SUPREME COURT OF CALIFORNIA
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Supreme Court of California
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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent,	S165998
v.	Orange County Case No. 01HF0193
NOEL JESSE PLATA AND RONALD TRI TRAN, Appellant.	

APPELLANT'S REPLY BRIEF

Appeal From The Judgment Of The Superior Court
Of The State Of California, Orange County

Honorable William R. Froeberg, Judge

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ARGUMENT

I. MR. TRAN'S CLAIM THAT CIVIL CODE SECTION 3513 BARS WAIVER OF THE JURY SECTION PROCEDURES SET FORTH IN SECTIONS 222 AND 223 OF THE CODE OF CIVIL PROCEDURE CANNOT ITSELF BE WAIVED ON APPEAL.

After the prospective jurors completed their written questionnaires, the trial court permitted the prosecutor and defense counsel to remove 20 prospective jurors by stipulation without any further questioning by counsel or the court. (2 RT 330-333.) In Argument I of his opening brief, Mr. Tran contended that the removal of the prospective jurors by mutual agreement violated the procedures established by Legislature in Code of Civil Procedure sections 222 and 223, and was contrary to the legislative policy set forth in section 191. (AOB 76-99.) Mr. Tran further contended that the error was structural in nature, and thus reversible per se. (AOB 99-103.) Respondent does not disagree. (RB 71-74.) Instead, respondent argues that "Tran's attorney . . . acquiesced in the removal of the jurors upon stipulation," and therefore "Tran is barred from raising any objections to this procedure on appeal." (Respondent's Brief ("RB") 71.) Respondent's argument must be rejected.

Mr. Tran recognized, of course, that this Court has previously ruled that violations of section 222 and section 223 can be waived and are therefore subject to forfeiture in the absence of an objection. (AOB 79, citing *People v. Visciotti* (1992) 2 Cal.4th 1, 38 [Civ. Proc. Code § 222]; *People v. Benavidas* (2005) 35 Cal.4th 69, 88 [Civ. Proc. Code § 223]; *People v. Ervin* (2000) 22 Cal.4th 48, 73 [same].) Mr. Tran contended, however,

that his claim was nonetheless cognizable on appeal because Civil Code section 3513 prohibits waiver of the requirements of sections 222 and 223, and this Court has never considered the effect of section 3513 on these prior cases. (AOB 79-80.)

Respondent does not dispute that Civil Code section 3513 prohibits waiver of the requirements of sections 222 and 223. (RB 71-74.) Instead, respondent argues this Court has already addressed and rejected Mr. Tran's claim in *Visciotti*, *supra*. (RB 72-73.) Respondent is wrong.

To its credit, respondent recognizes that this Court never mentioned section 3513 in *Visciotti*. (RB 73.) Instead, according to respondent, this Court "followed the rule enunciated in section 3513 to reach the conclusion that parties may not waive *compliance* with the statutory procedures [of section 222]," but "drew a distinction between waiver of *compliance* with the law and waiver of *a claim of error on appeal*, which may occur if the defendant acquiesced in the challenged jury selection procedures." (RB 73, emphasis in original, citing *People v. Visciotti*, *supra*, 2 Cal.4th at p. 38.) Respondent gives *Visciotti* much too broad an interpretation.

Visciotti did the following: it recognized that section 191 establishes a state policy in favor of random selection of juries (*People v. Visciotti*, *supra*, 2 Cal.4th at p. 38); it found that "equally important policies mandate that criminal convictions not be overturned on the basis of irregularities in jury selection to which the defendant did not object or in which he has acquiesced" (*Ibid*.); and it concluded that "[w]hile the parties

are not free to waive, and the court is not free to forego, compliance with the statutory procedures which are designed to further the policy of random selection . . . failure to object will . . . continue to constitute a waiver of a claim of error on appeal." (*Ibid*.)

Visciotti did not: explain why the one policy -- compliance with statutory jury selection procedures -- was "equally important" with the other policy -- preservation of error; explain why the one policy took precedence over the other if the policies are truly "equally important"; address how a party could waive the statutory provisions which precedents show "parties are not free to waive" and the trial court "is not free to forego"; or consider that section 3513 would be rendered a nullity if parties could waive what the Legislature said could not be waived.

Put simply, contrary to respondent's argument, Mr. Tran's claim that section 3513 prohibits waiver of the requirements of sections 222 and 223 was not raised, considered nor rejected in *Visciotti*. The claim is properly before this Court. Because respondent does not dispute that the removal of the 20 prospective jurors by stipulation violated the procedures in sections 222 and 223, and was prohibited by section 3513, nor disputes that the error was structural in nature, reversal is required.

II. THE "SUBSTANTIAL IMPAIRMENT" STANDARD FOR EXCLUDING JURORS IN CAPITAL CASES IS INCONSISTENT WITH THE INTENT OF THE FRAMERS OF THE SIXTH AMENDMENT AND THE FUNDAMENTAL RIGHT TO A JURY TRIAL.

During the voir dire process, the trial court discharged Jurors 234, 112, 214 and 158 for cause by finding that their views on capital punishment would substantially interfere with the performance of their duties as a juror. In Argument II of his opening brief, Mr. Tran contended that this standard was improper. This contention had three premises:

(1) First, the substantial impairment test was developed in a series of United States Supreme Court cases decided between 1968 and 1980 which reflected a then-common approach to the Sixth Amendment. Under this approach, the Court did not examine the intent of the Framers, but instead sought to identify and balance competing interests of the state and the defendant. (AOB 106-107.)

(2) Second, since 1999 the United States Supreme Court's approach to the Sixth Amendment has dramatically changed; rather than seeking to balance competing interests, the Court now looks to the intent of the Framers in enshrining the right to an "impartial jury" in the Constitution. (AOB 108-115.)

(3) Third, applying the Supreme Court's current approach, Mr. Tran contended that the substantial impairment test was inconsistent with the Sixth Amendment as well as the state constitutional right to a jury trial. (AOB 115-122.)

The state does not dispute any of these three premises. (RB 74-76.) Thus, the state does not dispute that in developing the substantial impairment test, the Supreme Court did not look at the intent of the Framers in drafting the Sixth Amendment, but instead tried to balance competing interests of the state and the defendant. (RB 74-76.)

Nor does the state dispute that the Supreme Court's current approach to the Sixth Amendment no longer attempts to balance competing interests, but instead seeks to effectuate the intent of the Framers in enshrining the right to an "impartial jury" in the Constitution. (RB 74-76.) Finally, the state does not dispute that a review of the history and intent behind the Sixth Amendment shows that the substantial impairment test is actually inconsistent with the Sixth Amendment as well as the state constitutional right to a jury trial. (RB 74-76.)

Mr. Tran recognizes that the Court has recently rejected his argument. (*See People v. Rices* (2017) 4 Cal.5th 49, 79-80.) The Court noted that "the United States Supreme Court developed [the substantial impairment] standard . . . [and] [i]f that standard is to be abandoned or modified, and death qualifying the jury prohibited, it is up to that court to do so." (*Id*. at p. 80.)

The Court is, of course, entirely correct that the Sixth Amendment substantial impairment standard set forth in *Witt* was developed by the United States Supreme Court. But as discussed in the opening brief, in a series of cases -- *Jones v. United States* (1999) 526 U.S. 227, *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, *Crawford v. Washington* (2004) 541 U.S. 36 and *Blakely v. Washington* (2004) 542 U.S. 296 -- the Supreme Court has *already* modified the approach to the Sixth Amendment on which the *Witt* rule was based. That is precisely why the state here is unable to dispute any of the three premises on which this argument is based.

The state does not argue the current substantial impairment test actually does advance the intent of the Framers. The state does not argue the intent of the Framers is irrelevant in applying the Sixth Amendment. And the state does not argue that the Framers intended that the state be permitted to discharge jurors because of their views on the law.

Respondent instead argues "juries do not have the *right* to nullify" (RB 76, citing *United States v. Kleinman* (9th Cir. 2017) 880 F.3d 1020, 1031, italics in original) and while "juries certainly have the ability to disregard or nullify the law, this ability 'does not diminish the trial court's authority to discharge a juror who, the court learns, is unable or unwilling to follow the court's instructions.'" (RB 76, citing *People v. Williams* (2001) 25 Cal.4th 441, 449.) Neither of these propositions address, however, the question of whether the Framers intended the Sixth Amendment impartial jury guarantee to prohibit jurors from being struck based on their views of the death penalty. The fact remains that the substantial impairment test is inconsistent with both the Sixth Amendment right to a jury trial and the state constitutional jury trial guarantee. Reversal of the penalty phase is required.

III. THE EVIDENTIARY AND INSTRUCTIONAL ERRORS RESULTING FROM THE TRIAL COURT'S DENIAL OF MR. TRAN'S SEVERANCE MOTION REQUIRE REVERSAL.

A. Introduction.

This case involved a felony murder where the actual killer was unknown. The state theorized that Mr. Tran was the actual killer. The state relied on the testimony of convicted felon and jailhouse informant Qui Ly that Mr. Tran confessed to killing Linda by pointing to himself when asked who killed her. Again and again the prosecutor relied on Ly's testimony to point the finger at Mr. Tran during the guilt phase. The prosecutor again heavily relied on Ly's testimony during the penalty phase when asking for a verdict of death against Mr. Tran.

There was substantial evidence, however, that Ly made the confession up. As an initial matter, Ly was a career confidential informant and convicted felon who faced a three-strikes term of a 31 year-to-life term and sought and obtained a deal from the state in exchange for providing helpful information. Moreover, although the conversation between Ly and Tran was audio-recorded, there was no video recording of Tran pointing to himself when asked about Linda's killer which would corroborate Ly's testimony. Indeed there was no eyewitness testimony or forensic or other scientific evidence which would corroborate the theory that Tran killed Linda. However, there was an eyewitness -- Plata's friend Linda Le -- who told police and her probation officer that hours after the murder, Plata was cleaning a six to eight inch knife, saying, "he had gone to rob a house

in Irvine that night," but "he didn't mean to hurt the girl." (6 RT 1188-1189, 1194-1195.) Finally, and what is most significant here, Ly told police prior to trial that Plata had repeatedly confessed that he killed Linda. (7 RT 1410.) The trial court admitted this evidence. Ly testified that Plata told him in a Vietnamese restaurant that he was the one who killed Linda, stating "he had killed the Korean girl," and "had to do it," which confirmed earlier and repeated statements by Plata to Ly admitting that he killed Linda. (7 RT 1445, 1452-1454, 1456.) According to Ly, Plata made statements implicating himself in Linda's killing more than once after the conversation in the restaurant. (7 RT 1446.)

Unfortunately, in a bargain struck between Plata's attorney and the prosecutor, the state was also permitted to introduce Ly's testimony about Plata's recorded statements in the jail holding cell. Contrary to his prior testimony and statements that Plata confessed to the killing, Ly testified that Plata told him that he was involved in the robbery, but did not strangle the victim or "do this murder." (7 RT 1437, 1444.) Instead, Plata said there was "nothing he could do" and was "pissed off" afterwards. (7 RT 1438.)

The trial court sanctioned this bargain. According to the court, "all the other evidence that's coming in pointing to Mr. Tran being the actor, I don't see how this is going to help or hurt Mr. Tran, and it certainly would be arguably anyway to Mr. Plata's benefit. So I'll allow it in with a limiting instruction." (6 RT 1275.) The court later instructed the jury, "You have heard evidence that each of the two defendants made

statements out of court and before the trial. You may consider that evidence only against the defendant making the statements and not against the other defendant." (4 CT 998.)

In Argument III of his opening brief, Mr. Tran contended that the trial court's denial of his severance motion led to these evidentiary and instructional errors which compromised his constitutional rights, rendering his trial fundamentally unfair and deprived him of due process of law and requiring reversal. (AOB 123-171.) Mr. Tran made three main arguments to support his claim.

First, as contended in Argument III-C of the opening brief, Plata's recorded statements to Ly while in the jail holding cell which implicated Mr. Tran were inadmissible hearsay under Evidence Code section 1200, and the admission of this hearsay by a nontestifying co-defendant violated *People v. Aranda* (1965) 63 Cal.2d 518 and *Bruton v. United States* (1968) 391 U.S. 123, which no limiting instruction could cure. (AOB 132-145.) Second, as contended in Argument III-D of the opening brief, the limiting instruction given by the trial court actually had the harmful consequence of precluding the jury's use of Plata's unrecorded inculpatory statements in determining Mr. Tran's role in the actual killing, in violation of the Fifth and Sixth Amendments. (AOB 150-155.) Finally, as contended in Argument III-E of the opening brief, under any standard of prejudice, the errors, whether considered singly or in combination, required

reversal. (AOB 155-170.) Respondent's arguments to the contrary will now be addressed in turn.[1]

B. Plata's Statements to Ly In the Jail Holding Cell Implicating Mr. Tran as the Killer Was Inadmissible Hearsay Which, Under *Bruton*, the Limiting Instructions Did Not Cure.

First things first. To its credit, respondent does not dispute that Plata's statements to Ly in the jail holding cell identified Mr. Tran as Linda's killer, and implied that Plata had no control over Mr. Tran and was angry that Mr. Tran killed Linda. (RB 77-96.) After all, Plata repeatedly referred to Mr. Tran and the jury knew that only Plata and Mr. Tran went into Linda's house, and Plata told Ly that he did not strangle the victim or "do this murder." (7 RT 1437, 1444.) Instead, Plata said there was "nothing he could do" and was "pissed off" afterwards. (7 RT 1438.) Nor does respondent dispute that this evidence was plainly inadmissible hearsay without exception under state law. (RB 77-96.)

Instead, respondent addresses Mr. Tran's federal constitutional claim that admission of this evidence violated *Aranda and Bruton*. (RB 82-88.) Respondent argues that "the *Aranda/Bruton* doctrine does not apply to Plata's recorded statements because more recent developments in Sixth Amendment jurisprudence limit the reach of

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[1] Mr. Tran also contended that the introduction of Plata's statements to Ly in the jail holding cell violated the Eighth Amendment requirement of enhanced reliability of the evidence against him. (AOB 145-146.) Respondent does not address this claim. (RB 77-96.) No further reply is necessary. Error has occurred.

Aranda/Bruton to testimonial statements only, and Plata's recorded statements do not qualify as testimonial. (RB 83.) According to respondent, "*Crawford* [*v. Washington*, *supra*, 541 U.S. 36] and its progeny" limit the *Aranda/Bruton* rule to testimonial statements." (RB 84.) Because, according to respondent, Plata's recorded statements to Ly "do not qualify as testimonial and do not fall within the *Aranda/Bruton* rule," the "general rule that juries will follow a limiting instruction applies." (RB 86.)

Respondent principally relies on this Court's recent decision in *People v. Cortez* (2016) 63 Cal.4th 101, 129.) There, defendant argued that the admission of an accomplice's incriminating out-of-court statements violated her Sixth Amendment right to confrontation under *Bruton*. The Court rejected the argument, explaining: "In *Davis v. Washington* (2006) 547 U.S. 813, 824 [], the high court unequivocally held 'that the confrontation clause applies *only to testimonial hearsay statements* and not to [hearsay] statements that are nontestimonial.'" (*People v. Cortez*, *supra*, 63 Cal.4th at p. 129, quoting *People v. Geier* (2007) 41 Cal.4th 555, 603, italics in original.)

But *Cortez* did not hold that *Bruton* was no longer good law after *Crawford* and *Davis*. Instead, because the accomplice's hearsay statements in *Cortez* were admissible as declarations against penal interest, the Court found the *Bruton* "decision is inapposite because it involved a nontestifying codefendant's hearsay statement *that did not qualify for admission against the defendant under any hearsay exception* and that was "clearly inadmissible against [the defendant] under traditional rules of evidence." (*Id*. at p. 128,

fn. 3, italics added) According to the Court, "the high court in *Bruton* expressly declined to comment on the admissibility of a nontestifying codefendant's hearsay statement where, as here, a "recognized exception to the hearsay rule" applies. (*Ibid*.) Contrary to respondent's contention, the fact remains that neither the Supreme Court nor this Court has decided whether *Bruton* remains good law after *Crawford* and *Davis* where nontestimonial hearsay statements by nontestifying codefendants in a joint trial are involved.

To be sure, respondent is entirely correct that "numerous federal courts" have found that *Crawford*'s holding necessarily limits *Bruton* to testimonial statements. (RB 84-85, and citations therein.) But more persuasive is the analysis presented in the dissent of *State v. Wilcoxon* (2016) 185 Wn.2d 324, 373 P.3d 224 [Madsen, C.J., dissenting].) As Chief Justice Madsen observed, *Bruton* addressed different concerns than *Crawford* and *Davis*. (*Id*. at pp. 232, 236-237.) Where *Crawford* and *Davis* dealt with the admissibility of hearsay (and thus its discussion of reliability), *Bruton* dealt with the prejudicial effect of placing inadmissible hearsay before a jury. (*Id*.) In fact, in *Crawford* -- the case which courts hold limits *Bruton* only to testimonial statements -- explicitly acknowledged that *Crawford* and *Bruton* address different concerns. Referencing *Parker v. Randolph* (1979) 442 U.S. 62, 69-76 (plurality opinion), abrogated by *Cruz v. New York* (1987) 481 U.S. 186, a *Bruton* case, the Court noted, "Our only precedent on interlocking confessions has *addressed the entirely different question* whether a limiting instruction cured prejudice to

codefendants from admitting a defendant's own confession against him at trial." (*Crawford v. Washington*, *supra*, 541 U.S. at p. 59, emphasis added.)

Based on these fundamentally different purposes, the *Bruton* doctrine continues to apply, even to nontestimonial hearsay statements. This case is not about whether Plata's hearsay statements to Ly implicating Mr. Tran should have been admitted against Mr. Tran as substantive evidence. Rather, it is about whether Plata's hearsay statements implicating Mr. Tran, which the trial court ruled were inadmissible against Mr. Tran and agreed to give a limiting instruction, should have been heard by the jury in a joint trial. This is the focus of *Bruton* -- that a defendant's confrontation clause rights are violated when the jury hears codefendant statements, inadmissible against the defendant, but that nonetheless implicate him, because the prejudice is so great that a limiting instruction is not enough to cure it. (U.S. Const. amend. VI.)

Put simply, *Bruton* survives *Crawford* and applies to both testimonial and nontestimonial statements. The limiting instruction given in this case did not cure the harm resulting from admission of Plata's statements to Ly in the jail holding cell implicating Mr. Tran as the actual killer. Respondent's argument to the contrary must be rejected. Error has occurred.

C. The Trial Court's Instruction Telling the Jury That it Could Only Consider Plata's Unrecorded Statements Exonerating Mr. Tran as the Actual Killer Against Plata Was Error.

As noted above, Plata told Ly that he was involved in the robbery, but did not strangle the victim or "do this murder." (7 RT 1437, 1444.) Instead, Plata said there was "nothing he could do" and was "pissed off" afterwards. (7 RT 1438.) As respondent does not dispute, these statements implicated Mr. Tran as the actual killer who could not be controlled.

Under cross-examination, however, Ly admitted the he told police Plata told him in a Vietnamese restaurant that he was the one who killed Linda, stating "he had killed the Korean girl," and "had to do it," which confirmed earlier and repeated statements by Plata to Ly admitting that he killed Linda, and was repeated more than once after the conversation in the restaurant. (7 RT 1445, 1452-1454, 1456.) The court later instructed the jury, "You have heard evidence that each of the two defendants made statements out of court and before the trial. You may consider that evidence only against the defendant making the statements and not against the other defendant." (4 CT 998.)

Mr. Tran contended that Plata's statements implicating himself and exonerating Mr. Tran as the actual killer -- admitted through the prior and inconsistent statements of Ly -- were themselves party admissions under section 1220. (AOB 148-149.) Mr. Tran further contended that the limiting instruction which told the jury that it "may consider that evidence only against the defendant making the statements and not against the other

defendant -- precluded the jury's use of Plata's statements to determine Mr. Tran's role in the killing and violated the Fifth and Sixth Amendments. (AOB 150-155.)

Respondent claims that "Tran argues Plata's inculpatory statements were admissible in his case as declarations against interest (Evid. Code, § 1230)," but Mr. Tran forfeited this argument because "Tran never sought to have Plata's alleged inculpatory statements admitted as declarations against interest." (RB 89.) Respondent thus concludes that "[t]he limiting instruction did not violate Tran's due process rights because Tran did not establish that Plata's statements fell within a hearsay exception, and, "as a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense." (RB 90.) Respondent misses the point.

Mr. Tran did not argue here or below that Plata's statements to Ly should have been admitted as declarations against interest under Evidence Code section 1230. Instead, Mr. Tran argued that *had the case been severed*, the statements would have been admissible as declarations against interest under Evidence Code section 1230, and the limiting instruction would never have been given. (AOB 149-150.) Indeed, Mr. Tran claimed that the statements were admitted as prior inconsistent statements under Evidence Code section 1235, and were party admissions under Evidence Code section 1220. (AOB 148-149.) Moreover, Mr. Tran never contended his claim amounted to evidentiary error. Instead, Mr. Tran contended that his claim amounted to instructional and constitutional error. (AOB 149-155.)

Respondent also argues that "it is unclear what Plata actually said to Ly about his role in the murder" because "Ly also repeatedly testified that he just *assumed* that Plata was the actual killer based on what Plata said about his involvement in the crime." (RB 90, emphasis in original.) To the extent respondent is arguing that the statements would not have been admissible as declarations against interest at a severed trial in light of Ly's testimony, this argument must fail. Ly admitted that he told police that Plata claimed "he had killed the Korean girl," and "had to do it." These were statements which "when made . . . so far subjected him [Plata] to the risk of civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true," and thus, would have been plainly admissible as declarations against interest. (*See* Evid. Code § 1230.) Ly's attempt at trial to walk back his statements to police by stating he was just assuming Plata killed Linda does not change the admissibility of these statements in the first place.

In short, Plata confessed to Ly that he killed Linda. The trial court's limiting instruction precluded the jury from considering -- as to Mr. Tran -- Plata's statements to Ly which exonerated Mr. Tran as the actual killer. Respondent does not argue otherwise. Error has occurred.

D. The Errors Cannot Be Deemed Harmless When Considered Singly or in Combination.

Respondent argues that "assuming there was any error with respect to how the court handled Plata's recorded and/or non-recorded statements, such error was harmless under any standard. (RB 90.) Respondent makes three main points.

First, respondent argues that "[n]o matter what statements Plata made about his role in the murder, Tran's own actions and recorded statements firmly established that Tran was the killer." (RB 91.) Respondent relies on the testimony of Ly -- a career confidential informant and convicted felon who sought to avoid a three-strikes term of a 31 year-to-life term -- that Mr. Tran nodded and pointed to himself when asked, "But who killed her, you or him?" (RB 91; see 6 CT 1613; 7 RT 1424-1425.) Recognizing that Mr. Tran's nonverbal response was not audio or video recorded, respondent claims the response was nonetheless corroborated by subsequent statements between the two where (1) after Tran's nonverbal response, Ly said, "Man, you idiot," and Tran replied, "Yeah, I know, I know man. Now I gotta live with it," and (2) still later, Ly said, "Man. What the fuck, fuck, you take her out for, you idiot?," and Tran replied, "I don't know what to say, man. Tie 'em up, you know. What can you do?" (RB 91; *see* 6 CT 1613, 1617.) According to respondent, "Ly and Tran's subsequent statements only make sense if Tran did in fact indicate he was the killer." (RB 91.)

Of course this was the state's interpretation of these statements. (*See* 8 RT 1673 [prosecutor's closing argument that statements prove Ly is not lying about Tran's

nonverbal response].) But the statements themselves subsequent to the alleged nonverbal conduct did not actually prove that Mr. Tran nodded and pointed to himself. Ly asked "But who killed her, you or him?" (6 CT 1613; 7 RT 1424-1425.) Tran's response could have been saying nothing and staring, and/or shrugging his shoulders, and/or shaking his head and/or grimacing at the question, and Ly's subsequent statement, "Man, you idiot," and Mr. Tran's response, "Yeah, I know, I know man. Now I gotta live with it," still make sense. After all, Mr. Tran could have engaged in any or all of this nonverbal conduct, and Ly's response may have been calling Mr. Tran an idiot simply for being involved, and Mr. Tran may have been agreeing, and showing remorse for his involvement. Likewise, Ly's statement, "Man. What the fuck, fuck, you take her out for, you idiot?," may not have been a comment on Tran's nonverbal conduct, but rather a general question of why Linda died, and Tran's response, "I don't know what to say, man. Tie 'em up, you know. What can you do?," could have an explanation that Linda died as a result of being tied up.

Respondent's assertion that "Tran's own actions and recorded statements firmly established that Tran was the killer" is also undermined by the statements of the foreperson, discovered after trial. In a memorandum to himself, the foreperson explicitly stated, "The evidence as to which of the two did the strangling is not absolutely conclusive." (2 SCT 390.) Thus at least one juror did not believe Ly's testimony that Mr. Tran admitted to killing Linda, notwithstanding Ly and Mr. Tran's subsequent statements,

and thus, the identity of Linda's killer was nowhere near "firmly established" as claimed by respondent.

Put simply, contrary to respondent's argument, the fact remains that Mr. Tran never verbalized that he was the actual killer, and the subsequent colloquies between Ly and Mr. Tran did not conclusively prove that Mr. Tran nonverbally admitted that he was the actual killer.

Next, respondent does not dispute that the errors here prejudicially affected the jury's determination of whether Mr. Tran was guilty of murder on an intent to kill theory. (RB 90-95.) Instead, respondent argues that "with respect to the guilt phase, the claimed errors clearly had no effect on Tran's conviction for first degree murder because the jury must have found at a minimum that Tran was guilty of felony murder." (RB 91.) According to respondent, "[a]lthough the jury's verdict did not indicate whether Tran was convicted under the malice aforethought theory and/or the felony-murder theory, the jury found true the special circumstance of murder in the commission of the crime of robbery or burglary, meaning that the jury found that Tran had committed felony murder." (RB 91.)

Respondent makes a good point. Mr. Tran agrees and concedes the argument. (*See*, *e.g., People v. Hardy* (2018) 5 Cal.5th 56, 95 ["By finding the felony-based special-circumstance allegations true, the jury necessarily found defendant committed all four of the special circumstance crimes, and [t]hus, it made all the necessary findings to

find defendant guilty of first degree felony murder;" held, provision of legally invalid theory of natural and probable consequence was harmless.])

Respondent cannot make the same claim, however, as to the special circumstances findings. Respondent does not dispute that the state's entire theory was that Mr. Tran killed Linda, and the prosecutor told the jury in closing argument that one part of the felony murder instructions (CALCRIM 540A) "applies to the actual perpetrator, the one that did the murder, Mr. Tran. See it says, 'the defendant committed the fatal act.'" (See 8 RT 1688.) Nor does respondent dispute that the state's entire theory was that Plata was an aider and abettor who did not kill Linda, and the prosecutor told the jury in closing argument that the other part of the felony murder instructions (CALCRIM 540B) "applies to Mr. Plata, the other one" who was the "coparticipant," and the special circumstances instruction for accomplices applied to Plata alone. (8 RT 1688.) Thus, as respondent does not dispute, the jury knew perfectly well that the state was urging a true finding on the special circumstances as to Mr. Tran on an intent to kill theory. Instead, respondent argues that "the instructions themselves did not specify who was the actual perpetrator and who was the coparticipant," and thus, "[t]he jury was not bound to apply only CALCRIM 540A to Tran and was free to find that Plata, not Tran, was the actual killer." (RB 92.)

Respondent forgets two things. First, the importance of the prosecutor's argument in the prejudice calculus here is beyond peradventure. Any meaningful assessment of

prejudice must proceed in the light of the *entire* record, and thus, not only the instructions themselves must be considered, but also the theories presented in closing argument by the prosecutor. (*Accord People v. Grimes* (2016) 1 Cal.5th 698, 721-723. *See also People v. Woodard* (1979) 23 Cal.3d 329, 341 [reversal where the prosecutor "exploited" erroneously admitted evidence during his closing argument]; *LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 876 [prejudice from erroneous instruction exacerbated by closing argument relying on the same]; *People v. Powell* (1967) 67 Cal.2d 32, 55-57, citing *People v. Gonzales* (1967) 66 Cal.2d 482, 493 [prosecutor's reliance on evidence in final argument reveals how important the prosecutor "and so presumably the jury" considered the evidence]; *Chapman v. California* (1967) 386 U.S. 18, 24 ["one need only glance at the prosecutorial comments" to see prejudice]; *People v. Cruz* (1964) 61 Cal.2d 861, 868 ["There is no reason why we should treat this evidence as any less 'crucial' than the prosecutor -- and so presumably the jury -- treated it"]; *United States v. Kojayan* (9th Cir. 1996) 8 F.3d 1315, 1318 ["closing argument matters; statements from the prosecutor matter a great deal"].)

Here, respondent is entirely correct that the instructions did not identify which defendant was the "actual perpetrator" and which defendant was the "co-participant," but the prosecutor sure did. According to the prosecutor, Mr. Tran was the "actual perpetrator" who "committed the fatal act," and Plata was a "co-participant." (8 RT 1688.) Thus, the prosecutor made perfectly clear in closing argument the state's entire

and sole theory of the case: Mr. Tran was the actual killer and Plata was the aider and abettor. Respondent's new attorney cannot now simply ignore the import of what its former attorney told the jury.

Second, respondent's argument that the jury was "free to find that Plata, not Tran, was the actual killer, ignores that the errors all but precluded the jury from meaningfully considering whether Plata was the actual perpetrator. After all, to point the finger at Mr. Tran as Linda's killer, the prosecutor principally relied on Ly's testimony that Mr. Tran nodded his head and pointed to himself after being asked, "But who killed her, you or him?" (6 CT 1613; 7 RT 1424-1425), to urge the jury to conclude that Mr. Tran -- not Plata -- killed Linda, telling the jury, "How does the DA know that Tran strangled Linda," and answering, "Because Tran told us he did. He told Le [sic]." (8 RT 1734.) By the prosecutor's own argument, this theory depended entirely on Ly's credibility.

Plata's counsel too joined the prosecutor's theory that Mr. Tran killed Linda and relied on the credibility of Ly's testimony regarding Mr. Tran's confession. In closing argument, counsel relied on the recorded jail conversation between Plata and Ly -- in which Plata claimed he did not kill Linda -- was "on tape," and "it is what it is." (8 RT 1724.) Counsel further reminded the jury that Plata told Ly, "Hey man, there was nothing I could do," and "he was upset after this thing happened," which meant, according to counsel, "means I couldn't do anything to stop it." (8 RT 1727, 1731.)

The state -- and Plata -- were able to corroborate Ly's testimony that Mr. Tran confessed with the erroneously admitted recorded statements that Plata told Ly that he (Plata) did not kill Linda, there was "nothing he could do" about the murder, and he was "pissed off" afterwards. This evidence directly supported the state's theory that Plata was merely a co-participant and Plata's theory that there was nothing he could do to stop Mr. Tran. The theory that Plata was actually the killer could not be successful unless Mr. Tran was able to challenge Plata's jailhouse denial, and undercut the reliability and credibility of Ly's testimony about Mr. Tran's jailhouse "confession."

Without the erroneous limiting instruction telling the jury it could not consider Plata's unrecorded statements to Ly in the Vietnamese restaurant, the jury would have been permitted to consider that Plata claimed he actually was the one who killed Linda, stating "he had killed the Korean girl," and "had to do it," which was consistent with repeated statements by Plata to Ly that he had killed Linda (7 RT 1445, 1452-1454, 1456), when considering Mr. Tran's role in the killing. Indeed, if Plata's statements to Ly were credited, then Ly -- an in-custody state informant -- would have been lying about Mr. Tran's alleged nonverbal admission that he was the actual killer and Plata -- a co-defendant on trial for his life -- would have been lying that he did not kill Linda and could do nothing to stop Mr. Tran. Put simply, respondent cannot argue that the jury "was free to find" that Mr. Tran was not the actual killer when the trial court gave a limiting instruction that precluded the jury from considering evidence that supported that theory

and admitted evidence that directly undercut that theory. Respondent's arguments to the contrary must be rejected.

Third and finally, respondent argues that the errors were harmless as to the penalty phase too. (RB 92-95.) Respondent recognizes that this Court reversed the penalty phase in *Grimes* where "the trial court erroneously excluded statements made by [co-conspirator] Morris [to in-custody informant Howe] that Grimes did not take part in the killing and looked surprised after Morris killed the victim." (RB 93, citing *People v. Grimes*, *supra*, 1 Cal.5th at p. 710.) As respondent notes, "this [C]ourt explained that the excluded statements would have given the defense a substantial basis for countering the prosecutor's argument that Howe's testimony was worthy of belief and that Grimes 'stood by' while the victim was brutally strangled and stabbed to death." (RB 93, citing *People v. Grimes*, *supra*, 1 Cal.5th at p. 722-723.) But, according to respondent, *Grimes* stands "in contrast" to the case here because Howe's "damning evidence" was "uncorroborated testimony by a prisoner who had reached a deal." (RB 93.)

Of course that is exactly what this case involves. Ly testified that Mr. Tran nodded his head and pointed to himself after being asked, "But who killed her, you or him?" (6 CT 1613; 7 RT 1424-1425.) Ly testimony as to Mr. Tran's nonverbal confession was not corroborated by permissible evidence; there was no eyewitness to this exchange, and the exchange was not video recorded. Moreover, Ly was indeed a prisoner who had reached a deal. He was arrested in 1998 for residential burglary. (7 RT 1408.) He was convicted

and being a "third striker," faced a sentence of 31 years to life. (6 RT 1257; 7 RT 1408-1409.) Before sentencing, Ly contacted police in the hope of consideration in exchange for information. (7 RT 1409.) And that is exactly what he received. After successfully obtaining Mr. Tran's nonverbal "confession," Ly subsequently became a confidential informant for police; during his time in custody, he provided police with all the information he knew about gang and criminal activities. (6 RT 1257; 7 RT 1411-1414.) In consideration for all his cooperation, he was sentenced to 13 and a half years time served, and released. (6 RT 1257; 7 RT 1411-1415.)

Put simply, Ly was the exact same type of witness who gave the most "damning evidence" as Howe was and had done in *Grimes*. And similar to *Grimes*, the jury was effectively precluded -- by way of a limiting instruction -- from considering evidence of Plata's confession, which would have given the defense a substantial basis for countering the prosecutor's argument that Ly's testimony was worthy of belief and that Mr. Tran was the actual killer. And worse than *Grimes*, the jury was impermissibly allowed to consider -- without an effective limiting instruction -- corroborating recorded statements by Plata that Mr. Tran was indeed the actual killer who could not be controlled.

Respondent's next argument fares no better. Respondent argues that "the penalty phase instructions directed the jury to 'disregard all of the instructions I gave you earlier' and did not include the instruction that a defendant's out-of-court statement can be used only against that defendant." (RB 93.) Therefore, according to respondent, "the jury was

not actually precluded from considering Plata's nonrecorded statements in Tran's penalty phase case." (RB 93.)

This is not so. To be sure, the jury was told to disregard the instructions from the guilt phase (5 CT 1283) and the offending limiting instruction at the guilt phase -- that a defendant's out-of-court statement can be used only against that defendant -- was not repeated in the penalty phase. The jury was also told, however, it "must consider the arguments and all the evidence presented during both phases of the trial" (5 CT 1321), but that the "evidence" was limited to "the sworn testimony of witnesses, the exhibits admitted into evidence, and *anything else I told you to consider as evidence*." (5 CT 1304, emphasis added.) Notably absent from this definition of "evidence" to be considered at the penalty phase was evidence that the jury was affirmatively precluded from considering at the guilt phase.

In other words, the jury heard evidence of Plata's confession to Ly that he killed Linda, but the trial court explicitly told the jury it could only use Plata's out-of-court statement against Plata; the evidence could not be used in determining Mr. Tran's culpability. The jury was never told at the penalty phase that it was now left free to consider this evidence in connection with both defendants. Indeed, having been instructed that it could only use "evidence" the court had "told you [the jury] to consider as evidence," the jury would have known that Plata's confession was not "evidence" it could use in its determination of whether Mr. Tran should live or die.

Putting this aside, however, the failure to repeat a limiting instruction at the penalty phase does not make the other error here -- the admission of Plata's recorded jailhouse statements implicating Mr. Tran -- better. It makes it worse. As recognized in *Bruton*, *supra*, the limiting instruction did not cure the harm resulting from the admission of Plata's recorded statements at the guilt phase; the jury would not have been able to disregard Plata's statements as "evidence" against Mr. Tran. The failure to repeat the limiting instruction at all at the penalty phase ensured that the jury would continue to consider Plata's recorded jailhouse statements as "evidence" against Mr. Tran. Again, those jailhouse statements by Plata asserted that he (Plata) did not kill Linda, there was "nothing he could do" about the murder, and he was "pissed off" afterwards. This evidence corroborated Ly's testimony that Mr. Tran confessed and, as Plata's counsel put it in the guilt phase closing argument, "means [Plata] couldn't do anything do stop it," and suggested Mr. Tran acted alone in killing Linda. (8 RT 1727, 1731.)

E. Conclusion.

The determination as to whether a defendant is entitled to relief based on a claim of improper joinder turns on whether joinder of parties rendered his trial fundamentally unfair. (*See Williams v. Superior Court* (1984) 36 Cal.3d 441, 451-452); *Grisby v. Blodgett* (9th Cir. 1997) 130 F.3d 365.) The joinder in this case resulted in the admission of Plata's recorded statements to Ly inculpating Mr. Tran as Linda's killer who acted alone and could not be controlled. Without an effective limiting instruction, this was

constitutional error. The joinder in this case also resulted in a limiting instruction which told the jury it could not consider Plata's own confessions to Ly that he had actually killed Linda when determining Mr. Tran's culpability. This too was constitutional error. Whether considered singly or together, the errors here rendered Mr. Tran's case fundamentally unfair. Respondent's arguments to the contrary must be rejected. Reversal of the special circumstance findings and penalty phase is required.

IV. THE TRIAL COURT'S INSTRUCTIONS ON ACCOMPLICE TESTIMONY, IN-CUSTODY INFORMANT TESTIMONY, AND UNRECORDED ORAL STATEMENTS IMPOSED ARTIFICIAL BARRIERS TO THE JURY'S CONSIDERATION OF DEFENSE EVIDENCE IN VIOLATION OF MR. TRAN'S CONSTITUTIONAL RIGHTS.

Prior to trial, Ly told police that Plata had repeatedly confessed to him that he killed Linda. According to Ly, Plata told him in a Vietnamese restaurant "he had killed the Korean girl," and "had to do it," which was consistent with repeated statements by Plata to Ly that he had killed Linda. The trial court admitted this evidence. (7 RT 1445, 1452-1454, 1456.) Moreover, the trial court admitted accomplice Joann Nguyen's testimony that Mr. Tran told her in an unrecorded conversation that his tattoo meant, "Forgive me." (5 RT 1048; 6 RT 1153; 8 RT 1552.)

Unfortunately, the trial court then told the jury that Ly was an "in-custody informant" and as such, his testimony "should be reviewed with caution and close scrutiny." (4 CT 1006.) The court further told the jury that Nguyen was an accomplice and it could not rely on Nguyen's testimony to convict or find the special circumstances true absent supporting evidence which "is independent" and "tends to connect the defendant to the commission of the crime." (4 CT 1004.) Finally, the court told the jury that "defendant made oral . . . statements before the trial," and "[y]ou must consider with caution evidence of a defendant's oral statement unless it was written or otherwise recorded." (4 CT 1010.)

In Argument IV of his opening brief, Mr. Tran argued that the trial court's instructions on in-custody informants, accomplices and oral statements deprived him of his constitutional rights to present a defense and lessened the state's burden of proof beyond a reasonable doubt. (AOB 172-185.) Mr. Tran further argued that the erroneous instructions were prejudicial. (AOB 185-192.) Respondent argues that no error occurred and alternatively, any error was harmless. (RB 96-100.) Respondent's arguments must be rejected.

Mr. Tran contended that the instructions on accomplice testimony, in-custody informant testimony and oral statements here were improper under *Cool v. United States* (1970) 409 U.S. 100. (AOB 177-180.) Respondent argues that the *Cool* does not apply to this case. (RB 99-100.)

In *Cool*, the jury heard accomplice testimony, much of which exculpated the defendant. The court gave a standard instruction which told the jury the accomplice testimony was "open to suspicion" and should be treated like other evidence if proven beyond a reasonable doubt. The Court held this instruction improperly erected "artificial barriers" which precluded the jury from fairly considering the defense evidence. (*Cool v. United States*, *supra*, 409 U.S. at p. 103.)

Respondent attempts to distinguish *Cool*. (RB 99-100.) According to respondent, "*Cool* is wholly distinguishable" because "the trial court instructed the jury that it could give accomplice testimony the same effect as it would an ordinary witness's testimony if

the accomplice testimony was true *beyond a reasonable doubt*. (RB 100, emphasis in original.)

It is true, of course, that unlike *Cool* the instruction here did not tell the jury it could not consider the defense evidence unless proven beyond a reasonable doubt. Instead, the trial court here told the jury to view evidence of Plata's unrecorded confession "with caution" and "close scrutiny" because Ly was an in-custody informant and the statements were not recorded. The court further told the jury to view Tran's unrecorded statements that his tattoo meant, "Forgive me," with "caution," and could not consider the evidence without "supporting evidence" because Nguyen was an accomplice. With respect to the interests *Cool* protects -- ensuring that no barriers are placed to the fair consideration of defense evidence -- this difference in phrasing is beside the point. Put another way, this difference in phrasing may impact the height of the barrier placed in the jury's path, but does not impact the conclusion that a barrier was indeed placed there. Respondent's attempt to distinguish *Cool* must fail. The instructions here did exactly what the instruction did in *Cool* -- they placed an artificial barrier to the jury's consideration of defense evidence. Just as in *Cool*, error has occurred.

Respondent also argues that accomplice instruction limited its applicability to "[a]ny testimony or statement of an accomplice that tends to *incriminate* the defendant." (RB 97, emphasis in original.) According to respondent, "the instruction required supporting evidence in order for the jury to 'use the testimony or statement of an

accomplice *to convict a defendant or to find an allegation or a special circumstance to be true*." (*Id*.) Thus, according to respondent, "the instruction did not restrict the jury's consideration of accomplice testimony that was favorable to the defendant." (RB 97.)

But these instructions were not given in isolation. The jury was first told that contrary to ordinary witnesses, "the testimony of Joanne Nguyen" could not be used to "prove *any fact*," but instead, her testimony "*requires* supporting evidence." (4 CT 995, emphasis added.) The jury was then given the instruction upon which respondent relies and told that "supporting evidence" is credible evidence "independent of the accomplice's testimony or statement" and "tends to connect the defendant to the commission of the crime." (RB 1005.) The idea that the jury would simply ignore both instructions when determining the credibility of Nguyen's testimony regarding Mr. Tran's statements on the meaning of the tattoo itself defies credulity. But even if respondent is correct, and the jury ignored the latter instruction -- because Nguyen's testimony was not incriminating -- the former instruction remains. Put simply, the jury was told Nguyen's testimony required "supporting evidence." (4 CT 995.) This was error.

Alternatively, respondent argues that no prejudice occurred. Respondent first argues that "any error in these instructions did not prejudice Tran because the alleged statements by Plata that he was the killer were not admissible for their truth as to Tran,"

and "Tran never sought to have Plata's alleged statements that he was the killer admitted as declarations against interest." (RB 99.) Respondent's argument is without merit.[2]

To be sure, Mr. Tran never sought to have Plata's statements that he was the killer admitted as declarations against interest under Evidence Code section 1230. As explained previously, however, Mr. Tran did not actually need to seek admission of the evidence under Evidence Code section 1230. The statements were already admitted as prior inconsistent statements under Evidence Code section 1235, and were party admissions under Evidence Code section 1220.

After all, Ly testified that Mr. Tran nodded and pointed to himself when asked, "But who killed her, you or him?" (6 CT 1613; 7 RT 1424-1425.) To contradict this evidence, defense counsel introduced Ly's prior inconsistent statement to police that Plata actually confessed to the killing. (7 RT 1445, 1452-1454, 1456.) The jury was then specifically told that it could use this evidence of inconsistent statements not only "[t]o evaluate whether the witness's testimony in court is believable," but also "[a]s evidence that the information in those earlier statements is true." (4 CT 1087.) Whether or not Mr. Tran sought to have the evidence admitted as declarations against interest is entirely besides the point.

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[2] Respondent further re-raises its harmless error analysis from Argument III-E of its brief. (RB 99.) Mr. Tran has already fully addressed this analysis and no further reply is necessary. (*See* Argument III-D, *supra*.)

The fact remains that the evidence was admitted and the jury was told it could consider it for the truth. The trial court's instructions on in-custody informant and oral statements lessened the state's burden of proof beyond a reasonable doubt and undercut the defense evidence that Ly told police that Plata told him in unrecorded statements that "he had killed the Korean girl" and "had to do it."

Turning to Nguyen's testimony, respondent argues any error was harmless because the parties stipulated to the fact that "the literal translation of the tattoo is 'forgive.'" (RB 98.) But the import of Nguyen's testimony was not the literal translation of the tattoo. The import of Nguyen's testimony was that *Mr. Tran* himself believed the tattoo meant, "Forgive me." (RB 98.) Indeed, at both the guilt and penalty phases, Mr. Tran's counsel knew all too well the import of Nguyen's testimony on this point, and relied on Nguyen's testimony that Mr. Tran meant his tattoo to convey remorse. According to counsel, "[H]e put remorse on his chest" (8 RT 1706 [guilt phase closing argument]), and "this guy is really profoundly affected" by Linda's death. (12 RT 2440 [penalty phase closing argument].) But the trial court's instructions told the jury that it needed "supporting evidence" before it could rely on this evidence of remorse, and the prosecutor was permitted without limitation to rely on Plata's recorded statement to Ly (told to the jury through the state's gang experts), and argue that Mr. Tran's tattoo actually was meant to convey, "blow me or suck me," as a showing of an utter lack of remorse. (8 RT 1734-

1735.) Respondent's argument that the stipulation mitigated the harm here must be rejected.

V. BECAUSE THERE WAS INSUFFICIENT EVIDENCE THAT MR. TRAN DELIBERATELY INFLICTED NONFATAL WOUNDS FOR A SADISTIC PURPOSE, THE TORTURE SPECIAL CIRCUMSTANCE MUST BE STRICKEN.

In Argument V of his opening brief, Mr. Tran contended that there was insufficient evidence to support the torture special circumstance allegation. (AOB 193-201.) Relying principally on *People v. Mungia* (2008) 44 Cal.4th 1101, and the cases cited therein, Mr. Tran argued that this Court has inferred the sadistic intent necessary to support the allegation only when the evidence showed "the defendant deliberately inflicted nonfatal wounds or deliberately exposed the victim to prolonged suffering." (AOB 195-198, citing *People v. Whisenhunt* (2008) 44 Cal.4th 174, 201 [defendant "methodically poured" hot oil on multiple portions of the victim's body]; *People v. Chatman* (2006) 38 Cal.4th 344, 390 [defendant inflicted over 40 stab wounds all over victim's body and later told friend he persisted in stabbing victim because "it felt good"]; *People v. Elliot* (2005) 37 Cal.4th 453, 467 [defendant inflicted 81 stab and slash wounds, only three of which were potentially fatal, and meticulously split victim's eyelids]; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1240 [defendant made incisions with "nearly scientific air" that demonstrated a calculated intent to inflict pain]; *People v. Raley* (1992) 2 Cal.4th 870, 889 [evidence sufficient to show first degree torture-murder where defendant inflicted knife wounds on victim while she screamed, wrapped her in rugs and left her, still conscious, in trunk of his car for hours before throwing her down ravine].) In stark contrast, according to Mr. Tran, the evidence in this case -- in which Linda was hog-tied

from behind, and suffered two overlapping cuts from the right side of the neck to the left before being strangled to death -- showed an intent to rob and kill, but not a torturous intent. (AOB 198-201.)

Respondent ignores the facts and import of every single one of these cases. (RB 100-103.) Instead, respondent relies on *People v. Hajek and Vo* (2014) 58 Cal.4th 1144. (RB 102.) There, defendants gained access to a home, where they held various members of the Wang family hostage for several hours. The attack on the family was in retaliation for a minor altercation a few days earlier between the family's teenage daughter, Ellen, defendant Hajek, and a friend of both defendants, Lori. On the night before the attack, Hajek told another friend that he planned to kill each member of Ellen's family while she watched, and then kill her last. At some point, defendants killed the family's 73 year-old grandmother, Su Hung. She was first strangled slowly, and then her throat had been slashed. There was a bruise on her chin caused by blunt force, possibly from a fist. She suffered a nonlethal stab wound to her left shoulder, one-inch long and one-inch deep, and five "very superficial" cuts to her chest. (*People v. Hajek and Vo*, supra, 58 Cal.4th at pp. 1157-1158, 1163.)

The Court found substantial evidence of defendants' torturous intent. According to the Court, "[w]hile Hajek did not explicitly say he intended to inflict extreme pain on Su Hung or any of the Wangs before killing them, that intent can be inferred from the totality of the circumstances: the sadistic nature of defendants' plan (to first kill Ellen's

family members while she watched and then to kill her), the deliberate and nonlethal wounds they inflicted on Su Hung while she was bound and completely defenseless (striking her chin hard enough to leave a bruise, stabbing her gratuitously in the shoulder, and treating her like a pincushion while they superficially punctured her chest five times), and the manner in which they killed her (choking her slowly but forcefully with a ligature until they fractured her thyroid cartilage, then slashing her throat through her trachea and jugular vein)." (*People v. Hajek and Vo*, supra, 58 Cal.4th at p. 1189.)

There was no such gratuitous intent and violence in this case. Respondent does not -- indeed, cannot -- cite to any evidence of a sadistic plan to torture Linda. (RB 100-103.) Instead, respondent claims "Linda sustained significant but nonlethal wounds to her throat." (RB 102.) According to respondent, "[t]he jury could reasonably infer from the evidence" that "Tran and Plata tied Linda up and slashed her throat to make her tell them where the cash and jewelry were hidden in her house." (RB 101.)[3]

In fact, however, the wounds to Linda's throat were not "nonlethal" as respondent claims. Dr. Richard Fukumoto testified that there were two overlapping slashing cuts from the right side to the left, where a "first cut is made, and then a second cut is made

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[3] This theory is one of two that the state presented below. The prosecutor also theorized in closing argument that Linda was not bound and cut until *after* she showed defendants where the money and jewelry were located. (8 RT 1686-1687 ["they tied her up after they got the money and jewelry" because "she had to show them where the money was . . . same thing with the jewelry boxes."].) No doubt recognizing that this theory undercuts the claim that the wounds were inflicted for extortion purposes, respondent now appears to abandon that theory. (RB 100-103.)

again over the first cut," and the cut was deeper on the right side than the left. (7 RT 1316-1317.) According to Dr. Fukumoto, although the cuts were "not deep enough to cause immediate death," the wound on the right side cut into the muscle of the neck and was a "bleeding wound" which, without medical attention, could be fatal. (7 RT 1318.)

But putting this aside, respondent's claim does not make sense. The wounds were not the result of pokes or otherwise prodding gestures one might expect if the intent was to persuade Linda to talk. Instead, the wounds were serious slashes from the right side of the neck to the left. If defendants wished Linda to actually talk, slashing her throat would have been a highly counterproductive move. Instead, the manner in which the wound was inflicted evidences nothing more than an intent to kill.

Finally, respondent cites to no evidence that proves Mr. Tran and Plata ever asked Linda about the money and jewelry. Instead, respondent simply argues that "Joann [Nguyen] testified that Linda never told her where the cash and jewelry were kept," and therefore "Joann could not have told Tran," but nonetheless "Tran and Plata located the cash in Sun's jacket and the jewelry boxes inside the drawer of Dong's makeup table without ransacking the house." (RB 101.) Thus, according to respondent, "[t]he reasonable inference from the evidence is that Linda was forced to tell Tran and Plata where the valuables were hidden." (RB 101.) But, of course, the insides of both a man's jacket and a woman's dressing table are quite logical places to find valuables in a home, and thus, no specialized knowledge from Linda would necessarily have been required.

In short, there was insufficient evidence that Mr. Tran harbored the sadistic intent necessary to support the torture special circumstance allegation. Respondent's arguments to the contrary must fail. The Court should vacate the true finding on the allegation.

VI. BECAUSE THE STATE CANNOT PROVE THE ADMISSION OF THE FIVE INVALID GANG PREDICATES HARMLESS, THE SECTION 186.22(B) GANG ENHANCEMENT MUST BE STRICKEN.

The jury found that the murder was committed for the benefit of, at the direction of, and in association with Viets for Life ("VFL"), a criminal street gang, within the meaning of section 186.22, subdivision (b)(1). (4 CT 1182.) To prove this allegation, the prosecutor introduced evidence of five prior convictions -- (1) Se Hoang's 1995 conviction for a 1992 burglary (§§ 459, 460); (2) Hoang's 1994 conviction for a 1993 conspiracy to commit murder (§§182.7, 187), illegal possession of a firearm (§ 12021, subd. (d)), and evading a police officer (Veh. Code § 2800.2); (3) Phi Nguyen's 1994 conviction for a 1994 attempted burglary (§§ 459, 460, 664); (4) Nguyen's 1995 conviction for a 1994 robbery (§ 211); and (5) Anthony Johnson's 1997 conviction for a 1995 attempted murder (§§ 187, 664) -- all through the testimony of gang expert Mark Nye to prove the requisite predicate offenses and establish a "pattern of criminal gang activity." (8 RT 1529-1535.)

In his opening brief, Mr. Tran contended the trial court gave the jury an instruction that proof of a "conviction" of two or more of qualifying crimes was sufficient to establish a "pattern of criminal gang activity," and gave an instruction that it could rely on Se Hoang's conviction for the crime of "conspiracy" to establish a "pattern of criminal gang activity," both in violation of state and federal ex post facto provisions. (AOB 212-217.) Mr. Tran further contended that the trial court also permitted the jury to rely on

case-specific, testimonial hearsay to find that Hoang and Johnson were members of the VLF gang, in violation of state and federal confrontation provisions. (AOB 217-221.) According to Mr. Tran, because none of the five predicates were valid, and because the record does not indicate the jury necessarily relied on a legally valid theory of liability, the section 186.22, subdivision (b), enhancement must fail. (AOB 221-224.)

As to Mr. Tran's first contention, respondent does not dispute that the trial court's instructions violated state and federal ex post facto provisions "by allowing the jury (1) to rely on convictions alone to establish a pattern of criminal activity, and (2) to consider conspiracy to commit an enumerated offense as a qualifying offense." (RB 117.) Instead, and to its credit, respondent concedes that "in 1995, section 186.22 did not refer to convictions or conspiracies to commit enumerated offenses." (RB 117.) Ex post facto error has occurred.

As to Mr. Tran's second contention, respondent disputes that the jury was permitted "to consider testimonial hearsay statements regarding the gang membership of Johnson and Hoang." (RB 119.) First, according to respondent, "the record does not reflect that Nye relied on hearsay statements to form his opinion regarding Johnson's gang membership." (RB 119.) This is simply not true. Here is what the record actually reflects:

"Q [by prosecutor]	You're familiar with [Johnson] as part of your preparation for the case and reviewing document[s] of Noel Plata, correct?

A [by Nye]		Yes."

(8 RT 1538.)

Indeed, the prosecutor specifically elicited Plata's hearsay statements to police in those documents that Johnson was a member of VFL:

"Q [by prosecutor]	Back in 1993, in reviewing those police reports [relating to criminal activity of Plata and Johnson on 3/27/1993], did you review documents showing that at the time that the police arrested Mr. Plata and they interrogated him, he initially denied any involvement for Mr. Johnson, but subsequently provided information to police about Mr. Johnson's involvement in a gang?

A [by Nye]		Yes.

Q		*And subsequently did he tell the police that Anthony Johnson -- 'he' being Mr. Plata -- that Anthony Johnson was a member of V.F.L?*

A		*Yes.*"

(8 RT 1537-1538, emphasis added.)

Respondent alternatively argues that Nye testified that he "reviewed records regarding Johnson, and also *personally* assisted in investigating the 1995 attempted murder and interviewed Johnson in connection with the case." (RB 120, emphasis in original.) Thus, according to respondent, "it appears that Nye's testimony regarding Johnson's gang membership was based on his own personal knowledge and certified court records." (RB 120.)

But Nye did not testify that the certified court records revealed anything to him about whether Johnson was a member of VFL. Indeed, the records themselves reveal no such thing. (*See* 1 SCT 196-203.) Instead, the records reveal that Johnson pled guilty to attempted murder (§ 187, 664), with an arming enhancement (§ 12022, subd. (a)(1)), and a gang enhancement (§ 186.22, subd. (b)), committed on August 3, 1995. (1 SCT 196-203; 8 RT 1533-1534.) While Johnson certainly admitted a section 186.22, subdivision (b), gang enhancement (1 SCT 200), this particular gang enhancement statute does *not* require that the defendant be a gang member, but only that he committed the felony "for the benefit of, at the at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (California Penal Code § 186.22(b)(1); *see People v. Albillar* (2010) 51 Cal. 4th 47, 67-68 [section 186.22(b) does not require gang membership]; *People v. Bragg* (2008) 161 Cal. App. 4th 1385, 1402 [active membership in gang not required].) And finally, while Nye did indeed testify that he personally assisted the 1995 investigation, and interviewed Johnson, there was no evidence about the circumstances surrounding this personal assistance and interview, much less any evidence that Nye specifically gleaned Johnson's gang membership from either. (*See* 8 RT 1533-1534.) Respondent's speculation to the contrary must be rejected. The fact remains that Nye's opinion that Johnson was a VFL member turned entirely on his review of testimonial hearsay -- Plata's admission to police -- that Johnson was a VFL gang member. Error has occurred.

Respondent's argument as to Hoang fares no better. Respondent recognizes that "[w]hen testifying about Hoang's gang membership, Nye said that he reviewed a document indicating that when contacted by police at the time of the residential burglary and the conspiracy to commit murder, Hoang admitted that he was a member of VFL." (RB 120.) Respondent admits "Nye conveyed hearsay," and does not dispute that it was testimonial in nature, but argues "it was not 'case-specific' hearsay." (RB 120.) According to respondent, "[f]acts regarding other predicate crimes, including the gang membership of the individuals who perpetrated them, are not 'case-specific' because they are independent of the facts of the particular crime being tried," and "[i]nstead, such facts constitute general background testimony about general gang behavior or descriptions of the gang's conduct." (RB 120-121.)

To its credit, respondent recognizes a few of a myriad of cases which have held that this is not the law. (RB 121, citing *People v. Lara* (2017) 9 Cal.App.5th 296, 337 [testimony based on police reports generated by other officers during official investigations of completed crimes to prove predicate offense is inadmissible]; *People v. Ochoa* (2017) 7 Cal.App.5th 575, 589 ["that someone admitted being a gang member is ... a case-specific fact"].)[4]

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[4] Respondent also cites *People v. Huynh* (2018) 19 Cal.App.5th 680. (RB 121.) After the filing of respondent's brief, this Court denied review in *Huynh* and ordered the lower court's decision depublished. (*People v. Huynh*, 2018 Cal. LEXIS 3432 (May 9, 2018.)

Indeed, in *People v. Sanchez* (2016) 63 Cal.4th 665, this Court unanimously cast aside a highly criticized legal fiction when it comes to expert testimony and hearsay. The Court in *Sanchez* disapproved its own prior precedents that incorrectly perpetuated the notion that jurors can consider hearsay testimony consisting of case-specific facts related by an expert witness solely for the purpose of evaluating the basis for the expert's opinion and without considering those facts for their truth. The impossibility of asking jurors to assess the reliability of an expert's opinion by reference to the facts on which the expert relied, while simultaneously pretending jurors were not considering the truth of those facts, had not been lost on practitioners, judges, and commentators prior to *Sanchez*. (*See*, *e.g.*, *People v. Hill* (2011) 191 Cal.App.4th 1104, 1129-1131 [agreeing with a New York Court of Appeals case rejecting this practice but following, as required, the Court's pre-*Sanchez* jurisprudence]; Kaye et al., The New Wigmore: Expert evidence (2d ed.2011) § 4.7.2, pp. 179-180 ["To admit basis testimony for the nonhearsay purpose of jury evaluation of the experts is . . . to ignore the reality that jury evaluation of the expert requires a direct assessment of the truth of the expert's basis"].)

Sanchez reconsidered the mental gymnastics the prior rule asked jurors to perform when presented with hearsay expert basis testimony and concluded the rule could no longer stand. The Court recognized that "[w]hen an expert relies on hearsay to provide case-specific facts, considers the statements as true, and relates them to the jury as a reliable basis for the expert's opinion, it cannot logically be asserted that the hearsay

content is not offered for its truth." (63 Cal.4th at p. 682.) Now, according to *Sanchez*, "[l]ike any other hearsay evidence, [such case-specific hearsay] must be properly admitted through an applicable hearsay exception" or by way of "a properly worded hypothetical question." (*Id*. at p. 684.)

In so holding, *Sanchez* expressly overruled "prior decisions concluding that an expert's basis testimony is not offered for its truth, or that a limiting instruction, coupled with a trial court's evaluation of the potential prejudicial impact of the evidence under Evidence Code section 352, sufficiently addresses hearsay and confrontation concerns." (*Id*. at p. 686, fn. 13, citing *People v. Bell* (2007) 40 Cal.4th 582; *People v. Montiel* (1993) 5 Cal.4th 877, 918-919; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1012; *People v. Milner* (1988) 45 Cal.3d 227, 238-240; *People v. Coleman* (1985) 38 Cal.3d 69, 91-93.)

It is clear then that the hearsay statements at issue in the present case -- out-of-court statements by Hoang admitting being a member of the VFL -- are case-specific hearsay rather than general background information about the VFL. *Sanchez* gave the following as one in a series of examples of the distinction: "That an associate of the defendant had a diamond tattooed on his arm would be a case-specific fact that could be established by a witness who saw the tattoo, or by an authenticated photograph. That the diamond is a symbol adopted by a given street gang would be background information about which a gang expert could testify. The expert could also

be allowed to give an opinion that the presence of a diamond tattoo shows the person belongs to the gang." (*People v. Sanchez*, *supra*, 63 Cal.4th at p. 677.) By analogy, that someone admitted being a gang member is also a case-specific fact.

Nonetheless, to support its contrary position, respondent relies on *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1175, review granted and case ordered to remain published and precedential in *People v. Meraz*, 2017 Cal. LEXIS 2250 (March 22, 2017). But *Meraz* does not support respondent's position.

Meraz was the first published case involving gang expert testimony since *Sanchez*. In *Meraz*, Division Eight of the Second District Court of Appeal held that most of the expert testimony to which the defense objected amounted to "generally accepted background information," which *Sanchez* held was admissible. According to *Meraz*, "under state law after *Sanchez*, [a gang expert] was permitted to testify to non-case-specific general background information about [one gang], its rivalry with [another gang], its primary activities, and its pattern of criminal activity, even if it was based on hearsay sources like gang members and gang officers." (6 Cal.App.5th at p. 1175.) *Meraz* further concluded that none of this expert testimony was testimonial within the meaning of the Sixth Amendment because the gang expert "described the sources of his background information on [the two gangs] in only the most general terms," "conveyed no specific statements by anyone with whom he spoke, and reached only general conclusions based on his education, training, and experience." (*Ibid*.)

While some of the case-specific facts to which the expert testified did not violate *Sanchez* because the expert "was present during those contacts, had personal knowledge of the facts, and was subject to cross-examination at trial," *Meraz* did find that the gang expert's testimony relating case-specific facts from FI cards and arrest reports "completed by *other* officers outside of his presence" was both inadmissible and testimonial under *Sanchez*. (*Id*. at p. 1176, emphasis in original.)

That is exactly what occurred here. Similar to *Meraz*, Nye's testimony that Hoang admitted VFL gang membership related case-specific hearsay obtained from police reports completed by other officers rather than general background information about the VFL. Respondent's argument to the contrary must be rejected.

Respondent finally argues that any error was harmless. (RB 117-119.) Relying on *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327, respondent argues that Mr. Tran raises an "instructional error as to an element of a sentencing enhancement," and because "the gang enhancement does not increase the penalty beyond the prescribed statutory maximum -- e.g., if the defendant was sentenced to an indeterminate term of imprisonment for life -- the error does not violate the federal constitution and is reviewed under the [*People v. Watson* (1956) 46 Cal.2d 818] harmless error standard." (RB 118.) But *Sengpadychith* involved a trial court's complete failure to instruct the jury on the primary activities element of the criminal street gang enhancement provision. (26 Cal.4th at pp. 324-348.) Here, the trial court instructed the jury on the primary activities element

of the criminal street enhancement provision, but provided the jury legally invalid theories upon which it could rest its finding in violation of federal constitutional ex post facto and confrontation principles. *Sengpadychith* is inapposite.

Turning now to the merits, Mr. Tran contended in his opening brief that the evidence and trial court's instructions presented the jury with legally inadequate theories of liability to support a true finding on the section 186.22, subdivision (b) allegation. (AOB 221-224.) First, none of the five prior convictions introduced by the state could legally serve as predicate offenses because the 1995 version of section 186.22 did not permit the jury to rely on "convictions" alone to find a "pattern of criminal gang activity." Second, Hoang's conspiracy to commit murder conviction and underlying conduct was not an enumerated offense of the 1995 version of section 186.22. Finally, Hoang's two convictions and Johnson's one conviction, and the conduct underlying these convictions, could not be used as predicate offenses because the state relied on inadmissible testimonial case-specific hearsay to prove they were committed by VFL members.

Respondent argues that the error was harmless because the jury was also presented with legally adequate theories. Respondent notes that "[t]he same documents that established *convictions* of the predicate crimes also established *commission* of the crimes," and thus, the offenses committed by Hoang (1992 first-degree residential burglary), Phi Nguyen (1994 attempted residential burglary, 1994 residential robbery, 1994 residential burglary) and Johnson (1995 attempted murder) support such a finding."

(RB 118-119, emphasis in original.) Respondent further notes that "the charged offense in this case may be considered in determining a pattern of criminal activity." (RB 119. *See also* RB 121 ["the charged offense in this case" could be used to "establish a pattern of gang activity"].)

As an initial matter, respondent exempts the evidence of Hoang's crime of conspiracy to commit murder from this assertion; as respondent implicitly concedes, neither the conviction itself nor the underlying conduct could serve as a predicate offense. (RB 118.) Moreover, as already explained above, Nye relied on inadmissible testimonial case-specific hearsay to prove Hoang and Johnson were VFL members. Respondent cites no further evidence that Hoang and Johnson were VFL members -- indeed, none exists -- and thus, none of the offenses committed by Hoang and Johnson -- and cited by respondent -- could serve as legally valid predicate offenses.

But putting this aside, respondent is entirely correct that the jury was presented with some legally valid theories. And if the jury's verdict or the remaining record otherwise revealed that the jurors hinged the section 186.22, subdivision (b), true finding on the commission of offenses by Nguyen or the current offenses as predicate offenses, Mr. Tran would have no complaint. But the jury returned a general verdict which revealed no such thing. Nor did the prosecutor elect to rely on the current offenses or commission of offenses by Nguyen. Instead, the prosecutor specifically told the jury in closing argument that the state had proven a "pattern of criminal gang activity" by

introducing "*the prior conviction* of Se Hoang, remember, Phi Nguyen and Anthony Johnson. You might be saying, 'Why did he introduce that?' Because that is one of the elements [of the gang enhancement]." (8 RT 1697, emphasis added.) On this record, and because the prosecutor told the jury to rely on the legally invalid theories of the prior "convictions" of Hoang, Nguyen and Johnson, it cannot be said, beyond a reasonable doubt, that the jury instead effectively embraced the legally valid theories posited by respondent. (*See People v. Nunez and Satele* (2013) 57 Cal.4th 1, 42 ["we cannot tell whether the jury found the section 12022.53(d) allegations true because it found true the section 186.22(b)(1) allegations (a legally invalid theory because the jury was misinstructed on the elements of the gang enhancement allegations) or because it found that each defendant personally shot the two victims (a legally valid theory)," and "therefore vacate the firearm use findings as to both defendants"]; *People v. Chun* (2009) 45 Cal.4th 1172, 1203 ["to find the error harmless, a reviewing court must conclude, beyond a reasonable doubt, that the jury based its verdict on a legally valid theory …"]; *People v. Green* (1980) 27 Cal.3d 1, 69, 71, 74 [kidnapping conviction reversed and special circumstance finding vacated when this court could not tell whether the jury based its verdict on a legally invalid theory]; *see also People v. Guiton* (1993) 4 Cal.4th 1116, 1128 ["cases involving a 'legally inadequate theory'" are "subject to the rule generally requiring reversal"].) The section 186.22, subdivision (b), finding must be stricken.

VII. THE ADMISSION OF EMOTIONAL VICTIM IMPACT TESTIMONY -- WHICH REDUCED AN INTERPRETER TO TEARS AND CAUSED THE REMOVAL OF A JUROR -- AND THE ABSENCE OF A LIMITING INSTRUCTION WAS PREJUDICIAL ERROR.

The penalty phase jurors here were being asked to make a normative decision as to whether Mr. Tran should live or die. Although the sentencing decision does not involve a binary determination of fact (as in the guilt phase for example), it nevertheless requires a rational process; a capital penalty phase "is in essence a sentencing hearing at which additional information . . . is adduced in order to permit a rational decision concerning the proper punishment to be imposed." (*People v. Jackson* (1980) 28 Cal.3d 264, 320, *disapproved on another point in People v. Cromer* (2001) 24 Cal.4th 889.) The Court has recognized this seemingly indisputable principle time and again. (*See, e.g., People v. Love* (1960) 53 Cal.2d 843, 713; *People v. Hamilton* (1963) 60 Cal.2d 105, 132; *People v. Durham* (1969) 70 Cal.2d 171, 194; *People v. Floyd* (1970) 1 Cal.3d 694, 751; *People v. Jurado* (2006) 38 Cal.4th 72, 134.)

Here, the jurors charged with reaching a "rational decision" as to whether Mr. Tran should live were presented with emotional victim impact evidence on the first day of the state's penalty case. The prosecutor introduced the testimony of Linda's father Sun-Hwa Park, through an interpreter, and the family's neighbor and friend Marilyn Fox, about the devastating impact that Linda's murder had on both him and Linda's mother. (9 RT 1777-1795.) The following day, a juror indicated she was "having some rather significant emotional problems with the penalty phase of the case." (9 RT 1875.) The juror told the

court she “went home and sat in the dark a long time,” and then was “up all night,” because “I was devastated by yesterday.” (9 RT 1875-1876.) She knew “these men deserve a fair trial,” and “believe[d] in the law” and “in being fair,” and having both a son who was the age of the defendants, and a daughter who was not long ago the age of the victim, she believed “I would be the most fair person there was,” and indeed, she “was the hardest one to convince of anything the other day.” (9 RT 1875-1876.) According to the juror, “I always thought I was such a strong person,” but she was “devastated by yesterday,” and “was shaking all night long,” and realized “I don’t think I have an open mind anymore” and “if either one of the defendants were my son, I would not want me here.” (9 RT 1877-1878.) The court itself recognized that the day had been “very emotional,” and indeed, had “never seen an interpreter cry during testimony before.” (9 RT 1877.) The court discharged the juror (9 RT 1879), and by the end of the day, the prosecutor closed its case with further victim impact evidence of the testimony Linda’s sister Janie Park. (9 RT 1913-1926.) Defense counsel later noted in closing argument that some of the jurors were crying when “listening to Mr. Park and listening to Janie.” (12 RT 2452.) Counsel himself admitted that he cried listening to Janie, stating, “I mean, I am sobbing over there.” (12 RT 2452.)

The prosecutor’s closing argument heavily relied on this dramatic evidence. (12 RT 2390-2396.) The prosecutor asked the jury to close its eyes and think about Linda’s father Sun Park’s testimony “30 seconds before you sign the verdict forms. Close your

eyes for just 30 seconds and try to imagine the hurt and the agony and the despair and the self-doubt and the loss of love that he experiences every day" (12 RT 2391.) The prosecutor asked the jury to close its eyes and think about Janie's testimony, stating, "I want another 30 seconds when you go back there for Mrs. Park. Close your eyes and for just 30 seconds try to think and imagine the horror and the terror and the sense of loss that they caused her, and then put a weight on it." (12 RT 2393.)

The prosecutor then shared that he had a discussion with a person in the courtroom after Mr. Park and Janie testified, a "smart friend, somebody I consider a friend, smart man had a chance to watch Janie Park and Sunny Park testify in front of you" and "[t]hat person said, 'It felt like a tidal wave when they testified.'" (12 RT 2394.) Sharing his thoughts, the prosecutor continued, "You go, 'Wow, that person was thinking the exact same thing I was thinking.' It's true until you think about that. It felt like a tidal wave, all that, the enormous emotions of loss and love and hurt and sense of loss. How long was their testimony? Remember? I think Mr. Park was on the stand for about an hour, 45 minutes, an hour? Janie Park was on the stand an hour? Less than that. That's what caused this tidal wave, two hours. Two hours." (12 RT 2395.) The prosecutor then urged the jury to "compare that to what they live with every day. This tidal wave becomes a drop in the ocean of what they go through. All caused by two men sitting in this courtroom, Scrappy [Mr. Tran] and Noel Plata. Put a value on that. Put a value on that." (12 RT 2395.)

In Argument VIII of his opening brief, Mr. Tran raised two issues as to the admission of this "tidal wave" of victim impact evidence. First, he contended that because the term "circumstances of the crime" used by the electorate when enacting section 190.3 had a then-recognized meaning which affirmatively precluded consideration of victim impact evidence or, at the very least, confined itself to facts which were part of the crime itself, the electorate is presumed under basic principles of statutory construction to have intended the same meaning in section 190.3. (AOB 237-244.) Second, Mr. Tran contended that the trial court's failure to guide the jury's consideration of the victim impact evidence with limiting instructions was error. (AOB 244-249.)

Respondent addresses both these arguments. As to the statutory construction argument, respondent argues that (1) this Court has rejected the argument in *People v. Seumanu* (2015) 61 Cal.4th 1293, 1366-1368 (RB 131-132) and, alternatively, (2) any error was harmless. (RB 138-139.) As to the argument that the trial court failed to give proper limiting instructions, respondent argues that (1) the claim was waived and, alternatively, no error occurred. (RB 133-134.) Mr. Tran addresses each in turn.

A. By Using the Phrase "Circumstances of the Crime" in the 1978 Initiative, and under Accepted Principles of Statutory Construction, the Electorate Signaled an Intention to Adopt its Already Accepted Meaning.

At its core, the statutory construction argument Mr. Tran is making in this case is based on three premises:

(1) First, when a statute passed by the electorate uses language which has already been interpreted, there is a strong presumption that the electorate intended to incorporate the same meaning when it used the same language. (AOB 237-238; *see In re Jeanice D.* (1980) 28 Cal.3d 210, 216.)

(2) Second, the phrase "circumstances of the crime" as used in the 1978 statute at issue here had its genesis in the identical phrase in the 1977 law, which -- in turn -- came from the 1958 death penalty law. (AOB 238; see Former § 190.1, added by Stats.1957, c. 1968, p. 3509, § 2, amended by Stats.1959, c. 738, p. 2727, § 1 [providing that in determining penalty, the jury could consider 'the circumstances surrounding the crime . . . ."].)

(3) Third, under the 1958 statute, victim impact evidence and argument was never admitted as a "circumstance surrounding the crime" in California. (AOB 238-240.)

In its brief, respondent does not take issue with any of these three propositions. Instead, respondent argues that Mr. Tran's statutory construction argument "is foreclosed" by *People v. Seumanu*, *supra*. (RB 132.) Respondent is only partially correct.

Mr. Tran's statutory construction argument principally relied on four cases to illustrate two main points. First, relying on the examples of *People v. Love* (1960) 53 Cal.2d 843, 856-857 -- in which the Court held the harm caused to victims could not be admitted absent evidence that the defendant intended to inflict that harm -- and *People v. Floyd* (1970) 1 Cal.3d 694, 721-722 -- in which the Court noted the impropriety of references to victim impact "without references to the [defendant's] intent" -- Mr. Tran argued that when the electorate enacted the 1978 death penalty law, the phrase

"circumstances of the crime" had already obtained a meaning which *precluded* admission of victim impact evidence without evidence that defendant intended the specific harm caused by committing the crime. (AOB 238-240.)

As respondent points out, this was indeed the argument the defendant presented in *Seumanu*, *supra*, and the Court rejected this argument. (61 Cal.4th at pp. 1366-1367; *see also People v. Seumanu*, S093803, Appellant's Opening Brief at pp. 225-229, Appellant's Reply Brief at pp. 80-82.) According to the Court, "[t]he centerpiece of defendant's claim is [*Love*]," and contrary to defendant's argument, "*Love* did not purport to give the phrase 'the circumstances surrounding the crime' a narrow interpretation so as to preclude evidence of the crime's impact on surviving family and friends." (61 Cal.4th at pp. 1366-1367.) Although Mr. Tran believes *Seumanu* was incorrectly decided, if the Court elects to follow that case, it must reject this argument.

But putting aside *Love* and its import, the fact remains that *Seumanu* did not address -- much less reject -- the second part of Mr. Tran's argument. Relying on the examples of *People v. Nye* (1969) 71 Cal.2nd 356, 366-367 -- in which the Court identified evidence of the crimes themselves that defendant committed rape, burglary and robbery in the perpetration of killing the victim was admissible as "circumstances surrounding the crime" -- and *People v. Morse* (1969) 70 Cal.2d 711, 729 -- in which the Court identified details of the crime itself, defendant's acknowledgment of committing the act, and the non-involvement of other participants as "circumstances of the crime" --

Mr. Tran argued that up until the electorate enacted the 1978 death penalty law, the Court had uniformly *confined* itself to facts which were part of the crime itself when referring to the "circumstances surrounding the crime," and indeed, as Justice Mosk recognized, "by 1978, the victim's personal characteristics, the emotional impact of the crime on the victim's family and others, and the opinions about the crime and the criminal held by such persons had not yet received acceptance as penalty factors," and thus, according to Mr. Tran, the electorate could not have intended the virtually identical phrase of "circumstances of the crime" to encompass what the phrase "circumstances surrounding the crime" had not. (AOB 240-242, citing *People v. Edwards* (1992) 54 Cal.3d 787, 854 [Mosk, J., dissenting].)

Thus, while this Court may follow *Seumanu* and reject the import of *Love* (and presumably the similar case of *Floyd*, *supra*), along with Mr. Tran's claim that victim impact evidence and argument had been *precluded* under the 1958 law, the Court has never considered the import of such cases as *Nye* and *Morse*, and the fact that the electorate would not have imbued the phrase "circumstances of the crime" with a different meaning than its virtually identical predecessor when -- as Justice Mosk recognized -- the Court itself had never previously given it that meaning. Cases are not authority for propositions neither presented nor considered. (*See People v. Williams* (2004) 34 Cal.4th 397, 405; *People v. Barragan* (2004) 32 Cal.4th 236, 243; *Flannery v.*

Prentice (2001) 26 Cal.4th 572, 581.) Respondent's suggestion that *Seumanu* rejected this claim is plainly wrong.

Finally, Mr. Tran recognized in his opening brief the seminal case of *People v. Edwards* (1991) 54 Cal.3d 787, in which this Court held that victim impact evidence was admissible as "circumstances of the crime." (AOB 243-244.) To its credit, respondent does not cite *Edwards* in support of its argument; after all, as noted in Mr. Tran's opening brief, *Edwards* did not consider the statutory construction argument Mr. Tran raises here. (AOB 243-244.) If the Court is nonetheless going to continue to rely on *Edwards* and its progeny to reject Mr. Tran's statutory claim, *Edwards* will require reconsideration.

In *Edwards*, the Court followed a more basic principle of statutory construction and examined the "usual, ordinary import" of the word "circumstance" as used in the phrase "circumstances of the crime." (54 Cal.3d at p. 833, citing *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698 [". . . courts are bound to give effect to statutes according to the usual, ordinary import of the language employed in framing them"].) Relying on the 1989 edition of the Oxford English Dictionary, the Court concluded the word did not mean "merely the immediate temporal and spatial circumstances of the crime," but "[r]ather ... extends to '[t]hat which surrounds materially, morally, or logically' the crime." (*People v. Edwards*, *supra*, 54 Cal.3d at p. 833, quoting 3 Oxford English Dict. (2d ed.1989) p. 240, "circumstance," first definition.) According to the Court, "[t]he specific harm caused by the defendant

does surround the crime 'materially, morally, or logically,'" and thus, victim impact evidence was admissible as a "circumstance of the crime." (54 Cal.3d at p. 833.)

The analysis of *Edwards* was fatally flawed. As an initial matter, the 1992 *Edwards* decision relied on a *1989 British dictionary* to determine the "usual, ordinary import" of the word "circumstance" as used in the *1978 California law*. Surely an American dictionary existing in 1978 would have been more appropriate source of reference.

But putting this aside, the definition chosen by the Court -- '[t]hat which surrounds materially, morally, or logically' -- was obsolete by the time of the 1978 initiative, and certainly by the time of the 1992 *Edwards* case. In fact, the definition originally appeared in the *1893 edition* of the Oxford English Dictionary (3 Oxford English Dict. (1st ed. 1893) p. 435, "circumstance," first definition.), and appeared in no other major dictionary in existence (or lesser known dictionaries that Mr. Tran could find) at the time of *Edwards*.

Instead, more modern definitions prevailed. By way of a few examples only, in 1992, The American Heritage Dictionary defined "circumstance" in relevant part as "[a] condition or fact attending an event and having some bearing on it; a determining or modifying factor," and a "condition or fact that determines or must be considered in the determining of a course of action," and "a particular incident or occurrence." (The American Heritage Dictionary (3rd ed. 1996, 1992) p. 347, "circumstance," first, second,

and seventh definitions. *See also* American Heritage Dictionary Second College Edition (2nd ed. 1982) p. 275, “circumstance,” first definition [“[a] condition or fact attending an event and having some bearing on it; a determining or modifying factor”].) In 1992, the Random House Webster’s Unabridged Dictionary defined “circumstance” in relevant part as “a condition, detail, part, or attribute, with respect to time, place, manner, agent, etc., that accompanies, determines, or modifies a fact or event; a modifying factor.” (Random House Webster’s Unabridged Dictionary (2nd ed. 2001, 1998, 1997, 1996, 1987) p. 376, “circumstance,” first definition.) In 1992, the Webster’s Third New International Dictionary defined “circumstance” in relevant part as “a specific part, phase, or attribute of the surroundings or background of an event, fact, or thing or of the prevailing conditions in which it exists or takes place : a condition, fact, or event accompanying, conditioning, or determining another : an adjunct or concomitant that is present or likely to be present . . . ‹the time, place, and other [circumstance]*s* of an action›.” (Webster’s Third New International Dictionary (2nd ed 1986) p. 410, “circumstance,” first definition.)

The specific harm caused by the defendant’s crime to the victim’s family or friends does not come within any of these American dictionary definitions of “circumstance” contemporary with *Edwards*. A crime’s subsequent effect on the victim’s family and friends is not “[a] condition or fact attending” a crime “and having some bearing on it; the evidence is not a “determining or modifying factor” of a crime. A crime’s subsequent

effect on the victim's family and friends is not "a particular incident or occurrence;" it is not the crime itself. A crime's subsequent effect on the victim's family and friends is not "a condition, detail, part, or attribute, with respect to time, place, manner, agent, etc., that accompanies, determines, or modifies" a crime. A crime's subsequent effect on the victim's family and friends is not "a specific part, phase, or attribute of the surroundings or background of" a crime or "a condition, fact, or event accompanying, conditioning, or determining" a crime. A crime's subsequent effect on the victim's family and friends is not "an adjunct or concomitant that is present or likely to be present" at a crime such as time or place.

It would be easy to ignore these definitions and continue to rely on the definition of the 1989 Oxford English Dictionary -- "[t]hat which surrounds materially, morally, or logically" -- as it was relied upon by the Court in *Edwards.* If the Court decides to do so, it should also take a look at the explanatory paragraphs for this definition. In explanatory paragraph 2, a definition of the plural of "circumstance" -- "circumstances" -- is provided as, "The logical surroundings or 'adjuncts' of an action; the time, place, manner, cause, occasion, etc., amid which it takes place." (3 Oxford English Dict. (2d ed.1989) p. 240, "circumstance," first definition, second paragraph.) The third paragraph also defines circumstance as, "The adjuncts of a fact which make it more or less criminal, or make an accusation more or less probable." (*Id*, third paragraph.)

None of these definitions encompass a crime's subsequent effect on family and friends within their purview. A crime's subsequent effect on family and friends is simply not a time, place, manner, cause or occasion "amid which [a crime] takes place," and certainly does not make a crime "more or less criminal." The simple truth is that the definition relied upon by the *Edwards* Court -- "[t]hat which surrounds materially, morally, or logically" -- was stretched far beyond its actual meaning to encompass a crime's subsequent effect on family and friends.

Put simply, in assessing Mr. Tran's statutory construction argument, this Court should reconsider *Edwards*. And as noted above, Mr. Tran's statutory construction argument is based on three essential premises. Respondent does not dispute any of the premises. Admission of evidence of the victim impact evidence here -- that is, the crime's subsequent effect on family and friends -- was not authorized by section 190.3.

Respondent alternatively argues that the admission of the victim impact evidence was harmless. The state makes two main points in this argument: (1) the victim impact evidence consisted of "[o]nly two family members and a friend/neighbor" and constituted a "brief" span of only 35 pages and (2) the nature of the crime and Mr. Tran's criminal past ensured a death verdict even without the victim impact evidence. (RB 138.)

When federal constitutional error occurs in the penalty phase of a capital trial, reversal is required unless the state can prove the error harmless beyond a reasonable doubt. (*People v. Gonzales* (2006) 38 Cal.4th 932, 961.) The standard of prejudice for

state-law error at the penalty phase is whether there is a reasonable possibility that the error affected the verdict. (*Ibid*.) The standards "are the same in substance and effect." (*Ibid*. *Accord People v. Jackson* (2014) 58 Cal.4th 724, 748; *People v. Lewis* (2008) 43 Cal.4th 415, 531; *People v. Ashmus* (1991) 54 Cal.3d 932, 990.)

The state cannot carry its burden in this case for three reasons. First is the nature and power of victim impact evidence generally. One federal trial judge has described the nature of this testimony:

> I cannot help but wonder if *Payne v. Tennessee* . . . would have been decided the same way if the Supreme Court Justices in the majority had ever sat as trial court judges in a federal death penalty case and had observed first hand, rather than through review of a cold record, the unsurpassed emotional power of victim impact testimony on a jury. It has now been over four months since I heard this testimony . . . and the juror's sobbing during the victim impact testimony still rings in my ears. This is true even though the federal prosecutors . . . used admirable restraint in terms of the scope, amount, and length of victim impact testimony. To pretend that such evidence is not potentially unfairly prejudicial on issues to which it has little or no probative value is simply not realistic, even if the court were to give a careful limiting instruction.

(*United States v. Johnson* (N.D. Iowa 2005) 362 F.Supp.2d 1043, 1107, aff'd in part (8th Cir. 2007) 495 F.3d 951.) Justices Stevens has described victim impact evidence as "powerful in any form." (*Kelly v. California* (2008) 555 U.S. 1020, 1025 [Stevens, J., dissenting from a denial of certiorari].) Justice Breyer has similarly noted the potential for victim impact to "produce a powerful purely emotional impact." (*Kelly v. California*, *supra*, 555 U.S. at p. 1027 [Breyer, J., dissenting from denial of certiorari].)

Second, there is no doubt that the content of the victim impact testimony here had a powerful purely emotional impact. One juror -- after listening to Linda's father and the family's neighbor and friend -- found that the evidence was "life changing" for her, and she had gone home afterwards and "sat in the dark a long time," staying "up all night" and "shaking all night long." (9 RT 1875.) She explained that she had a son the defendants' age and a daughter who had just been Linda's age, and thought she could be "the most fair person there was." (9 RT 1876.) But she concluded that while she "believe[d] in being fair," and had an "open mind," the testimony "devastated" her, and she did not think she had "an open mind anymore." (9 RT 1876.) The trial court noted that the juror was visibly shaking, and ultimately, dismissed the juror. (9 RT 1879.) The court further noted that "it was a very emotional day for just about everybody who listened" to the testimony, including the court interpreter who had been crying during the testimony. (9 RT 1877.) After the juror was substituted, the newly constituted jury then heard even more victim impact evidence with the testimony of Linda's sister Janie Park. (9 RT 19-26.) In closing argument, defense counsel noted that some of the jurors were crying when "listening to Mr. Park and listening to Janie." (12 RT 2452.) Counsel himself admitted that he cried listening to Janie, stating, "I mean, I am sobbing over there." (12 RT 2452.) In closing argument, the prosecutor too recognized that the victim impact evidence in this case was a "tidal wave" of "enormous emotions of loss and love and hurt and sense of loss . . . ." (12 RT 2395.)

Respondent's current counsel now attempts to minimize the impact of the evidence and argues a purely arithmetic perspective -- that the victim impact evidence constituted 35 pages of transcript from two family members and a friend. (RB 138.) The suggestion, of course, is that these figures mean the jurors hearing this testimony would not be influenced by it.

Not only does the record belie counsel's argument -- prosecutor said the evidence was a "tidal wave" of emotion that should influence the jury, one juror said the evidence was actually "life changing" and required her removal from the jury, and the court interpreter, several jurors and defense counsel were crying -- the effort to equate page length with emotional force is unpersuasive. As this Court has noted in addressing a similar argument, "[t]he question is the qualitative fairness of the evidence, not an arbitrary quantification." (*People v. Williams* (2015) 61 Cal.4th 1244, 1285.) Put another way, the Gettysburg Address was delivered more than 150 years ago. It was ten sentences long, a total of 272 words, and took only two minutes to deliver. It would be arbitrary indeed to say that because the Gettysburg Address was so short, those hearing it would "little note, nor long remember" what was said. What matters is *what* was said, not how long it took.

Third, as detailed in his opening brief, this was not a case without mitigation. Suffice it to say here that Mr. Tran was exposed to extreme domestic violence from his own mother growing up, and had low self-esteem and a need for negative attention that

brought him to the gang life. He nonetheless felt and showed deep remorse for Linda's murder, having nightmares and becoming suicidal. He showed a capacity for positive change when he became a father. (AOB 66-75.) Although the state minimizes this mitigation, in the absence of the overwhelming victim impact evidence presented, one or more jurors reasonably could have taken a different view of the life or death balance and found this evidence sufficiently mitigating to warrant a sentence less than death. But the excessive and highly-charged victim impact evidence permitted here precluded jurors from giving fair consideration to appellant's mitigating evidence. This is especially true as the state's only other penalty phase evidence was two juvenile prior adjudications committed when Mr. Tran was 17 years old and one prior felony case of committing a burglary and vehicle code violations when he was 18 years old. (AOB 62-65.)

In the final analysis, establishing that the improper admission of powerful victim impact evidence is harmless beyond a reasonable doubt is a heavy burden. It is supposed to be. If even a single juror found the victim impact evidence persuasive enough to negate consideration of mitigation, the error cannot be found harmless. Conversely, if even a single juror could have found the mitigation justified life absent the excessive victim impact testimony, the error cannot be found harmless. On the record of this case, the state simply cannot establish beyond a reasonable doubt that absent the improper admission of victim impact evidence not a single juror could reasonably have voted for life. Because the state cannot meet this heavy burden, a new penalty phase is required.

B. The Trial Court's Failure to Give Limiting Instructions to Guide the Jury's Consideration of the Victim Impact Evidence Requires a New Penalty Phase.

Mr. Tran contended that even if the victim impact evidence was admissible, the trial court should have guided the jury's consideration of the victim impact evidence with proper instructions. (AOB 244-249.) Respondent first argues that defense counsel's failure to request proper limiting instructions waived the claim on appeal. (RB 133.) This argument should not long detain the Court.

As explained in the opening brief, the trial court had a sua sponte duty to guide the jury's consideration of the victim impact evidence with limiting instructions. (AOB 245.) Any failure by counsel is irrelevant. Moreover, in an abundance of caution, appellant alternatively raised an ineffective assistance of counsel claim in the event the Court found that a trial court has no *sua sponte* duty to limit the jury's use of victim impact evidence. (See AOB 247-248.) Whether reviewed directly, or through the prism of an ineffective assistance of counsel claim, the merits of this issue are properly before this Court. Respondent's argument to the contrary must be rejected.

Respondent alternatively argues that this Court has "'repeatedly held that the trial court's use of jury instructions CALJIC Nos. 8.84.1 and 8.85 is sufficient to address a defendant's concerns about the proper use of victim impact evidence, and is consistent with his or her federal and state constitutional rights to due process, a fair trial, and a

reliable penalty determination.'" (RB 133, citing *People v. Simon* (2016) 1 Cal.5th 98, 143, and cases cited therein.)

Mr. Tran asks this Court to revisit this holding. Neither CALJIC 8.85 nor CALJIC 8.84.1 -- nor CALCRIM Nos. 761 and 763 as given in this case -- actually instruct the jury on the proper use of victim impact evidence consistent with *Payne* and *Edwards*, and none of the cases facing this issue have meaningfully addressed exactly how these instructions tell the jury that victim impact evidence may be considered a "circumstance of the crime" as part of its rational inquiry into the culpability of the defendant, or that the jury's pure emotional response to the evidence should not influence its decision at all.

1. Neither CALJIC 8.85 nor the instruction given in this case informs the jury that victim impact evidence is one of the "circumstances" of the crime.

The trial court instructed the jury, in accord with CALCRIM 763 and in relevant part, that "[t]he circumstances of the First Degree Murder that each defendant was convicted of in this case and the special circumstance that was found true" is a factor which the jury "must consider, weigh, and be guided by." (5 CT 1339.) CALJIC 8.85 is materially similar in that it instructs the jury, in relevant part, that the "circumstances of the crime of which the defendant was convicted in the present proceeding" is a factor which it "shall consider, take into account and be guided by." Nothing in the words of either instruction, however, logically told the jury that victim impact evidence was a "circumstance" of the crime.

Indeed, the jury was told that "[w]ords and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meaning." (5 CT 1335.) As explained in detail in Argument VII-A above, the specific harm caused by the defendant to the victim's family or friends did not come within the ordinary, everyday meaning of the dictionary definitions of "circumstance" contemporary with *Edwards* in 1992.[5]

Mr. Tran recognizes that this Court has held differently. In *People v. Brown* (2003) 31 Cal.4th 518, 573, defendant claimed that the trial court erroneously admitted victim impact evidence and did not instruct the jury how to consider the evidence. The Court rejected the claim, holding that "victim impact evidence is relevant to section 190.3, factor (a) ('The circumstances of the crime of which the defendant was convicted

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[5] Nothing had changed by the time of Mr. Tran's penalty phase in 2007. (*See*, *e.g.*, The American Heritage Dictionary (4th ed. 2006, 2000) p. 338, "circumstance," first, second, and seventh definitions ["[a] condition or fact attending an event and having some bearing on it; a determining or modifying factor," and a "condition or fact that determines or must be considered in the determining of a course of action," and "a particular incident or occurrence"]; The American Heritage College Dictionary (4th ed. 2007, 2004, 2002) p. 262, "circumstance," first definition ["[a] condition or fact attending an event and having some bearing on it; a determining or modifying factor"]; Random House Webster's Unabridged Dictionary (2nd ed., rev. 2002) p. 376, "circumstance," first definition ["a condition, detail, part, or attribute, with respect to time, place, manner, agent, etc., that accompanies, determines, or modifies a fact or event; a modifying factor."]; Webster's Third New International Dictionary (3rd ed 2002) p. 410, "circumstance," first definition ["a specific part, phase, or attribute of the surroundings or background of an event, fact, or thing or of the prevailing conditions in which it exists or takes place : a condition, fact, or event accompanying, conditioning, or determining another : an adjunct or concomitant that is present or likely to be present . . . ‹the time, place, and other [circumstance]*s* of an action›."].)

in the present proceeding'), and the court instructed the jurors with CALJIC No. 8.85, which tells them to 'consider, take into account and be guided by' such factors." (*Id*. at p. 573.) But while the observation that victim impact evidence was admissible under California law pursuant to section 190.3, subdivision (a), as a "circumstance of the crime" was legally accurate (*see People v. Edwards*, *supra*, 54 Cal.3d at p. 833), and the observation that CALJIC 8.85 informed the jury it could 'consider, take into account and be guided by" this factor was factually accurate (*People v. Brown, supra,* 31 Cal.4th at p. 573), the Court did not explain how the instruction actually told the jury itself that victim impact evidence was a "circumstance of the crime." Indeed, as noted above, a plain reading CALJIC 8.85 and the common dictionary definition of the word "circumstance" reveals that the jury is told no such thing.

In *People v. Zamudio* (2008) 43 Cal.4th 327, 369 -- relied upon by respondent (RB 133) -- defendant claimed that the jury should have been instructed, "Victim impact evidence is simply another method of informing you about the nature and circumstances of the crime in question. You may consider this evidence in determining an appropriate punishment." The Court rejected the claim by relying on *Brown*, *supra*, and holding that the proposed instruction was "adequately covered" in CALJIC 8.85 which "'instructed the jury to 'consider, take into account, and be guided by,' among other factors, 'the circumstances of the crime of which the defendant was convicted in the present proceeding.'" (*Ibid*.) The Court again did not consider the problem with *Brown*, *supra*,

and the fact that while CALJIC 8.85 informs the jury to 'consider, take into account, and be guided by" the factor of "the circumstances of the crime," the instruction does not actually inform the jury that victim impact evidence may be considered as part and parcel of the "circumstances of the crime."

In fact, where the Court has held that CALJIC 8.85 adequately instructs the jury that victim impact evidence may be considered as part and parcel of the "circumstances of the crime," the Court cited *Zamudio*, *supra*, or a case which itself relied on *Zamudio*, *supra*, without examination of the actual language of CALJIC 8.85 or recognition that the instruction actually says nothing about victim impact evidence. (*See*, *e.g.*, *People v. Bramit* (2009) 46 Cal.4th 1221, 1245 [relying on *Zamudio*]; *People v. Carrington* (2009) 47 Cal.4th 149, 198 [relying on *Zamudio*]; *People v. Tate* (2010) 49 Cal.4th 635, 708 [relying on *Zamudio*, *Carrington*, *Bramit*]; *People v. Russell* (2010) 50 Cal.4th 1228, 1265-1266 [relying on *Carrington*]; *People v. Famalaro* (2011) 52 Cal.4th 1, 39 [relying on *Zamudio* and *Bramit*]; *People v. Garcia* (2011) 52 Cal.4th 706, 762-763 [relying on *Zamudio*, *Tate*, *Carrington* and *Bramit*]; *People v. Enraca* (2012) 53 Cal.4th 735, 763-764 [relying on *Zamudio*, *Bramit* and *Brown*]; *People v. Williams* (2013) 56 Cal.4th 165, 197 [relying on *Tate*]; *People v. Romero and Self* (2015) 62 Cal.4th 1, 54-55 [relying on *Williams*]; *People v. Simon* (2016) 1 Cal.5th 98, 143 [relying on *Zamudio*, *Carrington*, and *Bramit*]; *People v. Potts*, 2019 Cal. Lexis. 2044 (Cal., March 28, 2019) [relying on *Simon*].)

In *People v. Harris* (2005) 37 Cal.4th 310, 358, the trial court actually did tell the jury that victim impact evidence was a "circumstance of the crime." There, the court instructed the jury, as requested by the prosecution, that "'[if] supported by the evidence, it is proper to consider the impact of the murder on the victim's family (including their pain and suffering) when determining the appropriate penalty. You are further instructed that such evidence is to be included within the meaning of factor (a), the circumstances of the offenses, in the preceding instruction (CALJIC No. 8.85) and is not a separate factor in aggravation.'" (*Ibid*.) The Court held that "[t]he instruction given properly informed the jury of the law regarding victim-impact evidence. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 835 [§ 190.3, factor (a), allows evidence and argument on specific harm caused by defendant, including impact on family of victim].)." (*Ibid*., parenthetical in original). A similar pinpoint instruction informing jury that victim impact evidence could be considered as a "circumstance of the crime" was found proper in *People v. Sousa* (2012) 54 Cal.4th 90, 138-139.)

If it is true that CALJIC 8.85 actually told the jury that victim impact evidence was a "circumstance of the crime" -- as respondent argues and this Court has held -- it is difficult to see why the trial courts in both *Harris* and *Sousa* found the additional pinpoint instructions were necessary and not superfluous. The fact remains that the trial courts in *Harris* and *Sousa* were right. CALJIC 8.85 does *not* inform the jury that victim impact

evidence is a "circumstance" of the crime, much less informs the jury of its proper use and limits. Mr. Tran can find no case that logically and meaningfully explains otherwise.

2. Neither CALJIC 8.84.1 nor the instruction given in this case informs the jury that emotion resulting from victim impact evidence cannot be considered.

Respondent's reliance on CALJIC 8.84.1 fares no better. CALJIC 8.84.1 instructs the jury, in relevant part, that it "must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings." The jury here was given the similar CALCRIM 761 instruction that it must "not allow bias, prejudice, or public opinion to influence your opinion in any way." (5 CT 1334.)

Nothing in CALCRIM 761 told the jury that it must keep its emotions resulting from the victim impact evidence in check. But even if the general instruction here conveyed to the jury the notion that it could not allow its emotions to affect its judgement, nothing in this instruction gave the jury any further guidance. It did not tell the jury why victim impact was introduced. It did not tell the jury that victim impact evidence was not introduced for its emotional effect, but rather "is designed to show . . . each victim's 'uniqueness as an individual human being," whatever the jury might think the loss to the community resulting from his death might be." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 823.) Respondent's argument to the contrary must be rejected.

XIII. MR. TRAN'S EIGHTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE PROSECUTOR ASKED THE JURY TO IMPOSE DEATH BY RELYING ON PRIOR FELONY CONVICTIONS AND CRIMINAL CONDUCT COMMITTED WHEN MR. TRAN WAS A CHILD.

Prior criminal acts are admissible at a capital defendant's penalty phase pursuant to section 190.3, subdivision (b). Under existing state law, it does not matter if the prior acts were committed when the defendant was a child. (*People v. Cox* (1991) 53 Cal.3d 618, 689.) The state introduced evidence of two prior felony adjudications -- and their underlying criminal conduct -- which Mr. Tran suffered as a child. (9 RT 1841-1869, 1881-1882.)

In Argument IX of his opening brief, Mr. Tran contended that admission of this evidence required a new penalty phase for three reasons. First, the rule permitting the use of juvenile conduct in aggravation of a capital sentence violates the Eighth Amendment, and must change, in light of three recent Supreme Court cases: *Roper v. Simmons* (2005) 543 U.S. 551, *Graham v. Florida* (2010) 560 U.S. 48 and *Miller v. Alabama* (2012) 567 U.S. 460. (AOB 256-261.) Second, the Eighth Amendment analysis is confirmed by an examination of objective indicia from around the country which reflect a societal consensus that juveniles are simply not mature enough to make decisions which can fairly be held to impact the rest of their life. (AOB 261-263.) Finally, on the facts of this case, the state will be unable to prove that admission of this juvenile conduct at the penalty phase was harmless. (AOB 266.)

The state disagrees, citing *People v. Bramit* (2009) 46 Cal.4th 1221, which rejects the argument that *Roper* itself precludes consideration of juvenile convictions in penalty phase aggravation. (RB 140.) As Mr. Tran conceded in his opening brief, although this case did not consider the impact of either *Graham* or *Miller*, the rationale on which it rejected his position is certainly broad enough to include those cases as well. As well-expressed in *Bramit*, the Court's position has been that reliance on *Roper* was "badly misplaced" because "[a]n Eighth Amendment analysis hinges upon whether there is a national consensus in this country against a particular punishment. (*Roper v. Simmons*, *supra*, 543 U.S. 551, 562–567. . . . Defendant's challenge here is to the admissibility of evidence, not the imposition of punishment." (46 Cal.4th at p. 1239.) This is the precise portion of *Bramit* on which the state relies. (RB 140.)

This distinction of *Roper* articulated in *Bramit* -- and on which the state now places so much reliance -- made sense prior to 2014. After all, up to that point it was entirely accurate to say -- as *Bramit* did -- that the Supreme Court's Eighth Amendment analysis was limited to assessing whether there was a "national consensus against a particular punishment."

But the United States Supreme Court has made clear this limitation on Eighth Amendment analysis is no longer true. (*See Hall v. Florida* (2014) 572 U.S. 701.) In *Hall*, the Court employed the identical Eighth Amendment analysis employed in *Roper* (and *Graham* and *Miller*) -- looking for a national consensus. But in *Hall*, the Court was

not assessing whether there was a "national consensus against a particular punishment," but instead it was assessing whether an evidentiary rule enacted by the Florida legislature violated the Eighth Amendment.

In *Hall*, defendant was sentenced to death in Florida prior to the Supreme Court ruled in *Atkins v. Virginia* (2002) 536 U.S. 304 that the Eighth Amendment precluded execution of the mentally retarded. In response to *Atkins*, the Florida legislature enacted a rule of evidence which provided that unless a defendant introduced an IQ test with a score lower than 70, he could not "present[] any additional evidence of his intellectual disability." (572 U.S. at p. 707. *See also id*. at p. 712 [absent a test score under 70, the state statute "bar[s] [a defendant] from presenting other evidence that would show his faculties are limited."].) The Supreme Court granted certiorari to decide whether this rule of evidence violated the Eighth Amendment.

Significantly, in evaluating this evidentiary rule under the Eighth Amendment, the Supreme Court applied the *identical* approach it had employed in *Roper* -- looking to see if this rule was consistent with a national consensus. (572 U.S. at pp. 714-718.) Because the Florida evidentiary rule was *not* consistent with the national consensus, it violated the Eighth Amendment. (*Id*. at p. 718.) In light of *Hall*, the suggestion by this Court in *Bramit* that traditional Eighth Amendment analysis was limited to assessing the propriety of a "particular punishment" is simply no longer true. Because the Eighth Amendment

analysis of *Hall* cannot be distinguished, *Bramit* no longer controls and the Court should reexamine the impact of the principles animating *Roper*, *Graham* and *Miller*.[6]

Alternatively, the state argues that any error was harmless. (RB 141.) The state's main thesis is that the aggravating evidence of the circumstances of the crime and other criminal history as an adult renders consideration of the juvenile conduct evidence harmless. (RB 141.)

The state's focus on the remaining aggravating evidence is, of course, one legitimate part of the harmless error calculus. But both federal and state courts have long recognized, proper harmless error review requires an analysis of the *entire* record, not just those portions of the record which the state selectively culls to support its position. (*See*, *e.g.*, *Rose v. Clark* (1986) 478 U.S. 570, 583; *People v. Galloway* (1979) 100 Cal.App.3d 551, 559.)

Here, the circumstances of the crime were indeed aggravating, as they are in all capital cases. But that does not mean the Court may ignore the mitigating aspects of the case which properly belong in a harmless error calculus. The defendant here -- in contrast to defendants in some other capital cases -- did not have a history of prior murders. (*Compare People v. Ray* (1996) 13 Cal.4th 313, 330-331 [defendant had two prior murder

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[6] Mr. Tran recognizes that the Court has recently rejected his argument. (*See People v. Rices* (2017) 4 Cal.5th 49, 86-87.) Mr. Tran nevertheless continues to raise the issue to preserve his rights to further review. (*See Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be re-raised to preserve the issue for federal habeas corpus review].)

convictions]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 567 [defendant had killed his three children in 1964 and had been on death row for these prior homicides]; *People v. Hendricks* (1987) 43 Cal.3d 584, 588-589 [defendant had two prior murder convictions].) Nor was this a case without mitigation. To the contrary, as discussed in some detail in the opening brief, the defense presented substantial evidence about defendant's troubled and abusive childhood, which ultimately led him to a gang life, his positive contributions and attributes, and his remorse over the death of Linda. (AOB 66-75.)

But the mitigating evidence is not the only factor the state ignores. The state also ignores entirely how the harmless error test is applied at the penalty phase. In assessing all this evidence in mitigation, and in determining if an error is harmless or prejudicial, the question is not whether the jury would have unanimously imposed a life sentence absent the error. Instead, it is whether on this record a single juror could reasonably have imposed a life sentence. (*See People v. Soojian* (2010) 190 Cal.App.4th 491, 521; *People v. Bowers* (2001) 87 Cal.App.4th 722, 735-736; *People v. Brown* (1988) 46 Cal.3d 432, 471 n.1 [conc. on. of Brossard, J.] [noting that a "hung jury is a more favorable verdict"

then a guilty verdict].) On this record, the error in permitting the state to introduce conduct committed when Mr. Tran was a juvenile requires a new penalty phase.[7]

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[7] The state also introduced a stipulation that Mr. Tran admitted the allegations in a juvenile petition accusing him of this conduct. (9 RT 1881-1882.) In his opening brief, Mr. Tran claimed there was no existing bar on the use of juvenile adjudications under section 190.3, subdivision (c). Mr. Tran relied on *People v. Pride* (1992) 3 Cal.4th 195, 256-257, in which the Court upheld the admission of a conviction in adult court of a crime committed when defendant was a minor that was later set aside under Welfare and Institutions Code section 1772 as section 190.3, subdivision (c), evidence. (AOB 252-253.) In a footnote, respondent argues (1) notwithstanding *Pride*, juvenile adjudications are not admissible as section 190.3, subdivision (c), evidence (RB 139, n.36., citing *People v. Lewis* (2008) 43 Cal.4th 415, 530; *People v. Burton* (1989) 48 Cal.3d 843, 861), and (2) evidence of the juvenile adjudications here was admitted as juvenile criminal conduct under section 190.3, subdivision (b), not subdivision (c). (RB 139, n.36.)

Mr. Tran now concedes both points. Juvenile adjudications are not admissible under subdivision (c). The juvenile adjudications here were admitted under subdivision (b). But respondent does not explain how this makes any difference. Even if evidence of the juvenile adjudications was admitted under subdivision (b), Mr. Tran's Eighth Amendment claim applies equally to this evidence.

IX. THE ADMISSION OF THE PRIOR JUVENILE ADJUDICATIONS OBTAINED WITHOUT A JURY TRIAL VIOLATED MR. TRAN'S RIGHT TO A RELIABLE PENALTY PHASE.

In Argument X of this opening brief, Mr. Tran contended that the state may not seek to impose a death sentence based on juvenile adjudications obtained in the absence of Sixth Amendment protections. (AOB 267-273.) Mr. Tran recognized this Court's decision in *People v. Nguyen* (2009) 46 Cal.4th 1007 in which the Court held the Sixth Amendment itself does not preclude the state from using juvenile convictions to enhance a sentence in the non-capital context. (AOB 271.) But, according to Mr. Tran, the question here was whether the Eighth Amendment requirement of reliability permits the same practice in a capital case. (AOB 272-273.)

Respondent does not address Mr. Tran's argument. (RB 142-143.) Instead, respondent argues "the prosecutor presented the evidence of Tran's juvenile offenses under factor (b), not factor (c)" and "the prosecutor was relying on evidence that Tran engaged in criminal conduct involving force or violence, not the adjudications themselves." (RB 142.) This argument not only ignores Mr. Tran's actual argument, but also ignores that the state actually did introduce and rely upon the "adjudications themselves." (7 RT 1881-1882; 12 RT 2407-2408.) Because respondent does not address Mr. Tran's argument, no further reply is necessary -- or even possible.

X. THIS COURT SHOULD RECONSIDER ITS DECISIONS PRECLUDING A DEFENDANT FROM ALLOCUTION WITHOUT CROSS-EXAMINATION.

In Argument XI of his opening brief, Mr. Tran contended that the trial court denied Mr. Tran's due process rights by refusing to allow allocution and an expression of remorse at the penalty phase. (AOB 274-280.) Mr. Tran further contended that -- because the issue of remorse was critical to the jury's determination of whether he should live or die -- the state would be unable to prove the error harmless beyond a reasonable doubt. (AOB 280-281.)

Respondent does not dispute that the error here was prejudicial. (RB 143-144.) Instead, respondent argues that the Court has previously rejected the argument that a capital defendant has a due process right to allocution upon request at the penalty phase. (RB 173-174.) Mr. Tran conceded this point in his opening brief. (AOB 279.) Although Mr. Tran believes these cases were incorrectly decided for the reasons stated in his prior briefing, if the Court elects to follow these cases, it must reject this argument.

XI. JUROR 7'S MISCONDUCT REQUIRES REVERSAL, BUT ALTERNATIVELY, A REMAND IS REQUIRED BECAUSE THE TRIAL COURT FAILED TO CONDUCT AN ADEQUATE HEARING AS TO ALL THE JUROR MISCONDUCT IN THIS CASE.

A. The Trial Court's Refusal To Declare A Mistrial After Learning That Juror 7 Violated The Court's Admonitions Not to View or Read News Stories Regarding the Case Requires Reversal, or Alternatively, Remand for Further Inquiry.

In the guilt phase, prior to the presentation of the state's case, the trial court twice admonished the jury to avoid media stories about the case. The jury was told it was "forbidden to read anything that's printed in the media, whether it be the Register or O.C. Weekly or the Times or on the internet or on T.V. . . . You have to avoid them. So please do not read, consider or even look at any media accounts of the case and "not read or listen to any accounts or discussions of the case reported by the newspapers or other news media" (5 RT 835-836, 838.) Prior to closing argument at the guilt phase, the court admonished the jury to "not do any research on your own" and "not use . . . the internet or other reference materials" or "investigate the facts or law." (4 CT 979.)

The foreperson -- Juror 7 -- violated these admonitions and committed misconduct. Juror 7 watched news stories and read newspaper articles about the American Bar Association's call for a national moratorium on executions and the United States Supreme Court's decision to review the legality of lethal injection. (12 RT 2497.) According to the juror, the news was "the top story on all the television news broadcasts," and "it was all over the internet," and "the lead story in the Los Angeles Times that day." (12 RT

2497.) Juror 7 also claimed that another juror -- possibly male -- brought up the news on the Supreme Court's decision during the penalty phase. (12 RT 2487, 2501.)

Juror 7 never brought his -- or the other juror's -- misconduct to the trial court's attention. Instead, the Juror 7 wrote about the news stories "toward the end of trial" in a three-page type-written document entitled, "Life or Death," for his "personal private deliberations." (12 RT 2486, 2494-2395, 2500.) He accidentally left the document in a folder in the jury deliberations room on the last day of penalty phase deliberations, which was subsequently discovered by court staff. (12 RT 2486.)

At the hearing on this misconduct, the trial court disclosed one paragraph of the document to trial counsel. The court believed the remainder of the document was a mere "thought-process thing." (12 RT 2486.) The paragraph read:

> "I cannot allow the fact that the American Bar Association ["ABA"] has recently resumed its campaign for a national moratorium on the death penalty to influence my judgment in this case. Likewise, I cannot consider the fact that the U.S. Supreme Court has agreed to review a case challenging the legality of execution by lethal injection as cruel and unusual punishment as I judge this case." (2 SCT 389.)

Defense counsel sought further inquiry into the timing of the document. (12 RT 2502.) The court refused any further inquiry. (12 RT 2502.)

Defense counsel then filed a motion for access to juror information pursuant to California Code of Civil Procedure section 237 with copies of newspaper stories on the ABA's call for a moratorium and the lethal injection case being reviewed in the Supreme Court. (5 CT 1402, 1421-1424.) The prosecutor agreed that the interests of justice would

be served by obtaining additional information at least from the other male jurors as to any discussions in deliberations regarding the news stories. (5 CT 1428.) At the hearing on the motion, in light of Juror 7's admission that another juror brought up the "the news article," and questions remained as to the specifics of what occurred, defense counsel requested that all the jurors be questioned. (12 RT 2511-2512.) The prosecutor had no objection to inquiry of all jurors except Juror 7 -- who had already been questioned. (12 RT 2512.)

The trial court refused. (12 RT 2513.) The court did, however, grant the defense motion to initiate proceedings pursuant to section 237 for the disclosure of juror information, which required notifying the jurors that the information was requested and a hearing would be conducted. (12 RT 2513.)

Four jurors -- Jurors 2, 3, 7 and 9 -- came to the subsequent hearing. Juror 2 recalled the news stories being brought up in jury deliberations, but did not recall the juror who brought the matter up. (12 RT 2526-2567.) Juror 3 did not recall any discussion. (12 RT 2532-2534.) Juror 7 recalled the news stories being brought up towards "the front" of deliberations, like "about a day and a half" or "the first day." (12 RT 2535.) Juror 9 recalled hearing about the news stories either "before or after the trial." (12 RT 2537.)

Jurors 1, 4, 5, 6, 8, 10, 11 and 12 were never questioned. The identity of the juror who raised the news stories in deliberations remained unknown. The trial court refused,

however, to conduct any further inquiry or reveal the identities of jurors. (12 RT 2545-2546.) The court then refused to grant a new trial. (12 RT 2563-2564.)

In his opening brief, Mr. Tran contended that the trial court erred in refusing a new trial based on Juror 7's receipt of extrinsic material about the ABA's call for a moratorium and the lethal injection case being reviewed in the Supreme Court. (AOB 296-309.) Alternatively, Mr. Tran contended that the court's failure to conduct an adequate hearing in determining the extent of the misconduct, especially in light of Juror 7's claim that another juror too had brought up the news stories in penalty phase deliberations, requires remand. (AOB 309-313.) Finally, Mr. Tran contended that the court's failure to disclose the remainder of three-page typewritten document and conduct a hearing in determining whether Juror 7 committed further misconduct requires remand. (AOB 313-317.)

Respondent agrees that Juror 7 committed misconduct. (RB 153.) Respondent further agrees that there is a resulting presumption of prejudice. (RB 153.) But then respondent argues that the presumption has been rebutted because the extraneous material was not inherently prejudicial and there was not a substantial likelihood of actual bias. (RB 153-159.) Respondent further argues that no remand is necessary because there was a sufficient inquiry into any misconduct. (RB 159-164.) Each of these arguments must be rejected.

Respondent argues the presumption of prejudice has been rebutted "because there is no substantial likelihood" of bias as the extraneous material was not inherently prejudicial. (RB 153-156.) The argument is not persuasive.[8]

Juror 7 saw television news stories and read newspaper articles on the ABA's campaign for a death penalty moratorium, and the Supreme Court's decision to take up a case on the legality of lethal injections as cruel and unusual. Respondent argues this extrinsic material was not "inherently prejudicial," and instead cites two articles -- an October 28, 2007 ABC News report and an October 31, 2007 Los Angeles Times article -- and argues, "[i]f anything, the news items were more helpful than harmful to appellants." (RB 154.) According to respondent, the articles merely expressed "[t]he fact that the Supreme Court was reviewing the constitutionality of *one particular execution protocol* and that a bar organization *sought* a moratorium on executions pending further investigation and reform would not cause a juror to conclude that the ultimate responsibility for a death judgement rested elsewhere." (RB 155, emphasis in original.)

Respondent does not explain how this information is actually helpful to Mr. Tran. Indeed, as respondent notes, the October 28, 2007 article also discussed the ABA's finding "that there were serious flaws in the death penalty system of the eight states

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[8] Respondent also argues that there is no substantial likelihood of "actual bias" in this case. (RB 156-159.) Mr. Tran anticipated and fully addressed respondent's arguments in his opening brief. (AOB 304-309.) There is no need to repeat that discussion here.

studied" and that "over 100 prisoners had been released from death sentences based on faulty convictions," plus "most states had frozen any scheduled executions," and the October 31, 2007 article had cited California as having "a de facto moratorium." (RB 154.) If any of the jurors had read these articles -- and the record does not show either way -- they would have learned that a death verdict did not necessarily mean death. Put simply, contrary to respondent's argument, there was nothing actually helpful to Mr. Tran in these articles.

But more importantly here, the argument is difficult to fathom in light of the actual record. As respondent concedes, "it is unclear what precise articles were viewed by Juror 7 and the other juror . . . ." (RB 155.) Without knowing the exact content of the unknown newspaper articles -- or the unknown television news stories -- it is impossible to glean what information could have been helpful to Mr. Tran.

Indeed, there is no need to guess as to what Juror 7 knew. Juror 7 wrote that "the American Bar Association has recently resumed its campaign for a national moratorium on the death penalty" and "the U.S. Supreme Court has agreed to review a case challenging the legality of execution by lethal injection as cruel and unusual punishment." (2 SCT 389.) As respondent recognizes, "[a] finding of inherently likely bias is required when . . . the extraneous introduction in the trial itself would have warranted reversal of the judgment. (RB 153, citing *In re Carpenter* (1995) 9 Cal.4th 634, 653.) Mr. Tran has already fully explained in his opening brief why that is the exact case here. (AOB 302-

304.) He does not need to repeat that discussion. Suffice it to say that had this information been injected at trial -- that there might be a national moratorium on the death penalty and lethal injection might be considered cruel and unusual by the Supreme Court -- reversal would have been warranted. Respondent's argument to the contrary must be rejected.

Mr. Tran alternatively argued that even reversal is not warranted on the record here, remand is required to conduct a more meaningful and adequate hearing into juror misconduct. As noted above, Jurors 1, 4, 5, 6, 8, 10, 11 and 12 were never questioned about news stories, and the identity of the juror who raised the news stories in deliberations remains unknown. Respondent argues that the trial court's inquiry was nonetheless adequate because Juror 7 "immediately admonished the jurors that they could not consider such information, and the topic was not discussed again. (RB 159. *See also* RB 163.) This argument is remarkable.

The trial court itself twice admonished the jurors that they could not consider this information. (4 CT 984; 5 CT 1354.) Nonetheless, Juror 7 not only considered this information, but also told the court that another juror brought up the information during jury deliberations. (12 RT 2487, 2501.) Having disregarded each of these admonitions, respondent never explains why this Court should turn around and simply believe that this unknown juror followed Juror 7's admonition to rely only on evidence presented in court. The law is quite to the contrary. The unknown juror's willingness to disobey the trial

court's admonitions "casts serious doubts on his willingness to follow the court's other instructions." (*People v. Cissna* (2010) 182 Cal.App.4th 1105, 1118. *See also In re Hitchings* (1993) 6 Cal.4th 97, 120 ["[w]hen a person violates his oath as a juror, doubt is cast on his ability to otherwise perform his duties"].) By parity of reasoning, there is even less reason to believe the unknown juror would nonetheless follow a fellow juror's instructions.

Contrary to respondent's position, although a reviewing court can typically presume a juror followed instructions (*People v. Gray* (2005) 37 Cal.4th 168, 217), it cannot do so when it is undisputed that a juror "disregarded an instruction that he was repeatedly told was essential to the fairness of the trial." (*People v. Cissna*, *supra*, 182 Cal.App.4th at p. 1119.) Juror 7's instruction to not discuss the news stories demonstrates that he knew he had violated the court's admonition not to consider evidence not received in the courtroom, and he knew that another juror was committing the same misconduct, yet he failed to inform the court. And, consistent with what Juror 7 told the court, there is no doubt that the unknown juror here disregarded instructions not to consider information outside the evidence at trial, having specifically brought it up during deliberations. (12 RT 2487, 2501.)[9]

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[9] Thus two jurors had already committed misconduct, and as discussed above, received extraneous material that was inherently prejudicial. Juror 7's recognition that he and another juror had committed misconduct cannot overcome this prejudice.

The fact remains that the identity of the juror who raised the news stories in deliberations remains unknown. Jurors 1, 4, 5, 6, 8, 10, 11 and 12 were never questioned. Remand is required for a full hearing to ascertain the identity of the unknown juror, along with any details of the exposure of the news stories to this juror and the remaining jurors.

B. Remand Is Required to Determine Whether Juror 7 Committed Further Misconduct as Revealed in His Previously Undisclosed Portion of the Three-page Typewritten Document.

During voir dire, the potential jurors were all told that "the defendant or defendants may not testify," and "they have a right to allow you to judge the case on the evidence before you," and thus, "[t]he fact that he didn't testify is nothing." (3 RT 487-488, 524.) All the potential jurors agreed that they could "follow the law" and it was a "fair thing to do." (3 RT 488, 524.) During the guilt phase, prior to the state's case, the trial court admonished the jurors that "[i]f the defendant does not testify, you may not consider that for any purpose. It can't enter into your deliberations in any way." (5 RT 830.) During the penalty phase, the court again instructed, "You may not draw any adverse inferences against the defendant from his failure to take the stand. You may not consider it as evidence the defendant lacks remorse." (12 RT 2346. *Accord Griffin v. California* (1965) 380 U.S. 609 [Fifth Amendment to the United States Constitution prohibits comment on a criminal defendant's invocation of his constitutional right to remain silent in the face of criminal charges.]

Moreover, at the guilt phase, the trial court instructed the jury that it must "decide what happened, based only on the evidence that has been presented to you in this trial." (4 CT 977.) Both at the guilt and penalty phase, the court repeated that the jury must "use only the evidence that was presented in this courtroom." (4 CT 977, 983.) Both at the guilt and penalty phase, the court further instructed that the jury "must disregard anything you saw or heard when the court was not in session . . . ." (4 CT 984; 5 CT 1354.) Finally, at both the guilt and penalty phase, the court admonished the jury that it "must not deliberate unless and until all twelve jurors are present in the jury room." (4 CT 1061; 5 CT 1378.)

After the hearings on Juror 7's misconduct, the trial court sealed the undisclosed portion of his three-page typewritten document. (12 RT 2546.) The full document, entitled "Life, or Death?," covered various points, but as relevant here, stated:

> ". . . The defendants in this case do not fit my definition of 'penitent.' I think their remorse may be genuine, but the fact that they did not voluntarily submit themselves to the law and confess their crimes taints their remorse, and disqualifies them as truly penitent in my view. They may be sorry for killing Linda Park, but they are also sorry they were caught and convicted. . . .
>
> "The crime required sustained murderous intent. If either of them feels remorse, it may be genuine, but it is not pure and it is too little too late. Remorse merely signifies that your moral compass is working. Remorse is but the first step in true penitence. I am sure they are both sorry the police caught with them; if they were truly penitent they would have turned themselves in, confessed, and attempted to make some kind of effort at restitution. I doubt they would have done so by now if the police hadn't caught them. Mr. Ciulla stated in court that mercy was something freely given, without price. I believe otherwise, the price of mercy is genuine

> penitence, which consists of remorse, confession, forsaking and restitution. Would the defendants still be free men today, keeping their secrets, if the police had not detected them? . . .
>
> "Their remorse for killing her may be genuine, but so is their remorse for being caught and convicted. Remorse alone is insufficient, in my opinion, to merit mercy. . . ." (2 SCT 390-391.)

In his opening brief, Mr. Tran contended that the undisclosed portion of Juror 7's three-page typewritten document revealed further misconduct, and the trial court's refusal to disclose the entire document to counsel for an evidentiary hearing requires reversal. After all, the undisclosed portion of the document revealed that Juror 7 violated the trial court's instructions by deliberating about the case outside the jury room and the presence of the remaining jurors, by considering Mr. Tran's failure to confess his crimes to police (a fact that was never adduced at trial) along with his subsequent silence, and finally, by taking these considerations as a significant sign that Mr. Tran lacked remorse. (*See* AOB 313-317.)

Respondent does not address Mr. Tran's argument that the three-page typewritten document itself reveals misconduct. (RB 164-171.) Nor does respondent address Mr. Tran's argument that because the three-page typewritten document reveals misconduct then remand is required for a full hearing. (RB 164-171.) Instead, respondent simply argues that the entire undisclosed portion of the document was inadmissible under Evidence Code section 1150. (RB 166-169.)

Section 1150 does not aid respondent. Section 1150 states in relevant part, "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly" but "[n]o evidence is admissible to show the effect of such a statement . . . upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." (§ 1150, subd. (a).) Thus, "jurors may testify to 'overt acts' . . . but may not testify to 'the subjective reasoning processes of an individual juror." (*In re Stankowitz* (1985) 40 Cal.3d 391, 397.)

Here, Mr. Tran agrees that the evidence that Juror 7 wrote that Mr. Tran remained silent and failed to confess his crimes, and thus lacked remorse, was not admissible to show that Juror 7 held this impression against Mr. Tran when determining his verdict. Instead, the evidence was admissible to prove Juror 7 actually made the statements that Mr. Tran's silence and failure to confess evidenced a lack of remorse. As such, the evidence of Juror 7's statements was proof of "overt acts," and thus, admissible under *Stankowitz* and section 1150.

Respondent also argues that "Juror 7's notes were not 'statements' within the meaning of section 1150 because they were not made to anyone else." (RB 167.) Mr. Tran can find no case -- and respondent cites none -- that requires that "statements" must be made "to anyone else" before qualifying as "statements" under section 1150. But in

any event, respondent's argument makes no sense. If Juror 7's statements do not qualify as "statements" under section 1150, then section 1150 does not even apply here.

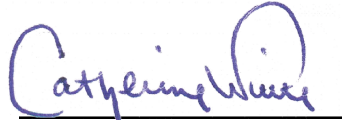
Respondent finally argues that "[a]ppellants conveniently ignore other portions of the document that reveal that Juror 7 was thoughtful, conscientious, and fair-minded." (RB 170.) Mr. Tran has no reason to doubt that Juror 7 was all these things. But, as respondent itself notes, this is not about "blameworthy conduct," but instead about jury misconduct. (RB 153.) Juror 7 plainly committed misconduct by ignoring the trial court's instructions and considering Mr. Tran's failure to confess to police, which was never introduced as evidence at trial, and subsequent silence as evidence that Mr. Tran lacked remorse. Juror 7's other good qualities have no place in this discussion. Misconduct has occurred. Remand is required.

CONCLUSION

Mr. Tran considers the remaining issues raised in his opening brief to be fully joined by the current briefing on file with the Court. Accordingly no further discussion of those issues is necessary here. For all these reasons, and for the reasons identified in the Mr. Tran's opening briefs and the briefings of his co-appellant in which Mr. Tran continues to join pursuant to California Rule of Court 8.200, the guilt verdict, special circumstance finding and verdict of death must be reversed.

DATED: June 14, 2019

Respectfully submitted,

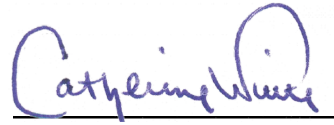


Catherine White
Attorney for Appellant
Ron Tri Tran

CERTIFICATE OF COMPLIANCE

I certify that the accompanying non-redacted brief is double spaced, that a 13-point proportional font was used, and that there are 24,202 words in the brief.

Dated: June 14, 2019



Catherine White

CERTIFICATE OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action. My business address is 4833 Santa Monica Avenue, #70220, San Diego, California 92107.

On June 14, 2019, I served the within

APPELLANT'S REPLY BRIEF, S165998

upon the parties named below by depositing a true copy in a United States mailbox in San Diego, California, in a sealed envelope, postage prepaid, and addressed as follows:

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Ronald Tri Tran : Appellant
CDC Number: G-30920
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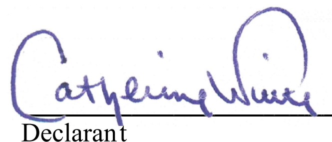
appellate@da.ocgov.com

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

Executed on June 14, 2019, in San Diego, California.



Declarant

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 6/14/2019 by April Boelk, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. PLATA (NOEL) & TRAN (RONALD)**
Case Number: **S165998**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **white193690@gmail.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

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SUPPLEMENTAL BRIEF	APPELLANTS SUPPLEMENTAL OPENING BRIEF
MOTION	MOTION FOR LEAVE TO FILE A SUPPLEMENTAL AOB

Service Recipients:

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

6/14/2019

Date

/s/Catherine White

Signature

White, Catherine (193690)

Last Name, First Name (PNum)

Law Office of Catherine White, APC

Law Firm