SUPREME COURT COPY

COPY

No. S073597
(Los Angeles Superior Court No. PA023649)

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JUAN MANUEL LOPEZ

Defendant and Appellant.

SUPREME COURT
FILED

JUL 31 2006

Frederick K.Ohlrich Clerk

Deputy

APPELLANT'S REPLY BRIEF

On Automatic Appeal from a Judgment of Death
Rendered in the State of California, Los Angeles County

(HONORABLE MEREDITH C. TAYLOR, JUDGE, of the Superior Court)

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JUAN MANUEL LOPEZ Defendant and Appellant.	No. S073597 (Los Angeles Superior Court No. PA023649)

APPELLANT'S REPLY BRIEF

INTRODUCTION

In this brief, appellant addresses specific contentions made by respondent, but does not reply to arguments which are adequately addressed in appellant's opening brief. Appellant's decision not to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

ARGUMENT

I.

THE TRIAL COURT IMPROPERLY LIMITED VOIR DIRE OF PROSPECTIVE JURORS

At the beginning of jury selection, the trial court stated that it would not voir dire prospective jurors about racial prejudice. Appellant objected that the court's failure to voir dire on racial prejudice violated his state and federal constitutional rights. (3 RT 276.) In particular, appellant argued on appeal that the trial court's decision violated his federal and state constitutional rights to due process, to a fair and impartial jury, and a reliable verdict in a capital case. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16, 17.)

A. Appellant's Claims on Appeal Were Not Waived

Respondent contends that the appellant's claims were waived because appellant objected at trial only on unspecified constitutional grounds. (RB 21.) Respondent's reliance on *People v. Staten* (2000) 24 Cal.4th 434 is misplaced. In *Staten*, the defendant participated in drafting a questionnaire that included questions regarding bias. He did not request additional voir dire concerning racial bias. The defendant did nothing to alert the trial court about a need to address the matter. This Court found that a "defendant cannot complain of a judge's failure to question the venire on racial prejudice unless the defendant has specifically requested such an inquiry." (*Id.* at pp. 251-252.) Here, the trial court specifically found that some of the responses to the jury questionnaire were inadequate, but stated, over appellant's objection, that it would not voir dire the jury on racial prejudice. Unlike the defendant in *Staten*, appellant requested further

inquiry. This Court should find that the issue was properly preserved before the trial court and may be addressed on appeal.

Moreover, appellant's objection alerted the trial court that he opposed its ruling and that its decision had legal consequences. Even assuming that appellant's objection could have been more specific, the legal consequences of the trial court's decision – the constitutional violation of state and federal due process guarantees and its impact upon appellant's rights to a fair and impartial jury and a reliable capital verdict – may be reviewed by this Court.

In *People v. Partida* (2005) 37 Cal.4th 428, this Court addressed the circumstances in which specific objections to evidentiary matters must be made in the trial court. It emphasized that an evidentiary objection "must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility." (*Id.* at p. 435, quoting *People v. Williams* (1988) 44 Cal.3d 883, 906.) However, the Court refused to impose formalistic requirements. Instead, it held that an issue is preserved for appeal if it "entails no unfairness to the parties," who had the full opportunity at trial to litigate whether the court should overrule or sustain the trial objection. (*Id.* at p. 436, quoting *People v. Yeoman* (2003) 31 Cal.4th 93, 118.) Most importantly, it emphasized that the legal consequences of an objection – the constitutional violation that resulted from the trial court's ruling – was a matter for the reviewing court to assess, and not the trial court. (*Id.* at p. 437.) Thus, it found that a defendant on appeal may argue a legal consequence of an asserted error. (*Id.* at p. 438.) Here, appellant's objection similarly gave the trial court full opportunity to determine whether it would voir dire on racial prejudice. Thus, the

constitutional issues implicated in the trial court's ruling may be reviewed by this Court.

B. Voir Dire on Racial Prejudice was Critical to the Guilt and Penalty Phases

Voir dire on racial prejudice must be conducted if there are special circumstances in the case that create a significant likelihood that racial prejudice might infect the trial. (*Ristaino v. Ross* (1976) 424 U.S. 589, 595.) Here, the trial court erroneously limited its voir dire because it believed that there was no evidence that racial considerations affected the charges against appellant. (3 RT 276.) However, in a case involving an Hispanic gang member and a white underage victim, the racial and ethnic factors that might have affected the jury's consideration were readily apparent. Thus, the trial court was under a constitutional duty to conduct adequate voir dire on the issue for the purposes of both the guilt and penalty phase.[1] (AOB 17-23.)

Respondent faults appellant for not suggesting what follow up questions might have been asked. (RB 23.) The issue is not what specific questions might have been asked, but whether the voir dire conducted by the trial court was sufficient to uncover racial prejudice.

> As the Supreme Court explained in *Ham v. South Carolina* [(1973) 409 U.S.524, 527]: "The trial judge was not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by petitioner." But in this case . . . the court had an obligation to make some inquiry as to racial bias of the prospective jurors. It made none, thereby denying

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1. Respondent does not dispute the constitutional importance of voir dire to both the guilt and penalty phases or distinguish this case from those that appellant has cited. Therefore, no further briefing is needed on this issue.

> appellant the opportunity to determine whether the prospective jurors had a disqualifying state of mind. This is a violation of appellant's constitutional right to a fair and impartial jury, and requires reversal.

(*People v. Wilborn* (1999) 70 Cal.App.4th 339, 348.) Accordingly, it is not up to appellant to suggest the questions that might have been asked.

Respondent also faults appellant for not identifying the jurors that should have been further questioned and contends that the questionnaire was sufficient to explore any issue of racial prejudice.[2] (RB 22-23.) Respondent mistakenly relies on *People v. Roldan* (2005) 35 Cal.4th 646. In *Roldan*, this Court found that racial prejudice was not an "obvious issue." (*Id.* at p. 695.) The defendant did not object to the trial court's voir dire. (*Ibid.*) Moreover, the defendant could not identify how the jury questionnaire was inadequate. Accordingly, this Court found that the trial court did not abuse its discretion by relying on the questionnaire to address the issue of possible racial bias. (*Id.* at p. 696.)

In contrast to *Roldan*, the trial court in this case found that "that a number of people did not respond to the question about racial prejudice." (3 RT 276.) These jurors certainly should have been questioned. However, all the jurors should have been questioned because the written questionnaire standing alone did not adequately guard against the possibility of racial prejudice. (See AOB 20-22.)

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2. Respondent notes that one of the jurors (No. 7183) that the trial court might have questioned about racial matters was excused for cause for other reasons so that no voir dire on racial prejudice was needed. (RB 23, fn. 17.) However, if the trial court did not question jurors that presented overt issues about racial prejudice, then its voir dire certainly could not have uncovered less open, but still important, forms of prejudice. The trial court's failure to question this juror demonstrates the complete inadequacy of its voir dire.

Question 83 asked if the jurors would use the same standards to judge a witness's credibility regardless of particular factors, including race and ethnicity. It invited a response only if the prospective juror did not believe that he or she could judge a witness's credibility without regard to several factors, including race and ethnic background. (4 CT 867.) Very few jurors would indicate that they could not measure the credibility of a witness, and this question did little to explore how racial factors might have influence a guilt or penalty verdict.

Question 86 asked the jurors to describe the problem if they believed there was racial discrimination against Hispanics in Southern California. (4 CT 868.) Racial prejudice is a very real problem. (See *Castaneda v. Partida* (1977) 430 U.S. 482, 495 [no dispute that Hispanics are in a class that is subject to discrimination].) Yet, a juror could have left this question blank for any number of reasons: he or she might not have understood the question; a juror might have believed that racial discrimination was warranted; or a juror simply might not believe that there was racial discrimination against Hispanics. Thus, a juror who left this question blank – as several jurors who served on this case did – should have been questioned further.[3/]

Question 87 asked the jurors to check "Yes" or "No" to indicate whether they had ever been afraid of another person because of their race. (4 CT 868.) Fear of another person because of their race may certainly raise questions about a person's racial attitudes, but one can be prejudiced without being afraid. The trial court again failed to follow up even when

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3. The sitting jurors who did not respond to this question included 2207 (7 CT 1260), 2393 (7 CT 1319), 3689 (7 CT 1375), 1952 (7 CT 1405), 4628 (7 CT 1465), 7027 (7 CT 1495), 0906 (7 CT 1525), and 1230 (8 CT 1555.)

answers should have elicited follow-up questions to determine if the jurors' experiences might affect their ability to sit on this case. For instance, sitting Juror 4193 indicated that she had once been afraid of another person because of their race (7 CT 11289), but the trial court did not conduct any follow-up questions on this issue. (3 RT 301-304.)

The final question that dealt with race or ethnic factors asked whether jurors had participated in private club that limited its membership on the basis of several factors. (Question 88; 4 CT 868.) Two prospective jurors indicated that had participated in private clubs that limited its membership, but the trial court did not pursue the issue further in voir dire. (See Prospective Juror 2386 [10 CT 2423 [attended "Jonathan Club"], 3 RT 304-309]; Prospective Juror 7359 [15 CT 3892 [member of "Checkers m/c"], 3 RT 343-346].)

Under these circumstances, the questionnaire alone could not have brought to light hidden prejudice that might have affected both the guilt and penalty phases. (See *People v. Taylor* (1992) 5 Cal.App.4th 1299, 1312-1313 [racial prejudice may be conscious or unconscious]; *Smith v. Phillips* (1982) 455 U.S. 209, 222 (conc. opn. by O'Connor, J.) [juror "may have an interest in concealing his own bias [or] may be unaware of it"].) By refusing to conduct voir dire on racial prejudice, the trial court failed to assure that the jury selection process was "meaningful and sufficient to its purpose of ferreting out bias and prejudice on the part of prospective jurors." (*People v. Taylor*, *supra*, 5 Cal.App.4th at p. 1314.)

The issue of possible racial prejudice was extremely important to the jury selection in this case. In a case that relied primarily upon inferences and speculation about what appellant told his brother and other gang members, any bias against Hispanics would make it easier for a juror to

assume that appellant instigated the crime. If jurors harbored any fear of young Hispanic males, they would believe that appellant acted accordingly. Or, if jurors believed that Hispanics were less trustworthy or prone to violence, they would similarly believe that appellant acted in accordance with their stereotypes. Moreover, in a capital trial, such bias could have had a profound affect upon the penalty decision. A juror could believe that a young Hispanic male deserved the death penalty simply because the victim was a white girl. Since this Court cannot determine whether any of appellant's jurors might have expressed views that would have disqualified them from service in this case, both the guilt and penalty verdicts against appellant must be reversed. (See *Ham v. South Carolina* (1973) 409 U.S. 524, 527 [failure to voir dire jurors on racial matters required reversal of guilt phase[; *Turner v. Murray* (1986) 476 U.S. 28 37 [inadequate voir dire on racial bias required penalty reversal]; see also *People v. Cash* (2002) 28 Cal.4th 703, 723 [failure to permit voir dire about penalty related issues required reversal]; *United States v. Baldwin* (9th Cir. 1979) 607 F.2d 1295, 1298 [reversible error if voir dire procedures do not create assurances that prejudice would be discovered].)

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II.

THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S MOTION BROUGHT UNDER *PEOPLE v. WHEELER* AND *BATSON v. KENTUCKY*

A. The Trial Court Erred in Finding That There Was No Prima Facie Case of Discrimination

Appellant objected when the prosecution used a peremptory challenge to strike the last African-American from the jury panel (juror 9877), after the prosecutor used a previous challenge to dismiss the only other African-American juror. Appellant also noted that the potential juror had prior jury experience and supported the death penalty. Appellant stated that she appeared to be otherwise qualified apart from any racial matters. (4 RT 488-489.) The trial court erred in finding that this did not establish a prima facie case of discrimination under *People v. Wheeler* (1978) 22 Cal.3d 258 and *Batson v. Kentucky* (1986) 476 U.S. 79. (4 RT 490.)

A prima facie case is established if there is a reasonable inference of discrimination. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 94.) The inference of a discriminatory purpose is not a high burden. In *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410], the United States Supreme Court emphasized that the *Batson* framework is designed to produce answers to "suspicions and inferences that discrimination may have infected the jury selection process." (*Id.* at p. 2418.) It explained that it "did not intend the first step to be so onerous that a defendant would have to persuade the judge – on the basis of all the facts, some of which are impossible for the defendant to know with certainty – that the challenge was more likely than not the product of purposeful discrimination." (*Id.* at p. 2417.) Rather, a defendant satisfies the requirements of *Batson*'s first step

"by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Ibid.*)

In *Johnson*, the United States Supreme Court found that the California standard for determining whether there was a prima facie case of discrimination was overly stringent since it required defendants to show that it was more likely than not that the prosecutor improperly used his peremptory challenge. (*Johnson v. California*, *supra*, 125 S.Ct. at p. 2416.) Respondent does not dispute that the trial court applied this incorrect standard. (RB 29-30.) Accordingly, this Court must review the issue de novo, without the usual deference given a trial court's rulings. (See *People v. McGlothen* (1987) 190 Cal.App.3d 1005, 1015 [a ruling that is erroneous as a matter of law is not entitled to deference].)

Respondent contends that the record demonstrates that there were reasons to excuse the prospective juror. (RB 31.) However, appellant based his motion primarily upon the prosecutor's focus in striking African-Americans from the jury panel. (4 RT 488-489.) At the time that the prosecutor struck juror 9877, he had used four peremptory challenges. (3 RT 409, 410; 4 RT 487, 488.) Two of these challenges were against African-Americans. (4 RT 488.) The prosecutor would have accepted the jury panel after using only one more challenge to the first group of potential jurors that were called to the panel.[4] (4 RT 493, 549.) Half the challenges the prosecutor used at that time were against African-Americans and he would have accepted the jury after using only one more challenge. Statistical evidence demonstrates that appellant was correct: the prosecutor focused his challenges on African-Americans, raising a reasonable

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4. Ultimately, the prosecutor only used 12 challenges.

inference of discrimination. (See *Miller-El v. Dretke* (2005) 545 U.S. 231 [125 S.Ct. 2317, 2324-2325] [using statistical analysis in *Batson* inquiry]; *Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1107 [a defendant can make a prima facie showing based on a statistical disparity].) Accordingly, the proper inquiry is not whether there may have been race-neutral reasons that could have supported the prosecutor's challenge, but whether the reasons cited by the trial court refuted the inference of discrimination raised by the prosecutor's focus on African-Americans. (*Williams v. Runnels, supra*, 432 F.3d at p. 1108-1110.)

In *Williams*, the prosecutor similarly focused his challenges upon African-Americans by striking three black potential jurors with his first four challenges. (*Williams v. Runnels, supra*, 432 F.3d at p. 1103.) This fact alone created a statistical disparity. (*Id.* at p. 1107.) The Ninth Circuit Court of Appeals found that state court and the federal district court erroneously addressed whether the record could support race-neutral grounds for the prosecutor's peremptory challenges. (*Id.* at p. 1108.) The court emphasized:

> A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. . . . To rebut an inference of discriminatory purpose based on statistical disparity, the "other relevant circumstances" must do more than indicate that the record would support race-neutral reasons for the questioned challenges.

(*Id.* at p. 1108.) Accordingly, the record must show more than reasons that might have supported a prosecutor's peremptory challenge, but the kind of evidence that erodes the premises of the disparity that is at issue.[5] (*Ibid.*)

Respondent's reasons do not erode the kind of disparity that was at issue in this case or provide sufficient reason for the prosecutor to have focused his challenges on African-Americans. First, respondent speculates that the prosecutor could have challenged juror 9877 because she had been an alternate juror in a case that resulted in a hung jury, and would have voted with the minority. (RT 31; see 17 CT 4484, 3 RT 417-418.) As an alternate juror, she did not participate in the deliberations and have the benefit of that process. (Compare 8 CT 1606 [alternate juror 4043 served on a hung jury, but switched from minority to majority in the course of deliberations].) Since neither the prosecutor or the trial court mentioned this as a reason why the juror may have been struck, it clearly did not weigh heavily in the determination.

Respondent also contends that juror 9877 was inattentive. (RB 31) The trial court stated that it had learned off the record that she had been working nights. (4 RT 490.) But neither the trial court nor the prosecutor questioned her about her demeanor, or whether her schedule would interfere with her duties as a juror. This indicates that it did not play an important role in the decision, and does not refute a prima facie case of

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5. The court noted that one such circumstance may be the timing of the *Batson* objection. (*Id.* at p. 1108, fn. 9.) If, as in this case, African-Americans are struck early in the jury selection process it may raise a reasonable inference of discrimination that would not necessarily arise if the same juror was struck after numerous challenges had already been exercised. (*Ibid.*; see *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1091 [pattern of strikes at the time of the *Batson* objection indicated disparity].)

discrimination. (See *People v. Wheeler*, *supra*, 22 Cal.3d at p. 281 [failure to question prospective juror relevant consideration in determining whether there is a prima facie case of discrimination].)

The reasons cited by respondent do not address why the prosecutor focused his challenges on African-American jurors. The statistical disparity raised by the prosecutor's use of his first four peremptory challenges to strike both African-Americans from the jury raised a reasonable inference of discrimination. This was particularly true in light of her questionnaire that indicated that juror 9877 could be a fair and impartial juror, applying the death penalty if the case warranted it. (17 CT 4501.) Under these circumstances, the trial court erred in not determining that there was no prima facie case of discrimination.

B. The Prosecutor's Stated Reason Did Not Provide a Legitimate Basis for a Peremptory Challenge

After the trial court ruled that a prima facie case was not established, the trial court asked the prosecutor to explain why he had excused juror 9877. He stated that he challenged her because she was not candid about her jury experience. (4 RT 491.) The trial court found that this was a sufficient reason to justify a peremptory challenge. (4 RT 492.) The trial court's consideration of the prosecutor's reason constituted an implied finding that a prima facie case was established, despite its ruling to the contrary. (*Hernandez v. New York* (1991) 500 U.S. 352, 359 [preliminary issue of whether there was a prima facie case of discrimination becomes moot once the prosecutor's reason is considered by a trial court]; *People v. Fuentes* (1991) 54 Cal.3d 707, 716 [trial court's inquiry constitutes an implied finding of a prima facie case of discrimination]; *People v. Ward* (2005) 36 Cal.4th 186, 200 [same].)

Once a prima facie case of discrimination is established, the validity of the prosecutor's reason is at issue. In *Miller-El v. Dretke*, *supra*, 125 S.Ct. 2317, the Supreme Court emphasized that a prosecutor must "stand or fall on the plausibility of the reasons he gives." (*Id.* at p. 2332.) "[I]t does not matter that the prosecutor might have had good reasons to strike the prospective jurors [based on the record]. What matters is the real reason they were stricken." *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090.) Accordingly, even if respondent's reasons (discussed above) might have supported a peremptory challenge, it is the prosecutor's stated reason that must control this Court's decision.

Respondent contends that the record supports the prosecutor's reason. (RB 35.) Yet, nothing in the record indicates that juror 9877 was not being candid. At the beginning of voir dire, she immediately corrected her answer on the jury questionnaire and stated that there had not been a verdict in the case upon which she had served as an alternate. (4 RT 416; 17 CT 4494.) As respondent notes, the trial court apparently confused her questionnaire with that of another juror who had the same last name. (4 RT 421.) The trial court referred to a case that happened "about 1990" that juror 9877 may have taken to mean the 1985 case in which she served. Yet, she consistently stated that she had served as an alternate juror, the jury did not reach a verdict, and that she voted with the minority. (4 RT 416, 422-423; 17 CT 4484.) There is nothing that demonstrates she was not being candid. Indeed, by correcting her answer on the questionnaire, juror 9877 was both candid and honest in her answers. Accordingly, the prosecutor's reason was not supported by the record. This was insufficient under *Batson*. (See *Miller-El v. Dretke*, *supra*, 125 S.Ct. at p. 2331 [reviewing whether the record supported the prosecutor's reasons]; *Johnson v. Vasquez*

(9th Cir. 1993) 3 F.3d 1327, 1331 [even a race-neutral reason must be supported by the record].)

Moreover, the prosecutor's reason was particularly spurious because it was not applied equally to white jurors that the prosecutor selected. (See *Miller-El v. Dretke, supra,* 125 S.Ct. at p. 2325 [using comparative analysis to show purposeful discrimination]; *Boyd v. Newland* (9th Cir., June 26 2006) ___ F.3d ___ [2006 WL 1728077] [comparative analysis is an important tool in determining both whether there was a prima facie case of discrimination and whether a prosecutor offered genuine reasons to support a peremptory challenge].) Many potential jurors, including those selected by the prosecutor, made changes to the answers given in their questionnaires. (See, e.g., 3 RT 368 [Juror 3689]; 4 RT 521 [Juror 2207]; 5 RT 639 [Juror 8982]; 5 RT 645 [Juror 1952]; 5 RT 676 [Juror 1230]; 6 RT 741 [Alt. Juror 0490]; 6 RT 768 [Alt. Juror 0871]; 6 RT 779 [Alt. Juror 6319].)

Moreover, other jurors were confused by the questionnaire. For example, juror 7027 indicated both that he had served on a jury in a criminal case that had reached a verdict and that he had voted with the minority. (7 CT 1486.) This answer was contradictory, yet the prosecutor accepted him on the jury without questioning him about it. In addition, unlike juror 9877, juror 7027 did nothing to correct this answer.

Under these circumstances, there is nothing in the record that indicates that juror 9887 was less candid than jurors chosen by the prosecutor. Thus, the trial court erred in accepting the prosecutor's rationale. It improperly denied appellant's *Batson* motion. Accordingly, reversal is required (See *United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 699 [*Batson* error required reversal after the prosecutor's reasons

did not hold up under judicial scrutiny because they were not applied equally to jurors who were accepted].)

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III.

APPELLANT WAS NOT PRESENT DURING TWO PORTIONS OF HIS TRIAL IN VIOLATION OF HIS STATUTORY AND CONSTITUTIONAL RIGHTS

Appellant has argued that he was improperly excluded from the individual voir dire that the trial court conducted in chambers with nine prospective jurors during the jury selection process. That appellant was left alone in the courtroom during the selection process not only denied him the opportunity to participate in the most sensitive part of the jury selection process, it separated him from his defense counsel and gave the impression that either he could not be trusted to participate in important matters affecting his trial or that he was disinterested in the entire process. Accordingly, the trial court's exclusion of appellant from these proceedings violated his statutory rights under Penal Code section 977 and his state and federal constitutional rights to due process and a trial by jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16.)

Respondent contends that before jury selection began, appellant's trial counsel indicated that appellant would be willing to waive his right to present during procedural discussions. (RB 38.) The trial court simply inquired if appellant were willing to waive his presence "for purposes of permitting the court and counsel to go over the jury questionnaire type of information, do anything procedural, arrange things so that they run the most smoothly when they can." (1 RT 88.) The court stated that it would make it easier for court and counsel if they did not need an interpreter and bailiffs for this type of proceeding. (1 RT 88-89.) Ricardo Lopez, appellant's co-defendant, was not willing to waive his presence. (1 RT 89.) Appellant's trial counsel indicated only that appellant would waive his presence if Ricardo changed his mind. (1 RT 89.) The trial court's request

did not extend to voir dire, and trial counsel's statement did not amount to a waiver. The trial court's discussion about the voir dire procedures was held in chambers, without appellant's presence. (5 RT 610.) Under these circumstances, appellant did not agree to waive his presence.

Respondent contends that the confidential portion of the voir dire bore no relation to appellant's opportunity to defend against the charges so that his presence was not required under either statutory or constitutional principles. (RB 42-44.) Respondent relies primarily upon *People v. Ochoa* (2001) 26 Cal.4th 398. In *Ochoa*, the trial court held sidebar conversations with 12 prospective jurors. The defendant did not participate in these discussions. This Court found that the defendant's presence in these matters was not required because they did not bear a reasonably substantial relation to the opportunity to defend himself.[6] (*Id.* at p. 435.)

Federal courts have often recognized that defendants have a constitutional right to participate in voir dire held at sidebar or in chambers. (See, e.g., *Beard v. United States* (D.C. 1988) 535 A.2d 1373, 1375 [right of defendant to participate in sidebar voir dire]; *United States v. Sherwood* (9th Cir. 1996) 98 F.3d 402, 407 [felony defendant has fundamental right to be present during the attorney-conducted jury voir dire at sidebar].) But,

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6. *Ochoa* relied on *People v. Holt* (1997) 15 Cal.4th 619, which respondent also cites. (RB 43.) In *Holt*, this Court held that the defendant's presence at the several hearings from which he was absent would not have had any impact, including a sidebar discussion of a challenge for cause and an in-chambers discussion of a sitting juror. *Holt* relied on the fact that the defendant prevailed in each of the matters discussed during the proceedings. (*Id* . at p. 707.) But a legal discussion about jurors is different than voir dire proceedings, where jurors are asked to clarify answers in their questionnaire. Moreover, appellant was not simply excluded from the side-bar discussions, but remained in the courtroom while confidential voir dire was conducted in chambers.

unlike *Ochoa*, appellant was not simply excluded from sidebar conversations – he remained in the courtroom while the trial court and the attorneys met with perspective jurors in chambers. The jury panel itself remained in the courtroom. This separated him from his counsel in the presence of the jury. The prospective jurors were left with the impression that appellant was either too dangerous to participate in the proceedings in chambers or not interested in doing so.

In a capital trial, it is critical to humanize the defendant in the eyes of the jurors. (Cf. *Payne v. Tennessee* (1991) 501 U.S. 808, 826 ["capable lawyers try . . . to convey to . . . jurors that the people involved . . . are . . . living human beings, with something to be gained or lost from the jury's verdict"].) Since the evidence against appellant was based primarily upon a single, ambiguous statement that he made to another gang member (see Argument IX [insufficient evidence to support the verdict]), the jury's perception of appellant was crucial – how they viewed appellant played a significant role in how they viewed the evidence against him. By leaving appellant at the counsel's table during proceedings in chambers, the trial court negated this aspect of appellant's defense. Reversal is required.

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IV.

THE TRIAL COURT IMPROPERLY ALLOWED THE PROSECUTOR TO PRESENT EVIDENCE OF A THREE-WAY CALL WITH RICARDO LOPEZ

Appellant has argued that trial court erroneously allowed the prosecutor to introduce evidence of a three-way phone call between appellant, Ricardo Lopez, and Jorge Uribe. The prosecutor used this evidence to link appellant to statements made by Ricardo about the plans that he made with Uribe to kill Melinda – statements that could not be admitted against appellant under the Confrontation Clause. Its use violated the stipulation that appellant had entered to limit any references to a three-party conversation and was more prejudicial than probative under Evidence Code section 352. It left the trial fundamentally unfair in violation of federal and state due process standards and violated Eighth Amendment standards for a reliable capital verdict. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 17.)

A. Testimony About a Three-Way Telephone Call Violated the Stipulation

During pre-trial proceedings, appellant and the prosecutor agreed to limit references to a three-party conversation. As set forth by the prosecutor, the stipulation provided:

> any references to those conversations, since they were three-party conversations, will only include a reference to the fact that this was a conversation between Ricardo Lopez and this person George Uribe, also known as Pelon, during which the murder of Miss Carmody was discussed, but there will not be any reference to the fact that this was a three-way conversation or that Mr. Lopez was involved in such conversation.

(7 RT 834.)

Respondent contends that the trial court properly interpreted the stipulation in accordance with the prosecutor's interpretation. (RB 56, citing *People v. Dyer* (1988) 45 Cal.3d 26.) However, respondent does not provide any convincing reason about why it is more reasonable to interpret the stipulation according to the prosecutor's wishes than to rely on meaning of the agreement itself, as understood by both appellant and the trial court.

In *Dyer*, the prosecutor agreed not to impeach the defendant with his prior convictions during the guilt phase of the defendant's capital murder trial. The defendant sought to take advantage of the stipulation to introduce testimony about his reputation as a peaceful, nonviolent person. (*People v. Dyer*, *supra*, 45 Cal.3d at p. 55.) This would have mislead the jury because the defendant's previous convictions for armed robbery and burglary showed that his character was different than that presented by the defense. The trial court interpreted the stipulation to preclude the prosecutor from introducing the convictions on his own, but not to limit his right to respond to the defendant's evidence. (*Ibid.*) This Court held that the trial court's ruling was a reasonable interpretation that reflected the probable intention of the parties. (*Id.* at p. 57.) Accordingly, in *Dyer*, the stipulation itself showed the intention of the parties and the Court simply declined to extend it into areas that it did not address.

Here, the prosecutor introduced evidence of a three-party conversation as part of his case-in-chief against appellant. The trial court initially found that the prosecutor's reference to a three-party conversation in his opening statement violated "the spirit, if not the absolute language of the stipulation." (7 RT 910.) Although it later allowed the prosecutor to use the evidence against appellant, it also stated that the stipulation was not as clear as the prosecutor maintained. (12 RT 1581.) Indeed, the trial court

asked the prosecutor to explain why the meaning of the stipulation was different than what the words themselves said:

> Reading from the stipulation . . . I simply want you to explain to me what it really means if its different than the words purport to state.

(12 RT 1580.) Thus, both the trial court and appellant understood that the wording precluded the prosecutor from referring to the three-party conversation. When the words of a stipulation are clear, there is no need to interpret it. (See *Floystrup v. City of Berkeley Rent Stabilization Bd* (1990) 219 Cal.App.3d 1309, 1318.) Moreover, any ambiguity had to be construed against the prosecutor, who presented the stipulation to the trial court. (See *In re Steven A*. (1993) 15 Cal.App.4th 754, 771.) Thus, appellant was entitled to rely on the meaning of the stipulation, that it would prevent the prosecutor from introducing any evidence of a three-way conversation involving appellant.

Respondent contends that in light of *Richardson v. Marsh* (1987) 481 U.S. 200, it is reasonable to conclude that the stipulation was meant to apply only to Ricardo's statement. (RB 59.) *Richardson* held that the Confrontation Clause is not violated if a co-defendant's statement is redacted to eliminate facially incriminating evidence, and the jury is instructed that it cannot be used against the defendant. (*Id.* at p. 211.) If the stipulation was limited to this, there would have been no need for the parties to have entered into it since the prosecutor could simply have presented the redacted testimony without violating the Confrontation Clause. However, in *Richardson*, the United States Supreme Court recognized that other matters at trial may make the redaction and limiting instruction meaningless. Thus, the Court found that the prosecutor's argument improperly linked the defendant to portions of the co-defendant's

confession that described a conversation the defendant had in a car. The argument undid the limiting instruction by urging the jury to use the co-defendant's confession in evaluating the defendant's guilt or innocence. (*Ibid.*)

In this case, the evidence of a three-way telephone conversation (and the prosecutor's argument) similarly allowed the jury to use Ricardo's confession against appellant. Ricardo's statement told the jury that he had discussed the killing with Uribe. (15 RT 1837.) Patricia Lopez testified that Ricardo and Uribe had participated in a telephone call with appellant during this same time period. (12 RT 1597.) The prosecutor used this to argue that appellant had discussed the crime with Uribe and Ricardo:

> According to his sister, [appellant] calls again and se setss up a three-way conversation between Juan, Ricardo, and [Uribe].
>
> Now, that in itself, if this was in a vacuum, might not mean that much at all. . . . When you look about what ultimately happened here and how did it and how this happened . . . it does not take a great leap of logic to see what they were talking about. Because if you recall, it was [Uribe] that got the gun.

(19 RT 2413.) The only evidence that Uribe obtained the gun was the statement by Ricardo. The prosecutor clearly used the three-way conversation to apply Ricardo's statements against appellant. The jury certainly did the same. Thus, evidence of a three-party conversation effectively undermined the protections established in *Richardson* under the Confrontation Clause and went beyond what *Richardson* contemplated.

The testimony about the three-way conversation rendered the stipulation meaningless because it invited the jury to speculate about the exact things that it was designed to prevent. It allowed the prosecutor to exceed the procedures established in *Richardson* and use the third-party

evidence to undo the way that Ricardo's statement was redacted. This left the trial fundamentally unfair and violated appellant's constitutional rights to due process and to confront the evidence against him. It left the verdict unreliable under Eighth Amendment standards. Under these circumstances, the trial court erred in not enforcing the stipulation to preclude any references to the three-party conversation.

B. The Evidence Was More Prejudicial Than Probative

Appellant also objected that the testimony about a three-party conversation was more prejudicial than probative. (12 RT 1578.) The prosecutor stated that the evidence was relevant because appellant showed a consciousness of guilt when he told the police he had not spoken to Uribe or Ricardo. (12 RT 1579.) The trial court also found that the act of making the call had significance. (12 RT 1583.) However, its probative value was extremely limited since the evidence did not necessary relate to the instant crime. The officers told appellant that they only wanted to talk to him about Melinda. (4 CT 896.) Although appellant denied speaking with Ricardo and Uribe, appellant may not have wanted to go beyond the purported subject of the interview and tell the police about his gang activities or to discuss matters concerning his family or friends with the officers. In contrast, its prejudicial impact was enormous because it allowed the prosecutor to speculate that appellant planned Melinda's killing during this conversation. (19 RT 2413.)

Respondent contends that the conversation was relevant because the prosecutor's theory was that there was a conspiracy between appellant, Ricardo, and Uribe. (RB 64.) Undoubtedly, there was evidence that appellant had made numerous phone calls from jail. (16 RT 1995-2015.) There was also evidence that appellant was using these calls to conduct

gang business. (See, e.g., 9 RT 1166 [testimony of Sandra Ramirez].) However, the inference that appellant planned the crime with Ricardo and Uribe was based on the statements of Ricardo – without these statements there was nothing linking Uribe to the crime.[7] Since Ricardo's statements were not admissible against appellant, the probative value of the three-way conversation was limited. The fact of the conversation did not establish a conspiracy to kill Melinda.

The specific prejudice of the three-way conversation was that it invited the jury to use Ricardo's statement to implicate appellant. (See 19 RT 2413 [prosecutor argues that the three planned the crime, using Ricardo's statement that Uribe had obtained the gun against appellant].) The jury was left to speculate – even as the prosecutor did – that appellant was linked to the plans made by Uribe and Ricardo. Yet, appellant could not defend himself against matters raised only in the case against Ricardo or confront the statements made by him. This made the trial fundamentally unfair in violation of the state and federal guarantees of confrontation, due process, and reliability. (See *People v. Partida* (2005) 37 Cal.4th 428, 438 [state law claims give rise to constitutional issues].) Since this was central to the key issue that the jury had to decide, reversal is required. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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7. Respondent notes that both Uribe and Ricardo were present at the murder scene. (RB 64.) It was a joint gang meeting and there was nothing unusual about both the regular gang and the girls' auxiliary gang meeting together. Similarly, that Uribe told Melinda that Ricardo wanted to speak with her did not point to a conspiracy since anyone present could have relayed this request without intending a murder. Ricardo's statements alone established that Uribe provided the weapon and knew about the crime.

V.

THE TRIAL COURT IMPROPERLY ALLOWED A STATEMENT ATTRIBUTED TO APPELLANT'S CO-DEFENDANT TO BE USED AGAINST APPELLANT

The trial court allowed the prosecutor to introduce evidence that after Ricardo shot Melinda, he pointed the gun to his head and said, "For my *carnal* [brother]." (18 RT 2250.) Appellant objected that the evidence was hearsay, improper rebuttal, and called for an improper conclusion. (18 RT 2218; 17 RT 2250.) The trial court allowed the testimony. Appellant has argued that its erroneous admission violated the state and federal due process guarantees of fundamental fairness, appellant's right to confront the evidence against him, and affected the reliability of the verdict. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16, 17.)

A. When Used Against Appellant, the Statement was Hearsay that Violated His Right to Confront the Witness Against Him

Respondent contends that Ricardo's statement properly was admitted for a nonhearsay purpose: to show Ricardo's state of mind. State of mind evidence is only admissible if it is relevant to an issue in dispute at trial. (*People v. Bunyard* (1999) 45 Cal.3d 1189, 1204.) Respondent contends that appellant could only have been found guilty if Ricardo planned the crime. According to respondent, the statement was relevant to show Ricardo's premeditation and deliberation.[8] (RB 70.)

Here, appellant did not dispute Ricardo's state of mind after the shooting. The sole issue was whether appellant had instigated or directed

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8. Respondent also argues that the trial court did not have a sua sponte duty to instruct the jury to limit its use to Ricardo's state of mind. (RB 71-72.) Appellant did not raise this issue in his opening brief and this Court should not consider it here.

him to commit the crime. Accordingly, evidence showing Ricardo's state of mind after he shot Melinda was not admissible against appellant unless it was relevant to that issue.

Under respondent's theory, Ricardo's statement would show premeditation and deliberation only if the content of the statement were true: i.e., that he committed the crime *for* appellant or upon his request. Under these circumstances it is not possible to separate Ricardo's statement from its hearsay use. (See *People v. Armendariz* (1984) 37 Cal.3d 573, 587 [declarant's statement offered for state of mind "in effect" proved the truth of the matter and was inadmissible hearsay].)

Ricardo's statement was extremely prejudicial. If the jury believed that Ricardo had done the killing "for" appellant, then they would assume that appellant directed him to do it. Yet, appellant had no opportunity to question Ricardo about his statement or determine its meaning. The jury was left to assume the worst in violation due process and appellant's right to confront the evidence against him.

Ultimately, the statement was simply not reliable evidence. (See *Ohio v. Roberts* (1980) 448 U.S. 56, 65-66 [requiring hearsay to bear indicia of reliability]; *People v. Corella* (2004) 122 Cal.App.4th 461, 467 [applying *Roberts* to non-testimonial hearsay].) It was made at a time when Ricardo was extremely distraught, to the point where he had tried to kill himself. He may have meant that he committed the crime "for" appellant after premeditation and deliberation. But he also could have talked to Melinda after drinking alcohol, argued with her, and committed the crime "for" appellant's honor. His statement was ambiguous and the circumstances under which it was made were very emotional, just before he tried to commit suicide. Under these circumstances, the Court should find

that its erroneous admission violated appellant's constitutional right to confront the evidence against him, the federal and state due process guarantees of fundamental fairness, and the requirements for reliability in a capital case. Because the statement left the jury free to speculate about its meaning and to use it against appellant, reversal is required.[9] (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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9. Respondent also contends that appellant waived the federal constitutional issues raised in the opening brief by failing to address these grounds at trial. (RB 69.) However, by allowing the evidence to be used against appellant, the trial court effectively implicated appellant's constitutional rights. Under these circumstances, this Court may review these issues. (*People v. Partida* (2005) 37 Cal.4th 428.)

VI.

THE TRIAL COURT ERRONEOUSLY ALLOWED THE PROSECUTOR TO PRESENT INFLAMMATORY HEARSAY ABOUT A MESSAGE ON THE VICTIM'S PAGER

The trial court erroneously allowed testimony that Melinda's pager showed the message "187." There was no evidence that the message was linked to appellant in any way. Its admission into evidence violated appellant's statutory rights under Evidence Code section 352 and his federal and state constitutional rights to due process and a reliable verdict in a capital case. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 17.)

Respondent contends that the evidence was properly admitted as a statement in furtherance of the conspiracy. (RB 76, citing Evid. Code, § 1223 [statements of a co-conspirator].) In order for the trial court to have admitted the evidence under this section it would have had to make a preliminary determination that the statement was made by a conspirator in furtherance of the conspiracy. (Evid. Code, § 1223. subd. (c); see *People v. Herrera* (2000) 83 Cal.App.4th 46, 61.) The prosecutor did not offer this statement under this section and the trial court did not make this determination.[10] Accordingly, it cannot be asserted here for the first time on appeal. (*People v. Smith* (1983) 34 Cal.3d 251, 270-271; *Centex Golden Const. Co. v. Dale Tile Co.* (2000) 78 Cal.App.4th 992, 999.)

Even assuming that this Court may consider respondent's position, there was no evidence to establish who placed the message. It might have

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10. The trial court admitted the testimony as part of the circumstances of the crime. (12 RT 1490-1491.)

been one of the alleged conspirators.[11] It might have been a left by someone who believed Melinda deserved her fate, but had not joined a conspiracy. As the trial court stated:

> How it got there and why it got there may be nothing more than serendipity. None of us may know that, what little's before the court now, unless we have something further that suggests that there is some known reason why it's there. . . .

(RT 12 1490-1491.) The foundational requirements of section 1223 – that the message on the pager was sent by a conspirator – required more.

Respondent's citation to *People v. Von Villas* (1992) 11 Cal.App.4th 175 is misplaced. In *Von Villas*, the trial court admitted a calendar found in one defendant's house which had the date of the victim's disappearance blackened out. The trial court found that the calendar was an admission of a conspirator. (*Id.* at p. 230.) Although the reviewing court found that the evidence was somewhat ambiguous, it emphasized that the trial court was in a position to determine the credibility of the witnesses who testified about the calendar. It also emphasized that only a small number of people – the co-conspirator's family – had access to the calendar. It noted that stronger foundations have been presented in support of such evidence, but found that the trial court did not abuse its discretion in admitting the calendar. (*Id.* at p. 232.) Here, the trial court made no findings under Evidence Code section 1223, and there were others apart from the alleged co-conspirators who could have left such a message. Without some evidence to show who placed the message, it could not have been properly admitted as a statement of a co-conspirator.

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11. The person who left the message presumably was not appellant as the prosecutor did not introduce any evidence indicating that a call had been made from the jail to Melinda's pager.

Respondent also contends that the message was relevant because it was evidence that there had been a plan to kill Melinda and that the shooting was intentional. (RB 77.) Respondent notes either that the call was "around the time the shooting occurred" (RB 76) or "just before the shooting" (RB 77). The chaplain testified that the pager showed that the call was made at 8:42 p.m. (15 RT 1906.) The exact time of the shooting was not established at trial. It would have been highly unlikely for either Ricardo or Uribe to have sent a message to Melinda before the shooting that threatened her with murder as this would have been counter to any alleged plan that depended upon Melinda feeling safe in order to attend a gang meeting. Moreover, there was no evidence that either individual made a phone call shortly before or after the shooting. Accordingly, the timing of the message did little or nothing to establish either the existence of the alleged conspiracy or a plan to kill Melinda.

Regardless of whether the "187" message was sent before or after the crime, the prosecutor used evidence of anonymous acts of others against appellant in ways that made it impossible for him to defend. There was no evidence that the message was sent as part of a conspiracy or with appellant's knowledge or approval. There was no evidence linking the message to appellant or any of the alleged co-conspirators. Accordingly, the trial court erred in allowing it to be admitted. (*People v. Weiss* (1958) 50 Cal.2d 535, 553; see also *People v. Hannon* (1977) 19 Cal.3d 588, 599-600 [attempt to suppress evidence must be attributable to defendant]; *People v. Pitts* (1990) 223 Cal.App.3d 606, 781 [evidence of threats not connected to defendant was inadmissible].) Since appellant could not defend himself against an anonymous act, it use made the trial

fundamentally unfair in violation of state and federal constitutional standards for due process and a reliable capital verdict.[12]

Respondent's theories demonstrate the prejudicial effect of the anonymous message. To the extent that the jury regarded the message as being attributable to appellant (either directly or as part of a conspiracy), it would have been used to prove the existence of a plan to kill Melinda. Moreover, the evidence invited a purely emotional response against appellant. It made him appear as the embodiment of people's fears about gang culture – cold, brutal, and gloating.

Moreover, respondent does not address the effect of the error on the penalty phase. (See AOB 66.) Even assuming that the error was harmless during the guilt phase, the testimony about the pager inflamed the jury against appellant. Once the jury concluded that appellant was guilty of the charged crime, they also would have believed that he was somehow responsible for the message. The jury was left with the impression that appellant was gloating over the murder, callous and indifferent to the consequences of his actions. The type of coldness and ruthlessness behind such a message were important considerations in the normative decision about whether appellant should live or die. Accordingly, this Court must reverse the judgment of death. (See *People v. Robertson* (1982) 33 Cal.3d 21, 54; *People v. Ashmus* (1991) 54 Cal.3d 932, 965 [any substantial error affecting the penalty verdict requires reversal under either federal or state tests for harmless error].)

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12. Respondent contends that appellant's constitutional claims were waived. However, the trial court's error in admitting the evidence implicated state and federal constitutional rights. Accordingly, this Coourt may consider the constitutional claims on appeal. (*People v. Partida* (2005) 37 Cal.4th 428, 437.)

VII.

THE TRIAL COURT IMPROPERLY RESTRICTED APPELLANT'S CROSS-EXAMINATION OF THE VICTIM'S MOTHER

Appellant sought to cross-examine Susan Carmody, the victim's mother, about the extent of Melinda's history of running away from home before she met appellant; the circumstances under which Melinda returned home after living with appellant's family; and her own state of mind that may about matters that affected her testimony. In each of these instances, the trial court improperly sustained objections by the prosecutor and refused to permit the questions. The trial court's rulings violated appellant's statutory rights to cross-examine a witness on matters that are within the scope of direct examination (Evid. Code, § 761) and his state and federal constitutional rights to present a defense, to confront the evidence against him, to due process, and for a reliable penalty verdict. (U.S.Const., 6th, 8th, & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16, 17.)

A. The Trial Court Improperly Prohibited Appellant from Questioning About the Victim's Pattern of Running Away from Home

Appellant sought to question Susan Carmody about how many times Melinda ran away from home before she lived with appellant's family. The trial court erroneously sustained the prosecutor's objections to the relevance of this question. (18 RT 2268-2269.)

Respondent contends that the number of times that Melinda ran away from home was of such marginal relevance that it was properly excluded by the trial court. (RB 81.) However, Melinda's previous actions were clearly a relevant issue. Melinda ran away and lived with appellant and his family when she was only 14 years old. Appellant could have been seen by the

jurors as being the person who was responsible for the problems that she had with her family, or as a person who contributed to these problems by encouraging Melinda to run away. Therefore, the extent of her problems at home – that she ran away from home on several previous occasions – was important for the jury to understand. Appellant's cross-examination would have placed Melinda's actions in a more complete context. It should have been permitted. (See *People v. Gates* (1987) 43 Cal.3d 1168, 1185 [cross-examination proper with respect to facts that are expressly stated or necessarily implied from the testimony on direct examination].)

B. The Trial Court Improperly Excluded Questions About the Circumstances Under Which the Victim Returned Home

On direct-examination, Carmody testified that Melinda had lived with appellant's family after she ran away from home. She returned home in September, 1995. (18 RT 2263.) On cross-examination, Carmody testified that Melinda came back on her own, but stated that it was "possible" that the police had scared her into doing so. (18 RT 2269.) Appellant sought to clarify this:

> Q. Did you, in fact, tell the officer that Mindy stayed with Juan from March 1995 until September 1995?
>
> A. Yes.
>
> Q. At that time, she ran into the police and they scared her into coming home?

(18 RT 2270.[13]) The trial court sustained the prosecutor's objection to this question as improper impeachment. (18 RT 2270.)

Respondent contends that unless Carmody observed what had happened, she lacked personal knowledge of the reason that Melinda chose to return home. Respondent reasons that her opinion would have been based on speculation or hearsay, so that there was no reason to believe she was being evasive during her testimony. (RB 82.)

Appellant did not ask Carmody for her opinion about what had happened. He asked about a prior inconsistent statement that she had given to a police investigator that implied personal knowledge. Indeed, the prosecutor did not base his objection on her lack of personal knowledge – if he had, the matter could have been resolved at a hearing under Evidence Code section 402 [allowing for a hearing outside the presence of the jury to determine factual foundation].) Respondent's contention should therefore be rejected. (See *People v. Smith* (1983) 34 Cal.3d 251, 270-271.)

The question was important because Carmody's testimony was unclear about the circumstances under which Melinda returned home. If Melinda returned home only because she had been scared by police officers, it would have placed appellant's actions that led to the alleged kidnaping – and the hope that they might marry – in a more mitigating context. It would

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13. Respondent characterizes the question as asking only if Melinda had been scared into coming home rather than relating to what she told the police. (RB 82.) However, appellant's trial counsel asked if she had been interviewed by the police, if she saw him taking handwritten notes, and what she told the officer. (18 RT 2269-2270.) In context, it is clear that the question referred to the Carmody's statements during her interview with the police.

have been important for the jury to consider, particularly in relation to the penalty phase decision.

C. The Trial Court Should Have Permitted Appellant to Question Carmody About Her State of Mind Regarding Her Daughter's Gang Associations

Appellant attempted to question Carmody about a statement she had made that would have shown her state of mind toward's her daughter's gang associations, including appellant. Appellant asked Carmody if she had ever stated that Melinda dressed "like a white girl" when they were together, but when Melinda was not with Carmody, she dressed "like a *chola* [Latina gang member]." (18 RT 2274.)

Respondent contends that there was nothing to link this statement toward any bias against appellant. (RB 83.) However, it reflected Carmody's state of mind about her daughter and her associations. That Carmody believed her daughter was different when she was at home certainly would imply a bias against those who had affected her when she was away from home. Appellant should have been allowed to explore that state of mind.

D. Reversal Is Required

Respondent contends that any error was harmless because the questions were marginally important. Respondent speculates that the questions would have not have assisted appellant and could have been used to his detriment. (RB 83-84.) Respondent's speculation should not trump the judgment of appellant's trial counsel, who sought to ask the questions.

The questions were important because Melinda's home life and her relationship to appellant were intertwined in both the guilt and penalty phases of this trial. That she moved in with appellant's family when she was only 14 and had associated herself with a Hispanic gang were very

emotional matters that were before the jury. The questions would have provided further information to help the jury understand why she came to live with appellant and why she moved back home. It would have helped the jury understand the tensions between Melinda's home life, where she dressed and acted one way, and her friendships within the gang. This would have placed the circumstances of this case into a more balanced context and affected both phases of the trial. This Court should therefore reverse the judgment against appellant. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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VIII.

THE TRIAL COURT IMPROPERLY PERMITTED AN INVESTIGATING OFFICER TO TESTIFY ABOUT THE VICTIM'S DEMEANOR WHEN SHE TESTIFIED AT THE PRELIMINARY HEARING REGARDING THE KIDNAPING CHARGE

The trial court erroneously permitted Detective Morritt to testify that Melinda was frightened, upset, and crying during her testimony at the preliminary hearing on the kidnaping charge. The testimony was irrelevant and speculative, violating appellant's federal and state constitutional rights to confront the evidence against him, due process, and a reliable verdict in a capital case. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16. & 17.)

Respondent contends that the testimony was relevant because Melinda's demeanor affected her credibility under Evidence Code section 780.[14/] Respondent reasons that since lay witnesses are permitted to testify about a person's demeanor in other situations, Detective Morritt's testimony was a proper observation that was relevant to Melinda's credibility as a witness. (RB 86.)

Respondent is mistaken because the assessment of a witness's credibility is unique to the jury's role as fact-finders. This assessment is so important that it is part of the rationale underlying the Confrontation Clause – it is the combination of a witness's physical presence, oath, cross-examination, and observation of demeanor by the trier of fact that allows the jury to measure the truth of the testimony. (*Maryland v. Craig*

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14. This section provides that in determining the credibility of a witness, a jury may consider certain factors, including the demeanor of the witness. (Evid. Code, § 780, subd. (a).)

(1990) 497 U.S. 836, 846; *People v. Adams* (1993) 19 Cal.App.4th 412, 437-438.) Although prior testimony of an unavailable witness may be read to the jury without violating the Confrontation Clause, courts have recognized that under these circumstances the jury is not able to consider the witness's demeanor. (*People v. Williams* (1968) 265 Cal.App.2d 888, 896; see also *Commonwealth v. Bohannon* (1982) 385 Mass. 733, 747-748 [prior testimony allowed "even though some demeanor evidence relevant to resolving the issue of credibility is forever lost"].) Thus, testimony about a witnesses's demeanor cannot be equated with the personal observation that is necessary for this type of assessment.

Although respondent correctly notes that witnesses can testify about the demeanor of an individual when that is a relevant to the trial, there is a difference between demeanor when it is offered as a specific factual consideration related to a disputed issue and when it is part of the over-all assessment of a witness's credibility. In the first situation, demeanor may indicate a flash of anger, fear, or thoughtfulness that is linked to a specific factual issue before the jury. In contrast, the jury's assessment of a witness's credibility considers demeanor in its entirety. As Justice Learned Hand explained,

> The words used are by no means all that we rely on in making up our minds about the truth of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are. They may, and indeed they should, take into consideration the whole nexus of sense impressions which they get from a witness.

(*Dyer v. MacDougall* (2d Cir.1952) 201 F.2d 265, 269.) In this case, the testimony of Detective Morrittt did not offer the "whole nexus of sense impressions" that was equivalent to measuring credibility under Evidence

Code section 780. Thus, it was not proper evidence to establish Melinda's credibility as a witness.

Respondent suggests that appellant could have cross-examined Morritt about Melinda's state of mind. (RB 88.) However, cross-examining Morritt about Melinda's demeanor would be of little or no value. As discussed above, evidence concerning a witness's demeanor is part of the rights secured under the Confrontation Clause. The right of confrontation "permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." (*California v. Green* (1970) 399 U.S. 149, 158.) Morritt's testimony could not substitute for this right because Melinda could not be cross-examined about the reasons for her demeanor and the jury could not assess her demeanor as a whole.

Respondent notes that this Court has allowed witnesses to testify about their fear of testifying. This kind of evidence is generally offered to explain why a witness changed his or her testimony or was hesitant in answering an important question. (See *People v. Malone* (1988) 47 Cal.3d 1, 30 [fear of retribution by gang members required showing that retaliation was part of gang practice]; *People v. Warren* (1988) 45 Cal.3d 471, 484-486 [evidence that witnesses wanted nothing to do with the case relevant after they refused to identify defendant]; *People v. Yeats* (1984) +150 Cal.App.3d 983, 987 [evidence tending to show witness was fearful provided a motive for him not to tell the truth]; *People v. Chacon* (1968) 69 Cal.2d 765, 779 [prosecution witness evasive and uncooperative].) In all these instances, the witness was subject to cross-examination. Cross-examination is particularly important in this situation because a witness's fear does not inherently make one's testimony more credible. If that were

the case, a paranoid individual suffering from delusions would be the most credible witness of all. Thus, the reasons that a witness is fearful provide an important measure to assess how that fear might affect the testimony.

Respondent contends that there could be no prejudice because Melinda had testified that she was frightened by appellant. (RB 88.) Yet, her testimony was in the specific context of the alleged kidnaping. She stated that she had not wanted appellant to come to her house because she was scared of him after they broke up their relationship. (7 RT 918.) She testified that she was frightened when appellant pushed her into the car. (7 RT 926.) This is far different than saying that she was frightened to testify against appellant.

Melinda did not testify that she was frightened or upset at the prospect of testifying. The prosecutor did not ask her about any kind of inconsistency or other aspect of her testimony that might be explained by fear. The investigating officer did not identify any questions or answers that might have caused Melinda to be upset. There was nothing to link her mental state to any specific issue in this case or to make her testimony more credible. Without some evidence to connect Melinda's emotional state to a disputed issue in the case, it was irrelevant to the jury's determination. (See Evid. Code, § 1250 [state of mind evidence must be relevant to an issue in the case]; *People v. Yeats* (1984) 150 Cal.App.3d 983, 986 [before evidence of threats against a witness is admitted, "the prosecution must first establish the relevance of the witness' state of mind by demonstrating that the witness' testimony is inconsistent or otherwise suspect"].)

Respondent finally contends that any error was harmless because Melinda's testimony went to the kidnaping charges that were supported by other evidence. (RB 88-89.) Yet, the primary danger was that the jury

would use Morritt's testimony to assume that Melinda was afraid to testify against appellant and assume that appellant acted in accordance with that fear to instigate her killing. (AOB 76-78.) This was an extremely emotional matter and went to the heart of appellant's defense against the capital charges. Appellant could not defend himself against this kind of speculation, particularly because there was no evidence that the victim's fear in testifying was caused by him. (See *People v. Mason* (1991) 52 Cal.3d 909, 946 [evidence of an anonymous threat not connected with the defendant should be suspect as an endeavor to prejudice the defendant before the jury in a way which he cannot possibly rebut].) Under these circumstances, reversal is required. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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IX.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A VERDICT OF FIRST DEGREE MURDER

Appellant was charged with first degree murder. The case against appellant relied primarily upon the testimony of Sandra Ramirez and Alma Cruz, who stated that appellant had asked Alma if she could "kill a homegirl." (9 RT 1187; 11 RT 1382.) After Alma told him that it depended on what she had done to her, appellant allegedly stated, "I already have someone doing it for me." (11 RT 1382.) At the close of the prosecutor's case, appellant asked the trial court to dismiss the charges under Penal Code section 1181.1, which allows a trial court to enter an acquittal if there is insufficient evidence of a defendant's guilt. (16 RT 1961.) The trial court erroneously denied the motion. Insufficient evidence supported the charges under both state and federal due process standards.

Respondent first contends that appellant had a motive to commit the crime because he was angry with Melinda's testimony at the preliminary hearing on the kidnaping charge. (RB 91.) Appellant asked Melinda not to testify at the preliminary hearing. (9 RT 1161.) During Melinda's testimony, he stood up and stated, "I don't have to listen to this shit." (8 RT 1055.) Appellant told the investigating officer that her testimony made him either sad or angry. (12 RT 1613.) But none of these statements threatened Melinda in any way and she continued to associate with appellant's gang. Under these circumstances, evidence of a motive is insufficient to support the verdict. (See *People v. Cleveland* (2004) 32 Cal.4th 704, 750 [jurors would not believe that motive alone was sufficient to establish guilt]; *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104 [motive alone insufficient to prove larceny].)

Respondent also cites appellant's actions with respect to Melinda's gang, moving their initiation of a new member to the alley where the regular meeting was to be held. (RB 92.) There was also no evidence that appellant changed the initiation as part of a plan to commit a homicide. Appellant spoke with Sandra Ramirez and Alma Cruz before the crime was committed. He was concerned that the gang members come to a meeting in order to pay dues, and that a "green light" had been placed on the gang by the Mexican Mafia. (9 RT 1166-1167; 10 RT 1324-1325.) A joint meeting was planned to discuss this situation. This meeting was set up even before it was decided to initiate the new member. (10 RT 1324.) Therefore, there was no need to orchestrate the girls' presence because they already would have been at a gang meeting.

If there had been a plan to kill Melinda, it would have complicated matters by ensuring that there were several witnesses to the killing. (See 9 RT 1205 [Ricardo upset that Sandra had brought a number of girls to the meeting].) Under these circumstances, appellant's statement that the girls should initiate the new member at the same time as the regular meeting, in their own gang territory, could not have been part of a plan to kill Melinda.

Respondent also contends that Ricardo's actions supported an inference that appellant was a principal in the murder. (RB 93.) Respondent notes that Ricardo asked Sandra Ramirez why she had brought a number of girls with her to the meeting. Ricardo also told Ramirez that if anything happened she should say it was a drive-by. (9 RT 1205.) However, if appellant had orchestrated the meeting as part of a plan to kill Melinda, then Ricardo would have been expecting all the girls to come to the alley. That he was surprised indicates that no such plan had been made.

If anything, it was evidence pointing to appellant's innocence – he did not believe that there was anything to hide.

Respondent contends that appellant's actions after the murder displayed a consciousness of guilt. (RB 93.) Appellant asked Sandra Ramirez what had happened at the meeting. (10 RT 1275.) No evidence links this to the crime. It was clear that appellant expected something to happen – he had discussed the green light, the dues situation, and the gang initiation with Ramirez. A general inquiry about what happened does not provide evidence to support guilt.

Appellant also told the police that he had not spoken with Ricardo and Uribe. It is hardly surprising that appellant would not want to discuss gang business with the police. Moreover, appellant's mental state at the time of the interview did not indicate a consciousness of guilt – he was clearly upset by Melinda's death, but agreed to try to answer the officers' questions. (4 CT 896-898.) He had been given psychiatric medication and placed on suicide watch, so he did not even remember having been informed about his rights in previous interviews. (4 CT 899-900.) Under these circumstances, what appellant remembered or the reasons why appellant may have told the officer certain things are speculative and do not provide reliable evidence against him.

Taken as a whole appellant's conviction rests on the single question he asked Alma and speculation about what he must have said or meant. Yet, his statement to Alma was far from clear and neither Sandra or Alma understood it as a threat against Melinda or anyone else. It may raise a suspicion of appellant's guilt, but suspicion is not enough to constitute

substantive evidence in support of the verdict.[15] (*People v. Raley* (1992) 2 Cal.4th 870, 891; *People v. Redmond* (1969) 71 Cal.2d 745, 755.) Accordingly, appellant's conviction for first degree murder must be reversed and his sentence of death set aside. (*People v. Allen* (2001) 86 Cal.App.4th 909, 918-919 [erroneous denial of motion to acquit requires reversal]; *People v. Guiton* (1993) 4 Cal.4th 1116, 1129 [reversal required if verdict is legally and factually insufficient].)

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15. Respondent correctly states that California's corpus delicti rule requires only proof that a crime occurred, and not proof of a defendant's mental state or the degree of a crime charged. (See *People v. Martinez* (1994) 26 Cal.App.4th 1098, 1104.) The jury had evidence apart from appellant's statement to Sandra that Ricardo had been drinking and was angry with Melinda; that they exchanged heated words; and that he shot her with a gun that he had obtained from Uribe, perhaps for protection because there was a "green light" upon the group. While this does not constitute substantive evidence of appellant's guilt, appellant acknowledges that it meets the requirements of the corpus delicti rule.

X.

THE TRIAL COURT ERRED IN ADMITTING MELINDA'S DIARY AND STATEMENTS THAT SHE HAD MADE TO A TEACHER

The trial court erroneously allowed the prosecutor to introduce in rebuttal an entry in Melinda's diary and statements that she had made to her teacher. Appellant objected that these statements were hearsay and improper rebuttal. (18 RT 2226.) However, the trial court allowed the evidence to be admitted as prior consistent statements under Evidence Code sections 791 and 1236. (18 RT 2225-2226.) The trial court erred because the statements were made after Melinda's inconsistent statements and after she had reported the incident to the police and accused appellant. Accordingly, they were not prior consistent statements under the statutory scheme. Moreover, the testimony violated appellant's constitutional rights to due process and a fair trial, to confrontation of witnesses and to a reliable capital trial. (U.S. Const. 6th, 8th, & 14th Amends.; Cal. Const. art. I, §§ 7, 15, 16, 17.)

A. The Statements were not Prior Consistent Statements

Prior consistent statements are allowed under Evidence Code sections 791 and 1236 when they are made before a declarant makes an inconsistent statement or before a motive for fabrication arose. Respondent contends that the evidence was properly admitted as consistent statements to rebut evidence presented by appellant that Melinda "said nothing [to appellant's mother, aunt and uncle] to indicate that she was with appellant against her will or that she was injured" shortly after the alleged kidnaping occurred. (RB 103.) Respondent mistakenly relies on an exception to the rule on prior consistent statements identified in *People v. Gentry* (1969) 270 Cal.App.2d 462.

In *Gentry*, Larry Taylor, a witness in a child abuse case, gave a statement to the first officer who questioned him that did not inculpate the defendant. Later that morning, Turner told another officer and a transcriber that the defendant had been involved in previous incident and that he had heard sounds of a child crying and noises indicating the child had been slapped or hit. Witnesses for the defendant impeached Turner with testimony that he had stated that he named the defendant only because he was afraid of going to jail himself. Turner testified that he had not mentioned the defendant because he was still groggy and that he was afraid only of going to jail as an accessory to the crime if he did not name the defendant. The trial court also permitted the second officer and transcriber to testify about Turner's second statement. (*Id.* at p. 472-473.) The reviewing court explained that a consistent statement that was made after an improper motive was alleged to have arisen was inadmissible. (*Id.* at p. 473.) However, it found that there was an exception when it was alleged that a witness did not speak of the matter when it would have been natural to do so. At that point, a consistent statement was proper because it rebutted the negative inferences that were alleged. (*Ibid.*)

Here, the evidence offered by appellant was not that Melinda did not make a complete statement when asked about a particular incident, nor was it simply that she was silent. There was no evidence that Melinda was asked about any of the events that had happened earlier that day. Rather, appellant's witnesses testified that Melinda was not injured and that her actions, appearance, and demeanor demonstrated a favorable relationship with appellant. In particular, appellant's mother testified that Melinda had given her a card that pictured a man and a woman and had the words, "You Light Up My Life" on it. (17 RT 2120, 2124.) Appellant's aunt testified

that appellant and Melinda came to their house and that they both spoke to her about their plans to go to Mexico to get married. She spoke to Melinda in order to talk her out of this plan.[16] (17 RT 2148-2149.) Appellant's uncle stated that he drove Melinda and appellant back to their neighborhood. (17 RT 2187.) All of these witnesses testified that they did not observe any injuries to Melinda's back and neck and that she did not appear to be frightened. (17 RT 2119, 2150-2152, 2188-2189.) Thus, Melinda's silence was not at issue, but her positive interactions with appellant's family and their observations about her physical and mental state. Accordingly, the *Gentry* exception does not apply.

The diary entry and her statement to her teacher were made after Melinda returned home, told her mother, and reported the incident to the police. Under these circumstances were not prior consistent statement under Evidence Code sections 791 and 1236. (*People v. Flores* (1982) 128 Cal.App.3d 512, 524 [consistent statement not admissible because it was made after the witness had a motive for fabrication]; *People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1303 [statements admissible only if made before the time that the defendant asserted a motive to fabricate had arisen].)

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16. Melinda testified that she had been unable to communicate with appellant's aunt, Maria Hernandez. because Maria spoke Spanish. (7 RT 932.) However, Hernandez testified in English, was married to a man named "Murphy," and stated that she spoke English at the time of the incident. (17 RT 2149.)

B. The Forfeiture Doctrine Does not Bar Appellant's Claims under the Confrontation Clause

Respondent contends that the forfeiture doctrine prevents appellant from asserting any claim under the Confrontation Clause because he was charged with killing the victim after she testified against him.[17] (RB 99-101.) This Court has granted review in other cases to determine if the doctrine applies when the alleged wrongdoing is the same as the offense for which the defendant is on trial. (*People v. Giles*, Case No. S129852 [review granted Dec. 7, 2004]; *People v. Jiles,* Case No. S128638 [review granted and held pending decision in *Giles*, December 22, 2004].) Appellant submits that the doctrine should be applied narrowly only when there is direct wrongdoing to prevent a witness from testifying, not when a witness has already testified against the defendant, as in the present case.

Respondent relies upon *United States v. Reynolds* (1879) 98 U.S. 145. (RB 100-101.) In *Reynolds*, the defendant was on trial for bigamy. The prosecution attempted to call the defendant's second wife to testify against him, but was unable to do so because the defendant refused to reveal her location to a process server. The trial court admitted testimony that she had given in a prior trial on the same issue. (*Id.* at pp. 159-160.) The Supreme Court found that the testimony was properly admitted: if a defendant "voluntarily keeps the witnesses away, he cannot insist on his

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17. Respondent also contends that the Confrontation Clause claim is waived because appellant did not assert the error in the trial court. (RB 99.) Appellant objected on the basis of hearsay. This objection alerted the trial court to the issue that was to be resolved, whether out of court statements not subject to cross-examination should be admitted. Moreover, the effect of the statements created a Confrontation Clause violation. The issue may therefore be resolved on appeal. (*People v. Partida* (2005) 37 Cal.4th 428, 436.)

privilege [to confront the witnesses against him]." (*Id.* at p. 159.) Viewed in context, it is clear that the defendant must have intended to prevent the witness from testifying at trial. It is also clear that the evidence to which the Court referred was prior testimony of a witness whom the defendant had a full opportunity to confront at an earlier trial. It was not hearsay from a witness the defendant never had an opportunity to confront.

The Supreme Court recently stated that the Sixth Amendment does not require trial courts to acquiesce when a defendant procures or coerces silence from witnesses or victims. (*Davis v. Washington* (2006) ___ U.S. ___ [126 S.Ct. 2266, 2280].) Thus, it has narrowly interpreted *Reynolds* to allow testimonial evidence to be presented when a defendant prevented a witness from testifying. (See, e.g., *Diaz v. United States* (1912) 223 U.S. 442 [right of confrontation may be waived when testimony from a previous trial is admitted].) Federal circuit courts have applied the forfeiture doctrine in order to prevent witness tampering, such as when a defendant intimidates a witness to prevent his or her testimony. (See *United States v. Carlson* (8th Cir. 1976) 547 F.2d 1346, 1360 [grand jury testimony admitted after witness was intimidated into not testifying].) A federal court also applied the doctrine when a witness was murdered to prevent him from testifying. (*United States v. Thevis* (5th Cir. 1982) 665 F.2d 616, 630-633.) This doctrine was eventually codified in the Federal Rules of Evidence, rule Rule 804, subdivision (b)(6), which defined forfeiture by wrongdoing to allow "a statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

Here, the prosecution believed that appellant was angry with Melinda because of her testimony at the preliminary hearing. As in

Reynolds, her preliminary testimony was admitted in the course of this trial. These statements were properly before the jury and are not at issue here. Rather, the prosecutor introduced statements that were made before Melinda at the preliminary hearing. They were not admitted at that hearing and there was no showing that appellant committed the crime in order to prevent these statements from being admitted. Under these circumstances, this Court should not apply the forfeiture doctrine.

C. Reversal is Required

Respondent contends that any error was harmless because of the weight of evidence supporting the kidnaping charge, but does not address appellant's contention that the error affected the penalty phase. (AOB 94, RB 105.) The improper hearsay encouraged the jury to simply accept the allegations against appellant. Yet, appellant had presented several witnesses who testified that Melinda did not appear to be injured and had done nothing to indicate that she was being held against her will. The nature and extent of the injury that Melinda testified about was very much in dispute. Melinda's own testimony about the events of that day may have been seen less than credible, since she had testified that appellant's aunt spoke no English. This indicated that the incident was more than a simple kidnaping, but part of a complex situation involving both Melinda and appellant, subject to interpretation. At the very least, these matters would have mitigated the alleged crime. Accordingly, the Court should find that the error affected both the guilt and penalty phases, requiring reversal. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Robertson* (1982) 33 Cal.3d 21, 54 [any substantial error affecting the penalty phase of a capital trial must be deemed prejudicial].)

XI.

THE TRIAL COURT'S INSTRUCTIONS IMPROPERLY ALLOWED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE

The trial court instructed the jury that the "presence of motive may tend to establish a defendant is guilty" while "absence of motive may tend to show that a defendant is not guilty." (21 RT 2654; 4 CT 981; CALJIC 2.51.) As applied in this case, the instruction permitted the jury to determine guilt based upon motive alone, reduced the prosecutor's burden of proof so that appellant had to show his innocence.

Respondent notes, as appellant acknowledged in his opening brief, that this Court has rejected similar arguments in past cases. (AOB 95; RB 106; see *People v. Nakahara* (2003) 30 Cal.4th 705, 713.) However, in this case the motive instruction uniquely influenced the jury. The prosecutor was faced with the difficulty of proving that appellant instigated his brother to kill the victim without providing direct evidence about what they might have said to each other. Motive, then, was particularly important to his case and the prosecutor introduced evidence that appellant was upset with Melinda during her testimony. (8 RT 1055.) Indeed, respondent notes in other contexts that appellant's alleged motive allowed the jury to infer that appellant aided and abetted the crime. (RB 91-92.) Under these circumstances, appellant's alleged motive and the instructions about it played a central role in this case.

The motive instruction lessened the prosecutor's burden by inviting the jury to speculate about appellant's motive. That he was angry with Melinda did not mean he was motivated to kill her. There was no evidence that he had threatened her. After her testimony, he spoke to Melinda on the telephone and she remained involved in gang activities. The instruction,

however, invited the jury to make a leap that appellant would have acted upon the alleged motive and to use it as evidence against him.

Moreover, the motive instruction encouraged the jury to consider whether appellant had proven that he lacked a motive. The prosecution's theory was based upon appellant's alleged anger toward the victim – that he must have sought the victim's death because he was angry about her testimony at the preliminary hearing. This instruction encouraged the jury to adopt the prosecutor's theory unless appellant established that he had no such anger. Taken as a whole, the instruction placed appellant in a "Catch-22" situation that allowed the jury to assume that appellant was guilty because he was angry and to assume that the anger was a motive because he was implicated in the victim's death. Either way, it was impossible for appellant to defeat such speculation and to establish his innocence.

Under these circumstances, the instruction violated appellant's federal and state constitutional rights to due process, a fair trial before a properly instructed jury, and a reliable verdict in a capital case. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art 1, §§ 7, 15, 16, 17.) Because motive was a key issue before the jury, this Court should find that it contributed to the verdict so that it was not harmless beyond a reasonable doubt. Reversal is required. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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XII.

THE CONSCIOUSNESS OF GUILT INSTRUCTIONS WERE IMPERMISSIBLY ARGUMENTATIVE AND ALLOWED THE JURY TO FIND IMPROPER INFERENCES TO ESTABLISH APPELLANT'S GUILT

The trial court improperly instructed the jury that they could consider a false statement by appellant (CALJIC 2.03) or an attempt to suppress evidence (CALJIC 2.06) as evidence of his consciousness of guilt. These instructions unfairly highlighted evidence favorable to the prosecution and invited the jury to draw critical but irrational inferences against appellant. Respondent states, as appellant has acknowledged, that this Court has rejected similar arguments in other cases. (AOB 102; RB 98; see *People v. Benavides* (2005) 35 Cal.4th 69, 100.) This Court's previous decisions should be reconsidered in light of the facts of this case.

Appellant objected to the instructions because they were not applicable to any of his actions. (18 RT 2303, 2307.) Respondent contends that the jury could infer consciousness of guilt under CALJIC 2.03 because appellant gave false statements to the police about his telephone contacts.[18] (RB 109.) Yet, there is nothing to link his actions to the crime. Appellant was clearly upset by Melinda's death, but agreed to try to answer the officers' questions. (4 CT 896-898.) At the time of the interview, appellant had been given psychiatric medication and placed on suicide watch, so he did not even remember having been informed about his rights in previous interviews. (4 CT 899-900.) Appellant had not been charged in connection with the homicide and the officers stated that they only wanted to find out

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18. During the police investigation, appellant initially denied speaking with Sandra Ramirez. He later acknowledged that he spoke to her, but denied speaking with anyone else from the gang. (12 RT 1618-1619.)

some information about what appellant might know about Melinda's death. (4 CT 898.) Under these circumstances, his statements to the police indicate a desire to cooperate rather than to hide his involvement. However, appellant had many reasons not to discuss his gang involvement with the officers. Thus, the evidence used to show appellant's alleged consciousness of guilt was not something that necessarily involved the present crime. His actions would have been the same regardless of his guilt or innocence. The inferences about appellant's state of mind were not supported by sufficient evidence to support CALJIC 2.03. (See *Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 165-167, and fn. 28 [inferences must be "more likely than not"]; see also *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, 316 [noting that the Supreme Court has required "'substantial assurance' that the inferred fact is 'more likely than not to flow from the proved fact on which it is made to depend'"].)

Similarly, appellant objected that CALJIC 2.06 did not apply because he made no attempt to suppress evidence. Respondent contends that the instruction was warranted because appellant asked Melinda not to testify and, after the she was killed, advised Sandra Ramirez not to talk to the police. (RB 108, 109-110.) However, neither of these actions warranted the trial court giving the instruction. His conversation with Melinda was far more complex than a mere attempt to suppress her testimony, and must take into account their entire relationship. Appellant spoke to Melinda from jail even after she testified and she continued to participate in gang activities, so it is clear that she did not feel intimidated. Moreover, his statement to Sandra Ramirez simply advised her not to talk to the police. This does not indicate a consciousness of guilt, particularly when there were substantial reasons not to involve the police in gang

activities at a time when appellant was in jail, still trying to determine what had happened. Again, it is not "more likely" that his statements reflected a consciousness of guilt regarding the present crime. Accordingly, this Court should find that the instructions were erroneous. Reversal is required.[19] (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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19. Since respondent does not address the issue of prejudice, no further briefing on this issue is needed. (See AOB 113-115.)

XIII.
THE PROSECUTOR COMMITTED MISCONDUCT DURING HIS CLOSING ARGUMENT AT THE GUILT PHASE BY IMPROPERLY ATTACKING APPELLANT'S COUNSEL AND LINKING APPELLANT TO EVIDENCE THAT WAS ADMITTED ONLY AGAINST APPELLANT'S BROTHER

A. The Prosecutor Accused Appellant's Counsel of Lying

During the closing argument in the guilt phase of the trial, the prosecutor attempted to rebut any suggestion that the evidence was speculative by attacking the credibility of counsel for both appellant and his co-defendant:

> But who wants you to speculate? I want you to think about what the – counsel has looked you in the eye unblinkingly and just said straight out, butter wouldn't melt in their mouth. . . .

(21 RT 2601.) The trial court sustained the objection by appellant's co-defendant. Shortly thereafter, the prosecutor denigrated appellant's counsel by stating that he "thought Mr. Gladstein had been in the courtroom during the testimony." (21 RT 2604.) The trial court sustained appellant's objection.

Respondent contends that there is no reasonable likelihood that the jury construed the prosecutor's remarks as an attack upon appellant's counsel's integrity. (RB 115.) What else could his statements mean? The prosecutor stated that counsel had looked the jury in the eye and lied. The prosecutor did not simply argue that counsel's theories lacked evidentiary support. He stated that counsel knowingly lied to the jury. This statement was clearly improper. (*People v. Cummings* (1992) 4 Cal.4th 1233, 1302; *People v. Jones* (1997) 15 Cal.4th 119, 167; *People v. Sandoval* (1992) 4 Cal.4th 155, 183.)

Respondent contends that any issue regarding the prosecutor's argument was waived because appellant did join in his co-defendant's objection to the prosecutor's first statement or request the jury to be admonished. (RB 113.) However, this Court may still review the matter if an objection would have been futile or an admonition would not have cured the harm. (*People v. Green* (1980) 27 Cal.3d 1, 34; *People v. Bradford* (1997) 15 Cal.4th 1229, 1333.) In this case, appellant's co-defendant objected to the first attack upon trial counsel. The trial court immediately sustained the objection so that appellant had little opportunity to respond. A second objection at that point, interrupting the court or the prosecutor's subsequent argument, would have only served to highlight the remark to the jury. Moreover, the prosecutor's second attack upon trial counsel continued the pattern established in the first remark. Taken together, the argument was a direct attack upon the integrity of appellant's trial counsel. Appellant's objection served to respond to this argument.

Respondent contends that this Court has found that a prosecutor's improper remarks can be cured with an admonition. (RB 114.) However, the prosecutor's statement in this case went beyond those cases cited by respondent. In *People v. Gionis* (1995) 9 Cal.4th 1196, the prosecutor read three "classic quotations" about lawyers, including a duty to lie and distort. This Court found that the context of the argument was that lawyers were schooled in the art of persuasion and did not imply that the defense counsel had lied. (*Id.* at p. 1216.) Indeed, by referring to all lawyers, the prosecutor implicated himself as well as defense counsel. Here, the prosecutor directly attacked the integrity of the defense ("butter wouldn't melt in their mouth") and appellant's counsel in particular.

Similarly, in *People v. Price* (1991) 1 Cal.4th 324, the defense asked a prosecution witness if there had been any investigation to determine if an officer might have placed evidence where it was found. On redirect, the prosecutor referred to counsel's "sleazy" question. This Court agreed that the statement was improper, but found it was an isolated incident in a very long trial. Under these circumstances, the trial court's admonition was enough to have cured the harm. (*Id.* at pp. 454-455.) Here, the prosecutor's statement occurred during his closing argument to the jury. It is a time when his words took on special importance. (*People v. Talle* (1952) 111 Cal.App.2d 650, 677; *Berger v. United States* (1935) 295 U.S. 78, 88.) Thus, the attack on defense counsel was much more powerful than that which occurred in *Price*.

The prosecutor's argument in this case was particularly harmful. By attacking the honesty of opposing counsel, the prosecutor's message was that he stood above such tactics and that he believed appellant's defense to be reprehensible. Although the trial court sustained the objections, the prosecutor's point was established and affected the jury's view of the entire trial. Under these circumstances, this Court should find that the argument was improper and prejudicial. (See *People v. Love* (1961) 56 Cal.2d 720, 733 [trial court could only "admonish the jury to disregard the prosecutor's statements; it could not erase them from the jurors' mind or explain they should not be considered further without magnifying their impact"].)

B. The Prosecutor Argued Facts Not in Evidence

The prosecutor argued that if Sandra Ramirez and Alma Cruz wanted to implicate appellant, they would have quoted him as saying, "I've got Ricardo and Pelon [Uribe] working on this." (21 RT 2525.) Appellant objected that the prosecutor was arguing facts not in evidence, but the trial

court overruled the objection and permitted the argument.[20] (21 RT 2625-2626.)

Respondent contends that this argument was simply a rhetorical response to indicate that Sandra and Alma could have made up testimony that directly implicated appellant had they wanted to testify falsely. (RB 118.) Yet, the argument went beyond this. It was improper because it assumed that Sandra and Alma *knew* that Ricardo and Uribe were both implicated in the crime. The only evidence establishing that Uribe had assisted Ricardo in committing the crime was the statement that Ricardo made to the police, which was not admitted against appellant.

Respondent points to evidence that Uribe heard Ricardo make certain statements, and that he was the one who told Melinda that Ricardo wanted to talk to her. (RB 118-119.) But none of this implicated Uribe in the crime, particularly in any manner that would have been apparent to Sandra or Alma. There was a gang meeting. Uribe was participating in gang activities. Uribe's actions took on meaning only in relation to Ricardo's statements.

The prosecutor's argument encouraged the jury to use the information from Ricardo's statements against appellant. Once Ricardo's statements were drawn into the case against appellant, the jury could speculate that appellant was part of a conspiracy to kill the victim. As the prosecutor argued in reference to the three-way conversations, "it doesn't take a great leap of logic to see what they were talking about. Because, if

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20. Respondent contends that the issue is waived because appellant did not request an admonition. (RB 117.) Since the trial court permitted the argument, any further request for an admonition would have been futile and was not required. (*People v . Hill* (1998) 17 Cal.4th 800, 820.)

you recall, it was [Uribe] that got the gun." (19 RT 2413.) The only way that the jury would know that Uribe obtained the gun – or that Sandra and Alma might have named Uribe – was from the information in Ricardo's statement. By assuming that Sandra and Alma would have named Uribe, the prosecutor effectively told the jury that he had information that went beyond the evidence in the case against appellant. Under these circumstances, this Court should find that the argument was prejudicial.

The evidence against appellant was based upon a slender thread. Therefore, anything that the prosecutor could do to cause the jury to dismiss appellant's defense and link appellant to Ricardo's statement would have weighed heavily. This Court cannot find that the prosecutor's improper argument was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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XIV.

THE PROSECUTOR COMMITTED MISCONDUCT DURING PENALTY PHASE ARGUMENT IMPROPERLY STATED THAT THE CRIME ALWAYS REQUIRED A DEATH SENTENCE AND BY PRESENTING AN EMOTIONAL PLEA TO THE JURORS RECALLING THE CRY FOR VENGEANCE ON THE PART OF THE VICTIM'S FAMILY

The prosecutor's penalty phase argument centered around an emotional plea to the jurors, recounting grave site visits by the victim's family and urging the jurors to impose the death penalty to preserve the rule of law. According to the prosecutor, the fate of his witnesses, Sandra Ramirez and Alma Cruz, rested in the hands of the jury, and that ultimately the fate of society depended upon imposition of the death penalty. The argument went beyond the limits or proper advocacy and violated appellant's federal and state constitutional rights to due process and a reliable penalty verdict. (U.S. Const., 8th, & 14th Amends.; Cal. Const. art. I, §§ 7, 15, 17.)

A. The Prosecutor Improperly Argued that the Death Sentence was Needed to Protect the Witnesses in this Case and to Preserve the Rule of Law

Over appellant's objection, the trial court allowed the prosecutor to argue that appellant had placed Sandara Ramirez and Alma Cruz in a very bad position. (23 RT 2856.) The prosecutor used this ruling to continue his line of argument:

> He's talking about the Mexican Mafia. He's talking about dues. He's talking about killing homegirls . . . So when does their nightmare end? When can they stop looking over their shoulder?

(23 RT 2856.) He concluded his argument with a very emotional appeal that placed the jury in the role of protecting these witnesses and society as a

whole. He told the jury that unlike the victim, the system must protect Sandra and Alma and that their trust in the system and "their need for justice" was in the juror's hands. (23 RT 2869.) He warned that if "people ever feel that that trust is misplaced, we cannot function as a society." (RT 2869.) He equated this trust with the death penalty. (23 RT 2870.) The trial court "noted" appellant's objection to the prosecutor's improper argument but did not otherwise rule on it. (23 RT 2870.)

1. Prosecutorial misconduct was not waived

Respondent contends that any issue was waived because appellant did not assign prosecutorial misconduct, obtain a ruling on his second objection, or seek a curative admonition. (RB 128.) Improper argument by the prosecutor constitutes misconduct. (See *People v. Hill* (1997) 17 Cal.4th 800 [finding numerous instances of improper argument constituted misconduct].) Appellant's objection alerted the trial court to the prosecutor's erroneous remarks. Moreover, the trial court "noted" appellant's objection and allowed the prosecutor to proceed. This implicitly overruled the objection. Accordingly, the absence of a request for a curative admonition does not forfeit the issue for appeal since the trial court's ruling made such a request futile. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 820-821.)

Respondent also contends that appellant did not object to each of the prosecutor's statements. (RB 128.) However, appellant's objections responded to a unified theme that the prosecutor built during his argument. The objections should apply to the theme as a whole. At the very least, the trial court's failure to sustain appellant's objections rendered any further objections at the time of the argument futile, since appellant otherwise would have had to constantly impose objections even after the trial court

allowed the prosecutor to proceed. Under these circumstances, this Court may review this issue on appeal. (*People v. Hill*, *supra*, 17 Cal.4th at p. 820.)

2. The argument inflamed the jury and diverted them from their proper task

Respondent contends that the prosecutor's argument simply urged the jury to find that the killing of a witness was a particularly aggravated form of homicide that undermined the entire criminal justice system. (RB 129.) The argument went far beyond this. The prosecutor first stated that appellant subjected Sandra Ramirez and Alma Cruz to a continuing nightmare. He concluded by telling the jury that they must protect the two witnesses. He told the jury that the only way to accomplish this was to put appellant to death. The prosecutor's message was unmistakable – the system had failed the victim so that the death penalty was the only way that the jury could protect Sandra and Alma. This argument was inflammatory because it set the jury up to be Sandra and Alma's personal guardians and diverted the jury from its proper task.

The argument lacked evidentiary support because there was no evidence that appellant had threatened Sandra and Alma in any way or that they felt endangered by appellant. Appellant's relationship with Melinda was unique, and his reaction to her testimony was undoubtedly influenced by their past relationship. The crime itself was committed by his brother, who faced a life term in prison. Yet, the prosecutor raised the specter of the Mexican Mafia and appellant's "connections" to assert that there was a continuing danger to Sandra and Alma. (23 RT 2856, 2868.) By interjecting the Mexican Mafia as a source of danger to the witnesses, the prosecutor invoked particularly inflammatory matters into the penalty

decision. (See *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 344 [evidence about gang threat to adverse witnesses was highly prejudicial].)

The jury was left to believe that the prosecutor had information about the danger to these witnesses and appellant's gang activities. They were told that the witnesses could only be protected if appellant were sentenced to death. And they were told this without evidentiary support to back the prosecutor's assertions. Thus, it is the type of argument that this Court has recognized as being particularly prejudicial. (See, e.g., *People v. Hill*, *supra*, 17 Cal.4th at p. 828 [facts not in evidence prejudicial because the jury would rely on prosecutor's assertions].)

3. The argument also placed the jury in the role as the guardian of society

The prosecutor extended his argument to make the jury responsible not only for Sandra or Alma but the rule of law. Although respondent characterizes the argument as stating that the crime was a particularly aggravated form of murder, the prosecutor again went beyond this. The prosecutor told the jury that the death penalty was necessary for the system of justice to function:

> It is your job to make sure that . . . that trust is not misplaced. Because if people ever feel that that trust is misplaced, we will not be able to function as a society. We cannot do anything but fall in some sort of chaos if people do not trust the system, do not even – if they have certain misgivings, at least be able to say that it is my duty to believe in the system, I will try to follow this, and place their lives, their need for justice in your hands.

(23 RT 2868-2869.) The prosecutor tied the ability to function as a society to the death penalty in this case: "we cannot, if we are to survive as a society, tolerate this." (23 RT 2869.)

Under the prosecutor's rationale, the death penalty would be mandated in every case with this special circumstance. However, society has determined that either the death penalty or life without possibility of parole is an appropriate punishment, and justice would be served by either punishment. There was no evidence to show that in this type of case, the death penalty was necessary to preserve the rule of law, that it would protect any of the witnesses, or that our survival as a society depended upon it being imposed against appellant. The argument therefore was inflammatory and misleading. (See *People v. Love* (1961) 56 Cal.2d 720, 731 [misleading for prosecutor to suggest that capital punishment is a more effective deterrent than imprisonment].)

B. The Prosecutor Improperly Contrasted Life in Prison with the Victim's Family Visiting the Grave Site

The prosecutor engaged in a very emotional argument contrasting Melinda's family visiting her grave site with appellant's life in prison. (23 RT 2865-2866.) This argument was designed solely to inflame the emotions of the jurors. It set up a standard that no defendant in a capital case could ever overcome. The victim's loss will always be real. A defendant's sentence to life in prison will always mean that he or she lives. The appeal to "gut emotion" was improper.[21] (*Hance v. Zant* (11th Cir. 1983) 696 F.2d 940, 952.)

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21. Respondent argues that the claim was waived because the trial court "noted" appellant's objection and appellant did not seek an admonition. (RB 130.) As discussed above, the trial court effectively overruled appellant's objection by allowing the prosecutor to proceed. Under these circumstances, appellant was not required to seek an admonition. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 820-821.)

Respondent contends that the prosecutor's argument referred to obvious matters and was based upon the evidence because Melinda's stepmother testified that they visited the grave. (RB 130.) That does not diminish the emotional impact of the argument. Indeed, respondent does not address the decisions from other courts that have forbidden such argument. As the Oklahoma court has found, "the State's contention – it is unfair for [the defendant] to live since [the victim] is dead – creates a super-aggravator applicable in every death case. No amount of mitigating evidence can counter this argument, and if the jury agrees they may not even consider mitigating evidence." (*Le v. State* (Okla.Crim App. 1997) 947 P.2d 535, 554-555; see also *Duckett v. State* (Okla.Crim.App. 1995) 919 P.2d 7, 19 [contrasting grave visits with imprisonment is improper]; *Walker v. Gibson* (10th Cir. 2000) 228 F.3d 1217, 1243 [prosecutor improperly appealed to the jury's emotions by referring to one victim as being "cold in his grave"].)

Moreover, the prosecutor's description of prison was not based upon evidence, but invited the jury to speculate about prison conditions for those serving sentences of life without possibility of parole: "What are you doing? What can you do? Can you read? Can you watch t.v.? Can you work out? Can you have friends? It might be monastic, but you do have a life." (23 RT 2865.) What a prisoner serving life without parole in a level IV prison can do may be very restricted, particularly if placed in a security housing unit because of suspected gang affiliations. (See Cal. Code Regs., title 15, § 3343 [conditions of confinement in security units].) Such conditions are hardly "monastic." (See *Madrid v. Gomez* (N.D.Cal.1995) 889 F.Supp. 1146, 1155 [describing conditions of confinement at Pelican Bay State Prison].) They also are irrelevant to the jury's penalty

determination. (*People v. Smith* (2005) 35 Cal.4th 334, 365 [conditions of confinement not relevant to penalty phase],)

This argument was particularly powerful in this case because it was made soon after Melinda's grandmother had testified that she was obsessed with thoughts of revenge. Edna Steffan stated that she remained vengeful because Melinda was dead while appellant was alive and in prison. (23 RT 2819.) Respondent contends that Steffan never expressed a personal opinion about the appropriate punishment (RB 131), but the jury certainly would have gotten the message and have been moved by the way that she contrasted her feelings about vengeance with appellant's life in prison. The prosecutor's argument did not occur in a vacuum. It resonated all the more deeply because Steffan's words were fresh in the juror's minds. Jurors certainly understood that the family's desire for vengeance was not satisfied by life in prison. Accordingly, the prosecutor's argument served no legitimate purpose and could only have been designed to inflame the jury.

C. Reversal is Required

Respondent finally contends that any misconduct was harmless because the focus on the prosecutor's argument was the circumstances of the crime and the applicable sentencing factors. (RB 131.) Yet, the arguments at issue here were woven within that argument and served as the emotional climax of his plea to sentence appellant to death.

The prosecutor offered the jury an easy way to make a hard choice: death was required to protect society and the witnesses in this case. It was necessary to avenge the victim's loss. The prosecutor set up barriers to life imprisonment that were impossible for any defendant to overcome. Given the great weight afforded a prosecutor's words and the quick speed of their deliberations, it is clear that the emotional and far-reaching impact of the

prosecutor's argument affected the jurors understanding of their duty and ensured that they would vote for death. Accordingly, reversal is required. (*People v. Robertson* (1982) 33 Cal.3d 21, 54 [any substantial error in penalty phase requires reversal]; *People v. Ashmus* (1991) 54 Cal.3d 932, 965; *Chapman v. California* (1967) 366 U.S. 18, 24.)

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XV.

THE TRIAL COURT FAILED TO INSTRUCT THE JURORS THAT THEY WERE TO DISREGARD APPELLANT'S RESTRAINTS IN REACHING THE PENALTY VERDICT

Appellant was shackled in restraints throughout the entire trial. Although appellant objected when the trial court imposed additional restraints following an incident in the courtroom, the trial court did not believe that these restraints would be visible to the jury. (10 RT 1262.) However, during the penalty phase, the jury was made aware of the restraints through the testimony of one of the prosecution's witnesses. A sheriff's deputy compared the handcuffs used in jail with those used in the courtroom:

> I walked over to handcuff him . . . with the chains in my hand. They're similar – I don't know what he's wearing now, but its a handcuff on each end, and it – its got a chain, and I was holding him like this.

(RT 2792.) This testimony informed the jury that restraints were being used. Accordingly, the trial court was under a sua sponte duty to instruct appellant's jury that the restraints should play no role in the penalty determination. (See *People v. Duran* (1976) 16 Cal.3d 282, 292.)

Respondent contends that the deputy's testimony indicates that the restraints were not visible. (RB 134.) However, this does not address appellant's argument that regardless of their visibility, the testimony made the jurors aware of the restraints. The effect is the same as if the jury saw the restraints. Thus, this Court has often framed the issue as being whether the jurors were aware that restraints were being used, not simply whether the restraints were visible. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 988 [jurors may have been aware that restraints were being used];

People v. Cox (1991) 53 Cal.3d 618, 652 [finding that jurors were not aware of shackling].)

The testimony was particularly important in the present case because it would have explained why appellant was left in his chair while perspective jurors were questioned in the judge's chambers. (See Argument III.) It would also have confirmed the prosecutor's argument that appellant was particularly dangerous. (See Argument XIV; *State v. Finch* (1999) 137 Wash.2d 792, 864-865 [975 P.2d 967, 1009] [shackling sends a message to the jury that the defendant is dangerous].) In the penalty phase of a capital trial, this added considerable weight in favor of death. Accordingly, the trial court's failure to instruct the jury on this matter was prejudicial error. (*Chapman v. California* (1967) 366 U.S. 18, 24 [error not harmless beyond a reasonable doubt] *People v. Ashmus* (1991) 54 Cal.3d 932, 965 [substantial error in penalty phase requires reversal under both federal and state standards].)

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XVI.

THE TRIAL COURT'S PENALTY PHASE INSTRUCTIONS FAILED TO PROVIDE APPROPRIATE GUIDANCE TO THE JURY

This Court has stated that trial courts should expressly instruct the jury at the penalty phase about which of the instructions previously given at the guilt phase should continue to apply at the penalty phase. (*People v. Babbit* (1988) 45 Cal.3d 660, 718, fn. 26.) In this case, the trial court instructed the jury to disregard all guilt phase instructions. (24 RT 2883.) Most importantly, it failed to instruct the jury on any of the principles of law that were included in the guilt phase instructions and were applicable at the penalty phase.[22]

Respondent contends that the evidence in the penalty phase was very straightforward and that the underlying facts were not disputed, making any error harmless. (RB 137-138, citing *People v. Moon* (2005) 37 Cal.4th 1, 38 [applying harmless error analysis when trial court failed to instruct the jurors on how they were to consider penalty phase evidence].) Respondent also notes that this Court has used harmless error analysis when a penalty phase jury was not instructed about the definition of reasonable doubt. (RB 136, citing *People v. Holt* (1997) 15 Cal.4th 619, 685 [jurors would not be confused about the meaning of reasonable doubt since they were instructed about it in the guilt phase and did not request a further explanation].) Appellant acknowledges that this Court has found that omitting applicable

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22. The use note for CALJIC 8.84.1, instructing the jury to disregard guilt phase instructions, indicates that it is to be followed by all appropriate instructions from CALJIC 1.01 through CALJIC 8.88. This was not done in the present case.

instructions in the penalty phase may be harmless. This Court should reconsider its opinion.

In this case, the jury was not instructed with *any* of the principles of law to help them evaluate the evidence that was presented. including a number of instructions that this Court has said is necessary in the determination of guilt. (See CALJIC 2.20 [Credibility of Witnesses], CALJIC 2.70 [Confessions and Admissions Defined], CALJIC 2.71 [Admission Defined].) They were not given the definition of reasonable doubt. (CALJIC 2.92.) Moreover they were not instructed concerning other important principles of law, including whether the jury should consider whether appellant testified (CALJIC 2.60) and how the jury should conduct their deliberations. (See. e.g., CALJIC 17:30 [jury not to take cue from judge]; 17.47 [admonishing against disclosure of the jury's balloting]; 17.48 [use of notes].)

Most importantly, the instruction at issue did not simply omit the guilt phase instructions, but told the jury to affirmatively disregard them. (CALJIC 8.84.1, 5 CT 1094.) This Court must presume that the jurors did exactly that so that they did not consider any of the instructions from the guilt phase. *(People v. Sanchez* (1995) 12 Cal.4th 1, 79; *Turrentine v. Mullin* (10th Cir. 2004) 390 F.3d 1181, 1194 [court "cannot presume, for purposes of harmless error review, that the jury disregarded its instruction"].) This left the jurors with unfettered discretion to consider the evidence in whatever way they saw fit. Federal and state constitutional guarantees of due process and the Eighth Amendment standards for reliability in capital cases demand more. (See *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112 [constitution requires "measured, consistent application" in death penalty determinations].)

In instructing the jury to disregard all other instructions, the trial court failed to provide any assistance to the jury in evaluating and applying the evidence offered in the penalty phase. This Court can have no confidence about what the jury might have believed or what the jury might have applied. By providing no guidance about these matters, the trial court created the type of indeterminate error that defies harmless error analysis. This affected the framework of the entire penalty trial. Under these circumstances, this Court should find that instruction was structural error, not subject to harmless error standards. (*United States v. Gonzalez-Lopez* (2006) ___ U.S.___ [126 S.Ct. 2557, 2565] [indeterminate error is structural]; *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310 [structural error defies harmless error analysis]; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278 [constitutionally deficient reasonable-doubt instruction is structural error].)

The factor (b) evidence in this case was the only aggravating factor apart from the circumstances of the crime. Accordingly, the trial court's failure to instruct on any of the principles of law necessary for the jury to evaluate the strength of the evidence was substantial error. This Court must reverse the penalty judgment. (*People v. Robertson* (1982) 33 Cal.3d 21, 54 [any substantial error affecting the penalty phase requires reversal].)

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XVII.

CALIFORNIA'S DEATH PENALTY INSTRUCTIONS, STATUTE, AND PROCEDURES ARE FLAWED IN SEVERAL RESPECTS

Appellant has argued that California's failure to conduct intercase review of his death sentence violated his Eighth and Fo urteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment. (AOB, Argument XVII.) He has also argued that California's statutory scheme for imposing death is flawed in several respects under the federal and state constitutions. (AOB, Argument XVIII.) Similarly, he has argued that the instructions defining the scope of the jury's sentencing discretion and the nature of its deliberative process violated appellant's constitutional rights. (AOB, Arguument XIX, XX.)

In each of these instances, respondent has relied on previous decisions of this Court that have rejected similar claims. Appellant has acknowledged these decisions and asked the Court to reconsider them, either as a matter of law or in the context of this case. The arguments contained in appellant's opening brief set forth the reasons establishing why this Court should revisit the issues. Since respondent does not address these reasons, the matter is fully joined and there is no need for further briefing.

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XXI.[23]

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW

Appellant has argued that his death sentence was unlawfully imposed in violation of international law, covenants, treaties and norms that bind the United States as the highest law of our land. Respondent relies on this Court's decisions that have held that international law does not compel the elimination of capital punishment. (RB 145, 147, citing *People v. Snow* (2003) 33 Cal.4th 44, 127 [death penalty as a regular form of punishment does not violate international law].)

Appellant submits that this Court should reconsider its previous decision for the reasons expressed in his opening brief. It is clear that abolishment of the death penalty has become the goal of European democracies (see European Union, EU's Policies on the Death Penalty, June 3, 1998 [objective for other countries to abolish the death penalty]), and is increasingly becoming the prevalent standard throughout the world. (See United Nations Economic and Social Council, Commission on Human Rights, "Status of the International Covenants on Human Rights," (2003) E/CN.4/2003/106.) Thus, abolishment of the death penalty has become the customary law of nations similar to our own. But even assuming that the death penalty itself can be imposed under international law, this Court should consider the specific application of the international standards to the judgment in this case. (AOB 210-216.)

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23. For the convenience of the Court, this argument is numbered to correspond to the identification used in appellant's opening brief. There is a gap in the numbering because appellant consolidated the previous claims (XVII-XX).

Respondent contends that international law does not confer any private rights and that appellant has no standing to challenge violations of international law. (RB 146.) Recently, in *Sanchez-Llamas v. Oregon* (June 28, 2006) ___ U.S___ [126 S.Ct. 2669], the United States Supreme Court assumed, without deciding, that the Vienna Convention conferred individual rights upon the plaintiffs. Justice Breyer would have reached this decision and found that treaties can confer rights on individuals. As he explained, the standing of individuals to challenge violations of international treaties in criminal cases is well-settled. (*Id.* at p. 2696 (dis. opn. of Breyer, J.), citing *United States v. Rauscher* (1886) 119 U.S. 407 [dismissing criminal indictment that breached extradition treaty]; *Kolovrat v. Oregon (1961)* 366 U.S. 187, 191, n. 6, [foreign nationals could use treaty right to challenge a state law limiting their right to recover an inheritance]; *Asakura v. Seattle* (1924), 265 U.S. 332, 340 [foreign national challenged a city ordinance on the basis of a treaty provision].)

The principles of international law extend not only to protect the "sovereign interests of nations," as respondent contends (RB 145), but to "govern the relationship between an individual and his state." (*United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1286 [citing specific treaty provision in the International Covenant on Civil and Political Rights (ICCPR)]; see also Convention Against Torture (CAT), art. 14 [treaty provides "enforceable right" of individuals]; International Convention on the Elimination of All Forms of Racial Discrimination (CERD), art. 6 [parties must ensure that individuals have effective remedies].) Accordingly, the United States Supreme Court has used both treaties and the customary law of nations to determine questions under international law. (See *The Paquete Habana* (1900) 175 U.S. 677, 700,

["trustworthy evidence of what [international] law really is" can be found in the works of jurists and commentators].) The Court has also recognized that international law may confer rights on individuals, which give rise to judicial review and remedies. (See *Valentine v. United States* (1936) 299 U.S. 5, 10 [quashing criminal warrants after a violation of an extradition treaty]; *Cook v. United States* (1933) 288 U.S. 102, 120 [voiding criminal fines that violated treaty requirements].)

At a minimum, a potential conflict between state law and international law obligations must be reviewed and resolved by the courts. (See, e.g., *Blue Star Line, Inc. v. City and County of San Francisco* (1978) 77 Cal.App.3d 429 [application of a municipal payroll tax to international steamship lines operating in California was not barred under foreign treaties or the Supremacy Clause].) Due process and Eighth Amendment standards also require courts to determine whether international law and the customary law of nations compel our laws and procedures to be re-examined. (See *Rochin v. California* (1952) 342 U.S. 165, 169 [due process obliges courts to ascertain whether laws offend "those canons of decency and fairness which express the notions of justice of English-speaking peoples"]; *Atkins v. Virginia* (2002) 536 U.S. 304 [122 S.Ct. 2242, 2249, fn. 21] [that the "world community" disapproves of executing the mentally retarded supports the conclusion that it violates the Eighth Amendment]; *Lawrence v. Texas* (2003)539 U.S. 558, 576 [citing decisions of the European Court of Human Rights as persuasive authority]; *Roper v. Simmons* (2005) 543 U.S. 551 [125 S.Ct. 1183,1198-1200] [citing international abolition of juvenile death penalty].)

Respondent contends that appellant has failed to establish the "basic prerequisite" of a violation of state and federal law. (RB 145.)

International law may implicate standards that go beyond domestic law. As appellant has demonstrated, international law permits the death penalty only if the guilt of the individual is established through "clear and convincing evidence "leaving no room for alternative explanation of the facts." (See "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty" (1984) ECOSOC Res. 1984/50, ¶ 4, endorsed by the General Assembly in res. 39/118 of Dec 14, 1984; see European Union, "Policy Towards Third Countries on the Death Penalty," General Affairs Council, June 29, 1998 [adopting standard].) Appellant's conviction, resting primarily upon a single ambiguous statement to a gang member, cannot be supported under this standard. (AOB 210-211.)

Similarly, international law imposes an obligation to remedy racial injustice. (International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 660 U.N.T.S. 195, art 1.) It looks not just to the purpose underlying a particular action, but its effect. (See Inter-American Commission on Human Rights, Report no. 57/96, Case 11.139 [*Andrews v. United States,* 1997 IACHR 570, ¶ 159] [applying objective purpose or effect rule to find that racial discrimination violated right to fair and impartial trial and right to life].) The prosecutor in this case violated its principles by excluding African-Americans from jury service and implicated appellant's right to an impartial tribunal. (AOB 211-212.)

As appellant demonstrated in his opening brief, international law provides important guarantees of an impartial tribunal, the right to a full and fair hearing, and protections from prosecutorial misconduct. These issues strengthen and expand the claims that appellant has presented before this Court. This Court should therefore review the issues raised in appellant's opening brief in light of the specific provisions of international law.

XXII.

CUMULATIVE ERROR REQUIRES THAT THE GUILT AND PENALTY VERDICTS BE REVERSED

Even assuming that none of the errors identified by appellant is prejudicial standing alone, the cumulative effect of these errors undermines the confidence in the integrity of the guilt and penalty phase proceedings. Respondent simply contends that there were no errors requiring reversal of the guilt or penalty verdicts. (RB 148.) No reply is therefore necessary to respondent's contention. However, cumulative error may require reversal even if errors are not prejudicial in themselves. (See *Thomas v. Hubbard,* (9th Cir.2001) 273 F.3d 1164, 1180 ["errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair"]; *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 884 [same].) Therefore, should this Court find errors that it deems non-prejudicial when considered individually, it should reverse the judgment based on the cumulative effect of those errors.

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CONCLUSION

For all the reasons stated above and in appellant's opening brief, the entire judgment and sentence of death must be reversed.

DATED: 7-31-06

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

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Deputy State Public Defender

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(B)(2))

I, Arnold Erickson, am the Deputy State Public Defender assigned to represent appellant, Juan Manuel Lopez, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 21,133 words in length excluding the tables and certificates.

Dated: July 31, 2006

Arnold Erickson

DECLARATION OF SERVICE

Re: People v. Juan Manuel Lopez

No. S073597
L.A. Superior Ct. No.: PA023649-01

I, GLENICE FULLER, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. A true copy of the attached:

APPELLANT'S REPLY BRIEF

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

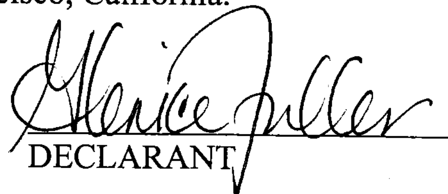
Office of the Attorney General
Attn: Theresa A. Patterson
300 S. Spring St., 5th Floor
Los Angeles, CA 90013

Juan Manuel Lopez
(Appellant)

Each said envelope was then, on July 31, 2006, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 31, 2006, at San Francisco, California.



DECLARANT