S065467

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**



PEOPLE OF THE STATE OF CALIFORNIA,

*Plaintiff and Respondent,*

RONALD BRUCE MENDOZA,

*Defendant and Appellant.*

**APPELLANT'S OPENING BRIEF**

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the County of Los Angeles

HONORABLE ALFONSO M. BAZAN, JUDGE

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**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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| PEOPLE OF THE STATE OF CALIFORNIA, | ) | S065467 |
| *Plaintiff and Respondent,* | ) | Los Angeles County Superior Court No. KA032117 |
| v. | ) | |
| RONALD BRUCE MENDOZA, | ) | |
| *Defendant and Appellant.* | ) | |

# APPELLANT'S OPENING BRIEF

## STATEMENT OF THE CASE

By an information filed on September 3, 1996, appellant was charged in Los Angeles Superior Court case number KA032117 in Count 1 with murder (Pen. Code, § 187, subd. (a))[1] and three special circumstances – murder of a police officer (§ 190.2, subd. (a)(7)), murder committed for the purpose of avoiding a lawful arrest (§ 190.2, subd. (a)(5)) and murder committed while lying in wait (§ 190.2, subd. (a)(15)). As to Count 1, the information also alleged enhancements for the personal use of a firearm (§ 1203.06, subd. (a)(1) and 12022.5 subd. (a)(1). (CT 6:506-507.)[2]

[1] Unless otherwise indicated, all statutory references are to the California Penal Code.

[2] "RT" refers to the Reporter's transcript on appeal and "CT" refers (continued...)

The Los Angeles County Public Defender's Office declared a conflict in appellant's case (RT 1:1) and private attorney Rayford Fountain was appointed on September 16, 1996. (CT 2:520; 1:8.) At the arraignment in superior court on September 3, 1996, appellant entered a plea of not guilty to the charge in the information and denied the special circumstances and weapon allegations. (CT 2:510.)

Before jury selection, on May 13, 1997, the prosecution filed a letter of intent to introduce evidence of aggravation in the penalty phase. (CT 2:536.) The prosecution noticed as evidence of aggravation an uncharged shooting incident and robbery on July 30, 1994, and victim impact evidence from the victim's mother and sister and friends from the Pomona Police Department. (*Ibid.*)

The prosecution pretrial motions to admit evidence of appellant's parole status (CT 2:543), for admission of crime scene photographs of the victim (CT 2:555), and to preclude the defense from questioning prosecution witness Flores on her "sex life" which were all granted. (CT 2:552.) The defense made no pretrial motions.

Jury selection began on July 16, 1997, and the guilt phase of the trial began on July 23, 1997. (CT 12:3390, 3400, 3408, 3411.)

At the close of the prosecution case, a defense motion pursuant to Penal Code section 1118.1 to dismiss the lying in wait special circumstance

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[2](...continued)
to the Clerk's transcript on appeal. The volume and page references will be separated by a colon, i.e. "RT 2:501" refers to Reporter's transcript volume 2 and page 501.

was argued and denied. (CT 13:3540.)[3] A defense motion to dismiss the remaining two special circumstances was also denied. (RT 14:2059; 15:2173.)

Appellant did not testify.

Following argument and instruction, the jury retired to deliberate on August 12, 1997. (CT 13:3545.) The following day, August 13, 1997, the jury announced the verdict. (CT 13:3637.) Appellant was found guilty of Count 1 and the special circumstances and weapon use allegations were found true. (CT 13:3636.)

The penalty phase of the trial began on August 18, 1997, and concluded on August 21, 1997. (CT 13:3642, 3653.) Arguments and instruction were concluded on August 22, 1997, and the jury returned a death verdict the same day. (CT 13:3654, 3668.)

At the sentencing hearing held on October 24, 1997, appellant's motion for new trial was argued and denied, as was the defense motion to reduce the penalty to life without parole. (CT 13:3732-3734.) As to Count 1, the trial court imposed the death penalty. (CT 13:3734; RT 18:2907.)

## STATEMENT OF APPEALABILITY

This appeal is from a final judgment imposing a verdict of death and it is automatic under Penal Code section 1239, subdivision (b).

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[3] Ultimately the trial court dismissed the lying in wait special circumstance at sentencing pursuant to Penal Code section 1385 ["The judge . . may, . . . in the furtherance of justice, order an action to be dismissed"] finding there was not a substantial period of watching and waiting. (RT 18:2868, 2875, 2907.)

## STATEMENT OF FACTS

### Introduction

The shooting of Officer Timothy Fraembs, a Pomona police officer was reported on May 11, 1996 at approximately 1:30 a.m. When the police arrived there were no witnesses at the scene. Who killed the officer and why were the questions the jury was asked to answer. Four days after the shooting, Johanna Flores told the police she witnessed appellant shoot the officer moments after the officer detained them with no probable cause.

The jurors were asked to answer the question who killed the officer based on the biased testimony of Flores, yet they were not apprised of her bias and her testimony was illegitimately enhanced with evidence of threats and her fear. The prosecutor was permitted to introduce evidence of threats by third parties against other witnesses thereby creating an atmosphere which also infected the jurors with fear.

The jurors were asked to determine whether the killing was a premeditated and deliberate killing or a killing committed while lying-in-wait despite the fact the evidence was insufficient to sustain either verdict. The trial court found there was an insubstantial period of watching and waiting, yet the question whether the killing was committed while lying-in-wait and whether the special circumstance of lying-in-wait was true was submitted to the jury.

The answer to the second question – why the officer was killed – was assured by the erroneous admission of attenuated testimony that appellant was on parole and once said he did not want to go back into custody. The evidence was also insufficient to establish the special circumstances of killing of a police officer and killing to evade arrest and these issues should not have gone to the jury.

A death verdict was virtually assured when the court failed to instruct the jurors that Penal Code section 190.3 factors (d), (e), (f), (g), (h) and (j) were exclusively mitigating and the prosecutor argued the absence of those factors made them aggravating. Based on the errors set forth below, the convictions and death judgment in appellant's case should not be allowed to stand.

**A. Guilt Case**

At approximately 1:30 a.m. on Saturday, May 11, 1996, Rupert Bascomb was working as a security guard at the Hughes Avacom facility on Humane Way when he heard a single shot. (RT 13:1937.) He heard a woman's voice saying, "Let's go, let's get out of here," or "Let's move from here." (RT 13:1940.) He saw two individuals he believed to be Hispanic males run across a dirt area. (RT 13:1941.) One was carrying something that could have been a gun. (RT 13:1940, 1944.) Before hearing the shot, Bascomb saw a police car drive by southbound on Humane Way. (RT 13:1938.)

At 1:37 in the morning, a 911 call was placed by an unidentified female reporting that a police officer "was down" in the area of Mission Boulevard and Humane Way in Pomona. (RT 5:656-659.) Pomona Police Officer Oliveri was first to arrive at the scene and found fellow officer Daniel Tim Fraembs lying face up next to the open door of his police car with a gunshot wound to the head. (RT 5:694, 696, 697.) His car was parked near the curb on Humane Way facing south, just north of Mission. (RT 5:697.) Officer Fraembs was dressed in full police uniform; the engine of his car was running; the headlights were on and the spotlight was on and pointed forward, toward the west sidewalk of Humane Way. (RT 5:695-696.) His radio was off; his weapon was snapped into its holster and his

baton was in its holder. (*Ibid.*) A spent .45 Remington shell casing was found 10 to 12 feet east of where Officer Fraembs lay, near his feet. (RT 5:714, 732, 749; 8:1263.) An expended bullet was later found in the grass approximately 10 feet east of the East curb of Humane Way. (RT 9:1296-1298; 12:1809.) The bullet tested positive for blood though it could not be said whether the blood was animal or human. (RT 10:1479.) The bullet was a .45 caliber round nose bullet (RT12:1808) consistent with the casing found. (RT 12:1809.) No weapon was found. (RT 12:1841.)

Officer Oliveri arrived at the scene within one minute of the dispatch of the call at 1:37 a.m. (RT 5:710.) He did not see anyone in the area or running from the scene. (RT 5:713.) Twenty to thirty other police units arrived within two to three minutes. (RT 5:704.) Eventually, 200 police officers responded to the scene. (RT 5:736.)

Sergeant Lafluer of the Pomona Police Department arrived at the scene within two to three minutes of hearing the broadcast of an injured officer at 1:37 a.m. and cordoned off the area. (RT 5:725, 731.) Pomona Police Officer Ferrara was directed to search the west and northwest areas of the crime scene perimeter that had been set up. (RT 6:768.) Several hours later Officer Ferrera along with a K-9 officer and dog searched bushes alongside a nearby abandoned incinerator. (RT 6:774.) He let the dog loose among the bushes and, after a few seconds heard a man yelling, "get him off, puto." (RT 6:777.) An Hispanic man with a shaved head, wearing a baggy white t-shirt, baggy gray pants and tennis shoes, with scratches on his face and arms emerged from underneath the incinerator. (RT 6:780.) He had a belt with a knife sheath attached, but no knife. (RT 6:781.) As he was being moved from the area, the man complained he had trouble walking because he had been shot on another occasion.

(RT 6:782.) He was Joseph "Sparky" Cesena. (RT 6:777.) A knife was found in the vegetation in the area. (RT 8:1290.)

Nineteen-year-old Johanna Flores, also known as Goon, testified she saw appellant shoot Officer Fraembs on May 11, 1997. (RT 6:819-820.) At that time, Ms. Flores was divorced from the father of her 2-year-old daughter and had known appellant for two to three months. (RT 6:819-820, 821.) Ms. Flores met appellant, also known as Boxer, through her friend Chantal Cesena, a relative of Joseph Cesena. (RT 6:820-821.) Appellant gave her his phone and pager numbers. (RT 6:825.) She saw him for three weeks before they became romantically involved (RT 6:827), however, Ms. Flores was more seriously involved with a man named Carlos from Baldwin Park. (RT 6:833.)[4]

Appellant lived with his mother, stepfather and brother, Angel, also known as Bandit. (RT 6:829.) Appellant and Angel were members of the Happy Town gang, a Pomona street gang. (RT 6:830.) Ms. Flores denied being a gang member. (RT 6:837, 953.) At the time that Ms. Flores was seeing appellant, he was in communication with Brandy Velore, a young woman who lived in Lake Havasu, Arizona who was about to have his baby. (RT 6:838-839.)

On May 10, 1997, Ms. Flores was working at Taco Bell. (RT 6:845.) Appellant called her close to 11:00 p.m., when her shift ended. (RT 6:846.) Chantal Cesena picked up Ms. Flores and they went to the

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[4] At various times, Ms. Flores said she had sex with appellant's brother Angel Mendoza (RT 7:950), never had sex with appellant's brother (RT 7:949), kissed Angel, or pushed him away when he tried to kiss her. (RT 7:956.)

house of another Happy Town member, Tank,[5] on 9th Street, a block over from appellant's house on Grier Street. (RT 6:847.) At Tank's house, Ms. Flores and Ms. Cesena met up with appellant and Jasper, another Happy Town gang member.[6] (RT 6:849.) All four talked, then Ms. Flores and appellant went into another room to have sex. (RT 6:851.)

Ms. Cesena received a call from Joseph Cesena asking for a ride. Ms. Cesena told him she would not give him a ride, then she and Jasper left. (RT 6:852.) Flores remained with appellant when his pager started beeping. At first appellant would not tell Ms. Flores who had called, but then appellant admitted Brandy Velore had called him. He would not let Ms. Flores hear the message. (RT 6:853.) Ms. Flores and appellant started arguing and Ms. Flores hit appellant near his waistband. (RT 6:855.) Appellant took a gun out of his waistband and checked it. (RT 6:856.) He told Ms. Flores it was a .45 caliber gun. (RT 6:857.)

Ms. Flores next heard appellant on the phone with Mr. Cesena.[7] She also talked to Mr. Cesena. (RT 6:863.) Appellant told Mr. Cesena he would meet him near the railroad tracks. He asked Ms. Flores if she was coming and told her to hurry up because he was "strapped." (RT 6:865.)[8]

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[5] Officer Collins identified Tank as Raul Arvizu. (RT 12:1866.)

[6] Initially, Ms. Flores did not tell the police about who was at the house because she was afraid Jasper would do something to her and her family. (RT 7:960.) At the preliminary hearing, she testified Chantal and Jasper were at the house. (RT 7:1014.)

[7] Joseph Cesena did not testify at trial.

[8] Prior to that night, a considerable time before the incident, appellant told Ms. Flores that he was on parole and did not want to go back into custody. (RT 6:880; 7:984, 1000, 1012.)

They walked down 9th Street and Westmont Avenue toward Mission Boulevard where they met up with Cherie Hernandez, Elva Arambula and Jason Meyers who were walking back from a 7-Eleven store to Ms. Arambula's house. (RT 6:866-867; 7:1080; 8:1214.) Appellant asked the group for a cigarette and Ms. Hernandez gave him one and lit it for him. (RT 6:870.) This made Ms. Flores mad and she hit and cursed appellant. (RT 6:870; 7:1086; 8:1221.)

Ms. Flores and appellant continued walking. On Humane Way they met up with Mr. Cesena. (RT 6:872.) Mr. Cesena had a knife that snapped out. (RT 6:878). The three planned to walk back to Tank's house when a bright light flashed from behind them onto the ground in front of them. (RT 6:876-877.) They all looked around behind them and saw a police officer in a police car. (RT 6:879.) Appellant said, "oh, shit, the jura."[9] (*Ibid.*) The police car came to a stop behind them on the same side of the street. (RT 6:880.) Ms. Flores was closest to the curb walking beside appellant; Mr. Cesena was walking a little behind them. (RT 6:877.) Appellant said, "Oh, shit. I got the gun," and Ms. Flores and Mr. Cesena told appellant to run. (RT 6:883, 884.)[10]

The officer got out of the car leaving the driver's side door open. (RT 6:882.) He asked the group how they were doing. (*Ibid.*) Appellant asked the officer why he was stopping them. (RT 6:885, 889.)[11] The

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[9] "Jura" means "cops." (RT 6:879.)

[10] Ms. Flores testified she either told appellant to run at that time or when the officer asked them how they were doing. (RT 6:883, 886.)

[11] At trial, Ms. Flores testified appellant had an "attitude" and the officer was "nice" (RT 6:885, 883), but prior to trial she told the police and (continued...)

officer called Mr. Cesena, who was closet to him, over to the car, and told the others to have a seat on the curb. (RT 6:885.) Mr. Cesena went to the hood of the car and placed his hands on the front fender while the officer patted him down. (RT 6:887.)

Appellant who had been holding hands with Ms. Flores, put his arm around her shoulder and stepped behind her as they walked to the street. (RT 6:889.) Ms. Flores stepped into the street as appellant applied pressure to her back. (RT 6:890.) Once they were in the street, she felt his hand in her back. (RT 6:891.) She took one or two steps toward the officer, then appellant pushed her toward the passenger side of the car. (RT 6:892.) She turned and saw appellant with a gun in his outstretched hands take one or two more steps forward, and shoot the officer one time. (RT 6:894, 897.) The gun was about two to three feet away from the officer. (RT 6:894.) The officer fell to the ground on one side, then onto his back. (RT 6:899.) Appellant then pointed the gun at Ms. Flores's torso and asked her two times if she was going to say anything. (RT 6:900.)[12] She said no, and he told her to run. (RT 6:901.)

As soon as the officer was shot, Mr. Cesena ran back in the direction from which he had come (RT 6:901), and appellant and Ms. Flores ran toward Mission. (RT 6:902.) Eventually appellant ran one way and she ran home. (RT 6:913, 920.)

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[11](...continued)
the prosecutor appellant was paranoid and panicked, and simply asked the officer why they were being stopped. (RT 7:976, 977, 979.)

[12] Prior to testifying, Ms. Flores told the police that when appellant pointed the gun at her he was nervous and didn't know what he had done. (RT 7:979.)

In the morning, Ms. Flores called appellant's house and talked to his brother who threatened her. (RT 6:922.) She then spoke to appellant and asked how he was. He said he was a killer, it was just "a fucking pig," just another day in the "hood." (RT 6:923.)[13] She was shocked and afraid, but talked to appellant for another 15 to 20 minutes. (RT 6:924-925.) Appellant asked her if she took his pager, and she said no, though she may have grabbed the pager when she was angry that Ms. Velore had called appellant. (RT 6:925; 7:979.) Appellant said he must have lost it "over there." (RT 6:925.)

A Motorola pager with cap number BST 1133627 and a "King of Beepers" sticker was found on the west sidewalk of Humane Way. (RT 8:1249-1251.) The pager contained Joseph Cesena's phone number. (RT 8:1288.) A service agreement between Ronald Mendoza and J&J King of Beepers for pager number 18049411 was made out on January 26, 1996. (RT 9:1314, 1317, 1318.) The original pager was "swapped" for a pager with cap code 1133627 on April 2, 1996. (RT 9:1330, 1335.) A service agreement and swap was also entered into between J&J and Angel Mendoza on January 26, 1996 and April 2,1996. (RT 9:1356-1357.) On May 17, 1996, the pager service on beeper cap number 1133627 was canceled. (RT 9:1346.)

Ms. Flores told her parents about the incident either the following day or the day after. (RT 6:932.) A few days after the incident, Father Charles Gard, a Roman Catholic priest, spoke with Ms. Flores's father and

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[13] In neither her statement to the police nor at the preliminary hearing did Ms. Flores ever state that appellant called Officer Fraembs a "fucking pig," however, that is what she claimed to recall at the time of trial. (RT 7:1002-1004.)

then with Ms. Flores. (RT 7:1042-1043.)[14] She told him she witnessed the murder of a police officer and named the killer. (RT 7:1075.) He held her story in confidence, but urged her to talk to the police. He called a parishioner who worked for the district attorney and the police came to his parish office to talk to Ms. Flores. (RT 7:1074.) She did not call 911 or talk to the police before contacting the priest because she feared appellant or his gang would do something to her. (RT 6:933.) Ms. Flores's entire family was relocated by the Pomona Police Department at her request. (RT 7:944.)

Ms. Flores regularly snorted methamphetamine and drank alcohol, though not every day. (RT 7:958.) She said appellant used methamphetamine the day before the shooting. (RT 7:976.) Methamphetamine makes a person paranoid and unable to sleep, nervous and hyperactive. (RT 7:959.) Ms. Flores did not use methamphetamine the night of the incident (RT 7:960), nor did she see appellant use drugs or alcohol that night (RT 7:941), though he might have used something before she met up with him that night. (RT 7:1016.) At the preliminary hearing, Ms. Flores testified she thought appellant might have used drugs that day. (RT 7:1019.)

That night, Jason Meyers drank about eight beers and used methamphetamine with Ms. Arambula and Ms. Hernandez. (RT 8:1107, 1160.) When he saw appellant on the way to the store appellant could have

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[14] In front of the jury Father Gard testified he spoke with Ms. Flores a day or two after the officer was shot, but in a 402 hearing it was established that he spoke with Ms. Flores on May 15, almost 4 days after the incident. (RT 7:1063.)

been under the influence, but he seemed normal. (RT 8:1111.[15]) Soon after the incident, Mr. Meyers told the police appellant did appear to "be buzzed." (RT 12:1879.)

Mr. Meyers knew Ms. Flores to be a girl who sleeps around with a lot of guys and uses methamphetamine until it is gone. (RT 8:1157.)[16] He also saw appellant with Ms. Flores on numerous occasions when she would be bickering with appellant and using profane language. (RT 8:1157-1158.)

Jason Meyers heard sirens about 15 to 30 minutes after returning to Ms. Arambula's from the store with Ms. Hernandez and Ms. Arambula. (RT 8:1103-1104.) It takes 30 minutes to walk from the store to Ms. Arambula's house. (RT 8:1176.)[17] When he was served with a subpoena to come to court, he became tearful and asked if he could be charged with anything. (RT 8:1112.) He told the officers that he drove appellant to buy a gun one to two weeks before the shooting. (RT 8:1114.) Appellant said he needed the gun for protection from rival gangs. (RT 8:1116.)[18] Appellant directed Meyers to a house where appellant gave Dean Coleman $150 for a gun. (RT 8:1124-1126; 10:1433.) Mr. Coleman once dated appellant's

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[15] Even when Mr. Meyers knew appellant to be using drugs he always appeared normal. (RT 8:1110.)

[16] Mr. Meyers did not mention these facts to Officer Miller when he was interviewed on June 13, 1996. (RT 12:1875.)

[17] Ms. Arambula testified that on June 13, 1996 she told the interviewing officers that she heard the sirens 20 minutes after returning from the store. (RT 8:1226.) The only other testimony Ms. Arambula gave related to a "threat" she received "not from law enforcement" which frightened her. (RT 8:1236.)

[18] On one occasion, a rival gang shot at appellant and others in the park. That is when Mr. Cesena was hit with a bullet. (RT 11:1573.)

mother, Delores Delgado. (RT 10:1447.) In the mid 1980s, Mr. Coleman was a gun dealer and security guard. (RT 10:1438.) His wife developed a methamphetamine problem and he pleaded guilty to a felony drug charge in 1993, however his gun license was renewed because his plea took place after he had applied for the renewal of his license. (RT 10:1441-1442.) The license expired in 1996 before he sold the gun to appellant. (RT 10:1442.)

About 15 days before the officer shooting, Mr. Coleman received a phone call from Ms. Delgado. She put appellant on the phone and he said he was having problems and needed something. Mr. Coleman understood that he needed a gun (RT 10:1453-54), and told appellant he only had a .45 caliber. (RT 10:1455.) Appellant came to Mr. Coleman's house that afternoon and received a .45 caliber Haskell in exchange for $155. (RT 10:1458-1459.) There were no bullets with the gun. (RT 10:1459.)

After appellant got the gun, Mr. Meyers drove him to a Big-5 sporting goods store where Mr. Meyers purchased a box of Remington .45 caliber bullets with appellant's money. Appellant took the bullets home. (RT 8:1134-1135.)

A Remington brand .45 caliber ammunition box with a Big-5 price tag (RT 8:1202-02) was found in appellant's parents' bedroom. (RT 10:1423, 11:1568.)[19] It was empty except for a .32 caliber bullet. (RT 10:1425.) A black nylon case, similar to a camera lens case, owned by appellant's stepfather, Harry Lukens[20] (RT 10:1528), was found in the trash

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[19] Documents in appellant's name were found in the northwest bedroom. (RT 9:1401.)

[20] Mr. Lukens and appellant's mother Delores Delgado, resided (continued...)

can outside appellant's parents' home. It contained 17 Remington .45 caliber bullets. (RT 9:1406, 1410.) A partial thumb print found on the Remington ammunition box (RT 10:1496) was identified as appellant's. (RT 10:1516.) The casing and bullet fragment found at the scene of the shooting are the same brand and type as the .45 caliber bullets and ammunition box found at appellant's parents' house. (RT 12:1817-1819.) Although other guns were found at appellant's parents' house (RT 10:1419), no .45 caliber gun was found there. (RT 12:1871.)

When Mr. Lukens came home from work on Friday, May 10, 1996 at 7:30 p.m., appellant, Angel, Mr. Cesena and a few other kids from the neighborhood were there. (RT 10:1537-1539.) Appellant had been staying at the house for two to three days (RT 11:1564), and before that had been in Lake Havasu, Arizona. (RT 11:1572.) That night, appellant and his friends were listening to music, until they went out around 8:30 p.m. Mr. Lukens and Ms. Delgado went to bed at 10:00 p.m. Mr. Lukens was awakened by sirens at 2:04 a.m.[21] (RT 10:1542, 1560.) Ms. Delgado got up to see what was going on. (RT 11:1577.) Mr. Lukens heard voices outside his bedroom door and heard appellant talking on the telephone asking if Sparky was there. (RT 10:1547.) Mr. Lukens also heard appellant say, "Turn on your scanner." (RT 10:1548.) When Mr. Lukens asked appellant what was

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[20](...continued)
together for 12 years but were not married. Mr. Lukens considers appellant his "stepson." (RT 10:1524.)

[21] At the trial, Mr. Lukens testified he was awakened at 1:57 a.m. (RT 10:1542), but his preliminary hearing testimony established he was awakened at 2:04 a.m. (RT 10:1543.) He testified he believed his memory of the events was probably better at the preliminary hearing which was closer in time to the events. (RT 10:1550.)

going on, appellant replied, "Nothing," and Mr. Lukens went back to bed.[22] (RT 10:1549, 1560.) Fifteen to twenty minutes later, Mr. Lukens heard the dog bark, and heard someone at the door. Ms. Delgado told him a policeman had been shot. (RT 11:1590.) Appellant was at the house for the following three days until Mr. Lukens took him to the bus station so that he could return to Arizona to be with his girlfriend. (RT 11:1563-1564.)

State Parole Agent Carl Hallberg had been appellant's parole agent for four to five years, since January 1992. (RT 11:1602.) When a youth first gets in trouble he is placed on probation. For succeeding problems he is sent to youth camps and finally, when the youth is deemed to be out of control, he is sent to the California Youth Authority. When released he is under the authority of a parole agent. (RT 11:1603.)

When appellant was paroled from the California Youth Authority he was informed of and signed a paper outlining the conditions of parole including a prohibition against possessing any weapons (RT 11:1608) and not associating with any gang members. (RT 11:1609.) The conditions were also discussed when he reported to his parole agent within 48 hours of his release. (RT 11:1604, 1608.) Failure to follow the rules and regulations of parole means a parolee will be returned to the Youth Authority, which is the same as an adult prison. (RT 11:1605.) Appellant signed a paper outlining the conditions of his parole on November 11, 1985, after discussing the conditions with Mr. Hallberg for 15 minutes. (RT 11:1612,

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[22] At trial, Mr. Lukens thought appellant might have told him a policeman had been shot, but he testified at the preliminary hearing that appellant told him nothing. (RT 10:1549.) He also testified at trial and at the preliminary hearing that it was Ms. Delgado who told him a policeman had been shot. (RT 6:1589-1590.)

1613, 1615.) They also discussed what would happen if appellant violated the conditions of his parole. (RT 1:1617.) Mr. Hallberg told appellant he would be returned to an institution for violating the conditions of his parole and he had one year and 7 months or 575 days "hanging over his head" if he violated parole. (RT 11:1623, 1630.) Appellant could also receive an additional sentence of one year for carrying a gun for a total of up to 2 years and 5 months. (RT 11:1630.)

Twenty-year-old Joseph Silva had known appellant and his brother since appellant was 12 years old. (RT 11:1636.) Mr. Silver lives one block away from appellant's parents' house. (*Ibid.*) Mr. Silver is not a member of the Happy Town gang. (RT 11:1638.) The day after the shooting, Mr. Silva, appellant and Angel were going swimming at a friend's house. (RT 11:1643.) Mr. Silva heard appellant say he wanted to sell a gun for $100 because he needed the money to travel to Arizona to visit his girlfriend and see his baby be born. (RT 11:1643.) Mr. Silva had seen appellant with a .45 caliber gun before. (RT 11:1645.) He gave Angel $100 for the gun. (RT 11:1686.) When Angel took too long to come back with the gun, Mr. Silva went to appellant's house and spoke to appellant who told him he had killed a cop.[23] (RT 11:1692-1693.) On a later date, Angel gave Mr. Silva a gun[24] which he took home and placed in a

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[23] Mr. Silva insisted appellant did not say the gun he was selling was *the* gun which had been used to kill the officer. (RT 11:1695, 1701.) However, in a pretrial statement, he told the police appellant said he used the gun to kill a police officer. (RT 12:1783.) Mr. Silva lied to the officers when he said this because he was scared and that is what the officers wanted to hear. (RT 12:1757-1758.)

[24] In a pretrial statement to police, Mr. Silva said it was appellant (continued...)

Monopoly box in his closet. (RT 11:1701.) The gun was black and may have been a .45 caliber. It looked like the sheriff's gun presented in court. (RT 11:1702.)

On May 18, 1996, in a three-way call between appellant, his mother and Mr. Silva,[25] appellant asked him if he still "got that?" and stated he could not have "that" in Pomona so he would send someone to get "it." (RT 11:1703, 1719.)[26] Mr. Silva understood appellant to mean the gun when appellant referred to "that." (RT11:1718.) Thereafter, Casper, a Happy Town gang member, called Mr. Silva to arrange to pick up the gun, but instead Angel came over and got the gun from Mr. Silva. (RT 11:1721.) Mr. Silva never received a replacement gun or had his $100 returned. (RT 11:1702, 1725.) Casper threatened Mr. Silva to keep his mouth shut and that if he testified his whole family could be killed. (RT 11:1695-1696.)

The jury heard four other tape recorded telephone conversations between appellant and his mother. On May 22, 1996, appellant told his mother to tell Angel to burn the jacket he had given her. (CT 12:3489-3496.) On May 23, 1996, Ms. Delgado told appellant that she had talked to Sparky, who appellant was with that night, who told her that the police were saying appellant had snitched on Sparky. (CT 13:3499-3505.) On May 24, 1996, appellant asked Ms. Delgado to go with Chantal to talk to Goon's

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[24](...continued)
who gave him the gun. (RT 12:1783.)

[25] Exhibit 39(A), a transcript of the tape was received in evidence. (RT 11:1713.)

[26] Mr. Silva told appellant yes, but in fact had not yet received the gun from Angel. Later that day he got the gun from Angel. (RT11:1705.)

mother to tell Goon not to testify. (CT 13:3507-3518.) Finally, on May 28, 1996, appellant reported to his mother that he had talked to an attorney about representing him who asked what they had in the case against appellant. Appellant recounted he told the attorney they did not have a gun, fingerprints, hair prints or blood samples, but only footprints of Nike shoes. According to appellant, the attorney said he had heard they had the pager and appellant told him, "Yeah." (CT 13:1520-1525.)

**B. Case in Aggravation**

**1. Prior Violent Act**

Ryan Schultz and his girlfriend Mcgara Bautista went to 1615 Vejar Street in Pomona on July 30, 1994 to get high. (RT 16:2481, 2514.) At that time they regularly used alcohol, marijuana, methamphetamine and PCP. (RT 16:2503, 2516.) There were about 15 people at the house smoking methamphetamine. (RT 16:2504, 2523.) Schultz smoked methamphetamine while he was there. (RT 16:2525.) While inside the house, they heard shots fired outside. (RT 16:2483.) Schultz went outside and saw three or four people near his 1994 Thunderbird car. Appellant had a rifle. (RT 16:2484-2485.) Schultz ran back inside the house shouting, "they are after me," and ran into one of the bedrooms. (RT 16:2525-2527.) When appellant came into the house, Bautista confronted him and told him, "don't do this." (RT 16:2529.) Appellant and others followed Schultz into the bedroom where appellant hit him on the face and head with the gun and the others beat him and took his jewelry and money. (RT 16:2491-2492.)

Schultz and Bautista drove away in Schultz's car but it broke down. When the police came to assist, Schultz told them he had been the victim of an attempted carjacking. (RT 16:2497.) He was taken to the hospital, but refused treatment for scratches and bruises. (RT 16:2506.) Bautista told

the police what happened and the police threatened Schultz with jail if he did not tell the truth. (RT 16:2498.) Schultz did not tell the truth because he did not want to get involved or start anything. He feared for his life from appellant and others. (RT 16:2499.) Schultz denied that he ever borrowed or stole money from the Happy Town gang. (RT 16:2504-2505.)

**2. Victim Impact Evidence**

Mike Ezell and Douglas Wagman worked with Officer Fraembs at the Pomona Police Department since 1993. They all trained in martial arts together in Officer Fraembs's garage (RT 17:2619-2620, 2637), and planned to go bow hunting together. (RT 17:2625.) Although Officer Fraembs had a gruff exterior – they called him Dan Tough (RT 17:2624, 2626) – he was very considerate toward Wagman's daughter (RT 17:2646) and was moved by other children he came across in his work. (RT 17:2624.) He was polite, considerate and humble about his impressive military and martial arts records. (RT 17:2642.) Ezell and Wagman both loved him and miss him. (RT 17:2626, 2653.)

Daniel Tim Fraembs was born Lam Tim in Hong Kong. He was found by a police officer buried in the sand, his umbilical cord still attached. (RT 17:2670.) Officer Fraembs was one of a large number of children brought to the United States from the throngs of Chinese flooding Hong Kong after the Communist Chinese takeover. (RT 17:2671.) Dorothy and Donald Fraembs, from Cincinnati, adopted Officer Fraembs when he was nine months old. (RT 17:2671.) Six months later, they adopted another baby, Darah Fraembs, who was a year younger than Officer Fraembs. (RT 17:2673, 2677.)

When the children were 13 and 14 years old, their adoptive father died from a heart attack. (RT 17:2677.) Ms. Fraembs raised the children

on her own after that. (RT17:2679.) Officer Fraembs was a good child, very agile, well-coordinated and active. He played the clarinet and guitar. (RT 17:2675.) He became involved with ROTC in college, later joined the Marines and was named honor man of his class. (RT 17:2680.) He served in Beirut and missed being in a barracks that was bombed because he was held back due to being a witness to a car accident. (RT 17:2682.) Although he considered the military as a career, he decided to follow some friends into security (RT 17:2682), then worked for the Orange County Sheriff and ultimately attended the police academy and joined the Pomona Police Department. (RT 17:2685.)

At 9:00 a.m. on the day before Mother's Day in 1996, Dorothy Fraembs was visited by a local police officer and a priest and she knew immediately that Officer Fraembs had been killed. (RT 17:2687.) Although they did not live near each other or were close, Officer Fraembs's death shattered Darah's world. She is not as happy as she was and she no longer has him to count on. Nothing will make the pain she feels go away. (RT 17:2668-2669.) Ms. Fraembs and Darah both loved him. (RT 17:2669, 2691.) Officer Fraembs's killing has left a hole in Ms. Fraembs's life. The pain she feels has not diminished in the past fifteen months and she thinks about him every day. (RT 17:2690-2691.)

**3. Mitigation Case**

Appellant is the second of three children born to Delores Delgado. Ms. Delgado became pregnant when she was 15 years old and living with her parents. (RT 18:2747.) The child, Michelle, was born with problems that required many surgeries to take fluid off of her brain. She is mentally slow. Michelle's father never supported her or took care of her. (RT 18:2749.) A few months after she was born, Ms. Delgado became

pregnant with appellant by Ronald Mendoza, Sr. Angel was born to them after appellant. Although Ronnie, Sr. tried to raise his children he was in Viet Nam and returned with a disease that eventually left him paralyzed. (RT 18:2750.) When the children were still young, Ms. Delgado became addicted to heroin and was sent to prison. (RT 18:2751.) Appellant and his siblings were taken in by Ms. Delgado's parents.

The Delgados had eight children of their own including one son who is mentally slow. (RT 18:2745, 2749.) Maria Christina Delgado, Ms. Delgado's older sister, lived in her parents' house with her own children after her parents took in appellant and his siblings. (RT 18:2751-52.) Although she worked two and three jobs at a time, she tried to love appellant and tell him right from wrong as she did her own children who never joined a gang. (RT 18:2752, 2759.)

Appellant's mother came to live with Harry Lukens when appellant was about 12 and she was a heroin addict. (RT 10:1571; 18:2751.) He tried to do what he could for the children. (RT 18:2751.)

Brandy Valore met appellant when she was about 20 years old. (RT 18:2771-2772.) They were together for one and a half years before she became pregnant. (RT 18:2772.) She and appellant wanted to relocate to Lake Havasu, Arizona where her mother lived, to start life as a family, but appellant's parole agent was against the plan. (RT 18:2773.) Ms. Valore was visiting her mother, in Lake Havasu, when she went into labor at five and one half months. (RT 18:2775.) She was taken by air to Good Samaritan Hospital in Phoenix, Arizona where appellant joined her and saw the baby born via Ceasarian on April 27, 1996. (RT 18:2775-2776, 2782.) Appellant cried at the birth and said he had never seen anything so beautiful. (RT 18:2775-2776.) A few days before Officer Fraembs was

killed, Ms. Valore and appellant returned from Phoenix to California in order to gather their belongings and then return to Arizona for the baby's release from the hospital. (RT 18:2782.) Appellant returned to Arizona approximately three days after the shooting. (RT 11:1563-1564.) Ms. Valore did not know appellant was having a relationship with another woman. (RT 18:2789.)

When appellant was arrested she lost someone she loved and had planned to marry. (RT 18:2777.) At first, Ms. Valore was against appellant seeing his daughter in custody but after the verdict she rethought her position and decided that her daughter should be able to see and know her father. (RT 18:2778, 2791.) She knows that appellant loves his daughter and wants to see his life spared for her daughter. (RT 18:2779.)

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## I

## THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION OF LYING-IN-WAIT FIRST DEGREE MURDER AND LYING-IN-WAIT SPECIAL CIRCUMSTANCE; THE FIRST DEGREE MURDER VERDICT AND LYING-IN-WAIT SPECIAL CIRCUMSTANCE MUST BE REVERSED

The trial court erred by instructing the jurors on first degree murder based on a theory of lying-in-wait (Pen. Code, § 189) and the special circumstance of lying-in-wait (Pen. Code, § 190.2, subd. (a)(15)) because the evidence was insufficient to establish the requisite elements of murder by means of lying in wait or an intentional killing committed while lying-in-wait. In fact, the trial court struck the special circumstance of lying-in-wait on its own motion under Penal Code section 1385[27] at the time of sentencing. (RT 18:2875.) The court stated, "I am finding the time was insubstantial for the special circumstance, and under Penal Code section 1385 I am dismissing the special circumstance of lying in wait." (RT 18:2875, 2913.) Because the evidence was insufficient to support the lying-in-wait special circumstance and because the first degree murder by means of lying in wait also requires a substantial period of watching and waiting for an opportune time to act, appellant's rights to due process under the Fourteenth Amendment to the federal constitution and article I, section 13 of the California Constitution, and his rights to a reliable guilt and

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[27] Penal Code section 1385.1, which was added by initiative measure (Prop.115) approved June 5, 1990, provides: "Notwithstanding Section 1385 or any other provision of law, a judge shall not strike or dismiss any special circumstance which is admitted by a plea of guilty or nolo contendere or is found by a jury or court as provided in Sections 190.1 to 190.5, inclusive."

penalty determination under the Eighth Amendment and the correlative rights under the California Constitution were violated. (*Griffin v. United States* (1991) 502 U.S. 46; *In re Winship* (1970) 397 U.S. 358, 364; *People v. Guiton* (1993) 4 Cal.4th 1116; *People v. Green* (1980) 27 Cal.3d 1.) The murder conviction, special circumstance, and death judgment must be reversed.

### A. Both the Special Circumstance of Lying in Wait and First Degree Murder Lying-in-Wait Require a Substantial Period of Watching and Waiting

The lying-in-wait special circumstance (Pen. Code, § 190.2, subd. (a)(15)) requires "an intentional murder,[28] committed under circumstances which include (1) concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage." (*People v. Morales* (1989) 48 Cal.3d 527, 557-558.) "To prove lying in wait [murder], the prosecution must prove there was a concealment of purpose, a substantial period of watching and waiting for a favorable or opportune time to act, and that immediately thereafter the defendant launched a surprise attack on an unsuspecting victim from a position of advantage." (*People v. Gurule* (2002) 28 Cal.4th 557, 630.) Appellant submits that the *Morales* factors, including the requirement of a "substantial period" of watching and waiting, are a part of the factual matrix required both for first degree murder under a lying in wait theory, as well as

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[28] Lying-in-wait first degree murder "requires only a wanton and reckless intent to inflict injury likely to cause death." (*People v. Webster* (1991) 54 Cal.3d 411, 448; accord, *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1148-1149.)

for the lying-in-wait special circumstance.

The issue of whether a "substantial period" of watching and waiting is required for lying-in-wait first degree murder was most directly discussed by this Court in *People v. Stanley* (1995) 10 Cal.4th 764. The defendant in *Stanley* challenged the first degree murder lying-in-wait instruction, arguing that it improperly required a period of lying in wait sufficient to be equivalent to premeditation or deliberation, rather than premeditation and deliberation. After rejecting this contention, this Court went on to address another of the defendant's arguments, "that if deliberation need not be proved, virtually any premeditated murder can satisfy the requirements of lying in wait and thus be murder in the first degree." (*People v. Stanley, supra*, 10 Cal.4th at p. 795.) The defendant maintained, "once the prosecution has proved premeditation, it has, by the same facts, in effect proved lying in wait." (*Ibid.*) This Court found this contention to be meritless, stating: "'Premeditated' simply means 'considered beforehand.' [Citation.] For lying in wait, by contrast, the prosecution must prove the elements of concealment of purpose together with 'a substantial period of watching and waiting for an opportune time to act, and . . . immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.' (*People v. Morales*, *supra*, 48 Cal.3d at p. 557 [lying-in-wait special circumstance].) These circumstances, taken together, present 'a factual matrix . . . distinct from "ordinary" premeditated murder . . . .' [*Ibid.*]" (*People v. Stanley, supra*, 10 Cal.4th at pp. 795-796.)

*Stanley* was cited as authority in *Gurule,* in the context of the sufficiency of the evidence to support a first degree murder conviction, for the elements of lying-in-wait first degree murder. (*People v. Gurule, supra*, 28 Cal.4th at p. 630.) And in *People v. Cole* (2004) 33 Cal.4th 1158, 1205,

this Court repeated the *Morales* factors when addressing first degree murder under a lying-in-wait theory, citing *Gurule.* (See also, *People v. Poindexter* (2006) 144 Cal.App.4th 572.)

In *People v. Gutierrez* (2002) 28 Cal.4th 1083, this Court held that an intentional murder committed under circumstances demonstrating the *Morales* factors, during the period of concealment and watchful waiting, sets the special circumstance murder apart from an ordinary lying-in-wait first degree murder, justifying its classification as a crime warranting the imposition of the death penalty. (*People v. Gutierrez, supra*, 28 Cal.4th at pp. 1148-1149.)[29]

Appellant submits that even for first degree murder lying-in-wait, those same factors listed in *Morales* as being required for special circumstances lying in wait, are required.

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[29] This Court's holding in *People v. Moon* (2005) 37 Cal.4th 1, that first degree murder lying in wait is slightly different from special circumstances lying in wait is not inapposite. *Moon* cites to *People v. Carpenter* (1997) 15 Cal.4th 312, 388 as authority for this position. (*Moon,* at p. 22); *Carpenter* in turn relies upon *People v. Ceja* (1993) 4 Cal.4th 1134, 1140, footnote 2. That *Ceja* footnote provides: "Lying in wait as a form of first degree murder under . . . section 189 should not be confused with the largely similar, but slightly different, special circumstance in which the 'defendant intentionally killed the victim *while* lying in wait.' ([ ] § 190.2, subd. (a)(15), italics added to indicate language differences between the two statutes; see *People v. Morales* . . . .)" (*Ibid.*) This Court goes on to "note that nothing in *People v. Hardy* (1992) 2 Cal.4th 86 . . . should be construed as eliminating the distinction between lying in wait as a form of first degree murder and lying in wait as a special circumstance, or as imposing an intentional murder requirement for lying-in-wait murder." (*Ibid.*) These cases do not, however, directly address the question of whether the *M orales* factors are required only for the special circumstance of lying in wait, or if they are also required for first degree murder under a lying-in-wait theory.

This Court's repeated upholding of CALJIC No. 8.25, which defines murder by means of lying-in-wait[30], despite its failure to track the *Morales* language does not undermine appellant's argument. In *People v. Ceja, supra*, this Court was faced with the issue of the sufficiency of the CALJIC instruction of first degree murder under a lying-in-wait theory. The defendant in *Ceja* challenged CALJIC No. 8.25 on the ground that it omitted three key elements of lying in wait: 1) that there be a "substantial period of lying in wait"; 2) that the attack proceed from a position of advantage; and 3) that the attack follow immediately the watchful waiting (the *Morales* factors). This Court held that "although the instruction does not verbatim track our language in [*Morales* ], we have repeatedly upheld the instruction, and continue to do so." (*People v. Ceja, supra*, 4 Cal.4th at p. 1139.) As the Court noted, "We did not require any particular phraseology in *Morales*, only the substance. The instruction contains the substance of all the legal requirements." (*Id.* at p. 1140.) This statement and the explanatory material in footnote 2 (see *supra*) arguably supports

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[30] CALJIC No. 8.25 provides:

> Murder which is immediately preceded by lying in wait is murder of the first degree.
> The term "lying in wait" is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise [even though the victim is aware of the murderer's presence]. The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation and deliberation.

appellant's position that even for lying-in-wait first degree murder, defined in CALJIC No. 8.25, the elements stated in *Morales* (including the "substantial period" of watching and waiting) are required. However, *Ceja*, while indicating that CALJIC No. 8.25 has repeatedly been upheld despite its failure to track precisely the *Morales* language, does not directly and specifically hold that the *Morales* factors, including a substantial period of watching and waiting, must be proven for lying-in-wait first degree murder.

Nevertheless, appellant submits the weight of this Court's authority supports the requirement that a substantial period of watching and waiting is necessary for lying in wait first degree murder as for its lying in wait special circumstance. Consequently, in this case, the lack of a substantial period of watching and waiting requires this Court to reverse both the lying in wait special circumstance and the first degree murder conviction under a lying-in-wait theory.

### B. The Court Erred in Instructing the Jury on Lying-in-Wait Murder and the Special Circumstance Because the Evidence Was Insufficient to Support the Conviction and Special Circumstance on That Theory

"It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1129.) Here, at the close of the prosecution case, defense counsel moved, under Penal Code section 1118.1, for judgment of acquittal on the special circumstance of lying in wait (RT 13:1915-1917), and first degree murder by means of lying in wait. (RT 13:1922.) Counsel argued the evidence was insufficient to establish lying in wait. "If we believe Johanna Flores, that once Officer Fraembs stopped there at the curb, within a very, very short period of time that my client would have removed this weapon from his waist and obviously, I

think, trying to conceal his purpose . . . [of] doing something with that weapon . . . and then at a particular moment almost within a flash he would have shoved Johanna Flores aside, removed the gun and shot Officer Fraembs." (RT 13:1916-1917.) Counsel also objected to the lying-in-wait murder instructions (CALJIC No. 8.25) and lying-in-wait special circumstance instructions (CALJIC No. 8.81.15) on the grounds the prosecutor had not proved facts sufficient to warrant giving the instructions. (RT 14:2046-2047, 2092.) Thus, "the issue is whether the trial court should have instructed on [first degree murder] lying in wait. [T]o decide the issue [this Court] must determine whether there was substantial evidence to support a jury verdict based on that theory." (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139, fn. 1.)

In examining the record for substantial evidence, this Court "must 'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Ceja, supra,* 4 Cal.4th at p. 1138 [quoting *People v. Johnson* (1980) 26 Cal.3d 557, 578, and citing *Jackson v. Virginia* (1979) 443 U.S. 307].) In this case, a rational trier of fact could not have found that every element of lying-in-wait had been proven beyond a reasonable doubt, so the trial court erred in instructing the jury on lying-in-wait first degree murder. For the same reasons the court should not have instructed on the special circumstance of lying in wait.

### C. The Record Contains Insufficient Evidence of a Substantial Period of Watchful Waiting to Support Lying-In-Wait Murder or the Special Circumstance of Lying-In-Wait[31]

The question whether lying in wait has been proved "is often a difficult one which must be made on a case-by-case basis, scrutinizing all of the surrounding circumstances." (*People v. Morales, supra,* 48 Cal.3d at pp. 557-558.) Specifically, appellant contends that the element of a substantial period of watching and waiting for a favorable or opportune time to act is not supported by sufficient evidence.

#### 1. Insufficient Evidence of a Substantial Period of Watching and Waiting

Without conceding that the record contains sufficient evidence of the first and third elements, it is plain that the prosecution failed to prove that appellant spent "a substantial period of watching and waiting for a favorable or opportune time to act." (*Ibid.*) The trial court found this to be so: "I found that as a matter of law that the time was insubstantial." (RT 18:2913.)

There was no evidence to support a finding that appellant spent a substantial period watching and waiting for a favorable or opportune time to act and a review of this Court's decisions on this element confirms

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[31] The requirements that the killing be 1) intentional and 2) committed while lying in wait are purported to sufficiently distinguish the lying in wait special circumstance from the first degree murder theory. Notwithstanding these two elements however, courts interpreting the lying in wait first degree murder theory, "can and do rely on special circumstances cases to the extent, which is substantial, that the two types of lying in wait overlap. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1140, 1140 fn. 2 [The lying in wait special circumstance and theory of first degree murder are "largely similar, but slightly different."].)

appellant's position. (*People v. Sims* (1993) 5 Cal.4th 405, 433 [defining "watchful" as "alert and vigilant in anticipation of [victim's] arrival so that defendant could take him by surprise"]; *People v. Moon* (2005) 37 Cal.4th 1, 23-24 [in order to eliminate a witness, defendant waited in the house while the victim drove home, parked, entered the home, searched the upstairs portion of the house for her daughter, came downstairs to the kitchen, where she encountered defendant]; *People v. Gurule*, *supra*, 28 Cal.4th at p. 630 [defendant and accomplice planned to rob service station, picked time (early morning) when fewer people would be about, waited across street for victim to be alone; accomplice engaged victim in conversation; defendant surprised victim from behind, and stabbed victim]; see also, e.g., *People v. Gutierrez, supra*, 28 Cal.4th 1083, 1149-1150 [defendant waited outside for several hours for his ex-wife and victim to return to home, took ex-wife by surprise, quickly subdued her, then fatally shot victim in the shower]; *People v. Hillhouse, supra*, 27 Cal.4th at pp. 500-501 [defendant watched and waited until victim was in vulnerable position, stabbing him while victim was urinating]; *People v. Carpenter* (1997) 15 Cal.4th 312, 388-389 [defendant passed victims on hiking trail, went to observation deck, peered at trail with binoculars, came back down to trail, waited around corner from victims in isolated location, appeared suddenly, and attacked victims]; *People v. Sims*, *supra*, 5 Cal.4th at p. 433 [defendant purchased clothesline and knife, rented hotel room, called for pizza delivery, lured deliverer into hotel room, bound him with clothesline, and killed him]; *People v. Ceja*, *supra*, 4 Cal.4th 1134, 1143 [defendant parked truck next to house hours before knocking on door and asking for victim, waited and watched until victim was alone with him before he struck]; *People v. Hardy* (1992) 2 Cal.4th 86, 120-123, 163-164 [while co-

conspirator was out of town, defendants drove to victims' home after 2 a.m., parked on a side street so as to avoid drawing attention to their activities, waited for co-conspirator's wife and son to go to sleep, entered the house and killed victims while they slept in same bed]; *People v. Edwards* (1991) 54 Cal.3d 787, 825-826 [defendant entered campground three hours before shooting victims, reentered campground, observed victims walking in opposite direction, turned around, followed them, waited for them to reach isolated area, and attacked them]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1020-1021 [defendant shot his wife from a concealed position almost immediately after she returned home]; *People v. Ruiz* (1988) 44 Cal.3d 589, 615 [defendant's wife and stepson were clothed in bedclothes, wrapped in bedding, buried in area a few feet outside their house, and shot in head from close range; jury could infer that defendant, who lived with victims, watched and waited until victims were asleep to attack].)

In the present case, the prosecutor's lying-in-wait argument was based on the theory that the killing was deliberate and premeditated. He argued that the requirement of a substantial period of watchful waiting was met because "this is a premeditated and deliberate murder. So there has to be a substantial period of watching and waiting for an opportune time to act . . . ." (RT 15:2196.)

Defense counsel argued to the court, "The instruction says clearly that mere concealment of one's purpose is not sufficient. You need a substantial period of time of watching waiting. If we were to accept [the prosecutor's] analysis, then these cases where we have disgruntled employees going back to their place of employment and shooting one or more people, all of these would be lying in wait murders. I mean because

obviously you are going to conceal your gun, you may take a back entrance, you might do certain things to try to get to the point where you could actually shoot your boss. You may have to deceive the secretary, whatever. But these are not lying in wait murders." (RT 13:1920.)

In ruling on the motion under Penal Code section 1118.1 at the close of the prosecution case, the court understood the law to be: "It is a first degree murder [if] there is a sufficient period of time to show that there was premeditation or deliberation and then in the special circumstance there is a substantial period of time if it shows a concealment of purpose watching, waiting, opportune time to act, a surprise attack in an unsuspecting subject." (RT 13:1923.) Nevertheless, the court denied the motion stating, "assuming that Miss Flores is believed, there is in rapid sequence a concealment and a killing." (RT 13:1928.)

Although the trial judge denied the 1118.1 motion at the close of the prosecution case, after hearing the entire case, it ruled the evidence was insufficient to find the special circumstance of lying in wait true because the evidence did not show a substantial period of watching and waiting. (RT 18:2913.) Appellant contends the court correctly found an insubstantial period of watching and waiting.

Johanna Flores's testimony[32] establishes that the entire encounter between the officer and the three individuals was fleeting. The officer approached the three individuals. He asked them one question, and appellant replied in one sentence. The officer ordered Cesena to the car to pat search him. It was at that time, while appellant was standing next to

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[32] Appellant does not concede the issue of identity, but for purposes of this appeal discusses the substance of the testimony of Johanna Flores as if it were true.

Flores on the sidewalk, according to the prosecutor, that appellant must have at least begun "thinking about it." (RT 15:2195.) From that time until the shooting was only a matter of seconds.

Flores testified that after the officer ordered Cesena to the car and ordered appellant and Flores to sit on the curb, he began a pat search of Cesena. (RT 6:887-888.) Flores testified that she was on the sidewalk closest to the street when appellant directed or pushed her to the curb. (RT 6:877, 889-890.) She took one to two steps off the curb into the street (RT 6:890), then maybe one or two more steps in the street (RT 6:892), before appellant pushed her aside. Flores testified appellant took one or two steps himself before shooting. (RT 6:893.) Defense counsel argued that even moving slowly, it could not have taken more than a matter of seconds to reach the curb and take those few steps in the street before shooting. The trial court "estimated the time as up to a minute." (RT 18:2868.)

Although this Court has held the period of watchful waiting must be "substantial" (*People v. Hillhouse, supra*, 27 Cal.4th at p. 500), it has never placed a fixed time limit on this requirement, stating that "[t]he precise period of time is also not critical." (*People v. Ceja* (1993) 4 Cal.4th 1134, 1145.) While a few minutes can suffice (*People v. Edwards* (1991) 54 Cal.3d 787, 825-826 [wait was only "a matter of minutes"], appellant submits those cases which find a few minutes substantial, in fact involve longer periods which establish the period of watchful waiting.

For example, in *People v. Moon, supra*, 37 Cal.4th 1, this Court called into doubt the defendant's account that he waited only 90 seconds before the killing. "According to defendant's testimony, when he reentered the Greigs' home, Melitta told him she had called her mother and that her

mother was returning to the home []. Apprised of this information, defendant admitted waiting in the house while Rose Greig drove home, parked, entered the home, searched the upstairs portion of the house for her daughter, came downstairs to the kitchen, and then encountered defendant. Based on these facts, the jury could have reasonably inferred that defendant, after killing Melitta, resolved to await Rose's arrival in order to kill her also, so as to eliminate the only witness who could place him in the Greig home that day, linking him to Melitta's murder. Although the period of waiting was relatively short, it was sufficient to negate any inference defendant's murder of Rose Greig was the result of panic or sudden impulse." (*Id.* at pp. 23-24.)

And in *Edwards, supra*, 54 Cal3d. 787, the defendant was first seen entering the campground about three hours before the shooting. He left and reentered, and saw his victims going in the opposite direction. As they were walking by a restroom near the entrance to the campground, he turned around and followed them. More than a quarter of a mile separated the spot where defendant first saw the victims and where he shot them, and since they were on foot, the jury could reasonably infer that a matter of minutes elapsed from the time defendant first saw them until he shot them. (*Id.* at p. 836.) In both cases, the time period of watching and waiting was actually more substantial than a few minutes and much more substantial than the time period of a few seconds in the present case.

The facts in the present case show that appellant acted almost immediately upon being stopped by the officer. This was not case where the defendant selected a murder location and waited there for his victim to arrive (*compare People v. Sassounian* (1986) 182 Cal.App.3d 361); he did not stalk or lure the officer to the murder location (*compare People v.*

*Webster* (1991) 54 Cal.3d 411); nor did he go to where the victim was (*compare People v. Hardy* (1992) 2 Cal.4th 86; *People v. Byrd* (1954) 42 Cal.2d 200, overruled on other grounds in *People v. Green* (1956) 47 Cal.2d 209, 232 and *People v. Morales*, 48 Cal.3d 527; *People v. Superior Court* (*Jurado*) (1992) 4 Cal.App.4th 1217.)

The trial court recognized these events occurred in this case in "rapid sequence" (RT 13:1928), and ultimately found an insubstantial period of time. (RT 18:2913.) Nevertheless, the prosecutor tried to establish through Flores's testimony that appellant moved slowly and acted calmly (RT 6:1030), claiming this was sufficient to establish the elements of lying in wait. Flores's testimony was impeached with two statements made to the police and the prosecution soon after the incident.

On May 16, 1996, five days after the incident, Flores told the police that she believed appellant did not run after she told him to do so because he was paranoid and panicked. (RT 7:979, 1036.) "[I told him] just run, and he didn't. I guess he got paranoid and he panicked, I don't know." Less than two weeks after the incident, on May 22, 1996, Flores told the prosecutor that appellant "panicked." In response to the question, "Does he push you out of the way or does he move you out of the way?"she told him, "I don't think he knew what he was going to do. He just panicked." (RT 7:1036-1037.) On re-direct examination, the prosecutor tried to imply that the witness' prior statement suggested that appellant panicked only after the shooting (RT 7:1037-1038), but the question posed to Ms. Flores – did he just move you or push you – clearly establishes that she was speaking about appellant's actions just before the shooting. On May 22, 1996, Flores also stated that when appellant threatened her, he acted "like he didn't know what he just did" (RT 7:1036), although he was also nervous and scared

about getting caught. (RT 7:1037.)

At the end of the case, the trial judge ruled "as a matter of law that the time was insubstantial." (RT 18:2913.) Generally, in determining whether a trial court's finding is supported by substantial evidence, the reviewing court may not usurp the trier of fact's assessment of credibility. "'[I]t is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.'" (*People v. Thornton* (1974) 11 Cal.3d 738, 754, disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12.) A trial judge's view is often given precedence because he or she "is in the best position to evaluate the evidence." (*People v. Fitch* (1997) 55 Cal.App.4th 172, 183 [Evid. Code, § 352 provides the judge with the sole duty to determine where its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury]; (*People v. San Nicolas* (2004) 34 Cal.4th 614, 644 [Pen. Code, § 1089 provides the trial court's exercise of discretion on whether a seated juror should be discharged for good cause will be upheld if supported by substantial evidence, "Except where bias is clearly apparent from the record, the trial judge is in the best position to assess the state of mind of a juror or potential juror on voir dire examination."].)

Permitting deference to the trial judge's view makes sense. As the court stated in *People v. Hillhouse*, *supra*, 27 Cal.4th at pp. 488-489, in the context of a claim for not removing a biased juror: "The trial court is present and able to observe the juror itself. It can judge the person's sincerity and actual state of mind far more reliably than an appellate court reviewing only a cold transcript." The trial court is "present and able to

observe" whether a juror's equivocal oral statements are accompanied by various vocal inflections and body language that assure the court of the juror's sincere interest in being fair. (*People v. Ray* (1996) 13 Cal.4th 313, 344.) Similarly, a trial judge is was uniquely able to assess the credibility of the witnesses.

In this case, the trial court was in the best position to assess the credibility of the only witness to the crime and ruled that there was an insubstantial period of watching and waiting for purposes of lying in wait. The trial court's assessment must be given deference. Thus, because there was insufficient evidence to prove the substantial period required to prove the special circumstance of lying in wait and lying-in-wait first degree murder,[33] the court erred in instructing the jury on that theory. (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1129.)

**2. Insufficient Evidence of Concealment of Purpose**

The prosecutor argued that although there was no physical concealment there was a concealment of purpose sufficient to establish this element. The law requires, however, that the defendant at least conceal his true intent and purpose so that he can take his victim by surprise. (*People v. Morales, supra,* 48 Cal.3d at p. 555.) "It suffices if the defendant's purpose and intent are concealed by his actions or conduct, and the concealment of purpose puts the defendant in a position of advantage, from which the factfinder may infer that lying-in-wait was part of the defendant's plan to take the victim by surprise." (*People v. Ceja*, *supra*, 4 Cal.4th at p. 1140, citing *People v. Webster, supra,* 54 Cal.3d at p. 448 and

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[33] Even if this Court fails to find the substantial period of watching and waiting to be required for first degree lying-in-wait murder, the lying-in-wait special circumstance must be struck.

*People v. Morales*, *supra*, 48 Cal.3d at pp. 554-555.)

The prosecutor argued that appellant concealed his purpose by moving behind Flores so that the officer could not see him reach for his gun. (RT 15:2198.) The prosecutor also argued, however, that Officer Fraembs perceived appellant's hostile attitude immediately after stopping the group, and so he took additional measures to protect his safety. It is not logical that if appellant was trying to conceal his purpose – to kill the officer so that he would not have his parole revoked – that he would have aroused the suspicion of the officer with a belligerent attitude.

As the prosecutor argued:

> The reason that Officer Fraembs is now on the alert that maybe his safety is now in danger, is because of what the defendant did as Johanna has repeatedly said. He acted like a jerk. He was hostile. What are you stopping us for? And Officer Fraembs is out there, it is just him at 1:30 in the morning on that dark and lonely street and there is [sic] three of them. Remember, when he begins that contact with these three, he doesn't know who they are. He doesn't know what they are up to. He is entitled to insure his safety.

(RT 15:2353-2354.)

Moreover, appellant did nothing to lure the officer to a place where he could be taken by surprise, or say anything to trick the officer. Other than asking why they were being stopped – in an apparently hostile manner – appellant said nothing to the officer. (RT 6:885.) The events all happened so quickly there could not have been an element of concealment or surprise of appellant's purpose and intent as required. If Flores is believed, appellant took out his gun and shot the officer within seconds. In previous statements she told the police appellant's actions were panicked and paranoid and that he did not know what he was doing. (RT 7:979.)

Unlike the unsuspecting victim in *Morales,* for example, who thought she was going shopping at the mall, Officer Fraembs knew he was in a hostile environment and was taking action to protect himself by patting down the members of the party.

### 3. Insufficient Evidence of a Surprise Attack on an Unsuspecting Victim from a Position of Advantage

This Court has acknowledged that "[i]f the defendant and the victim engage in activities before the killing not designed to gain a position of advantage, or the defendant passes up several positions of advantage before killing during an argument, there is not lying-in-wait." (*People v. Ceja*, 4 Cal.4th at p. 1143, fn.3.) An ambush or a lethal attack where the victim is taken by surprise necessarily places the killer in a position of advantage. (*People v. Edwards* (1989) 54 Cal.3d 787, 823.) However, as discussed above, Officer Fraembs was not an unsuspecting victim. In fact, it was appellant who was taken by surprise by the officer. Officer Fraembs stopped the three friends as they walked down the street and immediately took steps to protect himself from an attack by conducting a pat search of Cesena. Thus, any attack would not have been a surprise. Moreover, the officer was not in a particularly vulnerable position; he was not shot from behind (*cf. People v. Webster* (1991) 54 Cal.3d 411, 449 [defendant maneuvered himself behind the victim and then attacked without warning]) or while distracted (*cf. People v. Hillhouse*, *supra*, 27 Cal. 4th at pp. 500-501 [victim attacked while urinating]). Since the officer was preparing for a hostile encounter he was not an unsuspecting victim, and he was not attacked from a position of advantage.

### 4. Conclusion

The evidence was insufficient to prove an intentional murder,

committed under circumstances that include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.

This Court must strike the lying-in-wait special circumstance and find the evidence insufficient to establish first degree lying in wait murder.

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## II

## THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION OF PREMEDITATED AND DELIBERATE FIRST DEGREE MURDER

### A. Introduction

The Due Process Clause requires the prosecution to prove beyond a reasonable doubt every element of the crime with which the defendant is charged. (*In re Winship* (1970) 397 U.S. 358, 364.) A criminal defendant's state and federal rights to due process of law, a fair trial and reliable guilt and penalty determinations are violated when criminal sanctions are imposed based on legally insufficient proof of guilt. (U.S.Const., 5th, 6th, 8th & 14th Amends. & Cal. Const. art. I, §§ 1, 7, 12, 15, 16, & 17; *Beck v. Alabama* (1992) 447 U.S. 625, 637; *People v. Marshall* (1997) 15 Cal.4th 1, 34-35.) A conviction will be sustained on appeal only where a review of the entire record discloses substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Stanley, supra*, 10 Cal.4th at p. 792.) Only if a rational trier of fact could find the essential elements of the crime proved beyond a reasonable doubt are the requirements of due process, a fair trial and reliable guilt and penalty determinations satisfied. (U.S. Const., 5th, 6th, 8th & 14th Amends. & Cal. Const., art. I, §§ 1, 7, 15, 16 & 17; *Jackson v. Virginia*, *supra*, 443 U.S. at p. 319; *Herrera v. Collins* (1993) 506 U.S. 390, 401-402.) A review of the record in this case reveals that the evidence was legally insufficient to sustain a jury finding of deliberate and premeditated murder. Appellant's first degree murder conviction cannot be sustained on such a basis without violating state and federal constitutional standards governing the sufficiency of evidence to support a conviction.

### B. The Record Contains No Substantial Evidence That Appellant Committed Deliberate, Premeditated First Degree Murder

An unjustified killing of a human being is presumed to be second, rather than first, degree murder. (*People v. Anderson* (1968) 70 Cal.2d 15, 25.) In order to support a finding that the murder is first degree, the prosecution bears the burden of proving beyond a reasonable doubt that the defendant premeditated and deliberated the killing. (*Id.*; see also *In re Winship*, *supra*, 397 U.S. 358, 362-363; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 488-490 [state must prove every element that distinguishes a lesser from a greater crime].)

> In order for a murder to be first degree based upon a theory of premeditation and deliberation, the intent to kill must have been formed upon a preexisting reflection and must have been the subject of actual deliberation and forethought. [Citation.] A finding of first degree murder due to premeditation and deliberation is proper only when the slayer killed as the result of careful thought and weighing of considerations, as a deliberate judgment or plan, carried on coolly and steadily, especially according to a preconceived design. [Citation.] (*People* v. *Rowland* (1982) 134 Cal.App.3d 1, 7 citing *Anderson, supra,* 70 Cal.2d at p. 26.)

In *People v. Anderson*, *supra*, 70 Cal.2d 15, this Court set forth the guidelines for reviewing a finding of first degree murder based on premeditation and deliberation. Although the *Anderson* tripartite test does not establish "normative rules" (*People v. Sanchez* (1995) 12 Cal.4th 1, 31), it provides a "framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of considerations." (*People v. Thomas* (1992) 2 Cal.4th 489, 517.) This Court has continued to employ the test in deciding whether the murder occurred as a result of "preexisting reflection rather

than unconsidered or rash impulse." (*People v. Sanchez, supra*, 12 Cal.4th at p. 31, quoting *People v. Pride* (1992) 3 Cal.4th 195, 247.)

The *Anderson* case identified three categories of evidence to be considered in assessing the presence or absence of premeditation and deliberation: (1) planning activity prior to the killing; (2) motive, usually established by a prior relationship or conduct with the victim; and (3) manner of killing.[34] (*People v. Anderson, supra*, 70 Cal.2d at pp. 26-27.) Typically, this Court will sustain a verdict of first degree murder on a theory of premeditation and deliberation when there is evidence of *all three factors*; otherwise, absent other significant factors outside the rubric of *Anderson*, there must be "at least extremely strong" evidence of planning activity, or some evidence of planning activity in conjunction with either motive evidence or an exacting manner of killing. (*Id.* at p. 27; *People v. Sanchez, supra*, 12 Cal.4th at p. 31.)

Using this analysis, a reviewing court must:

> review the entire record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – from which a reasonable trier of fact could find that the defendant premeditated and deliberated beyond a reasonable doubt.

(*People v. Perez* (1992) 2 Cal.4th 1117, 1124; see also *Jackson v. Virginia, supra*, 443 U.S. at p. 319.)

The appellate court must "judge whether the evidence of each of the

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[34] The Court described category three as facts about the nature of the killing from which the trier of fact could infer that the manner of killing was so particular and exacting as to be accomplished according to a preconceived design "to take [the] victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of [planning or motive]." (*People v. Anderson, supra,* 70 Cal.2d at pp. 26-27.)

essential elements constituting the higher degree of the crime is substantial; it is not enough for the respondent simply to point to 'some' evidence supporting the finding." (*People v. Bassett* (1968) 69 Cal.2d 122, 138.) As discussed *supra,* the trial court in this case specifically found the period of watching and waiting to be "insubstantial" for purposes of lying in wait. (RT 18:2913.) Appellant submits that a review of the evidence will compel this Court to reach the conclusion that premeditation and deliberation are also missing.

### 1. Insufficient Evidence That the Killing Was Deliberate and Premeditated

Here, defense counsel moved, under Penal Code section 1118.1, for judgment of acquittal on all the charges. (RT 13:1915.) At that time, the court ruled specifically that it found sufficient evidence to establish the first degree murder charge on the basis of lying in wait and the lying in wait special circumstance. The court stated its understanding that the lying in wait special circumstance jury instruction requires "a period of time that is sufficient to show premeditation or deliberation." (RT 13:1923.)[35]

The prosecutor argued the evidence established premeditation and deliberation:

> So what we have is an uninterrupted chain of events beginning with the killer standing next to Johanna, to that

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[35] The court went on to state, "I think that's what the statute means that is what the law is, that the time is whatever is necessary to show and establish that this was premeditation *and* deliberation." (RT 13:1923; emphasis supplied.) (See also RT 13:1924 [trial court found the evidence "sufficient to show premeditation *and* deliberation"] [Emphasis supplied.].) The jury instruction for first degree murder by means of lying in wait provides, "The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation *or* deliberation." (CALJIC 8.81.15; emphasis supplied .)

> position behind her, to using her as a shield, to moving toward where Officer Fraembs is, at which time the killer casts her aside, he has a gun in his hand, he shoots Officer Fraembs in the face. Clearly this is not a rash act. This killer, he thought about it, he planned it. Actually it was pretty sophisticated if you think about it to use the girl as a shield. . . . ¶ But when he is doing these things, all the time he is cool, he is calm. It is not rash, it is not impulsive. This is a willful, deliberate and premeditated murder. He began thinking about it, at least or at the latest he began thinking about it was when he was standing next to Johanna on that curb. It continued uninterruptedly until the moment in time when that killer fires that bullet through Officer Fraembs'[s] face.

(RT 15:2195.)

On the contrary, however, nothing in the evidence shows planning, premeditation or deliberation in the killing, but rather the evidence reveals a rash, impulsive act and the absence of any of the factors discussed in *Anderson*.

**a. No Evidence of Planning**

No evidence was introduced against appellant that could support a reasonable inference of a prior plan to kill Officer Fraembs. The encounter between Officer Fraembs and the three friends was a spontaneous, unplanned event. It was Officer Fraembs who initiated the encounter. Appellant had no plan to meet the officer, but rather was taken unawares by Officer Fraembs when he pulled his police car up behind appellant and his friends and shone his light on them.

Cesena had a knife (RT 6:878) and appellant was carrying a gun, but there was no evidence appellant planned to use the gun to kill the officer. Jason Meyer testified he took appellant to buy a gun a week or two before the incident. (RT 8:1114.) Appellant told Meyers he wanted a gun to protect himself and others in his neighborhood from rival gang members

who would come into appellant's neighborhood and do drive-by shootings. (RT 8:1116-1117.)[36]

No one planning a murder would allow himself to be seen by two witnesses actually committing the act. The threat against Flores to keep silent was clearly an afterthought to the crime. On May 22, 1996, Flores told the prosecutor that after appellant pointed the gun at her, he was nervous like he did not know what he had just done. (RT 7:979.) In short, appellant's actions do not suggest that he "killed as the result of careful thought and weighing of considerations, as a deliberate judgment or plan, carried on coolly and steadily, especially according to a preconceived design." (*People v. Rowland, supra*, 134 Cal.App.3d at p. 7, citing *Anderson, supra*, 70 Cal.2d at p. 26.)

**b. No Evidence of Motive Consistent With Planning and Deliberation**

Motive evidence consistent with planning and deliberation was similarly lacking. Motive evidence consists of "facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill." (*People v. Anderson, supra,* 70 Cal.2d at pp. 26-27.) Under the *Anderson* analysis, such motive evidence, *alone*, is insufficient to support a finding of premeditation and deliberation. It must be supported by facts of planning or the nature of the killing which would "support an inference that the killing was the result of a 'pre-existing

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[36] The trial court ruled that evidence that the Cherryville gang came into appellant's neighborhood two days before the incident was not relevant. (RT 8:1170-1171.) The trial court also excluded evidence that approximately one-and-a-half months before the incident, Flores threatened appellant that she could have him "taken out at any time" by the Cherryville gang. (RT 8:1141, 1145.)

reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]." (*Id.* at pp. 26-27.)

In the present case, appellant had no "prior relationship or conduct" with the victim. The prosecutor argued that appellant had a motive to kill the officer because he was on parole and if caught with a gun he could be sent back to the Youth Authority. (RT 15:2192.) The prosecutor also argued that since appellant told Flores "he didn't want to go back," he was motivated to shoot the officer. (RT 6:880.)[37] This evidence, however, is not evidence that appellant possessed the kind of motive contemplated by *Anderson* to support a finding of premeditation and deliberation. (*People* v. *Rowland* (1982) 134 Cal.App.3d 1, 8 [evidence of planning must be directed toward, and explicable as intended to result in, the killing].) This possible explanation – that appellant killed the officer in order to avoid having his parole revoked and to avoid being sent back to the Youth Authority – is speculative at best.[38] Moreover, any evidence of a "cover up" of the crime – threatening Flores to not talk – is irrelevant to ascertaining the defendant's state of mind immediately prior to or during the killing. (*People* v. *Anderson*, *supra*, 70 Cal.2d at pp. 31-32 [evasive conduct shows fear: it cannot support the double inference that defendant

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[37] Flores could not recall when appellant told her he was on parole, but it could have been a considerable time before the night of the incident. (RT 7:984.)

[38] The trial court excluded evidence that appellant had, on other occasions, violated the terms of his parole, including providing a urine sample which tested positive for methamphetamine the month before the incident without having his parole revoked. (RT 11:1594-1595.) This error is addressed, *infra*, at Argument VII.

planned to hide his crime at the time he committed it and that therefore defendant committed the crime with premeditation and deliberation].)

The prosecutor never established that appellant had a greater fear than normal of incarceration. Even the people to whom appellant allegedly spoke after the crime, did not say that appellant told them he killed the victim in order to avoid a parole violation which might result in incarceration. Thus, there was no evidence to support this speculative allegation. While it is true that all reasonable inferences must be drawn in support of the judgment:

> [t]his rule, however, does not permit us to go beyond inference and into the realm of speculation in order to find support for a judgment. A finding of first degree murder which is merely the product of conjecture and surmise may not be affirmed.

(*People v. Rowland, supra*, 134 Cal.App.3d at p. 8; s*ee also People v. Felix* (2001) 92 Cal.App.4th 905, 912 ["the prosecution may not fill an evidentiary gap with speculation"].)

Moreover, even assuming that there was evidence that appellant was motivated to kill the officer to avoid having his parole revoked, there was no evidence of prior planning or manner of killing, required by *Anderson* in addition to motive, to support a finding of premeditation and deliberation. (*People v. Anderson, supra*, 70 Cal.2d at pp. 26-27.) There was no such evidence in this case. Indeed, the killing seems to exemplify a "mere unconsidered or rash impulse hastily executed." (*Id.* at p. 17 (quoting *People v. Thomas* (1945) 25 Cal.2d 880, 900-901.)

### c. No Evidence of A "Particular and Exacting" Manner of Killing

The manner in which Officer Fraembs was killed does not support a finding of premeditation and deliberation. A single shot is not akin to acts such as beating or strangulation which evince that the killing was the product of reflection. (See , e.g., *People v. Bonillas* (1989) 48 Cal.3d 757, 792 ["Ligature strangulation is in its nature a deliberate act."].) While in some cases, a close-range gunshot to the face is arguably sufficiently "particular and exacting" to permit an inference that defendant was acting according to a preconceived design (see *People v. Cruz* (1980) 26 Cal.3d 233, 245), generally in those cases there is substantially more evidence of either planning (see, e.g., *People v. Caro* (1988) 46 Cal.3d 1035, 1050 [defendant armed himself, drove to scene, walked to site, and stalked the victims before shooting them]), or motive consistent with planning and deliberation (see, e.g., *People v. Cruz, supra*, 26 Cal.3d 233, 245 [defendant's pent-up resentment toward his victims]).

In this case, the evidence does not suggest such an intent because there are absolutely no facts to support planning activity by appellant. Thus, while a single shot to the head might support the inference of a deliberate intent to kill:

> A deliberate intent to kill . . . is a means of establishing malice aforethought and is thus an element of second degree murder in the circumstances of this case. In order to support a finding of premeditation and deliberation the manner of killing must be, in the words of the *Anderson* court, 'so particular and exacting' as to show that the defendant must have intentionally killed according to a 'preconceived design.'. . .

(*People v. Rowland, supra*, 134 Cal.App.3d at p. 9.)

In sum, there is simply no evidence that is reasonable, credible and

of solid value to support a finding that the killing of Officer Fraembs was deliberate and premeditated first degree murder.

### C. Conclusion

Even viewed in the light most favorable to the judgment, the evidence presented at appellant's trial does not support a finding of a premeditated and deliberated killing. The first degree murder conviction is a violation of state law (*People v. Anderson, supra*, 70 Cal.2d at pp. 34-35), as well as a violation of appellant's federal rights to due process of law (*Jackson v. Virginia, supra*, 443 U.S. at pp. 313-14 (the "due process standard . . . protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crimes has been established beyond a reasonable doubt")), to present a defense (*id.* at p. 314) ("[a] meaningful opportunity to defend, if not the right to a trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused") and to a reliable guilt and penalty verdict. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 and 17.)

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## III

## THE MURDER CONVICTION AND LYING-IN-WAIT SPECIAL CIRCUMSTANCE MUST BE REVERSED BECAUSE THE JURY ACTED UNREASONABLY IN FINDING THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE AND LYING-IN-WAIT MURDER, WHICH WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

In *People v. Green*, *supra*, 27 Cal.3d 1, this Court stated the "settled and clear" rule on appeal that "when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*Id.* at p. 69.) "The same rule applies when the defect in the alternate theory is not legal but factual, i.e., when the reviewing court holds the evidence insufficient to support the conviction on that ground." (*Id.* at p. 70.)

In *People v. Guiton*, the Court relied on *Griffin v. United States* (1991) 502 U.S. 46, and created the following exception to the *Green* rule: "If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground." (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1129.) *Guiton* expressly based its holding on the following reasoning:

> In analyzing the prejudicial effect of error, . . . an appellate court does not assume an unreasonable jury. Such an assumption would make it virtually impossible to ever find error harmless. An appellate court necessarily operates on the assumption that *the jury has acted reasonably, unless the record indicates otherwise*. [¶] . . . Thus, if there are two possible grounds for the jury's verdict, one unreasonable and

> the other reasonable, we will assume, *absent a contrary indication in the record*, that the jury based its verdict on the reasonable ground.

(*Id.* at p. 1127 [italics added].) The *Guiton* exception is therefore based on the assumption that the jury has acted reasonably and did not base a finding on insufficient evidence.

Here, however, the assumption that the jury acted reasonably does not apply because the record shows that the jury acted unreasonably in finding the lying-in-wait special circumstance and murder based on insufficient evidence. This Court reviews the evidence presented at trial in the light most favorable to the prosecution to determine whether any rational trier of fact would have found each essential element beyond a reasonable doubt. (*People v. Ochoa* (1998) 19 Cal.4th 353, 413-414.)

"The lying-in-wait special circumstance requires 'an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. . . .' [Citations.]." (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 388.) Because the lying-in-wait special circumstance adds additional requirements to the otherwise identical lying-in-wait theory of first degree murder (*People v. Ceja*, *supra*, 4 Cal.4th at p. 1140, fn. 2), the Court has often stated that the evidence for the lying-in-wait theory of first degree murder is necessarily sufficient when there is substantial evidence supporting the lying-in-wait special circumstance. (See, e.g., *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 500.) Conversely, where the evidence supporting the lying-in-wait theory of first degree murder is insufficient, the evidence supporting the

lying-in-wait special circumstance cannot be sufficient.

As shown, the evidence supporting the lying-in-wait theory of first degree murder was insufficient. It necessarily follows that the jury acted unreasonably in finding the lying-in-wait special circumstance. Thus, the *Guiton* exception does not apply so that under *Green*, the first degree murder verdict must be reversed. (*People v. Green*, *supra*, 27 Cal.3d at p. 70; see also *In re Winship*, *supra*, 397 U.S. at p. 364 [conviction based on insufficient evidence violates defendant's constitutional right to due process of law]; *Sandstrom v. Montana* (1979) 442 U.S. 510, 526 ["'[i]t has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside'"]; accord, *Martinez v. Garcia* (9th Cir. 2004) 379 F.3d 1034, 1035-1036, 1041; *Keating v. Hood* (9th Cir. 1999) 191 F.3d 1053, 1062.)

Moreover, even under *Guiton*, the murder conviction must be reversed because there is "an affirmative indication in the record that the verdict actually did rest on the inadequate ground" (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1129), given that the jury also found the lying-in-wait special circumstance. (See *People v. Marshall* (1997) 15 Cal.4th 1, 38 [evidence did not support robbery-murder theory of first degree murder, but true finding on allegation that murder was committed in course of attempted rape "necessarily" meant that jury found defendant guilty of felony-murder on that theory]; *People v. Kelly* (1992) 1 Cal.4th 495, 531 [trial court misinstructed on robbery as basis for first degree murder, but because jury properly found rape-murder special circumstance, jury necessarily relied on rape-murder theory of first degree murder]; *People v. Hernandez* (1988) 47 Cal.3d 315, 351 [court can tell that general verdict of guilt rested on rape and sodomy felony-murder because jury found rape and sodomy special

circumstances].)

This case manifestly is not one in which the "defendant has not challenged the legal or evidentiary support for the prosecution's *premeditated* murder theory" (*People v. Johnson*, *supra*, 6 Cal.4th at p. 42, original italics), or in which there is "a valid basis for the verdict" (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1130). Instead, appellant's case falls squarely within the *Guiton* exception to the usual harmless-error finding for insufficient evidence on one of two theories of criminal liability: "[I]nstruction on an unsupported theory is prejudicial only if that theory became the sole basis of the verdict of guilt. . . ." (*Ibid.*)

Since the factually inadequate theory of lying-in-wait murder was the likely basis for the first degree murder verdict and, in any event, both theories of first degree murder presented to the jury were factually inadequate, appellant's conviction of first degree murder must be reversed. Accordingly, the first degree murder verdict and lying-in-wait special circumstance, and death judgment must be reversed.

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## IV

## THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT THEY COULD CONVICT APPELLANT OF MURDER WITHOUT AGREEING WHETHER HE HAD COMMITTED PREMEDITATED MURDER OR LYING-IN-WAIT MURDER

Appellant was charged in Count 1 with the willful murder of Officer Daniel Tim Fraembs with malice aforethought in violation of section 187, subdivision (a). (CT 6:506-507.) The prosecution proceeded at trial on both murder under section 187, and lying-in-wait murder under section 189, and the jury was instructed on both malice-murder and lying-in-wait murder. (RT 15:2402-2405.) The prosecutor argued both malice-murder and lying-in-wait murder to the jurors, and specifically informed them that it was up to them whether they found first degree murder "by either theory or by both theories." (RT 15:2200.) Consistent with the prosecutor's argument, nothing in the court's instructions required the jurors to unanimously agree on whether the homicide was premeditated and deliberate or committed by means of lying in wait. The failure to require jury unanimity as to which statutory form of murder was committed was error and denied appellant his rights to have the state establish proof of the crime beyond a reasonable doubt, to due process and to a reliable determination on allegations that he committed a capital offense. (U.S. Const., 5th, 6th, 8th & 14 Amends; Cal. Const., art. I, §§ 1, 15, 16, 17.)

This Court has previously heard and rejected various similar arguments pertaining to the relationship between malice-murder and felony murder. (See e.g., *People v. Carpenter* (1997) 15 Cal.4th 312, 394; *People v. Pride* (1992) 3 Cal.4th 195, 249-250; *People v. McPeters* (1992) 2 Cal.4th 1148, 1185.) Appellant acknowledges that the reasoning behind the

present claim is similar to the reasoning rejected in these cases, but submits that the issue deserves consideration in light of the charges and facts of this case.

### A. Lying-In-Wait Murder Does Not Have The Same Elements As Premeditated And Deliberate Murder

Due process requires that the state prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant has been charged. (*In re Winship* (1970) 397 U.S. 358, 364.) Although states have great latitude in defining what constitutes a crime, once it has set forth the elements of a crime, it may not remove from the prosecution the burden of proving every element of the offense charged. (See *Sandstrom v. Montana* (1979) 442 U.S. 510, 524; *Mullaney v. Wilbur* (1975) 421 U.S. 684, 704.)

In *Schad v. Arizona* (1991) 501 U.S. 624, the United States Supreme Court addressed the due process implications of convicting a defendant of both premeditated murder and felony murder. The defendant in *Schad* challenged his Arizona murder conviction where the jury was permitted to render its verdict based on either felony murder or premeditated and deliberate murder. The Court reaffirmed the general principle that there is no requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict. (*Id.* at p. 632, citing *McKoy v. North Carolina* (1990) 494 U.S. 433, 439.) *Schad* acknowledged, however, that due process does limit the states' capacity to define different courses of conduct or states of mind as merely alternative means of committing a single offense. In finding that Schad was not deprived of due process the Court gave deference to Arizona's determination that under their statutory scheme "premeditation and the commission of a felony are not independent

elements of the crime, but rather are mere means of satisfying a single mens rea element." (*Schad v. Arizona*, *supra*, 501 U.S. at p. 637.) "If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, *rather than independent elements of the crime*, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law." (*Id.* at p. 636, emphasis added.) Thus, while Arizona has authoritatively determined not to treat premeditation and the commission of a felony as independent elements of the crime, where a state has determined that the statutory alternatives are independent elements of the crime, *Schad* suggests that due process is violated if there is not unanimity as to all the elements.

California has followed a different course than Arizona. The various forms of first degree murder are set out in section 189. These include not only felony murder but lying-in-wait murder as well as murder by other means.[39] While this Court has stated that there is only one crime of murder in California (see e.g., *People v. Davis* (1995) 10 Cal.4th 463, 515; but see *People v. Dillon* (1983) 34 Cal.3d 441, 476, fn. 23 [separate statutory sources for malice-murder and felony murder]), and that various forms of murder may be described as two theories of that one crime (see *People v. Pride*, *supra*, 3 Cal.4th at p. 249 [re malice-murder and felony murder]), the

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[39]Section 189 at the time of the offenses read as follows: "All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, kidnaping, train wrecking, or any act punishable under section 286, 288, 288a, or 289, is murder of the first degree; and all other kinds of murders are of the second degree."

various forms and/or theories of murder have different elements. When the state seeks to convict a defendant of a particular form of murder, it cannot remove one of those elements without violating due process under *Winship* and *Schad.*

There can be little doubt that lying-in-wait murder under section 189 has different elements than premeditated and deliberate murder. For lying-in-wait murder, "the prosecution must prove the *elements* of concealment of purpose together with 'a substantial period of watching and waiting for an opportune time to act, and . . . immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.'" (*People v Stanley* (1995) 10 Cal.4th 764, 795, emphasis added, quoting *People v. Morales* (1989) 48 Cal.3d 527, 557.) The elements of lying in wait are distinct from the elements of premeditated malice murder. (*Ibid.*) For first degree malice murder the prosecution must prove premeditation *and* deliberation, whereas "the Legislature in adopting the lying-in-wait provision only required that the defendant be shown to have exhibited a state of mind which is 'equivalent to,' and not identical to, premeditation *or* deliberation." (*People v. Ruiz* (1988) 44 Cal.3d 589, 615, emphasis added.)

"Calling a particular kind of fact an 'element' carries certain legal consequences." (*Richardson v. United States* (1999) 526 U.S. 813, 819.) One consequence "is that a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." (*Ibid.*) The same consequence follows in a California criminal case; the right to a unanimous verdict arises from the state Constitution and state statutes (Cal. Const., art. I, § 16; Pen. Code, §§ 1163 and 1164) and is protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346;

*Vitek v. Jones* (1980) 445 U.S. 480, 488).

The analysis is different for facts which are not elements in themselves but rather theories of the crime – alternative means by which elements may be established. The Supreme Court in *Richardson v. United States*, *supra*, 526 U.S. at p. 817, explained this distinction and also showed why *Schad* is inapplicable in the present case. In *Richardson*, the Court cited *Schad* as an example of a case involving *means* rather than *elements*:

> The question before us arises because a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime. *Schad v. Arizona*, 501 U.S. 624, 631-632, . . . . Where, for example, an element of robbery is force or the threat of force, some jurors may conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement -- a disagreement about means -- would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely that the defendant had threatened force.

(*Richardson v. United States*, *supra*, 526 U.S. at p. 817.)

By contrast, and as shown above, this case involves two forms of murder which California has determined are not merely separate theories of murder, but contain separate elements. Evidence of premeditation and deliberation, and evidence of concealment of purpose and watchful waiting are not simply means, or "brute facts," that may be used to establish a common element of a single crime. Rather, such evidence goes to establish separate elements of two forms of murder. The jury should not have been permitted to convict appellant of first degree murder without being unanimous as to whether the homicide was premeditated and deliberate murder or lying-in-wait murder.

### B. The Error Was Prejudicial

Because the jurors were not required to reach unanimous agreement on the elements of first degree murder, it is impossible to conduct harmless error analysis. The failure to properly instruct the jury was structural error, and reversal of the entire judgment is therefore required. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280.)

Furthermore, this was not simply an abstract error. There was not compelling evidence supporting one of the two forms of murder over the other, and reasonable jurors could have credited evidence supporting one form while rejecting evidence supporting the other. There is nothing to suggest that the jury unanimously agreed the crimes were either premeditated murder or lying-in-wait murder. In fact, the prosecutor told the jurors it did not really matter. "If you believe willful, deliberate murder it is first degree. If you like lying in wait, it is first degree. Either way, you still get to the same place, first-degree murder." (RT 14:2200.)

Moreover, the jury instructions told the jury that the "lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation *or* deliberation" while the instruction for willful murder required the jurors to find premeditation *and* deliberation. (RT 15:2405, 2404; emphasis added.) The prosecution presented evidence in support of two different forms of murder, and argued each form to the jury. The court should have required the jurors to unanimously agree, if they could, on one form or the other in order to convict appellant. Because the court failed to do so, the conviction must be reversed.

## V

## THE RECORD CONTAINS INSUFFICIENT EVIDENCE TO SUPPORT A TRUE FINDING OF THE SPECIAL CIRCUMSTANCES OF KILLING A POLICE OFFICER IN THE LAWFUL PERFORMANCE OF HIS DUTIES AND KILLING TO AVOID A LAWFUL ARREST; THE SPECIAL CIRCUMSTANCES SHOULD HAVE BEEN STRICKEN AT THE CLOSE OF THE PROSECUTION CASE

### A. Introduction

The Due Process Clause requires the prosecution to prove beyond a reasonable doubt every element of the crime with which the defendant is charged. (*In re Winship* (1970) 397 U.S. 358, 361-362; *Jackson v. Virginia* (1979) 443 U.S. 307, 319; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 [the reasonable doubt standard applies in both state and federal proceedings].) A state-court conviction unsupported by sufficient evidence violates appellant's state and federal rights to due process of law, a fair trial and reliable guilt and penalty determinations. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Calif. Const. art. 1, §§ 1, 7, 12, 15,16, 17; *Beck v. Alabama* (1980) 447 U.S. 625, 637; *People v. Thomas* (1992) 2 Cal.4th 489, 545 (conc. & dis. opn. of Mosk, J.).) This Court independently reviews whether the evidence at trial was sufficient under the federal and state constitutional due process clauses. (See *People v. Thomas, supra,* 2 Cal.4th at p. 544 (conc. & dis. opn. of Mosk, J.); *Jackson v. Virginia, supra*, 443 U.S. at p. 319.) The rules governing sufficiency of the evidence apply both to challenges aimed at special circumstance findings and to claims of deficiencies in the elements of the crimes charged. (*People v. Thompson* (1980) 27 Cal.3d 303, 323, fn. 25.)

Reviewing the evidence in the light most favorable to the judgment,

including reasonable inferences to be drawn from the evidence, the test applied by this Court is whether substantial evidence of each element of the special circumstance exists. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *see also Jackson v. Virginia, supra*, 443 U.S. at pp. 317-320.) Further, "[w]here the section 1118.1 motion is made at the close of the prosecution's case-in-chief, the sufficiency of the evidence is tested as it stood at that point." (*People v. Trevino* (1985) 39 Cal.3d 667, 695, disapproved on another point in *People v. Johnson* (1989) 47 Cal.3d 1194, 1219-1221.) If, judging the record at the time the motion was made, the evidence was insufficient, a later conviction must be reversed. (See *People v. Lines* (1975) 13 Cal.3d 500, 505.)

The special circumstances of killing a police officer in the performance of his lawful duties (Pen. Code, § 190.2, subd. (a)(7)) and killing to avoid a lawful arrest (Pen. Code, § 190.2, subd. (a)(5)) should have been stricken because the evidence was insufficient to prove the officer was engaged in the lawful exercise of his duties. The findings must be reversed and the death judgment vacated.

**B. Relevant Facts**

According to the testimony of the main prosecution witness, Johanna Flores, she, appellant and Joseph Cesena were walking at 1:30 a.m. on Humane Way, when a bright light flashed from behind them onto the ground in front of them. (RT 6: 876-877.) Cesena had a knife that snapped out. (RT 6:878.) A police officer got out of his police car and spoke to the group. He asked them "How are you doing tonight?" (RT 6: 881-882.) Flores described the officer's demeanor as "nice." (RT 6:883.) According to Flores, appellant responded by saying either "What the hell are you stopping us for?" or "What are you stopping us for?" (RT 6:885.) Flores

described appellant as having an "attitude" when he posed the question. (RT 6:885-886.)

Flores and appellant stood shoulder to shoulder on the sidewalk facing the officer, and Cesena who was standing with them stood closest to the officer. (RT 6:882.) The officer told Cesena to approach the police car and told Flores and appellant to sit on the sidewalk curb. (RT 6:886.) Cesena went to the police car and put his hands on the hood. (RT 6:887.) The officer stood behind Cesena and patted him down. (RT 6:888.) According to Flores, appellant moved behind her and directed or pushed her to the curb. (RT 6:888-890.) Flores took one or two steps off the curb into the street (RT 6:890), then maybe one or two more steps in the street (RT 6:892), before appellant pushed her aside and shot the officer. (RT 6:893.)

At the close of the prosecution case, appellant moved pursuant to Penal Code section 1118.1 to strike the special circumstances of killing a police officer in the performance of his lawful duties (Pen. Code, § 190.2, subd. (a)(7)) and killing to avoid a lawful arrest (Pen. Code, § 190.2, subd. (a)(5)), because the detention was illegal (RT 14: 2048, *et seq.*), and objected to the commensurate jury instructions (CALJIC Nos. 8.81.5, 8.81.7 and 8.81.8; RT 14:2102.)[40] In ruling that the officer's actions were reasonable (RT 14:2144), the trial court found the operative facts to be: (1) the encounter occurred in an industrial area at 1:30 a.m. on a dark street

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[40] The prosecutor did not attempt to justify the detention on the basis that appellant was on parole. (RT 14:2132.) Now would such a justification be tenable. (*People v. Sanders* (2003) 31 Cal.4th 318, 332 [parolee retains reasonable expectation officers will not undertake search unsupported by reasonable suspicion of criminal activity].)

lighted by street lights; (2) appellant was dressed in black pants with a black "bomber" jacket, Flores wore a black Taco Bell uniform with a black, white and gray "Raider" jacket, and Cesena wore gray baggy pants and a white t-shirt; (3) Cesena carried a sheath and knife[41]; and (4) appellant had a hostile attitude. (RT 14:2142-2143.) The court found the encounter to be consensual and denied the motion. (RT 14:2144-2145.) The court instructed the jury with CALJIC Nos. 8.81.5, 8.81.7 and 8.81.8.[42]

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[41] As the trial court recognized, the evidence did not establish whether the officer was aware of the "sheath and a knife" on Cesena. (RT 14:2143.) The evidence established that when Cesena was arrested he was wearing a baggy white t-shirt as well as baggy pants; a knife sheath was attached to his belt. (RT 6:780-781.) A knife which fit the sheath, described as a pocket knife (RT 12:1841) and a knife which "snapped out" (RT 6:878), was found in the bushes 14 to 41 feet from the incinerator. (RT 9:1291.)

[42] CALJIC No. 8.81.5 provides:

> To find that the special circumstance referred to in these instructions as murder to prevent arrest or to perfect an escape is true, the following facts must be proved:
> 1. The murder was committed for the purpose of avoiding or preventing a lawful arrest.

CALJIC No. 8.81.7 provides:

> To find that the special circumstance referred to in these instructions as murder of a peace officer is true, each of the following facts must be proved:
> 1. The person murdered was a peace officer.
> 2. The person murdered was intentionally killed while engaged in the performance of his duties.
> 3. The defendant knew or reasonably should have known that the person killed was a peace officer engaged in the performance of his duties.

CALJIC No. 8.81.8 provides:

(continued...)

[42](...continued)

The phrase "in the performance of his duties" as used in these instructions means:
Any lawful act or conduct while engaged in the maintenance of the peace and security of the community or in the investigation or prevention of crime.
Lawfully detaining or attempting to detain a person for questioning or investigation.
A lawful arrest may be made by a peace officer without a warrant of arrest whenever the officer has reasonable cause to believe that the person arrested had committed a misdemeanor in the officer's presence.
The term reasonable cause as used in this instruction means such a state of fact or circumstances confronting the officer at the time of the arrest as would lead a peace officer of ordinary caution or prudence to believe and consciously entertain a strong suspicion that the person arrested had committed a misdemeanor.
A peace officer may lawfully detain and question a person when the circumstances are such as would indicate to a reasonable peace officer in a like position that such a course of conduct is within the proper discharge of his duties.
Temporary questioning permits reasonable investigation without the necessity of making an arrest. Although peace officers have the power to detain and question, there must be reasonable cause to detain.
Probable or reasonable cause to detain requires that there be some unusual or suspicious circumstance or other demonstrable reason warranting the investigation. Time, location, number of people. Demeanor, and conduct of a suspect or recently reported crime ans the

(continued...)

(RT 14:2409-2411.)

### C. To Uphold the Special Circumstances of Killing a Peace Officer and Avoiding Arrest it must Be Established That the Officer's Actions Were Lawful

The jury found true the special circumstance of intentionally killing a peace officer while in the course of the performance of his duties. (Pen. Code, §190.2, subd. (a)(7).)[43] The statute provides that the victim must be "engaged in the course of his duties." (Pen. Code, § 190.2, subd. (a)(7).) This Court has interpreted this language to mean that the officer must be "lawfully" engaged in his duties. (*People v. Gonzalez* (1990) 51 Cal. 3d 1179, 1217 [warrant that is valid on its face is sufficient to establish officer

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[42](...continued)

> gravity of the crime are among the factors you may consider.
> In order for a peace officer to have reasonable cause to detain:
> 1. There must be a rational suspicion by the peace officer that some activity out of the ordinary has taken place, is occurring or is about to occur;
> 2. Some indication must exist to connect the person under suspicion with the activity; and
> 3. There must be some suggestion that the activity is related to the crime.

[43] Penal Code section 190.2 provides, in pertinent part, as follows:

(a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true:

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest . . .

(7) The victim was a peace officer . . . who, while engaged in the course of the performance of his duties, was intentionally killed . . .

is lawfully engaged in performance of his duty for purposes of the special circumstance]; *People v. Mayfield* (1997) 14 Cal.4th 668, 791 [phrase "engaged in the course of the performance of his or her duties" means that the officer must have been acting lawfully at the time].)

Section 190.2, subdivision (a)(7) does not require proof of the defendant's *subjective* understanding that the officer's conduct is lawful, but it does require that the officer's conduct be lawful as an *objective* fact. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1020; see Pen. Code, § 190.2, subd. (a)(7).)

The jury also found true the special circumstance of killing for the purpose of avoiding or preventing lawful arrest (Pen. Code, § 190.2, subd. (a)(5)) which by its own language requires that the arrest be lawful.

In most cases that address the question of what constitutes the lawful performance of duties, the officer's conduct was either found to be lawful on its face or lawful in response to the defendant's criminal behavior. (*See People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217-1218 [officer executing a facially valid warrant is lawfully engaged in duty for purposes of the special circumstance]; *People v. Jenkins* (2000) 22 Cal.4th 900, 1022-1023 [investigating officer's conduct lawful where evidence pointed to the defendant's involvement in the robbery and the officer was killed while investigating the robbery]; *People v. Jackson* (1989) 49 Cal.3d 1170, 1198 [officer's aggressive conduct was lawful when detaining defendant who was disheveled, stumbling aimlessly and fought with the officer]; *People v. Mayfield* (1997) 14 Cal.4th 668, 791 [officer's investigatory detention was lawful].) In *Mayfield,* this Court directly addressed the legality of the officer's detention of the defendant. The Court found that the officer acted lawfully in detaining the defendant, because he possessed specific

articulable facts that the defendant was linked to criminal activity. The officer responded to a service station to investigate an unspecified problem, and once at the station, was told by a witness that the defendant was after the witness and was going to kill him. Unlike *Mayfield*, however, in the present case, there were no specific articulable facts providing some objective manifestation of involvement in criminal activity.

In cases in which this Court has found substantial evidence to support the special circumstance of murder to avoid a lawful arrest, the facts support findings where the arrest was either lawful or would be lawful based on the defendant's conduct. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1324 [special circumstance applied where the defendant was already legally detained by the police officer victim]; *People v. Vorise* (1999) 72 Cal.App.4th 312, 319-323 [while there was no peace officer present at the time, a reasonable jury could infer that defendant believed he would be immediately arrested for possessing a stolen bicycle; holding there was a direct connection between the perceived threat of imminent arrest and the murder].) According to these cases, a murder that falls within Penal Code section 190.2, subdivision (a)(5) is one in which a defendant kills because he fears arrest or under circumstances that would lead an objectively reasonable observer to conclude that arrest is highly likely. In each of these cases, the defendant was in the process of committing a crime or had already committed a crime, and thus the arrest was lawful. In *Cummings*, the defendant had committed robberies, and was driving in a stolen car, when he was stopped for a traffic violation. In *Vorise*, the defendant stole a bike and possessed a concealed loaded weapon. In contrast to the facts of these cases in which the arrest was arguably lawful, the officer's actions in detaining appellant and the others were not lawful and therefore the

evidence is insufficient to sustain the special circumstances findings.

### D. The Officer's Detention of Appellant and the Others Was Illegal

Rejecting appellant's argument that Officer Fraembs illegally detained appellant, Flores and Cesena, the trial court found that the encounter between the officer and the individuals was a lawful consensual encounter, and that Officer Fraembs's actions constituted reasonable self-protective measures. (RT 14:2144-2145.) The trial court, however, erroneously characterized Officer Fraembs's actions as a lawful consensual encounter instead of an illegal detention.

Analysis of the lawfulness of police contacts under the Fourth Amendment falls into three categories: consensual encounters, detentions, and other seizures, including formal arrests and other comparable restraints on an individual's liberty. (*Wilson v. Superior Court* (1983) 34 Cal.3d 777, 784.) When Officer Fraembs approached appellant and the others, and asked "How are you doing tonight?" the contact, initially, was a consensual encounter and not a detention. Consensual encounters do not restrain an individual's liberty and police officers can initiate a consensual encounter without any objective justification. (*Wilson v. Superior Court, supra*, 34 Cal.3d at p. 784; *Florida v. Bostick* (1991) 501 U.S. 429, 434 [When a police officer merely approaches an individual on the street and asks a few questions the contact is not a detention.].) Officer Fraembs's subsequent actions, however, ripened the consensual encounter into a detention. When an officer, using physical force or show of authority, or in some other manner restrains an individual's liberty, a seizure occurs. ((*Wilson v. Superior Court, supra*, 34 Cal.3d at pp. 789-790.) A seizure might include physically touching the person or using language or a certain vocal tone.

(*United States v. Mendenhall* (1980) 446 U.S. 544, 554; *In re James D.* (1981) 43 Cal.3d 903, 913, fn. 4.) If the officer's conduct would cause a reasonable person to believe that he was not free to decline the officer's request or otherwise terminate the encounter, a detention or seizure has occured. (*Florida v. Bostick, supra*, 501 U.S. at p. 439; *California v. Hodari D.* (1991) 499 U.S. 621, 629; *see also People v. Jones* (1991) 228 Cal.App.3d 519, 523 [officer's orders to "Stop. Would you please stop," would lead a reasonable person to believe he was not free to leave]; *People v. Verin* (1990) 220 Cal.App.3d 551, 557 [officer's command to defendant, "Hold it, Police" or "Hold on, Police" constituted a detention since the defendant reasonably had to comply with the officer's demand].)

Here, the consensual encounter evolved into a detention when Officer Fraembs directed appellant and Flores to take a seat on the curb, and ordered Cesena to approach the patrol car. Officer Fraembs's show of authority made apparent that compliance with his orders was compelled. While the record is not clear whether appellant and Flores sat on the curb, they did not leave the scene. Moreover, when Officer Fraembs ordered Cesena to walk to the police car, he complied. Cesena's compliance demonstrated that under the circumstances, a reasonable person would not believe he was free to leave.

> In order to justify a detention "the circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity. Not only must he subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so: the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience [citation], to suspect the same

> criminal activity and same involvement by the person in question."

(*People v. Aldridge* (1984) 35 Cal.3d 473, 478, quoting *In re Tony C.* (1978) 21 Cal.3d 888, 893.)

Because there is no "bright-line" distinction between a consensual encounter and a detention, a reviewing court must consider the totality of the circumstances known or apparent to the officer executing the detention. (*United States v. Mendenhall* (1980) 446 U.S. 544, 554.)

In this case, there was no evidence that Officer Fraembs had received any calls regarding suspicious or criminal activity in the area or that he personally suspected or observed criminal activity and reported it to police dispatch. There was no evidence that the area in which the incident took place was a high crime area. When Officer Fraembs encountered the three individuals, they were simply walking in an industrial area of town at 1:30 a.m., dressed in black and grey clothing.[44] It is not unheard of for young people to visit a town's industrial sections or to do so at 1:30 a.m. Rupert Bascomb, a security guard for a business located on Humane Way, testified that he would sometimes see people walking in the area at that time of the early morning. (RT 13:1967.) While Officer Fraembs may have entertained a hunch or suspicion based on manner of dress, number of people, gender, or any other factor, more is required. When an investigative stop or detention is "predicated on circumstances which, when viewed objectively, support a mere curiosity, rumor, or hunch, the stop is unlawful

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[44] There was no evidence presented at trial that the clothing worn by the individuals was associated with a gang. Moreover, mere membership in a street gang is not a crime *(People v. Green* (1991) 227 Cal.App.3d 692, 699-700), and cannot be the basis for a detention. (*People v. Rodriguez* (1993) 21 Cal.App.4th 232, 238-239.)

even though the officer may have been acting in good faith." (*People v. Conway* (1994) 25 Cal.App.4th 385, 389.)

In *People v. Roth* (1990) 219 Cal.App.3d 211, 215, the officers observations of the defendant walking in a shopping center's deserted parking lot in the early morning did not justify a detention. In *People v. Bower* (1979) 24 Cal.3d 638, 644-645, there was no cause for suspicion when police officers approached a group of Black men in a Black, high crime area and a single White man walked away from the group. In *People v. Wilkins* (1986) 186 Cal.App.3d 804, 810-811, there was no reasonable suspicion to justify a detention when the police officer on patrol in a store parking lot at night saw the defendant and another person in a station wagon "slide down" as they drove by. Finally, in *People v. Rodriguez, supra,* 21 Cal.App.4th at pp. 238-239, a second degree murder case, detention of suspected gang members to take pictures for a "gang book" was held to be illegal. The guarantees of the Fourth Amendment do not allow stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity. (*Brown v. Texas* (1979) 443 U.S. 47, 51-52.) These cases demonstrate that merely walking down a street in a group, dressed in black and grey clothing at 1:30 a.m., even in an industrial area, is insufficient to justify a detention.

The trial court concluded that appellant's "hostile" attitude when he asked Officer Fraembs "What the hell are you stopping us for?" and the fact that Cesena was carrying a knife sheath permitted Officer Fraembs to conduct the pat down search. (RT 14:2143-2144.)[45] Appellant's offensive

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[45] Despite the clear indications that the encounter escalated into a detention, the trial court insisted the encounter was a consensual encounter. (continued...)

attitude, however, did not create a reasonable suspicion that criminal activity was afoot. A simple question, albeit hostile, "Why are you stopping us?" or "Why the hell are you stopping us?" does not constitute criminal activity. One cannot assume from the question itself consciousness of guilt or activity justifying a seizure under the Fourth Amendment. (See *Florida v. Bostick, supra*, 501 U.S. at p. 438 ["'reasonable person' test presupposes an innocent person"].) As the United States Supreme Court explained in the context of consensual encounters, a person approached by an officer need not answer any question put to him, may decline to listen to the questions at all, and may go on his way. The person approached may not be detained without reasonable objective grounds, and the person's refusal to listen to or answer an officer, does not furnish reasonable objective grounds for a detention. (*Florida v. Royer* (1983) 460 U.S. 491, 497-498.) Likewise, a question directed to the officer cannot create grounds to detain the person. In fact, such a question suggests that appellant believed he was being detained rather than merely engaging in a consensual encounter with the officer.

Finally, neither appellant's attitude nor the presence of a knife sheath (or even a knife) on Cesena's belt was cause for Officer Fraembs to escalate the encounter. California case law supports brief "detentions" where there is no criminal activity when needed to protect officer safety. (*See People v. Glaser* (1995) 11 Cal.4th 354, 365 [the "initial brief detention of defendant was justified by the need to determine what connection defendant . . . had to the premises, and by the related need to ensure officer safety and security at the site of a search for narcotics"].) Such a concern, however, cannot

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[45](...continued)
(RT 14:2144.)

excuse Officer Fraembs's otherwise unlawful conduct. "Inchoate concerns for officer safety may justify certain minimal intrusions" but "a reasonable articulable suspicion of criminal activity is needed to justify a detention. [Citations.]" (*People v. Gonzalez* (1992) 7 Cal.App.4th 381, 386.) Lacing a question with hostility is not sufficiently suspicious behavior to meet this standard. Carrying a knife sheath even with a pocket knife does not implicate officer safety permitting a detention. Once legally detained, the presence of a knife would allow the officer to conduct a pat search for officer safety, however, in this case there was no evidence that the knife was even visible to Officer Fraembs. (See Exhibit 8; RT 6:777; 15:2329 [prosecutor did not object to or contradict defense counsel's argument that the knife was not visible under Cesena's clothing].) If permitted, police officers everywhere would be entitled to restrain the individual liberty of a person audibly grumpy at the prospect of dealing with a police officer or those carrying a pocket knife. Rather, it is only where a detention is legal that an officer is then permitted to conduct a pat search for weapons. (*Terry v. Ohio* (1968) 392 U.S. 1, 30 [having begun the detention, the officers were authorized to protect their safety by conducting a pat search for weapons].)

The trial court relied upon *People v. Rosales* (1989) 211 Cal.App.3d 325, in holding that officer safety justified Officer Fraembs' actions during the encounter. (RT 14: 2142.) In *Rosales*, the interaction between the officer and the defendant began as a consensual encounter. The officer approached the defendant and identified himself with the (aborted) intention to ask some investigatory questions. "The encounter was escalated by defendant's conduct which created an appearance of potential danger to the officer. When defendant suddenly put his hand into the bulging pocket,

Officer Siragusa reasonably believed he was, or could be, reaching for a weapon. Certainly, at that point, the officer acquired sufficient grounds to justify a temporary detention to check for weapons. (*People v. Lee* (1987) 194 Cal.App.3d 975, 982-983.)" (*People v. Rosales, supra*, 211 Cal.App.3d at p. 331.) The officer then grabbed the defendant's hand. The court found the officer was entitled to take appropriate precautionary measures to ensure his own safety, and that the officer's conduct was a justifiable response to the defendant's potentially threatening conduct. (*Id.* at pp. 330-331.) Here, the facts are distinguishable. The officer in *Rosales* had reasonable suspicion that the defendant was involved in a criminal activity of drug selling and he had observed the defendant engage in suspicious behavior. No such facts existed in this case. Further, there was no evidence of suspicious concealment or furtive movement on the part of appellant or the others prior to the detention which would have caused concern for officer safety.

Assuming, arguendo, that appellant and Flores were not detained when Officer Fraembs directed them to sit on the curb, when Fraembs pat searched Cesena the physical touching created a seizure. (*United States v. Mendenhall, supra*, 446 U.S. at p. 554; *In re James D., supra*, 43 Cal.3d at p. 913, fn. 4.) Arguably, Officer Fraembs conducted a pat search in order to protect himself, however, such searches are permitted only when an officer believes a person is armed and dangerous. Such belief must be objectively reasonable, based on reasonable inferences from known facts. (*Terry v. Ohio, supra,* 392 U.S. at p. 27; *People v. Lawler* (1973) 9 Cal.3d 156, 161 [evidence did not support belief that officer was dealing with an armed or dangerous individual].) While the evidence showed that Cesena had a knife

sheath attached to his belt,[46] there was no evidence that Officer Fraembs was aware of the sheath. Furthermore, there is no evidence that Cesena reached for or brandished a knife, nor were there any objective reasons to believe that Cesena posed a threat. The prosecutor never argued to the jury that Officer Fraembs was justified in detaining the individuals or in searching Cesena because he saw the knife or the knife sheath. Rather he argued:

> He is going to find out what is going on with these people. But now since he is met with this unreasonable and unusual hostile response, he's still got to insure [sic] his safety, such that he can find out who these people are and what they are up to. . . . And it is while he is patting Sparky down, trying to insure [sic] that neither Sparky, that Sparky does not have any kind of a weapon that is going to hurt him it is at that time that he is taken from this life.

(RT 15:2205.)

In short, there was no evidence that Cesena or anyone exhibited potentially threatening conduct justifying the pat down search and detention. The officer's detention of appellant was illegal.

**E. Conclusion**

Officer Fraembs's actions constituted an unlawful detention, unsupported by reasonable suspicion. The prosecution failed in its burden to establish the lawfulness of the officer's actions, thus failing to establish sufficient evidence of the essential element of a lawful arrest required by Penal Code section 190.2, subdivisions (a)(7) and (a)(5). For this reason, this Court must find the evidence was insufficient to support these special circumstances and the judgment of death must be reversed.

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[46] A knife which fit into the sheath was found in the underbrush 14 to 41 feet away from where Cesena was apprehended. (RT 9:1291.)

## VI

## THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY IMPROPERLY ADMITTING TESTIMONY ABOUT THREATS MADE TO JOHANNA FLORES AND OTHERS

### A. Introduction

In capital cases, the United States Supreme Court "has demanded that fact-finding procedures aspire to a heightened standard of reliability." (*Ford v. Wainwright* (1986) 477 U.S. 399, 411.) The evidentiary rulings in a guilt-phase trial involving a capital charge therefore take on an added constitutional significance. Under the Eighth and Fourteenth Amendments, state evidentiary rules "may not be applied mechanistically to defeat the ends of justice." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *see Walker v. Deeds* (9th Cir. 1995) 50 F.3d 670, 672-673.) In addition, even "mere" state evidentiary errors can violate federal due process if they render the fact-finding process fundamentally unfair. (*Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 456.)

Such was the case here. The trial court made erroneous evidentiary rulings that permitted testimony concerning alleged threats by appellant and others and the witnesses fear of appellant and others to undermine the integrity of the trial and violate appellant's rights to a fair trial, confrontation, due process, effective assistance of counsel and a reliable and non-arbitrary sentencing process under the Fifth, Sixth, Eighth and Fourteenth Amendments and analogous California Constitutional provisions.

### B. The Trial Court Erred By Permitting Johanna Flores To Testify That She Was Threatened By Appellant's Brother, Angel Mendoza

Appellant moved to exclude the testimony of Johanna Flores concerning statements made to her by appellant and by appellant's brother, Angel Mendoza. (RT 6:792-796.) The prosecution argued the evidence should be admitted as evidence of Flores's state of mind and as relevant to her credibility as a witness. (RT 6:794.) Appellant objected to Flores's testimony on hearsay, relevancy, and Evidence Code section 352 grounds. (RT 6:792-796.)

The trial court ruled that the prosecution would be permitted to elicit testimony from Flores that she felt threatened by appellant and Angel, and was afraid to testify. The trial court ruled, however, that the particular statement by Angel – "We kill Jaina's that see things that they should not have seen"– was not admissible, but that appellant's actual statements would be admissible. The trial court stated:

> If her statement is – I assume you're going to ask her are you afraid in giving testimony? And she's going to respond. And you're going to ask her, presumably, why are you afraid? And she's going to tell you why she's afraid. And if she states that the defendant made such and such a statement, as far as I'm concerned, that's admissible. If she states that she's afraid because the defendant's brother made statements to her, that's admissible. The statement itself is not admissible.

(RT 6:809-810.)

Thereafter, Flores testified:

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| [The Prosecutor]: | Did you speak with his brother? |
| [Ms. Flores]: | Yes |
| Q: | As – Did his brother say some words to you? |

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| A: | Yes. |
| Q: | As a result of his brother saying some words to you, what was your state of mind– |
| Mr. Fountain: | Well, objection, based upon previous conversation with the court. |
| The Court: | Overruled. You may answer. |
| The Witness: | He said – |
| [The Prosecutor]: | Okay. Don't say his words. He said something to you. How did you then feel? |
| A: | I was scared. I was really scared. |
| Q: | Did he threaten you in some fashion? |
| A: | Yes. |

(RT 6:921-922.)

Flores was permitted to testify that her entire family was relocated by the Pomona Police Department at her request "because they went to my house. They went to my mother's house." When the prosecutor asked Flores who went to her house, defense counsel's objection was sustained, but Flores was permitted to testify she was involved in the relocation program. (RT 7:944.) Finally, the court sustained a defense objection to the prosecutor's question whether she was still fearful. (*Ibid.*)

### 1. The Prosecution Presented No Inconsistent Testimony Which Would Have Permitted the Introduction of the Evidence of Threats Against Flores

While the trial court correctly ruled that Angel's statements should be excluded, the trial court should not have allowed Flores to testify that Angel had threatened her and that her family was relocated. The prosecution sought to introduce Flores's testimony either as non-hearsay evidence of her credibility as a witness, or as statements falling within the state of mind exception to the hearsay rule. The testimony should not have been admitted on either basis.

First, the testimony should not have been admitted as non-hearsay evidence of a witness' credibility because the witness neither recanted nor had substantial inconsistencies in her testimony. This rule is clearly laid out in the cases presented by the prosecution and reviewed by the trial court: *People v. Gutierrez* (1994) 23 Cal.App.4th 1576, and *People v. Olguin* (1995) 31 Cal.App.4th 1355. The court also reviewed *People v. Avalos* (1984) 37 Cal.3d 216. In both *Gutierrez* and *Olguin*, the witnesses to the crime implicated the defendants in pre-trial statements to the police, but later recanted at trial. The court ruled in both cases that it was proper for the jury to consider the threats and the witnesses' fear to evaluate the witnesses' credibility. (*People v. Gutierrez, supra*, 23 Cal.App.4th 1576, 1587-1588; *People v. Olguin, supra*, 31 Cal.App.4th 1355, 1368-1369.) Similarly, in *Avalos*, the eyewitness to the crime identified the defendant in an in-person lineup, but was later reluctant to identify the defendant in court. In that case, the California Supreme Court ruled that the fact that the witness felt fear was relevant to her credibility. (*People v. Avalos*, *supra*, 37 Cal.3d 216, 232.)

The trial court correctly recognized that pursuant to this Court's reasoning in *Avalos,* evidence of particular threats is only admissible once a witness has testified inconsistently to his or her prior testimony. In its ruling, the court stated that if Flores testified inconsistently to her previous testimony it would also admit the particular statement by Angel. (RT 6:812.) The trial court however, failed to recognize that *any* evidence of threats by Angel or others should not have been admitted without such an inconsistency.

This point is clearly articulated by the appellate court in *People* v. *Brooks* (1979) 88 Cal.App.3d 180. The court made clear the distinction between a witness who was threatened and feared giving testimony and a witness whose credibility was in question. The court clarified that the threats could be deemed non-hearsay as "offered for a proper credibility purpose" where the threatened witness had initially identified the defendant and later retracted the identification. In that instance, the court ruled that the evidence was admissible for a proper credibility purpose. However, as to another threatened witness, the court was "unable to overcome the initial relevancy hurdle" in that "[n]o inconsistent testimony had preceded the prosecutor's questioning of [that witness]; there was no issue of credibility (or "state of mind" as the trial court termed it). Hence, the 'threat' evidence was immaterial to any issue and irrelevant to the case . . . ." (*People v. Brooks, supra*, 88 Cal.App.3d 180, 187.) Flores's testimony regarding threats against her is like that of the second witness in *Brooks* – it is immaterial and irrelevant because she neither retracted nor recanted her prior testimony and no inconsistent testimony preceded the prosecutor's questioning of the witness.

Defense counsel brought out two peripheral inconsistencies on cross-

examination, but neither of these concerned the core facts of Flores testimony – that she saw appellant shoot the officer. First, defense counsel brought out that Flores in her first statement to the police failed to mention that Chantal and Jasper were at Tank's house the night of the incident. At the preliminary hearing however, she did testify that both Chantal and Jasper were present at Tank's house. (RT 7:1014-1015, 960.) On redirect examination, the prosecutor was permitted to elicit that Flores did not mention Chantal and Jasper in her statement to the police "[b]ecause Chantal at that time, me and her were good friends, and I didn't want to see nothing happen to her. I didn't you know, I didn't want to get anybody else in trouble. I was scared that Jasper would have did something and Chantal had her family, Happy Town. He has family in Happy Town. I was scared that if I were to mention to her that they were going to do something or Jasper would have did something or, you know." (RT 7:1014-1015.) Not only does this "inconsistency" concern only a peripheral fact, but Flores's testimony at trial was not inconsistent with her testimony at the preliminary hearing on this point – a statement under oath. The other potentially inconsistent fact concerned whether Flores previously told the police appellant had "an attitude" when stopped by Officer Fraembs. The possible exclusion of this minor point in her initial statement to the police is clearly not a substantial inconsistency sufficient to allow the introduction of the threats evidence. Moreover, in its ruling, the trial court correctly recognized that Flores was consistent in her statements "from the moment the witness came forward and gave a statement to the police," "through the preliminary hearing" and she was expected to testify consistently throughout the trial. (RT 6:811-812.)

Although, in its ruling, the trial court correctly distinguished the

instant case from *Olguin*, *Gutierrez* and *Avalos* it failed to grasp the full import of its findings. Because no inconsistent testimony preceded the prosecution's questioning of Flores and Flores's testimony was not in conflict with her other testimony given in the case, the "threat" and fear evidence was immaterial to any issue and irrelevant to the case. After distinguishing the instant case, the trial court should have excluded Flores's testimony that she was threatened and scared.

Additionally, in *Brooks* (like *Olguin* and *Gutierrez*), a limiting instruction to the jury accompanied the admission of evidence where the court found the witnesses' testimony admissible. In *Brooks*, the trial court gave a specific instruction to the jury that it had allowed the prosecutor to question the witness about the alleged threats "for the limited purpose that it has a bearing on the state of mind of this witness . . ." and read CALJIC No. 2.05[47] as requested by the defendant. (*People v. Brooks*, *supra,* 88 Cal.App.3d at p. 185.) The court held in *Brooks* that it is reversible error to permit introduction of evidence that the witness had been threatened by a person other than the appellant when such evidence is irrelevant to appellant's guilt or innocence, and that the error arising out of its introduction was not cured by giving a cautionary instruction. (*Ibid.*) While the court in this case gave CALJIC No. 2.05 to the jury, under *Brooks*, the instruction by itself did not cure the court's error. (RT 15:2391-

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[47] CALJIC No. 2.05 reads as follows: "If there is evidence that efforts to procure false or fabricated evidence were made by another person on behalf of the defendant, you may not consider this as tending to show the defendant's consciousness of guilt unless you find that the defendant authorized those efforts."

2392.)[48]

Second, the state of mind exception to the hearsay rule does not apply to Flores's testimony because the statute governing that exception, Evidence Code section 1250[49], deals with admissibility of a statement offered to prove a *declarant's* state of mind or conduct. Here, Angel's statements to Flores were not offered to prove his state of mind or conduct. Angel's state of mind was irrelevant because it was not at issue in the case. (*People v. Johnson* (1977) 72 Cal.App.3d 52, 55; *Bryan v. Superior Court* (1972) 7 Cal.3d 575, 587 [a hearsay statement that falls within a hearsay exception is still subject to the exclusionary rules of evidence other than hearsay].) This state of mind exception to the hearsay rule does not apply to Flores's testimony.

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[48] Nor could the evidence have been admitted as consciousness of guilt. California law prohibits proving consciousness of guilt by establishing attempts to suppress evidence unless those attempts can be connected to appellant. (*People v. Hannon* (1977) 19 Cal.3d 588, 596-600.) The prosecution would have had to show that the threats were authorized by appellant or made in his presence. (*People v. Terry* (1962) 57 Cal.2d 538, 566.) However, the record does not reflect any proof that appellant was connected to the threats. Further, Angel's relationship to appellant does not prove authorization of the "threats" by appellant. (*People v. Golden* (1961) 55 Cal.2d 358, 370.)

[49] Evidence Code section 1250 states: (a) Subject to section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or (2) The evidence is offered to prove or explain acts or conduct of the declarant. (b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed.

### ii. The Prejudicial Impact of the Evidence Far Outweighed its Probative Value

Finally, appellant objected under Evidence Code section 352 to the admission of Flores's testimony regarding her fear and Angel's threat. While the jury is entitled to hear those facts that would enable them to evaluate the witness' credibility (if admissible under that theory) such evidence is limited by Evidence Code section 352. (*People v. Olguin* (1995) 31 Cal.App.4th 1355, 1369; *People v. Jennings* (1991) 53 Cal.3d 334, 371 [even when credibility evidence is otherwise admissible, the trial court has the discretion under Evidence Code §352 to exclude it].)

The trial court is vested with wide discretion in determining the admissibility of evidence. Its exercise of discretion under Evidence Code section 352 will not be disturbed on appeal absent a clear abuse. (*People v. Allen* (1986) 42 Cal.3d 1222, 1256). Evidence Code section 352 provides that the trial court may exclude evidence "if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

When an objection is raised pursuant to this statutory provision, the trial court must weigh the probative value of the proffered evidence against its prejudicial effect, and this weighing process must appear on the record. (*People v. Zapien* (1993) 4 Cal.4th 929, 960; *People v. Heishman* (1988) 45 Cal.3d 147, 170; *People v. Green* (1980) 27 Cal.3d 1, 25 [the record must affirmatively show that the trial court did in fact weigh the prejudicial effect of the evidence against its probative value].) Here, however, the trial court completely ignored the question of whether the prejudicial effect of the evidence outweighed its probative value. The trial court failed to make a

ruling regarding appellant's Evidence Code section 352 objection and did not engage in the requisite weighing process at all. The court's utter failure to weigh the evidence and demonstrate its consideration under Evidence Code section 352 was error. Had the court fulfilled its duty and weighed the proposed evidence before it came in, it would have been compelled to exclude it.

Any probative value of Flores's testimony was minimal, while its underlying prejudicial effect was substantial. Because Flores's credibility was not at issue, the introduction of the evidence regarding her fears served only to bring the evidence of the threats to the jury's attention, and served to prejudice the jury against appellant. The testimony was prejudicial to appellant because it implied that appellant was connected to the threats. Moreover, testimony that Flores was scared to testify, if admissible at all, need only have been introduced once. The trial court compounded the prejudice by permitting the prosecution to introduce more evidence of threats from Angel after Flores had already testified regarding appellant's threats and her fear.[50] No further probative value was gained by the continued questioning or evidence surrounding that fear such as the evidence that Flores and her family were relocated by the police. Testimony about Angel's statements and actions was prejudicial, cumulative, and altered the balance of testimony in the case. In these circumstances, the trial court should have exercised its discretion to exclude Flores's testimony under Evidence Code section 352.

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[50] Flores's testified that appellant pointed a gun at her and asked her twice if she was going to say anything. (RT 3:900-901; 6:792-796.)

### C. The Trial Court Erred by Permitting Arambula and Silva to Testify About Threats by Third Parties

#### 1. Elva Arambula

Arambula testified regarding the encounter with appellant and Flores on her way back from the 7-Eleven store with Jason Myers and Cherie Hernandez. (RT 8:1214.) The prosecutor asked her if she received a threat after testifying at the preliminary hearing. She responded, yes, and defense counsel asked for a sidebar. (RT 8:1229-1230.)

Out of the jury's hearing, defense counsel informed the court he was unaware the prosecutor had planned to go into an incident in which Arambula was threatened by Angel. Angel was tried for that threat and sent to prison. (RT 8:1230.) By way of explanation, the prosecutor argued he should be allowed to go into the threat as relevant to Arambula's credibility because Arambula was trying to "shape her testimony a little" by testifying that she last saw appellant and Flores "headed toward Dennison," not that she saw them turn onto Dennison as she had at the preliminary hearing. (RT 8:1222, 1224, 1230.) Defense counsel objected to the testimony of the threat by Angel on the grounds that the discrepancies in Arambula's testimony were only minor and did not evince her trying to be evasive or untruthful, and that the threat by a third party should not be allowed to be imputed to appellant. (RT 8:1232, 1233.)

The trial court ruled that it would permit what it had permitted with Flores – it would allow the prosecutor to elicit that the witness had been threatened but, not by whom. (RT 8:1233.)[51] Thereafter, the prosecutor

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[51] This is not what the court permitted with Flores. As discussed, *supra*, the trial court allowed testimony that Angel had threatened Flores, but did not allow the exact wording of the threat to be admitted. (RT 6:809-

(continued...)

asked Arambula if she had been threatened and if she had been frightened as a result of that threat. She answered, yes, and testified the threat was not made by anyone in law enforcement or by appellant. (RT 8:1236, 1242.) The trial court admonished the jury that the testimony concerning the threat could only be considered for the purpose of determining the credibility of the witness. (RT 8:1238.)

**2. Joseph Silva**

Joseph Silva testified that the day after the shooting he paid $100 to Angel and received a gun from Angel. (RT 11:1641.) Silva also testified that appellant told him he had killed a police officer, but did not tell him the gun Silva was buying was the gun used to kill the officer. (RT 11:1692, 1736.) Detective Kono testified that Silva told him it was appellant who gave Silva the gun and that appellant told Silva it was the gun used to kill the officer. (RT 12:1783.)

Before Silva's testimony, defense counsel noted that there was no evidence Silva was ever threatened by appellant or Angel and asked the court to exclude evidence that Silva had been threatened by another Happy Town gang member named Casper both because there was no evidence the threats were directed by appellant and because threats by others would be prejudicial to appellant's case under Evidence Code section 352. (RT 11:1632.) The trial court ruled that the evidence of threats against a witness whether by appellant or by someone connected to appellant or by another not connected to appellant would be admissible because such evidence was relevant to the credibility of the witness. (RT 11:1651.) "The fact that a witness was threatened by a third person, that, in and of itself, is

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[51](...continued)
810.)

something that the jury may properly consider in deciding the witness's (sic) credibility. And in this instance, that's a substantial issue meaning the jury is going to have to decide whether he's telling the truth now or whether he was telling the truth at the time he spoke to Detective Kono." (RT 11:1651-1652.)

Thereafter, Silva testified that one time Casper, a Happy Town gang member, told him he better keep his mouth shut and that his entire family would be killed if he came into court and testified appellant had admitted shooting a cop. (RT 11:1695-1696.) He testified that when he came to court on June 23, 1997, he told the prosecutor he was frightened. (RT 11:1698.) The first time he was interviewed by the police, he told the detectives he did not want anything to happen to him. (RT 11:1699.)

Silva also testified that Detective Kono picked him up and transported him to the prosecutor's office for questioning on June 4, 1996. (RT 11:1638-1639.) At the conclusion of the interview, the prosecutor asked Silva to return the next day so that a stenographer could take down his statement. (RT 11:1639.) Silva testified he did not return the next day. (RT 11:1640.) The prosecutor asked him if he was afraid of something and then asked Silva why he was facing the jury with his back to appellant. Silva responded that he was not afraid and that he was not intentionally sitting with his back to appellant. (*Ibid.*) On cross-examination, Silva testified he did not return to the prosecutor's office on the advice of his attorney who told him to wait to talk to the police until the attorney could be present. (RT 12:1762.) He also testified he was never threatened by appellant or by Angel. (RT 11:1733.)

### 3. The Evidence of Third Party Threats to Arambula and Silva Should Not Have Been Admitted

As discussed, *supra*, evidence of threats should not be admitted as non-hearsay evidence on the issue of witness' credibility unless the witness recants or is otherwise inconsistent in his or her testimony. (*People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1587-1588; *People v. Olguin* (1995) 31 Cal.App.4th 1355, 1368-1369; *People v. Avalos* (1984) 37 Cal.3d 216, 232; *People* v. *Brooks* (1979) 88 Cal.App.3d 180, 187.) As defense counsel pointed out, the alleged inconsistency in Arambula's testimony – she last saw appellant and Flores headed toward Dennison versus turning onto Dennison – was minor and did not evince her trying to be evasive or untruthful, and the threat by a third party should not have been allowed. (RT 8:1232, 1233.)

The alleged inconsistencies in Silva's testimony - that he tried to buy the gun from Angel not appellant, and that appellant told Silva he had killed a police officer versus that he had killed an officer with this gun – also did not rise to the level of inconsistency discussed in the cases. In both *Gutierrez* and *Olguin*, the witnesses to the crime implicated the defendants in pre-trial statements to the police, but later recanted at trial. (*People v. Gutierrez, supra*, 23 Cal.App.4th 1576, 1586, ; *People v. Olguin, supra*, 31 Cal.App.4th 1355, 1367.) Similarly, in *Avalos*, the eyewitness to the crime identified the defendant in an in-person lineup, but was later reluctant to identify the defendant in court. (*People v. Avalos*, *supra*, 37 Cal.3d 216, 232.) In *People* v. *Brooks* (1979) 88 Cal.App.3d 180, 185, the witness had initially identified the defendant and later retracted the identification. In the present case, the alleged inconsistencies in the testimony of Arambula and Silva did not rise to the level of a recantation or a failure to identify the

defendant. The alleged inconsistency by Arambula was virtually inconsequential and the alleged inconsistency by Silva was also minor.

Moreover, the alleged threat to Silva was proven not to affect the testimony he gave. The prosecutor was permitted to elicit the testimony from Silva that Silva told the investigating officers and the district attorney that "Casper told you that you and your entire family would be killed if you came into court and testified that the defendant admitted shooting a cop[.]" (RT 11:1696.) However, Silva *did* testify that appellant told him he had shot a cop – the only point of contention was whether appellant said the gun he sold Silva was the gun used in the killing. (RT 11:1692, 1736.) Clearly the threat was not related to the alleged inconsistent testimony and was therefore not relevant to the issue of the witness' credibility. Pushing his advantage won with the court's erroneous ruling, the prosecutor also elicited testimony that Silva told the prosecutor he was frightened when he came to court on June 23, 1997, and that the first time he was interviewed by the police, he told them he did not want anything to happen to him. (RT 11:1698, 1699.)

Appellant objected to the evidence on Evidence Code section 352 grounds, but the court ruled the issue of Silva's credibility was "substantial" because "the jury is going to have to decide whether he's telling the truth now or whether he was telling the truth at the time he spoke to Detective Kono." (RT 11:1651-1652.) However, the discrepancies between Silva's testimony at trial and his statements to Detective Kono were not substantial. Silva testified he bought a gun from appellant but paid Angel and received the gun from Angel, and he testified that appellant admitted killing a police officer but not that appellant admitted the gun Silva bought was the gun used to kill the officer. Under these circumstances the probative value of

the threats evidence was not outweighed by its prejudicial effect. Other than the testimony of Flores, the prosecution had no physical evidence that appellant was the shooter. What it lacked in direct evidence it sought to make up with innuendo and fear. The alleged threat against Silva, that he and his family would be killed or hurt if he testified that appellant admitted killing the officer had no relevance to his credibility since he testified in exactly the manner he was allegedly warned against – that appellant admitted the killing – thus the probative value of the evidence was nonexistent.

The trial court should have exercised its discretion to exclude the testimony of threats against Arambula and Silva under Evidence Code section 352 and failure to do so was error.

### D. The Court Erred in Excluding Testimony of Flores's Threats Against Appellant

Over appellant's objection, Flores testified that appellant pointed a gun at her and asked her twice if she was going to say anything. (RT 3:900-901; 6:792-796.) At the same time that it ruled appellant's threats against Flores could be admitted, the trial court inconsistently ruled that Flores's threats against appellant would not be admitted. The court excluded testimony by Jason Meyers that Flores had threatened appellant with having him "taken out" by a rival gang because "what her feelings were a month and a half before, I don't believe that is relevant to show bias, interest or motive at or about this time." (RT 8:1143-1144, 1146.)

Clearly this evidence was relevant – having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.) That Flores had enough animosity toward appellant to threaten to have him "taken out" by a rival

gang would surely be relevant to a bias against him or a motive to lie and should have been admitted. (Cal. Const. art. I, § 28 (d); Evid. Code, § 351.) Further, appellant has a federal constitutional right to put on a defense case which may be violated when relevant defense evidence is excluded. (*Washington v. Texas* (1967) 388 U.S. 14, 18; *Holmes v. South Carolina* (2006) ___ U.S. ___, 126 S.Ct. 1727, 1732.) "[E]vidence Code section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense." (*People v. Reeder* (1978) 82 Cal. App. 3d 543, 553; *People v. Cunningham* (2001) 25 Cal.4th 926, 999; see also *Fowler v. Sacramento County Sheriff's Department* (9th Cir. 2005) 421 F.3d 1027, 1041 [granting federal habeas for misuse of 352 to deny confrontation evidence against complaining witness].) The evidence of threats by Flores against appellant was important evidence needed to judge her credibility.

**E. The Error Requires Reversal**

The improper admission of the threats evidence violated standards of California law and denied appellant his rights to due process of law under both the federal and state constitutions. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7 and 15; *People v. Partida* (2005) 37 Cal.4th 428, 439.) The trial court's erroneous rulings admitting this evidence also denied appellant his state and federal constitutional rights to a fundamentally fair trial and a reliable judgment of death. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, and 17; *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *Walters v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1357.)

The United States Supreme Court has recognized that due process can be violated if admission of evidence was "so inflammatory as to prevent

a fair trial." (*Duncan v. Henry* (1995) 513 U.S. 364, 366 (*per curiam*).) Here, the jurors were allowed to consider numerous accusations of threats by appellant, his brother, and other specified and unspecified gang members which were not relevant to any issue at trial but were highly inflammatory. In addition, the court excluded Flores's threats against appellant which would have shown her bias against him. Under these circumstances, the evidence was irrefutably prejudicial, if not determinative of the outcome. Admission of the evidence rendered appellant's trial fundamentally unfair and violated his right to due process.

Appellant was also deprived of the state-created protections of Evidence Code sections 210, 350, and 352, and, as a result, was subsequently deprived of his right to reliable fact-finding in a capital case under the Eighth and Fourteenth Amendments. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-333.) The inclusion of the irrelevant, inflammatory, and overwhelmingly prejudicial evidence of threats against the witnesses distorted the fact-finding process to such an extent that the resulting verdict could not have possibly possessed the reliability required by the Eighth Amendment. (*Beck v. Alabama* (1980) 447 U.S. 625, 638, fn. 13; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

The due process violation requires that appellant's conviction and death verdict be reversed unless respondent can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California, supra*, 386 U.S. at p. 24; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *Yates v. Evatt* (1991) 500 U.S. 391, 403.) Even if introduction of the threats evidence is state law error only, the conviction must be reversed because there is a reasonable probability that a more favorable result would have been reached in the absence of the

admission of this evidence. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The admission of the alleged threats; evidence of the unspecified fear of the witnesses; and the substantiation of that fear by the State was clearly prejudicial to appellant's case. The atmosphere created at trial by use of this evidence caused the jurors to fear for their own safety. Shortly after Silva testified, some of the jurors approached the bailiff inquiring about a spectator in court who, although he had not said or done anything, made them "uncomfortable." (RT 12:1831.) The prosecutor described him as someone with "an olive complexion," "short hair" and "a three- or four-day growth [], stubble on his face." The court stated it would tell the jurors that it believed the man to be a spectator, but that it would permit the jurors to leave the courtroom via the judges' elevator. (RT 12:1832.)

In another instance, a juror reported to the court that he was worried that a photograph of him might have been taken when a newspaper reporter took some photographs in court. (RT 18:2716.) The court held a hearing on the matter and ordered any such photographs to be cropped and not used for any purpose whatsoever. (RT 18:2736-2738.) By erroneously admitting the irrelevant threats evidence the trial court permitted the prosecutor to engender a fear of appellant. In light of the lack of physical evidence connecting appellant with the crime, this fear-mongering and innuendo assumed great importance in the prosecution's case.

The prosecutor relied heavily on the threats evidence to persuade the jurors that appellant was the murderer. The prosecutor argued Silva was the most "uncooperative" witness either because of his friendship with appellant or "due to fear." "He nevertheless came into this courtroom, although reluctantly, testified that on May 12th he heard the defendant saying he wants to sell his gun for $100. . . . [A]nd testified here in this

courtroom that the defendant said, 'I killed a cop.'" (RT 15:2244.) He argued that Flores had no incentive to lie because she was threatened by appellant, and her family had to be relocated. (RT 15:2228.) That the prosecutor was concerned with the strength of his case is evident. He believed he needed to shore up the testimony of his witnesses with inflammatory and irrelevant threats evidence. His last question of his key witness, Johanna Flores, belies his concern about the weakness of his case. He asked her, "Do you swear on the life of your daughter that defendant killed that officer?" (RT 7:1019.)

It is overwhelmingly clear that in the absence of any physical evidence, the prosecution relied heavily on the irrelevant but incendiary evidence of threats to make a case against appellant. The threats evidence played such a strong role at trial that even the jurors were infected and respondent cannot prove beyond a reasonable doubt that the error did not contribute to the verdict obtained (*Chapman v. California*, *supra*, 386 U.S. 18, 24); it is reasonably probable that, absent this evidence, the outcome would have been more favorable to appellant. (*People v. Watson, supra*, 46 Cal.2d at p. 837.)

Furthermore, notwithstanding the effect of the errors at the guilt phase, it is more than reasonably possible (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Brown*, 46 Cal.3d at pp. 448-449) and reasonably probable (*Strickland v. Washington*, *supra,* 466 U.S. at pp. 693-695) that the error adversely affected the penalty determination. As this Court has recognized, evidence that does not affect the guilt determination can have a prejudicial impact during penalty trial.

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty

> trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal, but in determining the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence, the misconduct and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a "reasonable probability" that a different result would have been reached in absence of error.

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-37; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [state law error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error].)

In its case in aggravation, the prosecutor introduced evidence of an prior incident in which appellant and others shot up the car of Ryan Schultz and beat and robbed him. (RT 16:2483-2492.) Schultz did not initially tell the police what happened because he feared appellant and "his gang." (RT 16:2510.) In the context of this testimony in aggravation, it is reasonably probable that the threats evidence at the guilt phase could have had a significant impact on at least one of the jurors's penalty determination.[52] Thus, it cannot be said that the error had "no effect" on the

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[52]*See Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 937(Gould, J. concurring) ["in a state requiring a unanimous sentence, there need only be a reasonable probability that 'at least one juror could reasonably have determined that . . . death was not an appropriate

(continued...)

penalty phase verdict. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

Accordingly, both the guilt conviction, special circumstances and the death judgment must be reversed.

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[52](...continued)
sentence'" (quoting *Neal v. Puckett*, 239 F.3d 683, 691-692 (5th Cir. 2001) (footnote omitted)].)

## VII

## EVIDENCE OF APPELLANT'S PAROLE STATUS AND HIS STATEMENT TO FLORES ABOUT RETURNING TO JAIL SHOULD HAVE BEEN EXCLUDED, BUT ONCE ADMITTED, APPELLANT SHOULD HAVE BEEN PERMITTED TO INTRODUCE EVIDENCE THAT HIS PAROLE HAD NOT BEEN VIOLATED ON PRIOR OCCASIONS

### A. Introduction

Over an Evidence Code section 352 objection, the prosecutor was permitted to introduce evidence that appellant was on parole at the time of the incident and had been warned that possession of a weapon would violate that parole resulting in his reincarceration. (RT 1:42-43; CT 1:548.) The court ruled the evidence was relevant to the issues of motive, intent, deliberation and premeditation, and that any prejudicial effect was outweighed by the "overwhelmingly probative" value of the evidence. (RT 1:43, 44.)

Johanna Flores testified that sometime during her three month relationship with appellant – a considerable time before the incident – appellant told her that he was on parole and "that he didn't want to go back" to jail. (RT 6:880; 7:984, 1000, 1012.)

Carl Hallberg testified that he supervised appellant's parole since January 1992. (RT 11:1603.) Appellant signed a form listing the conditions of parole on November 7, 1995, the day he was released from the Youth Authority. (RT 11:1607-1608.) On November 28, 1995, appellant signed a similar form in Mr. Hallberg's office. (RT 11:1614-1615.) One of the conditions of appellant's parole was that he not possess any weapons (RT 11:1608); another was that he not associate with gang members. (RT 11:1609.) Mr. Hallberg informed appellant that he would go back to

an institution for up to one year and 7 months if he violated his parole. (RT 11:1620, 1622.) In addition, Mr. Hallberg testified that appellant could receive an additional year jail term for possessing a weapon, although in his discussion with appellant Mr. Hallberg only told appellant about the year to year and a half "hanging over his head." (RT 11:1623, 1620.)

In light of the court's ruling that evidence of his parole status would be admitted, appellant sought to introduce evidence that in April 1997, appellant tested positive for methamphetamine when he was tested by his parole agent. The agent had previously told appellant that he would test appellant, therefore it would be in appellant's best interest to "clean up." Nevertheless, even though appellant tested positive, his parole was not violated. (RT 11:1594-1595.) The court ruled that the parole evidence was relevant only to show that appellant was on parole and "that there are terms and conditions and if he violates terms and conditions of parole, that he can be sent back to the Youth Authority," and excluded the proffered defense evidence. (RT 11:1596.)

Appellant also requested the court instruct the jury with CALJIC Nos. 2.50 (evidence of other crimes) and 2.51 (motive). (RT 1:45.) The prosecutor agreed to the jury instructions (RT1:45), however, only CALJIC No. 2.51 was given. (RT 15:2397.)

Appellant submits that the probative value of evidence regarding his parole status was outweighed by its prejudicial effect, and its admission violated his federal constitutional right to due process under the Fifth and Fourteenth Amendments to the Unites States Constitution and analogous sections of the California Constitution rendering his trial fundamentally unfair and requiring reversal of the conviction, special circumstances and death judgment. (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

Moreover, the court erred by excluding the evidence that a prior violation of the conditions of appellant's parole had not resulted in re-incarceration and failed to properly instruct the jury on the limited use of the character evidence.

### B. The Prejudicial Nature of the Evidence of Appellant's Parole Status Substantially Outweighed its Probative Value

While Evidence Code section 1101, subdivision (b), permits the admission of evidence of prior crimes to prove motive, intent, knowledge, identity, or other facts not related to a defendant's disposition to commit the charged crime (*People v. Kipp* (1998) 18 Cal.4th 349, 369), there is an additional requirement for the admissibility of such evidence: "The probative value of the . . . offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury." (*Id.* at p. 371.)

"There is little doubt exposing a jury to defendant's prior criminality presents the possibility of prejudicing a defendant's case and rendering suspect the outcome of the trial." (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1580.) However, a trial court has broad discretion to determine the relevance of any evidence. (Pen. Code, § 350; *People v. Scheid* (1997) 16 Cal.4th 1, 13-14.) A reviewing court will reverse the trial court's determination as to the admissibility of evidence only where there has been an abuse of discretion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) Where the trial court has abused its discretion, the defendant must then show a reasonable probability of a more favorable result had the evidence not been admitted. (*People v. Earp* (1999) 20 Cal.4th 826, 877.)

In this case, the prosecutor sought to portray appellant as an unfeeling, ruthless gang member and outlaw, willing to kill a police officer with little thought. He seized on the fact of appellant's parole status and transformed it into a motive to kill.

Flores testified that a considerable time before the incident appellant told her he didn't want to go back into custody. The sum total of her testimony on this point is:

[Ms. Flores]: He told me he was on parole and that he can't – that he couldn't go back.

[Mr. Arnold]: What do you mean "he couldn't go back"?

A. Well, that he didn't want to go back.

(RT 6:880.)

However, the prosecutor argued:

So that's why it occurred here. Let me pose the question to you. Why else did the defendant do it? Why else would the defendant have done it? I had mentioned to you before that youhave to base your verdict on the evidence and the witnesses but you can also use your common sense and your life experience. What other reason did he do it?

. . .

What would he rather do, go to jail for the gun, spend up to two years or two-and-a-half years or is it better to kill the officer, get away, not spend any time in jail? Obviously the killer in this case thought that the latter was the better course of action.

Do the killing. . . . He doesn't do a day in jail.

> The killing in this case, the murder of that officer in this case has to be because the killer did not want to be returned to custody for two years and five months.

(RT 15:2212-2213.)

While Flores mild testimony did show that, a considerable time before the incident, appellant told her he did not want to go back to jail, the prosecutor used the evidence of appellant's parole status to manufacture a motive to kill transforming the tragic facts of a senseless shooting into a capital crime. Appellant's statement to Flores is not a statement of intent to kill to avoid being arrested unlike other cases in which the defendant clearly threatened to kill someone rather than go back into custody. For example, in *People v. Stanley* (2006) 39 Cal.4th 913, 926, the defendant, arrested for a series of residential burglaries, while being transported to juvenile hall, managed to jump out of a police vehicle, still in leg restraints, after twice unsuccessfully attempting to wrestle control of the steering wheel from the driver, who was driving, in an effort to run the vehicle off the freeway. Defendant rolled across the slow lane of the freeway and jumped 35 feet to the street below. When recaptured two hours later, defendant told the officer, "[Y]ou'll never take me alive, because I'll kill you first." The defendant also stated that he would kill any police officers who tried to take him into custody or prevent his escape. (*Ibid.*) In *People v. Aguirre* (1995) 31 Cal.App.4th 39, the victim tried to lock the defendant out of her apartment, but he gained access through a window. When a neighbor knocked at the door, the defendant thought it was police and said, "you are not going to take me alive." He pointed the gun at the door. The person at the door was actually a neighbor trying to help the family. She distracted appellant while the family fled the apartment. A police officer

arrived and approached appellant from behind. When the officer was 20 to 30 feet away, he identified himself as a police officer and ordered appellant to put his hands up. Appellant said "I ain't going to go to jail alive" or "I won't be taken just like that," drew his gun from his waistband and pointed it at the officer and the two shot at each other almost simultaneously.

By contrast, the probative value of the evidence that appellant told Johanna Flores a considerable time before the incident that he was on parole and did not want to be returned to custody was not substantial, while its prejudicial effect was high and used by the prosecutor to establish a capital motive for what was otherwise a senseless killing. The evidence should have been excluded.

### C. Defense Evidence of the Failure to Violate Appellant's Parole on Another Occasion Was Improperly Excluded

Having admitted evidence of appellant's parole status, the trial court erred in excluding evidence that a prior violation of the conditions of parole did not result in appellant's being sent back to jail which is precisely what the prosecutor argued caused appellant to shoot the officer.

With certain exceptions, "all relevant evidence is admissible." (Cal. Const. art. I, § 28, subd. (d); Evid. Code § 351.) Further, appellant has a federal constitutional right to put on a defense case. (*Washington v. Texas* (1967) 388 U.S. 14, 18; *Holmes v. South Carolina* (2006) ___ U.S. ___, 126 S.Ct. 1727, 1732.) Trial judges in criminal cases should give "a defendant the benefit of any reasonable doubt when passing on the admissibility of evidence as well as in determining its weight." (*People v. Murphy* (1963) 59 Cal.2d 818, 829.) The trial court's exercise of discretion under section 352 "should favor the defendant in cases of doubt." (*People v. De Larco* (1983) 142 Cal.App.3d 294, 306).

These protections are violated when relevant defense evidence is excluded. While minimally relevant evidence may be excluded if other interests predominate (*Montana v. Egelhoff* (1996) 518 U.S. 37, 42), the fact that appellant's parole was *not* violated for another transgression is unquestionably probative to rebut the prosecutor's claim that appellant shot the officer to avoid having his parole violated. (See also, *People v. Wright* (1985) 39 Cal.3d 576, 588 [excluding evidence of drugs in the victim's system erroneously prevented the defendant from "supporting his perception of the victim's irrational state of mind"].)

The entire thrust of the prosecutor's case was that appellant committed the killing to avoid a parole violation and being sent back to jail. He argued:

> We have a killer who is on parole. He has that 575 days hanging over his head, plus he has the additional up to one year for the crime of carrying a loaded firearm or carrying a concealed firearm in a public place. And that's when he decides to act because he knows that Officer Fraembs is going to pat him down, Officer Fraembs is going to find that gun, Officer Fraembs is going to place him under arrest and as a result of that arrest, his parole is going to be violated.
>
> . . .
>
> So that's why it occurred here. . . . Why else did the defendant do it? Why else would the defendant have done it? I had mentioned to you before that you have to base your verdict on the evidence and the witnesses but you can also use your common sense and your life experience. [For w]hat other reason did he do it?
>
> . . . .
>
> The killing in this case, the murder of that officer in this case has to be because the killer did not want to be returned to custody for two years and five months.

(RT 15:2212-2213.)

The trial court excluded evidence which would have cast doubt on

the prosecution theory. Appellant had previously violated the terms of his parole and yet his parole had not been violated. He had even been warned by his parole agent, according to the offer of proof, to "clean up," had failed to do so, got caught, and still his parole was not violated.

The trial court excluded the evidence with very little explanation, stating only that the relevance of the parole evidence was limited to the fact that appellant was on parole and "that there are terms and conditions and if he violates terms and conditions of parole, that he can be sent back to the Youth Authority." (RT 11:1596.) This explanation for excluding the evidence does not evince "the delicate and critical" balance needed where what is at stake is a criminal defendant's liberty. (*People v. Wright, supra,* 39 Cal.3d at p. 588 citing *People v. Lavergne* (1971) 4 Cal.3d 735, 744; see also *People v. Murphy* (1963) 59 Cal.2d 818, 829.)

### D. The Trial Court Erred in Failing to Instruct with CALJIC No. 2.50

Appellant requested the court instruct the jury with CALJIC No. 2.50 (evidence of other crimes) and CALJIC No. 2.51 (motive). (RT 1:45.) The prosecutor agreed to the jury instructions (RT1:45), however, only CALJIC No. 2.51[53] was given. (RT 15:2397.)

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[53] CALJIC 2.51 provides:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

This instruction is the subject of Argument VIII.

CAJIC 2.50 provides:

> Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial.
>
> This evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show:
>
> A motive for the commission of the crime charged.
> For the limited purpose for which you may consider this evidence, you must weigh it in the same manner as you do all other evidence in this case.
>
> You are not permitted to consider such evidence for any other purpose.

Generally, when other crimes evidence is admitted, CALJIC No. 2.50 should be carefully modified to assure that the jury is directed to consider the evidence only upon the contested issue to which it is relevant. (See *People v. Felix* (1993) 14 Cal.App.4th 997, 1009.) While there is no sua sponte obligation to give CALJIC No. 2.50 (*People v. Collie* (1981) 30 Cal.3d 43, 63-64), appellant requested, and the trial court agreed, to give the limiting instruction but failed to do so. This Court has held that where such evidence is relevant only to a special circumstance "it should be accompanied by a jury instruction limiting its use." (*People v. Bigelow* (1984) 37 Cal.3d 731, 748; see also Evid. Code, § 355 [When evidence is admissible . . .for one purpose . . .the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly].)

In this case the need for the limiting instruction was particularly acute because the jury was told appellant was a gang member and likely surmised his parole status was associated with gang activity. "[G]ang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged—and thus should be carefully scrutinized by trial courts . . . ." (*People v. Carter* (2003) 30 Cal.4th 1166, 1194; see also *People v. Avitia* (2005) 127 Cal.App.4th 185, 194 [gang evidence was inflammatory, and its only possible function was to show the defendant's criminal disposition].) It follows, a fortiori, that a strong limiting instruction should be given when such evidence is admitted, admonishing the jurors not to consider such evidence as to criminal disposition.

*McKinney v. Rees* (9th Cir. 1993) 993 F2d 1378, 1380-1382, held that admission of emotionally charged character evidence to show propensity which is irrelevant to any issues in the trial violates the due process clause of the Fourteenth Amendment to the federal constitution and provides the basis for a grant of relief on federal habeas. (See also *People v. Garceau, supra,* 6 Cal.4th at p. 186.) Further, jury consideration of improper matters lessens the prosecution's burden of proof in violation of the defendant's state (Cal. Const., art. I, §§ 15 and 16) and Sixth and Fourteenth Amendment federal constitutional rights to trial by jury and due process.

**E. Conclusion**

Admission of the parole status evidence, exclusion of evidence that appellant's parole had not been violated for a prior violation of the terms of parole, and the failure of the court to properly instruct the jury as to the limitation of the parole evidence

violated appellant's federal constitutional right to due process under the Fifth, Sixth and Fourteenth Amendments to the Unites States Constitution and analogous sections of the California Constitution rendering his trial fundamentally unfair and requiring reversal of the conviction, special circumstances and death judgment. (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

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## VIII

## THE INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE

The trial court instructed the jury under CALJIC No. 2.51, as follows:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty absence [sic] of motive may tend to show the defendant is not guilty.

(RT 18:2397.)[54]

This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to appellant to show an absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. The instruction violated constitutional guarantees of a fair jury trial, due process and a reliable verdict in a capital case. (U.S. Const., 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7 and 15.)

### A. The Instruction Allowed the Jury to Determine Guilt Based on Motive Alone

CALJIC No. 2.51 states that motive may tend to establish that a defendant is guilty. As a matter of law, however, it is beyond question that

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[54] Defense counsel did not request CALJIC No. 2.51, but submitted to its inclusion. (RT 14:2085-2086.) The invited-error doctrine does not preclude review of this claim. Because the prosecution's case relied on motive evidence, the instruction would have been given even in the absence of the defense submission. (See 1 Witkin and Epstein, Cal. Criminal Law (2d ed. 1988) § 100.) Thus, the defense request did not cause the error. (*People v. Graham* (1969) 71 Cal.2d 303, 317-319.)

motive alone is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320 [a "mere modicum" of evidence is not sufficient].) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (See, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

The language in CALJIC No. 2.51 that the presence of motive may tend to establish guilt carried the inference that guilt was in fact proved in this case and effectively lowered the prosecution's standard of proof. The motive instruction allowed the jury to infer a finding of guilt from evidence of motive. "Permissive inference jury instructions are disfavored because they 'tend to take the focus away from the elements that must be proved.' [Citation.]" (*Hanna v. Riveland* (9th Cir. 1996) 87 F.3d 1034, 1037.) Nevertheless, a permissive inference instruction comports with due process unless, "under the facts of the case, there is no rational way for the jury to make the connection permitted by the inference." (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157.) Under those circumstances, there is an unacceptable "risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational fact finder to make an erroneous factual determination." (*Ibid.*) "Instructing the jury that the People have introduced evidence 'tending to prove' appellant's guilt carries the inference that the People have, in fact, established guilt." (*People v. Owens* (1994) 27 Cal.App.4th 1155, 1158.) Appellant recognizes that this Court rejected this claim in *People v. Snow* (2003) 30 Cal.4th 43, but the Court also stated that "[i]f the challenged instruction somehow suggested that motive alone *was* sufficient to establish guilt,

defendant's point might have merit." (*Id.* at pp. 97-98, original italics.)

Here, the motive instruction stood out from the other standard evidentiary instructions given to the jury. Notably, each of the other instructions that addressed an individual circumstance expressly admonished that it was insufficient to establish guilt. (*See* RT 18:2391, 2392, 2397 [CALJIC Nos. 2.05, 2.06 and 2.52 stating with regard to threats by others, attempts to suppress evidence and flight that each circumstance "is not sufficient by itself to prove guilt . . . ."].) The placement of the motive instruction, which was read immediately before the flight instruction, served to highlight its different standard.

Because CALJIC No. 2.51 is so obviously aberrant, it undoubtedly prejudiced appellant during deliberations. The instruction appeared to include an intentional omission that allowed the jury to determine guilt based upon motive alone. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (*See People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) [deductive reasoning underlying the Latin phrase *inclusio unius est exclusio alterius* could mislead a reasonable juror as to the scope of an instruction].)

This Court has recognized that differing standards in instructions create erroneous implications:

> The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder.

(*People v. Dewberry* (1959) 51 Cal.2d 548, 557; see also *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [when a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error].)

The decision in *Snow* did not address appellant's contextual argument; however, in *People v. Cleveland* (2004) 32 Cal.4th 704, this Court briefly rejected a contextual attack on the motive instruction by finding the claim "merely goes to [its] clarity[.]" (*Id.* at p. 750; see also *People v. Petznick* (2003) 114 Cal.App.4th 663, 685 [the instruction serves an "additional purpose of clarifying that motive is not an element of a crime"].) Appellant submits, nevertheless, that the instruction's comparative wording remains prejudicial. The instruction was insufficiently clear; in context, the instruction allowed the jury to infer intent to kill (for practical purposes here, appellant's guilt) based on motive alone.

Citing *People v. Jackson* (1996) 13 Cal.4th 1164, the court of appeal in *People v. Bell* (2004) 118 Cal.App.4th 249 found prejudicial error based on CALJIC No. 2.28 regarding late disclosure of defense witness statements. The court found the same comparative, contextual analysis significant:

> Significantly, other instructions [CALJIC Nos. 2.03, 2.04, 2.05, 2.06, 2.52] that address a defendant's consciousness of guilt "ma[k]e clear to the jury that certain types of deceptive or evasive behavior on a defendant's part could indicate consciousness of guilt, *while also clarifying that such activity was not of itself sufficient to prove a defendant's guilt*, and allowing the jury to determine the weight and significance assigned to such behavior. The cautionary nature of the instructions benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory." (*People v. Jackson,* 13 Cal.4th at

p. 1224.) No such clarification was included here. As a result, the jurors may have concluded they were free to find Bell guilty merely because he failed to comply with the discovery statute.

(118 Cal.App.4th at p. 256; emphasis in original.)

Appellant requests the Court reconsider this issue. In the present case, the instruction highlighted the omission, because the other instructions (CALJIC Nos. 2.05, 2.06 and 2.52) admonished the jurors that those circumstances were insufficient to establish guilt. In contrast, the omission in CALJIC No. 2.51 would have permitted the jurors to understand that motive alone could establish guilt. Accordingly, the instruction violated appellant's constitutional rights to due process of law, a fair trial by jury, and a reliable verdict in a capital case. (U.S. Const., 6th, 8th and 14th Amends; Cal. Const., art. 1, §§ 7 and 15.)

### B. The Instruction Impermissibly Lessened the Prosecutor's Burden of Proof and Violated Due Process

The jurors were instructed that a premeditated and deliberate murder requires a deliberate intent to kill and that murder preceded by lying in wait can be shown by a state of mind equivalent to premeditation and deliberation. (RT 15:2403, 2405.) The jurors were also instructed that in order to find appellant guilty of the special circumstance of murder to avoid arrest they must find the murder was committed to avoid arrest, and to find appellant guilty of the special circumstance of murder of a police officer that appellant had the intent to kill the officer, and to find the special circumstance of lying in wait that appellant intentionally killed the victim. (RT 15:2409, 2412.) By informing the jurors that "motive was not an element of the crime," however, the trial court reduced the burden of proof on three crucial, contested elements of the prosecutor's capital murder case

– *i.e.*, that appellant had the intent to kill to avoid arrest, that he intended to kill a police officer and that he intentionally killed the officer while lying in wait. The instruction violated due process by improperly undermining a correct understanding of how the burden of proof beyond a reasonable doubt was supposed to apply. (See *Sandstrom v. Montana* (1979) 442 U.S. 510, 524; *People v. Lee* (1987) 43 Cal.3d 666, 673-674 [conflicting instructions on intent violate due process]; *Baldwin v. Blackburn* (5th Cir. 1981) 653 F.2d 942, 949 [misleading and confusing instructions under state law may violate due process where they are "likely to cause an imprecise, arbitrary or insupportable finding of guilt"].)

There is no logical way to distinguish motive from intent in this case. The prosecution's theory underlying the first degree murder allegation was that appellant killed the officer to avoid having his parole revoked and being reincarcerated. Under these circumstances, the jury would not have been able to separate instructions defining "motive" from "intent." Accordingly, CALJIC No. 2.51 impermissibly lessened the prosecutor's burden of proof.

The distinction between "motive" and "intent" is difficult, even for judges, to maintain. Various opinions have used the two terms as synonyms:

> An aider and abettor's fundamental purpose, *motive and intent* is to aid and assist the perpetrator in the latter's commission of the crime. He may so aid and assist with knowledge or awareness of the wrongful purpose of the perpetrator [citations] or he may so act because he has the same evil intent as the perpetrator. [Citations.]"

(*People v. Vasquez* (1972) 29 Cal.App.3d 81, 87; emphasis added.)

> "A person could not kidnap and carry away his victim to commit robbery if the *intent* to rob was not formed until after

> the kidnaping had occurred." [citation] . . . . Thus, the commission of a robbery, the *motivating* factor, during a kidnaping for the purpose of robbery, the dominant crime, does not reduce or nullify the greater crime of aggravated kidnaping.

(*People v. Beaumaster* (1971) 17 Cal.App.3d 996, 1007-1008; emphasis added.)

> [T]he court as a part of the same instruction also stated to the jury explicitly that mere association of individuals with an innocent purpose or with honest *intent* is not a conspiracy as defined by law; also that in determining the guilt of appellants upon the conspiracy charge the jury should consider whether appellants honestly entertained a belief that they were not committing a wrongful act and whether or not they were acting under a misconception or in ignorance, without *any criminal motive*; the court further stating, "Joint evil *intent* is necessary to constitute the offense, and you are therefore instructed that it is your duty to consider and to determine the good faith of the defendants and each of them." Considering the instruction as a whole, we think the jury could not have misunderstood the court's meaning that a corrupt *motive* was an essential element of the crime of conspiracy.

(*People v. Bowman* (1958) 156 Cal.App.2d 784, 795; emphasis added.)

> In *Union Labor Hospital v. Vance Lumber Co.* [citation], the trial court had found that the defendants had entered into certain contracts detrimental to plaintiff's business solely for the purpose and with the *intent* to subserve their own interests. The Supreme Court said [citation]: "But if this were not so, and their *purpose* were to injure the business of plaintiff, nevertheless, unless they adopted illegal means to that end, their conduct did not render them amenable to the law, for an evil *motive* which may inspire the doing of an act not unlawful will not of itself make the act unlawful."

(*Katz v. Kapper* (1935) 7 Cal.App.2d 1, 5-6, emphasis added.) Quite clearly, the terms "motive" and "intent" are commonly used

interchangeably under the rubric of "purpose."

As the court of appeal stated in *People v. Maurer* (1995) 32 Cal.App.4th 1121, "We must bear in mind that the audience for these instructions is not a room of law professors deciphering legal abstractions, but a room of lay jurors reading conflicting terms." (*Id.* at p. 1127.)

There was potential for conflict and confusion in this case. The jury was instructed to determine if appellant had the intent to kill and the prosecution case hinged on the theory that appellant was motivated to kill to avoid reincarceration, but was also told that motive was not an element of the crime. Thus the prosecution's burden was lessened in violation of appellant's constitutional right to due process.

### C. The Instruction Shifted the Burden of Proof to Imply That Appellant Had to Prove Innocence

CALJIC No. 2.51 informed the jurors that the presence of motive could be used to establish guilt and that the absence of motive could be used to show appellant was not guilty. The instruction effectively placed the burden of proof on appellant to show an alternative motive to that advanced by the prosecutor. In *People v. Frye* (1998) 18 Cal.4th 894, 958 and *People v. Prieto* (2003) 30 Cal4th 3226, 254, this Court found the instruction did not shift the burden of proof, however, appellant respectfully requests this Court revisit this issue and find the instruction shifted the burden of proof. As used in this case, CALJIC No. 2.51 deprived appellant of his federal constitutional rights to due process and fundamental fairness. (*In re Winship*, *supra*, 397 U.S. at p. 368 [due process requires proof beyond a reasonable doubt].) The instruction also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution

having to present the full measure of proof. (*See Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [reliability concerns extend to guilt phase].)

**D. Reversal Is Required**

The evidence against appellant was purely circumstantial and based on the statement of one person. The motive instruction given in this case diluted the prosecution's obligation to prove beyond a reasonable doubt that appellant had a specific intent to kill to avoid arrest. CALJIC No. 2.51 erroneously encouraged the jury to conclude that proof of a specific intent to kill to avoid arrest was unnecessary for guilty verdicts on the first degree murder charges and a true finding of the special circumstances allegation. Accordingly, this Court must reverse the murder judgments and the special circumstances allegations because the error – affecting the central issue before the jury – was not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

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## IX

## A SERIES OF GUILT PHASE INSTRUCTIONS UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT IN VIOLATION OF APPELLANT'S RIGHTS TO DUE PROCESS, A TRIAL BY JURY, AND RELIABLE VERDICTS, AND REQUIRES REVERSAL OF THE JUDGMENT

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship*, *supra*, 397 U.S. at p. 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle" (*In re Winship*, *supra* at p. 363) at the heart of the right to trial by jury. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278.) Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood [them] to allow conviction based on proof insufficient to meet the Winship standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

The trial court instructed the jury with CALJIC Nos. 2.02, 2.21.2, 2.22, 2.27, and 8.20. (RT 15:2390, 2395, 2396, 2403-2405.) These instructions violated the above principles and thereby deprived appellant of his constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15) and trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16). (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278; *Carella v. California* (1989) 491 U.S. 263, 265.) They also violated the fundamental requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution having to

present the full measure of proof. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638. ) Because the instructions violated the federal Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 275.)

Appellant recognizes that this Court has previously rejected many of these claims. (See, e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1224; *People v. Crittenden* (1994) 9 Cal.4th 83, 144.) Nevertheless, he raises them here in order for this Court to reconsider those decisions and in order to preserve the claims for federal review if necessary.[55]

### A. The Instruction On Circumstantial Evidence Under CALJIC No. 2.02 Undermined The Requirement Of Proof Beyond A Reasonable Doubt

The jury was instructed with CALJIC No. 2.02 that if one interpretation of the evidence regarding mental state "appears to be reasonable, you must accept [it] and reject the unreasonable" interpretation. (RT 15:2390.) In effect, the instruction informed the jurors that if appellant reasonably appeared to be guilty, they were to find him guilty as charged of first degree premeditated murder even if they entertained a reasonable doubt as to whether he had premeditated the killings. The defects in this instruction were particularly damaging here where the prosecution's case

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[55] In *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, this Court ruled that "routine" challenges to the state's capital-sentencing statute will be considered "fully presented" for purposes of federal review by a summary description of the claims. This Court has not indicated that repeatedly-rejected challenges to standard guilt phase instructions similarly will be deemed "fairly presented" by an abbreviated presentation. Accordingly, appellant more fully presents the claims in this argument.

rested almost exclusively on one witness' testimony. The instruction undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17). (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama*, *supra*, 447 U.S. at 638.)[56]

First, the instruction compelled the jury to find appellant guilty of murder and to find the special circumstances to be true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, *supra*, 397 U.S. at p. 364.) The instruction directed the jury to convict appellant based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to be "reasonable." (RT 15:2391.) However, an interpretation that appears reasonable is not the same as the "subjective state of near certitude" required for proof beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty"].) Thus, the instruction improperly required conviction and a true finding of the special circumstances, and findings of fact necessary to support those verdict, on a degree of proof less than the

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[56] Although defense counsel did not object to the giving of CALJIC No. 2.02, the claimed errors are cognizable on appeal. Instructional errors are reviewable even without objection if they affect a defendant's substantial rights. (Pen. Code, § 1259; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.)

constitutionally-mandated one.

Second, the circumstantial evidence instruction required the jury to draw an incriminatory inference when such an inference appeared "reasonable." In this way, the instruction created an impermissible mandatory inference that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted it by producing a reasonable exculpatory interpretation. Mandatory presumptions, even ones that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Francis v. Franklin* (1985) 471 U.S. 307, 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

Here, the instruction plainly told the jurors that if only one interpretation of the evidence appeared reasonable, "you must accept the reasonable interpretation and reject the unreasonable." (RT 15:2391.) In *People v. Roder* (1983) 33 Cal.3d 491, 504, this Court invalidated an instruction which required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. Accordingly, this Court should invalidate the instructions given in this case, which required the jury to presume all elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

The instruction had the effect of reversing, or at least significantly lightening, the burden of proof, since it required the jury to find appellant guilty of first degree murder as charged unless he came forward with evidence reasonably explaining the incriminatory evidence put forward by the prosecution. The jury may have found appellant's defense unreasonable

but still have harbored serious questions about the sufficiency prosecution's case. Nevertheless, under the erroneous instruction the jury was required to convict appellant if he "reasonably appeared" guilty of murder, even if the jurors still entertained a reasonable doubt of his guilt. The instruction thus impermissibly suggested that appellant was required to present, at the very least, a "reasonable" defense to the prosecution case when, in fact, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215, citing *In re Winship, supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684.)

For these reasons, there is a reasonable likelihood the jury applied the circumstantial evidence instructions to find appellant guilty of both charges of first degree murder and a true finding on the special circumstance on a standard which was less than the federal Constitution requires.

### B. The Instructions Pursuant To CALJIC Nos. 2.21.2, 2.22, 2.27 And 8.20 Also Vitiated The Reasonable Doubt Standard

The trial court gave four other standard instructions which magnified the harm arising from the erroneous circumstantial evidence instructions, and individually and collectively diluted the constitutionally mandated reasonable doubt standard – CALJIC Nos. 2.21.2 (witness wilfully false), 2.22 (weighing conflicting testimony), 2.27 (sufficiency of testimony of one witness) and 8.20 (deliberate and premeditated murder). (RT 15:2390, 2395, 2396, 2403.) Each of those instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. Thus, the instructions implicitly replaced the

"reasonable doubt" standard with the "preponderance of the evidence" test, and vitiated the constitutional prohibition against the conviction of a capital defendant upon any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Cage v. Louisiana*, *supra*, 498 U.S. at pp. 39-40; *In re Winship*, *supra*, 397 U.S. at p. 364.)[57]

CALJIC No. 2.21.2 lessened the prosecution's burden of proof. It authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless, "from all the evidence, [they believed] the probability of truth favors his or her testimony in other particulars." (RT 15:2395.) That instruction lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses if their testimony had a "mere probability of truth." (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness' testimony could be accepted based on a "probability" standard is "somewhat suspect"].) The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case must be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable," or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

Furthermore, CALJIC No. 2.22 provided as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses which does not convince you as against the testimony of a lesser number or other evidence which appeals to your mind with more

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[57] Although defense counsel failed to object to these instructions, appellant claims are still reviewable on appeal. (See footnote 54 above, which is incorporated by reference here.)

> convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

(RT 15:2395-2396.) The instruction specifically directed the jury to determine each factual issue in the case by deciding which version of the facts was more credible or more convincing. Thus, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with one indistinguishable from the lesser "preponderance of the evidence standard." As with CALJIC No. 2.21.2, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (RT 15:2396), was likewise flawed. The instruction erroneously suggested that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case, and cannot be required to establish or prove any "fact." (*People v. Serrato* (1973) 9 Cal.3d 753, 766.)

Finally, CALJIC No. 8.20, which defines premeditation and deliberation, misled the jury regarding the prosecution's burden of proof. The instruction told the jury that the necessary deliberation and premeditation "must have been formed upon pre-existing reflection and not

under a sudden heat of passion or other condition precluding the idea of deliberation. . . ." (RT 15:2403-2404.) In that context, the word "precluding" could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation, as opposed to raising a reasonable doubt. (See *People v. Williams* (1969) 71 Cal.2d 614, 631-632 [recognizing that "preclude" can be understood to mean "'absolutely prevent'"].)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard under which the prosecution must prove each necessary fact of each element of each offense "beyond a reasonable doubt." In the face of so many instructions permitting conviction upon a lesser showing, no reasonable juror could have been expected to understand that he or she could not find appellant guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated appellant's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17).

### C. The Court Should Reconsider its Prior Rulings Upholding the Defective Instructions

Although each of the challenged instructions violated appellant's federal constitutional rights by lessening the prosecution's burden, this Court has repeatedly rejected constitutional challenges to many of the

instructions discussed here. (See e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751 [CALJIC Nos. 2.22 and 2.51]; *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [CALJIC Nos. 2.01, 2.02, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [circumstantial evidence instructions].) While recognizing the shortcomings of some of those instructions, this Court has consistently concluded that the instructions must be viewed "as a whole," and that when so viewed the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and give the defendant the benefit of any reasonable doubt, and that jurors are not misled when they are also instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court characterizes as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood the jury applied the challenged instructions in a way that violates the Constitution (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions are "saved" by the language of CALJIC No. 2.90 – requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction which dilutes the beyond-a-reasonable-doubt standard of proof on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see

generally *Francis v. Franklin*, (1985) 471 U.S. 307, 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the challenged instructions, as they were given in this case, explicitly told the jurors that those instructions were qualified by the reasonable doubt instruction. It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions which contain their own independent references to reasonable doubt.

**D. Reversal is Required**

Because the erroneous circumstantial evidence instruction required conviction on a standard of proof less than proof beyond a reasonable doubt, its delivery was a structural error which is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) At the very least, because all of the instructions violated appellant's federal constitutional rights, reversal is required unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.)

The prosecution cannot make that showing here, because its proof of

appellant guilt for the first degree murder was weak for all of the reasons previously discussed. Given the dearth of evidence, the instructions on circumstantial evidence were crucial to the jury's determination of guilt. Because these instructions distorted the jury's consideration and use of circumstantial evidence, and diluted the reasonable doubt requirement, the reliability of the jury's findings is undermined.

The dilution of the reasonable-doubt requirement by the guilt phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra*, 33 Cal.3d at p. 505.) Accordingly, appellant's murder conviction, special circumstance findings, and death sentence must be reversed.

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## X

## THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE VIOLATES THE EIGHTH AMENDMENT BECAUSE IT FAILS TO ADEQUATELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY

### A. Introduction

The Eighth Amendment requires that a state's capital sentencing scheme genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence on the defendant compared to others who have been found guilty of murder. (*Zant v. Stephens* (1983) 462 U.S. 862, 877; see *Arave v. Creech* (1993) 507 U.S. 463, 474 [state's capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty].) In order to avoid the Eighth Amendment's prohibition against cruel and unusual punishment, sentencing must provide a meaningful basis for distinguishing cases in which the death penalty is sought from cases where it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, quoting *Furman v. Georgia* (1972) 408 U.S. 238, 313 (White, J., concurring).) In addition, the death penalty, as the most irrevocable sanction, should be reserved for only the most extreme cases. (*Gregg v. Georgia* (1976)428 U.S. 153, 182.) Thus, the federal constitution requires that a capital sentencing statute provide the sentencer with identifiable criteria to separate a capitally-eligible crime from other first degree murders. (See *Gregg v. Georgia, supra*, 428 U.S. at p. 199.)

California attempts to comply with these constitutional requirements by the use of statutory "special circumstances" that purport to circumscribe a certain class of death-eligible offenders from all first degree murderers; a class which is broadly defined in California. (See Pen. Code, §§ 190.2, subd. (a), 189; *People v. Bacigalupo* (1993) 6 Cal.4th 457, 467-468; see

also *Tuilaepa v. California* (1994) 512 U.S. 967, 975.) Thus, California's special circumstances are susceptible to constitutional challenge when they do not meaningfully circumscribe the class of first degree murders to those truly deserving of the ultimate punishment. (See, e.g., *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1320 [noting that, absent a narrowing construction, "the torture special circumstance would fail to provide a principled basis for distinguishing capital murder from any other murder"].)

For the lying-in-wait special circumstance to perform this function, given the breadth of California's first degree murder statute, it necessarily must exclude a significant portion of premeditated and deliberate first degree murderers from potential death sentences. Instead of performing this function, the lying-in-wait special circumstance, as interpreted and applied by this Court, defines capital conduct in a manner identical to that which is required to establish premeditated murder.

**B. Lying in Wait in California**

Murder perpetrated by means of lying in wait has historically constituted first degree murder in California. (Pen. Code, § 189.) The lying-in-wait special circumstance that was added to California's death penalty scheme with the passage of the Briggs Initiative in 1978 differed from the first degree murder theory of lying in wait in only minor respects. The lying-in-wait special circumstance is established if the defendant commits an intentional murder with: (1) a concealment of purpose; (2) a substantial period of watching and waiting for an opportune time to act; and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. (*People v Morales* (1989) 48 Cal.3d 527, 557.) Far from narrowing the class of first degree murders eligible for a death sentence, the elements of the lying-in-wait special circumstance — as

interpreted by this Court — apply to virtually all premeditated and deliberate murders in California

Concealment, the first element of lying in wait, illustrates perhaps the most glaring constitutional shortcoming of this special circumstance. Traditionally, lying in wait was found where the perpetrator's physical presence was concealed, as in an ambush, and lying-in-wait cases, including early special circumstance cases, were typically limited to such ambush scenarios. (See *People v. McNeal* (1958) 160 Cal.App.2d 446, 451; *People v. Merkouris* (1956) 46 Cal.2d 540, 558-560 [lying in wait not established absent evidence of physical concealment or surprise].) Despite the notion that physical concealment has been the defining feature of lying in wait in California, this Court completely eliminated this requirement in *Morales*. (See *People v. Morales, supra*, 48 Cal.3d at pp. 554-555.)

Under this Court's interpretation, the concealment prong means nothing more than subjective intent to take a victim unawares, and is satisfied merely if the defendant conceals his or her murderous plan from the victim. (*Id.* at pp. 556-557.) Thus, whenever a killer fails to announce a murderous intent to the victim prior to inflicting the fatal injuries, the concealment element is satisfied. This Court has expanded this special circumstance even further, holding that it can apply even when such an announcement of intent *is* made. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 501.)

Although this Court has purported to require a substantial period of watching and waiting to establish the second element of lying in wait, the watching and waiting actually required by the Court must merely be of such duration as to "show a state of mind equivalent to premeditation or deliberation." (*People v. Carpenter* (1997) 15 Cal.4th, 312, 390-391,

emphasis omitted.) As with a finding of premeditation and deliberation, virtually any or no time period at all may satisfy this element, depending on the situation; thus making this element standardless.

Further, the killer need not be hiding; rather, the watching and waiting can occur in the victim's presence and with full knowledge by the victim that the killer is present. (See, e.g., *People v. Webster* (1991) 54 Cal.3d 411, 448.) In fact, the killer need not actually "watch" or even view the victim during the period of lying in wait, so long as he or she was "watchful," i.e., "alert and vigilant" while waiting. (*People v. Sims* (1993) 5 Cal.4th 405, 433.) This Court has even gone so far as to conclude that this element is satisfied even if the "vigilant" defendant falls asleep before the victim arrives. (See *People v. Tuthill* (1947) 31 Cal.2d 92, 100-101.) Since the "watching and waiting" elements are simply substitute methods of explaining premeditation and deliberation – i.e., all premeditated murders automatically satisfy this element – the remaining two elements of this special circumstance must adequately distinguish the lying-in-wait special circumstance from other premeditated murder.

The third element of lying in wait – the requirement of a "surprise attack on an unsuspecting victim from a position of advantage" (*People v. Morales*, *supra*, 48 Cal.3d at p. 557) – similarly fails in this regard. In California, a defendant is "in a position of advantage" if he or she is sitting, walking, or standing behind the victim at the moment of the attack, even if the victim is fully aware of the defendant's presence. (*Id.* at pp. 557-559.) Indeed, the killer need not even be physically behind the victim, as long as the victim is "vulnerable," which has been found to be the case when there are no other people around. (See *People v. Edwards* (1991) 54 Cal.3d 787, 825-826.) Finally, the "surprise attack on an unsuspecting victim from a

position of advantage" prong may be satisfied even if the victim becomes aware of the killer's intent. (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 501.)

Under this Court's broad construction of lying in wait, it is difficult to imagine a premeditated murder that does not in some way meet the definition of this special circumstance. Consequently, the elements set forth in jury instructions and as interpreted by courts in this state, provide no clear, objective, and principled way for a jury to identify the few cases in which lying in wait should be found from the many cases in which it should not. As a result, juries routinely apply this special circumstance inconsistently, even when faced with virtually identical fact patterns.

As it has been interpreted and applied in recent years, the special circumstance "has been expanded to such a degree that the line between premeditated murder and capital murder is but an illusory veil." (*Morales v. Woodford*, 388 F.3d 1159, 1180 (9th Cir. 2003) (McKeown, J., concurring in part and dissenting in part). California has "mistaken the lying in wait special circumstance with simply having a plan." (H. Mitchell Caldwell, *The Prostitution of Lying in Wait*, 57 U. Miami L. Rev. 311 (2003).)

Courts have defended the constitutionality of California's lying in wait special circumstance, saying that it is distinct from, and narrower than, lying-in-wait first degree murder. (See *Morales v. Woodford*, *supra*, 388 F.3d at p. 1175; *People v. Gutierrez* (2002) 28 Cal. 4th 1083, 1148-1149.) The courts have held that the crucial distinction between the lying-in-wait special circumstance and lying-in-wait first degree murder is timing. The special circumstance requires that the homicide take place during the period of watchful waiting, or at least that the lethal acts begin and flow continuously from the moment the concealment ends, whereas first degree

murder only requires that watchful waiting precede the homicide. (See *Morales*, 388 F.3d at p. 1175 (holding that a perceptible interruption between the concealment and watchful waiting and the period in which the killing took place would defeat the special circumstance); (*Domino v. Superior* Court (1982) 29 Cal.App.3d 1000; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1022; *People v. Sims* (1993) 5 Cal.4th 405, 434.) In practice, however, this distinction between the lying in wait special circumstance and lying in wait first degree murder is unclear, has not been fairly applied, and fails to appreciably narrow the class of death-eligible defendants. In addition, the distinction between the special circumstance and first degree murder does not reflect the relative culpability of the defendants, and thus does not reserve the death penalty for the most extreme cases.

### C. The Lying in Wait Special Circumstance Fail to Substantially Narrow the Class of Death-eligible Offenders

Originally, the lying-in-wait special circumstance was reserved for cases in which the killing immediately followed the lying in wait. Thus, the defendant in *Domino* could not be convicted of the special circumstance, even though he captured the victim by means of lying in wait and killed him a few hours later. (*Domino v. Superior Court, supra*, 29 Cal.App.3d 1000, 1012.) To qualify for the special circumstance, there could be no "cognizable interruption" between the lying in wait and the lethal attack. (*Ibid.*) Over the next two decades, California case law steadily eroded away this immediacy requirement. In 2002, after claiming that the requirements for the lying in wait special circumstance were only "slightly different" than those for first degree murder, the *Hillhouse* court found that a defendant who had driven his sleeping friend around rural roads for hours before later

stabbing him when he was conscious, on his feet, and outside the vehicle could be sentenced to death under the lying in wait special circumstance. (*People v. Hillhouse, supra*, 27 Cal.4th at p. 500.)[58] The court justified the ruling by proclaiming that "as long as the murder is immediately preceded by lying in wait, the defendant need not strike at the first available opportunity, but may wait to maximize his position of advantage before taking his victim by surprise." (*Ibid*). Even Justice Kennard, who agreed with the majority that this case warranted the lying in wait special circumstance, admitted that "recent decisions . . . have given expansive definitions to the term 'lying in wait,' while drawing little distinction between 'lying in wait' as a form of first degree murder and the lying in wait special circumstance, which subjects a defendant to the death penalty . . . . [T]hese decisions may have undermined the critical narrowing function of the lying in wait special circumstance." (*Id.* at p. 512 (Kennard, J., concurring).) As the dissent in *Morales* explained, "the lying in wait special circumstance, as construed by California courts, is insufficiently narrow to pass Constitutional muster." (*Morales, supra*, 388 F.3d at p. 1181 (McKeown, J., dissenting).)

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[58]The *Hillhouse* court made this judgement despite the fact that the defendant had told the victim "I ought to kill you" prior to the stabbing. (*People v. Hillhouse, supra*, 27 Cal.4th at p. 500.) One year after the *Hillhouse* decision, the *Morales* court, when challenged to describe a first degree murder that would not be eligible for the lying-in-wait special circumstance, gave the example of a sadistic defendant who said, "I'm going to kill you," to his victim and then did so. (*Morales v. Woodford, supra*, 388 F.3d at p. 1175.) This inconsistency shows that courts are in fact merely "pay[ing] lip service to the notion that lying in wait as an aggravator is much more restricted and less inclusive than lying in wait murder." (Caldwell, 57 U. Miami L. Rev. 311, 367.)

Not only does the lying in wait special circumstance fail to substantially narrow the class of death-eligible offenders, but it also fails to reserve the death penalty for the most culpable defendants. A killer who watches and waits may be no more blameworthy than one who attacks immediately and openly. (*People v. Morales, supra*, 48 Cal.3d at p. 575 (Mosk, J., dissenting).) Several judges have pointed out the absurdity of the distinctions that mean the difference between life and death. (See, e.g., *People v. Roberts*, 2 Cal.4th 271, 323 (1992) [where the only distinction between the defendant's case and one that would not be death-eligible was locomotion]; *People v. Webster, supra*, 54 Cal.3d at p. 467 [where one defendant may have been found guilty of the special circumstance merely because he attacked the victim from behind in a "position of advantage," while his codefendant was not death-eligible because he attacked from the front].) The death penalty can now be given to a defendant who enters his wife's house through the front door in the daytime and shoots her new lover, but theoretically may not be give to a "sadistic person, who wants the victim to know what is coming, and has no doubt of his ability to accomplish the crime," and so tells the victim of his murderous intentions beforehand. (See *People v. Gutierrez, supra*, 28 Cal.4th 1083; *Morales v. Wooford, supra*, 388 F.3d at p. 1175.)

Because the lying in wait law was so absurd and arbitrary, the California legislature amended the Penal Code in 2000. Instead of deleting the lying in wait special circumstance though, Proposition 18 provided that the death penalty could be given to defendants who had killed "by means of" lying in wait, as well as those who had killed "while" lying in wait. (*Murder: Special Circumstances, Analysis by the Legislative Analyst, at* http://primary2000.ss.ca.gov/VoterGuide/Propositions/18analysis.htm.)

Thus, California has eliminated the temporal proximity requirement, and the last vestige of a distinction between first degree lying-in-wait murder and the lying-in-wait special circumstance. Since this distinction was the key to defending the constitutionality of the lying in wait special circumstance, California's lying-in-wait special circumstance is no longer constitutional.

"Overall, it is relatively clear that murder by lying in wait as applied by the California Supreme Court has been stretched to the breaking point." (Caldwell, 57 U. Miami L. Rev. 311, 371.) The lying-in-wait special circumstance is so broad that it embraces nearly all premeditated murders. It does not appreciably narrow the class of death-eligible defendants, and it does not punish the most extreme criminals. Therefore the lying-in-wait special circumstance is unconstitutional.

**D. Conclusion**

The Eighth Amendment demands more than merely narrowing the class of death-eligible murderers. "When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so." (*Arave v. Creech, supra*, 507 U.S. at p. 474; see *Lewis v. Jeffers* (1990) 497 U.S. 764, 776.) An aggravating or special circumstance is unconstitutionally vague when it fails to create any inherent restraint on the arbitrary and capricious infliction of the death sentence, because under such circumstances a person of ordinary sensibility could find that almost every murder fit the stated criteria. (*Zant v. Stephens, supra*, 462 U.S. at p. 878.)

Rather than remedy the constitutional infirmities inherent in this special circumstance, this Court has exacerbated the vagueness problem by routinely expanding the elements of lying in wait, thereby creating greater

confusion and less guidance to juries who are charged with applying it. Because even diametrically opposed scenarios can satisfy the special circumstance, California juries are left with no guidance in determining when it should and should not apply. As a result, this special circumstance permits the wanton and freakish imposition of the death penalty prohibited by the Eighth Amendment. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195, fn. 46.) This special circumstance should be struck and appellant's death sentence set aside.

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## XI

## IF ANY COUNT OR SPECIAL CIRCUMSTANCE IS REDUCED OR VACATED, THE PENALTY OF DEATH MUST BE REVERSED AND THE CASE REMANDED FOR A NEW PENALTY PHASE TRIAL

The court made its decision to impose a death judgment at a time when appellant had been convicted of one count of first degree murder and the special circumstances of lying in wait, murder of a police officer and murder to evade arrest had been found to be true. If this Court reduces or vacates any of the counts or special circumstances, the matter should be remanded for a new sentencing hearing to permit the reconsideration of the death judgment. (See *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 849) [court found prejudice, noting that three of the four special circumstances the jurors found to be true were invalidated on appeal]; but see *Brown v. Sanders* (2006) 546 U.S. 212, 126 S.Ct. 884, 895 ["An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances].)

Section 190.3 codifies the factors that a trier of fact may consider in determining whether death or life imprisonment without parole should be imposed in a given case. In accordance with this provision, appellant's trier of fact was guided by CALJIC No. 8.85 which instructs that the trier "shall" consider and be guided by the presence of enumerated factors, including, *inter alia*, "the circumstances of the crime of which the defendant was convicted." (Pen. Code, § 190.3, factor (a); RT 18:2851-2852; CALJIC No. 8.85.)

The reliability of the death judgment would be severely undermined if it were allowed to stand despite the reduction or reversal of any of the counts. Accordingly, to meet the stringent standards imposed on a capital sentencing proceeding by the Eighth Amendment, as well as article I, section 17 of the California Constitution, appellant must be granted a new penalty trial, to enable the factfinder to consider the appropriateness of imposing death.

Moreover, in *Ring v. Arizona* (2002) 536 U.S. 584, the United States Supreme Court applied the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466 to capital sentencing procedures and concluded that specific findings the legislature makes as a prerequisite to a death sentence must be made by a jury and proven beyond a reasonable doubt. In this state, the trier of fact has two critical facts to determine at the penalty phase of trial: 1) whether one or more of the aggravating circumstances exists, and 2) if one or more aggravating circumstances exists, whether they outweigh the mitigating circumstances.[59] If this Court reverses or reduces any of the convictions or special findings, the delicate calculus the trier of fact must undertake when weighing aggravating and mitigating circumstances is necessarily skewed, and there no longer remains a finding that the aggravating factors outweigh the mitigating evidence beyond a reasonable doubt. This Court cannot conduct a harmless error review regarding the death sentence without making findings that go beyond the facts reflected in the verdict alone. (See *Ring*, at p. 588; *Apprendi*, at p. 483.) Accordingly, because penalty findings regarding the facts supporting an increased sentence is constitutionally required, a new determination that aggravating factors

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[59] *See* Argument XI, *infra*, for a full discussion of the impact of *Ring* and *Apprendi* on the California death penalty scheme.

outweigh mitigating factors and that death is the appropriate sentence must be made when any count or special circumstance is reversed or reduced. (But see *Brown v. Sanders, supra*, 546 U.S. 212, 126 S.Ct. 884, 895.)

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## XII

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

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

### A. The Instruction On Section 190.3, Factor (a) And Application Of That Sentencing Factor Resulted In The Arbitrary And Capricious Imposition Of The Death Penalty

Section 190.3, factor (a), violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, because it is applied in such a wanton and freakish manner that almost all features of every murder have been found to be "aggravating" within that statute's meaning, even ones squarely at odds with others deemed supportive of death sentences in other cases. Although factor (a) has survived a facial

Eighth Amendment challenge (*Tuilaepa v. California* (1984) 512 U.S. 967, 975-976), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Factor (a) directs the jury to consider as aggravation the "circumstances of the crime." Because this Court has always found that the broad term "circumstances of the crime" meets constitutional scrutiny, it has never applied a limiting construction to factor (a). Instead, it has allowed an extraordinary expansion of that factor, finding that it is a relevant "circumstance of the crime" that, e.g., the defendant: had a "hatred of religion";[60] sought to conceal evidence three weeks after the crime;[61] threatened witnesses after his arrest;[62] disposed of the victim's body in a manner precluding its recovery,[63] or had a mental condition that compelled him to commit the crime.[64]

California prosecutors have argued that almost every conceivable circumstance of a crime should be considered aggravating, even circumstances starkly opposite to others relied on as aggravation in other cases. (See *Tuilaepa v. California, supra,* 512 U.S. at pp. 986-987 (dis. opn. of Blackmun, J.).) The examples cited by Justice Blackmun in *Tuilaepa* show that because this Court has failed to limit the scope of the term "circumstances of the crime," different prosecutors have urged juries

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[60]*People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582.

[61]*People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10.

[62]*People v. Hardy* (1992) 2 Cal.4th 86, 204.

[63]*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn. 35.

[64]*People v. Smith* (2005) 35 Cal.4th 334, 352.

to find squarely conflicting circumstances aggravating under that factor.

In practice, the overbroad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) It is, therefore, unconstitutional as applied. (*Ibid.*)

### B. The Death Penalty Statute And Accompanying Jury Instructions Fail To Set Forth The Appropriate Burden Of Proof

#### 1. Appellant's Death Sentence Is Unconstitutional Because It Is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality (CALJIC Nos. 8.86, 8.87). (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (RT 18:2854-2857.)

*Apprendi v. New Jersey* (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, and *Ring v. Arizona* (2002) 530 U.S. 584, 604, now require any fact that is used to support an increased

sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: the jury had to determine whether any mitigating or aggravating factors were present; the jury had to decide whether the aggravating factors outweighed the mitigating factors; and the jury had to decide whether the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; RT 2855-2877.) Because these additional findings were required before the jury could impose the death sentence, *Ring*, *Apprendi* and *Blakely* require that each of these findings be made beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). The Court has rejected the argument that *Apprendi*, *Blakely*, and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, and *Blakely*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are

true, but that death is the appropriate sentence. This Court has previously rejected the claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Appellant requests that the Court reconsider this holding.

### 2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural sentencing protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (RT 18:2851-2854, 2855-2857), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely

moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even assuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law ].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

### 3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings

#### a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 290, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona*, *supra*. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping

principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." *McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal Constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994) – and, since providing more protection to a noncapital defendant than a capital defendant would violate the Equal Protection Clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421) – it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the Fourteenth Amendment and by its irrationality violate both the due process clause of the Fourteenth Amendment and the cruel and unusual punishment clause of the Eighth Amendment to the federal constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require

jury unanimity as mandated by the federal Constitution.

**b. Unadjudicated Criminal Activity**

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (CALJIC No. 8.87; RT 18:2854-2855.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3 subd. (b), violates due process and the Sixth, Eighth, and Fourteenth Amendments to the federal constitution, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson* (2001) 25 Cal.4th 543, 584-585.) Here, the prosecution presented evidence regarding unadjudicated criminal activity allegedly committed by appellant (RT 16:2479, et seq.) and argued it as an aggravating factor. (RT 18:2819.)

The United States Supreme Court's recent decisions in *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury. Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward*.

### 4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (RT 18:2856.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) Appellant asks this Court to reconsider that opinion.

### 5. The Instructions Failed to Inform the Jury That the Central Determination Is Whether Death Is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate. On the other hand, jurors find death to be "warranted" when

they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

This Court previously has rejected this claim (*People v. Arias*, *supra*, 13 Cal.4th at p. 171), but appellant urges this Court to reconsider those rulings.

### 6. The Instructions Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence Of Life Without the Possibility of Parole

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v.*

*Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

### 7. The Instructions Failed to Inform the Jurors that Even If They Determined That Aggravation Outweighed Mitigation, They Still Could Return a Sentence of Life Without the Possibility of Parole

Pursuant to CALJIC No. 8.88, the jury was directed that a death judgment cannot be returned unless the jury unanimously finds "that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (RT 18:2856.) Although this finding is a prerequisite for a death sentence, it does not preclude a sentence of life without possibility of parole. Under *People v. Brown* (1985) 40 Cal.3d 512, 541, the jury retains the discretion to return a sentence of life without the possibility of parole even when it concludes that the aggravating circumstances are "so substantial" in comparison with the mitigating circumstances. Indeed, under California law, a jury may return a sentence of life without the possibility of parole even in the complete absence of mitigation. (*People v. Duncan* (1991) 53 Cal.3d 955, 979.) The instructions failed to inform the jury of this option and thereby arbitrarily deprived appellant of a state-created liberty and life interest in violation of the due process clause of the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346).

The decisions in *Boyde v. California* (1990) 494 U.S. 370, 376-377

and *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307 do not foreclose this claim. In those cases, the high Court upheld, over Eighth Amendment challenges, capital-sentencing schemes that mandate death upon a finding that the aggravating circumstances outweigh the mitigating circumstances. That, however, is *not* the 1978 California capital-sentencing standard under which appellant was condemned. Rather, this Court in *People v. Brown*, *supra*, 40 Cal.3d at p. 541, held that the ultimate standard in California is the appropriateness of the penalty. After *Boyde*, this Court has continued to apply, and has refused to revisit, the *Brown* capital-sentencing standard. (See, e.g., *People v. Champion* (1995) 9 Cal.4th 879, 949, fn. 33; *People v. Hardy* (1992) 2 Cal.4th 86, 203; *People v. Sanders* (1990) 51 Cal.3d 471, 524, fn. 21.)

This Court has repeatedly rejected this claim. (See *People v. Smith* (2005) 35 Cal.4th 334, 370; *People v. Arias*, *supra*, 13 Cal.4th at p. 170.) Appellant urges the Court to reconsider these rulings.

### 8. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments By Failing to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity As to Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California*, *supra*, 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden

in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina*, *supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland*, *supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

### 9. The Penalty Jury Should Be Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be

instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., Amend. 14th), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., Amends. 8th & 14th), and his right to the equal protection of the laws. (U.S. Const., Amend. 14th.)

In *People v. Arias*, *supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

### C. Failing To Require That the Jury Make Written Findings Violates Appellant's Right To Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not

capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the Court to reconsider its decisions on the necessity of written findings.

### D. The Instructions To The Jury On Mitigating And Aggravating Factors Violated Appellant's Constitutional Rights

#### 1. The Failure To Delete Inapplicable Sentencing Factors Violated Appellant's Constitutional Rights

Most of the factors listed in CALJIC No. 8.85 were inapplicable to the facts of this case. However, the trial court did not delete those inapplicable factors from the instruction when requested to do so by appellant. Moreover, the prosecutor told the jury that the absence of mitigating factors (d), (e), (f), (g), (h) and (j) rendered them aggravating. (RT 18:2820-2826.) Including these irrelevant factors in the statutory list introduced confusion, capriciousness and unreliability into the capital decision-making process, in violation of appellant's rights under the Sixth, Eighth and Fourteenth Amendments. Appellant recognizes that this Court has rejected similar contentions previously (see, e.g., *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064), but in this case, the prosecutor actually told the jurors they could use the inapplicable mitigating factors as evidence in aggravation. For example he stated:

> Factor (d), whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. If he was, then you can certainly consider that as a factor in mitigation. But was he, when he acted in this case was he under the influence of extreme mental or emotional disturbance? You know that he wasn't. The defendant was cool, he was calm, he was calculating. Those wheels in that head of his were turning all the time toward his mission of murdering Officer Fraembs. So, ladies

and gentleman, factor (d), that is a factor in aggravation because he wasn't under any mental duress.

(RT 18:2820.)

Including inapplicable statutory sentencing factors was harmful in a number of other ways as well. First, only factors (a), (b), and (c) may lawfully be considered in aggravation. (See *People v. Gurule* (2002) 28 Cal.4th 557, 660; *People v. Montiel* (1993) 5 Cal.4th 877, 944-945.) However, the "whether or not" formulation used in CALJIC No. 8.85 given in this case not only suggested that the jury could consider the inapplicable factors for or against appellant, but the prosecutor told the jurors they could use the absence of those factors as aggravating circumstances against appellant. Moreover, instructing the jury on irrelevant matters dilutes the jury's focus, distracts its attention from the task at hand and introduces confusion into the process. Such irrelevant instructions also create a grave risk that the death penalty will be imposed on the basis of inapplicable factors. Finally, failing to delete factors for which there was no evidence at all inevitably denigrated the mitigation evidence which was presented. The jury was effectively invited to sentence appellant to death because there was evidence in mitigation for "only" one factor.

In no other area of criminal law is the jury instructed on matters unsupported by the evidence. Indeed, this Court has said that trial courts have a "duty to screen out factually unsupported theories, either by appropriate instruction or by not presenting them to the jury in the first place." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131.) At best, the failure to screen out inapplicable factors here required the jurors to make an *ad hoc* determination on the legal question of relevancy and undermined the reliability of the sentencing process. Since the prosecutor told the jurors they could consider the lack of the mitigating factors to be aggravating, it is

likely the jurors did so.

The inclusion of inapplicable factors also deprived appellant of his right to an individualized sentencing determination based on permissible factors relating to him and to the crime. In addition, that error artificially inflated the weight of the aggravating factors and violated the Sixth, Eighth, and Fourteenth Amendment requirements of heightened reliability in the penalty determination. (*Ford v. Wainwright*, *supra*, 477 U.S. at pp. 411, 414; *Beck v. Alabama*, *supra*, 447 U.S. at p. 637.) Appellant aks the Court to reconsider its decision in *People v. Cook* (2006) 36 Cal.4th 566, 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

### 2. Failing To Instruct That Statutory Mitigating Factors Are Relevant Solely As Mitigators Precluded The Fair, Reliable And Evenhanded Application Of The Death Penalty

The trial court failed to instruct the jurors which of the listed sentencing factors were aggravating, which were mitigating or which could be either aggravating or mitigating depending upon the evidence. Yet, as a matter of state law factors (c), (d), (e), (f), (g), (h) and (j), which were introduced by a prefatory "whether or not" were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034.) The prosecutor told the jurors that the absence of evidence under 190.3 factors (d), (e), (f), (g), (h) and (j) was aggravating. (RT 18:2820-2826.)

Without guidance from the court as to which factors could be considered solely as mitigating, combined with the prosecutor's erroneous argument, the jury was able to conclude that a "not" answer to any of those "whether or not" sentencing factors could establish an aggravating

circumstance, and was thus invited to aggravate appellant's sentence upon the basis of nonexistent or irrational aggravating factors, which precluded the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.) Failing to provide appellant's jury with guidance on this point was reversible error and appellant asks the Court to reconsider its holding on this point.

#### 3. Restrictive Adjectives Used In The List Of Potential Mitigating Factors Impermissibly Impeded The Jurors' Consideration Of Mitigation

The inclusion in the list of potential mitigating factors read to appellant's jury of such adjectives as "extreme" (see factors (d) and (g); RT 18:2852), and "substantial" (*see* factor (g); RT 18:2853), acted as a barrier to the consideration of mitigation, in violation of the Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. 367; *Lockett v. Ohio*, *supra*, 438 U.S. 586.) This Court has rejected this very argument (*people v. Arias* (2006) 38 Cal.4th 491, 614), but appellant urges reconsideration.

### E. The Prohibition Against Inter-Case Proportionality Review Guarantees Arbitrary And Disproportionate Impositions Of The Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner

or that violate equal protection or due process. For this reason, appellant urges the Court to reconsider its failure to require inter-case proportionality review in capital cases.

### F. The California Capital Sentencing Scheme Violates The Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the equal protection clause of the Fourteenth Amendment to the federal constitution. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; California Rules of Court, rule 4.42, subds. (b), (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. This Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but appellant asks the Court to reconsider that ruling.

### G. California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms

This Court numerous times has rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments

to the federal constitution, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook* (2006) 39 Cal.4th 566, 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the Court to reconsider its previous decisions.

**H. Conclusion**

For the reasons set forth above, appellant's death sentence must be reversed.

## XIII

## REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1987)(*en banc)* 586 F.2d 1325, 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

The insufficiency of the evidence to establish a premeditated and deliberate first degree murder or murder by means of lying in wait, combined with the court's erroneous admission of evidence of threats against the witnesses and appellant's parole status, renders the guilt phase verdicts so unreliable that they cannot stand. The cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process. (U.S. Const., 14th Amend.; Cal. Const. art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643.)

Appellant's convictions, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill*, *supra*, 17 Cal.4th at pp. 844-845 [reversal based on cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown, supra*, 46 Cal.3d at p. 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

In addition to the insufficiency of the evidence to establish the special circumstances of lying in wait and murder to avoid arrest and murder of a police officer engaged in the lawful conduct of his duties, the trial court also failed to fully and appropriately instruct the jurors at the

penalty phase. Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina*, *supra*, 476 U.S. at p. 8; *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

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## CONCLUSION

For all the reasons stated above, the guilt and penalty verdicts in this case must be reversed.

DATED: February 16, 2007

Respectfully submitted,

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**CERTIFICATE OF COUNSEL**
**(Cal. Rules of Court, rule 36(b)(2)**

I, Denise Kendall, am the Assistant State Public Defender assigned to represent appellant Ronald Bruce Mendoza in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 46,489 words in length.

DENISE KENDALL
Attorney for Appellant

## DECLARATION OF SERVICE

Re: People v. Ronald Mendoza

Los Angeles Superior Court No. KA032117
Supreme Court No. S065467

I, GLENICE FULLER, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. I served a copy of the attached:

**APPELLANT'S OPENING BRIEF**

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

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Each said envelope was then, on February 16, 2007, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on February 16, 2007, at San Francisco, California.

Glenice Fuller
DECLARANT