IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. ALFONSO IGNACIO MORALES Defendant and Appellant.	No. VA-071974 (Los Angeles County) California Supreme Court No. S136800

AUTOMATIC APPEAL FROM A JUDGMENT OF DEATH
SUPERIOR COURT OF LOS ANGELES COUNTY
THE HONORABLE MICHAEL A. COWELL, JUDGE PRESIDING

REPLY BRIEF OF APPELLANT ALFONSO IGNACIO MORALES

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Supreme Court of California for
Defendant and Appellant Alfonso Morales

DEATH PENALTY

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I.

GUILT PHASE

A.

THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT THE VERDICT OF FIRST DEGREE MURDER IN COUNTS 1 THROUGH 4

Morales established in the opening brief that the evidence was insufficient to support the verdicts of guilt in counts 1 through 4, because the prosecution failed to present evidence of planning activity prior to the killings that would establish premeditation and deliberation; a motive or motives for committing the killings; and a manner of killing showing a preconceived design. (AOB 75-81, citing *People v. Anderson* (1968) 70 Cal.2d 15, 26-27, 33-34; *People v. Cole* (2005) 33 Cal.4th 1158, 1224; *People v. Elliot* (2006) 37 Cal.4th 453, 470-471.)

Respondent argues, "In sum, substantial, if not overwhelming, evidence supports the jury's finding that the murders were deliberate and premeditated." (RB 34-42, at 42) Respondent's arguments do not persuade.

1. No Planning Activity

Respondent points to two pieces of evidence that purport to establish planning, and therefore premeditation. They do not.

First, respondent argues that, based on the fact two knives and other items found in the ammunition boxes from the woodpile contained blood consistent with Morales' and the victims' profiles, "a jury could reasonably infer that [these items] belonged to appellant and that he entered the Ruiz house armed with the instruments to carry out his bloody murder." (RB 37)

Months after the killings, Morales' stepfather Jerry Rodriguez delivered to the police two ammunition cans he found in his woodpile in his yard. He had seen ammunition cans before in Morales' bedroom, but there is no evidence as to when. In each can was a knife. The first was a knife with a black handle, described as the "United knife." (13RT 2842-2844, 2882-2884; 14RT 2920-2922, 2936-2941; Peo. Exh. 125-127) The second was a cold steel folding knife, described as the "Vaquero knife." (13RT 2842-2844, 2882-2884; 14RT 2936-2941; Peo. Exh. 125-127.) DNA tests were consistent with Trejo's profile on the United knife (14RT 3020) and Mike Ruiz's profile on the Vaquero knife. (14RT 3021-3022)

There is no evidence, however, that Rodriguez recognized the knives. The prosecution did not ask him, and he did not testify, whether they belonged to Morales. As a result, the knives are sufficient evidence that Morales committed the killings, but there is no evidence to support an inference that he entered the Ruiz house with them in hand. Thus respondent's authorities discussing weapon use are distinguishable on the facts and do not assist the premeditation argument. (RB 37) In *People v. Steele* (2002) 27 Cal.4th 1230, the prosecution established that after stabbing another victim, the defendant had a knife in his pocket when he led a second victim into her apartment. This Court correctly concluded that "the jury can readily infer that the person possessed the knife for the same purpose." (*Id.* at p. 1250) In *People v. Alcala* (1984) 36 Cal.3d 604, a knife was found near the crime scene and matched a similar set of knives in the defendant's home. (*Id.* at p. 626)

Second, respondent contends premeditation is proved by that the fact that neighbor Dorris Morris' trash bin was later found in Morales' shed and contained items taken from the Ruiz house. (RB 38)

Morris testified that her back wall abutted the Ruiz's house on Gunn. (11RT 2289-2291; 13RT 2808-2811) On Friday, July 11, 2002, at 12:00 p.m., she noticed there was a step stool against the back fence. She put the step stool inside her garage. (11RT 2299-2300; Peo. Exh. 33.) On Saturday, July 13, 2002, she set the alarm for 6:00 a.m. so that she would wake up and go out and rake the leaves. (11RT 2291-2294) She looked out her window and noticed a trash barrel and a stool against her side wall, towards the back of her lot. (11RT 2291-2294; Peo. Exhs. 32, 34.) She got dressed and went outside. The barrel and the stool were gone. She raked up the leaves and went behind her garage to get a barrel to dump them in. One of her two barrels was missing. (11RT 2295-2296, 2303)

At 8:00 a.m., she found a black case in her yard and called the sheriff. Sheriff's Deputy Bruce Goldowski responded and opened up the case. It contained a Compaq laptop computer with cords, business cards with the name Miguel Ruiz on them, a gold bracelet and a gold lighter. (11RT 2298, 2310-2312) Sheriffs' deputies executing a search warrant found a large trash bin with wheels in Morales' shed. (Peo. Exh. 108) They opened the lid and found 26 items including computer equipment, DVD's and cords, consistent with what was taken from the Gunn address. (13RT 2769, 2776-2777, 2794-2796; Peo. Exh. 32)

The location of the trash bin after the homicides also does not establish premeditation. Morris testified that she saw a stepstool by the fence Thursday afternoon, July 11, and put it back in the shed. (11RT 2299-2300; Peo. Exh. 33.) The prosecution maintained in final argument that on Friday morning, July 12, 2002, between 6:00 and 8:00 a.m., Morales took the stepladder and trash barrel from Morris' yard and used the stepladder to enter the Ruiz yard (16RT 3472), killed the Ruiz family (16RT 3470-3475), and then used the barrel to stash items he had taken from the Morris house. (16RT 3476)

But it was Saturday morning, July 13, when Morris looked out her window and noticed a trash barrel and a stool against her side wall, towards the back of her lot. She recalled that both were gone 15 minutes later. (11RT 2291-2296, 2303; Peo. Exhs. 32, 34.) She added that she raked up the leaves, went behind her garage to get a barrel to dump them in, and found one of her two barrels was missing. (11RT 2295-2296, 2303)

If the homicides occurred on Friday morning, as the prosecution maintained, there is no evidence that Morales put the stepladder and trash barrel in place prior to the homicides, and Morris' testimony about seeing them on Saturday morning does not demonstrate planning and premeditation, although it may reveal actions after the killings. The fact that a stool was seen up against the fence the previous Thursday is of no import. There is no evidence as to who put it there or how long it was there and no evidence that it was placed there again, along with the trash barrel, before the killings.

2. No Motive

Respondent postulates that there was a falling out, and Morales was motivated to kill the Ruiz family based on a need for revenge, but concedes, "Certainly, some evidence suggested motive, even if not strong evidence in isolation." (RB 42; and see RB 38, "the prosecution presented some evidence to suggest a motive.") The evidence which purports to support this theory is that Morales asked Maritza Raquel out twice and peeked in her window as a joke with Jasmine, and was asked by Mike and Maritza not to ask her out again. There also was evidence that he owed Mike a small sum of money. (RB 38-42)

From this, respondent extrapolates that, "A jury reasonably [could] infer that appellant and Mike had a falling out as a result of the money appellant owed to Mike and/or appellant's inappropriate behavior with Raquel. As a result, appellant was no longer welcomed around the house and stopped visiting. This evidence supported an inference of a motive founded upon revenge." (RB 39)

Respondent's theory is problematic. It is true that at some point Morales was told not to bother Martiza Raquel by asking for a date, but immediately after the window

incident, he apologized and brought dinner to the Ruiz family. (10RT 2120-2123) Neighbor Hector Alvarez testified that he was at the Ruiz house often to use the internet and that Morales was at the Ruiz home every day. Beginning sometime in June 2002, Alvarez noticed that Morales' car, a green Mustang, was not parked in front of the house anymore. (10RT 2222-2228; Peo. Exhs. 2, 31) No explanation was given as to why Morales would drive over and park his car in front of the Ruiz home, when he lived around the corner.

Based on this record, respondent makes a leap of logic that there was a falling out based on Morales' behavior towards Martiza Raquel, which admittedly was smoothed over, and that the absence of Morales' car proves he no longer visited the Ruiz family. This evidence fails to support an inference that he was motivated by revenge to kill the Ruiz family.

Respondent's authorities discussing motive are distinguishable on their facts. (RB 39) In *People v. San Nicolas* (2004) 34 Cal. 4th 614, the defendant held his wife down on the bed and pushed her into a wall within a few weeks of the time he killed her and her niece. (*Id.* at p. 668) In *People v. Daniels* (1971) 16 Cal.App.3d 36, where the defendant was charged with attempted murder of his wife and her female companion, the prosecution established that he previously had assaulted his wife and threatened to kill her if she divorced him. (*Id.* at pp. 41, 46.) In *People v. Hyde* (1985) 166 Cal.App.3d 463, the defendant threatened ex-girlfriend's new boyfriend after a restraining order was obtained. (*Id.* at p. 478) None of these authorities come close to supporting an inference that Morales had a falling out with the Ruiz family based on a minor debt and/or an inappropriate glance into Martiza Raquel's window. No prior threats or attacks occurred.

3. No Manner of Killing Showing Preconceived Design

Finally, respondent reflects in detail on the manner of the killings and insists the number of wounds and wound patterns alone demonstrate premeditation. (RB 39-40) Respondent further urges that "... appellant moved methodically from one victim to the

next, culminating with the sexual assault and murder of Jasmine, as supported by appellant's own version of the events, the
physical evidence, and [Deputy Paul] Delhauer's opinion on interpreting the crime scene." (RB 38)

There is no dispute that Morales killed the four Ruiz family members and left a grisly crime scene. As difficult as it may be to accept, however, physical evidence of the horrific manner in which he killed them still does not support an inference that he premeditated and deliberated before doing so. The claim that he "moved methodically from one victim to the next," is based not on the hard evidence at and derived from the crime scene. Rather, it is based on Deputy Delhauer's reconstruction of events, an inadmissible overreach without foundation to the point that the opinion itself was insufficient evidence.

Respondent's citations addressing the manner of killing also do not help establish premeditation. In *People v. Bolden* (2002) 29 Cal.4th 515, the defendant inflicted a six-inch-deep stab wound to the back that penetrated the victim's lungs and spleen. The Court concluded that the brutality of the wound supported an intent to kill but did not discuss premeditation. (*Id.* at p. 561.) In *People v. Pride* (1992) 3 Cal.4th 195, the Court observed that a violent and bloody death from stab wounds can be consistent with premeditation, but there was evidence about prior threats regarding the first victim and the second victim surprised him when he was cleaning up after the crimes against the first victim. (*Id.* at pp. 247-248)

4. Conclusion

Based on the foregoing, counts 1 through 4 must be reversed based on insufficient evidence to establish willful, deliberate premeditated murder. Where as here there was insufficient evidence to support the verdict, the appropriate remedy is reversal and dismissal of the first degree murder charge, with prejudice. (See *United States v. Dixon* (1993) 509 U.S. 688; *People v. Morris* (1988) 46 Cal.3d 1, 22; *People v. Trevino* (1985) 39 Cal.3d 667, 699; *People v. Pierce* (1979) 24 Cal.3d 199, 209-210.)

B.

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION CRIME SCENE RECONSTRUCTION EXPERT TO OVERSTEP HIS EXPERTISE AND TESTIFY WITHOUT FOUNDATION ABOUT THE SEQUENCE AND TIMING OF THE KILLINGS

Morales argued in the opening brief that the trial court failed as gatekeeper to control of the scope of the testimony of the prosecution's crime scene reconstruction expert, Paul Delhauer. As a result, Delhauer gave overbroad testimony that exceeded his expertise, lacked foundation, and buttressed a problematic case for first degree murder. (AOB 82-103, citing *inter alia,* Evid. Code, §§350, 400; *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 753; and *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516.)

Respondent counters that the evidence supported the trial court's admission of Delhauer's testimony as to the sequence of the homicides. (RB 43-57) Respondent argues that Delhauer qualified as a crime scene reconstruction expert, his reconstruction of events was not speculative or based on conjecture, his opinion was consistent with the other evidence, and any infirmities in his testimony were exposed during cross-examination. (RB 51-56) Respondent concludes that the evidence was overwhelming that Morales conducted a "cold, calculated killing spree" and any error was harmless under any standard. (RB 56-58, relying on standard of prejudice in *People v. Watson* (1956) 46 Cal.2d 818, 836.) Respondent's argument fails to address fundamental problems with Delhauer's testimony.

1. Deputy Delhauer Was Not Qualified to Interpret Blood Spatter.

While Deputy Delhauer had a great deal of field experience in assessing crime scenes and attended workshops, he was not qualified to interpret blood spatter because he did not have adequate scientific training. The National Academy of Sciences' recent

report, *Strengthening Forensic Science in the United States: A Path Forward,* National Research Council (2009) ("The NAS Report"),[1] provides that,

> "Interpreting and integrating bloodstain patterns into a reconstruction requires, at a minimum:
>
> • an appropriate scientific education;
>
> • knowledge of the terminology employed (e.g., angle of impact, arterial spurting, back spatter, castoff pattern);
>
> • an understanding of the limitations of the measurement tools used to make bloodstain pattern measurements (e.g., calculators, software, lasers, protractors);
>
> • an understanding of applied mathematics and the use of significant figures;
>
> • an understanding of the physics of fluid transfer;
>
> • an understanding of pathology of wounds; and
>
> • an understanding of the general patterns blood makes after leaving the human body."

(*Strengthening Forensic Science, supra,* "Bloodstain Patter Analysis," at p. 177)

The NAS expresses particular concern about expertise based on experience rather than scientific training: "Although there is a professional society of bloodstain pattern analysts, the two organizations that have or recommend qualifications are the IAI and the Scientific Working Group on Bloodstain Pattern Analysis (SWGSTAIN). SWGSTAIN's suggested requirements for practicing bloodstain pattern analysis are outwardly impressive, as are IAI's 240 hours of course instruction. But the IAI has no educational

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[1]Updated scientific and technical literature can be considered on appeal even if it was not before the trial court. (See, *People v. Brown* (1985) 40 Cal.3d 512, "[B]ecause appellate endorsement of a technique ends the need for case-by-case adjudication [citation], this court has sometimes looked beyond the trial record, examining California precedent, cases from other jurisdictions, and the scientific literature itself, to ascertain whether a particular technique is generally accepted. [Citations]" (*Id.* p. 530, citing *People v. Kelly* (1976) 17 Cal.3d 24, 32-35; *People v. Shirley* (1982) 31 Cal.3d 18, 33-34, 56.)

requirements for certification in bloodstain pattern analysis. This emphasis on experience over scientific foundations seems misguided, given the importance of rigorous and objective hypothesis testing and the complex nature of fluid dynamics. In general, the opinions of bloodstain pattern analysts are more subjective than scientific. In addition, many bloodstain pattern analysis cases are prosecution driven or defense driven, with targeted requests that can lead to context bias. ... extra care must be given to the way in which the analyses are presented in court. The uncertainties associated with bloodstain pattern analysis are enormous." (*Id.* at p. 178)

Deputy Delhauer lacked the scientific education suggested by SWGSTAIN. His formal education included a B.A. degree in liberal arts and a college course in physics for health sciences. That course applied physics to human physiology and focused on intravenous drugs and pulmonary function. (14RT 3113) He attended a 40-hour class in blood spatter interpretation: "During that class we went though, we talked specifically about the composition of blood, its components, and the dynamics of flight in blood as it is dispersed as a result of blood shedding incidents. And conducted somewhere in the neighborhood of 40 separate experiments that were reproduced, that were intended to reproduce dynamic events that results in bloodshed." (14RT 3115) He also studied brush marks, blood transfer as opposed to direct deposit from a blood source, transfer stains from body motion, and the direction of blood drops falling straight down and landing perpendicular or being projected and striking a vertical surface because of gravity. (14RT 3120)

Delhauer's qualifications fall short of SWGSTAIN's recommendations because he had no college-level education in physics and applied mathematics, and SWGSTAIN's principal concern was lack of solid scientific education to back up field experience. His course instruction was 40 hours, not the 240 hours SWGSTAIN desired. Moreover, he did not testify as to his knowledge of several key concerns in blood spatter analysis, including but not limited to arterial spurting and the limitations of bloodstain pattern measurements. (Cf. *Strengthening Forensic Science, supra*, "Bloodstain Patter Analysis," at pp. 177-178)

2. Delhauer's Opinion About Crime Sequence Lacked Foundation.

Deputy Delhauer's opinion as to the order the crimes occurred based on blood spatter also is problematic in terms of foundation. In *Reliability Assessment of Current Methods in Bloodstain Pattern Analysis, Final Report for the National Institute of Justice*, 2014 ("Report for NIJ") the researchers observed that experts err in concluding the order in which blood spatter is deposited "approximately 12% where spatter stains are deposited on top of transfer stains and 17% for the reverse sequence." (*Id.* at p. 71) The researchers concluded, "We suspect that many bloodstain pattern analysts do not attempt to determine the sequence of deposition of bloodstain patterns. For those who do, it would be worth reflecting on the results of this study. No defined methodology was prescribed for the sequencing analysis in this study and it is possible that a reliable methodology exists or could be developed. Either way it is incumbent on analysts to validate and publish their method and seek peer review." (*Id.* at p. 71.)

Delhauer testified exactly as the NIJ report said he should not. He talked at length about the sequence of the crimes against the Ruiz family, based on blood spatter and crime scene photographs, and rendered an opinion that Morales entered the house, disabled Mike Ruiz, was surprised by Trejo and killed her, then moved the bodies, then killed Ana Rodriguez, and finally sexually assaulted and killed Jasmine. (14RT 3114-15RT 3207)

The efficacy of Delhauer's sequencing analysis is further called into question because he was impeached about several conclusions that provided the foundation for his opinion. He disagreed with the pathologist who said Ruiz was stabbed with the assailant's left hand; he believed it was the right hand. (15RT 3216-2330) He also disagreed with the pathologist's conclusion that the wound margins were clean. (15RT 33229-3232) He was not present for the autopsies and did not talk to the pathologists that performed them. (15RT 3220-3229) He did not walk into the bathroom because criminalists were working there. (15RT 3264)

Delhauer opined that a bidet hose may have been used to douche Jasmine. However, he did no experiments to verify whether the hose was wiped on the clothes, or whose blood was on the clothing. The hose was not retained as evidence. (15RT 3280-3284; Def. Exh. KK, LL, MM, NN, OO) The defense presented evidence that this apparatus actually was a hookah hose. (15RT 3288-3291)

Delhauer admitted that the blood spatter in the entry to the house was not DNA-typed to any individual or several people. The blood on Trejo's clothing also was not typed. It could have been Ruiz's blood on her clothing. (15RT 3258-3260) If a criminalist testified there was no blood in the master bedroom, it would not change Delhauer's opinion because it still looked like blood. (15RT 3255-3258)

3. Deputy Delhauer's Conclusion Was Speculation and Conjecture.

The foregoing confirms that Delhauer reached an opinion about how the crimes occurred based on a foundation that was inadequate and often not supported by the actual forensic evidence. But in *Sargon Enterprises, Inc. v. University of Southern California, supra,* 55 Cal.4th 747, this Court held that expert opinion must be supported by the evidence and not veer into the realm of conjecture and speculation. (*Sargon, supra*, at p. 770.)

Surprisingly, respondent fails to address the lengthy discussion and application of *Sargon* in Morales' opening brief. In *Sargon,* the Court emphasized that, "'[T]he expert's opinion may not be based 'on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors.... [¶] Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide?' ..." (*Sargon, supra*, at p. 770.)

The trial court ruled, "[I]f there's a question that's asked that's totally off the wall and entirely speculative, yes, I will still sustain an objection. But asking him his opinion as to what may have happened or how stains may have gotten in place, you can still object. I'm not going to hold you in contempt if you object. I'm just indicating in advance the ruling is that I will permit him to tender an opinion." Yet despite its

misgivings that aspects of Delhauer's testimony were speculative, the court ultimately made a ruling allowed him to speculate as to how the crimes were committed: He testified based on knife wounds and blood spatter what he believed to be the sequence of the homicides. In the words of the court, "[Delhauer] just summarized the entire case." (15RT 3311-3312) Thus the court abused its discretion because even after acknowledging repeatedly that Delhauer's freewheeling testimony should be reined in, it utterly failed to do so.

4. Deputy Delhauer's Testimony Improperly Gap-Filled a Chaotic Crime Scene Into First Degree Murder.

Deputy Delhauer's opinion was not corroborated by other evidence supporting a finding of murder in the first degree, as respondent maintains. (See RB 55) Rather, Delhauer reviewed the chaotic crime scene and constructed an opinion which sequenced the events into a premeditated murder. Delhauer made what appeared to be an irrational attack into one with a cohesive narrative that established premeditation and deliberation. This is exactly what the NAS Report and the Report for the National Institute of Justice instruct not to do. Recall, the Report for the NIJ observed that, "No defined methodology was prescribed for the sequencing analysis in this study and it is possible that a reliable methodology exists or could be developed. Either way it is incumbent on analysts to validate and publish their method and seek peer review." (Report for NIJ, p. 71)

5. Admission of Deputy Delhauer's Testimony Was Prejudicial and Requires Reversal.

As discussed in the opening brief, the trial court's error in admitting and then not striking Deputy Delhauer's testimony deprived Morales of his constitutional rights to due process of law, a fair trial, and a reliable determination of guilt and of penalty. (U.S. Const. Amends. V, VI, VIII and XIV; Cal. Const., Art. I, §§ 7,15 and 17; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Beck v. Alabama* (1980) 447 U.S. 625, 638; *Ford v. Wainwright* (1986) 447 U.S. 399) The resulting prejudice is evaluated under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24, which shifts the burden to the

state to provide beyond a reasonable doubt that the error did not contribute to the verdict obtained. (*Ibid.*) Respondent will not be able to meet that burden.

The crime scene was frenzied and chaotic, the product of inexplicable rage. In its raw form, the scene was not likely to have been planned and carried out by an individual who premeditated and deliberated before doing so. Deputy Delhauer's testimony imposed upon that scene reason, organization and order based on assumptions largely refuted. Some of those assumptions were as elementary and as wrong as disagreeing with forensic experts as to whose blood was where. Some were as absurd as characterizing a hookah pipe for a bidet hose. Enough of the assumptions were wrong that his opinion was on very shaky ground.

However, the testimony gave the jury a hook on which to hang a finding of premeditated murder, and Delhauer's testimony was tantamount to telling the jury just that: Morales surprised Ruiz from behind and cut his neck. (14RT 3123; 15RT 3175, 3179-3182). Trejo entered the office at the time of the assault, and Morales stabbed and killed her as well [but the blood on the door jamb was never tested or shown to be hers]. Stains on the bedding in the master bedroom were consistent with blood spatter [but a criminalist testified there was no blood in the master bedroom]. (15RT 3254-3258.) There also were bloodstains on Jasmine's bedspread [but Delhauer did not examine it and there was no blood in the bedroom]. (15RT 3247-3250) Morales douched Jasmine with a bidet hose [which turned out to be a hookah pipe]. (15RT 3288-3291)

On the other hand, Dr. Purisch, the psychologist who performed the neuropsychological exam on Morales, concluded that Morales was so disabled from a frontal lobe injury that he was incapable of organizing what he wanted to do and too passive to do so even if he wanted to. Dr. Purisch explained that when an individual such as Morales cannot think things out, when the world kind of hits him and he reacts to it, he does so oftentimes in an impulsive manner. There is a reaction to things rather than an organization of one's thoughts. Some tests showed that under stress in particular, Morales would have faulty impulse control. (18RT 4034-4036) Morales did not think things through and reacted to situations out of frustration. (18RT 4053-4058)

Dr. Purisch's assessment was uncontradicted and was supported by a great deal of evidence. It confirmed that Morales was not capable of organizing an attack, but was capable of committing the offenses in a reactive, impulsive manner. Deputy Delhauer's opinion that the homicides were methodical and organized imposed order on the inexplicable, was without foundation and speculative. Nonetheless Delhauer's opinion gave the jury the go-ahead to find premeditation even though a neuropsychologist explained why that was improbable. Because it facilitated a finding of premeditation, admission of his opinion was not harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

C.

THE TRIAL COURT ERRED IN ADMITTING CUMULATIVE, GRUESOME, SUPERFLOUS CRIME SCENE PHOTOGRAPHS

Morales argued in the opening brief that the trial court abused its discretion when it admitted photographs of the crime scene that were gruesome and cumulative, far exceeding what was necessary to establish the prosecution's case. (AOB 98-103, citing *People v. Marsh* (1985) 175 Cal.App.3d 987, 997; *People v. Scheid* (1997) 16 Cal.4th 1, 13-14; and *People v. Moon* (2005) 37 Cal.4th 1, 34.)

Respondent maintains that the photographs were properly admitted into evidence. (RB 58-70) Morales disagrees. "The admission of allegedly gruesome photographs is basically a question of relevance over which the trial court has broad discretion." (*People v. Scheid* (1997) 16 Cal.4th 1, 13-14.) "A trial court's decision to admit photographs under Evidence Code section 352 will be upheld on appeal unless the prejudicial effect of such photographs clearly outweighs their probative value." (*People v. Moon* (2005) 37 Cal.4th 1, 34)

However, "[U]nnecessary admission of gruesome photographs can deprive a defendant of a fair trial and require reversal of a judgment. [Citation] Autopsy photographs have been described as 'particularly horrible,' and where their viewing is of no particular value to the jury, it can be determined the only purpose of exhibiting them is to inflame the jury's emotions against the defendant. [Citation]" (*People v. Marsh* (1985) 175 Cal.App.3d 987, 997)

Contrary to respondent's argument, the trial court's decision to admit the photographs went far beyond the purpose of establishing the crime scene, having no effect other than provoking jury emotion and subjective response. There was no question as to the identity of the victims, and their injuries were well-described. The photographs were excessive and had no effect other than to render what was already a gruesome murder scene more inflammatory.

If one or more jurors had a reasonable doubt about whether Morales premeditated the killings, that doubt was unfairly neutralized by the photographs because they were so inflammatory that no trier of fact could avoid being unduly swayed after looking at them. Consequently introduction of the photographs was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

II.

PENALTY PHASE

D.

THE TRIAL COURT ERRED IN ADMITTING EXCESSIVE VICTIM IMPACT EVIDENCE

In the opening brief, Morales detailed the wrenching testimony of Ruiz family survivors Maritza Raquel Trejo, Kenelly Zeledon, Miguel Ruiz, Sr., Luz Ruiz, Olga Lizzette Ruiz (17RT 3700-3751) and explained why that evidence exceeded the bounds of permissible victim impact evidence under *Payne v. Tennessee* (1991) 501 U.S. 808. (AOB 104-121)

Respondent counters that all of the victim impact evidence was properly admitted, citing *People v. Dykes* (2009) 46 Cal.4th 731, 781, *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1056 [quoting *Payne v. Tennessee* (1991) 501 U.S. 808, 825]. (RB 71-79, at 73)

Morales disagrees. Although such evidence generally is admissible (See *People v. Clark* (1990) 50 Cal.3d 583, 628-629; *People v. Edwards* (1991) 54 Cal.3d 787, 832-837; *People v. Mickle* (1991) 54 Cal.3d 140, 187; *People v. Garceau* (1993) 6 Cal.4th 140, 201-202, overruled on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118; *People v. Holloway* (2004) 33 Cal.4th 96, 143), admission of it may violate the Fifth, Sixth, Eighth and Fourteenth Amendments where it is so inflammatory as to invite an irrational, arbitrary, or purely subjective response from the jury. (*Payne v. Tennessee* (1991) 501 U.S. at pp. 824-825; *Edwards, supra*, 54 Cal.3d at 836.)

But several justices of the Supreme Court have expressed serious concerns that victim impact evidence may be unconstitutional unless it is carefully circumscribed. Recall, Justice Souter remarked, in part, "Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation. ..." (*Payne v. Tennessee* (1991) 501 U.S. at pp. 836-837 (conc. opn. of Souter, J.), citing *Burger v. Kemp* (1987) 483 U.S.

776, 785.) Justice Stevens went further, writing that "I remain convinced that the views expressed in my dissent in *Payne* are sound, and that the *per se* rule announced in *Booth* is both wiser and more faithful to the rule of law than the untethered jurisprudence that has emerged over the past two decades. Yet even under the rule announced in *Payne*, the prosecution's ability to admit such powerful and prejudicial evidence is not boundless." (*Kelly v. California, supra,* 555 U.S. at p. ___, 129 S.Ct. at p. 567 [J. Stevens, dissenting from denial of certiorari].)

Based on the foregoing, Morales maintains that the victim impact evidence introduced in this case was so voluminous, inflammatory and unduly prejudicial as to "divert the jury's attention from its proper role [and] invite[] an irrational, purely subjective response[.]" (*People v. Edwards, supra,* 54 Cal.3d at p. 836.) The evidence was so out of proportion to the evidence introduced in other cases as to shift the focus of the jury from "a reasoned *moral* response" to Morales's personal culpability and the circumstances of his crime (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319) to a passionate, irrational, and purely subjective response to the sorrow of the surviving Ruiz family members. (See *Cargle v. State* (Ok.Cr.App. 1995) 909 P.2d 806, 830 ["The more a jury is exposed to the emotional aspects of a victim's death, the less likely their verdict will be a 'reasoned moral response' to the question whether a defendant deserves to die; and the greater the risk a defendant will be deprived of Due Process."].)

Respondent also complains that Morales merely made "vague and general assertions" about the problematic testimony and did not identify any specific evidence that was unduly prejudicial. (RB 77) To the contrary, Morales set forth in detail the survivors' testimony, which viewed in its totality would prevent the most diligent of jurors from deliberating rationally to a fair verdict. (AOB 106-110) The emotionally charged and detailed testimony introduced in this case was precisely the type of evidence that *Payne* and progeny recognized as unduly prejudicial and likely to provoke irrational, capricious, or purely subjective responses from the jury. (*Payne v. Tennessee, supra,* 501 U.S. at p. 825; *People v. Edwards, supra,* 54 Cal.3d at p. 836.)

E.

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

Morales set forth in his opening brief various deficiencies and challenges relating to the application of the California death penalty statute. (AOB arguments F. through K., at 132-166.) Respondent relies on this Court's previous decisions rejecting these issues and asks this court to decline Morales' invitation to reconsider its prior rulings. (RB 82-87.) To the extent these issues are fully briefed, no reply is necessary to respondent's argument.

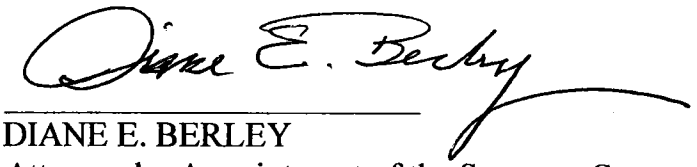
III.

CONCLUSION

For the reasons set forth herein and in the opening brief, it is respectfully submitted on behalf of defendant and appellant Alfonso Ignacio Morales that the judgment of conviction and sentence of death must be reversed.

Dated: December 17, 2014

Respectfully submitted,



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For Appellant Alfonso Ignacio Morales

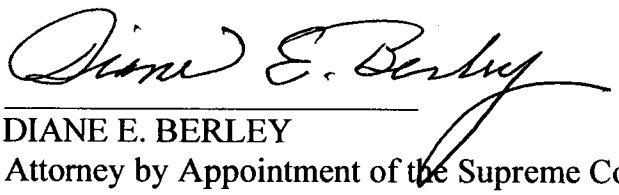
IV.

CERTIFICATE OF WORD COUNT

Rule 8.630, subdivision (b)(l), California Rules of Court, states that an Morales's opening brief in an appeal taken from a judgment of death produced on a computer must not exceed 95,200 words. The tables, the certificate of word count required by the rule, and any attachment permitted under Rule 8.204, subdivision (d), are excluded from the word count limit. Pursuant to Rule 8.630, subdivision (b), and in reliance upon Microsoft Office Word 2007 software which was used to prepare this document, I certify that the word count of this brief is 5,738 words.

Dated: December 17, 2014.

Respectfully submitted,



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V.

PROOF OF SERVICE BY MAIL

State of California)
)
County of Los Angeles)

I am employed in the County aforesaid; I am over the age of eighteen (18) years and not a party to the within action; my business address is 6520 Platt Avenue, PMB 834, West Hills, CA 91307-3218.

On December __, 2014, I served the within Reply Brief of Appellant Alfonso Morales on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at West Hills, California, addressed as follows:

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day, with postage thereon fully prepaid at West Hills, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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DIANE E. BERLEY