Supreme Court of California
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Supreme Court of California
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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent,

v.

NOEL JESSE PLATA AND RONALD TRI TRAN,

Appellant.

S165998

Orange County Case No. 01HF0193

APPELLANT'S OPENING BRIEF

Appeal From The Judgment Of The Superior Court
Of The State Of California, Orange County

Honorable William R. Froeberg, Judge

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INTRODUCTION

In the early evening hours of November 9, 1995, appellant Ron Tran and co-defendant Noel Plata drove to Linda Park's home to commit a burglary. Mr. Tran's girlfriend Joann Nguyen was friends with Linda, and told Mr. Tran that there was money and jewelry in the home. Neither Mr. Tran nor Plata intended to kill anyone that evening. But Linda was home when they arrived, and within the hour, she was robbed, cut with a knife and fatally strangled.

There was no real question at trial that Mr. Tran and Plata were guilty of burglary and robbery. After all, Nguyen testified about their plans that night to burglarize Linda's home, and Linda was robbed during the course of that burglary. Both Plata and Mr. Tran would later make incriminating statements about their roles in the burglary and robbery.

Rather, the critical question at trial was the identity of the actual killer. The state's theory was that Mr. Tran killed Linda, and the prosecutor would rely on this theory throughout trial in urging the jury to return a guilt verdict, find the special circumstances true, and ultimately, impose a verdict of death.

The sole evidence to support the theory that Mr. Tran killed Linda was the testimony of convicted felon and jailhouse informant Qui Ly. After Mr. Tran's arrest, police placed Ly in a holding cell with Mr. Tran, and audio recorded the conversation. Mr. Tran made numerous statements implicating Plata. At one point, however, Ly specifically asked who killed Linda. Although there was no audio or visual recording of

Mr. Tran's response, according to Ly, Mr. Tran pointed to himself in response. Of course, this was damning evidence that Mr. Tran killed Linda.

But there was equally damning evidence that *Plata* actually killed Linda. Hours after the murder, Plata was overheard talking about Linda's death. He was cleaning a six to eight inch knife, saying, "he had gone to rob a house in Irvine that night," but "he didn't mean to hurt the girl" and "didn't know she was there." Five or six months later, Plata spoke to his friend Ly. Ly testified that while the two were sitting in a Vietnamese restaurant, Plata told Ly that "he had killed the Korean girl." He further told Ly, "he had to do it." Ly had always assumed Plata had killed Linda from his earlier conversations with Plata, but this particular conversation confirmed his suspicions. Plata continued to admit killing Linda more than once after that conversation. Shortly after these conversations, Plata was convicted of an unrelated murder, and was sentenced to life in prison.

Of course, Plata's statements to Ly that he killed Linda did not at all square with the state's theory -- nor Plata's theory, for that matter -- that Mr. Tran alone killed Linda. As a result, the prosecutor readily joined into an agreement with Plata's counsel to introduce otherwise inadmissible and previously excluded evidence to further support the theory that Mr. Tran killed Linda. Here is what happened.

Just as done with Mr. Tran, police placed Plata in a holding cell with Ly, and audio recorded their conversation. In that conversation, Plata made numerous statements

incriminating Mr. Tran. Prior to trial, Mr. Tran moved for severance based on *People v. Aranda* (1965) 63 Cal.2d 518 and *Bruton v. United States* (1968) 391 U.S. 123. The state redacted Plata's statements to remove references to Mr. Tran, and the trial court redacted the statements further to survive all *Aranda-Bruton* scrutiny, before it denied Mr. Tran's severance motion.

Just prior to Ly's testimony, however, the prosecutor and Plata's counsel formed an alliance. Plata agreed that the prosecutor could present Plata's otherwise inadmissible recorded statement to Ly that he simply participated in the robbery. In exchange, the prosecutor agreed to introduce portions of Plata's recorded exculpatory statements to Ly. Over Mr. Tran's objection, and notwithstanding its earlier decision that Plata's recorded exculpatory statements violated *Aranda* and *Bruton*, the trial court allowed the jury to hear Plata's exculpatory statements that he was involved in the robbery, but that he did not kill Linda, and there was "nothing he could do" about the murder, and was "pissed off" afterwards. As Mr. Tran's counsel aptly put at the time, the statements naturally pointed to Mr. Tran as the actual killer and "there's no question what the inference of that is given the testimony that we've had which is essentially saying either Tran is out of control or I was coerced by Tran." Simply put, *Aranda-Bruton* error occurred.

But there is more. In an attempt to remedy any harm resulting to Mr. Tran by the erroneous admission of this evidence, the trial court gave a limiting instruction to the jury that it could consider the evidence "only against the defendant making the statements and

not against the other defendant." While this instruction may theoretically mitigate any harm resulting from the admission of a defendant's statement which implicated his co-defendant, giving the instruction on the facts of this case here was prejudicial error.

In this regard, and as noted above, Mr. Tran had introduced evidence that Plata and Ly had a conversation in a Vietnamese restaurant in which Plata admitted that he -- not Mr. Tran -- killed Linda. Plata's confession that he killed Linda, of course, was entirely admissible as a declaration against interest to prove that Mr. Tran did not kill Linda. The court's instruction, however, erroneously told the jury that Plata's statement could *only* be used against Plata. In other words, the jury was precluded from considering Plata's confession that he killed Linda in determining the extent of Mr. Tran's involvement and culpability for the crimes. This too was error.

But there is still more. As noted, Ly was a jailhouse informant. Accordingly, the trial court told the jury that Ly was an "in-custody informant," and the jury should view all his testimony "with caution and close scrutiny." Moreover, both Plata and Mr. Tran made oral unrecorded statements prior to trial. Thus, the court further told the jury that it "must consider with caution evidence of a defendant's oral statement unless it was written or otherwise recorded."

Of course, these two instructions were entirely helpful to Plata. Indeed, Plata's counsel relied on the instructions in closing argument to undercut the credibility of Ly's testimony about his unrecorded conversation in the Vietnamese restaurant in which Plata

admitted killing Linda. Instead, according to counsel, the jury must believe Plata's jail statement to Ly in which Plata denied killing Linda and there was "nothing he could do," and was "pissed off" afterwards. After all, the jail conversation with Ly was recorded, and thus, neither instruction actually undercut the credibility of Ly's testimony about it.

But in this joint trial, these cautionary instructions also directly undercut Mr. Tran's ability to rely on the unrecorded exculpatory evidence that Plata repeatedly told Ly that he killed Linda. Not only did the limiting instruction tell the jury that it could not consider this evidence in connection with Mr. Tran, but now the instructions told the jury in no uncertain terms that Ly's testimony regarding this evidence must be viewed with "caution and close scrutiny."

These errors skewed the jury's ability to determine guilt, the truth of the special circumstance allegations, and ultimately, whether Mr. Tran should live or die. But these errors were not the only hurdles to a reliable verdict. As discussed below, the trial court also committed evidentiary and instructional errors that limited the jury's ability to consider evidence that Mr. Tran was remorseful about Linda's death, and instead, allowed the jury to hear inadmissible evidence that Mr. Tran was actually bragging about Linda's death. Moreover, the court permitted victim impact evidence -- which caused an interpreter to cry and the discharge of an emotional juror -- and refused to grant a mistrial when the jury foreperson committed serious misconduct, including considering Mr. Tran's failure to take the stand in returning a verdict of death. For all these reasons -- and

for others discussed below -- reversal is required.

STATEMENT OF THE CASE

On August 24, 2007, the Orange County District Attorney filed a one-count first amended information against petitioner Ronald Tri Tran and co-defendant Noel Jesse Plata. The information charged a November 9, 1995 murder in violation of Penal Code section 187. (3 CT 758.) The count added burglary, robbery and torture special circumstances allegations in violation of section 190.2, subdivisions (a)(17)(G) [murder during burglary], (a)(17)(A) [murder during robbery], and (a)(18) [murder involving torture, with torturous acts alleged as binding of wrists and ankles, and slashing of throat], against both defendants, and a special circumstance allegation in violation of section 190.2, subdivision (a)(2), against Plata alleging he had previously been convicted of first degree murder. (3 CT 759.) The count added the enhancement allegation that the murder was committed for the benefit of, at the direction of, and in association with Vietnamese for Life ("VFL"), a criminal street gang within the meaning of section 186.22, subdivision (b)(1). (3 CT 759.) Finally, the information alleged that Mr. Tran had served one prior prison term within the meaning of section 667.5, subdivision (b), been convicted of a prior serious felony within the meaning of sections 667, subdivisions (a)(1), (d), (e)(1), and 1170.12, subdivisions (b) and (c)(1), and suffered a prior juvenile adjudication with the meaning of Welfare and Institutions Code 602. (3 CT 760.)

Tran's motion to sever his case from Plata was denied. (2 RT 229-263, 269-272.) On August 24, 2007, Mr. Tran and Plata pled not guilty and denied the enhancement

allegations. (3 CT 789, 791.) The state sought the death penalty against both defendants. (1 CT 192-193.)

Voir dire began on September 24, 2007. (3 CT 808.) The jury was sworn on October 10. (4 RT 712-718.) The state made its opening statement on October 11. (3 CT 885.) The state's guilt phase case ended on October 18. (4 CT 950.) Outside the jury's presence, Mr. Tran admitted the prior allegations. (4 CT 950.) After closing arguments on October 22, the jury deliberated over five hours over the course of two days, and found both defendants guilty as charged and the allegations true. (4 CT 954-955, 1181-1182.) The trial court entered its own true finding with respect to the section 190.2, subdivision (a)(2), allegation against Plata. (9 RT 1762.)

The state's penalty phase began on October 24, 2007. (4 CT 1193.) On October 25, Juror 1 was dismissed by stipulation, after victim impact evidence was introduced, and replaced by an alternate juror. (9 RT 1875-1880.) The state's penalty phase case ended that same day. (5 CT 1205.) Mr. Tran's penalty-phase case began and ended on October 29. (5 CT 1219.) Plata's penalty phase began and ended on October 30. (5 CT 1231, 1234.) Closing arguments were made on October 31. (5 CT 1243.) Deliberations began that same day, and continued through November 1. (5 CT 1244, 1248.) Deliberations resumed November 5, and later that day, the jury sentenced both defendants to death. (5 CT 1386-1389.)

On December 4, 2007, the trial court informed counsel that court staff, in cleaning

up the jury deliberations room, had discovered a three-page typewritten document entitled "Life or Death," that appeared written by the jury foreperson. The court refused to disclose more than one paragraph of the document. (12 RT 2486-2487.) On January 11, 2008, the court conducted a hearing at which the foreperson was questioned. (5 CT 1400-1401.) Based on the foreperson's testimony, Mr. Tran filed a motion for access to juror information; Plata joined. (5 CT 1402-1425, 1436.) The court sent a notice to jurors of a hearing on the defense request to disclose juror information. (5 CT 1433-1436.) After a limited hearing on March 14, 2008, with four jurors, the court denied the motion for access to juror information, and found no misconduct occurred. (5 CT 1441-1443.

Mr. Tran moved for a new trial, in which Plata partly joined. (5 CT 1484-1490, 1496.) In addition, defense counsel moved for a reduction of the sentence to life without parole. (6 CT 1491-1492.) The trial court denied these motions and sentenced both defendants to death. (6 CT 1586-1593.)

This appeal is automatic.

STATEMENT OF FACTS

The Guilt Phase.

Mr. Tran's girlfriend Tu Ahn Joann Nguyen identifies her friend Linda Park's home as a place to burglarize for money and jewelry.

Tu Anh Joann Nguyen (Nguyen) was good friends with the victim in this case, Linda Park (Linda). They became friends while they were in high school from 1993 to 1995. (5 RT 993-994, 996.) During this time, Nguyen visited Linda's home twice a month. (5 RT 994.) Linda lived with her parents and older sister, Janie. The family had a Doberman, Sammy, who usually stayed in the backyard. (5 RT 856.)

Linda's father Sunhwa Park (Park) kept between $700 and $800 cash in a brown jacket which hung in the master bedroom closet. (5 RT 858.) Both Janie and Linda knew where the money was kept. (5 RT 859.) Park's wife Dong kept jewelry inside the drawer of her makeup table in the bathroom of the master bedroom. (5 RT 860.)

According to Nguyen's testimony at trial, a few days prior to November 9, 1995, appellant Ronald Tran (Mr. Tran), who was her boyfriend at the time, asked if she knew anyone who had money or jewelry. (5 RT 1013.) Nguyen told Mr. Tran that Linda had money. (5 RT 1013.) Mr. Tran replied that he was going to rob Linda, and then asked Nguyen to show him where Linda lived. (5 RT 1014.) Nguyen and Mr. Tran drove in Nguyen's car to Linda's house, where Nguyen answered Mr. Tran's questions about who was inside the house and whether there were any dogs. (5 RT 1014-1015; 6 RT 1078, 1098.)

Mr. Tran suggested they switch cars for the burglary because his car was a white "junky" hatchback that looked suspicious, while Nguyen drove a nicer red Honda Prelude. (5 RT 1010, 1016.) In order to switch cars, Nguyen and Mr. Tran made plans to meet in the Irvine Valley College parking lot on November 9 before Nguyen went to her 7 p.m. biology class. (5 RT 1016, 1019.)

At 7:00 p.m., Nguyen met Mr. Tran and co-appellant Noel Plata (Plata) in the college parking lot as planned. (5 RT 1017.) Nguyen gave her car keys to Mr. Tran, and he and Plata left in her red Honda. (5 RT 1018.) Nguyen went to class. (5 RT 1020.)

Linda is robbed and killed during the course of the burglary of her home.

Between 6 and 7 p.m., Linda was home, speaking to her friend Danny Son over the telephone. (5 RT 901.) According to Son, while they were talking, Linda indicated that someone was at the front door. (5 RT 901.) She told Son to wait and put the telephone down. (5 RT 901.) Son then heard Linda speaking to someone, saying, "What's wrong? What's your problem? You need help?" (5 RT 901-902.) Son assumed Linda was speaking to her sister Janie, so hung up the telephone. (5 RT 902.) He called her back approximately 30 minutes later and there was no answer; the answering machine picked up the call. (5 RT 903.)

When Linda's father Park came home around 8 p.m., he discovered the door was unlocked. (5 RT 863.) Linda was face down on the living room floor with both feet and hands bound. (5 RT 863.) She was tied with a nylon cord around her ankles and wrists,

and a gray electrical cord was wrapped around her neck and tied to the nylon cord. (5 RT 880.) Park thought she was still alive. (5 RT 865.) He turned her over to untie her, but the rope was tied too tight. (5 RT 865.)[1]

Park went to call 911 in the kitchen. (5 RT 865.) When he could not find the cordless telephone there, he searched for a different phone in the master bedroom. (5 RT 865.) He saw, on the floor of the master bedroom closet, the brown jacket where he usually kept his cash (and from where Park would later confirm $700 had been taken). (5 RT 865-866, 888.) Not finding a telephone in the bedroom, Park ran to his neighbor Marilyn Fox's home (5 RT 866, 868), where Fox, who had not heard the dog barking prior to Park knocking on the door, called 911. (5 RT 892.)

Police arrived at 8:13 p.m. (5 RT 878-879.) Linda was not breathing, and her body was cold to the touch. (5 RT 881.) Lividity had not yet set. (5 RT 882.) The coroner arrived at the scene at 9:15 p.m., and set the time of death as approximately 7 p.m. (6 RT 1138, 1140.) At approximately 9 p.m., a videotape was made of the scene (5 RT 907) and the house was unsuccessfully dusted for fingerprints. (5 RT 989.)

There was no evidence of forced entry into the home. (5 RT 911.) The house appeared well kept; there was no evidence of ransacking. (5 RT 909-912.) The living

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[1] Park was later shown by police the rope that was used to tie up Linda. (5 RT 871-872.) He claimed he did not keep that type of rope in his house. (5 RT 872.) Nor did he keep duct tape in his house. (5 RT 872.) Park told police that Linda's pager, an electric heating pad, and scissors were missing from the house. (5 RT 872-873.)

room looked immaculate and undisturbed, except for two jewelry boxes on the coffee table and a plant that had been knocked over. The tray from one jewelry box had been taken out and left empty. (5 RT 884-886.) In an adjacent room, a movie was playing on a muted television. (5 RT 884.) The back sliding glass door was unlocked, but the screen door was locked. (5 RT 890.) The dog was barking in the backyard. (5 RT 890.)[2]

In the meantime, Nguyen left class a little early, and then waited by Mr. Tran's hatchback until Mr. Tran and Plata returned shortly before 10 p.m. (5 RT 1020-1021, 1065.) They parked her red Honda close to Mr. Tran's hatchback; she did not recall who was driving. (5 RT 1042; 6 RT 1105.) When the two got out of the red Honda, Nguyen saw them take out what she thought was a blanket, which measured about a foot by a foot and a half, and put it in Mr. Tran's car. (5 RT 1022; 6 RT 1096.)

Nguyen thought Mr. Tran looked anxious or "hyped up." (5 RT 1023, 1066.) Plata too looked anxious, "but a little less." (5 RT 1023.) She saw no blood on either of them or in her car. (5 RT 1089-1090.)

Nguyen's evolving claims of incriminating statements by Mr. Tran, culminating in her receiving immunity in exchange for her testimony.

When Nguyen was first interviewed by police on November 28, 1995, she lied

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[2] Police found that the electrical cord around Linda's neck appeared cut by scissors or a knife, and had a thermostat device attached to it. (5 RT 980.) There was an empty heating pad box located in the corner of the TV room. (5 RT 981.) The box pictured a heating pad which had a similar thermostat device attached. (5 RT 982.) The heating pad was never found. (5 RT 982.)

about what she knew. (5 RT 1048-1049.) She did not even tell police that Mr. Tran was her boyfriend. (5 RT 1068.) At trial, she tried to blame her silence on Mr. Tran, claiming that he told her to keep her answers short and not say anything about what happened to Linda. (5 RT 1048.)

Four years later, and two years after she broke up with Mr. Tran, on December 2, 1999, Nguyen was again interviewed by police. (5 RT 1049, 1061-1062.) During the interview, she asked to speak to a Catholic priest. (5 RT 1049-1050.) After speaking to the priest, she continued to speak to investigators. (5 RT 1050.) She claimed Mr. Tran told her about his involvement in Linda's death, but did not remember if he actually told her that "Linda had been killed" or "they killed her." (5 RT 1050, 1061-1062; 6 RT 1122-1124.) She continued to lie about her own involvement, i.e., the fact that she pointed out the house to Mr. Tran and let him borrow her car. (5 RT 1050, 1062-1063.)

On November 14, 2001, Nguyen received a subpoena to testify about the case. (5 RT 1051.) When she again met with police, she continued to lie about her involvement. (5 RT 1063.) It was only after meeting with a deputy district attorney and his investigator (5 RT 1051, 1058; 6 RT 1081), and being offered transactional immunity that she began revising her story. (5 RT 1052-1053; 6 RT 1113.) She recalled the deputy district attorney saying, "You're not telling the whole story. We know what happened." (6 RT 1116.) She was appointed a defense attorney, and after discussion with him, signed an immunity agreement to avoid getting a life sentence. (5 RT 1052, 1060.)

Upon the grant of immunity, Nguyen testified at trial that, upon their return to the college parking lot that night, Mr. Tran told Nguyen that "they had just killed her" (5 RT 1042-1044), and described how Linda was on the telephone when they knocked and pushed their way in, concluding that "they robbed her and then they killed her." (5 RT 1044-1045; 6 RT 1133.) She did not recall whether he said, "I killed Linda," or "We killed Linda," or "She has been killed." (6 RT 1108, 1132, 1134.) Nguyen testified further that Mr. Tran and Plata discussed creating an alibi, and meeting up with friends to go watch a movie, before leaving in Mr. Tran's car. (5 RT 1045-1046.) And for the first time, she testified that on November 11th or 12th, Mr. Tran admitted that Linda was killed because he did not want Linda to identify him if she was ever questioned about the robbery. (5 RT 1047.)

Plata cleans a knife on the night of the murder and then repeatedly admits to his friend Qui Ly that he killed Linda.

Linda Le (Le) was good friends with Plata, who was dating her sister Samantha Le. (6 RT 1173-1174.) She also knew Mr. Tran from childhood; she knew him by the nickname, "Scrappy." (6 RT 1174, 1180.)

On January 21, 2000, Le told her probation officer and a police officer that she overheard Terry Tackett (Tackett) and Plata talking about what happened earlier that night on November 9th, and Tackett asking Plata if he cleaned "the knife," and Plata replying that he had. (6 RT 1182-1184, 1186.) Le claimed that she did not learn about Linda's death until Plata spoke about it days later; "Noel was sad and he was just talking

about it, and he was saying he didn't mean to." (6 RT 1188-1189.) She claimed that Plata was on drugs, and told her that "he didn't mean to hurt the girl, and he knocked her out on accident, he didn't know she was there" and that "he hit her with something, you know, so she's knocked out." (6 RT 1194-1195.) At the preliminary hearing, Le testified that, while inside an apartment rented by Nguyen, she heard Plata tell Tackett that "he had gone to rob a house in Irvine that night." (6 RT 1185, 1197.)[3]

At trial, Le testified that she did not remember being in Nguyen's apartment on the night of Linda's murder, or overhearing a conversation between Plata and her boyfriend Tackett about a knife. (6 RT 1181-1185.) She claimed that she did not learn about Linda's death until she was arrested for possession of drug paraphernalia in 2000 (6 RT 1222), and she only remembered Plata wiping down a knife. (6 RT 1187, 1208.) The knife was six to eight inches long; it was not a kitchen knife. (6 RT 1215.) There were others present at the time; Swain Le, her sister Samantha, her friend Laura and Laura's boyfriend Tuan, Tom Nguyen and someone named Tia. (6 RT 1216, 1218.) The group ended up going to the movies afterwards. (6 RT 1230.)[4]

After Mr. Tran was arrested, on February 28, 2001, police made arrangements for

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[3] Rent documents revealed that Nguyen did not rent the apartment until March 15, 1996. (6 RT 1200.) When confronted with the documents, Le testified that she had no idea when she was in the apartment or when she overheard the conversation between Tackett and Plata. (6 RT 1204-1205.)

[4] Le recalled that her friend Laura and Laura's boyfriend Tuan had jewelry at some point. (6 RT 1219.) Le went with Laura and Tuan to pawn the jewelry. (6 RT 1219.) She did not know the source of the jewelry. (6 RT 1223.)

confidential informant Qui Ly (Ly) to be "placed into a cell [at Santa Ana Jail] individually with both Plata and Tran and attempt to get them to talk about the Linda Park murder." (6 RT 1246.) Plata was already serving a life sentence for a July 1996 murder conviction. (2 RT 197.)

Ly was a convicted felon. In 1992, he was convicted of residential robbery, assault with a firearm, and residential burglary, and sentenced to seven years in state prison. (6 RT 1277.) Within days of being released from prison in 1996, Ly met Plata. (6 RT 1279.) Ly was a Vietnamese gang member, belonging to the so-called "V." (6 RT 1258.) V and Viets for Life (VFL) were allies, and thus, Ly and VFL member Plata were friends. (6 RT 1278, 1280.) Once, Plata even backed up Ly in a bar fight. (6 RT 1281.) Ly, Plata and Mr. Tran, "h[u]ng around" together socially, sometimes at the Family Billiards in Westminster. (6 RT 1283-1284.)

In October 1997, police arrested Ly on a parole violation. (6 RT 1282.) He was held at Anaheim City Jail, then sent to Chino State Prison. (6 RT 1282.) After being released from Chino, Ly was arrested in April 1998 for residential burglary. (7 RT 1408.) He was convicted and being a "third striker," faced a sentence of 31 years to life. (6 RT 1257; 7 RT 1408-1409.) Before sentencing, Ly contacted police in the hope of consideration in exchange for information. (7 RT 1409.) He told police about conversations he had with Mr. Tran and Plata about Linda's death. (7 RT 1410.)

Ly testified about the conversations. Ly claimed that in May or June 1996, he and

Plata had a conversation about Linda's death at a Vietnamese restaurant called Thanh My. (6 RT 1282; 7 RT 1443.) He had an extensive interview with police in October 1999 about that conversation. (7 RT 1444-1445.) In the tape recorded interview, Ly claimed that Plata admitted to him that he was the one who killed Linda; Plata said "he had killed the Korean girl." (7 RT 1445, 1452.) He told police that he always assumed Plata killed Linda from earlier conversations with Plata, and then his suspicions were confirmed when Plata admitted to the murder. (7 RT 1453.) Plata also told Ly that "he had to do it." (7 RT 1454.) He continued to claim that Plata admitted killing Linda more than once. (7 RT 1446.)

In February 2001, police placed Plata in the cell with Ly, recording and monitoring their conversation. (6 RT 1248; 7 RT 1415.) A redacted tape recording of the jail conversation was played for the jury. (7 RT 1433-1437.) Plata told Ly that no fingerprints or other evidence was left behind at the scene. (6 CT 1639.) He was supposed to get $2,000 in cash and jewelry. (6 CT 1642.) Mr. Tran's girlfriend Joann Nguyen was not there, but Linda was Joann's "esse," meaning friend. (6 CT 1648.) He claimed Linda "looked through the door...and stand and watched us," and "[t]hat fool slipped by a cactus." (6 CT 1646, 1656.) When Ly asked, "Who else do you think knows?," Plata said he was just worried about "his girl, Joanne [sic]." (6 CT 1654.)

Ly also testified that during this recorded jail conversation Plata admitted being involved in the robbery, but did not strangle Linda. (7 RT 1437, 1444.) Plata opined that

if Tackett (the man Le claimed asked Plata about cleaning a knife on the night of the murder) were still alive, he was the one who would be talking to police. (7 RT 1438.) He said there was "nothing he could do" in connection with the murder. (7 RT 1438.) He also said that after he left the house, he was "pissed off," and he had to go back inside the house for something. (7 RT 1438.)[5]

Qui Ly and Tien Tran testify to incriminating statements by Mr. Tran.

Ly also testified about conversations he had with Mr. Tran. According to Ly, while at Chino in October 1997, he ran into Mr. Tran in the West Yard; Mr. Tran was in Chino for a parole violation too. (6 RT 1285.) Eventually the two became "bunkies," in the same cell from October to November 1997. (6 RT 1285.) While in the West Yard, Mr. Tran told Ly about the murder of a young girl in Irvine. (6 RT 1286.)

Just as done with Plata, police placed Ly and Mr. Tran in a cell together. (6 RT 1247; 7 RT 1415.) Police, Ly's probation officer and a district attorney investigator taped and monitored the conversation. (6 RT 1248.) A redacted tape recording of the conversation was played for the jury. (7 RT 1423-1430.)

In the recording, Mr. Tran told Ly that he was arrested for an Irvine murder. (6 CT 1610.) Ly asked whether it was the same murder that Mr. Tran mentioned in Chino. (6

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[5] Ly subsequently became a confidential informant for police; in April 2007, in consideration for his cooperation, he was sentenced to 13 and a half years time served, and released. (6 RT 1257; 7 RT 1411-1414.) During his time in custody, he provided police with all the information he knew about gang and criminal activities in Southern California. (7 RT 1414-1415)

CT 1610.) When asked by Ly if Mr. Tran thought "they got you good," Mr. Tran replied, "I don't even know what they got on me" and "if Noel's talking you know, I'm screwed . . . ." (6 CT 1613.) He did not know if "Noel talked." (6 RT 1616.) Ly asked, "But who killed her, you or him?" (6 CT 1613.) There was no verbal response recorded on the tape, but Ly testified that Mr. Tran pointed to himself and nodded his head. (6 CT 1613; 7 RT 1424-1425.) When asked if he was going to get an attorney, Mr. Tran replied that he did not have money for an attorney. (6 CT 1614.) When asked why he "t[ook] her out," Mr. Tran replied, "I don't know what to say, man. Tie 'em up, you know. What can you do?" (6 CT 1617.) When asked how much "it was supposed to be worth," Mr. Tran responded, "Fuck, about ten, about ten." (6 CT 1625.) When asked how much he ended up getting, Mr. Tran responded that he did not want to talk about it. (6 CT 1626.) He indicated he had to accept it, stating in Vietnamese, "You play and accept," and that he "felt bad about it, I feel stupid enough already . . . ." (6 CT 1628.)[6]

Police actually had information that Mr. Tran may have been involved in Linda's death long before these conversations took place. On September 14, 1996, police learned that Jin Ae Kang called police and said she had information relating to Linda's death. (5 RT 915-916.) Kang later testified at trial that her boyfriend Tien Tran told her that Mr.

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[6] Ly claimed that throughout the conversation, Mr. Tran would change the tone of his voice and point at the intercom speaker in the cell. (7 RT 1424, 1457.) According to Ly, Mr. Tran would run up to the intercom, yelling "I didn't do it. I had nothing to do with it." (7 RT 1456.) He would then continue talking about the crime when Ly calmed him down. (7 RT 1456.)

Tran told him that he was involved in murdering a girl in Irvine. (5 RT 950.) Tien further told Kang that Mr. Tran claimed that the girl was bound and that she (Linda) recognized Mr. Tran at the time of the break-in. (5 RT 950.) Tien finally told Kang that Mr. Tran claimed that four or five people were involved in the girl's killing, and a few gold items and a little bit of cash were taken from the Linda's home. (5 RT 951, 953.)

As a result of interviewing Kang, police spoke to Tien. (5 RT 919-920.) Tien was Mr. Tran's friend; he knew Mr. Tran as "Ron" or "Scrappy." (5 RT 920-921.) Tien told police he knew nothing about Linda's death. (5 RT 922.) He threatened the investigator during the interview; he was subsequently prosecuted and convicted of obstructing a police officer (Pen. Code § 69). (5 RT 933-934, 934, 941-942)

Just prior to taking the stand at trial, Tien again told the prosecutor that he knew nothing about Linda's death. (5 RT 929, 935.) Outside the jury's presence in a hearing, however, Tien testified that he now recalled that Mr. Tran "vaguely said that he killed some girl in Irvine" but "didn't go into details about it," and that he told Kang about what Mr. Tran admitted. (5 RT 924-926, 945-946.)

Back in the jury's presence, Tien testified that Mr. Tran told him there was a robbery and "a girl was killed, that's basically it." (5 RT 927, 929.) He was "not sure" if Mr. Tran claimed he was involved in the killing; he only "kind of remember[ed]." (5 RT 927, 946.) He did not recall if he told Kang that Mr. Tran said the girl was bound, the girl recognized Mr. Tran during the robbery, or that the "loot from that robbery was a few

gold items and a little bit of cash." (5 RT 929-930, 932.)

Under cross-examination, Tien claimed that he "vaguely remembered that Mr. Tran told [him] that he killed somebody." (5 RT 935.) He believed the conversation with Mr. Tran took place at his friend Tam's house when Tam was also present, but could not recall when. (5 RT 936.) He recalled telling Kang about what Mr. Tran said, but did not recall telling Kang that Mr. Tran was having nightmares and problems sleeping, started taking drugs, and that he wanted to kill himself, or that four or five guys were involved in the killing. (5 RT 939.)

The autopsy and forensic evidence.

On November 10, 1995, Dr. Joseph Halka performed the autopsy on Linda. (7 RT 1297.) Pathologist Dr. Richard Fukumoto testified about Dr. Halka's report, and his own conclusions about the cause of death.

The twine used to bind Linda's wrists and feet left hemorrhages and indentations antemortem, indicating that Linda resisted against the binding, thus was conscious at the time the wounds were inflicted. (7 RT 1321-1325.) There was a bruise on the cheek below the left eye, and a hemorrhage below the surface indicated an antemortem wound. (7 RT 1309.) Dr. Fukumoto opined it was caused by blunt force trauma, consistent with a fist, palm of the hand or back of the hand. (7 RT 1313.) There were two overlapping cuts on the neck. (7 RT 1309, 1316-1318.) There were petechial hemorrhages on a shoulder, and Dr. Fukumoto opined that the victim's chest was on the floor and someone

was causing compression on her back, causing the shoulder hemorrhages. (7 RT 1318-1321.)

Dr. Fukumoto concluded that the cause of death was asphyxiation due to ligature strangulation. (7 RT 1329.) He also opined that, "there is pain associated with strangulation because "the neck area is being traumatized." (7 RT 1302.) Dr. Fukumoto claimed he reached the same opinion and conclusion that Dr. Halka previously reached about the cause of death. (7 RT 1299.)

In 2000, the cord and twine obtained by Wong were examined by forensic scientist Mary Hong, the state's DNA expert. (7 RT 1359, 1361-1362.) Hong was unable to find any biological material with DNA on the cord consistent with Mr. Tran or Plata. (7 RT 1369.) Hong found a mixture of biological material with DNA from three different individuals on a knot in the twine; she compared the DNA profile from the knot sample to the DNA profiles of Linda, Plata and Mr. Tran. (7 RT 1364-1368.)

Hong used Short Tandem Repeat technology, using Profiler Plus and Cofiler amplification kits to compare DNA profiles; the former kit tested for nine DNA markers and a sex marker and the latter kit tested the same markers plus four additional DNA markers, for a total of 13 markers. (7 RT 1356.) None of the DNA from the mixture on the knot sample was consistent with Plata's DNA profile. (7 RT 1369.) There was DNA consistent with Linda's DNA profile; she could not be excluded from the sample. (7 RT 1370.) The DNA was also consistent with Mr. Tran's DNA profile; he could not be

excluded from the sample. (7 RT 1371.) According to Hong, using a Vietnamese database, approximately one in 3,800 Vietnamese would not be excluded; according to Hong, "that gives us 99.97368 percent that you would not expect to have that profile." (7 RT 1372-1374.) When Hong only considered the result of the Profiler Plus kit's nine markers, approximately one in 760 Vietnamese would not be excluded. (7 RT 1372, 1379-1380.)

The gang evidence.

Nguyen claimed that Mr. Tran told her that he was a Viets for Life ("VFL") member. (5 RT 1010.) According to Ly, Plata and Mr. Tran were both members of VFL. (6 RT 1176.) Sometime after the night of the crime, Nguyen saw a new tattoo on Mr. Tran's collarbone. (5 RT 1047.) Mr. Tran already had a tattoo with Vietnamese writing on his chest, a tattoo saying "Scrappy" on his back and Nguyen's name in Vietnamese on his lower stomach. (5 RT 1000-1001.) Mr. Tran told her the new tattoo said in Korean, "Forgive me." (5 RT 1048; 6 RT 1153.)

In March 2001, police obtained warrants to search Mr. Tran's parents' home on Hood Street in Santa Ana and Kathy Nguyen's home on Ponderosa in Fountain Valley; at the time, Kathy was Mr. Tran's girlfriend and mother of his son. (6 RT 1250-1251.) Inside Mr. Tran's parents' home, police found paperwork and a book related Fall 1995 classes Mr. Tran was taking at IVC. (6 RT 1248-1252.) Inside the book, there was writing which read, "Scrappy," "VFL, Gangsters, '93," and "Big Bad VFL Gang '93,"

"VFL," and "Fuck TRG [Tiny Rascals Gang]." (6 RT 1253.) In August 1995, Mr. Tran dropped two classes. (6 RT 1249.) Inside Kathy's home, police found three inch plaster letters on a bedroom wall that spelled, "VFL." (6 RT 1252.) Police also found a letter from Plata to Mr. Tran, dated October 18, 2000, referring to Mr. Tran as his "homie." (6 RT 1254.)

Vietnamese gang expert Mark Nye testified that the VFL was a gang which congregated at the Family Billiards in Westminster. (8 RT 1529.) Nye testified about VFL gang members Se Hong, Phi Nguyen and Anthony Johnson who were convicted of a 1992 residential burglary and a 1993 conspiracy to commit murder, a 1994 attempted residential burglary with a gang allegation and a 1994 robbery, and a 1995 attempted murder with gang charges and allegations, respectively. (8 RT 1530-1534.) Based on his experience and these reports, Ny concluded that VFL was a criminal street gang. (8 RT 1534.)

In November 1995, VFL had 20 to 30 members. (8 RT 1535.) The primary activity of the gang was home invasion robbery, residential burglary, attempted murder and murder. (8 RT 1535.) Ny would expect that one member of the VFL would be aware of the crimes committed by other VFL members; the members shared proceeds with each other, discussed what crimes they committed, and discussed gang rivalries. (8 RT 1535-1536.)

Ny reviewed records for Plata and Mr. Tran. (8 RT 1537.) Plata was interviewed

in 1993 regarding the criminal activity of Anthony Johnson. (8 RT 1538.) Plata denied involvement in any crimes, but admitted that Johnson was a VFL member, and that he (Plata) was an associate who had not been "jumped in" yet. (8 RT 1538.) There was also a 1993 letter from VFL leader Hong Lay to Plata, encouraging him to become close to Se Hong and become "good homeboys." (8 RT 1539, 1541.) Lay also told Plata to talk to Phi Nguyen about Homeless (a VFL member), and to 'jump Homeless out of V.F.L." (8 RT 1539-1540.) According to Ny, the letter was significant because a gang leader was a giving Plata a "big responsibility." (8 RT 1541.) There was also a 1993 letter from Plata to his friend who had been killed during a gang rivalry in 1992, saying that he wished he had not died, and that Anthony Johnson was trying to get him "jumped out," because he (Johnson) thought he (Plata) was "ratting on him," but that he (Plata) "would die for V.F.L." (8 RT 1543-1545.) Finally, Plata admitted to police in 1996 that he was a VFL member, and told Samantha Le and Laura Nguyen that he was a VFL member. (8 RT 1547.) Based on this information, Ny concluded that at the time of the instant crime, Plata was an active member of the VFL street gang. (8 RT 1548.)

Turning to Mr. Tran, Ny considered Mr. Tran's tattoos. Mr. Tran had a map of Vietnam on his right upper arm consistent with tattoos worn by other VFL members. (8 RT 1548.) He also had a tattoo which read, "In loving memory of Viet;" Ny recalled a VFL member named Viet, found dead in Costa Mesa. (8 RT 1548-1549.) On Mr. Tran's other arm, there were tattoos which read, "'93, '94, '95, and '96." (8 RT 1549.) These

were tattoos commonly worn by people who spent the denoted years in prison. (8 RT 1549.) On Mr. Tran's back, there were tattoos that read, "Scrappy," and "Tran." (8 RT 1550.) To the left of the "Scrappy" tattoo, there was a tattoo with a "V" surrounded by a ray of lines. (8 RT 1550.) There was another tattoo Mr. Tran put on his chest after November 9, 1995, of a Vietnamese phrase, which translated, "No good deed has been returned to my father and my mother by me," and meant in gang culture, "I kinda disrespected my mom and dad." (8 RT 1551-1552.) Finally, as noted above, there was a Korean phrase along Mr. Tran's neck, which translated, "Forgive." (8 RT 1552.) Ny conceded the phrase "may show remorse," but opined that Mr. Tran was also taking credit and bragging about Linda's death, and showing remorse would be a sign of weakness in the gang culture. (8 RT 1553-1554.) Ny believed his opinion was reinforced by the fact that Plata said in a taped conversation that Mr. Tran was actually conveying, "blow me" or "suck me." (8 RT 1554.) Ny also considered that in 1993, Mr. Tran admitted to police on eight to ten separate occasions that he was a VFL member. (8 RT 1554.) He finally considered the items which were found as a result of the search warrants by Seman. (8 RT 1555.) Based on this information, Ny concluded that at the time of the instant crime,

Mr. Tran was an active member of the VFL street gang. (8 RT 1555.)[7]

Ny finally expressed an opinion, based on hypothetical questions that tracked the evidence, that the charged crimes of robbery, burglary and murder were committed for the benefit of a street gang. (8 RT 1556-1557.) According to Ny, the gang supports itself financially on proceeds from criminal activities. (8 RT 1557.) The gang also gains respect in the community and has its reputation enhanced by committing violent crimes. (8 RT 1558.) Ny conceded that not every crime committed by gang members is done for the benefit of their gang. (8 RT 1559.) But, according to Ny, when two gang members commit a crime together and share the proceeds, the two commit the crimes to benefit each other, and thus, the gang. (8 RT 1560.)

The Penalty Phase.

The state's case in aggravation.

The state presented two general types of aggravating evidence at the penalty phase

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[7] Probation officer Timothy Todd supervised gang members and also guessed as to the meaning of Mr. Tran's tattoo. (6 RT 1146.) He believed the new Korean language tattoo "was an attempt at projecting his [Mr. Tran's] pride at something that had occurred" or "[a]t least noting an event or projecting his participation in an event." (6 RT 1157.) In forming his opinion, Todd took into consideration the fact that Linda was Korean, Mr. Tran and Plata were members of Viets for Life in 1995, and that Plata was placed in a cell with Qui Ly, and told Ly that Mr. Tran's tattoo meant, "suck me" or "blow me." (6 RT 1157-1159.) Todd admitted, however, that he also considered that the tattoo might signify remorse, and that a gang member would not want to admit that he felt remorse; it might be a sign of weakness in front of other gang members, and thus, Mr. Tran put the tattoo in Korean as a remorseful action rather than bragging. (6 RT 1160-1162.)

of this trial. First, the state presented victim impact evidence. Second, the state presented evidence of prior misconduct on Mr. Tran's part. In summary, this consisted of evidence as to three prior incidents: (1) a June 24, 1992 residential burglary and (2) a June 25, 1992 burglary, both of which Mr. Tran committed as a 17 year-old, and (3) an April 19, 1994 residential burglary and vehicle code violations, which Mr. Tran committed as an 18 year-old.[8]

Victim impact evidence.

The state's first victim-impact witness was Linda's father Sunhwa Park. (RT 2311.) Park testified to two general areas, describing (1) his young daughter's character and their family life together and (2) the devastating impact her death had on the family. (9 RT 1775-1790.) The prosecutor's second victim-impact witness was Marilyn Fox, the Park family's neighbor. Fox testified in three general areas, describing (1) the evening of the crime, (2) her memories of Linda growing up with her loving family and (3) the impact of the crime on the family. (9 RT 1790-1795.) The third victim-impact witness was Linda's sister, Janie Park; she testified to two general areas, describing (1) her baby sister and their family life together and (2) the impact Linda's death had on her parents. (9 RT 1913-1926.)

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[8] The jury also heard evidence as to three prior incidents involving Plata: (1) a March 23, 1993 robbery, (2) a June 17, 1996 residential burglary, and (3) a July 7, 1996 fatal gang shooting. (9 RT 1795-1840, 1906-1912.)

Evidence of prior misconduct.

In connection with the 1992 burglaries, the state presented evidence that on June 24, 1992, 17 year-old Mr. Tran burglarized the home of Fredrick Schonder, and the next day on June 25, Mr. Tran burglarized the home of David and Jacquelyn Nesthus. (9 RT 1841-1869.)

As to the June 24 burglary, police were dispatched to the Schonder home in Mission Viejo in response to a report of a residential burglary. (9 RT 1862.) Schonder reported that jewelry, a telephone, a video camera and camera equipment were stolen from his house. (9 RT 1863.) Five latent fingerprints were lifted from the home; three found on the exterior of the dining room window, and the window screen, matched Mr. Tran. (9 RT 1868-1869.) The parties stipulated that on May 5, 1993, Mr. Tran admitted an allegation in a juvenile petition accusing him of committing this June 24 burglary. (9 RT 1882.)

As to the June 25 burglary, on June 26, Deputy Sheriff Jim Rubio brought Mr. Tran and David Du into the sheriff's station in connection with a car accident. (9 RT 1841-1842.) Rubio told Lumm that a CHP officer was flagged down, and told that a car accident in Laguna Hills had just taken place, and the people in one of the cars ran and dropped a metal box into trash. (9 RT 1843.) The box was later retrieved; there was paperwork belonging to David Nesthus inside the box. (9 RT 1854.)

The CHP officer detained Mr. Tran and Du in the back of his patrol car, and tape-

recorded a conversation between them. (9 RT 1842-1843.) The two were discussing what to tell police about the metal box. (9 RT 1844.) Du told Mr. Tran to say that they stole the box from the park, and frightened, got into the car accident. (9 RT 1844.) Du then told Mr. Tran that he (Du) would take the blame for breaking into the house. (9 RT 1844.) Mr. Tran responded, "Don't worry about it, dude. It's your first offense. You might as well not make it so big." (9 RT 1844.) He also expressed worry about his mother, and that he was "going to give her a heart attack." (9 RT 1852.)

After listening to the tape recording, Lumm became aware of the June 25 residential burglary of the Nesthus's home, near the scene of the June 26 accident. (9 RT 1844-1845.) She interviewed Mr. Tran. (9 RT 1845.) Mr. Tran told Lumm that while he was at a video store in Lake Forest, he met up with someone named Huynh. (9 RT 1846.) Huynh suggested that they go pick up Du, and that he (Mr. Tran) needed money to pay his parents back for a $300 telephone bill. (9 RT 1846.) One of his group brought up an idea to burglarize a home, and he agreed because he needed the money. (9 RT 1846.)

According to Mr. Tran, the group drove around and looked for an empty house. (9 RT 1847.) They picked the Nesthus home. (9 RT 1847.) Mr. Tran approached the front door, and rang the doorbell 50 times; no one answered the door. (9 RT 1847.) While he was ringing the door, a woman drove by. (9 RT 1847.) Some of his friends got scared and ran. (9 RT 1847.) Mr. Tran went to the backyard to get into the house. (9 RT 1847.) His friends returned. (9 RT 1847.) Mr. Tran tried three different patio slider doors and a

kitchen window to gain entry. (9 RT 1847.) He then climbed the patio and entered the home through an unlocked window to a bedroom. (9 RT 1848.) He went downstairs and let Du and Huynh inside. (9 RT 1848.) Mr. Tran started getting nervous because it was close to 4:00 p.m., and he was worried that the owners might come home. (9 RT 1848.) He stole a television, a camcorder and 150 quarters. (9 RT 1848.) Others in his group stole guns, a video game and some junk jewelry. (9 RT 1849-1850.) The group then left the house, hopping the back fence and getting into the car and leaving. (9 RT 1850.) Mr. Tran then told Lumm that he took the guns to his friend Phil's house. (9 RT 1850.)

After the interview, Mr. Tran helped police find stolen property. (9 RT 1853.) Jacquelyn Nesthus testified that after the robbery, she found a knife lying on their closet floor that was removed from the kitchen knife block. (9 RT 1859-1860.) She called police, and the knife was collected. (9 RT 1860.) The parties stipulated that on November 30, 1992, Mr. Tran admitted an allegation in a juvenile petition accusing him of committing this June 25 burglary. (9 RT 1881-1882.)

In connection with the April 1994 residential burglary and vehicle code violations, Huntington Beach then-Detective Michael Reynolds testified that on April 4, 1994, he arrested Plata in connection with an auto theft. (9 RT 1884.) Reynolds searched Plata's residence and found a "note about an illegal transaction" and the name on it was "Scrappy." (9 RT 1884.) He later determined that Mr. Tran went by this nickname, and was associated with VFL. (9 RT 1884-1885.) Reynolds found out that Mr. Tran was

staying at his girlfriend Linda Vu's home in Garden Grove, and began surveillance. (9 RT 1885-1886.)

On April 20, 1994, Reynolds and his partner Joe Thrasher went by Vu's home and saw a car parked in front of the house; the stolen vehicle system revealed that the car had been stolen. (9 RT 1886.) Mr. Tran was standing in the driveway nearby. (9 RT 1886.) Soon thereafter, Mr. Tran and Vu got into the stolen car and drove away. (9 RT 1887.) When Reynolds called for backup, several patrol cars arrived and attempted a stop. (9 RT 1890.) Mr. Tran pulled into a parking lot, and when he was ordered to stop, he continued driving, taking a turn and driving against relatively heavy traffic. (9 RT 1890-1892.) Several oncoming cars had to take evasive action to avoid hitting Mr. Tran, who was speeding and driving erratically; he also ran a red light. (9 RT 1892-1894.) Mr. Tran stopped driving when his car was surrounded by patrol cars. (9 RT 1894.) He was taken into custody. (9 RT 1894.) Reynolds noted that the car's door locks and ignition were removed, and a screwdriver which could be used to start the car was in the center console. (9 RT 1896.) Mr. Tran's wallet was also inside the car, along with stereos, amplifiers, a cordless telephone and a Smith Corona word processor. (9 RT 1896-1897.)

Officer Manh Ingwerson was driving one of the patrol cars which followed Mr. Tran. (9 RT 1900.) He saw pedestrians in the parking lot, running out of the way so they would not be hurt. (9 RT 1901.) He claimed that Mr. Tran drove at least 90 miles per hour on a residential street to evade police. (9 RT 1901-1902.)

Darin Drummond Urabe testified that in 1994, he lived in Huntington Beach. (9 RT 1903.) On April 19, 1994, around noon, Urable reported a burglary to police. (9 RT 1904.) He had come home for lunch and found his garage door open, and a baby seat and spare tire in the garage. (9 RT 1904.) His house was ransacked; a Smith Corona word processor and a camcorder were stolen from the house. (9 RT 1905.)

The defense case in mitigation.

There were two central themes defense counsel sought to convey in the penalty phase mitigation case. First, counsel sought to convey a sense that Mr. Tran appeared on the outside to his friends and relatives as a happy child and teenager, but in reality, due to his home life which included an abusive mother, he had low self-esteem and a need for negative attention, which eventually led him to gang life. Second, counsel sought to convey that remarkably enough, despite his untenable family life, Mr. Tran had nevertheless contributed in positive ways to the lives of many around him. Thus, the defense presented the testimony of eleven family members (five cousins, one brother, three uncles and one aunt) and a psychology and Asian cultural expert, who testified to the psychological effect of his family life, as well as family members and close friends who had known Mr. Tran for many years.

Dr. Jeanne Nidorf was a cultural expert and consultant with a background in licensed clinical psychology and public health. (10 RT 2026, 2028.) She studied issues that involved people from other cultures, specifically Asian cultures, who have come to

the United States, and addressed concerns with adaptation, particularly in health and mental health. (10 RT 2026-2029.) She had also studied and given seminars on Asian street gangs. (10 RT 2030.)

In Mr. Tran's case, Dr. Nidorf was asked to be the historian presenting psycho social material that would bring an understanding of "him and his life from the time he was a young child to the time of the present." (10 RT 2033.) She reviewed the police reports on the crime, and police interviews of Mr. Tran's peers at the time he was gang involved; Samantha Le, Linda Le, Laura Nguyen, Xuan Le, Gina Kang, and Tien Tran, and Joann Nguyen. (10 RT 2033-2034.) She also reviewed background information about confidential informant Qui Van Ly, and transcripts and summaries of Ly's discussions with Mr. Tran and Plata. (10 RT 2034.) She next reviewed letters between Mr. Tran and Plata written in jail from 2003 to 2005, Mr. Tran's parole records from 1997, and jail records from 2001 to the present, along with his entire criminal record. (10 RT 2034.) She reviewed 17 interviews conducted by investigator Nicole Fisher with a variety of relatives on both the mother and father's side of the family. (10 RT 2034.) She also reviewed Mr. Tran's school records. (10 RT 2034.) She finally interviewed Mr. Tran, his mother Cam, his brother Hung and his present girlfriend Marissa. (10 RT 2034.)

Dr. Nidorf wrote a report on Mr. Tran. (10 RT 2035.) Mr. Tran was born in a refugee camp in Porchaffe, Arkansas, in 1975. (10 RT 2035.) His parents were refugees

who had escaped shortly before the fall of Saigon. (10 RT 2035.) His brother was two years old than Mr. Tran. (10 RT 2035.) The family moved to Missouri for a short period of time, staying a couple of years where they had a sponsor. (10 RT 2035.) When Mr. Tran was a young child, the family moved to a small apartment in Fountain Valley, California. (10 RT 2035.)

Mr. Tran's father was Catholic, and now deceased. (10 RT 2035.) His mother was a Buddhist, who converted to Catholicism, but rarely went to church; Mr. Tran and Hung were raised in the Catholic Church. (10 RT 2035.)

Mr. Tran and Hung attended a Catholic grammar school. (10 RT 2036.) Mr. Tran was described as "a very bright child" and "very sweet," but "[r]estless in the classroom." (10 RT 2036.) He was described as a "class clown," but was a "good child." (10 RT 2036.) He was not "a bully," and did never "picked fights." (10 RT 2036.) He was not formally diagnosed with attention deficit disorder, but "was a somewhat restless child." (10 RT 2036.)

Mr. Tran's parents were "very hard-working people;" his mother Cam worked as an electronic assembler and his father was a machinist. (10 RT 2037.) The parents "really valued education" and "they made a lot of sacrifices for the children." (10 RT 2037.) There were many relatives on both sides of the family and the parents were generous people and helped these relatives. (10 RT 2037.)

But while his parents could be described as good people, according to Dr. Nidorf,

“there was another aspect to the family life that impacted the way the family lived.” (10 RT 2037.) “There was a quite confrontational relationship between the parents.” (10 RT 2037.) Mr. Tran did not report this; instead, relatives on both sides of the family, who did not have much contact with each other, gave a consistent story that Mr. Tran’s mother Cam was a “verbally abusive, somewhat cruel, sometimes bizarre, self-centered, histrionic woman.” (10 RT 2037.) Dr. Nidorf interviewed Cam. (10 RT 2038.) According to Dr. Nidorf, Cam was “not an easy person.” (10 RT 2038.) She found Cam “an unusually self-absorbed person with somewhat unusual ideas about things.” (10 RT 2039.) Cam did not talk about Mr. Tran during the course of a several hour interview; she talked about herself. (10 RT 2040.) She avoided the topic of Mr. Tran and claimed she did not know what crimes were charged against her son. (10 RT 2041.) She claimed that her husband had most of the responsibility of child rearing, and was a gentle and kind person, and she was very angry with him because “she had a difference of opinion about how the children should be raised.” (10 RT 2042.) She said that she told her husband that the boys were his, and she did not want to have much to do with them. (10 RT 2042.)

When Cam did discipline Mr. Tran, she would use traditional Vietnamese forms of punishment. (10 RT 2042-2043.) She made him kneel for long periods of time, and occasionally used a stick on him. (10 RT 2043.) She denied using the stick as her own mother used the stick. (10 RT 2043.) But Mr. Tran claimed he was a “very active little boy,” and “that he had to kneel for long periods of time, and that he did get hit with a

stick quite a bit." (10 RT 2043.) He claimed that there was nothing extreme, but that he recalled some incidents that were "very frightening and humiliating for him." (10 RT 2043.)

On a couple of occasions, when he was about five years old, Cam filled the bathtub with boiling hot water and held Mr. Tran over the tub, telling him, "I'll drop you in if you don't behave." (10 RT 2043.) On other occasions, when he did something wrong, Cam made him take all his clothes off and kneel outside in front of the neighborhood children, who were mostly girls. (10 RT 1043.) Dr. Nidorf explained that in Vietnamese culture, shame is used as a means to control children. (10 RT 2044.) At the same time, Bao would talk to Tran, and make him feel guilty. (10 RT 2044.) Mr. Tran "felt guilty about a lot of things." (10 RT 2044.) He described that his family life was "gloomy," and that his parents and Hung were "distant." (10 RT 2045.) There were no hugs, there was no intimacy, and Mr. Tran preferred the company of his cousins because they seemed happier. (10 RT 2045.)[9]

Dr. Nidorf's review showed that Mr. Tran was a very sweet, outgoing and sociable child, but in the family, "there were a lot of comparisons that were made between him and Hung." (10 RT 2045.) Hung was a completely different child, who was "very quiet,

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[9] Mr. Tran's cousin and Hung, who was a gastroenterologist and treated Mr. Tran's father Bao when he was dying, reported to Dr. Nidorf that Bao's dying wish was to speak to Mr. Tran, who was in jail at the time. (10 RT 2038.) Mr. Tran called Hung's cellphone, and Cam refused to let Mr. Tran speak to his father. (10 RT 2038.)

studious, introverted kin of a boy, sort of passive," who loved to go to the library and read the encyclopedia. (10 RT 2045.) Mr. Tran was "a very social, outgoing, friendly child." (10 RT 2045.) Mr. Tran "couldn't measure up academically" with Hung. (10 RT 2045.) Hung reported that Cam was "an equal opportunity comparison maker," who compared Hung to his cousins that she believed achieved more than him, making him feel badly. (10 RT 2045.)

Mr. Tran reported that he had been sent to Missouri because he got into legal trouble; at the end of 11th grade, he got a ride with a friend to his girlfriend's house, but the car broke down; they did not have enough money to pay for repairs, so Mr. Tran stole rims from another car and got caught. (10 RT 2049.) His parents sent him away. (10 RT 2049.) When Mr. Tran was sent to Missouri to complete high school, it was a difficult transition, but he joined teams and made friends, including girlfriends. (10 RT 2049.) Mr. Tran believed, however, that "they didn't really want me there." (10 RT 2049.)

When Mr. Tran returned to California, he was amazed to find out that during his absence, he developed a reputation as being a "cool guy." (10 RT 2049-2050.) Mr. Tran, however, did not feel that way inside. (10 RT 2050.) According to Dr. Nidorf, Mr. Tran's internal self was different than his external self. (10 RT 2050.)

Mr. Tran was a child who got "a lot of negative messages," so "he was needy for attention and negative attention." (10 RT 2045.) When he was a little boy, he stole candy from a store and put it under his shirt. (10 RT 2046.) He then told his uncle that he had a

stomach ache, when he really did not. (10 RT 2046.) When his uncle asked where, Mr. Tran pulled up his shirt and the candy fell out. (10 RT 2046.) According to Dr. Nidorf, Mr. Tran "obviously wanted to get caught." (10 RT 2046.)

When interviewed, Mr. Tran spoke to Dr. Nidorf in a self-deprecating manner. (10 RT 2047.) For example, when he was in fifth grade, he was promoted ahead to the sixth grade. (10 RT 2047.) His relatives claimed it was because he was a "very smart child," but Mr. Tran claimed "I was just acting up, and they didn't know what to do with me, so they moved me ahead." (10 RT 2047.) Dr. Nidorf believed that Mr. Tran's lack of self-esteem drove him to the VFL gang life. (10 RT 2047.)

When two friends approached him to commit a residential burglary, he just "did it." (10 RT 2050.) He then committed a second burglary the next day, and was apprehended and sent to juvenile hall. (10 RT 2050.) In juvenile hall, he was segregated for the first time in his life with Vietnamese boys. (10 RT 2050.) The boys asked him where he as from, and he did not realize that they were asking him about his gang affiliation. (10 RT 2050.) He was introduced to the VFL street gang during his 45 days stay in juvenile hall, and during his 45 day house arrest, unbeknownst to his parents, the gang members came to the house, bringing cigarettes and befriending him. (10 RT 2051.) According to Dr. Nidorf, the VFL gang was attractive for Mr. Tran so he could escape his family life and pressures, and also Mr. Tran reported that it was the first time he "got a Vietnamese identity." (10 RT 2051.) He was taught by the gang members to speak and

write in Vietnamese. (10 RT 2051.) The VFL gang became a family of loyal brothers for Mr. Tran. (10 RT 2051.) He got girls, parties and access to drugs; Mr. Tran's first drug was marijuana. (10 RT 2052.) He became a "stoner," using marijuana on a daily basis." (10 RT 2053.) "It's very, very common. It's extremely common. And he, according to Hung, he always wanted to be liked. He always wanted to be in the in crowd, and this was a crowd, and this was a way he never really felt in his own family.' (10 RT 2051.) As soon as he was off house arrest, he committed another residential burglary because, "I had to prove myself to the gang." (10 RT 2052.) When he turned 18, he violated probation, and went to county jail for four months, and then, when released committed another residential burglary, went to prison for two years and was released in 1995. (10 RT 2053.) According to Dr. Nidorf, Mr. Tran did not learn from experience because he was still "hanging around with the gang," and still using drugs, so reoffended. (10 RT 2054.) "[H]e's invested in criminal conduct." (10 RT 2054.)

In 1995, however, he starts to date Joann Nguyen, who he knew from church. (10 RT 2055.) He fell in love with Nguyen, and begins to go to college. (10 RT 2055.) He does well, and started working at the family's store. (10 RT 2055.) Unfortunately, he took too many classes, and became overwhelmed, so dropped out. (10 RT 2055.) Thus, while he had begun to improve his life, he was still "hanging out" with Plata and his gang friends, and using marijuana. (10 RT 2055.)

After Linda's death, Mr. Tran was questioned, and then sent back to prison for

parole violations of using marijuana and gang affiliations. (10 RT 2055.) Mr. Tran told Dr. Nidorf that when released in 1996 at age 21, he decided "[h]e had enough of this kind of criminal lifestyle," and thought "it was time to grow up, and change, and get out of the gang, and start leading a meaningful life." (10 RT 2056.) He claimed that in the Vietnamese culture, "by the time you are 21, you should be a responsible adult, and I wasn't behaving as one." (10 RT 2056.)

Mr. Tran attended a motivational four-day seminar after Hung told him about it. (10 RT 2056.) When he finished, "he changed, and he became very respectful to his parents, apparently to Hung, Joann noticed the changes, and he was behaving in a different manner." (10 RT 2057.)

But in July 1996, things changed. Mr. Tran learned that Plata had been arrested for an unrelated murder. (10 RT 2060.) Mr. Tran "was devastated." (10 RT 2060.) He became depressed, and began using methamphetamine, and violated his parole. (10 RT 2060.) Between 1996 and 1998, he violated parole with his drug use, and continued to "hang around" with gang members. (10 RT 2060.)

In 1999, he met Kathy and the two had baby Eric. (10 RT 2061.) By all accounts, Mr. Tran again changed and took care of Eric when Kathy worked, and he worked at his family store. (10 RT 2061.) He stopped using "harder drugs,' and only used marijuana or ecstasy; he went to meetings and was working hard to quit. (10 RT 2061.) He was still not settled down when it came to Kathy, but "he was trying to pull himself together." (10

RT 2061.)

Mr. Tran was arrested in 2001. (10 RT 2062.) While in custody, he did not initiate any violence. (10 RT 2063.) He was present during a small fight between Hispanics and Asians, but “was not really a player in that.” (10 RT 2063-2064.) He had “write-ups” for having food or a newspaper in his cell. (10 RT 2063.)

Dr. Nidorf asked Mr. Tran about the tattoo on his neck which said, “Forgive me,” in Korean. (10 RT 2064.) Mr. Tran looked down in response, saying, “I -- I don’t know why.” (10 RT 2065.)

Dr. Nidorf concluded that Mr. Tran’s “criminal conduct seemed to be mostly tied to adolescence, developmental stage of late adolescence where he was rebelling, and experimenting, and it was sort of in a negative peer group, and this problems were less deeply embedded psychological problems.” (10 RT 2069.) But, “[a]fter this brutal killing of Linda Park, he never committed another burglary. He turned to substance abuse to anesthetize himself and mitigate his depression and shame and guilt, and he’s turned very strongly to his Catholic faith.” (10 RT 2069.)

Finally, the parties stipulated that if Kang were recalled as a witness, she would testify that in 1996, her boyfriend Tran told her that after Linda’s murder, Mr. Tran told Tien that “he was very remorseful, that he was taking all kind of drugs, that he lost weight, and that he was experiencing nightmares and wanted to kill himself because he could not handle the incident.” (10 RT 2025.)

ARGUMENT

ERRORS INVOLVING THE SELECTION OF THE JURY

I. THE TRIAL COURT IMPROPERLY PERMITTED THE PROSECUTOR AND DEFENSE COUNSEL TO REMOVE PROSPECTIVE JURORS BY MUTUAL AGREEMENT FROM THE JURY POOL, VIOLATING THE STATUTORY PROCEDURES AND POLICIES ESTABLISHED BY THE LEGISLATURE.

A. Introduction.

Before voir dire, the trial court permitted defense counsel and the prosecution to review the questionnaires completed by prospective jurors and then remove from the jury pool, by mutual agreement, any prospective jurors they wished. In doing so the court violated the procedures established by the Legislature in Code of Civil Procedure sections 222 and 223 and the legislative policy expressed in section 191. Moreover, because the procedures set forth in these provisions implicate public policy, and not simply the private rights of the parties, Civil Code section 3513 barred their waiver. Given the importance of the policies involved and the requirements of these statutes, the only way to ensure compliance with the Legislature's mandated procedures is to reverse appellant's conviction.

B. The Relevant Facts.

The state prepared and submitted a 17-page written questionnaire for completion by the prospective jurors. (2 RT 274.) Neither defense counsel had any objections to the questionnaire. (2 RT 297.) The “procedures” were explained to the prospective jurors by

the court's bailiff, and the trial court asked each prospective juror to complete a questionnaire and leave it with the court's bailiff. (2 RT 302-305.)

After the prospective jurors completed their questionnaires and the results were shared with the trial court and counsel for both parties, the court met with counsel out of the presence of the prospective jurors. The court indicated it had reviewed 103 of the questionnaires and found "four or five that I would think both sides would want to stipulate to." (2 RT 330.) The court believed "the logistics of calling those jurors and letting them know they're excused would not be a problem." (2 RT 330.)

On the next court date, the prosecutor indicated that "[a]fter having the opportunity to go through the questionnaires, we submitted to the court the list informally, a list of prospective jurors that we were agreeing to excuse without questioning them based on cause." (2 RT 332.) The prosecutor read the list of jurors into the record: "132, 145, 162, 124, 125, 118, 207, 240, 165, 181, 247, 122, 237, 184, 191, 201, 232, 252, 196 and 120." (2 RT 333.) The prosecutor then stated, "The People stipulate that, by agreement of all parties, we can excuse those jurors without bringing them to court and talking to them." (2 RT 333.) Both defense counsel agreed. (2 RT 333.) The court proceeded to grant these 20 stipulated challenges for cause. The jurors themselves were never orally questioned. According to the court, "All right. The clerk will notify those jurors tomorrow that they have been excused." (2 RT 333.)

C. Allowing Counsel To Remove Potential Jurors From The Jury Pool Violated Code Of Civil Procedure Sections 222 And 223.

Civil Procedure Code sections 222 and 223 establish the procedures for conducting voir dire in criminal cases. Section 222 provides that potential jurors are to be randomly selected for voir dire. Section 223 provides, among other things, that: "In a criminal case, the court *shall* conduct an initial examination of prospective jurors." (Code Civ. Proc., § 223, emphasis added.) By allowing counsel to remove potential jurors by agreement from the pool of potential jurors, the trial court violated both of these provisions.

The procedure used below upends the entire system crafted by the Legislature for ensuring that jurors are randomly selected. The system begins with the jury commissioner randomly selecting potential jurors for the venire from source lists that represent a cross section of the community. (Code Civ. Proc., § 197.) From these lists the jury commissioner, again using random selection, creates a master list to be used in summoning jurors. (Code Civ. Proc., § 198.) Once the court summons potential jurors the Legislature again requires the use of random selection in assigning those potential jurors to courtrooms for voir dire. (Code Civ. Proc., § 219.) Finally, once in the courtroom, section 222 mandates that the court randomly select prospective jurors for voir dire. By allowing counsel to systematically remove potential jurors from the pool to be called for voir dire, the court evaded the requirement that jurors be randomly called for voir dire.

The procedure below also ignores the requirement in section 223 that the attorneys

are not to be involved in jury selection until after the trial court conducts the initial questioning of the jurors. Only then may the attorneys question the potential jurors and seek to remove them. Moreover, potential jurors may be removed only for cause, with the judge determining whether the legal standard has been met, or through peremptory challenges, which are limited in number by statute. (Code Civ. Proc., § 231.) Additionally, the removal of jurors is subject to the constitutional limits of *Batson v. Kentucky* (1986) 476 U.S. 79, 87, *People v. Wheeler* (1978) 22 Cal.3d 258, and Code of Civil Procedure section 231.5.

D. This Claim Is Cognizable On Appeal Because Civil Code Section 3513 Prohibits Waiver Of The Requirements Of Sections 222 And 223.

This Court has previously ruled that violations of both section 222 and section 223 can be waived and are subject to forfeiture in the absence of an objection. (*See*, *e.g.*, *People v. Visciotti* (1992) 2 Cal.4th 1, 38 [Code Civ. Proc., § 222]; *People v. Benavides* (2005) 35 Cal.4th 69, 88 [Code Civ. Proc., § 223]. *Accord People v. Ervin* (2000) 22 Cal.4th 48 [relying on *Visciotti*, Court bars defendant from complaining on appeal about a preliminary jury screening procedure, whereby counsel reviewed the questionnaires completed by prospective jurors and stipulated to the removal of jurors whose questionnaire responses indicated that they were either strongly pro-death or pro-life, or would suffer a substantial financial or physical hardship, because defendant agreed to the procedure through counsel].) However, the Court did not consider the effect of Civil Code section 3513 in those cases.

Section 3513 provides that “Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.” Previous cases have not addressed whether section 3513 bars a defendant from waiving the procedures required by either section 222 or 223.

For section 3513 to bar waiver the public benefit must be more than “incidental” as “Some public benefit is . . . inherent in most legislation. The pertinent inquiry, therefore, is not whether the law has any public benefit, but whether that benefit is merely incidental to the legislation's primary purpose.” (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1049, abrogated on other grounds as noted in *DeBerard Properties, Ltd. v. Lim* (1999) 20 Cal.4th 659, 668.)

1. Waiver in criminal cases is limited to rights that are solely for the defendant's benefit and do not implicate public policy concerns.

While the ability of criminal defendants to waive their rights is, in some respects, fairly broad, this Court has held that it is limited by public policy concerns. “An accused may waive any rights in which the public does not have an interest and if waiver of the right is not against public policy.’ [Citation.]” (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371.) Examination of precedent shows that courts have allowed the defendant to waive rights where explicitly permitted, or at a minimum not prohibited by statute. It also shows that many circumstances characterized as the waiver of rights are actually the result of the enforcement of certain constitutional or statutory rights.

In *Cowan*, the defendant was charged with murder and sought to waive the statute of limitations so that he could plead guilty to the lesser included offense of voluntary manslaughter, on which the statute of limitations had run. (*People v. Cowan*, *supra*, 14 Cal.4th at p. 370.) This Court held that while the statute of limitations defense could not be forfeited, it could be waived under specific conditions: "(1) the waiver is knowing, intelligent, and voluntary; (2) it is made for the defendant's benefit and after consultation with counsel; and (3) the defendant's waiver does not handicap his defense or contravene any other public policy reasons motivating the enactment of the statutes. [Citation.]" (*Id.* at p. 372.) In *Cowan*, this Court cited to a list of rights that can be waived, set forth in *People v. Robertson*. (*People v. Cowan*, *supra*, 14 Cal.4th at p. 371, citing *People v. Robertson* (1989) 48 Cal.3d 18, 61 [capital defendant's right to waive his presence at the penalty phase].) These include the right to waive presence, a jury trial, and the right to counsel, as well as the rights to plead guilty, to testify to a preference for a death sentence, and to decline to participate in the penalty phase. (*People v. Robertson*, *supra*, 48 Cal.3d at p. 61.) However, all of these waivers are distinguishable from the waiver of the procedures required by sections 222 and 223.

Statutory provisions specifically allow the waiver of some of these rights, such as the right to a jury trial (see Cal. Const., art. I, § 16), or the right to be present (see Pen. Code, § 977). The right to plead guilty is also statutory, and is circumscribed by statute, in that counsel's consent is required in a capital case. Counsel's consent cannot be waived

as “a guilty plea has more immediate and drastic consequences than even a judicial confession; second, and most importantly, the Legislature has spoken on the subject of guilty pleas.” (*People v. Chadd* (1981) 28 Cal.3d 739, 750, fn. 7.) Notably, then, statutory directives may limit the scope of rights that may be waived.

Other “waivers” mentioned in *Robertson* are not waivers at all. For example, what is often characterized as the "waiver" of the right to counsel is more properly viewed as "the right of self-representation." (*Faretta v. California* (1975) 422 U.S. 806, 817.) And courts have imposed stringent requirements for defendants choosing self-representation. “[I]n order to represent himself, the accused must ‘knowingly and intelligently' forgo those relinquished benefits. [Citations.] . . . he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.' [Citation.]” (*Id*. at p. 835.) A court may also deny a defendant's request for self-representation if it finds that the defendant, while mentally competent to stand trial if assisted by counsel, is not mentally competent to engage in self-representation. (*Indiana v. Edwards* (2008) 554 U.S. 164, 167.) The right to decline to present a defense is also a component of the right to self-representation. (*People v. Teron* (1979) 23 Cal.3d 103, 113, disapproved of on other grounds by *People v. Chadd*, *supra*, 28 Cal.3d 739.) Similarly, the right to testify to a preference of death is a component of the right to testify. (*People v. Guzman* (1988) 45 Cal.3d 915, 962, overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046.) Thus,

while it is often viewed broadly, some acts characterized as waivers are actually the implementation of constitutional rights and true waivers in criminal cases are regularly limited by policy concerns and legislative directives.

2. A court may not allow the waiver of duties and procedures explicitly imposed on it by the legislature to serve a public purpose.

Sections 222 and 223 differ from the examples of permissible waivers discussed above in that they serve a public policy goal identified by the Legislature, which has imposed a duty on the court to follow their procedures, and include no provision permitting those procedures to be waived. This is significant because the courts have held that a defendant cannot waive requirements imposed by the Legislature on courts in criminal cases where those requirements serve a public purpose. In *People v. Stanworth* (1969) 71 Cal.2d 820, 833-834, this Court held that a capital defendant may not waive the statutorily required automatic direct appeal. This is because the statute not only manifested a concern for the defendant "but has also imposed a duty upon this court to make such review." (*Ibid*.) This Court held that it could not "avoid or abdicate this duty merely because defendant desires to waive the right provided for him." (Ibid.) "The law cannot suffer the state's interest and concern in the observance and enforcement of this policy to be thwarted through the guise of waiver of a personal right by an individual. 'Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.' (Civ.

Code, § 3513.) [Citation.]" (*Id*. at p. 834.) In *People v. Massie* (1998) 19 Cal.4th 550, 566, 570-571, the court reaffirmed *Stanworth* and extended it, holding that a capital defendant has neither the right to self-representation nor to decide which issues should be raised on appeal, a position subsequently adopted with regard to all criminal appeals by the United States Supreme Court. (*Martinez v. Court of Appeal of California, Fourth Appellate Dist*. (2000) 528 U.S. 152, 163.)

Stanworth cites with approval to *People v. Werwee* (1952) 112 Cal.App.2d 494, 499, superseded by statute as noted in *People v. Chain* (1971) 22 Cal.App.3d 493, 497, which barred a defendant from waiving a then existing statutory requirement that the jury not separate after deliberations had begun. "If it should be contended that a defendant under such circumstances waived his right to claim irregularity in the separation of the jury by consenting to it, our answer would be that he could not waive the right to have the statutory procedure observed." (*Id*. at p. 499.) The Court explained: "Although a defendant may waive rights which exist for his own benefit, he may not waive those which belong also to the public generally. If the prosecution and the defendant should be permitted to adopt their own procedure, wholly at variance with that prescribed by statute for the conduct of criminal cases, confusion and uncertainty would exist, and if it should become the custom to permit separation of jurors after submission of the cause, the tendency would be toward a lessened respect for and confidence in the independence of jurors and the justness of their verdicts. The law is mandatory. It does not give the

parties the right to agree to a separation. If that exception is to be written into the law it must be by the Legislature, not the courts." (*Id*. at p. 500.)

Stanworth also cited *People v. Blakeman* (1959) 170 Cal.App.2d 596, which held that a defendant could not be deemed to have waived the invalidity of banishment from the county as a probation condition reasoning that: "The fallacy of this argument is that we are not dealing with a right or privilege conferred by law upon the litigant for his sole personal benefit. We are concerned with a principle of fundamental public policy. The law cannot suffer the state's interest and concern in the observance and enforcement of this policy to be thwarted through the guise of waiver of a personal right by an individual." (*Id*. at p. 598.) The court then cited and quoted section 3513. (*Ibid*.)

In *People v. Chadd*, *supra*, 28 Cal.3d at pp. 746-753, this Court held that a trial court may not waive the requirement in Penal Code section 1018 that counsel must consent before a capital defendant may plead guilty, and further held that, while a defendant has a right to self-representation, there is no concomitant right to waive counsel for a guilty plea. In *Chadd*, the defendant sought to overturn his guilty plea, which the trial court had allowed over defense counsel's objection. In overturning the plea, this Court noted that the statute required "that no guilty plea to a capital offense shall be received 'without the consent of the defendant's counsel.' It is settled that 'When statutory language is thus clear and unambiguous there is no need for construction, and courts should not indulge in it.' [Citation.]" (*People v. Chadd*, *supra*, 28 Cal.3d at p.

746.) This Court also held that the Attorney General's argument to the contrary "fails to recognize the larger public interest at stake in pleas of guilty to capital offenses. It is true that in our system of justice the decision as to how to plead to a criminal charge is personal to the defendant: because the life, liberty or property at stake is his, so also is the choice of plea. [Citation.] But it is no less true that the Legislature has the power to regulate, in the public interest, the manner in which that choice is exercised. Thus, it is the legislative prerogative to specify which pleas the defendant may elect to enter (Pen. Code, § 1016), when he may do so (id., § 1003), where and how he must plead (id., § 1017), and what the effects are of making or not making certain pleas." (*People v. Chadd*, supra, 28 Cal.3d at pp. 747-748.)

Outside the context of statutory commands, this Court has also limited a defendant's ability to waive certain rights where policy concerns are implicated. Thus, courts may deny a defendant's waiver of a conflict of interest and remove defense counsel if it finds that such an action is necessary "in order to eliminate potential conflicts, ensure adequate representation, or prevent substantial impairment of court proceedings. . . . [Citation.]" (*People v. Richardson* (2008) 43 Cal.4th 959, 995.) Courts also must instruct on lesser included offenses that the evidence supports, even over a defendant's express objection. (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155.) "These policies reflect concern not only for the rights of the accused, but also for the overall administration of justice. [Citation.]" (*Id.* at p. 155.)

Taken together these cases stand for the proposition that both precedent and section 3513 bar the waiver of certain rights and procedural protections, and in particular, requirements that the Legislature has specifically imposed on the courts that implicate a public purpose or benefit.

3. The jury selection procedures mandated by the legislature serve the public interest and therefore cannot be waived under section 3513.

Like the cases discussed above, this case involves the purported waiver of procedures mandated by statute to further the Legislature's public policy goals. It thus runs afoul of the holdings of those cases, including the holding in *Stanworth* that a court cannot “avoid or abdicate [a] duty merely because defendant desires to waive the right provided for him.” (*People v. Stanworth*, *supra*, 71 Cal.2d at p. 833.)

The Legislature expressed its interest in and concern for jury selection policies in 1988, when it passed A.B. 2617, the "Trial Jury Selection and Management Act." (Code Civ. Proc., § 190; 1988 Cal. Legis. Serv. 1245 (West).) According to the Legislative Counsel's digest the bill enacted "an extensive revision of the law with respect to juries," which included changes to “the selection of jury panels, voir dire, and challenges to jurors.” (1988 Cal. Legis. Serv. 1245 (West).) In this bill, the Legislature enacted and repealed numerous provisions, creating a comprehensive system for jury selection.

The importance of the jury selection process has not only been recognized by the Legislature in carefully constructing that process, but also by the Judicial Council. The

Council has undertaken two major examinations of California's jury system in the last twenty years, The Blue Ribbon Commission on Jury System Improvement and the Task Force On Jury System Improvements. (*See* Final Report of the Blue Ribbon Commission on Jury System Improvement (1996) ("Blue Ribbon Report") available at http://www.courts.ca.gov/documents/BlueRibbonFullReport.pdf.; Final Report of Task Force on Jury System Improvements (2004) ("Task Force Report") available at http://www.courts.ca.gov/documents/tfjsi_final.pdf.) These examinations have included recognition of the important public interest implicated in the process for selecting juries: "A properly conducted voir dire is critical to a fair trial and to promote respect by litigants and the public for the jury's decision." (Blue Ribbon Report at p. 51.)

The procedure used here violated the Legislature's carefully crafted scheme for selecting jurors. It violated the provisions of section 222, requiring random selection of jurors, and in doing so violated the policy set forth in Code of Civil Procedure section 191. It also violated the voir dire procedures required by section 223, and in doing so created a new avenue for removing potential jurors not contemplated in any statute.

a. By allowing attorneys to remove jurors from the pool of prospective jurors who could be selected for voir dire the trial court violated the statutory provisions and legislative policy mandating random selection of jurors.

In section 191, the Legislature "recognizes that trial by jury is a cherished constitutional right, and that jury service is an obligation of citizenship." That section states that "[i]t is the policy of the State of California that all persons selected for jury

service shall be selected at random from the population of the area served by the court; that all qualified persons have an equal opportunity, in accordance with this chapter, to be considered for jury service in the state and an obligation to serve as jurors when summoned for that purpose; . . ." (Code Civ. Proc., § 191.) Section 222 is part of the means by which the Legislature effectuates this goal. In that section the Legislature requires that either the clerk of the court or the jury commissioner ensure that jurors are seated for voir dire in random order. Such procedures are also called for by the American Bar Association (ABA) Principles for Juries and Jury Trials (2005), Principle 10.B.2. ("Courts should use random selection procedures in . . . assigning jurors to panels [and] calling jurors for voir dire."). (*See also* ABA Stds. Relating to Juror Use and Management (1993) std. 3(b)(iii).)

In *Visciotti*, this Court recognized that section 191 establishes a state policy in favor of random selection of juries. (*People v. Visciotti*, *supra*, 2 Cal.4th at p. 38.) However, this Court also stated that "equally important policies mandate that criminal convictions not be overturned on the basis of irregularities in jury selection to which the defendant did not object or in which he has acquiesced." (*Ibid.*) It thus concluded that "[w]hile the parties are not free to waive, and the court is not free to forego, compliance with the statutory procedures which are designed to further the policy of random selection . . . failure to object will . . . continue to constitute a waiver of a claim of error on appeal." (*Ibid.*) This Court thus allowed the waiver of a provision it said could not be waived, and

in doing so favored the policy of requiring an objection over the policies set forth by the Legislature in section 191. This Court reached this conclusion without considering section 3513.

The ruling in *Visciotti* is inconsistent with both the text and intent of section 3513. As this Court stated in *Visciotti*, section 191 contains a statement of the Legislature's public policy concerns. If policy concerns regarding preservation of error can override the requirements of section 3513, it would be rendered a nullity. By its nature section 3513 is most often relevant where there has been a waiver. If section 3513 cannot be enforced where the underlying error below has not been preserved due to the very waiver that section 3513 barred, it will almost never be enforceable. Allowing counsel to review the questionnaires of the entire pool of potential jurors and agree on jurors to remove from consideration for jury service frustrates the state policy explicitly set forth in section 191 and effectuated by section 222. Rather than potential jurors being randomly selected for questioning, counsel can systematically remove potential jurors from the available pool in a secret, off the record, unsupervised proceeding.

This upends the system of jury selection designed by the Legislature to effect its policy goals. The system crafted by the Legislature begins when the jury commissioner randomly selects potential jurors for the venire from source lists representing a cross section of the community. (Code Civ. Proc., § 197.) From these lists the jury commissioner, again using random selection, creates a master list to be used in

summoning jurors. (Code Civ. Proc., § 198.) Once the court summons potential jurors the Legislature again requires the use of random selection in assigning those potential jurors to courtrooms for voir dire. (Code Civ. Proc., § 219.) Finally, once in the courtroom, section 222 mandates that the court randomly select prospective jurors for voir dire. (Even at this point the attorneys are not involved since, as discussed further below, section 223 directs that the court conduct the initial questioning of the jurors.) If the potential jurors are systematically culled by counsel, potential jurors are no longer being randomly selected for voir dire.

The approach used in this case is especially pernicious because it not only prevents jurors from sitting on a particular case, it prevents them from sitting on any case. This is because, under Government Code section 68550 and California Rules of Court, rule 2.1002, jurors are limited to one trial or one day on call. Thus, once excused from this case, the potential jurors were removed from the jury pool for at least one year. (Cal. Rules of Court, rule 2.1008(e).) This violates the "policy of the State of California that all persons selected for jury service shall be selected at random . . . [and] that all qualified persons have an equal opportunity . . . to be considered for jury service." (Code. Civ. Proc., § 191.)

This is not a theoretical problem; it occurred in this case. Twenty potential jurors were removed by agreement of the parties. Allowing such wholesale removal of potential jurors from the available pool before they can be randomly selected for voir dire

constitutes a material departure from the statutory procedures set forth by the Legislature. (*See People v. Johnson* (1894) 104 Cal. 418, 419 [allowing bailiff to select jurors to be called for voir dire "departed materially" from statutory procedures for selecting a jury.]) In *Visciotti*, this Court held that because the improper procedure only involved the first 12 jurors and those jurors had already been examined in an initial round of voir dire and sequestered (*Hovey v. Superior Court* (1980) 28 Cal.3d 1, 81) voir dire, it did not constitute a material departure. (*People v. Visciotti*, *supra*, 2 Cal.4th at pp. 40-41.) In finding no material departure, this Court in *Visciotti* noted that it was "not faced here with a complete abandonment of random selection." (*Id*. at p. 40.) This is exactly what this Court faces here.[10]

In *People v. Wright* (1990) 52 Cal.3d 367, 393, disapproved of on other grounds by *People v. Williams* (2010) 49 Cal.4th 405, the trial court designated the first twenty-one potential jurors who entered the court room as the first group for voir dire. This Court held that this was not a material departure because the rest of the potential jurors were called randomly and no individual controlled the order in which the potential jurors would enter. (*Id*. at p. 395.) This stands in stark contrast to the situation here where the improper method of selection affected the entire jury pool and most certainly

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[10] While *Johnson* held that this defect was waived by the defendant's failure to object, that decision preceded the enactment of section 191 and did not consider section 3513. Additionally, while *Visciotti* held that the enactment of section 191 did not affect the validity of the decision in *Johnson*, *Visciotti* too, as already discussed, failed to consider section 3513.

involved intentional selection by counsel.

b. By allowing attorneys to remove jurors from the pool of prospective jurors available for voir dire the court violated the statutory requirement that the court conduct the preliminary examination of jurors.

In addition to frustrating the Legislature's policy requiring that jurors be fairly and randomly selected at every stage, removal of jurors by counsel also frustrates the Legislature's specific and carefully crafted system for examining and excusing jurors. Section 223 specifies that the process “shall” begin with an examination of prospective jurors conducted by the judge. Only after the judge has completed that initial examination do the attorneys have the right to conduct voir dire. The statute also specifies that the only purpose of voir dire is to “aid in the exercise of challenges for cause.” (Code Civ. Proc., § 222.) The Legislature has specified when and in what order counsel may make challenges. (Code Civ. Proc., §§ 226, 227.) It has also limited counsel to two methods of excusing potential jurors: challenges for cause and peremptory challenges. (Code Civ. Proc., § 225.) The basis for cause challenges are set forth in detail and the judge must rule on them. (Code Civ. Proc., §§ 229, 230.) Peremptory challenges are strictly limited in number and cannot be based on bias. (Code Civ. Proc., §§ 231, 231.5.)

The language in section 223 requiring a judge to conduct the preliminary examination is also in the ABA Principles for Juries and Jury Trials. (*See* ABA Principles for Juries and Jury Trials (2005) principle 11.B. [stating that "[t]he voir dire

process should be held on the record" and that "[q]uestioning of the jurors should be conducted initially by the court"]; see also ABA Stds. for Crim. Justice, Trial by Jury Stds. (1996) std. 15-2.4 ["Questioning of jurors should be conducted initially by the court"]; ABA Stds. Relating to Juror Use and Management (1993) std. 7(b) ["The trial judge should conduct a preliminary voir dire examination. Counsel should then be permitted to question panel members for a reasonable period of time"].)

Batson, and cases following it, also demonstrate that the public, and not only the defendant, have an interest in a nondiscriminatory jury selection process. "Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. . . . by denying a person participation in jury service on account of his race, the State unconstitutionally discriminate[s] against the excluded juror." (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 87.) Moreover, "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. Discrimination within the judicial system is most pernicious because it is a stimulant to that race prejudice which is an impediment to securing to black citizens that equal justice which the law aims to secure to all others." (*Id*. at pp. 87-88, citations and internal quotation marks omitted, emphasis added; *see also Miller-El v. Dretke* (2005) 545 U.S. 231, 238 [finding that the harm of discrimination in jury selection is not "confined to

minorities. When the government's choice of jurors is tainted with racial bias, that ‘overt wrong . . . casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial. . . .' [Citation.] That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination ‘invites cynicism respecting the jury's neutrality,' [citation] and undermines public confidence in adjudication [Citation.]”]; *United States v. Harris* (6th Cir. 1999) 192 F.3d 580, 587-588 [holding that a *Batson* reversal may stem from the discriminatory strike of an alternate juror even if no alternate was ultimately seated, “the harm inherent in a discriminatorily chosen jury inures not only to the defendant, but also to the jurors not selected because of their race, and to the integrity of the judicial system as a whole”].)

The procedure permitted here allows the parties to trade discriminatory removal of potential jurors and would thus undermine the entire structure that *Batson* created to forestall racial discrimination in jury selection. In the ordinary course of voir dire counsel has an incentive to challenge the exercise of discriminatory peremptory challenges. However, in the context of the sort of horse trading that secret stipulated removals allow, counsel may choose to overlook opposing counsel's discriminatory action in exchange for the removal of other prospective jurors.

The procedure also frustrates the public policy requiring that voir dire be open to the public. (*Press-Enterprise Co. v. Superior Court of California, Riverside County* (1984) 464 U.S. 501.) “The process of juror selection is itself a matter of importance, not

simply to the adversaries but to the criminal justice system." (*Id*. at p. 505, italics added; see also ABA Principles for Juries and Jury Trials (2005) principle 7.A.1. ["Juror voir dire should be open and accessible for public view" unless there is "a finding by the court that there is a threat to the safety of the jurors or evidence of attempts to intimidate or influence the jury"]; *Waller v. Georgia* (1984) 467 U.S. 39, 50 ["While the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real"].)

This procedure also frustrates the Legislature's intent to reduce the number of peremptory challenges, acting as a de facto veto and recreating the problems inherent in peremptory challenges, but also magnifying the problems by removing them from public view. Commentators and courts have long expressed concern about peremptory

challenges, and whether they should be limited or eliminated.[11] Both the Blue Ribbon Panel and the Task Force recommended reducing the number of peremptory challenges, but not eliminating them. (Blue Ribbon Report at pp. 59-62; Task Force Report at pp. 51-52.)[12]

In 2016 the Legislature accepted that recommendation, in part, and amended Code

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[11] As the Blue Ribbon report noted "many scholars [have] forecast or call[ed] for the outright abolition of [peremptory challenges]. See, e.g., Susan A. Winchurch, *J.E.B. v. Alabama Ex Rel. T.B.: The Supreme Court Moves Closer to Elimination of the Peremptory Challenge*, 54 Md. L. Rev. 261 (1995); Felice Banker, *Eliminating a Safe Haven for Discrimination: Why New York Must Ban Peremptory Challenges From Jury Selection*, 3 J.L. & Policy 605 (1995). See also *Batson*, *supra*, 476 U.S. at p. 102 (Marshall, J., concurring) [calling for abolition of peremptory challenges]. *See generally* V. Hale Starr & Mark McCormick, Jury Selection, § 11.4.6 (1995 Supp.)." (Blue Ribbon Report at p. 57.) This criticism has only continued after the report was issued. (*See, e.g.*, *Miller-El v. Dretke* (2005) 545 U.S. 231, 273 (Bryer, J., concurring) [suggesting that it was necessary to "reconsider . . . the peremptory challenge system as a whole" in light of the difficulty in proving *Batson* challenges]; Amy Wilson, *The End of Peremptory Challenges: A Call for Change Through Comparative Analysis* (2009) 32 Hastings Int'l & Comp. L.Rev. 363, 363-364 [arguing that peremptory challenges should be abolished in the United States]; Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection* (2009) 15 Mich. J. Race & L. 57, 97 [arguing that the best way to remove race and racism as factors in discretionary challenges is to eliminate peremptory challenges]; Roger Allan Ford, *Modeling the Effects of Peremptory Challenges on Jury Selection and Jury Verdicts* (2010) 17 Geo. Mason L.Rev. 377, 422 ["[C]ourts and legislatures should consider limiting or eliminating peremptory challenges"].)

[12] As the Blue Ribbon Report noted, peremptory challenges can have a significant negative impact on potential jurors, who may view them as a "personal attack." (Blue Ribbon Report at p. 55.) They also have a negative impact on the jury system as their use requires calling more people for jury service. (Blue Ribbon Report at p. 56.) The Task Force Report raised similar concerns that peremptory challenges undermine citizen confidence in the jury system to be fair and impartial, are disrespectful of jurors, are wasteful, perpetuate bias and stereotyping, and are capricious in application. (Task Force Report at p. 49.)

of Civil Procedure section 231 to reduce the number of peremptory challenges in trials for all crimes punishable by one year or less from ten to six. (*See* 2016 Cal. Legis. Serv. Ch. 33 (S.B. 843) (West).) While this change was ultimately enacted as part of a catch-all budget bill, versions of the statute containing identical language had previously been introduced.

In the Senate Committee on Public Safety report on one such previous version, S.B. 213 (2015), the bill's author, Senator Block, noted that “High numbers of peremptory challenges cost more in terms of additional volumes of jury summons as well as the need for high-capacity jury rooms and infrastructure to support those jurors. . . . greater numbers of peremptory challenges have been correlated with large numbers of potential jurors being dismissed for improper reasons.” Reducing challenges would have “a huge impact on reducing workload, increasing juror satisfaction, and maximizing fairness. Reducing the number of challenges will reduce the number of jurors who must be called for services.” In addition “reducing peremptory challenges will decrease the number of potential jurors being dismissed for improper reasons, increasing fairness in the jury selection process and preserving justice.” The bill's sponsor predicted significant cost savings including reducing the number of jurors who have to be called, reducing the personnel resources required to call jurors, and improving juror attitudes and juror satisfaction. (Sen. Com. on Public Safety, Hrg. on Sen. Bill No. 213 (2015-2016 Reg. Sess.) April, 21, 2015, p. 4.) Given that the decrease in peremptory challenges effected

by this bill was relatively modest, a total of eight per case for single defendant cases, the costs, both financial and otherwise of the procedures permitted here would be far higher and would directly conflict with the policy goals the Legislature is seeking to realize through this legislation and the jury system as a whole.

The problems inherent in peremptory challenges are magnified here by the removal of the process from public view and the lack of either judicial oversight or numerical limitations. The Blue Ribbon Report noted that peremptory challenges "can defeat the attempt to create a trial jury that is a fair cross section of the community." (Blue Ribbon Report at p. 56.) This risk is more pronounced in the case of stipulated removals.

E. The Trial Court's Error Requires Reversal Of The Conviction.

Where a trial court has violated section 3513 by improperly permitting a defendant to waive a right that cannot be waived, the record will often contain no showing of the prejudice resulting from the error. Although defense counsel's agreement to the procedure was improper, that agreement would naturally mean that counsel would make no effort to preserve evidence of prejudice. This is the kind of situation in which it will often, if not always, be impossible for a defendant to demonstrate prejudice, thus, it should be considered structural error.

As in other instances where structural error has been applied, the secret, unexplained, unsupervised removal of potential jurors has "consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural

error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 282 [holding that harmless error does not apply where the jury was not properly instructed on the reasonable doubt standard].) The guarantee of a trial by jury is "a basic protection whose precise effects are unmeasurable" and the consequences of its depravation "are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" (*Id*. at pp. 281-282; *see also Batson v. Kentucky*, *supra*, 476 U.S. 79, 100 [discrimination in selection of trial jurors requires reversal without consideration of prejudice]; People v. Wheeler, *supra*, 22 Cal.3d at p. 283 [same]; *Vasquez v. Hillery* (1986) 474 U.S. 254, 261 [same regarding bias in selection of grand jurors].) It is appropriate to find an error "structural" where "the difficulty of assessing the effect of the error" precludes harmless error analysis. (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 156, fn. 4 [denying indigent defendant counsel of choice is structural error].)

Similarly, in the case of judicial bias, a judge's "actual motivations are hidden from review," and the court must, therefore, "presume that the process was impaired." (*Vasquez v. Hillery*, *supra*, 474 U.S. at p. 263, citing *Tumey v. State of Ohio* (1927) 273 U.S. 510.) When the right to a public trial is denied "a requirement that prejudice be shown 'would in most cases deprive [the defendant] of the [public-trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury.' [Citation.] While the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless

real." (*Waller v. Georgia* (1984) 467 U.S. 39, 50, fn. 9.)

Automatic reversal is also required where an indigent defendant has been denied a transcript of a first trial on retrial because "there is no way of knowing" how "adroit counsel assisted by the transcript to which the defendant was entitled might have been able to impeach or rebut any given item of evidence." (*People v. Hosner* (1975) 15 Cal.3d 60, 70.) A reviewing court could only "hypothesize what use at the latter trial could have been made of the transcript. . . . To paraphrase Mr. Justice Cardozo's epitaph for the National Industrial Recovery Act, this would be speculation running riot." (*Ibid.*)

In *Werwee*, a case discussed above that involved the then improper separation of a deliberating jury, the court applied the established standard that in such a circumstance prejudice would be presumed, and that the burden was on the government to show otherwise. (*People v. Werwee*, *supra*, 112 Cal.App.2d at p. 496.) Such a rule was necessary "because it would be impossible in almost every case for the prisoner to establish the fact of any corrupt or improper communications between the juror and others.'" (*Id*. at p. 498, quoting *People v. Backus* (1855) 5 Cal. 275, 276.)

People of Territory of Guam v. Marquez (9th Cir. 1992) 963 F.2d 1311, is particularly instructive as it also involved a situation in which the trial court's error resulted in a record inadequate to allow harmless error analysis. In *Marquez*, the trial court submitted instructions on the elements of the offense in writing, rather than reading them to the jury. (*Id*. at p. 1314.) The court held that this made it impossible to show

prejudice, since the record was silent as to whether the jurors had read the instructions. (*Id*. at pp. 1315-1316.) The court also noted that, as a matter of due process, an appellant is entitled to "'a record of sufficient completeness' so that he or she can demonstrate that prejudicial error occurred during the trial." (*Id*. at p. 1315, quoting *Mayer v. City of Chicago* (1971) 404 U.S. 189, 194.)

Also instructive are *Riley v. Deeds* (9th Cir. 1995) 56 F.3d 1117, and *United States v. Mortimer* (3d Cir. 1998) 161 F.3d 240. Both cases involved the judge's absence from court during a critical stage of the proceedings, a readback of testimony to the jury in *Riley* and defense closing arguments in *Mortimer*. In both cases, the courts found that the error was structural. (*Riley v. Deeds*, *supra*, 56 F.3d at p. 1120; *United States v. Mortimer*, *supra*, 161 F.3d at p. 242.) "A conviction obtained after a proceeding in which no judge presided and no judicial discretion was exercised is 'abhorrent to democratic conceptions of justice.' [Citation.] In these circumstances, there is a breakdown in the construct of the trial, a structural collapse so severe that its effect on the trial cannot be 'quantitatively assessed in the context of the other evidence presented.' In short, the error is structural and is not susceptible to harmless error analysis." (*Riley v. Deeds*, *supra*, 56 F.3d at p. 1120.) Similarly here, the trial court abandoned his role, allowing counsel to meet in his absence to choose potential jurors to be removed and then removing them without question or explanation.

Because the nature of the error here, ignoring legislative strictures and allowing an

improper waiver, is such that prejudice would almost never be visible in the record, requiring a showing of prejudice would make deterring the error impossible. The United States Supreme Court recognized this problem in rejecting the application of harmless error to racial discrimination in the selection of grand jurors. (*Vasquez v. Hillery*, *supra*, 474 U.S. at p. 261.) The court rejected the argument that any harm was cured by the defendant's conviction, in part because per se reversal was “the only effective remedy for this violation” and was necessary to deter future violations. (*Id*. at p. 263.) Just as racial discrimination in grand jury selection would continue if rendered harmless by a later conviction, improper waiver of California's jury selection procedures will continue if that waiver, the very wrongdoing at issue, renders itself unreviewable.

Because, by its very nature, the error here moved an entire critical portion of the trial out of view and off the record, it is impossible to know what the motivations or rationales of counsel were for removing potential jurors. No explanation for the removals was requested by, or offered to, the trial court. Due to the trial court's error in allowing the waiver, it is thus impossible for appellant to show, or the court to determine, whether prejudice resulted from the error and this Court should, therefore, find the error reversible per se.

F. Conclusion

The trial court unlawfully allowed the waiver of fundamental requirements of the Legislature's carefully crafted jury selection system. These requirements have profound

public policy implications and their waiver is therefore not permitted by Civil Code section 3513. Because the resulting prejudice defies calculation, and because it is the only way to deter future violations, this Court should reverse appellant's conviction.

II. THE "SUBSTANTIAL IMPAIRMENT" STANDARD FOR EXCLUDING JURORS IN CAPITAL CASES IS INCONSISTENT WITH BOTH THE STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A JURY TRIAL.

A. Introduction.

At the time of trial, the United States Supreme Court had made clear that under the Sixth Amendment a prospective juror could be properly discharged for cause "based on his views about capital punishment [if] those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Adams v. Texas* (1980) 448 U.S. 38, 45.) Presumably applying this standard, the trial court here discharged prospective Jurors 234, 112, 214, and 158 for cause based on their views on the death penalty. (2 RT 535; 3 RT 715.) As Mr. Tran explains below, however, the standard applied by the trial court in discharging prospective Jurors 234, 112, 214, and 158 is inconsistent with both the state and federal constitutions. For these reasons, a new penalty phase is required.

The standard used by the trial court here was taken from the Sixth Amendment framework erected by a series of United States Supreme Court cases decided between 1968 and 1980. This standard reflected a then-common approach to the Sixth Amendment which did not examine the intent of the Framers in enacting the Sixth Amendment, but instead defined the scope of that amendment by identifying and balancing competing interests of the state and the defendant.

As more fully discussed below, however, in the past 15 years the Court has

rejected this "competing interest" approach to the Sixth Amendment, reexamined its framework for analyzing the scope of the Sixth Amendment, and held that the contours of the Sixth Amendment are to be determined by the Framers' intent in enshrining the right to an "impartial jury" in the Constitution. As also discussed below, the test used by the trial court here is fundamentally inconsistent with the intent of the Framers in adopting the Sixth Amendment. Reversal of the penalty phase is required.

B. Development Of The *Adams* Test For Discharging Jurors Based On Their Views Of Capital Punishment.

In *Witherspoon v. Illinois* (1968) 391 U.S. 510, the Supreme Court first addressed whether the Sixth Amendment right to a jury trial permitted the state to exclude from jury service in a capital case jurors who opposed the death penalty. *Witherspoon* held that the Sixth Amendment permitted the state to exclude jurors only if the record made "unmistakably clear" the jurors would (1) automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. (391 U.S. at p. 515, n.9, 522, n. 21.)

Twelve years later, in *Adams v. Texas*, *supra*, 448 U.S. 38, the Court revised this standard. As discussed above, *Adams* held that the Sixth Amendment permitted the state to discharge any juror "based on his views about capital punishment [if] those views would prevent or substantially impair the performance of his duties as a juror in

accordance with his instructions and his oath." (*Id*. at p. 45.) The Court stated that its conclusion was part of an effort "to accommodate the State's legitimate interest in obtaining jurors who could follow their instructions and obey their oaths." (448 U.S. at pp. 43-44.)

The approach to the Sixth Amendment which resulted in the rule set forth in *Adams* -- an approach which considered the interests of the defendant and the interests of the state and then sought to reach a principled accommodation of the two -- was not unique to *Adams*. Indeed, on the very same day the Court decided *Adams* it issued another decision applying the Sixth Amendment -- *Ohio v. Roberts* (1980) 448 U.S. 56. In *Roberts*, the Court addressed whether the Sixth Amendment confrontation right permitted the state to introduce preliminary hearing testimony against a defendant at trial. Ultimately, as it did in *Adams*, the Court's Sixth Amendment analysis in *Roberts* recognized "competing interests" between the goals of the Confrontation Clause itself and effective law enforcement, sought to accommodate these competing interests, and ruled the evidence admissible. (448 U.S. at p. 64, 77.)

The question presented here is whether the "competing interests" approach to the Sixth Amendment taken in *Adams* -- and the standard *Adams* set forth as a result -- is consistent with the Court's current approach to the Sixth Amendment, or the intent of the Framers who drafted the Sixth Amendment. As discussed below, the *Adams* standard is consistent with neither.

C. The Supreme Court's Modern Sixth Amendment Precedent Focuses *Not* On Identifying And Accommodating Competing Interests, But On The Historical Understanding Of The Rights Embraced By The Sixth Amendment And The Intent Of The Framers.

In a series of decisions issued over the last 15 years, the Supreme Court has reexamined much of its Sixth Amendment jurisprudence. In those decisions, the Court has consistently explained that the contours of the Sixth Amendment are no longer to be determined by seeking to balance competing interested, but instead are to be determined by assessing the intent of the Framers. Indeed, the Court's decisions over the last decade show that the Court has not hesitated to overrule its prior Sixth Amendment precedents to incorporate into its Sixth Amendment jurisprudence a fidelity to the Framers' intent. (*See*, *e.g.*, *Ring v. Arizona* (2002) 536 U.S. 584 overruling *Walton v. Arizona* (1990) 497 U.S. 639 (1990); *Crawford v. Washington* (2004) 541 U.S. 36 overruling *Ohio v. Roberts*, *supra*, 448 U.S. 56.)

The starting point for this analysis is the Court's decision in *Jones v. United States* (1999) 526 U.S. 227. There, the Court addressed whether a particular factual finding was an element of the offense (which had to be proven to a jury under the Sixth Amendment) or merely a sentencing factor which could be decided by a judge. In making this assessment, the Court emphasized the Sixth Amendment implications based on the historical role of juries.

Thus, the Court explained that, historically, there had been "competition" between judge and jury over their respective roles. (526 U.S. at p. 245.) Juries had the power "to

thwart Parliament and Crown" both in the form of "flat-out acquittals in the face of guilt" and also "what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as 'pious perjury' on the jurors' part." (*Ibid*., quoting 4 William Blackstone, Commentaries on the Laws of England at pp. 238-39.) The Court explained that "[t]he potential or inevitable severity of sentences was indirectly checked by juries' assertions of a mitigating power when the circumstances of a prosecution pointed to political abuse of the criminal process or endowed a criminal conviction with particularly sanguinary consequences." (*Ibid*.)

Of course, there is no more "sanguinary consequence" than capital punishment. Although *Jones* was not a capital case, the Court's concern with the "genuine Sixth Amendment issue" that would flow from diminishing the jury's significance applies to death qualified juries as well. (*Id.* at p. 248.) The Court echoed a crucial warning from Blackstone that was "well understood" by Americans of the time: there is a need "'to guard with the most jealous circumspection'" against erosions of the jury trial right flowing from a variety of plausible pretenses for limiting the right. (*Ibid*.) As the Court reiterated, "however convenient these may appear at first, (as doubtless all arbitrary powers, well executed, are the most convenient), yet let it be remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters." (*Id*. at p. 246, quoting 4 Blackstone, *supra*, at pp. 342-44).

In capital cases, limiting juries to death-qualified juries is precisely the sort of convenience that Blackstone warned a free nation must guard against. That it may be more convenient to accommodate the Government's interest in only trying a capital case to a jury that has excluded from its ranks all of the individuals who might interfere with the Government's effort to impose a death sentence is no answer. The historical basis for the Sixth Amendment, as *Jones* emphasizes, is to interpose citizens between the government and an accused.

One year after *Jones*, the Court again invoked the Sixth Amendment's "historical foundation" as support for its conclusion that a jury must find a defendant guilty of every element of any charged crime beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 477.) Like *Jones*, *Apprendi* was not a capital case. It involved firearms charges and the potential for a sentencing enhancement under a New Jersey hate-crime statute. But in analyzing the question presented, the Court again focused on the jury's historical role as a "guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties . . . ." (*Ibid*., quoting 2 Joseph Story, Commentaries on the Constitution of the United States 540-41 (4th ed. 1873)). These principles, important in a case where the consequence at stake for a defendant is imprisonment, are indispensable in the context of a capital case.

Two years later, the Court applied the Sixth Amendment principles set forth in *Jones* and *Apprendi* in the capital context. (*See Ring v. Arizona* (2002) 536 U.S. 584.)

Ring involved the question whether it violated the Sixth Amendment for a trial judge to alone determine the presence or absence of aggravating factors required for imposition of the death penalty after a jury's guilty verdict on a first degree murder charge. In answering that question "yes," the Court reversed its earlier holding in *Walton v. Arizona* (1990) 497 U.S. 639 and recognized that "[a]lthough 'the doctrine of stare decisis is of fundamental importance to the rule of law[,] . . . [o]ur precedents are not sacrosanct." (*Ring*, *supra*, 536 U.S. at p. 608.) *Ring* continued the Court's focus on the historical right to a jury trial and discussed the juries of 1791, when the Sixth Amendment became law -- just as Justice Stevens had done in his *Walton* dissent. (*See Walton*, *supra*, 497 U.S. at p. 711.)

Ring unequivocally stressed that at the time the Bill of Rights was adopted, the jury's right to determine "which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind" was "unquestioned." (*Ring*, *supra*, 536 U.S. at p. 608.) In addition, the Court repeated that "the Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential factfinders." (*Id*. at p. 607.) "The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions in the Bill of Rights. It has never been efficient; but it has always been free." (*Ibid*.)

Two years after *Ring*, the Court again overturned one of its earlier Sixth Amendment decisions which had not relied on a historical understanding of the Sixth Amendment. In *Crawford v. Washington* (2004) 541 U.S. 36 the Court focused on an historical interpretation of the Sixth Amendment's Confrontation Clause and reversed its holding in *Ohio v. Roberts*, *supra*, 448 U.S. 56.

As noted above, in *Roberts* the Court had held that the Sixth Amendment permitted the state to introduce preliminary hearing testimony against a defendant at trial as a method of accommodating the "competing interests" between the goals of the Sixth Amendment and the Government's interest in effective law enforcement. (448 U.S. at p. 64, 77.) In *Crawford*, however, the Court took a very different approach, one that was consistent with the approach it took in *Jones*, *Apprendi* and *Ring*. The Court examined the "historical record" and concluded that under the common law in 1791, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial . . . ." (*Crawford v. Washington*, *supra*, 541 U.S. at pp. 53-54.) The Court acknowledged that its contrary holding in *Roberts* had failed to honor the historical role of the jury and thereby created a framework that did not "provide meaningful protection from even core confrontation violations." (*Id*. at p. 63.)

Finally, only three months after *Crawford*, the Court applied its historical record model yet again in the Sixth Amendment context. In *Blakeley v. Washington* (2004) 542 U.S. 296, the Court held that it violated the Sixth Amendment for a judge to impose a

longer sentence based on fact-finding not made by the jury. As the Court reiterated, again citing Blackstone, every accusation against a defendant should "be confirmed by the unanimous suffrage of twelve of his equals and neighbours." (*Id*. at p. 301.) Once again focusing on the Framers' intent, the Court stressed that "the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury." (*Id*. at pp. 306-08, citing Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 The Complete Anti-Federalist 315, 320 (H. Storing ed., 1981) (describing the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 Works of John Adams 252, 253 ©. Adams ed., 1850) ("[T]he common people, should have as complete a control . . . in every judgment of a court of judicature" as in the legislature); Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 Papers of Thomas Jefferson, 282, 283 (J. Boyd ed., 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislature or Judiciary department, I would say it is better to leave them out of the Legislative."); *Jones*, *supra*, 526 U.S. at pp. 244-48.)

The clear and consistent line of cases from *Jones* to *Apprendi* to *Ring*, *Crawford*, and *Blakeley* leaves no doubt that the Court has sought to connect Sixth Amendment jurisprudence to the historical role of juries and the intent of the Framers in adopting the Sixth Amendment. The Court's approach to the death qualification of capital juries --

based on the 1980 *Adams* decision -- is utterly incompatible with its current approach to the Sixth Amendment, as demonstrated by the cases just discussed. Unlike these recent cases -- *which specifically consider the Framers' intent when interpreting the Sixth Amendment's protections* -- the Court's earlier death-qualification decisions did not consider the Framers' intent *at all* in deciding whether the practice of death qualification violates the Sixth Amendment. Instead, the Court's death qualification decisions attempted to craft a balancing test that accommodated a State's interest in implementing its death penalty system while trying to avoid unduly stacking the deck against a defendant. While this balancing approach may be a perfectly valid approach to drafting legislation, it is plainly inconsistent with the Court's recent approach to interpreting the Sixth Amendment by tethering the protections of that amendment to a historical understanding of what it meant to guarantee a defendant an impartial jury.

It is worth noting that in the years since *Adams* was decided -- and while the Court has refined much of its Sixth Amendment jurisprudence to ensure that it aligns with the Framers' understandings -- the Court has never examined whether there is any historical support for the *Adams* death qualification standard. (*See*, *e.g.*, *Lockhart v. McCree* (1986) 476 U.S. 162; *Uttecht v. Brown* (2007) 551 U.S. 1.) Indeed, in *Uttecht* the Court explicitly noted that the relevant "principles" established in the case law create a standard that seeks to "balance" the interests of the defendant against the interest of the state -- without even contemplating whether the "impartial jury" guarantee permits such

"balancing." (551 U.S. at p 9.)[13]

Ultimately, as the Court's more recent pronouncements make clear, the propriety of death qualifying under the *Adams* standard in light of the Sixth Amendment depends not on whether that standard accommodates competing interests, but whether it violates the historical understanding of an impartial jury codified in the Sixth Amendment. As discussed below, it plainly does.

D. The Framers Intended The "Impartial Jury" Guarantee To Prohibit Jurors From Being Struck Based On Their Views Of The Death Penalty.

Permitting jurors to be struck for cause because of their views toward the death penalty is antithetical to the Framers' understanding of an "impartial jury." When the Sixth Amendment was adopted, neither prosecutors nor defense counsel were permitted to exclude a juror based on that individual's attitude toward the death penalty. Jurors were permitted to consult their conscience and, in this limited way, "find the law" in addition to "finding the facts."

Indeed, this was -- and should continue to be -- a critical component of the Sixth Amendment's "impartial jury" protection. Steeped in the experience of overreaching criminal laws (such as libel laws that were used to punish political dissidents), the

[13] Whether the *Adams* standard actually does result in a jury that is "balanced" in terms of attitudes towards the death penalty is very much an open question. Justice Stevens recognized that, in fact, the *Adams* test does not result in a balanced jury at all, but results in a jury "biased in favor of conviction." (*Baze v. Rees* (2008) 553 U.S. 35, 84, Stevens, J., dissenting).

Framers considered a jury to be the conscience of the community, serving as an important bulwark against the machinery of the judiciary. The jury was free to use its verdict to reject the application of a law that it deemed unjust -- indeed, it was its duty to do so -- and this was (and should again be) at the heart of the "impartial jury" guaranteed to all criminal defendants under the Sixth Amendment.[14]

At common law, striking a juror on the basis of bias, or "propter affectum," was limited to circumstances in which the jury had a bias toward a party (relational bias); it did not include striking a juror on the basis of her opinion of the law or the range of punishment for breaking the law. As Blackstone cogently articulated:

> "Jurors may be challenged propter affectum, for suspicion of bias or partiality. This may either be a principal challenge, or to the favour. A principal challenge is such where the cause assigned carries with it prima facie evident marks of suspicion, either of malice or favour: as, that a juror is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counselor, steward or attorney, or of the same society or corporation with him: all these are principal causes of challenge; which, if true, cannot be overruled for jurors must be omni exceptione majores." (3 William Blackstone, Commentaries on the Laws of England

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[14] A juror could still be struck for cause for refusing to deliberate at all. Consistent with the Framers' understanding, however, the Sixth Amendment's "impartial jury" guarantee ensures that a criminal defendant's case is tried before a jury that, upon deliberating, can consult their consciences and consider the fairness and justice of the law and punishment the jury is asked to apply.

363.)[15]

Chief Justice Marshall acknowledged this exact understanding of the propter affectum challenge, and its connection to the Sixth Amendment, in *United States v. Burr* (C.C.Va. 1807) 25 F. Cas.49, 50, noting that "[t]he end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose connection with a party is such as to induce a suspicion of partiality." And the limited understanding of "bias" or "partiality" is not some historical footnote: at the time of the Framers, bias as to the law was both welcomed and expected from jurors. The colonial and early American experience teaches that the right to reject the law as instructed was crucial to the role the jury played in its check against the judiciary and executive. For example, when England made the stealing or killing of deer in the Royal forests an offense punishable by death, English juries responded by committing "pious perjury," *i.e.*, rejecting these politically motivated laws by acquitting the defendant of the charged offense. (John Hostettler, Criminal Jury Old and New: Jury Power from Early Times to the Present Day 82 (2004); *see also Sparf v. United States* (1895) 156 U.S. 51, 143 [Gray, J., and Shiras, J., dissenting][observing that juries in England and America returned general verdicts of acquittal in order to save a defendant prosecuted under an unjust law].)

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[15] Blackstone specified three other grounds justifying exclusion of a juror: propter honoris respectum, which allowed challenges on the basis of nobility; propter delictum, which allowed challenges based on prior convictions; and propter defectum, which allowed challenges for defects, such as if the juror was an alien or slave. (*Id*. at pp. 361-364.)

One well known example of such "pious perjury" is the 1734 trial of John Peter Zenger. The Royal Governor of New York, in an effort to punish Zenger for his criticism of the colonial administration, prosecuted Zenger for criminal libel. Andrew Hamilton, representing Zenger at trial, argued that jurors "have the right beyond all dispute to determine both the law and the fact" and thus could acquit Zenger on the basis he was telling the truth, even though the libel laws at the time did not provide that truth was a defense. (James Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger 78-79 (Stanley N. Katz ed., 2d ed. 1972).) Zenger was acquitted on a general verdict. This trial, and others like it, provides necessary context for understanding what animated the Framers' intent in guaranteeing a defendant the constitutional right to an impartial jury.

Reinforcing how the Framers themselves viewed the issue, a different (and even more famous) Hamilton successfully made a similar argument seventy years later on behalf of a man accused of libeling John Adams and Thomas Jefferson. In that case Founding Father Alexander Hamilton argued:

> "It is admitted to be the duty of the court to direct the jury as to the law, and it is advisable for the jury, in most cases, to receive the law from the court; and in all cases, they ought to pay respectful attention to the opinion of the court. *But, it is also their duty to exercise their judgments upon the law, as well as the fact; and if they have a clear conviction that the law is different from what it is stated to be by the court, the jury are bound, in such cases, by the superior obligations of conscience, to follow their own convictions*. It is essential to the security of personal rights and public liberty, that the jury should have and exercise the power to judge both of the law and of the criminal intent." (*People v. Croswell* (N.Y. Sup. 1804) 3 Johns. Cas. 337,

346, emphasis added.)

At base, the notion of striking a juror because of his opinion on the propriety of the law was entirely foreign to the nation's founders. In fact, it was expected that the jurors would follow their conscience and render a verdict that was against a law they deemed unjust -- this was at the heart of the impartial jury as understood by the Framers. As John Adams wrote in 1771:

> "And whenever a general Verdict is found, it assuredly determines both the Fact and the Law. It was never yet disputed, or doubted, that a general Verdict, given under the Direction of the Court in Point of Law, was a legal Determination of the Issue. Therefore the Jury have a Power of deciding an Issue upon a general Verdict. And, if they have, is it not an Absurdity to suppose that the Law would oblige them to find a Verdict according to the Direction of the Court, against their own Opinion, Judgment, and Conscience[?]" (1 Legal Papers of John Adams 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

See also Akhil Reed Amar, America's Constitution 238 (2005) ("Alongside their right and power to acquit against the evidence, eighteenth century jurors also claimed the right and power to determining legal as well as factual issues -- to judge both law and fact 'completely' -- when rendering any general verdict.").

This principle was echoed in the instructions given by Chief Judge Jay who, at the end of a trial before the Supreme Court, charged the jurors with the "good old rule" that:

> "on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. *But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy*. On this, and on every other occasion, however, we have no doubt, you will pay that respect, which

> is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of the law. *But still both objects are lawfully, within your power of decision*." (*Georgia v. Brailsford* (1794) 3 U.S. 1, 4, emphases added).

Indeed, the importance of this right was widely shared by those attending the Constitutional Convention. (*See* Federalist 83 (Hamilton), reprinted in The Federalist Papers 491, 499 (Clinton Rossiter ed., 1961) ("The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.").

The current death-qualification "substantial impairment" standard reflects none of this -- and conflicts with all of it. To the Founding Fathers, it was the solemn duty of a jury to issue a verdict reflecting the jury's conscience. There was no exception to this rule carved out for cases where the State sought a sentence of death. Thus, the substantial impairment test announced in *Adams* in 1980 -- designed as a way to accommodate the interests of the state -- contradicts the intent and understanding of the Framers of the Sixth Amendment and erodes the Sixth Amendment's guarantee of an impartial jury where it is needed most. Application of that test in this case violated Mr. Tran's Sixth Amendment rights and requires that the penalty judgment be reversed.

It is true, of course, that in contrast to some of the Court's Sixth Amendment cases

such as *Walton* and *Roberts* -- where the Court's historical approach has already resulted in these decisions being overruled -- the Supreme Court has not yet been asked to revisit *Adams* based on this identical approach. But this should not change the result here.

Article I, section 16 of the California Constitution, originally enacted in 1850, provides that "[t]rial by jury is an inviolate right and shall be secured to all . . . ." This Court has long recognized that the state right to a jury trial "is the right as it existed at common law, when the state Constitution was first adopted." (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 75-76. *Accord Crouchman v. Superior Court* (1988) 45 Cal.3d 1167, 1173-1274; *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 8-9; *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 287.) As this Court has noted, in assessing the scope of the state jury trial guarantee, "[i]t is the right to trial by jury as it existed at common law which is preserved; and what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact. The right is the historical right enjoyed at the time it was guaranteed by the Constitution." (*People v. One 1941 Chevrolet Coupe*, *supra*, 37 Cal.2d at p. 287.)

Thus, in order to determine if the *Adams* "substantial impairment" test violated Mr. Tran's right to a jury trial under the state constitution, this Court must examine the common law. And as the above analysis of the common law shows, the substantial impairment test is simply irreconcilable with the common law. As such, the trial court's

use of that test to permit juror discharges not only violated the Sixth Amendment, but it violated the state constitution as well.

Of course, in making this argument Mr. Tran recognizes the similarity between the state and federal constitutional jury trial guarantees. But as Article 1, Section 24 of the California Constitution establishes, the "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." And as numerous justices of this Court have made clear over the years, in assessing the independent force of the state constitution, the Court "should disabuse [itself] of the notion that in matters of constitutional law and criminal procedure we must always play Ginger Rogers to the high court's Fred Astaire -- always following, never leading." (*People v. Cahill* (1993) 5 Cal.4th 478, 557–558 [Kennard, J., dissenting]. *Accord People v. Flood* (1998) 18 Cal.4th 470, 547 [Mosk, J., dissenting].)

It is time to lead. The historical evidence is clear. The substantial impairment test violates both state and federal law. Reversal of the penalty judgment is required.

ERRORS OCCURRING AT THE GUILT PHASE OF TRIAL

III. THE TRIAL COURT'S EVIDENTIARY AND INSTRUCTIONAL ERRORS AS A RESULT OF ITS ERRONEOUS DENIAL OF APPELLANT'S SEVERANCE MOTION, PERMITTING THE JURY TO CONSIDER PLATA'S HEARSAY STATEMENTS THAT HE DID NOT KILL LINDA AND THERE WAS NOTHING HE COULD DO ABOUT HER DEATH, AND PRECLUDING THE JURY FROM CONSIDERING PLATA'S EARLIER AND REPEATED ADMISSIONS THAT HE WAS THE ACTUAL KILLER, WHETHER CONSIDERED SINGLY, OR IN COMBINATION, REQUIRE REVERSAL OF THE GUILT AND PENALTY VERDICTS.

A. The Relevant Facts.

On November 9, 1995, Mr. Tran and co-appellant Plata drove to Linda's home to commit a burglary. As the prosecution itself conceded, neither Mr. Tran nor Plata went to Linda's home intending to kill anyone that night. (8 RT 1685.) Instead, according to the prosecutor, Mr. Tran and Plata intended to kill Linda when they realized Linda recognized Mr. Tran at the front door. (8 RT 1685-1686.) The state's theory was that Mr. Tran strangled and killed Linda, and Plata was guilty of murder, if at all, on an aider and abettor theory. (8 RT 1675.)

To prove this theory, the state sought to rely on the testimony of confidential informant Qui Ly. Ly and Plata were friends, and he, Plata and Mr. Tran "h[u]ng around" together socially. (6 RT 1278, 1280, 1283-1284.) Ly spoke to police about unrecorded statements Plata had made to him about the killing shortly after Linda's murder. After Ly spoke to officers, police made arrangements for Ly to be "placed into a cell [at Santa Ana Jail] individually with both Plata and Tran and attempt to get them to talk about the Linda

Park murder." (6 RT 1246.) The jail cell conversations were recorded. (6 RT 1248; 7 RT 1415.)

Prior to trial, Mr. Tran moved to sever his case from Plata's case. (2 CT 432-444.) According to Mr. Tran, a joint trial would violate his rights to confrontation and due process as guaranteed by the Sixth and Fourteenth Amendments and his statutory rights under section 1098. (2 CT 377-385, citing *People v. Aranda* (1965) 63 Cal.2d 518 and *Bruton v. United States* (1968) 391 U.S. 123.)

The state responded by offering twelve redacted excerpts of Plata's recorded statement, and fourteen redacted excerpts of Tran's recorded statement. (2 CT 454-459, 468-504.) As relevant here, one excerpt of Plata's statement -- Excerpt No. 4 -- was redacted as follows:

> Ly: "Wow, was it worth it?"
>
> Plata: "No."
>
> Ly: "~~Man, why did you guys wack her~~?"
>
> Plata: "~~I don't know man. There's nothing I could do~~ ***. If Terry was alive I'd say he was telling them." (Plata Statement Excerpt No. 4; 2 CT 477.)

Plata's counsel moved to admit the redacted portion of the excerpt under Evidence Code section 356 -- which provides that "[w]here part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party" -- should the state successfully introduce the

unredacted portion. (3 CT 723-724.) Plata's counsel further moved to introduce other excerpts of what Plata told Ly including statements that he "didn't strangle her" but was "just there," and tried to, but could not, stop Mr. Tran from killing Linda. (3 CT 724-725.)

At the hearing on the motion, Mr. Tran's counsel argued, "[M]y biggest concern is the penalty phase," and "what the individual defendant did and how that person reacted emotionally at the time becomes a really critical issue, having to do with assigning moral blame, which is really what the penalty phase is all about." (2 RT 236.) According to Mr. Tran's counsel, Plata would be "assigning moral blame" and "ascribe who actually did the killing," and Plata's statements to Ly "make it appear as if Plata is the one whose, in a sense, moral conscience from this event is more complex, more conflicted" than Mr. Tran. (2 RT 237.)

The trial court found that, with the exception of Excerpt No. 4, "the redactions are sufficient to satisfy the requirements under *Aranda-Bruton*." (2 RT 254.) The court excluded, however, the entirety of Excerpt No. 4. According to the court, "'Wow, was it worth it,' would not "make sense unless you add 'Man, why did you guys whack her?,'" and in turn, section 356 would permit Plata to admit the redacted portion -- "[t]here's nothing I could do" -- to explain the unredacted portion -- "Man, why did you guys whack her?" -- which, in turn, would be an *Aranda-Bruton* violation. (2 RT 253-254.) In light of this ruling -- which at this point precluded the jury from hearing all references to Mr.

Tran or references from which it could easily surmise that Plata was speaking about Mr. Tran -- the court denied Mr. Tran's motion to sever his case. (2 RT 270.)

At trial, however, the trial court changed its mind. Prior to Ly's testimony, Mr. Tran's counsel informed the court that Plata's counsel was "asking to go beyond what is in the present audio that's going to be played for the jurors" and "we're again going to have an *Aranda-Bruton* objection." (6 RT 1167.) Plata's counsel explained, "I have a feeling there are some areas that [the prosecutor] intends to go into on direct with Mr. Ly that are areas that get us into *Aranda-Bruton* issues, and counsel for Mr. Plata are in agreement as to what will or won't be objected to, but we cannot obviously include Mr. Tran's lawyers in that agreement unless they agree to it, and I'm sure they will not." (6 RT 1259.)

The prosecutor confirmed that there was an agreement with Plata's counsel, and sought to ask Ly, "Did Mr. Plata tell you that he had nothing to do with the strangulation of Linda Park?," and expected Ly to say, "Yes," and "Did he tell you that he had nothing to do or that he could do when it comes to the murder of Linda Park?, and again, expected Ly to say, "Yes." (6 RT 1260-1261.) The prosecutor argued, "I don't think that runs afoul to the *Aranda-Bruton*. . . . specifically if you take it in conjunction with the fact that as part of the testimony that I'm going to put in is the admission of Mr. Tran to [Ly] that he's the one that did the murder" (Tran Statement Excerpt No. 2; 2 CT 487), and then noted that the court could provide a limiting instruction which told the jury that Plata's

statement to Ly about his involvement could only be used against Plata. (6 RT 1261.)

Mr. Tran's counsel vehemently disagreed, arguing, "I can understand the court saying that when a -- when Plata says, 'I didn't have anything to do with it,' he's not casting in a sense aspersion on a second party, third party. But the statement 'There was nothing I could do about it' is -- I mean, there's no question what the inference of that is given the testimony that we've had which is essentially saying either Tran is out of control or I was coerced by Tran." (6 RT 1262.) Counsel referenced the court's earlier ruling excluding the evidence, and further argued, "[I]f the court remembers, when we went back a long time ago, this is exactly what we were talking about is it's more of an issue that comes to penalty phase, but by entering it now, it becomes penalty phase evidence," and the evidence "sure looks like Mr. Plata is standing there with his hands up saying, 'Gee, Mr. Tran, please don't kill her,'" and the issue at penalty phase "becomes what moral responsibility does the jury attach to these two individuals," thus, "I think it has a big impact on what they assign to Mr. Tran." (6 RT 1265-1267, 1274.)

The trial court ruled, "I just don't think it runs afoul of *Aranda-Bruton*," and "under 352, all the other evidence that's coming in pointing to Mr. Tran being the actor, I don't see how this is going to help or hurt Mr. Tran, and it certainly would be arguably anyway to Mr. Plata's benefit. So I'll allow it in with a limiting instruction." (6 RT 1275.) Mr. Tran's counsel sought a mistrial, claiming, "if the court is going to allow it in, we believe the court's other remedy is to declare a mistrial as to Mr. Tran and allow him

to have a separate trial." (6 RT 1275.) The court denied the motion. (6 RT 1275.)

At trial, Ly took the stand and the jury heard the recorded jail conversation between Ly and Plata. (6 RT 1248; 7 RT 1415.) In the recording, Plata told Ly that no fingerprints or other evidence was left behind, and a witness claimed seeing a blue car at the scene. (6 CT 1639-1640.) He claimed that he was supposed to get $2,000 in cash and jewelry. (6 CT 1642.) He then referenced Mr. Tran's girlfriend Nguyen, and said that "that girl Joann," had "visited him" in Chino prison, and was now "his wife, and although Joann was not at the scene, Linda was her "esse," meaning friend. (6 CT 1644, 1648.) He claimed Linda "looked through the door...and stand and watched us" and "[t]hat fool slipped by a cactus" by the front door. (6 CT 1646, 1656.) He also said that he [Plata] was worried about "his girl, Joanne [sic]." (6 CT 1654.)

Ly further testified that, during this recorded jail conversation, Plata claimed he did not kill Linda, and there was nothing he could do about the killing. Thus, Plata admitted being involved in the Irvine robbery, but claimed he did not strangle the victim or "do this murder." (7 RT 1437, 1444.) Instead, Plata said there was "nothing he could do." (7 RT 1438.) He also said that he was "pissed off" afterwards. (7 RT 1438.)

The jury also heard Mr. Tran's recorded statements to Ly. In the recording, Mr. Tran told Ly that he was arrested for an Irvine murder, which was the same murder that Mr. Tran mentioned in Chino. (6 CT 1610.) When asked by Ly if Mr. Tran thought "they got you good," Mr. Tran replied, "I don't even know what they got on me" and "if

Noel's talking you know, I'm screwed," but he did not know if "Noel talked." (6 CT 1613, 1616.) Ly asked, "But who killed her, you or him?" (6 CT 1613.) There was no verbal or visual response recorded on the tape, but Ly testified that Mr. Tran pointed to himself and nodded his head. (6 CT 1613; 7 RT 1424-1425.) When asked if he was going to get an attorney, Mr. Tran replied that he did not have money for an attorney. (6 CT 1614.) When asked why he "t[ook] her out," Mr. Tran replied, "I don't know what to say, man. Tie 'em up, you know. What can you do?" (6 CT 1617.) When asked how much "it was supposed to be worth," Mr. Tran responded, "Fuck, about ten, about ten." (6 CT 1625.) When asked how much he ended up getting, Mr. Tran responded that he did not want to talk about it. (6 CT 1626.) He indicated he had to accept it, stating in Vietnamese, "You play and accept," and that he "felt bad about it, I feel stupid enough already . . . ." (6 CT 1628.)

On cross-examination, however, Ly also testified that Plata had previously confessed to him that *he* actually killed Linda. These were Plata's statements which Ly had initially reported to police in a recorded interview. (7 RT 1410.) According to Ly, about six months after the murder in May or June of 1996, Ly and Plata spoke together in a Vietnamese restaurant called Thanh My. (6 RT 1282; 7 RT 1443.) Plata told Ly that he was the one who killed Linda, stating "he had killed the Korean girl." (7 RT 1445, 1452.) Based on even earlier conversations with Plata about the killing, Ly always assumed Plata killed Linda, and then his suspicions were confirmed when Plata admitted in the

restaurant that he committed the murder. (7 RT 1453.) Plata told Ly that "he had to do it." (7 RT 1454.) Plata again admitted to killing Linda more than once after the conversation in the restaurant. (7 RT 1446.)

The trial court instructed the jury on how it should consider Plata's and Mr. Tran's statements to Ly. The court told the jury, "You have heard evidence that each of the two defendants made statements out of court and before the trial. You may consider that evidence only against the defendant making the statements and not against the other defendant." (4 CT 998.)

As more fully discussed below, the trial court erred in failing to grant severance in this case. The admission of Plata's recorded statements to Ly that he did not kill Linda, and there was nothing he could do about the killing, violated *Aranda* and *Bruton*. Moreover, because there was a joint trial, the jury was told that it could only consider Plata's unrecorded statements that he killed Linda in connection with Plata. Put another way, the jury was precluded from considering this evidence -- which exculpated Mr. Tran as the actual killer -- in determining Mr. Tran's guilt. Under the state or federal standard of prejudice, reversal of the guilt verdict, special circumstance findings and death judgment are required.

B. The General Law on Severance.

Penal Code section 1098 provides that "[w]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be jointly

tried, unless the court orders separate trials." Generally, the decision whether to grant severance is left to the discretion of the trial judge. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1286.) While joint trials save time and expense, "the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial." (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 451-452.) As this Court has noted, severance is appropriate "in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." (*People v. Massie* (1967) 66 Cal.2d 899, 917; *see also People v. Champion* (1995) 9 Cal.4th 879, 904.) In *People* v. *Keenan* (1988) 46 Cal.3d 478, this Court observed: "Severance motions in capital cases should receive heightened scrutiny for potential prejudice." (*Id.* at p. 500.) This principle is consistent with the Eighth Amendment requirement of heightened reliability in capital cases. (*See, e.g.*, *Mills v. Maryland* (1988) 486 U.S. 367, 376.)

In *Zajiro v. United States* (1993) 506 U.S. 534, the United States Supreme Court held that severance is proper "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (*Id.* at p. 1081.) As this Court noted in *People v. Massie, supra,* in assessing a claim of improper denial of severance, an appellate court "must weigh the prejudicial impact of all of the significant effects that may reasonably be

assumed to have stemmed from the erroneous denial of a separate trial." (*Id.* at p. 923.)

Here, the trial court's denial of Mr. Tran's motion to sever compromised his constitutional rights, set forth below, rendered his trial fundamentally unfair and deprived him of due process of law. (*Estelle v. McGuire* (1991) 502 U.S. 62, 68; *Jammal v. Van de Kamp* (9th Cir.1991) 926 F.2d 918, 919-20; *Grisby v. Blodgett* (9th Cir. 1997) 130 F.3d 365, 370.) Thus, the court abused its discretion in denying the severance motion, and the guilt verdict and special circumstance findings must be reversed, and the judgment of death must be vacated.

C. The Admission of Plata's Recorded Statements to Ly Which Implicated Mr. Tran Violated *Aranda* and *Bruton*, and the Trial Court's Instructions on These Statements, Prejudicially Violated Mr. Tran's Fifth, Sixth, Eighth and Fourteenth Amendment Rights.

The Confrontation Clause of the Sixth Amendment to the federal Constitution, made applicable to the states through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." The right of confrontation includes the right of cross examination. *(Pointer v. Texas* (1965) 380 U.S. 400, 404-407.) In several cases, the United States Supreme Court has addressed the issue of whether and to what extent the statement of a nontestifying defendant in a joint trial may be edited to protect the rights of a nondeclarant codefendant.

In *Bruton v. United States, supra,* 391 U.S. at p. 126, the Court held that the admission of a nontestifying defendant's confession, facially implicating (i.e., by name)

his codefendant in the crime, violated the codefendant's rights under the Confrontation Clause of the Sixth Amendment, despite a limiting instruction to the jury to consider the statement against the declarant defendant only. The court reasoned that the risk was too great that the jury would not be able to follow the limiting instruction when faced with such powerfully incriminating evidence. *(Id.* at pp. 135-136.)

However, in *Richardson v. Marsh* (1987) 481 U.S. 200, the Supreme Court limited its holding in *Bruton,* ruling that the admission of a nontestifying defendant's confession does not violate the Confrontation Clause if the confession is redacted so as to eliminate the nondeclarant codefendant' s name and any reference to his or her existence, and if the court gives the jury a proper limiting instruction. (*See Richardson v. Marsh, supra,* 481 U.S. at pp. 208-09.) A basis for the ruling was the Court's concern that extending the ruling of *Bruton* to confessions that are not facially incriminating would result in fewer joint trials, thereby requiring “that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand.” (*Id.* at p. 210.) The Court further observed that “joint trials generally serve the interests of justice by avoiding the scandal of inequity of inconsistent verdicts.” *(Ibid.* [fn. omitted].) The Court in *Richardson* did not, however, express an opinion on the admissibility of a confession in which the defendant's name is replaced with a symbol or neutral pronoun.

(*Id.* at p. 211, n. 5.)

In *Gray v. Maryland* (1998) 523 U.S. 185, 192, 197, the Court addressed the latter issue and held that the *Bruton* rule prohibiting the introduction during a joint trial of a statement of a nontestifying defendant which names the nondeclarant codefendant as a perpetrator extends also to a redacted confession in which the name of the nondeclarant codefendant is replaced by a blank space, the word "deleted" or a similar symbol. The Court ruled that such redactions result in statements that, considered as a class, so closely resemble *Bruton*'s unredacted statements as to warrant the same legal results. (*Ibid.*)

Addressing the policy concern articulated in *Richardson v. Marsh* that the expanded application of *Bruton*'s rule would force prosecutors too often to abandon use either of the confession or of a joint trial, the Court believed that additional redaction of a confession that uses a blank space, the word "delete," or a symbol would normally be possible. (*Id.* at p. 196.) The Court gave an example of a redaction that would satisfy *Bruton:* The confession in *Gray* read: "Question: Who was in the group that beat Stacey? Answer: Me, deleted, deleted and a few other guys." The Court suggested that answer could be changed to "Me and a few other guys." (*Id*. at pp. 196-197.) The Court suggested that such redaction was condoned in *Richardson v. Marsh, supra.*

In *People v. Fletcher* (1996) 13 Cal.4th 451, 456, decided two years prior to *Gray,* this Court addressed the issue expressly left open in *Richardson v. Marsh, supra,* that is, "whether it is sufficient, to avoid violation of the Confrontation Clause, that a

nontestifying codefendant' s extrajudicial confession is edited by replacing all reference to the nondeclarant' s name with pronouns or similar neutral and nonidentifying terms." This Court decided that the kind of editing which retains references to a coparticipant in the crime but removes references to the coparticipant's name sufficiently protects a nondeclarant defendant's constitutional right of confrontation may not be resolved by a "bright line" rule of either universal admission or universal exclusion, but rather that "the efficacy of this form of editing must be determined on a case-by-case basis in light of the other evidence that has been or is likely to be presented at trial." (*Ibid.*) This Court noted that when effective redaction is impossible, an alternative to holding separate trials is a joint trial with separate juries; the Court noted with approval that this approach would conserve judicial and prosecutorial resources, and avoid the inconvenience and trauma to the witnesses that result when they must repeat their testimony in separate proceedings. (*Id.* at p. 468.)

In People v. Douglas (1991) 234 Cal.App.3d, 273, the Court of Appeal held that the trial court erred when it denied the defendant's motion for separate trials and allowed use of a redacted version of the defendant's post-arrest statement without permitting the defendant to present portions of the statement which tended to exculpate him. There, the declarant gave a statement to a detective that implicated both himself and his codefendant, but in which he denied stabbing the victim. (*Id.* at pp. 282-285.) The defendant moved for a separate trial, arguing that the prosecution's use of a redacted

version of defendant's statement, which deleted portions exculpatory to defendant and inculpatory to the codefendant, would prejudice the defendant. (*Id.* at p. 280.) Without reviewing the unredacted statement, the court denied the defendant's motion and instead ordered the detective who was to testify regarding the content of the statement to make references only to what the defendant did, and to omit all references to the codefendant' s actions. (*Id.* at p. 281.)

At the joint trial, the detective's testimony about the content of the statement omitted all reference to the actions of the codefendant, and the jury was admonished that the statement was admissible only against the defendant. (*Id.* at p. 281.) Defendant's counsel was precluded from cross-examining the detective about the content of the unredacted statement. (*Ibid.*) Both defendants were convicted of second degree murder. (*Id.* at p. 275.)

The Court of Appeal found that the redactions “completely distorted appellant's actual statement” in that the jury was left with the impression that the defendant and the codefendant both stabbed the victim and that the defendant played more of a leadership role in the killing than he did. (*Id.* at pp. 282-283, 287-288.) The Court of Appeal ruled that the trial court's evidentiary ruling precluding the cross-examination into the content of the actual statement was clearly erroneous under Evidence Code section 356, which provides that “Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse

party ....” (*Id.* at p. 285.) This rule applies to admission and confessions in criminal cases and applies even if the omitted portions of the conversation are self-serving. (*Ibid.* [citations omitted].) The Court of Appeal ruled that, by denying the defendant's motion to sever without thoroughly inquiring into the content of the “sanitized” statement, and without fully considering the prejudice to the declarant defendant, the trial court “set the stage for an inevitable collision” between the codefendant' s *Aranda/Bruton* rights and the defendant's right to hear his entire statement under Penal Code section 356. (*Id.* at pp. 285.)

In *People v. Matola* (1968) 259 Cal.App.2d 686, although the appellate court addressed a claim of prejudice by the non-confessing defendant, the court recognized the risks of prejudice to the confessing defendant:

> In ruling upon a severance motion, the trial court must be alert at the outset to factors which are harbingers of editorial failure. If the parts of the confession affecting a codefendant favor or may favor the confessing defendant, the deletion of those statements is not going to stick. The declarant' s counsel will want to bring them out, either upon cross-examination of the person who testifies to the confession, or upon direct examination of the declarant if he takes the stand. Were he prevented from bringing out evidence favorable to his declarant client, to protect the nondeclarant, the declarant would himself be prejudiced by the joint trial.
>
> The trial court in this case denied the motion to sever solely on the basis that the prosecuting attorney represented that the confession could and would be successfully edited. The trial court had no reason to doubt the prosecutor's good faith in so stating, but all the prosecutor could assure the court was that he himself would not offer the offending passages. His own restraint could not affect defense counsel's duty or strategy. Had the trial court closely examined the confession, including the proposed excision, the ineffectiveness of the prosecutor's assurance would have been evident. The

> court prejudicially erred in denying the severance motion. (*People v. Matola, supra,* 259 Cal.App.2d at pp. 692-693.)

Federal courts have interpreted the federal evidentiary "rule of completeness" to prohibit redaction that "'distorts the meaning of the statement or excludes information substantially exculpatory of the declarant" or excludes parts of a statement that are "'explanatory of [or] relevant to the admitted passages.'" *(United States v. Dorrell* (9th Cir. 1985) 758 F.2d 427, 434-435 [citations omitted]; see also *United States v. Washington* (D.C. Cir. 1991) 952 F.2d 1402, 1404; *United States v. Long* (8th Cir. 1990) 900 F.2d 1270, 1279; *United States v. Yousef* (2nd Cir. 2003) 327 F.3d 56, 150 [redaction improper if it "changes the tenor of the utterance as a whole"][citation omitted], cert. den. *Yousef v. United States* (Oct 6, 2003) _U.S._ [2003 WL 22005941, 72 USLW 3245]; *United States v. Thuna* (1st Cir. 1986) 786 F.2d 437, 441, n.7.)

In this state, the rewriting of a statement by substituting "I" for "we" has been held to be error. In *People v. Tealer* (1975) 48 Cal.App.3d 598, over defense objection, the trial court allowed the prosecutor to use a sanitized version of defendant Tealer's post-arrest statement ("We were just passing by the place and decided to rob it") by substituting "I" for "we." (*Id.* at p. 601.) The appellate court held that it was error for the trial court to allow the change in the text of the statement under *Aranda* error because it threw "the entire onus of the planned robbery on defendant by converting the sometimes ambiguous and partially exculpatory 'we' into an unmistakable 'I.'" *(Id.* at pp. 603-604.) The court held that the rewriting caused "prejudice to the declarant" within the

meaning of *Aranda,* ruling that, in the context of *Aranda,* the term "prejudice" is not necessarily synonymous with "prejudicial error" (which compels reversal) but rather has the customary dictionary meaning of "disadvantage" or "resulting injury or detriment." (*Id.* at p. 604 [citation omitted].) The court opined that the erroneous rewriting of the statement, standing alone, might not have been prejudicial, but because it led to defendant's testimonial denial of making any statement, improper comment on that testimony by the prosecutor, and a jury instruction running afoul of *Griffin v. California* (1965) 380 U.S. 609, reversal was required. (*Id.* at pp. 605-608.)

Here, upon agreement with Plata's counsel and over objection by Mr. Tran's counsel, the state was permitted to introduce testimony about -- and a jail tape recording of -- Plata's statements to Ly. Significantly, the jury heard that Plata told Ly he was involved in the robbery, but did not strangle Linda or "do this murder." (7 RT 1437, 1444.) Instead, Plata said there was "nothing he could do" about the murder and was "pissed off" afterwards. (7 RT 1438.)

Of course, under section 356 and the principles of *Douglas*, *Matola* and *Tealer*, the inclusion of Plata's statement that he did not murder Linda, and indeed, would have prevented the murder if he could, was entirely admissible to put his admission that he was involved in the robbery in context. But absent a joint trial, and the bargain between the prosecutor and Plata's counsel, the jury would never have heard Plata's statement.

Indeed, this evidence was plainly hearsay under state law. Evidence Code section

1200 provides that "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 asserted" is inadmissible hearsay. It was an out of court statement introduced to prove that, in fact, Plata was involved with the robbery but did not kill Linda, there was nothing he could do about it, and he was angry about what happened afterwards. Moreover, because Plata did not testify and was otherwise unavailable for cross-examination at the joint trial, and because Mr. Tran had no prior opportunity to cross-examine Plata, the admission of the statements violated *Aranda* and *Bruton*. Thus, absent a joint trial, Plata's statement to Ly would have been inadmissible.

Mr. Tran recognizes, of course, that (1) the trial court modified Plata's statement such that it did not implicate Mr. Tran by name and (2) gave a limiting instruction which told the jury that it could not consider Plata's statement against Mr. Tran. Respondent will undoubtedly argue that error was averted by taking these remedial steps. This argument is unavailing.

To be sure, under normal circumstances, a witness whose testimony is introduced at a joint trial is not considered to be a witness against the defendant, implicating confrontation concerns, if the jury is instructed to consider that testimony only against a codefendant. (*Richardson v. Marsh* (1987) 481 U.S. 200, 206.) "This accords with the almost invariable assumption of the law that jurors follow their instructions. [Citation.]" (*Id.*)

In *Bruton*, *supra*, however, the Supreme Court recognized an exception to this principle. "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a defendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial . . . ." (391 U.S. at pp. 135-136 [citations omitted]. *See People v. Song* (2004) 124 Cal.App.4th 983, 984 [statements of codefendants that defendant forced the victim into a car, the victim expressed a desire to go home and that she did not want to be in the car corroborated victim's testimony that she was taken by force or fear; held, the jury would be unable to apply codefendants' statements only in determining the culpability of codefendant, but not that of defendant].)

In *Gray v. Maryland* (1998) 523 U.S. 185, the Court again considered the efficacy of a limiting instruction. The Court found a codefendant's statement directly implicated defendant, but was then redacted to replace defendant's name with an obvious indication of deletion, such as a blank space, the word "deleted," or a symbol, fell within the *Bruton* rule. (*Id*. at p. 192.) The Court reasoned that where the confession made a reference which implicated a perpetrator other than the speaker -- a "nonconfessor" -- and the jury could immediately infer that perpetrator was defendant, the confession was "facially incriminating" and its admission was *Bruton* error despite the limiting instruction. (*Id.* at

p. 196.)

That is exactly what occurred here. In one recorded excerpt, Ly asked Plata, "Man, why did you guys wack her?," and Plata replied, "I don't know man. There's nothing I could do." (2 CT 477.) The court initially excluded the statement (2 RT 253-254), but then later allowed a redacted version after the state sought to ask Ly about Plata's incriminating statement that he was involved in the robbery, and Plata's counsel agreed only if Plata's exculpatory statement that he did not kill Linda was likewise admitted. Thus, over Mr. Tran's counsel's objection, the jury heard that Plata was involved in the robbery, but did not strangle or kill Linda, and there was nothing he could do about the murder, and was "pissed off" afterwards. (7 RT 1437, 1444.) As Mr. Tran's counsel aptly summed up, "there's no question what the inference of that is given the testimony that we've had which is essentially saying either Tran is out of control or I was coerced by Tran." (6 RT 1262.)

After all, there was no question at trial that Plata and Mr. Tran were the only individuals involved in the robbery at Linda's home; if Plata did not kill Linda and could not stop it from happening, then the jury would necessarily conclude that Mr. Tran did kill Linda and could not be stopped. And if there is any doubt that Plata was referring to Mr. Tran, one need only look at Plata's contemporaneous statements during this conversation. Plata told Ly "that girl Joann," had "visited *him*," in Chino prison and was now "*his* wife, and although Joann was not at the scene, Linda was her "esse," meaning

friend, and now Plata was worried about "*his* girl, Joanne [sic]." (6 CT 1644, 1648, 1654, emphasis added.) Of course the jury already knew that "Joann" was Joann Nguyen -- Mr. Tran's girlfriend (5 RT 998) who had visited Mr. Tran in Chino prison (5 RT 1009), and who was not present at Linda's home. Indeed, the jury heard Mr. Tran himself admit in his recorded statements to Ly that Joann was his "real girlfriend," who visited him in Chino. (6 CT 1619-1620.) Thus, the jury would know at all times Plata was discussing Mr. Tran's role in the killing with Ly, and thus, implicating Mr. Tran in the murder as the actual killer. Under these circumstances, Plata's statement immediately and "facially incriminated" Mr. Tran and thus, its admission was *Bruton* error despite the limiting instruction. (*See Gray v. Maryland*, *supra*, 523 U.S. at p. 196.)

Finally, given the multitude of statements by Plata and Tran, it is no stretch of the imagination to believe that the jury might be confused as to which statements could be used against whom. The prosecutor cleared up any confusion in closing argument. By way of example only, Mr. Tran got a tattoo of a Korean phrase shortly after the murder, which his girlfriend Nguyen testified, that she knew from discussions with Mr. Tran, meant an expression of remorse, meaning "Forgive me." (5 RT 1048.) To counter this evidence and support the allegation that the crimes were committed for the benefit of the VFL, however, the state introduced expert testimony that Mr. Tran got the tattoo to take credit and boast to other gang members about Linda's death.

Thus, gang expert Mark Nye told the jury that their opinion was reinforced by

Plata's hearsay statements to Ly in the taped jail conversation that Mr. Tran was actually conveying, "blow me" or "suck me." (8 RT 1554.) Probation officer Timothy Todd -- who supervised gang members -- testified to the same. (6 RT 1157-1159.) The prosecutor then heavily relied on this evidence in the guilt phase of closing argument, telling the jury that the tattoo was not evidence of Mr. Tran's remorse. Instead, the prosecutor told the jury, "Well, how about 'blow me and suck me? It's on tape. It's on tape. This is on tape," and "This is evidence, both of them, experienced in this field, told you that that's evidence of bragging." (8 RT 1735.)

This was error. In theory, Plata's recorded statements to Ly -- that Mr. Tran's tattoo was meant to convey "blow me and suck me" -- could only be used against Plata as party admissions (Evid. Code § 1230) and not against Mr. Tran; as to Mr. Tran, the statements were inadmissible hearsay (Evid. Code § 1200). It was an out of court statement introduced to prove that, in fact, Mr. Tran's tattoo was meant to convey "blow me and suck me," not the expression of remorse, "Forgive me." Moreover, because Plata did not testify and was otherwise unavailable for cross-examination at the joint trial, and because Mr. Tran had no prior opportunity to cross-examine Plata, the admission of the statements violated *People v. Aranda*, *supra*, 63 Cal.2d 518 and *Bruton v. United States*, *supra*, 391 U.S. 123, and could not be used against Mr. Tran.

In reality, the prosecutor told the jury that, in fact, the evidence *could* be used directly against Mr. Tran. The prosecutor told the jury in closing argument that the

evidence proved a gang purpose -- that Mr. Tran bragged about the crimes to benefit the gang -- and showed that Mr. Tran lacked remorse about the crime -- thus, deserved to die. Of course, not only did the erroneously admitted evidence, and the prosecutor's argument, skew the jury's ability to determine whether the crimes were committed for the benefit of the gang at the guilt phase, the evidence spoke directly to a critical issue at the penalty phase, i.e. whether Mr. Tran was remorseful.

In other words, notwithstanding the trial court's limiting instruction that Plata's hearsay statements could only be used against Plata, the prosecutor explicitly and repeatedly relied on Plata's hearsay statements against Mr. Tran to support its theory at every stage of trial. The jury here could hardly be expected to understand and follow a limiting instruction that the prosecutor himself refused to follow, and instead, by words and conduct in closing argument, effectively urged the jury to ignore.

There is another federal constitutional dimension to the error here. The Supreme Court has repeatedly recognized death is a unique punishment, qualitatively different from all others. (*See*, *e.g.*, *Gregg v. Georgia* (1976) 428 U.S. 153, 181-188; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gardner v. Florida* (1977) 430 U.S. 349, 357; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Beck v. Alabama* (1980) 447 U.S. 625, 638.) Relying on this fundamental premise, the Court has held there is a corresponding Eighth Amendment need for procedures in death penalty cases which increase the reliability of both the guilt and penalty phase processes. (*See*, *e.g.*, *Beck v. Alabama*, *supra*, 447 U.S.

625 [guilt phase]; *Gardner v. Florida*, *supra*, 430 U.S. at p. 357 [penalty phase].)

Here, the trial court was required to determine whether each statement was made under circumstances which showed it was "sufficiently reliable to warrant admission despite its hearsay character." (*People v. Cudjo* (1993) 6 Cal.4th 585, 607.) As this Court has noted, "the precedents in the hearsay area provide a persuasive reminder that declarations against penal interest may contain self-serving and unreliable information" and, consequently, "an approach which would find a declarant's statement wholly credible solely because it incorporates an admission of criminal culpability is inadequate." (*People v. Duarte* (2000) 24 Cal.4th 603, 611, quoting *People v. Campa* (1984) 36 Cal.3d 870, 883, italics omitted.) As scholars have observed, "'a self-serving statement lacks trustworthiness whether it accompanies a disserving statement or not.'" (*People v. Leach* (1975) 15 Cal.3d 419, 439, fn. 15, quoting Jefferson, Declarations Against Interest: An Exception to the Hearsay Rule (1944) 58 Harv. L.Rev. 1, 60.) Whatever the rule in connection with a non-capital case, admitting Plata's self-serving statements that he did not strangle or kill Linda, and there was nothing he could do about the killing, and he was "pissed off" afterwards, and likewise, his statements that supported the state's theory that Mr. Tran was unremorseful, was unreliable evidence which violated the Eighth Amendment's requirement of enhanced reliability at both the guilt and penalty phases.

D. Because Plata's Unrecorded Statements to Ly Maximized His Participation and Culpability in the Crime, They Were Admissible as Declarations Against Interest under Evidence Code Section 1230, and the Trial Court Erred in Instructing the Jury That They Could Not Be Used in Determining Mr. Tran's Culpability.

1. Plata's inculpatory statements to Ly were admissible as declarations against interest under Evidence Code section 1230.

As noted, the state's theory was that Mr. Tran strangled and killed Linda, and Plata was guilty of murder on an aider and abettor theory. (8 RT 1675.) To support this theory, the state introduced redacted recordings of statements made by Mr. Tran to Ly in the holding cell. In the recording, Mr. Tran told Ly that he was arrested for an Irvine murder, and when asked by Ly if Mr. Tran thought "they got you good," Mr. Tran replied, "I don't even know what they got on me" and "if Noel's talking you know, I'm screwed," but he did not know if "Noel talked." (6 CT 1610, 1613, 1616.) Ly asked, "But who killed her, you or him?" (6 CT 1613.) There was no verbal response recorded on the tape, but Ly testified that Mr. Tran pointed to himself and nodded his head. (6 CT 1613; 7 RT 1424-1425.) When asked why he "t[ook] her out," Mr. Tran replied, "I don't know what to say, man. Tie 'em up, you know. What can you do?" (6 CT 1617.) He indicated he had to accept it, stating in Vietnamese, "You play and accept," and that he "felt bad about it, I feel stupid enough already . . . ." (6 CT 1628.) The prosecutor relied heavily on this recording, and Ly's testimony that Mr. Tran pointed to himself when asked about who

killed Linda, to argue that Mr. Tran was the actual killer. (9 RT 1672-1675.)[16]

But the jury also heard the contradicting evidence that Plata was the one who killed Linda, which directly undercut the state's theory. Thus, as noted previously, Ly testified that Plata told him that he was the one who killed Linda, stating "he had killed the Korean girl," and "had to do it," which confirmed earlier and repeated statements by Plata to Ly admitting that he killed Linda. (7 RT 1445, 1452-1454, 1446.) Plainly this evidence was admissible against Plata.

Indeed, as noted above, Evidence Code section 1200 provides that "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 asserted" is inadmissible hearsay. Yet there is a well-recognized exception to this hearsay rule. Evidence Code 1220 permits evidence of a hearsay statement "when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."

Here, Plata confessed to Ly that he (1) killed "the Korean girl" and (2) "had to do it." Taken together, these statements show that Plata not only killed Linda, but in fact,

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[16] In at least one respect, the transcript of the redacted excerpt was incorrect. The transcript read in relevant part that Mr. Tran claimed, "You know if Noel's talking you know, I'm screwed, that's all I got to say." (6 CT 1613.) In fact, the original transcript, proffered by the state, of this excerpt read, "You know if Noel's talking you know." Ly responded, "True." Mr. Tran replied, "That's all I got to say." (3 CT 641.) This appears, however, to be a problem with form over substance. The message of both transcript excerpts was clear: if Plata was talking to police, Mr. Tran would be implicated.

made the decision to kill. Plainly, Plata's statements that he killed the victim subjected him to the risk of prosecution, and were admissions within the meaning of Evidence Code section 1220. And the trial court here no doubt reached precisely this result in admitting these statements for the jury to use against Plata.

Yet there is another relevant exception here. Evidence Code section 1230 permits hearsay declarations against penal or pecuniary interest when "the declarant is unavailable" and "the statement, when made, . . . so far subjected him to the risk of civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." Under this exception, of course, Ly's testimony that Plata admitted "he had killed the Korean girl" and "had to do it" -- was entirely admissible to prove that Mr. Tran was not the actual killer.[17]

Unfortunately, however, the trial court's instructions precluded the jury from relying on this evidence in connection with Mr. Tran. The court told the jury, "You have heard evidence that each of the two defendants made statements out of court and before

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[17] In full, Evidence Code section 1230 reads:

> "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

the trial. You may consider that evidence only against the defendant making the statements and not against the other defendant." (4 CT 998.) Thus, the jury was explicitly told it could consider the evidence that Plata admitted killing Linda "only" against Plata, effectively precluding the jury from relying on this evidence in determining Mr. Tran's role in the killing.

Of course this instruction was entirely proper as to Plata's recorded statements to Ly which implicated Mr. Tran as the actual killer. Indeed, the trial court specifically told the parties that the instruction was given for this purpose. (6 RT 1275.) But under the circumstances of this case, where Plata also made unrecorded statements that exonerated Mr. Tran as the actual killer, the court's instruction was error. If the case had been severed in the first place this instruction would never have been given at all.

2. The trial court's instruction, which precluded the jury's use of Plata's statements that he killed Linda to determine Mr. Tran's role in the killing, violated Due Process.

The error here did not simply violate state law. The Fifth Amendment provides that no person may be deprived of liberty without "due process of law." Under this constitutional guarantee, while a defendant is not entitled to a perfect trial, he is entitled to a fair one. (*Estes v. Texas* (1965) 381 U.S. 532.) In gauging the fairness of a trial, "few rights are more fundamental than that of an accused to present witnesses in his own defense." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) Thus, the right to present evidence "has long been recognized as essential to due process." (*Id.* at p. 294.)

The Sixth Amendment provides that defendants in criminal cases shall "have compulsory process for obtaining witnesses in his favor . . . ." The Sixth Amendment requires "at a minimum that criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt." (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56.)

Applying this well established authority, the Supreme Court has made clear that the erroneous exclusion of a defendant's evidence may violate the defendant's Fifth Amendment right to a fair trial as well as his Sixth Amendment right to present a defense. (*See*, *e.g.*, *Davis v. Alaska* (1974) 415 U.S. 308, 319-320; *Washington v. Texas* (1967) 388 U.S. 14, 19, 23; *Chambers v. Mississippi*, *supra*, 410 U.S. at p. 302.) The Supreme Court's case law in this area stands squarely for the proposition that where a trial court excludes critical, reliable defense evidence which fully corroborates a defense presented to the jury, the defendant's Fifth and Sixth Amendment rights are violated. (*See*, *e.g.*, *Chambers v. Mississippi*, *supra*, 410 U.S. at p. 302; *Washington v. Texas*, *supra*, 388 U.S. at pp. 19, 23.) Thus, when certain evidence is critical to the theory of defense presented to the jury, the Constitution does not permit the state to exclude that evidence *even where that exclusion is in full conformity with state rules of evidence*. (*See*, *e.g.*, *Davis v. Alaska*, *supra*, 415 U.S. at pp. 319-320; *Chambers v. Mississippi*, *supra*, 410 U.S. at p. 302; *Washington v. Texas*, *supra*, 388 U.S. at pp. 19, 23.)

The Supreme Court has applied these very principles to a trial court's exclusion of

evidence which places a defendant's purported confession in context. (*See Crane v. Kentucky* (1986) 476 U.S. 683.) There, after defendant was arrested for murder, he was interrogated by police. Ultimately defendant confessed to the murder. Prior to trial, the defendant moved to suppress this confession. The trial court determined that the confession was voluntary and denied the motion.

At trial, defendant denied complicity in the murder. Central to this defense was his claim that the confession he gave to police was unreliable and should not be believed. Defendant offered evidence about the circumstances of the interrogation which called into question the credibility of some of the incriminating statements defendant had made during the interrogation. As the Supreme Court recognized, defendant's objective was to give context to the confession and thus challenge the confession's credibility. (476 U.S. at p. 684.) The trial court excluded the testimony under state law.

On appeal, the Court first observed that the Constitution, whether rooted in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, guarantees criminal defendants "a meaningful opportunity to present a complete defense." (*Id*. at p. 690, *quoting California v. Trombetta* (1984) 467 U.S. 479, 485.) "That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." (*Ibid*.) Unless there is a valid state justification, the exclusion of this exculpatory

evidence "deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing." (*Id*. at pp. 690-691 [citations omitted].)

Applying these principles to the case before it, the Court held that the evidence which gave context to defendant's confession could not be excluded consistent with Due Process. (*Id*. at p. 691.) This was especially true where a central theme of the defense case was that defendant's earlier admissions of guilt should not be believed. (*Id*. *Accord Simmons v. South Carolina* (1994) 512 U.S. 154, 168-169 [in a capital case, Due Process does not permit the state to argue future dangerousness to the public as a reason to sentence defendant to death while at the same time exclude evidence showing that he would never get out of prison].)

The Court reached a similar result in *Chambers*. There, defendant was charged with murder. He sought to introduce hearsay evidence showing that a third person had confessed to the murder to three individuals. (*Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 292-293.) The state trial court excluded the evidence under the state's hearsay rules, which did not include an exception for statements against penal interest. (*Id*. at pp. 292-293, 299.) The Supreme Court noted that although the evidence was hearsay, it was nonetheless reliable. (*Id*. at pp. 300-301.) In light of its reliability, and although the evidence violated state law, the Court held that exclusion of the evidence violated defendant's constitutional rights. (*Id.* at p. 302-303.)

Not surprisingly, courts throughout the country have followed the principles expressed and applied in *Chambers* and *Crane*, holding that a trial court's exclusion of critical evidence which fully corroborates a defense presented to the jury is unconstitutional. (*See*, *e.g.*, *Depetris v. Kuykendall* (9th Cir. 2001) 239 F.2d 1057, 1062 [exclusion of evidence violated Due Process where it went to "the heart of the defense"]; *Lyons v. Johnson* (2d Cir. 1996) 99 F.3d 499 [exclusion of evidence violated Due Process where it would have corroborated a theory of defense presented to the jury through the testimony of other witnesses]; *Dey v. Scully* (E.D.N.Y. 1997) 952 F.Supp. 957 (same). *Cf. Franklin v. Henry* (9th Cir. 1997) 122 F.2d 1270, 1273 [where a defendant's culpability hinges largely on the testimony of a prosecution witness, the erroneous exclusion of evidence critical to assessing the credibility of that witness violates the Constitution]; *Justice v. Hoke* (2d Cir. 1996) 90 F.3d 43, 47-49 [same]; *Franklin v. Duncan* (N.D.Cal. 1995) 884 F.Supp. 1435, 1455.)

The constitutional principle applied in *Crane* and *Chambers*, and followed throughout the country since, controls this case. Ly testified that Plata confessed to him that he was the one who killed Linda, stating "he had killed the Korean girl," and "had to do it," which confirmed earlier and repeated statements by Plata to Ly admitting that he killed Linda. (7 RT 1445, 1452-1454, 1446.) The trial court told the jury it could hold evidence of Plata's statement against Plata. (4 CT 988.) Yet the trial court's instructions prevented Mr. Tran from relying on this very same evidence. Plata's statements to Ly --

that he killed Linda and "had to do it" -- directly contradicted Plata's later recorded statements to Ly -- that he "didn't strangle her" but was "just there," and tried to, but could not, stop Mr. Tran from killing Linda, and thus, entirely supported Mr. Tran's defense. Precluding Mr. Tran from relying on this important defense evidence violated Due Process.

E. The Admission of Plata's Recorded Statements Which Implicated Mr. Tran as the Actual Killer, and Exclusion of Plata's Unrecorded Statements Which Exonerated Mr. Tran as the Actual Killer, Whether Considered Singly or in Combination, Require Reversal.

Where a reviewing court finds that a trial court abused its discretion in failing to grant a defendant's motion to sever, the defendant is entitled to relief on appeal when he can demonstrate, to a reasonable probability, that he "would have received a more favorable result in a separate trial." (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 41.) Because this error also violated Mr. Trans's federal constitutional rights, however, the error is subject to the *Chapman* standard of prejudice, requiring the state to prove the error harmless beyond a reasonable doubt. (*See Chapman v. California* (1967) 386 U.S. 18, 24.) The beyond-a-reasonable-doubt standard of Chapman "requir[es] the beneficiary of a [federal] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (Id. at p. 24.) "To say that an error did not contribute to the ensuing verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt* (1991) 500 U.S. 391, 403.) "Thus, the focus is what the jury

actually decided and whether the error might have tainted its decision. That is to say, the issue is 'whether the ... verdict actually rendered in this trial was surely unattributable to the error.'" (*People v. Neal* (2003) 31 Cal.4th 63, 86, quoting *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) Significantly, even if a trial court acted within its discretion in denying severance, "'the reviewing court may nevertheless reverse a conviction where, because of the consolidation, a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law.'" (*People v. Cleveland* (2004) 32 Cal.4th 704, 726.) Severance motions in capital cases receive heightened scrutiny for potential prejudice. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1173; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 44.) Ultimately, however, there is no need for the Court to decide which standard should apply; under any standard, reversal is required here.

This Court's recent decision in *People v. Grimes* (2016) 1 Cal.5th 698 is instructive. In *Grimes*, there was no question that the capital defendant was not the actual killer. Instead, the state proceeded on a felony murder theory, and primarily relied on a jailhouse informant's testimony that defendant admitted to personally ordering the victim's death. This Court held that the trial court erred by excluding a defendant's evidence of an accomplice's out-of-court statements that defendant took no part in the accomplice's actual killing of the murder victim during a robbery, and that defendant reacted with surprise when accomplice killed the victim, which undermined the jailhouse informant's testimony. (1 Cal.5th at p. 710-719.)

With respect to the effect of the error at the guilt phase, defendant acknowledged that the trial court's erroneous exclusion of the proffered evidence had no effect on his conviction for felony murder. (*Id.* at p. 720.) The Court accepted this conclusion, reasoning "under the felony-murder rule, he was guilty of this crime regardless of whether he had anything to do with the killing." (*Id.*)

Turning to the felony murder special circumstances, the Court began, "To find the special circumstances true, the jury had to find either that defendant acted with the intent to kill or that he assisted in the criminal enterprise as a 'major participant' and acted with 'reckless indifference to human life.'" (*Id.* at p. 720, citing § 190.2, subds. (c) & (d).) The Court found that, "The excluded evidence that defendant expressed surprise after Morris killed Bone might well have affected the jury's determination with respect to whether defendant had the intent to kill." (*Id.* at p. 720.) But, according to the Court, "the prosecution relied primarily not on that theory but on the evidence that defendant was a major participant who acted with reckless indifference to human life," and the evidence as to that theory "was overwhelming," including defendant's statement to police that he participated in the planning of the burglary-robbery, that he handed a gun to the accomplice, and that he participated in ransacking victim's house. (*Id.* at pp. 720-721.)

The Court then held that the error was not harmless beyond a reasonable doubt as to the jury's death verdict. (*Id.* at pp. 721-723.) The Court first recognized that "[u]nder California law, the effect of a trial court's erroneous ruling on the admissibility of

evidence is ordinarily measured by the standard first described in *People v. Brown* (1988) 46 Cal.3d 432, 448 []: '[W]e will affirm the judgment unless we conclude there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred.' This reasonable possibility test '"is the same, in substance and effect"' as the test for errors that violate the federal Constitution, which requires reversal unless the reviewing court can say beyond a reasonable doubt that the error was harmless." (*People v. Grimes*, *supra*, 1 Cal.5th at p. 721, citing *People v. Pearson* (2013) 56 Cal.4th 393, 472.) The Court then held that the prosecutor heavily relied on the circumstances of the case in closing argument at the penalty phase, and even though the prosecutor never argued that defendant personally killed the victim, the prosecutor argued that defendant was directly responsible for planning the murder, and that defendant had not given the jury a reason to doubt a jailhouse informant's testimony that defendant admitted to personally ordering the victim's death, and thus, "the excluded statements would have given the defense a substantial basis for countering the prosecutor's argument." (*People v. Grimes*, *supra*, 1 Cal.5th at p. 721.) The Court concluded, "We cannot say with certainty whether the proffered evidence would ultimately have caused the jury to render a different verdict," but "given the centrality of the issue of defendant's role in the murder . . . we also cannot say that the jury's verdict was 'surely unattributable' to the trial court's error" and instead "find a 'reasonable (i.e., realistic) possibility' that it would have rendered a different verdict." (*Id*. at p. 723,

quoting *People v. Neal*, supra, 31 Cal.4th at p. 86; *People v. Brown*, *supra*, 46 Cal.3d at p. 448.)

Grimes leads inexorably to the conclusion that the guilt and death verdicts in this case must be reversed. Just as in *Grimes*, the trial court precluded the jury from considering evidence that directly shed light on Mr. Tran's role in the killing, and directly undermined the state's evidence that Mr. Tran was the actual killer. The state presented a jailhouse informant's testimony that Mr. Tran admitted -- by pointing to himself when asked by Ly who killed Linda -- that he was the actual killer. There was no corroboration -- by way of eyewitness or video-recording -- that this actually occurred. Nonetheless, this was the single and most damning piece of evidence upon which the state relied to support its sole theory that Mr. Tran was the actual killer. Further the jury was permitted to consider Plata's recorded self-serving statements to Ly in the holding cell that he was involved in the robbery, but did not kill Linda, there was "nothing he could do" about the killing and he was "pissed off" afterwards. Just as in *Grimes*, however, there was the significant defense evidence that Plata confessed to killing Linda, and believed he had to kill her. But given the trial court's limiting instructions -- which told the jury that it could only consider this evidence against Plata -- the jury was precluded from considering evidence which would have directly undercut the state's theory at all phases of trial.

First things first. Just as in *Grimes*, the penalty verdict must be reversed. The state's sole theory at trial was that Mr. Tran was the actual killer. Plata was guilty, if at

all, as an aider and abettor. Just as in *Grimes*, the prosecutor heavily relied on the circumstances of the crime to urge the jury to return a verdict of death. According to the prosecutor, "We're gonna talk about a lot of aggravating circumstance just for what they did to Linda, forget about everything else." (12 RT 2368. *See also* 12 RT 2365 ["Some people engage in such horrible conduct that they forfeit the right to live. Ronald Tran and Noel Plata."]; 2365-2366 ["What Ron Tran and Noel Plata did cries for, screams for the ultimate punishment . . . ."]; 2420 ["The question is is it (LWOP) harsh enough for the conduct. Is it harsh enough for what they did. And nothing is. Nothing is. That penalty (death) is the closest that we can get."].) Significantly, the prosecutor argued, "You already heard the worse about Tran. That by itself is enough to give him the death penalty. The thing we just called the worse about Tran, what he did to Linda Park." (12 RT 2424.) And, as the state had done at all times at trial, the prosecutor relied on Ly's testimony that when he asked Mr. Tran in the holding cell who killed Linda, Mr. Tran pointed to himself, to support its theory that Mr. Tran was the actual killer. (12 RT 2385.) The prosecutor's reliance on Mr. Tran's conduct, and his role as the actual killer, shows just how important this evidence was to the state's penalty case. (*See People v. Powell* (1967) 67 Cal.2d 32, 55-57 [prosecutor's reliance on evidence in final argument reveals how important the prosecutor "and so presumably the jury" considered the evidence]; *People v. Cruz* (1964) 61 Cal.2d 861, 868 [same]. *Accord United States v. Kojoyan* (9th Cir. 1996) 8 F.3d 1315, 1318 ["closing argument matters; statements from the prosecutor

matter a great deal"].)

Just as in *Grimes*, evidence that Mr. Tran was *not* the actual killer -- Plata's statements to Ly in the Vietnamese restaurant that, in fact, *he* killed "the Korean girl" and believed "he had to do it" -- directly undercut the state's theory that Mr. Tran deserved death because he actually killed Linda. Because the jury was never permitted to consider this evidence in determining whether Mr. Tran should live or die, reversal of the death verdict is required based on this error alone.

But this conclusion is beyond peradventure when considered in combination with the trial court's second error in admitting Plata's recorded statements to Ly that he did not kill Linda, there was "nothing he could do" about the murder, and he was "pissed off" afterwards. Not only did this evidence confirm the state's theory that Mr. Tran was the actual killer, but the evidence made Mr. Tran more culpable in Linda's killing, and thus more deserving of death in the jury's eyes.

In this regard, under California law, when a capital jury is faced with deciding whether to impose a death sentence, or give life, it must weigh aggravating and mitigating factors. (Pen. Code § 190.3) Among the designated aggravating factors under California's death penalty scheme is Penal Code section 190.3(a), which permits the jury to impose death by relying on the "circumstances of the crime." As this Court has explained, a "circumstance of the crime" under section 190.3(a) "is concerned with those circumstances that make a murder especially aggravated, and therefore more culpable and

deserving of the ultimate penalty." (*People v. Bunyard* (2009) 45 Cal.4th 836, 897, *citing People v. Jenkins* (2000) 22 Cal.4th 900, 1052-1053.) Significantly, in applying the "circumstances of the crime" aggravating factor under section 190.3(a), it is well established that where a defendant has acted alone in deciding to kill, that fact is aggravating within the meaning of section 190.3(a), and makes the defendant both more culpable and deserving of death. (*See e.g.*, *People v. Carpenter* (1997) 15 Cal.4th 312, 415. *See also People v. Howard* (1992) 1 Cal.4th 1132, 1195 [reiterating aggravating nature of the fact that a defendant acted alone in killing the victim].)

Here, Plata told Ly that he did not participate in the killing and, in fact, there was "nothing he could do" about it and was "pissed off" afterwards. This was compelling evidence not only that Mr. Tran acted alone in killing Linda, but that he alone had made the decision to kill the victim, and could not be controlled. Pursuant to cases like *Carpenter* and *Howard*, as to Mr. Tran this evidence was aggravating under Penal Code section 190.3(a) and made Mr. Tran "more culpable and deserving of the ultimate penalty." (*See People v. Bunyard*, *supra*, 45 Cal.4th at p. 897.)

Moreover, the trial court's penalty phase instructions permitted the jury to rely on Plata's recorded statements to Ly in determining whether Mr. Tran should live or die. Indeed, although there was a limiting instruction in the guilt phase of trial -- albeit an ineffectual one -- which told the jury that it could not consider Plata's statements against Mr. Tran the trial court told the jury at the penalty phase to "disregard all of the

instructions I gave you earlier." (5 CT 1332.) The court instead instructed, "I will give you a set of instructions that apply to this phase of the trial" and "you must follow only this new set of instructions in this phase of trial. (5 CT 1332.) The court further told the jury that it "must consider the arguments of counsel and all the evidence presented during both phases of the trial," but then never told the jury that it still could not use Plata's recorded statements against Mr. Tran. (5 CT 1370.)

The prosecutor took full advantage of this instructional gap. In closing argument at the penalty phase, the prosecutor told the jury, "I know you heard the judge say that all the evidence that was introduced in the guilt phase is still before you. All the -- everything. So when you go back there, everything is before you, the same exhibits on top of the ones that we introduced right now. So everything is before you." (12 RT 2385.) The prosecutor too never told the jury that it could not use Plata's recorded statements to Ly against Mr. Tran at the penalty phase. Instead, the jury was permitted to rely on Plata's statements that he did not kill Linda, and could do nothing about it, and consider the prosecutor's arguments that Mr. Tran -- not Plata -- was the actual killer, and, as noted earlier, Plata's statements that that Mr. Tran's tattoo -- which translated "Forgive me" -- was not an expression of remorse, but actually meant to convey, "blow me and suck me." (8 RT 1735.) In other words, nothing precluded the jury from considering Plata's recorded hearsay statements against Mr. Tran at the penalty phase -- on the critical issues of Mr. Tran's role in the murder and whether he exhibited remorse.

The error, whether considered singly, or in combination with the trial court's error in precluding the jury from considering Plata's confession in determining whether Mr. Tran should live or die cannot be deemed harmless.

The guilt verdict and special circumstance findings in this case fare no better. As noted above, this Court in *Grimes* found that the erroneously excluded evidence -- that defendant took no part in the actual killing and expressed surprise afterwards -- "might well have affected the jury's determination with respect to whether defendant had the intent to kill." (*People v. Grimes*, supra, 1 Cal.5th at p. 720.) The Court had no occasion to determine whether the error affecting an intent to kill theory was harmless; as the Court noted, defendant was convicted on a felony murder theory and thus, the identity of the actual killer was inconsequential.

In stark contrast to Grimes here, Mr. Tran was not simply prosecuted on a felony murder theory. Instead, the trial court instructed the jury that defendants were "being prosecuted for murder under two theories: (1) malice aforethought, and (2) felony murder." (4 CT 1018.) The prosecutor relied on both theories in closing argument, telling the jury, "You can go either way." (8 RT 1680.)

As to the malice aforethought theory, the prosecutor conceded that Mr. Tran and Plata had no intention to kill Linda up until they arrived at her home, and only when Mr. Tran realized Linda recognized him, he decided to kill her and, according to Plata, "there was nothing [he] could do" to stop Mr. Tran. (8 RT 1685-1686.) Thus, according to the

state, Mr. Tran was the actual killer and Plata was guilty as the aider and abettor.

As to the felony murder theory, the prosecutor argued that one part of the felony murder instructions (CALCRIM 540A) "applies to the actual perpetrator, the one that did the murder, Mr. Tran. See, it says, 'the defendant committed the fatal act.'" (8 RT 1688.) The second section of the felony murder instructions (CALCRIM 540B) "applies to Mr. Plata, the other one" who was the "coparticipant." (8 RT 1688.)

Under either theory then, the identity of the actual killer (or perpetrator) and the coparticipant was critical to the state's case against Mr. Tran. Indeed, the prosecutor principally relied on the recorded statements between Mr. Tran and Ly to urge the jury to conclude that Mr. Tran -- not Plata -- killed Linda, telling the jury, "How does the DA know that Tran strangled Linda," and answering, "Because Tran told us he did. He told Le [sic]." (8 RT 1734.) And naturally, co-defendant's counsel got on board with the prosecutor's theory that Mr. Tran -- not Plata -- killed Linda. In closing argument, counsel relied on the recorded jail conversation between Plata and Ly -- in which Plata claimed he did not kill Linda -- was "on tape," and "it is what it is." (8 RT 1724.) Counsel further reminded the jury that Plata told Ly, "Hey man, there was nothing I could do," and "he was upset after this thing happened," which meant, according to counsel, "means I couldn't do anything do stop it." (8 RT 1727, 1731.)

Thus, the erroneously admitted evidence that Mr. Tran was the actual killer -- Plata's statements to Ly that he did not kill Linda, there was "nothing he could do" about

the murder, and he was "pissed off" afterwards -- was the fulcrum of both the state and co-defendant's case. Without this evidence, the entire premise of this theory would fail. And the erroneously excluded evidence that Mr. Tran was *not* the actual killer -- Plata's statements to Ly in the Vietnamese restaurant that, in fact, *he* killed "the Korean girl" and believed "he had to do it" -- directly undercut both the state and co-defendant's theory that Mr. Tran was guilty of murder because he was the perpetrator who had an intent to kill, could not be controlled, and Plata was merely a coparticipant.

Even if this Court concludes that the error did not affect the felony murder theory of murder -- as it concluded in *Grimes* -- there still remains the adversely affected intent to kill theory of murder relied upon by the state. Indeed, as this Court found, evidence a defendant took no part in the actual killing "might well have affected the jury's determination with respect to whether defendant had the intent to kill." (*People v. Grimes*, *supra*, 1 Cal.5th at p. 720.)

A trial court's submission of "legally insufficient" alternative theories of liability requires reversal unless the record affirmatively establishes that the jurors actually based their verdict on a legally valid ground. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129; *People v. Swain* (1996) 12 Cal.4th 593, 607. *Accord Hedgpeth v. Pulido* (2008) 555 U.S. 57, 61 [improper instruction on invalid alternative theory constitutes constitutional error]; *Yates v. Evatt* (1991) 500 U.S. 391, 404, overruled on other grounds in *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [an error in instructing on a mandatory

presumption can be deemed harmless only if "the jury *actually* rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption."].) Insofar as the verdict will rarely show that the jury expressly relied on the proper theory, the error "'can be harmless only if the jury verdict on other points effectively embraces this one or if it is impossible, upon the evidence, to have found what the verdict *did* find without finding this point as well.'" [Citation.]" (*People v. Chun* (2009) 45 Cal.4th 1172, 1204, emphasis in original.) In other words, if other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the proper findings necessary for conviction or true finding, the trial court's submission of legally insufficient theories can be deemed harmless. The state will be unable to meet this burden here.

The jury returned a general verdict on the murder charge. (4 CT 954-955, 1181-1182.) The jury gave no indication in its verdict that it was not relying on the state's intent to kill theory of murder to support the verdict. And the prosecutor here did not elect to primarily rely on either theory. Instead, the prosecutor relied on both theories in closing argument, telling the jury, "You can go either way." (8 RT 1680.)

On this record, where the jury returned a general verdict, and the record does not otherwise reveal upon which theory of murder the jury relied, the state will be unable to prove beyond a reasonable doubt that all jurors "effectively" rejected the intent to kill theory and instead, unanimously relied on the felony murder theory. (*See People v. Chun*,

supra, 45 Cal.4th at p. 1204.) Reversal of the guilt verdict is required.

For similar reasons, the special circumstances findings must be reversed. In *Grimes*, the Court concluded the error was harmless as to the special circumstance findings because the state did not rely on an intent to kill theory (which the excluded evidence would have affected), but instead on the theory that defendant was a major participant who acted with reckless indifference to human life (which the excluded evidence would not have affected), and the evidence as to the latter theory "was overwhelming." (*Id*. at pp. 720-721.)

Here, in urging the jury to find the special circumstances true as to Mr. Tran, the state relied solely on the theory that Mr. Tran was the actual perpetrator, and that the special circumstance instructions "for somebody who is not the actual killer" solely applied to Plata because "Mr. Plata is not the actual killer." (8 RT 1693.) Obviously, the state's theory would be successful if the jury believed that Ly's testimony that Mr. Tran "confessed" by pointing to himself when asked about who killed Linda. The state -- and co-defendant -- were able to corroborate Ly's testimony with the erroneously admitted evidence that Plata told Ly that he did not kill Linda, there was "nothing he could do" about the murder, and he was "pissed off" afterwards. The defense theory that Plata was the actual killer could not be successful unless Mr. Tran was able to challenge Plata's jailhouse denial, and undercut the reliability and credibility of Ly's testimony about Mr. Tran's "confession." Plata's statements to Ly that, in fact, *he* killed "the Korean girl" and

believed "he had to do it" -- which the trial court kept from the jury -- would have allowed Mr. Tran to do just that.

Indeed, the admission of Plata's jailhouse statements inculpating Mr. Tran, and exclusion of Plata's confession exculpating Mr. Tran, left the jury with a fundamentally distorted impression of Mr. Tran's involvement in the actual killing. The jury was not permitted to consider Plata's confession that he was the actual killer in determining the credibility of Ly's claim that Mr. Tran confessed that he killed Linda. The jury only heard Plata's jailhouse statements in which he took no responsibility for the actual killing.

Moreover, the case against Mr. Tran on this critical issue was hardly overwhelming. Indeed, the prosecutor's only real evidence that Mr. Tran killed Linda was Ly's testimony that Mr. Tran pointed to himself when asked who killed Linda. (6 CT 1613; 7 RT 1424-1425.) The prosecutor relied heavily on this testimony to urge the jury to conclude that Mr. Tran -- not Plata -- killed Linda, telling the jury, "How does the DA know that Tran strangled Linda," and answering, "Because Tran told us he did. He told Le [sic]." (8 RT 1734.)

But this nonverbal act was not recorded or otherwise corroborated (except by the erroneous admission of Plata's hearsay statements that he did not kill Linda). Indeed, other than Ly's testimony about Mr. Tran's "confession," there was no solid evidence that Mr. Tran confessed to killing Linda, much less evidence that Mr. Tran actually killed Linda. On this record, allowing the jury to consider Plata's claim to Ly that he did not

kill Linda, and instructing the jury that it could not consider Plata's earlier confession to Ly that he killed Linda, precluded Mr. Tran from attacking the critical evidence against him and cannot be found harmless under either the state or federal standard. Reversal of the special circumstance findings and verdict of death is required.

F. Conclusion.

The determination as to whether Mr. Tran is entitled to relief based on a claim of improper joinder turns on whether joinder of parties rendered his trial fundamentally unfair. (*See Williams v. Superior Court, supra,* 36 Cal.3d at pp. 451-452); *Grisby v. Blodgett, supra,* 130 F.3d 365.) A joinder of defendants renders a trial fundamentally unfair when evidence which substantially bolstered the prosecution's case and undermined an defendant's defense was introduced that would not have been admissible against defendant if he were tried separately. (Cf. *Zajiro v. United States, supra,* 506 U.S. at p. 539 ["Evidence probative of a defendant's guilt but technically admissible only against a codefendant ... might present a risk of prejudice."].)

Here, joinder resulted in the admission of Plata's statements to Ly that he did not kill Linda, there was nothing he could do about the killing, and he was "pissed off" afterwards, which violated *Aranda* and *Bruton.* The trial court then precluded the jury from considering exculpatory evidence that Plata repeatedly admitted to Ly he did indeed kill Linda. Whether considered singly, or in combination, the errors resulting from the joinder in Mr. Tran's case rendered his trial fundamentally unfair. (*Williams v. Superior*

Court, supra, 36 Cal.3d at pp. 451-452); *Grisby v. Blodgett, supra,* 130 F.3d 365.)

Reversal of the guilt verdict, and special circumstance findings, and death judgment are required.

IV. THE TRIAL COURT VIOLATED MR. TRAN'S FEDERAL AND STATE RIGHTS TO PRESENT A DEFENSE AND TO PROOF BEYOND A REASONABLE DOUBT BY TELLING JURORS THAT CERTAIN DEFENSE EVIDENCE REQUIRED "SUPPORTING EVIDENCE" IN ORDER TO "PROVE ANY FACT" AT ISSUE, AND TO VIEW CERTAIN DEFENSE EVIDENCE "WITH CAUTION."

A. The Relevant Facts.

In its case-in-chief, the state called confidential informant Qui Ly to testify against both defendants. Ly testified that he was friends with Plata, and "hung out" with Mr. Tran, and both made statements to Ly as a result of that friendship. It is fair to say that Ly provided testimony on which both sides ultimately sought to rely.

On one hand, much of Ly's testimony supported the state's theory of the case. Mr. Tran has detailed this evidence in Argument III-A, *supra*, and there is no need to repeat that discussion here. Suffice it to say, Ly testified about a recorded jail conversation with Plata, in which Plata admitted being involved in the Irvine robbery, but claimed he did not strangle the victim or "do this murder." (7 RT 1437, 1444.) Instead, Plata said there was "nothing he could do" and was "pissed off" afterwards. (7 RT 1438.)

Plata further told Ly that Mr. Tran's tattoo, which Mr. Tran got shortly after the murder, and, according to Mr. Tran's girlfriend Joann, said in Korean, "Forgive me" (5 RT 1048; 6 RT 1153; 8 RT 1552), actually meant "blow me and suck me." (8 RT 1554.) State witnesses relied on Plata's statement to opine that Mr. Tran was proud of killing Linda, who was Korean, and actually taking credit and bragging about the murder by getting the tattoo. (6 RT 1146, 1157; 8 RT 1553-1554.)

Ly finally testified about the separate recorded jail conversation with Mr. Tran, in which Mr. Tran said, "I don't even know what they got on me" and "if Noel's talking you know, I'm screwed." (6 CT 1613.) Ly asked, "But who killed her, you or him?" (6 CT 1613.) According to Ly, Mr. Tran pointed to himself and nodded his head. (6 CT 1613; 7 RT 1424-1425.) When asked why he "t[ook] her out," Mr. Tran replied, "I don't know what to say, man. Tie 'em up, you know. What can you do?" (6 CT 1617.)

Plainly, Ly's testimony -- and the recorded jail statements -- supported the state's theory of the case. If Ly was believed, Mr. Tran strangled and killed Linda. Plata was guilty, if at all, as an aider and abettor, and believed there was "nothing he could do" about Mr. Tran killing Linda, because Linda recognized Mr. Tran. Mr. Tran was not remorseful about killing Linda, but rather was proud, and bragged about the murder by getting a tattoo in Korean, which was meant to convey "blow me and suck me."

But, on the other hand, some of Ly's testimony also supported the defense. On cross-examination, Ly testified as to earlier unrecorded statements Plata made to him about Linda's death. (7 RT 1410.) Ly told police that, in May or June of 1996, Ly and Plata spoke together in a Vietnamese restaurant called Thanh My. (6 RT 1282; 7 RT 1443.) Plata told Ly that *he* was the one who killed Linda, stating "he had killed the Korean girl." (7 RT 1445, 1452.) Based on even earlier conversations with Plata about the killing, Ly always assumed Plata killed Linda, and his suspicions were confirmed when Plata admitted in the Vietnamese restaurant to committing the murder. (7 RT

1453.) According to Ly, Plata told Ly that "he had to do it." (7 RT 1454.) Ly told police that Plata continued admitting afterwards that he killed Linda. (7 RT 1446.)

Plainly, this testimony supported Mr. Tran's case. Under this version of events, Mr. Tran did not kill Linda. Instead, Plata killed Linda because he felt "he had to do it." Plata's later recorded statements to Ly that he did not kill Linda and "there was nothing he could do" were a lie (indeed, Plata was a convicted felon who would have known that jail conversations were monitored), and Ly was lying about Mr. Tran pointing to himself when asked who committed the actual killing. Moreover, this evidence was entirely consistent with evidence that Mr. Tran felt deeply remorseful about Linda's death, including evidence that Mr. Tran got a tattoo shortly after the murder, which, according to Mr. Tran's girlfriend Nguyen, said in Korean, "Forgive me." (5 RT 1048.)

Indeed, during closing arguments, Mr. Tran's defense counsel told the jury that Ly's testimony directly undercut the state's theory and supported the defense theory that the identity of the actual killer was unknown. According to counsel, "He [the prosecutor] says that Ron Tran strangled this girl. How does he know that? That's what you have to do when you're examining evidence. You have to say how does he know that? He doesn't know that. There's nothing in the evidence that proves that one or the other of these guys strangled her." (8 RT 1702.)

Plata's counsel, of course, was having none of it. In closing argument, counsel argued that the jail conversation between Plata and Ly -- in which Plata claimed he did

not kill Linda -- was "on tape," and "it is what it is." (8 RT 1724.) Counsel then argued that the unrecorded conversation between Plata and Ly from "back in 1996" -- in which Plata claimed he did kill Linda -- could not be believed. (8 RT 1725-1726.) According to counsel, the court's instructions would warn the jury about "when you are dealing with that kind of an informant," and the jury had "better really look hard about what they [informants] are saying because they have such a big motive to lie or to embellish." (8 RT 1724-1725.) Counsel further reminded the jury that Plata told Ly, "Hey man, there was nothing I could do," and "he was upset after this thing happened," which meant, according to counsel, "means I couldn't do anything do stop it." (8 RT 1727, 1731.)

In rebuttal, the prosecutor attacked the closing argument of Mr. Tran. The prosecutor asked the jury, "How does the DA know that Tran strangled Linda. Because Tran told us he did. He told Le." (8 RT 1734.) Moreover, the prosecutor told the jury that Mr. Tran did not even have remorse over Linda's death, but instead got a tattoo, which Plata told Ly meant to convey, "blow me and suck me." (8 RT 1735.)

The trial court recognized that Qui Li was an in-custody informant. Accordingly, and in accord with CALCRIM 336, the court instructed the jury that "Qui Ly is an in-custody informant." (4 CT 1006.) The court further told the jury "the testimony of an in custody informant should be viewed with caution and close scrutiny." (4 CT 1006.)

The trial court further recognized that Joann Nguyen was an accomplice. (4 CT 1004.) In accord with CALCRIM 301, the court separately told the jury that "except for

the testimony of Joanne [sic] Nguyen, which requires supporting evidence, the testimony of only one witness can prove any fact." (4 CT 995.) Instead, and in accord with CALCRIM 335, the court told the jury it could not rely on Nguyen's testimony to convict or find the special circumstances true absent supporting evidence which "is independent" and "tends to connect the defendant to the commission of the crime." (4 CT 1004.)

The trial court finally recognized that some evidence at trial -- including statements Plata made to Ly and Mr. Tran made to Nguyen -- was evidence of unrecorded oral statements. Accordingly, and in accord with CALCRIM 358, the court told the jury, "You have heard evidence that the defendant made oral or written statements before the trial. . . . You must consider with caution evidence of a defendant's oral statement unless it was written or otherwise recorded." (4 CT 1010.)

None of these instructions should not have been given in this case. The fact of the matter is that although Ly and Nguyen were called as witnesses "against the defendant," they both provided some testimony which was favorable to the state and some which was favorable to the defense. Under this circumstance, the court's instruction that Ly's testimony should be "viewed with caution," and likewise that Nguyen's testimony could not be considered absent "supporting evidence" which "tends to connect the defendant to the commission of the crime," all with the overarching instructional mandate that the jury "must consider with caution" each defendant's oral statements that were not recorded, the court imposed a fundamentally unfair barrier to the jury's consideration of defense

evidence favorable to Mr. Tran. Reversal of the special circumstance finding and judgment of death is required.

B. Telling the Jury it Should Consider Ly's Testimony with Caution, and it Could Not Consider Nguyen's Testimony Unless it Was Supported by Other Evidence, along with the Instruction That it must Consider with Caution A Defendant's Oral Statements Unless They Were Recorded, Prejudicially Violated Defendant's Federal and State Constitutional Rights to Present a Defense and to Proof Beyond a Reasonable Doubt.

The Sixth and Fourteenth Amendments guarantee criminal defendants not only the right to confrontation, but "a meaningful opportunity to present a complete defense." (*Crane v. Kentucky* (1986) 476 U.S. 683, 690. *See also Washington v. Texas* (1967) 388 U.S. 14.) The Fifth Amendment due process clause requires that the prosecution prove beyond a reasonable doubt "every fact necessary to constitute the crime with which the defendant is charged." (*In re Winship* (1970) 397 U.S. 358, 364.) When a defendant elects to challenge the state's case against him by affirmatively presenting defense evidence, trial courts violate both these constitutional guarantees by instructions which preclude the jury from considering defense evidence unless it is corroborated in some way. (*Cool v. United States* (1970) 409 U.S. 100.)

Cool is very similar to this case. There, defendant was charged with possession of counterfeit bills. At trial, the jury heard from an accomplice to the crime, a Mr. Voyles. Part of Voyles' testimony exculpated defendant, and other parts inculpated defendant. (*Cool v. United States*, *supra*, 409 U.S. at p. 105 [Rehnquist, J., dissenting].) The trial court instructed the jury that the accomplice's testimony could be relied on only if proven

beyond a reasonable doubt. (*Cool v. United States, supra*, 409 U.S. at p. 102.) Defendant was convicted.

On appeal, the Supreme Court held this instruction violated defendant's right to present a defense. (*Id*. at p. 104.) The Court noted that criminal defendants had "a Sixth Amendment right to present to the jury exculpatory testimony . . . ." (*Id*. at p. 104.) The instruction given "impermissibly obstructs the exercise of that right by totally excluding relevant evidence unless the jury makes a preliminary determination that is it extremely reliable." (*Ibid*.)

But this was not the only vice of the instruction. The Court also found the instruction unconstitutionally violated the Fifth Amendment by reducing the state's burden of proof beyond a reasonable doubt. (*Id*. at p. 104.) This was so because -- if the accomplice's testimony had been believed -- it "would have created a reasonable doubt . . . ." (*Ibid*.) By imposing an "artificial barrier to the consideration of relevant defense evidence" -- evidence which if believed could raise a reasonable doubt -- "the trial judge reduced the level of proof necessary for the Government to carry its burden." (*Ibid*.)

After finding error, the Court reversed defendant's conviction, noting that "the defendant's case rest[ed] almost entirely on" the defense evidence as to which the trial court required corroboration. (*Ibid*.) "Because such a requirement is plainly inconsistent with the constitutionally rooted presumption of innocence, the conviction must be reversed." (*Ibid*.)

Cool controls this case. Just like the defendant in *Cool*, Mr. Tran had a Sixth Amendment right to defend against the charges. Here, Mr. Tran exercised this right by cross-examining Ly and eliciting testimony which directly undercut the state's theory of the case that Mr. Tran killed Linda. Ly claimed that, in unrecorded conversations, Plata repeatedly confessed that he had killed Linda; Plata told Ly that he was the one who killed Linda, stating "he had killed the Korean girl," and "had to do it," which was consistent with earlier and repeated statements by Plata to Ly admitting that he killed Linda. (7 RT 1445, 1452-1454, 1446.) Just as in *Cool*, the trial court here told the jury that Ly was "an in-custody informant," thus his testimony "should be viewed with caution and close scrutiny" (4 CT 1006), and because Plata's statements to Ly were unrecorded oral statements, it "must consider with caution" this evidence. (4 CT 1010.) Just as in *Cool* then, the court "impermissibly obstruct[ed] the exercise of [the right to present a defense] by totally excluding relevant evidence unless the jury makes a preliminary determination that is it extremely reliable." (*Cool v. United States, supra*, 409 U.S. at p. 104.)

This case also presents the second vice noted in *Cool* -- the instruction here unconstitutionally reduced the state's burden of proof beyond a reasonable doubt. Just as in *Cool*, if Ly's testimony about Plata's unrecorded oral statements had been believed it would "have created a reasonable doubt" as to who the actual killer was. Thus, when the trial court here told the jury Ly was "an in-custody informant," and his testimony "should

be viewed with caution and close scrutiny," and it must consider with caution" Plata's unrecorded oral statements to Ly, the court imposed an "artificial barrier to the consideration of relevant defense evidence" which could have raised a reasonable doubt and therefore "reduced the level of proof necessary for the Government to carry its burden." (*Cool v. United States, supra*, 409 U.S. at p. 104.)

Mr. Tran's statements to Nguyen fare no better. Nguyen testified that Mr. Tran told her, his girlfriend at the time, that the tattoo said, "Forgive me," in Korean. The defense relied on this evidence to argue that Mr. Tran was remorseful about Linda's death. According to counsel, "[H]e put remorse on his chest." (8 RT 1706.) Just as in *Cool*, the trial court told the jury that Nguyen was an accomplice, thus it could not consider her testimony to "prove any fact" unless there was "supporting evidence" (4 CT 995), and it "must consider with caution" Mr. Tran's unrecorded statements to Nguyen. (4 CT 1010.) Again, just as in *Cool*, the court "impermissibly obstruct[ed]" Mr. Tran's right to present a defense, and instead, imposed an "artificial barrier to the consideration of relevant defense evidence." (*Cool v. United States, supra*, 409 U.S. at p. 104.)

In short, the trial court's instructions here violated both the Fifth and Sixth Amendments. Error has occurred.

In making this argument, Mr. Tran recognizes the general rule with respect to instructions urging caution, and requiring corroboration of accomplice testimony and in-custody informant testimony, is that they should be given *sua sponte* when the accomplice

or in-custody informant is called to prove the *prosecution's* case. (*Accord Cool v. United States*, *supra*, 409 U.S. at p. 103 [accomplice]; *People v. Davis* (2013) 217 Cal.App.4th 1484, 1488-1489 [in-custody informant].) The reason for this rule, of course, is that the evidence is coming from a potentially tainted source, often in expectation of favorable treatment from the prosecution. (*People v. Bivert* (2011) 52 Cal.4th 96, 120-121 [in-custody informant]; *People v. Tewksberry* (1976) 15 Cal.3d 953, 967 [accomplice]; *People v. Dail* (1943) 22 Cal.2d 642, 654 [accomplice].)

But the trial court here ignored that modification to these standard instructions may be required when corroboration -- or any cautionary warning -- is not required for the parts of testimony which support the defense -- here, Mr. Tran's defense. (*See* CALCRIM 335, Bench Notes, citing *People v. Coffman* (2004) 34 Cal.4th 1, 105. Indeed, this Court's earlier cases consistently held that it was error to instruct the jury that the testimony of an accomplice should be viewed with distrust where the accomplice testified for the defendant. (*People v. O'Brien* (1892) 96 Cal. 171, 180-181.)

In *People v. Williams* (1988) 45 Cal.3d 1268, the Court reiterated different rules for accomplice testimony instructions depending upon whether the witness was called by the defense or prosecution. The Court reiterated the long-standing requirement that, when an accomplice is called by both the prosecution and the defendant, the trial court should tailor the instruction to relate only to the accomplice's testimony on behalf of the prosecution. (*Id*. at p. 1314.)

In *People v. Guinan* (1998) 18 Cal.4th 558, 569, the Court recognized that favorable and unfavorable accomplice testimony should be treated differently, but held there was no sua sponte duty to modify the instruction. (*Id*. at pp. 568-570.) The Court suggested that the accomplice instruction's language should be modified to read that accomplice testimony that "incriminates a defendant" should be viewed with caution. (*Id*. at p. 569.)

Finally, in *Coffman*, *supra*, 34 Cal.4th at p. 105, two codefendants testified and blamed each other in part while each professed their own innocence. The court instructed the jury that the testimony of each defendant must be viewed with distrust when it is considered against the other codefendant, but that the jury must use the "general rules of credibility" when considering the evidence in support of the defendants defense. (*Ibid*.) This Court approved this instruction as striking the right accommodation of the defendant's desire that accomplice testimony be viewed with caution, and the defendant's constitutional right to have testimony supporting her defense viewed under rules of general credibility. (*Ibid*.)

Neither instruction given here -- CALCRIM 335 nor 336 -- contain the language approved in *Coffman*, which expressly informs the jury that testimony or statements by an accomplice or in-custody informant that are favorable to a defendant do not require corroboration. (*People v. Coffman*, *supra*, 34 Cal.4th at p. 105; *see People v. Guinan*, 18 Cal.4th at p. 569.) Without the modification, the instructions protected Plata against

inculpatory evidence from an accomplice and an in-custody informant, but at the same time, placed an improper hurdle to the jury's acceptance of accomplice and informant testimony favorable to Mr. Tran's defense; they thus denied Mr. Tran his federal constitutional right to present a defense and to require the state to prove his guilt beyond a reasonable doubt.

Likewise, Mr. Tran recognizes the general rule with respect to CALCRIM 358 (and its predecessor CALJIC 2.71) is that it should be given *sua sponte* when there is evidence of a defendant's admission. (*People v. Beagle* (1972) 6 Cal.3d 441, 445; *People v. Marks* (1988) 45 Cal.3d 1335, 1346; *People v. Shoals* (1992) 8 Cal. App.4th 475, 498.) An admission is an extrajudicial statement by the defendant -- inculpatory or exculpatory -- which tends to prove his guilt when considered with the rest of the evidence in the case. (*People v. McClary* (1977) 20 Cal.3d 218, 230; *People v. Mendoza* (1987) 192 Cal.App.3d 667, 676; *People v. Brackett* (1991) 229 Cal.App.3d 13, 19-20.) The purpose of this rule is to direct the jury to critically evaluate whether the admissions were in fact made and, if so, whether they were reported accurately. (*People v. Beagle*, *supra*, 6 Cal.3d 441, 455; *People v. Bemis* (1949) 33 Cal.2d 395, 400.) In this respect, the treatment of CALCRIM 338 parallels the accomplice instruction at issue in *Cool v. United States*, *supra*. (*See Cool v. United States*, *supra*, 409 U.S. at p. 103 [recognizing that where the state calls the accomplice, the accomplice instruction is proper].)

However, just as *Cool* recognized in connection with the accomplice instructions,

when a defendant (here, Mr. Tran) does not contest the making or accuracy of the pretrial statements (here, those made by Plata), and actually incorporates them in his defense, the rationale for giving CALCRIM 358 no longer applies. Indeed, the danger is that the defendant's reliance on the unrecorded statement will lead the jurors to conclude the caution was intended to admonish them to skeptically view the substance of the words (as opposed to whether the words were in fact said). When the defendant himself relies on the evidence of the admissions, inclusion of the cautionary segment of the instruction is therefore improper. (*People v. Williams* (2008) 43 Cal.4th 584, 639 [trial court erred in instructing the jury to view defendant's oral confession and admissions with caution, because reasonable jurors would have interpreted the instruction as directing them to view defendant's version of the relevant events with skepticism, notwithstanding the circumstance that defendant's statements "included both inculpatory admissions, exculpatory statements, and admissions of culpability that mitigated the extent of [defendant's] involvement in the crime."].)

In short, it is important to keep in mind what Mr. Tran is *not* arguing here. "It is well-settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. Martin* (1970) 1 Cal.3d 524, 531.)

The instructions given here were required *sua sponte* and correctly made clear to the jury the limitations on use of an accomplice's and in-custody informant's testimony, and evidence of unrecorded oral statements -- *to convict and find the special circumstance true as to Plata.* The problem here is that the trial court utterly failed to properly instruct the jury on the use of this same evidence -- *to convict and find the special circumstance true as to Mr. Tran.* Not only was the jury never told how to treat those parts of this evidence which were useful to Mr. Tran and supported his defense, but the jury was broadly told that it should consider Ly's useful and supportive testimony with caution, and it could not consider Nguyen's useful and supportive testimony unless it was supported by other evidence that connected him to the crime, along with an overarching admonition to consider with caution all oral statements -- even if they were useful and supportive of Mr. Tran's defense -- unless they were recorded. Error has occurred.

C. Because Portions of Ly's and Nguyen's Testimony Were Central To Mr. Tran's Defense, Imposing Instructional Barriers Precluding The Jury From Fairly Considering That Evidence Requires A New Trial.

The question then becomes one of prejudice. As explained above, a trial court must instruct *sua sponte* on the general principles of law relevant to the issues raised by the evidence. When a court chooses to instruct a jury on a particular point, it must do so correctly. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) Because key portions of the testimony of Ly and Nguyen were important to Mr. Tran's defense, the trial court's

instructions telling jurors that Ly's testimony should be "viewed with caution," and likewise that Nguyen's testimony could not be considered absent "supporting evidence" which "tends to connect the defendant to the commission of the crime," all with the overarching instructional mandate that the jury "must consider with caution" each of defendant's oral statements that were not recorded, was error. While the court's instructions no doubt served to protect Plata, the court failed to take precautions and properly instruct the jury on the use of this same evidence to protect Mr. Tran.

Thus the trial court's failure to give correct instructions on the use of the evidence plainly violated state law and, as a consequence, the due process clause. (*See Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [arbitrary deprivation of state law right violates Due Process]. In addition, since state law permitted Mr. Tran to urge the jury to rely on Ly's testimony that Plata confessed to killing Linda, and rely on Nguyen's testimony that he meant to convey remorse over Linda's murder when he got a tattoo that said, "Forgive me," the trial court's refusal to properly instruct on this line of defense affirmatively interfered with Mr. Tran's ability to present a defense to the jury that was fully recognized by state law, in violation of the Fifth Amendment right to present a defense and the Sixth Amendment right to a jury trial. (*See*, *e.g.*, *Simmons v. South Carolina* (1994) 512 U.S. 154 [at penalty phase of capital trial, jury was instructed not to consider parole; held, instruction violated due process where defense theory was that defendant would never be paroled]; *People v. Mize* (1889) 80 Cal. 41, 44-45 [defendant charged with murder,

defense presented evidence of self-defense, jury instructed it could find culpable mental state simply by finding defendant shot victim; held, instruction improper because it undercut the defense presented]; *People v. Medrano* (1978) 78 Cal.App.3d 198, 214 [instruction which withdraws a principal defense from the jury is error], overruled on other grounds in *Vista v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 307.)

The trial court's refusal to properly instruct the jury also violated the Eighth Amendment, which imposes a heightened standard "for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [plurality opinion of Stewart, Powell, and Stevens, JJ.]; *see also*, *Godfrey v. Georgia* (1980) 446 U.S. 420, 427-428, *Mills v. Maryland* (1988) 486 U.S. 367, 383-384.) The Eighth Amendment requires provision of "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die," (*Gregg v. Georgia* (1976) 428 U.S. 153, 190 [joint opinion of Stewart, Powell, and Stevens, JJ.]), and invalidates "procedural rules that ten[d] to diminish the reliability of the sentencing determination." (*Beck v. Alabama* (1980) 447 U.S. 625, 638.)

Pursuant to these principles, the trial court's failure to give correct instructions on the use of the testimony of Ly and Nguyen violated the Eighth Amendment. Under state law, Mr. Tran was entitled to rely on the useful and supportive testimony of Ly and Nguyen without limitation. The trial court's refusal to explain this to the jury violates the

Eighth Amendment precisely because it undercut the reliability of the evidence which resulted in the jury's subsequent death sentence.

Whether the error is analyzed under the Fifth Amendment, the Sixth Amendment or the Eighth Amendment is of no import. Under any framework, the error is subject to the so-called *Chapman* standard of prejudice, requiring the state to prove the error harmless beyond a reasonable doubt. (*See Chapman v. California*, *supra*, 386 U.S. at p. 24.) But even if this Court were to solely focus on the state law error, and apply the state's lower standard of prejudice, reversal would still be required. (*See People v. Watson* (1956) 46 Cal.2d 818.)

The Court must presume that the jurors followed the trial court's instructions. (*People v. Scott* (1988) 200 Cal.App.3d 1090, 1095; *People v. Jackson* (1986) 177 Cal.App.3d 708, 714.) Thus, under the instructions here -- which told the jury that they *should* view Ly's testimony with caution, and *must* view evidence of Plata's oral statements with caution -- the jurors *did* view Ly's testimony that Plata admitted he killed Linda with caution. But as explained in Argument III-D, and incorporated herein, Plata's oral unrecorded statements to Ly were key to the jury's determination of Mr. Tran's guilt, the truth of the special circumstance, and ultimately at the penalty phase in determining whether Mr. Tran should live or die.

Moreover, the instructions certainly assisted Plata in placing the blame for Linda's death squarely at Mr. Tran's doorstep. In closing argument, Plata's counsel argued that

the jail conversation between Plata and Ly -- in which Plata claimed he did not kill Linda -- was "on tape," and "it is what it is." (8 RT 1724.) Counsel then argued that the unrecorded conversation between Plata and Ly from "back in 1996" -- in which Plata claimed he did kill Linda -- could not be believed. (8 RT 1725-1726.) According to counsel, the court's instructions would warn the jury about "when you are dealing with that kind of an informant," and the jury had "better really look hard about what they [informants] are saying because they have such a big motive to lie or to embellish." (8 RT 1724-1725.) Counsel further reminded the jury that Plata told Ly, "Hey man, there was nothing I could do," and "he was upset after this thing happened," which meant, according to counsel, "means I couldn't do anything do stop it." (8 RT 1727, 1731.) Thus, in no uncertain terms, Plata's theory was that he was not the actual killer, and he could do nothing to stop Mr. Tran from murdering Linda.

Of course, this was the exact nightmare scenario that Mr. Tran's counsel foresaw when the trial court denied severance and admitted the evidence of Plata's recorded statement. According to counsel, "the statement 'There was nothing I could do about it' is -- I mean, there's no question what the inference of that is given the testimony that we've had which is essentially saying either Tran is out of control or I was coerced by Tran." (6 RT 1262.) Counsel further argued, "[I]f the court remembers, when we went back a long time ago, this is exactly what we were talking about is it's more of an issue that comes to penalty phase, but by entering it now, it becomes penalty phase evidence,"

and the evidence "sure looks like Mr. Plata is standing there with his hands up saying, 'Gee, Mr. Tran, please don't kill her,'" and the issue at penalty phase "becomes what moral responsibility does the jury attach to these two individuals," thus, "I think it has a big impact on what they assign to Mr. Tran." (6 RT 1265-1267, 1274.)

Put simply, while the trial court's instructions may have been quite helpful to Plata in this joint trial, it was essential to Mr. Tran that jurors be able to consider the helpful portion of Ly's testimony -- that Plata repeatedly told Ly he killed Linda -- without being told to view Ly's testimony on this point with caution, and without being specifically instructed that it must view with caution Plata's unrecorded oral statements.

Likewise, under the instructions here -- which told the jury that Nguyen's testimony could not be considered absent "supporting evidence" which "tends to connect the defendant to the commission of the crime," and *must* view evidence of Mr. Tran's unrecorDey oral statements with caution -- the jurors *did* view with caution Nguyen's testimony that Mr. Tran expressed remorse and told her his tattoo meant, "Forgive me," and indeed, *did not* consider Nguyen's testimony without attempting to find evidence supporting that statement which tended to connect him to the commission of crime (which, of course, logically could not exist).

This Court has repeatedly commented that "the presence or absence of remorse is a factor 'universally' deemed relevant to the jury's penalty determination." (*People v. Crittenden* (1994) 9 Cal.4th 83, 146, citing *People v. Hardy* (1992) 2 Cal.4th 86, 209-210;

People v. Gallego (1990) 52 Cal.3d 115, 197; *People v. Breaux* (1991) 1 Cal.4th 281, 313.) At both the guilt and penalty phases, Mr. Tran's counsel relied on the tattoo, and Nguyen's testimony that Mr. Tran meant to convey in Korean, "Forgive me," as evidence of remorse. According to counsel, "[H]e put remorse on his chest" (8 RT 1706 [guilt phase]), and "this guy is really profoundly affected" by Linda's death. (12 RT 2440.) Not only did the trial court's instructions tell the jury that it needed "supporting evidence" before it could rely on this evidence of remorse, but the prosecutor was permitted without limitation to rely on Plata's recorded statement to Ly (told to the jury through the state's gang experts), and argue that Mr. Tran's tattoo actually was meant to convey, "blow me or suck me," showing a lack of remorse. (8 RT 1734-1735.) It was therefore essential that jurors be able to consider Nguyen's testimony *alone* to prove a fact (that defendant meant his tattoo to convey an expression of remorse) without being told there must be "supporting evidence."

In addition, there can be no dispute that if the trial court had precluded Mr. Tran from presenting this testimony from Ly and Nguyen, this would have unequivocally violated his right to present a defense. Here, Mr. Tran was permitted to present and rely on this evidence, but the court then gave instructions which may well have precluded the jury from considering the evidence. As noted above, and as a practical consequence, it makes little difference where the vice lies; the harm is that the jury does not get to fairly consider evidence relied on to exculpate. The error cannot be harmless. (*Compare*

Eddings v. Oklahoma (1982) 455 U.S. 104, 113-114 [where the Constitution precludes the state from excluding certain evidence, it equally precludes admitting the evidence under instructions which prevent the factfinder from considering it].) Reversal is required.

V. BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SHOW THAT MR. TRAN SPECIFICALLY INTENDED TO INFLICT EXTREME PHYSICAL PAIN FOR PURPOSES OF REVENGE, EXTORTION, PERSUASION, OR ANY OTHER SADISTIC REASON, HIS TORTURE CONVICTION MUST BE REVERSED.

A. The Relevant Facts.

The state charged Mr. Tran and co-defendant Plata with the murder of Linda Park. (3 CT 758.) The state added a torture special circumstance allegation that the murder involved torture within the meaning of section 190.2, subdivision, (a)(18). (3 CT 759.) The state specifically alleged that the torturous acts were binding of the wrists and ankles, and slashing of the throat. (3 CT 759.)

Forensic pathologist Dr. Joseph Halka performed the autopsy of Linda. (7 RT 1297.) At trial, pathologist Dr. Richard Fukumoto testified about Dr. Halka's findings, and his own conclusions about the cause of death. Linda was bound, both hands and feet from the back, with twine. (7 RT 1321-1323.) There were ligature abrasions near the wrists, indicating that the victim was resisting against the binding, thus conscious. (7 RT 1324-1325.) There were two "slash, sharp instrument injuries" inflicted antemortem with a sharp object, like a knife or scissor edge, from the right side of the neck to the left; the first cut was made, and then the second cut overlapped the first, and the wound was deeper on the right side than on the left. (7 RT 1309, 1316-1318.) The neck was wrapped twice with an electrical cord; there was indentation on the neck when the cord was removed, the appearance of which indicated an antemortem wound. (7 RT 1309-

1312.) There was edema (fluid) in the lungs, indicating death was not instantaneous. (7 RT 1328.) Dr. Fukumoto concluded that the cause of death was asphyxiation due to ligature strangulation. (7 RT 1329.) He also opined that, there is pain associated with strangulation because "the neck area is being traumatized." (7 RT 1302.)

The prosecutor relied on Dr. Fukumoto's testimony in closing argument to urge the jury to find the torture special circumstance true. (8 RT 1695-1697.) The prosecutor argued that Mr. Tran "intended to inflict extreme physical pain and suffering on Linda Park . . . for the calculated purpose of revenge, extortion, persuasion, or any other sadistic reason." (8 RT 1696.) According to the prosecutor, "It's not about revenge, but all the other ones apply. Extortion, to get her to tell them where the money and jewelry is. Persuade, to tell them where the money and jewelry is. And if that's not sadistic, nothing is. If that was not sadistic, nothing is." (8 RT 1696.)

As more fully discussed below, there was insufficient evidence that Mr. Tran specifically intended to inflict extreme pain for purpose of revenge, extortion, persuasion, or a sadistic reason. Reversal of the torture special circumstance finding is required.

B. The State Was Required To Prove That Mr. Tran Specifically Intended To Cause Extreme Pain And Suffering For Purposes Of Revenge, Extortion, Persuasion or A Sadistic Reason.

The due process clause of the Fourteenth Amendment guarantees no criminal defendant may be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397

U.S. 358, 364.) The standard for assessing a sufficiency of evidence claim on appeal is well established.

In a nutshell, the reviewing court must review the entire record “in the light most favorable to the judgment to determine if it contains substantial evidence -- i.e. evidence that is credible and of solid value -- from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.” (*People v. Tran* (1996) 47 Cal.App.4th 759, 771-772 (citation omitted). *Accord People v. Johnson* (1980) 26 Cal.3d 557, 576-577; *Jackson v. Virginia* (1979) 443 U.S. 307, 319.)

To be “substantial,” evidence must be of “ponderable legal significance . . . reasonable in nature, credible and of solid value.” (*People v. Johnson*, *supra*, 26 Cal.3d at pp. 576-577.) Reasonable inferences from the evidence “‘may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to the probabilities without evidence.” (*People v. Tran*, *supra*, 47 Cal.App.4th at pp. 771-772 (citations omitted).)

Under the statutory provision delineating the torture-murder special circumstance, first degree murder is punishable by death or life without the possibility of parole if the murder “was intentional and involved the infliction of torture.” (§ 190.2, subd. (a)(18).) The torture-murder special circumstance requires the state prove that the defendant acted with torturous intent in that he “intentionally performed acts that were calculated to cause

extreme physical pain to the victim." (*People v. Mungia* (2008) 44 Cal.4th 1101, 1136; *People v. Streeter* (2012) 54 Cal.4th 205, 237.) More specifically, "[t]he requisite torturous intent is an intent to cause cruel or extreme pain and suffering" for any "sadistic purpose." (*People v. Elliot* (2005) 37 Cal.4th 453, 479; *see People v. Mungia*, *supra*, at p. 1136.) In cases that "have upheld [torture-murder special circumstance] findings, the evidence has shown that the defendant deliberately inflicted nonfatal wounds or deliberately exposed the victim to prolonged suffering," thereby demonstrating a "'sadistic intent to cause the victim to suffer pain *in addition to the pain of death*.'" (*People v. Mungia*, *supra*, at pp. 1136, 1138, italics added.) In sum, in order to sustain the torture-murder special circumstance finding here, the record must disclose substantial evidence indicating defendants harbored an independent intent to torture Linda, i.e., that they intended to inflict extreme physical pain on Linda in furtherance of a sadistic purpose. (*Id*. at p. 1136.)

Mungia is instructive. There, the defendant killed the victim with blows to her head while she was bound. The coroner testified the victim had suffered 23 blows to the head, four of which were significant, and had died of craniocerebral injuries. (*People v. Mungia*, *supra*, 44 Cal.4th at p. 1110.) The coroner described the victim's injuries as "some of the most brutal that he had ever seen" and opined they were inflicted over a short duration. (*Ibid*.) The victim also displayed defensive wounds and it appeared her hands had been bound. (*Id*. at pp. 1106–1109.)

This Court reversed the jury's torture-murder special circumstance finding on the basis that the evidence was insufficient as to an intent to torture. The Court noted, "[t]he killing was brutal and savage, but there is nothing in the nature of the injuries to suggest that [the] defendant inflicted any of them in an attempt to torture [the victim] rather than to kill her." (*Id*. at p. 1137.) In other words, severe injuries, without more, may simply reflect "the desire to kill." (*Ibid*.) The Court also declined to infer a sadistic intent from the evidence that the victim was bound, noting that "[w]e have never found that evidence that the defendant bound the victim is, by itself, substantial evidence of an intent to inflict sadistic pain." (*Id*. at p. 1138.) The Court explained, "[h]ere, [the] defendant bound the victim in the course of robbing her; it is not uncommon for robbers to bind their victims to prevent them from resisting or escaping." (*Ibid*.)

Mungia analyzed cases in which the Court upheld torture-murder special circumstance findings, concluding that such a result was warranted when "the defendant deliberately inflicted nonfatal wounds or deliberately exposed the victim to prolonged suffering." (*People v. Mungia*, *supra*, 44 Cal.4th at p. 1137, citing, e.g., *People v. Whisenhunt* (2008) 44 Cal.4th 174, 201 [defendant "methodically poured" hot oil on multiple portions of the victim's body]; *People v. Chatman* (2006) 38 Cal.4th 344, 390 [defendant inflicted over 40 stab wounds all over victim's body and later told friend he persisted in stabbing victim because "it felt good"]; *People v. Elliot* (2005) 37 Cal.4th 453, 467 [defendant inflicted 81 stab and slash wounds, only three of which were

potentially fatal, and meticulously split victim's eyelids]; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1240 [defendant made incisions with "nearly scientific air" that demonstrated a calculated intent to inflict pain]; *People v. Raley* (1992) 2 Cal.4th 870, 889 [evidence sufficient to show first degree torture-murder where defendant inflicted knife wounds on victim while she screamed, wrapped her in rugs and left her, still conscious, in trunk of his car for hours before throwing her down ravine].)

Here, the torture-murder special circumstance finding is not supported by substantial evidence because there is no evidence which takes the case outside the bounds of *Mungia*. Mr. Tran recognizes, of course, that Linda was hog-tied from behind, and she suffered two cuts to her neck before being strangled to death, but just as in *Mungia*, this evidence is consistent with defendants' intent to rob and kill Linda and does not, by itself, sustain an inference that defendants harbored a torturous or sadistic intent.

"The intent to torture is a 'state of mind which, unless established by the defendant's own statements (or by another witness's description of a defendant's behavior in committing the offenses), must be proved by the circumstances surrounding the commission of the offense [citations], which include the nature and severity of the victim's wounds.'" (*People v. Mungia*, *supra*, 44 Cal.4th at p. 1137.) Here, the defendants' own statements do not suggest they tortured Linda or intended to do so. Instead, Mr. Tran asked his girlfriend Nguyen to take him to Linda's house because he wanted money and jewelry, and later claimed Linda recognized him at the time of the

break-in. (5 RT 950, 1013.) The prosecutor told the jury that "the minute she recognized Tran, they were not going to let her live," and the intent to kill during the robbery occurred "the moment Linda recognized Tran." (8 RT 1686, 1688.) There was no evidence of statements by either defendant which indicated an intent to torture Linda.

Nor do the circumstances of the offense or the nature of the wounds constitute evidence from which a rational trier of fact could infer an intent to torture. Dr. Fukumoto described the injuries Linda suffered from being tied up and strangled: ligature abrasions, two cuts to the neck and injuries consistent with asphyxiation. As in *Mungia*, although the killing was brutal, there is nothing to suggest the injuries were inflicted in an attempt to torture Linda rather than tie her up to secure her during the robbery and kill her because she recognized Mr. Tran. Put simply, there was no evidence that any of the injuries "deliberately exposed the victim to prolonged suffering" as part of a calculated, sadistic effort. (*People v. Mungia*, *supra*, 44 Cal.4th at p. 1137.)

Finally, and significantly, the prosecutor recognized that the state was required to prove that defendants "intended to inflict extreme physical pain and suffering on Linda Park . . . for the calculated purpose of revenge, extortion, persuasion, or any other sadistic reason." (8 RT 1696.) Not surprisingly, given the dearth of evidence as to intent, the prosecutor speculated as to a couple of theories in closing argument.

The prosecutor argued that Mr. Tran and Plata tortured Linda for information about where the money and jewelry were kept. According to the prosecutor, "It's not

about revenge, but all the other ones apply. Extortion, to get her to tell them where the money and jewelry is. Persuade, to tell them where the money and jewelry is. And if that's not sadistic, nothing is. If that was not sadistic, nothing is." (8 RT 1696.)

But there was no evidence -- circumstantial or otherwise -- that Mr. Tran and Plata ever asked Linda about the money and jewelry, much less any evidence as to when she was bound and cut, such that it could be inferred that she was bound and cut in an effort to find the money and jewelry. Indeed, given that there was no evidence that Mr. Tran and Plata ever asked Linda anything, the prosecutor actually proposed a second theory in closing argument as to what occurred.

The prosecutor argued, "they tied her up after they got the money and jewelry. Makes sense, right? Because she had to show them where the money was. . . . So they had to take her into that master bedroom to find the jacket for them -- for her to show them the jacket. The same thing with the jewelry boxes." (8 RT 1686-1687.) Under this theory, then, Linda was not bound and cut until *after* the defendants already had the information they needed, and thus, the torturous acts were incidental to the robbery and murder. In other words, the defendants did not torture Linda for revenge, extortion, persuasion, or any other sadistic reason.

In short, the record lacks "substantial evidence -- that is evidence that is reasonable, credible, and of solid value" from which the jury could find the intent necessary for a true finding on the torture special circumstance. Indeed, when the

evidence regarding a particular issue is circumstantial -- as it is here -- the appellate 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.) "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*, *supra*, 9 Cal.3d at p. 250.) The Court should therefore vacate the torture-murder special circumstance finding.

VI. BECAUSE THE FIVE PREDICATE CONVICTIONS UPON WHICH THE STATE RELIED TO SUPPORT THE SECTION 186.22, SUBDIVISION (B), ALLEGATION WERE INVALID, THE GANG ENHANCEMENT FINDING MUST BE STRICKEN.

A. Introduction.

The state alleged that the murder charged in count one was committed for the benefit of, at the direction of, and in association with for Life ("VFL"), a criminal street gang within the meaning of section 186.22, subdivision (b)(1). (3 CT 759.) The state's theory was that Mr. Tran belonged to VFL, and committed the murder for the benefit of VFL. To prove that VFL was a "criminal street gang" which engaged in a "pattern of criminal gang activity," within the meaning of section 186.22, the state introduced the testimony of City of Westminster Police Department Sergeant Mark Nye. Nye testified as an expert on street gangs, generally, and street gangs, specifically.

To prove a "pattern of criminal gang activity -- Nye's testimony included evidence of five prior offenses -- so-called "predicate offenses" -- of the VFL:

1. Se Hoang's 1995 conviction for a 1992 residential burglary conviction.

On May 3, 1995, Se Hoang was convicted of first degree burglary (§§ 459, 460), committed on November 6, 1992, when he was sixteen years old. (1 SCT 104-117; 8 RT 1530.) Hoang stated in a plea form that, "On 11-6-92 in Orange County I willfully and unlawfully entered the residence lived in and occupied by Gayle Nunez, without permission, and with the intent to take to take and keep personal property of Ms. Nunez

without permission from within the residence. I intended to permanently deprive Ms. Nunez." (1 SCT 114.) There were no gang charges or allegations brought in connection with this crime. Instead, Nye testified that he reviewed "a document" which indicated that when contacted by police, Hoang told officers that he was a member of VFL at the time of the burglary. (8 RT 1531.)

2. Se Hoang's 1995 conviction for a 1993 conspiracy to commit murder, illegal possession of a firearm, and evading a police officer with willful disregard.

On February 1, 1994, Hoang was convicted of conspiracy to commit murder (§§ 182.2, 187), illegal possession of a firearm (§ 12021, subd. (d)), and evading a police officer, willful disregard (Veh. Code § 2800.2), with a firearm enhancement (§ 12022, subd. (a)(1)), committed on July 14, 1993, when he was sixteen years old. (1 SCT 118-135; 8 RT 1531.) In a plea form, Hoang claimed, "On July-14-93 in Orange County I agreed with Duc Luu, Krystal Nguyen, and Xuan Tran to murder 'Diep,' a human being, with the intent that we actually murder 'Diep' and we met, possessed a shotgun, entered an automobile and began to look for Diep in Orange County, California in furtherance of the conspiracy. I possessed the shotgun in violation of an express term of probation in O.C., California. We tried to evade the officers red lights and siren in wanton disregard for the safety of persons and property while in a car." (1 SCT 133.) Again there were no gang charges or allegations brought in connection with these crimes. Instead, Nye relied on the "document" which indicated that when contacted by police, Hoang told officers

that he was a member of VFL at the time the crimes were committed. (8 RT 1531.)

3. Phi Nguyen's 1994 conviction for a 1994 burglary.

On July 21, 1994, Phi Nguyen was convicted for attempted first degree burglary (§§ 459, 460, 664), and street terrorism (§ 186.22, subd. (a)), with a gang enhancement (§ 186.22, subd. (b)), committed on May 27, 1994. (1 SCT 136-162; 8 RT 1532.) Nguyen admitted on a plea form, "On 5/27/94 in OC I attempted to enter the residence of Suzanne Do with the intent to commit theft. I actively participated with the V.F.L. criminal street gang knowing its members actively participate in criminal gang activity." (1 SCT 141.)

4. Phi Nguyen's 1995 conviction for a 1994 robbery.

On December 11, 1995, Nguyen was convicted of a first degree robbery (§ 211), with a weapon use enhancement (§ 12022, subd. (b)), committed on October 19, 1994. (1 CT 164-195; 8 RT 1532-1533.) There were no gang charges or allegations brought in connection with the crime. Instead, Nye claimed he "reach[ed] the conclusion that Mr. Phil Nguyen, based on his background and his record, was a member of V.F.L." at the time the crime was committed. (8 RT 1533.)

5. Anthony Johnson 1997 conviction for a 1995 attempted murder with a true gang enhancement finding.

On February 20, 1997, Anthony Johnson pled guilty to attempted murder (§ 187, 664), with an arming enhancement (§ 12022, subd. (a)(1)), and a gang enhancement (§ 186.22, subd. (b)), committed on August 3, 1995. (1 SCT 196-203; 8 RT 1533-1534.) According to Nye, "police reports" showed that police officers interviewed co-defendant

Plata in 1993 regarding the criminal activity of Johnson. (8 RT 1538.)

Plata denied involvement in any crimes, but admitted that Johnson was a VFL member, and that he (Plata) was an associate who had not been "jumped in" yet. (8 RT 1538.) There was also a 1993 letter from VFL leader Hong Lay to Plata, encouraging him to become close to Se Hong and become "good homeboys." (8 RT 1539, 1541.) Lay also told Plata to talk to Phi Nguyen about Homeless (a VFL member), and to 'jump Homeless out of V.F.L." (8 RT 1539-1540.) According to Nye, the letter was significant because a gang leader was giving Plata a "big responsibility." (8 RT 1541.) There was also a 1993 letter from Plata to his friend who had been killed during a gang rivalry in 1992, saying that he wished he had not died, and that Johnson was trying to get him "jumped out," because he (Johnson) thought he (Plata) was "ratting on him," but that he (Plata) "would die for V.F.L." (8 RT 1543-1545.)

Based on his experience and these reports, Nye concluded that VFL was a criminal street gang. (8 RT 1534.) According to Nye, the primary activities of the gang were home invasion robbery, residential burglary, attempted murder and murder. (8 RT 1535.)

The trial court instructed the jury on the elements necessary for a true finding of the section 186.22, subdivision (b), enhancement. Thus, the court told the jury, in relevant part, "To prove this allegation, the People must prove that: [¶] 1. The defendant committed the crime for the benefit of, at the direction of, or in association with a criminal street gang; [¶] AND [¶] 2. The defendant intended to assist, further, or promote

criminal conduct by gang members." (4 CT 1050.)

The trial court then informed the jury, "A criminal street gang is any ongoing organization, association, or group of three or more persons, whether formal or informal: [¶] 1. That has a common name or common identifying sign or symbol; [¶] 2. That has, as one or more of its primary activities, the commission of one or more of the crimes [of murder, attempted murder, conspiracy to commit murder, assault with a deadly weapon or by means of force likely to produce great bodily injury, robbery, burglary or attempted burglary or conspiracy to commit burglary, theft and unlawful taking or driving of a vehicle, in violation of section 10851 of the Vehicle Code]; [¶] AND [¶] 3. Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity." (4 CT 1051, 1054.)

The trial court finally defined "pattern of criminal gang activity" for the jury. Thus, the court told the jury, in relevant part, "A pattern of criminal gang activity, as used here, means: [¶] 1. The commission of, or attempted commission of, or conspiracy to commit, or conviction of, or having a juvenile petition sustained for commission of any combination of two or more of the crimes [of murder, attempted murder, conspiracy to commit murder, assault with a deadly weapon or by means of force likely to produce great bodily injury, robbery, burglary or attempted burglary or conspiracy to commit burglary, theft and unlawful taking or driving of a vehicle, in violation of section 10851 of the Vehicle Code], or two or more occurrences of one or more of the[se] crimes." (4

CT 1051-1052, 1054.)

In closing argument, the prosecutor told the jury that the state established a "pattern of criminal gang activity" by introducing "the prior conviction of Se Hoang, remember, Phi Nguyen and Anthony Johnson. You might be saying, 'Why did he introduce that?' Because that is one of the elements [of the gang enhancement]." (8 RT 1697.) The jury subsequently found true the section 186.22, subdivision (b), gang enhancement. (4 CT 1182.)

As more fully discussed below, the section 186.22, subdivision (b), enhancement must fail for three main reasons. First, as explained in Argument VI-C-1, the trial court instructed, and the prosecutor told the jury, that proof of a "conviction" alone was sufficient. Under the current version of the statute, the court's instructions and the prosecutor's argument would be valid. But under the version in effect at the time the charged offense was committed, proof of a "conviction" alone was insufficient. Next, as explained in Argument VI-C-2, the court's instructions allowed the jury to rely on Hoang's conspiracy to commit murder conviction which was not an enumerated offense at the time the charged offense was committed. Finally, as explained in Argument VI-C-3, the court's instructions permitted the jury to rely on case-specific, testimonial hearsay to find that Hoang and Johnson were members of the VFL gang. For these three reasons, all five prior convictions did not actually qualify as predicates necessary to sustain the section 186.22, subdivision (b), allegation. Because the jury returned a general verdict,

and the record does not otherwise effectively reveal the predicates upon which the jury relied, reversal is required.

B. General Principles of Law on a Section 186.22, Subdivision (b), Allegation.

The Legislature's intent in creating the California Street Terrorism Enforcement and Prevention Act, section 186.20 et seq., is "... to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs." (§ 186.21.) Section 186.22, subdivision (a), sets forth the substantive crime of participation in a criminal street gang, providing: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished...." In section 186.22, subdivision (b), the Legislature approved additional punishments for any person "convicted of a felony which is committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members...." (§ 186.22, subd. (b)(1), emphasis added.)

"[C]riminal street gang" is the linchpin for the act's provisions. The phrase is defined specifically, and its application requires proof of multiple elements. A criminal street gang is currently defined as "[1] any ongoing organization, association, or group of

three or more persons, whether formal or informal, [2] having as one of its primary activities the commission of one or more [of twenty-eight specified crimes], [3] having a common name or common identifying sign or symbol, and [4] whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).) A "pattern of criminal gang activity" is currently defined as "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of [thirty-three specified crimes], provided at least one of those offenses occurred after [September 23, 1988] and the last of those offenses occurred within three years after a prior offense, and the offenses are committed on separate occasions, or by two or more persons...." (§ 186.22, subd. (e).) "Thus, for a group to fall within the statutory definition of a 'criminal street gang,' these requirements must be met: (1) the group must be an ongoing association of three or more persons sharing a common name or common identifying sign or symbol; (2) one of the group's primary activities must be the commission of one of the specified predicate offenses; and (3) the group's members must 'engage in or have engaged in a pattern of criminal gang activity.' [Citations.]" (*People v. Loeun* (1997) 17 Cal.4th 1, 8.) (capitalization omitted.)

"The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude

the occasional commission of those crimes by the group's members. . . . [¶] Sufficient proof of the gang's primary activities might consist of evidence that the group's members consistently and repeatedly have committed criminal activity listed in the gang statute." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323-324; *see People v. Sanchez* (2016) 63 Cal.4th 665.)

A gang's primary activities can be established through expert testimony. (*People v. Sengpadychith*, *supra*, 26 Cal.4th at pp. 323-324.) The prosecution may use an expert to testify about a gang, however such testimony should be admitted only if the subject matter is "sufficiently beyond common experience that the opinion would assist the trier of fact." (*People v. Gardeley* (1996) 14 Cal.4th 605, 617.) Under Evidence Code section 801, an expert may give testimony in the form of an opinion. (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 617.) However, section 801 limits expert opinion testimony to an opinion that is "[b]ased on matter . . . perceived by or personally known to the witness or made known to [the witness] at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which [the expert] testimony relates." (*People v. Gardeley*, *supra*, 14 Cal.4th at pp. 617-618.) Any material that forms the basis of the expert's opinion must be reliable because the law "does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based." (*Id.* at p. 618, citing

Kennemur v. State of California (1982) 133 Cal.App.3d 907, 923.) Thus, an "expert's opinion may not be based 'on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors.'" (*People v. Richardson* (2008) 43 Cal.4th 959, 1008; *People v. Gardeley*, *supra*, 14 Cal.4th at p. 618.)

C. The Trial Court's Instructions -- Which Permitted the Jury To Rely on Five Convictions That Did Not Qualify As Predicates Under Section 186.22 -- Violated Mr. Tran's Constitutional Rights to Due Process and a Fair Jury Trial.

The Fifth and Fourteenth Amendments requires that in criminal cases, the state must prove every fact necessary to establish its case beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364.) In turn, the Sixth Amendment requires that criminal defendants are entitled to a jury determination of all elements of a charged offense. (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 697-698; *Sandstrom v. Montana* (1979) 442 U.S. 510, 512-514; *Morrissette v. United States* (1952) 342 U.S. 246, 274-275.) Together, these rights require a jury determination, based upon proof by the State beyond a reasonable doubt, of every factual element of the crime charged. (*Sandstrom v. Montana*, *supra*, 442 U.S. at pp. 512-514; *In re Winship*, *supra*, 397 U.S. at pp. 363-364.)

Where proof of a particular fact exposes a defendant to greater punishment than that available in the absence of such proof, that fact is an element which the Fifth and Sixth Amendments require be proven beyond a reasonable doubt to a jury. (*Mullaney v. Wilbur*, *supra*, 421 U.S. at p. 698; *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 88.) "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial

guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (*United States v. Jones* (1999) 526 U.S. 227, 243, n.6. *Accord Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.)

Here, the state introduced evidence of five predicate offenses through documentary evidence and the testimony of its gang expert Nye. In closing argument, the prosecutor told the jury that the state established a "pattern of criminal gang activity" by introducing "the prior conviction of Se Hoang, remember, Phi Nguyen and Anthony Johnson." (8 RT 1697.)

None of the predicate convictions relied upon by the state, however, could validly support the section 186.22, subdivision (b), allegation. The trial court's gang instructions -- which erroneously told the jury it could rely on these predicate convictions -- violated Mr. Tran's Fifth, Sixth and Fourteenth Amendment constitutional rights. Appellate review of an instructional claim requires no deference to a ruling by the trial court; instead, the appellate court should review such claims de novo. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581, 584.)

1. The state's reliance on the five predicate "convictions" of enumerated offenses violated state and federal ex post facto provisions.

As noted above, a "pattern of criminal gang activity" is currently defined as "the commission of, attempted commission of, conspiracy to commit, or solicitation of,

sustained juvenile petition for, *or conviction* of two or more" of the enumerated offenses. (§ 186.22, subd. (e), emphasis added.) The crimes here, however, occurred in 1995. At that time the statute defined a "pattern of criminal gang activity" as "the commission, attempted commission, or solicitation of two or more" of the enumerated offenses. (Former § 186.22 , subd. (e) (Stats. 1994, ch.451, § 1.) Proof of "conviction" of two or more enumerated offenses was insufficient to prove a predicate offense to support a section 186.22, subdivision (b), enhancement allegation.

But that is not what the trial court told the jury. Instead, the court told the jury a "pattern of criminal gang activity"means "[t]he commission of, or attempted commission of, or conspiracy to commit, *or conviction of,* or having a juvenile petition sustained for commission of any combination of two or more" enumerated offenses. (4 CT 1051-1052, 1054, emphasis added.) And significantly, the prosecutor too told the jury that the state introduced "the prior *conviction* of Se Hoang, remember, Phi Nguyen and Anthony Johnson" to prove a "pattern of criminal gang activity," which was "one of the elements [of the gang enhancement]." (8 RT 1697.)

The application of the current version of section 186.22 in this case to permit the state to rely on a "conviction" alone to prove a predicate offense violated the state and federal ex post facto clauses. Article I, section 10 of the United States Constitution provides in relevant part that "[n]o state shall . . . pass any Bill of Attainder [or] ex post facto law . . . ." In its most basic form, of course, this clause precludes laws which make

criminal an act already performed. (*Calder v. Bull* (1798) 3 U.S. (1 Dall) 386, 390.) As the Supreme Court has made clear, however, a statute also violates the ex post facto clause where it alters the legal rules of evidence to permit conviction on lesser or different evidence than was required at the time the act was committed. (*Carmell v. Texas* (2000) 529 U.S. 513, 522-526; *Calder v. Bull*, *supra*, 3 U.S. (1 Dall) at 390.)

Carmel v. Texas, *supra*, is instructive. There, defendant was charged with sexual assault of his 16 year old step-daughter. At the time he committed the offense, Texas law permitted the state to introduce testimony from sexual assault victims. (*Carmel v. Texas*, *supra*, 529 U.S. at p. 544.) Unless the victim had told someone of the assault within 6 months, however, Texas law did not permit a conviction based solely on the victim's testimony unless the victim was less than 14 years old. (*Id*. at p. 517.) After the offense -- but prior to trial -- the Texas legislature changed this rule of evidence to permit a conviction based solely on the victim's testimony (and without a report of the assault) so long as the victim was less than *18* years old. (Id. at pp. 517-518.) Because the victim was 16, the state courts applied the new law and instructed the jury it could convict defendant by relying solely on the victim's testimony. On appeal, defendant challenged application of the new law.

The state courts rejected the challenge, ruling that the new statute did not lessen the burden of proof but added a new type of evidence that the jury could rely on to convict. (*Id*. at p. 520.) The Supreme Court reversed, concluding that the Texas statute

did not simply "enlarge the class of persons who may be competent to testify . . . ." (*Id*. at p. 544.) Noting that sexual assault victims could testify both before and after the rule of evidence was changed, the Court concluded that the practical effect of the new law was to "govern[] the sufficiency of . . . facts for meeting the burden of proof." (*Ibid*.) As a result, the Court held that the constitutional proscription on ex post facto laws precluded application of the new law to defendant's case. (*Id*. at pp. 552-553.)

This case is virtually identical to *Carmel*. Here too evidence of predicate offenses was admissible both prior to and after the charged offense to prove a "pattern of criminal gang activity." Prior to the charged offense, a pattern of criminal gang activity could be proven with evidence of "the commission, attempted commission, or solicitation of two or more" enumerated offenses. (Former § 186.22 , subd. (e) (Stats. 1994, ch.451, § 1.) Proof of "conviction" alone was insufficient to prove a predicate offense to support a section 186.22, subdivision (b), enhancement allegation.

After the charged offense, however, the state amended section 186.22. As explained to the jury in this case, section 186.22 permitted the jury to find a "pattern of criminal gang activity" by relying on evidence of a (1) commission of, (2) attempted commission of, (3) conspiracy to commit, (4) or solicitation of, (5) sustained juvenile petition for, (6) or conviction of two or more" of the enumerated offenses. (§ 186.22, subd. (e).) Thus, proof of "conviction" alone was now sufficient to prove a predicate offense to support a section 186.22, subdivision (b), enhancement allegation. None of

this had been possible when the crime had been committed in 1995. Like *Carmel*, the statute here actually changed "the sufficiency of . . . facts for meeting the burden of proof." (*Carmel v. Texas*, *supra*, 529 U.S. at p. 544.) An ex post facto violation has occurred.

2. The state's reliance on Se Hoang's 1995 conviction for a 1993 crime of conspiracy to commit murder violated state and federal ex post facto provisions.

In the same vein, the state's reliance on Se Hoang's 1995 conviction for a 1993 crime of conspiracy to commit murder (§§ 182.2, 187) violated state and federal ex post facto provisions. In this regard, the trial court told the jury a "pattern of criminal gang activity" means "[t]he commission of, or attempted commission of, *or conspiracy to commit*, or conviction of, or having a juvenile petition sustained for commission of any combination of two or more" enumerated offenses. (4 CT 1051-1052, 1054, emphasis added.) The court further informed the jury that one of the enumerated offenses was "conspiracy to commit . . . Conspiracy to Commit Murder . . . . (4 CT 1052, 1054.)

In 1995, however, the statute defined a "pattern of criminal gang activity" as "the commission, attempted commission, or solicitation of two or more" of the enumerated offenses. (Former § 186.22 , subd. (e) (Stats. 1994, ch.451, § 1.) Proof of "conspiracy to commit" two or more enumerated offenses was insufficient to prove a predicate offense to support a section 186.22, subdivision (b), enhancement allegation. Moreover, conspiracy to commit murder was not an enumerated offense. (Former § 186.22 , subd.

(e) (Stats. 1994, ch.451, § 1.) For the same reasons explained in Argument __-__, an ex post facto violation has occurred.[18]

3. The state's reliance on the testimony of the gang expert regarding the predicate offenses violated the U.S. Constitution's confrontation clause and California's hearsay rule.

At the time of Mr. Tran's trial, this Court had held that an expert could testify and reveal the information on which he had relied in forming his expert opinion, including hearsay. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617-620.) Under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, the trial court was obligated to follow *Gardeley,* notwithstanding *Crawford v. Washington* (2004) 541 U.S. 36, 59 and its progeny.

Subsequently, in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, this Court, expressly disapproving *Gardeley* on this point, held that where a gang expert recites case-specific out-of-court statements, and the truth of those statements is presupposed by the expert's opinion, those statements are hearsay admissible only as allowed under Evidence Code section 1200, subdivision (b). The Court further held that where gang

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[18] The state also submitted evidence that, in addition to the crime of conspiracy to commit murder (§§ 182.2, 187), Hoang was convicted of illegal possession of a firearm (§ 12021, subd. (d)), and evading a police officer, willful disregard (Veh. Code § 2800.2), with a firearm enhancement (§ 12022, subd. (a)(1)). (1 SCT 118-135; 8 RT 1531.) The trial court did not instruct the jury, however, that these were enumerated offenses within the meaning of section 186.22. (4 CT 1054.) This was proper; these two additional offenses were not enumerated offenses in 1995. (Former § 186.22 , subd. (e) (Stats. 1994, ch.451, § 1.)

experts recite case-specific out-of-court testimonial statements, and the truth of those statements is presupposed by their opinion, those statements are testimonial hearsay and admissible in a criminal trial only upon a showing of witness unavailability and a prior opportunity for cross-examination, absent forfeiture by wrongdoing. (*Ibid*.)

A case-specific out-of-court statement is a statement which asserts a fact about a person or event that is allegedly involved in the case in which the statement is introduced. (*Id*. at 676.) Such statements relate facts which a percipient witness could report. (*Id*. at 676-677; *see also United States v. Garcia* (10th Cir. 2015) 793 F.3d 1194, 1211-1216 [Confrontation Clause precludes gang expert's testimony about gang members' "commission of specific crimes" based on testimonial hearsay]; *United States v. Gomez* (9th Cir. 2013) 725 F.3d 1121, 1129 [Confrontation Clause precludes expert repeating "out-of-court testimonial statements of cooperating witnesses and confidential informants directly to jury in guise of expert opinion"] [internal citation and quotes omitted] .)

Testimonial hearsay is hearsay uttered "with some degree of formality or solemnity… and its primary purpose [must pertain] in some fashion to a criminal prosecution." (*People v. Dungo* (2012) 55 Cal.4th 608, 619.) Police reports are testimonial hearsay. (*People v. Sanchez*, *supra*, 63 Cal.4th at 694-695 [citing *Melendez Diaz v. Massachusetts* (2009) 557 U.S. 305, 320-321]; *United States v. Palmer* (E.D. Va. 2006) 463 F.Supp.2d 551, 553.) Statements by third parties to police typically also are testimonial hearsay. (*People v. Sanchez*, *supra*, 63 Cal.4th at 694-695.)

It is the prosecution's burden to show the admission of evidence of an out-of-court statement is barred by neither the Confrontation Clause nor by California's hearsay rule. (*See Idaho v. Wright* (1990) 497 U.S. 805, 816; *People v. Morrison* (2004) 34 Cal.4th 698, 724.) Application of *Sanchez* to this case compels the conclusion that Nye's testimony included substantial hearsay and testimonial hearsay, and the state will be unable to meet this burden.

To qualify the Hoang offenses as predicate offenses and thus, establish a "pattern of criminal gang activity," the state introduced Nye's testimony that he reviewed "a document" which indicated that when contacted by police, Hoang told officers that he was a member of VFL at the time of the burglary. (8 RT 1531.) Likewise, to qualify the Johnson offense as a predicate offense, Nye testified that "police reports" showed that police officers interviewed co-defendant Plata in 1993, and Plata denied involvement in any crimes, but admitted that Johnson was a VFL member, and that he (Plata) was an associate who had not been "jumped in" yet. (8 RT 1538.)

In *Sanchez*, *supra*, the Court gave the following example to clarify the distinction between general, background information and case-specific facts: "That an associate of the defendant had a diamond tattooed on his arm would be a case-specific fact that could be established by a witness who saw the tattoo, or by an authenticated photograph. That the diamond is a symbol adopted by a given street gang would be background information about which a gang expert could testify. The expert could also be allowed to give an

opinion that the presence of a diamond tattoo shows the person belongs to the gang." (*People v. Sanchez*, *supra*, 63 Cal.4th at p. 677.)

Similarly here, Nye's opinion that certain persons -- Hoang and Johnson -- were VFL members turned entirely on his review of admissions -- Hoang's admission that he was a VFL gang member and Plata's admission that he was an VFL associate and Johnson was a VFL gang member. When testifying regarding facts of this kind, Nye was relating case-specific facts. (*People v. Ochoa* (2017) 7 Cal.App.5th 575, 589 ["that someone admitted being a gang member is ... a case-specific fact"].)

Nye's opinions regarding VFL gang members was inadmissible case-specific hearsay. Admissions to VFL membership, whether told directly to Nye or to others, are out-of-court statements offered for the truth of their content. (*See People v. Sanchez*, *supra*, 63 Cal.4th at p. 674; *People v. Ochoa*, *supra*, 7 Cal.App.5th at pp. 588-589.) As such, the admissions are hearsay, and inadmissible.

Since Nye's knowledge of the persons committing the predicate offenses -- Hoang and Johnson -- turned entirely on police reports, and police reports are both hearsay and testimonial hearsay, and include multiple levels of hearsay and testimonial hearsay, the entirety of Nye's testimony introduced to prove Hoang and Johnson were members of VFL was inadmissible.

Neither did the prosecution adduce any basis for finding the contrary. It identified neither an apposite hearsay exception nor grounds to find Nye's testimony concerning the

predicate offenses he imputed to VFL members did not consist of inadmissible hearsay. The conclusion is unavoidable that under *Sanchez* admission of this testimony violated Evidence Code section 1200, subdivision (b). Similarly, the prosecution offered no basis for finding the hearsay on which Nye relied was not testimonial hearsay nor that the hearsay declarant was unavailable and defendant had a prior opportunity to cross-examine, nor that he had forfeited that right by wrongdoing. The unavoidable conclusion is that Nye's testimony on these matters also violated the Confrontation Clause. (*See Crawford v. Washington*, *supra*, 541 U.S. at 59.)

D. The Submission of Legally Insufficient Predicates to the Jury, Each of Which Did Not Qualify as Predicates under Section 186.22, Requires Reversal.

As explained above, the trial court's instructions on section 186.22 violated Mr. Tran's federal constitutional rights. A trial court's submission of "legally insufficient" alternative theories of liability requires reversal unless the record affirmatively establishes that the jurors actually based their verdict on a legally valid ground. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129; *People v. Swain* (1996) 12 Cal.4th 593, 607. *Accord Hedgpeth v. Pulido* (2008) 555 U.S. 57, 61 [improper instruction on invalid alternative theory constitutes constitutional error]; *Yates v. Evatt* (1991) 500 U.S. 391, 404, overruled on other grounds in *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [an error in instructing on a mandatory presumption can be deemed harmless only if "the jury *actually* rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt,

independently of the presumption."].) Insofar as the verdict will rarely show that the jury expressly relied on the proper theory, the error "'can be harmless only if the jury verdict on other points effectively embraces this one or if it is impossible, upon the evidence, to have found what the verdict *did* find without finding this point as well.'" [Citation.]" (*People v. Chun* (2009) 45 Cal.4th 1172, 1204, emphasis in original.) In other words, if other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the proper findings necessary for conviction or true finding, the trial court's submission of legally insufficient theories can be deemed harmless. The state will be unable to meet this burden here

Here, the prosecutor introduced evidence of five prior convictions to prove the requisite predicate offenses. None of these convictions could legally serve as predicate offenses because the 1995 version of section 186.22 did not permit the jury to rely on "convictions" alone to find a "pattern of criminal gang activity." Moreover, Hoang's conspiracy to commit murder conviction was not an enumerated offense of the 1995 version of section 186.22. Finally, Hoang's two convictions and Johnson's one conviction could not be used as predicate offenses because the evidence was based on inadmissible hearsay. Because none of the five predicates were valid, the section 186.22, subdivision (b), enhancement must fail.

Mr. Tran recognizes, of course, that the trial court also instructed the jury that it could rely on "[t]he commission of, or attempted commission of," the enumerated

offenses. (4 CT 1051-1052, 1054.) And at the time of the 1995 offense, section 186.22 did permit the jury to rely on the commission or attempted commission of the enumerated offenses. (Former § 186.22 , subd. (e) (Stats. 1994, ch.451, § 1.) Thus, although evidence of the five "convictions" themselves could not validly prove the predicate offenses, the conduct underlying the *commission or attempted commission* of the offenses was potentially admissible. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1465, n. 5 [a pattern of criminal activity can be proved by *commission* of the two predicate offenses.] Moreover, the conduct underlying the charged offenses, in this case murder, burglary and robbery, could have been considered in determining a pattern of criminal street gang activity. (*People v. Bragg* (2008) 161 Cal.App.4th 1385, citing *People v. Gardeley*, *supra*, 14 Cal.4th at pp. 624–625, and cases cited therein; *People v. Duran*, *supra*, 97 Cal.App.4th at p. 1457.)

But the jury returned a general verdict on the section 186.22, subdivision (b), enhancement. (4 CT 1176.) The jury gave no indication in its verdict that it was not relying on the five legally insufficient predicate convictions to support its true finding. And the prosecutor here did not elect to rely on the conduct underlying the commission of the prior offenses. Nor did the prosecutor elect to rely on the current offenses. Instead, the prosecutor specifically told the jury in closing argument that it must rely on the evidence of the convictions themselves. According to the prosecutor, the state established a "pattern of criminal gang activity" by introducing "the prior conviction of Se Hoang,

remember, Phi Nguyen and Anthony Johnson. You might be saying, 'Why did he introduce that?' Because that is one of the elements [of the gang enhancement]." (8 RT 1697.) Thus, in accord with the prosecutor's argument, the jury was effectively discouraged from relying on the conduct underlying the convictions, or the current offenses, to make its finding. (*See People v. Powell*, *supra*, 67 Cal.2d at pp. 55-57 [prosecutor's reliance on evidence in final argument reveals how important the prosecutor "and so presumably the jury" considered the evidence]; *People v. Cruz*, *supra*, 61 Cal.2d at p. 868 [same]. *Accord United States v. Kojoyan* (9th Cir. 1996) 8 F.3d 1315, 1318 ["closing argument matters; statements from the prosecutor matter a great deal"].)

On this record, where the jury returned a general verdict, and the record does not otherwise reveal upon which predicates the jury relied, the state will be unable to prove beyond a reasonable doubt that the jury "effectively" rejected the five legally insufficient predicates, and instead relied on evidence upon which the state itself did not rely. (*See People v. Chun*, *supra*, 45 Cal.4th at p. 1204.) Reversal of the section 186.22, subdivision (b), enhancement finding is required.

VII. MR. TRAN JOINS IN CO-APPELLANT'S ARGUMENT THAT THERE WAS INSUFFICIENT EVIDENCE THE CRIMES WERE COMMITTED FOR THE BENEFIT OF A GANG.

Pursuant to Rule 8.200 of the California Rules of Court, Mr. Tran hereby joins in Argument I of co-appellant Plata's opening brief. Plata argues that there was insufficient evidence to support the section 186.22, subdivision (b), gang allegation for two main reasons. (Plata's Opening Brief (POB) 41-71.) First, according to Plata, Nye's testimony about the primary activities of the VFL was speculative and based on assumptions unsupported by the facts of the case. (POB 50-61.) Second, according to Plata, there was insufficient evidence that the crimes were committed for the benefit of the VFL. (POB 61-71.) The problems described by Plata all apply equally to Mr. Tran.

ERRORS OCCURRING AT THE PENALTY PHASE OF TRIAL

VIII. THE TRIAL COURT'S ADMISSION OF POWERFUL VICTIM IMPACT EVIDENCE -- WHICH REDUCED AN INTERPRETER TO TEARS AND CAUSED THE REMOVAL OF A JUROR -- VIOLATED FEDERAL AND STATE LAW AND REQUIRES A NEW PENALTY PHASE.

A. Introduction.

In 1987, the United States Supreme Court held that the Eighth Amendment barred the state from introducing "victim impact" evidence in capital cases -- evidence concerning such matters as the victim's personal characteristics, the emotional impact of the crime on his family and the opinions of family members about the crime and the criminal. (*Booth v. Maryland* (1987) 482 U.S. 496, 502-509.) California law was in accord. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1266-1267.)

The penalty phase here began on October 24, 2007. By that time, the Supreme Court had overruled *Booth* and ruled that the Eighth Amendment did *not* bar evidence relating to the victim's personal characteristics or the emotional impact of the crime on the victim's family. (*Payne v. Tennessee* (1991) 501 U.S. 808, 829.) Instead, the Court ruled that states were free to permit victim impact evidence. (*Id.* at p. 827.)

In light of *Payne*, the prosecutor sought to introduce victim impact evidence, representing that it was "going to call victim member's family to talk about the impact of the loss of Linda Park," including Linda's father, mother and sister, and the family's neighbor, Marilyn Fox, along with "photographs of Linda Park," and "four or five minutes of videos." (9 RT 1766.) Defense counsel strenuously objected to the victim

impact evidence "both in the general and in the specific," based on Mr. Tran's rights under the Eighth and Fourteenth Amendments. (9 RT 1765.) According to counsel, "I recognize the California Supreme Court is to the contrary, but my view is that this evidence violates the 8th Amendment because it focuses the jury's decision, in a sense, on revenge" and "it changes it to an emotional reaction to whoever the victim is." (9 RT 1765.) Over counsel's objection, the trial court admitted the evidence. (9 RT 1766.) According to the court, "[t]he trend with the California Supreme Court is not to narrow the scope, but to widen the scope." (9 RT 1767.)

Defense counsel's fears were well-founded. On the first day of the state's case, the prosecutor introduced the testimony of Linda's father Sun-Hwa Park, through an interpreter, and the family's neighbor Marilyn Fox, about the devastating impact that Linda's murder had on both him and Linda's mother. (9 RT 1777-1795.)

The following day, Juror 1 called the trial court. (9 RT 1875.) According to the court, the juror "is having some rather significant emotional problems with the penalty phase of the case." (9 RT 1875.)

Juror 1 was called into the courtroom. (9 RT 1875.) She explained, "I was up all night. I went home and sat in the dark a long time." (9 RT 1875.) She knew "these men deserve a fair trial," but "[y]esterday was life changing for me, and I have to be honest enough to say and brave enough to say, because it would be easy to let the things I feel now dictate any things I might say, and I don't think that's fair." (9 RT 1875.) When

asked if she felt she could continue as a juror, Juror 1 replied, "I don't believe, in fairness to them, I can. And I've got to be very fair. I have a son their age. I have a daughter that was not too long ago the age of the victim. I thought, based on those things, I would be the most fair person there was. And I was the hardest one to convince of anything the other day. And then yesterday -- I just don't think I can be fair. I believe in the law, and I believe in being fair, and I believe that I have to be courageous enough to say I don't think I have an open mind anymore. And I was devastated by yesterday." (9 RT 1876.)

The trial court confirmed that it had, indeed, been an emotional day. According to the court, "Yesterday was a very emotional day. *I have never seen an interpreter cry during testimony before.* So it was a very emotional day I think for just about everybody who listened to that, but that part is over. It's going to move on now. . . ." (9 RT 1877, emphasis added.) The court asked, 'I need to know if mentally and physically you are able to go on." (9 RT 1877.) Juror 1 replied, "I don't know. If either one of the defendants were my son, I would not want me here." (9 RT 1877.) The court told the juror, "The other alternative, rather than doing anything at this point, is waiting and seeing perhaps at the end of today. We're going to have a relatively short day today. I think we're going to be done by noon. . . . So if you want to try to tough it out for that, we can have that option. If you just don't think you can -- I see you're kind of shaking there a little bit." (9 RT 1878.) Juror 1 responded, "I was shaking all night long. I will do, with all due respect, whatever you want. Out of fairness to everyone involved,

everyone involved, I thought I owed it to all of you to be honest enough to say I'm not coping. And I always thought I was such a strong person." (9 RT 1878.)

Outside the juror's presence, all defense counsel requested discharge of the juror; the prosecutor submitted the matter. (9 RT 1878.) Ultimately, the trial court discharged Juror 1. (9 RT 1879.) By the end of the day, the prosecutor closed its case with still more victim impact evidence with the testimony of Linda's sister Janie Park. (9 RT 1913-1926.) At the close of the state's case, defense counsel renewed the objection to the evidence. (9 RT 1927.)

As more fully discussed below, the trial court's admission of victim impact evidence requires reversal of the penalty phase in this case. First, although in the *post-Payne* era this Court held victim impact evidence admissible pursuant to section 190.3(a), the Court has never analyzed the matter in light of the legislative history of that section. Fundamental principles of statutory construction show that in enacting section 190.3 as part of the 1978 death penalty law, the electorate intended that victim impact evidence be inadmissible. Second, even if *Payne* is applied to this case, the testimony in this case was improperly admitted both because of the overwhelmingly prejudicial nature of the testimony here and the absence of any instructions to guide the jury's consideration of such testimony.

B. The Prosecutor Introduces Dramatic Victim Impact Evidence Which Reduces An Interpreter to Tears and Causes Removal of a Juror, Then Urges The Jury To Rely On This Evidence To Decide Whether Mr. Tran Should Live Or Die.

The prosecutor called three victim-impact witnesses: Sunhwa Park (Linda's father), Janie Park (Linda's sister), and Marilyn Fox (the Park family's neighbor). All provided dramatic, heart-wrenching testimony about Linda Park's good qualities, their family life together, and the devastating impact her death had on the family. (9 RT 1775-1790.)

The prosecutor also showed the jury a slide presentation of a 26-page binder (People's Exhibit (PE) 19) of photographs of Linda, including:

(1) Linda wearing a traditional Korean outfit when she turned one year old (9 RT 1779);

(2) Linda smiling which she "always" did (9 RT 1780);

(3) Linda's school picture from 1987 which showed a "sweet little girl" (9 RT 1780);

(4) Linda mimicking her older sister Janie with "her smile," as Janie was learning to play the violin (9 RT 1781);

(5) Linda at a concert with her mother Dong (9 RT 1781);

(6) Linda and her father singing together at home with a karaoke machine (9 RT 1782);

(7) Linda holding a baby (9 RT 1783);

(8) Linda on one of her birthdays when all her friends came over (9 RT 1783);

(9) Linda and her father on holiday (9 RT 1783);

(10) Linda at home with Janie (9 RT 1783);

(11) Linda on the day she was born with her mother (9 RT 1784);

(12) Linda with her mother (9 RT 1784);

(13) Linda with Janie (9 RT 1784);

(14) Linda with friends at her high school graduation (9 RT 1789);

(15) Linda standing on the palm of his hand, smiling (9 RT 1788); and

(16) Linda in a family portrait, which remained hung on their living room wall (9 RT 1789.)

The presentation also included Linda's personal items:

(17) Linda's high school diploma (9 RT 1789);

(18) A certificate of outstanding work that Linda brought home from school (9 RT 1789);

(19) Linda's 1994 yearbook, which was filled with notes from friends (9 RT 1916-1917); and

(20) Linda's address book, which was filled with stickers (9 RT 1917).

The prosecution finally showed the jury three videotapes of Linda:

(1) A videotape of Linda's high school graduation, where Linda stood with her parents and sister (9 RT 1920-1921; PE 119);

(2) A videotape showing Linda's 14th birthday party (9 RT 1922; PE 120); and

(3) A videotape of the one-year anniversary memorial service for Linda at which the family's "very tight-knit community" attended (9 RT 1924; PE 121).

The prosecution presented evidence to show Mr. Park's emotional reaction at the crime scene shortly after he found his daughter's body on November 9, 1995. His neighbor, Fox, was speaking to a friend on the telephone, when she heard Park banging and screaming at her door. (9 RT 1793.) When she opened the door, Park was screaming at her that Linda was dead. (9 RT 1793.) She ran over to the house with him, and "it was as if you opened your front door and your daughter was on the floor dead and her hands had been completed -- tied behind her back to her feet. And it looked as though her throat were slit." (9 RT 1793.)

Fox saw Park on the other side of Linda, "cradling her head in his lap saying that his Linda was dead, and someone had murdered Linda." (9 RT 1793-1794.) When Park could not tell her the location of his telephone, Fox went home and called police. (9 RT 1794.)

After Linda's death, there was a "dramatic change" in the Park family. (9 RT 1794.) For months, Park came home every night, but could not enter his house. (9 RT 1795.) He would have to come to the Fox home first, stay for a hour to sit and talk, and then find the strength to go home. (9 RT 1795.)

As for Linda's mother Dong, Park described how Linda's death had a devastating effect. "The first day when Linda's mom found out what happened to Linda, she came home and basically passed out. Since then with just a little bit of shock, she has tendencies to faint." (9 RT 1784.) According to Park, "[t]hat's one of the reason [sic]

why she's not able to come here." (9 RT 1784.) She fainted on the first day in court; he had to call 911. (9 RT 1784.)

He explained that before Dong got pregnant with Linda, the family did not have enough resources to have another child. (9 RT 1785.) Dong was on birth control. (9 RT 1785.) As she got older, she decided she wanted another child. (9 RT 1785.) She did not tell her husband when she became pregnant. (9 RT 1785.) Dong felt that Linda was the child she had without letting him know, which has added to her stress of losing Linda. (9 RT 1785.)

Dong still went to Linda's grave every Saturday, cleaning the area and then coming home. (9 RT 1785.) She sat in Linda's room crying every day. (9 RT 1785.) The family did everything they could to try and calm her. (9 RT 1785.) She wanted another child, but instead began raising small puppies. (9 RT 1785.) Sometimes when Park came home, he found his wife laughing out loud and crying; "[s]he'll be acting like a crazy person." (9 RT 1786.)

When Park, saw his wife suffering so much from the emotions of losing Linda, he thought he would ease her pain by letting her die or killing her. (9 RT 1786.) He once took a knife in her room to kill her, but was stopped by his brother. (9 RT 1786.) On another occasion, the "pain was too much for us to bear, and we couldn't really go on living without her." (9 RT 1786.) He thought "maybe we should all just die together, all together, so [he] got a gasoline [sic] and pour [sic] it all over our house to set ourselves on

fire so we can die." (9 RT 1786.) When Janie saw what was happening, she ran over to their neighbor Fox's home, and the Foxes stopped him. (9 RT 1786.)

Since Linda's death, Park became an alcoholic. (9 RT 1786.) He could not live a day without having alcohol in his system. (9 RT 1786.) From 2:00 p.m. to 11:00 p.m. everyday, the pain was "way too great." (9 RT 1786.) His neighbor Steve Fox would have alcohol in his house, and would invite him over, and comfort him during the difficult times. (9 RT 1786.)

At a certain point, Park realized that "dying at this point doesn't do us any good," thinking about Janie. (9 RT 1787.) He decided to focus on her. (9 RT 1787.) He "became to know the Lord, and through faith . . . overc[a]me the alcohol and tobaccos." (9 RT 1787.) He was "living day by day by the faith." (9 RT 1787.)

Park still kept a family photograph, enlarged and hung in his home. (9 RT 1789.) He had not removed anything that belonged to Linda from the house, including her clothing. (9 RT 1789.) Linda's bedroom was left the same way as it was in November 1995. (9 RT 1789.) But after her death, Park wrote on the entire walls of her room, saying, "Linda, I love you. Linda, I miss you. Linda, I am so sorry." (9 RT 1790.)

At first, Linda's sister Janie was shielded from how Linda died. (9 RT 1923.) When she later saw the images and way her father found Linda, she realized "the way that he found her and what he has to live with for the rest of his life, how he found his baby daughter that way, you can't -- you can't get that image out of your mind." (9 RT 1923.)

“She didn’t just die. She was killed, killed in an inhumane way that nobody should ever have to go through. Think of her last moments, how scared. She was probably thinking, ‘Where are my parents? Where is my sister? I need help.” (9 RT 1923.) Janie saw her father suffer every day. (9 RT 1923.) He could not sleep “because I know he’s thinking that and he sees that. It’s devastated him. And he’s never, ever going to be the same. No father should have to come home to see his daughter like that.” (9 RT 1923.) Janie said that her father wrote on the walls of Linda’s room that he was sorry, that he could not protect her, and that he could not help her that time.” (9 RT 1923.)

At the time of trial, Janie was married and had a three year-old son and 18 month-old daughter. (9 RT 1913-1914.) She took her children to Linda’s grave, telling them, “this is your aunt. (9 RT 1924.) When she was walking down the aisle at her wedding, she thought of Linda and how her father would not have the chance to walk her down the aisle too. (9 RT 1915.)

The prosecutor took full advantage of the impact of this testimony. He heavily relied on the evidence. (12 RT 2390-2396.) The prosecutor asked the jury to close its eyes and think about Linda’s father Sun Park’s testimony “30 seconds before you sign the verdict forms. Close your eyes for just 30 seconds and try to imagine the hurt and the agony and the despair and the self-doubt and the loss of love that he experiences every day” (12 RT 2391.) The prosecutor asked the jury to close its eyes and think about Linda’s sister Janie Parks testimony, stating, “I want another 30 seconds when you back

there for Mrs. Park. Close your eyes and for just 30 seconds try to think and imagine the horror and the terror and the sense of loss that they caused her, and then put a weight on it." (12 RT 2393.)

The prosecutor then shared that he had a discussion with a person in the courtroom after Mr. Park and Janie testified, a "smart friend, somebody I consider a friend, smart man had a chance to watch Janie park and Sunny Park testify in front of you" and "[t]hat person said, 'It felt like a tidal wave when they testified.'" (12 RT 2394.) Sharing his thoughts, the prosecutor continued, "You go, 'Wow, that person was thinking the exact same thing I was thinking.' It's true until you think about that. It felt like a tidal wave, all that, the enormous emotions of loss and love and hurt and sense of loss. How long was their testimony? Remember? I think Mr. Park was on the stand for about an hour, 45 minutes, an hour? Janie Park was on the stand an hour? Less than that. That's what caused this tidal wave, two hours. Two hours." (12 RT 2395.) The prosecutor then urged the jury to "compare that to what they live with every day. This tidal wave becomes a drop in the ocean of what they go through. All caused by two men sitting in this courtroom, Scrappy and Noel Plata. Put a value on that. Put a value on that." (12 RT 2395.)

C. Because The Term "Circumstances Of The Present Offense" Used By The Electorate In Section 190.3 Had A Then-Recognized Meaning Precluding Consideration Of Victim Impact Evidence, The Electorate Is Presumed To Have Intended The Same Meaning In Section 190.3.

As explained above, Penal Code section 190.3 was enacted by voter initiative in November of 1978. Section 190.3 provides that a jury deciding whether a defendant will live or die must consider the "circumstances of the crime of which the defendant was convicted in the present proceeding . . . ." (§ 190.3, factor (a).)

As more fully discussed below, basic principles of statutory construction compel the conclusion that victim impact evidence is not admissible under section 190.3. In section 190.3, the electorate permitted the jury to consider "circumstances of the crime." This phrase was taken from earlier versions of the death penalty statute, and had been interpreted by cases prior to the 1978 election. Under well-accepted principles of statutory construction, the electorate is deemed to have intended "circumstances of the crime" as used in section 190.3 to have the same meaning it had in the pre-1978 statutes. And that meaning was clear: victim impact evidence could not be introduced absent a showing that defendant intended the particular harm sought to be introduced.

As explained above, the primary goal of statutory construction is to determine the Legislature's intent and so effectuate the purpose of the law. (*DuBois v. Workers' Comp. Appeals Board* (1993) 5 Cal.4th 382, 387.) In determining the intent behind any particular statute, a court looks first to the language of the statute. (*Ibid.*) Where the language of a statute includes terms that already have a recognized meaning in the law,

'the presumption is almost irresistible" that the terms have been used in the same way. (*In re Jeanice D.*, *supra*, 28 Cal.3d at p. 216.) This principle applies to legislation adopted through the initiative process. (*Ibid*.)

Here, the 1978 death penalty statute provided that the parties may introduce -- and the trier of fact must consider -- "circumstances of the crime." Significantly, however, the phrase "circumstances of the crime" as used in the 1978 statute was not new. Prior to 1978, virtually the same term had been used in the statute's predecessor.

As explained above, the language of current section 190.3 was taken directly from identical language in section 190.3 of the 1977 statute. In turn, section 190.3 of the 1977 statute has its genesis in section 190.1 of the 1958 death penalty statute. Under the 1958 statute, in determining whether a defendant would live or die, the jury could consider "the *circumstances surrounding the crime,* . . . the defendant's background and history, and . . . any facts in aggravation or mitigation of the penalty." (Former § 190.1, added by Stats.1957, c. 1968, p. 3509, § 2, amended by Stats.1959, c. 738, p. 2727, § 1 [emphasis added].)

The 1958 statute did not expressly define the phrase "circumstances surrounding the crime." In several cases, however, this Court made clear that victim impact evidence and argument was improper under the 1958 law.

For example, in *People v. Love* (1960) 53 Cal.2d 843, the Court directly held that under the 1958 law, the harm caused to victims could not be admitted absent evidence

showing that the defendant intended to inflict that harm. There, defendant was convicted of shooting and killing his wife. At the penalty phase, the state sought to introduce photographs of the victim at the hospital, and a tape recording of the victim made in the hospital shortly before her death, to show that she suffered great pain before she died. On appeal, defendant argued that the evidence was inadmissible. The state argued that the evidence was admissible under state law "to demonstrate the enormity of the crime that defendant had committed." (53 Cal.2d at p. 856.)

The Court noted that "[t]he prosecution did not suggest that defendant intended to cause such pain . . . ." (53 Cal.2d at p. 855.) Absent such a showing, the Court ruled that such victim evidence was inadmissible. (53 Cal.2d at pp. 856-857 and n.3.) According to the Court, such victim impact evidence was inadmissible under the 1958 law "unless it was intentionally inflicted." (53 Cal.2d at p. 856.) Evidence showing the consequences of a murder was of "doubtful" relevance to choosing between life and death unless the defendant intended those consequences. (53 Cal.2d at p. 857, n.3.)

Several years later, this Court relied on *Love* to hold improper a prosecutor's victim impact argument. (*People v. Floyd* (1970) 1 Cal.3d 694.) In *Floyd*, defendants were convicted of robbery and murder. During the penalty phase closing arguments, the prosecutor argued that the jury should consider the effect of the victim's murder on the victim's family. (*Id*. at p. 721.) The jury sentenced defendants to death. (*Id*. at p. 702.)

On appeal, defendants argued that the prosecutor committed misconduct. (*Id*. at p.

722.) In light of the prosecutor's closing argument as a whole, which properly discussed other factors the jury was to consider in selecting the punishment, the Court found no prejudicial misconduct. (*Ibid.*) Nevertheless, citing *Love*, the Court noted the impropriety of references to victim impact "without reference to the [defendant's] intent." (*Ibid.*)

In addition to cases which explained what the phrase "circumstances surrounding the crime" did *not* include, the Court also had many occasions to address what the phrase *did* include. Uniformly, these cases showed that the phrase included facts which were part of the crime itself. (*See*, *e.g.*, *People v. Nye* (1969) 71 Cal.2d 356, 366-367 [evidence that defendant committed crimes of rape, burglary and robbery in the perpetration of killing the victim was admissible as "circumstances of the crime"]; *People v. Morse* (1969) 70 Cal.2d 711, 729 ["victim garrotted against the bars of defendant's cell with a cord from defendant's own mattress, defendant's full and clear acknowledgment of the act, the non-involvement of any other participant" were the "circumstances of the crime"].)

This Court's interpretation of "circumstances of the crime" was consistent with the meaning long given to the term by the United States Supreme Court. For example, in *Gregg v. Georgia* (1976) 428 U.S. 153, 189, the plurality opinion of Justices Stewart, Powell, and Stevens quoted from *Pennsylvania v. Ashe* (1937) 302 U.S. 51, 55, to hold that "'[f]or the determination of sentences, justice generally requires . . . that there be

taken into account the *circumstances of the offense* together with the character and propensities of the offender.'" (Emphasis added.) Neither *Gregg* nor *Ashe* explicitly defined "circumstances of the offense" or otherwise indicated what evidence would be included in the phrase.

Yet cases preceding *Ashe* inform the meaning of the term. (*See* Note (1990) 56 Brooklyn L.Rev. 1045, 1073-1076.) In these cases, the Supreme Court used "circumstances" of the crime to describe facts of the crime itself. (*See*, *e.g.*, *Pico v. United States* (1913) 228 U.S. 225, 229 [defendant "charged with the crime of murder, with the qualifying circumstance of alevosia (treachery) . . . ."]; *Hale v. Henkel* (1906) 201 U.S. 43, 62 ["the facts and circumstances which constitute the offense"]; *Carver v. United States* (1896) 160 U.S. 553, 556 ["[w]hether the homicide was committed under such circumstances as to reduce the grade of the crime from murder to manslaughter . . . ."]; *Moore v. Missouri* (1895) 159 U.S. 673, 679 ["but under such circumstances as shall not constitute the offence"]; *Gourko v. United States* (1894) 153 U.S. 183, 192 ["his crime was that of manslaughter or murder, as the circumstances, on the occasion of the killing, make it the one or the other."]; *United States v. Hess* (1888) 124 U.S. 483, 486 ["the material facts and circumstances embraced into the definition of the offence"]; *Coleman v. Tennessee* (1878) 97 U.S. 509, 519 ["a murder committed . . . under circumstances of great atrocity"]; *United States v. Cook* (1872) 84 U.S. 168, 180 [desertion is a "circumstance [that] entered into the very description of the offense . . .

."].)

Thus, prior to the 1978 election, the phrase "circumstances surrounding the crime" as used in the 1958 statute had a clear meaning. The phrase did *not* include victim impact evidence and arguments absent an affirmative showing that defendant intended to cause the specific harm referenced in that evidence of argument.

Pursuant to the principles of statutory construction discussed above, "the presumption is almost irresistible" that the phrase "circumstances of the crime" as used in section 190.3 was intended to have the same meaning as the virtually identical term had in the 1958 death penalty law and prior case law interpreting that term. (*See In re Jeanice* D., *supra*, 28 Cal.3d at p. 216.) Because the term "circumstances of the crime" did not include victim impact evidence prior to 1978, it should be given the same meaning in section 190.3.

Indeed, as the late Justice Mosk recognized, "by 1978, the victim's personal characteristics, the emotional impact of the crime on the victim's family and others, and the opinions about the crime and the criminal held by such persons had not yet received acceptance as penalty factors." (*People v. Edwards* (1992) 54 Cal.3d 787, 854 [Mosk, J., dissenting]. Justice Mosk was entirely correct.

In fact, the former California Rules of Court did not even include such evidence as "circumstances in aggravation." (*See*, *e.g.*, Cal. Rules of Court, former Div. I-A, Sentencing Rules for the Superior Courts, adopted eff. July 1, 1977, former rule

421(a)(1). As a court of appeal later recognized,

> "We think it obvious that a defendant's level of culpability depends not on fortuitous circumstances such as the composition of his victim's family, but on circumstances over which he had control. . . . *All* of the factors of rule 421 are based upon such choices which the defendant makes of his own will. In contrast, the fact that a victim's family is irredeemably bereaved can be attributable to no act of will of the defendant other than his commission of homicide in the first place. Such bereavement is relevant to damages in a civil action, but it has no relationship to the proper purposes of sentencing in a criminal case." (*People v. Levitt* (1984) 156 Cal.App.3d 500, 516.)

Indeed, victim impact evidence did not receive significant recognition until the early 1980's. (*See*, *e.g.*, Hudson, *The Crime Victim and the Criminal Justice System: Time for a Change* (1984) 11 Pepperdine L.Rev., 23, 51-53. *Accord Payne v. Tennessee*, *supra*, 501 U.S. at p. 820 ["the admission of this particular kind of evidence . . . is of recent origin"].) It can hardly be said that by using virtually the same statutory phrase in effect when the *Love* court held victim impact evidence inadmissible absent a showing of defendant's intent, the electorate intended the opposite result.

To be sure, Mr. Tran recognizes that in *People v. Edwards* (1991) 54 Cal.3d 787, this Court held that victim impact evidence was admissible as "circumstances of the crime." But as this Court has also held, cases are not authority for propositions neither presented nor considered. (*See People v. Williams*, *supra*, 34 Cal.4th at p. 405; *Flannery v. Prentice*, *supra*, 26 Cal.4th at p. 581.) It is clear from *Edwards* that this Court was not presented with, nor did it resolve, the statutory construction argument presented here. As discussed above, applying well-established principles of statutory construction to section

190.3 leads inexorably to the conclusion that the electorate did not intend to permit victim impact evidence in capital cases. The trial court's ruling was error.

D. The Trial Court's Failure To Guide The Jury's Consideration Of The Victim Impact Evidence Violated Mr. Tran's State And Federal Constitutional Rights.

As discussed above, on the first day of the state's case, the prosecutor presented the testimony of Sun Park through an interpreter, and the testimony of neighbor Marilyn Fox, about the impact of Mr. Tran's crime on the Park family's lives. The trial court noted the overwhelming impact of this testimony alone, stating for the record that the day "was a very emotional day I think for just about everybody who listened to that," and caused the court's interpreter to cry. (9 RT 1877.) The evidence was so emotionally devastating that the court was forced to remove a juror, who was so traumatized that she lost her otherwise strong faith that she could be fair, and could not move forward. After the juror was discharged, the prosecutor then continued presenting similarly emotional testimony through Linda's sister Janie.

Unfortunately, the trial court never gave the jury any instructions on the proper use of victim impact evidence. The prosecutor took full advantage of the trial court's failure to limit the jury's use of the victim impact evidence. In closing argument, the prosecutor heavily relied on the victim impact evidence in urging the jury to consider whether Mr. Tran should live or die. According to the prosecutor, the evidence created an emotional "tidal wave," and the jury should consider this "tidal wave" as "a drop in the ocean of

what [the Parks] go through" and "live with every day." (12 RT 2395.)

As more fully discussed below, courts throughout the country have explicitly recognized the need for instructional guidance when victim evidence is introduced at the penalty phase of a capital case. Such instructions prevent the emotional use of victim impact evidence to make comparative worth judgments. The trial court's failure to give any instructional guidance in this case was clear error.

It well-settled that "[i]n criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085.) The court has a *sua sponte* duty to instruct on principles "that are closely and openly connected with the facts before the court and necessary for the jury's understanding of the case." (*People v. Price* (1991) 1 Cal.4th 324, 442. *Accord People v. Murtishaw* (1989) 48 Cal.4th 1001, 1022; *People v. Wilson* (1967) 66 Cal.2d 749, 759.) This obligation is based on the defendant's state and federal constitutional rights "to have the jury determine every material issue presented by the evidence." (*People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351.)

When the absence of instructions permits a jury to impose death as an emotional reaction to certain evidence, and not as a reasoned moral response to aggravating and mitigating evidence, the failure to give proper instructions also violates the Eighth Amendment. As the Georgia Supreme Court has concluded, "[b]ecause of the importance of the jury's decision in the sentencing phase of a death penalty trial, it is imperative that

the jury be guided by proper legal principles in reaching its decision." (*Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842.)

With these general principles in mind, courts from around the country have held that a trial court should specifically instruct the jury on the proper use of victim impact evidence. (*Turner v. State*, *supra*, 486 S.E.2d at p. 842; *State v. Koskovich* (N.J. 2001) 776 A.2d 144, 181; *State v. Muhammad* (N.J. 1996) 678 A.2d 164, 178; *State v. Hightower* (N.J. 1996) 860 A.2d 649, 661; *Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, 829; *State v. Nesbit* (Tenn. 1998) 978 S.W. 2d 872, 892.) "Allowing victim impact evidence to be placed before the jury without proper limiting instructions has the clear capacity to taint the jury's decision on whether to impose death." (*State v. Hightower*, *supra*, 860 A.2d at p. 661.)

Several courts have proposed appropriate limiting instructions. (*Turner v. State*, *supra*, 486 S.E.2d at p. 843; *Cargle v. State*, *supra*, 909 P.2d at pp. 828-829; *Commonwealth v. Means* (2001) 773 A.2d 143, 158-159; *State v. Nesbit*, *supra*, 978 S.W. 2d at p. 892.) Although the language of the instructions varies in each state, depending on the role played by victim impact evidence in each state's statutory scheme, there are several common elements among all of the limiting instructions.

For instance, the highest courts of Pennsylvania, Tennessee, and Georgia have each proposed that jury be specifically told that although it may consider victim impact evidence in determining an appropriate punishment, its consideration of this evidence

must be limited to a rational inquiry into the culpability of the defendant, "not an emotional response to the evidence." (*Cargle v. State*, *supra*, 909 P.2d at p. 829; *Commonwealth v. Means*, *supra*, 773 A.2d at p. 159; *State v. Nesbit*, *supra*, 978 S.W. 2d at p. 892.)

This instruction is consistent with *Payne*. The Supreme Court there allowed the admission of evidence which merely provided "a quick glimpse" of the victim's life which was not "unduly prejudicial." (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 822, 823.) Requiring the jury to consider victim impact evidence as it impacts defendant's own culpability, and precluding the jury from relying on a purely emotional response to the victim impact evidence, is entirely consistent with the Court's admonition against admitting "unduly prejudicial" evidence in the first place.

None of these instructions were given in this case. The trial court gave the jury no guidance whatsoever as to its use of the victim impact evidence and the prosecutor stepped into this gap and relied on the victim impact testimony to make the precise kind of argument condemned in *Payne* itself. This was error; if victim impact evidence is to be admitted in this state, it should be done under circumstances calculated to minimize the danger that the evidence will be improperly used by the jury.

Even if the trial court had no *sua sponte* duty to limit the jury's use of victim impact evidence, reversal would be required. The obligation to ensure the jury is properly instructed falls not only on the trial court, but on defense counsel as well. (*People v.*

Sedeno (1974) 10 Cal.3d 703 at p. 717, n.7.) Where counsel fails to request an instruction which could only benefit the defendant, counsel's conduct has fallen below the standard of care to be expected from a diligent advocate. (*See People v. Jackson* (1986) 187 Cal.App.3d 499, 505-506; *People v. Guizar* (1986) 180 Cal.App.3d 487, 492, n.3.) Here, there was no conceivable tactical reason for defense counsel's failure to request instructions limiting the jury's use of the victim impact evidence. For the same reasons discussed below in Argument V-F, counsel's failure to request such limiting instructions was prejudicial and requires a new penalty phase.

Mr. Tran recognizes that in *People v. Ochoa* (2001) 26 Cal.4th 398, this Court rejected a limiting instruction which would have told the jury to "not impose the ultimate sanction as a result of an irrational, subjective response to emotional evidence." According to the Court, the instruction was duplicative of CALJIC 8.84.1 -- an instruction similar to the CALCRIM instruction given in this case (5 CT 1285) -- which tells the jury not to be "influenced by bias nor prejudice against the defendant . . . ." (*Id.* at p. 455. *See* CALCRIM 761 ["Do not allow bias, prejudice, or public opinion to influence your decision in any way."].)

Yet even if this general instruction conveyed to the jury the notion that it must keep its emotional response to the victim impact evidence in check -- a feat that even the interpreter could not accomplish, and a fact which sharply distinguishes this case from *Ochoa* -- nothing in this instruction gave the jury any further guidance. It did not tell the

jury why victim impact was introduced. In short, no instructions here guided the jury's consideration of the victim impact evidence in this case.

F. The Trial Court's Admission Of The Victim Impact Evidence, And Its Failure To Instruct The Jury As To Its Proper Use, Requires Reversal.

The only remaining question becomes whether admission of this evidence, and the failure to provide the jury guidance as to its proper use, is harmless. The admission of aggravating evidence unauthorized by state law requires a new penalty trial where there is a reasonable probability of a different result absent the error. (*See*, *e.g.*, *People v. Brown* (1988) 46 Cal.3d 432, 449.)

The admission of this evidence also violated federal law. As the Supreme Court has long held, "[a]n important element of a fair trial is that [the trier of fact] consider only relevant and competent evidence . . . ." (*Bruton v. United States* (1968) 391 U.S. 123, 131, n.6; *McKinney v. Rees* (1993) 993 F.2d 1378, 1380. Admission of irrelevant evidence violates federal due process and requires reversal if the evidence is "of such a quality as necessarily prevents a fair trial." (*Lisenba v. California* (1941) 314 U.S. 219, 236.)

Ultimately, however, on the facts of this case it does not matter what standard of prejudice is applied. A new penalty trial is required under either standard.

As the trial court itself recognized, the victim impact evidence was devastating. According to the court, the first day of victim impact evidence "was a very emotional day I think for just about everybody who listened to that," and Park's testimony alone caused

the court's interpreter to cry. (9 RT 1877.) At the end of the day, one juror -- Juror 1 -- went home and just "sat in the dark a long time," staying "up all night." (9 RT 1875.) The testimony was "life changing" for her. (9 RT 1875.) Before the testimony, she was "the most fair person there was," "a strong person" and "was the hardest one to convince of anything" during guilt-phase deliberations, but after the testimony, she no longer had "an open mind anymore." (9 RT 1876, 1878.) By her own admission, she was "devastated" by the evidence. (9 RT 1876.) The court was forced to discharge the juror precisely due to the emotional impact of the evidence. And at the end of the day, the prosecutor knew all too well the emotional impact of the evidence -- as the prosecutor aptly put in closing argument, the evidence was a "tidal wave." (12 RT 2395.)

Put simply, gauging the effect of the victim impact evidence on the jurors in this case needs no imagination. The trial court's error cannot be deemed harmless; reversal is required.

To be sure, a proper limiting instruction -- which required the jury to consider victim impact evidence only as it relates to defendant's own culpability -- might have minimized the harm here. But as explained above, the court gave the jury no guidance whatsoever on the proper use of the victim impact evidence. Instead, the jury was left free to rely on a purely emotional response to the victim impact evidence. This error alone cannot be deemed harmless.

In short, because the trial court recognized that impact of the victim impact

evidence was devastating yet gave no guidance to the jury as to its proper use, and because the prosecutor heavily relied on the emotional "tidal wave" in closing, the admission of this evidence cannot be deemed harmless. Reversal is required.

IX. THE PROSECUTOR VIOLATED THE EIGHTH AMENDMENT IN ASKING THE JURY TO SENTENCE MR. TRAN TO DIE BASED, IN PART, ON PRIOR FELONY CONVICTIONS AND CRIMINAL CONDUCT COMMITTED WHEN MR. TRAN WAS A CHILD.

A. Introduction.

Penal Code section 190.3, subdivision (b) provides that at a capital penalty phase, the state is authorized to introduce evidence showing "the presence . . . of criminal activity by the defendant which involved the use or attempted use of force or violence . . . ." The purpose of permitting this evidence is to allow the penalty phase jury to assess the "character and history of a defendant" and thereby determine the appropriate punishment. (*People v. Tully* (2012) 54 Cal.4th 952, 1029.)

Penal Code section 190.3, subdivision (c) provides that at a capital penalty phase, the state is authorized to introduce evidence showing "[t]he presence . . . of any prior felony conviction." The purpose of permitting this evidence "is to show the capital offense was the culmination of the defendant's habitual criminality -- that it was undeterred by the community's previous criminal sanctions." (*People v. Malone* (1988) 47 Cal.3d 1, 46. *Accord People v. Gurule* (2002) 28 Cal.4th 557, 636.)

Of course, for prior conviction evidence under section 190.3(c) to serve the identified purpose it does not matter if the prior conviction was suffered when the defendant when he was a child or an adult. In either case, the evidence shows he was undeterred by the prior sanctions. Accordingly, there has been no bar on the use of juvenile convictions under subdivision (c). (*See*, *e.g.*, *People v. Pride* (1992) 3 Cal.4th

195, 256-257.) Similarly, for prior criminal acts evidence under section 190.3(b) to serve the identified purpose it does not matter if the prior acts were committed when the defendant was a child or an adult. (*See*, *e.g.*, *People v. Cox* (1991) 53 Cal.3d 618, 689.)

The prosecutor here took full advantage of these rules, introducing evidence that on June 24, 1992, when 17 years old, Mr. Tran burglarized the home of Fredrick Schonder, and the next day on June 25, Mr. Tran burglarized the home of David and Jacquelyn Nesthus. (9 RT 1841-1869.)

As to the June 24 burglary, Orange County Sheriff's Coroner's Department's forensic specialist Randall Giroux testified that on June 24, he was dispatched to the Schonder home in Mission Viejo in response to a report of a residential burglary. (9 RT 1862.) Schonder reported that jewelry, a telephone, a video camera and camera equipment were stolen from his house. (9 RT 1863.) Forensic specialist Eric Nelson testified that five latent fingerprints were lifted from the home; three found on the exterior of the dining room window, and the window screen, matched Mr. Tran. (9 RT 1868-1869.) The parties stipulated that on May 5, 1993, Mr. Tran admitted an allegation in a juvenile petition accusing him of committing this June 24 burglary. (9 RT 1882.)

As to the June 25 burglary, District Attorney investigator Beverly Lumm testified that she was a sergeant with the Orange County Sheriff's Department in 1992. (9 RT 1841.) Lumm recalled that on June 26, Deputy Sheriff Jim Rubio brought Mr. Tran and David Du into the sheriff's station. (9 RT 1841.) Rubio told Lumm that a CHP officer

was flagged down, and told that a car accident in Laguna Hills had just taken place, and the people in one of the cars ran and dropped a metal box into trash. (9 RT 1843.) The box was later retrieved; there was paperwork belonging to David Nesthus inside the box. (9 RT 1854.)

The CHP officer eventually detained Mr. Tran and Du in the back of his patrol car, and tape-recorded a conversation between them. (9 RT 1842-1843.) The two were discussing what to tell police about the metal box. (9 RT 1844.) Du told Mr. Tran to say that they stole the box from the park, and frightened, got into the car accident. (9 RT 1844.) Du then told Mr. Tran that he (Du) would take the blame for breaking into the house. (9 RT 1844.) Mr. Tran responded, “Don’t worry about it, dude. It’s your first offense. You might as well not make it so big.” (9 RT 1844.) He also expressed worry about his mother, and that he was “going to give her a heart attack.” (9 RT 1852.)

After listening to the tape recording, Lumm became aware of the June 25 residential burglary of the Nesthus’s home, near the scene of the June 26 accident. (9 RT 1844-1845.) She interviewed Mr. Tran. (9 RT 1845.) Mr. Tran told Lumm that while he was at a video store in Lake Forest, he met up with someone named Huynh. (9 RT 1846.) Huynh suggested that they go pick up Du, and that he (Mr. Tran) needed money to pay his parents back for a $300 telephone bill. (9 RT 1846.) One of his group brought up an idea to burglarize a home, and he agreed because he needed the money. (9 RT 1846.)

According to Mr. Tran, the group drove around and looked for an empty house. (9

RT 1847.) They picked the Nesthus home. (9 RT 1847.) Mr. Tran approached the front door, and rang the doorbell 50 times; no one answered the door. (9 RT 1847.) While he was ringing the door, a woman drove by. (9 RT 1847.) Some of his friends got scared and ran. (9 RT 1847.) Mr. Tran went to the backyard to get into the house. (9 RT 1847.) His friends returned. (9 RT 1847.) Mr. Tran tried three different patio slider doors and a kitchen window to gain entry. (9 RT 1847.) He then climbed the patio and entered the home through an unlocked window to a bedroom. (9 RT 1848.) He went downstairs and let Du and Huynh inside. (9 RT 1848.) Mr. Tran started getting nervous because it was close to 4:00 p.m., and he was worried that the owners might come home. (9 RT 1848.) He stole a television, a camcorder and 150 quarters. (9 RT 1848.) Others in his group stole guns, a video game and some junk jewelry. (9 RT 1849-1850.) The group then left the house, hopping the back fence and getting into the car and leaving. (9 RT 1850.) Mr. Tran then told Lumm that he took the guns to his friend Phil's house. (9 RT 1850.)

After the interview, Mr. Tran helped police find stolen property. (9 RT 1853.) Jacquelyn Nesthus testified that after the robbery, she found a knife lying on their closet floor that was removed from the kitchen knife block. (9 RT 1859-1860.) She called police, and the knife was collected. (9 RT 1860.) The parties stipulated that on November 30, 1992, Mr. Tran admitted an allegation in a juvenile petition accusing him of committing this June 25 burglary. (9 RT 1881-1882.) The court instructed the jury on this evidence. (5 CT 1339-1340, 1345-1346.) And the prosecutor urged the jury to rely

on this evidence in sentencing Mr. Tran to die. (12 RT 2380, 2397-2399, 2407-2408.)

As discussed more fully below, the rules permitting the use of juvenile convictions and uncharged conduct in aggravation of a capital sentence must change in light of a trio of cases from the United States Supreme Court addressing application of the Eighth Amendment to harsh penalties imposed on children: *Roper v. Simmons* (2005) 543 U.S. 551, *Graham v. Florida* (2010) 560 U.S. 48, and *Miller v. Alabama* (2012) ___ U.S. ___, 132 S.Ct. 2455. In each case, the Court has recognized that there are substantial differences between children and adults, differences which preclude applying traditional concepts of deterrence and punishment to juveniles. In light of this recognition, the prosecutor's reliance on Mr. Tran's criminal conduct as a juvenile violated the Eighth Amendment and a new penalty phase is required.

B. Evolving Standards Of Decency, And Recent Supreme Court Authority, Preclude The State From Asking A Jury To Sentence A Defendant To Die Based On Acts He Committed When He Was A Child.

In *Roper v. Simmons*, *supra*, 543 U.S. 551, the Court held that the death penalty could not be imposed on defendants who were under the age of eighteen at the time of the crime. In reaching this result, the Court noted that as compared to adults, teenagers have "[a] lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures"; and their character "is not as well formed." (*Id*. at pp. 569-70.) Based on these basic differences, the Court concluded that "it is unclear whether the death penalty has a significant or even

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

In *Graham v. Florida*, *supra*, 560 U.S. 48, the Court again recognized that traditional concepts of deterrence do not apply to juveniles. There, the Court addressed the question of whether juveniles could receive a life without parole term for a non-homicide offense. The Court cited scientific studies of adolescent brain structure and functioning which again confirmed the daily experience of parents everywhere that teenagers are still undeveloped personalities, labile and situation-dependent, impulse-driven, peer-sensitive, and largely lacking in the mechanisms of self-control which almost all of them will gain later in life. Because "their characters are 'not as well formed,'" the Court found that "it would be misguided to equate the failings of a minor with those of an adult." (*Graham v. Florida*, *supra*, 560 U.S. at p. 68.) The Court held that deterrence did not justify a life without parole sentence because -- in contrast to adults -- "juveniles' 'lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions . . . .'" (*Id*. at p. 72.)

Finally, in *Miller v. Alabama* (2012) 132 S.Ct. 2455 the Court again addressed the

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

But in reaching this more limited decision, it is important to note that the Court fully embraced the view of deterrence expressed in both *Roper* and *Graham*. As it had in both *Roper* and *Graham*, the Court again recognized that because of the "immaturity, recklessness and impetuosity" with which juveniles act, they are less likely than adult to consider consequences and, as such, deterrence cannot justify imposing a life with parole term on a juvenile. (*Id*. at p. 2465.)

The Court's rationale in these cases directly undercuts the use of juvenile convictions and conduct to aggravate penalty in a capital case. As noted above, the reason prior felony convictions are permitted in aggravation at a penalty phase is to show "the capital offense was . . . undeterred by the community's previous criminal sanctions." (*People v. Malone*, *supra*, 47 Cal.3d at p. 46.) This is entirely sensible when the prior conviction was committed by an adult. But the opinions in *Roper*, *Graham* and *Miller*

establish that juveniles and adults should not be treated the same when it comes to assumptions about deterrence.

To the contrary, in light of what the Supreme Court has said regarding children and deterrence, there are two reasons the traditional rationale for admission of prior felony convictions at a capital penalty phase makes little sense when applied to juvenile convictions. First, in connection with a juvenile conviction, the decision to commit the prior crime itself was made by a juvenile who was not deterred by the criminal sanction applicable to that crime precisely because of a "lack of maturity and underdeveloped sense of responsibility." (*Graham v. Florida* (2010) 130 S.Ct. 2011, 2028.) Second, *Roper*, *Graham* and *Miller* all recognize that expecting deterrence from a conviction imposed on a juvenile -- as the state may legitimately expect from an adult -- is a "misguided [attempt] to equate the failings of a minor with those of an adult." (*Graham v. Florida*, *supra*, 130 S. Ct. at p. 2026.)

Similarly, prior criminal conduct is admitted at the penalty phase to permit an assessment of the "character and history of a defendant to determine" the appropriate punishment. (*People v. Tully*, *supra*, 54 Cal.4th at p. 1029.) Given the Supreme Court's recognition that because of their brain structure, teenagers show "[a] lack of maturity and an underdeveloped sense of responsibility," "are more vulnerable or susceptible to negative influences and outside pressures" and their character "is not as well formed" (*Roper*, *supra*, 543 U.S. at pp. 569-570), it seems both unfair and unreliable to permit

decisions made and conduct taken as a juvenile to so heavily impact a jury's subsequent decision as whether defendant should live or die. To treat adults and juveniles the same in this instance -- that is, to treat prior conduct committed as a juvenile the same as prior conduct committed as an adult for purposes of a capital sentencing phase -- runs square into the Supreme Court's admonition that "it would be misguided to equate the failings of a minor with those of an adult." (*Graham v. Florida*, *supra*, 130 S. Ct. at p. 2026.)

It is true, of course, that the current crime in this case was committed by defendant when he was an adult. But that does not change the equation in any constitutionally significant way. Aggravating the capital murder here by relying on the fact that when he was a child, defendant was not deterred from committing crimes by the criminal sanction available for that crime, or by conviction for those crimes, implicates the precise concerns about ignoring the impact of youth on the "lack of maturity and . . . underdeveloped sense of responsibility" which juveniles possess and which renders them "less culpable than adults . . . [and] less susceptible to deterrence." (*Roper v. Simmons*, *supra*, 543 U.S. at p. 569-572.)

In assessing an Eighth Amendment challenge to a practice, the Supreme Court "looks beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" (*Graham v. Florida*, *supra*, 130 S.Ct. at p. 2021. *Accord Roper v. Simmons*, *supra*, 543 U.S. at p. 561; *Trop v. Dulles* (1958) 356 U.S. 86, 101.) In making this assessment, a reviewing court must look to "objective indicia of

society's standards, as expressed in legislative enactments . . . ." (*Graham v. Florida*, *supra*, 130 S.Ct. at p. 2022. *Accord Roper v. Simmons*, *supra*, 543 U.S. at p. 563.) With these objective indicia in mind, the court must then bring its independent judgment to bear on the constitutional question. (*Graham v. Florida*, *supra*, 130 S.Ct. at p. 2022; *Roper v. Simmons*, *supra*, 543 U.S. at p. 563.)

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

There are many examples. As the Supreme Court noted in *Roper* itself, "[i]n recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent." (*Roper v. Simmons*, *supra*, 543 U.S. at p. 569.) Every state precludes juveniles under the age of 18 from drinking alcohol. (*See*, *e.g.*, *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 589 [noting that "every state prohibits the sale of alcohol to those under 21 . . . . "].) Every state precludes juveniles from using tobacco products. (*See Clay v. American Tobacco Co.* (S.D. Ill. 1999) 188 F.R.D. 483, 486 [noting that every state prohibits sale of tobacco products to minors].) Similarly, the vast majority of states do not even permit juveniles under 18 to decide whether to get a

tattoo.[19]

There is a basic, common strand -- a national consensus -- reflected by these consistent legislative judgments. Legislatures throughout the country recognize that as a class, juveniles are simply not developed enough to make the kinds of decisions which can impact the remainder of their life -- such as the decision to take up smoking, to drink, to marry, or even to get a tattoo. In turn, *Roper* and *Graham* recognized that the common concerns about maturity which animated these otherwise diverse legislative enactments are a key factor in assessing the constitutionality of a practice that involves juveniles.

Significantly, *Roper* and *Graham* do not stand alone in recognizing the special fragility of juveniles and the implication of this recognition in assessing the protection juveniles should be given. (*See*, *e.g.*, *J.D.B. v. North Carolina* (2011) 131 S.Ct. 2394, 2403 ["[T]he common law has reflected the reality that children are not adults" and has

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[19] *See* Ala. Code § 22-17A-2; Alaska Stat. Ann. §08.13.217; Ariz. Rev. Stat. Ann. § 13-3721; Ark. Stat. Ann. § 5-27-228; Cal. Penal Code § 653; Col. Rev. Stat. Ann. § 25-4-2103; Conn. Gen. Stat. § 19a-92g; Del. Code Ann. Title 11, Ch 5 § 1114(a); Fla. Stat. § 877.04; Ga. Code §16-5-71; Hawaii Rev. Stat. § 321-379; Idaho Code § 18-1523; Ill. Pub. Act 094-0684; Ind. Code Ann. § 35-42-2-7; Iowa Code § 135.37; Kan. Stat. Ann. § 65-1953; Ky. Rev. Stat. § 211.760; La. Rev. Stat. Ann. § 14:93.2; Me. Rev. Stat. Ann. Title 32, Ch. 63 § 4203; Mich. Comp. Laws Ann. § 333.13102; Minn. Stat. § 609.2246; Miss. Laws § 73-61-1; Mo. Rev. Stat. § 324.520; Mont. Code Ann. § 45-5-623; Neb. Rev. Stat. § Sec. 427 71-3; N.J. Stat. Ann. § 2C:40-21; N.C. Gen. Stat. § 14-400; N.D. Cent. Code § 12.1-31; Ohio Rev. Code Ann. § 3730.06; Okla. Stat. Title 21 § 842.1, 842.2; Pa. Cons. Stat. Title 18 § 6311; RI General Laws § 11-9-15; S.C. Code Ann. § 44-34-60; S.D. Codified Laws Ann. § 26-10-19; Tenn. Code Ann. § 62-38-207; Texas Health and Safety Code Ann. § 146.012; Utah Code Ann. § 76-10-2201; Vt. Stat. Ann. Title 26 § 4102; Va. Code § 18.2-371.3; Wash. Rev. Code § 26.28.085; W. Va. Code § 16-38-3; Wis. Stat. § 948.70; Wyo. Stat. § 14-3-107.

erected safeguards to "secure them from hurting themselves by their own improvident acts."]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115-116 ["Our history is replete with laws and judicial recognition that minors . . . generally are less mature and responsible than adults."].)

In sum, allowing the state to aggravate a capital sentence by relying on actions the defendant took as a juvenile violates not only the principles animating the Court's decisions in *Miller*, *Graham*, and *Roper*, but a national consensus recognizing that juveniles are simply not mature enough to make decisions which impact the rest of their lives. The practice cannot be squared with the Eighth Amendment.

In making this argument Mr. Tran recognizes that this Court has rejected the argument that *Roper* itself precludes consideration of juvenile convictions in penalty phase aggravation. (*See People v. Bivert* (2011) 52 Cal.4th 96, 123; *People v. Lee* (2011) 51 Cal.4th 620, 648-649; *People v. Taylor* (2010) 48 Cal.4th 574, 653-654; *People v. Bramit* (2009) 46 Cal.4th 1221, 1239.) Although none of these cases considered the impact of either *Graham* or *Miller*, Mr. Tran concedes that the rationale on which they reject his position is certainly broad enough to include those cases as well.

The essential rationale is expressed by this Court's decision in *People v. Bramit*, *supra*, 46 Cal.4th at p. 1239. There the Court concluded that reliance on the holding in *Roper* was "badly misplaced" because "[a]n Eighth Amendment analysis hinges upon whether there is a national consensus in this country against a particular punishment.

(*Roper v. Simmons*, *supra*, 543 U.S. at pp. 562–567. . . . Defendant's challenge here is to the admissibility of evidence, not the imposition of punishment."

Mr. Tran agrees that the actual holdings of *Roper*, *Graham* and *Miller* do not control this issue. They are, after all, simply holdings about whether there is a national consensus against certain punishments for juveniles -- the death penalty and life without parole. And since the claim here is that evidence of juvenile convictions is not admissible, the actual holdings of *Roper*, *Graham* and *Miller* are properly distinguished.

But the principles animating that trio of cases should not be so easily brushed aside. After all, the entire reason prior crimes evidence is permitted under section 190.3 is that it shows the current crime was undeterred by the prior sanctions imposed on the defendant. (*People v. Gurule* (2002) 28 Cal.4th 557, 636; *People v. Malone* (1988) 47 Cal.3d 1, 46.) But *Roper*, *Graham* and *Miller* all recognized that the concept of deterrence simply does not work the same way with children as it does with adults. (*Roper v. Simmons*, *supra*, 543 U.S. at p. 571 [noting that juveniles "will be less susceptible to deterrence]. *Accord Graham v. Florida*, *supra*, 130 S.Ct. at p. 2028; *Miller v. Alabama*, *supra*, 132 S.Ct. at p. 2465.) Each of these three cases recognizes that because of the differences between adults and children in connection with the impact of deterrence, they should not be treated the same way as one another.

That same principle applies here, even if the narrow holdings of *Roper*, *Graham* and *Miller* are distinguishable. It is precisely because prior felony convictions are

permitted in aggravation to show "the capital offense was undeterred by previous criminal sanctions that the Supreme Court's rationale in *Roper*, *Graham* and *Miller* applies here. That rationale -- that juveniles and adults should not be treated the same in connection with deterrence -- directly undercuts the use of juvenile convictions to aggravate penalty in a capital case. While it may make perfect sense to prove that a defendant was not deterred from the capital crime by convictions imposed on him as an adult, *Roper*, *Graham* and *Miller* make clear that the same purpose is *not* achieved when the prior convictions were committed as a juvenile. To the contrary, the decision to commit the prior crime itself was made by a juvenile who was not deterred by the criminal sanction applicable to that crime precisely because of a "lack of maturity and underdeveloped sense of responsibility." (*Graham v. Florida*, *supra*, 130 S.Ct. at p. 2028.) And expecting deterrence from a conviction imposed on a juvenile -- as the state may legitimately expect from an adult -- is nothing but a "misguided [attempt] to equate the failings of a minor with those of an adult." (*Graham v. Florida*, *supra*, 130 S. Ct. at p. 2026.)

Thus, while this Court has held that the narrow holding of *Roper* does not itself preclude admission of juvenile convictions to aggravate, the principles on which *Roper*, *Graham* and *Miller* were decided directly supports such a conclusion. This Court should interpret section 190.3 in light of the rationale of *Roper*, *Graham* and *Miller*. (*See United States v. Graham* (6th Cir. 2010) 622 F.2d 445, 465, 469 [Merrit, J., dissenting]

[relying on rationale of *Graham v. Florida* to reject reliance on juvenile conviction to enhance adult conviction and impose life sentence].)

C. The Erroneous Admission Of Acts Committed When Mr. Tran Was A Child Was Not Harmless Beyond A Reasonable Doubt.

Because the erroneous admission of this evidence at the penalty phase violated Mr. Tran's Eighth Amendment rights, reversal is required unless the state can prove the error harmless beyond a reasonable doubt. (*See Chapman v. California* (1967) 386 U.S. 18, 24 [federal constitutional errors require reversal unless the state can proven the error harmless beyond a reasonable doubt].) For many of the same reasons discussed above, the state will be unable to carry its burden here.

Although the state did present substantial aggravating evidence in this case, the fact of the matter is that there was significant mitigation evidence presented regarding defendant's childhood. Moreover, the prosecution heavily relied on the evidence in closing argument. Considered either alone, or in conjunction with the trial court's error in admitting inflammatory victim impact evidence, there is at least a reasonable possibility that in the absence of error at least one juror could reasonably have voted for life. A new penalty phase is therefore required. (*See Wiggins v. Smith* (2003) 539 U.S. 510, 537; *People v. Soojian* (2010) 190 Cal.App.4th 491 at p. 520.)

X. MR. TRAN'S RIGHT TO A RELIABLE PENALTY PHASE WAS VIOLATED WHEN THE PROSECUTOR RELIED UPON JUVENILE CONVICTIONS IN URGING THE JURY TO IMPOSE DEATH.

A. Introduction.

Under state law, at the penalty phase of a capital trial prosecutors are free to introduce juvenile convictions of a defendant and rely on those convictions in asking the jury to impose death. *(People* v. *Pride* (1992) 3 Ca1.4th 195, 256-257.) Pursuant to this rule, the prosecutor here did just that. (12 RT 2380, 2397-2399, 2407-2408.)

In Argument VII, *supra*, Mr. Tran contended that admission of this evidence violated the Eighth Amendment in light of three Supreme Court cases: *Roper v. Simmons* (2005) 543 U.S. 551, *Graham v. Florida* (2010) 560 U.S. 48, and *Miller v. Alabama* (2012) ___ U.S. ___, 132 S.Ct. 2455. But there is an entirely separate Eighth Amendment reason that juvenile convictions may not be admitted in a capital penalty phase.

The Supreme Court has recognized that the death penalty is a qualitatively different punishment than any other. (*See*, *e.g.*, *Beck* v. *Alabama* (1980) 447 U.S. 625, 638, n.13; *Woodson* v. *North Carolina* (1976) 428 U.S. 280, 305.) In light of the absolute finality of the death penalty, there is a "heightened need for reliability" in capital cases. *(See, e.g., Caldwell* v. *Mississippi* (1985) 472 U.S. 320, 323; *Beck* v. *Alabama, supra,* 447 U.S. at pp. 637-638, n.13.)

Procedures which risk undercutting this heightened need for reliability violate the

Eighth Amendment. *(See, e.g., Lanliford* v. *Idaho* (1991) 500 U.S. 110, 127; *Eddings* v. *Oklahoma* (1982) 455 U.S. 104, 118-119 (O'Connor, 1., concurring); *Lockett* v. *Ohio* (1978) 438 U.S. 586; *Gardner* v. *Florida* (1977) 430 U.S. 349, 362.)

Here, the state introduced prior juvenile convictions at the penalty phase. But that juvenile convictions were obtained without providing Mr. Tran the right to a jury trial. As discussed below, the Supreme Court has recognized that the jury trial right is designed to ensure a reliable result. Thus, regardless of whether juvenile convictions are properly admitted for enhancement purposes in non-capital trials, the Eighth Amendment requirement of reliability precludes such convictions from being admitted at the penalty phase of a capital trial.

B. The State May Not Seek To Impose A Death Sentence Based On Convictions Obtained In The Absence Of Sixth Amendment Protections.

The Sixth Amendment guarantees that defendants in state criminal proceedings are entitled to certain procedural protections, including the rights to counsel, confrontation and jury trial. The Supreme Court has long held that these rights are specifically designed to ensure the reliability of the proceedings. *(Lewis v. United States* (1980) 445 U.S. 55, 72 ["the absence of counsel impairs the reliability of a felony conviction .... "]; *Crawford v. Washington* (2004) 541 U.S. 36, 61 ["the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence .... "]; *United States v. Booker* (2005) 543 U.S. 220, 244 ["the right to a jury trial" protects "the interest in fairness and reliability."]')

Because these rights are directly related to reliability, the Supreme Court has for more than 40 years consistently held that where a defendant has been convicted *without* being afforded one of these essential rights, the state may *not* subsequently use that conviction for impeachment, sentencing or enhancement. (*See, e.g., Loper v. Beto (1972)* 405 U.S. 473,484 [state could not impeach defendant with a prior conviction where the state obtained that conviction without affording defendant his Sixth Amendment right to counsel because in such a situation the prior conviction "lacked reliability"]; *United States v. Tucker* (1972) 404 U.S. 443 [in sentencing a defendant, a sentencing judge may not consider a prior conviction where the state obtained that conviction without affording defendant his Sixth Amendment right to counsel; *Burgett* v. *Texas* (1967) 389 U.S. 109, 115 [state could not enhance a defendant's sentence based on a prior conviction where the state obtained that conviction without affording defendant his Sixth Amendment right to counsel].) The Court has emphasized that the holdings in "*Burgett, Tucker* and *Loper* . .. [all] depended upon the reliability of a past ... conviction;" each of these cases sought to avoid subsequent use of any prior conviction "that is unreliable." *(Lewis* v. *United States, supra,* 445 U.S. at p. 67.)

What the Supreme Court explicitly precluded in *Burgett* -- reliance on a prior conviction to enhance where the prior was unreliable because the procedural protections of the Sixth Amendment had not been provided -- is exactly what occurred here. After all, as noted above, the Supreme Court has explicitly recognized that the Sixth

Amendment right to a jury trial -- just like the Sixth Amendment right to counsel -- protects the defendant's interest in a reliable result. (*United States* v. *Booker, supra, 543* U.S. at p. 244.) “[The Framers] knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people . . . .” (*Crawford* v. *Washington, supra,* 541 U.S. at p. 67. *Accord Williams* v. *Florida* (1970) 399 U.S. 78, 100.)

Here, in Mr. Tran's capital penalty phase the state introduced and relied on convictions obtained at a juvenile proceeding at which Mr. Tran had no right to a jury trial. Just as in *Burgett, Loper* and *Tucker,* the state's subsequent use of convictions obtained in a proceeding where the defendant was not afforded a Sixth Amendment right designed specifically to ensure the reliability of those convictions was improper.

The Supreme Court's decision in *Apprendi* v. *New Jersey* (2000) 530 U.S. 466 directly supports this result. There, the Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *(Apprendi* v. *New Jersey, supra,* 530 U.S. at 490.) The Court carved out an exception to this general rule for prior convictions, which need *not* be submitted to a jury. (*Id.* at p. 490.) Prior to *Apprendi,* the Court foreshadowed the logical reason for this exception, explaining that "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees.” *(Jones* v. *United States* (1999) 526 U.S. 227, 249.) Indeed, the Court

reiterated this rationale in *Apprendi* itself, confirming that the prior conviction exception depended on "the certainty that procedural safeguards attached to the 'fact' of prior conviction" and noting that there was a "vast difference" between accepting the validity of a prior conviction in which the defendant "had the right to a jury trial" and one in which his guilt was determined by a single judge. *(Apprendi, supra,* 530 U.S. at pp. 488, 496.)

The prior conviction exception set forth in both *Jones* and *Apprendi* is entirely consistent with the rule set forth in *Loper, Burgett* and *Tucker.* Where a prior conviction is established "through procedures satisfying the ... jury trial guarantee[]" of the Sixth Amendment, there is no reason to again require that conviction to be proven yet again to a jury under either *Apprendi* or *Burgett.* The reliability concerns at the core of the Sixth Amendment -- and of both *Apprendi* and *Burgett* -- are addressed by providing a jury at the initial trial. But where the prior conviction was obtained *without* affording defendant a jury trial, the reliability concerns of the Sixth Amendment, *Burgett* and *Apprendi* are all directly implicated, and the conviction should not fall into the prior conviction exception set forth in *Apprendi.*

In making this argument, Mr. Tran recognizes that, in *People v. Nguyen* (2009) 46 Cal.4th 1007, this Court held that the Sixth Amendment itself did *not* preclude the state from using juvenile convictions to enhance a sentence *in the non-capital context.* (46 Cal.4th at p. 1028.) Justice Kennard wrote a dissent on this exact point. (46 Cal.4th at

pp. 1028-1034.)

This case does not involve the Sixth Amendment issue involved in *Nguyen.* Nor does it involve a non-capital case. Instead, even assuming (as *Nguyen* held) that juvenile convictions are permissible to enhance in the non-capital context pursuant to the *Sixth* Amendment, the question here is whether the *Eighth* Amendment requirement of reliability permits the same practice in a capital case. In this context it is worth noting that even where a procedure does not violate the Constitution in connection with noncapital proceedings, that same procedure *can* violate the Eighth Amendment's more exacting requirement of reliability when applied to a capital case. (*See, e.g., Beck* v. *Alabama, supra,* 447 U.S. at pp. 636-638 [in a capital case, Eighth Amendment need for reliability requires instructions on lesser included offenses even though Due Process may not]. *See Sawyer* v. *Smith* (1990) 497 U.S. 227, 235 [Supreme Court distinguishes between the protections of the due process clause and the "more particular guarantees of sentencing reliability based on the Eighth Amendment."]. *Compare Furman* v. *Georgia* (1972) 408 U.S. 238 [standardless capital sentencing violates the Eighth Amendment] *with McGautha* v. *California* (1971) 402 U.S. 183 [standardless capital sentencing does not violate Due Process].)

In short, the Supreme Court has long recognized that the jury trial right -- like other rights in the Sixth Amendment -- protects the defendant's interest in "fairness and reliability." *(United States* v. *Booker, supra,* 543 U.S. at p. 244.) Permitting the state to

obtain a death judgment on convictions obtained without this protection cannot be reconciled with the Eighth Amendment requirement of reliable penalty phase procedures. Admission of the juvenile convictions was error. And, as explained in Argument __, *supra*, the state will be unable to prove beyond a reasonable doubt that admission of this evidence was harmless.

XI. THE TRIAL COURT DENIED MR. TRAN'S FEDERAL DUE PROCESS RIGHTS BY FAILING TO ALLOW ALLOCUTION AT THE PENALTY PHASE.

A. The Relevant Facts.

Prior to the close of Mr. Tran's penalty phase case, Mr. Tran filed a "Motion for Penalty-Phase Allocution." (5 CT 1210-1212.) Mr. Tran sought to "make a 'personal statement immune from cross-examination." (5 CT 1210.) Specifically Mr. Tran sought "to tell the Park family and jurors of his remorse for the death of Linda Park." (5 CT 1210.) At the hearing on the motion, defense counsel argued that the jury had heard victim impact evidence which "is the most damaging evidence there is in a capital case," particularly "in a case like this where the victim impact evidence is just -- it's like a tidal wave," and "jurors want to know whether the defendant feels remorse for a crime that they did." (10 RT 2121, 2123.)

Defense counsel was entirely correct. As explained in Argument V-A, *supra*, the state introduced victim impact evidence through the testimony of Linda's father and sister, and the testimony of neighbor Marilyn Fox. The trial court stated that the day of testimony "was a very emotional day I think for just about everybody who listened to that," and caused the court's interpreter to cry. (9 RT 1877.) The evidence forced the removal of a juror, who upon hearing Park and Fox's testimony, was so traumatized, she could no longer be a juror. The state then presented similarly devastating testimony through Linda's sister Janie.

The state objected to allocution. (10 RT 2120.) The trial court sustained the objection and denied the motion. (10 RT 2125-2126.) According to the court, "Recognition of a right of allocution is unnecessary to a fair trial . . . ." (10 RT 2125.) The court ruled, "If he wants to testify, it's certainly his right, he may do so, but it's subject to cross-examination." (10 RT 2125-2126.)

The prosecutor recognized the impact of the victim impact testimony, telling the jury in closing argument, the evidence created an emotional "tidal wave," and the jury should consider this "tidal wave" as "a drop in the ocean of what [the Parks] go through" and "live with every day." (12 RT 2395.) And, in the end, as set forth in Argument VII, *infra*, at least one juror -- Juror 7 -- believed the lack of evidence of Mr. Tran's remorse for committing the crimes was a significant factor in determining whether Mr. Tran should live or die. (*See* 2 SCT 390-391.)

As more fully discussed below, the trial court violated Mr. Tran's due process right at sentencing to allocute without being subject to cross-examination. Because the jury imposed sentence without considering Mr. Tran's allocution, remand for a new penalty phase is required.

B. The Trial Court's Failure to Allow Mr. Tran To Allocute Without Being Subject To Cross-Examination Requires Penalty Phase Reversal.

The right of a criminal defendant to allocute is not specifically set forth in the Bill of Rights. Moreover, it is clear that as a general matter, states are free to regulate procedures under which their criminal laws are carried out. (*Medina v. California* (1992)

505 U.S. 437, 445.)

It is equally clear, however, that a state's criminal procedures are not immune from federal review simply because they do not violate a specific provision in the Bill of Rights. To the contrary, a criminal procedure will violate the general requirements of "Due Process" whenever it offends some principal of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. (*Speiser v. Randall* (1958) 357 U.S. 513, 523. *Accord, Montana v. Egelhoff* (1996) 518 U.S. 37, 58; *Leland v. Oregon* (1952) 343 U.S. 790, 798.) In determining whether a particular principle is "fundamental" the Court looks to "historical practice" (*Herrera v. Collins* (1993) 506 U.S. 390, 407), and examines whether the practice has a "lengthy common-law tradition." (*Montana v. Egelhoff, supra*, 518 U.S. at p. 59; *In re Winship* (1970) 397 U.S. 358, 361-364; *Patterson v. New York* (1977) 432 U.S. 197, 202.)

In this case, both inquiries lead to the same place. More than 200 years ago, Sir William Blackstone noted in his treatise on the common law of England that when a verdict of guilty is rendered against a prisoner, "he is either immediately, or at a convenient time soon after, asked by the court, if he has anything to offer why judgment should not be awarded against him." (Blackstone, Commentaries on the Laws of England (1766) Volume IV, Of Public Wrongs, at p. 444.)

Blackstone was right. There is a long historical practice of permitting a defendant to allocute prior to sentencing. (*See, e.g., Anonymous* (1689) 3 Mod. 265, 266, 87 Eng.

Rep. (King's Bench) 175.) The United States Supreme Court has noted the "traditional right of a criminal defendant to allocution prior to the imposition of sentence." (*Groppi v. Leslie* (1972) 404 U.S. 496, 501.) As the Supreme Court noted more than forty years ago, the "common law right of allocution" required a trial court "to ask the defendant if he had anything to say before sentence was imposed." (*Green v. United States* (1961) 365 U.S. 301, 304, emphasis supplied.) "The most persuasive counsel may not be able to speak for a defendant as the defendant, with halting eloquence, might speak for himself." (*Ibid.*) And more recent cases have also recognized that a defendant's right to address the court prior to sentencing is "an essential element of a criminal defense." (*Boardman v. Estelle* (9th Cir. 1992) 957 F.2d 1523, 1526.)

At common law, allocution allowed the defendant to make a personal statement in mitigation of punishment. A criminal defendant "may allege any ground in arrest of judgment; or may plead a pardon, if he has obtained one . . . . If he has nothing to urge in bar, he frequently addresses the court in mitigation of his conduct, and intercession with the king, or casts himself upon their mercy." (1 Chitty, A Practical Treatise on The Criminal Law (5th Am. Ed. 1847) at p. 700.) Significantly, this statement was not subject to cross-examination. Instead, after the defendant made his statement, "*nothing more is done*, but the proper judge pronounces sentence." (*Id. See also* Blackstone, Commentaries on the Laws of England, *supra*, at p. 444 [explaining allocution in terms of a defendant's unsworn statement not subject to cross-examination].)

Boardman v. Estelle is instructive. Although arising in a non-capital context, the Ninth Circuit stated:

> "[W]e hold that allocution is a right guaranteed by the due process clause of the Constitution. Our holding is limited to circumstances in which a defendant, either unrepresented or represented by counsel, makes a request that he be permitted to speak to the trial court before sentencing. If the trial court denies that request, the defendant has not received due process." (957 F.2d 1 at p. 1530.)

In reaching its conclusion, the Ninth Circuit noted that the Supreme Court's holding in *Hill v. United States* (1962) 368 U.S. 424, which determined that allocution is not a right protected by the United States Constitution, was limited to situations where the sentencing judge fails to ask a defendant if he has anything to say. (*See Boardman v. Estelle*, supra, 957 F.2d at p. 1527.) The Ninth Circuit read *Hill* as "le[aving] open the question of whether a defendant who asks the court to speak has a Constitutionally guaranteed right to do so." (*See id.*)

Although *Boardman* did not address capital sentencing, *United States v. Chong*, 104 F.Supp.2d 1232 (D.Haw.1999), applied *Boardman* in holding that a defendant has a right to allocute before a sentencing jury in a capital sentencing hearing. The *Chong* court saw "no basis for distinguishing [*Boardman*] from the instant case," and explained that allowing a defendant to allocute before the sentencing judge would be an "empty formality" in capital cases where the judge lacks sentencing discretion. (*Id*. at 1234.) The court further explained that a defendant testifying under oath and subject to cross examination is not the same as allocution:

> "The Court observes that the fear of cross-examination might compel capital defendants to forego addressing the jury and offering pleas for mercy, expressions of remorse, or some explanation that might warrant a sentence other than death. Moreover, the Court sees no reason why a capital defendant should have a lesser right to explain his position and ask for mercy by being sworn and subject to cross examination than a non-capital defendant, who has an unfettered right to allocute. (*Id* at 1236.)

Mr. Tran acknowledges that this Court has held there is no right of allocution at the penalty phase of a capital trial. (*See*, *e.g.*, *People v. Clark* (1993) 5 Cal.4th 950, 1036–1037; *People v. Nicolaus* (1991) 54 Cal.3d 551, 583; *People v. Keenan* (1988) 46 Cal.3d 478, 511, 250 Cal.Rptr. 550, 758 P.2d 1081.) This Court, however, should revisit its holding and follow *Boardman*. *Boardman* recognizes a constitutional right to allocute, and that to make such right meaningful, a trial court must provide defendant the opportunity to allocute before the jury. And to the extent allocution may run afoul of any evidentiary standard applicable to capital cases, limits on the scope of allocution or appropriate instructions to the jury can address this concern. (*See United States v. Biagon* (9th Cir.2007) 510 F.3d 844, 847 ["we have 'never held that a defendant has a right to unlimited allocution'"], quoting *United States v. Leasure* (9th Cir.1997) 122 F.3d 837, 840); *see*, *e.g.*, *United States v. Wilson* (E.D.N.Y.2007) 493 F.Supp.2d 509, 511 [placing limits on scope of allocution]; *United States v. Henderson* (S.D.Ohio 2007) 485 F.Supp.2d 831, 845 [holding that "Defendant has a right to allocute before the sentencing jury subject to an appropriate limiting instruction"].)

To its credit, the trial court here acknowledged Mr. Tran's right to allocute.

Unfortunately, the court then told Mr. Tran that this right was subject to cross-examination by the prosecutor. This was wrong -- the right to make an unsworn statement without being subjected to cross-examination is the essence of the right to allocute. By hinging Mr. Tran's right to allocution on the state's ability to cross-examine, the trial court deprived Mr. Tran of his right to allocute. Due Process has been violated.

The remaining question is one of prejudice. Generally, federal constitutional errors require reversal unless the beneficiary of the error can prove it harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Here, the state will be unable to carry this burden.

A principal purpose of allocution is to afford the accused an opportunity to ask for mercy and to impress the trier of fact with his feelings of remorse. (*See, e.g., Shelton v. State* (Del. 2000) 744 A.2d 465, 496.) The jury plainly has full discretion to ignore a defendant's allocution and impose sentence. Just as plainly, however, a jury has discretion to consider the defendant's allocution and select an appropriate sentence in light of that allocution.

Here, the jury plainly did not use any discretion in evaluating Mr. Tran's allocution because -- in fact -- the trial court refused to allow it into evidence without subjecting it to the state's cross-examination. Of course Mr. Tran's allocution would have been especially important in a case like this. The court heard an emotional account from the victim's father and sister, and neighbor, about the devastating impact of Mr. Tran's

conduct. From Mr. Tran, the jury heard absolutely nothing. And, as one juror's later statement revealed, the lack of evidence of Mr. Tran's remorse for committing the crimes was a key factor in determining the sentence here. On this record, the state will be unable to prove the error harmless beyond a reasonable doubt. Reversal of the penalty phase is required.

XII. THE TRIAL COURT ERRED IN REFUSING TO GRANT A NEW TRIAL UPON DISCOVERING JUROR 7 READ NEWS ACCOUNTS ABOUT THE CASE, AND THEN FAILING TO CONDUCT AN ADEQUATE INQUIRY INTO THE JUROR'S MISCONDUCT IN CONSIDERING MR. TRAN'S SILENCE AND FAILURE TO CONFESS AND SHOW REMORSE.

A. Introduction.

After the penalty-phase verdict was reached, the trial court discovered that Juror 7 had written a three-page document during penalty-phase deliberations. Finding the document "a thought-process thing," the court refused to disclose the entire document to the parties, but instead, disclosed only one paragraph that it believed might require further inquiry. The paragraph revealed that Juror 7 had read news accounts that the ABA was campaigning for a moratorium on the death penalty, and the United States Supreme Court had decided to review a case to determine whether lethal injection in death penalty cases was cruel and unusual. This evidence implicates *Caldwell* v. *Mississippi, supra,* 472 U.S. 320 and its progeny, because the information would have lessened the juror's sense of responsibility for a death sentence.

After inquiry of four jurors -- including Juror 7 -- the trial court learned that the news accounts had been brought up during deliberations by one or more jurors. Over objection, the court refused to conduct any further inquiry into the identity of these jurors, or into the details of the exposure to -- and dissemination of the extraneous material -- during deliberations. The court instead found there was "no juror misconduct."

Following the trial court's ruling, the defense requested disclosure of the

remainder of Juror 7's document. Unbeknownst to the parties at the time, Juror 7 had repeatedly stated in the document that Mr. Tran's silence and failure to come forward to police and confess his crimes, and show remorse, required no mercy, in direct violation of the court's admonishment not to consider such evidence. Notwithstanding this prima facie evidence of misconduct, the court refused to disclose the document to the parties, much less make any further inquiry.

As more fully explained below, Mr. Tran did not get the fair and impartial jury to which he was entitled, nor the hearings to determine whether further misconduct occurred. Reversal and/or remand is required.

B. The Relevant Facts.

1. Evidence of misconduct uncovered by the court clerk.

On November 1, 2007, the jury began its penalty phase deliberations. On November 5, 2007, the jury returned a verdict of death against both defendants. (12 RT 2478-2485.) On December 4, 2007, the trial court issued, and served on counsel and the jury foreperson -- Juror 7, a minute order that read:

> "The court, having received information of potential juror misconduct, orders all counsel, the defendants and the foreperson from the penalty phase of the trial to appear on January 4 2008, to determine if the foreperson considered outside information during the deliberation process." (5 CT 1390-1391.)

The hearing was continued until January 11, 2008. (5 CT 1393-1394.) On that date, the trial court informed counsel, outside the presence of the foreperson, that while

cleaning up the jury deliberation room after the penalty verdicts were reached, the court clerk found a three-page, typewritten document, entitled, "Life or Death," in a folder of jury instructions. (12 RT 2486.) In the court's opinion, the document was a "thought-process thing," but believed one paragraph might require inquiry. (12 RT 2486.)

2. Facts surrounding the disclosed portion of Juror 7's document.

The trial court shared the paragraph with counsel, asking if counsel had questions for the court to ask the foreperson. (12 RT 2486.) The paragraph read:

> "I cannot allow the fact that the American Bar Association ["ABA"] has recently resumed its campaign for a national moratorium on the death penalty to influence my judgment in this case. Likewise, I cannot consider the fact that the U.S. Supreme Court has agreed to review a case challenging the legality of execution by lethal injection as cruel and unusual punishment as I judge this case." (2 SCT 389 [transcript page under seal].)

The trial court informed counsel that it had directed its clerk to contact Juror 7 to determine the author of the document, and had learned that Juror 7 himself was its author. (12 CT 2490.)

The trial court stated that it wished to question Juror 7, but, in its opinion, the document was "totally" inadmissible. (12 RT 2487.) Both defense counsel and the prosecutor stated, in effect, that Juror 7 needed to be questioned. (12 RT 2487-2489.) The court stated it would inquire of Juror 7 into how the document was prepared, whether it had been shared with the other jurors, and whether the juror wished the entire document disclosed to counsel. (12 RT 2489.)

The prosecutor then revealed that he had spoken to Juror 7 after the penalty verdict

was reached, "around the holidays," and Juror 7 claimed that he had "put down [his] thinking process" and wanted to share it with the prosecutor. (12 RT 2490.) The prosecutor told Juror 7 to wait until after the holidays, but, according to the prosecutor, as soon as the state received notice of the court-ordered hearing, had no further communications with the juror. (12 RT 2490.)

Juror 7 was then brought into the courtroom for questioning. (12 RT 2394.) He testified that the document was "a written summary of my personal private deliberations in the case" which he wrote because "[w]hen I'm considering issues that are very complex and also very important, I find that if I can express them clearly in writing, it enforces clarity of thought as well." (12 RT 2494-2495.) He brought the document in his shirt pocket to the court on the last day of deliberations because "he wanted to be able to refer to it personally, privately . . . ." (12 RT 2495.) He denied that he showed the document to the other jurors. (12 RT 2495.) After trial, he realized that the document was no longer in his shirt pocket; "leaving it behind was absolutely accidental and unintentional." (12 RT 2495.) He "intended it as an entry in my personal journal." (12 RT 2495.) He reiterated that he did not read the document to his fellow jurors. (12 RT 2495.)

The trial court informed Juror 7 that it would honor the juror's choice of nondisclosure, but would disclose the document to counsel if the juror had no objection. (12 RT 2496.) Juror 7 replied, "I wish to only do what will serve justice best," and asked

the court's advice. (12 RT 2496.) The court informed the juror, "A juror's thought process is something that's personal to that juror," and "something that you can choose to disclose or not to disclose." (12 RT 2496.) Juror 7 replied, "If that's the case, then I think I would choose that it remain personal." (12 RT 2496.)

Turning to the paragraph which it did disclose, the trial court asked where Juror 7 had received information about the ABA resuming its campaign for a national moratorium on the death penalty. (12 RT 2496-2497.) Juror 7 replied, "During the course of the trial, the story about the Supreme Court's action broke," and "it was the lead story in the Los Angeles Times that day." (12 RT 2497.) The story was "the top story on all the television news broadcasts," and "it was all over the internet." (12 RT 2497.) He did not seek out the story, but rather "[i]t was something I simply happened to see." (12 RT 2497.)

The trial court asked Juror 7 whether the ABA's campaign for a death penalty moratorium, or the Supreme Court's lethal injection case, were discussed during deliberations. (12 RT 2497.) Juror 7 replied, "Another juror brought the Supreme Court news item up," and "one of the reasons I wrote that item into my private deliberations was that I felt that my obligation as the foreperson was to make sure that if somebody else brought that up, that everyone was reminded that we could not allow that in any way to influence our deliberations" in accord with "my understanding of your instructions." (12 RT 2487.) He confirmed that another juror brought up "the news item," and, because he

"figured somebody would, since it was so broadly distributed," he "remind[ed] the other jurors that we could not allow either of those facts to affect our judgment in the case." (12 RT 2497-2498.) According to Juror 7, the issue was not brought up again. (12 RT 2498.)

After conferring with counsel at sidebar, the trial court asked Juror 7 when he authored the document. (12 RT 2500.) Juror 7 did not recall the exact day, but claimed, "It was toward the end of the trial." (12 RT 2500.) He further did not recall the identity of the other juror who had brought up "the news item," but he thought "it was a male." (12 RT 2501.) He claimed, "The whole discussion of it was really very brief," and when it was brought up, "I made my comment, you know, that we couldn't allow that to affect our deliberations." (12 RT 2501.)

At a second sidebar, both defense counsel requested that the trial court make further inquiry into the timing of events. Plata's counsel wanted to inquire as to whether the document was prepared before the "other juror" raised the matter in deliberations, and guessed it was prepared before deliberations had begun. (12 RT 2501.) The prosecutor pointed out that the juror stated that he believed the news story would be mentioned in deliberations, so wanted to remind himself that it was the jury's duty not to consider such matters. (12 RT 2502.) Mr. Tran's counsel believed the juror could not have prepared the document until deliberations because he would not have known he was going to be the foreperson yet; the jury switched forepersons between the guilt and penalty phases.

(12 RT 2502.) The court cut off the discussion, stating, "I don't intend to make any further inquiries." (12 RT 2502.)

Back in the presence of Juror 7, the trial court had the document marked and sealed, and ordered it not be disclosed absent further order of the court. (12 RT 2505.) The court then thanked Juror 7, and stated, "I have reviewed the document and your responses, and it confirms my opinion that this is a recitation of your thought process." (12 RT 2505.) According to the court, "I don't see anything that was improper." (12 RT 2505.)

On January 28, 2008, Mr. Tran's counsel filed a motion for access to juror information pursuant to California Code of Civil Procedure section 237. (5 CT 1402.) In his motion, Mr. Tran contended that disclosure of juror information was supported by good cause because Juror 7 gave ambiguous testimony, and the document's wording suggested that it was actually a response to improper matters having already been discussed in deliberations despite Juror 7's testimony. (5 CT 1405-1406.)

Counsel attached (1) a printout of an ABC News report that appeared on October 28, 2007, discussing the ABA's statement about flaws with the death penalty and its urging that executions be halted until improvements could be made (5 CT 1412-1413), and (2) a printout of an online search of the Los Angeles Times archives for all articles referencing the Supreme Court between October 1, 2007, and November 6, 2007. (5 CT 1421-1423.) The search revealed articles entitled (1) Possley, *The Nation: Lawyer Group*

Wants Executions Frozen: A Three-Year Study Finds Unfairness And Glitches the American Bar Assn. Says in Calling for a National Moratorium, L.A. Times (October 29, 2007) p. A11, (2) Weinstein, *Judge May Force State to Redesign Executions*, L.A. Times (October 31, 2007) p. B1, (3) Anonymous, *National in Brief/Washington, D.C.: High Court Grants Stay on Execution*, L.A. Times (October 31, 2007) p. A12, and (4) Weinstein, *Judge Bars New Plan for Executions. The Jurist Rules that State Broke the Law by Not Seeking Independent Review*, L.A. Times (November 1, 2007) p. B3. (5 CT 1421-1423.)

Counsel explained the call for the ABA moratorium occurred on October 28, 2007 -- during Mr. Tran's case at the penalty phase of trial -- and was reported in the Los Angeles Times on October 29 -- also during Mr. Tran's case at the penalty phase. (5 CT 1404, 1421.) The Supreme Court granted certiorari in *Baze v. Rees* (07-5439) -- a lethal injection case -- on September 25, 2007. (5 CT 1405, 1415.) No articles were found in the Los Angeles Times regarding *Baze* except one posted the day after the jury's penalty phase verdict. (5 CT 1405, 1424.)

In its written response, the state agreed that the interests of justice would be served by obtaining additional information at least from the other male jurors as to any discussions in deliberations about the ABA's campaign for a death penalty moratorium, or the Supreme Court's lethal injection case. (5 CT 1428.) The prosecutor argued, however, that the trial court should simply summon and question the male jurors. (5 CT

1429.) The prosecutor also pointed out an October 31, 2007 Los Angeles Times article which mentioned an injunction to proposed lethal injection regulations issued by the Marin County Superior Court, and stated, "The U.S. Supreme Court is considering a challenge to lethal injection in a Kentucky case." (5 CT 1431-1432.) The article's main point was that lethal injections in California might not resume for some time because the injunction could require the state to redesign its execution protocol. (5 CT 1431.)

At the hearing on the motion on February 8, 2008, Mr. Tran's counsel requested that all of the jurors be questioned. (12 RT 2511-2512.) He relied on Juror 7's admission that another juror brought up "the news article," and questions remained as to the specifics. (12 RT 2511.) The prosecutor had no objection to inquiry of all jurors, except Juror 7, having already been questioned. (12 RT 2512.)

The trial court refused to order any of the jurors to court for questioning. (12 RT 2513.) According to the court, "I'm satisfied with the explanation that the foreperson came up with." (12 RT 2513.) The court did, however, grant the defense motion to initiate proceedings pursuant to section 237 for the disclosure of juror information, which required notifying the jurors that the information was requested and a hearing would be conducted. (12 RT 2513.) The court invited counsel to submit questions for the court to ask jurors, relating to "what was discussed concerning the death penalty and lethal injection." (12 RT 2519.) The court reiterated, "I don't see enough to order jurors in," but instead decided that jurors would simply be notified of the hearing on the request for

disclosure of juror information and invited to voluntarily come to court for questioning. (12 RT 2513-2519.)

The trial court subsequently sent jurors a Notice to Jurors of Hearing on Defense Request for Juror Identifying Information. (5 CT 1433-1435.) The notice informed the jurors that a hearing would be held on the defense motion for disclosure of juror information, and then stated, “At the hearing, the jurors who appear will be asked to discuss with the Court whether their decision in the penalty phase of the trial was affected by discussions of matters that were not presented by way of evidence or the law upon which the jury was instructed.” (5 CT 1433-1434.)

At the hearing on the motion on March 14, 2008, the trial court provided counsel with a list of the jurors’ responses. (2 SCT 394-395.) The court told counsel that none of the jurors wanted their information released (in fact, Juror 3 did not indicate whether her information could be disclosed (2 SCT 395)), but some indicated that they would attend the hearing. (12 RT 2521.) Juror 2 was then brought into the courtroom for questioning.

The trial court informed Juror 2 that paperwork was found in the jury deliberations room and that, although misconduct had not occurred, further questions were required. (12 RT 2526.) The court then asked Juror 2 whether he recalled “any discussions of the moratorium, alleged moratorium on lethal injections for executions for capital punishment.” (12 RT 2526.) Juror 2 replied, “I believe it was brought up. I don’t believe it was any part -- used as any part of the decision making.” (12 RT 2526.) The juror did

not recall who brought the matter up, or whether there was written material to which was referred. (12 RT 2526.) He did not recall seeing any paperwork that referenced "any materials." (12 RT 2526.) Juror 2 recalled, "it just seems like it was brought up as an aside, and I also remember -- or as I recall it, that the head juror said at the time that 'we are not supposed to consider that,' and it was dropped." (12 RT 2527.) He did not believe the conversation lasted longer than 15 seconds. (12 RT 2527.) He did not recall which juror brought the matter up, nor when it when it was brought up. (12 RT 2530-2531.) According to Juror 2, "I don't remember it being anything meaningful." (12 RT 2531.)

Juror 3 was then brought into the courtroom. The trial court asked Juror 3 if she wished her identifying information released. (12 RT 2532.) Juror 3 replied, "I have no idea. I'm kind of confused with this whole process." (12 RT 2532.) Juror 3 did not recall if anyone discussed "any moratorium on lethal injections for executions." (12 RT 2532.) She further did not recall Juror 7 telling the jurors, "We're not supposed to discuss that, so let's drop it." (12 RT 2532-2533.) She recalled that she heard something about a moratorium on the death penalty, but believed it was "probably not during that time frame because I didn't watch a lot of T.V. or read newspapers or anything." (12 RT 2533.) She did not recall paperwork brought by Juror 7. (12 RT 2533.) She did not recall discussions about the ABA's stance on the death penalty or the Supreme Court taking up a case on a moratorium on lethal injections. (12 RT 2534.) Finally, she agreed that her

identifying information could be disclosed to the attorneys. (12 RT 2534.)

Juror 7 was then brought to the courtroom. Initially the trial court told the juror that no further questions were necessary, but then asked whether he could now recall which juror brought up the moratorium. (12 RT 2535.) Juror 7 still could not recall, but instead simply remembered immediately saying, "We cannot allow that -- any of that to influence our thinking." (12 RT 2535.) He further believed that the discussion occurred "more toward the front than the end [of deliberations], but we were about a day and a half I think total, something like that," and it was "the first day." (12 RT 2535.) He confirmed that he did not show the document to any other juror. (12 RT 2535.)

Juror 9 was then brought into the courtroom for questioning. The trial court asked the juror whether she recalled any conversations about a moratorium on lethal injections for executions, or anything about the ABA stance on the death penalty. (12 RT 2536.) Juror 9 did not recall. (12 RT 2536-2537.) The court asked Juror 9 if she heard "[a] federal judge up in Northern California in essence came down with a ruling that suspended executions by using lethal injection." (12 RT 2537.) Juror 9 replied, "I recall hearing something about the suspension of executions, not necessarily that it was lethal injection, but I don't recall if it was during -- before or after the trial." (12 RT 2537.) She did not recall whether the ruling, or whether paperwork, was brought into deliberations. (12 RT 2537.)

Outside Juror 9's presence, Mr. Tran's counsel moved for the release of identifying

information for the remaining jurors who had not voluntarily come to court. (12 RT 2538.) Plata's counsel joined, but further suggested alternatively ordering the eight remaining jurors to court for questioning. (12 RT 2539.) The prosecutor objected, arguing that there was no evidence of misconduct, but requested that any questioning be conducted by the court. (12 RT 2540-2541.) Mr. Tran's counsel agreed to the jurors being called into court. (12 RT 2541.) According to counsel, the identity of the juror who raised the moratorium issue was still unknown. (12 RT 2543.) Because Juror 7 believed the other juror was male, counsel wanted the court to question the male jurors at the very least. (12 RT 2543-2545.)

The trial court denied the requests. The court stated that there was a two-prong inquiry to determine whether to there was a prima facie case "to hold a hearing that we have held today," but the issue was "beside the point," since it had already held the hearing. (12 RT 2545.) After stating it must balance the statutory interest of "providing peace of mind to jurors," against the right to a fair trial, the court stated it saw no reason to go further and to go further, it would "have to disbelieve what these jurors have already told this court in the hope that throwing the line in the water would somehow grab some fish . . . ." (12 RT 2545.) Because all but one juror opposed having their identifying information released, the court "den[ied] the request for further investigation of jurors [sic] information." (12 RT 2545-2546.)

Plata's counsel then moved that the entire document written by Juror 7 be released

to the defense. (12 RT 2546.) On the prosecutor's objection, the court denied the request. (12 RT 2546.)

Mr. Tran filed a motion for new trial, contending, *inter alia*, jury misconduct. (5 CT 1485-1490.) Plata joined the claim. (6 CT 1496.) At the hearing on the motion on August 15, 2008, Mr. Tran's counsel argued that the jurors would miss a half-day's work if brought into court for questioning, which did not compare to execution, and then submitted on his written motion. (12 RT 2558-2559.) The prosecutor requested an express finding that no juror misconduct occurred. (12 RT 2561.) The court obliged the prosecutor:

> "The issue of juror misconduct was considered, it was investigated, it was litigated. There was no juror misconduct. The court invited all jurors to discuss the case. I believe, if I'm not mistaken, five -- four chose to appear.
>
> "When I first was presented with the notes from this juror, my initial reaction was: this is nothing. The further we went into it, I was convinced this is nothing. This is merely a note to oneself as to the thought process of a juror in making a determination.
>
> "The court gave defense time to take the matter to the appellate court. Relief was denied at the appellate court. Relief was denied at the Supreme Court.
>
> "I see absolutely no reason to grant a mistrial based on juror misconduct that did not exist. I don't believe that any further investigation would have done anything constructive." (12 RT 2563-2564.)

3. Facts surrounding the undisclosed portion of Juror 7's document.

As explained above, the trial court disclosed to counsel one paragraph of the three-

page typewritten document written by Juror 7. (12 RT 2486.) The court ordered the entire document sealed over objection. (12 RT 2546.) The full document, entitled "Life, or Death?," covered various points, but as relevant here, stated:

> ". . . The defendants in this case do not fit my definition of 'penitent.' I think their remorse may be genuine, but the fact that they did not voluntarily submit themselves to the law and confess their crimes taints their remorse, and disqualifies them as truly penitent in my view. They may be sorry for killing Linda Park, but they are also sorry they were caught and convicted. . . .
>
> "The crime required sustained murderous intent. If either of them feels remorse, it may be genuine, but it is not pure and it is too little too late. Remorse merely signifies that your moral compass is working. Remorse is but the first step in true penitence. I am sure they are both sorry the police caught with them; if they were truly penitent they would have turned themselves in, confessed, and attempted to make some kind of effort at restitution. I doubt they would have done so by now if the police hadn't caught them. Mr. Ciulla stated in court that mercy was something freely given, without price. I believe otherwise, the price of mercy is genuine penitence, which consists of remorse, confession, forsaking and restitution. Would the defendants still be free men today, keeping their secrets, if the police had not detected them? . . .
>
> "Their remorse for killing her may be genuine, but so is their remorse for being caught and convicted. Remorse alone is insufficient, in my opinion, to merit mercy. . . ." (2 SCT 390-391.)

C. The Trial Court Erred In Refusing A New Trial Based On Evidence That Juror 7 Received Extrinsic Material About the Death Penalty.

A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *In re Hitchings* (1993) 6 Cal.4th 97, 110.) A defendant is "entitled to be tried by 12, not 11, impartial and unprejudiced jurors. 'Because a

defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced.' [Citations.]" (*People v. Holloway* (1990) 50 Cal.3d 1098, 1112, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) "An impartial juror is someone 'capable and willing to decide the case solely on the evidence' presented at trial." (*People v. Nesler* (1997) 16 Cal.4th 561, 581.)

A criminal defendant may move for a new trial on the basis of juror misconduct. (§ 1181, subds. 3 & 4; *People v. Ault* (2004) 33 Cal.4th 1250, 1260.) When "a party seeks a new trial based upon jury misconduct, the court must undertake a three-step inquiry." (*People v. Duran* (1996) 50 Cal.App.4th 103, 112.)

First, the trial court must determine the admissibility of the evidence submitted in connection with the motion. (*Ibid.*) Evidence Code section 1150 is of particular import in this regard. (*People v. Duran*, *supra*, 50 Cal.App.4th at p. 112.)[20]

Second, the trial court must determine whether the admissible evidence establishes

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[20] Section 1150 reads in relevant part:

> "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." (§ 1150, subd. (a).)

misconduct. (*People v. Duran*, *supra*, 50 Cal.App.4th at p. 113.) "The trial court may conduct an evidentiary hearing to determine the truth of the allegations set out in the declarations." (*Ibid.*; *see People v. Hedgecock* (1990) 51 Cal.3d 395, 415.) The defendant is not entitled to such a hearing as a matter of right; the trial court has discretion to hold such a hearing. (*People v. Hedgecock*, *supra,* 51 Cal.3d at p. 415.) If the court chooses to hold such a hearing, it "should not be used as a 'fishing expedition' to search for possible misconduct, but should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred. Even [then], an evidentiary hearing will generally be unnecessary unless the parties' evidence presents a material conflict that can only be resolved at such a hearing." (*Id*. at p. 419.)

Third, if the trial court finds that misconduct occurred, it must then determine whether the misconduct was prejudicial. (*People v. Duran*, *supra*, 50 Cal.App.4th at p. 113.) "Once misconduct has been established, prejudice is presumed; reversal is required unless the reviewing court finds, upon examination of the entire record, there is no substantial likelihood that any juror was improperly influenced to the defendant's detriment." (*Ibid.*; *People v. Danks* (2004) 32 Cal.4th 269, 302; *In re Hamilton* (1999) 20 Cal.4th 273, 296.)

"'Whether prejudice arose from juror misconduct ... is a mixed question of law and fact subject to an appellate court's independent determination.' [Citation.] However, '[the

reviewing court] accept[s] the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence.'" (*People v. Danks*, *supra*, 32 Cal.4th at pp. 303-304.)

1. Juror 7's receipt of extraneous information as revealed by the single paragraph disclosed to counsel was prejudicial misconduct.

There should be no dispute as to whether juror 7 committed misconduct. As this Court has said, "[i]t is well settled that it is misconduct for a juror to read newspaper accounts of a case on which he is sitting ...." (*People v. Holloway*, *supra*, 50 Cal.3d at p. 1108; *see also People v. Hernandez* (1988) 47 Cal.3d 315, 338.) While there is nothing to suggest that the news articles here connected specifically to Mr. Tran's case, but instead pertained to the ABA's campaign for a death penalty moratorium and the Supreme Court's decision to take up a case on the legality of lethal injections as cruel and unusual, the Court has also admonished against the reading of "'any matter in connection with the subject-matter of the trial which would be at all likely to influence jurors in the performance of duty ....' " (*People v. Holloway*, *supra*, 50 Cal.3d at p. 1108, quoting *People v. McCoy* (1886) 71 Cal. 395, 397 [12 P. 272].) This receipt of this extraneous material was misconduct.

To be sure, Juror 7 claimed he did not seek out the stories, but rather "[i]t was something I simply happened to see." (12 RT 2497.) But a "juror's inadvertent receipt of information that [has] not been presented in court falls within the general category of

‘juror misconduct.’” (*People v. Nesler*, *supra*, 16 Cal.4th at p. 579. *See People v. Dykes* (2009) 46 Cal.4th 731, 809 [“a juror’s receipt or discussion of evidence not submitted at trial constitutes misconduct”].) “Although inadvertent exposure to out-of-court information is not blameworthy conduct, as might be suggested by the term ‘misconduct,’ it nevertheless gives rise to a presumption of prejudice, because it poses the risk that one or more jurors may be influenced by material that the defendant has had no opportunity to confront, cross-examine, or rebut.” (*People v. Nesler*, *supra*, 16 Cal.4th at p. 579.) Misconduct has occurred.

The appropriate prejudice calculus here is relatively simple. As noted above, juror misconduct raises a rebuttable presumption of prejudice in the defendant’s favor. (*In re Carpenter* (1995) 9 Cal.4th 634, 655; *In re Hamilton*, *supra*, 20 Cal.4th at p. 295). When juror misconduct involves the receipt of information about a party or the case from extraneous sources, the verdict must be set aside unless the state establishes there was no substantial likelihood of juror bias. (*In re Carpenter, supra*, 9 Cal.4th at p. 653.)

Juror bias may appear in either of two ways: (1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not “inherently” prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was “actually biased” against the defendant. (*In re Carpenter*, *supra*, 9 Cal.4th at p. 653.) Reversal is required if the court

finds prejudice under either test. (*Id.*)

The first of these tests can be analogized to California's general standard for a harmless error analysis. (*Id.*) Under this standard, a finding of "inherently" likely bias is required when "the extraneous information was so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment." (*Id.*) The standard requires a "review of the trial record to determine the prejudicial effect of the extraneous information." (*Id.*)

But in contrast, "the [second] test for determining whether juror misconduct likely resulted in actual bias is 'different from, and indeed less tolerant than,' normal harmless error analysis, for if it appears substantially likely that a juror is actually biased, [a reviewing court] must set aside the verdict, no matter how convinced [it] might be that an unbiased jury would have reached the same verdict." (*Id.* at p. 654.) Under this second test, "[a]ll pertinent portions of the entire record, including the trial record, must be considered." (*Id.*) The "entire record" includes (1) the nature of the juror's conduct, (2) the circumstances under which the information was obtained, (3) the instructions the jury received, (4) the nature of the evidence and issues at trial, and (5) the strength of the evidence against the defendant." (*Id.*)

Here, the state will not be able to rebut the presumption of prejudice under either test. The nature of the extraneous material was inherently prejudicial, and the state will be unable to effectively show that its injection into the trial would have been harmless.

And moreover, given the entire record of the misconduct, the state will be unable to effectively show that under the totality of the circumstances there was no substantial likelihood that juror 7 was actually biased.

2. The extraneous material, judged objectively, was inherently prejudicial and substantially likely to have influenced juror 7.

Juror 7 read news articles on the ABA's campaign for a death penalty moratorium, and the Supreme Court's decision to take up a case on the legality of lethal injections as cruel and unusual. Although the exact content of the articles is not clear -- as the articles themselves were not made part of the record, and Juror 7 never identified the specific articles he read in the papers and on the internet -- the news itself was very clear. As Juror 7 made clear in his writing, "the American Bar Association has recently resumed its campaign for a national moratorium on the death penalty" and "the U.S. Supreme Court has agreed to review a case challenging the legality of execution by lethal injection as cruel and unusual punishment." (2 SCT 389 [transcript page under seal].)

This extraneous information was so prejudicial that its erroneous admission at trial would have warranted reversal. It is now well established that under the Eighth Amendment, "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." (*California v. Ramos* (1983) 463 U.S. 992, 998-999.) Thus, the Supreme Court's death penalty jurisprudence has consistently reflected a concern that the sentencing process ensure a reliable and responsible exercise of sentencing discretion. (*See, e.g., Lankford v.*

Idaho (1991) 500 U.S. 110; *Maynard v. Cartwright* (1988) 486 U.S. 356; *Eddings v. Oklahoma* (1982) 455 U.S. 104; *Lockett v. Ohio* (1977) 438 U.S. 586; *Gardner v. Florida* (1977) 430 U.S. 349.)

Among the fundamental premises which lead to a reliable exercise of sentencing discretion is the sentencer's understanding that the responsibility for any ultimate determination of death rests with in its hands. (*See, e.g. Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 329-330, 333. *See also Darden v. Wainwright* (1986) 477 U.S. 168, 184, n.15.) Thus, in approving a death penalty scheme which reposed a broad discretion in the sentencer to choose between life and death, the Court has explicitly relied on the assumption "that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human being will act with due regard for the consequences of their decision . . . ." (*McGautha v. California* (1971) 402 U.S. 183, 208.) Where jurors are told that the responsibility for a death verdict lies elsewhere, this fundamental premise is fatally undercut and a death sentence may not stand. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 328-329.)

In *Caldwell v. Mississippi*, *supra*, the Supreme Court held that the Eighth Amendment would not permit the execution of a defendant whose sentencer had been told that the responsibility for a death judgment rested elsewhere. There, defense counsel sought to impress the jurors with the importance of their decision, telling them they were to exercise an "awesome responsibility." (472 U.S. at p. 324.) In response, the

prosecutor argued that this was an unfair burden to place on the jurors. He told them that their decision was “automatically reviewable” by the state supreme court. (472 U.S. at pp. 325-326.) Defendant was sentenced to death. The Supreme Court reversed, reasoning that the prosecutor's argument “presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.” (472 U.S. at p. 333.)

The news articles here minimized Juror 7's sense of responsibility in a death verdict in the precise way condemned by *Caldwell*. The articles informed Juror 7, in no uncertain terms, that a vote for death was not necessarily the end of the matter. The ABA was seeking a national moratorium on the death penalty, and a death penalty case was not only reviewable by the United States Supreme Court, but the Court had actually agreed to review a case challenging the legality of execution by lethal injection as cruel and unusual punishment. This is exactly what *Caldwell*, and the Eighth Amendment, prohibit. On this record, it cannot be said that the extraneous material was not “inherently prejudicial;” instead there is a substantial likelihood that bias occurred -- indeed, *Caldwell* error -- as a result.

3. Given the nature of the misconduct and the surrounding circumstances, it is substantially likely juror 7 was “actually biased.”

Even if the extraneous material was not inherently prejudicial, the most cursory glance at the circumstances surrounding the misconduct here reveals that there was a substantial likelihood that Juror 7 was actually biased. The juror misconduct here was

both pervasive (affecting at least five jurors) and substantive (amounting to *Caldwell* error). Juror 7's review of newspaper and internet accounts not only violated his sworn obligation not to independently read news reports about the case but also contravened Mr. Tran's right to 12 jurors free from outside influence. (*See People v. Cissna* (2010) 182 Cal.App.4th 1105, 1118; *People v. Pierce* (1979) 24 Cal.3d 199, 207; *People v. Wilson*, *supra*, 44 Cal.4th at p. 838.) As noted above, the Court must not only evaluate the trial record to determine actual bias, but also the "entire record" of the case, including (1) the nature of the juror's conduct, (2) the circumstances under which the information was obtained, (3) the instructions the jury received, (4) the nature of the evidence and issues at trial, and (5) the strength of the evidence against the defendant." (*In re Carpenter*, *supra*, 9 Cal.4th at p. 654.)

Juror 7's failure to comply with the trial court's admonitions not to read newspaper and internet articles relevant to the case "casts serious doubts on his willingness to follow the court's other instructions." (*People v. Cissna*, *supra*, 182 Cal.App.4th at p. 1118. *See also In re Hitchings* (1993) 6 Cal.4th 97, 120 ["[w]hen a person violates his oath as a juror, doubt is cast on his ability to otherwise perform his duties"].) The trial court here told the jurors that they were under an absolute obligation not to read newspaper or internet accounts, emphasizing that the jurors were "forbidden to read anything that's printed in the media . . . or on the internet . . . ." (5 RT 835-836.) Juror 7 disregarded this obligation and read newspaper and internet accounts related to the death penalty.

And this is not simply a case where a juror inadvertently or briefly heard something trivial about the case, which the trial court ensured could be disregarded. (*See e.g.*, *People v. Danks*, *supra*, 32 Cal.4th at p. 307 [no prejudice from juror's brief inadvertent exposure to pastor's single "gratuitous" comment which juror]; *People v. Zapien* (1993) 4 Cal.4th 929, 994 [no prejudice from juror's inadvertent exposure to outside material about defendant where told by court amounted to mere rumor, which juror agreed could disregard].) While Juror 7's initial exposure to the news accounts here may very well have been inadvertent, the juror thought enough of the stories to subsequently write them down for further consultation in deliberations.

And, as detailed above, the news accounts informed the juror that the ABA was seeking a national moratorium on the death penalty, and that a death penalty case was reviewable by the United States Supreme Court, which had, indeed, agreed to review a capital case challenging the legality of execution by lethal injection as cruel and unusual punishment. Thus, in a case in which the jury's sole task was the determination of whether Mr. Tran should live or die, the extraneous material was not trivial information, but instead went to the heart of the sole issue at the penalty phase proceedings. Put simply, Juror 7's review of the newspaper and internet accounts, "compromised the integrity of the jury's deliberative process and undermined the requirement that the jury alone determine" the verdict. (*See People v. Cissna*, *supra*, 182 Cal.App.4th at p. 1119.)

Moreover, Juror 7 was not the only juror who received this extraneous

information. Juror 7 told the trial court that “[a]nother juror brought the Supreme Court news item up,” which was one reason why he wrote down his thoughts; he wanted to remind the other jurors not to consider the information if any other jurors subsequently raised the issue. (12 RT 2497.) Juror 2 told the court that a juror brought up the moratorium issue during deliberations, but that Juror 7 had admonished the juror not to consider the information. (12 RT 2526-2527.) Juror 3 recalled that she had heard “something about” the moratorium on the death penalty, but could not recall the time frame. (12 RT 2533.) Juror 9 recalled that she heard “something about the suspension of executions, not necessarily that it was lethal injection,” but could not recall the time frame. (12 RT 2537.) Thus, not only was Juror 7 aware of the news, at least four other jurors -- Juror 2, Juror 3, Juror 9 and at least one other unnamed juror -- were made aware of it, either through the news or through fellow jurors. But because Juror 7 did not bring the matter to the trial court’s attention, the court did not have the opportunity to take any ameliorative steps, such as admonishing the deliberating jurors. Thus, there were no instructions or other corrective measures take by the court or parties to cure the harm. (*See People v. Holloway*, *supra*, 50 Cal.3d at p. 1108 [“Our conclusion might have been different had the misconduct been revealed in time for the court to have taken corrective steps to cure it through admonition or by other prophylactic measures.”]; *People v. Harper* (1986) 186 Cal.App.3d 1420, 1426-1430 [admonition rebutted presumption of prejudice]; *People v. Craig* (1978) 86 Cal.App.3d 905, 919 [same].)

Finally, while Mr. Tran recognizes that the Court must also consider the strength of the state's case against him in determining the likelihood of bias, this factor is not dispositive here. Outside the victim impact evidence, the strongest aggravating factor here was the identity of the actual killer. But there was no eyewitness testimony as to who actually killed Linda. There was no forensic or other scientific evidence that proved the actual killer. To be sure, the state presented evidence at trial that Mr. Tran admitted the actual killing to Qui Ly -- Ly testified that when he asked Mr. Tran "who killed her, you or him [Plata]," Mr. Tran pointed to himself and nodded his head (7 RT 1424-1425) -- but there were significant problems with this evidence. Ly was a career confidential informant and convicted felon who faced a three-strikes term of 31 year-to-life term and sought a deal in exchange for providing helpful information. (6 RT 1257; 7 RT 1408-1409.) Moreover, in a tape recorded interview, Ly initially claimed that Plata admitted to him that he was the one who killed Linda; Plata said "he had killed the Korean girl." (7 RT 1445, 1452.) He told police he assumed Plata killed Linda from earlier conversations with Plata, and then his suspicions were confirmed when Plata admitted to the murder. (7 RT 1453.) Plata told Ly that "he had to do it." (7 RT 1454.) Ly continued to claim that Plata admitted killing Linda more than once after that initial interview. (7 RT 1446.) He only changed his story at trial, claiming he was only assuming all along that Plata killed Linda. (7 RT 1451.) Based on this evidence, it is not surprising that Juror 7 would later write, "The evidence as to which of the two did the strangling is not absolutely

conclusive." (2 SCT 390.) On this record, the state will be unable to rely on the strength of their case to rebut the prejudice presumed from juror 7's misconduct. Reversal is required.

D. The Trial Court's Failure to Conduct an Adequate Hearing in Determining Whether Jurors Received Extraneous Material Requires Remand.

As more fully discussed below, the trial court erred in failing to conduct an adequate evidentiary hearing into the allegation that jurors received extraneous material. Because it is impossible on this record to determine whether or not jurors committed serious misconduct, or whether any misconduct was harmless, remand for an adequate hearing is required.

As noted above, when a defendant in a criminal case alleges that there has been jury misconduct, the trial court has discretion to hold an evidentiary hearing to determine the truth of these allegations. (*People v. Hedgecock*, *supra*, 51 Cal.3d 395, 415.) Although the defendant is not entitled to a hearing as a matter of right, a hearing should be held whenever (1) the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred and (2) the evidence presents a material conflict that can only be resolved at such a hearing. (*Id*. at p. 419.) At such a hearing, it is entirely appropriate for jurors to testify. (*Id*. at p. 416.) Once a court decides to hold a hearing, it has a duty to conduct a sufficient inquiry to determine facts alleged as juror misconduct. (*People v. Davis* (1995) 10 Cal.4th 463, 547.) When the

issue involves the receipt of extraneous material, "the trial court should conduct a hearing 'into whether and to what extent the jury as a whole may have been affected and whether there was good cause to discharge any of the jurors.'" (*People v. Cummings* (1993) 4 Cal.4th 1233, 1332, quoting *People v. Hernandez*, *supra*, 47 Cal.3d at p. 338.) When a court fails to conduct an adequate and proper hearing, the remedy is to remand the case for an appropriate hearing. (*People v. Hedgecock*, *supra*, 51 Cal.3d at pp. 420-421.) As this Court has noted, the [f]ailure to conduct a hearing sufficient to determine whether good cause to discharge the juror exists is an abuse of discretion subject to appellate review. (*People v. Burgener* (1986) 41 Cal.3d 505, 520.)

Here, given the information alleging that Juror 7 had received extraneous material, the trial court had before it evidence showing a strong possibility that misconduct had occurred. Given this showing, the court properly exercised its discretion to hold a hearing to determine the truth of the allegations. Unfortunately, however, the scope of that hearing was completely inadequate to determine [the] facts alleged as juror misconduct . . . . (*People v. Davis*, *supra*, 10 Cal.4th at p. 547.)

To its credit, the trial court questioned Juror 7 about the allegation. Juror 7 told the trial court that he wrote down his thoughts because "[a]nother juror brought the Supreme Court news item up," and he wanted to remind any other juror that might raise the issue. (12 RT 2497.) Juror 7 could not recall which juror had brought the "news item" up.

In light of Juror 7's testimony, Mr. Tran's counsel requested that all of the jurors

be questioned. (12 RT 2511-2512.) The prosecutor had no objection. (12 RT 2512.) The trial court refused. (12 RT 2513.) According to the court, “I’m satisfied with the explanation that the foreperson came up with.” (12 RT 2513.)

The trial court did, however, grant the defense motion to initiate proceedings pursuant to section 237 for the disclosure of juror information, which required notifying the jurors that the information was requested and a hearing would be conducted. (12 RT 2513.) The court invited counsel to submit questions for the court to ask jurors, relating to “what was discussed concerning the death penalty and lethal injection.” (12 RT 2519.) The court reiterated, “I don’t see enough to order jurors in,” but instead decided that jurors would simply be notified of the hearing on the request for disclosure of their identifying information, and invited to voluntarily come to court for questioning. (12 RT 2513-2519.)

The trial court subsequently sent a notice which informed the jurors that a hearing would be held on a motion for disclosure of juror information, and those who attended would be questioned on “whether their decision in the penalty phase of the trial was affected by discussions of matters that were not presented by way of evidence or the law . . . . .” (5 CT 1433-1434.)

With the exception of Juror 3, all jurors did not wish their information to be disclosed. (12 RT 2521; 2 SCT 395.) At the hearing, Juror 2 told the trial court that another juror brought up the moratorium issue during deliberations, and indeed, Juror 7

admonished the juror not to consider the information. (12 RT 2526-2527.) Juror 3 too recalled that she had heard “something about” the moratorium on the death penalty. (12 RT 2533.) Juror 9 recalled that she heard “something about the suspension of executions, not necessarily that it was lethal injection.” (12 RT 2537.)

Based on this evidence, defense counsel moved for the release of identifying information for the remaining jurors, or alternatively, an order to the eight remaining jurors who were never questioned. (12 RT 2538-2539, 2541.) The prosecutor objected, arguing that there was no evidence of misconduct, but requested that any questioning be conducted by the court. (12 RT 2540-2541.)

The trial court refused. According to the court, balancing the statutory interest of “providing peace of mind to jurors,” against the right to a fair trial, the court stated it saw no reason to go further and to go further, it would “have to disbelieve what these jurors have already told this court in the hope that throwing the line in the water would somehow grab some fish . . . .” (12 RT 2545.) Because all but one juror opposed having their identifying information released, the court “den[ied] the request for further investigation of jurors [sic] information.” (12 RT 2545-2546.) Without any further inquiry, the court found that “[t]here was no juror misconduct.” (12 RT 2563.)

Error occurred. Put simply, there was undisputed evidence that Juror 7 heard an unidentified juror bring “the Supreme Court news item up” so wrote down an admonishment for future use (12 RT 2497), and undisputed evidence that Juror 2 heard an

unidentified juror bring up the moratorium issue which caused Juror 7 to admonish (12 RT 2526-2527), and undisputed evidence that Jurors 3 and 9 too recalled an unidentified juror bring up the moratorium issue which stood without admonishment (12 RT 2533, 2537). On this record, where the identity of the one or more jurors who received extraneous material remained unknown, along with any specific details of the exposure to, and dissemination of this extraneous material by, these jurors, the process provided by the court to resolve these critical issues was patently inadequate. Remand is required. (*People v. Hedgecock*, *supra*, 51 Cal.3d at pp. 420-421.)

E. The Trial Court's Failure to Conduct an Adequate Hearing in Determining Whether Juror 7 Committed Further Misconduct As Revealed by the Undisclosed Portion of the Three-Page Document Requires Remand.

As noted above, the trial court informed the parties that Juror 7 wrote a 3-page document entitled "Life or Death," and left the document in the deliberations room after the jury reached its penalty-phase verdict. (12 RT 2486.) The court reviewed the entire document and found, "it's my opinion that it is nothing more than the man putting down his thoughts. It's definitely a thought-process thing." (12 RT 2486.)

The trial court did, however, disclose one paragraph of the document, finding, "There was one single paragraph that I thought perhaps should be inquired into." (12 RT 2486.) The court then proceeded to inquire of Juror 7 and three other jurors about the contents of the single paragraph, and ultimately found that "[t]here was no juror misconduct." (12 RT 2563.) After the hearing, and on the prosecutor's objection, the

court refused to release the entire document written by Juror 7 based on the juror's wishes that the document remain private, and instead, sealed the document. (12 RT 2496, 2505, 2546.) No inquiry was made of Juror 7 regarding any content of the document outside the single paragraph.

This was error. The law is plain that it is misconduct for a juror to violate a trial court's instructions. (*See*, *e.g.*, *People v. Williams* (2001) 25 Cal.4th 441, 448; *People v. Thomas* (1994) 26 Cal.App.4th 1328, 1333.) It is equally plain that when a trial court instructs jurors in a criminal case that they may *not* consider a particular issue, evidence showing that the jurors ignored that instruction -- and spoke about the subject -- establishes that misconduct has occurred. (*See*, *e.g.*, *In re Stankewitz* (1985) 40 Cal.3d 391, 397-398 [declaration regarding a juror's erroneous legal advice to his fellow jurors during deliberations was admissible since the juror act ignored trial court instructions and advice constituted an overt act of misconduct]; *People v. Perez* (1992) 4 Cal.App.4th 893, 908 [court instructs jurors not to consider fact that defendant did not testify, jurors ignored the instruction and spoke about this topic during deliberations, trial court denied defendant's motion for new trial; held, new trial motion improperly denied and case remanded for hearing on misconduct]. *See also DiRosario v. Havens* (1987) 196 Cal.App.3d 1224, 1235 ["if the jurors in this case made their decision based upon an intentional collective disregard of [a jury instruction] ... then such activity would be grounds for seriously considering reversal of the judgment"]; *People v. Elkins* (1981) 123

Cal.App.3d 632, 638 [finding juror affidavits inadmissible since the declarations failed to "indicat[e] ... any open discussion or agreement among the jurors evidencing a deliberate refusal to follow the court's instructions"].)

Here, the potential jurors were admonished in voir dire that "the defendant or defendants may not testify," and "they have a right to allow you to judge the case on the evidence before you," and thus, "[t]he fact that he didn't testify is nothing." (3 RT 487-488, 524.) All potential jurors agreed that they could "follow the law" and it was a "fair thing to do." (3 RT 488, 524.) The trial court instructed the jurors, "You may not draw any adverse inferences against the defendant from his failure to take the stand. You may not consider it as evidence the defendant lacks remorse." (12 RT 2346. *Accord Griffin v. California* (1965) 380 U.S. 609 [Fifth Amendment to the United States Constitution prohibits comment on a criminal defendant's invocation of his constitutional right to remain silent in the face of criminal charges.]

Juror 7, however, wrote in the three-page document that "defendants . . . did not voluntarily submit themselves to the law and confess their crimes," and the failure to do so "taints their remorse, and disqualifies them as truly penitent." (2 SCT 390.) According to Juror 7, "if they were truly penitent they would have turned themselves in, confessed, and attempted to make some kind of effort at restitution." (2 SCT 391.) Juror 7 concluded, "the price of mercy is genuine penitence, which consists of remorse, confession, forsaking and restitution." (2 SCT 391.)

These statements were plain misconduct which creates a presumption of prejudice. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1425; *People v. Hord* (1993) 15 Cal.App.4th 711, 721, 725; *People v. Perez, supra*, 4 Cal.App.4th at p. 908.) And there is nothing on the record which would rebut this presumption. Indeed, given that Juror 7 openly discussed and made negative inferences about Mr. Tran's silence and refusal to confess and show remorse, there is a more than a substantial likelihood that the misconduct affected the juror's critical determination of whether Mr. Tran lived or died.

None of this, however, was addressed in the new trial motion or at the subsequent hearing. The reason is simple. The trial court refused to disclose the entirety of the three-page document to the defense. The court found the document was a "thought-process thing," undoubtedly relying on the limits of Evidence Code section 1150. (12 RT 2486.)

The trial court's ruling was erroneous as a matter of law. Under Evidence Code 1150, "any otherwise admissible evidence may be received as to *statements made*, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly." (Emphasis added.) Testimony about improper "statements made" by jurors during deliberations was entirely admissible. (*See People v. Steele* (2002) 27 Cal.4th 1230, 1261 [Evidence Code 1150 "distinguishes 'between overt acts, objectively ascertainable, and proof of the subjective reasoning process of the individual juror"]; *People v. Hill* (1992) 3 Cal.App.4th 16, 34 [considering testimony about statements jurors made regarding potential punishments].)

Because the court erroneously excluded evidence that Juror 7 violated the admonitions not to consider Mr. Tran's silence and failure to confess and exhibit remorse, it never even reached the question of whether (1) misconduct had occurred and (2) the presumption of prejudice could be rebutted. Remand is required. (*People v. Hedgecock*, *supra*, 51 Cal.3d at pp. 420-421.)

XIII. BECAUSE THE CALIFORNIA CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL IN NUMEROUS RESPECTS, MR. TRAN'S DEATH SENTENCE MUST BE REVERSED.

In the capital case of *People v. Schmeck* (2005) 37 Cal.4th 240, the defendant presented a number of attacks on the California capital sentencing scheme which had been raised and rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (37 Cal.4th at p. 303.) This Court acknowledged that in dealing with these systemic attacks in past cases, it had given conflicting signals on the detail needed in order for a defendant to preserve these attacks for subsequent review. (37 Cal.4th at p. 303, n.22.) In order to avoid detailed briefing on such claims in future cases, the Court held that a defendant could preserve these claims by "(i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (37 Cal.4th at p. 304.)

Mr. Tran has no wish to unnecessarily lengthen this brief. Accordingly, pursuant to *Schmeck*, Mr. Tran identifies the following systemic (and previously rejected) claims relating to the California death penalty scheme which require a new penalty phase in his case:

> (1) The trial court's instructions permitted the jury to rely on defendant's age in deciding if he would live or die. (5 CT 1341.) This aggravating factor is unconstitutionally vague in violation of the Eighth Amendment and requires a new penalty phase. This Court has already rejected this argument. (*People v. Ray* (1996) 13 Cal.4th 313, 358.) The Court's decision in *Ray* should be reconsidered.

(2) During the penalty phase, the jury was instructed it could consider criminal acts which involved the use or attempted use of force or violence, or the direct or implied threat to use force or violence. (5 CT 1339-1340.) Evidence supporting this instruction had been admitted at the penalty phase, and the jury was authorized to consider such acts at the penalty phase pursuant to Penal Code section 190.3, subdivision (b). The jurors were instructed they could not rely on this evidence unless it had been proven beyond a reasonable doubt. (5 CT 1346.) The jurors were told, however, that they could rely on this factor (b) evidence even if they had not unanimously agreed that the conduct had occurred. (5 CT 1347.) In light of the Supreme Court decision in *Ring v. Arizona* (2002) 536 U.S. 584, the trial court's failure to require unanimity as to these crimes violated Mr. Tran's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at p. 609.) In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable penalty phase determination. This Court has already rejected both these arguments. (*People v. Lewis* (2006) 39 Cal.4th 970, 1068.) The Court's decision in *Lewis* should be reconsidered.

(3) At the penalty phase, the jury was properly instructed that before it could rely on prior criminal activity as a basis for imposing death, it had to find the prior activity true beyond a reasonable doubt. (5 CT 1346, 1348.) Allowing a jury which has already convicted the defendant of first degree murder to decide if the defendant has committed other criminal activity violated defendant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to an unbiased decisionmaker. This Court has already rejected this argument. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 77.) The Court's decision in *Hawthorne* should be reconsidered.

(4) At the penalty phase, the trial court instructed the jury in accord with a standard instructions defining the statutory aggravating and mitigating factors, and the weighing process. (5 CT 1289-1294, 1321-1323) The instructions were constitutionally flawed in six ways: (1) they failed to delete inapplicable sentencing factors, (2) they failed to delineate between aggravating and mitigating factors, (3) they contained vague and ill-defined factors, (4) some mitigating factors were limited by adjectives such as "extreme" or "substantial," (5) they failed to specify a burden of proof as to either mitigation or aggravation, and (6) they failed to inform the jury that it was presumed that life without parole was an appropriate sentence. (*Ibid*.)

These errors, taken singly or in combination, violated Mr. Tran's Fifth, Sixth, Eighth and Fourteenth Amendment rights. This Court has already rejected these arguments. (*People v. Schmeck*, *supra*, 37 Cal.4th at pp. 304-305; *People v. Ray*, *supra*, 13 Cal.4th at pp. 358-359; *People v. Arias* (1996) 13 Cal.4th 92, 190.) The Court's decisions in *Schmeck*, *Ray* and *Arias* should be reconsidered.

(5) California's capital punishment scheme, as construed by this Court in *People v. Bacigalupo* (1993) 6 Cal.4th 457, 475-477, and as applied, violates the Eighth Amendment and fails to provide a meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast majority who are not. This Court has already rejected this argument. (*People v. Schmeck*, *supra,* 37 Cal.4th at p. 304.) For the same reasons set forth by the appellant in *People v. Schmeck*, *supra*, however, the Court's decision should be reconsidered.

(6) California's sentencing scheme does not require a trial court or reviewing court to undertake a comparison between the present case and other similar cases regarding the relative proportionality of the sentence imposed, i.e. intercase proportionality review. (*People v. Bonilla* (2007) 41 Cal.4th 313, 359.) This failure violates the Fifth, Sixth, Eighth and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection and due process. This Court should require an intercase proportionality review in capital cases.

(7) Penal Code section 190.3, subdivision (a) -- which permits a jury to sentence a defendant to death based on the "circumstances of the crime" -- is being applied in a manner that institutionalizes the arbitrary and capricious imposition of death. The jury in this case was instructed in accord with this provision. (5 CT 1339.) This Court has already rejected this argument. (*People v. Schmeck*, *supra*, 37 Cal.4th at pp. 304-305.) For the same reasons set forth by the appellant in *People v. Schmeck*, *supra*, however, the Court's decision should be reconsidered.

(8) Under California law, a defendant convicted of first degree murder cannot receive a death sentence unless a jury (1) finds true one or more special circumstance allegations which render the defendant death eligible and (2) finds that aggravating circumstances outweigh mitigating circumstances. The jury in this case was not told that the second of these

decisions had to be made beyond a reasonable doubt. This violated Mr. Tran's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. This Court has already rejected this argument. (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.) For the same reasons set forth by the appellant in *People v. Schmeck*, *supra*, and in light of *Hurst v. Florida* (2016) __U.S. __ 136 S.Ct 616, as explained in Argument V of co-appellant Plata's opening brief, however, the Court's decision should be reconsidered.

(9) Because the California death penalty scheme violates international law -- including the International Covenant of Civil and Political Rights -- Mr. Tran's death sentence must be reversed. This Court has already rejected this argument. (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 305.) For the same reasons set forth by the appellant in *People v. Schmeck*, *supra*, however, the Court's decision should be reconsidered.

To the extent respondent argues that any of these issues is not properly preserved because Mr. Tran has not presented them in sufficient detail to this Court, Mr. Tran will seek leave to file a supplemental brief more fully discussing these issues.

XIV. CUMULATIVE PREJUDICE FROM THE ERRORS IN THIS CASE REQUIRES REVERSAL OF THE GUILT VERDICT, THE SPECIAL CIRCUMSTANCE FINDINGS, AND THE VERDICT OF DEATH.

There was no real question in this case that Mr. Tran and Plata were guilty of burglary and robbery. The identity of the actual killer was an entirely different story. The state's sole theory -- and co-defendant Plata's theory -- was that Mr. Tran killed Linda. To support this theory, the prosecutor introduced the testimony of convicted felon and jailhouse informant Qui Ly. Ly testified that when asked who killed Linda, Mr. Tran pointed to himself. Although there were no other eyewitnesses or proof otherwise to this "confession," the prosecutor relied on this evidence to urge the jury to find Mr. Tran guilty of murder as the actual killer, find the special circumstances true on an intent to kill theory, and return a verdict of death.

As explained above, the jury's ability to resolve the question of whether Ly was telling the truth -- and Mr. Tran was the actual killer -- was seriously undermined by a series of errors. Each of the errors alone were sufficiently prejudicial to warrant reversal of Mr. Tran's case. As more fully discussed below, however, even if none were alone sufficiently prejudicial, the cumulative effect of the errors eliminated all chance of a fair trial.

Even where individual errors do not result in prejudice, the cumulative effect of such errors may require reversal. (*Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622 [cumulative prejudice required affirmance of order granting petition for writ of habeas

corpus]; *Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, fn. 6 [cumulative errors may result in unfair trial in violation of due process]; *accord United States v. McLister* (9th Cir. 1979) 608 F.2d 785, 788; *see also People v. Hill* (1998) 17 Cal.4th 800, 845-847 [cumulative effect of multiple errors resulted in miscarriage of justice, requiring reversal under California Constitution].)

Here, the cumulative effect of the errors deprived Mr. Tran of a fair trial and cannot be shown harmless beyond a reasonable doubt. First, the trial court admitted Ly's testimony that Mr. Tran confessed to killing Linda, but then precluded the jury from considering Ly's testimony that shortly after the murder, Plata confessed that he killed the "Korean girl" because he felt "he had to do it." Next, the court gave instructions which effectively told the jury that Ly's testimony that Plata's unrecorded oral confession that he killed Linda must be viewed "with caution." Next, the court admitted Plata's recorded statements to Ly that he did not kill Linda, there was "nothing he could do" about the murder, and was "pissed off" afterwards, and moreover, evidence that Mr. Tran got a tattoo after the killing was evidence that Mr. Tran was bragging about killing Linda, telling the world, "blow me and suck me." Next, the court instructed the jury that contrary evidence -- Mr. Tran's girlfriend Nyugen's testimony that Mr. Tran told her the tattoo actually said, "Forgive me," as a show of remorse -- must be viewed with caution, and indeed, could not be considered unless it was supported by other evidence.

Put simply, the trial court's evidentiary and instructional errors all skewed the

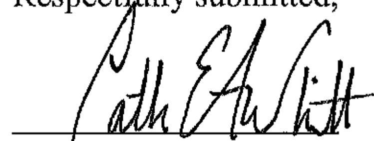
jury's ability to determine whether Mr. Tran killed Linda. Because the prosecutor's entire theory at both the guilt and penalty phases rested entirely on the premise that Mr. Tran was the actual killer, the cumulative effect of the errors requires complete reversal. This is especially true as to the penalty phase where the trial court impermissibly allowed the jury to hear devastating victim impact evidence -- which caused an interpreter to cry and the loss of a juror -- and refused to grant a mistrial when the jury foreperson committed serious misconduct, including considering Mr. Tran's failure to take the stand, in returning a verdict of death.

CONCLUSION

For all these reasons, and for the reasons identified in the briefing of his co-appellant in which Mr. Tran hereby joins pursuant to California Rule of Court 8.200, the guilt verdict, special circumstance finding and verdict of death must be reversed.

DATED: September 19, 2017

Respectfully submitted,

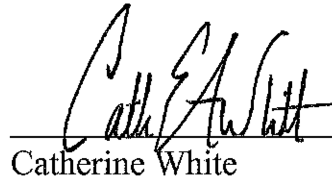


Catherine White
Attorney for Appellant
Ron Tri Tran

CERTIFICATE OF COMPLIANCE

I certify that the accompanying non-redacted brief is double spaced, that a 13-point proportional font was used, and that there are 76,889 words in the brief.

Dated: September 19, 2017



Catherine White

CERTIFICATE OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action. My business address is 1448 San Pablo Avenue, Berkeley, California 94702.

On September 19, 2017, I served the within

APPELLANT'S OPENING BRIEF, S165998

upon the parties named below by depositing a true copy in a United States mailbox in Berkeley, California, in a sealed envelope, postage prepaid, and addressed as follows:

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Orange County Superior Court
Central Justice Center
700 Civic Center Drive West
Santa Ana, California 92701

Office of the District Attorney
401 W. Civic Center Drive
Santa Ana, California 92701

Ronald Tri Tran, G-30920
San Quentin State Prison
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AND upon the parties named below by submitting an electronic copy through TrueFiling:

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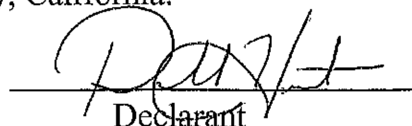
I declare under penalty of perjury that the foregoing is true.

Executed on September 19, 2017, in Berkeley, California.



Declarant

Supreme Court of California
Jorge E. Navarrete, Court Administrator and Clerk
Electronically FILED on 9/27/2017 by Regine Ho, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S165998**
Lower Court Case Number:

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White, Catherine (193690)
Last Name, First Name (PNum)

Law Office of Catherine White, APC
Law Firm