S065467

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY 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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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 REPLY BRIEF

INTRODUCTION

Appellant Mendoza's trial was riddled with prejudicial error. Respondent has struggled to preserve this conviction by ignoring pertinent facts, avoiding significant legal issues, and dismissing all error as harmless. Respondent's efforts, however, cannot conceal the fact that grievous error occurred and the convictions and death judgment must be reversed.[1]

[1] Appellant has only addressed respondent's contentions that require further discussion for the proper determination of the issues raised on appeal and has not replied to every aspect of every argument. Appellant specifically adopts the arguments presented in his opening brief on each and every issue, whether or not discussed individually below. Appellant intends no waiver of any issue by not expressly reiterating it herein.

ARGUMENTS

I

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

Appellant has argued the prosecution failed to prove the elements of "a substantial period of watching and waiting for a favorable or opportune time to act," concealment of purpose, and surprise attack sufficient to uphold the verdict of lying-in wait first degree murder and lying-in-wait special circumstance. (*People v. Morales* (1989 48 Cal.3d 527, 557-558.) Respondent contends there was substantial evidence from which a rational juror could find sufficient evidence of lying in wait. (Respondent's Brief, hereafter RB, at p. 60.) Respondent also contends the trial court lacked the authority to strike the lying-in-wait special circumstance citing *People v. Johnwell* (2004) 121 Cal.App.4th at p. 1285 and requests this Court reinstate the special circumstance. (RB at p. 54.)

Appellant submits the evidence of lying in wait was insufficient to establish either lying-in-wait first degree murder or the lying-in-wait special circumstance, and the trial court had the authority to find the evidence of the lying-in-wait special circumstance insufficient. In the alternative, if this Court finds the trial court did not have the authority to exercise its discretion to strike the special circumstance, appellant requests this Court remand the matter to the trial court to properly exercise its discretion.

A. This Court must Strike the Lying-in-wait Special Circumstance or Remand the Case to the Trial Court to Exercise its Proper Discretion

At every opportunity, defense counsel moved the trial court to find the evidence of lying in wait insufficient. Appellant moved for judgement

of acquittal following the prosecution's case-in-chief under Penal Code section 1118.1 arguing there was not a substantial period of watching and waiting. (RT 13:1917.) At the close of evidence, appellant objected to the giving of jury instructions on lying-in-wait first degree murder (CALJIC 8.25) and on the lying-in-wait special circumstance (CALJIC 8.81.15) arguing the prosecution had not proved facts sufficient to warrant giving the instructions. (RT 14:2046.) During the jury instruction hearing, appellant renewed his objection to the lying in wait instructions. (RT 14:2092.) Appellant filed a motion for a new trial under Penal Code section 1181 alleging inter alia, that the evidence was insufficient to establish lying in wait (CT 13:3674-3689), and that conviction of the lying-in-wait murder and lying-in-wait special circumstance deprived him of his constitutional rights to due process, equal protection, a fair and impartial trial and to be free from cruel and unusual punishment.[2] (RT 13:3680.) Appellant also moved the court to modify the verdict under Penal Code sections 190.4, 1385 or 1181, subdivision (6)[3] again alleging the evidence was insufficient to establish either lying-in-wait first degree murder or the lying-in-wait

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[2] The California Constitution's prohibition against "cruel or unusual punishment" (Cal. Const., art. I, § 17) precludes the imposition of punishment that "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.)

[3] Penal Code § 190.4, subdivision (e) provides that in every death penalty case the trial court must consider modification of the verdict. Penal Code § 1385 provides in part, "The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in the furtherance of justice, order an action be dismissed." Penal Code § 1181, subdivision (6) provides "When the verdict or finding is contrary to law or evidence . . . the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial. . . ."

special circumstance. (CT 13:3688-3696.)

Ultimately, the trial court found the evidence insufficient to establish the lying-in-wait special circumstance (RT 18:2867) but, respondent contends, the trial court lacked the authority to strike the special circumstance which must therefore be reinstated. The trial court stated it is was striking the lying-in-wait special circumstance under Penal Code section 1385, apparently unaware of section 1385.1 which restricts the court's authority to strike a special circumstance following a jury finding.[4] Nevertheless, appellant contends the trial court had the authority to find the evidence of lying in wait insufficient either under section 1181, subdivision (6), section 190.4 or under appellant's state and federal constitutional rights.

In *People v. Ybarra* (2008) 166 Cal.App.4th 1069, a jury found 17-year-old Cernas guilty of first degree murder and found true the special circumstance of intentional murder by an active criminal street gang member in violation of section 190.2, subdivision (a)(22). (*Ybarra*, 166 Cal.App.4th at p. 1074.) At sentencing, Cernas's attorney moved the court to strike the special circumstances if it had the inherent power to do so. The prosecutor responded that Cernas deserved a life without parole sentence for the multiple crimes. The trial court denied the motion to strike for the reasons cited in the probation report – that the jury found Cernas committed the murder pursuant to section 190.2(a)(22), the murder was intentional, and that he was an active participant in a criminal street gang which would

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[4] Neither did the prosecutor or trial counsel bring section 1385.1 to the court's attention which provides, "Notwithstanding Section 1385 or any other provision of law, a judge shall not strike or dismiss any special circumstance which is admitted b y a plea of guilty or nolo contendere or is founded by a jury or court . . . ."

establish the sentence to be life without the possibility of parole, and because the gravity of the current offense did not merit the striking of the special circumstance. The court imposed a life without possibility of parole term for the special circumstance first degree murder.

In *Ybarra*, the appellate court recognized that the language of section 1385.1 denied the trial court the inherent power to strike the special circumstance. The court found that implicit in the trial court's ruling on Cernas's motion to strike was "a lack of awareness by the court and counsel alike of the electorate's express elimination of the power the trial court purported to exercise." In addition, "the silence of the sentencing hearing record about Cernas's age is suggestive of a lack of awareness by the court and counsel alike of the discretion that section 190.5, subdivision (b) confers to impose on a youthful offender a 25-to-life term instead of an LWOP term." (*Id.* at p. 1094.) The appellate court went on to find that "[s]ince the record explicitly shows a lack of meaningful argument by counsel about the facts and the law and implicitly shows a belief by the court and counsel alike that an LWOP term was mandatory if the special circumstance were not stricken," the matter must be remanded for resentencing. (*Ibid.*)

Similarly, in appellant' case, the trial court was not aware of its limited authority to strike the special circumstance of lying in wait under section 1385.1, but could have stricken the special circumstance under either section 1181, subdivision (6), section 190.4 or "under the compulsion of the federal and/or state constitutions." (*People v. Mora* (1995) 39 Cal.App.4th 607, 615; see *People v. Johnwell* (2004) 121 Cal.App.4th at p. 1285.) Had the court been aware of these provisions, it could have reached the same result under different authority.

Here, trial counsel never argued the court should use its discretionary powers to dismiss the special circumstance under section 1385. Rather counsel consistently argued there was insufficient evidence of lying-in-wait. (RT 13:1915-1916, 1917, 1920-21; 14:2046-2047.) In his written motion for a new trial, defense counsel again argued the insufficiency of the evidence and, in a single sentence in the motion, listed section 1385 as a basis for ensuring justice is done. (CT 13:4-5.)

Thus, appellant contends the trial court's finding of insufficient evidence of the lying-in-wait special circumstance was correct even if the court struck the special circumstance under the wrong authority. Appellant requests this Court similarly find the evidence insufficient to sustain the lying-in-wait special circumstance and reverse that special circumstance or remand the case to the trial court to exercise its discretion under the proper authority.

This Court may not, as respondent contends reinstate the special circumstance without respondent filing it's own appeal because the sentence was unauthorized by law. (RB at p. 55, fn. 21.) Respondent cites *People v. Johnwell, supra*, 121 Cal.App.4th 1267 for the proposition that the prosecution is permitted to raise the issue without having first objected on the same ground in the trial court and is permitted to raise the issue on appellant's appeal without filing its own separate appeal. (*Id.* at p.1283-1285, and fn. 9.)

The prosecution's right to appeal is statutory, and appeals that do not fall within the exact statutory language are prohibited. [Citation.]" (*People v. McDougal* (2003) 109 Cal.App.4th 571, 580, accord, *People v. Ibanez* (1999) 76 Cal.App.4th 537, 542.) Respondent states this Court should find the court's order was not authorized by law and requests this Court modify

the judgment, but section 1238 provides only for an appeal by the prosecution where, in pertinent part, there is "(10) The imposition of an unlawful sentence. . . . ." Section 1238 defines an "'unlawful sentence' [as] the imposition of a sentence not authorized by law or the imposition of a sentence based upon an unlawful order of the court which strikes or otherwise modifies the effect of an enhancement or prior conviction." (Pen. Code, sec. 1238, subd. (10).)

In the present case, the striking of the lying-in-wait special circumstance did not result in an unauthorized sentence. Upon a jury's verdict finding special circumstances to be true, section 190.2 provides only two possible punishments, death or life imprisonment without possibility of parole. (*People v. Young* (1992) 11 Cal.App.4th 1299, 1308.) Appellant is sentenced to death on count 1 for the murder of Officer Fraembs. The trial court's order striking one of the three special circumstances is not an "unlawful order of the court which strikes or otherwise modifies the effect of an enhancement or prior conviction." (Pen. Code sec., 1238, subd. (10).) In *Mora*, the court found a trial court has no statutory discretion to strike a special circumstance finding in order to reduce the punishment under section 1385.1. (*People v. Mora, supra*, 39 Cal.App.4th at p. 614.) The court here did not exercise its discretion to reduce the punishment, but merely found the evidence insufficient to establish the lying-in-wait special circumstance while upholding the other two special circumstances findings. Thus, the court's action had no sentencing effect on appellant's conviction of first degree murder.[5]

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[5] Respondent concedes that even if the lying-in-wait special circumstance is found deficient no reversal of the penalty phase is required (continued...)

Appellant remains sentenced to death on count 1 and there was no reduction in sentence.

B. There Was Insufficient Evidence of Lying in Wait

This Court should find there was insufficient evidence of the elements of lying-in-wait to support either the first degree murder conviction or the special circumstance finding. Respondent claims there was sufficient evidence of a substantial period of watching and waiting "from the moment that Officer Fraembs turned his spotlight on appellant and his companions until the moment appellant shot the officer." (RB at p. 60.) The trial court estimated this time period to be, at most, one minute. (RT 18:2686.) Respondent contends appellant started planning his assault at the moment the officer shone his light on the party (RB at p. 60), but respondent concedes, it was not until appellant allegedly stepped behind Flores so as not to catch the officer's attention that he concealed his purpose. (RB at p.61.) The law requires "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. 555.)

Flores testified that she was on the sidewalk closet to the street when appellant moved her two steps off the curb, then two steps more in the street until he moved from behind her and took one or two steps himself before shooting. (RT 6:890, 892, 893.) Thus, the time period when appellant had arguably concealed his purpose consisted of, at most, six steps – far less

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[5] (...continued)
since the jurors found two other special circumstances true. (RB at p.66.)

than the one minute from the time the officer shone his light, pulled up his car, got out of his car, addressed the party, heard appellant's response, ordered them to the curb and began searching Cesena. All of those actions were found to consist of at most one minute and included the six steps Flores described. Clearly the time from which appellant allegedly concealed his purpose could have been no more than a few seconds of that minute. Thus, the prosecution failed to prove the elements of concealment of purpose together with a substantial period of watching and waiting.

Not only was the time period when appellant allegedly lay in wait fleeting and insubstantial, but it is clear that appellant's actions are not of the same character as those cases in which the courts have found lying in wait where the defendants took some action to initiate the period of watching and waiting or implement a plan for killing. For example, the courts have upheld the elements of lying-in-wait where a defendant lures his victim to a spot in order to ambush and kill (*People v. Carasi* (2008) 44 Cal.4th 1263, 1310, *People v. Webster* (1991) 54 Cal.3d 411, 448-449 and *People v. Bonilla* (2007) 41 Cal.4th 313, 332) or selects a murder location and waits for his victim to arrive. (*People v. Sassouin* (1986)182 Cal.App.3d 361.) Lying-in-wait has also been found where the defendant follows his victims for a quarter of a mile before killing them (*People v. Edwards* (1991) 54 Cal.3d 787, 825-826) or where the defendant enters his victims' bedroom and murders them while they were helplessly sleeping. (*Hardy*, 2 Cal.4th at p. 164.) A defendant has also been found to initiate the period of watching and waiting where he engages in a subterfuge intended to convince the victim to stay put so the defendant could go and get his shotgun and kill him. (*People v. Poindexter* (2006) 144 Cal.App.4th 572.) A defendant's actions in killing his victim from the back seat of a car

was upheld where the defendant acquired the murder weapon and walked a few miles before attacking. (*People v. Jurado* (2006) 38 Cal.4th 72, 119-120; *People v. Cruz* (2008) 44 Cal.4th 636, 681.) Finally, lying-in-wait has been found where the defendant is told the victim is on her way home and waits in her home for her to arrive before killing her. (*People v. Moon* (2005) 37 Cal.4th 1, 23-24.)

The alleged actions of appellant are fundamentally different than in all of the reported cases in which California courts have upheld the sufficiency of evidence of lying in wait. Appellant neither waited for his victim in a specific location, followed his victim, selected the location of the murder or lured the victim to the spot where the killing occurred.

While the element of watching and waiting is temporal, it is the defendant's actions during that period which determines whether its character is substantial enough to qualify as a period of watchful waiting. In each of those cases in which the court has found lying-in-wait, the defendant has in some way actively initiated the temporal period. In this case, appellant did not take any action which can be described as initiating the period of watchful waiting.

In *People v. Stevens,* this Court held that the purpose of the watching and waiting element is to distinguish those cases in which a defendant acts insidiously from those in which he acts out of rash impulse. (See People v. Moon (2005) 37 Cal.4th 1, 24.) This period need not continue for any particular length "'of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.' (*People v. Sims,* supra, 5 Cal.4th at p. 433-434, 20 Cal.Rptr.2d 537, 853 P.2d 992.)" (*People v. Stevens* (2007) 41 Cal.4th 182, 202.)

In *Stevens,* the defendant engaged in a series of random attacks by shooting at people on or near the freeway. The defendant challenged the lying-in-wait special circumstance of the killing of victim August. Prior to shooting August, the defendant pulled up alongside a car driven by victim Stokes and got his attention. Both cars slowed down. Stokes lowered his passenger window, and looked over to see if he knew the driver. Defendant motioned as though trying to get Stokes's attention, and smiled at him. Stokes had never seen defendant before, but thought perhaps he had a passenger who was a friend from work. Just as Stokes realized there was no passenger, defendant shot at him.

Stokes lay down on the seat and slowed to 30 miles per hour. When he looked up the defendant was coasting in front of him and fired two more shots. The defendant pulled away, and Stokes sped up to catch the defendant. Stokes saw the defendant slow down and pull alongside August's car. The defendant got the attention of August because both sets of brake lights came on. Stokes lost sight of the cars for a brief moment, and after rounding a slight turn, Stokes saw the cars again, and heard at least two gunshots. Defendant rapidly drove away and August's car crashed into a pillar.

Discussing the elements of lying-in-wait in the August shooting, this Court distinguished this lying-in-wait crime from rash impulse explaining,

> Even a short period of watching and waiting can negate such an inference. [Citation.] The facts here are more than sufficient to establish that after an assault on Stokes, defendant turned his attention to a new target. He selected August, the driver of the only other nearby car on the road ahead of him, as his next victim. He approached and concealed his deadly purpose by pulling alongside of August and induced him to slow down. August did so, just as Stokes

> had. This process may not have taken an extended period, because defendant did not have to wait long until his next target became available. But there is no indication of rash impulse. To the contrary, *it was reasonable for the jury to conclude that defendant acted to implement his plan of luring a victim of opportunity into a vulnerable position by creating or exploiting a false sense of security.* The jury could also reasonably conclude that August was taken by surprise. He did not flee, but slowed down and drove side-by-side with defendant, just as Stokes had done. Once the intended victim slowed down, the time to act became opportune. Defendant stopped watching and started shooting. Such behavior is completely consistent with, and provides substantial evidence for, the watching and waiting element of the lying-in-wait special circumstance.

(*Id.* at p. 203; emphasis added.)

As *Stevens,* makes clear, in addition to the temporal aspect of the period of watching and waiting necessary for lying-in-wait, the defendant's action in initiating or implementing his plan negates any finding of rash impulse. In this case, the alleged period of watchful waiting and concealment of purpose occurred over the course of six steps and was not part of any plan initiated or implemented by appellant to lure a victim into a position where he could be killed. As trial counsel argued and the court agreed, this was a rash impulse not preceded by the substantial period of acting to implement a plan. "The period of time must be one of watching and waiting, the purpose of which is to distinguish those cases in which a defendant acts insidiously from those in which he acts out of rash impulse. (See *People v. Stevens* (2007) 41 Cal.4th 182, 202; *People v. Moon* (2005) 37 Cal.4th 1, 24.)

C. There Was Insufficient Evidence of Concealment of Purpose

Under respondent's reasoning any killing in which the victim was not aware of the killer's intention and therefore unable to defend himself would constitute the concealment of purpose element of lying-in-wait. Respondent argues, "it is clear that although Officer Fraembs was aware of appellant's physical presence, appellant managed to conceal his purpose so successfully that he took the officer completely by surprise, shooting and killing him before Officer Fraembs had a chance to unsnap his holster, draw a weapon, defend himself, run or react to appellant's lethal assault in any way at all." (RB at p. 64.)

Contrary to respondent's reasoning, it is the *action* of the defendant which determines the element of concealment of purpose not the awareness of the victim. "It suffices if the defendant's purpose puts the defendant in a position of advantage, from which the fact finder may infer that the lying-in-wait was part of the defendant's plan to take the victim by surprise." (*People v. Ceja* (1993) 4 Cal.4th 1134, 1140, citing *People v. Webster, supra,* 54 Cal.3d at p. 448 and *People v. Morales*, *supra*, 48 Cal.3d at pp. 554-555.) Thus, the fact that the officer was unaware of appellant's actions does not control. Rather, the concealment of purpose must be part of a plan to take the victim by surprise. Here the mere fact that appellant did not announce his intent to shoot the officer does not constitute evidence of a plan to kill the officer by lying in wait. The evidence shows that at most appellant had stepped behind Flores for the period of time in which he took 6 steps before shooting. There are no additional facts such as luring the victim to the murder site (see e.g. *Morales, supra*, 48 Cal.3d at p. 554-555) or tricking the murder victim into staying in a particular place (see e.g.

Poindexter, supra, 144 Cal.App.4th 572) from which the fact finder might infer the purpose of the alleged concealment to be killing by lying-in-wait.

D. There Was Insufficient Evidence of a Surprise Attack from a Position of Advantage

Respondent argues that nothing more is needed to show the element of a surprise attack from a position of advantage than the "photograph of Officer Fraembs's dead body, shot in the face, on the ground right where he stood while patting down Cesena, with his gun snapped in its holster, his baton still attached to his belt, and his hands still down at the level of his waist." (RB at p. 65.) However, it is not the inaction of the victim which determines the element of a surprise attack from a position of advantage which controls, but rather the actions of the defendant to gain the advantage so that the jury can infer a plan to take the victim by lying-in-wait. Facts from which the jurors could infer this element such as where the victim is shot from behind (see e.g., *People v. Webster* (1991) 54 Cal.3d 411, 449 [victim shot from behind] or while distracted (*People v. Hillhouse, supra,* 27 Cal.4th at pp. 500-501[vicitm shot while urinating]) are not present in this case. The officer was shot while detaining three individuals, a horribly unfortunate, but not uncommon occurrence in police work. No additional factors enhance this shooting to one by lying-in-wait.

E. Conclusion

Lying-in-wait defines a very specific set of circumstances which cannot be established under the facts of this case in which a police officer initiated the confrontation and was shot in less than a minute from the beginning of that confrontation and within seconds after appellant allegedly planned to shoot the officer. For the reasons stated above, this Court must find the evidence insufficient to establish first degree lying-in-wait murder

and not reinstate the lying-in-wait special circumstance.

II

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

A. Introduction

Appellant has argued that the evidence is insufficient to support a finding that appellant committed deliberate, premeditated first degree murder. Respondent contends the evidence supports the inference that the killing of Officer Fraembs was the result of preexisting reflection rather than an unconsidered or rash impulse. (RB at p.70.) Respondent suggests that appellant "relies heavily" on *People v. Anderson* (1968) 70 Cal.2d 15, 25 in support of his argument that the evidence is insufficient to establish a premeditated and deliberate killing, but that such reliance is misplaced. (RB at p. 69). In fact, as appellant has stated, this Court has continued to employ the test of *Anderson* in deciding whether murder occurred as the result "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 evidence here shows appellant acted on rash impulse rather than preexisting reflection.

1. No Evidence of Planning Activity Prior to the Killing

Respondent relies solely on the fact that appellant allegedly shot Officer Fraembs after stepping from behind Flores to support the inference that the act was planned; an act respondent calls cowardly, but not rash. (RB at p. 72.) However, there was no evidence of planning activity prior to the killing. The evidence shows that appellant had purchased the gun a week or two before the incident for protection from by rival gang members

who would come into appellant's neighborhood and commit drive-by shootings. (RT 8:1116-1117.) There was no evidence appellant had purchased the gun planning to kill Officer Fraembs or any police officer. Nor was there any evidence that appellant had a plan to meet the officer, but rather, the meeting was a chance encounter initiated by Officer Fraembs. If appellant had not had access to the gun, which facilitates unconsidered rash impulses, the incident would never have occurred.

All of the "planning" respondent points to occurred within six steps – the steps appellant took behind Flores over a distance of two feet. Both the time, the distance, and the acts respondent points to are more indicative of a rash unconsidered impulse than the "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.) The alleged threat to Flores after the shooting also shows appellant did not plan the action. Thus, there was no evidence of planning activity prior to the killing to support a finding of premeditation and deliberation.

2. No Evidence of Motive Consistent With Planning and Deliberation

Respondent alleges the evidence of motive is compelling relying on the fact that appellant was on parole. (RB at p. 72.) Respondent fails to address any of appellant's points which show that evidence of appellant's parole status fails to provide evidence of motive consistent with planning and deliberation which would show the killing was premeditated and deliberate. Mere evidence that appellant was on parole and did not want to return to custody is insufficient evidence of motive consistent with planning

and deliberation.

It is no great revelation that a person on parole would not want to return to custody. In this case, respondent claims there is a clear link between this motive and the alleged shooting. However, such a connection is speculative, at best.

Flores testified that appellant told her he was on parole and did not want to go back, and "couldn't go back" though she did not know when appellant told her this. She testified it could have been a considerable time before the shooting. (RT 7:984.) Moreover, there was no indication appellant's alleged statements meant anything more than expressing a dislike of custody and not wanting to return to it. There was no evidence, for example, that appellant ever expressed a conviction that he would do anything not to return to custody, nor was there a direct link between appellant's parole status and the shooting. (Cf. *People v. Daniels* (1991) 52 Cal.3d 815, 857 [evidence of prior offense admissible where "despite the gap in time, there is a direct relationship between the police rendering defendant a paraplegic and defendant murdering the officers in retribution. This is particularly true when coupled with other admitted evidence of defendant's antipathy toward the police."].)

The prosecutor repeatedly argued to the jury that appellant committed this crime because he knew if he were caught with the gun he would go back to the Youth Authority for two years and five months, but such evidence was speculative.[6] In *People v. Vorise* (1999) 72 Cal.App.4th

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[6] There was no direct evidence showing appellant shot the officer to avoid being returned to custody. In fact, evidence which was excluded by the trial court shows that appellant had violated parole before without

(continued...)

312, cited by respondent, there was little or no planning evidence, but "very strong motive and method of killing evidence." (*Id.* at p. 318.) There the evidence showed the defendant pulled out his loaded gun, pointed it at the victim and said, "Oh, no, you aren't" in response to the victim's statement she was going to call the police. The defendant admitted he knew at that time the bicycle was stolen and that he did not want "to get in trouble" for possessing the stolen bicycle or the loaded, concealed firearm. The court held, "From this evidence – the timing of when Vorise drew his gun, his statement at the time and his testimony at trial – a reasonable jury could infer that Vorise believed he would be imminently arrested for being in possession of the stolen bicycle and loaded, concealed weapon if the victims were allowed to proceed and that he committed the murder to avoid that arrest." (*Id.* at p. 322.)[7]

In the present case, there was no clear evidence of motive. Appellant made no contemporaneous or post hoc statement indicating such a motive. Nor did the alleged remote, ambiguous statement to Flores provide sufficient evidence of motive.

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[6] (...continued)
having his parole revoked. (RT 11:1594-95. See Argument VII.)

[7] In *Vorise*, unlike the present case, the manner of killing also tended to show a premeditated and deliberated murder. There the evidence showed the defendant wounded the victim during the second, third and fourth shots. The third and fourth shots, at least one of which was fatal, was fired at close range into the victim's chest as he lay slumped against the wall. (72 Cal.App.4th at p. 322.)

3. No Evidence of A "Particular and Exacting" Manner of Killing

Respondent contends the manner of killing was sufficiently "particular and exacting" to support the inference that appellant acted according to a preconceived design citing several cases of gunshot wounds to the head (RB at p. 75), however, the single shot allegedly fired by appellant is not strong evidence of manner of killing which can support an inference of premeditation and deliberation. In all of the allegedly analogous cases cited by respondent, there is additional evidence which elucidates exactly how the manner of killing is indicative of planning and design. No such evidence exists in the present case to explain how the manner of killing shows premeditation and deliberation.

In *People v. Caro* (1988) 46 Cal.3d 1035, this Court found a close-range gunshot to the face arguably sufficiently "particular and exacting" to permit an inference that defendant was acting according to a preconceived design. (*Id.* at p. 1050.) However, in that case, the evidence also showed the defendant had armed himself, stalked the victims and shot the victim in order to eliminate him as a witness to the kidnaping of the other victim. (*Ibid.*) Similarly in *People v. Thomas* (1992) 2 Cal.4th 489, two victims were killed with single gunshot wounds to the head, but the evidence also showed the defendant was seen unarmed with the two victims before returning to his car to get ammunition and a rifle. The rifle was missing a clip which required the defendant to hand load the second round and the evidence showed the second victim was killed because he was a witness. (*Id.* at p. 517-518.) The evidence in *People v. Bloyd* (1987) 43 Cal.3d 333 showed the defendant obtained a .357 magnum from his mother prior to the execution-style killings of his girlfriend and her father. One

victim was killed with a point blank shot to the head while lying on her back, and the other victim was shot from one foot away while kneeling. (*Id.* at p. 348.) Finally, in *People v. Cruz* (1980) 26 Cal.3d 233, the defendant crushed the skulls of his wife and two step-grandchildren and delivered a shotgun blast to his wife's face. Prior to the killings the defendant snuck out to get the pipe, and secured and loaded the shotgun.

The method of killing in all of the cases relied upon by respondent is markedly different than the killing in the present case. In each of those cases there was a prior relationship between the victims and the defendant. The killing of two victims in each of those cases also shows a level of planning not present in appellant's case. Additionally, in each of those cases the defendant prepared for the killing by obtaining the murder weapon specifically for the killing ahead of time which showed a preconceived design. As this Court recognized in *Bloyd,* where manner-of-killing evidence is sufficiently strong it can provide evidence of premeditation and deliberation, but manner-of-killing evidence is often ambiguous, and frequently cannot be relied on by itself to support an inference of premeditation beyond a reasonable doubt. (*People v. Bloyd, supra,* 43 Cal.3d at p. 348.)

4. Conclusion

There was insufficient evidence that appellant planned this shooting. Flores testified that when appellant threatened her after the shooting, he was nervous like he did not know what he had just done. (RT 7:979.) The evidence of motive is speculative, but even if appellant was motivated to shoot the officer to avoid going back into custody, there is nothing in addition to motive, to support a finding of premeditation and deliberation. A single shot without more to suggest the killing was the product of

reflection is insufficient evidence of a manner of killing that is so particular and exacting as to show intent to kill according to preconceived design. In all, even viewed in the light most favorable to the judgment, the evidence does not support a finding of premeditation and deliberation and petitioner's conviction of first degree murder must be reversed.

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

Appellant contends that, like here, where the prosecution presents its case on alternate theories and the evidence is insufficient to support one theory and there is reason to believe the jury acted on the insufficient ground the conviction must be reversed. (*People v. Green* (1980) 27 Cal.3d 1, 70.) Here the lying-in-wait 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 was not supported by substantial evidence. Respondent argues the evidence was sufficient to support the murder and lying-in-wait special circumstance findings, and alternately argues the murder conviction can be upheld on theory of premeditation and deliberation because the jurors found true the special circumstance of murder to avoid arrest. (RB at p. 78.)

As discussed in Argument I, the evidence was insufficient to establish murder by means of lying-in-wait and the special circumstance of lying-in-wait. Even under *Guiton* which created an exception to the rule of *Green*, where there is an affirmative indication in the record that the verdict actually rested on the inadequate ground the conviction must be reversed.

(*People v. Guiton*, *supra*, 4 Cal.4th at p. 1129.) In this case, the assumption the jury acted reasonably does not apply because the record shows the jury acted unreasonably in finding the lying-in-wait murder and lying-in-wait special circumstance.

Respondent counters that the evidence was sufficient, but that even if the evidence was insufficient to support a theory of lying-in-wait murder, the conviction must be upheld because the evidence supports a finding of first degree murder base on premeditation and deliberation because the jury found true the special circumstance of murder to prevent an lawful arrest. (RB at p. 79.)

Appellant contends both that the evidence of the special circumstance of murder to prevent a lawful arrest is insufficient (see Argument V), and that even if the evidence did support such a finding it does not also show the killing was premeditated and deliberate.

Respondent argues, "it is clear from the jury's findings that it necessarily found premeditated, deliberate murder, since it returned special circumstance findings that appellant intentionally killed Officer Fraembs, for the purpose of avoiding and preventing a lawful arrest." (RB at p. 79.) However, nothing in the elements of the special circumstance of Penal Code section 190.2, subsection (a)(5) requires the jury to find premeditation and deliberation or even an intent to kill.

The jury was instructed that in order to find the special circumstance of murder to prevent arrest it must find: "The murder was committed for the purpose of avoiding or preventing a lawful arrest." (CALJIC No. 8.81.5.) There is no element in this special circumstance which requires either an intent to kill or a finding of premeditation and deliberation. The jury could have found first degree murder by means of lying-in-wait, and

still found the special circumstance of murder to avoid arrest true without any finding of premeditation and deliberation. Respondent cites no authority for the novel proposition that a finding of the special circumstance of murder to prevent arrest means the jury necessarily found a premeditated and deliberate murder. (RB at p. 79.)

Murder is killing with malice aforethought either express or implied. Malice is express when there is an express intention to kill or implied when the killing results from an intentional act dangerous to human life, deliberately performed with a conscious disregard for human life. Nothing in this definition requires a finding of premeditation and deliberation. Rather, once a finding of murder is made the jurors must determine whether the murder is of the first or second degree. The special circumstance finding of murder to avoid arrest does not elevate murder to a first degree murder by premeditation and deliberation.

Thus, respondent's alternate theory that premeditation and deliberation was affirmatively found by the jurors because they found the special circumstance of murder to avoid arrest is unreasonable and appellant's conviction of first degree lying-in-wait murder and the special circumstance of lying-in-wait must be reversed.

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 has argued that the failure to require the jurors to unanimously agree on which statutory form of murder was committed denies appellant his right, inter alia, to have the state establish proof of

every element of the crime beyond a reasonable doubt and asks this Court to re-examine its prior reasoning on this issue in light of the facts and circumstances of appellant's case. Respondent completely fails to address the underlying basis for appellant's request for reconsideration, and contends that since this Court has rejected a similar claim in other cases it must reject appellant's claim here. Appellant has shown, however, that 1) this Court must recognize that the statutory forms of murder established in California requires a unanimous verdict on the elements of the crime, and 2) this case demonstrates why the error is not simply an abstract error.

Respondent candidly admits that this Court "has repeatedly held that even though the *elements* underlying the two theories differ, there is only one statutory offense of first degree murder. . . ." (RB at p. 82; emphasis supplied.) However, it is by the elements that a crime is defined. The elements test is used to determine what constitutes the "same offense" for purposes of the Double Jeopardy Clause of the Fifth Amendment. (*United States v. Dixon* (1993) 509 U.S. 688, 696-697.) As appellant pointed out in his opening brief, "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).

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.)

In *Richardson v. United States* (1999) 526 U.S. 813, 819, the Supreme Court explained 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. In appellant's case, the two forms of murder which the prosecutor argued to the jury are not merely separate theories of murder, but contain separate elements.

The error was not a mere abstract error because there was not compelling evidence supporting one of the two forms of murder over the other and reasonable jurors could have credited one form while rejecting evidence supporting the other. The prosecutor told the jurors it did not matter which they chose – "Either way you still get to the same place." (RT 12:2200.) The jury instructions, however, clearly told the jurors that the elements were different for the two forms of murder. While the lying-in-

wait need only continue for a period of time equivalent to premeditation *or* deliberation, willful murder required the jurors to find premeditation *and* deliberation. (RT 15:2405, 2404; emphasis added.)

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 TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION TO DISMISS THE SPECIAL CIRCUMSTANCES OF MURDER OF A PEACE OFFICER IN THE PERFORMANCE OF HIS DUTIES AND MURDER TO AVOID LAWFUL ARREST

Appellant argued that the trial court erred in denying his motion to dismiss the special circumstances of killing of a peace officer in the performance of his duties (Pen. Code § 190.2, subd. (a)(7)) and killing to avoid lawful arrest (Pen. Code § 190.2, subd. (a)(5)) because the evidence was insufficient to prove the officer was engaged in the lawful exercise of his duties. Respondent claims that appellant was never detained by Officer Fraembs because appellant did not submit to the officer's authority, and that even if a detention did occur, it was lawful under the totality of the circumstances. (RB at p. 84.)

Respondent argues that whether the officer made a show of authority is immaterial to establish a seizure because appellant did not submit to his authority citing *California v. Hodari D.* (1991) 499 U.S. 621, 625-626. (RB at p. 109.) Respondent's argument reflects a fundamentally flawed analysis of the law as applied to the facts in this case. In *Hodari D.*, the defendant ran away from the scene as police drove around a corner and saw four or five youths huddled around a parked car in a high crime area of Oakland.

The court held that because the defendant ran away from the police before they initiated a detention he was not seized within the meaning of the law when he unexpectedly ran into another officer coming from another direction. (*Ibid.*)

In this case, Officer Fraembs directed appellant and Flores to be seated on the curb and proceeded to pat search Cesena. As the court ruled in *Hodari D.*, 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 occurred. (*California v. Hodari D.* (1991) 499 U.S. 621, 629; *Florida v. Bostick, supra*, 501 U.S. at p. 439; *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].) No such command or directive was issued in *Hodari D.*, but was issued in this case. Appellant's full or partial compliance with the directive is not the issue. Rather it is the officer's actions which dictate the level of detention and here Officer Fraembs's order to be seated combined with the pat down of Cesena indicated appellant was not free to leave. Regardless of appellant's conduct in this case, the reasonable person would not have believed that he or she was free to leave or to terminate the encounter with Officer Fraembs.

Respondent next contends that even if there was a detention, it was a lawful detention because it occurred in gang territory, late at night on a darkened street in an industrial area. Respondent also cites to the facts that appellant was taller than the officer, was a gang member carrying a

concealed weapon, and appellant and his friends had on dark clothing to justify the detention however, none of these "facts" are specific and articulable facts known or apparent to the officer "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." (*People v. Aldridge* (1984) 35 Cal.3d 473, 478, quoting *In re Tony C.* (1978) 21 Cal.3d 888, 893.) As this Court has held, "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." (*Ibid.*)

None of the circumstances cited by respondent provide an objectively reasonable basis upon which to suspect criminal activity. The officer did not know appellant was an alleged gang member, nor that he had a concealed weapon. The industrial area was not identified gang territory and it is common for people to frequent this route at this time. (RT 13:1967.) The area was darkened because it was nighttime, but it was lit by street lights. The dark clothing worn by the three friends was not identified as gang wear. In fact, Flores was dressed in her Taco Bell uniform because she had just gotten off of work. (RT 6:850.) In this case, there were no articulable facts that could have led a reasonable law enforcement officer to conclude that criminal activity was afoot.

Respondent next argues that appellant's "pugnacious and defiant reaction" was a factor to be considered in determining whether the detention was reasonable. (RB at p. 112.) However, appellant's response "Why are you stopping us?" or "Why the hell are you stopping us?" did not

create reasonable suspicion of criminal activity. None of the cases cited by respondent require any different conclusion. In *People v. Souza*, the defendant ran away from the officers when he was spotted talking to people in a parked car at 3:00 a.m. on a darkened corner in a high crime area. These actions created a reasonable suspicion because the defendant's response was consistent with criminal activity and an investigation was justified. (*People v. Souza, supra,* 9 Cal.4th at p. 233.) The issue in *United States v. McCarthy* (1st Cir. 1996) 77 F.3d 522, 531and *United States v. Richards* (9th Dir. 1974) 500 F.2d 1025, 1029 was not whether the initial detentions were justified – they were justified due to other suspicious circumstances – but whether the defendants' evasive responses to the officers' questions justified a continued and lengthy detention. Those courts found that the length of the detention was in part due to the defendants' evasive answers and thus the length of the detention could not be held against the police. The United States Supreme Court has ruled that a person's refusal to answer an officer's question does not create reasonable objective grounds for a detention. (*Florida v. Royer* (1983) 460 U.S. 491, 497- 498.) Here, however, appellant only questioned the officer as to why he had decided to stop them. Regardless of appellant's alleged hostile tone in speaking, his inquiry does not justify a finding of reasonable suspicion of criminal activity.

Respondent next seeks to justify the detention on the basis that Cesena was carrying a knife in a sheath on his belt. (RB 112.) A pat search conducted in order to protect himself is permitted only where 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].) Respondent contends since Officer Fraembs directed Cesena to step over to his patrol car first, rather than appellant, "the belligerent one," it is reasonable to conclude that the officer saw something hanging from Cesean's belt and concluded it might be a weapon. (RB at p. 113.) However, the evidence shows that Cesena was the closet of the group to the officer and it is just as reasonable to conclude that is why Cesena was pat searched first.

Unlike the case cited by respondent in which the officer observed a bulge in the defendant's jacket at his waistband when the defendant alighted from a car following a traffic stop, no such articuable facts were present in this case. (*Pennsylvania v. Mimms* (1977) 434 U.S. 106, 111-112.) Here respondent conjectures that Officer Fraembs was aware Cesena was carrying a knife on sheath on his belt because the photographs of Cesena show the sheath "hangs quite low." (RB at p. 113.) However, the photographs only show Cesena with his shirt raised in order to display the sheath, which in fact supports the alternate conclusion that the sheath was not visible under the shirt. Respondent also relies on the fact that Flores was aware that Cesena was carrying a knife to justify the conclusion that the officer must have seen a knife. However, Flores did not testify how she became aware Cesena was carrying a knife, and it is reasonable to conclude she learned this information after she cooperated with the police. While the evidence showed that Cesena had a knife sheath attached to his belt when he was apprehended,[8] there was no evidence that Officer Fraembs was

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[8] 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.)

aware of the sheath or a knife.

Respondent faults appellant's argument for referring to each aspect of the detention separately and claims that under the totality of the circumstances the detention was lawful. Respondent concedes that factors such as a high crime area, nervous, evasive behavior and wholly lawful but suspicious conduct may not on their own justify a detention, but in total may create sufficient reasonable suspicion for detention. (RB at p. 114.) The problem with respondent's argument, however, is that none of these factors have been shown alone or together in appellant's case. This was not a high crime area, but an industrial area. Appellant's behavior was not evasive though arguably belligerent, and there was no set of innocent circumstances such as in *United States v. Sokolow* (1989) 490 U.S. 1, 9-10, cited by respondent, which amounted to suspicious behavior. *United States v. Sokolow* (1989) 490 U.S. 1, 9-10.)[9] In the case at bar, three young people were walking through a neighborhood frequented by members of their peer group at a time of night when it is reasonably common to find young people in the area. The group displayed no obvious indicia of criminal activity either before or after Officer Fraembs illegally detained them, and the only verbal response from the group once the officer detained them was a question to ask why they had been stopped. Under these facts, it cannot be said that the detention was justified or the officer's actions lawful and the special circumstances must be set aside.

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[9] In *Sokolow,* the defendant paid $2,100 for a round trip airline ticket from Honolulu to Miami from a roll of twenty dollar bills, he traveled under a pseudonym, his destination was Miami, a source of illicit drugs, he checked no luggage, he appeared nervous during the trip, and he stayed in Miami for only forty-eight hours despite the fact that the flight of the entire trip was twenty hours.

The error was prejudicial because the trial court had struck the only other special circumstance in the case – lying-in-wait (see Argument I) – and if the court had properly struck the special circumstances of murder to avoid arrest and murder of a police officer appellant would not have been sentenced to death. This is not a situation akin to that in *Brown v. Sanders* (2006) 546 U.S. 212, 224 where two of four special circumstances were invalidated on appeal, but two valid special circumstances remained. Here there was insufficient evidence of all three special circumstances and appellant's death sentence must be reversed.

VI

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

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

Appellant argued that the trial court committed reversible error when it admitted evidence of alleged threats to Flores by appellant's brother, Angel. Respondent contends the evidence was properly admitted because it was relevant to determining the witness's credibility relying on this Court's decisions in *People v. Avalos* (1984) 37 Cal.3d 216 and *People v. Green* (1980) 27 Cal.3d 1. (RB at p. 116.) However neither case establishes that the court acted properly in the present case where evidence of threats to the witness was used to establish her credibility.

In *People v. Avalos,* the witness hesitated when asked if the person she identified in the lineup was in the courtroom. The in camera proceedings revealed that the witness' fear was not caused by any threats or

intimidation, but only by the nature and gravity of her testimony, and the court ruled that the fact she felt fear, was relevant to her credibility and that the probative value outweighed any potential prejudice to defendant. Thus, when the witness resumed the stand the district attorney asked her if she was afraid to testify. She responded in the affirmative and the questioning proceeded to the substantive identification issue. On cross-examination defense counsel clarified that her fear was due only to the importance of the event. (*Avalos,* 37 Cal.3d at p. 232.) On appeal, defendant argued the evidence was irrelevant, because the witness was able to identify defendant, and that its only function was to prejudice defendant. Relying on *People v. Green, supra*, 27 Cal.3d 1, 20, this Court held the contention was without merit. "[A]n explanation of Ms. Martinez' hesitation would be relevant to the jury's assessment of her credibility [and] was well within the discretion of the trial court. (See, *People v. Green* (1980) 27 Cal.3d 1, 20 [164 Cal.Rptr. 1, 609 P.2d 468].) Defense counsel's question clarified that her fear did not reflect on defendant, thus avoiding any prejudicial impact. The trial court properly exercised its discretion pursuant to Evidence Code section 352." (*Id.* at p. 232.)

In *People v. Green, supra*, 27 Cal.3d 1, 20, the witness against the defendant had been promised by the authorities that he would not be sent to prison, and the defendant sought to establish that this was the reason for his negative testimony against the defendant. The trial court, therfore, allowed the prosecution to show instead that the motive for the promise was the witness' fear of retaliation in prison due to the defendant's alleged connections in prison. On appeal, defendant argued the testimony should not have been admitted as prejudicial because it showed defendant previously had been incarcerated. This court found the evidence properly

admitted because it was supportive of the credibility of the witness. (*Id.* at p. 20.)

Respondent contends these cases establish the rule that where the prosecution can reasonably anticipate the defense will attack the credibility of a witness the trial court may, within its discretion, permit the prosecution to support the witness's credibility on direct examination. (RB at p. 150.) Appellant does not quibble with respondent's citation to these cases, but contends respondent's characterization of the "rule" established by these cases is misleading. Rather, the material core of these holdings is that a party may introduce evidence which explains the motive or reason behind a witness' seeming incredibility. However, what must be apparent before a party can introduce prejudicial evidence to establish that credibility is some specific conduct or events to question that credibility.

The cases of *Olguin* and *Gutierrez* cited by appellant clearly follow in that vein. There the courts found the evidence of threats or the witness' fear was admissible because the witnesses either recanted or provided substantial inconsistencies in their testimony. (*People v. Olguin* (1995) 31 Cal.App.4th 1355, *People v. Gutierrez* (1994) 23 Cal.App.4th 1576.)

In appellant's case, there was no fact which called the witness' testimony into question beyond the general desire of a party to establish its witness' credibility. Here there was no recantation, inconsistency, hesitation, or specific reason to question the witness' motive to testify against appellant.

The principle that some specific act or conduct must be apparent before prejudicial evidence can be admitted to establish the witness' credibility was elucidated in *People v. Brooks*. The court made clear the distinction between a witness who was threatened and feared giving

testimony and a witness whose general credibility was in question. The court clarified that threats could be deemed non-hearsay as "offered for a proper credibility purpose" where the threatened witness had initially identified the defendant but 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* (1979) 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 hesitated, retracted nor recanted her prior testimony and no inconsistent testimony preceded the prosecutor's questioning of the witness. Because Flores did not hesitate, recant, give inconsistent testimony or create a specific basis to question her testimony, the evidence of the alleged threats was not admissible as non-hearsay evidence of her credibility.[10]

Finally, with respect to Flores's testimony regarding Angel's alleged threats, appellant argued the trial court failed to conduct an analysis under

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[10] Appellant has noted that in *Brooks*, the court held that a limiting instruction under CALJIC 2.05 did not cure the error of admitting evidence of alleged threats to the witness. (AOB at p. 85.) From this, respondent extrapolates that the court was not required to give such an instruction sua sponte, however, appellant's point is merely that such an instruction does not cure the reversible error of the introduction of evidence that the witness has been threatened by someone other than appellant.

Evidence Code section 352. Respondent contends the court listened to the arguments of counsel, and in ruling on the issue of the admission of the statements must have impliedly ruled on section 352. (RB at p.155.) The records shows however, that the court did not discuss Evidence Code section 352 or explicitly engage in the weighing process which 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, supra,* 27 Cal.3d at p. 25.)

Finally, respondent misses the point of appellant's claim that Flores's credibility was not at issue and claims appellant has been disingenuous. (RB at p. 156.) However, appellant's point is that Flores's credibility was not called into question by any specific conduct or action which required the prosecution to establish her credibility.

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.[11] 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.

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[11] 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.)

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.

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

1. Elva Arambula

Respondent next contends that an alleged threat made by a third party to witness Arambula after her preliminary hearing testimony was properly admitted because the alleged change in her testimony "was anything *but* minor." (RB at p. 157.) At the preliminary hearing, Arambula testified she last saw appellant and Flores turn on Denison, but at trial she testified she last saw them "headed toward Denison." Respondent contends this was a major inconsistencies that was dispositive in the fact-finder's final analysis. (RB at p. 157.) However, even the prosecutor at trial considered this difference to be "little" and argued to the jury that appellant and Flores were headed right to the crime scene shortly after tuning on Denison. (RT 8:1222; 5:655.)

Defense counsel objected to the introduction of the alleged threat because the minor variation in Arambula's language was not an attempt to be evasive or untruthful while the admission of the third party threat, imputed to appellant, was overly prejudicial. (RT 8:1232, 1233.) Arambula testified she did not recall telling the prosecutor she saw them turn on Denison. There is nothing to suggest she was being intentionally dishonest, while the admission of the third party threat was highly prejudicial. Respondent also characterizes Arambula's testimony that it seemed like 20 minutes after she had seen appellant and Flores until she heard the sirens

because time seems to go faster when she had taken speed as an attempt to qualify her earlier statement, arguing that such testimony shows an "evident unwillingness" to testify and an "attempt[] to retreat from prior statements," however, there is nothing from which to conclude that these minor variations in testimony evidenced such a retreat because she had been allegedly threatened. (RB at p. 157.)

The alleged variations were minor and did not affect the prosecutor's case to any substantial degree which would have permitted the highly prejudicial evidence of threats form a third party.

2. Joseph Silva

Appellant argued the court erred in permitting the prosecutor to elicit testimony, inter alia, that Silva was allegedly threatened by a Happy Town gang member that he better keep his mouth shut or his entire family would be killed because the alleged inconsistency in Silva's testimony was minor and did not rise to the level of an inconsistency or recantation. (AOB at p. 92.) Respondent contends the inconsistency was not minor and the evidence should have been admitted regardless of whether the witness had recanted or was otherwise inconsistent in his testimony. (RB at p. 158.)

At trial, Silva testified that appellant had told him he shot a cop, but that appellant did not say the gun Silva bought was the one used to shoot the police officer. (RT 11:1692, 1736.) Respondent argues the alleged discrepancy abut whether appellant said this was the gun used in the shooting was not minor or insubstantial because appellant's own admission that this was the gun was highly probative of his guilt. (RB at p. 159, fn. 46.) Appellant contends, however, that after testifying appellant admitted to Silva that he had shot the police officer, the discrepancy about whether the gun Silva purchased was the gun used in the killing or not was

insubstantial. The only reason Silva could have for allegedly changing his testimony was merely to distance himself from buying a gun used in such a crime. The alleged change in testimony did nothing to exculpate appellant especially where the evidence showed that appellant sold the gun at a loss shortly after purchasing it and that appellant's brother retrieved the gun and apparently disposed of it. The damage to appellant's case was complete when Silva testified appellant told him he had shot the officer.

In each instance where the court permitted evidence of threats by third parties to be introduced at trial, the basis upon which such evidence was deemed to be relevant non-hearsay was in fact a slim reed incapable of providing the connection between the alleged threat and the need for its admission. None of the witnesses' alleged change in testimony was substantial nor did it follow any basis upon which to question the minor discrepancies such that the highly prejudicial evidence of threats against the witnesses imputed to appellant should have been admitted.

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

Appellant argues the trial court erred in excluding evidence that Flores had threatened to have appellant "taken out" by a rival gang while it permitted threats by against Flores to be admitted. (AOB at p. 94.) Respondent claims that the evidence of the threats made to appellant by Flores were properly excluded because it added nothing to the already extensive evidence of the tempestuous relationship between appellant and Flores. (RB at p. 160.) However, evidence of the mercurial nature of their relationship does not rise to the level of a threat to have someone "taken out" by a rival gang, and under the facts of this case, where the court allowed evidence that appellant or people associated with appellant made

repeated threats against the lives of the witnesses and their families, the court should have permitted appellant to show the witness had used a similar threat against appellant.

Respondent also contends the exclusion of this evidence did not constitute a denial of appellant's right to present a defense because the jurors heard evidence that appellant was not the shooter. (RB at p. 95.) This evidence – that Flores was friends with Cesena longer than appellant, was close friends with Chantal Cesena and had initially lied to police regarding Chantal's presence at Tank's house – does not show the depth of Flores's antipathy toward appellant which the threat to have him killed would have shown.[12]

E. The Error Requires Reversal

Respondent submits that even if the errors committed by the trial court had not occurred, it is not probable that appellant would have received a more favorable result and there was no miscarriage of justice because the evidence of appellant's guilt was so overwhelming. (RB 162.) In fact, the evidence was not overwhelming. There was no physical evidence that appellant had shot the officer. The only evidence that appellant had shot the officer came from Flores who claimed to have seen him do it and from Silva who claimed appellant admitted the crime to him. The prosecutor relied on the alleged threats by third parties against the witnesses to make his case. He argued the strength of Silva's testimony came from the fact that he testified against appellant despite the threat to his life, and he argued

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[12] Respondent argues that defense counsel's initial ignorance about the threat shows that the evidence was not crucial to the defense. (RB at p. 161 at fn 47.) However, appellant contends the timing of defense counsel's awareness of the evidence does not affect its relevance or prejudicial effect.

that Flores was to be believed because she testified despite the threat to her and her family. (RT 15:2244, 2228.)

The central role the evidence of these threats played in the prosecutor's case was made evident by the jurors' response to two innocuous events. First, was the reaction of the jurors to the presence of a member of the public who observed a part of the trial. The jurors told the bailiff they were uncomfortable with his presence. (RT 12:1831.)

Respondent argues that the jurors' discomfort was not an indication of the atmosphere of fear in the courtroom because their discomfort was temporary and they never asked for any additional security measures to be taken. (RB at p. 164.) Respondent also argues that the incident in which a juror alerted the court to the possibility that he or she had been inadvertently photographed and asked for the photographs to be destroyed also does not show the jurors were frightened because three witnesses had been threatened before trial. (*Ibid.*) Respondent claims that any fear that was engendered was felt because of the evidence regarding gangs which had been brought into the trial at appellant's request. (*Ibid.*) Evidence of rivalry between gangs which might explain the reason that rival gang members were trying to place the blame for this crime on appellant is markedly different than evidence of threats by gang members against the witnesses at trial. Admission of these third party threats imputed to appellant allowed an atmosphere of fear against appellant to permeate the proceedings, and in the absence of any physical evidence to connect appellant to the crime allowed the prosecutor to rely on the irrelevant, but highly incendiary evidence. Respondent cannot show that the error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

The trial court's errors in admitting the evidence of threats also had a

prejudicial effect on the penalty phase determination. (*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 case, 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.[13] Thus, it cannot be said that the error had "no effect" on the 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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[13] *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 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

The trial court should have excluded evidence of appellant's parole status and parole conditions because the prejudicial value of the evidence clearly outweighed any probative effect. (AOB 103.) The court also erred in excluding evidence that appellant's prior violation of parole did not result in re-incarceration (RT 11:1596), and by failing to instruct the jury with CALJIC No. 2.50 in regard to the limited use of character evidence. (RT 15:2397.) Respondent alleges that appellant has waived these issues on appeal, and that the evidence was properly admitted because relevant. Further, respondent argues, it was appellant's fault the court failed to instruct with CALJIC No. 2.50. Respondent is wrong on all counts.

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

1. No Waiver Occurred

Respondent alleges that appellant's objection to the prosecutor's request to introduce appellant's parole status failed to preserve the issue for appeal. (RB at p. 186.) Respondent contends that appellant was required to object for a second time during the testimony of Johanna Flores and parole agent, Carl Hallberg, when the evidence was presented to the jury. However, appellant's objection during the pretrial motion hearing was not merely a "general objection on the grounds of relevancy." (*People v. Clark* (1992) 3 Cal.4th 41, 126.) Appellant made a clear and timely objection

based on Evidence code section 352 regarding the highly prejudicial nature of the evidence, properly preserving the issue for appeal. (RT 1:42.)

Respondent also argues that the issue was waived because it was the prosecutor, not appellant, who brought the motion in limine to admit the evidence of appellant's parole status at trial. (RB at p. 186.) However, the court in *Morris* makes no distinction between defense counsel making the pretrial motion or the prosecutor making the pretrial motion. (*People v. Morris* (1991) 53 Cal.3d 152, 189-190.)

In *Morris*, the defendant filed a motion in limine to exclude testimony regarding the alleged existence of coercive conditions in two co-defendants' plea bargains. The Attorney General argued that the defendant failed to preserve the issue for appeal because he failed to repeat his objection when the evidence was actually offered. (*Id.* at p. 187.)

The California Supreme Court held that a motion in limine to exclude evidence is a sufficient objection to protect the record on appeal when it satisfies the basic requirements of Evidence Code section 353. In order to satisfy Evidence 353, the following requirements must be met: "(1) a specific legal ground for exclusion is advanced and subsequently raised on appeal; (2) the motion is directed to a particular, identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context." (*Id.* at p. 190.) However, the court did not state that it was required for an appellant to file a motion in limine in order to preserve the issue for appeal. The court held that, "Evidence Code section 353 does not exalt form over substance. No particular form of objection or motion is required; it is sufficient that the presentation contain a request to exclude specific evidence on the specific legal ground urged on appeal." (*Id.* at p.

188.)

Appellant sufficiently objected to preserve this issue for appeal. Appellant objected on the record to the prosecutor's motion in limine to allow evidence of appellant's parole status. (RT 1:42.) The objection was based on Evidence Code section 352, and appellant argued that the prejudicial effect outweighed the probative value of the evidence. Appellant now raises this same objection on appeal. (AOB at pp. 103 - 106.) Additionally, the objection was directed at Flores's and Hallberg's testimony regarding appellant's parole status, leaving no room for confusion over what evidence was the subject of the objection. Finally, appellant made the objection at the pretrial hearing regarding admissibility of a variety of evidence which was the appropriate time for the court to make the determination. (RT 1:42.) Any further objection would have been repititious and would have served "no useful purpose." (*People v. Morris*, *supra*, 53 Cal.3d at p. 189.) Therefore, appellant's objection satisfied the requirements of Evidence Code 353 and no waiver occurred.

2. Evidence of Appellant's Parole Status was Highly Prejudicial and Inappropriate Character Evidence

Respondent claims that the trial court properly admitted evidence of appellant's parole status to show appellant's intent and motive for committing the murder. (RB at p. 189.) Relying on *People v. Durham* (1969) 70 Cal.2d 171, 186-189, respondent argues that evidence of a defendant's parole status can be relevant to motive. In *Durham*, the co-defendants were on a multi-state crime spree. They were pulled over in their car by police. After exiting the vehicle, one of the co-defendants began to shoot at the police officers, killing one of the officers. (*Id.* at p. 177.)

The court found the evidence relevant to the defendants' motive to shoot the police officers given the crimes the defendants' were committing and had committed just prior to being pulled over. On the day of the crime, the defendants were on felony parole; one defendant was subject to arrest for violations of parole in Ohio. Both defendants were violating their parole by being in the state of California. Eleven days before the crime, defendants robbed an A&P store in Ohio. Eight days before the crime, they robbed a grocery store in Nebraska using a pistol, they threatened the manager, and shot out a store window as they fled the scene. Additionally, the car the defendants were in on the night of the crime was stolen from a San Francisco automobile agency four days before the crime. (*Id.* at p. 178-179.)

The facts of this case are significantly different. In *Durham*, the defendants were not only on parole but were on a major crime spree across the country, making the defendants' parole status more probative and relevant given the slew of crimes they were engaging in. Unlike in *Durham*, appellant was not on a crime spree and had committed no felony crimes prior to being stopped by Officer Fraembs. Additionally, appellant's statement to Flores "that he didn't want to go back" to jail was made a substantial time before the crime took place and had no probative value as to appellant's state of mind on the night of the crime. Moreover, respondent argues that appellant would have been subject to "a substantial amount of time" if arrested by Officer Fraembs, but the time he would actually have spent in jail for possession a weapon or for violating parole was negligible compared to the consequences he faced for murder. (RB at p. 190.) Therefore, evidence of appellant's parole status was not probative of his motive at the time of the crime.

Respondent also relies on *People v. Powell* (1974) 40 Cal.App.3d 107, 154-155, to support the argument that appellant's parole status was properly admitted to show appellant's intent to commit first degree murder. In *Powell*, the Court of Appeal found that evidence of the defendant's parole status presented at trial was "relatively sterile. It amounted to substantially no more than the foundational testimony by an employee of the Department of Corrections for the purpose of authenticating appellant's criminal record in general and the documentation of his parole." (*Id.* at p. 154) However, in the present case, the prosecution not only presented evidence of appellant's parole, but evidence of the parole conditions and consequences, and testimony by Flores of a statement made several months prior to the crime. The presentation of evidence regarding appellant's parole status was highly prejudicial given that it was not merely foundational testimony, nor "sterile," but used by the prosecutor to create a motive for a first degree murder. (*Ibid.*)

Respondent also relies on *People v. Vidaurri* (1980) 103 Cal.App.3d 450, 460-462, to justify the admission of appellant's parole status as evidence of motive and intent. In *Vidaurri*, the defendant was charged with burglarizing a department store, assault and robbery when defendant violently resisted attempts by department store security guards to arrest him. Before trial, the court ruled that the prosecutor could not present evidence of defendant's prior burglary on the prosecution's case-in-chief. (*Id.* at p. 458.) At trial, the defendant testified he drew his knife in self-defense. The trial court then permitted cross-examination of defendant concerning his prior conviction for burglary and an outstanding arrest warrant which was issued when defendant failed to appear for sentencing on the prior burglary conviction. (*Id.* at p. 460.) In *Vidaurri*, the trial court allowed evidence of

the defendant's prior burglary and outstanding warrant only after the defendant opened the door to rebut his self-defense testimony.

In appellant's case, the trial court allowed evidence of appellant's parole status to be used in the prosecutor's case-in-chief, not merely to rebut appellant's defense, but to allow the prosecutor to manufacture a motive and intent for the senseless killing. The evidence was not probative of appellant's state of mind given that the statement was several months old and appellant made no specific threats to kill in the statement. Therefore, the court should have excluded the evidence of appellant's parole status.

3. The Relevance of Appellant's Statement to Johanna Flores is Diminished Given the Passage of Time Between the Statement and the Crime

Respondent argues that the even though a substantial amount of time passed between appellant's statement "that he didn't want to go back" to jail and the crime, the evidence was still relevant and probative and the passage of time merely goes to the weight of the evidence. (RB at p. 191.) In *Douglas*, the trial court allowed evidence of the defendant's prior acts and statements in order to prove identity, not motive. Therefore, the passage of time in *Douglas* was not as important as in the appellant's case because the court was looking at the relevance of the prior statements and acts for the purpose of identifying the perpetrator of the crime, not proving the defendant's state of mind at the time of the crime. (*People v. Douglas* (1990) 50 Cal.3d 468, 510.)

Moreover, the statements and prior acts which were allowed into evidence were not merely general statements, like in appellant's case. In *Douglas*, the defendant had asked a witness to go out to the desert with him and essentially make a "snuff" film. The activities the defendant described were substantially similar to the circumstances involved in the charged

murders. (*Id.* at p. 511.) However, the facts in the present are significantly different. Appellant never specifically made any statements that he was willing or would kill a police officer in order to avoid going back to jail. He merely stated "that he didn't want to go back" to jail. (RT 6:880.)

The court erred in admitting evidence of appellant's parole status which allowed the prosecutor to manufacture a motive for first degree murder. Respondent agrees with appellant that the main issues in the case was the degree of the murder and the truth of the special circumstances. (RB at p. 192.) There was little evidence which could explain why appellant would have shot the officer, and the prosecutor's entire case relied upon being able to prove the murder was committed so appellant could avoid going back to jail. (RT 15:2212-2213.) By allowing the prosecutor to use the evidence of appellant's parole status, the prosecutor was able to create a motive for the shooting where one did not exist. Without this evidence the jury would not have reasonably been able to convict appellant for first degree murder. Therefore, the trial court violated appellant's state and federal constitutional rights which requires reversal of the convictions and death judgment. (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

B. The Trial Court Erred by Failing to Exclude Appellant's Parole Status and Notice of Parole Conditions

Having admitted evidence of appellant's parole status, the trial court should have admitted evidence that appellant's previous violation of parole did not result in parole revocation in order to rebut the prosecutor's claim that appellant shot the officer to avoid violating parole.

1. No Waiver Occurred

Respondent asserts that appellant waived this claim regarding the exclusion of appellant's prior parole violation because appellant failed to

argue that he wished to elicit this testimony in order to counter the prosecutor's claim that this was the motive for the shooting. (RB at p. 194.) "An objection is sufficient if it fairly apprizes the trial court of the issue it is being called upon to decide. [Citations.] In a criminal case, the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented. [Citations.]" (*People v. Scott* (1978) 21 Cal.3d 284, 290.) (See also *People v. Lucas* (1995) 12 Cal.4th 415, 466 [defendant's challenge to the introduction of evidence on foundational grounds was sufficiently understood by the trial court as encompassing a relevancy claim]; *People v. Valdez* (1997) 58 Cal.App.4th 494, 507 [appellant preserved the issue of admissibility of the expert's opinion that appellant acted for the benefit of a gang by making a general, unspecific objection to testimony concerning the ultimate issues in the case].)

Respondent argues that the court only ruled on this evidence based on appellant arguing he wanted to elicit the testimony to show that appellant might have been on methamphetamine at the time he shot the officer. (RB at p. 194.) But, it is clear from the record that the trial court understood defense counsel's objection to be based on both the use of the evidence for a diminished capacity defense as well as to be used to rebut the prosecutor's motive and intent theories based on appellant wanting to avoid violating parole. The trial court specifically addressed the issue of the prior parole violation and excluded the evidence believing it to be irrelevant. (RT 15:1596.) Therefore, the trial court fully understood the nature of the constitutional challenges which defendant now raises, and appellant's objection on this ground was not waived by any lack of specificity.

2. The Trial Court Improperly Excluded Appellant's Prior Parole Violations

Respondent asserts that even if this evidence was admitted at trial, it would not have proved appellant was not concerned about his parole status on the night of the crime. (RB at p. 195.) The main issue of the case was the degree of murder. The prosecutor's entire case was based on the theory that appellant committed first degree murder to avoid violating his parole. (RT 15:2212-2213.) However, the fact that appellant's parole was not violated for another transgression is highly probative to rebut the prosecutor's claim that appellant shot the officer to avoid going back to jail and to explain appellant's state of mind. Therefore, the trial court erred in excluding this evidence, violating appellant's state and federal constitutional rights which requires reversal of the convictions and death judgment. (*People v. Partida, supra*, 37 Cal.4th at p. 439.)

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

Respondent argues that appellant failed to request the court give CALJIC No. 2.50. (RB at p. 195.) However, appellant requested, and the prosecutor agreed, the court should give CALJIC No. 2.50 because the prosecutor was bringing in evidence of appellant's parole status. (RT 1:45.) Therefore, the court erred by failing to give the requested jury instruction.

Respondent also argues that the trial court was not required to give CALJIC No. 2.50 sua sponte. (RB at p. 196.) Appellant does not argue that there is a sua sponte duty to give this CALJIC No. 2.50. (*People v. Collie* (1981) 30 Cal.3d 43, 63-64.) The trial court is only required to give CALJIC No. 2.50 upon request. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1052.) Therefore, the trial court erred in failing to give the instruction once appellant made the request. (RT 1:45.)

Additionally, respondent argues that there is a "'narrow exception' to the general rule not requiring sua sponte instruction, i.e., when the evidence is a dominant part of the evidence against the accused and is both highly prejudicial and minimally relevant to any legitimate purpose." (RB at p. 197.) Respondent contends that this exception does not apply to this case because "the evidence was highly probative" and "did not constitute a 'dominant part' of the evidence against appellant." (*Ibid.*) Appellant disagrees.

The evidence regarding appellant's parole status was the principal evidence used by the prosecutor to prove first degree murder and the truth of the special circumstances, making it a "dominant part" of the evidence against appellant. The evidence was highly prejudicial because the statement appellant made regarding not wanting to go back to jail was made several months prior to the crime and was so attenuated it had very little relevance or probative value. Additionally, the need for a limiting instruction was substantial given that the jury was told that appellant was a gang member and the jury was likely to infer that appellant's parole was related to gang activity, and gang activity is highly prejudicial evidence. (*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].) Since no limiting instruction was given regarding appellant's parole status, violating appellant's state and federal constitutional rights which requires reversal of the convictions and death judgment. (*People v. Partida, supra,* 37 Cal.4th at p. 439.)

VIII

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

Appellant asserts that CALJIC 2.51, regarding motive, improperly allowed the jury to determine guilt based solely upon the presence of an alleged motive and shifted the burden of proof to appellant to show an absence of motive to prove innocence, thereby lessening the prosecutor's burden of proof.

Respondent relies on this Court's prior decisions to argue that the claim should be denied and offers no other argument. (RB at p. 203.) Therefore, appellant will stand on the arguments presented in the opening brief.

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

Appellant asserts that several of the instructions given to the jury diluted the requirement of proof beyond a reasonable doubt and violated appellant's constitutional rights.

Respondent counters by citing several of this Court's decisions which rejected similar claims, and contends that this Court should do so again in this case. (RB at pp. 203-207.) Appellant has previously acknowledged this Court's rejection of such claims, while urging this Court to reconsider those rulings.

Respondent fails to rebut appellant's arguments and offers no basis, aside from stare decisis, for continuing to follow precedents that are fundamentally flawed. (See *Lawrence v. Texas* (2003) 539 U.S. 558, 577 ["The doctrine of *stare decisis* . . . is not . . . an inexorable command."]; *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [although doctrine of stare decisis serves important values, it "should not shield court-created error from correction"].) Due to the defects detailed in appellant's opening brief, this Court should hold that the challenged instruction violated appellant's constitutional rights and reverse the death judgment.

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

While acknowledging that this Court has rejected the argument, appellant challenges the lying-in-wait special circumstance as unconstitutional under the Eighth Amendment to the United States Constitution because it fails to meaningfully narrow the pool of death-eligible crimes and select out crimes that are genuinely deserving of a greater sentence, extending, rather, to virtually all lying-in-wait first degree murders. (AOB at p. 132.) Respondent merely notes that this issue has been previously rejected by this Court and fails to address any of the substance of appellant's argument. (RB at pp. 208-210.)

Although this Court has addressed the constitutionality of the lying-in-wait special circumstance on other occasions,[14] the dissent and

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[14] See, e.g. *People v. Jurado* (2006) 38 Cal.4th 72; *People v. Gutierrez* (2002) 28 Cal.4th 1083; *People v. Morales* (1989) 48 Cal.3d 527.

concurrences in *People v. Stevens* (2007) 41 Cal.4th 182 shows the issue remains the subject of reasonable disagreement among jurists. In his dissent in that opinion, Justice Moreno contends that the lying-in-wait special circumstance has devolved into "nothing more than *murder by surprise*" which cannot pass constitutional muster. (*Stevens, supra*, 41 Cal.4th at pp. 220 (dis. opn. of Moreno, J.) (italics in original).)[15]

Tracing the history of the elements of the lying-in-wait special circumstance, Justice Moreno shows that "lying in wait, as a principle in criminal law, began as a 14th-century statute denying to the Crown the right to pardon any person who killed 'while lying in wait' for his victim . . . [a]s a reaction by the Norman conquerors of England against the subjugated Anglo-Saxons' practice of killing the Normans by ambush. [Citation omitted.] It evolved into a form of first degree murder, incorporated into Penal Code section 189 . . . as an alternative means of proving that the defendant premeditated or deliberated before the murder." (*Stevens, supra*, 41 Cal.4th at pp. 217-218 (dis. opn. of Moreno, J.).)

As Justice Moreno explains, lying in wait took on a different use when it was incorporated as a special circumstance into the 1978 death penalty statute together with other forms of first degree murder in existence at the time, such as murder by torture or by a destructive device. This death penalty statute provided that a defendant must be sentenced to death or life imprisonment without possibility of parole if the "defendant intentionally

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[15] This Court upheld a challenge to the lying-in-wait special circumstance as unconstitutionally vague in *People v. Lewis* (2008) 43 Cal.4th 415, 526. (See also *Morales v. Woodford* (9th Cir. 2004) 388 F.3d 1159, 1175.) Here appellant argues the evisceration of the elements of the special circumstance of lying in wait fails to distinguish it from other murders not deserving of the death penalty.

killed the victim while lying in wait." (§ 190.2, subd. (a)(15), as added by Prop. 7, approved by voters, Gen. Elec. (Nov. 7, 1978).) Like all death eligibility statutes, "lying in wait must provide a "'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" (*Godfrey v. Georgia* (1980) 446 U.S. 420, 427, 100 S.Ct. 1759, 64 L.Ed.2d 398.)" (*People v. Webster* (1991) 54 Cal.3d 411, 465, 285 Cal.Rptr. 31, 814 P.2d 1273 (conc. & dis. opn. of Broussard, J.).)" (*Stevens, supra*, 41 Cal.4th at pp. 218 (dis. opn. of Moreno, J.).) However, the elements of the special circumstance of lying in wait have eroded to the point that they no longer serve the narrowing function which distinguish it from ordinary premeditated murder.

In *Morales,* the court made clear that lying in wait within the meaning of the special circumstance statute did not require actual physical concealment, but only concealment of purpose, but required a substantial period of watching and waiting. (*People v. Morales* (1989) 48 Cal. 3d 527, 557.) In *Sims,* the court found that the second requirement of lying in wait also did not distinguish it from ordinary premeditated murder by holding that the particular period of time need only be of a duration long enough to show "a state of mind equivalent to premeditation or deliberation. . . ." (*People v. Sims* (1993) 5 Cal.4th 405, 433-434.) This was the tipping point, according to Justice Moreno, where the special circumstance of lying-in-wait became no more than ordinary premeditated murder. (*Stevens, supra*, 41 Cal.4th at pp. 220 (dis. opn. of Moreno, J.).) "'[T]he substantial period of watching and waiting' as interpreted in *Morales* has become no more than the watching and waiting needed to establish premeditation and deliberation required in the 'ordinary' premeditated murder." (*Ibid.;* footnote omitted.)

Thus, the only element of lying-in-wait special circumstance which remains is "a surprise attack on an unsuspecting victim from a position of advantage." (*Morales, supra*, 48 Cal.3d at p.557.) However, as Justice Moreno, shows, concealing murderous intent and launching a surprise attack from a position of advantage are not two elements but one since invariably one conceals one's murderous intention in order to gain an advantage over the victim. Thus, he concludes, the lying-in-wait special circumstance requires neither lying nor waiting, and is nothing more than murder by surprise. (*Stevens, supra*, 41 Cal.4th at pp. 220 (dis. opn. of Moreno, J.).)

In appellant's case the jury was instructed on the definition of the lying-in-wait special circumstance under CALJIC No. 8.81.15 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." (RT 15:2412.) Appellant objected at trial to the instruction. (RT 14:2046.)

Murder by surprise, however, does not provide "a meaningful basis for distinguishing the few cases in which the penalty is imposed from the many cases in which it is not." *Godfrey v. Georgia* (1980) 446 U.S.420, 427. As Justice Moreno points out, "[Surprise [is] a common feature of murder – but it is not at all obvious that a murderer who does not conceal his purpose before murdering the victim is any less culpable than one who does." (*Stevens, supra*, 41Cal.4th at p. 230.) As he puts it, "The defendant deserves a greater punishment than the ordinary first degree murderer because not only did he commit first degree murder, but he failed to let the

person know he was going to murder him before he did." (*Ibid.*)[16]

If this Court upholds the lying-in-wait special circumstance in appellant's case, it will show how far this Court has come in weakening the elements of the special circumstance of lying in wait, and specifically the element of a substantial period of watching and waiting. Within less than a minute of being stopped by Officer Fraembs, appellant acted. He had not followed or pursued or targeted Officer Fraembs for any reason. Rather, Officer Fraembs singled out appellant and his friends and appellant acted virtually immediately upon being detained. There was no substantial period of watching and waiting in appellant's case, nor need there be under the construct of special circumstance lying-in-wait upheld by this Court. (See e.g., *People v. Morales, supra*, 48 Cal.3d at p.557; *People v. Sims, supra,* 5 Cal.4th at p. 433-434.)

The facts of appellant's case and the approval by this Court of the special circumstance of lying-in-wait without a substantial period of watching and waiting is a far cry from the ambush-assassination which originally defined lying in wait. It is the ambush-assassination aspect of lying-in-wait which "'has been anciently regarded . . . as a particularly heinous and repugnant crime.'" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023 [citation omitted].) Having rendered lying in wait to be nothing more than surprise murder this Court has diminished lying-in-wait murder as a subclass of murder more deserving of death. The failure to distinguish lying-in-wait from other murders thus violates the Eight Amendment where

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[16] Justice Moreno opines that a court might give the lying-in-wait special circumstance a reasonable limiting construction that would survive an Eighth Amendment challenge, however, he concludes the Court has failed to so. (*Stevens, supra*, 41 Cal.4th at p. 224.)

"'to pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" (*Romano v. Oklahoma* (1994) 512 U.S. 1,7.)

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

Appellant argues that 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 respondent contends *Brown v. Sanders* (2006) 546 U.S. 212, precludes such a review. (["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] *Brown v. Sanders* (2006) 546 U.S. 212, 221-224.)

In *Brown* v. *Sanders* (2005) 546 U.S. 212, the United States Supreme Court revisited the question of when a capital-sentencing jury's consideration of an invalid aggravating factor violates the Eighth Amendment. The high court found that California is a nonweighing state under its distinction between weighing and nonweighing schemes (*id.* at p.

222) and then replaced this long-standing distinction, which it considered "needlessly complex," with a new rule:

> 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.

(*Id.* at p. 220.) In other words, when the jury considers an invalid aggravating factor in deciding the sentence, constitutional error ensues "only where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor." (*Id.* at p. 221.)

In this case, appellant has argued that the evidence was insufficient to establish any of the special circumstances, therefore, appellant msut be granted new penalty trial to consider the appropriate sentence.

XII

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

Appellant argued in his opening brief that California's death penalty scheme fails in several ways to properly to assign the proper burden of proof. Appellant acknowledged that this Court has previously rejected these arguments, but urged the Court to reconsider them. Respondent relies on the Court's previous precedents without any substantive new arguments. (RB at p. 213.) Accordingly, no reply is necessary to respondent's argument.

XIII

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS

Appellant has argued that the cumulative effect of the errors at trial require reversal of the convictions and sentence of death even if any single error considered alone would not. Respondent claims, without any substantial analysis, that any errors are harmless. (RB at p. 218.) The issue is joined, and no further reply to respondent's argument is necessary.

CONCLUSION

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

DATED: January 6, 2010

Respectfully submitted,

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State Public Defender

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RONALD BRUCE MENDOZA

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 17,536 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 REPLY BRIEF

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

KAREN BISSONETTE
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Clerk, Capital Appeals Unit
ADDIE LOVELACE
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Each said envelope was then, on January 6, 2010, 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 January 6, 2010, at San Francisco, California.

Glenice Fuller

DECLARANT