SUPREME COURT OF THE STATE OF CALIFORNIA

S076785

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondents,

v.

PEDRO RANGEL, Jr.,

Defendant and Appellant.

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF MADERA

Honorable JOHN W. DeGROOT, Judge

APPELLANT'S REPLY BRIEF

(AUTOMATIC APPEAL)

CHARLES M. BONNEAU
(State Bar No.: 056583)
331 J Street, Suite 200
Sacramento, CA 95814
(916) 444-8828
Attorney for Defendant and Appellant

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SUPREME COURT OF THE STATE OF CALIFORNIA

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PEOPLE OF THE STATE OF CALIFORNIA,

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PEDRO RANGEL, Jr.,

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APPELLANT'S REPLY BRIEF

In this Reply Brief, appellant replies to the arguments raised in Respondent's Brief. No waiver is intended as to any argument not specifically addressed or reiterated in this Brief. (*People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

ARGUMENT

I. APPELLANT WAS DENIED THE RIGHT TO A JURY DRAWN FROM A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY, BY THE SELECTION OF JURORS IN ORDER ACCORDING TO THEIR APPEARANCE ON THE FIRST PANELS OF PROSPECTIVE JURORS.

Appellant was denied his right to a jury drawn from a representative cross section of the community, guaranteed by the Sixth Amendment to the United States Constitution and by Article I, section 16 of the California Constitution, by the trial court jury selection procedure by which the initial panels containing most of the Hispanic prospective jurors were not included in the random draw and could not be considered for service on this jury. (*People v. Sanders* (1990) 51 Cal.3d 471, 491; *Taylor v. Louisiana* (1975) 419 U.S. 522, 530.)

Respondent contends that the issue is forfeited for failure to object; that the six groups called for jury selection ("initial panels" in appellant's terminology) were created according to statutory procedures; that the defendant must show that the overall venire was racially skewed; and that the Hispanic representation on appellant's jury was not less than that of the community as a whole.

A. This Constitutional Error May Be Reviewed Without Objection.

As stated in *People v. Smith* (2003) 31 Cal.4th 1207, 1215, "an appellate court is generally not prohibited from reaching questions that have not been preserved for review by a party. (*People v. Williams* (1998) 17 Cal.4th 148, 161–162, fn. 6.)" (See *People v. Urbano* (2005) 128 Cal.App.4th 396, 404.)[1] This Court should exercise its discretion to review this issue because it affects the conduct of jury trials throughout the state. The issue is otherwise impervious to review because analysis of the racial composition of large groups of people is only possible from the perspective of the appellate stage of review.

Moreover, a "pure question of law" which does not involve the lower court's use of discretion or findings of fact may be raised on appeal in the absence of an objection. (*People v. Hines* (1997) 15 Cal.4th 997, 1061; *In re Samuel V.* (1990) 225 Cal.App.3d 511, 515.) This claim of constitutional error, involving a conflict between California statutory procedure and the demands of the state

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[1] "Assuming arguendo Urbano forfeited his right to appellate review by failing to object, nonetheless reviewing courts generally have discretion to consider on the merits issues a party has not preserved for review. (See *People v. Smith* (2003) 31 Cal.4th 1207, 1215.)"

and federal constitutions, is appropriate for review as a pure question of law.

In addition, the failure to object is excused where the argument involves a legal doctrine which could not have been foreseen by trial counsel at the time of trial. (*People v. Black* (2007) 41 Cal.4th 799, 811; *People v. Turner* (1990) 50 Cal.3d 668, 704.) This is particularly true for cases involving a change of procedure in jury selection. (See *Ford v. Georgia* (1991) 498 U.S. 411, 423; *Trevino v. Texas* (1992) 503 U.S. 562, 567.)

The present argument involves a procedure which has been sanctioned by custom, and which is (according to respondent) authorized by state law, but which is constitutionally infirm. The fundamental constitutional claim should be addressed in the absence of an objection.

B. The Statute Is Not Clear on the Procedure for Random Draw When There Are Multiple Initial Panels.

Respondent argues that the procedure used here is not subject to challenge, simply because it conforms to state statute. But California statutes which refer to "jury panels" are based on the assumption that a trial jury may be drawn from a single panel of 50 or 60 prospective jurors. Where multiple initial panels – here six – are

summoned and examined (a common procedure in capital cases), a random process cannot be assured unless prospective jurors are drawn from the entire combined panel.

Code of Civil Procedure § 222 provides for randomness either by a random selection process by the court clerk (subd. (a)), or by an assumed randomness in the assignment of prospective jurors to the trial department (subd. (b)).[2] The randomness requirement runs across the jury selection process; thus it cannot be defeated by pointing to a subgroup (one or two of the "initial panels") that may have been randomly selected, while selection from the overall jury panel proceeded in a non-random fashion.

The trial court could have assured randomness in this trial by ordering a random draw by the court clerk, from all the combined initial panels (subd. (a)). But that procedure is not mandated, and the statute is unclear on what the trial court should do when there are multiple initial panels drawn for a single capital trial.

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[2] "(a) Except as provided in subdivision (b), when an action is called for trial by jury, the clerk shall randomly select the names of the jurors for voir dire, until the jury is selected or the panel is exhausted.

"(b) When the jury commissioner has provided the court with a listing of the trial jury panel in random order, the court shall seat prospective jurors for voir dire in the order provided by the panel list."

As pointed out in the Opening Brief, the statutory and constitutional guarantee of randomness is defeated when multiple initial panels are called for trial of a capital case. If most of the minority prospective jurors are grouped in the later initial panels, as here, then randomness as guaranteed by state statute is defeated. Respondent is wrong to seek refuge under the state statutory structure because that structure is not clear.

Furthermore, mere compliance with state statutory procedure is not necessarily enough to guarantee a constitutional result. If most of the minority prospective jurors cannot be reached in the process of calling prospective jurors to the jury box, as here, and that is a result of a deliberate nonrandom process of jury selection, equal protection is denied.

C. *Appellant Need Not Demonstrate that the Original Venire Called to Serve on His Jury Was Racially Skewed.*

Respondent contends that appellant must demonstrate that the venire racial composition differs significantly from the community racial composition, citing *Taylor v. Louisiana* (1975) 419 U.S. 522 and *Duren v. Missouri* (1979) 439 U.S. 357. To the contrary, even if the jury venire has been fairly drawn, there still may very well be an unconstitutional method of jury selection leading to a violation of

equal protection. See *Batson v. Kentucky* (1986) 476 U.S. 79, 94, and *People v. Silva* (2001) 25 Cal.4th 345, 386.

The Hispanic composition of Madera County is very high. The United States Census Bureau estimates the current (2008) population of Madera County to be 50.8% Hispanic. In 2000, four years after appellant's trial, the Hispanic portion of Madera County's population was 44.3%. In 1990 the Hispanic portion of the county's population was an estimated 48.0%, based on reporting by household units. (Source: U.S. Census Bureau, *American Fact Finder*, Quick Tables.)

The jury venire here grossly underrepresented the Hispanic population of Madera County. But that is not the focus of appellant's contention. Of the Hispanic prospective jurors who were part of the original venire and who were called for examination, and who survived exclusion for hardship, the majority were relegated to initial panels which could not be conceivably reached in the draw, even if the parties had exercised all their peremptory challenges. This racial exclusion was the result of a non-random process of jury selection.

D. The Proportion of Hispanics on the Relevant Portion of the Venire – the First Two Initial Panels – Was Less than the Proportion of Hispanics in the Venire as a Whole, and Less than the Proportion of Hispanics in the Community.

One Hispanic person served on appellant's jury – a proportion of 8.3% in a county which was almost half (no less than 44%) Hispanic.

The subgroup of the venire which was made available for the draw was composed of the first two initial panels, a total of 84 persons.[3] Of that group eight persons (including the seated juror) were Hispanic.[4] Thus the group available for selection as jurors on appellant's trial jury was 9.5% Hispanic.

But the six initial panels taken as a whole – a total of 222 persons[5] – contained 34 Hispanic persons.[6] This was a proportion of 15.3%. There were far more Hispanic persons available and qualified to serve (15.3%) than the proportion of Hispanics in the initial panels subject to the draw (9.5%).

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3 See Appellant's Opening Brief, p. 57.

4 See Appellant's Opening Brief, pp. 60-61.

5 There are 222 juror questionnaires, completed by persons who passed the hardship phase of voir dire.

6 See Appellant's Opening Brief, p. 61.

The under-representation of Hispanics in the pool available for jury selection in this case resulted in a violation of the fair cross-section requirement under the comparative-disparity test as well as the absolute-disparity test. (Compare *United States v. Sanchez-Lopez* (9th Cir. 1989) 879 F.2d 541, 547, with *Serena v. Mock* (9th Cir. 2005) 547 F.3d 1051, 1054, n.2, and *United States v. Rodriguez-Lara* (9th Cir. 2005) 421 F.3d 932, 943 n. 10.)[7]

The disparity between the Hispanic portion of the available prospective jurors and the Hispanic portion of the venire was a side effect of the selective process of performing jury selection only from the first two initial panels. Not coincidentally, the Hispanic proportion of appellant's jury was far below that of the community as a whole.

But the Hispanic proportion of appellant's jury was also significantly lower than the Hispanic proportion of the qualified initial

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[7] The application of absolute disparity versus comparative disparity is now before the United States Supreme Court, in *Berghuis v. Smith*, cert. granted Sept. 30, 2009, No. 08-1402. "Whether the U.S. Court of Appeals for the Sixth Circuit erred in concluding that the Michigan Supreme Court failed to apply 'clearly established' Supreme Court precedent under 28 U.S.C. § 2254 on the issue of the fair cross-section requirement under *Duren* where the Sixth Circuit adopted the comparative-disparity test (for evaluating the difference between the numbers of African Americans in the community as compared to the venires), which this Court has never applied and which four circuits have specifically rejected."

panels taken as a whole. For these reasons, appellant was denied equal protection by a systematic fault in the method of jury selection.

II. APPELLANT WAS DENIED DUE PROCESS BY THE TRIAL COURT'S REFUSAL TO EXCUSE A PROSPECTIVE JUROR, ULTIMATELY SEATED ON THE JURY, WHO HAD A FIXED OPINION ON THE DEATH PENALTY AND WAS PROPERLY CHALLENGED FOR CAUSE.

Appellant was denied federal due process by the seating of a juror who had a fixed opinion on penalty. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; *People v. Ghent* (1987) 43 Cal.3d 739, 767.)

Respondent argues that appellant's challenge for cause, strongly argued to the trial court, was forfeited for failure to exercise a peremptory challenge. In addition, it is said, this juror was not subject to challenge for cause.

A. The Juror Was Properly Challenged for Cause.

Respondent claims that the prospective juror so successfully indicated her fairness that defense counsel implicitly decided to keep her on the jury. This claim is wholly unrealistic in view of the record. The juror vigorously held to her belief that death was the only proper punishment for first degree murder.

The juror barely was able to entertain the possibility of a punishment other than death following a first degree murder verdict. A juror such as this must be excluded for cause if his or her views on capital punishment would "prevent or substantially impair the per-

formance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; *People v. Ghent* (1987) 43 Cal.3d 739, 767.)

B. Defense Counsel's Obligation to Challenge the Juror Was Satisfied by the Challenge for Cause.

Respondent relies on the rule that a failure to exhaust peremptory challenges bars an appellate attack on the jury composition. (*People v. Bolin* (1998) 18 Cal.4th 297, 315.)

Juror no. 180007014 was properly challenged for cause. With the entry of the challenge for cause, it should have been understood that the defense was also entering a peremptory challenge. In general, in a criminal case an objection will be preserved if despite inadequate phrasing the record shows that the trial court understood the issue presented. (*People v. Scott* (1978) 21 Cal.3d 284, 290; *People v. Lang* (1989) 49 Cal.3d 991, 1010.) And, if a party has once formally taken exception to a ruling, he is not required to renew the objection at each recurrence of the issue. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) "A litigant need not object, however, if doing so would be futile. (*People v. Brown* (2003) 31 Cal.4th 518, 553.)" (*People v. Wilson* (2008) 44 Cal.4th 758, 793.)

Under these circumstances, it was misconduct for the trial court to insist on the seating of an unqualified juror. (See *People v.*

Sturm (2006) 37 Cal.4th 1218, 1237-1238; and see *People v. Terry* (1970) 2 Cal.3d 362, 398 and *People v. Perkins* (2003) 109 Cal.App.4th 1562, 1567 [no objection required].)

The challenge for cause subsumed the peremptory challenge; it was a clear objection to the seating of this juror on this capital jury. An unqualified juror sat in judgment on the death penalty issue in violation of due process (see *People v. Yeoman* (2003) 31 Cal.4th 93, 114), and the death sentence must be set aside.

III. IT WAS ERROR TO DENY DEFENSE CHALLENGES TO TWO SWORN JURORS, ONE OF WHOM KNEW VICTIM CHUCK DURBIN'S BROTHER RANDY, AND ONE OF WHOM WAS FORMERLY RELATED BY MARRIAGE TO DURBIN'S MOTHER.

Due process was denied by the seating of jurors who knew the victim's relatives. (*Williams v. Taylor* (2000) 529 U.S. 420, 442.) Respondent argues that the challenge to these jurors was forfeited, and that there was no showing of bias sufficient to justify their removal.

A. The Objection Was Not Forfeited.

Respondent suggests that the defense effort to challenge juror no. 180002598 was forfeited, first because defense counsel did not orally examine her during the voir dire process. This consideration has no significance in reviewing appellant's argument; defense counsel had plenty of information without engaging in voir dire.

The juror had filled out a questionnaire, which disclosed substantial reasons for the defense to be leery of her.[8] Defense counsel

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[8] In her questionnaire the juror indicated that the death penalty was the only appropriate punishment for murder: "I use[d] to believe you shouldn't take a life --- but a lot of violent criminals that are in prison for life & no parole are getting out. I feel now if they are proven guilty for a violent killing the punishment should be death." She also indicated that the death penalty is not used enough: "people are getting out on lesser sentences." (14 CT 3063.) She indicated

indicated that that due to her close connection with law enforcement, "it was a very close question whether we were going to use a peremptory challenge." He noted that "it seems rather incredible" that her relationship with Randy Durbin did not come out on voir dire, and asked that the court reopen the issue of jury selection. (4 RT 852.)

Respondent also argues that the issue was conceded because defense counsel did not take the trial court's invitation to submit further information or legal authorities. To the contrary, defense counsel clearly stated his position, which was fully understood by the trial court. An objection is preserved if the record shows that the trial court understood the issue presented, and ruled on it. (*People v. Scott, supra*; *People v. Lang, supra.*)

Penal Code § 1089 provides that the trial court alone, without objection or request, may "order the juror to be discharged and draw the name of an alternate," whenever a juror dies or becomes ill, "or upon other good cause shown to the court is found to be unable to perform his or her duty." This Court has determined that Section 1089 authorizes a trial court to discharge a juror if "good cause" is

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that several friends and relatives were employed in law enforcement or the prison system. (14 CT 3051.)

shown that the juror is unable to perform his or her duty. When the trial court is put on notice that good cause may exist to discharge a juror, it is the duty of the court to make whatever inquiry is reasonably necessary to determine if the juror should be discharged, and the failure to make such an inquiry is error. (*People v. Farnam* (2002) 28 Cal.4th 107, 140-141; see *People v. Engelman* (2002) 28 Cal.4th 436, 442 [duty to inquire during deliberations].)

"Good cause" certainly includes the juror's views on capital punishment, if the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; *People v. Ghent* (1987) 43 Cal.3d 739, 767.)

When the trial court has reason to believe that a juror may be unable to perform his or her duties, the court must conduct "an inquiry sufficient to determine the facts." (*People v. Burgener* (1986) 41 Cal.3d 505, 519, overruled on another ground in *People v. Reyes* (1998) 19 Cal.4th 743.) Such an inquiry is required in part because, on appellate review, "the trial court's determination that good cause exists to discharge a juror must be supported by substantial evidence." (*People v. Delamora* (1996) 48 Cal.App.4th 1850, 1856.) Failure to conduct an adequate injury into allegations of juror misconduct or inability to perform has been held to be prejudicial and

reversible error. (See, e.g., *People v. Castorena* (1996) 47 Cal.App.4th 1051, 1066 [failure to conduct an adequate inquiry into allegations of juror misconduct was prejudicial where the trial court "did not have the requisite facts upon which to decide whether [the discharged juror] in fact failed to carry out her duty as a juror to deliberate or whether the jury's inability to reach a verdict was due, instead, simply to [the juror's] legitimate disagreement with the other jurors"]; *People v. Delamora* (1996) 48 Cal.App.4th 1850, 1856 [trial court's determination that good cause exists to discharge a juror must be supported by substantial evidence and where there is no evidence to show good cause because no inquiry of any kind was made, the procedure used was by definition inadequate]; see also *People v. McNeal* (1979) 90 Cal.App.3d 830, 838 ["Once the court is alerted to the possibility that a juror cannot properly perform his duty to render an impartial and unbiased verdict," the trial court "is obligated to make reasonable inquiry" as to the facts concerning impartiality and bias.].)

For these reasons, the trial court was under a duty, independent of counsel's objections, to make a suitable inquiry and remove the unqualified juror, and the lack of further objection by trial counsel does not preclude review on appeal.

Regarding juror no. 173558182, who was related to the victim's family, respondent criticizes appellant's argument as perfunctory. It is true that defense counsel made no challenge to the continued service of the juror when the new information came out. Nevertheless, appellant does not abandon this argument, since it appears that a juror sat in judgment who should have been disqualified.

B. The Juror Should Have Been Disqualified.

As noted by respondent, when the prosecutor brought up the name of Randy Durbin, Chuck Durbin's brother, one prospective juror indicated that she knew him very well and could not be fair, and the trial court excused her. (4 RT 564.) Juror no. 180002598, who was shortly called to the jury box, may have taken the cue to avoid being excused; she did not acknowledge any familiarity with the victim.

Respondent relies on the general test for review of a trial court's discretion in removing a sworn juror,[9] citing *People v. Williams* (2001) 25 Cal.4th 441, 447-448.[10] In *Williams* this Court re-

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[9] The jurors and alternates were sworn just before the information about the juror's association with Randy Durbin came to light. (3 RT 748, 773.)

[10] "A trial court's authority to discharge a juror is granted by Penal Code section 1089, which provides in pertinent part: 'If at any time, whether before or after the final submission of the case to the

viewed a trial court's decision to remove a sworn juror in a non-capital case, when it was determined that the juror disagreed with the law and would not follow the trial court's instructions (see discussion of section 1098, *supra*).[11]

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jury, a juror dies or becomes ill, *or upon other good cause shown to the court is found to be unable to perform his duty*, or if a juror requests a discharge and good cause appears therefor, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors.' [fn.] (Italics added; see also Code Civ. Proc., §§ 233, 234.) 'We review for abuse of discretion the trial court's determination to discharge a juror and order an alternate to serve. [Citation.] If there is any substantial evidence supporting the trial court's ruling, we will uphold it. [Citation.] We have also stated, however, that a juror's inability to perform as a juror must ' "appear in the record as a demonstrable reality." ' [Citation.]' (*People v. Marshall* (1996) 13 Cal.4th 799, 843.)"

[11] When the jury has not yet been sworn, the trial court's decision to discharge or not discharge a juror is also reviewed for abuse of discretion.

"'A challenge to an individual juror may only be made before the jury is sworn." (Code Civ. Proc., § 226, subd. (a).) The 'jury,' under this provision, does not include the alternates. (*People v. Cottle* (2006) 39 Cal.4th 246, 257.) 'Peremptory challenges shall be taken or passed by the sides alternately .... When each side passes consecutively, the jury shall then be sworn, *unless the court, for good cause, shall otherwise order*.' (Code Civ. Proc., § 231, subd. (d), italics added.) Accordingly, although the law no longer permits a trial court to reopen jury selection proceedings once a jury has been sworn (*People v. Cottle, supra,* 39 Cal.4th at p. 258), the emphasized portion of subdivision (d) of Code of Civil Procedure section 231 affords the court the discretion to reopen proceedings when the jury has not yet been sworn (see *People v. DeFrance* (2008) 167 Cal.App.4th 486, 504). '[D]iscretion is abused whenever the court

Significantly, neither of the parties in this appeal have cited any prior decisions in which a seated juror was found to have a relationship with a victim/ witness in a death penalty trial, particularly where the juror was allowed to remain on the jury.

The death penalty decision is unlike any other decision faced by a juror. It is not readily comparable to a decision on witness credibility, for instance, in which a juror might be able to set aside his or her feelings about an acquaintance/ witness and objectively judge the witness' credibility.

In large part, the penalty decision here had to do with the depth of the loss sustained by the Durbin family and how much weight that should have in the penalty determination. Surely the factor of victim impact is much weightier in the eyes of a juror who knows the brother of the homicide victim. This consideration was not adequately weighed by the trial court, and it was an abuse of discretion to refuse to remove juror no. 180002598.

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exceeds the bounds of reason, all of the circumstances being considered. [Citations.]'" (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

Although the jury was sworn before the juror's relationship to Randy Durbin came to light, the opening statements had not been given, there was no pre-instruction, and no witness had testified.

IV. THE RECORD CONTAINS INSUFFICIENT EVIDENCE OF PREMEDIATION TO SUPPORT THE CONVICTION ON COUNT I, MURDER OF CHUCK DURBIN.

Respondent seeks for evidence of premeditation in the shooting of Chuck Durbin, and claims to find it in the evidence of the plan to track down and shoot Juan Uribe. This reasoning should be rejected.

First, there is no evidence that the perpetrators intended to massacre everyone in the house, or even anyone who "got in the way." The object of the perpetrators was to eliminate Juan Uribe, who was the source of the escalating and increasingly lethal exchanges between the two factions.

Second, Chuck Durbin was not in the line of fire of Juan Uribe. He was not killed because he was in the "kill zone"; the elements of intent and premeditation which applied to the killing of Juan Uribe could not be applied across the board to the killing of another person who was not in the kill zone. (See *People v. Bland* (2002) 28 Cal.4th 313, 333 [victims in car were in "kill zone"]; *People v. Vang* (2001) 87 Cal.App.4th 554, 564-565 [shooting from outside the house; all persons in house, even those unknown to the defendant, were potential victims of attempted murder].)

Third, there is no rational reason to find premeditation in the absence of intent, or before intent is formed.[12] The defendant must know of the victim, or at least his existence or potential existence, before he can "deliberate" the killing. "The word 'deliberate' means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word 'premeditated' means considered beforehand." (CALJIC 8.20.)

The death of Chuck Durbin was the product of a separate mental state; it was not the direct product of the murder of Uribe. Yet respondent proposes that the element of premeditation be transferred from the killing of Uribe to the killing of Durbin. The doctrine which respondent proposes is a sort of "transferred premeditation," akin to the doctrine of transferred intent. (See *People v. Scott* (1996) 14 Cal.4th 544 [defendant intends to kill one person, but by mistake or inadvertence kills someone else].) According to this proposed doctrine, persons who premeditate the killing of one person necessarily premeditate the killing of another person who is later

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[12] See *United States v. Begay* (9th Cir. 2009) 567 F.3d 540, 547: "... [P]remeditation, at minimum, requires that at some point *after* the defendant forms the intent to kill the victim, he has the time to reflect on the decision to commit murder, that he in fact does reflect on that decision, and that he commits the murder with a 'cool-mind' after having engaged in such reflection."

killed but who is unknown to the perpetrators when the premeditation is formed. No authority is cited for this proposition.

Even if appellant killed Durbin intentionally, the element of premeditation was lacking. Since appellant did not know Durbin and had no reason to harm him, Durbin's death could not have been part of the planning process. Planning and motivation are the most common elements which may support a finding of premeditation (*People v. San Nicolas* (2004) 34 Cal.4th 614, 657-658; *People v. Anderson* (1968) 70 Cal.2d 15, 26-27); those elements are lacking on this record.

True, the elements of planning and motivation are not essential, and the record may disclose other evidence to support a finding of premeditation. (cf. *People v. Perez* (1992) 2 Cal.4th 1117, 1124-1125.) But respondent does not point to any other factor which would play a comparable role or which would substitute for evidence of planning and motivation on this record. This is necessary; without evidence to support premeditation, the first degree murder verdict must be reversed.

There was substantial confusion in the rendering of this verdict, and particularly on the question of premeditation in Count 1.

The prosecutor managed to conflate the elements of intent and premeditation in his argument to the jury; this alone could have produced the first degree murder verdict. (See Argument XII below.)

> And then the final [element] is the willful, deliberate, and premeditated that's required in first degree murder. And with respect to willful, deliberate, and premeditated does that mean there has to be a certain amount of plan[n]ing ahead of time? They get together and they draw diagrams and everything? No. It does not mean that at all. It means that the intent to kill, that the killing was accompanied by clear and deliberate intent to kill. That this intent to kill was formed upon pre-existing reflection and that the slayer must have weighed and considered the question of killing, the reasons for and against killing, and having in mind the consequences of killing, he chooses to kill and he does kill.
>
> And does this mean that there's a duration of time that's required? No. There's no – the law does not require any specific duration of time for willful, deliberate, and premeditated murder. The true test is not the duration of the time, but the extent of the reflection. A cold and calculated judgment can be arrived at in a short amount of time.
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> (9 RT 2123-2124; emphasis added.)

The resulting verdict reflected the jury's confusion. The jury found untrue the personal use allegation on Count 1. (11 CT 2386.) This hardly comports with the conviction on Count 1, since under any reasonable view of the evidence, if appellant killed Durbin he used a firearm to do it. (See Argument V below.)

The verdict is to be given a reasonable intendment, and be construed in light of the issues and the instructions. (*People v. Jones* (1997) 58 Cal.App.4th 693, 710.) Technical defects may be disregarded if the jury's intent to convict of a specific offense is unmistakably clear. (*People v. Webster* (1991) 54 Cal.3d 411, 417.) But the jury's intent is hardly clear here.

The jury must have found something lacking in the evidence relating to Count 1, and the lack of evidence of premeditation surely played a role. For these reasons, the conviction on Count 1 must be reduced to second degree, and the death penalty judgment must be set aside.

V. THE RECORD CONTAINS INSUFFICIENT EVIDENCE TO SUPPORT THE FINDING OF PERSONAL USE OF A FIREARM AS TO COUNT II, MURDER OF JUAN URIBE.

Respondent argues that there was evidence of firearm use in Count 2 because Chuck Durbin was killed in the effort to get at Juan Uribe. Respondent claims that "Chuck confronted the armed home invaders and was shot to death; Uribe was then shot to death in the kitchen." (RB 61.)

To the contrary, the record contains no evidence that Durbin was shot before Uribe. See testimony of Cindy Durbin at 6 RT 1383-1388, and testimony of Richard Diaz at 5 RT 1273-1274, 1348. Ms. Durbin describes shots fired at her (and presumably Uribe) first, before her husband rushed into the living room to protect the children. Diaz described the shooting of Uribe first, followed by the shooting of Chuck Durbin.

If Uribe was killed before Chuck Durbin was shot, then appellant's firearm use could not have facilitated the Uribe murder, and lacked a nexus to it.

In the alternative, respondent suggests that the firearm use enhancement to Count 2 be reduced to an arming enhancement

(Penal Code § 12022 (a)). Appellant agrees; this argument does not encompass a challenge to an arming enhancement.

However, such a modification would affect the death judgment. The prosecution case in aggravation was not overwhelming; the shooting of Uribe was provoked by Uribe's own criminal conduct, and the shooting of Durbin was not contemplated in advance. Appellant had no prior record. He was a hard worker and a pillar to his family, and had cared for several stepchildren and others who were homeless or abandoned. The personal firearm use allegation surely had a role in the penalty determination.

Alteration of this verdict should lead to the reversal of the death judgment.

VI. APPELLANT WAS DENIED THE RIGHT TO CONFRONTATION BY THE ADMISSION OF OUT-OF-COURT STATEMENTS AGAINST PENAL INTEREST OF HIS SON AND CO-DEFENDANT, PEDRO RANGEL III, THROUGH THE TESTIMONY OF ANOTHER SUSPECT, JESSE RANGEL, AND BY THE USE OF AN OUT-OF-COURT STATEMENT OF HIS WIFE, MARY RANGEL, INTRODUCED AS AN ADOPTIVE ADMISSION THROUGH THE TESTIMONY OF JESSE'S WIFE ERICA RANGEL.

Despite respondent's argument to the contrary, the out-of-court statements challenged here were testimonial: the statements were not casual conversations, but went to the heart of a murder case which was in the process of active investigation. The sources of the alleged statements were so highly interested in the outcome that they acted essentially as police agents; for that reason the statements were also unreliable.

The parties disagree about the application of confrontation guarantees to out-of-court statements characterized as "testimonial." The court of appeal has summarized the undecided state of this controversy in *People v. Garcia* (2008) 168 Cal.App.4th 261, 283:

> The People suggest there was no *Aranda/Bruton* error because none of Garcia's out-of-court statements in question were testimonial—i.e., none were made under circumstances that would lead an objective witness to believe they would be available for use at a later trial. The People rely on *Crawford v. Washington* (2004) 541 U.S. 36, 53–54 (*Crawford*), in

> which the United States Supreme Court held that the Sixth Amendment bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant ... had a prior opportunity for cross-examination." (Italics added.) Whether the *Aranda/Bruton* rule applies only to extrajudicial testimonial statements appears to be an unsettled question, and one that we need not address in this case. We note, without citation or reliance, that there is inconsistency in unpublished California appellate court opinions on the issue. We also note the federal Third Circuit Court of Appeals has "interpreted *Bruton* expansively, holding that it applies not only to custodial confessions, but also when the statements of the non-testifying co-defendant were made to family or friends, and are otherwise inadmissible hearsay." (*U.S. v. Mussare* (3d Cir. 2005) 405 F.3d 161, 168.)
>
> (Emphasis added.)

Appellant was prejudiced in the guilt phase because the contrived testimony of Jesse Rangel, providing a version of the offense through the mouth of Little Pete which erased Jesse himself from the crime scene, became the template for Richard Diaz' testimony, and that in turn influenced Cindy Durbin to change her eyewitness identification. In short, the out-of-court statement was the keystone to the prosecution case.

Appellant was prejudiced in the penalty phase because Mary Rangel's moral judgment on appellant's relative culpability necessarily influenced the jury's penalty determination. (See *Duncan v. Ornoski* (9th Cir. 2008) 528 F.3d 1222, 1240 [omitted evidence affected jury's assessment of defendant's exact role in crime.)

A. Jesse Rangel Repeated Purported Testimonial Statements by Little Pete.

Respondent argues that the statements of Little Pete were not testimonial because "[t]here is [no] evidence that Jesse was acting as some sort of 'police agent.'" (RB 69.)

To the contrary, Jesse was recruited as a police agent as soon as he was run to ground in New Mexico. Jesse and Erica gave statements to Officer Ciapessoni over the phone from their trailer in New Mexico. (6 RT 1598.) A short time later, Investigator Benabente appeared at the door of their trailer. (6 RT 1520, 1598.) Jesse was not arrested. Jesse and Erica were then flown back to California at county expense. (6 RT 1550.)

In this situation, Jesse was recruited as a police agent. His motives in relation to repeating or misconstruing the statement of Little Pete, or manufacturing it out of whole cloth, were the same as those of a police agent. (cf. *Crawford v.* Washington (2004) 541 U.S. 36, 56, fn. 7 ["Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse...."].) The conversations described by Jesse were not "casual remark[s] to an acquaintance." (RB 68.)

In *People v. Cage* (2007) 40 Cal.4th 965, relied on by respondent, this Court reviewed a conviction for domestic violence.

The alleged victim was not available for trial, and her statements were used in evidence over a confrontation objection. But she was in no sense a "police agent," because, unlike Jesse Rangel, she was never a suspect, she never worked hand in glove with investigators, and she never had a motive to shift blame from herself and onto the defendant.

Jesse Rangel was provided a perfect opportunity to manufacture evidence against appellant which would conveniently take himself out of the homicide scenario. Significantly, he did not go to the police with this highly relevant information, and did not mention it until he was trapped in New Mexico. In these circumstances the hand of the government is too plain to muzzle confrontation protections.

Appellant has cited *People v. Corella* (2004) 122 Cal.App.4th 461, 467, for the proposition that a nontestimonial hearsay statement continues to be governed by the "reliability" standard of *Ohio v. Roberts* (1980) 448 U.S. 46, 65. (See also *People v.* Smith (2005) 135 Cal.App.4th 914, 924.) Respondent counters with a citation to *People v. Cage, supra,* 40 Cal.4th at 981, fn. 10, exempting nontestimonial hearsay statements from the *Roberts* "reliability" requirement.

The *Corella* standard, adopting *Ohio v. Roberts* to nontestimonial hearsay, has not been overruled.

Moreover, California applies a similar reliability standard to purported statements against penal interest. Jesse Rangel's self-serving testimony repeating Little Pete's out-of-court statements fails this test.

In *People v. Blankenship* (1985) 167 Cal.App.3d 840, the defendant claimed that another person had confessed to him. When that person (the declarant) was called to testify, he exercised his self-incrimination privilege (like Little Pete here; see 3 RT 815-816) and thereby became unavailable. The defendant then proposed to testify to the declarant's confession, as a statement against penal interest (as Jesse Rangel did here). This gambit was refused, and the decision to exclude the proposed testimony was upheld on appeal. The defendant's proposed testimony was highly suspect "because defendant had a motive to falsify and because accurate details concerning the crime could be explained by defendant's own knowledge and guilt rather than [the declarant's]." (*Id.* at 849.)

The same can be said of Jesse Rangel in this case: (1) he had "a motive to falsify": he had the motive and opportunity to commit the crimes, and he faced capital murder charges if Cindy Durbin's initial identification of him turned out to be correct; moreover, (2)

"accurate details concerning the crime" could be explained by Jesse's own involvement, all he had to do was place the details in Little Pete's mouth.

A similar result was reached by this Court in *People v. Geier* (2007) 41 Cal.4th 555, 585. In *Geier* the defense offered a video-taped statement of the wife of a homicide victim, in which she claimed that she killed her husband. The statement was offered as a declaration against penal interest. However, since she was having an affair with one of the accomplices to the alleged murder, she had a motive to give a false statement against penal interest. The situation in *Geier* differs from the present case because there the trustworthiness of the declarant was in issue; here there is no videotape and it is the trustworthiness of the witness (Jesse Rangel), not the declarant, which is in issue.

Nevertheless, it is clear from both *Blankenship* and *Geier* that California courts do not uncritically accept evidence of statements against penal interest. There is a reliability factor much like the requirement from *Ohio v. Roberts, supra*. Here the testimony of Jesse Rangel fails the reliability test. His testimony was most likely contrived to shift the blame away from himself.

The out-of-court statements repeated by Jesse Rangel were the keystone of the prosecution case. They were provided in written

form as discovery to Richard Diaz while he was a co-defendant of appellant, and they thereby became the template for Diaz' own testimony. The combination of evidence against appellant finally obliged Cindy Durbin to change her identification. Thus appellant was prejudiced by the use of the out-of-court statement attributed to Little Pete.

B. Erica Rangel Repeated Purported Testimonial Statements by Mary Rangel as Adoptive Admissions of Appellant.

Respondent claims that appellant's confrontation objection was not preserved for failure to object. To the contrary, the defense objection to the Erica Rangel - Mary Rangel - Pete Rangel statement was explicitly linked to the objection to the Jesse Rangel - Little Pete statement. (See discussion at 6 RT 1560.) A foundational hearing was held. The objection was thoroughly presented to the trial court.

Respondent argues that appellant was not in a Catch-22 situation with respect to his wife and son; according to respondent, appellant could have explicitly denied the involvement of both him and his son in the face of his wife's accusations. (RB 75.) Perhaps, but what if Little Pete was guilty, and appellant knew it? Or what if appellant did not know if his son was guilty or not and was therefore not in a position to protest his son's innocence? Expecting appellant

to wade into a domestic quarrel with his wife in these circumstances is an unreasonable burden, and introduction of the adoptive admission is an unreasonable sanction.

Respondent further argues that any error was harmless. But respondent ignores the key role that these statements played in both phases of the trial. In particular, appellant's role in creating a false alibi tape was merely the act of an accessory (see Argument XI), and did not point necessarily to guilt on the murder charge. For these reasons, the judgment must be reversed.

VII. THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON FLIGHT AS EVIDENCE OF CONSCIOUSNESS OF GUILT, WHERE OTHER SUSPECTS ALSO FLED THE CRIME SCENE AND LATER FLED MADERA, BUT THE STANDARD FLIGHT INSTRUCTION ONLY PINPOINTED APPELLANT'S CONDUCT.

This Court has continued to express its confidence in the efficacy of the flight instruction, especially when employed to establish identity.

> We have explained that the flight instruction, as the jury would understand it, does not address the defendant's specific mental state at the time of the offenses, or his guilt of a particular crime, but advises of circumstances suggesting his *consciousness that he has committed some wrongdoing.* (*People v. Bolin* (1998) 18 Cal.4th 297, 327 (*Bolin*); *People v. Crandell* (1988) 46 Cal.3d 833, 871 (*Crandell*).) Thus, the flight instruction—amply supported by evidence of defendant's sudden departure for Mexico within days of Reyna's disappearance—was manifestly relevant to the issue whether defendant held an honest belief that Reyna's death was an accident for which he bore no criminal responsibility.
>
> In any event, we have repeatedly rejected the argument that instructions on consciousness of guilt, including instructions regarding the defendant's flight following the crime, permit the jury to draw impermissible inferences about the defendant's mental state, or are otherwise inappropriate where mental state, not identity, is the principal disputed issue. (E.g., *Jurado, supra*, 38 Cal.4th 72, 125; *People v. Moon* (2005) 37 Cal.4th 1, 28 (*Moon*); *People v. Smithey* (1999) 20 Cal.4th 936, 983; *Bolin, supra*, 18 Cal.4th 297, 327; *Crandell, supra*, 46 Cal.3d 833, 871; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579–580.) As we have

> said, even where the defendant concedes some aspect of a criminal charge, the prosecution is entitled to bolster its case, which requires proof of the defendant's guilt beyond a reasonable doubt, by presenting evidence of the defendant's consciousness of guilt. (E.g., *Moon, supra*, at p. 28; *Nicolaus, supra*, at pp. 579–580.) No reason appears to reconsider the soundness of these decisions and conclusions. We find no error.
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> (*People v. Zambrano,* (2007) 41 Cal.4th 1082, 1160, overruled on other grounds in *People v. Doolin* (2008) 45 Cal.4th 390, 421, fn. 22; italics in original, underlining added.)

The Court of Appeal has expressed similar confidence in the flight instruction.

> ... [A] defendant's conduct after a crime, including flight, is a relevant factor in determining his liability for aiding and abetting the crime. (*People v. Jones* [1980] 108 Cal.App.3d [9] at p. 15.)
>
> (*People v. Garcia* (2008) 168 Cal.App. 4th 261, 274.)

These authorities demonstrate the efficacy of the instruction in focusing the jury's attention on the defendant's conduct after the offense. They also demonstrate the unfairness in reading an instruction which focuses only on the defendant's flight, and ignores similar conduct by other suspects.

Respondent's argument in support of the instruction fails to address appellant's argument that CALJIC 2.52 should not have been read at all in these circumstances. (See AOB 136-137.) An

attack on a jury instruction which was improperly read must be reviewed even in the absence of an objection. (Penal Code § 1259; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7; see *Brown v. Payton* (2005) 544 U.S. 133, 146.)

Reading CALJIC 2.52, unaltered, unbalanced the jury's consideration of the evidence, particularly in their assessment of Jesse Rangel's credibility. Respondent seems to accept appellant's characterization of 2.52 as a pinpoint instruction; in the circumstances of this case, and especially in light of the prosecution guilt phase argument, it is not hard to see the instruction as argumentative. (See *People v. Wright* (1988) 45 Cal.3d 1120, 1141.) The simple answer would have been not to read it all.

A more challenging path would have been to fashion an instruction which pointed to the flight of Jesse Rangel and Richard Diaz as well. This would have been an appropriate solution if chosen by the trial court. (See *People v. Henderson* (2003) 110 Cal.App.4th 737, 744.) The *Henderson* opinion treated such an instruction as necessary only on request. But the *Henderson* court did not consider that a modified instruction might be the only solution, consistent with a reading of CALJIC 2.52, which does not create a burden-

shifting instruction. (Again, the *Henderson* solution does not arise at all if CALJIC 2.52 is simply omitted.)

Where there is evidence of third-party culpability (as here), and where there is evidence of flight by the third party suspect (as here), a modified version of CALJIC 2.52 focusing on the third party suspect may be the only path out of the trial court's dilemma. But solution of the dilemma is primarily the duty of the trial court. Since the instruction could be omitted entirely, it is not the defendant's sole responsibility to solve the dilemma created by the use of CALJIC 2.52.

Appellant was prejudiced. Respondent points to other evidence such as evidence that appellant "fled Madera" (RB 80), but that is circular reasoning where the flight instruction itself is challenged. Respondent also relies on the testimony of Richard Diaz, but he is one of the accomplices who fled. Evidence concerning the alibi tape and appellant's efforts to dispose of the firearms only relates to appellant's role as an accessory after the fact (see Argument XI) and not to his liability as a principal.

For these reasons the objection to CALJIC 2.52 was not waived. The pinpoint instruction was argumentative in these circumstances, and shifted the burden of proof away from the prosecution, where it belonged.

VIII. THE TRIAL COURT FAILED TO INSTRUCT *SUA SPONTE* ON THE LESSER INCLUDED OFFENSES OF VOLUNTARY MANSLAUGHTER AND INVOLUNTARY MANSLAUGHTER.

Respondent correctly points out that Chuck Durbin legitimately exercised the right to defense of habitation, and appellant could not base an argument of imperfect self-defense on his perceived need to defend himself against Durbin. (See *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 834.)

Appellant was nevertheless entitled to *sua sponte* jury instructions on voluntary and involuntary manslaughter, based on evidence of intoxication and provocation or heat of passion. (See *Taylor v. Workman* (10th Cir. 2009) 554 F.3d 879 [federal relief granted for failure to instruct on lesser-included non-capital offense of second degree murder].)

In *People v. Moye* (2009) 47 Cal.4th 537, this Court recently dealt with asserted error in failure to instruct on heat of passion in a murder case. The victim in *Moye* had assaulted the defendant the night before. The next morning the defendant caught the victim kicking his car. He and his friends pursued the victim, and the defendant ultimately beat him to death with a baseball bat.

The defendant, however, testified that he was attacked again by the victim, and that he took the bat away from the victim. The defendant testified that he acted strictly in self defense, and not from heat of passion or provocation based on events of the night before. This testimony was deemed to eliminate the basis for a jury instruction on heat of passion. "In the face of defendant's own testimony, no reasonable juror could conclude defendant acted ' " 'rashly or without due deliberation and reflection, and from this passion rather than from judgment ...' " [citations]' (*Breverman, supra*, 19 Cal.4th at p. 163) when, according to defendant, he responded to Mark's attack with the baseball bat by grabbing the bat from him and using it to defend himself from Mark's continuing advances." (*Id.* at 554.)

The present case does not involve an abandonment of the heat of passion defense. To the contrary, defense evidence and argument stressed the trauma of his son's shooting on appellant, and how it inflamed him on the night of the Uribe/ Durbin shootings.

Respondent characterizes these shootings as motivated by "retaliation" and "revenge," and not by the fear of imminent harm to appellant's family. Nevertheless, uncontraverted evidence established that appellant's son was shot in the head two weeks prior to the shootings of Uribe and Durbin.

Respondent views two weeks as a sufficient cooling off period. To the contrary, the factions continued sniping at each other over the two weeks after Little Pete was shot. Jesse Rangel and Tino Alvarez shot up Juan Uribe's car. (4 RT 1097.) Juan Uribe and Chris Castaneda confronted Richard Diaz at a market, and Castaneda hit Diaz in the face. (5 RT 1340-1342.) The day before the murders Jesse Rangel was seen with gun under the seat of his jeep, and he said that he was going to "get even" with Juan. (8 RT 2088.)

The homicidal dispute between Juan Uribe and Little Pete remained an open wound through the time of the Uribe/ Durbin shootings. Provocation or heat of passion may be supported by evidence of a dispute which extends over a period of time. (See *People v. Wharton* (1991) 53 Cal.4th 522, 571 ["his defense theory at trial was that he killed after enduring provocatory conduct by the victim over a period of weeks"]; contrast *People v. Avila* (2009) 46 Cal.4th 680, 706-707.)

The provocation incited by the shooting of Little Pete did not dissipate in a short period of time. In the absence of police intervention, the two factions ratcheted up the violence. Emotions continued to run high, and the shootings at the Durbin house, particularly the shooting of Juan Uribe, were the result of this continuing provocation.

Respondent argues that in any event there was no prejudicial error because the jury convicted on the greater offense of premeditated murder. (RB 85, citing *People v. Abilez* (2007) 41 Cal.4th 472, 516, *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1145, and *Schad v. Arizona* (1991) 501 U.S. 624, 645-648.)

The principle which respondent relies on has limited application to this record. The authorities cited by respondent point out that the constitutional requirement of jury instructions on lesser included offenses is meant to guard against an "all or nothing" choice by the jury. (*Schad v. Arizona, supra.*) This concern is satisfied when the jury is given a lesser alternative such as second degree murder, but rejects it in favor of premeditated murder. (*People v. Abilez, supra.*) It would serve no clear purpose to require instructions on yet another lesser included offense such as manslaughter, which merely contains a subset of the elements of second degree murder.

This principle does not apply to this record because the element of provocation, which would have been introduced through an instruction on voluntary manslaughter, does not appear in the jury instructions at all. It was not implicitly rejected by the first degree murder verdict. If the jury had been instructed on voluntary manslaughter through heat of passion, they would have been confronted

with an entirely new set of considerations, considerations not addressed by the instructions and findings on first and second degree murder.

To illustrate this point, it is worth recalling that CALJIC 8.73, which would have directed the jury to consider provocation on the issue of premeditation,[13] was not read to this jury. (See *People v. Avila, supra,* 46 Cal.4th at 707-708.) The issue of provocation was not presented in these jury instructions. Thus, voluntary manslaughter through provocation was not an issue necessarily decided against appellant by the first degree murder verdict.

Self-defense did not figure into the defense case at trial. Therefore, unlike the situation in *People v. Moye, supra,*[14] there was no implied rejection of the evidence supporting the heat of passion

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[13] "If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation."

[14] "Once the jury rejected defendant's claims of reasonable and imperfect self-defense, there was little if any independent evidence remaining to support his further claim that he killed in the heat of passion, and no direct testimonial evidence from defendant himself to support an inference that he subjectively harbored such strong passion, or acted rashly or impulsively while under its influence for reasons unrelated to his perceived need for self-defense." (47 Cal.4th at 557.)

instruction. Prejudice must be evaluated in view of the abundant evidence of provocation.

Whether shooting the defendant's son in the head was an act of provocation was at least an arguable issue on this record. There was substantial evidence of provocation. The issue was not resolved against appellant by the verdict on greater offenses whose definitions failed to mention or take into account the question of provocation.

Appellant has argued that the standard of review for federal constitutional error must apply in these circumstances. (AOB 141, citing *Chapman v. California* (1967) 386 U.S. 18.) Respondent also adopts the *Chapman* standard. (RB 85, citing *Neder v. United States* (1999) 527 U.S. 1.) The *Chapman* standard is necessary in these circumstances because in the absence of instructions on heat of passion, the state trial court failed to adequately define the offense to the jury. (See dissenting opinions of Justice Kennard in *People v. Moye, supra,* 47 Cal.4th at 563, and *People v. Breverman* (1998) 19 Cal.4th 142, 194.)[15]

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[15] The majority opinion in *Moye* concluded that (unlike here) the question of the standard of review had not been adequately raised in briefing. "Accordingly, the claim must properly await a case [such as the present case] in which it has been clearly raised and fully briefed." (*People v. Moye, supra,* 47 Cal.4th at 558, fn. 5.)

For these reasons appellant was prejudiced by the lack of manslaughter instructions, and the conviction must be reversed.

IX. THE TRIAL COURT FAILED TO INSTRUCT *SUA SPONTE* ON THE PRINCIPLES OF ACCOMPLICE TESTIMONY, AS APPLIED TO THE OUT-OF-COURT STATEMENTS OF APPELLANT'S SON AND CO-DEFENDANT.

Respondent agrees that Little Pete was an accomplice as a matter of law. Respondent denies, however, that Jesse Rangel was an accomplice. (RB 88.)

Jesse Rangel was an accomplice because he was subject to prosecution for the same offenses charged against appellant. Jesse sought revenge for the shooting of Little Pete; he participated with Tino Alvarez in the fusillade directed at Juan Uribe's car. (4 RT 1086, 1100.) Jesse was identified by Cindy Durbin as one of the shooters (6 RT 1397, 1437); despite her recantation, this identification was fully admissible as evidence of Jesse's guilt (see Evidence Code § 1235). Beyond that, Jesse fled Madera, then fled California, shortly after the shootings; this was substantial evidence of guilt (see Argument VII above).

In these circumstances the accomplice distrust and corroboration instruction was necessary.

This Court has held that even a statement against penal interest may be excluded if its trustworthiness is sufficiently in doubt. (See *People v. Geier* (2007) 41 Cal.4th 555, 584.) The trial court

may find that a statement against penal interest is not trustworthy, and therefore not admissible as a statement against interest, even if no independent evidence affirmatively shows untrustworthiness. (*People v. Frierson* (1991) 53 Cal.3d 730, 744-746.)

Respondent takes the position that an out-of-court statement against penal interest uttered by an accomplice (Little Pete) is necessarily more reliable than the same statement made by the accomplice when testifying under oath. In this way, respondent seeks to reconcile the holding of *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 105-106, with that of *People v. Brown* (2003) 31 Cal.4th 518, 555-556.

This Court's holding in *Brown* should not be so interpreted, in part because it would set evidence law on its head. Considerations of confrontation necessarily imply that sworn in-court statements, though impeachable, are more reliable at the outset than out-of-court statements. As stated in *Crawford v. Washington* (2004) 541 U.S. 36, 62,

> Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable

> evidence (a point on which there could be little dissent), but about how reliability can best be determined. [Citations.]

By this test, an out-of-court statement which is not subject to cross-examination can never be deemed automatically more reliable than an in-court statement which is subject to cross-examination.[16]

Anything in the *Brown* opinion (2003) which appears to elevate the reliability of out-of-court statements above the reliability of in-court statements should be re-evaluated in the light of the Supreme Court's later opinion (2004) in *Crawford v. Washington, supra.* Whether an accomplice distrust and corroboration instruction is necessary should be evaluated under the standard expressed in *People v. Coffman and Marlow, supra*, regardless of whether the accomplice statements were uttered in court or out of court.

It makes no difference whether the purported statement of Little Pete was "testimonial" or not.[17] The instructional requirement

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[16] With respect to statements against penal interest specifically, see *Lilly v. Virginia* (1999) 527 U.S. 116, 134 (plurality opinion) ["[A]ccomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule"].

[17] See *People v. Garcia* (2008) 168 Cal.App.4th 261, 283: "The People suggest there was no *Aranda/Bruton* error because none of Garcia's out-of-court statements in question were testimonial—i.e., none were made under circumstances that would lead an objective witness to believe they would be available for use at a later trial. The People rely on *Crawford v. Washington* (2004) 541 U.S. 36, 53–54 (*Crawford*), in which the United States Supreme Court held that

stems from Penal Code § 1111 and not directly from the Confrontation Clause.

The error here was prejudicial because Jesse Rangel's status as an accomplice was insufficiently taken into account by the jury instructions, because the accomplice statement of Little Pete was untrustworthy given its source in Jesse Rangel's testimony, and because the entire prosecution case grew from Jesse Rangel's claim that Little Pete made a detailed confession to him.

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the Sixth Amendment bars 'admission of *testimonial* statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant ... had a prior opportunity for cross-examination.' (Italics added.) Whether the *Aranda/Bruton* rule applies only to extrajudicial testimonial statements appears to be an unsettled question, and one that we need not address in this case. We note, without citation or reliance, that there is inconsistency in unpublished California appellate court opinions on the issue. We also note the federal Third Circuit Court of Appeals has 'interpreted *Bruton* expansively, holding that it applies not only to custodial confessions, but also when the statements of the non-testifying co-defendant were made to family or friends, and are otherwise inadmissible hearsay.' (*U.S. v. Mussare* (3d Cir. 2005) 405 F.3d 161, 168.)"

X. THE CONVICTION ON COUNT TWO, MURDER OF JUAN URIBE, MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO READ A JURY INSTRUCTION ON THE EFFECT OF VOLUNTARY INTOXICATION ON THE ELEMENT OF SPECIFIC INTENT TO AID AND ABET.

Respondent acknowledges that there was substantial evidence of intoxication, and that evidence of intoxication was relied on by the defense in an effort to raise a doubt on the key element of premeditation. Respondent implicitly acknowledges that appellant was convicted as an aider and abettor to the murder of Juan Uribe. Respondent argues, however, that the instruction relating evidence of voluntary intoxication to the element of specific intent to aid and abet the perpetrator is a pinpoint instruction, that it need only be given on request of the defendant, and that the absence of a request amounts to a waiver.

Assuming for the purpose of argument that the instruction relating voluntary intoxication to aider and abettor liability (CALJIC 4.21.2) is not required *sua sponte,* there was ample demand for the instruction on this record.

First, a partial instruction relating evidence of intoxication to the element of premeditation was read. The instruction, however, was limited to the element of premeditation and deliberation; it did

not extend to mental states in general.[18] (Compare *People v. Castillo* (1997) 16 Cal.4th 1009, 1016-1017, in which CALJIC 4.21 was worded to refer to "mental states" in general, and thus included premeditation; no error to fail to modify the instruction *sua sponte* to apply specifically to premeditation.)

The reading of a partial instruction, which omits a key element, is enough to satisfy the requirement for a "pinpoint" request. See *People v. Castillo, supra,* 16 Cal.4th at 1015 (emphasis added):

> Even if the court has no sua sponte duty to instruct on a particular legal point, when it does choose to instruct, it must do so correctly. "Although we might hesitate before holding that the absence of any instruction on voluntary intoxication in a situation such as that presented in this case is prejudicial error, when a partial instruction has been given we cannot but hold that the failure to give complete instructions was prejudicial error." (*People v. Baker* (1954) 42 Cal.2d 550,

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[18] CALJIC 4.21: "In the crimes of murder in the first degree and attempted murder of the first degree, a necessary element is the existence in the mind of the defendant of the mental state of premeditation.

"If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding whether defendant had the required mental state.

"If from all the evidence you have a reasonable doubt whether the defendant formed that mental state, you must find that he did not have such mental state."

> (12 CT 2657; 9 RT 2262; emphasis added. CALJIC 4.21 does not appear on the list of prosecution requested instructions, 12 CT 2697.)

575-576, and quoted in *People v. Saille, supra,* 54 Cal.3d at p. 1119.)

Partial instructions were read on voluntary intoxication, relating voluntary intoxication to premeditation but not to the shared intent to commit a crime whose natural and probable consequence was the death of Juan Uribe; the trial court was therefore under a duty to give complete instructions even in the absence of a request.

Second, the defense made known its request for instructions on voluntary intoxication (CALJIC 3.01, 3.02, 4.21). The issue was squarely before the trial court. It is the trial court which has the responsibility for giving complete and correct instructions, a responsibility that cannot be abdicated to counsel. (See *Brown v. Payton* (2005) 544 U.S. 133, 146.)

Third, the jury made known its confusion on the relationship of intoxication to the necessary mental states. The jury note read, "Clarification of a law, CALJIC 3.02, 3.01. Intoxication consideration." (10 RT 2292.) The trial court was obliged to answer the question pursuant to *People v. Mendoza, supra*; instead the trial court reread CALJIC 4.21, which the jury had already heard and which had failed to answer their question.

Evidently, the jury could not determine whether voluntary intoxication was relevant to the anticipation of the natural and proba-

ble consequences of the acts of a co-defendant. That was an issue of some controversy, which had only been decided shortly before appellant's trial began. (See *People v. Mendoza* (1998) 18 Cal.4th 1114.) The trial court was obliged to answer the jury's question consistent with *Mendoza*, quite apart from any issue of whether trial counsel had made an adequate request for a pinpoint instruction.

Respondent (RB 93) argues that the instruction on aider and abettor liability for "natural and probable consequences" (CALJIC 3.02) was limited to the charge of attempted murder of Cindy Durbin, which was assertedly a natural and probable consequence of "the commission of the crime of murder." (12 CT 2648.)

True, CALJIC 3.02 included language which referred to the attempted murder of Cindy Durbin. But CALJIC 3.02 was not limited to the attempted murder charge. Rather, it applied to all charges in the information: "One who aids and abets another in the commission of a crime is not only guilty of that crime, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime originally aided and abetted." (12 CT 2648.) This instruction was not limited to the Cindy Durbin attempted murder charge.

The jury asked for instruction on the relationship between evidence of intoxication and aider and abettor liability, specifically under CALJIC 3.02. Their question clearly embraced the possibility that appellant might be deemed guilty of the murder of Juan Uribe, based not on "traditional" aider and abettor liability (CALJIC 3.01), but on the doctrine of natural and probable consequences (3.02).

Since the standard instruction (4.21) failed to connect intoxication with aider and abettor liability under the natural and probable consequences doctrine, it was misleading to simply read it again in response to the jury's question.

The jury probably convicted appellant of the murder of Juan Uribe as a "natural and probable consequence" of the invasion of the Durbin home, and without consideration of evidence of voluntary intoxication. Indeed, since that connection had only recently been an issue of controversy, pending the *Mendoza* opinion, there is every likelihood that the jury's confusion produced the first degree murder verdict in Count 2.

For these reasons, appellant was prejudiced by the lack of accurate instructions, and the conviction on Count 2 must be reversed.

XI. THE TRIAL COURT ERRED BY FAILING TO CONSIDER A JURY INSTRUCTION ON ACCESSORY AS A LESSER-RELATED OFFENSE.

Appellant argues that this Court in *People v. Birks* (1998) 19 Cal.4th 108 overruled its prior decision in *People v. Geiger* (1984) 35 Cal.3d 510; that as a result of *Birks*, instructions on lesser related offenses are no longer mandatory at the request of the defense; that the *Birks* opinion does not however preclude trial court discretion to instruct on lesser related offenses, even over the objection of the prosecution; that the *Birks* opinion did not determine whether such discretionary trial court authority would violate the separation of powers doctrine; that such discretionary trial court authority to instruct on lesser related offenses would not violate the separation of powers doctrine; that substantial evidence in this case supported an instruction on accessory (Penal Code § 32); and that appellant was prejudiced by the refusal to instruct on accessory as a lesser related offense.

In addition, the failure to read lesser related offense instructions, like the failure to read lesser included offense instructions, should be deemed a violation of federal due process. (*Beck v. Alabama* (1980) 447 U.S. 625, 637; *Schad v. Arizona* (1991) 501 U.S. 624.)

Respondent attempts to finesse this argument by casually claiming, incorrectly, that the *Birks* opinion rejected appellant's claim. (RB 96.) Indeed, respondent asserts that the separation of powers issue was "fully addressed" in *Birks,* and that this Court "has not since disavowed it even if some members of this Court felt the discussion unnecessary to the result."

Respondent offers no precise citation for this characterization of *Birks,* which in fact did not reach a final conclusion on the trial court's discretion to instruct on lesser related offenses (as opposed to the defendant's right to insist on such instructions). The following passage contains the entire discussion of the issue in the majority opinion.

> One final consideration influences us to retreat from *Geiger*'s holding that the California Constitution grants criminal defendants an affirmative right to insist upon consideration of uncharged and nonincluded offenses over the prosecution's objection. Despite the *Geiger* majority's contrary conclusion, a serious question arises whether such a right can be reconciled with the separation of powers clause of the same document.
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> The California Constitution (art. III, § 3) provides that "[t]he powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."
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> It is well settled that the prosecuting authorities, exercising executive functions, ordinarily have the sole discretion to determine whom to charge with public offenses and what charges to bring. (E.g., *People v. Eu-*

banks (1996) 14 Cal.4th 580, 588-589; *Dix v. Superior Court* (1991) 53 Cal.3d 442, 451.) This prosecutorial discretion to choose, for each particular case, the actual charges from among those potentially available arises from " 'the complex considerations necessary for the effective and efficient administration of law enforcement.'" (*People v. Keenan* (1988) 46 Cal.3d 478, 506, quoting *People v. Heskett* (1982) 30 Cal.3d 841, 860.) The prosecution's authority in this regard is founded, among other things, on the principle of separation of powers, and generally is not subject to supervision by the judicial branch. (*People v. Wallace* (1985) 169 Cal.App.3d 406, 409; *People v. Adams* (1974) 43 Cal.App.3d 697, 708; see also *Taliaferro v. Locke* (1960) 182 Cal.App.2d 752.)

In his *Geiger* dissent, Justice Richardson argued vigorously that allowing a defendant to dictate the consideration of crimes neither charged nor necessarily included in the charge violates these principles. Quoting an earlier Court of Appeal opinion by Justice Feinberg, Justice Richardson reasoned that " '[t]o hold that a defendant can require that a jury be told that he can be convicted of crime X when he has been charged with crime Y, a charge that does not necessarily include crime X, is to hold that the defendant, in effect, has the power to determine what crime he is charged with, *a power that resides exclusively with the prosecution.*'" (*Geiger, supra*, 35 Cal.3d 510, 533 (dis. opn. of Richardson, J.), quoting *People v. West* (1980) 107 Cal.App.3d 987, 993, italics added by *Geiger*.) [fn. 18.]

[fn. 18] Lesser *necessarily included offenses* do not present a similar problem, because the prosecution understands that when it chooses to charge the greater offense, it is by definition charging the elements of every lesser offense necessarily included therein. Hence, by its selection of the stated charge, the prosecution has retained the exclusive power to determine the specific crime or crimes which may be presented to the jury. [end footnote]

The *Geiger* majority rejected this argument on the premise that once the prosecution has had a "full opportunity to exercise [its] charging powers," and the case is at issue, the process, including the instructions, by which the defendant's guilt or innocence is thereafter determined are exclusively judicial matters. (*Geiger, supra*, 35 Cal.3d 510, 530.) The majority (*id.* at pp. 529-530) relied heavily on broad language to that effect in *People v. Tenorio* (1970) 3 Cal.3d 89, 94 (*Tenorio*). But *Tenorio*, like our more recent decision in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), concerned only the established judicial power to dispose of charges and sentencing allegations the prosecution has chosen to submit. Neither of these decisions stands for the proposition that a court, upon the defendant's demand, may add new charges without the prosecution's consent. Despite the *Geiger* majority's contrary conclusion, the concern arises that whether additional nonincluded offenses are judicially injected at the pleading stage, or during the trial itself, the prosecutorial discretion to control the charges is equally undermined.

We need not finally resolve the separation of powers issue here. It is enough to invoke the established principle that when reasonably possible, courts will avoid constitutional or statutory interpretations in one area which raise "'serious and doubtful constitutional questions'" (*Romero, supra*, 13 Cal.4th 497, 509, quoting *Miller v. Municipal Court* (1943) 22 Cal.2d 818, 828) in another.

Our recent *Romero* decision applied this principle where an issue of statutory construction implicated the separation of powers clause. In *Romero*, we faced a provision that might or might not be read to require the prosecutor's approval before the court could exercise, in a Three Strikes case, its general statutory authority to dismiss a sentencing allegation in furtherance of justice. In order to free the Three Strikes statute from constitutional doubt, we adopted the latter interpretation, noting the rule of *Tenorio* and its progeny that the Legislature cannot adopt laws giving the pros-

ecutor power to "veto . . . judicial decisions related to . . . sentencing or other *disposition* of criminal charges." (*Romero, supra*, 13 Cal.4th 497, 512, italics added.)

Romero thus supports the principle that the power to dispose of charges is judicial in nature, but as explained above, it is ordinarily the prosecution's function to *select* and *propose* the charges. Hence, separation of powers difficulties may arise, as they did in *Romero*, from a constitutional interpretation that requires a *judicial* officer, acting at the defendant's unilateral insistence, to *add* lesser nonincluded offenses which the prosecution has chosen to withhold in the exercise of its charging discretion, and to which it objects. This substantial concern additionally informs our conclusion, contrary to *Geiger*, that the California Constitution should not be construed to grant criminal defendants an affirmative right to insist on jury consideration of nonincluded offenses without the prosecutor's consent.

(19 Cal.4th at 134-136; underlining added; italics in original.)

The first problem with citing the *Birks* opinion as final authority on the separation of powers issue is that the opinion itself expressly declines to settle the issue. ("We need not finally resolve the separation of powers issue here.") Consequently, this portion of the opinion is *dicta.*[19] At most the opinion raises a "serious question"

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[19] "A decision 'is not authority for everything said in the . . . opinion but only "for the points actually involved and actually decided." [Citations.]' (*Santisas v. Goodin* (1998) 17 Cal. 4th 599, 620.) '[O]nly the ratio decidendi of an appellate opinion has precedential effect [citation] . . . .' (*Trope v. Katz* (1995) 11 Cal.4th 274, 287.) Thus, 'we must view with caution seemingly categorical directives not essential to earlier decisions and be guided by this dic-

whether mandatory instructions on lesser related offenses at defense request can be reconciled with the separation of powers doctrine.

The second problem with reliance on the *Birks* dictum in this context is that it only addresses the mandatory obligation to instruct on lesser related offenses, as embodied in *Geiger*. (" ...an affirmative right to insist..."; "...allowing a defendant to dictate..."; "...the defendant, in effect, has the power..."; "...upon the defendant's demand..."; "...the defendant's unilateral insistence..."; "...an affirmative right to insist....") Even as quoted, the *Birks* dictum does not address the separate question of whether the trial court has the non-mandatory discretion to instruct on lesser related offenses.

For these reasons, this Court has barely hinted at the issue of separation of powers as related to the trial court's discretion to instruct on lesser related offenses[20]; the issue was certainly not addressed directly in *Birks*, even in the quoted discourse commenting

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tum only to the extent it remains analytically persuasive.' (*Marks II, supra,* 1 Cal.4th at p. 66.)

"For several reasons, we do not find *McDonald*'s dictum analytically persuasive...."

(*People v. Mendoza* (2000) 23 Cal.4th 896, 915.)

[20] See *People v. Rundle* (2008) 43 Cal.4th 76, 144 [under strict elements test, assault is not a lesser included offense of attempted rape, and trial court has no *sua sponte* duty to instruct on it].

on the constitutional dimensions of the post-*Geiger* mandatory instruction debate.

To eliminate the trial court's discretion to instruct on lesser related offenses supported by the evidence would violate the separation of powers doctrine of the state constitution (Cal. Constitution, art. III, § 3)[21] and the United States Constitution.[22]

This Court has drawn the line separating prosecution authority from judicial authority at the charging or pre-filing phase. The prosecutor may so structure the criminal charge as to eliminate judicial discretion over the ultimate sentencing options available to the trial court. For instance, by charging a juvenile in adult court the prosecutor may eliminate the trial court's ultimate discretion to sentence to the Youth Authority. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 556.)[23] This authority is contrasted to the disposi-

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[21] "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

[22] See *Coolidge v. New Hampshire,* 403 U.S. 443 (1971). The separation of powers doctrine is implicit in the Constitution. It is traced to the Federalist Papers, no. 47, and by the authors of the Federalist Papers to the Baron de Montesquieu, *L'Esprit des Lois.*

[23] "A consideration of the statutory changes effected by Proposition 21, however, establishes that the legislative branch has eliminated the judicial power upon which petitioners base their claim. It

tion phase; there it is deemed unconstitutional to fetter the judicial authority, for instance by requiring prosecutor approval and thus conditioning the trial court's authority to strike a prior conviction allegation in a manner to reduce the sentence which would otherwise be imposed on a repeat offender. (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.)

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is true that, prior to the enactment of section 707(d), section 707 provided that the juvenile court, after a hearing, made the decision whether certain minors charged with particular offenses were fit for treatment under the juvenile court law or instead could be charged and sentenced in criminal court. (See *Edsel P. v. Superior Court* (1985) 165 Cal. App. 3d 763, 786 [fitness determination constitutes a judicial function].) Now, however, with regard to minors within the scope of section 707(d), the statute confers upon the prosecutor the discretion to determine whether accusations of criminal conduct against the minor should be filed in the juvenile court or criminal court. If the prosecutor initiates a proceeding in criminal court, and the circumstances specified in section 707(d) are found to be true, the court generally is precluded by statute from ordering a juvenile disposition. (Welf. & Inst. Code, § 1732.6, subd. (b)(2); see Pen. Code, §§ 1170.17, 1170.19.)

"The prosecutor's discretionary charging decision pursuant to section 707(d), which thus can limit the dispositional alternatives available to the court, is no different from the numerous prefiling decisions made by prosecutors (e.g., whether to charge a wobbler as a felony, or whether to charge a particular defendant with assault, assault with a deadly weapon, or another form of aggravated assault, or whether to charge manslaughter or murder, or whether to allege facts that would preclude probation eligibility [Pen. Code, § 1203.06 et seq.]) that limit the dispositions available to the court after charges have been filed. Conferring such authority upon the prosecutor does not limit the judicial power, after charges have been filed, to choose among the dispositional alternatives specified by the legislative branch...."

The *Manduley* opinion makes clear that the charging decision is within the prosecutor's purview, as contrasted to trial determinations, particularly those that have not been excluded from judicial authority by relevant legislation:

> In *Davis, supra*, 46 Cal.3d at pages 81-86, we distinguished a line of decisions that invalidated statutory provisions purporting to give a prosecutor the right to veto decisions made by a court after criminal charges had been filed. (*E.g., People v. Superior Court (On Tai Ho)* (1974) 11 Cal.3d 59 (*On Tai Ho*) [district attorney could not disapprove trial court's decision, following a hearing, to grant diversion]; *Esteybar v. Municipal Court* (1971) 5 Cal.3d 119 [district attorney could not veto magistrate's decision to reduce a wobbler to a misdemeanor]; *People v. Tenorio, supra,* 3 Cal.3d 89 [district attorney could not preclude trial court from exercising discretion to strike an allegation of a prior conviction for the purpose of sentencing].) Such decisions are based upon the principle that once the decision to prosecute has been made, the disposition of the matter is fundamentally judicial in nature. A judge wishing to exercise judicial power at the judicial stage of a proceeding never should be required to " 'bargain with the prosecutor'" before doing so. (*Davis, supra,* 46 Cal. 3d at p. 83.) Charging decisions made before the jurisdiction of a court is invoked and before a judicial proceeding is initiated, on the other hand, involve purely prosecutorial functions and do not limit judicial power. (*Id.* at p. 86.) This court recently reiterated these principles when we construed a provision of the "Three Strikes" law (Pen. Code, § 667, subd. (f)) not to require the prosecutor's consent before a trial court could exercise its authority at sentencing to strike a prior-felony-conviction allegation pursuant to Penal Code section 1385. (*Romero, supra,* 13 Cal.4th at pp. 509-517.)
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> (*Manduley v. Superior Court, supra,* 27 Cal.4th at 554; emphasis added.)

Since the decision whether to instruct on lesser related offenses is a decision which arises during the trial and in view of all the evidence, it is properly within the scope of judicial authority. It would violate the separation of powers doctrine to abrogate judicial authority over this determination.

The issue presented here – the extent of judicial authority to instruct on lesser related offenses – falls well after the charging decision is made. In the course of a trial evidence may well emerge that justifies instruction on lesser offenses which the prosecutor may have deliberately chosen not to charge prior to trial. Thus, there are recurrent disputes over the quantity of evidence sufficient to warrant an instruction on lesser included offenses. (See *People v. Reed* (2006) 38 Cal.4th 1224, 1229 [lesser included offenses determined only by statutory elements test, not by accusatory pleadings test, which would include prosecutor's non-statutory allegations in the charging document]; *People v. Breverman* (1998) 19 Cal.4th 142, 156, 160 [trial court's duty to instruct on lesser included offense determined by "substantial evidentiary support" and by arguments of counsel].) The decision to instruct on lesser included offenses, advocated or opposed by one side or the other, is a quintessential judicial function.

Moreover, the trial court has a superior vantage point to judge whether submitting a lesser related offense to the jury will serve the interests of justice. The prosecution case on the charged offense may be at risk of an acquittal, whereas conviction on a lesser related offense may be entirely justified on the basis of the evidence at trial. And yet, acquittal on the greater offense may bar a retrial on the proper lesser related offense: the lesser related offense may have the same intent and objective as the greater offense, thus barring retrial,[24] which could have been avoided if the lesser related offense alternative had been presented to the initial jury. Or, the lesser related offense may share an element in common with the charged offense; in that event retrial on the lesser offense following acquittal would be barred by constitutional principles of double jeopardy.[25] The van-

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[24] See Penal Code § 654 (a): "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." And see *Sanders v. Superior Court* (1999) 76 Cal.App.4th 609 [defendant convicted of grand theft; conviction reversed on appeal for insufficient evidence; prosecution for same conduct as forgery (a related offense) is precluded by section 654].

[25] See *Yeager v. United States* (2009) 129 S.Ct. 2360, 2368-2369: if a certain element "was a critical issue of ultimate fact" in the original charge against the defendant, "a jury verdict that neces-

tage point of the trial court is superior to the narrow view of an advocate (prosecutor or defense counsel), and permits the court to assess the actual evidence at trial with an eye to the ultimate interests of justice. The trial court can and should exercise its discretion to instruct in such circumstances, whether the lesser offense is included or related. (See *People v. Barton* (1995) 12 Cal.4th 186, 204 [where acquittal on the charged offense is a real possibility, trial court may instruct on lesser included offense supported by the evidence, even over objection of the defendant].[26])

Again, this has nothing to do with the defendant's former right to insist on lesser related instruction, which was rejected in the *Birks* opinion. The final determination of the question of whether to

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sarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element."

[26] "In this case, defendant was prepared to roll the dice in a high stakes game of chance, betting that the jury, faced with the choice of convicting him of murder or acquitting him entirely, would find him not guilty. If successful, this gamble would have served defendant's interests. It would not, however, have served the interests of justice, for it would have denied the jury the chance to consider the possibility, between the extremes of a murder conviction and an acquittal, that defendant was guilty of voluntary manslaughter, a lesser offense included in murder." (*Ibid.*; emphasis added.)

instruct on lesser related offenses is unquestionably a judicial function, not a matter of prosecutorial fiat.[27]

The decision whether to instruct on a lesser related offense, where the prosecution cannot claim unfair surprise, is essentially a matter of insuring a fair trial to both parties; insuring a fair trial is the gist of the *Birks* opinion. Insuring a fair trial is a core judicial function. "When the decision to prosecute has been made, the process which leads to acquittal or sentencing is fundamentally judicial in nature." (*Esteybar v. Municipal Court* (1971) 5 Cal.3d 119, 128 [court's exercise of discretion to designate offense as misdemeanor in holding order is a judicial function].)

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[27] Appellant is aware of the observation in footnote 18 of the *Birks* dicta, quoted above: "Lesser *necessarily included offenses* do not present a similar problem, because the prosecution understands that when it chooses to charge the greater offense, it is by definition charging the elements of every lesser offense necessarily included therein. Hence, by its selection of the stated charge, the prosecution has retained the exclusive power to determine the specific crime or crimes which may be presented to the jury."

Appellant suggests that this reasoning should be reconsidered; the prosecution does not by definition charge "the elements of every lesser offense necessarily included therein"; the charge includes only those lesser included offenses which are supported by substantial evidence which emerges at trial. (*People v. Breverman, supra.*) The lesser included offenses submitted to the jury are ultimately determined by the trial court based on the evidence, not solely by the prosecutor as part of the charging function. The same should be true of instructions on lesser related offenses.

Where there is substantial evidence of a lesser related offense, and a lesser related offense instruction creates no unfair surprise to the prosecution, as here, the issue is not whether the prosecutor's charging discretion has been infringed but whether the trial court's ability to guarantee a fair trial has been hamstrung in violation of the Constitution. "... [T]he issue whether a power is judicial in nature depends not on the procedural posture of the case but on the substance of the power and the effect of its exercise." (*People v. Superior Court (On Tai Ho)* (1974) 11 Cal.3d 59, 68 [statutory requirement of consent of prosecutor to diversion program held unconstitutional].)[28]

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[28] See also the following observation in *People v. Thomas* (2005) 35 Cal.4th 635, 641-642 (emphasis added):

"The discretion that Penal Code section 1170.19, subdivision (a)(4), grants to a criminal court to order a juvenile disposition in some cases where the prosecutor has filed charges directly in criminal court indisputably constitutes a judicial responsibility. (See *Davis v. Municipal Court, supra*, 46 Cal.3d at p. 83.) Like the statutes in *Tenorio* and its progeny, section 1170.19, subdivision (a)(4), authorizes 'the exercise of a prosecutorial veto after the filing of criminal charges, when the criminal proceeding has already come within the aegis of the judicial branch.' (*Davis v. Municipal Court, supra*, at p. 83.) Thus, the requirement of section 1170.19, subdivision (a)(4), that the criminal court must secure the prosecutor's consent before it can order a Youth Authority commitment violates the state Constitution's separation of powers doctrine. (Cal. Const., art. III, § 3.)"

There appears to be little question on this record that the evidence would support an accessory instruction; respondent does not raise any such concern. Appellant clearly had the intent to aid his son in avoiding criminal charges, in hiding the weapons, creating a false alibi tape, and taking him to motels and then to another state to avoid prosecution.[29]

The question of prejudice (also not discussed by respondent) revolves in part around the preclusive effect of the jury's verdict of first degree murder on both counts. (See discussion in Argument VIII above.)

Since being an accessory is not a lesser included offense of murder, it necessarily includes elements which are not present in the murder charge. Since the elements of accessory were not resolved, and could not be resolved, solely as part of the murder charge, the murder conviction does not automatically render the accessory instruction irrelevant, and does not cure the error or render it harmless.

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[29] For contrast, see *People v. Whisenhunt* (2008) 44 Cal.4th 174, 212: "The trial court ultimately refused the requested instruction because the evidence did not show that defendant had the intent required to be an accessory at the time he made the statements, and because the evidence on which he was relying was exculpatory. The court noted, however, that defense counsel was free to argue to the jury that the evidence at most showed that defendant was guilty of being an accessory—an uncharged offense—and that defendant should therefore be acquitted. Defense counsel did not present this argument in summation." (Emphasis added.)

The standard of review for federal constitutional error should be applied in these circumstances. (See discussion at pp. 141 and 197 of Appellant's Opening Brief.)

There was room for substantial doubt over appellant's role in this offense. His identity as one of the shooters swung on the self-serving testimony of Jesse Rangel, buttressed by the accomplice testimony of Richard Diaz, and boosted again when Cindy Durbin changed her statement to conform to theirs.[30] The jury could well have viewed all of this as a house of cards. The remaining evidence was consistent with accessory liability.

Appellant was prejudiced by the trial court's refusal to even consider the reading of instructions on accessory liability. If the ac-

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[30] Compare *People v. Rundle* (2008) 43 Cal.4th 76. The defendant there changed his story from the account given in a police interrogation, versus his testimony at trial. This Court held that it was not misconduct for the prosecutor to argue that the defense team was involved in a conspiracy to fabricate evidence. This Court determined that it was reasonable to conclude that the defendant lied in his testimony, and "to the extent the statements swept counsel up in defendant's asserted lies, this was not an improper comment in the context of this case, in which defendant's story changed drastically during trial preparations." (*Id.* at 163; emphasis added.)

Here, the shoe is on the other foot; needless to say, a similar comment could be made about Cindy Durbin's changed testimony on the very day of the preliminary hearing, and her relationship to the prosecution effort in this case. To paraphrase, "to the extent the statements swept up the prosecutor in the witness' asserted lies, this was not an improper comment in the context of this case, in which the witness' story changed drastically during trial preparation."

cessory instructions had been properly considered by the trial court, they would have been read. Properly instructed, the jury would have likely adopted accessory as an alternative to the murder verdict, on which the evidence was questionable. The conviction must be reversed.

XII. THE PROSECUTOR COMMITTED MISCONDUCT BY ARGUING TO THE JURY THAT MURDER, INCLUDING IMPLIED MALICE SECOND DEGREE MURDER, MUST BE ACCOMPANIED BY AN INTENT TO KILL.

As to the prosecutor's confused argument over malice as intent to kill (omitting implied malice) and his reference to "implied intent," respondent argues that any error was waived by a failure to object.

The requirement of an objection in this extremely delicate area would be an unreasonable burden on the defense. The defense was constrained by the fact that its main focus was on the lack of reliable evidence of identity. Defense counsel was reluctant to even mention the partial defense of intoxication. To object to an erroneous argument on the elements of murder would appear to concede identity. This consideration should be accepted as an exception to the objection requirement.

The prosecutor's argument informed the jury that malice equals intent, therefore all murder is based on intentional killing. However, implied malice murder is a general intent crime. This Court so held in its opinion in *People v. Rogers* (2006) 39 Cal.4th 826, 872-873:

> We agree with defendant that the instruction given regarding the concurrence of act and specific intent was erroneous. The trial court gave a modified concurrence instruction, CALJIC No. 3.31, stating: "In each of the crimes charged in counts one and two and in the crime of voluntary manslaughter there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator, and unless such specific intent exists the crime to which it relates is not committed. [¶] The specific intent required is included in the definitions of the crimes charged. However, *the crime of murder requires the specific intent to unlawfully kill a human being*, and the crime of voluntary manslaughter requires the specific intent to unlawfully kill a human being." As the Attorney General concedes, the concurrence instruction was erroneous because implied malice second degree murder, a form of murder, does not require the specific intent to kill.
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> (Underlining added.)

The Court in *Rogers* went on to find harmless error. However, in the present case the erroneous argument may well have blocked the jury's consideration of the lesser offense of implied malice second degree murder. (See *People v. Ramkeeson* (1985) 39 Cal.3d 346: error to refuse instruction on theft as a lesser included offense of robbery, since the lesser offense would have given the jury a path to a lesser verdict which would not trigger special circumstance liability.) This is a situation in which improper prosecution argument can undermine the fairness of a trial even where jury

instructions are given which are at least minimally consistent with current law.[31]

Appellant did not know Chuck Durbin, and he had no reason to harm or kill him. The prosecutor's argument to the jury virtually invited a second degree murder verdict. His argument reflected the relative weakness in the evidence of premeditation on Count One, and the fact that the case could advance into the penalty phase with one count of first degree murder and one count of second degree murder. (See Penal Code § 190.2 (a)(3).)[32]

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[31] Federal constitutional error may arise where a state court jury instruction, even one which is not unconstitutionally vague, is subject to an unconstitutional interpretation, and that interpretation is advanced by the prosecutor with the apparent approval of the state trial court. Something similar occurred in *Brown v. Payton* (2005) 544 U.S. 133, 146. There the prosecutor argued a "too narrow" interpretation of the state death penalty statute; he argued that the defendant's religious conversion was not a factor in mitigation. The United States Supreme Court had already upheld the constitutionality of the state's jury instruction. But the improper interpretation offered by the prosecutor resulted in federal constitutional error. *Ibid.*

[32] Appellant offers the following correction to the Opening Brief. At page 198 of the AOB it is stated, "a verdict of manslaughter was unlikely, given the egregious circumstances of the shootings." This understates appellant's argument, because no manslaughter instructions were given. In order to express a reasonable doubt on the element of specific intent the jury would have had to acquit entirely; the only lesser alternative was implied malice second degree murder (general intent), and this alternative was effectively blocked by the prosecutor's argument. Had manslaughter instructions been given, there is a reasonable likelihood that the jury would have found manslaughter to be a reasonable alternative verdict.

However, in the penalty phase the lack of a premeditation finding on one count very likely would have affected the outcome of the penalty phase. This jury should not have been misinformed on the crucial element of implied malice. Appellant has been prejudiced; the conviction of first degree murder on Count One must be reduced, and the penalty phase judgment must be set aside.

XIII. THE PROSECUTOR COMMITTED MISCONDUCT BY ARGUING TO THE JURY THAT PREMEDITATED MURDER IS ESTABLISHED MERELY BY EVIDENCE OF AN INTENT TO KILL.

Respondent claims that this argument is foreclosed by the failure to object. As in Argument XII above, the defense could not object because to do so would appear to concede identity. The defense never conceded identity; defense counsel had great difficulty presenting argument and objections to arguments that focused on the murder elements of murder, for to do so would suggest that the defense was conceding identity. The contemporaneous objection requirement should therefore be waived.

As set forth in Argument IV above, the evidence in this record is legally insufficient to support the charge of first degree murder on Count One. At a minimum the prosecution argument to the guilt phase jury was made against a backdrop of extremely weak evidence of premeditation. By arguing that premeditation is established merely by evidence of intent to kill, the prosecution shifted its own burden of proof and denied appellant a fair trial. The conviction must be reversed.

XIV. THE PROSECUTOR COMMITTED MISCONDUCT BY ARGUING TO THE JURY THAT THE TESTIMONY OF RICHARD DIAZ, AN ACCOMPLICE, COULD BE CORROBORATED BY THE TESTIMONY OF JESSE RANGEL, ANOTHER ACCOMPLICE.

Defense counsel made a tactical decision to object to the standard instruction on the jury's determination of Jesse Rangel's accomplice status (CALJIC 3.19), and the instruction was not given. The objection to the instruction was made because the standard instruction required the defense to prove that Jesse Rangel was an accomplice. (8 RT 2017; 9 RT 2118.) This by no means meant that the defense acceded to the Jesse Rangel's credibility; to the contrary, the defense challenged his credibility, and relied on Cindy Durbin's initial and repeated identification of Jesse Rangel as one of the assailants.

Placing the burden of proof on the defense in this context was approved by this Court in *People v. Belton* (1979) 23 Cal.3d 516, 523, and appellant does not challenge that rule in this appeal. Defense counsel argued that Jesse Rangel's alibi was false (9 RT 2176-2177), and that Jesse Rangel was therefore one of the shooters. Regardless of where the burden of proof to show accomplice status lies, no accomplice may corroborate another. There is good reason to believe that Richard Diaz merely tracked Jesse Rangel's statement, and

that this entire prosecution is based on an accumulation of accomplice statements.

It was therefore crucial to the prosecution to demonstrate that Richard Diaz' account was corroborated. The inconvenient truth is that Diaz' "corroboration" lies largely in Jesse Rangel's testimony. This should not have occurred in contravention of Penal Code § 1111, regardless of the presence or absence of an instruction that would have explicitly labeled Jesse Rangel as an accomplice. The prosecution argument to the jury attempted to repair a breach in the prosecution case which otherwise might have been fatal. (See *People v. Najera* (2008) 43 Cal.4th 1132, 1136-1137.)[33]

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[33] "As we have previously explained, accomplice testimony requires corroboration not because such evidence is factually insufficient to permit a reasonable trier of fact to find the accused guilty beyond a reasonable doubt, but because '[t]he Legislature has determined that because of the reliability questions posed by certain categories of evidence, evidence in those categories by itself is insufficient as a matter of law to support a conviction.' (*People v. Cuevas* (1995) 12 Cal.4th 252, 261; see Pen. Code, § 1111.) That is, even though accomplice testimony would qualify as 'substantial evidence' to sustain a conviction within the meaning of *People v. Johnson* (1980) 26 Cal.3d 557, 578, the Legislature has for policy reasons created an 'exception[]' to the substantial evidence test and requires accomplice testimony to be corroborated. (*Cuevas, supra*, 12 Cal.4th at p. 261.)" (Emphasis added.)

As explained in *Najera*, legally sufficient evidence may be composed in part of accomplice testimony. Therefore, a jury would have no way to know of the accomplice corroboration rule in the absence of a jury instruction, especially where the prosecutor argues as if the rule did not exist.

Defense counsel was placed in a Catch-22. Having foregone CALJIC 3.19, they could not then enter an objection which was based on the underlying premise of that instruction: that Jesse Rangel was an accomplice. This certainly was not invited error.[34] In this situation the absence of a contemporaneous objection should not bar review of this issue on appeal.

In total disregard of the record, respondent argues that "Jesse was not a principal, i.e., an accomplice to the murders because there was no evidence to make him subject to prosecution for the identical offenses charged against appellant." (RB 105.) To the contrary, Cindy Durbin identified Jesse Rangel initially and repeatedly in the months leading up to the preliminary hearing. (Ex. 52; 6 RT 1395-1397, 1413-1419.) Her identifications of Jesse Rangel were fully admissible as substantive evidence under Evidence Code § 1235. If he was one of the shooters, then he was "subject to prosecution for the identical offenses charged against appellant."

To that must be added Jesse's shooting at Juan Uribe's car (evidence of malice and motive), and his flight to New Mexico (evi-

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[34] The doctrine of invited error applies only in situations in which defense counsel has requested an instruction based on a "conscious and deliberate tactical choice." (*People v. Lucero* (2000) 23 Cal.4th 692, 724.)

dence of consciousness of guilt). This was all evidence that Jesse Rangel was an accomplice to the murders. It simply is not accurate to deny that there is evidence of Jesse's accomplice status. It was a denial of due process to utilize his testimony as corroboration of Richard Diaz, and the error should have been corrected by the trial court.

XV. THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE THAT JUAN URIBE WAS A DRUG DEALER, AND THAT THERE WAS DRUG USE AND DRUG DEALING AT THE DURBIN HOUSE AT THE TIME OF THE SHOOTINGS, TO IMPEACH PROSECUTION WITNESSES AND TO REBUT VICTIM IMPACT TESTIMONY IN SUPPORT OF THE DEATH PENALTY.

Respondent correctly observes that defense rebuttal evidence concerning drug dealing at the Durbin home could not be offered in support of a claim of self defense or imperfect self defense. (See *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 834.) The drug evidence was nevertheless highly relevant.

Respondent also confronts a straw man, concerning whether the evidence of drug dealing was properly offered to impeach Cindy Durbin's testimony at the guilt phase (RB 116). Impeachment at the guilt phase is outside the scope of this Argument; at the penalty phase the evidence of drug dealing was offered by the defense as substantive evidence in rebuttal to the victim impact evidence, and the exclusion of that evidence at the penalty phase is the subject of this Argument.

One prong of respondent's argument, echoing the trial court's revised ruling,[35] is that "this was not a drug case," and "there was no evidence to show any drug activity by Uribe and Durbin contributed to their deaths." (RB 106, 115.) To the contrary, the fact that Juan Uribe was a drug dealer may have had everything to do with the quarrel leading to his death. By opening their home to drug sales and usage, the Durbins exposed themselves to risks brought in by their erstwhile guests.

It is not accurate to say that drug dealing had nothing to do with this case. According to the defense offer of proof, Juan Uribe had no visible means of support other than drug dealing. There was no elucidation of the underlying motives leading to the confrontation and shooting following the baptism party, two weeks before the Uribe/ Durbin shootings, and the factional war that followed; Uribe's status as a drug dealer undoubtedly had something to do with the origins of the conflict. It would have added to the jury's knowledge of the "circumstances of the case" to know that there was full-time drug dealing in the background.

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[35] The trial court initially accepted the defense argument and held that the evidence of drug usage was admissible, even at the guilt phase. (4 RT 907.)

Respondent also invokes Evidence Code § 352 considerations. (See RB 107, citing *People v. Guerra* (2006) 37 Cal.4th 1067, 1145 [photograph of defendant's family in Guatemala deemed cumulative to testimony on the same subject].) Respondent confuses probative value with prejudice. "The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against [a party or witness] as an individual and which has very little effect on the issues." (*People v. Karis* (1988) 46 Cal.3d 612, 638.) The offered defense evidence on drug dealing had a direct effect on the weight of the victim impact evidence; it was "prejudicial" to the prosecution case on victim impact, but that did not lessen its probative value.[36]

To a large degree this was a drug case. Drug dealing was in the background of the scenario leading up to the fatal shootings. Uribe was the supplier for the Durbins, and the crowd gathered at their house were evidently there for drug usage. A drug scale was found on the kitchen table. Durbin had a substantial level of methamphetamine in his system at the time of his death. The drug evidence was relevant as a circumstance of the crime under Penal Code

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[36] Compare *People v. Loker* (2008) 44 Cal.4th 691, 735: evidence of drug usage by victim properly excluded, because the prosecution presented no victim impact evidence.

§ 190.2 (a). Yet none of this information was allowed to go before the jury.

Respondent also argues that the prosecution limited itself to "victim impact evidence," while avoiding "victim character evidence," and reasons that the evidence of drug dealing was relevant only to character and not to victim impact. (RB 112, 115.)

Significantly, in its recital of victim impact evidence respondent fails to mention the death of Natasha Durbin. (See RB 114.) This is one item of evidence that surely involved the character and reliability of Chuck Durbin; the relevance of her death was supposedly keyed to the effect on her mother, who dealt with the death in the absence of her husband (see Argument XVI below). But that assumes that Chuck Durbin was a dutiful and reliable husband and father, not a drug user, and that is an assumption that the defense was entitled to rebut.[37]

Respondent treads a fine line, laid out by this Court in *People v. Boyette* (2002) 29 Cal.4th 381, 445, between victim impact evidence and pure character evidence. "Testimony from the victims'

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[37] Again, appellant would not pursue this entire line of reasoning, which by inference demeans the victims, if the impact of their deaths had not been unreasonably exalted through victim impact evidence.

family members was relevant to show how the killings affected *them*, not whether they were *justified* in their feelings due to the victims' good nature and sterling character." (*Ibid.*)

Up to a point, this is a valid distinction: for instance prior to his exposure and arrest, Bernie Madoff was highly regarded by many people who probably would have eulogized him, had he suffered an untimely death; but at some point more becomes known of the victim, and then such testimonials begin to ring hollow. The trier of fact is entitled to know the entire story *as it was known to the victim's survivors.* Here information which was fully known to Cindy Durbin at the time of the shootings (that Uribe was dealing drugs regularly in the Durbin house, including the day of the shootings, and that her husband was a "recreational" user) was erroneously suppressed by the trial court.

Permitting the introduction of such evidence would bring this case into line with the normal rule of assessing victim damages. For instance, where unflattering information about the deceased was reasonably known to the surviving victims, it must be considered by the jury in assessing damages for wrongful death.[38]

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[38] See, e.g., *Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011, 1027: "And where a husband sues for the wrongful death of his wife, evidence of his extramarital affairs is admissible to show 'the nature of the personal relationship [with his

Respondent goes on to argue that the exclusion of the defense rebuttal testimony was not prejudicial error. As to the decision to impose the death penalty, it is never easy to assess prejudice. But in the present case the penalty case was not overwhelming. Appellant was a loving and conscientious husband and father. He was fifty years old at the time of the killings, and he had no prior record. His motivations, however misguided, had to do with protecting his son.

The fact that this is a double murder case does not eliminate the possibility of prejudicial error in presentation of the mitigating case. (See *Porter v. McCollum* (2009) 130 S.Ct. 447, 455 [habeas relief granted for failure to present mitigating evidence, where defendant was convicted of two counts of premeditated murder].)

Victim impact evidence was pivotal to the death judgment. The jury was given a distorted perspective of the victims, not pertaining to their character but to the esteem in which they were held by their families.

It is one thing to say that the victim (Juan Uribe) was a conscientious provider for the family, it is another to say that he made

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wife] and thus ... whether there was any loss of love, companionship, comfort, affection, society, solace, moral support or enjoyment of sexual relations.' (*Morales v. Superior Court* (1979) 99 Cal.App.3d 283, 288.)"

his living, with the knowledge of his family, off of felony drug sales. (Compare *People v. Boyette, supra*: "The jury was aware from the evidence adduced at the guilt phase that the victims were probably drug addicts and were killed in a dispute at a disreputable house at which drug addicts congregated. In short, the jury already knew the victims were not upstanding citizens, so defendant's inability to emphasize this point in cross-examination could not have affected the penalty judgment." (Emphasis added.))

For these reasons the drug evidence offered by appellant in the penalty phase was erroneously excluded from evidence. It is reasonably likely that a different result would have been reached on a more complete record, and the death judgment must be reversed.

XVI. EVIDENCE WAS IMPROPERLY INTRODUCED OF THE DEATH OF CHUCK DURBIN'S DAUGHTER NATASHA AND THE AUTISM OF HIS SON BRETT, WITHOUT FOUNDATIONAL EVIDENCE THAT THESE CIRCUMSTANCES WERE RELATED TO DURBIN'S DEATH.

Respondent argues that the argument regarding evidence of Brett's autism was waived for failure to object. Since the autism evidence was introduced in conjunction with the testimony regarding Natasha's death, the defense objection should be deemed to encompass both. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Further objection, in view of the Natasha ruling, would have been futile. (*Ibid.*)

Respondent argues that there is "no conceivable way" the jury could infer that Chuck Durbin's murder caused Natasha's death or Brett's autism. (RB 124.)

Appellant simply disagrees – the invited connection is obvious, though unfounded. In our society, nine-year-olds do not commonly die of the flu. There must have been something else involved – we don't know what it was (congenital ill health? parental neglect?) but the jury certainly must have concluded, reasonably enough, that they wouldn't have been told about it if it wasn't a result of the homicide of her father.

Respondent echoes the prosecutor below, in arguing that the evidence of Natasha's death was only offered to show how Cindy

Durbin was affected, to demonstrate the difficulties she had in daily life. (RB 119, 123.) But that could have been done in a much less prejudicial way, for instance by evidence that she was prone to be depressed. (See 10 RT 2432.) It was not necessary to introduce evidence that her daughter had died.

This situation contrasts to this Court's recent opinion in *People v. Hamilton* (2009) 45 Cal.4th 863, 928. The prosecutor in that case argued to a penalty jury that the death of the victim's husband, fifteen years later was a result of the murder. This Court determined that the argument was reasonably taken as hyperbole; "[n]o reasonable juror" would believe that the prosecutor was asking them to find the defendant "legally responsible" for the husband's death. (*Ibid.*)

Here the connection was much more obvious. The prosecutor used a stalking horse to get Natasha's death into evidence: the difficulty Cindy Durbin had in dealing with problems of daily life in her husband's absence. But the implicit invited connection was that appellant was responsible for Natasha's death. The trial court should have had the good judgment to see through this stratagem. The evidence should have been excluded for lack of relevance and excessive prejudicial effect. (Evidence Code § 352.)

Respondent argues that the trial court acted within its "discretion" in permitting the evidence of Natasha's death. But the trial court's authority was only to apply the law as determined by this Court. (See *Miyamoto v. Department of Motor Vehicles* (2009) 176 Cal.App.4th 1210, 1222; Rushing, J. conc.[39] And see *In re Charlisse C.* (2008) 45 Cal.4th 145, 161.[40])

The supposed connection between the homicide and Brett's autism was made directly in Cindy Durbin's testimony. She testified that Brett ran and hid when he heard the doorbell. He received counseling, and was autistic. (10 RT 2431.) This was all associated with the homicide according to Cindy's testimony, but the autism connection lacked foundation because, if it was a correct diagnosis, it existed well before the homicide.

Finally, respondent argues that there was no prejudicial effect to the use of this evidence. (RB 124.) To the contrary, this case was not overwhelming as to the death penalty. Appellant, in his drunken state, was involved in an affair which he did not understand, with

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[39] "Properly viewed, the trial court's ruling here was not an exercise of discretion but an application of a rule of law. The trial court had no discretion to decide what the applicable law was or to determine its logical effect in light of the facts found. Its legal analysis was either correct or incorrect."

[40] "... The juvenile court committed legal error—and thus, abused its discretion—in concluding otherwise."

people he had never met. Other than this bizarre incident, he was a productive citizen and a credit to his community. Surely the evidence of Natasha's death was a blockbuster factor when it came time to determine punishment. The death judgment must be reversed.

XVII. APPELLANT WAS DENIED THE CONSTITUTIONAL RIGHT TO CONFRONTATION BY THE USE IN EVIDENCE OF A STATEMENT TAKEN FROM NATASHA DURBIN.

Appellant argues that Natasha's statements to the investigating officer[41] and to her grandmother were testimonial statements governed by the confrontation clause. Although admissible at the time of trial under the hearsay exception for spontaneous statements and under the then-current interpretation of the Confrontation Clause (see *Ohio v. Roberts* (1980) 448 U.S. 56), they should now be deemed inadmissible under the rule of *Crawford v. Washington* (2004) 541 U.S. 36.

Respondent argues first that the Confrontation Clause does not apply to the penalty phase of a capital trial. This claim should be rejected.

Respondent relies on the Fifth Circuit opinion in *United States v. Fields* (5th Cir. 2007) 483 F.3d 313, which in turn relied on the United States Supreme Court opinion in *Williams v. New York* (1949) 337 U.S. 241.

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[41] Detective Ciapessoni was apparently promoted to detective during the pendency of the trial, and he had that status at trial. At the time of the shootings he was a patrol officer, and he was one of the first officers who responded to the crime scene. He took Natasha's statement that night.

The proposed rule, exempting penalty phase evidence from the Confrontation Clause, is fundamentally unsound. There is no reason to think that the Founders would have intended an exception to the Confrontation Clause for penalty phase trials, the one species of trial which above all matches the power of the State against the individual, for the highest stakes imaginable.

The opinion in *Williams v. New York, supra,* was based on the Due Process Clause, not the Confrontation Clause.[42] Under *Williams* the state court judge was permitted to overrule a jury and sentence the defendant to death, based on information in a probation report. At the time of the *Williams* decision, the incorporation of the Confrontation Clause into state procedure was still years in the future.[43]

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[42] "We hold that appellant was not denied due process of law." (*Williams v. New York, supra,* 337 U.S. at 252.)

Decisions such as *Fields* have been criticized for the failure to recognize the distinction between confrontation and due process. See Alan C. Michaels, "Trial Rights at Sentencing," 81 N.C.L.Rev. 1771, 1837 (2003) ("[*Williams*] was decided on due process grounds alone, however, and was decided sixteen years before the Confrontation Clause was incorporated against the states."); Note, "An Argument for Confrontation Under the Federal Sentencing Guidelines," 105 Harv. L. Rev. 1880, 1890 (1992) (criticizing Courts of Appeals for failing to notice that "*Williams* was not a Confrontation Clause case.")

[43] In 1949, when *Williams* was decided, *Pointer v. Texas* (1965) 380 U.S. 400, had not yet incorporated the Confrontation Clause into

Moreover, the *Williams* result has been significantly eroded by subsequent cases. The Supreme Court has made clear since *Williams* that "death is different," that there is a need for reliable information at a capital sentencing, and that there is a need for confrontation when there is constitutionally significant fact-finding on the part of the jury. (See, e.g., *United States v. Booker* (2005) 543 U.S. 220; *Blakely v. Washington* (2004) 542 U.S. 296; *Ring v. Arizona* (2002) 536 U.S. 584; *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

Apart from *Fields,* there has been wide disagreement over the question of Confrontation Clause rights at the penalty phase of a capital case. Many decisions have held that confrontation rights apply at the penalty phase.[44]

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the Fourteenth Amendment as a fundamental right in state prosecutions. The older concept of "ordered liberty" under *Palko v. Connecticut* (1937) 302 U.S. 319 was still the guiding principle in 1949.

[44] Compare *Proffitt v. Wainwright* (11th Cir. 1982) 685 F.2d 1227, 1254 (holding that "the right to cross-examine adverse witnesses applies to capital sentencing hearings"); *United States v. Mills* (C.D.Cal. 2006) 446 F.Supp.2d 1115, 1135 ("*Crawford v. Washington*'s protections apply to any proof of any aggravating factor during the penalty phase of a capital proceeding under the FDPA."); *Russeau v. State* (Tex.Crim.App. 2005) 171 S.W.3d 871, 880 (reversing a death sentence under *Crawford* because the trial court admitted testimonial hearsay at the punishment phase); *State v. Bell* (N.C. 2004) 359 N.C. 1, 603 S.E.2d 93, 115-16 (applying *Crawford* to

Confrontation is nowhere more important than in a death penalty trial. This Court should reject respondent's suggestion and hold that the right to confrontation does apply to the penalty phase.

Respondent further argues that Natasha's statements were not "testimonial" within the meaning of *Crawford* and *Davis v. Washington* (2006) 547 U.S. 813. Respondent argues that Natasha's statement to her grandmother "bore absolutely no characteristics of testimony." Respondent acknowledges that whether Natasha's statement to the officer was testimonial "presents a close question." (RB 129.)

Natasha's statement to her grandmother was not a casual remark to a disinterested person. Ginger Colwell was keenly interested in the details of the shooting, and Natasha was a potential source of information that could be used later in court proceedings.

In *People v. Gutierrez* (2009) 45 Cal.4th 789, this Court reviewed the admissibility of an out-of-court statement made by a child about two months after his mother's death, while his aunt was

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hold that the introduction of testimonial hearsay at the sentencing phase of a capital trial violated the Confrontation Clause); and *Rodriguez v. State* (Fla. 2000) 753 So.2d 29, 43-44 (holding that "the Sixth Amendment right of confrontation applies to all three phases of the capital trial" and that "the admission of . . . hearsay statements of co-defendants in the penalty phase violated the Confrontation Clause.")

driving him to the cemetery to visit his mother's grave. This Court held that the statement was made too long after the event to qualify as a spontaneous declaration, and it was therefore error to admit the statement under Evidence Code § 1240.[45] However, the statement was made completely out of the context of any criminal investigation; the statement was therefore not "testimonial" and its introduction did not violate the Confrontation Clause.[46]

The situation is quite different here. Natasha spoke to her grandmother a few hours after the shootings. She was much more

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[45] "Here, defendant argues that the child's statement did not satisfy the requirements of a spontaneous declaration because the child's ability to reflect and fabricate had returned by the time he made the statement, and the statement failed to describe the event immediately preceding it. We agree." (45 Cal.4th at 810.)

For a similar conclusion, see *Winzer v. Hall* (9th Cir. 2007) 494 F.3d 1192, 1200: "The mere fact that Parrish was upset as she spoke would not make her utterance reliable. As the Supreme Court has recognized, a spontaneous statement is reliable because it is offered 'without the opportunity to reflect on the consequences of one's exclamation.' *White*, 502 U.S. at 356. Just because a subject is or appears to be *upset* offers no guarantee that he has not taken time to consider the matter. The subject may be upset precisely because he's had time to reflect, or he may feign emotional distress in a calculated effort to appear more credible."

[46] "The statement of a three-year-old declarant made to his aunt is more like 'a casual remark to an acquaintance' and is therefore not a testimonial statement under *Crawford*. (See *People v. Griffin* (2004) 33 Cal.4th 536, 579, fn. 19 [out-of-court statement made to a friend at school does not constitute testimonial hearsay" under *Crawford*].)" (45 Cal.4th at 813.)

likely to give a description of the incident to her grandmother than she would to a detective or a uniformed officer. It is only natural in this situation to use the child's grandmother to speak to a frightened child, to obtain the maximum amount of information for later use in court. For these reasons, the context of Natasha's statement was not like "a casual remark to an acquaintance." It was testimonial, and should be subject to the confrontation rules for testimonial statements.

Natasha's statement to the officer was also testimonial. Respondent points out that the murder investigation was ongoing.[47] But Natasha's statement did not contribute to the investigation or the identification of suspects. Her statement was gathered in order to recreate the crime scenario, in order to present a murder case and a case in aggravation at trial. It was entirely testimonial and subject to Confrontation Clause restrictions.

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[47] Notwithstanding the Supreme Court's statement in *Davis v. Washington, supra,* that the emergency ended when Mr. Davis fled the scene, courts have divided over whether a dangerous suspect's being at large constitutes an ongoing emergency. Compare *State v. Ayer* (N.H. 2006) 917 A.2d 214 (ongoing emergency) and *United States v. Arnold* (6th Cir. en banc 2007) 486 F.3d 177 (same), with *State v. Kirby* (Conn. 2006) 908 A.2d 506 (no ongoing emergency merely because suspect still at large) and *People v. Bryant* (Mich. 2009) 768 N.W.2d 65 (same). And see Fisher, *What Happened – and What Is Happening – to the Confrontation Clause*, 15 Journal of Law and Policy 587 (2007).

Appellant was denied confrontation by the use of Natasha's statements at the penalty phase. The error was prejudicial because, contrary to respondent's argument, this was a close case on penalty. (See *Porter v. McCollum, supra.*) Quoted statements by the perpetrator(s) such as, "Juan, you disappointed us" (10 RT 2388) were bound to influence the jurors' penalty decision. The penalty determination must be reversed.

XVIII. THE TRIAL COURT ERRONEOUSLY REFUSED REQUESTED PENALTY PHASE INSTRUCTIONS THAT WOULD HAVE INCLUDED THE MOTIVATION FOR THE KILLING OF JUAN URIBE AMONG MITIGATING FACTORS.

Appellant submitted two proposed instructions which would have permitted the jury to consider in mitigation the defendant's motivation for the crime, and Juan Uribe's contribution to appellant's emotional disturbance. Both instructions were rejected by the trial court.

Respondent argues that the requested instruction which would have allowed the jury to consider appellant's motivation was improper, because it "would have run contrary to the prosecutor's closing argument about the circumstances of the crimes under factor (a)." Suggesting that the defendant's motivation could actually be a mitigating factor would have confused the jury. (RB 135.)

Respondent argues that the proposed instruction on the victim's contribution to the defendant's emotional disturbance was improper because Chuck Durbin did nothing to contribute to the defendant's emotional disturbance. Further, it is argued, there is insufficient evidence that appellant believed that Juan Uribe was responsi-

ble for his son's injuries, and there was no evidence of "building tension between appellant and Uribe." (RB 135-136.)

Respondent goes on to argue that the generalized factor (k) instruction ("[a]ny other circumstance which extenuates the gravity of the crime...") was enough to cover the subject.

Respondent attempts too much by arguing that an instruction is "misleading" and "confusing" merely because it contradicts the prosecutor's argument. True, this was the explicit reason given by the trial court for denying the defense instruction on motive. (10 RT 2535.) But this Court has never endorsed the denial of a requested instruction just because it was potentially inconsistent with the prosecution's argument.[48]

The proposed instruction indicated that the jury "may" consider motive in mitigation. (12 CT 2476, 2590.) It did not indicate that the jury "must" consider motive in mitigation; the prosecutor would still have been free to argue the contrary, or even request his own pinpoint instruction.

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[48] Respondent cites to *People v. Gurule* (2002) 28 Cal.4th 557, 659, but that decision only rejected proposed defense instructions that were legally incorrect or duplicative; nothing of the sort can be said of the proposed instructions here.

The danger here is that appellant's concern over his son's well-being, even though accepted by the jury, would not be seen as falling within the generalized language of the standard instruction, as a circumstance which "extenuates the gravity of the crime." The prosecutor argued that it didn't. (10 RT 2549-2550.) Defense counsel could not do much more than argue that appellant's reactions sprang from ordinary human emotion. (10 RT 2560-2561, 2588.)

There was nothing in the jury instructions to guide to jury to even consider motivation as a mitigating factor.[49] Thus the jury was given no vehicle for expressing its "reasoned moral response" to appellant's mitigation evidence. (*Penry v. Johnson* (2001) 532 U.S. 782.)

Regarding the proposed modification to factor (e), to focus on the victim's contribution to the defendant's emotional disturbance, this was obviously meant to refer to Juan Uribe. No one suggests that Chuck Durbin contributed to appellant's emotional disturbance. There was ample evidence that the feud had focused on Juan Uribe, involving several violent incidents leading up to the homicides;

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[49] Respondent cites to *People v. Barnett* (1998) 17 Cal.4th 1044, 1176-1177. That decision holds only that the trial court need not include language from section 190.2 that a life term must be imposed where mitigating evidence outweighs aggravating evidence. *Barnett* does not mean that the unadorned CALJIC language is always sufficient; in some cases, as here, a pinpoint instruction is necessary.

clearly appellant had been clued into the nature of this controversy, at least to focus his concern on Uribe, not Jesse Candia, and certainly not Chuck Durbin.

Even if not a complete "legal excuse for the crime" (factor (k)), evidence of provocation and heat of passion was an important aspect of the defense. Evidence of provocation and heat of passion was not attenuated and should have been included as a mitigating factor on request. (See Argument VIII above, and *People v. Moye* (2009) 47 Cal.4th 537.)

Respondent argues unconvincingly that the jury "necessarily rejected any contention that appellant was under the influence of extreme mental or emotional disturbance." (RB 136.) To the contrary, the jury undoubtedly believed that the prior shooting weighed heavily on appellant's mind, provoking him and making him fearful for his family's safety. Yet that factor alone may not have been enough to tip the balance under factor (e), for the simple reason that it did not appear to "extenuate the gravity of the crime" – the prosecutor assured them that it did not.

In these circumstances appellant was prejudiced by the failure to read a pinpoint instruction on the defense request (see *Porter v.*

McCollum, supra), and the penalty phase judgment must be reversed.

XIX. THE TRIAL COURT IMPROPERLY REFUSED DEFENSE-REQUESTED PENALTY PHASE INSTRUCTIONS ON THE ASSESSMENT OF MITIGATING EVIDENCE.

A. Instruction on Standard of Proof. Respondent correctly points out that the beyond-a-reasonable-doubt standard of proof does not apply to the penalty phase. (RB 139.) But respondent does not explain how a jury would know that; there is certainly no harm in telling what the jurors explicitly of a rule that the lawyers understand implicitly.

The requested instruction does not direct the jury to "make findings based on the evidence." It directs the jury to accept uncontradicted mitigating evidence which the jury finds to be believable, i.e. "substantial." This instruction guards against the jury rejecting mitigating evidence out of passion or prejudice. It makes a worthwhile point: regardless of how dire the circumstances in aggravation may appear, the jury must pause and consider any mitigating factor that is supported by substantial evidence.

Without citation to authority, respondent claims that the trial court need not "parse" the *Wharton* instruction[50] to separate the valid portions from those which are cumulative or argumentative in the

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[50] *People v. Wharton* (1991) 53 Cal.3d 522, 600-601.

circumstances of the case. To the contrary, the trial court must parse a proposed instruction, even modify it if necessary, so long as an important point is contained in it. (*People v. Brady* (1987) 190 Cal.App.3d 124, 136.) "The judge is, after all, the one responsible for instructing the jury on the law, a responsibility that may not be abdicated to counsel." (*Brown v. Payton* (2005) 544 U.S. 133, 146.)

For these reasons it was error to refuse the instruction on the treatment of mitigating evidence.

B. Instruction on Intracase Comparison. Respondent relies on the principle that "the individually negotiated disposition of an accomplice" is not relevant to the penalty determination, citing *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1188, and authorities there cited.

However, "under article I, section 17 of the California Constitution,[51] defendant is entitled to intracase review to determine whether the death penalty is disproportionate to his personal culpability." (*People v. Williams* (1997) 16 Cal.4th 153, 280.) Favorable treatment of a potential accomplice such as Jesse Rangel, where there is lingering doubt of who was actually involved in the fatal

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51 "Cruel or unusual punishment may not be inflicted or excessive fines imposed."

shootings, should be a matter of concern to the sentencing jury, and to this Court on review of the sentence.

Appellant continues to press for jury consideration of evidence of intracase dispositions, as a matter of federal due process. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 187, and *Parker v. Dugger* (1991) 498 U.S. 308, 314.)

XX. THE TRIAL COURT FAILED TO INSTRUCT THE PENALTY PHASE JURY *SUA SPONTE* ON THE CIRCUMSTANTIAL EVIDENCE RULE.

Respondent relies on the proposition that the Circumstantial Evidence Rule has no application where the prosecution does not rely substantially on circumstantial evidence. (RB 143.) However, in seeking the death penalty the prosecution here did rely substantially on circumstantial evidence. Central to the prosecution penalty argument was the assertion that appellant was motivated by "revenge" and by a need for "respect." These are factors that can only be proven by circumstantial evidence.

The case in mitigation was also based on circumstantial evidence, i.e. evidence of intoxication, or "impaired capacity." (See Penal Code § 190.3 (h).)[52] At the guilt phase the evidence was necessarily limited to the question of "diminished actuality," and impaired capacity was a consideration which only arose in the penalty phase. It was supported entirely by circumstantial evidence.

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[52] "Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects [*sic*] of intoxication."

The blanket erasure of the Circumstantial Evidence Rule, along with all other guilt phase instructions, created the likelihood that this important principle would be ignored in the penalty phase. As this Court stated in *People v. Romero* (2008) 44 Cal.4th 386, 425, "[d]efendant correctly observes that a trial court's failure to specify which previously given guilt phase instructions apply at the penalty phase may mislead the jury (*People v. Weaver* (2001) 26 Cal.4th 876, 982), and that we have admonished trial courts that they should 'expressly inform the jury at the penalty phase which of the instructions previously given continue to apply' (*People v. Babbitt* (1988) 45 Cal.3d 660, 718, fn. 26)...." This situation is to be distinguished from trial court instructions that permit the use of guilt phase instructions at the penalty phase. (See *People v. Rogers* (2009) 46 Cal.4th 1136, 1175.[53]

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[53] "Here the trial court instructed the jury that 'unless otherwise indicated ... all applicable instructions given in the guilt phase will apply.' The court additionally instructed the jury to disregard only those guilt phase instructions that conflicted with the penalty phase instructions the court was about to give. [fn.] Having instructed as such, the court was not obligated to repeat all the guilt phase instructions that applied to the penalty phase. (See *People v. Rogers* (2006) 39 Cal.4th 826, 905 [distinguishing those situations in which a penalty phase jury was instructed, without limitation, to disregard all other instructions given in other phases of the trial]; see *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1067; *People v. Cooper* (1991) 53 Cal.3d 771, 846.)" (Emphasis added.)

Respondent also asserts that the Circumstantial Evidence Rule is not necessary in any proceeding where there is no burden of proof beyond a reasonable doubt. Respondent cites *People v. Edwards* (1991) 54 Cal.3d 787, 782, for the proposition that since there is no standard of proof beyond a reasonable doubt at the penalty phase, the Circumstantial Evidence Rule has no application, and there is no duty to instruct on it.

However, there are predicate facts which the Circumstantial Evidence Rule applies, such as motive and impaired capacity. (See *People v. Richardson* (2008) 43 Cal.4th 959, 1033: "The death penalty statute does not adopt any new rules of evidence peculiar to itself, but simply allows the generally applicable rules of evidence to govern.") It is only the ultimate decision, not the predicate facts, which is immune from the Circumstantial Evidence rule. CALJIC 2.02 should have been read to apply to those essential items of contention in the penalty phase.

XXI. THE TRIAL COURT'S FINDING OF PREMEDITATION IN COUNT ONE, IN DENYING THE DEFENSE MOTION TO MODIFY THE DEATH VERDICT, WAS AN ABUSE OF DISCRETION AND A VIOLATION OF DUE PROCESS.

Defense counsel filed an extensive motion to modify the death judgment. (13 CT 2855.) Respondent now asserts that there was a failure to preserve the objection to premeditation as a factor in aggravation. (RB 146.) Appellant submits that the wide-ranging defense motion should be deemed to preserve the objection to improper factors relied upon by the trial court.

Respondent goes on to argue that there was no prejudice because there is no other reasonable interpretation of the evidence other than that Count One was a premeditated killing. To the contrary, given appellant's intoxication and the extremely short time span, a few seconds at most, leading to the shooting, proof of premeditation was not an easy task.[54] (See Argument IV above.)

Moreover, the phantom element of premeditation swung the balance in favor of the death penalty. It is reasonably likely that in

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[54] Respondent incorrectly states that a .38 slug was found near the victim's body. The slug recovered next to the victim's head was a .380. (4 RT 928.) According to the testimony of Richard Diaz, he fired a .38, whereas appellant fired a .380 (5 RT 1271, 1276.)

the absence of this factor the trial court, as well as the jury, would not have imposed the death penalty.

XXII. MANY FEATURES OF THE CALIFORNIA CAPITAL SENTENCING SCHEME, AS INTERPRETED AND APPLIED BY THIS COURT, VIOLATE THE FEDERAL CONSTITUTION AND INTER-NATIONAL NORMS.

Appellant submits this Argument, and its sub-arguments, on the basis of prior briefing.

CONCLUSION

For the foregoing reasons, appellant's conviction must be reversed. In the alternative, the death penalty judgment must be reversed, or the matter must be remanded for further proceedings.

Date: December 22, 2009

Respectfully submitted,

CHARLES M. BONNEAU
Attorney for Appellant

STATEMENT OF COMPLIANCE

Pursuant to Rule 8.630 (b), Cal. Rules of Court, the foregoing Brief is in Times New Roman font, 13-point, and contains a word count of 18,702.

Date: December 22, 2009

CHARLES M. BONNEAU
Attorney for Appellant

CASE NAME: **PEOPLE v. RANGEL**
CASE NO.: **S076785**
COURT: **SUPREME COURT OF CALIFORNIA**

PROOF OF SERVICE BY MAIL

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On the dated below I served the APPELLANT'S REPLY BRIEF on the parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as follows:

LUKE HIKEN
California Appellate Project
101 Second Street Ste. 600
San Francisco, CA 94105

PEDRO RANGEL, Jr. P-28501
S.Q.S.P. 4-E-46
San Quentin, CA 94974

Dep. Atty. Gen. BRIAN ALVAREZ
2550 Mariposa Mall, Rm. 5090
Fresno, CA 93721
[Attorney for Respondent]

MADERA CO. SUPERIOR CT.
209 W. Yosemite Ave.
Madera, CA 93637

MADERA CO. DIST. ATTY.
209 W. Yosemite Ave.
Madera, CA 93637

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