meeting with Navarro, and Halpern replied that Rodriguez had not. Halpern said that Rodriguez had not told Halpern that he recalled having heard appellant discuss these matters previously until the day Rodriguez had testified, and that Halpern had immediately reported the information to the district attorney and also placed the new information on the record. (25 RT 4554-4555.)

The trial court focused on the fact that Detective Rodriguez had met with defendant and counsel about two months prior to trial. (25 RT 4555.) Counsel Halpern had fully explained the limited purpose of the meeting: to discuss a letter that counsel thought had been circulating in the Valley, that counsel thought Rodriguez possessed, regarding appellant being an informant. (25 RT 4555-4556.)

The court then denied Halpern's request to re-open his examination of Rodriguez. The court noted that it was considering,

> the nature of your client's testimony when he was on the stand . . . that he repeatedly asserted that he had very little recollection as to what took place five years ago. I'm citing that as a factor because of the factors that are being discussed here. [¶] One of the things the court needs to evaluate is how trustworthy the out-of-court statements are, and I jut (sic)

> don't find it to be a trustworthy area and therefore will deny the request to recall Rodriguez to testify as to this matter." (25 RT 4557.)

Halpern again emphasized that he was not seeking to present appellant's statements but those of Detective Rodriguez himself. The court responded: "What I'm saying, what you're offering as the foundation is that the defendant recalls that conversation, told that to Rodriguez back in 2002, but for an unreported, unrecorded, no-notes-taken conversation is the basis of your offer." (25 RT 4558.)

Co-counsel Kallen protested that any witness should be permitted to return to the stand and testify that upon reflection, having reviewed their testimony and considered all the events that occurred, they wanted to correct their testimony. (25 RT 4560-4561.) However, the court refused to reconsider its ruling, stating "I'm going to deny your request to recall Rodriguez. The court finds that the proposed question and answer on this subject matter is untrustworthy. The factors the court has considered have been identified and put on the record." (25 RT 4561.) The court further explained as follows:

> [T]here are several factors the court considered. One of the big factors is a percipient witness was allowed to talk to the defendant, and that's a big factor in the court's consideration. And there is no way that you can get to Rodriguez's testimony without stating what the defendant allegedly said to

the witness. [¶] So you got a couple of problems there. I don't want to discuss it further. (25 RT 4562)

3. Appellant's Motion for Reconsideration

On October 3, 2007, Halpern filed a motion for reconsideration (7 CT 1766 *et seq.*) in which he quoted and cited *Chambers v. Mississippi* (1973) 410 U.S. 284, 294, and *People v. Cudjo* (1993) 6 Cal.4th 585 for the proposition that the court ought not substitute its determination of credibility of a witness for the jury's: "Except in these rare instances of demonstrable falsity, doubts about the credibility of the in-court witness should be left for the jury's resolution; such doubts do not afford a ground for refusing to admit evidence under the hearsay exception for statements against penal interest." (7 CT 1771, quoting *Cudjo*, *supra*, 6 Cal.4th at p. 609.)

The court denied the motion without comment. (26 RT 4601-4602.)

B. THE COURT'S INCREASINGLY STRICT INTERPRETATIONS OF *ROLAND*, ITS ERRONEOUS HEARSAY RULINGS, AND ITS UNWARRANTED EXCLUSION OF RODRIGUEZ'S ADDITIONAL TESTIMONY DEPRIVED APPELLANT OF HIS RIGHT TO PRESENT A COMPLETE DEFENSE, AND VIOLATED HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL

The prosecutor's initial objection to questions about what appellant told Rodriguez about the crime beforehand, during the defense direct

examination, was on hearsay and discovery grounds, but the trial court's ruling was explicitly on the basis of *Roland*. (23 RT 4225, 4228-4229.) In his statements regarding the subject after the prosecutor's hearsay objection during re-direct questioning, the court again referenced *Roland*. (23 RT 4305-4306, 4311.)

1. *Roland* Was Wrongly Decided, But If Not, The Trial Court Misapplied It

The trial court cited *Roland* as one of its reasons for excluding Rodriguez's testimony that he recalled things differently now. (23 RT 4306-4307.) The trial court appeared to believe that every scintilla of evidence to which a witness might testify must have been provided in discovery or the court was required to exclude it from evidence. As an initial matter, *Roland* was wrongly decided. But, even if it was not, the trial court here misapplied it, by forging a far-too-strict interpretation of its oral-statement rule.

Roland should be overruled because it inappropriately expanded the requirements of section 1054.3. This Court has explained that, "In criminal proceedings, under the reciprocal discovery provisions of section 1054 et seq., all court-ordered discovery is governed exclusively by--and is barred except as provided by--the discovery chapter newly enacted by Proposition 115." (*In re Littlefield* (1993) 5 Cal. 4th 122, 129.) In

addition, section 1054, asserting the purposes of the reciprocal-discovery chapter, states, *inter alia*, that one of those purposes is "To provide that *no discovery shall occur* in criminal cases *except as provided by this chapter*, other express statutory provisions, or as mandated by the Constitution of the United States." (§ 1054, subd. (e); italics added.) There is simply no mention, in section 1054.3 or elsewhere in the statute, of the discovery of oral statements.

Nevertheless, the *Roland* court held that "section 1054.3 . . . requires defense counsel to disclose to the prosecution *all* relevant statements" of defense witnesses, other than defendant, either relayed orally to defense counsel by a third person, such as an investigator, or made by the witness directly to defense counsel." (*Id.* at p. 160; emphasis in original.) According to the *Roland* court, the purpose of section 1054.3 and related sections of the discovery statute was " 'to reopen the two-way street of discovery . . . .' " (*Id.* at p. 162, quoting *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372.) The court noted this Court's explanation in *In re Littlefield*, *supra*, that one of the voters' objectives in enacting Proposition 115 was " 'to permit the prosecution a reasonable opportunity to investigate prospective defense witnesses before trial so as to determine the nature of their anticipated testimony [and] to discover any matter that might reveal a

bias or otherwise impeach the witnesses'[s] testimony.' *In re Littlefield*, *supra*, 5 Cal.4th at p. 131.)" (*Roland*, 124 Cal.App.4th at p. 167.) Therefore, the *Roland* court held, the defense must disclose not only written or recorded statements of its witnesses, but oral ones as well. (*Id.* at p. 160.)

Roland violated the strictures of section 1054, subdivision (e) – "that no discovery shall occu*r* in criminal cases except as provided by this chapter" – because section 1054.3 makes no mention of unrecorded oral statements. Rather, it refers only to witnesses' "relevant *written* or *recorded* statements . . . including any *reports* or *statements* of experts . . . ." (Pen. Code § 1054.3, subd. (a)(1); emphasis added.) Therefore, *Roland* was incorrectly decided and should be overruled.

Assuming, *arguendo*, that *Roland* is good law, the trial court still mis-applied it. Nothing in *Roland* compels, or even begins to suggest, that a witness may be precluded from testifying that he or she has changed his mind, recalled additional information, or otherwise wishes to change his or her earlier testimony. The trial court's ruling in this case went far beyond *Roland* and barred a witness from testifying that he had changed his mind since he gave his initial testimony.

The trial court's increasingly exacting rulings regarding oral statements to the defense grossly exceeded the purpose of the discovery that this Court explained in *Littlefield,,* that with respect to its witnesses the defense must disclose both "the *nature* of their anticipated testimony" as well as *sufficient information* to permit the prosecution "to discover any matter that might reveal a bias or otherwise impeach the witnesses'[s] testimony." (5 Cal.4th at p. 131; emphasis added.) Nowhere does *Littlefield* suggest that this disclosure contain the level of detail required by the trial court in this case.

Accordingly, even if *Roland* was correct as a general matter, the trial court here extended the case's rationale to such an absurd degree that it cited the case as one reason to bar the witness from testifying that he had reconsidered his earlier testimony. There is no indication, either in *Roland*, *Littlefield*, or any other California case, that a witness may not voluntarily amend his earlier testimony unless the adverse party has received a written witness statement to that effect. Indeed, a substantial part of the art of cross examination lies precisely in persuading the witness to reconsider the accuracy of his or her earlier testimony. Taken to its logical ends, the court's unwarranted expansion of *Roland*'s discovery requirement would effectively render cross and redirect testimony obsolete. Moreover, the

prosecution advanced no claim of prejudice from the failure to disclose the witness's change of heart, nor could it have done so. There is nothing that would have been available for the prosecution to do, in the way of further investigation, had this detail been disclosed in discovery.

Appellant's position is supported by other courts, including the United States Supreme Court. In *Taylor v. Illinois* (1988) 484 U.S. 400, defense counsel failed to list an alibi witness in amended discovery filed the first day of trial. In response to the prosecution's motion to exclude the witness, counsel explained that although the defendant had told counsel about this witness earlier, counsel had been unable to locate him. However, on *voir dire* the witness stated that he had met with counsel the week before trial. The trial court found that counsel's failure to provide timely discovery was a blatant and willful violation of the discovery rules, and added that the court doubted the veracity of the witness's testimony.[51] (*Id.* at pp. 403-404.) The trial court also found that defense attorney had blatantly violated discovery rules in the previous three or four cases, and excluded the testimony. (*Id.* at p. 405.)

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[51] The witness's testimony was indeed suspect. In the *voir dire* hearing, he first claimed he saw the victim and his brother carrying guns, and heard them saying they were after Taylor and the other people, and that he had warned Taylor. On cross, however, he admitted he hadn't met Taylor until two years after the incident.

The Supreme Court held that the trial court's sanction did not violate the Compulsory Process Clause of the Sixth Amendment. In so holding, however, the court made several statements applicable to this case:

> As we noted just last Term, "[o]ur cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). Few rights are more fundamental than that of an accused to present witnesses in his own defense, see, *e. g.*, *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Indeed, this right is an essential attribute of the adversary system itself.
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> . . . . .
>
> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967).
>
> The right of the defendant to present evidence "stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States." *Id.*, at 18. We cannot accept the State's argument that this constitutional right may never be offended by the imposition of a discovery sanction that entirely excludes the testimony of a material defense witness. (*Taylor v. Illinois, supra*, 484 U.S. at pp. 408-409.)

The Supreme Court noted that the right is not unfettered, and must be used responsibly. (*Id.* at p. 410.) "Discovery, like cross-examination,

minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony. The 'State's interest in protecting itself against an eleventh-hour defense' is merely one component of the broader public interest in a full and truthful disclosure of critical facts." (*Id.* at pp. 411-412 [footnote omitted.].)

Of particular importance in the instant case, the Supreme Court emphasized that a less drastic sanction was always available. "Prejudice to the prosecution could be minimized by granting a continuance or a mistrial to provide time for further investigation; moreover, further violations can be deterred by disciplinary sanctions against the defendant or defense counsel." (*Id.* at 413.)

In *Taylor*, the surprise involved an alibi witness and, therefore, in addition to the lack of notice to the prosecution there was also a risk of fabrication. It was partly for this reason that the Supreme Court rejected Taylor's assertion that preclusion is never a permissible sanction. Rather, it said,

> In order to reject petitioner's argument that preclusion is never a permissible sanction for a discovery violation it is neither necessary nor appropriate for us to attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case. It is elementary, of course, that a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor. But the mere invocation of that right cannot

> automatically and invariably outweigh countervailing public interests. The integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance
>
> A trial judge may certainly insist on an explanation for a party's failure to comply with a request to identify his or her witnesses in advance of trial. If that explanation reveals that the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness' testimony. (*Id.* at pp. 414-415 [footnotes omitted].)

Since *Taylor*, courts have attempted to articulate the standards that the Supreme Court declined to promulgate in that case. For example, the Fifth Circuit has held that, "[T]he Compulsory Process Clause of the Sixth Amendment forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants." (*United States v. Davis* (5th Cir. 1981) 639 F.2d 239, 243.) The Fifth Circuit reasoned that unlike other evidentiary orders, "discovery orders are designed to prevent surprise, not to protect the integrity of the evidence sought to be presented." (*Ibid.*) The court further held that the testimony in *Davis* was crucial to the defense and that the preclusion was, therefore, not harmless beyond a reasonable doubt. (*Id.* at p. 245.)

In *Escalera v. Coombe* (2d Cir. 1988) 852 F.2d 45, the Second Circuit, without citing any authority, noted the Supreme Court's holding that a defense attorney's conduct that could be imputed to the defendant did not include error produced by the attorney's "mere inadvertence or even gross negligence." (*Id.*, at p. 48.) And the Ninth Circuit has emphasized in a preclusion case "that for a balancing test to meet Sixth Amendment standards, it must begin with a presumption *against* exclusion of otherwise admissible defense evidence." (*Fendler v. Goldsmith* (9th Cir. 1984) 728 F.2d 1181, 1188.)

California Court of Appeal cases follow similar analytical principles. For example, *People v. Edwards* (1993) 17 Cal.App.4th 1248, involved an *in propria persona* defendant promising to produce a partnership agreement that would show that the property he stole was his own. He later told the court the agreement was lost, and the trial court imposed the discovery sanction of precluding any mention of the partnership. The Court of Appeal held that the sanction was error, though harmless. In doing so, it carefully reviewed the U.S. Supreme Court's cases, including both *Taylor v. Illinois*, *supra,* and *Michigan v. Lucas* (1991) 500 U.S. 145:

> We interpret these authorities to instruct that preclusion sanctions may be imposed against a criminal defendant only for the most egregious discovery abuse. Specifically, such sanctions should be reserved to those cases

> in which the record demonstrates a willful and deliberate violation which was motivated by a desire to obtain a tactical advantage at trial such as the plan to present fabricated testimony in Taylor.
>
> . . . . .
>
> Under federal law, the factors to be considered in determining the appropriate remedy for discovery violations include: (1) the effectiveness of less severe sanctions, (2) the impact of preclusion on the evidence at trial and the outcome of the case, (3) the extent of prosecutorial surprise or prejudice, and (4) whether the violation was willful. (*Taylor v. Illinois, supra*, 484 U.S. at p. 415, fn. 19, citing *Fendler v. Goldsmith* [9th Cir.1983] 728 F.2d [1181] at pp. 1188-1190.)
>
> Under California's reciprocal discovery scheme, there is an additional statutory requirement. Subdivision (c) of Penal Code section 1054.5 allows a trial court to preclude the testimony of a witness "*only* if all other sanctions have been exhausted." (Italics added.) (*Edwards, supra*, 17 Cal.App.4th at pp. 1263-1264.)

"Absent a showing of significant prejudice and willful conduct," said another Court of Appeal opinion, "exclusion of testimony is not appropriate punishment [for a discovery violation]." (*People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1758.)[52]

The foregoing cases all illustrate that the courts consistently employ a policy that preclusion remedies should be used sparingly, and then only in circumstances of wilful violations where necessary to prevent or punish

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[52] Civil cases, too, are wary of preclusion sanctions, especially as punishment for discovery violations. See, *e.g., McGinty v. Superior Court* (1994) 26 Cal. App. 4th 204, 213-214, citing *Caryl Richards, Inc. v. Superior Court of Los Angeles County* (1961) 188 Cal. App. 2d 300; *Deyo v.Kilbourne* (1978) 84 Cal.App.3d 771.)

sharp or unfair practices by one party. Otherwise, the courts should attempt to employ lesser sanctions, such as granting the party affected by the lack of timely discovery more time for preparation.

The foregoing cases also demonstrate that the trial court here clearly erred in ruling that Rodriguez could not take the stand to relate his new recollection that appellant did in fact mention the woman in Orange County involved in the plot to kill Montemayor. The facts here disclose absolutely no evidence of wilfulness – to the contrary, defense counsel himself was unaware of the new evidence because Rodriguez did not remember the mention of the woman and the Big Homies until after he had testified on direct and cross-examination. There was, moreover, no possible prejudice to the prosecution apart from the fact that the defense case would have been bolstered by the new testimony, and that is not improper or unfair prejudice. While Rodriguez did meet with the defendant and counsel two months prior to trial, there was no evidence that this matter was discussed in that meeting, and not even the prosecutor argued that. And finally, a defense witness was prevented, for no discernable reason, from returning to the stand to correct his earlier testimony, testimony the witness himself no longer believed was entirely accurate. The court's ruling therefore interfered with the search for truth that is at the heart of the criminal justice

process. Indeed, given the critical nature of the proffered testimony, regarding what appellant actually told Rodriguez about the impending crime that the prosecution was claiming he then had a part in committing, the preclusion sanction was stunningly inappropriate.

2. The Statement Was Not Hearsay

When the defense tried to raise the matter again on re-direct, after the prosecutor had asked a series of questions about what appellant had *not* told Rodriguez before the crime (23 RT 4287-4288), the prosecutor's objection was that the question called for hearsay. (23 RT 4296, 4298.) It did not. The defense was trying to elicit what appellant had told Rodriguez about the impending crime, and that Detective Rodriguez, since his earlier testimony, now recalled more information appellant told him during their meeting in the jail in October, 2002, after appellant had been arrested. Specifically, he recalled appellant telling him he had been arrested in connection with the matter about which he had previously told Rodriguez – i.e., that a woman in Orange County told appellant Mexican Mafia shot-callers wanted to involve him in a kidnap for ransom or murder for hire plot – and that appellant's statement was consistent with what he had told Rodriguez earlier. (23 RT 4296-4297, 4299, 4303.) Contrary to the district attorney's objection, this proffered testimony was not hearsay. But to the

extent that the trial court's rulings on this matter referred to reliability and trustworthiness (25 RT 4557, 4562.), it presumably had hearsay and the exceptions to hearsay in mind.[53]

Pursuant to Evidence Code section 1200, hearsay evidence is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code §1200, subd. (a).) A statement is offered to prove the truth of the matter asserted when it is offered for the same purpose as the testimony of a witness on the stand and therefore depends for probative value on the credibility of the declarant. (Witkin, *California Evidence* (5th ed. 2012), "Hearsay," §5, p. 788, and authorities there cited.)

Except as provided by law, hearsay evidence is generally inadmissible. (Evid. Code §1200, subd. (b).) The California Evidence Code includes a number of statutory hearsay exceptions. Among those exceptions is the exception for prior consistent statements. This exception states that "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his

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[53] To the extent that the trial court was also concerned with the defense compliance with *Roland* (23 RT 4305-4306, 4311), that is answered in the previous subsection.

testimony at the hearing and is offered in compliance with Section 791." (Evid. Code §1236.)

While California, unlike the federal and some state courts, does not have a so-called "residual" hearsay exception for hearsay evidence that bears sufficient indicia of reliability, the language of Evidence Code section 1200, subdivision (b), prohibiting hearsay except as provided "by law" has been construed as including exceptions crafted by decisional law. (*People v. Spriggs* (1964) 60 Cal.2d 868, 873; *In re Cindy L.* (1997) 17 Cal.4th 15, 26-27.) Thus, the courts have power "to create hearsay exceptions for classes of evidence for which there is a substantial need, and which possess an intrinsic reliability that enable them to surmount constitutional and other objections that generally apply to hearsay evidence." (*In re Cindy L., supra*, 17 Cal.4th at p. 28.)

In this case, Detective Rodriguez's testimony regarding appellant's statements to him in 2002 was not offered to prove the truth of appellant's statement. It was not offered for the same purpose as appellant's statements; instead, it was offered to prove that appellant had disclosed the plot to Rodriguez. Whether or not either the woman in question or the Mexican Mafia had actually sought to involve him in the plot was not the purpose of the testimony. For purposes of appellant's defense, what

mattered was that he had told one of his law enforcement handlers about the plot in advance, thereby making it less likely that he actually participated in the crime for which he had been charged. (Evid. Code, § 1200; *People v. Green* (1980) 27 Cal. 3d 1, 23, fn. 9; Jefferson, *supra,* 30 U. West. L.A. L. Rev. at p. 139.) If believed by the jury, the fact that Rodriguez had substantially corroborated appellant's testimony about what he told law enforcement of the impending crime had a strong tendency to show that appellant had no intent to actually participate in the Montemayor killing and, to the contrary, was in fact attempting to prevent it from happening. This fact lay at the very heart of appellant's defense, and its exclusion was error. Moreover, following the prosecutor's series of questions about what Navarro had *not* told Rodriguez, Rodriguez's excluded testimony was not only material but vital to show what Navarro actually *had* told him.

Shortly after the defense began its redirect of Detective Rodriguez, the court questioned the witness out of the presence of the jury. With regard to the conversation in jail between Rodriguez and appellant a couple of days after his arrest, the court asked what Navarro had told him. Rodriguez answered:

> He brought up the phone calls that he made to me regarding the Orange County incident. Then he made the comment about this female that had -- was having him meet with the Big Homies, and that's what this whole kidnap for

ransom case was based around, was her, the Big Homies, and somebody in Orange County. And he brought it up, you remember me telling you about this kidnap case?

I said yeah. (23 RT 4297.)

The prosecutor objected that this was hearsay, offered for the truth of the matter asserted. (23 RT 4299.) While the simple answer was that this was not hearsay at all, defense counsel answered that the testimony was admissible as a prior consistent statement. (*Ibid.*)

If the statement had been hearsay, defense counsel would have been technically correct, because it was a prior consistent statement. Because the statement was not hearsay, there was no need to apply the exception for prior consistent statements, and the entire discussion of it (23 RT 4299-4303, 4305, 4309, 4312), was simply irrelevant.

To the extent that the trial court's ruling was on the basis of hearsay (the prosecutor's initial objections), this was error. The statement at issue – what Navarro told him in July – was not offered for the truth of the matter asserted in the statement and therefore was not hearsay.

3. There Was No Evidence Supporting the Court's Suggestion That the Evidence Might Otherwise be Unreliable

It is difficult to square the court's reference to reliability in its ruling with anything in law or in the record.

First, the court appears to have conducted its analysis of whether the proposed testimony was reliable in response to the prosecutor's hearsay objection. (*See* the court's reference to the reliability of out-of-court statements in the statement quoted below.) However, since the evidence was plainly non-hearsay, there was no need for such an analysis, and the analysis itself was therefore improper.

Second, the analysis was incorrect because the court examined the reliability of the wrong party. The judge told defense counsel that he was considering

> the nature of your client's testimony when he was on the stand . . . that he repeatedly asserted that he had very little recollection as to what took place five years ago. I'm citing that as a factor because of the factors that are being discussed here. [¶] One of the things the court needs to evaluate is how trustworthy the out-of-court statements are, and I [just] don't find it to be a trustworthy area and therefore will deny the request to recall Rodriguez to testify as to this matter." (25 RT 4557.)

Defense counsel pointed out that what was issue was reliability of Rodriguez, not appellant, and argued that the court should allow any witness to the stand to testify that upon further reflection they wanted to correct their testimony. (25 RT 4558, 4560.) The court, however, disagreed: "I'm going to deny your request to recall Rodriguez. The court finds that the proposed question and answer on this subject matter is

untrustworthy. The factors the court has considered have been identified and put on the record." (25 RT 4561.)

The court further explained,

> [T]here are several factors the court considered. One of the big factors is a percipient witness was allowed to talk to the defendant, and that's a big factor in the court's consideration. And there is no way that you can get to Rodriguez's testimony without stating what the defendant allegedly said to the witness. [¶] So you got a couple of problems there. I don't want to discuss it further. (25 RT 4562)

The statements were not hearsay; reliability was therefore not an issue. And the fact the Rodriguez met with defendant and his counsel two months prior to trial has no logical connection to Rodriguez now wishing to correct his initial testimony. If it had affected him, that would have come out on direct, and there would have been no need for the correction.

C. THE COURT'S ERROR COMPELS REVERSAL UNDER BOTH THE FEDERAL AND STATE STANDARDS

Where there is no showing that the s supposed defense discovery violation was wilful or irremediably prejudicial, the complete exclusion of evidence is a violation of the Compulsory Process Clause of the Sixth Amendment and must be assessed under the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California, supra*, 368 U.S. at p. 24. (*People v. Gonzalez, supra*, 22 Cal.App.4th at p. 1760.) However, even under the

state law standard, the error would still compel reversal because it is more than reasonably possible that the jury would have reached a different result absent this evidence. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 918.)

This was a close case. Appellant himself was not present at the scene and had no direct role in the commission of the crime; rather, he was alleged to have been involved in arranging for the killing behind the scenes. The prosecution's case in chief relied entirely on attenuated circumstantial inferences that included: inferences derived from the testimony of Edelmira Corona, an admitted serial liar; the fact that appellant had been a shot-caller and the perpetrators had once been part of his "crew"; the fact that he stated that he used a particular cell-phone number in a letter he never sent but apparently wrote within a nine-day window in which the phone was active; and the fact that he gave a number of "I don't remember" answers to the prosecutor's often sarcastic cross-examination questions. Most of the prosecution's evidence – appellant's past gang connection, the supposed connection with Corona, the mind-numbing cross-examination regarding the cell-phone calls, was also consistent with appellant's innocence if, in fact, he had left the gang behind to move to Las Vegas, was no longer residing at the Sunrose residence, and, most important, had left the cell-

phones behind, where Corona and Bridgette and the perpetrators could use them to implicate him.

In contrast, appellant presented consistent and persuasive law enforcement testimony casting doubt on the likelihood of his having ordered the Montemayor murder, including most obviously the fact that the perpetrators, in violation of the most basic gang practices, had used a car registered to appellant's address when they committed the crime and left a car rented to one of them in front of his house. Plainly, if appellant had actually been involved in the crime, he would not have permitted the perpetrators to use a car that could be connected to him, and even if the perpetrators had done so against his instructions, he certainly would have had a car connecting them to him removed from his premises after the perpetrators had been arrested.

However, one of the strongest pieces of evidence of appellant's innocence was the fact in issue here: the fact that appellant had called his law enforcement handlers and told them in advance about the impending hit on Montemayor. Obviously, no sane person would inform law enforcement in advance that a murder was about to be committed and then proceed to be criminally involved in its perpetration. The evidence the court excluded here pointed directly toward innocence, corroborated appellant's testimony

regarding what he told Rodriguez, and its exclusion was thus more prejudicial to appellant's case than nearly any other ruling the court might have made short of a directed verdict.

Also important in the excluded testimony was the amount of detail appellant conveyed to Rodriguez about the hit. The prosecutor, in his cross-examinations of appellant, Starkey, and Rodriguez, hammered home the supposedly limited nature of appellant's disclosure and made this one of the central themes of his closing argument. First, he read from Starkey's testimony, and asked the jury, "Is the defendant's story corroborated? No, it is not." (28 RT 5041.) He then read from appellant's testimony, including this passage: "I said this girl approached me that Chispa wanted somebody from the San Fernando area to come out to Orange County to kill somebody." (28 RT 5041-5042.) The prosecutor then contrasted appellant's testimony with Rodriguez's:

> But the defendant is quite specific. Told Rodriguez, Chispa, Orange County, touch up, I have the address, Mira, Chispa's daughter.
>
> Well, that's not what Rodriguez says. I asked Rodriguez some very pointed questions. Did you have the name of intended victim? No.
>
> How about an address of intended victim? No.
>
> Did he tell you he had heard the name, but doesn't remember it? No.
>
> Did he tell you that he had the address but couldn't remember it? No.

Did he tell you that he had the address written down on a note? No.

Did he tell you that he had the address in the Glove box of his car? No.

Did he tell you that he knew any of the potential suspects? No.

Did he tell you that he knew a first name but not a last name of one of the suspects? No.

Did he say the name Mira to you? No.

Did he tell you that he knew the cell phone number of one of the suspects? No.

Did he tell you that he knew the intended victim was the boss of one of the suspects? No.

Did he tell you there was a coffee can in the garage of the intended victim? No.

And there was cash inside the coffee can in the garage of the intended victim? No.

Did he tell you that there is some girl who is the daughter of a Mexican Mafia member and that this is the person who is a suspect? No.

Did he mention the name Chispa? No.

Did he say to you Felipe Vivar? No.

I mean, it's pretty black-and-white. Is there anyone out there to corroborate the testimony defendant's testimony about one thing besides back in the day he did some good work for the FBI? No. Not Starkey, not Rodriguez. (27 RT 5044-5046.)

The prosecutor was able to make the argument that appellant's story was uncorroborated only because the court had excluded from evidence portions of Rodriguez's testimony on direct (23 RT 4223-4224) and redirect examination (23 RT 4304-4305), and again when appellant sought to recall him, in his motion for reconsideration (7 CT 1766 *et seq.*) to correct at least some of the negative responses the prosecutor cited above.

The prosecutor contended that appellant was lying, that he gave his law enforcement handlers just enough information to divert suspicion, and then went ahead and ordered the Montemayor killing. Rodriguez's excluded testimony would have directly undercut the prosecutor's assertion that appellant's story was uncorroborated.

Accordingly, because the court's erroneous ruling severely damaged the defense case, the error cannot be deemed harmless under any standard of review, and should result in reversal.

IV. THE TRIAL COURT MADE A SERIES OF HEARSAY AND OTHER EVIDENTIARY ERRORS WHICH VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AND RENDERED HIS TRIAL UNFAIR

The trial court made a series of additional evidentiary errors, both of exclusion of defense evidence and admission of prosecution evidence. The errors undermined appellant's rights to due process, a fundamentally fair trial, to present a defense, and to a reliable guilt and penalty phase determination in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. Because respondent cannot show the errors were harmless beyond a reasonable doubt, appellant's conviction should be reversed.

A. IN ADDITION TO THE HEARSAY ERRORS ALREADY SET FORTH, THE TRIAL COURT MADE ADDITIONAL HEARSAY ERRORS FURTHER UNDERCUTTING THE DEFENSE CASE

Appellant has already noted in the foregoing sections a number of misapplications of the hearsay rule. The trial court also made numerous further hearsay errors, almost all in favor of the prosecution. The result in almost all instances was to exclude admissible defense evidence.

The hearsay rule is embodied in Evidence Code section 1200, which provides that hearsay evidence, "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to

prove the truth of the matter stated," is inadmissible, except as provided by law. (Evid. Code §1200, subds. (a), (b).

The question presented by the statements at issue in the examples below are not whether or not they fall within one or another exception to the hearsay rule (Evid. Code §§ 1220 *et seq.*). Rather, the question is whether the statement in issue was "offered to prove the truth of the matter stated," either (1) because the statement was inherently not a statement the truth of which could be at issue (see, *e.g.*, *People v. Jurado* (2006) 38 Cal.4th 72, 117 [a request for something)], (2) because of the purpose for which they were offered (see, *e.g.*, *People v. Bolden* (1996) 44 Cal App 4th 707, 714-715 [communication offered to prove motive by showing the recipient's reaction to the statement]; or (3) where the very fact in controversy is whether certain things were or were not said, as distinguished from whether these things were true or false (*e.g., Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 109-110.)

Justice Jefferson offered the following as the most common three kinds of non-hearsay statements offered for purposes other than to prove the truth of the matter stated or asserted:

> (1) a Declarant's Statement Offered to Prove Information, Knowledge, or Belief on the Part of the Person to Whom the Statement is Made; or (2) a Declarant's Statement Stating Facts Other than Declarant's State of Mind but Offered to

> Prove, by Inference, Declarant's State of Mind and Declarant's Conduct in Conformity Therewith; or (3) a Declarant's Statement Offered to Prove the Making of the Statement as a Relevant Fact in the Action. (Jefferson, *supra*, 30 U.West.L.A.L.Rev. at p. 142; initial capitals in original.)

The hearsay errors set forth below were either on their own prejudicial, which will be argued as to the individual error, or cumulatively so, which will be argued at the end. In addition, rather then set them out with separate subsection headings, they are simply listed by number.

1. During the defense direct examination of Detective Rodriguez, the witness was asked whether, when he went to see appellant in jail shortly after his arrest, appellant "confirm[ed] that he was here for this robbery-murder that he was trying to tell you about in July?" The prosecution objected on hearsay grounds, and the court sustained the objection. (23 RT 4248.) The ruling was clear error. Neither the fact that appellant had been arrested for a robbery-murder nor the fact that the offense was the same one appellant had told Rodriguez about in July or August were offered to prove the truth of those facts but instead to show that appellant had made the statements. The significance of the evidence was that appellant had mentioned the potential crime in a prior discussion with his law enforcement handlers, and he was affirming to them that this was the matter he had told them about. In part, it was offered to prove information

Rodriguez formerly had – Jefferson's category (1) – and in part for the non-hearsay purpose of relating the arrest to the non-hearsay statements appellant had earlier made to Rodriguez about the then-impending crime.

As discussed in the foregoing sections, the exclusion of the evidence was prejudicial as part of the pattern of exclusion of evidence going to show that appellant informed his handlers of the impending crime and was thus less likely to have taken part in it.

2. In redirect examination, defense counsel asked Rodriguez questions about phone calls appellant's wife made to him near the end of her marriage to appellant. The following exchange ensued:

> Q In fact, you told us his wife called you from time to time, right?
>
> A Towards the end there, yes.
>
> Q Would his wife ask you anything that -- did his wife ask you questions?
>
> A Yes.
>
> Q What was she trying to find out, if anything?
>
> Mr. Wagner: Objection. Calls for hearsay.
>
> The Court: Sustained.
>
> By Mr. Halpern:
>
> Q What did she ask you about?

Mr. Wagner: Objection. Calls for hearsay.

The Court: Sustained.

Mr. Halpern: Not being asked for the truth of the matter asserted. It's not being -- to prove what she asked for. I'm not even --

Q Did she say anything to indicate to you that she was suspicious that the defendant was messing around with other girls?

Mr. Wagner: Objection. Calls for hearsay.

The Court: Mr. Halpern. A couple of the objections seem to be well-founded to the court. That's why I sustained them.

Mr. Halpern: Thank you.

Q Did she appear to be jealous?

The Court: Any statements made by Bridgette to this witness is not admissible at this stage. Do you have another question?

Mr. Halpern: Can I ask if she appeared to be jealous, Your Honor?

Q Did she appear to be jealous?

A Yes.

Q Did she appear to be simply a little jealous or was she extremely jealous? If you can characterize it.

A I don't think there is a difference, but probably extremely.

Q And at times did she appear to be looking for him?

Mr. Wagner: Objection. Calls for hearsay.

The Court: You're talking about his being a percipient witness or something that she said to him?

Mr. Halpern: Let me ask you this. Did she ask – that's not asking for hearsay, your honor. Did she ask if he knew where Anthony was or where Mr. Navarro was.

The Court: I understand. We had a long discussion about what's hearsay or not hearsay. I need you to make a distinction, is he observing the demeanor of Bridgette, which he's testified to concerning her relationship with the defendant.

Mr. Halpern: I'll move on. (23 RT 4326-4328.)

Contrary to the trial court's rulings, none of these questions called for hearsay, once again because none of them were offered for the truth of the matter asserted by Bridgette Navarro, and to the extent that they called for the witness's state of mind or explained her conduct, they were additionally admissible under Evidence Code section 1250.[54] (Jefferson,

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[54] Evidence Code section 1250 provides, in relevant part:

(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:

(continued...)

supra, 30 U.West.L.A.L.Rev. at page 140-141; *In re Bacigalupo* (2011) 55 Cal.4th 312, 339.)

There is no possible answer that Rodriguez might have given which would have been hearsay. The questions called for description of conduct, a verbal act, or an expression of Bridgette Navarro's state of mind. Such matters cannot be hearsay because they are "neither inherently true or false." (*People v. Cowan* (2010) 50 Cal.4th 401, 472; Evid. Code § 1250, subd. (a)(2).)

In addition, the fact that Bridgette Navarro was often looking for appellant was relevant to support appellant's testimony that he was no longer living regularly at the Sunrose residence at the time the Orange County crime occurred. Similarly, Bridgette Navarro's state of mind was relevant to support the inferences: (1) that she was looking for appellant in

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[54] (...continued)

(1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or

(2) The evidence is offered to prove or explain acts or conduct of the declarant.

Section 1252 provides: "Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness."

order to keep track of his activities; (2) because she was jealous of his relationship with Ochoa; and (3) that her jealously could have motivated her to stage the crime in order to implicate appellant. The last point was especially important to the defense, and its exclusion therefore prejudicial.

The trial court also clearly erred in its sweeping ruling that "[a]ny statements made by Bridgette to this witness is (sic) not admissible at this stage." (23 RT 4327.) It is obviously untrue that *any* statement by the witness as to what Bridgette said would have been inadmissible as irrelevant or hearsay. Taken literally, this statement meant the court would have sustained an objection to the question: "Did Bridgette tell you that she was so jealous and angry at defendant that she intended to frame him for a murder in Orange County?" The fact that the court eventually allowed the defense to ask and have answered two general questions regarding Bridgette Navarro's jealousy does not render harmless the court's errors in excluding the answers to these questions. The defense theory was that it was Bridgette who worked with Corona and the perpetrators to not only have the crime committed but to implicate appellant in the process. *Any* erroneous limitations on evidence supporting such an inference prejudicially undercut the defense theory.

3. The court erroneously upheld a hearsay objection when defense counsel asked appellant's mother the nature of Bridgette Navarro's phone calls to her in the period near to the crime. Counsel made clear that he was not seeking to present Bridgette Navarro's statements themselves but merely the nature of the phone calls. (26 RT 4692.) However, even if counsel had sought to present the statements themselves, the defense was again seeking to elicit verbal acts or conduct, or state of mind. The questions did not call for hearsay, and the trial court erred in excluding them.

The prosecutor had asked appellant about a phone call from the cell phone with the 1600 number to his mother's number in Las Vegas in the afternoon after the crime. Appellant answered that it was it was Bridgette who made the call, looking for him. (19 RT 3607.) Had appellant's mother been allowed to answer, she presumably would have testified that Bridgette's calls to her were in the nature looking for him, thereby corroborating appellant's testimony.

These errors directly undercut appellant's right to present a complete defense. Their prejudicial effect will become even clearer when considered in combination with the errors discussed below.

B. THE TRIAL COURT PREJUDICIALLY ERRED IN ADMITTING UNNECESSARY AND INFLAMMATORY GANG EVIDENCE

The trial court allowed in, over objection, far more gang-related evidence than was necessary for the prosecution's case. Gang evidence is inherently inflammatory, and the defense objected in each instance either on grounds of relevance or under Evidence Code section 352 (hereafter, section 352.) The over-inclusions of such inflammatory and irrelevant evidence impaired appellant's constitutional rights to due process and a fair trial.

Relevant evidence is defined by Evidence Code section 210 as "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." But only relevant evidence is admissible. (Evid. Code § 350.)

> ' "[I]rrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." ' [Citation.]" (People v. Harris (2005) 37 Cal.4th 310, 351 [].) "Such evidence violates the Fourteenth Amendment's due process clause when it is so unduly prejudicial that it renders the trial fundamentally unfair." (*Ibid.*) (*People v. Bivert* (2011) 52 Cal. 4th 96, 118)

Section 352 requires the exclusion of even relevant evidence when its prejudicial effect substantially outweighs it probative value, when,

"broadly stated, it poses an intolerable risk to the fairness of the proceedings . . ." (*People v. Tran* (2011) 51 Cal.4th 1040, 1048, citing *People v. Waidla* (2000) 22 Cal.4th 690, 724) [internal quotations and citations omitted].) Moreover, " '[the] prosecution has no right to present cumulative evidence which creates a substantial danger of undue prejudice to the defendant.' (*People v. De La Plane* (1979) 88 Cal. App. 3d 223, 242.)" (*People v. Cardenas* (1982) 31 Cal. 3d 897, 905.)

The objectionable evidence described below all involved gangs and gang membership. "Evidence of gang membership is considered prejudicial because it tends to establish criminal disposition." *People v. Pinholster* (1992) 1 Cal. 4th 865, 945, citing *People v. Cardenas, supra*, 31 Cal.3d at p. 945; see also *People v. Cox* (1991) 53 Cal.3d 618, 660 [evidence that defendant is member of gang is "highly inflammatory"]. "Moreover, even where gang membership is relevant, because it may have a highly inflammatory impact on the jury trial courts should carefully scrutinize such evidence before admitting it." (*People v. Williams* (1997) 16 Cal. 4th 153, 193, citing *People v. Champion* (1995) 9 Cal. 4th 879, 922.)

If gang *membership* is highly inflammatory, then, *a fortiori*, the irrelevant and unduly prejudicial gang activities and gang connections set forth below can be no less inflammatory.

1. The Trial Court Erred in Allowing the Prosecution Gang Expert to Testify to Gang Customs and Habits Not Relevant to this Case

The prosecution presented Detective Nathaniel Booth, a Buena Park Police detective assigned to the gang unit, as its expert on gangs. (16 RT 3054-3055; 17 RT 3147 *et seq.*) The discussion of his qualifications before the jury turned into a discussion of the characteristics of Hispanic gangs in general, as distinguished from other ethnic gangs (17 RT 3154-3155), including that (1) they are connected to a specific neighborhood or territory, their turf (17 RT 3155.); (2) there are several ways to get into a gang, most commonly by being "jumped in," a beating by gang members (3157-3158); (3) respect within the gang is gained by committing violent acts (17 RT 3158); (4) the gangs control their neighborhoods with violence, intimidation, and fear (17 RT 3159-3160; and (5), the term "crazy"means willing to perform violent or foolhardy acts to prove your bravado and gain respect. (17 RT 3160-3161.)

At that point, the defense made an Evidence Code section 352 objection. In chambers, counsel explained that this was not a typical gang case. Even though there is an allegation that the crime was for the benefit of a gang, and the need for general gang characteristics to be presented, "going on and on and about earning respect and not backing down from a

fight" is not relevant to this case. There was no gang fight here, no drive-by shooting. (17 RT 3161.) "This is criminal activity that my client is being accused of murder for hire, and . . . we could spend another hour having him talk about gangs in general." To do so would inflame the passions of the jurors, but was extraneous to this case. (17 RT 3161-3162.)

The trial court found that nothing in the present context was unduly inflammatory. (17 RT 3162.) The prosecutor explained that this testimony went to the element that the defendant had knowledge that the gang had engaged in a pattern of criminal gang activity, which included glorifying violence and bragging about their own crimes. (*Ibid.*) And that is what the prosecutor returned to when questioning resumed. (17 RT 3164.)

Defense counsel was right. While there was an allegation that the crime was for the benefit of the gang, that this was a gang-related activity, in other respects it was not at all gang-related. It did not involve a drive-by shooting of rival gangs, or defense of turf, or violence for the sake of intimidation of the gang's neighbors. The only "gang" involvement was that three perpetrators and Navarro were members of the same gang, and Navarro was the senior member.

The charging of a gang enhancement in a case such as this should not have given the prosecutor a free-floating license to introduce to the jury

irrelevant or marginally relevant, but certainly inflammatory evidence regarding the gang's violent propensities. To do so was to paint the defendant with too broad, and inflammatory, a propensity brush.

2. The Trial Court Erroneously Admitted Photos and a Phone Book from Martinez's Residence Which Were Not Connected to Appellant or the Crime

The defense objected, on relevance grounds, to the admission of several items taken from Martinez' residence the day of the murder, each of which the trial court admitted.

–Exhibit 67, a copy of paper with graffiti-style names, including "Crook" and "Pacoima Flats", and a drawing of a female with glasses, which the prosecutor said was "part of the foundation" of Detective Booth's testimony that in his opinion Martinez was a member of the Pacoima Flats gang. (27 RT 4748.) The defense objected, questioning the relevance to Navarro of a writing found in a residence he did not occupy, written by an unknown individual, that did not identify or relate to defendant in any way. (27 RT 4748-4749.)

–Exhibits 70 and 71 are photographs showing Martinez, Macias, and an unidentified third individual. Exhibit 69 is a personal phonebook from Martinez' residence, which includes telephone numbers for codefendants Macias and Lopez (Sniper), and Martinez' brother, "Weasel." The

prosecutor claimed relevance in showing the interrelatedness of Martinez, Macias, and Lopez. It also had some "Pacoima Flats writing," which tended to indicate that Martinez was a gang member. The relevance to Navarro, the prosecutor averred, "is just going to show that he's associating with and that's one of the theories under which he can be guilty of a gang enhancement . . . [and] tends to show a preexisting relationship of the co-conspirators which I think lends to an argument that this crime was committed as a conspiracy." (27 RT 4750.) However, as defense counsel argued, Exhibit 69 [as well as 70 and 71] was an item recovered from the residence of someone not before the court, and if the prosecution want to establish a relationship with appellant, they had more than ample means with the roll calls on the walls of his garage, and other things such as names in his phone books, and his admission that he was a shot-caller for the gang. Neither the photographs nor the phone directory taken from another gang members residence established any connection that appellant may have had with the persons photographed or listed in the phone book. As the defense argued, it was speculative evidence that allowed the prosecutor to argue that because it's a photograph of these people and appellant might have known some of them, that he must have been associated with them in connection

with this crime. (27 RT 4750-4751.) The court overruled the objections. (27 RT 4751-4752.)

3. The Prosecutor Was Allowed to Introduce Unnecessary Predicate-Crime Evidence Regarding Other Gang Members

The prosecutor sought to introduce "prison packets" showing four separate gang members' convictions for "predicate crimes" under section 186.22, subdivision (e); that is, to show that the gang was involved in a "pattern of criminal activity."[55]

The prosecution's gang "expert," Detective Booth, was asked whether one of the "primary activities" of the Pacoima Flats gangs was the commission of certain of the enumerated crimes in subsection (e), and which ones. The detective answered in the affirmative, and listed homicide, assault with a deadly weapon, and narcotics sales. (17 RT 3184.) The

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[55] Section 186.22 provides for punishment for active participation in a street gang which engages in a pattern of criminal activity. Subdivision (e) defines "pattern of criminal gang activity" as the

> commission of, attempted commission of, conspiracy to commit, or solicitation of . . . , or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons: [followed by 33 enumerated offenses].

prosecutor then introduced four "prison packets" of gang members unrelated to this crime in order to establish the predicate offenses under Section 186.22.

Exhibit 130 was a "prison packet" for gang member Jose Martinez, who was convicted in 1995 of second-degree robbery, and in 2000 of possession for sale of cocaine base. (17 RT 3185-3186; Ex. 130.) He did so, according to Detective Booth, while a member of Pacoima Flats. (17 RT 3187.)

The prosecutor similarly introduced the records regarding Victor Andrade, also a Pacoima Flats gang member, convicted in 1994 for sale or transportation of cocaine (17 RT 3187-3188; Ex. 131), and Juan Calzada, who was convicted in 1998 of six counts of attempted murder in a drive-by shooting.[56] (17 RT 3188-3189; Ex. 132.)

At this point in the testimony, as the prosecutor was about to question Booth about a fourth gang members' predicate crimes, the defense objected. (17 RT 3189-3190.) Counsel sought to exclude the fourth predicate pursuant to section 352. In order for the prosecution to prevail,

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[56] Appellant's reading of the Calzada Abstract of Judgment is that he was convicted of five of the six charged attempted murder counts. (Ex. 132, p. 9896.)

the defense argued, they had to show two predicate acts, and they already had shown two, or three, or perhaps a fourth.[57] To introduce more was cumulative, unnecessary, and done primarily to "highly prejudice" the defendant. (17 RT 3190.) The actions of other members of the gang "are totally irrelevant after the People have met their burden with the two predicate acts". (17 RT 3190-3191.)

The trial noted that his had not been objected to prior to trial when the prosecution had presented its revised outline of what it expected to show through its expert. The court also mentioned its reluctance to having down time with the jury, even though this discussion was taking place during an afternoon break. (17 RT 3191.) When counsel were earlier asked about objections to the outline, these matters were not objected to. (17 RT 3191-3192.) Regarding the specific objection, however, the court's comments did not explicitly constitute a section 352 weighing:

> You know, I would like to agree with you, and I would like to go on to other things. I have to be truthful with you. But there is an issue that's going to go to the jury, was your client an active informant at the time of the alleged crime. Was he or was he not the person who could give direction to

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[57] Actually, there were four predicate crimes solely from the three gang members' convictions already introduced in the "predicate" packets, but, as will be discussed below, there were also an additional four connected with the Montemayor murder.

other members, whether they were of the same gang or other people that were on the street.

I don't know how difficult that issue is going to be for the jury, so I'm prepared to give the opposing side some latitude in introducing the information as to what persons constitute the members, the predicate acts, the nature of the predicate acts, for the purpose of allowing the jury to make whatever decision is warranted. That's my assessment of your objection.

I've indicated to both of you that certainly we appreciate any effort to get the lawsuit going and expedite this process, but I think I need to give both sides a chance to present your evidence. (17 RT 3192-3192.)

The court's reasoning, on its face, is flawed. In addition to almost no reference to the apparent prejudice inherent in the introduction of all of this gang evidence unrelated to the current crime, there was no evidence (either at this point or later in the trial) that appellant was the shot-caller involved in ordering any of the crimes set forth as predicate acts. Whether or not he was an active informer at the time of the Montemayor crime, and whether or not he was a shot caller who could give direction to gang members was not in any way shown, or rebutted, by the information presented regarding these predicate acts. He was a gang member, they were gang members. Nothing was to be gained, once the prosecution had met its burden, other than to tar appellant with further gang-crime evidence.

The trial court's error allowed in the further testimony and documentation regarding a fourth gang member, Daniel Hueso, who was convicted in 2002 of a 2001 second-degree robbery. (17 RT 3193-3194; Ex. 133.) Also shown to Detective Booth were several photographs showing Hueso's gang-related tattoos, upon which he commented at length. (17 RT 3194-3196.) While all that the prosecution needed to establish a gang connection was either one of two tattoos – "Pacas," slang for Pacoima, and "Pacoima" – the detective was also asked about a small "p," a tattoo that "seems to say 'Droopy,' " and several tattoos showing connections to the Mexican Mafia. (17 RT 3194-3198, Exs. 121, 122.)

The defense unsuccessfully renewed its objection later, at the time the exhibits were offered into evidence. (27 RT 4769-4770.)

The court erred. There was simply no reason to introduce twice as many predicate crimes than were needed under section 186.22, subdivision (e). Indeed, as indicated in *People v. Loeun* (1997) 17 Cal.4th 1, the current offense, by the defendant and his three separate the co-defendants, were available to the prosecutor as predicate acts. (*Id.*, at p. 10 [pattern of criminal activity can be established by evidence of offense committed by one or more persons on the same occasion]; see also *People v. Deloza* (1998) 18 Cal.4th 585, 598-599 [*Loeun* allows requisite "pattern" to be

shown by defendant's commission of charged offense and by contemporaneous commission of a second predicate offense by a fellow gang member].) Accordingly, even without the four additional gang-related convictions submitted by the prosecutor, there was more than enough evidence to satisfy the "pattern of criminal activity" prong of the statute. *Loeun* and *Deloza* were both decided before the trial in this case, and there were at least three predicate crimes (kidnapping, murder, robbery) and four gang members involved. But even if the prosecutor did not wish to include the current crime, two such predicates were sufficient. (See *People v. Williams* (2009) 170 Cal.App.4th 587 [abuse of discretion to admit cumulative evidence concerning issue not subject to dispute}.)

Moreover, this is *not* an instance of risk to the People that insufficient predicates would be proven. (*E.g., People v. Perez* (2004) 118 Cal.App.4th 151, 159-160 [no expert testimony, and prior activities were six years earlier]. In this case, there was both expert testimony and documentary evidence of convictions for the enumerated crimes. Certainly, and especially in light of the four defendants in the current crime being available as an alternative (*Leoun, supra*, 17 Cal.4th at p. 9) there was no need for all four the prior predicates to be introduced.

"Any such evidence must be subject to scrutiny under Evidence Code section 352, and part of the analysis under that section is whether the evidence is cumulative." (*People v. Williams, supra,* 170 Cal.App.4th at pp. 609-611 [evidence of eight predicate crimes was abuse of discretion]; *but see*, *People v. Rivas* (2013) 214 Cal.App.4th 1410, 1436 [approving introduction of six predicate crimes]; *People v. Hill* (2011) 191 Cal.App.4th 1104, 1137-1139 [approving introduction of eight predicate crimes].)

4. The Admission of the Evidence was Prejudicial

In this case, some gang-related evidence was no doubt relevant, including the surfeit of evidence regarding appellant's gang-related activities, the goings-on at the Remick Avenue house, and the "roll-calls" on the garage walls and in the writings found at the Sunrose residence. (See, *e.g.*, *People v. Hernandez* (2004) 33 Cal. 4th 1040, 1049-1050 [listing issue upon which gang-related evidence can be relevant, and cases there cited].) The trial court, however, seems neither to have filtered out the irrelevant, nor to have considered the prejudice side of the section 352 weighing at all.

In the cases cited in the introduction to this section, this Court has recognized that gang evidence in inherently inflammable (*e.g., People v. Williams*, *supra,* 16 Cal.4th at p. 194), and that the prosecution may not present cumulative evidence that "presents a substantial danger of under

prejudice to the defendant" (*People v. Cardenas*, *supra*, 31 Cal.3d at p. 905).

"Prejudice for purposes of Evidence Code section 352 means evidence that tends to evoke an emotional bias against the defendant with very little effect on issues, not evidence that is probative of a defendant's guilt." (*People v. Crew* (2003) 31 Cal.4th 822, 842.) That is precisely the situation here. The trial court admitted irrelevant, or at best marginally relevant, and certainly inflammatory gang evidence which had no bearing on appellant's guilt, either of the underlying crime or for purposes of the gang enhancement.

While, in general, a trial court's evidentiary rulings are matters of state law (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103), they may in egregious cases also violate a defendant's constitutional rights. (*E.g.*, *People v. Babbitt* (1988) 45 Cal.3d 660, 684 [section 352 unconstitutionally applied to limit presentation of defense evidence].) That is the case here: the prosecutor's unfettered introduction of the irrelevant and inflammatory gang evidence "divert[ed] the attention of the jury," inflamed their passions, was "so unduly prejudicial that it render[ed] the trial fundamentally unfair." (*People v. Bivert*, *supra*, 52 Cal.4th at p. 118; *People v. Harris*, *supra*, 37 Cal.4th at p. 351.)

As has been detailed elsewhere, this was, or should have been, a close case, with more than sufficient defense evidence to raise a reasonable doubt. There was ample and striking evidence that appellant would not have ordered the perpetrators to commit the underlying crime, that they would not have taken such an order from him, and that the manner of its being carried out would never have been allowed by a gang shot-caller such as appellant. The admission of the evidence set forth above, then, can neither be said to be harmless beyond a reasonable doubt under the federal standard, nor that it is not reasonably possible that the jury would have reached a different result absent the error. (*Chapman*, *supra*, 368 U.S. at p. 24; *People v. Superior Court (Ghilotti)*, *supra*, 27 Cal.4th at p. 918.)

Moreover, as presented below, the trial court's rulings here were part of a pattern of nearly unfettered inclusion for the prosecution evidence and persistent exclusion of defense evidence, cumulatively prejudicial under any standard. (*See post*, at pp. *****.)

C. IN CONTRAST TO THE COURT'S PERMISSIVENESS IN ALLOWING IN PROSECUTION EVIDENCE, THE COURT BOTH HAMPERED DEFENSE COUNSEL'S EFFECTIVE EXAMINATION OF FBI AGENT THOMERSON AND THEN EXCLUDED THE DEFENSE EXHIBIT CONTAINING THE FBI REPORTS OF THEIR CONTACTS WITH APPELLANT

1. The Trial Court Refused to Allow Counsel a Short Time to Interview the FBI Agent Before His Testimony, and Again Later That Morning

The trial court, for no apparently valid reason, cut short defense counsel's already insufficient time to interview FBI Agent Thomerson before his testimony.

As the court knew, the federal witnesses were not made available to counsel to interview prior to their coming to court to testify. The day before FBI Special Agent Thomerson's guilt-phase testimony, which was to begin at 9:30 a.m., the court asked counsel to arrive at 9:15 that morning, "just to make sure that we can discuss any issues that might be lingering for that witness." (19 RT 3673.)

Apparently, counsel were unable to get there on time that morning.[58] The following morning, the court minutes indicate that proceedings began

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[58] Counsel drove together each morning, from the San Fernando Valley to Orange County, which could entail unexpected traffic delays. (*E.g.*, 31 RT 5584.)

at 9:30 a.m. (7 CT 1734.) Second counsel Kallen reminded the court that the defense had never had an opportunity to speak with Thomerson personally, and asked for a brief opportunity to speak with him before he testified. (20 RT 3676.) The court denied the request:

> THE COURT: You already know what testimony you're going to elicit from this witness concerning the relationship of your client to the FBI, and you've been provided adequate discovery for that purpose, and we asked you to be here by 9:15 so you could talk to whatever witnesses, or counsel, to get ready to go. So we are going to start with the jury.
>
> MR. HALPERN: Can we just have 15 minutes, Your Honor?
>
> THE COURT: No.
>
> MR. HALPERN: Thank you very much, Your Honor. That's very kind. (20 RT 3676-3677.)

Later that morning, at nearly the end of cross-examination and just after a recess, the court, in chambers, acknowledged denying the time that morning to speak with the witness, and asked, "[B]efore I release this witness, after you finish your cross, is there any area that you think that you haven't had a chance to inquire into?"[59] (10 RT 3730.) Mr. Halpern

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[59] The phrase "after you finish your cross" doesn't quite make sense here, unless the court was addressing that phrase to the district attorney, as his cross-examination was not quite finished.

indicated that he had only spoken with Thomerson for a few minutes and would like to go over some of the reports in more detail with him, and ask him about what might not be in the reports. (10 RT 3730-3731.) Although counsel had the reports, he had no access to the witness for the three years prior to trial, and in particular would like to know which of the handlers wrote which sections of the reports. (10 RT 3731.) There was a tremendous volume, about 3-inches thick worth, of reports, and it was not always clear who wrote them. (20 RT 3732-3733.) So, again, he would appreciate some time before redirect to find out which reports he was privy to, and get more detail. (20 RT 3731-3732.)

The court then lit into Halpern for what appeared to be the history of his woeful preparation, and his failure to bring his files to court, and having to rely on the district attorney for pages he was asking witnesses about. (20 RT 3733-3734.) Halpern again asserted that, unlike other witnesses he can go over things with in advance of testimony, he had just had ten minutes with Thomerson before he got on the stand.[60] (20 RT 3734.) The problem

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[60] This comment seems to indicate both that he had a bit more than the "few minutes" mentioned earlier, and that defense counsel arrived that morning not that much after the court's suggested 9:15. In any case, the relevant fact is that they did not have enough time, as the court should have been able to figure out from the circumstances.

was that without the opportunity to review with the witness what he did and did not remember, he was forced to ask him on the stand, without knowing what the answer would be. (20 RT 3735.) The court noted that in his direct examination, Thomerson was able to inform that jury that Navarro was an informant, the nature of his activities, the quality of his work, and whatever else counsel mentioned in his opening statement. (20 RT 3736.) Mr. Halpern responded that he wanted to be able to find out if there is something more, something he did not know, that is not in the reports. (20 RT 3737.)

Mr. Kallen suggested that, as soon as cross-examination was complete, they take an early lunch to give Halpern an opportunity to speak to Thomerson. (20 RT 3738.) If, as the district attorney had told him, he did not have too much further on his further examination of Navarro (which was interrupted for Thomerson), the jury could the be excused early, at 3:00 or 3:30. The court again said no. He would give them a few minutes to speak with Thomerson specifically about the question of Navarro's dealings with cars (which Halpern had brought up earlier as an example of what he did not know.) (20 RT 3731.) The court continued:

> But as to your request to go over the reports that are contained in Defense I [the packet of FBI reports] in detail with the witness, I'm going to deny that request. That has to

be with – essentially, I think everything that you wanted to give to the jury in the guilt phase dealing with his relationship with the FBI has, in fact, been presented fully. (20 RT 3739.)

There may have been little more that Halpern could have gleaned from meeting with Thomerson . . . we'll never know. But it is clear that, for whatever reason, the court again hampered appellant's ability to present his defense.

And there was more.

2. Having Hampered the Defense Examination of Their FBI Witness, the Court then Undermined the Defense Further by Excluding the Exhibit Containing the FBI Reports

While the court had little problem admitting the wide-ranging and minimally relevant gang-related exhibits presented by the prosecution, it had equally little hesitation on severely limiting the jury's exposure to the extensive FBI files sought to be presented by the defense.

Defense Exhibit "I" was the log of all of the FBI's interactions with appellant. (20 RT 3682.) Most of 150 pages consisted of memoranda of contacts with appellant, each page headed with "**FEDERAL BUREAU OF INVESTIGATION**" and signed or initialed by the investigating officer or agent, such as and/or "SA Curran Thomerson." (Ex. I, p. 1, *passim.*)

The reports contained in Exhibit I formed the basis for the testimony of Special Agents Thomerson (guilt and penalty phases) and Rees (penalty phase.) (See, *e.g.*, 20 RT 3705 ['If it's documented in the report, then yes."], 20 RT 3710 [documents contain 64 separate entries in 2000 and 2001]."]

When it came time to enter the exhibit into evidence, however, the trial court balked. Initially, the issue was raised by the prosecutor, who claimed that Agent Thomerson's testimony was sufficient, and on that basis objected to all of the "200" pages of Exhibit I. (27 RT 4796.) The defense countered that the witnesses had referred to pages in the exhibit, and were basing their opinions concerning the defendant on the documents within it. (27 RT 4798.)

The court had earlier asked the defense to propose redactions, and the only ones defense counsel were aware of were (1) possible arrests which did not result in convictions; and (2) the names of two or three attorneys who were mentioned therein. (*Ibid.*) As an initial matter, the court excluded Exhibit I:

> I've had a chance to look at it, and it contains many entries that are extraneous to this particular case, and I thought I cautioned counsel at the very beginning that it was unlikely that I would admit the document, but make a good record as to what portions and what testimony, what

> questions. So I think the pertinent portions have been given to the jury in the form of testimony, so I'm going to deny the request for the admission of "I." (27 RT 4798.)

This is, in light of the very liberal admission of prosecution evidence and exhibits, simply stunning. Moreover, the court's reasoning does not withstand scrutiny. The court references many entries "extraneous to this case." But a major portion of the defense rested on the defendant's wide-ranging assistance to law enforcement; indeed, most of the law enforcement testimony on behalf of the defense had nothing directly to do with this case. Similarly, to say that the "pertinent portions have been given to the jury in the form of testimony" was never for a moment suggested as a reason to exclude the slew of prosecution exhibits – photos of persons other than appellant; phone-book entries not written by him – that the court had no trouble admitting, but which had been the subject of testimony.[61]

In a somewhat later discussion, the court did aver that portions of "I" might be relevant as mitigation in a penalty phase. (27 RT 4712-4716.)

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[61] The most striking example of this is Exhibit 100, and to a lesser extent Exhibit 101, pages and pages of phone-bill call logs, *including the prosecutor's yellow highlighting and notes,* all of which had been the subject of extensive, repetitive, and exhaustive testimony. (27 RT 4757-4758, 4810.)

Indeed, a severely redacted summary, Exhibits P and Q, were admitted in the penalty phase.

But the defendant has a right to present his complete defense. "Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense.

In *Chambers v. Mississippi, supra,* 410 U.S. 284, it was held that the exclusion of evidence, vital to a defendant's defense, constituted a denial of a fair trial in violation of constitutional due-process requirements. (*People v. Reeder* (1978) 82 Cal. App. 3d 543, 552-553; quoted with approval in *People v. Babbitt* (1988) 45 Cal.3d 660, 684; see also *Chambers v. Mississippi, supra,* 410 U.S. at pp. 302-303.)

The importance of admitting the evidence in the guilt phase was heightened by Special Agent Rees's absence. Agent Thomerson, while he had reviewed portions of Rees's reports, could not possibly replace the plentiful evidence presented in Exhibit I that originated with Rees's contacts with appellant. Moreover, Agent Thomerson's testimony, hampered as it was by the trial court's refusal to allow defense counsel sufficient time to consult with the witness, could not come close to approximating the impact of the sheer volume of reports of Navarro's

contacts with, and information given to, the FBI, as the exhibit itself would have.

This Court has said that Evidence Code section 352 determinations – and this was a determination under that section only *sub-silentio*, if at all – ordinarily do not implicate the federal Constitution, and thus are subject to the "reasonable probability" standard of *People v. Watson*, *supra*, 46 Cal.2d at p. 836. (*People v. Gonzales* (2011) 51 Cal.4th 894, 924.) Appellant would disagree to the extent that this decision represented a significant undermining of appellant's right to present his defense, subjecting the matter to the federal *Chapman* standard. (*Chapman v. California, supra*, 386 U.S. at p. 24.) Even under the state standard, however, and especially in light of the trial court's liberal admission of prosecution evidence, the trial court's exclusion of Exhibit I in this case, in which the prosecution's never-more-than-circumstantial evidence against appellant was largely countered by significant evidence that he was not the shot-caller who ordered the murder, were prejudicial. There is a reasonable chance, more than an abstract possibility, that the jury would have reached a different result absent the error. (*People v. Superior Court (Ghilotti), supra*, 27 Cal.4th at p. 918; *College Hospital, Inc. v. Superior Court, supra,* 8 Cal.4th at p. 715.)

D. IN COMBINATION, THE EVIDENTIARY ERRORS WERE SEVERELY PREJUDICIAL

There was a distinct and disturbing pattern to the trial court's evidentiary rulings, which consistently allowed in prosecution evidence and consistently excluded evidence favorable to the defense. The inevitable result was a distortion of the fact finding process, egregious enough to be violation of due process, and a persistent prevention of appellant's right to present a defense, in derogation of his federal and state constitutional rights. This should have been a close case. The prosecution evidence was built chiefly on the testimony of an admitted liar, the fact that appellant and the perpetrators were fellow gang members sharing a great deal of gang indicia, and the fact that a cell-phone which was one of nine used by appellant, his wife, and fellow gang members, was used in relation to the crime. That requires the inference that Navarro, once he had used the 1600-number cell phone, kept that as his phone – a not unnatural event for a non-gang-member person, such as a juror. But Detective Rodriguez testified that nearly every time Navarro called him, it was from a different number. (23 RT 4258.) The defense relied further on the facts that appellant was an informant, was suspected of being so by his fellow gang members (and was known to be so by his wife), and that the vehicle taken to commit the crime

and the vehicle left behind in front of appellant's residence, would never have been so had appellant truly been the shot-caller in this case. *Every* error of admission of prosecution evidence or exclusion of defense evidence might have tipped the scales in favor of guilt. Cumulatively, they went way beyond both the federal standard of harmlessness beyond a reasonable doubt (*Chapman, supra*), and that state standard of a reasonable chance, more than an abstract possibility, that the result would have been different. (*Ghilotti v. Superior Court, supra*, 27 Cal.4th at p. 918.)

The conviction should be reversed.

V. THE PROSECUTOR, ABETTED BY COURT, COMMITTED VARIOUS FORMS OF MISCONDUCT WHICH CUMULATIVELY AFFECTED THE FAIRNESS OF THE TRIAL

The prosecutor engaged in a pattern, or several patterns, of misconduct throughout the trial, abetted by the trial court's indifference, failures to rein him in, and outright approval. While the prosecutor's actions did not sink to the level of the prosecutor in *People v. Hill* (1998) 17 Cal.4th 800 (*Hill*) – and it is hard to imagine any that will – they were persistent and cumulatively prejudicial enough to bring them within the ambit of the standards established in *Hill.* The prosecutor in this case repeatedly prevented appellant from giving complete answers to his questions, engaged in a repeated argumentative questions and sarcastic comments, and engaged in questioning which had been precluded in a pre-trial hearing.

In *Hill*, the prosecutor's offending sarcastic and dismissive comments were directed toward defense counsel. In this case, the prosecutor's sarcastic comments, as well as his persistent cutting off of answers in cross-examination, were directed at appellant, demeaning him. A prosecutor's behavior violates the federal Constitution when it "comprises a pattern of conduct 'so egregious that it infects the trial with

such unfairness as to make the conviction a denial of due process.' "

Conduct which does not constitute a due process violation may nevertheless constitute prosecutorial misconduct if it "involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*Hill, supra*, 17 Cal.4th at p. 819 (citations and internal quotation marks omitted).) Moreover,

> Prosecutors . . . are held to an elevated standard of conduct. "It is the duty of every member of the bar to 'maintain the respect due to the courts' and to 'abstain from all offensive personality.' (Bus. & Prof. Code, § 6068, subds. (b) and (f).) A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. [Citation] As the United States Supreme Court has explained, the prosecutor represents 'a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' (*Berger v. United States* (1935) 295 U.S. 78, 88 [].) Prosecutors who engage in rude or intemperate behavior, even in response to provocation by opposing counsel, greatly demean the office they hold and the People in whose name they serve. [Citations.] (*Hill, supra*, 17 Cal.4th at pp. 819-810.)

The prejudice was cumulative, and where not argued in the following sections, will be set forth in the final section.

A. THE TRIAL COURT ALLOWED THE PROSECUTOR TO REPEATEDLY PREVENT APPELLANT FROM FINISHING HIS ANSWERS TO THE PROSECUTOR'S CROSS-EXAMINATION QUESTIONS

The court allowed the prosecutor to repeatedly cut off appellant's answers in his cross-examination, by objecting that it was non-responsive, and moving to strike. The court sustained most of these objections, some over protests from the defense that appellant should be allowed to finish his answer. The court kept telling defense counsel to make note of it, and ask follow-up questions on re-direct. The result, however, is that appellant's true responses to the prosecutor's questions – that is, the responses which came spontaneously from the question, was kept from the jury at the time the question was posed. This is true even where the question clearly called for more than a yes-or-no answer. The fact that the defense was invited to later explain the cut-off matter on redirect separated that response from the question to which it was addressed, preventing the jury from accurately assessing it. Moreover, defense counsel on redirect was necesarily hampered by not being able to ask leading questions.

As above, the following instances are simply numbered.

1, During cross-examination of Navarro about why he became a snitch after leaving prison in 2000, the following exchange occurred:

Q This is a good way to have a little spending money.

A To support myself.

Q Support yourself by turning in friends like Philip Sanchez; is that right?

A Yes.

Q Is that how you view this, I'll trade my friends in so I can have a few dollars for myself?

A No. Philip Sanchez was doing things --

MR. WAGNER: Objection. Nonresponsive. Move to strike.

MR. HALPERN: Your Honor. I'd ask that the witness be allowed to explain why he turned in Philip Sanchez. He was asked, he turned in Philip Sanchez for the money. He says no. I think he should be able to explain why he turned in Philip Sanchez.

THE COURT: And you might well be correct on that. I'm not making less of that. But just make a note there on your calendar that that's an area that you want to visit. With that, the next question. (18 RT 3412-3413.)

When the prosecutor asked, "Support yourself by turning in friends like Philip Sanchez, right[,]" it was permissible because it was an example of Navarro's acknowledgment that he was snitching in part for the money. The prosecutor's next question, besides its sarcastic undertone, asked how Navarro "viewed this," while characterizing Navarro's state of mind, and Navarro was entitled to answer with more than a "yes" or a "no."

2. Another example of this occurred when the prosecutor was questioning appellant about the Chevy Tahoe that Anthony Valles was driving when arrested. The Tahoe was registered in the name of appellant's girlfriend, Sarah Ochoa, and the prosecutor asked appellant if he told her to report that car stolen right before he snitched on Valles. Appellant answered no. Then, the prosecutor asked/commented:

> Q You didn't do that so that Rodriguez would have a reason to pull him over in the Tahoe?
>
> A No, What happened –
>
> MR. WAGNER: Objection. Nonresponsive.
>
> MR HALPERN: Your Honor –
>
> MR. WAGNER: Move to strike everything after "No."
>
> MR. HALPERN: I think there is something he should be able to explain
>
> THE COURT: And I might agree with you when you ask that question.
> Next question. (18 RT 3453.)

Here the prosecutor had both asked what happened and suggested a motivation for it. Appellant was entitled to answer with more than a yes or no, to explain either (1) that he did not have the Tahoe reported stolen; or (2) that he did not do it for that reason. This was not a question calling for a yes or no answer.

3. During later cross-examination regarding the trip Navarro made to Crescent City with Mira Corona, the following exchange occurred:

> Q During that trip, whenever it was, you can't remember, she came back with more information and talked to you more about this hit, correct?
>
> A No. On the way back when we drove on the way back she was --
>
> MR. WAGNER: Objection. Nonresponsive. Move to strike after no.
>
> THE COURT: It will go out.
>
> MR. HALPERN: Your Honor --
>
> THE COURT: It will go out.
>
> MR. HALPERN: Pardon me?
>
> THE COURT: It will go out. Just make a note of the areas that you feel need to be elaborated on, and you will be permitted at redirect to cover this area. (19 RT 3529.)

Again, the prosecutor's question assumed facts regarding what occurred on the trip back from Crescent City. Navarro was entitled to correct him.

4. After further questions about the trip to Crescent City and Pelican Bay State Prison, the following transpired:

Q Did she at any time in this August trip tell you the intended victim was her boss at Interfreight Transport where she worked?

A I can't remember. I didn't know where she worked.

Q Well, whether you knew where she worked or not, did she ever say, and by the way, this guy's my boss?

A She probably did. I can't remember, though.

Q Okay. So now you have more information that you could have given to Manitas, Detective Rodriguez.

A Yes.

Q You could say it's Edelmira -- Mira, the girl with the 562 number, it's her boss.

MR. HALPERN: Your Honor.

MR. WAGNER: The one-handed man.

MR. HALPERN: Your Honor, there will be an objection. The answer, there is no evidence that Ms. Corona said it was her boss. The witness said she may have given him that information. It's assuming facts not in evidence. Misstating testimony.

THE COURT: I'm going to overrule the objection. Where are we on the next question?

BY MR. WAGNER:

Q Sir, did you explore that with her, what is it that your boss is doing that has got Chispa wanting him to touch him up?

A No.

Q It was a mere coincidence?

A What do you mean?

Q Well, you try to put this together, your position is you're wrongly accused of this crime, correct?

A Yes.

Q You didn't have anything to do with the murder of David Montemayor.

A No.

Q What happened is, was there ever another conversation with Edelmira Corona between yourself and her after this Crescent City trip concerning the proposed hit?

A No, she --

MR. WAGNER: Objection. Nonresponsive. Move to strike after "no."

THE COURT: That's fine.

MR. HALPERN: Once again, I'd ask the witness be allowed to finish the answer before we know whether it's responsive or not. We don't know what the response is.

THE COURT: Make a note of the areas you wish to cover on redirect examination. (19 RT 3533-3535.)

The defense was correct, with respect to the first objection above: It assumed facts not in evidence. And with respect to the second objection, again the prosecutor was asking a question to which there may have been a

yes or no answer, but about which Navarro was entitled to explain, especially because the prosecutor started the question (or statement, really) with "What happened was . . ." Having been asked what happened, Navarro was entitled to explain what, in fact, happened.

5. The prosecutor was questioning appellant about the note from Corona, containing Montemayor's address, having been found in his glove box when he was arrested on October 17, 2002:

> Q And so then you remembered when this moment happens on October 17th, ah, I got that from Mira and I put it in my glove box and I haven't touched it since, correct?
>
> A Yes.
>
> Q But you also remembered, but I talked to Rod Rodriguez a couple times and I told him it was in my glove box.
>
> A Yes, and then some time passed from that day.
>
> Q Right. But on October 17th, it all came rushing back to you the day you got arrested.
>
> A Yes. There was so much going on, I had left. I was already in Las Vegas.
>
> MR. WAGNER: Objection. Nonresponsive. Move to strike everything after "Yes."
>
> THE COURT: That will go out. (19 RT 3558-3559)

The district attorney is characterizing Navarro's state of mind – "it all came rushing back to you the day you got arrested" – and Navarro was entitled to explain what, in fact, his state of mind was.

6. On the third day of appellant's testimony, in re-cross examination, the prosecutor brought up (for the first time) Exhibit 150, an undated letter to an unknown recipient.[62] (22 RT 4147.) The letter contains a reference to appellant's having "dropped four niggas" and "making all the dough again." (22 RT 4152.) The prosecutor asked if appellant was referring to his having snitched on Anthony Valles, Jeffrey Bueno, Jesus Casares, and Jose Primo Mendez. When appellant answered, "No. That's from a verse –," the prosecutor cut him off – "Yes or no." Defense counsel objected: He was answering the question as to where the phrase came from, and should be able to answer. The court merely repeated its familiar response: "Just make a note, and so you can get a clarification." (22 RT 4153.) While appellant got the opportunity to finish his answer on redirect – the phrase that includes reference to four niggas was from a song by Ice

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[62] The prosecutor posited that it was a letter to Navarro's girlfriend Sarah. (22 RT 4147.) Later, discussing some of the language of the latter, Navarro averred that it would not have been Sarah, because that was not the way he spoke to her. (22 RT 4149.)

Cube, "No Vaseline"[63] (22 RT 4176-4177) – the jury was initially left with the prosecutor's interpretation, that appellant was referring to the gang members he had snitched on. As discussed *ante* in the discussion about the delay in opening argument, such first impressions do not go away. And again, it was a question that inherently asked for explanation, which was cut off by the prosecutor and sustained by the court.

There are numerous other examples of this cutting off of defendant's answers, set forth in the margin.[64] While the appellant did have the opportunity on redirect to "finish" his answers and counter some of the prosecutor's inferences, the damage had already been done. The prejudice to the defendant arises from the dual facts that if defense counsel has to bring these things out on redirect, he may not do so using leading questions, and the simple fact that the prosecutor was allowed consistently to make appellant and his actions look bad, without the opportunity for immediate amelioration. This is both because he has no chance to explain – leaving

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[63] The full line from the song is: "I started off with too much cargo, dropped four niggas now I'm makin' all the dough." (<http://azlyrics.com/lyrics/icecube/novaseline.html> (as of January 29, 2014).)

[64] See, *e.g.*, 18 RT 3415-3416, 3443, 3482; 19 RT 3502-3503, 3612. Another occurred during the cross-examination of defense expert Richard Valdemar. (25 RT 4476.)

the impression that he has no explanation – and because the trial court was continuously allowing this, making the defendant, or his counsel, appear at fault.

B. THE TRIAL COURT REPEATEDLY FAILED TO REIN IN THE PROSECUTOR'S ARGUMENTATIVE, SARCASTIC, AND OTHERWISE IMPROPER CROSS-EXAMINATION OF APPELLANT

In contrast to the trial court's incredibly tight control of defense questioning of the witnesses, discussed above, its treatment of the prosecutor was deferential to the point of error.[65] The prosecutor repeatedly testified, asked argumentative questioned, made sarcastic remarks, and denigrated appellant's testimony and character:

1. During cross-examination, the prosecutor questioned appellant about why, after being pulled over by Officer Randolph in 1995, Navarro began to feed him information. The prosecutor was attempting to establish that Navarro was doing this for his own benefit: "Okay. He let you out. Actually, what happened is a couple days later he went down and talked to a court commissioner that your case was going to be in front of."

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[65] This is not to say that the court never sustained defense objections (*see, e.g.*, 19 RT 3521, 3522; 3538-3539), or denied the prosecutor's motions to strike *(e.g.* 19 RT 3541-3542; 3547); *but see* 19 RT 3522-3523 [argumentatively badgering the witness about a date prosecution had available to present to jury].

The defense objections, that counsel was testifying and that it called for hearsay, were overruled. Navarro, however, could not remember. (18 RT 3425.) Counsel was correct – prosecution was both testifying and speculating, on the basis of no evidence whatsoever that Navarro knew any such thing.

2. The prosecutor was questioning Navarro about the letter to Casper, found at the Sunrose residence (and hence, never sent), and its reference to five signatures.[66] (20 RT 3854 *et seq.*) The prosecutor suggested that Navarro was trying to fool Casper into believing that he, Navarro, had become a made member of the EME. Navarro denied it, and also claimed not to remember what he meant when he said "I got five hands." The prosecutor became sarcastic: "Did you go to Dodger Stadium, get the autographs of five ballplayers?" "Never been there." "You just have no idea what you meant?" "No." "If the author doesn't know, how are we to know?" Defense counsel's objection to the argumentative question was overruled. (20 RT 3856.)

3. Following the exchange regarding the "five signatures" reference in the un-sent letter to Casper, the prosecutor was asking about

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[66] "Now I got five signatures. Shoot, Doggie, We are gonna be unstoppable." (20 RT 3854).

the reference in the letter to the "Big Señores." Navarro averred that he was trying to let Casper know that everything was cool, Navarro was still the *llavero* for the Valley. The questioning continued:

> Q And you were keeping up, you were letting Casper know, you're trying to let Casper keep thinking that, right?
>
> A Yeah.
>
> Q That's what your whole life was about, was keeping up that appearance, right?
>
> A To find out information.
>
> Q You were very, very motivated to stop crime, weren't you?
>
> MR. HALPERN: Objection , Your Honor. Argumentative.
>
> THE COURT: Overruled. (20 RT 3857.)

4. The following exchange involved a call to appellant's mother's phone number on the day of the crime, that the prosecutor alleged that appellant made, and appellant believed that Bridgette made:

> Q Did you make a call at 3:14 in the afternoon on October 2nd to your mom's number in Las Vegas?
>
> A No.
>
> Q No? Do you know who called your mom at 3:14 in the afternoon on October 2nd?
>
> A Yes

Q Who was that?

A Bridgette.

Q Bridgette did? So did Bridgette have the phone for 1600 at 3:14 in the afternoon?

A I don't know, but she had called Vegas looking for me.

Q How do you know that Bridgette made this phone call that's right here at 3:14 in the afternoon?

A Because at first she tried to call my sister's house, then she tried to call my mom's then. Before that, Mira had called, and then after that Bridgette called and said what the hell was I doing and all that stuff.

Q So we get to the bottom of things.

MR. HALPERN: Your honor, move to strike. Ask counsel be admonished. "Get to the bottom of things."

THE COURT: Overruled. (19 RT 3607.)

5. The trial court refused to rein in the District Attorney even after this exchange regarding whether Navarro called his handlers about it from Las Vegas on the day of the murder, or later:

Q Okay. But then something unusual happened that day because you saw this pursuit on television and you realized this murder had happened, right?

A Yes.

Q And so you got on the phone and called Agent Starkey when after seeing that pursuit on television?

A I never said I called him.

Q You didn't, did you?

A No. No.

Q And then with respect to Detective Rodriguez, right after seeing that pursuit on television, you got on the phone and called Detective Rodriguez when?

A Not, not after that.

Q You didn't, did you?

A No. No.

Q Why not?

A I don't know. I don't know.

Q That's the best you can do for us?

MR. HALPERN: Objection, your honor.

MR. KALLEN: Objection, your honor. It's getting argumentative.

THE COURT: Sustained.

MR. KALLEN: Move to strike.

BY MR. WAGNER:

Q This is your whole defense, isn't it?

A What?

Q That you were an informant and you were trying to stop this murder, and somehow you got tossed up in this and you're wrongly accused. Isn't that your defense?

MR. HALPERN: Objection, your honor.

THE COURT: Overruled.

THE WITNESS: I didn't have a name. I didn't know--

MR. WAGNER: Objection. Nonresponsive. Move to strike.

MR. KALLEN: I think the witness should be allowed to answer the question.

THE COURT: Restate the question.

BY MR. WAGNER:

Q Is it or is it not your defense that you want to put to this jury on the charge of -- the capital charge, the murder of David Montemayor, that despite some appearances of evidence of your apparent involvement, whatever appearances there are, they are just due to the fact that you were playing along with this murder plot and, in fact, you were trying to stop it? Is that your defense?

A I tried to find out about it to tell Rodriguez, yes.

Q Why did you not call Detective Rodriguez on October 2nd after seeing the pursuit on television?

A I can't recall. I can't recall.

Q Let me give you some time. Think about it. Give us a better answer than that, if you can.

MR. HALPERN: Objection, your honor.

MR. KALLEN: Objection, your honor.

THE COURT: Overruled.

THE WITNESS: I can't recall.

BY MR. WAGNER:

Q Isn't it because you were involved in the murder?

A No.

Q How about when you found out that your house had been searched, the police were out there, busted down the door, turned everything upside down, took a bunch of your property, that's when you called Detective Rodriguez and said, man, I got to tell you, this is all Mira's doing, isn't it?

A No, I found out the house got hit when Bridgette called.

Q Now, so when you found that out, you got right on the phone to Detective Rodriguez, didn't you?

A I can't remember if I did.

Q Well, maybe it was Agent Starkey that you called.

A I can't remember if I did.

Q Give it a minute. Think about it.

A When the house got hit, Bridgette called me in Vegas and told me they raided the house.

Q Then what's you got on your phone to the handler and explained the whole mess.

A I can't remember if I did.

Q Why can't you remember?

A It's been five years.

Q Yeah. But when it was then, it was the most important thing in your life. You've been thinking about this day for five years.

MR. HALPERN: Excuse me, your honor. I'd ask --

MR. KALLEN: Objection. Compound and argumentative.

MR. HALPERN: Argumentative. Also tone of the voice. I would object and ask for an admonition not to yell at our witness.

THE COURT: That will be overruled. Did you get a chance to answer the question?

THE WITNESS: No.

MR. WAGNER: I'll withdraw the question. (20 RT 3770-3774)

6. Regarding Exhibit 56, a "to do" note found inside a CD case in the Sunrose residence (19 RT 3488), the prosecutor, after establishing that "playing hardball" meant turning the listed people in to Detective Rodriguez, initiated the following exchange:

Q You put "visit Manitas" way down here, but you talk about the things you're going to turn in to your handler up here and just say "play hardball" up here.
Does that make sense to you?

MR. HALPERN: Objection, Your Honor, Argumentative.

THE COURT: Overruled.

THE WITNESS: It's just the way I wrote it.

BY MR. WAGNER:

Q Uh-huh. Yeah. And it doesn't lie, does it? It's just there.

MR. HALPERN: Objection, Your Honor. Once again, it's commentary, and it's argumentative.

THE COURT: Overruled. (19 RT 3492.)

7. While the prosecutor was questioning appellant about why he did not give Detective Rodriguez more identifying information about the intended victim of the impending Orange County hit, there was this exchange:

Q When Mira passed you the note that said "one hand" on it, she told you it was her boss, didn't she?

A I can't remember. But yes, I think so.

Q Yes, you think so?

A Yes.

Q So even though you didn't have a name, it wouldn't have been that hard to tell Detective Rodriguez, gee, I can't remember his name, but it's Mira Corona's boss?

MR. HALPERN: Your Honor --

BY MR. WAGNER:

Q He's a one handed man.

MR. HALPERN: Objection. Argumentative.

THE COURT: Overruled.

BY MR. WAGNER:

Q Why, if you already had that information?

A I don't --

MR. HALPERN: Objection, your honor. Misstates evidence.

THE COURT: Overruled. (19 RT 3524.)

8. While asking about Navarro's meetings with Mira Corona, the prosecutor asked if she ever asked appellant to do the hit himself, as opposed to getting someone to do it for him:

> Q At McDonald's, whenever that was, she asked you to do it personally or did she ask you to arrange to have somebody else to do it?
>
> A At first she tried, she asked me to do it personally.
>
> Q So now we have to add to this note, can you do it yourself.
>
> MR. HALPERN: Your Honor, there will be an objection to counsel not asking questions, but narrating for the jury, just this last time.
>
> THE COURT: Overruled. (19 RT 3531.)

9. Regarding appellant's March, 2002, arrest for felon-in-possession, in which a gun was found in a secret compartment of appellant's Lexus, the prosecutor was trying to show that appellant's work as a snitch thereafter was to "work off" that charge. Appellant said that at the time of the bust, he was already working with Sanchez. The prosecutor asked, "And then Sanchez passes you to Rodriguez to work off this felon with a firearm beef?" Defense counsel objected, "Misstates facts not in evidence." That was overruled and appellant answered, "I didn't work off nothing." (20 RT 3806-3807.)

10. Neither, he said, was his going to work for the ATF in April. 2002: "Again, I didn't work off no – they never even took me to court for it." The prosecutor responded: "I understand. Somebody might have believed your lie that that wasn't your gun, is that what you're saying?" Appellant answered, "What? I don't understand," just before defense counsel objected that the question called for speculation as to the reasons why the charges were not filed. The judge ruled: "The answer will stand." (20 RT 3807-3808.)

11. The focus shifted to appellant's having picked up two Pacoima Criminals gang members after one of them, Guillen, paged him. "This guy from the Pacoima Criminals must have thought you were pretty

legit. He didn't think you had a green light, did he?" Again the defense objected that this called for speculation as to the states of mind of other people. The judge "let this question go to the witness in terms of his perception." (20 RT 3809.) How, though, would appellant know what was in the minds of his passengers? This was in direct conflict with the holding in *People v. Killebrew* (2002) 103 Cal.App.4th 644, which the court had earlier misapplied to prevent a portion of the defense expert's testimony. (24 RT 4448-4450, 4455-4456.)

Other examples of the prosecutor's improper comments abound: *E.g.,* 18 RT 3391 ("Actually, that's the very nature of being a confidential informant is you lie all the time. Your life is a lie." [Court allows Navarro's answer, "no," to stand]); 18 RT 3441 (commenting on appellant's having cars registered in his mother's name, to save on insurance: "So dishonest, but it was to your advantage?" [Court rules word "dishonest" will go out]); 18 RT 3456 ("No honor among thieves" [court strikes comment]); 20 RT 3776 ("Why can't you remember? You've been thinking about his day for five years, haven't you?" [Objection overruled.]).

The court's attitude seemed to be summarized in an exchange about phone records and what was shown in a stipulation regarding them. The court actually sustained a defense objection about one of the prosecutor's

comments. But when defense counsel asked that the prosecutor be admonished not to make editorial comments about appellant's answers, the court responded:

> THE COURT: You know, ideally it would be good for both sides.
>
> MR. HALPERN: I agree.
>
> THE COURT: From time to time, counsel wills stray. The jury will disregard it and we will march on. (19 RT 3577.)

Of course, there were few if any examples of such defense comments, and the court most often refused to order the jury to disregard the jury's comments. Rather, it simply allowed the prosecutor to "march on" with his sarcastic and other improper comments.

But these were not the only examples of the prosecutor's misconduct.

C. THE PROSECUTOR BROUGHT OUT FACTS NOT IN EVIDENCE BUT DAMAGING TO THE DEFENSE

Deborah Almodover testified for the defense that in a jail conversation, Mira Corona had told her about Perna's request to have her brother killed, and that Macias, Corona's lover, came down to Orange County to do it. (19 RT 3647-3648.)

When appellant returned to the stand for further cross-examination, the prosecutor asked how many times he had spoken on the phone with Almodovar. That led to questions about the male inmates talking to the female inmates through the jail bathroom pipes. (20 RT 3823.) Navarro stated that he no longer did that, because "you get tired after a while." Asked when he got tired, appellant answered, "After speaking to some girl named Summer." "Oh," the prosecutor answered, "the girl who went upstate for threatening Mira Corona?" (20 RT 3824.)

The defense objected, and asked, outside the presence of the jury, for a mistrial for intentional prosecutorial misconduct for stating that Navarro had been talking to a woman who had threatened a People's witness. There had been no evidence to that effect; and it was not asked in good faith. It was just "blurt[ed] out in front of the jury to poison the jury." (20 RT 3824-3825.)

The prosecutor responded that it was in discovery; it was in evidence.[67] Sherwood was serving a two-year sentence for threatening Corona if she testified against Navarro. (20 RT 3825.) The defense

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[67] It should be noted that while Summer Sherwood was listed in the People's final list of potential witnesses, she was one of but 4, out of 31, civilian witnesses who was *not* marked as "most likely" to be called. (5 CT 1187, 1189-1190.)

responded that Sherwood was not going to be called as a witness; Ms. Corona was not questioned about it; there is no evidence of any connection with Navarro; and under these circumstances to bring this before the jury was misconduct. (20 RT 3825-3826.)

The court asked if the prosecutor intended to introduce evidence of the Sherwood case. He responded that he had no intention of it, but now that Navarro had volunteered his connection to Sherwood, it was something he was thinking of doing, but would back off of it for now. (20 RT 3826.)

Of course, the fact that the prosecutor was thinking about it was neither justification nor excuse for his bringing the matter before the jury when he did. Worse, when the defense asked the court to strike the comment, it did not – "I don't know that I will until he makes a further determination as to if he's going to pursue it further with this witness or through other witnesses or other evidence. I'll leave it alone at this point in time." (20 RT 3827.) Unfortunately, it was never returned to, either by the prosecutor or the court.

A prosecutor's statement of facts not in evidence are improper whether or not the error was intentional. (*People v. Bolton* (1979) 23 Cal.3d 208, 214 [closing argument].) It is, however, as part of the pattern

of court-abetted misconduct, argued *post*, that the magnitude of prejudice becomes clear.

D. THE TRIAL COURT ALLOWED THE PROSECUTOR TO ASK ABOUT MATTER WHICH HAD BEEN PRECLUDED *IN LIMINE*

During the cross-examination of appellant, the prosecutor brought up the 2003 jailhouse stabbing by Martinez, Macias, and Lopez. Before trial, the court had excluded questions suggesting that the reason for the stabbing was not an EME green light, but that the co-defendants had learned that Navarro was an informant through discovery shared with them by their attorneys. (10 RT 2093-2097; 12 RT 2201-2203.) Nevertheless, the prosecutor began to ask the excluded question, which was cut off by a defense objection, leading to another discussion out of the presence of the jury. (22 RT 4164-4165.) In the ensuing discussion, the trial court sustained the objection. (22 RT 4166-4167.) The court would allow, however, the more general question of whether appellant had considered that they might have other reasons to assault or attack him. (22 RT 4167.)

The prosecutor then proposed asking appellant whether the attack might have come about because they discovered that he had lied to them about the reasons for doing the hit – it did not come as an order from above, from the EME, but was simply Navarro's currying favor with Mira Corona.

Again the court limited the prosecutor to the more general question, did he consider that the other three co-defendants felt he had lied to them. (22 RT 4168.)

The prosecutor, in part with the court's blessing, went way beyond what the court had approved:

> Q Now, this stabbing in February of 2003, it was your testimony that you interpreted this as a sign that there was a green light put out by the Mexican Mafia on you, correct?
>
> A I knew I had a green light.
>
> Q Wasn't it the case that the reason your co-defendants stabbed you is that you had given them this job to do and told them this comes from way up above from Pelican Bay?
>
> MR. HALPERN: Objection, Your Honor. That was the same objections as before.
>
> THE COURT: Same ruling to the form of the question.
>
> BY MR. WAGNER:
>
> Q Did you consider that the -- your co-defendants had realized you had lied to them about the reason for this murder going down?
>
> A No.
>
> Q And when they discovered there is a sister and not Pelican Bay behind this --

MR. HALPERN: Objection, your honor. Once again, objection.

THE COURT: It will be sustained.

BY MR. WAGNER:

Q You told Macias, Martinez and Lopez to go out and do this job, here is a car, here is a phone, here is your AAA note, here is the victim's workplace, pick him up, take him home, there is coffee cans in the garage, and the reason for doing this, gentlemen, is this comes from way up above, my -- the Big Homie, the Señores are calling this hit, didn't you?

A I did not.

Q When they found out that was not true, they turned on you, didn't they?

A No.

Q They didn't want to, they probably wouldn't have done this job if you had come to them and said there is some girl named Mira, her boss is jealous, the boss is jealous of the boss's brother, and this has nothing do with us, guys, but Mira has some connections, and I need to use her connections, so won't you please go out and do this job?

MR. HALPERN: Your Honor, there is an objection. It's not a good faith question.

THE COURT: Overruled. You can answer that.

THE WITNESS: No.

BY MR. WAGNER:

Q If you had put it to them that way, they never would have gone and done that job so you could curry favor with some secretary, right?

A I didn't put it no way.

Q So you had to present it to them, this comes from way up above.

A No.

MR. WAGNER: I have no further questions. (22 RT 4171-4173.)

While the pre-trial discussion related principally to the prosecutor's conjecture about the three perpetrators having found out about Navarro's being a snitch from discovery materials, this was no less speculative, based on no evidence whatsoever, and incapable of being countered. This violated the principle that a gang member cannot be asked about the subjective knowledge of other gang members. (*People v. Killibrew, supra*, 103 Cal.App.4th at p. 652 [each of four gang members in car cannot be held to know the subjective knowledge and intent of each of the others in the car];see also *People v. Ward* (2005) 36 Cal.4th 186, 210 [allowing fact-specific hypothetical questions to experts]; *People v. Gonzalez* (2006) 38 Cal.4th 932, 946 [*Killebrew* merely prohibited expert from testify to his or her opinion of knowledge or intent of a defendant on trial]; *People v. Vang*

(2011) 52 Cal. 4th 1038, 1045-1046 [hypothetical questions must be rooted in the facts in evidence, but may not be based on speculation or conjecture].

The prosecutors questions about why appellant may have been attacked were, in fact, rooted in conjecture and should have been excluded.

E. THE PROSECUTOR'S MISCONDUCT, ABETTED BY THE COURT'S RULINGS, PREJUDICIALLY DISTORTED THE TRIAL

In each of the foregoing examples of the prosecutor improper conduct – cutting off of appellant's answers, sarcastic comments and argumentative questions, improper mention of matters not in evidence, and asserting facts not in evidence – a pattern emerged: The prosecutor learned that he could get away with most anything he wanted and the court would not intervene. Thus, this case is similar to, if not on all fours with, the prosecutorial misconduct described in *People v. Hill, supra,* 17 Cal.4th at p. 821 (misstating evidence, sarcastic and critical comments demeaning defense counsel, and propounding outright falsehoods).

Here, the prosecutor repeatedly cut off defendant's right to explain his answer to questions which called for more than simple yes-or-no answers, repeatedly demeaned defendant by argumentative, sarcastic, and editorializing comments, and was abetted in all of this by the trial court refusal to rein him in. The first distorted the fact-finding process; the

second demeaned appellant. Unlike *Hill*, however, this was a close case, in which the prosecution evidence of appellant's involvement in the crime was barely, if at all, sufficient, and was belied by facts and circumstances that were not consistent with his having been involved according to the testimony of his law-enforcement handlers and the defense expert.

Prosecutors are held to an elevated standard of conduct (*Hill, supra*, 17 Cal.4th at pp, 819-820); and the cumulative effect of trial errors such as these can require reversal. (*Id.* at p. 818.) Moreover, as in *Hill's* discussion of the prosecutor's misconduct during argument, the trial court here "failed to place reasonable limits on a prosecutor who often approached and line between proper and improper argument, and who many times crossed that line. (*Id.* at p. 831, fn. 3; citing *People v. Bain* (1971) 5 Cal.3d 839, 849 [by not reprimanding either counsel, trial judge allowed trial to be conducted at destructive emotional pitch].)

In this case, in which the trial had already been distorted by the court's deferral of the opening argument and the trial court's several erroneous rulings against the presentation of defense evidence, the further distortions caused by the prosecutor's misconduct surely amounted to a denial of due process. Given that the defense presented ample evidence that appellant was not involved, especially after he informed his handlers of the

impending crime, and given that he would not have allowed things to proceed as they did, the prosecutor's over-zealousness could not have been harmless beyond a reasonable doubt. (*Chapman, supra.*)

Neither can it survive state-standard review, whether as stated in *Hill* – involving the use of deceptive or reprehensible methods to attempt to persuade the jury (17 Cal.4th at p. 819) – or the more general state standard as stated in *Ghilotti v. Superior Court, supra*, 27 Cal.4th at page 918, there is more than a reasonable chance, more than an abstract possibility, that the result would have been different absent the prosecutor's misconduct abetted by the trial court's rulings.

VI. CUMULATIVELY, THE TRIAL COURT'S ERRORS RESULTED IN A GROSS DISTORTION OF THE FACT-FINDING PROCESS AND VIOLATIONS OF APPELLANT'S RIGHTS TO DUE PROCESS AND TO PRESENT A DEFENSE

Appellant submits that each of the errors set forth elsewhere in this brief were sufficiently prejudicial to require reversal for the reasons discussed in the respective arguments. Cumulatively, however, these errors added up to an egregious distortion of the fact-finding process, violating appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process and a fair trial, to counsel, and to present a defense, as well as the analogous rights embodied in the California Constitution, article 1, sections 7, 15, and 16. (*People v. Hill, supra*, 17 Cal.4th 800, 844, 847 [cumulative error may be prejudicial].)

Even in cases in which no single error compels relief, a criminal defendant may nevertheless be deprived of due process if the cumulative effect of all the errors in the case denied him fundamental fairness. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487 and fn. 15; and see *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439; *United States v. McLister* (9th Cir. 1979) 608 F.2d 785, 791.) In addition, the Eighth Amendment guarantee of heightened reliability in death judgments also compels relief when the cumulative effect of errors undermines confidence in the

reliability of the judgment. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.)

The Supreme Court has repeatedly held that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair. (*Chambers v. Mississippi, supra*, 410 U.S. at pp. 298, 302-3 [combined effect of individual errors "denied [Chambers] a trial in accord with traditional and fundamental standards of due process" and "deprived Chambers of a fair trial."]; *see also Montana v. Egelhoff* (1996) 518 U.S. 37, 53 (1996) [stating that *Chambers* held that "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation"]; *Taylor, supra*, 436 U.S. at 487 n. 15 ["[T]he cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness . . . ."].)

The Supreme Court has also stated that the cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal. (*Chambers*, 410 U.S. at p. 290, fn. 3.) Where the combined effect of individually harmless errors renders a criminal defense "far less persuasive than it might [otherwise] have been," the resulting conviction violates due process. (*See Chambers*, 410 U.S. at 294.) Thus, it would be

incorrect to hold that because no individual error warranted relief, relief for cumulative error is unwarranted.

The federal appellate courts have similarly held. The Tenth Circuit has found that cumulative error analysis grows out harmless error analysis. (*Cargyle v. Mullin* (10th Cir. 2003) 317 F.3d 1196, 1220, *citing United States v. Rivera* (10th Cir. 1990) 900 F.2d 1462, 1469, 1470, which in turn cites *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681.)

The Supreme Court has said that cumulative error analysis is a natural extension of the law, without which the law makes little sense. "The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." (*Delaware v. Van Arsdall, supra*, 475 U.S. at p. 681.) The *sine qua non* of the Supreme Court's criminal jurisprudence is whether or not a fair trial occurred. This is why the Tenth Circuit found the *Brecht* standard of a "substantial and injurious" effect upon the verdict as appropriate when reviewing multiple claims of error that by their nature do not share a common test of prejudice.

(*Cargyle, supra,* 317 F.3d at p. 1220.) This standard respects finality as well as fairness.

The Ninth Circuit has similarly held:

> Under traditional due process principles, cumulative error warrants habeas relief only where the errors have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Such "infection" occurs where the combined effect of the errors had a "substantial and injurious effect or influence on the jury's verdict." *Brecht* [*v. Abrahamson*], 507 U.S. at 637, 113 S.Ct. 1710 (internal quotations omitted); *see also Thomas* [*v. Hubbard*], 273 F.3d at 1179-81 (noting similarity between *Donnelly* and *Brecht* standards and concluding that "a *Donnelly* violation necessarily meets the requirements of *Brecht* "). In simpler terms, where the combined effect of individually harmless errors renders a criminal defense "far less persuasive than it might [otherwise] have been," the resulting conviction violates due process. *See Chambers*, 410 U.S. at 294, 302-03, 93 S.Ct. 1038. (*Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927.)

A review of the arguments made in this brief reveals two persistent themes to the trial court's errors. On the one hand, the prosecution was allowed wide latitude both in the improper admission of evidence and also in the court's failure to rein in the prosecutor's misconduct. Conversely, the defense was persistently hobbled by the court, both by judicial meddling in the defense case and by a long string of evidentiary errors.

The was more than just a close case; the record strongly suggests innocence. But for the distortions in the fact finding process introduced by the trial court's numerous errors, the defense case would have established far more than reasonable doubt of guilt. Unlike the circumstances in many cases, much of the defense case was presented by law enforcement officers who corroborated much of appellant's testimony, including agents from the FBI and ATF, Los Angeles Police Department detectives, and a former detective – the defense gang expert – whose expertise was endorsed by the prosecution's own expert. (20 RT 3678 *et seq*; 21 RT 3873 *et seq*; 22 RT 4086 *et seq.*; 23 RT 4202 *et seq.*; 25 RT 4420 *et seq*; 17 RT 3234.) Appellant himself was a law enforcement informant and, according to his law enforcement handlers, for the most part a reliable and credible one (*e.g.*, 20 RT 3671; 21 RT 3875, 3886, 3911) who more than once put his life in danger. (*E.g.*, 20 RT 3685-3685, 3687, 3712, 3745-3746.)

Moreover, there was strong evidence that the allegations against him had been cooked up by others with strong motives to frame him. From the time appellant was released following his arrest on a third-strike, felon-in-possession car stop, the fact that he was an informant was known by his angry and jealous wife, Bridgette, whom he was divorcing – and who reported his narcotics activities and that he was still carrying a gun to Agent

Starkey, a third-strike crime. (18 RT 3448; 21 RT 3878.) More importantly, that he was an informant had to have been known or strongly suspected by his fellow gang members and their Mexican Mafia overlords. Moreover, he had as early as late 2000 been terminated by the FBI because word on the street was that he was a snitch, and Mira Corona had received a letter from "Chispa" Vivar warning of suspicions about him that would have prevented her from continuing to seek his assistance in the murder. (20 RT 3714; 25 RT 4441-4443.) Under those circumstances, his gang cohorts would never have followed his orders to commit the crimes against Montemayor.

Rather, it was far more likely that Bridgette Navarro, in concert with her new friend Mira Corona and the three perpetrators, intentionally set up the crime in such a way as to implicate appellant. (23 RT 4314-4316.) There is no other plausible reason why the perpetrators would have used as their "G-ride" a vehicle registered to appellant's address and left a car rented to Macias, one of the perpetrators, in front of his residence. (25 RT 4447.) Certainly, if appellant had actually been involved in the planning or execution of the crime, he would never have permitted these actions or failed to take steps to correct them once the perpetrators were arrested. (23

RT 4318-4320.) No gang "shot-caller" would have allowed this to happen. (*Ibid.*)

It is *only* because of the numerous trial court errors and the prosecutor's misconduct that the defense was unable to establish reasonable doubt as to appellant's guilt. Even applying the state standard, of "a reasonable chance, more than an abstract possibility" that the errors affected the trial outcome (*People v. Superior Court (Ghilotti), supra*, 27 Cal.4th at p. 918), the errors are not harmless. How could they be, in view of the combined effect of the trial court's interference in the defense, causing the defense opening argument to be deferred; the numerous evidentiary errors, almost all in favor of the prosecution and against the defense; the prosecutor's persistent pattern of argumentative, sarcastic comments and appalling conduct in repeatedly interrupting to prevent appellant from fully answering the cross-examination questions?

The sum total of the errors set forth above turned due process on its head, and consistently interfered with appellant's rights to counsel and to present a defense. It is simply not possible, in any rational world, that these errors, taken together, were harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.) Appellant's conviction should be reversed.

PENALTY PHASE STATEMENT OF FACTS

A. PROSECUTION EVIDENCE

1. INTRODUCTION TO PROSECUTION EVIDENCE

The prosecution introduced in aggravation evidence of prior convictions (§ 190.3, subd. (c)) and prior unadjudicated criminal activity involving the use or attempted use of force (§ 190.3, subd. (b)). To the extent that the "factor c" prior convictions also involved the use or attempted use of force, the trial court allowed the prior convictions to be introduced as "factor b" evidence.

2. THE "FACTOR B" INCIDENTS INVOLVING THE USE OR ATTEMPTED USE OF FORCE OF VIOLENCE

(a) The February 2, 2002 Incident at Laurie Fadness's House

On February 2, 2002, several gangsters entered the home of Laurie Fadness and attacked her boyfriend or tenant, David Gallegos-Estrada, who was also known as "Perico," his cousin "Blackie," and Fadness's roommate Steve Newman. (31 RT 5501-5508.) When she came into the house through the back door, Fadness found Gallegos sitting on the floor in front of the fireplace with a blank look on his face. (31 RT 5506-5507.) "Blackie" was sitting in the bathroom doorway with blood gushing from his head. (31 RT 5508.) Steve Newman, who was sitting on the floor next to

"Blackie" was very sweaty and looked like he had seen a ghost. (31 RT 5508.) As Fadness arrived, some of the intruders were going out the front door; others were coming towards her. One of the them, a man she knew as "Primo," hollered "Droopy, Jesse, let's go." (31 RT 5511-5512.)

Fadness described her house as "destroyed." The furniture was upside down and broken, and blood was splattered on the walls. (31 RT 5513.) Blackie had cuts and contusions on his face, and the index and middle finger of one of his hands were bloody and hanging as if by a string from the knuckle. (31 RT 5514.) Gallegos sat staring and did not respond to questions. His cheeks were puffy and his mouth was bloody. When he was unable to speak or open his jaw for two days, Fadness took him to the hospital. (31 RT 5514-5516.)

Fadness did not call the police for five days. During a search at that time, Detective Edwards found a bullet hole in the attic. (31 RT 5516-5518.)

Gallegos testified that there were five intruders, four of whom he knew: Phillip Hirsch, "Primo," "Fila," and "Capone." (32 RT 5633-5637.) When the men entered the house, Hirsch said to Blackie that Droopy wanted to talk to him. Blackie answered that he had nothing to say to Droopy, and the intruders then began to hit Gallegos, Blackie, and

Newman.[68] Hirsch hit Gallegos first in the face and knocked him down. After that Gallegos didn't see anyone else being hit, but he heard Blackie screaming. (32 RT 5637.) Gallegos then passed out, but also recalled hearing two gunshots. When he awoke, the intruders were gone. (32 RT 5638). Blackie had a gunshot wound to his head, and his finger was "flying about . . . as if it had exploded due to something." (32 RT 5639.) Gallegos had a broken jaw, which had to be wired shut for two months. (32 RT 5639-5640.)

Gallegos said the attack had occurred because Primo, Fila, Capone, and Hirsch incorrectly believed Gallegos had stolen ephedrine from Hirsch.[69] (32 RT 5708-5709.) He said appellant was not present at the attack. (32 RT 5722.) Indeed, District Attorney's Inspector Gomez testified that when he spoke with Laurie Fadness in 2005, she confirmed that she did not see Navarro there that night, and never indicated to Gomez that she heard appellant's name that night. (37 RT 6487.)

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[68] While Gallegos referred on the stand to his cousin Juan, for consistency with the Fadness testimony he will be referred to here as Blackie.

[69] There was no evidence that Fila and Capone were Pacoima Flats gang-members, and some evidence that they belonged to the Vineland gang. (32 RT 5724, 5727-5728.)

(b) TheMarch 18, 2002 Incident at Remick Avenue House

In early March, 2002, Gallegos was asked by a Vineland Gang shot-caller named "Chonga" to deliver a letter to someone in the Pacoima Flats gang. (32 RT 5641-5644, 5646, 5724.) Gallegos arranged a meeting and passed the letter, which he never read, to four people he did not know. (32 RT 5645.)

About two weeks later, on March 18, 2002, he got a call from his friend Richard, who lived on Remick Avenue about five doors down from appellant's house, who told him told Droopy wanted to talk to him. (32 RT 5649-5651.) Gallegos thought that the Pacoima Flats gang wanted to talk to him about the ephedrine that the gang mistakenly thought he had stolen, the issue that had prompted the attack at Fadness's house. (32 RT 5652.) Gallegos therefore armed himself with a gun and went to Richard's house, where three or four men he did not know came and took him to Droopy's house. As they did so, one of them seemed to be pointing a gun at him from under his shirt. (32 RT 5654-5657.) When he got to appellant's house, there were seven to eight men there, including Primo and the men to whom he had given the letter. Droopy asked him if he was the one who passed the letter and asked him who the letter was from. When Gallegos answered that

he had received the letter from Chonga of the Vineland Boys, Droopy and all the other Pacoima Flats members started hitting him. (32 RT 5658-5661, 5663.)

There ensued an extended period of assault, torture – including the removal of some of the wires holding his jaw shut and the burning of his feet with a torch – false imprisonment, by encasing his body in duct tape, and threats of death. (32 RT 5663-5685.) At the end of the assault, several of the gang members placed him in a car and told him to crouch down in the seat. (32 RT 5685-5686.) Gallegos could not recall what occurred next, but awoke some time later in the hospital, where he was being treated for gunshot wounds. He had been shot 14 times. (32 RT 5690-5691.) At the time of trial he remained in a wheelchair. He said that half his fact was paralyzed, that he cannot work, and that he needs assistance to live. (32 RT 5692-5692.) However, Gallegos said that appellant was not among the people in the car the night he was shot. (32 RT 5773.)

Officer David Ortiz testified that Gallegos told him that it was Vineland gang members who shot him, but the only name he could give was "Trusty." (32 RT 5607.) Later, speaking with Detective Edwards,

Gallegos identified "Trusty" as Valles.[70] (34 RT 6117-6118.) Valles, at the time, lived in back of the Remick House. (18 RT 3442.)

The prosecution also presented evidence regarding the shooting from Officer David Ortiz, who found Gallegos lying in the street (35 RT 5601 *et seq.*), Detective Alvonso Muñoz, who processed the scene (32 RT 5622-5630), and a resident of the neighborhood, who lived down the street from where Gallegos was shot. (33 RT 5814-5823.)

(c) The Incidents Involving Paul Parent

Paul Parent was a mechanic who met appellant in September, 2001, and appellant offered him a substantial salary to come work for him. (33 RT 5836-5837.) A couple of weeks later, appellant asked Parent to move into the Remick Avenue house, and Parent did so. (33 RT 5838-5839.) Parent worked on all of appellant's cars, including the Chevy Blazer which, Parent said, belonged to appellant. (33 RT 5840-5841.)

Parent said that Bridgette, Bridgette's daughter, and two men he knew as "Casper" and "Villain" also lived at the Remick Avenue house at that time. He described "Villain" (Valles) as appellant's right-hand man.

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[70] Edwards said that on March 21, three days after he was shot, Gallegos identified the shooters as Droopy and Trusty. Later, on April 12, Gallegos identified the shooters as Primo and Trusty. (34 RT 6155.)

(33 RT 5842.) "Primo," who had a gold Chevy Tahoe and a gold Toyota Camry, was also around frequently. (33 RT 5843-5844; Exh. 173).

Regarding the beating of Gallegos described the the foregoing section, Parent testified that he saw a Latino man being beaten up and dragged into the garage by appellant, Macias, and Anthony Valles. (33 RT 5873.) After taking the Latino man into the garage, appellant told Parent to go into the house. (33 RT 5873.) Parent then heard the Latino man yelling, then he heard appellant tell Pirate to stop, that they weren't in the barrio, and to take it easy. Parent also heard a crashing sound, like metal hitting wood. (33 RT 5874.) When Parent was allowed back into the garage about 45 minutes later, it was empty. (33 RT 5875-5876.) However, the garage looked like it had been ransacked. (33 RT 5881-5882.)

Parent wanted to leave beginning about two weeks after he arrived because of "the things that were going on." (33 RT 5845.) Parent said that on November 13, 2001, he took one of appellant's cars and drove it back to his own house, but when he returned the car, appellant, Pirate and Villain jumped him. Appellant hit him in the face, someone else hit him in the head from behind with a beer bottle, and his finger was broken with a hammer. (33 RT 5845-5846, 5848-5849). When he went to the hospital for treatment, appellant told him to say he was robbed. (33 RT 5846.) The cut

to his head required twelve staples, and he needed a splint for the bone on the end of his finger. (33 RT 5847.)

After he had been treated and released, appellant, Pirate, and Villain found him at the home of his friend, Eddie Mena, and told him they wanted him to go back to work at appellant's house. Out of fear for his life, he agreed to do so. (5849-50).

About a month later, Parent tried to leave again. (33 RT 5850-5851.) "Casper," who had been assigned to keep watch on him, wanted to go to a pawn shop. Parent tricked Casper into leaving his gun in the car and getting out to see if the pawn shop was open, and then drove off in the car. (33 RT 5851-5852.) Parent went to stay at his brother's girlfriend's house, but when he went back to Eddie Mena's house, appellant pulled up in front with three or four gang members and they chased him, until Parent jumped a wall. Appellant told Parent to get back to his house or there would be "problems," and, under that threat, he returned. (33 RT 5852.) Appellant said everything would be "all right," but when Parent went into the back yard of the Remick Avenue house, he was jumped and beaten by appellant, Villain, Villains's brother, Pirate, and a man named Rudy. (33 RT 5853, 5855.) His only injuries were bumps and bruises on his head and back. (33

RT 5856.) However, after that he was always watched and not permitted to leave without someone going with him. (33 RT 5865.)

One night Bridgette took Parent and a man named Jerry out to dinner and asked Parent how he felt about appellant. Parent told her if appellant ever took the gun out of his hand, Parent would fight him. (33 RT 5887.) The next day, appellant came up to Parent and pistol-whipped him without saying why. (33 RT 5888-5890.)

When appellant was arrested and then immediately released for possession of a firearm,[71] Villain told Parent that appellant was a rat. Villain also told Parent he was going to get him out of the Remick Avenue house to work at another house and handed him a gun. (33 RT 5891.) The next day, after appellant saw the gun in Parent's pocket, Rudy and Pirate attacked Parent and hit him with a baseball bat, leaving him with a scar over his right eyebrow. (33 RT 5891-5892.)

About three days after appellant's arrest and release, Villain left the scene. Two days after that, Parent heard appellant on the phone saying Villain was on his way over to kill appellant, and then a neighbor came over

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[71] This was apparently the felon-in-possession charge arising from the vehicle stop by Officer Jeff Smith on March 15, 2002. (31 RT 5530-5535.)

to say Villain had been apprehended by police after a high-speed chase. Appellant and Parent drove by the scene and saw Villain's wrecked Chevy Tahoe surrounded by police. (33 RT 5895-5896.)

About a month after appellant's release on the firearm charge, he told Parent that if Parent helped him move to the Sunrose Place residence, he would give Parent all his tools and a mechanic's van equipped with a generator, compressor and hot water tank, and would then be free to go. (33 RT 5894-5895, 5897-5898) On April 18, 2002, appellant, Parent, and Rudy made the move in three trips, and appellant gave Parent the keys to the van, which appellant had obtained from some neighbors a couple of weeks prior. (33 RT 5844-5845, 5899-5901.) Apparently freed, Parent walked across Sunrose Place to the home of his friend Richard, who was also Primo's best friend. (33 RT 5901-5902.)

About ten minutes later, while Parent was in Richard's driveway under the hood of his van, he received a cell-phone call from appellant, who told him that Rudy was going to shoot him. (33 RT 5903.) Appellant's tone of voice was "Like he just won the lottery." About two minutes later, Parent was shot in the back. (33 RT 5904.) He turned around and saw Rudy's face, then dropped. (33 RT 5905.)

Parent said he was in the hospital for about six months during which time he said he "died twice" and had to be resuscitated. He said he was permanently disabled as a result of the shooting and that he no longer had a spleen or a gall bladder. In addition, he said that part of his liver had been removed, and one of his lungs was "messed up." (33 RT 5907.)

On cross-examination, Parent admitted that although he had previously given statements to police about the shooting incident on the day he was shot, a month later when he spoke to a detective in the hospital, again when he testified at Rudy's preliminary hearing, and a fourth time when he spoke with Detective Rodriguez, he had never previously mentioned that appellant had called him just before Rudy shot him in the back. (5908-5911.) However, he claimed that he mentioned it to an ATF agent who may have been Agent Starkey. (33 RT 5913-5914.) He said the ATF agent told him appellant already had been arrested in Orange County and was facing life. (33 RT 5922-5923.)

Cris Jacubecy, who lived across the street from the Remick Avenue house, testified that she saw appellant "beating the crap" out of Paul Parent in appellant's front yard. (34 RT 6063-6064.)

(d) The Karensa Spellman Incident

Karensa Spellman testified that she knew Valles (Villain), and that Jeffrey Bueno (Spanky) was the father of her daughter. (33 RT 5971.) At one time she and Valles were "sort of romantic" and she therefore stayed from time to time in the back house at appellant's Remick Avenue house with Valles and several others. (33 RT 5973-5974.)

Spellman said she met appellant through Eddie Mena, who was her best friend, and that appellant began buying crystal meth from her. (33 RT 5975.) Later, appellant threatened her for selling him what he said was bad dope. After Valles was arrested, appellant said he needed to speak to her. When she went to his house appellant asked her for information about Valles, and when she protested that she had no information he took her into the garage and assaulted her, hitting her in the head with his fist. (33 RT 5986-5988, 5990.) She went down into a fetal position, but he continued to kick and hit her head and body. Appellant then locked the garage and left her there for two weeks. During that time he came back once or twice, but it was Paul Parent who ultimately let her go, and together they agreed not to tell anyone about it. (33 RT 5991-5992.) There were bruises all over her body, and she hadn't eaten for two weeks. (33 RT 5992.) When she was released, she didn't go to the hospital or tell anyone about the beating or her

imprisonment because she was frightened. (33 RT 5989-5990.) She admitted that she was under the influence of drugs when she first went to speak to appellant, but said that she didn't have anything with her and that the drugs quickly wore off. (33 RT 5992-5993.)[72]

Asked how the relationship between appellant and Valles had begun to deteriorate, Spellman testified that Valles and others living there were saying that appellant's word was not good and that he was full of crap. (34 RT 6022.) Valles did not refer to him as a snitch or a rat until after he, Valles, was arrested. (34 RT 6023.) But she said that Valles did not need to spread his own suspicions to others: "There was nothing to spread. The word was already out." Spellman said everyone knew. (33 RT 6051.)

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[72] Paul Parent was called by the defense to impeach Spellman's testimony. While he confessed to having a poor memory since he was shot, he nevertheless vaguely remembered releasing Spellman from a garage. (35 RT 6213.) However, he thought the garage might have been at Eddie Mena's house and that she might have entered the garage to release a pit bull who was penned up inside. (35 RT 6219-6220.) Parent also said that he always had access to his tools in the garage at the Remick Avenue house, and did not remember Spellman being in that garage for two weeks, or even for two days. (35 RT 6217.)

Parent's testimony was consistent with what he told Investigator Gomez earlier in 2007 – that he only remembered an incident involving Eddie Mena's garage, and when Gomez asked him specifically if he had released Spellman from Navarro's garage, he referred back to Mena's garage. (37 RT 6492-6493.)

3. EVIDENCE OF PRIOR ADJUDICATED CRIMES INCLUDED WITHIN FACTOR (b) AS UNADJUDICATED VIOLENT INCIDENTS

(a) The 1983 Rival Gang Shooting

On October 15, 1983, when appellant was 16 years old, he was part of a group of Pacoima Flats gang members who went to Recreation Park in San Fernando and shot two rival gang members in retaliation for the shooting of a Pacoima woman and an assault against a Pacoima gang member. (34 RT 6078 *et seq.*) Interviewed by Detective Ernest Halcyon after the incident, appellant admitted that had been present along with between 25 and 30 others. (34 RT 6083-6084.) There was no evidence that appellant was one of the shooters. (34 RT 6086-6087.) To the contrary, appellant told Halcyon that he thought they were going to the park for a fist-fight and when he realized guns were involved, he did not want to take part but was bullied or threatened by another gang member to go along. (34 RT 6087.) Halcyon did not believe this part of appellant's story, but concluded appellant was an aider and abetter. (34 RT 6092.) Appellant appeared to Halcyon to be a scared teenager and was tearful when he was talking to him. (34 RT 6091, 6094.)

(b) The 1995 Robbery

Francisco Chavez testified that on November 18, 1995, appellant and one of his friends were looking at some "Guess" jeans Chavez had inside his car and was hoping to sell. Appellant also began playing with Chavez's purebred Pomeranian, a dog worth about $1,000. (31 RT 5420-5423.) Appellant expressed an interest in the jeans but said he had no money on him and gave Chavez his pager number. (31 RT 5423-5424.)

Later, they arranged to meet at a Food-4-Less in Pacoima. (31 RT 5420, 5426.) When Chavez and his wife drove up in their car, appellant was not there, but the other man he had seen with appellant earlier told Chavez that appellant would be there soon and told Chevez where to park in the parking lot. (31 RT 5427-5429.) The other man said he wanted to play with the dog again, reached into the car, and brought it out of the car. Then another car showed up and the man put the dog into that car. (31 RT 5429.) Appellant then jumped into the back seat of Chavez's car and held a knife to his throat while the other man got into the front seat and put the point of a knife against Chavez's stomach. (31 RT 5430-5431.) Two other Hispanics then took everything Chavez and his wife had with them, including $475 cash, the clothes they were selling, as well as the dog. (31 RT 5432-5434, 5437.) Appellant pulled up his shirt to display a gun,

which Chavez though looked like an Uzi, and told Chavez and his wife "if you call the police, we will know, we are a big gang, we know where you live, we are going to kill you." Then, as they left, they punctured one of his tires, leaving it flat. (31 RT 5438-5439; Ex. 159.) The police later returned the dog to Chavez. (31 RT 5437-5438.)

4. THE FACTOR "C" PRIOR CRIMES

Appellant's three prior felony convictions, some of which were also introduced as factor (b) evidence, were presented to the jury by stipulation and by means of a chart which is reproduced at 9 CT 2375. (27 RT 6553.) They include:

1. A 1984 conviction for voluntary manslaughter (§192.1), the rival gang shooting discussed in section C(1) above;

2. A 1985 conviction for unlawful taking of a vehicle (Veh. Code § 10851, subd. (a)); and

3. A 1985 conviction for second-degree robbery with use of a weapon (§ 211, 12022, subd. (b)), the robbery of Francisco Chavez and his wife discussed in section C(2) above.

5. VICTIM-IMPACT EVIDENCE

The prosecution introduced testimony of David Montemayor's daughters, Rachel and Amy, and that of his wife, Susan.[73] Rachel was 14 at the time of trial and 9 years old when her father died. She remembered the day he died, and her sadness. Rachel remembered him as loving, trustworthy, and caring. (34 RT 6161-6162.) What she missed most about him was how he would always be there for them, take time to hang out with them, and with their friends.[74] (34 RT 6163.)

Rachel's older sister Amy was 17 at the time of the trial, 12 when she lost her father. (34 RT 6168.) She remembered her father for his humor. (34 RT 6168-6169.) She played softball, and her father was always there for her at the games and practices, cheering her on. (34 RT 6169.) She missed most the family camping trips they took, which they no longer did. (34 RT 6169-6170.) Amy also described family Christmases together. (34 RT 6171-6172; Ex. 207.) Her life is different without him because she does not have a father anymore, and a father's advice, especially around boys, whom she can't bring home to meet her father. (34 RT 6172.)

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[73] The Montemayors also had a son, Luke, who did not testify. (34 RT 6163-6164.)

[74] Through Rachel, the prosecutor introduced a number of family pictures, Exhibits 199-205. (34 RT 6162-6167.)

Susan Montemayor, David's wife, also commented on his humor, how he could make anything fun. "He was just an all-around good guy." His death was still sometimes overwhelming. (34 RT 6174.) While David was alive, she could be a stay-at-home mom for their children. Now she was faced with taking care of three kids, a home, and providing income for the family, which was "pretty daunting." (34 RT 6175.)

Susan also described the demise of Interfreight Transport after David's death, and the resulting loss of jobs for their employees. (34 RT 6175-6177.)

Regarding her children, the loss of David made things very hard, because she had to become the disciplinarian, to teach them and guide them, to do it all, which was really hard. (34 RT 6180-6181.)

B. PENALTY-PHASE DEFENSE EVIDENCE

1. LAW ENFORCEMENT PERSONNEL

The law enforcement evidence adduced in appellant's favor at the penalty phase was, if anything, more detailed and far-ranging than that introduced at the guilt phase. Much of this evidence was derived from an extensive log of appellant's FBI activities. (Defense Exh. I.)

(a) ATF Agent James Starkey

Agent Starkey testified, regarding the shooting of Paul Parent, that he received information that Parent was shot by Villain, accompanied by Rudy. (35 RT 6200.)

(b) Detective Rodney Rodriguez

Detective Rodriguez testified that he had arrested Karensa Spellman and Valles in early April, 2002, after Valles dropped her off on a corner when he spotted the police following the car in which they were driving. (33 RT 5978-5979; 35 RT 6205.) Rodriguez said that when he interviewed her she appeared to be high on meth or cocaine or some other stimulant. (35 RT 6205-6205.)

Regarding the shooting of Gallegos, Spellman told Rodriguez that she remembered Valles had left her at dinner one night, and that he spent the next day nervously watching the TV news channels. When she asked about this, he said that he and some other men had taken a man to a garage and tortured him, and after he escaped, had dumped his body. Valles said he was watching to see if the man had died or if the police had located his body. However, Rodriguez said appellant's name did not come up in that conversation as having been involved in the torture incident. (35 RT 6205-6207.)

After appellant's arrest in this case, Rodriquez kept in touch with him, and referred other law enforcement officers to appellant for help in other cases. From 2002 to the present, the information from appellant that Rodriguez passed to Foothill Division detectives had led to a number of arrests and the recovery of a large number of guns. Rodriguez was also aware that information appellant gave to Detective Sanchez regarding a shooting that was about to happen led to an arrest of an individual who had been armed with an AK-47. (35 RT 6209.)

Since appellant's arrest, he had also helped detectives from the North Hollywood homicide unit, the gang unit at Foothill, and two sheriff's sergeants about a case they had been investigating before his arrest. (35 RT 6210.) "[T]he information he provided since 2002 has been accurate, has probably stopped crime, and cleared a number of incidents in . . . Southern California." (*Ibid.*) Rodriguez also said that "the information that Anthony passes on to law enforcement is very helpful, because without that specific information, the cases probably would never be solved. . . . So it's very helpful and important to law enforcement and the community[.]" (35 RT 6210-6211.) He said that appellant had probably saved a number of lives, that he had done so at great risk to himself, and that he absolutely should not suffer the ultimate penalty in this case. (35 RT 6211.)

(c) FBI Agent Curran Thomerson

Special Agent Thomerson returned to the stand to provide far greater detail than the jury had heard in the guilt phase regarding appellant's activities as an informant for the FBI. The FBI log of contacts with appellant, Exhibit I, was before the jury and formed the basis for Thomerson's and Special Agent Reece's testimony.[75]

Thomerson first explained that much of the information given to the FBI was passed on to local law enforcement agencies, and that his assessment that Navarro was reliable and credible was based only on those matters in which he did follow-up investigations. (36 RT 6354-6355.) An example of information passed on to other agencies was information concerning drug activities which were not within FBI jurisdiction. The local authorities to whom that information was passed on never informed Thomerson that the information was bogus. Had they done so, Thomerson said he would have made note of such reports in his files and there were no such notations. (36 RT 6360.)

Thomerson also emphasized again that appellant had placed himself and his family in danger when he engaged in informant activities. In spite

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[75] Only a shortened version of Exhibit I was given to the jury for their penalty deliberations. (See Court's Exs. 150-A and 151-A.)

of the danger, however, appellant continued to provide information. (36 RT 6357-6358.) Indeed, appellant continued to work as an informant even after he was notified that he was a potential target. (36 RT 6358.) His information assisted the FBI and other agencies in preventing criminal conduct from occurring, and on more than one occasion, arresting at-large criminals. (36 RT 6358.) Appellant's information also saved the lives of some people who were targeted to be killed. (36 RT 6358-6359.) Appellant also provided important information regarding various criminal enterprises, including information regarding the manufacture and distribution of narcotics, the people engaged in those activities, and the locations where the businesses were being conducted, including names and addresses. (36 RT 6359.)

Thomerson repeated his guilt-phase testimony regarding the high degree of danger to appellant in taping conversations with Mexican Mafia and other criminal elements . (36 RT 6360-6361.) Thomerson provided some specific case details regarding some cases in which appellant was involved. For example, he identified a person who became a witness in a prosecution. (36 RT 6364-6366). He also gave the FBI information about individuals who called themselves Israeli Mafia. (36 RT 6366.) On another matter, Navarro provided information about a Department of

Corrections officer who was going to allow a three-way phone call, contrary to CDC rules, from Wino (Thomas Grajeda) to Frank Rodriguez, a Mexican Mafia associate. (36 RT 6367-6368.) Also, on the same day, he provided information on the potential killing of Ron Kuglar and a "Mr. Moses," which Thomerson would have conveyed to the LAPD. (36 RT 6369.)

One of appellant's surreptitiously taped conversations disclosed that Fred Vargas was targeted for killing by the Mexican Mafia, and from another tape from the same date, the FBI learned that a person named "Gibby" had also been targeted. Thomerson said that information regarding both was "most likely" conveyed to the LAPD. (36 RT 6370-6371.)

On cross-examination, Thomerson was able to recollect two arrests he made on the basis of information provided by Navarro. One was the arrest of a parolee named Philip Sanchez; the other was of a man named James Abel, who was allegedly on his way to commit a murder at the time. (36 RT 6375.) Sanchez was found with guns and drugs, but the prosecutor brought out that Sanchez had also threatened to kill appellant. (36 RT 6381-6383.)

Thomerson also could not say what appellant did with the $8,000 he was given in order to relocate. (36 RT 6377.) Neither could he say what appellant's motive might have been in telling him he had heard that gang

members suspected "Nemo," or John Garcia, of being an informant. Thomerson said appellant might have passed on the information in order to save Garcia, but also agreed with the prosecutor's speculation that it was possible appellant was playing both sides and asking someone to kill Nemo. (36 RT 6377-6378.)

In January, 2001, after appellant was terminated from the Los Angeles FBI office, he called Thomerson and reported that "Wino," Tomas Grajeda, wanted to meet him, along with Scrappy and Player (James Abel and his brother) in the Harbor area of Los Angeles. Appellant reported that he knew that Wino wanted to kill Scrappy and Player. Thomerson told him not to attend the meeting, and to contact Agent Rees in San Diego. Several days later, police found Scrappy's body, and a month later, appellant provided information leading to Player's arrest. (36 RT 6383-6385.)

(d) FBI Agent Stephen Rees

FBI Special Agent Stephen Rees was appellant's handler at the San Diego FBI office, beginning in late November, 2000. (37 RT 6427-6428, 6430-6431.) At the time, Rees was on a task force which focused on the Ramon Arrellano Felix cartel based in Tijuana. The cartel was notorious for committing murders and was the largest exporter of contraband drugs to the U.S. (37 RT 6429.)

Navarro was instructed to gain as much information as he could, without jeopardizing his life, on cartel member Jose Albert Marquez. Marquez, also known as "Bat," who was known to be extremely violent and an assassin. (37 RT 6231.) Appellant did in fact provide information on Marquez over the course of between ten and twenty conversations, including information regarding a murder attempt by seven gang members in San Diego. (37 RT 6432-6433.) The information included the place where this hit team had stayed and the types of vehicles they were using. (37 RT 6433.)

Several times, appellant recorded conversations with various members of the Mexican Mafia and other criminal elements while under FBI surveillance.[76] (37 RT 6435.) He also provided information on a Los Angeles-based gang member, information that was passed on to the Los Angeles FBI office. (37 RT 6433-6434.) When a Mexican Mafia member "green lighted" Los Angles Police Detective Sanchez for alleged perjured testimony, appellant provided information which included those who were going to commit the killing and all those who attended the meeting at which the killing was ordered. (37 RT 6441-6443.) The conversation was never

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[76] The surveillance was not for appellant's protection but instead to corroborate the information. (37 RT 6435.)

recorded, and led to no arrests. (37 RT 6446-6447.) However, Officer Sanchez was never injured. (37 RT 6444.)

Appellant did record conversations with "Big Al" Contreras, but these recordings did not lead Rees to arrest him. Rather, an arrest warrant for Contreras was issued from another jurisdiction. However, while Rees had Contreras in his sights, he allowed him to remain at liberty in the hope of developing more information on the cartel. Appellant was then engaged to conduct meetings with Contreras, most of them surreptitiously recorded, in which there was some discussion, at FBI direction, of Contreras providing appellant with a half-pound of methamphetamine.[77] (37 RT 6444-6446.)

Appellant was unable to record or determine the location of "Bat" Marquez. (37 RT 6446.) It was for this reason, along with the shift of the Bureau's focus after September 11, 2001, that appellant was terminated in November, 2001. (37 RT 6437-6438.)

Ultimately, Rees said, appellant was the key to two arrests out of the San Diego office (37 RT 6453), but because other information was passed

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[77] This corroborates a portion of Navarro's guilt-phase testimony on this subject, though Agent Rees was apparently not available to testify then.

on to local authorities or to the FBI's Los Angeles office, Rees could not say how many lives were saved, injuries prevented, or arrests made as a result of appellant's work. (37 RT 6456-6457.)

(e) Department of Corrections Agent Daniel Evanilla

Daniel Evanilla was a Special Agent for the Department of Corrections' Special Services Unit. (37 RT 6460-6461.) He met appellant when he arrested him for a parole violation, and when that time had been served, met with him again, along with the FBI Agent Thomerson and Parole Agent Darby, to discuss the possibility of appellant becoming an informant. (37 RT 6462-6563.) After that, Evanilla kept in touch with appellant on a regular basis and visited his home with Thomerson. (37 RT 6465.) If Thomerson was unavailable, appellant contacted Evanilla if he had information regarding people who had committed crimes or parolees who had violation their parole. (37 RT 6466-6467.) Appellant provided very good information leading to five or six arrests, and Evanilla considered Navarro a very reliable informant. (37 RT 6447.) Some of the parole violations he reported involved a "good quantity" of PCP; and a large quantity of methamphetamine and several weapons were recovered in the arrest of Philip Sanchez. (37 RT 6469-6472.)

Evanilla said that in his opinion, appellant was a reliable informant. (37 RT 6467.) Asked by the prosecutor whether appellant was still active in the criminal life when he worked as an informant, Evanilla said that "he was involved in the criminal life so that he could provide information to the task force." (37 RT 6467.)

2. APPELLANT'S COMMUNITY SERVICE

George Birrell testified that he was a film maker who worked with appellant's brother, actor Demetrius Navarro, on a film called *No Salida* which was intended to inform at-risk youth about the pitfalls of gang life. (35 RT 6257-6261.) The film premiered at the Los Angeles Sports Arena in front of 10,000 young people, followed by school screenings before 17-18,000 young people in Los Angeles middle and high schools. (35 RT 6261-6263.) The first such screening was at the movie studio, where young people could also learn about jobs and careers that they might go into. Appellant was there and spoke eloquently and extemporaneously about what his life had been like, noting that half of it had been spent behind bars. (35 RT 6262-6263.) Birrell said, "I wish I could write something as moving as what Anthony shared with those kids, and as impressive in terms of his cautionary message." (35 RT 6263-6264.)

Appellant took part in more of the screenings at schools, in 1997, 1998, and 1999. (35 RT 6265.) He was not compensated for his services and, said Birrell, "I can tell you that it was absolutely, startlingly, effective." (35 RT 6268.)

Robert Coppel worked with appellant during 2000 in the area of teen pregnancy prevention and family planning, as well as other problems of young people. (35 RT 6274.) Coppel said he first became acquainted with appellant through his consultations in the mid-1990's on videos, presented on the website Teensource.org, about choices and decision-making, and said that appellant also used to come to outreach presentations and talk with young people. Appellant also consulted with him on gang prevention, being involved in gangs and gang violence, his personal experiences, and on ways of reaching youths in a way that most people could not. (35 RT 6174-6275.) The videos on which appellant consulted were streamed on the website, which was a project of the State of California Family Health Counsel. (35 RT 6276-6277.) In addition, in 2000, appellant came to a number of outreach presentations to talk with young people. (35 RT 6275.) These presentations were organized through the Valley Community Clinic and the Bridges Program in front of very large groups of teens. (35 RT 6278.) In addition, appellant worked in one of Coppel's programs in which

he met one-on-one with young men and talked about the realities of gang life "and it made a profound impact upon a lot of young men." (35 RT 6278.) As with the work related to *No Salida*, appellant was not paid for his services. (35 RT 6278-6279.)

4. APPELLANT'S FAMILY

(a) Demetrius Navarro

Appellant's brother Demetrius, who was two-and-a-half years younger than appellant, testified on his behalf. (35 RT 6286.) He said they also had a sister, Sandra, who was one year older than appellant. (35 RT 6288.) When Demetrius was eight, and appellant was ten-and-a-half, their parents separated. This separation had a great impact on appellant because he had to become the family's father figure and protector since their own father had left and they lived in a gang-plagued area. (35 RT 6287.)

Demetrius had never been in a gang, but appellant became a member "to make sure I wasn't[.]" Demetrius explained that from the time he was eight until he was twelve or thirteen, he had been afflicted with a disease of the hip which required that he wear a "strange contraption, braces on my legs," and that this resulted in constant abuse from his peers. (35 RT 6288-6289, 6290.) "I was constantly picked on and made fun of," but appellant always came to his aid. (35 RT 6289.) The young people abusing him were

bullies and gang members, many of them much older than he was, so appellant was always in the position of protecting the family. Not being able to move freely, Demetrius was a "sitting duck." (35 RT 6289-6290.) Appellant also helped protect Sandra, making sure that other boys, aware that their father had left, did not try to take advantage of her. (35 RT 6290.)

Demetrius attributed his success in part to the protection appellant provided him in junior high school, which enabled him to pursue theater arts without worrying about the abuse that would have come from such matters as wearing tights on stage. (35 RT 6298.) Moreover, said Demetrius:

> You need a solid foundation to grow. Anthony gave me that foundation, and let me know it doesn't matter where we are at, what you want to do, you can achieve it, and yeah, that's a big part, because Anthony let me see even though I couldn't walk, I could do anything. You like Elvis on TV, Bro, you can be on TV. You can be in movies, Bro. And fortunately, we worked together in major motion pictures and on major television episodes. (35 RT 6299.)

Demetrius explained that appellant had worked on feature films as a consultant, and also worked as a grip, working on film sets and lighting. (35 RT 6299.) Appellant had also worked as a consultant on an episode of *Walker, Texas Ranger* that involved a young boy who was trying to avoid involvement in gangs. (35 RT 6300-6301.)

Demetrius was the lead actor in *No Salida*, which was a finalist for an Academy Award and won an award from the National Council on Crime and Delinquency. (35 RT 6301.) The screenings of the film,organized by Bill Birrell and, later, by Robert Coppel, stretched over the period of 1999-2000, and perhaps into 2001. (35 RT 6302.) The post-screening question-and-answer sessions often went on longer than the movie itself, and appellant appeared at these sessions and spoke very openly about his life. (35 RT 63-3-6304.) Demetrius testified that he remained in contact with some of the teens who had heard these presentations, and said they had modified their behavior or changed their lives as a result of appellant's influence. (35 RT 6307.)

On cross-examination, when asked about whether appellant had ever sought his help in getting out of gangs, Demetrius described the difficulties appellant had in trying to do so in the 1990's. Demetrius said he told him "just move, we have family in Las Vegas." (35 RT 6313.) He said that appellant finally did so about four and a half years prior to trial. "He said, I'm going to go, Bro. I'm going to get myself and go . . . and he went" for about two months.[78] (35 RT 6314.)

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[78] This corroborated appellant's guilt phase testimony regarding (continued...)

(b) Amanda Navarro

Appellant's daughter Amanda, who was 16 years old at the time of trial, also testified. A high-school junior with straight A's, Amanda lived in Arizona with her mother, stepfather, brothers, sisters, and maternal grandmother. (36RT 6340-6341.) She said that appellant had been an important part of her life as one of the people who motivated her, "one of the persons that make me 'me.'" She said he did so by making sure she was doing well in school and that she was not focusing on boys, telling her that school comes first. (37 RT 6341.)

For the last five years, she had come to Orange County to visit appellant in jail. She said he wrote to her often about school and advising her to stay away from the life he had led. (37 RT 6342.) Before he was incarcerated, she spent summers with him. (37 RT 6342-6343.) Appellant also raised her brother Michael, who was 20 at the time of trial, because Michael's father was not present in his life, and Michael considered appellant to be his father. (37 RT 6343.)

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[78] (...continued)
his move to Las Vegas.

Amanda said appellant and her mother remained best friends, even though her mother had remarried. Amanda said she stayed in touch with all of her uncles and cousins in her father's family. (37 RT 6344.)

C. PROSECUTION REBUTTAL

The prosecution presented two witnesses in rebuttal.

The first, Correctional Sergeant Richard Overman, related in incident which occurred in Chowchilla State Prison in November, 1997. He said he heard a taped telephone call of appellant arranging with a girlfriend to bring narcotics into the prison. (37 RT 6515.) At the rules violation hearing, appellant heard a portion of the tape and admitted the violation. (37 RT 6517.)

The second rebuttal witness was Los Angles Police Sergeant Dan Randolph, who had testified in the guilt trial. Randolph said that at the end of their six-month informant/handler relationship, appellant was involved in the robbery (of the Chavezes) for which he was later convicted. After his arrest on that case, appellant asked to see Randolph and sought "some consideration" on the robbery, for which he was facing 25 years to life. Randolph declined to help him, and the next day he heard from the Detective Sanchez of the FBI Joint Task Force that appellant was claiming that Randolph had set him up on the robbery. (37 RT 6519-6521.) The

claim was false, and the upshot was that appellant was labeled by the LAPD as an undesirable informant, which meant that anyone later seeking to use him as an informant would have to go through many levels of supervisory approval. (37 RT 6521-6523.)

Randolph acknowledged on cross-examination that he made several successful arrests based on appellant's information, and that all of the information that Randolph checked out was credible. (37 RT 6529-6530.) Randolph also admitted that he never confronted appellant about whether he had made comments Sanchez attributed to him. (37 RT 6530-6531.) Moreover, appellant was later a witness in an internal affairs hearing against Detective Sanchez, and Randolph admitted that no internal affairs officer would present a non-credible witness in such a proceeding. (37 RT 6531.)

PENALTY PHASE ARGUMENTS

VII. THE TRIAL COURT ERRONEOUSLY ALLOWED TO GO TO THE JURY THE FACTS REGARDING THREE FACTOR (B) PRIOR CRIMINAL ACTS FOR WHICH THERE WAS INSUFFICIENT EVIDENCE

During the penalty phase of appellant's trial, the prosecutor sought to present evidence in aggravation pursuant to Penal Code section 190.3, subdivision (b), which requires the trier of fact in the penalty phase to take into account, inter alia, "the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violent or the express or implied threat to use force or violence." (Pen. Code §190.3, subd. (b).) The defense objected, to no avail, to the admission of three if these incidents: appellant's alleged involvement in the violence at Laurie Fadness's house; his involvement in the shooting of Paul Parent; and that the letter to Niño sent through Bridgette included a solicitation of violence. At the conclusion of the penalty phase, the defense moved to strike the first two incidents on the grounds that the evidence was insufficient to prove that appellant had engaged in conduct falling within the scope of factor (b), but the court denied the motion and permitted the jury to consider the evidence in aggravation. In so ruling, the court abused its discretion and

violated appellant's federal constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

This court held in *People v. Phillips* (1982) 41 Cal.3d 29, 65, 72, that evidence of prior criminal activity may only be used in aggravation at the penalty phase if the activity would have constituted a violation of a criminal statute. Moreover, the Court noted in its discussion of the law prior to the enactment of section 190.3, subdivision (b), that "the admissibility of evidence of other crimes depended on whether the evidence was competent and relevant (citation), *and, most significant to the present discussion, sufficient to demonstrate the commission of actual crimes.*" (*Id.*, at p.68; emphasis added.) In each of the instances described below, this standard was not met.

More recently, this Court stated that when the prosecution seeks to present evidence in the penalty phase to prove previously unadjudicated criminal activity under factor (b), the evidence may be admitted even without a prior foundational hearing to determine whether the evidence is legally sufficient to prove the defendant guilty beyond a reasonable doubt. (*People v. Yeoman* (2003) 31 Cal.4th 93, 132.) *Yeoman* held that the risk of presenting evidence that is not sufficient to convince all jurors of the defendant's guilt beyond a reasonable doubt is "acceptable, in view of the

need to place before the jury all evidence properly bearing on its capital sentencing decision, and in view of the rule that no juror may consider such evidence unless first convinced of its truth beyond a reasonable doubt." (*Ibid.*, and cases there cited.) This court has also held that the courts lack discretion to exclude factor (b) evidence pursuant to Evidence Code section 352 because the question for the jury is not one of fact in determining guilt. (*People v. Karis* (1988) 46 Cal.3d 612, 641; *but see*, *People v. Box* (2000) 23 Cal.4th 1153, 1201 [factor (b) evidence may be excludable under section 352 insofar as it unfairly persuades jurors to find defendant guilty of the crime's commission].)

However, this Court has also held that "Evidence of other criminal activity involving force or violence may be admitted in aggravation *only if it can support a finding by a rational trier of fact as to the existence of such activity beyond a reasonable doubt.*" (*People v. Clair* (1992) 2 Cal.4th 629, 672-673.) Accordingly, while foundational hearings may not be required prior to admitting evidence of unadjudicated violent conduct, they "may be advisable" in order to "help mitigate the risk" that the evidence may be insufficient to prove the conduct beyond a reasonable doubt. (*People v. Yeoman, supra*, 31 Cal.4th at p. 132.)

Moreover, it is also clear that the scope of admissible factor (b) evidence is not unlimited. The admission of "bad act" testimony violates due process when "the admission of the testimony was arbitrary or fundamentally unfair." (*Terronova v. Kincheloe* (9th Cir. 1988) 852 F.2d 424, 428-429.) All penalty phase errors potentially implicate the Eighth and Fourteenth Amendments by creating a risk that the jury's death verdict is not a reliable determination that death is the appropriate punishment. *Caldwell v. Mississippi* (1985) 472 U.S. 320; *Johnson v. Mississippi, supra*, 486 U.S. at p. 587 [death sentence based on "materially inaccurate information may violate Eighth and Fourteenth Amendments].) In addition, violation of a state criminal statute which creates or protects a liberty interest violates federal due process principles. (*Hicks v. Oklahoma* (1980) 447 U.S. 343.) *Hicks* held:

> Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, cf. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. See *Vitek v. Jones*, 445 U.S. 480, 488-489, citing *Wolff v. McDonnell*, 418 U.S. 539; *Greenholtz v. Nebraska Penal*

Inmates, supra; *Morrissey v. Brewer*, 408 U.S. 471. (*Hicks v. Oklahoma*, *supra*, 447 U.S. 343, 346.)

There is an additional, larger, point to be made regarding this Court's factor (b) jurisprudence. It is true that the cases have held that the trial courts have broad discretion regarding whether to hold a foundational hearing before admitting factor (b) evidence. (*People v. Yeoman*, *supra*, 31 Cal.4th at p. 132, and cases there cited.) *Yeoman*, as well as other cases, place a very low bar on the admission of such evidence. (*Ibid.*) There is also no requirement that the jury unanimously agree with regard to a violent criminal offense under factor (b). (*People v. Griffin* (2004) 33 Cal.4th 536, 585.) But section 190.3 says that the jury "shall" take into account all the factors listed there. In other words, when factor (b) evidence is presented, the jury *must* consider it. This mandatory language, and the low, virtually nonexistent bar for admissibility of factor (b) evidence, effectively compels the jury to consider evidence that can be legally insufficient when it decides whether or not to take the defendant's life.

In such circumstances, when each juror is left to his or her own assessment of a defendant's guilt of the factor (b) incident, due process demands greater, rather than lesser, gate-keeping by the trial court to ensure the fairness of the trial and the reliability of the penalty determination under

the Eighth and Fourteenth Amendments to the United States Constitution and article 1, sections 7, 15, and 17 of the California Constitution. Simply put, the loosening of the bounds of unanimity ought to be accompanied by a concomitant tightening – or at least a careful evaluation – of the sufficiency of the proffered evidence.

The trial court's failure to make such a careful evaluation in this case was an abuse of discretion, and a violation of appellant's constitutional rights to a due process and a fair penalty determination.

A. THERE WAS BOTH A LACK OF FOUNDATION AND INSUFFICIENT EVIDENCE OF APPELLANT'S INVOLVEMENT IN THE GALLEGOS BEATING AT LAURIE FADNESS'S HOUSE TO ALLOW IT TO GO THE JURY

Before Laurie Fadness testified at the penalty phase regarding a home invasion and assault at her house by a number of gang members, the court and counsel discussed whether to admit, for purposes of section 190.3, subdivision (b), her testimony that she heard Juan Mendez say "Droopy, Jesse, let's go." (31 RT 5486.)

The defense objected on two grounds, and attempted to object on a third. Initially, defense counsel Kallen objected that it was hearsay. (31 RT 5489-5490.) The court ordered a recess so that the court and counsel could read a case cited by the prosecutor, *People v. Freeman* (1971) 20

Cal.App.3d 488. (31 RT 5490-5491.) *Freeman*, at page 492, held that a witness's overhearing of the statement, "Hi, Norman" was not hearsay for the purpose of establishing that Norman was present at that time. Upon reconvening, the court indicated that *Freeman* "seems to support the People's position" (31 RT 5492.) That appeared to settle the hearsay question.

Counsel then made an additional point:

> I would be objecting to the introduction of this out-of-court statement being made by a third party which may have been overheard by the witness the prosecution intends to present, because it's introduced to establish circumstantially that Mr. Navarro was the Droopy supposedly referred to and that he was present. (31 RT 5493.)

Though inartfully stated, this was a foundational objection, as shown by the reference to whether Mr. Navarro was the Droopy referred to. The court overruled the objection, though solely on the hearsay ground. (31 RT 5493.) Before the court ruled, moreover, Mr. Halpern sought to make an additional point. While the court initially said, "Sure," it then asked if Halpern had read *Freeman*, and when he answered "No," the court indicated he could not add any further argument, and made its ruling. (31 RT 5493-5494.)

The court then stated that, as there was no contrary authority, and the noon recess was complete, it would call the jury back in. When Mr. Halpern indicated that he wanted to provide contrary authority, very briefly, the court refused to allow it, again noting Halpern's failure to read *Freeman*. (31 RT 5494.) Mr. Halpern persisted: "It's not on that case, Your Honor. It's based on the fact that –." The court interrupted and again denied him the chance to make any additional comment.[79] (31 RT 5495.)

Between Mr. Kallen's second objection, referring specifically to whether appellant was the "Droopy" referred to, and the trial court's disallowance of Mr. Halpern's further grounds, the foundational objection should be deemed preserved. And on those grounds, the testimony was inadmissible.

David Gallegos, the principal victim and witness regarding the incident, knew and named all of the men who came into the house, and appellant was not among them. (32 RT 5633-5637, 5722.) Moreover, Detective Gomez testified that when he interviewed Fadness in 2005, she said she did not see appellant there, and did not mention that she heard either appellant's name or gang moniker that night. (37 RT 6487.) In

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[79] Mr. Halpern than made a motion for mistrial, which the court denied without allowing him to state the grounds. (31 RT 5495.)

addition, Gallegos identified three of the perpetrators – "Capone," "Fila," and "Casper" – as members of the Vineland Boys gang, not the Pacoima Flats gang.[80] (32 RT 5662.) Gallegos mentioned that another of the perpetrators, a gang member known as "Primo," was at appellant's Remick Avenue house later when Gallegos alleged he was beaten there. (32 RT 5681.) Gallegos's only other reference to appellant was that his testimony that Hirsch had told Gallegos's cousin, Juan, that "Droopy" wanted to talk to him. (32 RT 5636.)

As Mr. Kallen submitted, however, there was no evidence that appellant was the only Droopy that might have been involved in the drug trade in the San Fernando Valley. Nor was there any evidence that appellant, a Pacoima Flats shot-caller, was the Droopy that wanted to talk to Gallegos, or that the Vineland gang member who said it was not simply using his name to justify the attack. In short, there was an insufficient foundation to "support a finding by a rational trier of fact as to the existence of such activity beyond a reasonable doubt." (*People v. Clair*, *supra*, 2 Cal.4th at pp. 672-673.)

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[80] Navarro testified that Casper was a member of another gang, the Pacoima Knock Knocks. (18 RT 3389.)

The evidence was also insufficient. At the conclusion of the penalty phase, defense counsel Norman Kallen moved to strike the evidence on the grounds that there was insufficient evidence with respect to both of the two criminal acts charged:

> MR. KALLEN: Your Honor, does the court feel that there was sufficient evidence presented with respect to either one of those counts?
>
> The only information that I seem to recall is the witness said Droops wants to talk to you, or Droopy wants to talk to you. No one has placed Navarro at that scene. No one has indicated that Mr. Navarro ordered, requested, or suggested that anybody do anything negative to any of the occupants of that residence.
>
> THE COURT: I'm just considering all of the evidence presented during this part of the proceeding, and also the evidence presented during the guilt phase, as applies to Factor "A," in terms of could he be the person directing this group, was he present with the person who was aiding and abetting, or co-conspirator. And so I'm going to deny the request to strike this, which is how I took your comment.
>
> MR. KALLEN: That's exactly what I saying, Your Honor. (35 RT 6239-6240.)

The same reasoning regarding foundation applies here: There was no evidence that the person referred to as "Droopy" was appellant, and Gallegos not only testified that appellant was not present but also that the perpetrators were members of a different gang– they were members of the Vineland Boys gang, not the Pacoima Flats gang. Moreover, Fadness did

not mention having heard the name in her 2005 interview with Investigator Gomez. This evidence was manifestly not sufficient to prove beyond a reasonable doubt either that appellant was present or that he had committed any violent act within the meaning of factor (b).

Thus, whether on foundational or sufficiency grounds, the evidence should either have not been admitted or been struck. The court abused its discretion. Because the error deprived appellant of due process, equal protection, and a reliable penalty phase in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, the federal standard should apply. And because it is impossible to replicate the normative evaluation of each individual juror, the error cannot be harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.) Reversal of the death judgment is required, and, because the evidence was insufficient, upon retrial the evidence should be excluded. (*Lockhart v. Nelson* (1988) 488 U.S. 33, 39-40 [retrial permissible even if evidence of guilt, *apart from erroneously admitted evidence*, would have been insufficient to sustain conviction]; *Burks v. United States* (1978) 437 U.S. 1, 11 [barring second trial where evidence insufficient in first trial]; but see *People v. Barragan* (2004) 32 Cal.4th 236, 244-245 [allowing retrial of a strike allegation after Court of Appeal has reversed true finding for insufficient evidence].)

B. THERE WAS ALSO INSUFFICIENT EVIDENCE OF APPELLANT'S INVOLVEMENT IN THE SHOOTING OF PAUL PARENT

The defense also moved to strike proffered factor (b) evidence of appellant's involvement in the shooting of Paul Parent. In the initial discussion of the matter, the defense sought to exclude Parent's opinion that when appellant called Parent to tell him that he may be shot a few minutes before he was shot, appellant was mocking him. Without Parent's opinion, the defense argued, there was no competent or credible evidence linking appellant to the shooting. (31 RT 5561-5562.) The court invited submission of statutes or cases on the matter but tentatively ruled against the defense objection. (31 RT 5567-5568.)

When the matter was taken up again, the trial court excluded Parent's opinion testimony regarding appellant's tone of voice when he called Parent, who could only testify that appellant called him and what he said.[81] (33 RT 5831.) Defense counsel reiterated that the entire basis for appellant's alleged involvement in the shooting was based on Parent's opinion that appellant was mocking him when he called; without that,

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[81] The trial court did not state the basis for this ruling, except by reference to defense counsel's earlier-expressed concern about Parent's giving an opinion that appellant was mocking him in the phone call. (33 RT 5831.)

"where is the evidence indicating that Mr. Navarro either committed the act, threatened the act, or was involved in the act? If there is no evidence, it shouldn't even go the jury . . . ." (33 RT 5831-5833.) This was, again, both an insufficiency objection and, without naming it so, a foundational objection.

Parent was permitted to testify that after appellant released him and kept his promise to give Parent the keys to the mechanic's van, Parent went to work on the van the driveway of his friend, Richard. (33 RT 5902-5903.) Parent then received a cell phone call from appellant warning him that "Rudy" was going to shoot him. (33 RT 5903.) In apparent defiance of the court's earlier barring of opinion testimony, Parent was allowed to testify, without objection, that appellant's tone of voice was "[l]ike he had just won the lottery." Two minutes later, Rudy shot Parent in the back. (33 RT 5904.)

Later, ATF Agent Starkey testified that he heard from appellant that either Villain (Valles) or Rudy shot Parent, and that the shooter had been arrested. (35 RT 6201-6202.)

At the conclusion of the penalty phase, during the same discussion regarding the jury instructions in which the defense sought to strike the evidence regarding the incident at Fadness's house, the defense also moved

to strike evidence of the Parent shooting as factor (b) evidence. The defense argued that the only evidence regarding appellant was that he called to notify Parent that he was going to be shot, and that this evidence was insufficient to prove appellant had been involved in the shooting. (35 RT 5242.) However, the trial court refused to strike the evidence. (35 RT 6252-6243.)

As with Lurie Fadness's testimony, this evidence should have been excluded because no rational trier of fact could have found beyond a reasonable doubt that appellant was involved in violent factor (b) conduct, which includes only evidence of "the use or attempted use of force or violence or the express or implied threat to use force or violence." Indeed, Parent's testimony that appellant called and warned him he was going to be shot is virtually the opposite of an express or implied threat – no matter his tone of voice. The force and violence in this incident was inflicted not by appellant, or even by gang members acting under his direction, but according to Gallegos, someone from another gang entirely. Thus, whether viewed as a foundational issue (*People v. Clair*, *supra*, 2 Cal.4th at pp. 672-673) or insufficiency claim, no rational juror could find that appellant was involved in the shooting beyond a reasonable doubt. And

for the reasons set forth in the discussion, *ante*, of the Fadness testimony, the error was not harmless.

C. THERE WAS INSUFFICIENT EVIDENCE THAT THE LETTER TO NIÑO CONSTITUTED A SOLICITATION TO COMMIT VIOLENCE

The court erroneously allowed the jury to consider under factor (b) a letter introduced in the guilt phase which, the prosecution asserted, constituted an attempt to solicit the commission of assault by means of force likely to cause great bodily injury. Its admission was error because it did not fall within the statutory language of section 190.3, subdivision (b), and because there was insufficient evidence to support its inclusion as a foundational matter.

The letter, Exhibit 151, introduced during the guilt phase (21 RT 4031-4032), was a letter accompanying a letter sent by appellant to Bridgette from the Orange County Jail in December, 2002. The second letter was addressed to a person named Niño (whom appellant knew only by that name), which, the prosecution asserted, sought to have Niño "fuck up" – commit violence against – another gangster named Chino. As the prosecutor noted during a discussion of factor (b) evidence held out of the presence of the jury, there was no evidence either that the letter was or was not received by Niño, which led the court to treat it as an attempt to solicit

as assault by means of force likely to commit great bodily injury. (35 RT 6244-6246.) The trial court did note that it may have a "corpus problem" with this (35 RT 6246). In a later discussion, the defense objected on those grounds:

> MR. KALLEN: The court has yet to make a ruling whether or not there is a corpus, whether or not it's sufficient for the purpose of these proceedings to even be argued as a factor (b) and, therefore, I'd be objecting right now with respect to the proposed instruction that deals with that subject matter. (37 RT 6559.)

The court overruled the objection (*Ibid.*) and the letter was included as a factor (b) item for the jury's consideration. (38 RT 6698; 8 CT 2096.)

The court also instructed the jury, regarding the attempted solicitation, that one of the elements to be proved was that "The soliciting message was received by the intended recipient." (38 RT 6700; 8 CT 2098.)

As the defense pointed out, there was no evidence that the letter was ever received. (35 RT 6245.) And that was the first flaw in its inclusion as a factor (b) incident: There was no evidence presented that the letter was ever received – either by Bridgette in the first instance or by Niño. The prosecutor, in the discussion with the court and counsel about its inclusion, did mention the guilt-phase evidence that it was common practice within

the Mexican Mafia to send letters to a wife or girlfriend and include within it a letter to go to somebody else (35 RT 6244-6245), but he did not argue this to the jury in the penalty phase. (38 RT 6626.) While the court at least included the requirement of proof of receipt in its instruction, there was simply no evidence introduced, even assuming that Bridgette received the initial letter, that she attempted to pass it on to Niño or that he in fact received it.

There is, moreover, a more fundamental flaw: The incident – an attempted solicitation for an assault – does not fall within the statutory definition of factor (b) evidence. In relevant part, the statute reads: "In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: . . . (b) The presence or absence of criminal activity which involved the use of attempted use of force or violence or the express or implied threat to use force of violence." (§ 190.3, subd. (b).) This is at worst an attempted solicitation, not a violent criminal act. Under factor (b), "no specific 'elements' are at issue . . . except that some violent criminal offense must exist." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1241, citing *People v. Melton* (1988) 44 Cal.3d 713.) An attempt to solicit is not a violent offense, or, in the words of the statute, "the *use* or attempted *use* of force or violence." (§ 190.3, subd. (b); emphasis added.) An

attempt to solicit violence – especially one for which there is no evidence of delivery to the solicitee – is simply too attenuated from the statutory language to be validly included within the factor (b) items presented to the jury in this case.

The defense objection also mentioned sufficiency. (37 RT 6559.) Even if it were valid in the abstract to include an attempted solicitation for which there was no evidence of receipt of the solicitation, there was insufficient evidence that the Spanish phrase the prosecutor was seeking to give that meaning to could be interpreted that way.

The letters to Bridgette and Niño (Ex. 151) were introduced in the prosecution's guilt-phase cross-examination of appellant. The letter to Bridgette told her to give the second letter to Niño without showing him the envelope. (21 RT 4031-4032.)

Appellant explained that Chino was a guy who had just been released from prison who was telling people, including Nemo, that Navarro was an informant. (21 RT 4036.) Appellant references in the letter to "four señores" (i.e., four EME members) in an attempt to indicate that he was not in informant. (21 RT 4036-4037.) The prosecutor asked:

> Q That guy Chino, you write, this guy Chino, fuck him. He's a drunk and a false. I'm here with four men and

they give their support to fuck him up. That's what it says, right?

A I don't see where it says that.

Q That's what you're writing to Nino. Copies of paperwork of Nemo, he's false.

A But you said fuck him up and all that. I don't see where it says that.

Q Translate for us.

A Those were your words saying fuck him up.

Q Using names. Rob the homies, right?

A Yes. It says they are using names so they can extort them for money, that they are full of shit. And then I, right here, I am telling him that I had a copy of Nemo's paperwork, which at one time I did have a copy that the feds gave me back, I don't know what happened to it.

Right here, I'm telling him to send Chino to go to Hell right here. It don't say fuck him up. Then it says he's a hype and he's false.

. . . . .

Q You're saying go beat Chino up.

A I'm not saying that. It does not say that there.

Q It says if he gives you any lip, send in the men.

A Uh-huh. No, no. It's says don't give him anything.

Q Don't hold back.

A Yeah, don't give him nothing. But it doesn't say fuck him up as you state it, and send in the men. (21 RT 4039-4040.)

The reference to the "four señores," the prosecutor suggested, was to indicate that, with Navarro, there were five EME members, sufficient to put a green light on Chino. No, appellant responded, it was only to bolster his credibility, to suggest he was in prison, not a county jail, all to counter the rumor that he was an informant. (21 RT 4040-4041.) (It should be noted here that the prosecutor's suggestion that Navarro would be the fifth EME member needed to put on a green light was unsupported by any evidence that Navarro was ever a made member of the Mexican Mafia.)

On redirect, appellant explained further the reference to the "four señores." (Ex. 151.) The "señores" was to bolster the impression that he was in prison with four members of the EME rather than in jail. (22 RT 4133-4134.) And the converse was also true – if Niño knew he was in jail, he would know Navarro was lying about being with the EME members. (22 RT 4134.)

Regarding the language that the prosecutor interpreted as "fuck him up," -- "ese vato Chino mandalo ala verga" – appellant explained first that the letter was written in a combination of English and Spanish called "Spanglish," or Pocho. But it does not say anywhere that appellant wanted

someone killed, or to let them have it. (22 RT 4135.) "Vato" means a man, guy, or dude. Chino is a nickname meaning "Curly," or "Asian." (22 RT 4135-4136.) The operative words, "mandalo ala verga" does not translate literally, because "verga" is penis, and he is not saying "send him to the penis." Rather, it is slang for "forget about him," or "don't pay attention to him." (22 RT 4136.) It does not translate to "Fuck him" – that would be "chinga lo." (22 RT 4136-4137.) Neither does it say kill him – "mata lo." (22 RT 4137.)

Similarly, the words, further down in the paragraph, "fuck those fake vatos" does not mean hurt them, it means ignore them. (22 RT 4138.)

Another interpretation came from defense gang expert Richard Valdemar, on cross-examination. The prosecutor now focused on the phrase "des en la madre," which Valdemar – who confessed to limited Spanish[82] – said he recognized the phrase as street slang for "rough him real good," perhaps even to kill him. (25 RT 4515-4517.) The references earlier in the paragraph indicated that this is a shot-caller, speaking with EME members, and the recipient should go out and do what he is told. (25 RT 4518-4519.)

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[82] Asked if he could read Spanish, Valdemar answered, "No, sir." (25 RT 4437-4438.)

Fannie Draiem, a Certified Spanish Language Interpreter, was called by the prosecution in its rebuttal. She typed up an English translation of the letter, the operative language of which she interpreted as: "Send that Chinese dude to Hell, he is false and an addict. I'm here with four men that will support to you [sic] fuck them up. Don't let them go. Okay? I send you my support as well. And send the names of those that do not listen to you. Okay?" (26 RT 4655.) On cross-examination, however, she admitted that she was not entirely familiar with street-gang expressions, and idioms can vary by region. (26 RT 4664-4665.) Thus, the reference to Chino might be to Curly in Mexico, but Chinese elsewhere. (26 RT 4672.) "Mandalo ala verga" she translated as something like go to Hell or screw himself or something like that. And the phrase that she translated as "I'm here with four men that will support you to fuck them up" is not literally translated. The work "fuck" is not there – that would be "chinga" – so it could mean "tell them to fuck themselves." (26 RT 4674.) There is simply no way, she testified, to accurately translate a letter between two people speaking a very casual language without being very familiar with their form of casual language. (26 RT 4676.)

No additional testimony regarding the letter was adduced during the penalty phase.

In *People v. Phillips*, *supra*, 41 Cal.3d 29 – which also included, *inter alia*, a solicitation letter sent from jail – the State argued that factor (b) "criminal activity" need not be restricted to the commission of a crime to be admissible. (*Id.* at p. 67.) This Court disagreed: "[T]he statute limits admissibility to evidence that demonstrates the commission of an actual crime[.]" (*Id.* at p. 72.) Thus, as an initial matters, in the absence of any evidence of delivery of the letter in this case, no actual crime could have been committed. This alone should have prevented the admission of the "attempted solicitation" charge.

In addition, concerning the solicitation letter in *Phillips,* this Court interpreted section 653f, subdivision (d) [now subdivision (f)] to require that a solicitation be proven by " 'at least one witness who gives "positive" or "direct" testimony evidence of facts that are incompatible with innocence, and corroborating evidence of circumstances which, independent of the direct evidence, tend to show guilt.' "[83] (*Id.* at pp. 75-76, quoting 2 Witkin, Cal. Crimes (1963) § 856, p. 803.) This Court held that the "introduction of defendant's jailhouse letter effectively rendered

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[83] Section 653f, subdivision (f), provides, in relevant part: follows: "An offense charged in violation of subdivision (a), (b), or (c) shall be proven by the testimony of two witnesses, or of one witness and corroborating circumstances."

defendant "a witness" within the meaning of the provision, who provided direct "testimony" about the crime of solicition." (*Id.* at p. 76.) Although the Court stated that the letter's content "on its face is somewhat ambiguous as to the conduct it solicits," it noted that corroboration was sufficient where the defendant had strong motives to kill the persons whose murder he solicited – principle witnesses against him in a pending murder trial. (*Id.* at p. 77.) Indeed, the letter named each individual, gave a physical description and address for each, and then, for each, suggested the methods by which they might be approached, assaulted, and, presumably, killed.[84] (*Id.* at p. 77, fn. 28.) In addition, the defendant had made earlier threats against some of the same witnesses. These facts taken together provided "adequate independent corroboration to the letter" to satisfy the statutory requirements. (*Ibid.*)

This case is distinguishable from start to finish. To begin with, the ambiguity inherent in Exhibit 151 goes far beyond that of the letter in

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[84] As just one example, the letter is quoted as saying: "'1. 'Ric', Richard Graybill . . . Must go first: Two armed men with guns showing tell him "Freeze and no one will get hurt!! Come with us, some one wants to talk to you. Make him get in our car, and immeediately [sic] knock out. Then take his car also. dispose of, as we will discuss. . . .'" (*Id.* at p. 77, fn 28.)

Phillips. The letter in that case was written in English, and while the defendant did not come out and say "kill" or "murder" these victims, his meaning, down to the names, addresses, and methods to be used against them, could not have been clearer. In this case, however, the ambiguity went to the very meaning of the operative words themselves, the idiomatic Spanish phrases. These could not, therefore, provide the "direct" or "positive" evidence incompatible with innocence. Said another way, there was no doubt about the meaning of the words and phrases used by Phillips, while here it was indeed the very meaning of appellant's words which were the subject of controversy. In that setting, the letter itself could not provide "direct" or "positive" evidence in lieu of a witness. Indeed, the witness in this case, appellant, provided evidence to the contrary. The string of inferences is too great to constitute "direct" or "positive" evidence: That the letter says something other than what appellant said it did; that it instead meant what others said it *could* mean (i.e., fuck him up). Even if we accept the additional inference – that "fuck him up" referred to a physical assault – the prior set of inferences takes us further and further away from "direct" and "positive" testimony.

Neither could the other "witnesses" – Valdemar and the court interpreter – and, inappropriately, the prosecutor – provide the necessary

corroboration, when the very meaning of the words was in issue. The asserted corroboration, found in *Phillips* by other facts, is here merely opinions about the meaning of the supposed solicitation. And there was nothing in this case anywhere close to the corroboration found in *Phillips*: "Chino" was not a potential trial witness against appellant, and there was no prior evidence of threats against him.

Finally, it must be noted that the trial court itself, upon its review of the evidence on the automatic motion for modification of the verdict (§ 190.4, subd. (e)), did not find the evidence sufficient to include the incident among those he found proven in it's post-verdict review on appellant's motion to modify the verdict. (39 RT 6804-6805.)

Accordingly, there was insufficient evidence of an actual crime, and insufficient evidence of solicitation, under the exacting requirements of section 653f, subdivision (d), to allow this to go the jury as factor (b) evidence.

D. INSOFAR AS THE DEFENSE OBJECTIONS WERE INSUFFICIENT TO PRESERVE THESE ISSUES FOR REVIEW, THOSE FAILURES CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL

The defense objections to the foregoing three errors may have, in this Court's view, missed the mark. They were mostly cast in terms of

insufficiency of the evidence, rather than a lack of sufficient foundation, though the two are inevitably intertwined. Nevertheless, to the extent that they were not sufficient to preserve the issue, that failure constituted ineffective assistance of counsel.

Even without the assistance of a habeas corpus proceeding, this court can consider ineffective assistance of counsel when there is no reasonable tactical or strategic reason for counsel's failures. (*People v. Pope, supra*, 23 Cal.3d at p. 426.) That is the case here, as the fact that the defense objected indicates that there was no possible tactical or strategic reason for not designating the proper grounds for their objections. Under these circumstances, any failure to preserve any of the issues for appeal amounted to the ineffective assistance of counsel. (See *People v. Lewis* (1990) 50 Cal.3d 262, 282 [this Court considers otherwise forfeited "claim on the merits to forestall an effectiveness of counsel contention"]; *People v. Stratton* (1998) 205 Cal.App.3d 87, 93 [Sixth Amendment violated by failing to preserve meritorious claim for review].)

E. THE ERRORS WERE PREJUDICIAL

Collectively and individually, the errors were prejudicial.

This could have gone either way. While there was strong evidence of violent gang activity, appellant provided evidence, including from

several law enforcement officers, experts, and others that (1) he was an active, reliable, and credible informant, who (2) nevertheless had to present himself as a gang shot-caller in order to provide the information sought by law enforcement; but who (3) participated in several community activities intended to dissuade at-risk youth from taking part in gangs.

Moreover, there most likely was lingering doubt. The guilt phase itself was a close case, given (1) his aforementioned informant activities; which led (2) to his being pegged by many of his cohorts as a possible informant, whom they would therefore not take orders from to commit a crime such as this; while (3) he informed his handlers of the impending crime; and (4) his gang- and EME-related wife, whom he was divorcing, had become friends with Mira Corona; and (5) was angry enough at appellant to report to his ATF handler that he was dealing drugs and carrying a weapon – information which if pursued could have led to a third-strike conviction; while there was complete agreement among the officers and experts that (6) a shot-caller would never have allowed a car traceable to his home address to be used in a crime, and (7) would not have allowed a car traceable to one of the perpetrators to be parked in front of his house and remain there even after their arrest.

In such circumstances, it is highly likely that one or more of the jurors harbored lingering doubt, increasing the importance of the factor (b) evidence. The inclusion in that evidence of the letter to Niño was damaging, because it suggested that, even from jail, appellant was still operating as a shot-caller and ordering hits. So, too, the inclusion of the attack at Laurie Fadness's house, an attack principally by members of a gang other than appellant's, at which he was not present, but relying on his being the shot-caller and ordering violence. And so, too, his alleged involvement – which did not approach being proven – in the shooting of Paul Parent. Singly, and especially cumulatively, in light of the closeness of the guilt-phase case, these errors meet the standard of a reasonable possibility that they affected the verdict. (*People v. McKinnon* (2011) 52 Cal.4th 610, 685; *People v. Jackson* (1996) 13 Cal.4th 1164, 1232.)

VIII. THE COURT PREJUDICIALLY ERRED BY INSTRUCTING THE JURY THAT THE FACTS UNDERLYING TWO PRIOR CONVICTIONS COULD BE USED IN AGGRAVATION AS FACTOR (B) EVIDENCE WITHOUT A FINDING THAT THE FACTS WERE TRUE BEYOND A REASONABLE DOUBT

The trial court erred in instructing the jury that the facts underlying two factor (c) prior convictions could be considered by the jury under factor (b) without finding them to be true beyond a reasonable doubt. The court did mention to counsel, in a discussion regarding the penalty-phase instructions, that it intended to instruct the jury that, for the purposes of factor (b), the overlapping factor (c) evidence need not be proven beyond a reasonable doubt. (35 RT 6229.) There was no defense objection, but any instruction regarding the reasonable doubt standard of proof with regard to factor (b) evidence must be given *sua sponte*. (*People v. Yeoman, supra*, 31 Cal.4th at p. 132; *People v. Michaels* (1992) 28 Cal.4th 486, 539.)

The prosecution presented evidence of three prior convictions as aggravating evidence under Penal Code section 190, subdivision (c). In addition, the trial court permitted the prosecution to present the facts underlying two of the three prior convictions as evidence of violence or the threat of violence under Penal Code section 190.3, subdivision (b).

However, the court also instructed the jurors that, with regard to the 1985 manslaughter conviction arising from the inter-gang shooting and the

1995 robbery of Mr. and Mrs. Chavez, the underlying facts were not subject to "the requirement that the commission of the criminal activity must be proved beyond a reasonable doubt . . . [because] the defendant has previously been convicted of those crimes." (38 RT 6699-6700.) In so instructing, the court committed prejudicial error in violation of appellant's federal constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, and reversal is required.

Because the Eighth Amendment requires greater reliability in capital sentencing than in non-capital cases, traditional constitutional guarantees such as the privilege against self-incrimination, the right to counsel, double jeopardy, due process, and equal protection, also apply to the penalty phase. (*See, e.g., Satterwhite v. Texas* (1988) 486 U.S. 249; *Estelle v. Smith* (1981) 451 U.S. 430; *Arizona v. Rumsey* (1984) 467 U.S. 203; *Ake v. Oklahoma* (1985) 470 U.S. 68; *Gardner v. Florida* (1979) 430 U.S. 349.) For this reason, evidence offered in aggravation at the penalty phase of a capital trial must be proved beyond a reasonable doubt. (*People v. Robertson* (1982) 33 Cal.3d 21, 53-54.)

As this court explained more than four decades ago, "it is now settled that a defendant during the penalty phase of a trial is entitled to an instruction to the effect that the jury may consider evidence of other crimes

only when the commission of such other crimes is proved beyond a reasonable doubt." (*People v. Stanworth* (1969) 71 Cal.2d 820, 840; *People v. Robertson, supra*, 31 Cal.3d at p. 53.) Evidence of unadjudicated violent conduct presented in aggravation under factor (b) must also be proved beyond a reasonable doubt. (*People v. Phillips, supra*, 41 Cal.3d at pp. 65, 84; CALJIC No. 8.87.)

In *Phillips*, the trial court failed to instruct the penalty phase jury that they could only consider evidence of other criminal activity under facator (b) if they found beyond a reasonable doubt that the defendant had engaged in such activity. This court held that this omission was error under *People v. Robertson, supra*, 33 Cal.3d at pp. 53-55, 60-62, and *People v. Stanworth, supra*, 71 Cal.2d 840-841. (*People v. Phillips, supra*, 41 Cal.3d at p. 65.)

The *Phillips* court also held that evidence of prior criminal activity must at least constitute the commission of a crime in violation of a criminal statute. (*People v. Phillips, supra*, 41 Cal.3d at pp. 65-66.) The court then analyzed much of the aggravating evidence presented in that case and concluded that some of the allegedly criminal activity presented did not constitute crimes. However, the State argued that with respect to evidence of the most serious crime presented at the penalty phase – a letter soliciting

the murder of four prosecution witnesses – the evidence was so overwhelming that the failure to give a "reasonable doubt" instruction was harmless error. This Court rejected that contention. It first noted that "it is not clear, however, that such an error may properly be dismissed on that basis." (*Id.*, at p. 84.) The opinion cites *Jackson v. Virginia* (1979) 443 U.S. 307, 320, for the proposition that at least with respect to guilt phase proceedings, the "failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt *can never be harmless error.*" (*Id.*, at p. 84, n. 34, emphasis in original.) In addition, the court found that there was evidence in the record from which defense counsel could have argued that there was at least a reasonable doubt regarding the defendant's guilt of the alleged criminal activity. Accordingly, this court reversed the penalty judgment and remanded the case for a new penalty trial.

Phillips compels reversal of the penalty judgment in this case. Indeed, the error in this case was far more egregious than the one in *Phillips*. In *Phillips* the court merely failed to give a reasonable doubt instruction, whereas in this case the court affirmatively instructed the jurors that the prosecution did not need to prove the facts underlying the prior convictions beyond a reasonable doubt. Appellant further submits that the error is reversible per se. As this court noted in *Phillips*, settled United

Supreme Court authority requires automatic reversal when a jury is not instructed on the necessity of proof beyond a reasonable doubt because such errors can never be held harmless. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320, fn. 14; *People v. Phillips*, *supra* 41 Cal.3d at p. 84, fn. 34.) Appellant recognizes that *Jackson* dealt with a court's failure to give a reasonable doubt instruction in the guilt phase, and that this court in *Phillips* stopped short of squarely holding that *Jackson* applies with equal force in the penalty phase. However, equally well established United States Supreme Court authority holds that due process requirements are *heightened*, not lessened, in the penalty phase (see *Johnson v. Mississippi, supra,*486 U.S. at pp. 584-585), and accordingly if the failure to administer a reasonable doubt instruction in the guilt phase constitutes per se reversible error, the failure to administer a similar instruction in the penalty phase must *a fortiori* compel automatic reversal.

Moreover, as was the case in *Phillips*, there was ample evidence in this case from which counsel could have argued the presence of reasonable doubt as to appellant's guilt of the underlying criminal activity. While appellant admitted being with the large group of gang members who together went to Recreation Park in 1983, where two rival gang members were shot, there was no evidence that appellant was the shooter. Indeed,

appellant told Detective Halcon that he thought they were going over there for a fist-fight. When he realized guns were involved, he did not want to participate, though he was bullied or threatened by a fellow gang member to go along. (34 RT 6087.) Even if the jury believed what appellant told the detective, the withdrawal of the reasonable doubt standard, in concert with the statutory language in the instruction that the jury "shall consider" and be guided by all of the factors, including factor (b), virtually assured that the Recreation Park incident would be considered.

Similarly, regarding the robbery of Mr. and Mrs. Chavez in 1995, the lessening of the standard of proof insured that even a doubting juror would have to take it into account.

However, even if the failure to give a reasonable doubt instruction in the penalty phase were subject to harmless error analysis, the error here could not be held harmless because the prior convictions were by guilty plea. (18 RT 3395 [discussion out of presence of jury of objection to prosecutor's questions to appellant re: the 1983 rival-gang shooting that resulted in manslaughter conviction]; 18 RT 3410 [the 1995 robbery conviction].) Appellant's guilty pleas reflected only the presence of facts sufficient to satisfy the elements of the crimes. They did not involve admission of the sort of aggravated details of the crimes presented during

the penalty phase – details which, under factor (b), the prosecution was still required to prove beyond a reasonable doubt.

In conclusion, even if the court's error in instructing the jury that the prosecution did not need to prove factor (b) evidence beyond a reasonable doubt was not *per se* reversible error, both the factors discussed in *Phillips* and the fact that the prior convictions resulted from guilty pleas compel the conclusion that the error cannot have been harmless in this case. Reversal is compelled, and the case must be remanded for a new penalty phase.

Moreover, this error and the errors set forth above, when considered cumulatively, meet the standard of a reasonable possibility that they affected the verdict. (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 685; *People v. Jackson, supra,* 13 Cal.4th at p. 1232.)

IX. 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, alone or in combination with each other, violate the United States Constitution. Appellant is well aware of this Court's preference, expressed in *People v. Schmeck* (2005) 37 Cal.3d 240, that these arguments be set forth as briefly as possible. (*Id.* at 304.) Nevertheless, appellant must also be careful to preserve these issues for further review. Appellant will endeavor to do both.

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6;[85] see also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 [while

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[85] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall

(continued...)

comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].)

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

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the

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(...continued)
structure of "the Kansas capital sentencing system," which, as the court noted, " is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (548 U.S. at p. 178.)

victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

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

A. APPELLANT'S DEATH SENTENCE IS INVALID BECAUSE PENAL CODE § 190.2 IS IMPERMISSIBLY BROAD

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained thirty-three special circumstances [86] purporting to narrow the category of first degree murders to those murders

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

most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

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

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

This court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.[87] .

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

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death

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[87] In a habeas petition to be filed after the completion of appellate briefing, appellant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[88] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[89] or having had a "hatred of religion,"[90] or threatened witnesses after his arrest,[91] or disposed of the victim's body in a manner that precluded its recovery.[92] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the

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[88] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88, ¶ 3; CALCRIM 763, ¶ 3.

[89] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, *cert. den.*, 494 U.S. 1038 (1990).

[90] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S. Ct. 3040 (1992).

[91] *People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S. Ct. 498.

[92] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, *cert. den.* 496 U.S. 931 (1990).

crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.) Relevant "victims" include "the victim's friends, coworkers, and the community" (*People v. Ervine* (2009) 47 Cal.4th 745, 858), the harm they describe may properly "encompass[] the spectrum of human responses" (*ibid.*), and such evidence may dominate the penalty proceedings (*People v. Dykes* (2009) 46 Cal.4th 731, 782-783).

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

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

variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

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

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

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its

"special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

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

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

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

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

[*Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296 [*Blakely*]; and *Cunningham v. California* (2007) 549 U.S. 270 [*Cunningham*].

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

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.*, at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Id.*, at 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found

or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

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

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

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

In *Cunningham*, the high court rejected this court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. (*Cunningham v. California, supra,* 549 U.S. at 274.) In so doing, it explicitly rejected the reasoning used by this court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial. (549 U.S. at 282.)

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

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

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[93] As set forth in CALCRIM No.

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

763, which was read to appellant's jury, "an aggravating circumstance or factor is any fact, condition or event relating to the commission of a crime above and beyond the elements of the crime itself that increases the wrongfulness of the defendant's conduct, the enormity of the offense or the harmful impact of the crime." (30RT 3808.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[94] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is

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(...continued)
448.)

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

the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings. [59]

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

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

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

sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham*.[96] In *Cunningham* the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (549 U.S. at pp. 276-279.) That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." (*Cunningham, supra,* 549 U.S. at pp. 290-291.)

Cunningham then examined this court's extensive development of why an interpretation of the DSL that allowed continued judge-based

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

finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.*, p. 293.)

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi*'s "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line"). (*Cunningham, supra,* 549 U.S. at pp. 291.)

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

In its effort to resist the directions of *Apprendi*, this court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this court repeated the same analysis: "Because any finding of aggravating

factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto, supra,* 30 Cal.4th at p. 263.)

This holding is simply wrong. As section 190, subdivision (a) [79] indicates, the maximum penalty for any first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the middle rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra,* 549 U.S. at p. 279.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or

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

more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and *Ring* was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

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

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

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating

circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALCRIM 766.) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 536 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 542 U.S. at p. 328; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

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

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring, supra,* 65 P.3d 915, 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.[98])

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U2.S. 721, 732 ["the death

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

penalty is unique in its severity and its finality"].)[99] As the high court stated in *Ring, supra,* 536 U.S. at p. 609:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

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

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[99] In its *Monge* opinion, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [Citations.]" (*Monge v. California* (1998) 524 U.S. 826, 732 (emphasis added), quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441, and *Addington v. Texas* (1979) 441 U.S. 418, 423-424.)

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

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

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439

U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

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

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship, supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet*

(1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky, supra,* the U.S. Supreme Court reasoned:

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

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky, supra,* 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for

reducing the risk of convictions resting on factual error." (*Winship, supra*, 397 U.S. at p. 363.)

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

In *Monge,* the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [Citations.]" (*Monge v. California, supra*, 524 U.S. at p. 732 (emphasis added), quoting *Bullington v. Missouri*, 451 U.S. 430, 441 (1981), and *Addington v. Texas*, 441 U.S. 418, 423-424 (1979).) The sentencer of a person facing the death

penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

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

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 358, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank, supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by

this court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.)[100] The same analysis applies to the far graver decision to put someone to death.

In a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to more rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan,*(1991) 501 U.S.

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

957, 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra;* Section 4, *post*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

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

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the

failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra,* 548 U.S. at pp. 177-178 [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

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

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this court has eschewed. In *Pulley v. Harris* (1984)

465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review."

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

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia, supra.* (See Section 1 of this Argument, *ante.*) The

statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section 3, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section 2, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh, supra,* 548 U.S. at pp. 177-178), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro,* (1991) 1 Cal.4th 173, 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this court. (See, *e.g.*, *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

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

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

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

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

Fourteenth Amendments. (*Woodson v. North Carolina*, supra, 428 U.S. at p. 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

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

This court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft, supra*, 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, *"no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors."* (*People v. Arias, supra,* 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.) (*People v. Morrison* (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that

section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, 32 Cal.4th at pp. 727-729.) This court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, *e.g.*, *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)[101] The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma, supra,* 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 [holding that Idaho law specifying manner in which

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101 See also *People v. Cruz* (2008) 44 Cal.4th 636, 681-682 [noting appellant's claim that "a portion of one juror's notes, made part of the augmented clerk's transcript on appeal, reflects that the juror did 'aggravate [ ] his sentence upon the basis of what were, as a matter of state law, mitigating factors, and did so believing that the State-as represented by the trial court [through the giving of CALJIC No. 8.85]-had identified them as potentially aggravating factors supporting a sentence of death'"; no ruling on merits of claim because the notes "cannot serve to impeach the jury's verdict"].

aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment]; and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].)

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

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALCRIM No. 763 pattern instruction. (See 30RT 3803-3810.) Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable

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

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

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

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States

Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas, supra; Skinner v. Oklahoma*, supra, 316 U.S. at p. 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[102] as in Snow,[103] this court analogized the process of determining whether to impose death to a sentencing court's traditionally

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

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

discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias, supra,* 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, *e.g.*, §§ 1158, 1158a.) At the time of appellant's trial, Rule 4.42(e), for example, also required the court to give "a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Further, this court has conceded that at the time of appellant's 2007 trial, pursuant to *Cunningham*, the Sixth Amendment required that in non-capital cases findings of aggravating circumstances supporting imposition of the upper term be made beyond a reasonable doubt by a unanimous jury. (See *In re Gomez* (2009) 45 Cal.4th 650.)

In a capital sentencing context, by contrast, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply.

And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[104] *(Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

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

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

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

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, *e.g.*, *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 [plur. opn. of Stevens, J.].) Indeed, as of January 1, 2010, the only countries in the world that have not abolished the death penalty in law or fact are in Asia and Africa – with the exception of the United States. (Amnesty International, "Death Sentences and Executions, 2009 – "Appendix I: Abolitionist and Retentionist Countries as of 31 December 2009" (publ. March 1, 2010) (found at www.amnesty.org).

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot* (1995) 159 U.S 113, 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

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

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

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[105] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental

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

disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra.*)

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

CONCLUSION

For the foregoing reasons, appellant's conviction and death sentence should be reversed.

DATED: January 31, 2014

Respectfully submitted,

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RICHARD I. TARGOW
Attorney at Law

CERTIFICATE OF LENGTH OF BRIEF:

I, Richard I. Targow, attorney for appellant herein, hereby certify under California Rule of Court 8.630(b)(2), that the length of this brief is 79,307 words, within the limits for the opening brief set forth in rule 8.630(b)(1)(A).

RICHARD I. TARGOW

DECLARATION OF SERVICE BY MAIL

Re: People v. Anthony Navarro No. S165195

I, RICHARD I. TARGOW, certify:

I am, and at all time mentioned herein was, an active member of the State Bar of California and not a party to the above-entitled cause. My business address is Post Office Box 1143, Sebastopol, California 95473.

I served a true copy of the attached APPELLANT'S OPENING BRIEF on each of the following, by placing same in an envelope or envelopes addressed, respectively, as follows:

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Anthony Navarro, Appellant

Each said envelope was then, on January 31, 2014, sealed and deposited in the United States Mail at Sebastopol, California, with postage fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 31st day of January, 2014 , at Sebastopol, California.

RICHARD I. TARGOW
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