SUPREME COURT COPY

SUPREME COURT
FILED

NOV 14 2012

Frank A. McGuire Clerk

Deputy

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	**No. S097886**
Plaintiff and Respondent,	**(San Joaquin County Superior Court Case No. SP076824A)**
v.	
LOUIS RANGEL ZARAGOZA,	
Defendant and Appellant.	

AUTOMATIC APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN JOAQUIN

The Honorable Thomas Teaford, Presiding

APPELLANT'S REPLY BRIEF

MICHAEL R. SNEDEKER, SBN 62842
SNEDEKER, SMITH & SHORT
PMB 422
4110 SE Hawthorne Blvd.
Portland, OR 97214
Telephone: 503-234-3584
Facsimile: 503-232-3215

Attorney for Appellant
LOUIS RANGEL ZARAGOZA

DEATH PENALTY

TABLE OF CONTENTS

STATEMENT OF THE CASE. 1

STATEMENT OF FACTS. 1

ARGUMENT. 10

I. THE EVIDENCE WAS CONSTITUTIONALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS.. 10

II. THE TRIAL COURT'S REFUSAL TO ALLOW APPELLANT TO CALL AS A WITNESS HIS CODEFENDANT PREJUDICIALLY VIOLATED HIS RIGHT TO DEFEND HIMSELF... 20

A. The Trial Court's Unprecedented Ruling Violated Appellant's Constitutional Right to Defend Himself As Well As Settled Law Regarding the Right to Waive One's Privilege Against Self-incrimination.. 20

B. The Error of Refusing to Allow David Zaragoza the Opportunity to Testify Was Prejudicial.. 25

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO ALLOW A KEY PORTION OF DAVID ZARAGOZA'S VIDEOTAPED INTERVIEW TO BE PLAYED FOR THE JURY.. 27

IV. FAILURE TO PROVIDE APPELLANT WITH A USABLE COPY OF THE JACK IN THE BOX VIDEOTAPE OF DRIVE-THROUGH PATRONS PREJUDICIALLY VIOLATED APPELLANT'S RIGHT TO DISCOVERY UNDER SECTION 1054.1 AND HIS RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW.. 30

V. THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO INSTRUCT THE JURY AS TO HOW CIRCUMSTANTIAL EVIDENCE WAS TO BE CONSIDERED IN THIS PARTICULAR CASE.. 35

VI. THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO INSTRUCT THE JURY TO TAKE INTO ACCOUNT THE PRESENCE OR ABSENCE OF DAVID ZARAGOZA'S MOTIVE FOR THE KILLING... 38

VII. THE TRIAL COURT ERRED IN NOT SUPPRESSING APPELLANT'S STATEMENTS AS SEIZED IN VIOLATION OF THE FOURTH AMENDMENT... 41

VIII. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT QUESTIONING FURTHER AND DISQUALIFYING A JUROR WHO WORKED WITH THE VICTIM'S BROTHER, AND WHO ACKNOWLEDGED THAT APPELLANT MIGHT HAVE A "PROBLEM" WITH THE APPEARANCE OF BIAS.. 42

A. Guilt Phase. 42

B. Penalty Phase. 43

PENALTY PHASE. 46

IX. DUE PROCESS OF LAW NOW FORBIDS THE IRREVOCABLE PENALTY OF DEATH TO BE IMPOSED UNLESS GUILT IS FOUND BEYOND ALL DOUBT... 46

X. THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT WRONGFULLY EXCUSED TWO LIFE-PRONE JURORS... 50

A. Prospective Juror No. 129. 50

B. Prospective Juror No. 16. 55

XI. THE TRIAL COURT ERRED BY NOT FINDING A PRIMA FACIE CASE OF RACIAL BIAS ANIMATING THE PROSECUTOR'S PEREMPTORY DISMISSAL OF HISPANIC JURORS.. 57

XII. THE TRIAL COURT ERRED IN ALLOWING EXTENSIVE VICTIM IMPACT EVIDENCE TO BE PRESENTED.. 58

XIII. WHERE THE STATE RELIES ON THE IMPACT OF A MURDER IN ASKING FOR DEATH, THE DEFENDANT SHOULD BE PERMITTED TO RELY ON THE IMPACT OF AN EXECUTION IN ASKING FOR LIFE.. 59

XIV. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.. 63

XV. THIS COURT SHOULD RECONSIDER AND REJECT ITS MISPLACED RELIANCE ON TWO UNITED STATES SUPREME COURT CASES AS AUTHORITY FOR THE ERRONEOUS PROPOSITION THAT CALIFORNIA'S DEATH PENALTY SCHEME MEANINGFULLY NARROWS THE POOL OF PERSONS ELIGIBLE FOR DEATH.. 64

XVI. CALIFORNIA'S DEATH PENALTY SCHEME IS UNCONSTITUTIONAL. 71

XVII. THE RACIAL DISCRIMINATION THAT PERMEATES CAPITAL SENTENCING THAT IS EXPLICITLY ACCEPTED BY DOMESTIC LAW VIOLATES BINDING INTERNATIONAL LAW, AND REQUIRES THAT APPELLANT'S DEATH PENALTY BE SET ASIDE.. 72

XVIII. THE ERRORS, BOTH SINGLY AND CUMULATIVELY, OBSTRUCTED A FAIR TRIAL, AND REQUIRE REVERSAL OF BOTH THE GUILT AND PENALTY PHASES OF APPELLANT'S TRIAL.. 75

A. Guilt Phase.. 75

B. Penalty Phase. 76

C. Any Substantial Error Requires Reversal of the Penalty Verdict.. 78

CONCLUSION. 81

TABLE OF AUTHORITIES

CASES

Batson v. Kentucky
(1986) 476 U.S. 79. 57

Beck v. Alabama
(1980) 447 U.S. 625. 30

Brady v. Maryland
(1963) 373 U.S. 83. 33

Caldwell v. Mississippi
(1985) 472 U.S. 320. 80

Chapman v. California
(1967) 386 U.S. 18. . . . . 25, 30, 80

Dallago v. United States
(D.C. Cir. 1969) 427 F.2d 546. 75

Delaware v. Van Arsdall
(1986) 475 U.S. 673. 25

Franklin v. Lynaugh
(1988) 487 U.S. 164. 46

Frye v. United States
(D.C. Cir. 1923) 293 F. 1013. 27

Gray v. Mississippi
(1987) 481 U.S. 648. . . . . 54, 56

Herrera v. Collins
(1993) 506 U.S. 390. . . . . 46, 47

In re Reno
(2012) 2012 WL 3764521.. 47

Kansas v. Marsh
(2006) 548 U.S. 163. 63

Lego v. Twomey
(1972) 404 U.S. 477. 23

Lockhart v. McCree
(1986) 476 U.S. 162. 55

McCleskey v. Kemp
(1987) 481 U.S. 279. 72-74

Miranda v. Arizona
(1966) 384 U.S. 436. 23

Pantano v. Donat
(D. Nev., Sept. 7, 2012) 2012 WL 3929515. 26

Payne v. Tennessee
(1991) 501 U.S. 808. . . . . 58, 60

People v. Arias
(1996) 13 Cal.4th 92. . . . . 65, 68

People v. Avila
(2006) 38 Cal.4th 491. . . . . 50, 51

People v. Bacigalupo
(1993) 6 Cal.4th 857. . . . . 64, 65

People v. Beames
(2007) 40 Cal.4th 907. 68

People v. Bell
(2010) 181 Cal.App.4th 1071. 20

People v. Bennett
(2009) 45 Cal.4th 577. 60

People v. Bradford
(1997) 14 Cal.4th 1005 23

People v. Breaux
(1991) 1 Cal.4th 281 23

People v. Carrington
(2009) 47 Cal.4th 145 26

People v. Daya
(1994) 29 Cal.App.4th 697 38

People v. Demetrulias
(2006) 39 Cal.4th 1 79

People v. Dillon
(1983) 34 Cal.3d 441 66

People v. Fuentes
(1986) 183 Cal.App.3d 444 . . . . . 36, 39

People v. Gonzales
(filed Aug. 2, 2012) 2012 WL 3116943 59

People v. Hamilton
(1963) 60 Cal.2d 105 76–79

People v. Hawkins
(1995) 10 Cal.4th 920 77

People v. Hawthorne
(1992) 4 Cal.4th 67 79

People v. Heard
(2003) 31 Cal.4th 946 . . . . . 54, 56

People v. Hillhouse
(2002) 27 Cal.4th 469 66

People v. Jacinto
(2010) 49 Cal.4th 263. 24

People v. Jennings
(2010) 50 Cal.4th 616. 65

People v. Kelly
(1976) 17 Cal.3d 24. 27

People v. Lines
(1964) 61 Cal.2d 164. . . . . 78, 79

People v. Masterson
(1994) 8 Cal.4th 965. 20

People v. Merkouiris
(1956) 46 Cal.2d 540. 20

People v. Montiel
(1993) 5 Cal.4th 877. 74

People v. Riccardi
(2012) 54 Cal.4th 758. 52–55

People v. Richardson
(2008) 43 Cal.4th 959. 27

People v. Rogers
(2006) 39 Cal.4th 826. 36

People v. Samuel
(1981) 29 Cal.3d 489. 20

People v. Sanchez
(1995) 12 Cal.4th 1. 68

People v. Solomon
(2010) 49 Cal.4th 792. 56

People v. Stanley
(1995) 10 Cal.4th 764. 64

People v. Superior Court (Engert)
(1982) 31 Cal.3d 797. 65

People v. Taylor
(1990) 52 Cal.3d 719. 75

People v. Taylor
(2010) 48 Cal.4th 574. 58

People v. Wheeler
(1978) 22 Cal.3d 258. 57

People v. Whitt
(1990) 51 Cal.3d 620. 65

Pulley v. Harris
(1984) 465 U.S. 37. 64–67

Satterwhite v. Texas
(1988) 486 U.S. 249. 79

Schaffer v. Superior Court
(2010) 185 Cal.App.4th 1235. . . . . 32, 33

Shephard v. Superior Court
(1986) 180 Cal.App.3d 23. 20

Smith v. Texas
(2004) 543 U.S. 37. . . . . 59, 60

Tennard v. Dretke
(2004) 542 U.S. 274. . . . . 59, 60

Tuilaepa v. California
(1994) 512 U.S. 967. . . . . 68, 69

United States v. Garibay
(9th Cir. 1998) 143 F.3d 534. 23

United States v. Montgomery
(W.D. Mo., Apr. 12, 2007) 2007 WL 1031282. 48

United States v. Quinones
(2d Cir. 2002) 313 F.3d 49. 47

United States v. Varoudakis
(1st Cir. 2000) 233 F.3d 113.. 75

United States v. Williams
(D.C. Cir. 2000) 212 F.3d 1305. . . . . 75, 76

Wardius v. Oregon
(1973) 412 U.S. 470. 61

Washington v. Texas
(1967) 388 U.S. 14. 24

Woodson v. North Carolina
(1976) 428 U.S. 280. 80

CONSTITUTION

U.S. Const., 4th Amend.. 41

U.S. Const., 5th Amend.. 20

U.S. Const., 6th Amend.. 25

U.S. Const., 8th Amend.. . . . . 30, 59–61, 80

U.S. Const., 14th Amend.. 61

STATUTES

Evidence Code § 701. 22

Penal Code § 190.2. . . . . 64, 66, 68, 70

Penal Code § 190.3. . . . . 69, 70

Penal Code § 859, former. 33

Penal Code § 1054.1. 31–33

Penal Code § 1102.5, former. 33

Penal Code § 1367 et seq.. 22

MISCELLANEOUS

1978 Voter's Pamphlet. 65

5 Witkin, California Criminal Law (2005) § 694 et seq. 22

CALJIC No. 2.01. . . . . 35, 36, 39

CALJIC No. 2.51. 38

International Convention Against All Forms of
Racial Discrimination. 73, 74

James et al., Principles of Bloodstain Pattern Analysis:
Theory and Practice (2005).. 14

Johnson, *Shifts Detected in Support for Death Penalty*,
USA Today <http://www.usatoday.com/news/nation/
story/2012-04-24/ abolish-death-penalty-movement/
54515754/1> [as of Nov. 9, 2012]. 49

National Registry of Exonerations
<http://www.law.umich.edu/special/exoneration/
Pages/about.aspx> [as of Nov. 10, 2012]. 47

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **LOUIS RANGEL ZARAGOZA,** **Defendant and Appellant.**	**No. S097886** **(San Joaquin County Superior Court Case No. SP076824A)**

APPELLANT'S REPLY BIRIEF

STATEMENT OF THE CASE

Appellant has no objections or corrections to respondent's statement of the case.

STATEMENT OF FACTS

In numerous respects, the facts presented by respondent are not supported by the record, or are incomplete and misleading.

Respondent's statement of the facts omits evidence of the irregularity of David Gaines's work hours around the time of the crime.

(Respondent's Brief, hereinafter RB, p. 4; Appellant's Opening Brief, hereinafter AOB, p. 7.)

Respondent writes that "heavy bushes and trees separated [the Gaines and French] homes. (23 RT 6002–6003, 6007.)" (RB 8.) This vegetation supposedly provided shelter for appellant to hide behind while waiting for the decedent and his father to return from work. But it's not true.

People's Exhibit 82, introduced at 27 RT 7153 to show where the bullet landed on neighbor David French's lawn [see the number 1 on a marker delineating the spent bullet's location], shows the space available between the French and Gaines houses. There is a potted plant on the concrete next to the Gaines garage that would have offered very limited cover, and there are no other bushes or plants between the two houses. The Gaines driveway wraps around the side of the garage and is blocked by a fence and a gate to their back yard.

Prosecution witness Billy Gaines told the sheriff's department that the suspect he saw in the Gaines liquor store had tattoos on his neck (25 RT 6501), but appellant has no tattoos on his neck. (33 RT 8611–8614, 35 9082–9083.) David Zaragoza, however does have tattoos on his neck. (People's Exh. 51; 6 RT 1252.) Billy Gaines also testified that appellant

came into the liquor store at a time when appellant was at work in Tracy. (See AOB 19.)

Respondent states that David Zaragoza could not have pulled a weapon from a pocket because when the crime was committed, he was wearing blue pull-up institutional pants similar to pajamas, that had no pockets. (RB 52, citing 6 CT 1562–1564, 1726.)[1] See also RB 84: "both appellant and David Zaragoza indicated that David Zaragoza was wearing pajama-type pants without pockets on the night of the murder. (6 CT 1562–1564, 1726.)"

The pages cited by respondent do not support this assertion. Instead, they show that appellant described David Zaragoza as wearing a white tuxedo or white vest on the night of the murder, with grey or blue slacks. (See 6 CT 1562, l. 8–6 CT 1563, l. 25.)[2] Detective Wuest then followed up

---

[1] Respondent repeats this as evidence of how overwhelming was the evidence against appellant in numerous arguments. (See RB 30–31, 52–53, 82–83, 93 ["David Zaragoza could not carry a weapon on the night in question because he was wearing pants without pockets."].)

[2] The entire portion of the interview that discussed David Zaragoza's clothing is as follows:

WUEST: On Friday, when, I believe, it's Friday when David, []picked up David over at the group home and—and he came over, was talking to the girls, do you remember what he was wearing that day?

LOUIS:	He was wearing a white tuxedo.
WUEST:	A white tuxedo?
LOUIS:	Yeah.
JERRY A:	The full thing?
WUEST:	All white?
LOUIS:	Ah, I don't know what, I can't, I know he was wearing a white vest, straps around the neck, ah . . . David dresses up weird . . .
WUEST:	Yeah.
JERRY A:	I know, we've seen him.
LOUIS:	. . . he's always into suits . . .
JERRY A:	Yeah.
LOUIS:	. . . you know what I mean, and, ah, I tell him, I tell him, "'ey, it's a hundred degrees outside, what you doing?" "Well., man, this' what I wear, you know." He just . . . that's David.
WUEST:	Right.
JERRY A:	Ha, ha, ha.
LOUIS:	You know.
JERRY A:	Ah, so he's wearing a—a white vest basically, did it have a jacket with it too?
LOUIS:	I don't think so.

JERRY A: Okay. And what about the pants?

LOUIS: I think they were gray or blue.

JERRY A: So a lighter color?

LOUIS: Yeah, gray or blue.

JERRY A: Ah, any, ah, well like the blue ones, did they have any writing on 'em?

LOUIS: No, not that I remember. Shirt . . .

JERRY A: So, are they like your pockets or where they the, the kind that pull up type? It's hard ta tell a little bit . . .

LOUIS: Like slacks.

JERRY A: like slacks?

LOUIS: Oh, yeah.

JERRY A: Blue slacks slacks gray or blue slacks?

LOUIS: uh huh.

WUEST: the reason we're asking is 'cause the other day he was wearing a blue pull up pants from the mental hospital and he was walking around with those on.

LOUIS: Like pajamas?

WUEST: Yeah, like . . .

LOUIS: Well I bought those for him.

with questions about David's pants that were like pajamas; appellant replied that he bought those for David, and David wore them everywhere.

> WUEST: Okay, yeah, no, I mean, that's what he wore the other day?
>
> LOUIS: Yeah.
>
> WUEST [changing the subject]: What's your girlfriend's name?

(6 CT 1562–1564.)

The fairest reading of the interview segment cited by respondent is that David Zaragoza wore blue or grey slacks with pockets on the night of the murder along with a dressy white vest or shirt, and often dressed up, but regularly wore institutionally marked pajama pants. That reading is supported by other witnesses who had nothing to do with appellant, i.e., the Gaines's neighbor Carol Maurer, who described the only assailant whose

---

> WUEST: Okay. Stockton State Mental Hospital . . .
>
> LOUIS: He wears, he wears 'em everywhere.
>
> WUEST: Okay, yeah, so, I mean, that's what he wore the other day.
>
> LOUIS: Yeah.
>
> WUEST: What's your girlfriend's name: Is she . . .

(6 CT 1562–1564.)

clothes she remembered as wearing white clothing (23 RT 6014), and William Gaines, who told Detective Alejandre that his assailant was wearing "lighter clothing." (28 RT 7381.)

David Zaragoza never stated what he was wearing that night; he acquiesced to leading questions by the police. (See 6 CT 1725–1726.) David also "admitted" during this interview that the shirt he wore was the same—a darker-patterned, red Pendleton wool shirt with pockets that was nothing like the clothing described by the other witnesses who saw David Zaragoza that night, either earlier in the evening or at the crime scene.[3]

This is the same initial interview in which David Zaragoza denied the crime, and denied being with his brother at all on the night of the murder. (See 8 CT 2189 et seq.) Given that David Zaragoza was lying throughout the interview about his whereabouts and his company, why would he not also lie about his clothing? Respondent gives us no reason why this acquiescence by David Zaragoza to leading questions about his clothing in an interview that respondent otherwise regards as false, should be believed over the other mutually corroborating witnesses with no

---

[3] Photographs of these pants and David's plaid wool shirt, and of David wearing a vest, may be seen at People's Exhs. Nos. 132 and 133.

relationship to exch other who described David Zaragoza as wearing different clothing.

Respondent accuses Jorge Mendoza, appellant's animation technician, of making an "arbitrary and random selection of facts" to include in his reconstruction of the crime, and of relying on information received from defense counsel. (RB 28–29.) Since the point of the video was to show the plausibility of the defense version of the facts, where else should Mr. Mendoza have gotten his information?

Respondent's accusation of arbitrary fact-selection was specifically aimed at Mr. Mendoza's selection of William Gaines's clothing, the precise location of where David Zaragoza hid before attacking William Gaines, and his choice to stop the video after the crime was committed but before showing David Zaragoza returning to the car. (RB 29.) None of these choices affects the accuracy or the import of the video, which was meant to show how one person committed this crime. (See Def. Exh. 300-A, AOB 23.)

Respondent's assertion that "Mendoza did not consider all of the facts when developing the recreation such as David Zaragoza dropping the bag after taking it from Williams Gaines" (RB 29) again misses the point of the video. The only basis for this "fact," which respondent treats as if he

were reporting something as unassailable as the address of the Gaines's house, is William Gaines's changed statement, which was found by the trial court to be in part incredible (the statement that he saw two persons, although he had initially told the police he had only seen one person. (AOB 12, 55–56.)

It is likely this "fact," the proposition that David Zaragoza had dropped the paper bag containing the salad bowl which William Gaines did not report when first interviewed, was introduced to William by the prosecution to explain how David Zaragoza's papers could have appeared on the asphalt beside William Gaines's car without having landed there when David Zaragoza pulled a gun from his pocket. The facts as given to Mr. Mendoza by defense counsel would not include this "fact" any more than they would include the sudden appearance of appellant from between the French and Gaines houses, or other "facts" that compose the prosecutor's version of events. The animation video was prepared to show the plausibility of appellant's version of the facts, not to visually present the state's case to the jury.

ARGUMENT

I. THE EVIDENCE WAS CONSTITUTIONALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS.

Appellant does not disagree with respondent's summary of the relevant law. (RB 49–50.) However, respondent's summary is not complete. Respondent omits the requirement that this Court

> "[n]ot limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements . . . is *substantial*; it is not enough for the respondent simply to point to 'some' evidence supporting the finding, for 'Not every surface conflict of evidence remains substantial in light of other facts.'" [citation omitted].

(*People v. Johnson* (1980) 26 Cal.3d 557, 576–577, emphasis in original.) The evidence supporting appellant's conviction does not meet this standard.

The prosecution's case hinges on William Gaines's testimony that he was watching David Zaragoza flee to the west when he heard gunshots coming from driveway. (RB 52.) However, William Gaines did not so state when interviewed immediately after the crime occurred. (AOB 12.) His description of what had happened was more reliable then because he had no reason to say anything but what he remembered had happened; it is also corroborated by undisputed facts. It is true that this Court is bound to consider the evidence in the light most favorable to the verdict, but it must

do so in light of the whole record—it cannot isolate favorable bits that support the prosecution's case, and regard them as enough. (*People v. Johnson*, *supra*, 26 Cal.3d at pp. 576–577.)

William Gaines's initial statements that he saw only one person and not two; that he fell to the ground after being hit; that he lost track of the fleeing assailant as shots were fired; and that he then saw his assailant flee to the east, are plausible as well as timely and unrehearsed. (See 24 RT 6326–6331.)

Mr. Gaines was hit so hard that the following morning after the shock wore off he was in pain because of his injured jaw; he even had difficulty talking. (24 RT 6273–6274.) Mr. Gaines spilled papers out of his pocket where he had been hit—yet the final version presented to the jury, and relied on by respondent throughout his brief, was that he had only gone down to one knee, and never lost sight of David Zaragoza. (RB 6–7.) That version of events, presented to the jury in William Gaines's direct testimony, comports with neither his own first statements to the police nor with the manifest improbability of small papers[4] surging out of his shirt pocket upon his falling to one knee. Respondent understandably does not

[4] The papers in his pocket were lotto machine results, about the size of business cards. (24 RT 6281.)

discuss that part of the prosecutor's closing argument where he asserted that Williams Gaines's small papers fell from his pocket when he dropped to one knee after being struck. (30 RT 7836.)

Respondent asserts that it is more reasonable to believe that David Zaragoza's papers spilled out of his shirt pocket when he bent over to pick up the brown paper bag containing the bowl that had fallen to the ground when he ripped it from William Gaines than believing that they came out of his pocket along with the gun he used to shoot David Gaines. (RB 53.) Appellant entirely disagrees.

Anyone can bend over to pick something up, or drop to one knee, and have basic physical principles demonstrated. Small pieces of paper will not come out of shirt pockets in either circumstance. It takes something more. Pulling a weapon out of one's pocket might do it. Being knocked down to the ground might also do it. These are appellant's explanations. They are more in accord with applicable physical principles than are respondent's explanations.

Respondent argues that "the physical evidence does not support the theory that David Zaragoza acted alone and shot David Gaines." (RB 53.) This statement is wrong. Respondent acknowledges that David Gaines's body was exactly halfway down the driveway—just where he would be

expected to encounter David Zaragoza if both men were running towards each other. David Gaines was shot four times from close range; three of the bullets were fatal. (RB 7–8; AOB 10.) It is not likely that he moved far at all after being shot. The extensive pool of blood under him, and paucity of blood anywhere else in the driveway, supports this proposition. (See Exhs. 309–314, I ACT 406–411; esp. 314, at 1 ACT 411.)

There were only a few drops of blood on the driveway close by. According to Detective Wuest, those drops are "possibly" blood spatter or cast-off traveling in a northwest direction (24 RT 6178, 6204), or away from the house and garage. However, the pictures (e.g., Exh. 314) all show a small amount of blood spatter to be in a rough arc on the pavement between David Gaines's body and the garage behind him—or to the southeast. Respondent states,

> David Zaragoza could not have been the shooter as appellant argues. Rather, the shooter was someone else, moving out from the cover of darkness southeast of the Gaines's driveway. The blood spatter found near David Gaines's body that ran in a northwesterly direction is additional evidence that supported this conclusion for the same reasons (24 RT 6156–6157, 6177, 6203.)

(RB 54-55.)

This statement is refuted by the photographs and physical evidence. The testimony to which respondent refers was understandably tentative, and

referred to possibilities, while the photographs taken by the officers who responded to the scene show clearly a small amount of blood between David Gaines's body and the garage, and nothing on the street side of the victim to the north. (See People's Exhs. 23–24, at 1 ACT 320–321;[5] Def. Exh. 314, 1 ACT 411; supplemental photographs at ACT 2529.)

Respondent contends at some length that the fact that many pieces of David Gaines's watch were found to the north shows that David Gaines must have been facing back towards his garage when he was shot: "If David Gaines had been facing the street, the force of the gunshot would have scattered the pieces of his watch behind him about the house and garage area, not into the street." (RB 54.) Why so? Why is it not equally possible that the watch fragments would have bounced towards the shooter—like blood spatter does when someone fires a shot into a victim and is in turn speckled with the victim's blood?[6] Why would not the watch fragments rebound off the victim's wrist and fly towards the shooter? And how can we not know that the two were grappling with each other when the shot was

[5] Unfortunately, the people's photographic exhibits made a part of the appellate record (2 ACT 311–325) were reproduced in black and white, even though the original exhibits are 8½" by 11" color photographs. Some of these pictures were reproduced as color copies at CT 2527–2538.

[6] See James et al., Principles of Bloodstain Pattern Analysis: Theory and Practice (2005), p. 136 et seq.

fired, with David Gaines's wrist pointing in an unguessable direction? There is nothing here in this full page of speculation about watch fragments (RB 54) that amounts to any evidence at all of a second person's involvement, let alone of appellant's involvement.

Respondent also argues that the bullet on David French's lawn to the east of the driveway actually supports respondent's theory of a second participant because David Gaines was shot on the left side of his back (RB 55–56), and that the trajectory downward of the fatal bullets' paths shows that the shooter had to be to the north because of the driveway's slope. (RB 56.) This is nonsense. The driveway's slope, like most driveways in the flat Central Valley, is very modest. The downward angles of the bullets are much sharper; the shot through David Gaines's aorta was at a 45-degree downward angle. (25 RT 6594.) The wrist shot was at a 20-degree upward angle. (25 RT 6685.) These angles tell us nothing about whether the shooter was standing to the north, south, east, or west, of the victim, and respondent tells us nothing about how the slope of the driveway influenced the nature of the evidence in this case.

In sum, David Gaines's body was not found "high in the driveway," as the prosecutor argued. (30 RT 7856.) It was found exactly halfway down a 48-foot driveway. (RB 10.) David Gaines responded to his father's call for

help from the garage. There is no evidence of any additional assailant emerging from between the French and Gaines houses. There is no evidence that David Gaines was shot from behind without notice; he had time to reach in his pocket and pull out a can of Mace. He lay in a pool of his own blood that was slowly flowing to the north, following the slope of the driveway.[7]He was likely shot where he fell, because the contact gunshot wounds that killed him included shots through the brain and the heart.

The bushes and foliage referred to by David French separate his porch from the Gaines's house, but were not between the two houses or yards. There was no place for anyone to hide between the houses, unless that person had been clinging to the Gaines garage, far back from the street. Respondent argues that this must have been the case, because

> [A]ppellant was likely to have hidden further back in the darkness or foliage between the Gaines and French residences. Thus, upon seeing David Gaines appear from the garage [it is not at all clear how anyone hiding back between the houses could have seen him], it would have taken appellant a moment to emerge from his hiding place and get to the drive way allowing David Gaines the opportunity to

---

[7] The prosecutor inexplicably argued, "The driveway is at an angle. Slopes *upward*. Not like in the Oakland hills where they slope downwards. This slopes *upwards*. It's not a huge grade but it's noticeable grade because everything is flowing *down*. There's no pool here of blood to indicate it's flat. It's all flowing *downward*." (30 RT 7852; emphasis added.)

> retrieve his mace cannister and walk partially down the driveway.

(RB 61.)

This is very different from the prosecutor's closing argument, which has appellant surprising David Gaines as he emerged from inside the garage,[8] killing him "high in the driveway" (30 RT 7856) and wrestling with him down the driveway to the halfway point: "David's body is moving in different directions and he's moving. He moves in an arcing sweep because of all the blood droplets, blood, blood, blood, blood droplets. He does not drop when he's shot." (30 RT 7852; see, 30 RT 7842–7857.) Neither scenario is plausible.

Regarding the eyewitnesses, it should be noted that Carol Maurer, the elderly woman roused from bed by gunshots, who reported seeing two persons fleeing, was located across the street at 1105 Cameron Way, east of the Gaines house and away from the direction in which the perpetrator(s) fled,[9] while Cynthia Grafius, the witness at 1034 Cameron Way who saw one person fleeing, had a clear look of at least three seconds from her

---

[8] "Now, David Gaines is shot up here in the driveway. The question is was David shot where he lays? No. He was not shot where he lays." (30 RT 7843.)

[9] Google Earth or any online mapping service will show that 1105 Cameron Way is across the street and to the northeast of the Gaines house.

kitchen window of only one person running from the east to the west of her house.

Respondent points to the factors that make it improbable for David Zaragoza to have committed this crime on his own, primarily his mental deficits and lack of recent driving history, and the timing of the evening's events, which would have required that David Zaragoza drive back to appellant's home, leave the car and walk over two miles to his residence.[10] (RB 57–66.) Yes, appellant's theory of the case is improbable; but it is no more improbable than respondent's theory of the case. (AOB 46–64.) As noted, appellant was not experiencing any financial pressure at the time the crime was committed. David Zaragoza, however, was increasingly relying on illegal drugs in place of his prescribed medication. Appellant's expenses were minimal, he had a good job, and recent checks had not yet been cashed. (AOB 58.)

Why would appellant choose to commit a crime with his brother? Respondent urged that appellant was the mastermind behind this crime, but all the deficits of David Zaragoza detailed by respondent illustrate why it is improbable that appellant would plan this crime by relying on his severely

[10] The investigating officers knew David Zaragoza could "walk a long ways," and that he "walked all over town." (1 ACT 239–240.)

impaired brother to be the actual thief, while appellant shot and killed someone who was not a threat to stop the robbery from being committed—in order to steal something that was not at all likely to be valuable, and in fact was not valuable at all.

This crime is the sort of crime that would be designed by someone with mental deficits. The evidence supporting appellant's role does not have the "solid value" required to support a verdict of guilty beyond a reasonable doubt.

II. THE TRIAL COURT'S REFUSAL TO ALLOW APPELLANT TO CALL AS A WITNESS HIS CODEFENDANT PREJUDICIALLY VIOLATED HIS RIGHT TO DEFEND HIMSELF.

A. The Trial Court's Unprecedented Ruling Violates Appellant's Constitutional Right to Defend Himself As Well As Settled Law Regarding the Right to Waive One's Privilege Against Self-incrimination.

Respondent's overarching point here is that David Zaragoza's attorney "had the right to assert David Zaragoza's Fifth Amendment privilege against self-incriminating upon behalf of his incompetent client" (RB 69.) But respondent cites no authority of any kind supporting the existence of such an attorney's "right." The decision to waive one's rights and testify is uniquely personal, and is routinely made by people who are incompetent despite the wishes of their counsel.

All cases relied on by respondent (*People v. Samuel* (1981) 29 Cal.3d 489); *People v. Masterson* (1994) 8 Cal.4th 965; *People v. Merkouiris* (1956) 46 Cal.2d 540; *Shephard v. Superior Court* (1986) 180 Cal.App.3d 23; *People v. Bell* (2010) 181 Cal.App.4th 1071), concern the role of counsel at the client's own hearing, either a competence hearing or a sanity hearing. Appellant, too, cited such cases, in order to show that the right to testify on one's own behalf is not something that counsel can

prevent, even at a hearing to determine if an accused is competent to be put on trial. (AOB 73–75.)

Here, however, the issue is David Zaragoza's right to waive his own privilege against self-incrimination when called as a witness in proceedings that do not directly concern him. He was found capable of asserting, and waiving, his rights repeatedly during these proceedings when interviewed by the police and by the psychiatrists retained by his counsel to assist him. (See 2 RT 216–217; 2 RT 304; 4 RT 924; 11 RT 2605.) Respondent finds David Zaragoza competent to waive his rights when it suits the state's goals, but incompetent to assert his right to testify and comply with appellant's subpoena when his testimony would undercut appellant's convictions. This is neither fair nor legal.

Counsel for David Zaragoza understandably does not want his client to talk about this case—ever. That is the reasonable response of most criminal lawyers to any situation where their client is being questioned. But the United States Constitution does not allow counsel to make that call. There are a host of reasons why someone might choose to override his or her attorney's desires, and to talk to the authorities. Sometimes, the strategy succeeds in removing them from suspicion; appellate courts never see these cases. Often, the statement are incriminating, or they are demonstrably

false. Appellate courts around the country have seen thousands of such cases. The consistent point throughout the law is that the choice to talk to the authorities, or to testify under oath, is an individual one. People are allowed to waive their right to remain silent and make statements to the authorities even if they are delusional.

There are three levels of "competence" at play in this case. The first may be called David Zaragoza's competence to stand trial. In order to be competent, a defendant must be found not only to understand the charges against him, but also to be able to assist his attorney in a rational manner. (5 Witkin, California Criminal Law (2005) § 694 et seq.; Pen. Code, § 1367 et seq.) The trial court found that David Zaragoza understood the charges against him, but was not able meaningfully assist his attorney. (26 RT 6893–6894; AOB 68–69.)

Another level is the competency of a person to be a witness. (See Evid. Code, § 701, Law Revision Commission Comments, ¶ 1.) Respondent does not dispute David's competence in this regard. (RB 77-78.)

Finally, there is the competence of a person to waive his privilege against self-incrimination. David Zaragoza was indisputably competent to do so, and in fact, he did so when interviewed by psychiatrists who testified

at his competency trial. Proof of incompetence in the first sense does not establish incompetence in either the second or third sense.

The government must prove by a preponderance of the evidence that a defendant voluntarily, knowingly and intelligently waived his *Miranda*[11] rights. (*Lego v. Twomey* (1972) 404 U.S. 477; *United States v. Garibay* (9th Cir. 1998) 143 F.3d 534, 536–537; *People v. Bradford* (1997) 14 Cal.4th 1005, 1034; *People v. Breaux* (1991) 1 Cal.4th 281, 300–301.)

In *Breaux*, the defendant had taken heroin earlier in the day, was shot in the arm and thigh while trying to escape from police, and was given morphine at the hospital to alleviate his pain. (1 Cal.4th at pp. 299–300.) This Court found a voluntary waiver of *Miranda* rights because "the officers did not use an intimidating tone" and "defendant did not appear intimidated at all." (*Id.* at p. 300.)

In sum, the fact that David Zaragoza was not competent to meaningfully assist counsel in a criminal trial does not mean that he could not waive his right to self-incrimination. In fact, he did so to both police officers and doctors. But that's what respondent seeks to establish. In so doing, respondent is frustrating David Zaragoza's desires, and appellant's

---

[11] *Miranda v. Arizona* (1966) 384 U.S. 436.

right to present a defense. (*Washington v. Texas* (1967) 388 U.S. 14; *People v. Jacinto* (2010) 49 Cal.4th 263; see AOB 70–72.)

Respondent recognizes that appellant's right to call a witness is a fundamental element of due process of law. (RB 78.) Respondent also acknowledges that David Zaragoza was probably competent to testify at appellant's trial. (RB 78.) Respondent contends that all this is trumped by David Zaragoza's counsel's authority to keep him from testifying, even though he was subpoenaed, and even where David Zaragoza wanted to waive his rights and testify. (RB 75–78.)

Respondent cites no authority for the proposition that counsel could preclude his client from testifying in other proceedings despite his client's desire, but argues by analogy, saying that since a conservator or guardian may be appointed only at the end of three years from the date of commitment, David Zaragoza's counsel had a comparable authority to oversee David Zaragoza. (RB 76–77.)

Lacking authority, respondent argues that it is "unreasonable" to expect an attorney to simply close the file after a finding of incompetency. This may or may not be true, but it does not provide counsel with the authority to override his client's wishes, nor does it undercut the constitutional right of appellant to present a defense to the jury—to provide

the jury with direct testimony and cross-examination of the one person who was indisputably involved with this crime.

B. **The Error of Refusing to Allow David Zaragoza the Opportunity to Testify Was Prejudicial.**

Appellant and respondent agree that the prejudicial effect of a violation of appellant's Sixth Amendment right to present a defense is measured by the standard of review set forth in *Chapman v. California* (1967) 386 U.S. 18, 24: whether, assuming the damaging potential of the error were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.)

Respondent believes that if this Court finds the trial court erred in refusing to allow David Zaragoza to testify, the error was harmless. He says that is so because David Zaragoza had previously denied having committed the crime when questioned by law enforcement officers shortly after its occurrence, and because he told family members that a white man was involved in the murder. (RB 79.) Respondent also asserts that David Zaragoza was not likely to be believed by the jury because of his mental impairments, and that there was "overwhelming" circumstantial evidence that appellant was the person who shot David Gaines. Respondent is wrong on all these assertions.

David's prior statements included many statements that he had done the crime without appellant's involvement. He said as much to his own doctors, as well as other prisoners. (26 RT 6880.) The fact that he initially denied the crime, or minimized his guilt to his family does not distinguish him from a substantial percentage of persons who subsequently confess. (See, e.g., *Pantano v. Donat* (D. Nev., Sept. 7, 2012) 2012 WL 3929515 ["Pantano's ultimate confession, as opposed to his initial denials, was consistent with the victim's statement to the police."], p. 33; *People v. Carrington* (2009) 47 Cal.4th 145, 188.)

Respondent's assertion that the evidence against appellant is "overwhelming" is wishful thinking. It was not overwhelming to the jury, which took more than 20 hours to resolve essentially one question: was appellant present at the crime scene? A close look at the factual record does not support this assertion. (See Arg. I, *ante*, and AOB Arg. I.)

The jury was likely to have weighed David Zaragoza's testimony carefully. If it was coherent and included unanswered details, the jury was likely to have credited it, even if it also contained delusions or paranoid ideation. His presence alone would have been influential, and likely in a good way for appellant. It was prejudicial error to prevent appellant from calling David Zaragoza as a witness.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO ALLOW A KEY PORTION OF DAVID ZARAGOZA'S VIDEOTAPED INTERVIEW TO BE PLAYED FOR THE JURY.

Respondent recognizes that all relevant evidence is admissible if it has a tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (RB 82; *People v. Richardson* (2008) 43 Cal.4th 959, 1000–1001.) Respondent abandons the trial court's rationale for excluding this evidence, and does not say that presenting the jury with Detective Wuest asking David Zaragoza to bend over and pick something up from the ground was precluded by the *Kelly–Frye*[12] rule, but instead argues that it is not actually relevant, because "Detective Wuest's experiment occurred inside an interview room, not outside on a neighborhood street late at night." (RB 82.)

Respondent says that the items then in David's shirt pocket were a lighter and pouch of chewing tobacco instead of small pieces of paper; moreover, the shirt "may not have been the same shirt he was wearing on the night of the murder." (RT 82–83.) But elsewhere, respondent relies on statements attributed to appellant regarding David Zaragoza's pants – statements that omitted appellant's actual answer to questions about

---

[12] *People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013.)

David's clothing – and on David Zaragoza's agreeing that he wore the same pants on the day of the murder, and David acquiesced to the detective's assertion that he wore that same *shirt* the night before as well. (See *ante*, pp. 3-7; RB 30–31, 52–53, 82–83, 84, 93.) If David Zaragoza did not wear the same shirt on the night before, he may not have had the same pajama pants on, and if he did not, a key factual basis of respondent's theory of the case falls.

Respondent paints a vivid picture on the assault of William Gaines, painting it as a "violent and hectic physical struggle that consisted of many twists and turns." (RB 83.) A surprise assault on an 80-year-old man by a trained boxer was not a "violent and hectic struggle." That phrase would be more apt if applied to the struggle between David Zaragoza and David Gaines. Respondent simply recites the state's version of events in contending that the circumstances of the crime were completely dissimilar to Detective Wuest's experiment, and therefore the evidence would not be relevant. (RB 83.) But the detectives did not think it was irrelevant. They wanted to know what would happen with the items in David Zaragoza's shirt pocket if he bent over.

Respondent's version of how David Zaragoza's papers fell from his pocket—when he bent over to pick up a bowl from the ground—is highly

improbable. The evidence at issue would have illuminated that improbability. Respondent argues that if the exclusion of this evidence was erroneous, any error was harmless, and relies once again on the incorrect assertion that "both appellant and David Zaragoza indicated that David Zaragoza was wearing pajama-type pants without pockets on the night of the murder. (6 CT 1562–1564, 1726.) As we have seen, the cited pages do not support this statement. (See *ante*, pp. 3–7.)

Appellant did not, as respondent contends, say that David Zaragoza wore pajama pants on the night of the crime. He described his brother as wearing slacks on the night in question, while David Zaragoza was assenting to questions asked by the police, in an interview respondent believes was otherwise full of lies. Nevertheless, respondent persists in placing the weight of its argument on the fact that "Detective Wuest's experiment would not have convinced the jury that David Zaragoza pulled the gun out from his pants pocket in order to shoot David Gaines to make his escape since he had no pockets in which to pull the gun from." (RB 84.)

This evidence would have undercut the prosecutor's version of events. The trial court's failure to allow it blocked appellant from developing his version of how the crime unfolded, improperly protected the

prosecution's case investigation, and skewed the jury's view of events in the prosecution's direction. (AOB 80–86.)

This error was prejudicial and in and of itself requires reversal. As noted in the statement of the case, the jury deliberated for over 20 hours, and continually asked the trial court for rereads of testimony. (Statement of the Case, *ante*.) The case was close. It cannot be said beyond a reasonable doubt (*Chapman v. California*, *supra*) that this error had no effect on the outcome of the jury's deliberations. The guilt verdict does not have the reliability required by the Eighth Amendment and due process of law in a capital case (*Beck v. Alabama* (1980) 447 U.S. 625), and must therefore be set aside.

IV. FAILURE TO PROVIDE APPELLANT WITH A USABLE COPY OF THE JACK IN THE BOX VIDEOTAPE OF DRIVE-THROUGH PATRONS PREJUDICIALLY VIOLATED APPELLANT'S RIGHT TO DISCOVERY UNDER SECTION 1054.1 AND HIS RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW.

The facts relevant to this contention are contained in an exchange between defense counsel and the trial court near the end of trial:

MR. SCHICK: It was never in the format that could be viewed. It was never—I—I was not aware of anyplace that I could go to look at it because the viewing machine I was told existed only at the Jack-In-The-Box. It wasn't a format that Mr. Himelblau or his investigators had a—a machine in their office that could be viewed through.

THE COURT: But it was never being withheld from you; it was simply— it was told in the sense—only in the sense that you didn't have equipment and they apparently didn't have equipment—

MR. SCHICK: Right. Nobody had equipment.

THE COURT: —to view it.

MR. SCHICK: No, we were told originally—

THE COURT: If you wanted to put your fingers on the actual tape itself, you could have, I think is what you're telling me. Might not have done you much good, but you would have had it.

MR. SCHICK: We were told in the beginning, a copy would be made available, that there was

> a process by which it could be. That turned out not to be available, as I understand it, through whatever technical reasons.

(37 RT 9784–9785.)

Appellant and respondent agree on the law generally applicable to discovery issues, but disagree over the trial court's ruling that the prosecutor had no obligation to appellant beyond granting him access to the actual physical evidence. (AOB 87–94; RB 85–86.) Respondent relies on *Schaffer v. Superior Court* (2010) 185 Cal.App.4th 1235, as authority for the proposition that the prosecution's duty ended when it made available for inspection its copy of the Jack in the Box video. (RB 87–88.) *Schaffer* did not so hold. The case was remanded to the Court of Appeal by this Court after defendant was acquitted of felony charges to resolve a question of cost, or "why the imposition of a fee for cost of duplicating discovery materials subject to mandatory disclosure is permissible pursuant to section 1054, et seq." (*Id.*, 185 Cal.App.4th at p. 1240.) The right of the defendant to obtain a usable copy of the materials disclosed to him was not disputed.

Respondent misreads *Schaffer* when asserting that "there was no requirement that the prosecution produce a copy of the videotape for the benefit of the opposing party." (RB 88.) The reviewing court's actual language is, "No court has interpreted the prosecutor's duty to disclose

under section 1054.1 to include the responsibility of furnishing photocopies or other materials to a defendant *at taxpayer expense*." (*Schaffer*, 185 Cal.App.4th at p. 1242, emphasis added.) The court also wrote, "Numerous cases discussing the prosecution's duty to disclose under former sections 859 and 1102.5 referred only to the duty to allow defendants to view, inspect, and copy the materials. [citation omitted.]." (*Ibid.*)

The prosecutor was not allowed to have its agents view the tape at issue, without either providing a copy of the tape that would allow appellant to also view the tape, or by providing clear directions as to how appellant could also view the tape. Failure to do either was error.

Appellant and respondent agree on the law regarding what constitutes "materiality" within the meaning of *Brady v. Maryland* (1963) 373 U.S. 83: Whether this Court can be confident that the jury's verdict would have been the same had the prosecution disclosed favorable evidence. (RB 89.) Respondent argues that there would not have been any difference because of the *contents* of the tape. But what are those contents? Respondent relies only on the prosecutor's summary of what the detectives who watched the tape at Jack in the Box told him. (RB 89.)

When they watched the tape, the detectives were not looking for exculpatory evidence—they were looking for evidence of appellant's mother's car. The prosecutor referred to one vehicle that was shown in a

grainy monochrome in which one could see only one corner, but it could be identified as a compact car.[13]

If there was indeed only one car that went through the drive-through window at that time, there may well be a way to distinguish the car supposedly driven by appellant from the car on the videotape. It is disingenuous for respondent to say that "*given the content of the videotape*, the jury's verdict would have been the same even if it had viewed the subject evidence." (RB 89.) Neither appellant, nor this Court, is in a position to support or refute respondent's depiction of the tape's contents because of the prosecution's failure to provide a viewable copy of the tape.

The issue was important to the parties and to the jury, for the reasons set out at AOB 91–92. Had appellant been able to use the tape to exclude his mother's car from being driven through the Jack in the Box at the relevant time period, or to establish that Nina Tahod's car was indeed driven through, this Court cannot be confident that his jury would have reached the same verdicts and judgment against him. Respondent should not be allowed to be the only one to view this evidence and then be allowed to characterize its contents while neither appellant nor this Court are able to verify or challenge its assertions as to the tape's contents.

---

[13] "You can see a compact car, the corner of it." (37 RT 9780.)

V. THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO INSTRUCT THE JURY AS TO HOW CIRCUMSTANTIAL EVIDENCE WAS TO BE CONSIDERED IN THIS PARTICULAR CASE.

Respondent's summary of the applicable law (RB 91–92) is unobjectionable. Failure to give the requested pinpoint instruction[14] was error because it was the only instruction that focused on the key question of who shot David Gaines. No one ever contended that David Zaragoza shot David Gaines while appellant stood idly by. The alternatives available to the jury were that David Zaragoza shot David Gaines in the course of committing the robbery by himself, or appellant shot him as part of the robbery committed by David Zaragoza and appellant.

Appellant's version of events did not have to be clearly superior to the prosecutor's for him to be acquitted; it just had to be a reasonable alternative. Appellant's version was a reasonable alternative to the prosecution's theory of how the crime at issue took place. The instruction at issue focused the jury's attention on the critical question of the trial, one

---

[14] Counsel submitted an instruction related to CALJIC No. 2.01 directly tethered to his theory of the case: "If the evidence permits two reasonable interpretations, one of which points to the guilt of the defendant and the other to the guilt of [David Zaragoza], you must reject the interpretation that points to defendant's guilt and return a verdict of not guilty." (Exh. LZ 67, p. 2.)

that was probably at the heart of the jury's 20-hour struggle to reach unanimous verdicts.

Respondent argues that appellant was not entitled to the instruction because the pinpoint instruction was not supported by substantial evidence, and repeats his contention that the evidence supporting appellant's convictions was "overwhelming" because the physical evidence established that the shooter came from the southeast, and because David Zaragoza could not have carried a weapon in his pajama pants. (RB 92–93.) For the reasons set forth in appellant's opening brief and in the arguments herein (*ante*, pp. 3-18) appellant disagrees.

Respondent attempts to distinguish *People v. Rogers* (2006) 39 Cal.4th 826, and *People v. Fuentes* (1986) 183 Cal.App.3d 444, by noting that the error in each of those cases was the failure to give any version of CALJIC No. 2.01, whereas here, a modified version of this instruction was given by the trial court. (RB 93–94.) For the reasons set forth in appellant's opening brief, however (see AOB 97–100), appellant believes that both these cases support his claim, and further support his contention that the error was prejudicial.

Respondent's bases for asserting that there is no substantial evidence to support the giving of this instruction, as appellant has repeatedly shown,

are either unsupported, or wrong. Repetition of error does not make it more plausible. For the reasons set forth in his opening brief, this error was prejudicial, and reversal of appellant's convictions and sentence is required.

VI. THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO INSTRUCT THE JURY TO TAKE INTO ACCOUNT THE PRESENCE OR ABSENCE OF DAVID ZARAGOZA'S MOTIVE FOR THE KILLING.

The trial court also refused appellant's proposed instruction No. 3,[15] a modification of CALJIC No. 2.51, which focused the jury's attention on the question of motive as it applied to both appellant and David Zaragoza, not solely appellant. (AOB 102–106; RB 95–97.) Respondent states that "the trial court was not required to modify the standard motive instruction, which accurately conveyed the law to the jury. (See *People v. Daya* (1994) 29 Cal.App.4th 697, 714.)" (RB 96.) But in *Daya*, the defendant claimed that the trial court erred in not refining a motive instruction sua sponte; unlike the case at bench, there was no modification instruction proposed. The *Daya* court concluded, "In sum, defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions." (*Ibid.*) Here, appellant

---

[15] The proposed instruction, part of Exhibit LZ 67, reads as follows: "Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive IN THE DEFENDANT OR [insert name of third party] may tend to establish THAT PERSON'S guilt. Absence of motive IN THE DEFENDANT OR [insert name of third party] may tend to establish THAT PERSON'S innocence. You will therefore, give its presence or absence, as the case may be, the weight to which you find it to be entitled." (Exh. LZ 67, p. 6.)

did precisely what the defendant should have done in *Daya*: he proposed a modification of the CALJIC No. 2.01 tailored to the facts of this case. (AOB 94–95.)

Appellant's modification of the instruction, in the context of this third-party-culpability defense, fills in a blank left by the unmodified instruction, which states that motive is only relevant when considering appellant's guilt. (See AOB 102-106.) Here, the presence or absence of motive in David Zaragoza is not argumentative; it is relevant to any determination of whether or not David Zaragoza had designed and carried out this crime alone.

Respondent contends that even if the trial court erred in refusing this pinpoint instruction, the error was harmless because the jury was instructed on similar legal principles, and on the proper burden of proof. (RB 97.) None of these instructions, however, filled in the gap left by the trial court's failure to give the proposed modification at issue. Even if the evidence supporting the conviction was substantial, as respondent asserts (RB 97), it was a close case. The jury spent 20 hours in determining essentially one question: did David Zaragoza pull the trigger and kill David Gaines? In *People v. Fuentes*, *supra*, the court reversed convictions due to an instructional error because, inter alia, the jury deliberated nine hours over

the question of which of two brothers actually pulled the trigger. An instruction that would have directed the jury to consider David Zaragoza's potential motive as well as appellant's potential motive could have affected their deliberations, and led to a more favorable verdict for appellant. (AOB 102–106.)

VII. THE TRIAL COURT ERRED IN NOT SUPPRESSING APPELLANT'S STATEMENTS AS SEIZED IN VIOLATION OF THE FOURTH AMENDMENT.

For the reasons set out in his opening brief, it was error not to suppress appellant's statements, and to have approved appellant's arrest without a warrant.

VIII. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT QUESTIONING FURTHER AND DISQUALIFYING A JUROR WHO WORKED WITH THE VICTIM'S BROTHER, AND WHO ACKNOWLEDGED THAT APPELLANT MIGHT HAVE A "PROBLEM" WITH THE APPEARANCE OF BIAS.

A. Guilt Phase

There is no dispute between appellant and respondent about the facts underlying this issue. (AOB 112–117; RB 105–112.) Appellant's key point is that Juror No. 8 acknowledged that returning a verdict not suitable to his co-worker Steve Gaines, brother of the decedent David Gaines, might cause him problems. As respondent notes, the juror also said that he did not feel as if he had to explain his verdicts to anybody, and he reported his relationship with Steve Gaines to the court as soon as he recalled the prior contacts.

But the fact that he had three or four contacts with Steve Gaines over the previous months, and was "positive" that he would had future contacts with Steve Gaines on "work-related" issues, i.e., the installation of a time card in his store, may explain why this juror acknowledged the possibility that the likelihood of offending Steve Gaines might cause him problems. (AOB 112–118.)

Juror No. 8 was a grocery manager for Save-Mart. (SCT 7729.) Steve Gaines spoke to him more than once about work-related things, i.e.,

about installing a time card in his store. (28 RT 7416–7417.) Respondent argues that their contacts were "de minimis." (RB 111.) But apparently Steve Gaines held a supervisory position over Juror No. 8. If so, that would be a solid reason for the juror to be concerned about offending Steve Gaines. The trial court's failure to inquire further in this particular case violated appellant's rights to a trial by a panel of impartial, indifferent jurors. (AOB 116–118.)

B. Penalty Phase

During the penalty phase the issue resurfaced, because Steve Gaines's wife was named as a victim impact witness. When asked by counsel for appellant on renewed voir dire if appellant could be comfortable to have someone with Juror No. 8's state of mind on his jury, the juror answered that he did not know how to answer that question, and ultimately said that if he were in appellant's position, he might be uncomfortable with Juror No. 8 sitting in judgment on him. (AOB 118–121; RB 112–117.)

Respondent argues, as did the prosecutor below, that the relationship of the jury to Steve Gaines was so attenuated that it could not have an impact on the juror. (32 RT 8344; RB 114–116.) But as counsel for appellant pointed out, there was definitely something on the juror's mind:

> MR. SCHICK: "Well, you know, that's why he was given the opportunity to ask a question and follow up on it

after I got the answer. He chose not to do so. So the meaning and the implications are there for the Court, and I...there is something on his mind when he makes that statement. And if Counsel [the prosecutor] felt that it was related to what he is speculating, he could have asked that question."

(32 RT 8344–8345.)

Respondent states that "as appellant implicitly concedes by his argument, the record in this instance fails to demonstrate that Juror No. 8 was actually biased because of his limited business contact with Steve Gaines prior to trial." (RB 115.) Appellant concedes that this record does not demonstrate that the juror was actually biased, but it does show that the juror himself recognized that in spite of his sincere efforts, the defendant might have reason to be uncomfortable. Juror No. 8 stated that he thought that his relationship with Steve Gaines would be minimal, but he himself might be uncomfortable with a person like him sitting in judgment, and that it was appellant's decision to make. (AOB 118–120.)

But, it was not appellant's decision to make; his motion to remove the juror from the penally phase was denied by the trial court. Respondent asserts that whatever reasons appellant might have for being uncomfortable with Juror No. 8 could not have anything to do with the juror's relationship with Steve Gaines, and quotes the juror as saying it "would be very seldom if any contact that I would ever have with the gentleman. And I think I

could be fair and impartial." (RB 116.) Although it is not clear from this record, the whole record indicates a real possibility that Steve Gaines had the type of supervisory role over the juror that would not lead to contact unless a change were needed to the store (like the addition of a time-card system for employees)—or if something were wrong at the store.

Juror No. 8's answers indicate that the possibility of repercussions at work would be a factor that might weigh on him, even though he would try to be fair and impartial. This shows a recognition of reality. The reason he thought that appellant might have reason to be uncomfortable was that he could not promise that despite his very best efforts, he would not be influenced by this business relationship.

The trial court's refusal to remove him was prejudicial error. Respondent states that any error could not be prejudicial because the prior business contact of the juror with Steve Gaines was minimal. (RB 117.) The issue, however, is the subjective state of the juror, who was certain of his efforts to be fair but not certain of his results, and of how he appears to outsiders. The trial court found that because the juror understood his duty, and thought he could be fair, that was enough. Juror No. 8's lack of certainty, however, and his recognition that if he were in appellant's shoes, he might be uncomfortable with him as a juror, present sufficient evidence

of probable bias, and the certain appearance of bias. It was prejudicial error not to dismiss him. (AOB 121.)

PENALTY PHASE

IX. DUE PROCESS OF LAW NOW FORBIDS THE IRREVOCABLE PENALTY OF DEATH TO BE IMPOSED UNLESS GUILT IS FOUND BEYOND ALL DOUBT.

Respondent notes appellant's recognition that this court has previously rejected claims that death penalty cases require a standard of proof higher than beyond a reasonable doubt. (RB 117.) These cases all simply cite to a plurality—not a majority—opinion in *Franklin v. Lynaugh* (1988) 487 U.S. 164, and did not have the issues and facts presented in appellant's opening brief before them. (AOB 122–142.)

Respondent relies on *Herrera v. Collins* (1993) 506 U.S. 390 (RB 118), but does not respond to appellant's demonstration that *Herrera*, which was not asked to pass on anything but the rights of an individual who claimed unpersuasively to be able to prove he was innocent after having exhausted all ordinary remedies for direct and collateral review, actually made clear that the execution of innocent defendants is a matter of critical constitutional importance. (AOB 130–131.) As Justice O'Connor wrote for a majority in *Herrera*, "I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the constitution. Regardless of the verbal formula employed . . . the execution of a legally and factually innocent person would be a constitutionally intolerable event."

(*Herrera*, 506 U.S. at p. 419; see also *In re Reno* (2012) 2012 WL 3764521, p. 49.)

Respondent notes that capital punishment has been upheld for over two hundred years, and cites the Second Circuit's opinion in *United States v. Quinones* (2d Cir. 2002) 313 F.3d 49, without discussing appellant's treatment of this decision. (RB 118–119; AOB 130.) Respondent repeatedly refers to the "possibility" that an actually innocent person may be convicted (RB 118–119), but does not acknowledge the *inevitability* of such convictions in a far greater number of cases than was thought possible until recently, and the *reality* that hundreds of people have been wrongly convicted of serious crimes in the past few decades. The National Registry of Exonerations, a joint project of the Michigan and Northwestern Law Schools, recently tallied 1010 exonerations,[16] and the number is growing.

The reason why we can now see particularized flaws in our system trace back to the emergence of DNA testing, and studies of the legal process triggered by the substantial number of people shown to be innocent of crimes for which they had been convicted. (See AOB, Claim IX, *passim*.) Respondent does not challenge any of the factual assertions that underlay

---

[16] *National Registry of Exonerations* <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> [as of Nov. 10, 2012].

appellant's claim. Instead, respondent cites an unpublished Missouri case as follows: "'[T]he *mere possibility* that an actually innocent person may be convicted cannot be the constitutional touchstone for a due process violation. If it were, no judicial system could withstand the scrutiny.' (*U.S. v. Montgomery*, 2007 WL 1031282 *7 (W.D. Mo. April 12, 2007.)" (RB 119.)

This argument is not based on a "mere possibility." It is based on the fact that we now know that hundreds of persons, including many convicted and sentenced to death, have been wrongly convicted. That is why appellant seeks a higher burden of proof in capital cases. Given the length of the jury's deliberations in this case and the relative simplicity of the facts before it (See AOB 5), this is an especially appropriate case in which to ask for the application of a higher burden of proof.

Respondent cites numerous authorities for the proposition that the death penalty as currently applied in California is constitutional. (RB 118–119.) Appellant is not here challenging the constitutionality of the death penalty. The alteration of the burden of proof proposed by appellant would not impede the prosecution from seeking the death penalty in any case where the evidence is beyond all doubt.

Such a burden of proof would strengthen, not weaken, the death penalty by eliminating doubts as to the underlying guilt of persons selected for a penalty phase trial. This qualitative change in the reliability of the convictions underlying the death penalty would, however, protect appellant from being executed; it is virtually certain that no juror would have found appellant guilty beyond all doubt of the crimes for which he was charged.

It is within this Court's power to eliminate a chief cause of the widespread loss of support for the death penalty—uncertainty about the underlying guilt of persons sentenced to death.[17] For the reasons set forth in appellant's opening brief (AOB 122–142), he asks this Court to not allow anyone to be considered for death unless their guilt has been proven beyond all doubt.

---

[17] See, e.g., Johnson, *Shifts Detected in Support for Death Penalty*, USA Today <http://www.usatoday.com/news/nation/story/2012-04-24/abolish-death-penalty-movement/54515754/1> [as of Nov. 9, 2012].

X. THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT WRONGFULLY EXCUSED TWO LIFE-PRONE JURORS.

Appellant has no quarrel with the respondent's general summary of the applicable law (RB 119–121); it essentially tracks what was presented in the opening brief. When talking about specific jurors, however, respondent misapplies that law.

A. Prospective Juror No. 129

Regarding Juror No. 129, who was inexplicably dismissed solely on the basis of her questionnaire, the case relied on by respondent (*People v. Avila* (2006) 38 Cal.4th 491) actually makes the error in dismissing Juror No. 129 unmistakably clear.

Juror No. 129's questionnaire includes a statement that it would be difficult for her to impose the death penalty because of her religious convictions. (17 CT 4806, 4817.) However, she also stated that she would follow the law as instructed by the trial court despite the fact that she might personally disagree with the law. (17 CT 4812.) Although she did say she had moral reasons for not believing she had the right to sit in judgment for another human being to die, she said repeatedly that she could set aside her own views as to what the law ought to be, and follow the law as it was given to her by the trial judge, and that she would not defy the court's

instructions in any of the matters such as guilt or special circumstances determinations that would determine whether or not a penalty phase trial would take place. (17 CT 4812, 4817–4819.) This Court's decisions make clear what is apparent from the prospective juror's answers: she was quite capable and desirous of following the law as given to her by the trial court, and it was prejudicial error to dismiss her without asking her any questions on voir dire.

In *People v. Avila*, *supra*, prospective juror O.D.

> [s]trongly opposed the death penalty, [and] also acknowledged that one of the duties of a juror was to follow the law and indicated he could set aside his personal feelings and follow it. Given only these two answers, we might not be able to say that O.D.'s opposition to the death penalty was clear and unequivocal. *But he also indicated that he entertained such conscientious opinions regarding the death penalty that he would, in every case and regardless of the evidence presented, automatically vote for something other than first degree murder so as not to reach the penalty phase, automatically vote for a verdict of not true as to the special circumstances alleged so as not to reach the penalty phase, and, automatically vote for life imprisonment without the possibility of parole if there was a penalty phase.*

(*Avila*, 38 Cal.4th at p. 532, emphasis added.)

This Court thus was able to resolve the ambiguity by looking further into the questionnaire, and finding that as a practical matter, O.D.'s approach to the trial would be to automatically vote in such a way that the

defendant would never be given the death penalty. Accordingly, he was properly discharged.

Looking at the equivalent secondary questions on Juror No. 129's questionnaire leads to a different conclusion. She stated that she would not raise the burden of proof in this case because of the potential death penalty. (17 CT 4818.) She would not refuse to find defendant guilty of first degree murder just to prevent the penalty phase from taking place. (17 CT 4817.) She would not refuse to find a special circumstance true in order to avoid a penalty phase. (17 CT 4818.) She would not refuse to consider evidence in aggravation because of her views concerning the death penalty. (17 CT 4818.) She would not automatically vote for a sentence of life without possibility of parole. (17 CT 4817–4819.) She did not express any general opposition to the death penalty, and said that it was imposed at about the right frequency. (17 CT 4819.)

The most reasonable course to follow in light of her written answers would have been to allow her to serve on appellant's jury. Any remaining doubts should have been resolved by voir dire, not by summary dismissal.

This Court's recent decision in *People v. Riccardi* (2012) 54 Cal.4th 758, explains how dismissals based on questionnaires alone should be evaluated, and further supports appellant's argument. In *Riccardi*, the

dismissal of four jurors was challenged: A.K., N.K., E.H., and J.F. Three of the four (A.K., E.H., and J.F.), wrote "yes" in response to a question which asked whether the prospective juror would automatically and absolutely refuse to vote for the death penalty in any case. Two of them also stated that they could not set aside these feelings and follow the law as given to them by the trial court. The third (A.K.) said that he could "set aside" his "own personal feelings regarding what the law ought to be and follow the law." But he also said that his opposition to the death penalty would cause him to "refuse to vote" for a verdict of murder in the first degree even if the prosecution proved guilt beyond a reasonable doubt. In describing his feelings about the death penalty, A.K. wrote "I desagri [*sic*]." He wrote that he believed the death penalty was used too often. This Court therefore found that his personal views would "prevent or substantially impair" performance of his duties as a juror. (*Id.*, 54 Cal.4th at 781–782.)

The fourth juror discharged on the basis of her answers on the questionnaire (N.K.) gave conflicting answers. On the one hand, she supported the death penalty, and would not automatically refuse to impose it. On the other hand, she said that "I'm afraid I could not feel right in imposing the death penalty on someone even though I feel it is nessasary [*sic*] under some circumstances." She also stated that "she would refuse to

vote in favor of defendant's guilt of murder in the first degree, even if it were proved beyond a reasonable doubt, because she *opposes* the death penalty and would not want the jury to have to consider the death penalty." N.K. checked "no" in response to question No. 65, indicating that she could not "set aside" her "own personal feelings regarding what the law ought to be and follow the law. . . ."

> [H]er inconsistent answers are susceptible of two interpretations—either she, like other jurors not disqualifiable under *Witherspoon–Witt,* feared that actually being on a death jury would be difficult or uncomfortable, or she was advising the court that she could not impose a decision of death, even if the evidence warranted its application. From the questionnaire alone, we cannot possibly determine which scenario prompted her answers. Under these circumstances, N.K.'s answers did not clearly reveal that she was unable to impose the death penalty, thereby preventing her from performing her duties as a juror.
>
> Accordingly, we conclude the trial court erred by failing to question Prospective Juror N.K. in open court to determine whether she was excusable as someone who could not face of the enormity of the task of judging life or death.

(*Riccardi*, *supra*, 54 Cal.4th at pp. 781–782.)

Excusing her for cause was per se reversible error. (*People v. Heard* (2003) 31 Cal.4th 946, 950; *Gray v. Mississippi* (1987) 481 U.S. 648.) This Court therefore set aside defendant Riccardi's death sentence. (54 Cal.4th at p. 783.)

Here, Juror No. 129's answers reflected that she would take into account "somewhat" her religious beliefs, but a higher moral belief was that she should follow the law of the land. She made it clear in a variety of answers to questions that she would not slant her deliberations in order to avoid a penalty phase trial in any way. To the extent there is any doubt about her ability to perform her duties as a juror, she should have been questioned by the parties, and not summarily dismissed. Under the law in effect summarized by this Court in *Riccardi* and AOB 144–146, appellant's death sentence must be set aside.

B. Prospective Juror No. 16

This prospective juror was not at all ambivalent about her ability to serve as a juror and follow the law as instructed when questioned by the trial court. The ambivalence noted by respondent came *entirely* from her answers on the questionnaire. (AOB 149–151; RB 126–130.) The fact that she may have found it difficult to impose the death penalty is no grounds for dismissal. There are few prospective jurors who would not find it difficult to vote for death, even though they believe in the death penalty. In *Lockhart v. McCree* (1986) 476 U.S. 162 at p. 176, the high court wrote, "those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are

willing to temporarily set aside their own beliefs in deference to the rule of law." See also *People v. Solomon* (2010) 49 Cal.4th 792, 832–833.

Prospective juror No. 16 may have been uncertain about her position on the death penalty (RB 129), but she had no ambivalence at all about her ability and determination to follow the law as given her by the trial court; that clarity was unmistakable on voir dire. (AOB 149–151.) It was reversible error for the trial court to have granted the prosecutor's motion to dismiss her. (*Gray v. Mississippi*, *supra*, 481 U.S. 648; *People v. Heard*, *supra*, 31 Cal.4th at p. 950.)

XI. THE TRIAL COURT ERRED BY NOT FINDING A PRIMA FACIE CASE OF RACIAL BIAS ANIMATING THE PROSECUTOR'S PEREMPTORY DISMISSAL OF HISPANIC JURORS.

Respondent acknowledges that the trail court used the wrong standard in resolving appellant's contention pursuant to *People v. Wheeler* (1978) 22 Cal.3d 258, and *Batson v. Kentucky* (1986) 476 U.S. 79, that the prosecutor impermissibly used peremptory challenges to remove two Hispanic prospective jurors based on their race. However, he contends that even though the trial court applied the incorrect "substantial likelihood" standard in determining that the prosecutor did not have to explain any of his dismissals, reversal is not required. (RB 132.)

Respondent relies primarily on materials put forth in the prosecutor's answer to appellant's motion for a new trial after his conviction. These materials were not considered by the trial court, which reiterated its decision as well as the incorrect standard it used to make its decision. (See 9 CT 2571 et seq.; 37 RT 9774–9778.) Appellant was not given an opportunity to develop a case according to the proper standard during jury selection. He is entitled to a remand for a judicial determination if his rights to an impartial jury and equal protection of the laws were violated.

XII. THE TRIAL COURT ERRED IN ALLOWING EXTENSIVE VICTIM IMPACT EVIDENCE TO BE PRESENTED.

Appellant has presented his argument in his opening brief. Respondent's points are an accurate summary of this Court's views on this issue. (RB 139–143.) For the reasons set forth in his opening brief (AOB 158–162), appellant asks this court to reconsider the broad reading of *Payne v. Tennessee* (1991) 501 U.S. 808, it has articulated in cases such as *People v. Taylor* (2010) 48 Cal.4th 574, and in the circumstances of this particular case, hold that due process was violated by the presentation of testimony about their loss by five members of the decedent David Gaines's extended family.

XIII. WHERE THE STATE RELIES ON THE IMPACT OF A MURDER IN ASKING FOR DEATH, THE DEFENDANT SHOULD BE PERMITTED TO RELY ON THE IMPACT OF AN EXECUTION IN ASKING FOR LIFE.

This Court recently reaffirmed its view that "the impact of a defendant's execution on his or her family may not be considered by the jury in mitigation. [citation omitted]" *People v. Gonzales* (filed Aug. 2, 2012, 2012 WL 3116943.) For the reasons set out in his opening brief, appellant believes that an execution's impact on the defendant's family easily crosses the "low threshold for relevance" imposed by the Eighth Amendment to the United States Constitution. (*Smith v. Texas* (2004) 543 U.S. 37, 43; *Tennard v. Dretke* (2004) 542 U.S. 274, 285.) Appellant asks this Court to reexamine its position regarding evidence of the impact his execution would have on his family and friends.

As these cases recognize, the Eighth Amendment does not permit a state to exclude evidence which "might serve as a basis for a sentence less than death." (*Smith v. Texas*, *supra*, 543 U.S. at p. 43.) So long as a "fact-finder could reasonably deem" the evidence to have mitigating value, a state may not preclude the defendant from presenting that evidence. (*Id.* at p. 44.)

There is no doubt that execution impact evidence could have such an impact. Neither respondent nor this Court has denied this obvious point; the

Court simply holds that it is "improper." (*People v. Bennett* (2009) 45 Cal.4th 577, 601.)

Execution impact evidence is relevant under *Smith* and *Tennard*. As the Supreme Court has concluded, victim impact evidence is relevant because it shows the "uniqueness" of the victim. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 823.) For the very same reasons, execution impact evidence is relevant because it shows the uniqueness of the defendant—not just his own personal qualities (*People v. Bennett*, *supra*, 45 Cal.4th at p. 601), but what those qualities actually mean to those who have lived with him and been close to him. A juror deciding whether or not appellant should be killed could reasonably deem the execution impact evidence to have mitigating value.

As this trial unfolded, the jury was presented with five members of the Gaines family talking about David Gaines, describing him, and telling the jury what the impact of his death had on them. (See RB 35–36, 138–141.) Appellant was not allowed to present similar testimony about the impact his execution would have on his family members.

This disparity was not trivial, or meaningless. Failure to allow this evidence not only violated the Eighth Amendment's guarantee that mitigating evidence that might move a juror to vote for a sentence of less

than death be presented, but also the Fourteenth Amendment's guarantee of equal protection of the law. (*Wardius v. Oregon* (1973) 412 U.S. 470.) The error in blocking appellant from presenting this testimony violated his rights to present a defense, including mitigating evidence that might move at least one juror to vote for a sentence of less than death, as well as the Eighth Amendment's requirement that a person subject to a death penalty be allowed to present mitigating evidence, and the Fourteenth Amendment's guarantee of equal protection of the laws. Because he was denied the opportunity to present relevant mitigating evidence, appellant's death sentence must be set aside.

Respondent and appellant agree that any error in excluding mitigating evidence requires a new penalty phase trial unless the state can show that the error was harmless beyond a reasonable doubt. (AOB 173–174; RB 149.) In an effort to meet this standard, respondent duly asserts that the evidence establishing appellant's guilt was "overwhelming." (RB 147.)

As evidence for this assertion, respondent cites that David Gaines was shot four times from a distance of no more than two feet away,[18] and

---

[18] The pathologist referred to each of the fatal wounds as contact gunshot wounds. (25 RT 6579, 6590, 6592, 6604.)

three of those shots were fatal. (RB 147.) Appellant cannot see how these undisputed facts show anything about appellant's guilt as opposed to David Zaragoza's guilt.

Respondent then recounts in detail the aggravating evidence presented by the prosecutor in the penalty phase of appellant's trial. (RB 147–149.) He evidently believes that the evidence is so overwhelming that little or no deliberation should have been required to reach the right verdict. Why, then, did the jury deliberate more than 16 hours over more than four days before reaching its verdict? We cannot know the subjective processes of the jury, but we do know that the decision was not an easy one. (See prejudice discussion, *post.*)

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

Respondent disagrees with appellant's contention that this Court has considered challenges to California's death penalty scheme in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. (RB 150), but does not challenge the authorities cited by appellant. For the reasons set forth in his opening brief (AOB 175–177) appellant believes that this Court should review the system as a whole. (*Kansas v. Marsh* (2006) 548 U.S. 163.)

XV. THIS COURT SHOULD RECONSIDER AND REJECT ITS MISPLACED RELIANCE ON TWO UNITED STATES SUPREME COURT CASES AS AUTHORITY FOR THE ERRONEOUS PROPOSITION THAT CALIFORNIA'S DEATH PENALTY SCHEME MEANINGFULLY NARROWS THE POOL OF PERSONS ELIGIBLE FOR DEATH.

According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v. Bacigalupo* (1993) 6 Cal.4th 857, 868.) Respondent relies on *Bacigalupo* as the prime authority supporting California's method of narrowing the pool of those eligible to be considered for death. (RB 150–151.) See also *People v. Stanley* (1995) 10 Cal.4th 764, where this Court rejected the claim that California's 1978 death penalty law is unconstitutional because the special circumstances fail to perform the narrowing function required by the Eighth Amendment, citing *Pulley v. Harris* (1984) 465 U.S. 37, in holding "[t]his contention has been rejected by the United States Supreme Court." (*Stanley*, at pp. 842–843.)

Bacigalupo held that "California's 1978 death penalty statute is essentially identical to California's 1977 death penalty law the United States Supreme Court upheld in *Pulley v. Harris* [citations omitted] in that it 'requir[es] the jury to find at least one special circumstance beyond a

reasonable doubt,' thereby 'limit[ing] the death sentence to a small subclass' of murders."[19] *(Bacigalupo*, 6 Cal.4th at p. 467.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make *all* murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained 31 special circumstances[20] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in

---

[19] See also *People v. Jennings* (2010) 50 Cal.4th 616, 648–649 [stating the United States Supreme Court "has held that California's requirement of a special circumstance finding 'adequately limits the death sentence to a small sub-class of capital-eligible cases'"], quoting *Harris*, 465 U.S. at p. 53); *People v. Arias* (1996) 13 Cal.4th 92, 187 [rejecting the defendant's narrowing claim and citing *Harris*, 465 U.S. at p. 53, as "upholding the 1977 death penalty law" and *Bacigalupo*, 6 Cal.4th at p. 467 as "noting essential identity of 1978 scheme"]; *People v. Whitt* (1990) 51 Cal.3d 620, 659–660 [rejecting defendant's claim there is no "meaningful" distinction between capital and noncapital murderers because of aggravating sentencing factors common to most murders by citing *Harris* and stating "California's statute satisfies the Eighth Amendment's requirement that the category of death-eligible murderers by suitably narrowed"].

[20] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now 34.

definition as to encompass nearly every murderer, per the drafters' declared intent but contrary to constitutional requirements.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1983) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500–501, 512–515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

This Court's belief that the United States Supreme Court resolved the constitutionality of the 1978 death penalty statute in *Pulley v. Harris* represents a fundamental misunderstanding of that decision. In *Harris*, the issue was "whether the Eighth Amendment . . . requires a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner." (*Harris*, 465 U.S. at pp. 43–44.) The issue in *Harris* was

plainly different from the question of whether the 1978 version of the statute sufficiently narrows the pool of death-eligible murderers.

It is true that *Harris* contains the statement that the California statute, "[b]y requiring the jury to find at least one special circumstance beyond a reasonable doubt, . . . limits the death sentence to a small sub-class of capital murders." (465 U.S. at p. 53.) *Harris*, however, involved California's *1977* death penalty statute (see *Harris*, 465 U.S. at pp. 38–39, fn. 1), while the whole point of the Briggs initiative was to substantially expand the reach of that statute to include "all murderers."

Furthermore, *Harris* concluded only that the 1977 California statute was constitutional "[o]n its face." (See 465 U.S. at p. 53.) The Court explicitly distinguished the two laws, noting that the special circumstances in the 1978 California death penalty law are "*greatly expanded*" from those in the limited 1977 law. (465 U.S. at p. 53 fn. 13, emphasis added.)

Harris does not address, let alone resolve, the issue of whether the 1978 statute fails to meet the Eighth Amendment's requirement that a death penalty scheme meaningfully narrow those eligible for a death sentence.

This Court has also erroneously relied upon *Tuilaepa v. California* (1994) 512 U.S. 967 in rejecting narrowing claims. In *People v. Sanchez* (1995) 12 Cal.4th 1, 60, this Court rejected the claim that "the 1978 death

penalty law is unconstitutional . . . because it fails to narrow the class of death-eligible murderers and thus renders 'the overwhelming majority of intentional first degree murderers' death eligible," in reliance on a misunderstanding that the United States Supreme Court in *Tuilaepa* resolved this claim:

> [I]n *Tuilaepa v. California*, *supra*, and in a number of previous cases, the high court has recognized that 'the proper degree of definition' of death-eligibility factors 'is not susceptible of mathematical precision'; *the court has confirmed* that our death penalty law avoids constitutional impediments because it is not unnecessarily vague, *it suitably narrows the class of death-eligible persons*, and provides for an individualized penalty determination.

(*Sanchez*, 12 Cal.4th at pp. 60–61, emphasis added. See also *People v. Arias*, *supra*, 13 Cal.4th at p. 187 [rejecting narrowing claim by stating "[i]dentical claims have previously been rejected with respect to the death penalty scheme applicable in this case and to its closely related predecessor, the 1977 law" and citing to *Tuilaepa*]; see also *People v. Beames* (2007) 40 Cal.4th 907, 933–934 [rejecting the defendant's narrowing claim by citing to *Tuilaepa*, 512 U.S. at pp. 971–972, for the proposition that "the special circumstances listed in section 190.2 apply only to a subclass of murderers, not to all murderers . . . [thus] there is no merit to defendant's contention . . . that our death penalty law is impermissibly broad."].)

The issue resolved in *Tuilaepa* was whether the aggravating factors in section 190.3—which in California pertain only to the death selection determination, and not the death eligibility determination—are constitutional. (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 969.)

The Supreme Court in *Tuilaepa* explicitly said that it was *not* addressing any issue concerning the eligibility stage of the California scheme. (*Id.* at p. 975 [noting the petitioners were not challenging their special circumstances—the eligibility phase in California's scheme—"so we do not address that part of California's scheme save to describe its relation to the selection phase"]; see also *id.* at p. 984 (conc. opn. of Stevens & Ginsburg, JJ.) [concluding that the sentencing factors used at the selection phase at issue in the cases were constitutional, based on "the assumption (unchallenged by these petitioners) that California has a statutory 'scheme' that complies with the narrowing requirement"]; *id.* at p. 994 (dis. opn. of Blackmun, J.) [observing "the Court's opinion says nothing about the constitutional adequacy of California's eligibility process" or its "extraordinarily large death pool" and clarifying "the Court is not called on to determine that they collectively perform sufficient, meaningful narrowing"].)

The United States Supreme Court has never considered, let alone

approved, the method of determining who is eligible for a death sentence set out in section 190.2. In rejecting prior claims that California's statute does not adequately narrow the pool of murderers eligible for a death sentence, this Court has relied on two cases from the high court that explicitly stated they were not ruling on this question, or explicitly stated that their holding was limited to the 1977 statute, and not on the "greatly expanded" 1978 statute.

This Court has said that numbers of people eligible for death under the 1977 and 1978 statutes are "*essentially identical*" (*Bacigalupo*, 6 Cal.4th at p. 467, emphasis added) while the United States Supreme Court says that the number of people eligible for a death sentence was "*greatly expanded*" by the 1978 revisions to the 1977 law. (*Harris*, 465 U.S. at p. 53 fn. 13, emphasis added.) One of these statements is wrong. The *Tuilaepa* case did not address in any way the question of death-eligibility, or section 190.2—it was solely concerned with what factors could be considered in actually selecting someone for death—that is, section 190.3, a different statute entirely. This Court should recognize that the U.S. Supreme Court has never approved California's method of determining who is eligible for the death penalty and reconsider this question without relying on inapplicable cases.

XVI. CALIFORNIA'S DEATH PENALTY SCHEME IS UNCONSTITUTIONAL

Respondent answers appellant's claims 16 through 19 by citing to this Court's previous rejection of the arguments contained therein. For the reasons set out in appellant's opening brief (AOB 153–165), appellant asks this Court to reconsider and reject its positions regarding various facets of California's death penalty scheme.

XVII. THE RACIAL DISCRIMINATION THAT PERMEATES CAPITAL SENTENCING THAT IS EXPLICITLY ACCEPTED BY DOMESTIC LAW VIOLATES BINDING INTERNATIONAL LAW, AND REQUIRES THAT APPELLANT'S DEATH PENALTY BE SET ASIDE.

Respondent misunderstands appellant's contention. (RB 165–166.) Appellant has shown that the criminal justice system in the United States has *accepted* racism in the context of capital sentencing as an unfortunate but inevitable byproduct of allowing sentencers discretion in the choice of what penalty to impose. (AOB 226–242.)

Respondent does not deny this. He acknowledges appellant's "various studies" but does not dispute them. The studies cited by appellant show that racism is deeply embedded in our capital sentencing system, and is an effect, if not the purpose of that system. Respondent does not, and cannot, deny the force or conclusions of these studies. He can only repeat that racism cannot be established in a particular case unless there is case-specific evidence presented that proves racial bias on the part of the prosecutor, judge, jury, or legislature. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 292–299 [hereinafter *McCleskey*].)

Respondent's statement that "international law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements" (RB 165) is not correct.

Appellant's claim is precisely that the law as set out in *McCleskey*, the overarching case on this question, itself violates international law. Furthermore, decisions of this Court accept racism in a variety of contexts as a legitimate basis for decisions, with the proviso that it can't be the *only* basis for such decisions also violate international law. (AOB 239–240.) Respondent does not acknowledge the existence of these arguments, let alone refute them.

The covenants against racism to which the United States subscribes do not tolerate acceptance of racism, even when cloaked in the name of "discretion" or when racism is an acceptable motive if combined with more legitimate bases for decision making. Article 1 of the International Convention Against All Forms of Racial Discrimination defines "racial discrimination" as:

> [a]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

General Recommendation No. 14: Definition of discrimination (Art. 1, par.1) 03/22/1993, emphasis added.)

McCleskey ordains that racism can only be proved if that is the *purpose* of a challenged act or omission, but specifically forbids the

establishment of racism by showing the *effects* of a challenged practice or system independent of anyone's express intentions. In so holding, it violated the Convention to which the United States specifically subscribed. (AOB 226-228.)

Respondent has not argued that the covenants against racism to which the United States has formally committed itself (see AOB 226-242) would tolerate the racism permitted by *McCleskey* and *Montiel*.[21] It is clear that they do not. The racism that results from our system of justice has been repeatedly documented with well-designed studies and with individual testimony. *McCleskey*'s requirement that a specific act of racism be photographed or recorded or documented is an effective way of tolerating, even encouraging, racism. The effects of such an impossible standard are documented in the research cited by appellant dismissively referred to by respondent as "various studies." (RB 165.) Appellant intends to take this question to the governing bodies charged with implementing the covenant in question if this Court does not acknowledge and consider appellant's argument on this question.

---

[21] *People v. Montiel* (1993) 5 Cal.4th 877.

XVIII. THE ERRORS, BOTH SINGLY AND CUMULATIVELY, OBSTRUCTED A FAIR TRIAL, AND REQUIRE REVERSAL OF BOTH THE GUILT AND PENALTY PHASES OF APPELLANT'S TRIAL.

A. Guilt Phase

Respondent argues that no errors were committed at all, so any analysis of their effects, whether singly or cumulatively, is misplaced. (RB 167.) Any error committed in the guilt phase must be deemed prejudicial, given how close was this case. In *People v. Taylor* (1990) 52 Cal.3d 719, 732, this Court found that 10½ hours of deliberation in a guilt phase of a death penalty trial "cannot be said to be unduly significant" in light of the gravity of what was at stake and the number of crimes the jury had to consider. Here, deliberations in the guilt phase were twice as long, and considered evidence regarding one crime—the shooting of David Gaines. In this context, the lengthy deliberations were indeed significant.

Longer jury deliberations "weigh against a finding of harmless error [because lengthy deliberations suggest a difficult case." (*United States v. Varoudakis* (1st Cir. 2000) 233 F.3d 113, 126; *Dallago v. United States* (D.C. Cir. 1969) 427 F.2d 546, 559 ["The jury deliberated for five days, and one would expect that if the evidence of guilt was overwhelming the jury would have succumbed much sooner." (footnote omitted)]; see also *United States v. Williams* (D.C. Cir. 2000) 212 F.3d 1305, 1313 (dis. opn. of

Silberman, J.) ["[W]e are willing to take into consideration the length of jury deliberations in our harmless error review."], cert. denied (2000) 531 U.S. 1056.) The length of deliberations, together with the circumstantial nature of the evidence against appellant, suggest that should this Court agree with any one of the claims of error set out by petitioner, or with more than one of these claims, appellant is entitled to a new trial.

B. Penalty Phase

During the penalty phase, the jury was expressly told that it should consider all of the evidence which had been received during any part of the trial of this case. (36 RT 9544.) However, since the question the jury resolves at the guilt phase is fundamentally different from the question resolved at the penalty phase, error that is harmless as to the guilt determination can be prejudicial at the penalty phase.

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal. But in determining the issue of penalty, the jury, in deciding between life imprisonment or death, may be swayed one way or the other by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can

> ascertain whether there is a reasonable probability that a different result would have been reached in absence of error.

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136–137.)

This Court has recognized that, at a capital penalty trial, lingering doubts about guilt constitute a proper factor in mitigation of the penalty. (*People v. Hawkins* (1995) 10 Cal.4th 920, 966–968.) Here, appellant's jury was instructed that it could consider lingering or residual doubt in this case as it deliberated whether or not to impose a death sentence. (36 RT 9550–9551.)

By definition, it takes less to raise a lingering doubt than it takes to raise a reasonable doubt. Guilt phase errors which might be found harmless under traditional guilt phase tests of prejudice might nonetheless have the effect of negating a lingering doubt as to whether or not appellant was present at the scene of the crime, and shot David Gaines. Such errors may prejudicially impact the penalty determination even though they may be harmless as to the guilt verdict.

Accordingly, this Court must make a separate assessment of the impact of each guilt phase error, and of the cumulative impact of all guilt phase errors, on the penalty determination.

C. **Any Substantial Error Requires Reversal of the Penalty Verdict**

Prior to the adoption of California's current death penalty procedures, in which juror discretion is guided by a statutory list of aggravating and mitigating factors, this Court recognized in two key cases that assessment of the impact of an error is more difficult in a penalty trial than in a guilt trial. In addition to the language of *Hamilton*, *supra*, set out above, this Court wrote:

> [T]he jury may conceivably rest the death penalty upon any piece of introduced data or any one factor in this welter of matter. The precise point which prompts the [death] penalty in the mind of any one juror is not known to us and may not even be known to him. Yet this dark ignorance must be compounded 12 times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner.
>
> We cannot determine if *other* evidence before the jury would neutralize the impact of an error and uphold a verdict. . . . We are unable to ascertain whether any error which is not purely insubstantial would cause a different result; we lack the criteria for objective judgment.
>
> Thus, *any* substantial error in the penalty trial may have affected the result; it is reasonably probable that in the absence of such error a result more favorable to the appealing party would have been reached (Citation.)

(*People v. Lines* (1964) 61 Cal.2d 164, 169.)

While it is true that juries today have more guidance in choosing the penalty than did juries in the days of the death penalty law at issue in

Hamilton and *Lines*, penalty determinations are still very different from guilt determinations. In the guilt phase, the jury makes inherently factual decisions. Exactly what events occurred? In this case, was appellant present at the scene of the crime? In a penalty phase, juries make similar decisions in some respects, but they conclude with a moral and highly normative determination when they make the ultimate decision as to whether death or life without parole is the appropriate penalty. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 41–42; *People v. Hawthorne* (1992) 4 Cal.4th 67, 79.)

The discretion that a jury possesses in deciding penalty remains much broader than the discretion possessed when determining guilt or innocence. Appellant's penalty phase jury was instructed that it was free to assign whatever moral or sympathetic value it deemed appropriate to each and all of the various factors it was permitted to consider. (36 RT 9550.) No guilt phase jury possesses comparable discretion.

> It is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer.

(*Satterwhite v. Texas* (1988) 486 U.S. 249, 258.)

Certainly *any* error that impacts on the reliability of the judgment in a capital case—even if it is purely an error of state law—carries federal

Eighth Amendment reliability implications. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) The federal *Chapman* standard is also affected by the inescapable fact that the greater discretion in sentencing determinations, compared to guilt determinations, makes it far more difficult to determine whether an error did or did not have an impact on the outcome. For example, in *Caldwell v. Mississippi* (1985) 472 U.S. 320, a death judgment was reversed when the Court found an error and concluded that it could not say that it had no effect on the sentencing decision, that decision did not meet the standard of reliability that the Eighth Amendment requires.

As noted above, the jury in this case for over 16 hours over what penalty to impose on appellant. Any guilt or penalty phase error that potentially impacted on the penalty determination must result in reversal of the penalty verdict.

CONCLUSION

For the foregoing reasons, the judgment against appellant must be reversed.

DATED: November 12, 2012

Respectfully submitted,

____

MICHAEL R. SNEDEKER

Attorney for Appellant
LOUIS RANGEL ZARAGOZA

CERTIFICATE OF WORD COUNT

After conducting a word count on this opening brief, I have determined there are a total of 15,998 words in this document, excluding tables.

DATED: ______________________

Respectfully submitted,

____
MICHAEL R. SNEDEKER

Attorney for Appellant
LOUIS RANGEL ZARAGOZA

DECLARATION OF SERVICE BY MAIL

Re: *People v. LOUIS RANGEL ZARAGOZA*, Cal. Supreme Court No. S097886; San Joaquin Co. Super Ct. No. SP076824A

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is PMB 422, 4110 SE Hawthorne Blvd., Portland, Oregon 97214. I served a true copy of the attached

APPELLANT'S REPLY BRIEF

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

Clerk, Criminal Appeals
San Joaquin County Superior Court
222 E. Weber Ave.
Stockton, CA 95202

Dorothy Streutker, Esq.
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

Attorney General of California
1300 I Street
Sacramento, CA 95814

Louis Rangel Zaragoza
PO Box T-18228
San Quentin State Prison
San Quentin, CA 94974

District Attorney
San Joaquin County
222 E. Weber Ave., #202
Stockton, CA 95202

Each said envelope was then, on November 13, 2012, sealed and deposited in the United States mail at Portland, Oregon, Multnomah County, the county in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 13, 2012, in Portland, Oregon.

____

MICHAEL R. SNEDEKER