No. S084996

SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RUN CHHOUN, Defendant and Appellant.	(San Bernardino County Superior Court No. FSB 858658)

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of San Bernardino

HONORABLE BOB N. KRUG, JUDGE

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	No. S084996
v.	
	(San Bernardino Co. Superior Ct.
RUN PETER CHHOUN,	No. FSB 858658)
Defendant and Appellant,	

APPELLANT CHHOUN'S REPLY BRIEF

INTRODUCTION

The trial of this case was infected with a raft of unnecessary and irrelevant, but damning, other crimes evidence and racially tinged "Asian" gang testimony that clouded the true issues in the case and made it impossible for the jurors to accept the defense presented. The trial court failed to properly instruct the jurors regarding this evidence, and other instructional and evidentiary errors compounded the prejudice caused by introduction of the other crimes evidence. Respondent largely fails to address or counter appellant's arguments regarding these errors. Instead, respondent recites talismanic phrases with no analysis and argues that

evidence of prior murders and membership in a violent gang was not prejudicial. To the contrary, the errors were highly prejudicial and require that the guilt verdicts, special circumstances findings, and death judgment be reversed.[1]

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

ARGUMENT

I.

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A RELIABLE DETERMINATION OF GUILT BY PERMITTING THE PROSECUTION TO INTRODUCE IRRELEVANT AND INFLAMMATORY EVIDENCE OF PRIOR MURDERS AND GANG INVOLVEMENT

The Evidence Code section 1101, subdivision (a)[2], ban on introduction of uncharged offense evidence to prove bad character does not prohibit the admission of evidence of prior offenses to prove the issues listed in section 1101, subdivision (b), when those issues are fairly in dispute. This Court, however, has made clear that subdivision (b) may not be interpreted so broadly as to swallow the absolute evidentiary bar contained in subdivision (a).

In this case, the section 1101, subdivision (b) evidence was ostensibly admitted to prove "premeditation and malice aforethought as required in the crime of first degree murder, the necessary intent as required in the crimes of murder, robbery and burglary. It may be used as evidence of a common scheme, motive or knowledge." (27 RT 3677.)[3] None of these elements was actually disputed. Appellant's defense was that there was insufficient corroborated accomplice witness testimony of appellant's presence at the San Bernardino crime scene to sustain a conviction. The only issue in dispute, then, was the identity of the fourth person

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[2]All statutory references in this argument are to the Evidence Code unless otherwise indicated.

[3]The trial court was hardly clear throughout the trial regarding its basis for admitting the other crimes evidence, but this is the instruction it read to the jury. (27 RT 3677.)

participating in the robbery, and the court was clear that the Sacramento evidence was inadmissible to prove identity. (See 13 RT 1856.)

Respondent's various rationales for admitting the section 1101, subdivision (b) evidence effectively eliminate any and all hurdles to the admission of character evidence in a criminal trial in California. This Court should not accept respondent's invitation to judicially repeal section 1101, subdivision (a).

A. The Sacramento Evidence Was Inadmissible Against Appellant Chhoun

This Court has directed trial courts to employ "extremely careful analysis" before admitting evidence of uncharged offenses to prove issues listed in section 1101, subdivision (b) due to the great risk of prejudice such evidence carries (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404), and to admit that evidence only "with extreme caution" and only after resolving "all doubts about its connection to the crime charged . . . in the accused's favor" (*People v. Alcala* (1984) 36 Cal.3d 604, 631, citation omitted). The trial court, in admitting the avalanche of uncharged offense evidence, was far from "extremely careful" in its analysis, and respondent has added nothing of substance to show the need for that evidence. The trial court initially stated that the Sacramento crime evidence was unnecessary, cumulative, and prejudicial. (13 RT 1857.) It nevertheless allowed the prosecutor to introduce the evidence without even addressing the court's own concerns about its admissibility and with no analysis of how the evidence proved premeditation and deliberation, intent, or motive.

In fact, the prosecution sought to introduce the Sacramento robbery and murders in an attempt to implicate appellant's codefendant Pan in the

Elm Avenue offenses at which he was not even present.[4] Ultimately, however, the evidence against Pan was so weak that even with introduction of the extrinsic evidence, the trial court was forced to dismiss the case against Pan at the close of the prosecution's evidence. (27 RT 3605.) Unfortunately, this was too late for appellant, against whom the evidence was so irrelevant, inflammatory, and prejudicial that it would not have been admitted in a severed trial.

1. The Sacramento Evidence Was Not Relevant to Show Appellant's Premeditation and Deliberation[5]

Respondent initially states that appellant's plea of not guilty put in issue all the elements of the charged offense and therefore identity, intent, and motive are material facts that must be proved. (RB 59, citing *People v. Roldan* (2005) 35 Cal.4th 656, 705-706 and *People v. Balcom* (1994) 7 Cal.4th 414, 423.) This is first of many instances where respondent makes a broad statement superficially supported by case law, with no real examination of underlying reasoning of the decisions it relies upon. In *Roldan*, the Court concluded that the defendant placed all issues in dispute by pleading not guilty (35 Cal.4th at p. 705-706), but immediately noted

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[4]The prosecutor acknowledged that, "primarily," the Sacramento evidence is "very important for the issue of what Mr. Pan knew and could have known at the time he handed Mr. Chhoun the gun for Elm Street [sic]." (13 RT 1840.) In his closing argument, the prosecutor stated, "A lot of stuff about Sacramento and why we called the expert had to do with building a bigger case against Pan." He then was quick to add that the evidence "also applies . . . in the way we have limited it to Chhoun as well." (28 RT 3703-3704.)

[5]Respondent failed to respond directly to appellant's arguments so appellant has modified the argument headings in this section of the reply to address respondent's points.

that "defendant declined to stipulate that he was one of the robbers (identity) or that he intended permanently to deprive Pipkin of his money (intent)." (*Id.* at p. 706, fn. 24.) And while the Court in *Balcom* recognized that a defendant's plea of not guilty puts all elements of a charged offense in dispute (7 Cal.4th at pp. 422-423), it *also* recognized that where the act, if done, does not permit a finding of non-criminal intent and permits no "middle ground," the other crimes evidence must be excluded as cumulative, particularly in light of its inherently prejudicial effect. (*Ibid.* ["because the victim's testimony that defendant placed a gun to her head, if believed, constitutes compelling evidence of defendant's intent, evidence of defendant's uncharged similar offenses would be merely cumulative on this issue"].)

The charges in this case were murder, attempted murder, robbery, and burglary. At trial, no one disputed that a robbery and burglary occurred at the Elm Avenue residence on August 9, 1995. As this Court recognized in *People v. Ewoldt, supra*, 7 Cal.4th at p. 406, "*in most prosecutions for crimes such as burglary and robbery, it is beyond dispute that the charged offense was committed by someone*; the primary issue to be determined is whether the defendant was the perpetrator of that crime." (Italics added.) "If the jury found that defendant committed the act alleged, there could be no reasonable dispute that he harbored the requisite criminal intent." (*People v. Balcom, supra*, 7 Cal.4th at p. 422.)

Respondent nevertheless insists that the Sacramento evidence was necessary to prove premeditation and deliberation since appellant was charged with first degree murder "on the theory of" premeditation and deliberation. (RB 58.) In making this assertion, respondent ignores the record, which shows that the prosecutor did not rely on a theory of

premeditated first degree murder at trial. (AOB 100-102.) To the contrary, as pointed out in the opening brief, the prosecutor told the jurors, in so many words, not to bother with premeditation and deliberation because it was "the harder way of doing it, more complicated." (AOB 100; 28 RT 3691.) He urged them instead to find felony murder, as it "[d]oesn't require all of this other stuff about premeditation." (28 RT 3692-3693.) "[T]hose two simple ways of finding your first two steps, I would recommend, because they are so clear and so obvious. You don't have a lot of room for concern or dispute about them. A little easier than using a first degree premeditated, intentional killing." (28 RT 3694.) His reference to Sacramento regarding premeditation and deliberation was perfunctory: "the judge will tell you you may consider the Sacramento evidence as far as bearing on his intent to kill, premeditation, deliberation, things like that." (28 RT 3702.) But, more specifically, he told the jurors the Sacramento evidence was introduced to show that appellant acted with "reckless indifference to human life," something anyone involved in an armed residential burglary would have harbored. (28 RT 3701.)

The prosecutor's argument thus belies any purported need to introduce the Sacramento evidence to prove premeditation and deliberation. At the very least, his argument underscores that the evidence had little, if any, legitimate probative value. (AOB 100.)

Further, even if premeditation and deliberation were an issue in this case, the Sacramento case certainly did not add anything to the probative-value equation. Respondent attempts to cite the similarities of the two offenses but really does little more than list the elements of a residential robbery: the parties planned a robbery of individuals they believed had something of value; they obtained information about the selected victims;

they armed themselves; they committed the robbery; and they shot the victims.[6] (See RB 54, 62.) Respondent states that the victims were shot when they resisted, but there is no evidence that the Elm Avenue victims resisted.

To the extent that there is any similarity between the two offenses other than their elements,[7] Sacramento shines no light on the issue for which it was allegedly admitted – premeditation and deliberation. On the facts adduced at trial, the Sacramento shootings were unplanned and impulsive. The prosecutor himself contrasted the facts of this case with those of Sacramento: "we don't have a situation here where there . . .[are] random shots fired all through the Elm Street house, do we? We have selected shots. . . ." (28 RT 3692.) Respondent's argument is therefore unavailing: a spontaneous shooting in Sacramento in response to resistance cannot prove a premeditated shooting in San Bernardino. The two crimes are different on the very point that was to be proved by the similar crimes evidence.

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[6]Respondent argues that it is significant that both Sacramento and Elm Avenue involved Asian victims. But "street crime in America is intraracial. About 84% of single-offender violent crimes committed by blacks are committed against blacks, and some 73% of such crimes committed against whites are committed by whites. This intraracial crime pattern holds with great force on homicide rates as well." (John J. DiIulio, Jr., *Comment on Douglas S. Massey's Getting Away with Murder: Segregation and Violent Crime in Urban America* (1995) 143 U. Pa. L. Rev. 1275, 1277.) There is no indication that statistics are different for Asian offenders.

[7]As appellant pointed out in his opening brief, the two incidents were not as similar as respondent asserts. (AOB 93-94.)

Respondent argues alternatively that the Elm Avenue murders were "contemplated beforehand, if not outright planned." (RB 59.) As this Court recently acknowledged, however, "'the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen; it is one principal reason that felons arm themselves.' This understanding of the requisite culpability 'amounts to little more than a restatement of the felony-murder rule itself.'" (*People v. Banks* (2015) 61 Cal.4th 788, 808, quoting *Tison v. Arizona* (1987) 481 U.S. 137, 151.) The fact that a death might be foreseeable in a commission of a violent crime does not make all violent felonies premeditated and deliberate.

The cases respondent cites do not support admissibility of the uncharged offense under the facts of this case. Both *People v. Rogers* (2013) 57 Cal.4th 296 and *People v. Cummings* (1993) 4 Cal.4th 1233, stand for the simple proposition that section 1101, subdivision (b) evidence can be used to prove premeditation and deliberation. In *Rogers* it was used to "negat[e] accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act. . . ." (*People v. Rogers*, *supra*, 57 Cal.4th at pp. 327-328.) In *Cummings*, the Court concluded that evidence that defendant possessed a handgun and threatened to kill any policeman who got in his way went to motive for killing an officer and thus to the elements of intent, premeditation, and deliberation. (*People v. Cummings*, *supra*, 4 Cal.4th at p. 1289.)

Here, there was no suggestion of self-defense, accident, or provocation at the Elm Avenue residence. Respondent's attempt to

bootstrap propensity into premeditation must be rejected. The trial court erred in allowing the evidence to be introduced to prove premeditation and deliberation.

2. The Sacramento Evidence Was Not Relevant to Show Motive, Intent to Rob, or Intent to Kill

It is abundantly clear that whoever participated in the Elm Avenue incident intended to take property by fear or force – i.e., intended to commit a robbery. While criminal intent is seldom proved by direct evidence and often must be inferred from a defendant's conduct (*People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1380), here, accomplices provided direct evidence of an armed robbery, the shooting death of five individuals, and the accompanying criminal intent. Respondent attempts to justify introduction of the Sacramento crime evidence to prove two contradictory theories: (1) primary intent to kill with robbery as an afterthought; and (2) robbery with a conditional intent to kill. Respondent cannot have it both ways.

Respondent initially claims, implausibly, that intent to rob was not apparent from the facts of this case: "Contrary to appellant's argument, the robbery or theft motive was not wholly clear." (RB 60.) The motive was nothing if not wholly clear. If appellant engaged in the conduct described by the accomplices – and the young victim Dennis[8] – appellant's intent in doing so could not reasonably be disputed. (See, e.g., *People v. Lopez* (2011) 198 Cal.App.4th 698, 715 ["Evidence regarding the Mendicino burglary showed that someone entered the kitchen of the Mendicino

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[8]The parties stipulated that on August 10, 1995, Detective Brian Cartony interviewed two-and-one-half-year old Dennis Nguyen who described a robbery and his father being shot in the head. (24 RT 3233-3235.)

residence and took two purses. Assuming appellant committed the alleged conduct, his intent in so doing could not reasonably be disputed – there could be no innocent explanation for that act"]; *People v. Bigelow* (1984) 37 Cal.3d 731, 748 [defendant's prior thefts and robberies inadmissible to establish that charged robbery-kidnap murder was committed to obtain victim's property as "the motive for robbery is generally one of acquiring the victim's property, and proof that Bigelow previously committed theft or robbery for this purpose adds little to the case"].)

Respondent also argues that the prosecution needed the Sacramento evidence to prove that the intent to rob was "not merely incidental to the murders." (RB 60.) But no one suggested at trial that the offenders entered the Nguyen residence with the primary intent to kill its occupants and that the robbery was an afterthought. The intent to rob was apparent and undisputed.

It is equally true that the Sacramento evidence was not needed to prove intent to kill. Whoever shot the Nguyen family members in San Bernardino intended to kill them. Respondent states that it was not apparent who among the defendants shot the victims. (RB 60.) This underscores that the *real* issue in the case was identity, which the trial court and prosecutor agreed the Sacramento evidence was inadmissible to prove.[9]

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[9]The Sacramento evidence was never proffered to show identity at trial. After the court stated "the Sacramento evidence cannot be used on the issue of identity," the prosecutor allowed that he was "not offering it for identity really." (13 RT 1856.) The court then explicitly stated, "to make it clear, if it's admissible at all, its not admissible against Mr. Chhoun on the issue of proving identity." (*Ibid.*; see also, 5 RT 579, 13 RT 1861.) While the trial court never articulated the basis for this ruling, it is clear that there were insufficient similarities between the two events to meet the stringent

(continued...)

Respondent never addresses appellant's argument that intent to kill was evident from the shootings, yet even the prosecutor acknowledged this fact: "[D]oes it mean intentional killing when you put a gun to the back of someone's head and blow their teeth out? Of course, it does." (28 RT 3691-3692; see also, 28 RT 3699-3700 ["I am not going to bore you with talking about the intent to kill, because I think we certainly have intent to kill given the nature of the wounds we've seen here and so on and so forth"].) And, as appellant pointed out in the opening brief (AOB 92), this Court has recognized that firing at close, but not point blank, range "'in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill. . . .'" (*People v. Perez* (2010) 50 Cal.4th 222, 230, citation omitted; see also *People v. Lashley* (1991) 1 Cal.App.4th 938, 945-946.)

Respondent states that contrary to appellant's contention (that the trial court posited what appears to be a theory of conditional premeditation, which this Court has never found [AOB 94-95]), this Court has found conditional intent to kill, citing *People v. Lang* (1989) 49 Cal.3d 991, 1013-1016.) (RB 61.) Initially, *Lang* does not address conditional premeditation and deliberation, which is the term appellant used in his opening brief. Nor did *Lang* involve "conditional intent." Rather, the defendant in *Lang* made a generic threat to a class of people. (See e.g., *People v. Rodriguez* (1986)

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[9](...continued)
requirements of *Ewoldt*: "For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.' " (*People v. Ewoldt, supra*, 7 Cal.4th at p. 403, citation omitted.)

42 Cal.3d 730, 756-757 ["a generic threat is admissible to show the defendant's homicidal intent where other evidence brings the actual victim within the scope of the threat"].)

In addition, unlike in this case, intent was a genuine issue in *Lang*: the offense was committed during the window period between *Carlos v. Superior Court* (1983) 35 Cal.3d 131 and *People v. Anderson* (1987) 43 Cal.3d 1104 when proof of intent to kill was required for the robbery-murder special circumstance. Evidence of the defendant's intent to kill was also relevant in *Lang* to defeat a claim of self-defense. (*People v. Lang*, *supra*, 49 Cal.3d at p. 1016; see also, *id.* at pp. 1015-1016 [generic threat "provided evidence that the killing was intentional rather than accidental or in response to a threat of deadly force by the robbery victim"].) No such defense was raised in this case.

Here, as in *Ewoldt*, there can be no reasonable dispute that whoever committed the alleged acts harbored the requisite criminal intent. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 406.) The defense conceded as much. They did not dispute that the Elm Avenue offenses occurred. They instead argued to the jurors that there was insufficient corroborated evidence of appellant's involvement in those offenses: "I don't think we need to belabor or go into the details of what happened at this crime. They were pretty evident from the evidence here. But what evidence, persuasive or not, put Mr. Chhoun at the scene of that crime?" (28 RT 3721.) If the jurors accepted the accomplice testimony, appellant committed armed robbery and first degree murder. If the jurors rejected these witnesses, there was little evidence appellant was even at the Elm Avenue residence. These wholly divergent accounts create no middle ground from which the jury could conclude that appellant committed the proscribed acts of taking items

from the victims by force or fear and intentionally shooting the family members at close range, but lacked criminal intent for some reason. (Cf. *People v. Williams* (1992) 4 Cal.4th 354, 362 [wholly divergent accounts as to consent to sexual intercourse create no middle ground from which defendant could argue he reasonably misinterpreted victim's conduct].)

3. The Sacramento Evidence Was Not Admissible to Prove a Common Scheme or Plan

Respondent's rationale for its assertion that the evidence of the Sacramento murders was admissible to show a common plan or scheme (RB 62), is elusive. Unlike proof of intent or identity, with proof of common design or plan, the criminal act is not conceded or assumed, it is contested. (See *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2.) Respondent states the prior conduct showed that appellant "engaged in conduct charged in the instant case." (RB 63.) Since the criminal acts – the armed robbery and killings – are conceded in this case, it appears that respondent is arguing the Sacramento evidence was admissible to show identity – which, again, even respondent acknowledges a common plan or scheme is inadmissible to prove. (RB 62; see *People v. Ewoldt*, *supra*, at p. 406 ["If there was a question whether the defendant was present when the incident took place, the real question is identity, not common design or plan"]; *ibid.* ["evidence of a common design or plan is admissible only to establish that the defendant engaged in the conduct alleged to constitute the charged offense, not to prove other matters, such as the defendant's intent or identity as to the charged offense"].)

Respondent cites *People v. Johnson* (2013) 221 Cal.App.4th 623 and *People v. Balcom*, *supra*, 7 Cal.4th 414, apparently to demonstrate that the Sacramento and San Bernardino cases were similar enough to be introduced

under a theory of common plan or scheme. (RB 62.) But the true issue is whether there was a need to prove common plan or scheme at all, given that the criminal acts were not contested.[10]

The situation in *Johnson* is more similar to that of codefendant Pan than appellant. There, the defendant was not even present at the home invasion robbery that he apparently "masterminded" and at which a provocative act murder occurred. (*People v. Johnson*, *supra*, 221 Cal.App.4th at pp. 627-629.) At issue was whether he harbored malice (*id.* at pp. 630-632) and whether the killing was committed in furtherance of the common design (*id.* at p. 633). Evidence that the defendant committed a prior home invasion was admitted under section 1101, subdivision (b) to show that he acted with the intent to commit robbery and that he had a plan or scheme to commit the offense alleged. (*Id.* at p. 634.) In this case, if appellant was present, he acted with intent, and common plan or scheme was not needed to establish that appellant engaged in the conduct alleged; its only purpose was to act as improper propensity evidence.

In *Balcom*, evidence of a prior rape was introduced under section 1101, subdivision (b), to show common scheme or plan where the defendant argued that he and the alleged victim engaged in consensual sexual intercourse. (*People v. Balcom*, *supra*, 7 Cal.4th at pp. 420-424.) Unlike here, the act itself was disputed.

In apparent recognition that the acts of robbery and murder were not disputed, respondent makes what amounts to an assertion that the Sacramento evidence was needed to prove identity: "[I]t was not beyond

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[10]Respondent also acknowledges, quoting *Ewoldt*, such evidence would be cumulative and prejudicial if there is no dispute that the crime occurred. (RB 63.)

dispute that appellant took a lead role in the crime by demanding money and jewelry from the Elm Avenue victims and personally shot or threatened them. (RB 63.) Respondent cites no authority for the proposition that common plan and scheme can be introduced to show a person's *role* in an offense when the offense itself is not disputed, but identity is. Instead, respondent relies on "role" as a code word for identity. In as much as respondent is seeking to prove through the Sacramento evidence who shot whom, it is seeking to prove appellant's identity as the perpetrator.[11]

Nor does respondent describe how the Sacramento conduct shows appellant's role or that he demanded money or threatened and shot anyone in San Bernardino, other than through his propensity to do such things. No one positively identified appellant as the assailant or shooter in Sacramento.[12] Nor was there testimony that appellant demanded money or threatened anyone in Sacramento.

Respondent has turned the test for common plan or scheme on its head, essentially arguing that because appellant committed the San Bernardino offenses, he must have been acting pursuant to a common plan

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[11]It must be noted that this rationale for introduction of the extrinsic evidence was never raised, discussed, or argued at trial.

[12]Respondent acknowledges that Luu believed the shooter looked like appellant but was unsure. (RB 22, citing 19 RT 2702-2703.) Luu testified that she did not know whether appellant was her assailant. (19 RT 2702-2703.) And on cross examination Luu acknowledged she had earlier testified "All I remember, the guy with dark skin came in. That's all." "I was really frightened. I don't really know which one. I was frightened." (19 RT 2706.)

or scheme. Common plan or scheme evidence was unnecessary in this case, and the other crimes evidence should not have been admitted to prove it.

4. The Sacramento Evidence Was Minimally, If at All, Probative of Any Disputed Fact, Unquestionably Time Consuming, and Highly Prejudicial

Respondent argues that the Sacramento evidence was "highly probative" to show appellant's intent to kill and his motive and intent to rob. (RB 63.) This is a specious contention made with no explanation of how anyone could have committed the killings without an intent to kill or committed a burglary without intent to rob. Respondent does not address *People v. Perez, supra*, 50 Cal.4th at p. 230, which appellant cited in his opening brief (AOB 92) and in which this Court recognized that intent to kill can be found from the circumstances of a shooting. Nor does respondent address the fact that the prosecutor told the jurors at trial that intent to kill could be found from the nature of the shootings. The prosecutor made no reference to the Sacramento evidence in arguing intent to kill. (28 RT 3691-3692.) He similarly made no mention of the Sacramento evidence when discussing the robbery and burglary. He told the jurors that appellant went to the Elm Avenue location with the intention of committing a robbery, so intent to commit burglary was easy. "So now we have a quick decision. Burglary. Not going to take a lot of deliberation." (28 RT 3693.) He never suggested that intent to rob was somehow in dispute.

The trial court recognized the lack of probative value, cumulativeness, and prejudice of the Sacramento evidence. It opined that the prosecution had a "fairly strong case" against appellant if the jurors believed he was present and that "there's no really need to have the

Sacramento case except it just adds on to the fact that now the jury knows that this guy is a very bad man." (13 RT 1857.)

The court also found the evidence to be cumulative and highly prejudicial.

> And it's . . . cumulative. I think it's more perhaps damaging than merely cumulative because of the nature of what happened in Sacramento, if there is sufficient evidence that you apparently do have to establish all these other factors in the Elm Street case absent Sacramento.

(13 RT 1857.)

Respondent attempts to minimize the prejudice caused by admission of the Sacramento evidence by suggesting that the murder of two people and shooting of another was "relatively benign" compared to the Elm Avenue offenses. (RB 63-64, quoting *People v. Callahan* (1999) 74 Cal.App.4th 356, 371.) *Callahan* concerned admission of a prior child molestation pursuant to Evidence Code section 1108, which is not subject to section 1101's prohibition of evidence of character or disposition. (*Id.*, at p. 367.) Moreover, the *Callahan* court noted that "[t]here was no undue consumption of time. [The prior victim's] testimony was brief and to the point. Her complete testimony . . . covers only nine pages of the trial transcript. There was not a substantial danger of undue prejudice because the circumstances of the [earlier] incident were no more inflammatory than the circumstances of the current incident involving [the current victim]." (*Id.*, at p. 371.) In contrast, in this case, the other crimes evidence was voluminous.

Respondent also cites *People v. Lindberg* (2008) 45 Cal.4th 1, which, too, is inapposite. There, this Court concluded that uncharged prior robbery offenses had substantial probative value, and the trial court had

instructed the prosecutor to keep this evidence brief so that it would be neither cumulative nor excessive. Moreover, none of the robberies was particularly inflammatory "compared to the manner in which defendant brutally murdered Ly by stomping on his head, repeatedly stabbing him, and slicing the veins in his neck." (*Id.* at p. 25.)

In this case, in contrast, the Sacramento evidence was both cumulative and excessive. It took up such an inordinate amount of the trial that it almost overshadowed evidence of the charged offense. It comprised 16 witnesses and 230 pages of the prosecution's case. (See *State v. Hembree* (N.C. 2015) 770 S.E.2d 77, 83-87 [state went beyond purpose of showing defendant acted with common plan, scheme, or design in presenting 12 witnesses over seven of eight days of its case, despite repeated limiting instructions].) Moreover, contrary to respondent's assertion, the evidence was highly inflammatory. The victims' family gave highly emotional testimony, not only about the killings but also about their reactions and the tragic impact the killings had on them. Also, two family witnesses were assisted by victim-witness advocates, which further enhanced the prejudicial impact of the other crimes evidence by suggesting appellant was a dangerous individual who had emotionally scarred the witnesses. (AOB 135-136.)

The legitimate probative value, on the other hand, was virtually nil, as discussed above and in the opening brief. (AOB 99-107.) Tellingly, as noted above, the prosecutor during closing argument mentioned premeditation and deliberation only in passing and urged the jurors to rely instead on a theory of felony murder. (28 RT 3691-3694.)

Consequently, the probative value of the contested evidence was substantially outweighed by the danger of undue prejudice, confusing the

issue, and misleading the jurors. (See Evid. Code § 352; *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.)

B. The Trial Court Erred in Admitting Evidence of Appellant's Gang Membership

In its brief response to appellant's argument that introduction of his gang membership was improper, respondent fails to address most of appellant's arguments and tries to justify introduction of the evidence against appellant by asserting exceptions never raised at trial: that is, the gang evidence showed modus operandi and explained why each person took a specific role in the crime. (RB 70-71.) The word "modus" was uttered just twice on the record. Once, outside the presence of the jury, the trial court suggested that a gang expert might testify that "gangs, in the relationship that they have, work together – and I'm not trying to be a prophet or anything – that their modus operandi, if I may use that term, is perhaps for a common understanding as to the activity of the gang membership; that one member of the gang may carry out a certain function; that another member could do something else, and the whole thing being a purpose to accomplish an end." (15 RT 2101-2102.) A second time, the prosecutor used it in a question that elicited testimony from the expert that "[t]he weapons for the team that makes the entry are provided by other members of the gang that are holding the weapons[,] the transportation . . . may[ ]be provided by yet another different member of the gang and yet all coordinated together during the planning stages of that particular crime." (15 RT 2155.) The court's suggestion and witness's testimony were clearly directed to Pan and how his role in supplying a gun implicated him in the robbery and murders. And, indeed, as noted above, the prosecutor told the jurors "A lot of stuff about Sacramento and why we called the [gang] expert

had to do with building a bigger case against Pan." (28 RT 3703-3704.) He added that it also applied to appellant, as limited. (*Ibid.*)

Respondent also contends that the gang evidence was relevant to show the relationship between appellant and his other codefendants, and to explain their participation over their own misgivings. (RB 70.) This justification was never mentioned at trial, understandably, because it is not relevant to any disputed issue. The materiality of the gang testimony was nonexistent.

Moreover, respondent's contentions beg the question: what is evidence of modus and role intended to prove, except that Pan could be connected to a robbery and murder in which he participated only by providing a weapon and that appellant was guilty because he was the type of person who engages in criminal activity.

This is not a case where the prosecution needed to prove a substantive gang offense (Pen. Code § 186.22 subd. (a)), a gang enhancement (Pen. Code § 186.22, subd. (b)), or a gang special circumstance (Pen. Code § 190.22, subd. (a)(22)). Nevertheless, in making its arguments, respondent cites cases involving gang crimes and gang enhancements interchangeably with those, such as here, where gang evidence was merely incidental. But the standard for admission in the two types of cases is not the same. "In cases *not* involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049, original italics.)

Respondent's reliance on cases in which gang offenses or enhancements were not charged, *People v. Parrish* (2007) 152 Cal.App.4th 263 and *People v. Montes* (2014) 58 Cal.4th 809, is misplaced as gang

activity was the motive for the crimes in both cases. (RB 70.) In *Parrish*, the defendant raised a defense that he was coerced by the gang into committing a robbery. (152 Cal.App.4th at pp. 269, 277.) "This defense put into issue whether defendant's motive in committing the robbery was to avoid further injury to himself or his family." (*Id.* at p. 279.) No such defense was presented here, and there was no legitimate basis for admission of the gang evidence.

In *Montes*, this Court found gang evidence probative because the defendant had bragged that he "earned his stripes," which this Court found suggested that he intentionally killed the victim to gain admittance to the gang. (*People v. Montes*, *supra*, 58 Cal.4th at p. 859.) There was a gang-related reason the defendant acted as he did. In contrast, here, a gang expert testified that Asian gangs engage in home invasion robberies to obtain money or jewelry. (15 RT 2122-2123.) Expert testimony was not needed to explain this motive. Where, as here, there is no gang motive that needs elucidation, respondent is simply couching a disposition argument in the language of motive.

1. Respondent Does Not Dispute Appellant's Argument That Gang Evidence Was Not Probative to Prove Motive

Although respondent refers to the trial court's written order admitting gang evidence to prove conspiracy, Pan's knowledge and intent, Pan and appellant's intent to commit the murders in the course of the robbery, and motive (RB 64), respondent addresses none of these bases for admission. Instead, respondent cites *People v. Parrish*, *supra*, 152 Cal.App.4th at p. 279, and *People v. Montes*, *supra*, 58 Cal.4th at p. 859, for the proposition that gang evidence is admissible as background information to show gang organization and hierarchy. (RB 70.)

Respondent thus fails to respond to appellant's argument that motive was not a proper basis for the admission of the gang testimony in this case. Indeed, respondent does not mention the word "motive" in its argument. (RB 69-72.)

As discussed in the opening brief (AOB 123), gang evidence introduced to prove motive is usually admissible where the motive was gang-related:

> Gang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related. There is not the usual gang motive here, such as criminal activity against a rival or a suspected rival; a battle over gang territory; retaliation for a prior attack upon a gang member; intimidation preceded by gang signs and identification; or bolstering one's reputation within the gang.

(*People v. Memory* (2010) 182 Cal.App.4th 835, 858-859, internal quotes and citations omitted.) There is no such evidence here.

2. Respondent Does Not Dispute that Gang Evidence Was Inadmissible to Prove Intent

Appellant argued introduction of gang evidence to prove intent is improper. (AOB 122-123.) Respondent does not contend otherwise. And, in fact, as a Ninth Circuit panel stated, bluntly, "[r]ecent authority in this circuit establishes that membership in a gang cannot serve as proof of intent, or of the facilitation, advice, aid, promotion, encouragement or instigation needed to establish aiding and abetting." (*United States v. Garcia* (9th Cir. 1998) 151 F.3d 1243, 1246, internal quotes and citations omitted.) The cases demonstrate how close the concepts of disposition and intent are – gang members generally act like this, so we can surmise defendant intended to act that way:

> Except in *West Side Story*, gang members do not move in lock-step formation. Gang movements are, in fact, often more

> chaotic than concerted. See Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 Wake Forest L.Rev. 943, 949-50 (1993) (describing most gangs as "disorganized" and decrying "efforts to prosecute ... gang members on the basis of social ties," as opposed to "traditional legal principles," as a "panic response"). Membership in a gang cannot serve as proof of intent, or of the facilitation, advice, aid, promotion, encouragement or instigation needed to establish aiding and abetting. To hold otherwise would invite absurd results. Any gang member could be held liable for any other gang member's act at any time so long as the act was predicated on the "common purpose of 'fighting the enemy.'" *Curtin v. Lataille*, 527 A.2d 1130, 1133 (R.I.1987).

(*Mitchell v. Prunty* (9th Cir. 1997) 107 F.3d 1337, 1342.)

3. Respondent Does Not Address Appellant's Argument That the Gang Testimony Was Overly Broad

Appellant argued that even if there was some justification for introduction of gang expert testimony, the testimony went far beyond any relevant or legitimate purpose. Sergeant Frank testified about the behavior of "Asian gangs" in general, as if they were some monolithic entity. But as this Court recently observed in *People v. Prunty* (2015) 62 Cal.4th 59, 73-74, a case addressing the sufficiency of evidence to support criminal street gang enhancement allegations, there is not necessarily a shared identity among subset members of a larger organization. The import of that decision is that different subsets of ostensibly the same gang, in that the subsets share names, colors, etc., may in fact be so unconnected that lumping them all together obscures rather than illuminates anything of evidentiary value.

Testimony about all "Asian gangs" provides little of value about the subset Tiny Rascals Gang. Just as Norteños and Sureños are not the same,

and the Crips and the Bloods are not the same, not all Asian gangs are the same gang. As Justice Cuellár noted in his dissenting opinion in *People v. Lam Thanh Nguyen* (2015) 61 Cal.4th 1015, 1096, the generality inherent in a discussion of "Asian gangs" writ large diminishes the probative value of a gang expert's testimony:

> [The gang expert]'s broad observations about the general culture of 'Asian' gangs does not, in and of itself, prove what defendant's actions and intentions were with respect to any given incident. . . . No human being acts in all instances as even a carefully drawn portrait of his cultural affiliation would predict.

Moreover, the expert testimony passed the bounds of admissibility when Frank testified about (1) gang members dangling a two-year-old boy out a second-story window by his ankles; (2) gang members repeatedly dunking the head of a one-year-old boy into a toilet; and (3) gang members pouring boiling water on a "79-year-old grandmother." (16 RT 2274-2275; AOB 126-128.)

Tellingly, respondent does not even address the probative value of the specific examples of torture by "Asian gang members" until it attempts a section 352 analysis. Even then, it glosses over probative value to simply argue that the examples were no more inflammatory than the crimes, and thus not prejudicial. (RB 71-72.)

In fact, however, Frank demonized appellant by associating him with the actions of unknown individuals who shared an incredibly broad category with him: "Asian gang member." Informing the jury that three of the thousands of Asian gang members active in the United States[13]

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[13]As appellant noted in his opening brief, the 1996 National Youth (continued...)

committed acts of torture shed no light on appellant's intent or motive in this case, but it was excellent fuel for inflaming the jury's attitudes toward Asian gang members as a class, and for assigning criminal propensity to a member of that class – appellant.

This Court has long recognized that prior acts of violence and other crimes have an inherently inflammatory and prejudicial effect. (See, e.g., *People v. Ewoldt, supra,* 7 Cal.4th at p. 404.) Although the potential for prejudice may be decreased where an uncharged crime is less inflammatory that the charged crime (*id.* at p. 405), it is not eliminated. Even if one believed that graphic examples of torture described in this case are perhaps slightly less horrifying than the killing of children at Elm Avenue, that does not render them benign and non-inflammatory. The evidence was chilling, misleading, irrelevant, and prejudicial. Having chosen to introduce the most repugnant examples of gang torture to inflame the jurors, it is disingenuous to now attempt to minimize their effect on them.

Just recently, the Washington State Supreme Court cautioned its courts "about the prejudice that can result from erroneously admitting . . . irrelevant and problematic generalized gang testimony." (*State v. DeLeon* (Wash. May 5, 2016 (No. 91185-1)) ___ P.3d ___, 2016 WL 2586679.) It observed that the trial court should not have admitted aspects of gang operation such as ordering hits from prison and gang members threatening others via the Internet. The court explained:

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[13](...continued)
Gang Survey found there were over 846,000 gang members in the United States at that time, of which five percent, over 42,000 members, were Asian. (<http://www.ojjdp.gov/pubs/96natyouthgangsrvy/surv.html> as of May 20, 2016.)

> [The gang expert] gave extensive testimony on how gangs generally operate, which frequently crossed the line into inflammatory statements regarding gang members. For instance, he testified that "[t]hey do some really, really bad crimes out there, whether they get caught or not." We do not see any probative value in such a statement, but there is certainly prejudice. The Court of Appeals acknowledged as much when it said that this evidence "could suggest to the jury the 'forbidden inference' underlying ER 404(b) [similar to California's Evidence Code 352] that the defendants were part of a pervasive gang problem and were criminal-types with a propensity to commit the crimes charged."

(*Id.* at p. 6. Internal citations omitted.)

The generalized gang testimony *DeLeon* censured – testimony regarding ordering hits, making threats, committing bad crimes – is certainly comparable to the extensive testimony in this case of brutal torture by Asian gangs. The trial court erred in allowing the prosecutor to introduce Frank's testimony.

4. The Error of Admitting the Gang Testimony Was Not Minimized by a Proper Limiting Instruction

Respondent asserts without citation to the record, that "the jury was instructed on the proper use of the gang evidence. Further, the jury instructions also informed the jury on the purposes for which the evidence was used and directed the jury to consider the evidence only for its limited purpose." (RB 74.) In fact, as discussed at length in the opening brief, the trial court in this case gave no such instruction. (AOB 131-134.) The instruction the court did give on the gang testimony told the jurors that appellant's membership in the TRG could not be considered to prove he was a "person of bad character" or had "a disposition to commit crimes."

(27 RT 1679.) It did not tell them what it *could* be used to prove.[14] Without guidance as to the relevance of the gang testimony, the jurors were left to assume it relevant to whatever they determined, save that appellant was a person of bad character or criminal disposition. For example, the gang evidence was not introduced or admissible to prove identity or common plan, yet the jurors, unaware of the *Ewoldt* standards, were free to so consider the evidence for this impermissible purpose and thus dismiss out of hand the defense of insufficient evidence of appellant's presence at Elm Avenue. They were also free to conclude that if appellant participated in some of the torture or gang activities the expert described, he deserved to be punished for that behavior.

Since respondent failed to acknowledge that proper instruction was not given, it ignores *United States v. Jobson* (6th Cir. 1996) 102 F.3d 214, 222, cited in appellant's opening brief. (AOB 133.) There, the reviewing court concluded that the trial court's instructions, which did not identify the legitimate purposes for which the admitted gang evidence could be considered, were "inadequate to safeguard against the impermissible use of gang evidence." The panel stated that the trial court,

> must expressly indicate the *precise purpose* for the other acts evidence. In this case, the District Court was obliged to instruct the jurors that they could consider the evidence of defendant's gang membership only to establish his opportunity to possess the firearm. Given the court's failure

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[14]Before Frank's testimony, the court instructed the jurors that the witness would testify "concerning activities which at first may sound strange to you and not relevant to the case, *but at some subsequent time I will admonish you and explain to you why the evidence is relevant, if it is, and why it has been admitted and the limited purpose for which you may consider it.*" (16 RT 2245, italics added.)

> to provide an effective limiting instruction, the jurors "could not have had the vaguest notion of the limited proper purpose for which they might have considered the evidence." We must assume, then, that the jury improperly considered the gang evidence on the direct issue of defendant's guilt, which is a clear violation of Rule 404(b).

(*United States v. Jobson*, *supra*, 102 F.3d at 222, italics in original; internal citations omitted.)

"In ruling upon the admissibility of evidence of uncharged acts . . . it is imperative that the trial court determine specifically what the proffered evidence is offered to prove, so that the probative value of the evidence can be evaluated for that purpose." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 406.) Identifying the specific purpose for which the evidence is admissible is of no value if the jurors are not affirmatively advised of that purpose. Even if there were an arguably valid basis for introducing the gang evidence in this case, the jurors were never informed of it and were left on their own to determine the relevance of the evidence, rendering any proper purpose worthless.

It is hard to imagine any inference at all to be drawn from the fact that appellant was a member of the Tiny Rascals Gang, except that he was a dangerous member of a pervasive gang problem inclined to commit violent crime and, therefore, more likely to have committed the charged offenses. The gang evidence served no purpose other than to taint appellant. To the extent that there was any legitimate purpose, the failure to so inform the jurors rendered that purpose irrelevant.

C. The Erroneous Admission of Prior Murders and Gang Evidence Was Prejudicial, Violated Appellant's State and Federal Constitutional Rights to Due Process, a Fair Trial, and Reliable Determinations of Guilt and Penalty and Requires That the Judgment Be Reversed

Appellant argued in his opening brief that if there are no permissible inferences that the jurors may draw from other misconduct evidence, its admission can violate due process. (AOB 134-135, and cases cited therein.) It is true, as respondent surmises (RB 72), that the due process violation appellant raised is a result and consequence of the trial court's error in admitting the gang and Sacramento evidence. Respondent argues, however, that even if the admission of the Sacramento and gang evidence was error, it was harmless under either *People v. Watson* (2008) 43 Cal.4th 652, or *Chapman v. California* (1967) U.S. 18, 24. (RB 73-75.) Respondent's arguments are not persuasive.

Respondent initially states that the error was harmless because the jurors were instructed on the proper use of the Sacramento and gang evidence. (RB 74.) As noted above, that is incorrect. They were not instructed on what the gang evidence was admissible to prove. Respondent states that the jury is presumed to have faithfully followed limiting instructions (*ibid.*); but where no such instruction has been given, the reviewing court cannot presume that such highly inflammatory evidence was not used for an improper purpose and did not contribute to the verdict.

Respondent also states that the jury's acquittal of appellant on attempted murder of Dennis Nguyen and its not-true finding on the personal firearm allegations "indicated" that the jurors were not improperly influenced by the other crimes evidence. (RB 74.) To the contrary, the verdict suggests the jurors struggled with inconsistencies in the evidence,

apparently concluding that one gun was passed back and forth between the perpetrators.[15] With no forensic evidence and weak non-accomplice witnesses, the evidence was far from overwhelming that appellant was even present at the Elm Avenue residence. The amount of trial time devoted to the other crimes evidence conveyed to the jurors that the evidence was significant and assured them appellant was somehow culpable of something.

Moreover, the prosecutor was a master of paralipsis, frequently drawing attention to the Sacramento offense by suggesting it not be used to prove appellant is a bad man, all the while, doing just that. As he told the jurors, "[t]he Sacramento case we heard a lot about. And that was given to you for a very limited purposes. All right? You should not – I repeat this with my strongest possible voice inflections – you should not find that Mr. Chhoun is guilty just because you think he might have done the murders in Sacramento or just because you think he is a bad person. That's just not right. That is not fair. A person could be an Attilla the Hun, or anybody you want to think about, and they might be innocent of a given crime. So just because you may or may not think a person is a bad guy is not good reason to convict him, and that is just fair, right? That is just not the way the law is." (28 RT 3701.)

Later, the prosecutor argued, "[o]ur law protects all of us, the good and the bad, so you are not supposed to use the Sacramento evidence to

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[15]Criminalist William Matty testified at the guilt phase of trial that all the shell casings from the Elm Avenue scene came from the same gun, likely a Glock nine-millimeter. (24 RT 3354-3355.) Nevertheless, the jury concluded appellant shot just one victim, which could only be explained by the speculation that the perpetrators passed the gun back and forth.

show that he is a bad person or anything else, except what the judge says you can consider it for." (28 RT 3702.)

Still later, he stated, "Mr. Chhoun was willing to kill in Sacramento and apparently did so, even though he was not on trial for Sacramento here. Killed two people, 73-year-old man and a 43-year-old woman, and wounded a third one. But, again, you are not to consider that as a reason for convicting him of Elm Street, unless you feel that that evidence helps you make decisions about what is really on trial here: His intent to kill, his methods of operation, and so on and so forth." (28 RT 3702.)

Finally, he argued they "should not use it for any other reason other than what the judge tells you you can use it for. It wouldn't be fair and none of us would want that to happen, so keep it in mind: We're only here to decide the guilt or innocence on the Elm Street [sic] crime in this particular trial, okay?" (28 RT 3703.)

After comparing appellant to Attila the Hun, and assuring the jurors that appellant was, indeed, a bad man who killed people, the prosecutor told them to do the impossible – ignore those insinuations.

Given the amount of evidence regarding the Sacramento offense, it was highly unlikely that the jury would be able to follow any limiting instructions given. As set forth in the opening brief, numerous courts have recognized that some evidence may be so prejudicial and inflammatory that judges cannot reasonably expect jurors to be able to compartmentalize their thinking and follow the instructions. [AOB 131-134, collecting cases.] Respondent fails to counter those authorities or explain why, given the sheer volume of bad character evidence presented to the jury, they do not support appellant's argument that limiting instructions were likely to have been ineffective.

The error was particularly damaging given the defense presented at trial: the accomplice testimony was not sufficiently corroborated to prove appellant's guilt beyond a reasonable doubt. The only eyewitnesses were accomplices whose testimony needed corroboration.[16] The corroborating witnesses were disreputable. The Ibarra brothers, both of whom were gang members, were even dismissed by the prosecutor in his opening statement.[17] Milazo was a jailhouse informant, and Kunthea Sar was a TRG partisan who was present for the formation of the robbery team and profited from robbery proceeds. As noted in the opening brief, it was a difficult and nuanced defense, and one that, ultimately, could not withstand the improperly introduced propensity evidence. (AOB 136-137.)

Under *Chapman*, the burden is on the People "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt* (1991) 500 U.S. 391, 403.) The inquiry under *Chapman* "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but

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[16]Dennis did not identify any of the perpetrators.

[17]The prosecutor told the jurors:

> There will be some statements made by both Jonathan and Marshall Ibarra, which quite frankly, I have a lot of problems with. [¶] For example, both of them say, I think, that Pan admitted doing the shootings at Elm Street and so on. And we just don't believe that is true. We think that what I told you earlier is what the evidence will show. [¶] So we think he has it mixed up.

(14 RT 1919.)

whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Under the circumstances of this case, the State cannot prove beyond a reasonable doubt that the error in introducing the extraneous evidence was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

Even in the absence of federal constitutional error, reversal is required on state grounds under the *Watson* standard of prejudice. It was "reasonably probable" that the result at trial would have been different had the section 1101, subdivision (b) evidence not been introduced. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) A reasonable probability "does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, citations omitted; *In re Willon* (1996) 47 Cal.App.4th 1080, 1097-1098.) Here, the presumption of innocense was eroded by introduction of evidence that, days before the Elm Avenue robbery and murders, appellant committed another robbery and murders in Sacramento and that he was a member of a dangerous Asian gang who roamed the state terrorizing people. Under either the federal or state standard, reversal is required.

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II.

THE PROSECUTOR'S USE OF WITNESS ADVOCATES TO BOLSTER SEVERAL OF ITS WITNESSES INFRINGED ON APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES AGAINST HIM AND THE PROSECUTOR FAILED TO DEMONSTRATE A CASE-SPECIFIC SHOWING OF NEED THAT WOULD JUSTIFY THE INFRINGEMENT

A. Appellant's Objection Was Sufficient to Preserve Both Constitutional and State Law Claims

In his opening brief, appellant argued that the prosecution failed to demonstrate the required individual need for various witness advocates deployed by the prosecution to stand with or sit near several prosecution witnesses, and thus violated Penal Code section 868.5[18] and infringed on appellant's right to confront witnesses against him. (AOB 141-161.) Respondent argues that appellant failed to object at trial to the witness advocates on the particular ground that their presence violated the confrontation clause of the Sixth Amendment, and thus appellant has forfeited that argument. (RB 82.) But as respondent acknowledges, appellant objected to the prosecutor's failure to follow the procedure required by the use of section 868.5: "[Appellant] challenged the prosecutor's showing that the witnesses desired a support person and asked for a hearing where the witnesses themselves could state their desire for a support person. (14 RT 1990-1991; 15 RT 2237-2238; 18 RT 2689-2690.)" (RB 82.) Appellant's objection to the prosecutor's failure to demonstrate an individualized need for the witness advocates was sufficient to preserve his confrontation clause claim, because the showing of need is central to the

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[18]All statutory references in this argument are to the Penal Code unless otherwise indicated.

confrontation clause analysis of the constitutional permissibility of the witness advocate.

As in *People v. Kabonic* (1986) 177 Cal.App.3d 487, 496, "the basis of appellant's objection was section 868.5[,] thus encompassing all of its procedural requirements." In *People v. Adams* (1993) 19 Cal.App.4th 412, 441 (hereafter "*Adams*"), discussed in the opening brief (AOB 150-154), the Sixth District Court of Appeal recognized "that the procedure of allowing a witness to testify accompanied by another person at the witness stand has an effect on jury observation of demeanor." The appellate court acknowledged that demeanor evidence is one of the core components of the confrontation right because "[i]t can have a dispositive effect in the outcome of a case 'in which the existence or nonexistence of a determinative fact depends upon the credibility to be given to testimonial evidence.'" (*Adams, supra*, 19 Cal.App.4th at p. 438, internal citation omitted.) Despite the infringement of the confrontation right, the appellate court rejected the defendant's argument that section 868.5 is unconstitutional per se, finding a compelling state interest in the protection of child witnesses and concluding that the statute is narrowly drawn to further that interest. (*Id.*, at pp. 441-442.)

However, based on decisions of the United States Supreme Court involving the use of special procedures to protect child witnesses (*Coy v. Iowa* (1988) 487 U.S. 1012; *Maryland v. Craig* (1990) 497 U.S. 836), the appellate court held that before a witness may be accompanied by a support person during trial, the court must make an individualized finding that the support person is necessary to protect the psychological well-being of the witness. (*Adams, supra*, 19 Cal.App.4th at pp. 443–444.) Section 868.5, by providing a buffer between the defendant and his accuser, necessarily

infringes upon a defendant's Sixth Amendment right of confrontation and thus requires a case-specific finding of need before it can be utilized.

The court in *Adams* noted that the legislature, in enacting section 868.5, is deemed to have been aware of existing laws and judicial decisions when enacting and amending the statute. (*Adams, supra*, 19 Cal.App.4th at p. 443.) The court further noted that section 868.5 was initially enacted to allow support for child victims of sexual assault, and that it has been amended several times since the United States Supreme Court's decision in *Coy v. Iowa, supra,* 487 U.S. 12, which held that an exception to the requirements of the confrontation clause must be based on an important public policy, and requires an individual showing of need by the witness. (*Adams, supra*, 19 Cal.App.4th at pp. 443–444.) Therefore, the court, held:

> Section 868.5 does not require such a showing [of need]; nor does it forbid it. Since the Legislature is deemed to have known of the requirements of *Coy v. Iowa*, it is consistent with the intent of the Legislature to infer that the requirement of a showing of need applies.

(*Adams, supra*, 19 Cal.App.4th at p. 444.)

In other words, the preliminary showing-of-need requirement is more than a mere procedural formality, it goes to the constitutional merits of whether a witness advocate's presence is justified. That the prosecutor must show that the witness needs the advocate and that the advocate will be helpful is not merely a foundational prerequisite, it is, quite literally, the advocate's *raison d'etre*. Without a need, no witness advocate should be present, as their presence infringes upon the defendant's right to confront witnesses against him, by affecting the demeanor of the witness. Far from being a narrow procedural issue, the prosecution's failure to demonstrate need goes to the heart of the statute and the confrontation clause violation.

In several of the cases cited by respondent, including *People v. Myles* (2012) 53 Cal.4th 1181, and *People v. Lord* (1994) 30 Cal.App.4th 1718, the defendant made no objection at all to the use of witness advocates at trial. "The absence of an objection deprived the trial court of the opportunity to correct any procedural error and make an evidence-based finding that [the witness] needed a support person." (*People v. Lord, supra*, 30 Cal.App.4th at p. 1722.) Here, appellant objected on the basis that the prosecutor had failed to make the required showing of need, and the trial court denied the objection, holding that "the fact that [the advocate is] there and the jury doesn't know who she is, I didn't know who she was, is inconsequential, as far as I'm concerned." (14 RT 1990-1991.) The trial court was thus on notice of its procedural errors and declined to correct them, accepting instead the prosecutor's offers of proof as to the general desire of the witnesses for support persons. (14 RT 1990-1992, 25 RT 3387.)

B. Respondent Has Failed to Show that the Witness Advocates Were Justified By a Compelling State Interest, and Failed to Show that the Trial Court Conducted the Required Case-Specific Finding of Need

Respondent notes that the holding in *Adams* has been criticized by the First and Fourth District Courts of Appeal, citing *People v. Chenault* (2014) 227 Cal.App.4th 1503, 1516, *People v. Johns* (1997) 56 Cal.App.4th 550, 553-556, and *People v. Lord, supra,* 30 Cal.App.4th 1718, 1722. These cases draw a useful distinction between the established use of witness advocates and the purported need for witness advocates in this case.

In *People v. Chenault*, the appellate court considered a challenge to the use of a support dog for two minor victims in a sexual assault case, pursuant to Evidence Code section 765. (*People v. Chenault, supra*, 227

Cal.App.4th at p. 1510.) The prosecutor presented detailed reasoning as to the witnesses' need for the support dog and suggested that the dog would sit under the feet of the witnesses during testimony rather than be visible. (*Id.* at p. 1511.) The trial court was sympathetic to the defendant's objection to the support dog and noted that the dog would not be visible, that the jury would be brought in only after the dog had entered and taken its place, and the dog would only be available to those victims who were minors both at the time of the assault and at the time of their testimony, and not for victims who were adults at the time of their testimony. (*Id.* at p. 1512-1513.) Thus, although the appellate court in *Chenault* ultimately disagreed with the holding in *Adams* that an individualized showing of need was required prior to use of support persons, it did take care to highlight the trial court's careful consideration of the potential disruptive effects of the support dog, and contrasted the need for a reasonable accommodation for the child witnesses with the lack of such a need by the adult witnesses. (*People v. Chenault, supra*, 227 Cal.App.4th at pp. 1519-1521.)

In *People v. Johns*, the witness advocate was a human being; specifically, the mother of an 11-year-old child who had been sexually assaulted. (*People v. Johns, supra*, 56 Cal.App.4th at p. 553.) The appellate court disagreed with the reasoning of *Adams* concerning the showing of need, and concluded that there was "no appreciable difference in the impact on the demeanor of a minor victim in the eyes of the jury between having a parent sitting in the courtroom spectator section and having one sitting next to the testifying child. In both cases, the parent is saying, 'I am here to support my child,' and nothing more." (*People v. Johns, supra*, 56 Cal.App.4th at p. 555.) The court of appeal in *People v. Lord* held that when the witness at question is a minor victim of sexual

assault, the case-specific finding of need would be a mere formality: "In the case of a molested six-year-old victim, it is almost given that the support person's presence is desired and would be helpful, and the statutory showing will be perfunctory." (*People v. Lord, supra*, 30 Cal.App.4th at p. 1722.)

In other words, due to their very nature, in sexual assault cases in which minor victims are testifying, (the factual situation for which the statute was created in the first place[19]), some appellate courts collapse the compelling state interest (protecting vulnerable minor victims from trauma) into the necessity requirement. In such a factual scenario, these courts reason, the need for a support person, especially a family member, is apparent on its face, and the resulting impact on the demeanor of a minor sexual assault victim is properly balanced with the traditional and transcendent interest in protecting the abused child.

Here, unlike in *Chenault, Johns, Lord, Adams, Maryland v. Craig,* and *Coy v. Iowa,* the witnesses for whom the prosecutor furnished advocates were not minor victims of sexual assault. Here, the witnesses who utilized witness advocates were all adults. Lilah Garcia was a neighbor who observed the crime scene the day after the crime. The Le sisters were victims of an uncharged violent robbery called by the prosecutor to flesh out collateral Evidence Code section 1101 evidence. Karol Tran was a charged co-conspirator. In addition, the witness advocates were not parents accompanying their children for support. (See *People v. Johns, supra,* 56 Cal.App.4th at pp. 555-556 [danger of witness

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[19]The principal concern that led to enactment of the statute was minimizing the trauma suffered by a child witness in a sexual offense trial. (*People v. Kabonic, supra,* 177 Cal.App.3d at p. 495.)

advocates is heightened when they are not close family members].) While it is natural that a family member would appear simply in order to support the witness – whether or not she was credible – non-family members instead appear to be an objective stamp of approval on the witness's credibility.

To the extent that there is any true conflict between the Sixth District Court of Appeal's decision in *Adams* and cases from the First and Fourth District Courts of Appeal, *Adams* is the better reasoned and should control. *Adams* correctly applies United States Supreme Court precedent regarding procedures that infringe upon a defendant's Sixth Amendment confrontation rights. As the Fourth District Court of Appeal discussed in *People v. Johns:*

> The [United States Supreme Court] enumerated the components of the confrontation clause as (1) the face-to-face confrontation, (2) the oath, (3) the cross-examination, and (4) the jury's observation of the witness's demeanor. (*Maryland v. Craig, supra*, 497 U.S. at p. 846.) The court went on to acknowledge the importance of protecting child victims from trauma while testifying against their abusers and held that where the state makes an adequate showing of necessity, and reliability is otherwise assured through the presence of factors 2 through 4, ante, an exception to the confrontation clause is permissible.

(*People v. Johns, supra*, 56 Cal.App.4th at p. 554.) The appellate court in *Johns* disagreed with *Adams* to the extent it "asserts that *any* impact on *any* of the components of the confrontation clause constitutes a violation of the clause, which must be justified by a necessity that an important public policy be furthered." (*People v. Johns, supra,* 56 Cal.App.4th at p. 554, italics in original.)

It is not the *Adams* court that "asserts" the requirement that an infringement of a component of the confrontation clause is a violation that

must be justified by an important state interest and requires a case-specific finding of need, it is the United States Supreme Court:

> Accordingly, we hold that, if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant. [¶] The requisite finding of necessity must of course be a case-specific one.

(*Maryland v. Craig, supra*, 497 U.S. at p. 855.[20])

In other words, the procedure in *Maryland v. Craig* infringed on the confrontation clause by interfering with one of the four enumerated components of the confrontation clause, face to face encounter, and so needed to be justified by a compelling state reason, but it left intact other important features of confrontation, like the ability of the judge, jury and defendant to observe the witness's demeanor, so assuming the requisite finding of necessity was made, the procedure was not unconstitutional. Similarly, in this case, the witness advocate procedure infringed on the confrontation clause by interfering with the observation of the demeanor of the testifying witnesses, one of the four enumerated components of the confrontation clause, and so needed to be justified by a compelling state reason.[21] The fact that the face to face encounter, oath and cross-

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[20]Four Justices dissented in *Craig* on the grounds that even with a compelling state interest and a case-specific finding of necessity, the infringement of a component of the defendant's confrontation rights violated the Sixth Amendment. (*Maryland v. Craig, supra*, 497 U.S. at p. 860.)

[21]Demeanor evidence is a crucial component of the confrontation

(continued...)

examination components of the confrontation right were preserved only means that the procedure created by section 868.5 is not an unconstitutional deprivation on its face.

The mere presence of a support person is not a per se infringement on a defendant's rights. Section 868.5 is not unconstitutional. (*People v. Adams, supra*, 19 Cal.App.4th at pp. 435, 437.) But the use of witness advocates requires justification, in order to balance the valid societal goal of minimizing victim trauma against a defendant's constitutional rights. (See *People v. Adams, supra*, 19 Cal.App.4th at p. 444, *People v. Patten* (2007) 9 Cal.App.4th 1718, 1726.)

Respondent argues in the alternative that the use of un-vetted witness advocates did not violate appellant's constitutional rights because the prosecutor did in fact demonstrate the necessary case-specific need as to Lilah Garcia. (RB 83.) Respondent does not contest that there was no individualized showing of need made for a witness advocate to stand with Mei Tuyet Le. Respondent argues that the prosecutor's statement that Garcia was scared of the defendants and did not want to be there met the constitutional requirements of an individualized need for a witness advocate that could be properly balanced against appellant's Sixth Amendment rights, as set forth in *Adams*. (RB 83.)

Use of a procedure that infringes on the confrontation clause may not be based on a "generalized finding underlying . . . a statute;" such a

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[21](...continued)
right, the jury must be able to look at the witness, "and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." (*People v. Herrera* (2010) 49 Cal.4th 613, 621.)

procedure must involve "individualized findings that these particular witnesses needed special protection." (*Coy v. Iowa*, *supra*, 487 U.S. at p. 1021.) The United States Supreme Court fleshed out the process of making case-specific findings: "The trial court must hear evidence and determine whether use of the . . . procedure is necessary to protect the welfare of the particular child witness who seeks to testify." (*Maryland v. Craig*, *supra*, 497 U.S. at p. 855.) As part of the individualized balancing test a trial court must undertake to determine the need for witness advocates, the court must determine if the witness would be *traumatized* by the presence of the defendant; "the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimus, i.e., more than 'mere nervousness or excitement, or some reluctance to testify,' [citations]." (*People v. Adams*, *supra*, 19 Cal.App.4th at p. 443, quoting *Maryland v. Craig*, *supra*, 497 U.S. at p. 856.)

The United States Supreme Court declined to decide the minimum level of emotional trauma required to meet constitutional standards, but it noted that the Maryland statute in question, which required a determination that the child witness would suffer serious emotional distress such that the child could not reasonably communicate, met those standards. (*Maryland v. Craig*, *supra*, 497 U.S. at p. 856.) A mere assertion by the prosecutor that a witness is frightened does not rise to the level of individualized need required to balance the infringement of appellant's constitutional rights. (See *People v. Murphy* (2003) 107 Cal.App.4th 1150, 1158 [a court may not "dispense with complete face-to-face confrontation merely upon a prosecutor's unsworn representation that defendant's presence was part of a distraught adult witness's problem"].)

Respondent also contends that because Shirley Amador, who acted as Karol Tran's advocate, sat in the audience across from Karol during testimony, rather than next to her, there was no infringement of appellant's confrontation rights. (RB 83.) Respondent additionally alleges that "appellant makes no claim of improper interference" by any of the witness advocates. (RB 81.) Appellant set forth in detail the improper behavior of Amador during Karol's testimony, including some signaling between Karol and Amador. (AOB 146-147, 156-157.)[22] It is true that when an unidentified supporter passively sits in the audience, a defendant's confrontation clause rights are not infringed. (*People v. Patten, supra*, 9 Cal.App.4th at p. 1727.) But, as mentioned above, Amador was not passively "present in the audience section of the courtroom and without having any particular attention drawn to [her]." (*People v. Patten, supra*, 9 Cal.App.4th at p. 1727.) Appellant objected to Amador's location at trial; the prosecutor acknowledged that Amador's location was problematic, and that it "would be better to have [her] sit somewhere else." (25 RT 3438.)

Respondent's interpretation of the law permitting witness advocates pursuant to section 868.5 is remarkably unconstrained. In respondent's view, section 868.5 entitles a prosecutor to utilize witness advocates without any showing of need; it is enough for the prosecutor to state that the witness requested an advocate. (RB 81.) That is not the law; the use of witness advocates is not unfettered. Although the statute has been amended to expand the list of crimes to which it applies and to eliminate the

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[22]Respondent challenges one of appellant's citations, stating that "there is nothing referencing Mrs. Amador, Mr. Amador, or Tran on 24 RT 3372-73." (RB 79, fn. 29.) On the contrary, those pages contain a discussion of the interviews of Karol conducted by Shirley Amador.

requirement that the prosecuting witness be a minor, protecting victims of sexual abuse, particularly minors, remains the compelling state interest that justifies the interference with a defendant's constitutional right. (*People v. Adams*, *supra*, 19 Cal.App.4th at pp. 441-443; See *People v. Murphy*, *supra*, 107 Cal.App.4th at p. 1157 [prosecution failed to identify "transcendent" or "compelling" state interest to justify infringement on confrontation right].) To be sure, there may be other compelling state interests that justify procedures that infringe on a component of a defendant's confrontation rights, but respondent has failed to identify such a reason here, and has failed to demonstrate that the trial court conducted the required case-specific finding of necessity for the advocates.

Finally, respondent argues that appellant was not prejudiced by the witness advocates because the jury was admonished regarding the presence of the support person. (RB 84.) However, as respondent's citation to the record makes clear, that admonishment was only given as to the support person for Mei Tuyet Le. (RB 84; 19 RT 2708.) Moreover, even if the jury had been admonished as to each of the uses of a witness advocate for the witnesses in this case, those admonishments would not have eliminated the prejudice resulting from the constitutional violations. Admonishments as to all of the uses of advocates could have possibly ameliorated some of the bolstering effect provided by the advocates, but the admonishments would not have ameliorated the effect of the advocates on the confrontation right. The demeanor of the witnesses was altered by the presence of the advocates; the purpose of the advocates is to minimize the impact of confronting the defendant. (See *People v. Kabonic*, *supra*, 177 Cal.App.3d at p. 495.) The admonishments would not have allowed the jury to observe

the demeanor of the witnesses had appellant been allowed to confront them without an intermediary.

C. Appellant Was Prejudiced by the Violation of His Confrontation Rights

Where the requisite showing of need for witness advocates has not been made, the defendant's constitutional rights have been violated, and the state bears the burden of proving beyond a reasonable doubt that the error was harmless. (*People v. Adams, supra*, 19 Cal.App.4th at p. 444, citing *Chapman v. California* (1967) 386 U.S. 18, 24.) Respondent acknowledges that the *Chapman* standard is the correct standard of review for assessing the prejudice of the error. (RB 85.) In the confrontation clause context, a reviewing court cannot speculate on how the affected witnesses' testimony would have been unchanged had there been no violation; this Court must disregard the testimony of those witnesses entirely. (*Coy v. Iowa, supra*, 487 U.S. at p. 1021-1022.)

Respondent argues that the testimony of the affected witnesses was merely cumulative of the testimony of other witnesses, contributed nothing to the case against appellant, and thus it is beyond reasonable doubt that the jury would have would have convicted appellant of the same charges and sentenced appellant to death absent the testimony of Lilah Garcia, Mei Le and Karol Tran. Appellant set forth in his opening brief the various aspects of prejudice resulting from the violation of appellant's constitutional rights and will not recount them here in full. But respondent's argument, that the testimony of the witnesses was unimportant because it was merely cumulative, flatly contradicts its argument at trial: that Karol Tran was one of the state's two "primary witnesses." (AOB 158, 28 RT 3705.)

Under *Chapman*, it is the government's burden to prove, beyond a reasonable doubt, not that the same verdict would have been reached absent the error, but that the error did not *affect* the verdict; in other words, this Court must assess "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." (*Chapman v. California, supra*, 386 U.S. at p. 24.) There is more than a reasonable possibility that the testimony of one of the state's two primary witnesses might have contributed to the conviction. Respondent cannot meet its burden to prove otherwise, beyond a reasonable doubt.

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III.

THE TRIAL COURT PREJUDICIALLY ERRED AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS IN INSTRUCTING THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH SECOND DEGREE MALICE MURDER IN VIOLATION OF PENAL CODE SECTION 187

Appellant has argued that he was only charged with second degree murder in violation of Penal Code section 187. The information did not charge appellant with first degree murder or allege the facts necessary to establish first degree murder; thus the trial court lacked jurisdiction to try him for first degree murder. (AOB 162-168.) Respondent argues, as appellant acknowledges, that this Court has rejected similar claims. (RB 86-90.) Because respondent simply relies on this Court's prior decisions and adds nothing new to the discussion, the issues are fully joined and no reply is necessary. For the reasons stated in appellant's opening brief, this Court should reconsider its previous opinions and hold that the instructions given in this case were erroneous.

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IV.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS IN FAILING TO REQUIRE THE JURY TO AGREE UNANIMOUSLY ON THE THEORY OF FIRST DEGREE MURDER

Appellant has argued that the trial court erred in failing to instruct that there must be unanimous agreement on the specific theory of guilt adopted by the jury. (AOB 169-179.) Respondent contends that the argument should be rejected both on the merits and as forfeited. (RB 90-94.) Because respondent simply relies on this Court's prior decisions and adds nothing new to the discussion, the issues are fully joined and no reply is necessary. For the reasons stated in appellant's opening brief, this Court should reconsider its previous opinions and hold that the instructions given in this case were erroneous.

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V.

THE TRIAL COURT DISREGARDED THIS COURT'S DIRECTIVE NOT TO INSTRUCT A JURY WITH CALJIC NO. 17.41.1, AND IN SO INSTRUCTING, VIOLATED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR AND IMPARTIAL JURY IN HIS CAPITAL TRIAL, WHICH REQUIRES REVERSAL

In 2002, this Court, in a non-capital case, took the unusual step of invoking its seldom-used supervisory power to declare that CALJIC No. 17.41.1 posed an unnecessary and dangerous risk to the proper functioning of jury deliberations and thus was no longer acceptable in California courts. (*People v. Engelman* (2002) 28 Cal.4th 436, 445-449, hereinafter *Engelman*.) In his opening brief, appellant argued that instructing with CALJIC No. 17.41.1 in his capital case violated his Sixth and Fourteenth Amendment rights to due process and trial by a fair and impartial jury and requires reversal of the judgment. (AOB 180-195, and authorities cited therein.) Respondent disagrees. (RB 94-95.)

Respondent first contends that defense counsel's failure to object to the instruction forfeited appellant's right to challenge it on appeal. (RB 94.) Respondent argues that the instruction did not violate appellant's substantial rights and hence the failure to object amounted to waiver. (*Ibid.*) In support of this position, respondent cites to *People v. Elam* (2001) 91 Cal.App.4th 298, a Second District Court of Appeal decision reached one year prior to this Court's exercise of its supervisory power in *Engelman.* Respondent's reliance on the conclusions of the court in *People v. Elam* is thus misplaced. (See *People v. Elam, supra,* 91 Cal.App.4th at pp. 312-313 [" CALJIC No. 17.41.1 neither interferes with a defendant's right to a jury

trial nor has a chilling or coercive effect on juror deliberations. . . . [I]t is unobjectionable."])

The instruction violated appellant's rights to due process by a fair and impartial jury, which are substantial rights, and therefore appellant's counsel's failure to object to it did not amount to waiver. (AOB 180; see also *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7 [rejecting Attorney General's waiver argument where defendant's claim was that instruction violated his right to due process of law, which "is not of the type that must be preserved by objection"].)

In *Engelman*, this Court directed that trial courts discontinue use of CALJIC No. 17.41.1 because the risk it posed to the proper functioning of jury deliberations was great, and it provided no benefit that might justify such a risk. (*Engelman, supra*, 28 Cal.4th at pp. 448-449.) This Court noted that the instruction, " has the potential needlessly to induce jurors to expose the content of their deliberations," and "suggests that jurors embarking upon deliberations have an obligation to police each other's reasoning and decisionmaking process during their discussions," which "could chill the free exchange of ideas that lies at the center of the deliberative process." (*Id.* at pp. 446-447) "CALJIC No. 17.41.1 creates a risk to the proper functioning of jury deliberations and . . . it is unnecessary and inadvisable to incur this risk." (*Id.* at p. 449) Appellant acknowledged in his opening brief that despite this Court's strong concerns about CALJIC No. 17.41.1, it did not find that the instruction violated Mr. Engelman's constitutional rights in that case. Respondent maintains that this Court's decision in *Engelman* definitively resolves the *validity* of CALJIC No. 17.41.1 and disposes of appellant's claims. (RB 94-95.) Not so. The unnecessary risk identified by this Court in 2002 should have been clear to

the trial court in this case in 2008, but the court incurred that risk nonetheless.

Respondent does not address appellant's argument that in the context of his case, a capital case requiring heightened reliability pursuant to the Eighth Amendment, the trial court's disregard of this Court's directive to not instruct the jury with CALJIC No. 17.41.1 is error, especially when the trial court instructed the jurors at penalty phase that the guilt phase instructions, including CALJIC No. 17.41.1, should guide them in determining the penalty. (AOB 185-195.) For the reasons stated in the opening brief, the use of CALJIC No. 17.41.1 at the guilt phase, and by extension, at the penalty phase violated appellant's Sixth, Eighth and Fourteenth Amendment rights to due process, trial by a fair and impartial jury, and heightened reliability that the judgment of death is appropriate in his case.

Finally, in arguing only that *Engelman* fully disposes of the error complained of by appellant, respondent forfeits any argument that the error was not prejudicial; this Court should thus review the error under the "double-level of certainty" harmless error standard. (*People v. Sandoval* (2015) 62 Cal.4th 394, 445-446.) The error requires reversal of the judgment.

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VI.

THE INSTRUCTIONS IN THIS CASE IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Appellant Chhoun argued that ten guilt phase jury instructions (CALJIC Nos. 2.01 [circumstantial evidence], 2.02 [circumstantial evidence to prove specific intent or mental state], 2.21.1 [discrepancy in testimony], 2.21.2 [witness willfully false], 2.22 [weighing conflicting testimony], 2.27 [sufficiency of one witness], 2.51 [motive], 8.20 [deliberate and premeditated murder], 8.83 [circumstantial evidence to prove special circumstances], and 8.83.1 [circumstantial evidence to prove mental state]) impermissibly reduced the prosecution's burden of proof and thereby deprived appellant of his constitutional right to due process, among other rights. (AOB 196-208.) Respondent contends that the argument should be rejected both on the merits and as forfeited. (RB 96-100.) Having fully addressed respondent's merits argument in his opening brief, appellant replies only to respondent's unsupported forfeiture claim.

According to respondent, appellant forfeited his argument because he did not object or request any modifications to the ten instructions in the trial court. In support, respondent cites *People v. Virgil* (2011) 51 Cal.4th 1210, 1260. *Virgil*, however, does not apply here. Instead, Penal Code section 1259 controls, and because it does, there was no forfeiture.

In *Virgil*, it does not appear that the defendant argued that CALJIC No. 2.51, the motive instruction, was, by itself, an incorrect statement of law. Rather, he argued that the instruction, combined with the prosecutor's closing argument, could have led the jurors to believe they did not have to find the element of intent for robbery or the robbery special circumstance.

Virgil cited *People v. Hillhouse* (2002) 27 Cal.4th 469, 504, for the proposition that the defendant's failure to object to the instruction at trial forfeited the claim on appeal. (*People v. Virgil, supra*, 51 Cal.4th at p. 1260.) In *Hillhouse* the Court actually stated the narrow principle that a party "may not argue that an instruction correct in law, was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial." (*People v. Hillhouse, supra*, 27 Cal.4th at p. 503.) The Court also explained, however, that this principle did not apply to the extent the defendant argued the instruction was legally incorrect and should not have been given. (*Ibid.*)

Appellant similarly asserts that each of the ten jury instructions "is not 'correct in law,' and . . . violated his right to due process of law; [each] claim therefore is not of the type that must be preserved by objection. (§ 1259 ['The appellate court may . . . review any instruction given, . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.']; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7, [76 Cal.Rptr.2d 180, 957 P.2d 869].)." (*People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.)

Respondent does not argue otherwise, and indeed gives a "but see" citation to *People v. Stitely* (2005) 35 Cal.4th 514, 556, wherein this Court observed that Penal Code section 1259 seemed to preserve all the appellant's challenges to the circumstantial evidence instructions. (RB 96.) Respondent makes no attempt to distinguish this case from *Stitely*. The law simply does not support respondent's claim that appellant forfeited his arguments on appeal. (See also *People v. Contreras* (2013) 58 Cal.4th 123, 161-162 [CALJIC Nos. 2.01, 2.21.2, 2.22, 8.83]; *People v. Sattiewhite* (2014) 59 Cal.4th 446, 474 [rejecting claim that giving of motive

instruction (CALJIC No. 2.51) reduced prosecutor's burden of proof after assuming it affected defendant's substantial rights].)

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VII.

THE TRIAL COURT ERRED IN ADMITTING HEARSAY STATEMENTS OVERHEARD BY CHAMPA ONKHAMDY THAT DID NOT COME WITHIN THE COCONSPIRATOR OR THE ADOPTIVE ADMISSION EXCEPTIONS TO THE HEARSAY RULE

Respondent does not dispute appellant's contention that the trial court erred in admitting, under the adoptive admission exception to the hearsay rule, the testimony of Detective Dillon that during an interview with Champa Onkhamdy, she stated that she overheard a conversation wherein somebody, or some combination of speakers, said something about a murder. Respondent instead pivots to an alternative theory: the "statement" related by Detective Dillon was admissible under the co-conspirator exception to the hearsay rule. (RB 105.) But that justification must fail for the same reason. The lack of any specific statement is fatal. Without evidence of a specific statement, there is no statement that can be classified as made in furtherance of a conspiracy, just as there is no statement that can be classified as accusatory.

A. Respondent Does Not Contest the Conclusion that the Trial Court Erred in Admitting Testimony Describing Onkhamdy's Discussion of Overhearing a Conversation About Murder as an Adoptive Admission by Appellant Pursuant to Evidence Code Section 1221

In his opening brief, appellant noted that the prosecution failed to meet its burden to offer sufficient proof that any statement related to the conversation referenced by Onkhamdy qualified as an adoptive admission pursuant to Evidence Code section 1221. (AOB 215-219.) Respondent does not contest this. Appellant noted that although Onkhamdy testified to the existence of a conversation where "there was a topic of a murder mentioned by some of them or one or more of them" (32 RT 4237), the

inherent ambiguity of a general "conversation" means there was no specific "statement" that could be considered accusatory that appellant could be found to have adopted through silence, action or response. (AOB 217-219.) Respondent does not contest this.

Respondent's decision not to attempt to justify the trial court's error in admitting the "statement" as a purported adoptive admission is understandable: there was no specific statement, thus the proponent could not meet an element of that hearsay exception (an accusatory statement). Without a specific statement, the proponent also cannot meet an the element of the co-conspirator hearsay exception set forth in Evidence Code section 1223 (a statement in furtherance of the conspiracy). Nevertheless, respondent argues that the trial court properly admitted the "statement" pursuant to that exception.

B. The Lack of a Definitive Statement Related by Detective Dillon's Recitation of Onkhamdy's Description of a Conversation Renders that Conversation Too Vague to be Admissible Under the Co-Conspirator Exception to the Ban on Hearsay Evidence

Respondent asserts that there was "sufficient foundation for the trial court to admit the statement under Evidence Code section 1223 as '[t]he court should exclude the proffered [hearsay] evidence only if the "showing of preliminary facts is too weak to support a favorable determination by the jury."'" (RB 105, quoting *People v. Lucas* (1995) 12 Cal.4th 415, 466, brackets in original.) As respondent's use of brackets to shoehorn the word "hearsay" into the quote from *People v. Lucas* indicates, this Court was talking about something quite different in that case: an analysis of the relevance of proffered evidence, pursuant to Evidence Code section 403. Under that section, there is a presumption of admissibility; a judge

determines if there is evidence sufficient to sustain a finding of the preliminary fact, and if so, admits the proffered evidence as relevant.

For hearsay, the rule is just the opposite. Evidence Code section 1200 is a rule of exclusion. (Evid. Code, § 1200.) Hearsay evidence is generally inadmissable and should be excluded as unreliable, unless it falls within an established exception to that general rule. (*People v. Ayala* (2000) 23 Cal.4th 225, 268-269.)

In order for a statement, otherwise excluded as hearsay, to be admitted under the co-conspirator exception set forth in Evidence Code section 1223, the proponent of the statement must show that the declaration was made in furtherance of the objective of the conspiracy. (*People v. Sanders* (1995) 11 Cal.4th 475, 516; *People v. Hardy* (1992) 2 Cal.4th 89, 139; accord, Evid. Code, § 1223.) The "in furtherance of" requirement reflects the fact that a co-conspirator's statements are attributed to his fellow co-conspirators based on the classical agency rule.

> Statements not in furtherance of the conspiracy are outside the exception because they are not the acts of the conspiracy for which the party, as a coconspirator, is legally responsible. Underlying this concept is the notion that conspirators act as agents for each other only with respect to acts and statements that promote the agreed upon criminal enterprise.

(Mendez, *Hearsay and Its Exceptions: Conforming the Evidence Code to the Federal Rules* (2003) 37 U.S.F. L. Rev. 351, 410.)[23]

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[23]This article was part of a background study commissioned by the California Law Revision Commission as part of its study comparing the California Evidence Code to the Federal Rules of Evidence. As to the "in furtherance of" requirement, Mendez finds it to be the same for each rule. Indeed, in the Advisory Committee Notes for Federal Rules of Evidence, Rule 801(d)(2)(E), the Committee cites California Evidence Code Section

(continued...)

A statement truly made in furtherance of a conspiracy is admitted because it is an act of the conspiracy for which the party, as a co-conspirator, is legally responsible. A declaration made by a member of the conspiracy, pursuant to the original plan and with reference to the common object of the conspiracy, is considered an adoptive declaration of all the members of the conspiracy. (*People v. Lorraine* (1928) 90 Cal.App. 317, 327.) The co-conspirator exception is thus a close analog of the adoptive admission exception to the hearsay rule.

Here, there is no evidence that any statement made during the conversation overheard by Onkhamdy was made in furtherance of a conspiracy. This element fails for the same reason the adoptive admission theory was improper. Indeed, at trial, appellant asked Detective Dillon: "In fact, your recollection, if I understand it correctly, is simply limited to the general subject of that conversation?" (32 RT 4241.) Dillon responded, "[y]es." (32 RT 4241.) It is impossible to isolate a statement, a single declaration or remark, from the general concept of a conversation, and thus attempting to classify a "statement" as accusatory, or made in furtherance of a conspiracy, is futile. In short, there is no evidence of any specific statement or statements made, so it cannot be said that any statement or statements were made in furtherance, against, or even about the conspiracy.

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[23](...continued)
1223 in its discussion of the limitation of admissible co-conspirator statements to those that are "in furtherance of" the conspiracy.

C. Respondent Failed to Meet its Burden to Prove Beyond a Reasonable Doubt that the Erroneous Admission of Onkhamdy's Description of a Conversation About Murder as an Adoptive Admission by Appellant had no Impact on The Penalty Phase Jury's Assessment of the Evidence

The trial court's failure to keep out Onkhamdy's prejudicial hearsay statements violated appellant's right to confront the witnesses against him, guaranteed by the Sixth and Fourteenth Amendments, and the California Constitution, article I, section 15; his right not to be deprived of his life or liberty without due process of law, guaranteed by the Fourteenth Amendment, and the California Constitution, article I, sections 7 and 15; and his right to "reliability in the determination that death is the appropriate punishment in a specific case" (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (plurality opn.)), and reliability in the determination of guilt in a capital case (*Beck v. Alabama* (1980) 447 U.S. 625) guaranteed by the Eighth and Fourteenth Amendments, and the California Constitution, article I, section 17.

Respondent argues that because there was evidence connecting appellant to the Spokane murders, any error in presenting to the jury Detective Dillon's testimony that Onkhamdy overheard a conversation about murder as an admission by appellant that he committed the murders was harmless. (RB 106.) Because the error in admitting Dillon's testimony violates appellant's federal constitutional rights, the burden is on respondent to prove the error harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) In conducting harmless error analysis under *Chapman*, "[t]he inquiry . . . is not whether, in a trial that occurred without the error, a [death] verdict would surely have been rendered, but whether the [death] verdict actually rendered in this trial was

surely unattributable to the error." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279.) Thus, the proper inquiry is whether the error might have affected the jury's decision-making, not whether there was overwhelming evidence to support the result. (*Ibid.*; see *People v. Jackson* (2014) 58 Cal.4th 724, 790 (dis. opn. of Liu, J.).)

Because the error in the instant case occurred during the penalty phase, respondent must prove beyond a reasonable doubt that the erroneous evidence had no impact on the jury's assessment of the aggravating and mitigating evidence, including evidence of the Spokane murders. The respondent's simple reference to "overwhelming" evidence of appellant's connection to the Spokane murders (RB 106) does not meet this high burden.

It is true that circumstantial evidence connected appellant to the murders, as noted by appellant in the opening brief, but the Onkhamdy hearsay was not circumstantial evidence, it was treated as an admission by defendant that he murdered two people. A confession is "'probably the most probative and damaging evidence that can be admitted. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.'" (*Arizona v. Fulminante* (1991) 499 U.S. 279, 296, quoting *Bruton v. United States* (1968) 391 U.S. 123, 139-140 (dis. opn. of White, J.).)

The trial court's error in allowing irrelevant and prejudicial evidence to bolster the prosecution's case fits a pattern of prejudicial over-inclusiveness pervasive throughout both the guilt and penalty phases.

Respondent cannot prove beyond a reasonable doubt that the error in admitting Detective Dillon's testimony about the conversation did not affect the jury's decision to sentence appellant to death.

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VIII.

VIHN TRAN'S ADMISSION THAT HE KILLED TREN YEN TRAN AND HER CHILDREN WAS ADMISSIBLE AS A DECLARATION AGAINST INTEREST; THE FAILURE TO PRESENT IT TO THE PENALTY PHASE JURY PREJUDICED APPELLANT

> Evans's testimony indicated that appellant was the person who shot the father. Further, the firearms evidence indicated that two guns were used in the Elm [Avenue] case, with one casing matching one gun and all of the remaining casings matching a second gun. (33RT 4529.) Since Evans testified that only [Vinh Tran] and appellant were armed in the house, except for the brief time that appellant had Evans hold appellant's gun while he got a knife (17RT 2434), it was reasonable to infer that [Vinh Tran] personally shot the mother and children, while appellant only shot the father.

(RB 112-113.)

By respondent's own account, Vinh Tran's narrative of the Elm Avenue crimes represented the likely factual scenario based on the evidence. Respondent argues, however, that because, in its view, the penal consequences for Vihn[24] in admitting to killing a woman and three children were de minimis, his admision was unreliable and properly excluded. Respondent also argues that because Vihn's admission that he personally killed four of the five victims at Elm Avenue matched the factual scenario the jurors would have inferred from the evidence presented, its admission at the penalty phase would have been superfluous and thus the failure to admit it was harmless. Not so.

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[24]In the interest of clarity, appellant has shortened Vihn Tran to "Vihn," rather than "Tran," so as to avoid confusion with other relevant parties to this case who share that name.

A. Vihn Tran's Admission Qualified as a Statement Against Interest Pursuant to Evidence Code Section 1230

Although the hearsay exception set forth in Evidence Code section 1230 is known colloquially as the "declaration against penal interest" exception, it is not limited to declarations that expose the speaker to criminal liability. Evidence Code section 1230 provides that out-of-court statements that normally would be prohibited as hearsay may be admitted if:

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

As a threshold matter, respondent agrees with appellant that Vinh Tran's invocation of his Fifth Amendment right not to testify rendered him unavailable to testify. (RB 111.) It should be noted, however, as discussed in full in appellant's opening brief, that it was the unrelenting pressure of the prosecutor's threats to introduce collateral matters, and expose Vihn to criminal charges for unrelated crimes if he testified, that resulted in Vihn's decision to invoke his Fifth Amendment rights. (AOB 226-227.) Vihn Tran intended to testify to his involvement in the Elm Avenue killings, and submit to cross-examination on that subject. The trial court stated that if the defense restricted itself solely to the facts of the incident, the prosecution could impeach Vihn with prior inconsistent statements as to the facts of the incident, but the trial court could see no theory that would allow the prosecution to "go beyond that and get into the Vu killing." (42 RT 5428.) The prosecutor responded, "you can't separate the two. They're intertwined

in terms of the continuing gang activity by this group of people." (42 RT 5428.) The prosecutor continued to push back, the trial court again reiterated its intention to circumscribe the testimony, the prosecutor pushed back once again, and finally the trial court gave up, telling Vihn Tran's lawyer, "maybe [the prosecutor] can explain to you a little more his position on this and can convince you." (42 RT 5429-5440.) Thus chastened, Vihn did not testify; appellant then sought to introduce Vihn's admission as a declaration against interest, the prosecutor objected, and the admission was excluded. (45 RT 5789, 5832-5839.)

Respondent argues that Vihn Tran's admission that he killed Tren Yen Tran and her children, Doan, Daniel and David Nguyen, was not against Vihn's penal interest because his conviction for those crimes was final, his appeals were exhausted, and his chances of habeas relief were slim. (RB 111.) Setting aside for the moment that the "statement against interest" hearsay exception encompasses more than merely penal interest, Vihn clearly faced some penal consequences for his statement. As appellant noted in his opening brief, Vihn's trial attorney was adamant that Vihn should not testify, because despite his long sentence, 50 years to life, he was a minor when sentenced, and thus had a chance to receive parole. (AOB 232.) But, "the shooting of children would doom him with any parole board." (42 RT 5420.) Parole discharge dates may not be as dramatic as the possibility of having a conviction overturned on appeal or habeas, but the difference between having a chance to eventually go home rather than dying in prison is not trivial.[25]

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[25]It should be noted that some of Vihn's reluctance to make his initial admission to defense investigator Pancucci stemmed from his belief that he (continued...)

Beyond the purely penal consequences, Vihn Tran's admission was a statement against interest in the broader sense contemplated by Evidence Code section 1230. Respondent does not address appellant's argument on this point, as set forth in the opening brief. (AOB 230-232.) Although respondent initially asserts that the admission at issue, "was not against [Vihn's] penal *or* social interest," (RB 106, italics added), respondent addresses only the purported lack of penal consequences facing Vihn, not the social consequences. (RB 111.) Instead, after arguing that the admission was not against Vihn's penal interest, respondent moved on: "Second, even if the statement was against his penal interest *or against his social interest, i.e., to be known as a killer of women and children*, [Vihn's] statement was unreliable." (RB 111, italics added.)

Respondent thus does not address appellant's argument that admitting to being a killer of women and children would not merely make a prisoner such as Vihn an object of "hatred, ridicule, or social disgrace" in his community, but a target of violence. (See AOB 231, citing *Arizona v. Fulminante* (1991) 499 U.S. 279, 283 [defendant admitted crime to informant on the condition informant would protect him from rough treatment he was receiving from inmates due to rumor he had killed child].) Aly Tamboura, an inmate at San Quentin State Prison, writes that inmates known to have hurt children "are subject to the most horrible acts of violence imaginable. . . . Most offenders who have hurt a child have enough sense to enter into protective custody . . . and even there they face problems." (Tamboura, *How Do Prisoners Generally Feel About Those*

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[25](...continued)
might be able to retain a new attorney to withdraw his plea and secure a new trial. (AOB 224; RB 107; 45 RT 5794-5795.)

Who Have Been Convicted of Crimes Against Children? (July 1, 2014) Quora <https://www.quora.com/How-do-prisoners-generally-feel-about-those-who-have-been-convicted-of-crimes-against-children> [as of June 14, 2016].)

Moreover, Vihn Tran's actions and demeanor surrounding his admission indicate that he understood the negative consequences. As investigator Pancucci testified, Vinh was concerned with his safety and initially stated that he would only testify about the killings in a closed courtroom with no media present in order to limit his exposure. (45 RT 5800-5801.) Vihn was also worried about the effect his admission would have on the life he had carved out for himself in prison; that he was placing his housing and his job in jeopardy. (45 RT 5800.) "The declarant's awareness of a supposed threat to an interest is the key to inferring her sincerity." (Imwinkelreid, *Declarations Against Social Interest: the (Still) Embarrassingly Neglected Hearsay Exception* (1996) 69 S.Cal.L.Rev. 1427, 1433.)

B. The Totality of the Circumstances Surrounding Vihn Tran's Admission Indicates it Was Sufficiently Reliable to Meet the Standard Set Forth in Evidence Code Section 1230

Respondent contends that regardless of the status of Vihn Tran's admission as a statement against interest, it was unreliable because (1) it was made years after Vihn was convicted of the crime, (2) prior to his admission to the killings Vihn gave inconsistent accounts of what happened, (3) when he finally admitted to personally shooting Tren Yen Tran and her children he refused to make the statement on tape, and (4) when it was made clear to Vihn that if he testified he would expose himself to murder charges for unrelated collateral crimes he refused to testify. (RB

111-112.) Interestingly, although respondent notes that the trial court ultimately disallowed Vihn Tran's admission on the grounds that it was likely to be false (RB 109), respondent later argues that any error in excluding the admission was harmless because "it was reasonable to infer that [Vihn Tran] personally shot the mother and children, while appellant only shot the father." (RB 112-113.) Thus, respondent simultaneously argues that Vihn's admission was most likely a true account of the crimes that occurred, *and* too unreliable to admit for the jury's consideration.

In contending that Vihn Tran's statement was unreliable, respondent relies on *People v. Frierson* (1991) 53 Cal.3d 730, 745, which appellant distinguished in his opening brief. (AOB 234-235; RB 112.) Here, unlike in *Frierson*, Vihn's admission did not exclusively benefit appellant, it directly inculpated him as the one who shot Henry Nguyen.[26] (AOB 234-235.) As discussed above, Vihn's statement posed a real risk to himself, also in contrast to the declarant in *Frierson*.

Respondent points to Vihn Tran's reluctance to have his admission recorded electronically as a marker of unreliability (RB 112), but the circumstances indicate this was due to the import Vihn understood his statements to carry. He was afraid his admission would jeopardize a new appeal, and, as discussed above, would have other consequences for his life in prison and prospects for parole. (45 RT 5800-5801.) In *Frierson*, this Court noted that the trial court found the declarant's statement unreliable because there was no evidence the declarant "had a sufficient belief," that negative consequences would flow from his admission. (*People v.*

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[26]At guilt phase, the jury found the allegation that appellant used a handgun in the murder of Henry Nguyen not true. (28 RT 3789.)

Frierson, supra, 53 Cal.3d at p. 745.) Here, Vihn clearly believed that his admission would have significant consequences, as discussed in the opening brief and above.

Respondent also points to evidence that Vihn Tran made prior statements that minimized his involvement in the Elm Avenue incident, and that those statements were inconsistent with his later admission at issue here. It is again worth noting that respondent contends this later admission fits the evidence. (RB 112-113.) Nevertheless, admitting Vihn's statement would not have precluded the prosecutor from introducing the prior inconsistent statements as impeachment; the prosecutor could have recalled Dillon to testify about the earlier contradictory accounts Vinh gave in his three previous interviews (42 RT 5430, 5437-5438), which would have allowed the jurors to compare the contradictory statements, as they did with witnesses Evans, Karol Tran, and others.

It is true that Vihn Tran ultimately decided not testify once the prosecutor made it abundantly clear he would find a way to expose Vihn to liability for an unrelated murder. But the hearsay exception codified by Evidence Code section 1230 does not rest on the proposition that a statement is only reliable if the declarant would be later willing to expose himself to the harshest possible penal consequences that statement might possibly engender. It can be true both that, at the time he made the statement, Vihn was willing to bite the bullet and lose a chance for parole, his housing and job, and possibly his safety, as a self-admitted child-killer, and also that when confronted with even graver consequences once in court – new charges on unrelated cases that would result in him dying in prison – he capitulated to his attorney's advice and invoked the Fifth Amendment. Vihn's unwillingness to face the consequences of testifying at the time of

trial does not change the calculus of the negative consequences he was potentially risking at the time he initially made his admission. (See *People v. Duarte* (2000) 24 Cal.4th 603, 610-611 [pursuant to Evidence Code section 1230, statement must be against interest *when made*].)

Finally, in its prejudice analysis, respondent cites to the existence of evidence that two guns were used to commit the killings as part of the overall evidence from which the jury would have found it "reasonable to infer that [Vihn] personally shot the mother and children," such that Vihn's admission would have been superfluous and thus its exclusion harmless. (RB 112-113.) However, as appellant noted in his opening brief, Vihn made his admission to the defense investigators prior to the guilt phase; at the guilt phase the evidence indicated that only one gun was used in the killings. (AOB 236-237.) No one, not the prosecution nor counsel for appellant or Pan, knew that an unanalyzed piece of evidence actually showed that there were two guns used at Elm Avenue. (24 RT 3359-3365; 26 RT 3548-3550; 33 RT 4528-4529.) Thus, when Vihn admitted his role and described the killings, involving two shooters, he revealed a fact that, at the time, no one but a participant of the crime could have known.

C. Preventing Appellant's Penalty Phase Jury From Hearing that Vihn Tran Admitted to Killing Tren Yen Tran and Her Children During the Home Invasion Robbery Prejudiced Appellant

Respondent argues that error in excluding Vinh Tran's admission was harmless; the jury had convicted appellant under a felony murder theory at the guilt phase, and thus the identity of the actual shooter(s) would not have made a difference in the jury's penalty phase consideration of appellant's culpability for the killings. (RB 113.) Where, as here, the exclusion of such an important piece of evidence at the penalty phase

implicated appellant's constitutional rights to present relevant mitigating evidence and a penalty phase defense, a fair trial and a fair and reliable capital-sentencing determination, and rebut aggravating evidence, as discussed at length in appellant's opening brief (AOB 238-242), it is the prosecution's burden to prove, beyond a reasonable doubt, "that the error complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24.) Here, respondent's simple assertions that even without Vihn's admission the jurors would have reasonably inferred that he committed the killings, and that other evidence supported their penalty verdict, do not meet that high burden.

Respondent argues that because the jury did not find beyond a reasonable doubt that appellant personally used a firearm as to the murder counts, the jury was "unconvinced that appellant personally shot and killed any of the victims," and thus hearing from Vihn that *he* personally shot and killed four of the five victims, "would not have made a difference in the jury's consideration of [appellant's] role," in the killings. (RB 113.) In essence, respondent contends that the jury's guilt phase verdict means that Vihn's affirmative admission that he, not appellant, murdered Tren Yen Tran and her children would not have affected the jury's consideration of appellant's culpability at the penalty phase.

The jury function at the penalty phase differs substantially from its function at the guilt phase. "'The sentencing function [at the penalty phase] is inherently moral and normative, not factual.'" (*People v. Wilson* (2008) 44 Cal.4th 758, 830, internal citation omitted.) Because the penalty decision of each juror in a capital case is subjective in nature, it is permissible for a juror to assign greater weight or importance to a particular mitigating factor or factors based upon moral views shaped by the juror's

own life experiences. Thus, if even one juror might have viewed appellant as less culpable based on Vihn Tran's admission, the error in excluding the admission was not harmless.

Relative culpability is one of the most important factors in capital sentencing. (*Enmund v. Florida* (1982) 458 U.S. 782, 798.) A penalty phase jury must examine the defendant's "*personal* role in the crimes," and weigh the defendant's individual responsibility for loss of life when determining proportionate punishment in a capital case, not just his vicarious responsibility for the underlying crime. (*People v. Banks* (2015) 61 Cal.4th 788, 801, italics in original.) In other words, the details of which defendant actually killed four of the five victims, including all three children, was of critical importance to the jury's sentencing decision. Respondent implicitly acknowledges this by contending that appellant's purported role as the leader of the group made him particularly culpable. (RB 113.) But without Vihn's admission, appellant's role appears very different. According to Vihn, appellant did not mastermind the killings. Things quickly spiraled out of control; Vihn "went crazy" and shot Tren Yen Tran and then shot each of the children. (45 RT 5827.) Vihn's statement would not have absolved appellant of felony murder liability, but it certainly could have affected the jurors' view of his relative culpability.

The standard is not whether, in a trial that occurred without the error, the same verdict would surely have been rendered, but whether the verdict actually rendered in this trial "was *surely* unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, italics added.) Here, the mitigation evidence regarding appellant's background was compelling, and all the other participants received term of years sentences. In that climate, it is impossible to say that the error in not permitting the jury to learn of Vihn

Tran's admission surely did not contribute to the jury's decision to sentence appellant to death. "[T]he ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy. . . . In the last analysis, jurors will accord mercy if they deem it appropriate, *and withhold mercy if they do not*." (*Kansas v. Carr* (2016) __ U.S. __ [136 S.Ct. 633, 642], italics added.) The prosecution has not met its burden to show beyond a reasonable doubt that the error in excluding Vihn Tran's admission did not contribute to the penalty verdict. Accordingly, the death judgment must be reversed.

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IX.

THE TRIAL COURT ERRED IN REFUSING APPELLANT'S LEGALLY SUPPORTED MODIFICATIONS TO CALJIC NO. 8.85

Appellant proposed several modifications to the pattern jury instruction CALJIC No. 8.85. The trial court refused all of the modifications. In his opening brief, appellant argued that the modifications were legally supported and clarified how the jurors should consider the specific evidence of appellant's case in determining the appropriate punishment, and that the trial court's refusal to adjust the generic pattern instruction violated appellant's constitutional rights. Respondent disagrees.

A. Appellant's Proposed Lingering Doubt Instruction Was Improperly Rejected

In his opening brief, appellant acknowledged that courts are not required as a matter of state law to instruct on lingering doubt. (AOB 249.) Appellant nonetheless set forth an argument that, due to the factual and procedural posture of his specific case, his lingering doubt modification was proper and the trial court violated his constitutional rights by refusing to instruct the jury regarding lingering doubt in this case. (AOB 249-252.) Respondent declines to address appellant's argument and relies on this Court's previous holdings that trial courts are not required to instruct on lingering doubt. (RB 114.) Appellant considers this issue to be fully joined by the briefs on file with the Court.

B. Appellant's Proposed Modifications Concerning Penal Code section 190.3, Factor (i) Relating to the Age and Immaturity of Appellant Were Improperly Rejected

In his opening brief, appellant argued that the trial court's rejection of his proposed age-related modifications to the portion of CALJIC No. 8.85 addressing Penal Code section 190.3, factor (i) resulted in an arbitrary

and capricious sentence and deprived appellant of due process by depriving him of instructions supported by the evidence in support of his theory of the defense. (AOB 252-255, and authorities cited therein.) Respondent disagrees and rests on this Court's rejection of similar contentions in previous cases. (RB 114-115.) As appellant argued in his opening brief, the evolving scientific knowledge regarding the development of the juvenile brain and neurological effects of trauma increasingly recognize the importance of a defendant's age and psychological maturity or lack thereof. Here, the requested modifications regarding age-related factors were essential to appellant's penalty phase theory of mitigation, focusing on appellant's relative youth and traumatic childhood experiences during the Cambodian genocide. The proposed modifications discussed by appellant in his opening brief would have properly pinpointed the theory of the defense. For all of the reasons set forth in the opening brief, provision of the unmodified factor (i) instruction demands reversal of the death judgment.

C. The Trial Court Improperly Rejected Appellant's Proposed Modifications to CALCJIC No. 8.85 Concerning Penal Code Section 190.3, Factor (j) Regarding Appellant's Culpability in Relation to That of His Accomplices

Appellant contended in his opening brief that the trial court's rejection of his proposed modifications to the portion of CALJIC No. 8.85 addressing Penal Code section 190.3, factor (j) violated several of his constitutional rights. (AOB 256-258.) Respondent disagrees and cites this Court's rejection of similar claims in prior cases. (RB 115.) Earlier in its brief, however, respondent argues that the specific roles each person took in the crime were important for the jury to understand. (See RB 69-70.)

Indeed, the roles of the various participants of a crime that leads to a killing are paramount in considering the appropriate punishment for each participant. "A sentencing body must examine the defendant's *personal* role in the crimes leading to the victim's death and weigh the defendant's individual responsibility for the loss of life, not just his or her vicarious responsibility for the underlying crime." (*People v. Banks* (2015) 61 Cal.4th 788, 801.) For all of the reasons set forth in the opening brief, provision of the unmodified factor (j) instruction demands reversal of the death judgment.

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X.

RESPONDENT'S GENERIC RESPONSE TO APPELLANT'S ARGUMENT THAT THE TRIAL COURT ERRED BY REFUSING TO MODIFY CALJIC NO. 8.88 FAILS TO TAKE INTO ACCOUNT THE UNIQUE FACTUAL CIRCUMSTANCES SURROUNDING THE ERROR

In his opening brief, appellant contended that the failure of the trial court to modify CALJIC No. 8.88 to accurately reflect Penal Code section 190.3 violated appellant's fundamental rights to due process and to a reliable penalty determination guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution. (AOB 260-265.) Respondent cites this Court's rejection of previous challenges to the instruction, but fails to address the specifics of appellant's particular claim under the facts of his case. (RB 117-118.)

The trial court here approved much of the language of appellant's modification to CALJIC No. 8.88, and initially modified the instruction accordingly. Eventually, however, the trial court rejected the modification based on the erroneous assumption that this Court affirmatively *disapproved* of any modifications to CALJIC No. 8.88. (47 RT 6095-6099.)

The trial court erred by failing to consider whether appellant's proposed modification better accomplished the instructional objective of CALCJIC No. 8.88. As appellant noted in his opening brief, CALCRIM No. 766, the successor instruction to CALJIC No. 8.88, implicitly recognizes the deficiency in the language of CALJIC No. 8.88 that appellant's modification, discussed approvingly by the trial court, would have corrected. (AOB 262.) On the merits, and for all of the reasons set forth in appellant's opening brief, appellant respectfully asks this Court to

find that the trial court erred in denying appellant's proposed modification to CALJIC No. 8.88, and that the error prejudiced appellant.

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XI.

THE TRIAL COURT PREJUDICED APPELLANT WHEN IT ADMONISHED THE JURY WITH THE PROSECUTION'S PINPOINT INSTRUCTION TO SPECIFICALLY FOCUS ON THE IMPACT OF THE CRIME ON DENNIS NGUYEN

Appellant argued that the pinpoint instruction regarding Dennis Nguyen was improperly argumentative because it highlighted certain aspects of the evidence without explaining the legal limitations on the use of such evidence. Because respondent simply relies on this Court's prior decisions and adds nothing new to the discussion (RB 118-120), the issues are fully joined and no reply is necessary.

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XII.

APPELLANT IS ENTITLED TO REMAND FOR RECONSIDERATION OF THE $10,000 RESTITUTION FINE BY A JURY IN LIGHT OF HIS INABILITY TO PAY, OR IN THE ALTERNATIVE FOR A STAY AND REFUND OF SUMS PAID

Appellant argued in his opening brief that the trial court abused its discretion when it imposed the maximum restitution fine. He argued imposition of the maximum fine also violated appellant's federal and state constitutional rights to due process and a jury trial because it was based on a factual determination made by the trial judge, did not meet the required standard of proof, and appellant did not waive his right to have a jury determine the existence of those facts beyond a reasonable doubt. Finally, because the restitution fine is part of the judgment, which is stayed pending appellant's automatic appeal to this Court, enforcement of the fine should have been stayed. (AOB 270-276.) Because respondent simply relies on this Court's prior decisions and adds nothing new to the discussion (RB 120-122), the issues are fully joined and no reply is necessary except as to appellant's argument pursuant to *Apprendi v. New Jersey* (2000) 530 U.S. 466.

This Court has not decided whether fines imposed under Penal Code section 1202.4, subdivision (b) must be determined by a jury under *Apprendi, supra*. Respondent relies upon *People v. Kramis* (2012) 209 Cal.App.4th 346, to argue that since the maximum restitution fine is $10,000, the trial court's imposition of that fine did not involve any judicial factfinding and thus need not be determined by a jury. (RB 122.) However, in light of the United States Supreme Court's decision one year after

Kramis in *Alleyne v. United States* (2013) 570 U.S. __ [133 S.Ct. 2151, 2158], *Kramis* was mistaken.

The Court in *Kramis* observed that under Penal Code section 1202.4, subdivision (b), the minimum fine for a felony conviction was $200, and the maximum fine was $10,000. It concluded that "[i]t is the fact of the conviction that triggers imposition of a section 1202.4, subdivision (b)(1) restitution fine." (*People v. Kramis*, *supra*, 209 Cal.App.4th at pp. 349-350.)

Kramis then quoted the following from *Blakely v. Washington* (2004) 542 U.S. 296: "'[The] "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.' Stated differently, '[T]he relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.' Therefore, in sentencing a defendant, a judgment may not 'inflic[t] punishment that the jury's verdict alone does not allow.'" (*People v. Kramis*, *supra*, 209 Cal.App.4th at pp. 350-351, quoting *Blakely*, 542 U.S. at pp. 303-304, citations omitted, brackets by *Kramis*.) *Kramis* next noted that because the trial court in *Southern Union Co. v. United States* (2012) 567 U.S. __ [132 S.Ct. 2344, 2357, 183 L.Ed.2d 318], and not the jury, made a factual finding as to the number of days the defendant violated the applicable statute, and the amount of the fine was tied to the number of days, *Apprendi* was violated. (*Id.* at p. 351.)

Thus, *Kramis* concluded, *Apprendi* and *Southern Union* did not pertain to the case before it because, in imposing a fine of $10,000 under Penal Code section 1202.4, subdivision (b), which establishes a minimum

fine of $200 and a maximum of $10,000, "the trial court exercises its discretion within a statutory range." (*People v. Kramis*, *supra*, 209 Cal.App.4th at p. 351.) *Kramis* added that "[t]he trial court did not make any factual findings that increased the potential fine beyond what the jury's verdict – the fact of the conviction – allowed." (*Id.* at p. 352.)

This application of *Apprendi* is wrong, as explained in *Alleyne v. United States*, *supra*, 133 S.Ct. 2151. There, the Court stated: "The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense. In *Apprendi*, we held that a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed. While *Harris* [*v. United States* (2002) 536 U.S. 545] declined to extend this principle to facts increasing mandatory minimum sentences, *Apprendi* 's definition of 'elements' necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment. *Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt.*" (*Alleyne v. United States*, *supra*, 133 S.Ct. at p. 2158, italics added, citations omitted; *People v. Nunez* (2013) 57 Cal.4th 1, 39, fn. 6 [*Alleyne* "held that the federal Constitution's Sixth Amendment entitles a defendant to a jury trial, with a beyond-a-reasonable-doubt standard of proof, as to 'any fact that increases the mandatory minimum' sentence for a crime"].)

Here, based on the jury's verdict, the largest fine the court could impose – i.e., the mandatory minimum – was $200. To increase that

amount, fact findings set forth in Penal Code section 1202.4, subdivision (d), must be made: "In setting the amount of the fine pursuant to subdivision (b) in excess of the minimum fine . . . , the court shall consider any relevant factors including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in the crime. Those losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime."

Under *Apprendi* as explicated by *Alleyne*: "Juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range and does so in a way that aggravates the penalty." (*Alleyne v. United States*, *supra*, 133 S.Ct. at p. 2161, fn. 2.) Thus, because the jury in this case did not decide the factors described in Penal Code section 1202.4, subdivision (d), the trial court violated *Apprendi* and *Alleyne*.

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XIII.

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

Appellant has argued that specific portions of California's capital sentencing scheme violate the United States Constitution. (AOB 278-295.) Respondent generally argues, as appellant has acknowledged, that this Court has upheld the statute against similar challenges. (RB 122-134.) Rather than discuss each issue, appellant focuses on the effect of a recent case relating to appellant's claim that jurors must make each penalty phase finding using the beyond-a-reasonable-doubt standard (AOB 280-283) and that prior criminality must be found by a unanimous jury (AOB 285).

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Ring v. Arizona* (2002) 530 U.S. 584, 504, and *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. This Court has has held that these cases have no application to California's capital sentencing scheme because the death penalty decision is "normative" rather than "factual," and any finding of aggravating factors does not increase the penalty for the crime beyond the maximum penalty set by statue. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.)

Recently, the United States Supreme Court invalidated Florida's death penalty statute under *Apprendi* and *Ring* because the sentencing judge, not the jury, made the factual findings that are required before the death penalty can be imposed in Florida. (*Hurst v. Florida* (2016) ___ U.S___ [136 S.Ct. 616, 624].) Under the Florida law then in effect, a

defendant was eligible for death upon conviction of a capital crime at the guilt phase but could not be sentenced to death without the additional findings by the trial judge at the penalty phase that "sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh aggravating circumstances," which are prerequisites for imposing a death sentence. (*Hurst v. Florida*, *supra*, 136 S.Ct. at pp. 620, 622, citing former Fla. Stat. §§ 775.082, 782.04(1)(a), 921.141(1), and 921.141(3).) The Court found that these determinations were part of the "necessary factual finding that *Ring* requires." (*Hurst v. Florida*, *supra*, 136 S.Ct. at p. 622.)

California law is similar to Florida's in that a death sentence may be imposed only if the sentencer finds "the aggravating circumstances outweigh the mitigating circumstances." (Pen. Code, § 190.3.) Although *Hurst* did not address the standard of proof to be applied in Florida, the Court made clear that the weighing decision is within the ambit of *Ring*. (See *Hurst v. Florida*, *supra*, 136 S.Ct. at p. 622.)

Moreover, the constitutional imperative for juror determination of factual issues is not affected by whether the decision is "normative" instead of "factual." The terms are simply a label attached to the process by which the jury comes to a conclusion. Any number of issues a jury decides (for instance, various degrees of culpability in mental states) could be labeled as "moral" or "normative." But California cannot evade the Constitution simply by ascribing a label to a question that must be part of the jury's determination. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 602).

Ring v. Arizona, *supra*, 536 U.S. 584, *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, and *Hurst v. Florida*, *supra*, 136 S.Ct. 616 confirm that under the due process clause of the Fourteenth Amendment and the jury

trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury, and any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury. This Court, should therefore reconsider its holdings that California's death penalty scheme comports with the principles set forth in *Apprendi*, *Ring*, *Blakely* and *Hurst*.

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XIV.

CUMULATIVE GUILT AND PENALTY PHASE ERRORS REQUIRE REVERSAL OF THE GUILT JUDGMENT AND PENALTY DETERMINATION

Appellant argued that the cumulative effect of the errors in both phases of his trial prejudiced him. (AOB 296-298.) Respondent dismisses appellant's argument in a paragraph, denying any errors to accumulate. (RB 134.)

Contrary to respondent's rather cavalier assertion, this was far from an error-free trial. Introduction of the Sacramento crimes, introduction of the gang evidence, denial of severance, and the presence of witness advocates were each, individually, serious error. The combination of these errors, however, was greater than the sum of their parts and resulted in egregious error mandating reversal.

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CONCLUSION

For the foregoing reasons, as well as the reasons stated in appellant's opening brief, appellant's convictions and sentence of death must be reversed.

DATED: July 14, 2016

Respectfully submitted,

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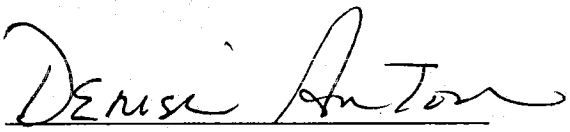
CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630(b)(2)

I, Denise Anton, am the Deputy State Public Defender assigned to represent appellant RUN PETER CHHOUN in this Appellant's Opening Brief. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 22,626 words in length.

DATED: July 14, 2016



DENISE ANTON
Senior Deputy State Public Defender

Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Run Chhoun*

Supreme Court No. S084996
Superior Court No. FSB858658

I, Neva Wandersee, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, Suite 1000, Oakland, California 94607; that I served a copy of the attached:

APPELLANT'S REPLY BRIEF

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

Collette C. Cavalier
Deputy Attorney General
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110 West "A" Street, Ste 1100
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Run Chhoun, #P-75108
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Karen Mueller, Deputy Clerk
San Bernardino County Superior
Court–Appeals Division
401 N. Arrowhead Ave.
San Bernardino, CA 92415-0063

California Appellate Project
101 2nd St., #600
San Francisco, CA 94105

Each said envelope was then, on July 14, 2016, sealed and deposited in the United States mail at Oakland, Alameda County, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Signed on July 14, 2016, at Oakland, California.

DECLARANT

SUPREME COURT COPY

COPY

AMENDED
DECLARATION OF SERVICE BY MAIL

Case Name: *People v. Run Chhoun*
Case Number: Supreme Court No. S084996
Superior Court No. FSB858658

I, **Neva Wandersee**, declare as follows:

I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 1111 Broadway, 10th Floor, Oakland, California 94607. I served a copy of the following document(s):

APPELLANT'S REPLY BRIEF

by enclosing it in envelopes and

/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
/X/ **placing** the envelopes for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The following envelopes were addressed and mailed on **July 14, 2016,** as follows:

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The following envelope was addressed and mailed on **July 15, 2016,** as follows:

Toni R. Johns Estaville, Deputy Attorney General
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **July 15, 2016,** at Oakland, California.

NEVA WANDERSEE