No. S143531

SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOSE LUIS LEON, Defendant and Appellant.	Riverside County Superior Court No. RIF109916

APPELLANT'S OPENING BRIEF

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

HONORABLE CHRISTIAN F. THIERBACH, JUDGE

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	S143531
Plaintiff and Respondent,	)	Riverside County Superior Court
v.	)	No. RIF109916
JOSE LUIS LEON,	)	
Defendant and Appellant.	)	

APPELLANT'S OPENING BRIEF

INTRODUCTION

Appellant was convicted of the murder of Hope Ragland, who was his girlfriend Veronica Haft's grandmother; the murder of Austin Perez, Veronica's brother; and the attempted murder of Marion Ragland, Veronica's grandfather. The only special circumstance alleged was multiple murder. It was the prosecution's theory that appellant had gone to the Ragland residence planning to kill Hope because he thought she had persuaded Veronica to break up with him; that he then killed Austin when he walked in; and that he attempted to kill Marion when he in turn came home. Conceding murder as to Austin, the defense maintained appellant did not plan or intend to kill Hope, who had come at him with a knife and who appellant believed was practicing witchcraft, and that he was at most guilty of manslaughter on this count.

The centerpiece of the prosecution's case was appellant's confession,

given during the second of two videotaped custodial interrogations and followed by a crime scene re-enactment or "walk through." Appellant's statements should have been suppressed for want of a knowing and intelligent waiver of his *Miranda* rights. (*Miranda v. Arizona* (1966) 384 U.S. 436.) The record, including unrebutted expert testimony and other undisputed evidence, establishes that appellant's limited intellectual and cognitive functioning, inexperience with the criminal justice system, immaturity and poor acculturation, among other factors, rendered him incapable of understanding or waiving his *Miranda* rights.

Compounding the *Miranda* violation, the trial court instructed the jurors, pursuant to CALJIC No. 2.71.7, that appellant's statement to Veronica, who was giving him mixed signals about their relationship, that he would always love her, no matter what happened, was a pre-offense statement of intent, plan, motive or design. By giving this instruction the court usurped the jury's role as fact finder and lightened the prosecution's burden to prove appellant guilty of at least one count of first degree murder.

At the penalty phase the court erred prejudicially in denying defense counsel's request to give exclusively CALCRIM instructions, which were the official state jury instructions at the time of appellant's trial. (Cal. Rules of Ct., Rule 2.1050; former Cal. Rules of Ct., Rule 855.) Of these, CALCRIM No. 766 would correctly have instructed the jurors that in weighing the aggravating and mitigating circumstances their ultimate task was to determine the appropriate sentence for appellant. The court erred as well in refusing to give three specially-drafted instructions, all of which were legally mandated, had been incorporated in CALCRIM No. 763 and would properly have guided the jurors in their consideration of the evidence presented.

These errors, individually or in combination, were highly prejudicial. The case against appellant, absent his statements to the police and the mischaracterization of his statement to Veronica, was weak. There were no eyewitnesses to the homicides, Marion did not identify his assailant, and no fingerprints or other forensic evidence clearly linked appellant to the crime. Appellant's conviction, special circumstance finding and judgment of death should be reversed.

STATEMENT OF APPEALABILITY

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

STATEMENT OF THE CASE

Appellant Jose Luis Leon was arraigned May 20, 2003, on a three-count felony complaint: count one, the murder of Hope Ragland (Pen. Code, § 187, subd. (a)); count two, the murder of Austin Perez (Pen. Code, § 187, subd. (a)); and count three, the attempted murder of Marion Ragland (Pen. Code, §§ 664, 187, subd. (a)). (1 CT 1, 4.)[1] The complaint further charged, as to count three, that appellant inflicted great bodily injury (Pen. Code, §§ 1202.7, subd. (a), and 1192.7, subd. (c)(8)), and alleged a multiple murder special circumstance (Pen. Code, § 190.2, subd. (a)(3)). (*Ibid.*) The crime was alleged to have occurred May 1, 2003. (*Ibid.*)

The information, filed December 4, 2003, charged the same three counts and related enhancements and allegations as set forth in the complaint. (1 CT 102-103.) On December 23, 2003, the prosecutor filed a notice of the People's intention to seek the death penalty. (1 CT 108.)

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[1] "CT" refers to the Clerk's Transcript, "Supp. CT" to the Supplemental Clerk's Transcript and "RT" to the Reporter's Transcript.

Appellant was arraigned January 30, 2004, and pled not guilty to all charges and denied all enhancements and allegations. (1 CT 111.)

On January 5, 2006, appellant filed a motion to suppress his post-arrest statements to the police on the grounds that he had not knowingly and intelligently waived his *Miranda* rights. (Eight Supp. CT 1-12;[2] 2 CT 303-310; *Miranda v. Arizona*, *supra*, 384 U.S. 436.) On January 9, 2006, following an evidentiary hearing, the court denied the motion. (B RT 616-618.) The court then heard and denied appellant's motion to suppress his post-arrest statement on the grounds that he had not been notified of his right under the Vienna Convention on Consular Relations and Penal Code section 834c to contact the Mexican consulate and consult with its representatives. (1 CT 249-275; B RT 649-650.)

Jury selection began January 30, 2006 (2 CT 351-352), and the jury was sworn on February 8, 2006 (8 CT 2346). On February 9, 2006, counsel gave opening statements. (8 CT 2347.) The prosecution called its first witness February 9, 2006, and rested its case on February 22, 2006. (8 CT 2348; 9 CT 2517.) The defense called its first witness on February 22, 2006, and rested on February 23, 2006. (9 CT 2517; 10 CT 2733.) The prosecution presented its case in rebuttal on February 23, 2006. (10 CT 2733.) The parties rested on February 23, 2006, and counsel gave closing arguments on February 23 and 27, 2006. (10 CT 2734, 2735.) On February 27, 2006, the court instructed the jury, and the jurors began deliberations. (10 CT 2735.)

The jurors returned verdicts on February 28, 2006, finding appellant

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[2] Because of a clerical error, the record on appeal includes both an "Eight Supplemental Clerk's Transcript" and an "Eighth Supplemental Clerk's Transcript,"containing different materials.

guilty on all counts and finding the enhancements as to count three and the multiple murder special circumstance true. (10 CT 2840.)

On March 6, 2006, counsel gave penalty phase opening statements. (10 CT 2872-2873.) The prosecutor presented the state's case in aggravation on March 6 and 8, 2006. (10 CT 2872-2873.) The defense began its case in mitigation on March 8, 2006, and rested on March 15, 2006. (10 CT 2875; 11 CT 2929.) On March 15, 2006, counsel gave closing arguments and the jurors began their deliberations. (11 CT 2929.) On March 21, 2006, the jurors returned their verdict of life imprisonment without possibility of parole as to court 1 (Hope Ragland) and death as to count 2 (Austin Perez). (11 CT 2968-2969.)

By order filed May 12, 2006, the court denied appellant's automatic motion, pursuant to Penal Code section 190.4, subdivision (e), to modify the sentence of death. (11 CT 3013-3015.) Judgment was entered May 12, 2006. (11 CT 3002-3004, 3005-3007.) Appellant was sentenced to life without possibility of parole on count 1 (Hope Ragland), to death on count two (Austin Perez), and to four years plus life with the possibility of parole on count three (Marion Ragland, with enhancements). (11 CT 3002-3005.) Appellant was also ordered to pay a restitution fine, pursuant to Penal Code section 1202.4, subdivision (b), in the amount of $10,000, and an additional parole revocation fine, pursuant to Penal Code section 1202.45, in the amount of $10,000, suspended pending revocation of probation. (*Ibid.*)

STATEMENT OF FACTS

I. Guilt Phase Evidence

The prosecutor called lay witnesses who saw appellant the night of the homicides; but none who saw what occurred inside the Ragland

residence. Marion[3] testified he was struck on the head the moment he entered the house; but it was dark and he did not see his assailant. Veronica testified about her relationship with appellant and his relationship with her family. Law enforcement personnel described the crime scene and their recovery and analysis of evidence. A forensic pathologist described the homicide victims' wounds, and opined on the manner and cause of death.

The prosecutor also introduced three videotaped statements appellant made while in custody: the initial custodial interrogation, where appellant denied any wrongdoing; a second interrogation, where he confessed to stabbing Hope and Austin and assaulting Marion; and a crime scene walk-through, where he further described what occurred inside the Ragland residence the night of the homicides. These statements were admitted over defense counsel's objection that appellant had not knowingly and intelligently waived his *Miranda* rights, and that he had been denied his right, as a Mexican national, to consular notification. Appellant's statements are the only direct evidence of what allegedly occurred at the Ragland residence the night Hope and Austin were killed.

A. Appellant's Relationship With Veronica and Her Family

Veronica lived with her grandmother, Hope, her grandfather, Marion, and her younger brother, Austin, in a gated housing development in Corona, California. (5 RT 1319, 1326, 1444.) Hope had raised Veronica since childhood and was like a mother to Veronica, who called Hope mom. Veronica, like Hope, was fluent in Spanish. (5 RT 1331.)

Veronica met appellant in February 2001. (5 RT 1330-1331.) She

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[3] Marion Ragland and Hope Ragland, who share a last name, are referred to by their first names.

was 16 and in high school. (5 RT 1333.) Appellant told her he was 19, but she later learned he was older. (*Ibid.*) She called him Luis because she had a former boyfriend named Jose. (5 RT 1331.) Soon she became appellant's girlfriend. (5 RT 1334.)

Appellant was from Mexico and spoke only limited English, so he and Veronica, and Hope, spoke in Spanish to one another. (5 RT 1388, 1331, 1332.) Marion did not speak Spanish. (5 RT 1332, 1402.) Appellant developed a close relationship with Hope, but he and Marion never got along well. (5 RT 1341, 1336.) Appellant nonetheless became a member of the family and was at the Ragland residence often. (5 RT 1317-1318, 1335-1336, 1399-1405.)

Veronica testified in detail about her own relationship with appellant: that it was good the first year, then up and down; that he became jealous and possessive (5 RT 1337); and that he feared Hope was urging her to break up with him, when in fact she herself was having second thoughts about their relationship (5 RT 1364-1365). The summer after high school graduation Veronica discovered she was pregnant. (5 RT 1369.) She had an abortion, but told appellant she had miscarried. (5 RT 1369-1370, 1396.) Although her relationship with appellant was "on and off," she remained committed to the relationship and dated no one else. (5 RT 1334.)

Appellant and Hope got along very well at first. She welcomed him into their home, cooked meals for him, and she, Veronica and appellant went on outings together. (5 RT 1334, 1402, 1419, 1860.) Hope helped appellant buy a car, with the understanding he would reimburse her every month for the car payment and insurance. (5 RT 1359, 1858.) Even when Hope and appellant were not getting along, appellant continued to come to the house, and she still cooked for him. (5 RT 1402, 1419.)

Over time, Hope and appellant began to "bicker" more. (5 RT 1398.) Sometimes they quarreled when appellant failed to make a timely car payment. (5 RT 1398.) Veronica described a scene that took place in the parking lot of the church Hope and Veronica attended. (5 RT 1343-1348.) Appellant had been taunting Hope and calling her names. (5 RT 1344-1346.) Hope tried to slap appellant, but he backed away. (5 RT 1346.) Hope chased after him, yelling and wielding her purse. (5 RT 1347-1348.) Hope carried a small knife in her purse; she like to eat fruit, but needed to use a knife because she wore dentures. (5 RT 1348-1350.)

When Veronica first met appellant he was living with his parents, who were from Mexico. (10 RT 1845.) When they returned to Mexico appellant became more "unstable" and wanted to spend more time with Veronica and her family. (5 RT 1360.) He moved into a house owned by a woman named Maria, who "did witchcraft" there, according to Veronica. (5 RT 1353, 1352.) Hope went there once a week to have Maria read her tarot cards. (5 RT 1353.) Appellant suspected Hope of practicing witchcraft on him. (5 RT 1377.) Marion acknowledged that Hope, a Catholic, was also involved in some other "religious thing," but denied it was witchcraft. (5 RT 1419-1420, 1423.) However, a defense investigator testified that Marion had told him, on two occasions, that Hope had been "in and out" of witchcraft over the years, and that he was sure Hope had gotten involved in it again shortly before her death. (7 RT 1581-1582.)

Veronica began attending the University of California at Riverside, and in January 2003 was awarded a scholarship to study in England, at Oxford. (5 RT 1328-1329.) She described the argument that ensued at the Ragland residence between Hope, who was encouraging Veronica to accept, and appellant, who did not want her to go. (5 RT 1355.) When

Veronica and appellant stepped outside, Hope followed them and the argument continued. (5 RT 1357-1358.) Hope bent down as though to pick up a brick and Veronica had Austin call the police; but she regretted the decision, as nothing happened. (*Ibid.*) The officer who responded to the call testified that appellant chose not to press charges. (7 RT 1573.)

When Veronica left for England, in February 2003, she told appellant it was "probably best" they break off their relationship, or "give it a breather." (5 RT 1354, 1362.) But she and appellant stayed in touch while she was away. He phoned her often (5 RT 1360-1361) and she sent him cards and love letters, telling him she loved him, missed him and wanted to be with him forever (8 RT 1614-1622). Appellant called Veronica one evening, shortly before the homicides, when she was out with friends, and told her that no matter what happened, he would always love her. (5 RT 1366.) Veronica said "whatever," and hung up. (*Ibid.*)

Veronica left England and returned home when a Corona police officer phoned her, at "3:00 in the morning back home," and told her "we have witnesses . . . that Luis killed your mother and your brother." (10 RT 1812-1813.)

B. Appellant's Whereabouts the Night Of the Homicides

Two employees of a video rental store near the Ragland residence, Monique Perez and Yvette Alvarez, testified that appellant, who they knew as Elias,[4] and his girlfriend Veronica, were frequently patrons. (4 RT 1267-

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[4] Appellant's full name is Jose Luis Leon Elias. (1 RT 1.) He is a Mexican national. (Seventh Supp. CT 55-56; 9 CT 2419-2420.) Thus, as is customary, appellant's father's surname (Leon) is followed by his mother's surname (Elias).

1268, 1279-1280.) On May 1, 2003, the night of the homicides, Ms. Perez saw appellant drive slowly into the store parking lot, and later saw him walk toward the Ragland residence. (4 RT 1270-1271.) She noticed nothing unusual about him. (4 RT 1272.) Ms. Alvarez also saw appellant that night, once walking toward the Ragland residence, and later walking back, at a faster pace. (4 RT 1280-1283.)

Osvaldo Magdaleno, a friend of Austin's, was 14 at the time of the homicides and 17 when he testified. (4 RT 1291.) He lived across the street from the Raglands, in the same gated community. (4 RT 1288.) He and Austin played video games and football at Osvaldo's house the afternoon of the homicides. (4 RT 1291-1292.) Austin then returned home with his skateboard, knocked on the front door and hopped over the fence when no one answered. (4 RT 1294-1295.)

Osvaldo testified that at some point he saw appellant looking out a window from inside the Ragland residence. (4 RT 1292-1293.) But Osvaldo's testimony about when and where he actually saw appellant that day was garbled and contradictory: On the one hand, he said "later that day" he saw appellant "running,"and appellant "just took off." (4 RT 1296.) On the other hand, when asked how much time had elapsed between when Austin jumped the fence and when appellant ran off, Osvaldo said "it wasn't that day, like, that time he ran," but rather that appellant had run when "his grandpa came from a park." (*Ibid.*) Finally, Osvaldo changed course again and said he did see appellant "the same day," but that appellant "was trying to open the gate, so he just took off," and that appellant was not coming out of the Ragland house. (4 RT 1296-1297.) Osvaldo's initial testimony that he saw appellant looking out a window from inside the Ragland's house was also contradicted by Coronado Police Officer Robert

Gonzales, who testified that Osvaldo told him, shortly after the homicides, that he had seen appellant standing outside the Ragland's front door, looking in. (7 RT 1568-1569.)

Jenyffer Soto, another resident of the housing development, described how the gate worked and stated that on May 1, 2003, when she was driving out the gate, she saw appellant walk in. (5 RT 1320-1322.) She thought it odd that he would be there, given that Veronica was away. (5 RT 1323.)

Arnulfo Avalos, appellant's co-worker at the Alewyn Dairy, testified that on May 1 and 2, 2003, appellant worked his usual split shift with him, from 10:00 a.m. to 3:00 p.m. and 10:00 p.m. to 3:00 a.m. (4 RT 1304-1305.) Mr. Avalos noticed nothing unusual about appellant. (4 RT 1305, 1308.) Asked whether he had ever seen appellant wear a ski mask when he was working with the cows, Mr. Avalos said no. (4 RT 1309.) He explained that they did sometimes wear latex gloves on the job. (*Ibid.*) Mr. Avalos also testified that appellant told him he loved his girlfriend and wanted to marry her in May, and that he called his girlfriend's mother "his little grandmother." (4 RT 1309-1310.)

C. Marion Ragland's Account Of His Assault

On May 1, 2003, Marion left the house, alone, at about 6:20 p.m. (5 RT 1406-1407.) He put one of his dogs in the car and drove either to the park or to the nearby K-Mart parking lot to walk the dog. (*Ibid.*) He noticed nothing unusual when he left the house. (5 RT 1408.) When he returned home, at about 8:15 p.m., the house looked darker than usual and he was surprised to find both the security screen and the front door already locked. (5 RT 1408-1409.)

When he entered the house it was pitch dark. (5 RT 1409.) When

the dog tugged on its leash Marion started to turn around, but immediately felt a blow to his head. He thought he had been shot. (5 RT 1410.) He could not see anything but thought he heard "just a slight shuffle like in the kitchen." (*Ibid.*) He noticed Hope's bedroom door was open a crack, and saw a bit of light through the opening. (5 RT 1413.) He assumed Hope and Austin were in there. (*Ibid.*) He thought he might have interrupted a robbery. (*Ibid.*) Marion walked back out the front door, as fast as he could, his head bleeding. (5 RT 1410.) He went to the video store, where one of the employees called 911. (5 RT 1411, 4 RT 1285.) Marion suffered a skull fracture and a severe concussion as a result of the blow to his head. (7 RT 1561.) He never identified his assailant.

D. Forensic Evidence

Forensic technician Daniel Verdugo described the crime scene and the collection of evidence and lay the foundation for a crime scene video and numerous crime scene photos. (5 RT 1445-6 RT 1449; see generally 6 RT 1451-1492; 7 RT 1556.) A knife recovered from the kitchen sink, apparently part of a set of knives kept in a knife block on a kitchen table, tested negative for blood. (6 RT 1454-1456.) Another knife, found in the backyard behind a roll of carpet, was bent and tested positive for blood, but yielded no fingerprints. (6 RT 1486-1487.) A hatchet was recovered from a table in the backyard. (6 RT 1485.) A telephone handset was found in the garage, between some boxes and the wall. (6 RT 1475.) No blood or identifiable fingerprints were detected on the phone. (*Ibid.*) The words "Austin is a bad student" were written in lipstick on the living room mirror, and a lipstick was recovered from a the kitchen trash can. (6 RT 1462.) The bedrooms on the second floor appeared to have been ransacked, with dresser drawers and closets opened and their contents strewn about the

rooms. (6 RT 1470, 1484.)

Mr. Verdugo opined that Austin's body, found face down on the floor of a hallway, had been dragged there from elsewhere in the house. (6 RT 1457-1461.) Hope's body was found in a closet near the kitchen. (6 RT 1467.)

Mr. Verdugo testified he found a ski mask in appellant's car, along with a box of rubber gloves "that had been opened and most of the contents used," and agreed that wearing gloves could prevent the deposit of fingerprints. (6 RT 1486-1490; People's Exs. 98, 34.) He found nothing he regarded as evidence of Brujeria, or witchcraft, such as an alter or candles, at the Ragland residence. (6 RT 1494.)

Mark McCormick, M.D., a forensic pathologist, described the autopsies he performed on the bodies of Hope and Austin. (6 RT 1510-1530.) He identified and described the slash and stab wounds on the bodies, using photographic exhibits. (6 RT 1512-1522, 1523-1530.) He opined that the victims had died from exsanguination (loss of blood) from multiple stab wounds. (6 RT 1522, 1530.)

E. Appellant's Post-Arrest Statements To Law Enforcement Personnel

Following his arrest on May 2, 2003, appellant was questioned twice by Coronado Police Officer John Rasso, in Spanish, at the police station, and then agreed to participate in a crime scene walk-through at the Ragland residence. The interrogations and the walk-through were videotaped, and portions of all three tapes were played for the jurors. (6 RT 1531-1532, 1534-1535; 7 RT 1549, 1550-1552, see also 6 RT 1502-1503.) The jurors were also provided with transcripts including the English translations. (9 CT 2400-2513 [People's Ex. 93A], 8 CT 2361-2398 [People's Ex. 94A]

and 9 CT 2522.1-2600 [People's Ex. 95A].)

During the first interrogation, conducted the morning of appellant's arrest, appellant denied any involvement in the homicides. He explained that Veronica's grandmother had bought him a car and that he was supposed to make car payments to her. He said he had gone to the Ragland residence on May 1st to give Hope a car payment, but left when she did not answer the door because he did not want to run into Marion, who would be returning home after walking his dog. (Seventh Supp. CT 32, 35-36, 39, 44-45; 9 CT 2405, 2407-2408, 2410, 2413-2414.) Appellant also said Hope had been using witchcraft on him. (9 CT 2496-2500, 2503.) Appellant, sometimes crying, maintained his innocence. (E.g., 9 CT 2488, 2489, 2512.)

When the police interrogated appellant again the next day, he confessed to stabbing Hope and Austin, and assaulting Marion. Appellant explained that Hope had come at him with a knife (8 CT 2376, 2380) and talked at length again about witchcraft and being possessed by the devil. (8 CT 2377- 2381.) He said he fought with Hope and then stabbed her, then started fighting with Austin, and then struck Marion. (8 CT 2377-2383.)

During the videotaped walk-through, conducted later the same day, appellant further described what happened at the Ragland residence: how he got Hope's knife away from her, "lost his senses" and "did what [he] did" to her (9 CT 2570); how he then "lost [his] head" and stabbed Austin, who was calling him names and threatening him with his skateboard (9 CT 2582-2584, 2587; 10 CT 2632, 2638-2641); and how he threw a hatchet at Marion when he came in (10 CT 2697).

II. Penalty Phase Evidence

It was stipulated that appellant had no prior criminal record, in the

United States or Mexico. (12 RT 2254.) Nor was there any evidence of prior unadjudicated criminal conduct. The prosecutor presented evidence about Hope and Austin and the impact of their death on surviving family members and friends. The defense presented evidence regarding appellant's upbringing in an extended family in a rural Mexican village and evidence of his good character and anticipated good conduct in prison.

A. The Prosecutor's Case In Aggravation – Victim Impact

Veronica described Hope as lively, happy, outgoing, caring and youthful. (10 RT 1789-1790, 1809.) She had been a mother and best friend to Veronica. (10 RT 1790, 1803.) Hope had worked as a nurse for 30 years; she had been close to her patients and her co-workers looked to her as a friend. (10 RT 1790-1793.) When Hope was not working she liked to shop or go to parties. (10 RT 1793.) She loved to cook and garden and she kept a clean house. (10 RT 1793-1794.) She made sure Veronica took her education seriously, as she wanted her to have opportunities she had not had herself. (10 RT 1800-1801.) Veronica testified that Hope's death had hurt her very much, and that she thought of all the things "her mom" would not be around for. (10 RT 1815.)

Veronica recalled that Austin had come to live with Hope and Marion when he was six years old. (10 RT 1804.) His birth mother had lost custody of Austin because she had a drug problem. (10 RT 1816.) Austin was difficult at first, but Hope laid down rules and Austin settled in and began to call Hope mom. (10 RT 1804-1805.) He struggled in school, but was bright. (10 RT 1817.) He was popular and athletic. (10 RT 1816-1817.) He liked Spanish music and liked to dance. (10 RT 1818.) He respected Hope and Marion; she and Austin were close. (10 RT 1817,

1819.)

Veronica identified and described several family photos. (10 RT 1823-1824; People's Exs. 100-U, 110-T, 110-B, 110-X, 110-Y and 110-Z.) She testified she was devastated when she first went into the house, where she found a piece of Austin's skin on a wall and spots she believed were blood. (10 RT 1825-1826.) She made all the funeral arrangements for Hope and Austin. (10 RT 1826-1828.) Veronica also identified and described several photos taken at the funeral. (10 RT 1832; People's Exs. 110-BB, 110-CC and 110-GG.) She testified that she felt the homicides were her fault, because appellant was her boyfriend, and that her life would never be the same. (10 RT 1829.) She no longer went to "scary" movies and could not cook because knives "freak[ed] [her] out." (10 RT 1830.) She wanted "the nightmare" to end, but would always feel the loss. (10 RT 1831.)

Marion testified about Austin: that he was full of energy, loved sports and was respectful; that he liked to go with Marion to walk the dogs and play football; that when he grew up he wanted to be either a professional football player or a firefighter; and that he had difficulty in school, but did well when he applied himself. (11 RT 1910-1913.) Marion said he thought of Austin's murder constantly and missed Hope; the loss would never go away. (11 RT 1919-1921.) Austin had a full life ahead of him, and Hope had good years ahead of her. (11 RT 1920-1921.) She was eagerly awaiting Veronica's return from England; they were counting the days. (11 RT 1921.)

Hope's nephew testified he spent holidays with Hope and her family and saw them often. (11 RT 1905-1907.) The holidays were not the same after the homicides, and he was affected by the way Hope and Austin were

killed. (11 RT 1908.)

A neighbor who described himself as a writer known to the kids in the area as the old man in the garage testified that, as a member of the community, he had been affected by Austin's death. (11 RT 1922-1924.) He used to encourage Austin to work hard in school and would have been proud to call Austin his son. (11 RT 1924-1925.)

B. The Defense Case In Mitigation – Appellant's Family, Personal History and Anticipated Good Conduct In Prison

At the penalty phase the defense called a number of appellant's relatives, friends and employers, almost all of whom had come from Tulancingo, the village in Hidalgo, Mexico, where appellant grew up. The defense also presented evidence that appellant had done well, and would continue to do well, while incarcerated. The picture that emerged was that appellant was a caring and respectful member of an extended family; that he had led a very simple, sheltered life in a tight-knit rural community with loving but strict and old-fashioned parents; that he was naive and vulnerable, ignorant of the ways of the world outside his village; that he had a junior high school education; that he was responsible and hard working, willing to do menial and unpleasant jobs to help contribute to the family financially; that he had good friends; and that he would not be dangerous in prison.

Thus, for example, one of appellant's uncles, a truck driver from Mexico City, described appellant as having "a very innocent mentality," "a child's mentality." (11 RT 1942, 1943.) Appellant seemed intelligent but "didn't have a lot of knowledge about things." (11 RT 1942.) Appellant was naive "[b]ecause his parents raised him in a family environment. It was

very restricted. They did not allow him to go out. Therefore, they were not aware of what was beyond their town." (11 RT 1945.) Although appellant wanted to be a truck driver like his uncle, he was not quick enough, was too "innocent," moved too slowly and lacked the "strength and open mind" of the truck driver lifestyle. (11 RT 1939-1940, 1947.)

One of appellant's former employers testified that he and his brothers ran a family business in Tulancingo, tanning leather and making leather and sheepskin jackets. (11 RT 1954-1955.) Appellant started working there part time when he was 12 years old and then worked for them full time after he left school. (11 RT 1955, 1957.) He cured hides and scraped the flesh and fat off them; he was hard-working and responsible. (11 RT 1958-1959.) A manager at a suckling pig farm in Tulancingo testified that appellant worked there feeding the animals, attending the birth of suckling pigs, cleaning the pigs' cages and watering manure. (11 RT 1967-1968, 1972, 1979.) Appellant was a good, responsible and trustworthy worker. (11 RT 1971.)

One of appellant's boyhood friends testified that appellant did not go to high school (11 RT 1983-1984); instead he worked full time, helping his family financially (11 RT 2005). He and appellant used to talk about their girlfriends, who were cousins, and appellant said he wanted to marry his girlfriend, Lupe. (11 RT 1995.) Appellant treated Lupe well; she had a stronger and controlling personality and often "scolded" appellant. (11 RT 1999-2000, 2004.) Appellant was easily frightened; he was a simple, docile, perhaps "noble" person. (11 RT 2003-2004, 2013.) As a teenager appellant liked to play with young children's toys. (11 RT 2008.) Appellant's mother and sisters were important to him and he was protective of them. (11 RT 2005-2006.)

Appellant's former girlfriend Lupe testified that she and appellant were together three years in Mexico. (11 RT 2046.) He was generous and made her happy. (11 RT 2033.) Appellant played with Lupe's younger brother, and was like a child himself. (*Ibid.*) When her parents started a banquet business, he worked there with Lupe on weekends, so he could be with her. (11 RT 2025-2026.) He supported her decision to attend the university, and encouraged her to take the entrance examination again after she failed it the first time. (11 RT 2028-2029.) They talked about getting married and having children. (11 RT 2032, 2037-2038.)

Lupe explained that when appellant's father went to the United States, alone, appellant's mother missed him so much she became ill and depressed; so appellant accompanied his mother across the Mexican border so she could be reunited with her husband. (11 RT 2038-2039.) Lupe missed appellant very much and suffered emotionally when he left. (11 RT 2038-2039.) He said he would return in a year but never did. (11 RT 2039.) At first he called her often and said he wanted to make enough money to return to Mexico and build a house. (11 RT 2041.) Eventually he told her he had met "a young lady." (11 RT 2043.)

On cross-examination Lupe was shown a letter appellant had written, in Spanish, to another woman, from jail, in which he said the dreams he and Veronica had had gone "up in smoke," and mentioned meeting another woman at a time when he would still have been with Veronica. (12 RT 2052-2055.) Lupe testified that appellant was never unfaithful while he was with her and that being unfaithful was out of character for him. (*Ibid.*)

Lupe's parents testified that they loved appellant and thought of him as a son, that they trusted him, that he was respectful and courteous, that he was a hard worker who helped them in their business and with household

chores, that they were happy he and their daughter Lupe were together, and that they thought he would be a good husband and father. (12 RT 2068, 2070, 2069, 2081, 2082, 2091, see also 12 RT 2036.) Lupe's father said appellant was never violent. (12 RT 2075.) Lupe's mother recalled that appellant played like a little boy with her younger son (12 RT 2080), and that after Lupe started college appellant still visited to see if she needed any help. (12 RT 2082.)

Two of appellant's younger sisters, Marina and Adela, described life growing up in a home that was "humble" but loving. (12 RT 2145-2146.) When appellant was growing up, the entire extended family, and no one else, lived on a dirt road in Tulancingo. (12 RT 2108.) When they were children their house had no running water or bathroom. (12 RT 2117.) They used a latrine and fetched water from a stream, with a donkey. (*Ibid.*) They often ate just beans and homemade tortillas. (12 RT 2121, 2125.) Appellant typically gave whatever money he earned to his mother, to help pay for furniture, food and clothing; or he would use it to buy sandwiches at school that he would share with his sisters. (12 RT 2132.) He also helped his parents buy a car. (*Ibid.*) Appellant was affectionate with their mother and went with her when she crossed the border into the United States, to ensure her safety. (12 RT 2135-2136.) Appellant also had a very close relationship with their grandfather. (12 RT 2145-2146.)

Appellant's mother testified that appellant was a good and loving son, affectionate with her and with his sisters. (12 RT 2198-2199.) She identified and described several family photos, including one showing appellant at his first communion. (12 RT 2191-2193; Defense Exs. XX, WW, VV, JJ, FF, EE, LL.) She described the frightening ordeal of crossing the border into the United States: that appellant had gone with her, to

protect her, even though he wanted to stay in Mexico; that they were caught and sent back four times; and that when they finally succeeded, on their fifth attempt, they were reunited with appellant's father. (12 RT 2193-2197.) Appellant got along well with his father, though he was very strict. (12 RT 2197, see also 2011.)

The defense also played three video tapes (without audio), depicting life in the village of Tulancingo, the pig farm where appellant worked and the tannery where he also worked. (Defense Exs. UU, Y and Z.)

Four witnesses testified about how well appellant had done in jail and how he would likely do in prison. A Riverside County Sheriff's Department employee testified that appellant had never done anything wrong, gotten written up or broken any rules. (12 RT 2207-2208.) The head of adult education at the jail described the work appellant had done toward earning his G.E.D. (12 RT 2213-2216.) A volunteer with Set Free Prison Ministries testified that appellant had completed a number of Bible study correspondence courses in Spanish. (12 RT 2062-2065.) Correctional consultant James Esten opined that, notwithstanding one minor disciplinary incident and the nature of appellant's crime, if appellant were sentenced to life imprisonment without possibility of parole he would adjust well to his permanent placement at a Level 4 institution; he would play a positive role and not cause problems. Mr. Esten also testified that he saw no basis for concern about appellant's possible future dangerousness. (12 RT 2235, 2236-2237, 2239-2240, 2241-2243, 2251, 2253.)

ARGUMENT

I.

APPELLANT'S STATEMENTS TO THE POLICE SHOULD HAVE BEEN EXCLUDED AT TRIAL BECAUSE HE DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS *MIRANDA* RIGHTS

A. Introduction

At trial appellant moved to suppress his post-arrest statements to the police on the grounds that his purported waiver of his *Miranda*[5] rights was not knowing and intelligent, and that he was denied his right, under the Vienna Convention on Consular Relations and Penal Code section 834c, to consular notification. At an evidentiary hearing the defense presented uncontradicted expert testimony as to appellant's limited intellectual, cognitive and verbal abilities, his rural upbringing in a Mexican village, his dependent and passive personality, his limited education, his poor acculturation and his inexperience with the criminal justice system. The trial court denied appellant's motion on the grounds that he had given affirmative responses when asked whether he understood and agreed to waive his *Miranda* rights, and that he had lied to the police before ultimately confessing. The court then denied appellant's consular notification motion on the grounds that appellant was not prejudiced by the violation because he had been advised of his *Miranda* rights and had waived them.

Yet, the record, including unrebutted expert witness testimony regarding appellant's "background, experience, and conduct," establishes that appellant did not knowingly and intelligently waive his *Miranda* rights.

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[5] *Miranda v. Arizona*, *supra*, 384 U.S. 436.

(*North Carolina v. Butler* (1979) 441 U.S. 369, 374-375, quoting *Johnson v. Zerbst* (1938) 304 U.S. 538, 464.) The undisputed denial of appellant's right to consular notification is another in the totality of circumstances that undermine the validity of his waiver of his *Miranda* rights.

The admission of appellant's statements into evidence violated his Fifth Amendment privilege against self-incrimination and to due process; his Sixth Amendment right to counsel, to a fair trial and to present a defense; his Eighth Amendment right to be free from cruel and unusual punishment and to heightened reliability in a capital case; his Fourteenth Amendment right to due process; his analogous state constitutional rights; and his rights under the Vienna Convention on Consular Relations.

B. Factual Background

Appellant was arrested at home in the early morning hours of May 2, 2003, and taken into custody. (A RT 53-54.) His clothes were taken from him and he was given a jail-issued jump suit. (*Ibid.*) He was interrogated later that morning by Detective Dave Anderson and Officer John Rasso, of the Corona Police Department. They were aware appellant was a native Spanish speaker who spoke little English. (A RT 57.) Appellant was questioned in Spanish by Officer Rasso, a native Spanish speaker and a "certified bilingual officer." (B RT 558.) The interview took place in a small room at the police station, and was videotaped. (People's Ex. 93.)

Officer Rasso informed appellant that he had been arrested and taken into custody because of something that had happened the night before at the Ragland residence. (Seventh Supp. CT 30; 9 CT 2403.)[6] When appellant

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[6] The Seventh Supplemental Clerk's Transcript includes Pretrial Exhibit 1A, which is the transcript of the portion of the video of the May 2, (continued...)

asked what had happened, Officer Rasso replied that someone had "robbed and killed them," without specifying who "them" was. (*Ibid.*) As appellant started to cry and reach for a tissue, Officer Rasso began reading aloud the following *Miranda* advisements (translated from Spanish):

> Before I ask you questions here about this, uh, I have to read to you some rights that, that you have here, okay, in the states. You have the right to say nothing. You can remain silent. But everything that you tell me, I will use in a court of law. You have the right to have an attorney with you when I am asking you questions. If you cannot pay for an attorney, the court will provide you an attorney without, without cost, okay.

(Seventh Supp. CT 30; 9 CT 2404; People's Ex. 93, 3:02-3:27 [minutes and seconds elapsed].) When Officer Rasso then asked appellant whether he had understood "these rights I have read to you" appellant responded, "uhm-hm." (*Ibid.*) Pressed for a yes or no answer appellant said, either, "Yes. . . . And does my girlfriend already know?" or, "Yes. . . . And how is she, do you know?" (Seventh Supp. CT 31; 9 CT 2402.)[7] Without

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[6](...continued)
2003, interrogation that was played at the hearing on appellant's motion to suppress. (Seventh Supp. CT 26-59.) A transcript of the entire interrogation was later admitted into evidence as People's Exhibit 93A. (9 CT 2400-2513.) Appellant cites both the Seventh Supplemental Clerk's Transcript (Pretrial Exhibit 1A) and the Clerk's Transcript (People's Exhibit 93A), where applicable, to indicate that the cited passage is part of what was played in court at the evidentiary hearing.

[7] As noted, Pretrial Exhibit 1A is a transcript of the portion of the May 2, 2003 video played at the *Miranda* evidentiary hearing. (Seventh Supp. CT 26-59.) People's Exhibit 93A is a transcript of the entire video. (9 CT 2400-2513.) The Spanish language transcriptions, and hence the English translations, differ in certain respects, including as quoted above. In addition, People's Exhibit 93A notes that at this juncture appellant was crying. (9 CT 2404.) Pretrial Exhibit 1A does not so state; but the

(continued...)

responding, Officer Rasso asked appellant, "having these rights with you do you want to speak about what of-, what happened last night?" Appellant responded, "Yes." (*Ibid.*)

Officer Rasso then handed appellant the written waiver form he had read from, which set out the *Miranda* advisements in English and in Spanish. (Seventh Supp. CT 31, 61 [Pretrial Ex. 2]; 9 CT 2404.) Appellant immediately signed the form at the bottom, without looking at the rest of it. (People's Ex. 93, 4:14-4:22.) As Officer Rasso would later confirm, he, not appellant, wrote the word "Si" in the blank following the Spanish version of each of these questions: "Do you understand each of these rights that I have explained to you?" and "Having these rights in mind, do you wish to talk to us now?" (Seventh Supp. CT 61 [Pretrial Ex. 2]; B RT 568.) Officer Rasso also later acknowledged that appellant had not been asked to read the form and in fact did not. (B RT 572.)

Officer Rasso then told appellant they "already knew, uh, more or less what had happened," and knew appellant had been having problems in his relationship with Veronica. (Seventh Supp. CT 32; 9 CT 2405.) Asked why he had gone "over there," appellant explained that Veronica's grandmother (Hope) – who appellant sometimes referred to as his "mother-in-law" – had purchased a car for him with the understanding that he would reimburse her for the car payments and insurance. He had gone there to take her his payment; but had left because she did not answer the door and he did not want to run into his girlfriend's grandfather (Marion), who did not like him. (Seventh Supp. CT 32, 35-36, 39, 44-45; 9 CT 2405, 2407-

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[7](...continued)
videotape itself shows that appellant is crying and reaching for a tissue. (People's Ex. 93, 3:02-3:27, 4:21-4:26.)

2411.) Appellant told Officer Rasso he was an "illegal Mexican" with "no papers." (Seventh Supp. CT 55-56; 9 CT 2419-2420.) Neither at this point, nor at any other time, did Officer Rasso or Detective Anderson inform appellant of his right under the Vienna Convention on Consular Relations to consult with a representative of the Mexican consulate.

Officer Rasso repeatedly told appellant the police knew he was guilty, had witnesses and evidence to prove it, and knew he was lying. (E.g., 9 CT 2434, 2435, 2438, 2439, 2454.) Officer Rasso urged appellant to "be a man" and tell the truth (9 CT 2475, 2490), and eventually told appellant this was his "last chance" to do so (9 CT 2494, see also 2434, 2475, 2490). Appellant, sometimes crying, repeatedly said he was telling the truth and was innocent. (E.g., 9 CT 2488, 2489, 2512.) Appellant gave a garbled account of how Hope had been poisoning his food and had caused a witch to put a curse on him. (9 CT 2497-2499, 2503.) Near the end of the interrogation appellant, crying, asked to call his parents in Mexico to say goodbye. (9 CT 2510.) He wanted to know whether they were going to execute him "today or tomorrow." (9 CT 210-2511.)

The next day, May 3, 2003, appellant was interrogated again, at the same location and by the same personnel. (8 CT 2361-2397 [People's Ex. 94A].) This interrogation, too, was conducted in Spanish and videotaped. (People's Ex. 94 [Redacted].) Officer Rasso referred back to the advisements he had read the day before: "Oh, you have the right to, not, not talk to us. To not tell us anything, and, and (unintelligible) that way yesterday, whe (*sic*), where I read you those rights." (*Ibid.*) Appellant responded, "Uh huh." (*Ibid.*) Officer Rasso asked, "So, uh, you understand that (unintelligible) like that?" (*Ibid.*) Appellant nodded his head. (*Ibid.*) Officer Rasso said, "Ok, that's fine," and moved on to inform appellant that

the investigation had turned up "more information and more things against you." (*Ibid.*) Appellant again simply nodded. (*Ibid.*)

After telling appellant they would be testing blood found in his car, Officer Rasso suggested they could help appellant with "the court" and said Veronica would talk to him if he told the truth. (8 CT 2364.) Again, appellant simply nodded. (*Ibid.*) Officer Rasso said they were collecting more information and told appellant he needed "to finish with the lies and tell us what happened and why." (*Ibid.*) Appellant said "Yes sir, officer. . . . [¶] I'm going to tell the whole truth . . . ." (8 CT 2364.) Appellant then gave a rambling and confusing account of his confrontation first with Hope and then with Austin, explaining that Hope had wielded a knife and engaged in witchcraft, and that he (appellant) had been possessed by the devil. Appellant then confessed to stabbing Hope and Austin and to assaulting Marion. (8 CT 2377- 2378, 2383.)

Appellant agreed to participate in a videotaped crime scene walk-through, conducted later the same day. (9 CT 2522-10 CT 2732; [People's Exs. 95 and 95A].) In addition to Detective Anderson and Officer Rasso, Deputy District Attorney John Davis participated. Officer Rasso questioned appellant in Spanish and translated their exchange into English.

After appellant had begun describing his confrontation with Hope (9 CT 2555-2559), Mr. Davis said to Officer Rasso: "Okay and, I forgot to ask him, does he understand that I'm the prosecutor and not his attorney? Just make sure he knows that. He'll be given an attorney uh, in a couple days but I'm the attorney for the police." (9 CT 2562.) Officer Rasso translated this for appellant as, "This is the attorney for, for the law. Do you know that?" (*Ibid.*) Appellant responded, "No." Officer Rasso replied, "Okay, I'm telling you, you know. And, and it is alright that he's

here right? (*Ibid.*) Mr. Davis intervened before appellant could answer, saying, "And he will be given his own attorney when he's arraigned." (*Ibid.*) Officer Rasso translated this as, "Okay and they will give you an attorney when uh, you go to court okay?" Appellant did not respond. Officer Rasso said, "Let's continue okay?" and resumed questioning appellant. (9 CT 2563-2564.)

Appellant further described his confrontation with Hope. After appellant had explained that he took her knife from her and then "lost [his] senses" and "did what [he] did" to her, Mr. Davis broached the subject of *Miranda* advisements:

> Uhm, I, I forgot, we need to make one thing clear. He was read his *Miranda* rights at the station earlier when he gave a statement and does he remember them and does he, does he, you know we didn't *Miranda.* I don't know that we have an obligation to *Mirandize* him during this tape but, we probably uh, should just make sure that he understands that he you know his *Miranda* rights. (*Sic.*)

(9 CT 2570.) The following exchange then took place between Officer Rasso and appellant (as translated from Spanish):

> OFFICER RASSO: Jose Luis you remember the rights that I reads to you (*sic*) and you have the right for not, not, not talk with us and all (*sic*)? And that you can have an attorney that here with you when we are asking you stuff? (*Sic.*) Do you remember that?
>
> APPELLANT: Yes sir.
>
> OFFICER RASSO: And, and, and, you have of that with you right now okay? (*Sic.*) Always.
>
> APPELLANT: Yes sir thanks.
>
> OFFICER RASSO: Okay so, when uh, you want to make

those rights you tell me, alright? (*Sic.*) Okay?

APPELLANT: Yes.

OFFICER RASSO: Okay.

APPELLANT: You, well anyway when I go to court my attorney is going to be there, right?

OFFICER RASSO: Yes. Okay, so, so, she got up, she was yelling . . .

(9 CT 2570-2571, ellipses in original.) The videotaped walk-through continues, with appellant repeatedly describing and reenacting aspects of his fatal confrontations with Hope, fighting her for the knife she had, and with Austin, who was threatening him with his skateboard (e.g., 9 CT 2464-2569, 2576, 2632), and admitting that he threw a hatchet at Marion (9 CT 2696-2697). He repeatedly stated that he was not himself when he stabbed Hope and Austin. (E.g., 9 CT 2576, 2635, 2683.)

C. Procedural History

1. Appellant's Suppression Motions

Defense counsel filed a motion to suppress all of appellant's post-arrest statements to the police on the grounds that appellant never knowingly and intelligently waived his *Miranda* rights, and that admitting his statements into evidence would violate his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, the California Constitution and the Vienna Convention on Consular Relations. (Eight Supp. CT 1-12.) The defense motion proffered that Dr. Francisco Gomez, a Spanish-speaking forensic clinical psychologist who had evaluated and tested appellant, would testify at the evidentiary hearing that appellant ranked in the borderline intelligence range; was monolingual in

Spanish and poorly acculturated; believed he had an obligation to talk to the police and that doing so would minimize the punishment and abuse he would suffer at their hands; and lacked the cognitive, intellectual or linguistic ability to understand the *Miranda* advisements read to him, much less to know what it meant to waive his *Miranda* rights. (Eight Supp. CT 3-5.)

Defense counsel also moved to suppress appellant's post-arrest statements on the grounds the police had failed to notify him of his right, under article 36, subdivision (b)(1), of the Vienna Convention on Consular Relations and Penal Code section 834c, to contact the Mexican consulate and consult with its representatives. (1 CT 249-275.)[8] This motion was

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[8] Article 36, subdivision (b)(1), of the Vienna Convention on Consular Relations provides:

> If [a detained foreign national] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of the State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

Penal Code section 834c, subdivision (a)(1), provides:

> In accordance with federal law and the provisions of this section, every peace officer, upon arrest and booking or detention for more than two hours of a known or suspected foreign national, shall advise the foreign national that he or she has a right to communicate with an official from the consulate of his or her country, except as provided in subdivision (d) [listing countries, not including Mexico, here

(continued...)

supported by a declaration by Carlos Giralt Cabrales, Consul at the Mexican consulate in San Bernardino, attesting to the nature of the assistance that would have been provided to appellant had the consulate been notified of his detention, including the assistance of the consulate's attorney. (8 CT 2337-2342.)

2. The Evidentiary Hearing On Appellant's *Miranda* Suppression Motion

The trial court conducted an evidentiary hearing, pursuant to Evidence Code section 402, on appellant's *Miranda* suppression motion. (B RT 556-616.) At that hearing the prosecutor called Officer Rasso, who testified, first, about the May 2, 2003, custodial interrogation. He described appellant as "acting sad and quiet." (B RT 560.) He testified that his practice with Spanish-speaking suspects was to make sure they understood the *Miranda* warnings because there are multiple Spanish dialects; that in this case he made sure appellant understood his dialect; and that it appeared to him that appellant understood him when he spoke to him in Spanish. (B RT 561.) Asked by the prosecutor whether "[a]t each question" he made sure appellant understood what he was saying, Officer Rasso answered, "That's correct." (B RT 562.) Asked whether it appeared to him that appellant understood his rights "as [he] had read them to him," Officer Rasso responded, "He said he understood his rights, and I believe he also

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[8](...continued)
notification is mandatory]. If the foreign national chooses to exercise that right, the peace officer shall notify the pertinent official in his or her agency or department of the arrest or detention and that the foreign national wants his or her consulate notified.

signed the *Miranda* form." (*Ibid.*) Officer Rasso acknowledged that, prior to testifying, he had watched only the first few minutes of the video of the May 2, 2003, interrogation, not including the portion showing him reading the *Miranda* advisements to appellant. (B RT 564.)

The prosecutor then asked the court how much of the May 2, 2003, video interrogation it wished to see. (B RT 565.) The court responded that "the issue . . . is the *Miranda* warning itself and whether the waiver was freely, voluntarily and intelligently given; and, secondarily, his understanding of the English language. So, I need to see enough to allow me to reach a conclusion that the defendant understood what he was being asked and responded accordingly."[9] (*Ibid.*)

Officer Rasso then identified the *Miranda* waiver form he had used and confirmed it was he who had written "Si" in the blanks after the words, "Do you understand each of those rights as I have explained to you (*sic*)" and, "Having these rights in mind, do you wish to talk to us now?" (Seventh Supp. CT 61; B RT 568.) Officer Rasso, Detective Anderson and appellant each signed it. (B RT 568.) Officer Rasso acknowledged on cross-examination that appellant did not actually read the *Miranda* waiver

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[9] The transcript of the hearing twice indicates the video is "now playing." (B RT 566.) The prosecutor is then quoted as saying, "Your Honor, I believe that's the end of where I transcribed." (*Ibid.*) This suggests the court watched only as much of the May 2, 2003, interrogation as had been transcribed at that point (People's Pretrial Exhibit 1A), which amounted to approximately 30% of that interrogation. (Compare Seventh Supp. CT 27-60 [Pretrial Exhibit 1A, comprising 33 pages] and 9 CT 2401-2513 [People's Exhibit 93A, comprising 112 pages].) See also B RT 571 (the trial court and counsel distinguish "the entire interview" from "the excerpt" and the prosecutor distinguishes "the transcribed part" from "the whole interview").

form:

> Q: Mr. Leon did not actually read that sheet. You did not provide that form for him to read?
>
> A: No, I didn't. I provided it to him to sign it.

(B RT 572.)

The defense called Dr. Francisco Gomez, a psychologist, who described his academic and professional background in forensic clinical psychology, including his expertise in conducting mental health evaluations of Spanish-speaking clients. (B RT 575-577.) Dr. Gomez explained he had conducted a psychological assessment of appellant, in Spanish, specifically geared to assessing whether appellant had understood his *Miranda* rights and had knowingly and intelligently waived them. (B RT 577, 580.) Dr. Gomez outlined the four components of his forensic assessment of appellant: an evaluation to test for malingering; four clinical interviews; psychological testing; and third-party interviews. (B RT 577-578.) He also watched both of the videotaped interrogations and the videotaped walk-through. (*Ibid.*)

Appellant scored in the mildly mentally retarded or borderline intellectual functioning range on each of the psychological tests Dr. Gomez administered, consistently reflecting appellant's low intellectual functioning. (B RT 581, 582.) Dr. Gomez explained that appellant tested at grade level 3.5 to 5 in reading comprehension, whereas a 7th grade level is required for a person to understand *Miranda* warnings. (B RT 582.) Dr. Gomez's testing also revealed deficits in appellant's memory: appellant scored at only the 5th grade level on this parameter. (*Ibid.*)

Dr. Gomez explained that appellant was poorly assimilated and acculturated. (B RT 585.) He came from a small town in Mexico where he

was raised by very protective parents (who Dr. Gomez interviewed), and had been in the United States only two years when the homicides occurred. He had interacted mainly with Spanish-speaking people, and although incarcerated for two years following his arrest, had barely learned basic "survival English." (B RT 583.) He had no criminal record, and knew nothing about the Mexican or American legal system. (B RT 585.) According to Dr. Gomez, what little knowledge Mexican immigrants such as appellant had about the criminal justice system came from soap operas, which generally portrayed police officers as aggressive, especially when arresting someone. (B RT 586.) Appellant's fear and ignorance were exemplified, Dr. Gomez noted, by his asking the police officers interrogating him whether they were going to execute him "today or tomorrow." (*Ibid.*; 9 CT 2510.)

Dr. Gomez considered appellant's educational history, noting he had failed the sixth grade, which in appellant's case was consistent with mild or borderline mental retardation. (B RT 586.) Appellant's employment history was also consistent with intellectual impairment: after leaving Mexico appellant had gotten his jobs through friends or had friends accompany him to help him get jobs, which consisted of working with animals and on farms. (B RT 588.)

Dr. Gomez offered a diagnosis, using the Diagnostic and Statistical Manual of Mental Disorders, edition IV-TR (DSM IV-TR), opining that appellant had an adjustment disorder with depressed mood anxiety (Axis 1); borderline intellectual functioning (with further investigation needed to "rule out" mental retardation) (Axis 2); and dependent traits (Axis 3). (B RT 591.)

With respect to appellant's waiver of his *Miranda* rights, Dr. Gomez

explained that appellant would have had difficulty following and understanding the advisements, in part because they were read straight through – i.e., appellant was not asked separately whether he understood each advisement. (B RT 592.) Yet, because of his low intellectual functioning and ignorance and fear of the criminal justice system, he would have been embarrassed and eager to agree, and so would have said he understood, when he did not. (B RT 592-593.) Specifically, Dr. Gomez explained why appellant's affirmative responses should not be taken at face value:

> Q. [DEFENSE COUNSEL]: Even though the forms were read in Spanish and it's a good translation in Spanish and he agrees and said, Yeah, I understand, in your opinion, does he understand what is being read to him in Spanish?
>
> A. [DR. GOMEZ]: Well, if you look at the first time it was read to him, we know from testing, one, he doesn't have reading comprehension. He's low functioning. He needs things explained to him. He's a passive person. He needs to agree with you, especially authority figures, people who are more in authority, to say yes to [more] things than they comprehend. I know that from my testing. I know from him not understanding but still saying he understood. [¶] If you look at those rights, one, intellectually they were done too fast. Secondly, he nodded yes to everything, just nodded. [¶] If you look through the interview, he nodded affirmatively like that to many things. . . . [¶] *So, in my opinion . . . [h]e didn't understand* Miranda. *He doesn't have intellectual abilities to understand them, comprehend them and the abstraction involved in them.*

(B RT 593-594, italics added.)

On cross-examination Dr. Gomez explained why even someone who, like appellant, is intellectually limited, will deny things even when confronted with contradictory information. (B RT 603.)

Following Dr. Gomez's testimony, the prosecutor argued that exclusion of a confession was a remedy reserved for police misconduct, and that here "they did everything right." (B RT 610-611.) Defense counsel argued that even though appellant was read his rights in Spanish and was reminded of the advisements, he never fully understood his rights or the consequences of abandoning them. (B RT 612-613.) Defense counsel emphasized that multiple factors were to be considered, including language, acculturation, intelligence, and reading comprehension. (B RT 615.) Defense counsel also noted that on the May 2, 2003, video appellant is often seen simply nodding his head, and that Dr. Gomez had testified that appellant "was just going along," saying yes to authority figures. (*Ibid.*)

The court rejected the prosecutor's "good faith" argument and correctly stated: "If he didn't understand his rights, then you cannot conclude that he intelligently, voluntarily and freely waived them; therefore, exclusion is the appropriate remedy." (B RT 611.) The court noted that the People had the burden to show by a preponderance of the evidence that appellant had understood his rights, and that the proper remedy, if the burden was not met, was to exclude the statements. (*Ibid.*)

Nonetheless, the court denied appellant's motion. It stated it had viewed the May 2, 2003, video, because it was important to consider appellant's demeanor. (B RT 616.) The court then announced it had concluded, for two reasons, that there was "not even a scintilla of evidence" (*ibid.*) to suggest appellant had not understood his *Miranda* rights:

First, appellant "immediately responded in the affirmative, either through a nod or audible answer, that he understood them, that he was willing to waive them and talk to the officers." (B RT 616.)

Second, appellant had lied:

> THE COURT: . . . . [¶] And almost of equal importance, in my opinion, as to cognitive ability to understand and be "fully" – in your term [referring to defense counsel] – aware of what he was waiving, was the story he concocted. Clearly, he knew he was in trouble and he needed to come up with some sort of explanation regarding the conduct that he was being accused of, and he set forth a story denying even being present. [¶] Obviously that changed later. [¶] And your own expert acknowledged he was lying.

(B RT 616.) The court stated that, even under a "beyond a reasonable doubt" standard, it was clear that appellant "understood his rights and voluntarily and intelligently waived them." (B RT 617.)

3. The Disposition Of Appellant's Consular Notification Claim

The trial court had deferred ruling on appellant's consular notification motion until it had disposed of appellant's *Miranda* motion, reasoning that "if [appellant] did, in fact, understand [his *Miranda*] rights, how would, basically, getting the same rights from a representative of the Mexican Consulate have been any more of a benefit to him than the original *Miranda* warning?" (B RT 535.)

At the conclusion of the hearing on appellant's *Miranda* suppression motion, the court reiterated its view that the consular notification and *Miranda* inquiries were essentially the same. (B RT 617, 622.) Defense counsel urged that being advised of *Miranda* rights by police officers in an adversarial setting was different from being counseled by a representative of one's country of origin. (B RT 622-625.) The court reiterated that a representative of the Mexican consulate would have advised appellant to "keep his mouth shut," which is what *Miranda* says as well. (B RT 625.)

The trial court then denied appellant's consular notification motion, finding, first, that while appellant had been denied his right to consular

notification, neither the Vienna Convention nor Penal Code section 834c provided a remedy; and that no remedy was necessary because appellant had not been prejudiced by the violation, since he had been advised of his *Miranda* rights and had waived them. (B RT 649-650.)

D. A Waiver Of *Miranda* Rights Must Be Voluntary, Knowing and Intelligent

The United States Supreme Court has held that a suspect must be advised, prior to any custodial interrogation, that he has the right to remain silent, that anything he says can be used against him in court, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him at no cost prior to any questioning. The opportunity to exercise these rights must be afforded the suspect throughout the interrogation. Unless and until the prosecution demonstrates that these warnings were given and knowingly, intelligently and voluntarily waived, no evidence obtained as a result of the interrogation may be used against him. (*Miranda v. Arizona*, *supra*, 384 U.S. at pp. 478-479.)

In explaining the importance of these advisements the Court in *Miranda* observed: "For those unaware of the [right to remain silent], the warning is needed simply to make them aware of it – the threshold requirement for an intelligent decision as to its exercise." (*Miranda v. Arizona*, *supra*, 384 U.S. at p. 468.) "Likewise, the warning that anything said can and will be used against the individual 'is needed in order to make him aware not only of the [Fifth Amendment] privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent 'exercise of the privilege.'" (*Id.* at p. 469; see also *Colorado v. Spring* (1987) 479 U.S. 564, 574; *People v. Whitson* (1998) 17 Cal.4th 229,

244-245.)

A suspect may waive his *Miranda* rights and respond to questioning. (*Edwards v. Arizona* (1981) 451 U.S. 477, 484.) However, to be valid, a *Miranda* waiver must be voluntary, knowing and intelligent. (*Miranda v. Arizona*, *supra*, 384 U.S. at pp. 444-445.)

The two-part test to be used to assess the validity of a *Miranda* waiver has been explained as follows: First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. (*Moran v. Burbine* (1985) 475 U.S. 412, 421.) Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. (*Fare v. Michael C.* (1979) 442 U.S. 707, 725.) The "question of waiver must be determined on the 'particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" (*North Carolina v. Butler*, *supra*, 441 U.S. at pp. 369, 374-375, quoting *Johnson v. Zerbst, supra*, 304 U.S. at p. 464.) Thus, even if a *Miranda* waiver is voluntary in the sense that it was not coerced by threats or promises, it is still not valid unless it is also knowing and intelligent. (*Derrick v. Peterson* (9th Cir. 1990) 924 F.2d 813, 820 [knowing and intelligent prong is a separate inquiry]; *Miller v. Dugger* (11th Cir. 1988) 838 F.2d 1530, 1539 [noting ongoing "distinction between voluntariness and knowing waivers"].)

The prosecution bears the burden of demonstrating the validity of the defendant's waiver by a preponderance of the evidence. (*People v. Dykes*

(2009) 46 Cal.4th 731, 751; see *Berghuis v. Thompkins* (2010) 560 U.S. 370, 383-384.) In considering a claim that a defendant's statement or confession was inadmissible because it was obtained in violation of a defendant's *Miranda* rights, this Court reviews independently the trial court's legal determinations, and evaluates the trial court's factual findings regarding the circumstances surrounding the statement or waivers, and accepts its resolution of disputed facts and credibility determinations if supported by substantial evidence. (*People v. Dykes*, *supra*, 46 Cal.4th at p. 751, citation omitted.)

Here, as explained below, the record demonstrates that appellant was incapable of understanding the *Miranda* advisements read to him or what it meant to waive his *Miranda* rights. Appellant's waiver of his rights was thus not knowing or intelligent and the court committed reversible error in admitting his statements to the police.

E. Appellant Did Not Knowingly and Intelligently Waive His *Miranda* Rights

In assessing whether a *Miranda* waiver is knowing and intelligent courts consider a variety of factors, including whether the defendant signed a written waiver, whether the *Miranda* advisements were given in the defendant's native language (and if not, whether a translator was provided), whether the defendant appeared to understand his rights, whether the *Miranda* advisements were given individually or repeatedly, whether the defendant had prior experience with the criminal justice system and how the defendant responds to authority figures (*United States v. Garibay* (9th Cir. 1997) 143 F.3d 534, 538-539, citations omitted); as well as the defendant's age, experience, education, background, intelligence and intellectual capacity to understand warnings given and the consequences of waiving the

his rights (*Cooper v. Griffin* (5th Cir. 1972) 455 F.2d 1142, 1144-1145; *Fare v. Michael C.*, *supra*, 442 U.S. at p. 725 [totality of the circumstances test; applied to juvenile].)

A review of the record in this case, including the unrebutted and undisputed evidence regarding appellant's distressed and inattentive demeanor, marginal intelligence, poor education and reading comprehension, ignorance of the criminal justice system, and cultural deference to authority, establishes that appellant never knowingly and intelligently waived his *Miranda* rights.

Distraught and Unfocused Demeanor and Ineffective Advisement During the May 2, 2003 Interrogation

The trial court correctly recognized that a suspect's demeanor is a factor to be considered in assessing the validity of a *Miranda* waiver and acknowledged the importance of the May 2, 2003 video (B RT 616); but it focused solely on the fact that appellant initially gave affirmative responses (People's Ex. 93, 3:17-4:15) and failed to recognize what the video so graphically reveals about appellant – that he did not understand what was going on beyond that he was in trouble with the law.

As Officer Rasso begins his recitation of the *Miranda* advisements, appellant is slumped in a chair, crying, and reaching for a tissue. (People's Ex. 93, 3:02-3:27.) Appellant remains visibly distressed and inattentive, turning his head to the side and wiping his eyes with the tissue, as Officer Rasso continues reading. (*Ibid.*) Appellant eventually begins nodding his head, in the bobbing way that would become familiar, as Officer Rasso continues reading. (*Id.* at 3:33-3:46; see also, e.g., 4:40-4:55.) Officer Rasso keeps reading, without stopping to ask appellant, as to each *Miranda* advisement, whether he understands. (*Id.* at 3:06-3:42.) Asked at the end

whether he understood "these rights I have read to you," appellant first gives an inaudible response, and only when pressed gives a perfunctory "yes" answer that is itself part of a question: either, "Yes. . . . And does my girlfriend already know?" or, "Yes. . . . And how is she, do you know?" (Seventh Supp. CT 31; 9 CT 2402.)[10] When Officer Rasso then asks, "having these rights with you do you want to speak about what of-, what happened last night?" Appellant responds, "Yes, sir, okay," not simply "yes" or "okay" (Seventh Supp. CT 31), consistent with Dr. Gomez's observation that appellant would feel a need to agree with authority figures (B RT 593-594). The video of the May 2, 2003, interrogation thus reveals appellant was not tracking, much less grasping, what Officer Rasso was saying, and belies the notion that he understood his *Miranda* rights and knowingly and intelligently waived each one.

The May 2, 2003, video also confirms that appellant's signing of the *Miranda* waiver form was perfunctory and uninformed: Officer Rasso hands appellant the form, without explanation and without asking appellant to read it; appellant barely looks at it, signs it without reading it, and hands it back. (People's Ex. 93, 4:14-4:22; compare *People v. Davis* (2009) 46 Cal.4th 539, 586 [defendant reviews waiver form, then looks up at officer and says "sure" and asks where to sign].) Dr. Gomez would later testify that appellant's reading comprehension was in fact significantly limited. (B RT 582, 593.) Thus, while a written waiver, though not required, has been held to support the validity of a waiver (*Derrick v. Peterson*, *supra*, 924 F.2d at p. 824), such an inference cannot be drawn here.

That the *Miranda* advisements were not read to appellant

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[10] See footnote 7, *ante*, and accompanying text.

individually, particularly given he was obviously distracted and inattentive, is also among the totality of circumstances that undermine a finding that appellant's waiver was knowing and intelligent. (*United States v. Garibay*, *supra*, 143 F.3d at pp. 538-539.)

Borderline Intelligence, Cognitive Impairment, Poor Reading Comprehension, Inexperience with the Criminal Justice System and Lack of Acculturation

Psychologist Francisco Gomez, Ph.D., gave expert testimony on precisely the question before the court below, and now before this Court on de novo review: whether appellant knowingly and intelligently waived his *Miranda* rights. Dr. Gomez conducted six to nine hours of clinical interviews (in Spanish) (B RT 583); reviewed all of appellant's statements to the police (B RT 578); surveyed and took into account appellant's personal history – notably his rural upbringing in Mexico, his lack of experience with the criminal justice system, his limited education and poor reading comprehension, and his recent immigration and poor acculturation (B RT 584-588); and measured appellant's intellectual deficits and cognitive impairment using appropriate psychological tests conducted in Spanish (B RT 577, 579-580, 580-584). In other words, Dr. Gomez examined appellant's "background, experience, and conduct," which the Supreme Court has held must be considered in assessing the validity of a *Miranda* waiver (*North Carolina v. Butler*, *supra*, 441 U.S. at pp. 374-375, quoting *Johnson v. Zerbst*, *supra*, 304 U.S. at p. 464). Based on this comprehensive assessment Dr. Gomez concluded that even though appellant had *said* he understood his *Miranda* rights and was willing to waive them, in fact he did not understand what the advisements read to him were meant to convey or what it meant to waive his *Miranda* rights. (B RT

577- 587, 591-594.)

The prosecutor did not challenge Dr. Gomez's qualifications as an expert, nor cross-examine him regarding his opinion on the *Miranda* waiver issue (B RT 599-600), nor call an expert of his own to rebut Dr. Gomez's testimony.

Dr. Gomez's testimony that appellant never knowingly and intelligently waived his *Miranda* rights was thus effectively uncontroverted and constitutes substantial evidence that appellant's purported waiver was not knowing and intelligent. (*Cooper v. Griffin*, *supra*, 455 F.2d at pp. 1144-1145 [substantial uncontroverted evidence established suspects were not capable of meaningfully understanding *Miranda* warnings, even though police officers testified suspects "appeared" to understand the situation].) This distinguishes this case from *United States v. Glover* (9th Cir. 1979) 596 F.2d 857, 864-866, in which the expert testimony regarding the defendant's competence to waive his *Miranda* rights was in conflict, and from *Derrick v. Peterson*, *supra*, 924 F.2d at p. 824, in which the defendant's own expert psychologists testified that the defendant "could understand the concepts the *Miranda* warnings are meant to convey," even if he could not adequately understand the possible consequences of talking to the police.

In sum, numerous factors identified by the courts as negating the validity of a *Miranda* waiver are present here. Appellant did not appear to understand the *Miranda* advisements, which were read serially, without interruption (*United States v. Garibay*, *supra*, 143 F.3d at p. 538); when he was interrogated by the police he had no previous experience with the criminal justice system (compare *People v. Davis*, *supra*, 46 Cal.4th at p. 586 [defendant "no stranger to the criminal justice system and had fully

waived his *Miranda* rights on previous occasions"]) and harbored a culturally-based fear of law enforcement personnel and authority figures (*id.* at pp. 538-539); his education and reading comprehension were limited (*Cooper v. Griffin, supra*, 455 F.2d at p. 1145); his "personal life experiences" had taken place, until just two years before the homicides, in an insular Mexican village where he was raised by overprotective parents (*United States v. Garibay, supra*, 143 F.3d at p. 539) and he suffered from clinically documented and undisputed cognitive and intellectual impairment (*Cooper v. Griffin, supra*, 455 F.2d at p. 1145). Thus, the totality of the circumstances surrounding the interrogation, including appellant's background, experience and personal traits, as well as his distraught and unfocused demeanor, fall far short of the substantial evidence required to sustain the court's ruling that appellant knowingly and intelligently waived his *Miranda* rights. (*United States v. Garibay, supra*, 143 F.3d at p. 538.)

F. The Trial Court's Conclusion That Appellant Knowingly and Intelligently Waived His *Miranda* Rights Ignores the Totality Of the Circumstances and the Applicable Legal Principles

The trial court's two-pronged explanation for why it found "not even a scintilla of evidence" to suggest appellant did not understand his *Miranda* rights – in face of the evidence summarized above – makes clear that it failed to take into account the applicable factors courts are to consider in assessing the validity of a *Miranda* waiver. (B RT 616.) Of particular relevance to this case are such factors as appellant's borderline intelligence, poor reading comprehension and lack of experience with the criminal justice system, as well as his distraught and unfocused affect during the interrogations.

Without any mention of this array of relevant evidence, the court reasoned that appellant must have understood his rights simply because he said he did: "He immediately responded in the affirmative, either through a nod or audible answer, that he understood them, that he was willing to waive them and talk to the officers." (B RT 616.) But the fact that appellant *said* he understood his *Miranda* rights and agreed to waive them is necessarily the beginning of the inquiry, not the end. The question is whether, when appellant assented, he did so knowingly and intelligently. Here, Dr. Gomez explained why, under all the circumstances, appellant's "yes" or nod of the head could not be taken at face value.

The court's second reason for finding appellant knowingly and intelligently waived his *Miranda* rights – that appellant lied to the police before confessing – is equally problematic. The fact that *after* appellant agreed to talk to Officer Rasso he denied involvement in the homicides is not probative of whether he understood at the outset that he had the right not to speak to him at all. Moreover, Dr. Gomez explained that the fact that appellant could lie did not mean he had the intellectual capacity or cognitive ability to understand such abstract legal concepts as *Miranda* rights. (B RT 602-603, 608-609, 593-594.)

A review of the totality of the circumstances in this case, in light of the applicable legal standard, undermines the trial court's determination that appellant validly waived his *Miranda* rights and, to the contrary, establishes that appellant's purported waiver was not knowing and intelligent.

G. The Denial Of Appellant's Right To Consular Notification Further Undermines the Validity Of Appellant's Waiver Of His *Miranda* Rights

The denial of appellant's right to be notified that he could consult

with a representative of the Mexican government is another in the totality of circumstances the trial court should have taken into account in assessing whether appellant's waiver of his *Miranda* rights was knowing and intelligent. (Cf. *United States v. Amano* (9th Cir. 2000) 229 F.3d 801, 804-805 [incorporating violation of consular treaty obligations into the "totality of the circumstances" analysis when assessing the voluntariness of a *Miranda* waiver by a foreign national].) As defense counsel argued below, consular officials "offer two things of utmost importance: (1) the familiar background, language, and culture of the alien's homeland, and (2) a familiarity with the criminal system threatening to take away their liberty." (1 CT 267-268.)

The declaration of Mexican Consul Carlos Giralt Cabrales, which defense counsel filed and asked the court to consider in support of the consular notification motion (3 RT 1192), makes clear that consular assistance went well beyond merely telling appellant to "keep his mouth shut" (B RT 625):

> Had Mr. Leon been promptly notified of his rights to contact the Consulate . . . and had the authorities properly notified the Consulate of his detention, I or my staff would have immediately initiated the protocol by which my department provides meaningful and prompt assistance to detained Mexican nationals. As provided by Article 36, paragraph 1(c) of the Vienna Convention, a consular officer would have gone immediately to the place of his detention to speak with Mr. Leon personally and to ascertain the nature of the charges against him. . . . In providing this assistance to Mr. Leon, [we] would have sought and procured the assistance of our attorney. . . . . In light of our experience and training on this question, we would have recommended to Mr. Leon that he not discuss his case with anyone other than his attorney.

(8 CT 2340-2341.) Mr. Cabrales' declaration also confirms the importance

cultural and linguistic distinctions and the potential inadequacy of *Miranda* advisements:

> Consular officers take particular care in ensuring that Mexican nationals fully understand the scope and significance of their rights in the United states criminal justice system. *Even nationals who have resided in the United States for many years are often confused by the judicial system*, and many do not speak English fluently.
>
> Significant cultural and linguistic barriers impede the ability of Mexican nationals to understand their rights, communicate effectively with their attorneys and participate fully in their defense. *They have trouble grasping abstract legal concepts* such as the right to remain silent and their right to have an attorney present during the interrogation – *even after they are advised of their Miranda rights by the police*.

(8 CT 2341, italics added.)

Here, as Dr. Gomez testified, in addition to being intellectually limited, appellant was poorly acculturated (B RT 583-585), and had no prior experience with the criminal justice system. Appellant certainly would have had no reason to know anything about the California statutes on which his arrest was based or the procedures law enforcement officials were legally required to follow. Appellant is thus precisely the sort of person intended to be served by the right to consular notification.

The trial court nonetheless concluded appellant had not been prejudiced by not having "the chance to listen to somebody from Mexico tell him that he was potentially facing the death penalty and should keep his mouth shut," because he had been advised of his *Miranda* rights and had waived them. (B RT 629.)

The Ninth Circuit Court of Appeals has rejected precisely this reasoning: "Even if we accept, arguendo, the assumption that the Mexican

Consulate would have done nothing more than advise appellant of his right to counsel . . . it remains difficult from a practical standpoint to equate being advised by the INS in an adversary setting with being advised by the Mexican consulate." (*United States v. Rangel-Gonzales* (9th Cir. 1980) 617 F.2d 529, 532-533.) Similarly here, *Miranda* advisements read from a form by an interrogating police officer bent on eliciting a confession to murder were no substitute for the assistance of a representative of the Mexican consulate, who would have had appellant's best interest at heart and, as Mr. Cabrales' declaration suggests, would have fully and carefully explained to appellant the rights he enjoyed and the implications of waiving them. (8 CT 2340-2341.)

The trial court narrowly construed appellant's right to consular notification as equivalent to his right, under *Miranda*, to receive an admonition to remain silent, when in fact the right to consular notification, under the Vienna Convention and Penal Code section 834c, is independent of and distinct from his federal constitutional *Miranda* rights. In this case, the denial of appellant's right to consular notification is another in the totality of circumstances demonstrating that appellant did not knowingly and intelligently waive his *Miranda* rights.

H. The Erroneous Admission Into Evidence Of Appellant's Post-Arrest Statements To the Police Was Prejudicial

The court's admission of appellant's highly prejudicial post-arrest statements was reversible error. "A confession is like no other evidence. Indeed, the defendant's own confession is probably the most provocative and damaging evidence that can be admitted against him." (*Arizona v. Fulminate* (1991) 499 U.S. 279, 296.) Further, "while some statements by a

defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision." (*Ibid.*) This Court has recognized that an improperly admitted confession "is much more likely to affect the outcome of the trial than are other categories of evidence, and thus is much more likely to be prejudicial . . . ." (*People v. Cahill* (1993) 5 Cal.4th 478, 503.)

The state has the burden to prove that the erroneous admission of a confession in violation of *Miranda* was harmless beyond a reasonable doubt. (*People v. Lujan* (2001) 92 Cal.App.4th 1389, 1403; *People v. Sims* (1993) 5 Cal.4th 405, 447-448, citing *Chapman v. California* (1967) 386 U.S. 18, 24.) This Court reviews the record de novo to determine an error's harmlessness. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *Satterwhite v. Texas* (1988) 486 U.S. 249, 258.)

Because the only special circumstance allegation in this case was multiple murder, the prosecutor had to prove appellant guilty of either two counts of first degree murder or one count of first degree murder and one count of second degree murder. (Pen. Code, § 190.2, subd. (a)(3).) To do so, the prosecutor made appellant's confession the centerpiece of his case. In his opening statement he told the jurors they would see a video of appellant in which "he admitted . . . that he killed Hope and that he killed Austin and that he hit Marion in the head with the hatchet." (4 RT 1259.) The jurors then saw the video of the May 3, 2003, interrogation, in which appellant confessed to stabbing Hope and Austin and assaulting Marion; the video of the crime scene walk-through, in which appellant elaborated on what occurred and further incriminated himself; as well as the initial, May

2, 2003 interrogation, in which appellant had denied any involvement in the homicides. (People's Exs. 93, 94 [Redacted] and 95.)

The prosecutor then devoted over half of his closing argument to appellant's post-arrest statements (9 RT 1718-1729), arguing they established that appellant had not only murdered two people but had lied about it, which was indicative of planning (9 RT 1719-1720, 1723); that appellant lacked remorse (9 RT 1722, 1726); that he was a "sophisticated, not a simple-minded killer," who had thought about what to say to the police (9 RT 1724); that he had lied about believing in witchcraft and spells, which the defense had argued mitigated against a finding of intent (9 RT 1725-1726); and that his lies were "evidence of his consciousness of guilt" (9 RT 1727; see also 10 CT 2748; 8 RT 1641 [jury instructed pursuant to CALJIC No. 2.03].)[11]

The impact of the erroneous admission of appellant's statements is underscored by the jurors' request to see the videos again. At 3:45 p.m. on the day the jurors began deliberating they sent the court a note requesting "a television and VCR player," which the record indicates were provided. (10 CT 2735-2736.) The videotapes of appellant's post-arrest statements had been admitted as exhibits, and so would already have been provided to them. The jurors returned their verdicts just before noon the next day. (10 CT 2840-2841.) The jurors' request to see the interrogations again supports a finding of prejudice. (*United States v. Blueford* (9th Cir. 2002) 312 F.3d

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[11] The record indicates the prosecutor used demonstrative evidence to bring home his argument. As he began to go through appellant's statements he stated: "Now let's get to the defendant's words. . . . [¶] And now I want to stop and focus in. I put some of the statements up on boards here. I just would like you to focus in on a few of them." (9 RT 1718.)

962, 976 [deliberating jury requested readback of witness testimony, "so it evidently did not regard the case as an easy one"]; *Thomas v. Chappell* (9th Cir. 2012) 678 F.3d 1086, 1103 [deliberating jury's request for readback of witness testimony was an indication "[t]hat the jury was clearly struggling to reach a verdict" (citations omitted); compare *People v. Livingston* (2012) 53 Cal.4th 1145, 1160 [despite prosecutor's invitation to the jurors to "watch it, if it's important to you," deliberating jurors did not ask to view videotape of witness interrogation].)

Apart from appellant's statements, the evidence that appellant was guilty of one count of first degree murder and another count of first or second degree murder was weak. Contrary to what Officer Rasso told appellant during the May 2, 2003, interrogation, there was no fingerprint or shoe print evidence, nor any DNA evidence. Nor was there eye-witness identification, nor video surveillance or other contemporaneous recording of the crime scene. Without appellant's statements the prosecution was left with the following circumstantial evidence at best indirectly implicating appellant in the homicides.

The two video store employees saw appellant go to and from the Ragland residence, but noticed nothing unusual about him, other than that he was walking quickly on his way back. (4 RT 1270-1272, 1280-1283.) Osvaldo Magdaleno's account of when and where he saw appellant the day of the homicides, summarized above, was garbled and confusing, and his testimony that he saw appellant inside the Ragland residence looking out a window was squarely contradicted by the contemporaneous account he gave the police three years earlier. (4 RT 1291-1297, 7 RT 1568-1569.) Marion described being struck on the head the night of the homicides, but did not see his assailant. (5 RT 1408-1413.)

Veronica testified that her relationship with appellant had deteriorated, and that he had become jealous and possessive. (5 RT 1337, 1339-1340.) But although he once got so angry he punched the windshield of his car, he was never violent toward any member of her family. (5 RT 1342.) When appellant told Veronica he thought Hope was influencing her decision to break up with him, she assured him it was her own decision. (5 RT 1363-1365.) And in any event, Veronica led appellant to believe they might still work things out, telling him in love letters that she missed him, loved him and wanted to be with him always. (8 RT 1616-1622.) That she was sending appellant mixed signals, if not toying with him, is also demonstrated by the fact that when he told her, during a phone conversation, that he would always love her, no matter what happened, she just said, "whatever," and hung up.[12] (5 RT 1367.)

As for the box of latex gloves and ski mask found in appellant's car, appellant's co-worker at the dairy confirmed they sometimes wore latex gloves on the job (4 RT 1305-1307, 1309), and none of the witnesses who testified they saw appellant the afternoon or evening of the homicides mentioned a ski mask. (See People's Exhibits 34 and 98.)

The record thus demonstrates that without appellant's post-arrest statements the state could not have proved beyond a reasonable doubt that appellant was guilty of at least one count of first degree murder and another count of first or second degree murder. The erroneous admission of

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[12] Based on this statement, the court, at the request of the prosecutor and over the defense objection, instructed the jurors that evidence had been presented from which it could find that appellant had made a pre-offense statement of "intent, plan, motive or design." (10 CT 2761; Fourth Supp. CT 27; 8 RT 1645 [CALJIC No. 2.71.7].) That the court erred in giving this instruction is the basis for Argument II, below.

appellant's statements was therefore not harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Accordingly, his convictions of first degree murder, true finding of the multiple murder special circumstance and verdict of death must be set aside.

I. Conclusion

The record in this case includes extensive, largely unrebutted evidence of appellant's intellectual, cognitive and verbal impairment, his sheltered upbringing in a Mexican village, his dependent and passive personality, his limited education, his poor acculturation and his inexperience with any criminal justice system. This evidence, along with appellant's demeanor during the May 2, 2003, interrogation, establishes that appellant did not understand the *Miranda* advisements read to him or knowingly and intelligently waived his *Miranda* rights. The court's conclusion that there was not "a scintilla" of evidence that appellant did not validly waive his *Miranda* rights, on this record, demonstrates that it misapprehended the applicable legal standard. Reversal of appellant's conviction and death sentence is therefore warranted.

II.

THE TRIAL COURT ERRED PREJUDICIALLY BY INSTRUCTING THE JURY THAT EVIDENCE HAD BEEN PRESENTED THAT APPELLANT HAD MADE A PRE-OFFENSE STATEMENT OF INTENT, PLAN, MOTIVE OR DESIGN

A. Introduction

By the time of the homicides appellant's relationship with his girlfriend Veronica had deteriorated. Appellant still wanted a serious, long-term relationship, but Veronica was sending mixed signals, telling him, with Hope's encouragement, that it was time to end their relationship, or give it "a breather," yet sending him love letters from England. Appellant continued to profess his love for Veronica, calling her daily. During one of appellant's calls, shortly before the homicides, he told her, "No matter what happens, I'll always love you." Veronica dismissed the sentiment with, "whatever," and hung up.

Based on appellant's statement, the trial court, at the prosecutor's request and over defense counsel's objection, instructed the jurors in the language of CALJIC No. 2.71.7, which reads:

> Evidence has been received from which you may find that an oral statement of intent, plan, motive or design was made by the defendant before the offense with which he is charged was committed. [¶] It is for you to decide whether the statement was made by the defendant. [¶] Evidence of an oral statement ought to be viewed with caution.

(10 CT 2761; Fourth Supp. CT 27; 8 RT 1645.) By giving this instruction the court effectively told the jurors that appellant's statement that he would love Veronica always, no matter what happened, was a pre-offense statement of "intent, plan, motive or design." By doing so, the trial court directed the jurors to treat as incriminating a statement that plainly was not;

usurped the jurors' role as fact finder, leaving them to decide only whether appellant had made the statement; and lightened the prosecution's burden to prove appellant guilty of at least one count of first degree murder in which the only special circumstance was multiple murder.

The court's instruction violated appellant's Sixth Amendment right to a fair and impartial jury trial and to present a defense; his Eighth Amendment right to be free from cruel and unusual punishment and to heightened reliability in a capital case; his Fourteenth Amendment right to due process; and his analogous state constitutional rights.

B. Factual and Procedural Background

At the guilt phase Veronica testified extensively about her relationship with appellant. When they met, in February 2001, she was 16 years old and still in high school. (5 RT 1331, 1333, 1329.) Appellant told her he was looking for a serious relationship and wanted her to become his girlfriend, which she later did. (5 RT 1333-1334.) He gave her a "promise ring." (5 RT 1362.)

Veronica's relationship with appellant was good the first year. (5 RT 1334.) Appellant came to her house frequently, and "was like part of the family." (5 RT 1336.) Then they were on again, off again:

> I would tell him we can't be together anymore. Things aren't going to work out. I would break it off. It didn't even count. 30 minutes later he would call or even a day later he'd show up at the house crying. So we were always off and on after that but never to the point to say that we were broken up for a week or anything like that.

(5 RT 1334.) Veronica was nonetheless serious about their relationship and did not date anyone else. (5 RT 1335.)

When Veronica was accepted to a program at Oxford, appellant told

her he did not want her to go. (5 RT 1328-1329, 1355.) Veronica said, "I have to do this for myself. I have to go. If you really love me, things will work out. In the end, if we're meant for each other, it will happen." (5 RT 1355-1356.) In February 2003, on the eve of her departure, she told him "it was probably best that we should break it off since I was going to be out there. Just give it a breather." (5 RT 1354, 1362.)

While in England Veronica wrote to appellant often, telling him that she missed him and that she loved him. (8 RT 1614.) She sent appellant a poem she had written, telling him she could not live without him and never wanted to be away from him. (8 RT 1615-1616.) Her letters and postcards included phrases such as "I love you," "I miss you," and "I love you always." (8 RT 1616-1622.) She testified that she loved appellant and wanted to be with him; that she was very confused. (8 RT 1625-1626.) "It was weird. I did love him, but I knew that for me it was over." (8 RT 1628.)

While Veronica was away she and appellant spoke frequently by phone. (5 RT 1361.) Veronica described a conversation they had on April 29, 2003. (5 RT 1363.) Appellant told her he missed her and did not want their relationship to end. (*Ibid.*) Again, Veronica said she thought they should end their relationship. "Relax," she told him, he would find someone new. (*Ibid.*) Although appellant worried Hope was influencing her decision, Veronica told appellant, as she had before, that it was her own decision. (5 RT 1364.) Appellant seemed to understand, but, as in previous conversations, asked to see her the Saturday after she returned from England. (5 RT 1363-1364.) Veronica agreed. (5 RT 1364.)

Veronica spoke to appellant again on May 1, 2003, at about 6:30 p.m. her time, in England. (5 RT 1364-1365.) She was at a movie theater

with her girlfriends, at the concession stand. (5 RT 1366.) Veronica could see (on her cell phone) that appellant was calling. (*Ibid.*) She answered, saying simply, "What?" (*Ibid.*) Appellant said, "Where are you at?" (5 RT 1367.) Veronica answered, "What does it matter?" Appellant then said, "No matter what happens I love you." (*Ibid.*) Veronica said, "Okay. Whatever," and hung up. (*Ibid.*) When the prosecutor pressed Veronica for appellant's exact words, she clarified that he had said, "No matter what happens, I'll always love you." (*Ibid.*) Asked whether she found appellant's statement "odd," Veronica replied, "I did, but at the same time I was just, like – I was irritated that he still called me." (*Ibid.*)

Later that night Veronica spoke with Hope, for whom it would have been early afternoon, May 1, 2003. (5 RT 1368.) Veronica had gone on to a nightclub with her girlfriends. (*Ibid.*) She testified there was nothing unusual about their conversation, which lasted about 10 minutes. (*Ibid.*) Veronica apparently did not think to mention appellant's earlier phone call.

During a conference on jury instructions the prosecutor requested the jurors be instructed pursuant to CALJIC No. 2.71.7, quoted above:

> THE COURT: . . . [¶] [CALJIC No.] 2.71.7 requested by the People. And I – it's obvious that relates to the statement he allegedly made about – beforehand about – well, his statement was, "I'll kill you."
>
> [THE PROSECUTOR]: The pre-offense statement by the defendant is actually the one that – the phone calls that he made to Veronica.
>
> THE COURT: Okay. "No matter what happens, I'll still love you."
>
> [THE PROSECUTOR]: Yes. Then the other one about his (*sic*) mom being in the way.

THE COURT: Right. . . .

(8 RT 1603.)[13] The court granted the prosecutor's request, over defense counsel's objection: "There is an inference that he is intending to do something in the future, something evil. Generally speaking, the law is that if there is some evidence that supports an instruction, it should be given." (8 RT 1604.)

In his initial closing argument the prosecutor argued that appellant went to the Ragland residence "with a specific purpose and that purpose was to orphan Veronica." (8 RT 1680.) Appellant "had murder on his mind" and he killed Hope and Austin to get Veronica back. (8 RT 1688.) He urged the jurors to "look at his words . . . to Veronica, 'If I can't have you, no one can. Your mom is to blame for our problems. Your mom's getting in the way.'" (8 RT 1666.) Veronica, whose relevant testimony is set out above, in fact never attributed those words to appellant. The prosecutor then characterized as "most ominous[ ]" the statement Veronica did attribute to appellant: "No matter what happens, I'll always love you." (8 RT 1666-1667.)

The prosecutor devoted much of his rebuttal argument to appellant's post-arrest custodial statements to the police (the subject of Argument I, *ante*). The prosecutor argued that appellant had lied to the police, and denigrated appellant's assertion that he had to defend himself against Hope because she had a knife and he believed her to be practicing witchcraft. (9 RT 1716-1733.) Near the end of his argument the prosecutor again invoked appellant's statement to Veronica in support of his argument that appellant

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[13] No one ever testified that appellant had said, "I'll kill you," as the prosecutor recognized, in correcting the court.

had planned to kill Hope:

> [THE PROSECUTOR]: . . . [Appellant] decided ahead of time what he was going to do. He made that phone call to Veronica, "Whatever happens, I'll love you," and had already accepted what he was going to do. He had already accepted his decision, and he was already emotionally detached from it. It was just something that had to be done in his mind because it was a way to get to his ultimate goal which was Veronica.

(9 RT 1734.)

It was the defense theory that appellant was guilty at most of manslaughter as to Hope, based on his unreasonable belief that he needed to defend himself when she came at him with a knife when they argued, and on his belief that she had engaged in witchcraft and put a spell on him. (4 RT 1263-1265, 8 RT 1691, 1696.) The jurors were instructed on the elements of manslaughter, as well as justifiable homicide in self-defense, as to count one (Hope). (10 CT 2777-2780, 2787-2796; Fourth Supp. CT 43-46, 53-62; 8 RT 1651-1654; 8 RT 1658-1661.)

C. There Was No Evidentiary Basis For Instructing the Jury That Appellant Had Made a Pre-Offense Statement Of Intent, Plan, Motive Or Design

"It is error to give an instruction which, while it correctly states a principle of law, has no application to the facts of the case. [Citation.]" (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1049-1050, citing *People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) Instructions not supported by substantial evidence should not be given. (*People v. Marshall* (1997) 15 Cal.4th 1, 39-40.) "Such an instruction tends to confuse and mislead the jury by injecting into the case matters which the undisputed evidence shows are not involved." (*People v. Jackson* (1954) 42 Cal.2d 540, 546-547.)

When evidence has been presented that a defendant did make a pre-

offense statement of intent, plan, motive or design, the defendant is entitled to have the jurors instructed sua sponte pursuant to CALJIC No. 2.71.7, which tells the jurors they must view such evidence with caution. Thus, for example, the instruction should be given when the prosecutor seeks to prove "that the criminal act was intentionally or willfully done" by relying on "testimony repeating the words purporting to come from the lips of the accused." (*People v. Lopez* (1975) 47 Cal.App.3d 8, 12, citations omitted.) The jurors' role is then to determine whether the defendant in fact made the statement attributed to him, and to view with caution the evidence that he did. (*People v. Beagle* (1972) 6 Cal.3d 441, 456 ["The purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made."].) Thus, in *People v. Lopez*, *supra*, 47 Cal.App.3d at p. 12, the court held that a defendant charged with assaulting a police officer and alleged to have made "pre-offense statements in the nature of admissions" – "Leave my brother alone . . . Do you want trouble?" – was entitled to a cautionary instruction.

Here, however, CALJIC No. 2.71.7 was objected to by the defense, was not supported by the evidence, and should not have been given. The only words attributed to appellant that the prosecutor cited in support of his request the instruction be given were, "No matter what happens, I'll always love you." (5 RT 1367 [Veronica's testimony]; 8 RT 1603 [the prosecutor's proffer].) This was not a statement of "intent, plan, motive or design." It was simply the classic lament of a man professing his eternal and unconditional love for a young woman who has told him she wants to end their relationship: even if Veronica really meant it this time when she said they were through, appellant would still love her; even if she took up with someone new, he would carry the torch. The eventuality – "no matter what

happens" – refers not to something appellant might do, but to what Veronica might do.

It is telling that Veronica herself, the only person who actually heard appellant utter the words at issue, did not find them threatening or foreboding. Her reaction was to simply hang up, with a dismissive and exasperated "whatever." (5 RT 1367.) Nor is there any evidence she thought the comment worthy of mention in her conversation with Hope later that evening. Given how close she repeatedly said she and Hope were, there can be little doubt that if she had thought appellant's comment foreshadowed trouble of any sort, she would have mentioned it. The prosecutor himself acknowledged that Veronica merely thought appellant's statement "was strange, but not strange enough that it alarmed her." (4 RT 1252.)

Appellant's statement is not the sort contemplated by CALJIC No. 2.71.7. It is plainly not comparable, for example, to a defendant's statement that he was going to the apartment of someone who owed him money, coupled with his request for bullets for the gun he had stolen in a prior burglary (*People v. Farmer* (1989) 47 Cal.3d 888, 919 [CALJIC No. 2.71.7 properly given because supported by substantial evidence]); or to a defendant's statements to an intended rape victim ordering her to "take off her clothes" and telling her "he would show her that he was a man" (*People v. Clem* (1980) 104 Cal.App.3d 337, 345 [CALJIC No. 2.71.7 properly given]); or even to a defendant's participation in a conversation with his accomplices regarding their plan to steal drugs (*People v. Rodriguez* (1994) 8 Cal.4th 1060, 1136-1137 [Same]). Appellant's statement to Veronica professing his unconditional love does not constitute substantial evidence of plan, intent, motive or design and thus did not support giving CALJIC No.

2.71.7.

Nor is there evidence of any other statement by appellant that would support giving CALJIC No. 2.71.7. Although the prosecutor represented, outside the presence of the jurors, that appellant had made a statement "about his (sic) mom being in the way" (8 RT 1603), and told the jurors in closing argument that appellant had said Veronica's mother was "getting in the way" (8 RT 1666), in fact no evidence was presented that appellant ever uttered those words. There is merely Veronica's testimony that appellant thought Hope had influenced her decision to break up with him, which Veronica denied was the case. (5 RT 1364.)[14] There was thus no evidentiary basis for giving CALJIC No. 2.71.7.

D. By Erroneously Giving CALJIC No. 2.71.7 the Trial Court Usurped the Jury's Role As Fact Finder and Lightened the Prosecutor's Burden To Prove Appellant Guilty Of At Least One Count Of First Degree Murder and One Count Of First Or Second Degree Murder

Where the error is that the court gave an instruction which, while correctly stating the law, had no application to the facts, the error is one of state law subject to the *Watson* test for prejudice. (*People v. Guiton*, *supra*, 4 Cal.4th 1116, 1129, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) Under the *Watson* standard of review, reversal is required if it is reasonably probable the jurors found the defendant guilty based on the inapposite theory. (*People v. Guiton*, *supra*, 4 Cal.4th at p.1129.) This determination is made based on an examination of the entire record. (*Id.* at p. 1130.)

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[14] The written instructions provided to the jurors properly instructed that "[s]tatements by the attorneys during the trial are not evidence." (10 CT 2738; Fourth Supp. CT 4; 8 RT 1639.)

However, a judicial error, even if made under state law, results in a federal due process violation if it makes the trial fundamentally unfair. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70; *People v. Partida* (2005) 37 Cal.4th 428, 439.) Federal constitutional error will not be found harmless unless the state can show beyond a reasonable doubt the error did not contribute to the verdict. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Here, both state and federal standards are met as it is highly probable the erroneously-given instruction contributed to at least one of the first degree murder verdicts.

Under CALJIC No. 2.71.7, the jurors' only role is to determine whether the defendant in fact made the statement attributed to him, not whether it was a statement of intent, plan, motive or design.[15] (*People v. Beagle*, *supra*, 6 Cal.3d at p. 456 ["The purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made"].) Thus, by giving CALJIC No. 2.71.7 the trial court effectively instructed the jurors that the statement Veronica had attributed to appellant – "No matter what happens, I'll always love you" – was *in fact* a declaration that he intended or planned to kill.

Yet, it should have been for the jurors to assess whether appellant's statement to Veronica evidenced "intent, plan, motive or design." The due process clause of the Fifth and Fourteenth Amendment and the Sixth

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[15] The Judicial Council of California Criminal Jury Instructions (CALCRIM) have eliminated separate instructions for confessions/ admissions (CALJIC No. 2.70) and statements of intent, plan, motive or design (CALJIC No. 2.71.7). Instead, the jury is currently given a single, cautionary instruction covering all statements made by a defendant, leaving it to the jurors to "consider the statement[s], along with all the other evidence, in reaching your verdict." (CALCRIM No. 358.)

Amendment right to a jury trial entitle appellant to a jury determination of every element of each offense charged. (*United States v. Gaudin* (1995) 515 U.S. 506, 522-523 [reversible error to refuse to allow jury to determine materiality of defendant's false statements]; *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 277 ["The [jury trial] right includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty'"]; *People v. Mendoza* (2000) 23 Cal.4th 896, 930-931 [right to jury determination of guilt of every element of crime charged]; *People v. Hedgecock* (1990) 51 Cal.3d 395, 409 ["in a perjury prosecution based on errors or omissions in disclosure statements required by the [Political Reform] Act [of 1974], materiality is an element of the offense, and must therefore be determined by the jury"]; *People v. Figueroa* (1986) 41 Cal.3d 714 [whether a note given to an investor was a "security" was a question for the jury].)

The error in taking the issue away from the jury was highly prejudicial. The prosecutor had the burden to prove appellant guilty of at least one count of first degree murder and one count of first or second degree murder, as multiple murder was the only special circumstance alleged. (10 CT 2797; Fourth Supp. CT 63 [CALJIC No. 8.80.1]; 10 CT 2772; Fourth Supp. CT 38 [CALJIC No. 8.20]; Pen. Code, §§ 187, 188, 189.) While the defense conceded appellant was guilty of murder as to Austin (but not the degree of murder), they maintained that as to Hope appellant was guilty at most of manslaughter. The evidence was sufficient to warrant instructing the jurors on the elements of manslaughter as to Hope. (See 10 CT 2777-2780, 2787-2796; Fourth Supp. CT 43-46, 53-62; 8 RT 1651-1654; 8 RT 1658-1661.) By giving CALJIC No. 2.71.7 the trial court lightened the prosecutor's burden to prove the element of malice

beyond a reasonable doubt as to Hope.

Giving CALJIC No. 2.71.7 also gave the prosecutor ammunition to argue to the jurors that appellant had "decided ahead of time what he was going to do," i.e., that both homicides were deliberate and premeditated. (9 RT 1734.) The prosecutor cited Veronica's testimony that appellant had said, "No matter what happens, I'll always love you," as evidence that appellant had "already decided he was going to kill . . . hours before Hope and Austin are murdered" (8 RT 1683), and had then gone to the Ragland residence "with a specific purpose and that purpose was to orphan Veronica" (8 RT 1679-1680).

Without the erroneous characterization of, "No matter what happens, I'll always love you," as a statement of advance planning, there was no admissible evidence appellant was guilty of murder as to Hope. None of the evidence, summarized in Argument I, above, supports such a finding. For example, the prosecutor's argument to the jurors that appellant must have planned to take Hope by surprise because he waited by the gate to the housing complex until someone opened it, instead of calling to be let in (8 RT 1669-1670), was undermined by Veronica's testimony that appellant sometimes did simply wait for the gate to open rather than call (5 RT 1380) and by the evidence that appellant was welcome at the Ragland household, even after his relationship with Veronica and Hope had soured (5 RT 1334, 1402, 1419).

The trial court's error in giving CALJIC No. 2.71.7 was highly prejudicial and cannot be said to be harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) Moreover, even under the *Watson* standard of review, reversal is required because it is reasonably probable a more favorable result would have been obtained had the jurors

not erroneously been instructed on an inapposite theory. (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1129.)

E. Conclusion

The court's erroneous instruction pursuant to CALJIC No. 2.71.7 that appellant had made a pre-offense statement of intent, plan, motive or design deprived appellant of his state and federal constitutional right to due process and a jury trial on every element of the charges against him, lightened the prosecutor's burden to prove either at least one count of first degree murder and one count of first or second degree murder and deprived appellant of his right to be free from cruel and unusual punishment and to heightened reliability in a capital case. Reversal of the conviction, special circumstance finding and the sentence of death is therefore required.

III.

THE TRIAL COURT ERRED PREJUDICIALLY AT THE PENALTY PHASE BY DECLINING TO GIVE EXCLUSIVELY CALCRIM INSTRUCTIONS AND REFUSING TO GIVE SPECIALLY-DRAFTED INSTRUCTIONS THAT WERE LEGALLY MANDATED

A. Introduction

At the penalty phase of appellant's trial defense counsel requested the court give exclusively CALCRIM instructions, which had become effective January 1, 2006, rather than CALJIC instructions, as were given at the guilty phase. (12 RT 1761, 1766.) Defense counsel had also submitted three specially-drafted instructions, each of which was required to be given and had been incorporated into CALCRIM No. 763. (5 RT 1415-1416; 11 CT 2963-2965.)

Although the trial court had informed counsel at the guilt phase that it was willing to give either CALJIC or CALCRIM instructions but would not "mix and match" them (5 RT 1415-1416), it denied defense counsel's request to use exclusively CALCRIM instructions at the penalty phase, even though, as defense counsel pointed out, the jury would be instructed to ignore the CALJIC instructions given at the guilty phase. (10 RT 1762, 1768; see 11 CT 2947; 4 Supp. CT 92 [CALJIC 8.84.1].) The court also independently refused to give any of the three specially-drafted instructions. (11 CT 2693-2695.)[16]

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[16] Although the court was not precluded from using CALJIC instructions, at the time of appellant's trial CALCRIM, the jury instructions approved by the California Judicial council, were, and remain, the official instructions for use in California and are recommended unless different

(continued...)

The trial court's refusal to give the instructions requested deprived appellant of his rights to due process, a fair trial by jury and fair and reliable penalty determinations as guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, and by the analogous provisions of the California Constitution.

B. The Court Erred In Refusing To Give Exclusively CALCRIM Instructions

At the penalty phase defense counsel requested the court instruct the jury entirely with CALCRIM instructions, rather than CALJIC instructions, noting the jury would be instructed to disregard the instructions given at the guilt phase. (10 RT 1762; see 11 CT 2947; 4 Supp. CT 92 [CALJIC 8.84.1].) The court erred in denying counsel's request to give these instructions, which would more accurately have guided the jurors in their sentencing task. CALCRIM No. 766, in particular, which modified CALJIC No. 8.88, would correctly have instructed the jurors that their task was both to weigh the aggravating and mitigating circumstances and to determine "which penalty is appropriate and justified by considering all the evidence and the totality of any aggravating and mitigating circumstances." (CALCRIM No. 766.)

At the time of appellants trial, the last sentence of paragraph four of CALJIC No. 8.88 read:

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants

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[16](...continued)
instructions "would more accurately sate the law and be understood by the jury." (Cal. Rules of Court, Rule 2.1050, subds. (a) and (e); former Cal. Rules of Court, Rule 855, subd. (e).)

death instead of life without parole.

(11 CT 2956-2957; 4 Supp. CT 101; 12 RT 2266 [CALJIC 8.88].) In implicit recognition of this deficiency, CALCRIM No. 766 modified CALJIC No. 8.88 to provide in pertinent part:

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances *both outweigh* the mitigating circumstances *and* are also so substantial in comparison to the mitigating circumstances *that a sentence of death is appropriate and justified.*

(CALCRIM No. 766, italics added.)

Moreover, as noted in Argument IV.D.1., below, unlike CALCRIM No. 766, none of the instructions given in this case informed the jurors that the central determination in the weighing exercise was whether the death penalty was the "appropriate and justified" sentence for appellant – rather than one that was "warranted" in his case. The ultimate question in the penalty phase of any capital case in fact is whether death is the *appropriate* penalty. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1037.) Moreover, to satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; *i.e.*, it must be appropriate. This Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown* (1985) 40 Cal.3d 512, 541 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; accord, *People v. Champion* (1995) 9 Cal.4th 879, 948; *People v. Milner* (1988) 45 Cal.3d 227, 256-257; see also *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d

926, 962.) CALJIC 8.88 did not make clear this standard of appropriateness.

A rational juror could have found that death was warranted, but not appropriate, because the meaning of "warranted" is broader than that of "appropriate." *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001) defines the verb "warrant" as, *inter alia*, "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found such a sentence was permitted. That is far different from the finding the jury is required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

The instructional error involved in using the term "warrants" was not cured by the earlier reference in CALJIC No. 8.88 to a "justified and appropriate" penalty. (11 CT 2956-2957; 4 Supp. CT 101; 12 RT 2266 [CALJIC 8.88] ["In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate . . . ."].) That sentence did not tell the jurors they could only return a death verdict if they found it appropriate. Moreover, the sentence containing the words "justified and appropriate" was prefatory in effect and impact; the operative language, delineating the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors that to return a sentence of death they must be persuaded "that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it *warrants* death instead of life without parole." (11 CT 2956-2957; 4 Supp. CT 101; 12 RT 2266 [CALJIC 8.88],

italics added.)

The court's failure to give CALCRIM instructions erroneously allowed the jury to impose a death judgment without first reliably determining that death was the appropriate penalty as required by the Eighth and Fourteenth Amendments and by state law. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) The judgment of death must be reversed.

C. The Trial Court Erred Prejudicially In Refusing To Give Any Of the Three Specially-Drafted Instructions Requested By the Defense

Independent of the trial court's failure to give exclusively CALCRIM instructions, the court erred in refusing to give defense counsel's three specially-drafted instructions, all of which had been incorporated into CALCRIM No. 763, were supported by the evidence and were legally required to be given. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604; *People v. Hillhouse* (2002) 27 Cal.4th 469, 509; *People v. Melton* (1988) 44 Cal.3d 713, 788.) Moreover, the requested instructions would have helped guide the jurors' deliberations in accordance with the defense goal of eliciting sympathy for appellant and would have precluded the jury considering in aggravation factors not legally permitted to be considered as such.

1. Sympathy Or Compassion For the Defendant

First, the defense requested the jury be instructed that it could consider sympathy or compassion for appellant. (11 CT 2963.) CALCRIM No. 763 correctly expanded the instruction on sentencing factor (k) to include: "In reaching your decision, you may consider sympathy or compassion for the defendant . . . ." None of the CALJIC instructions given so instructed the jury. Yet both federal and state law establish that a capital

jury must be instructed to consider any mitigating evidence, including sympathy for the defendant. (*Lockett v. Ohio*, *supra*, 438 U.S. at pp. 604-605; *People v. Benson* (1990) 52 Cal.3d 754, 799; *People v. Easley* (1983) 34 Cal.3d 858, 876.) This Court made clear in *People v. Lanphear* (1984) 36 Cal.3d 163 that the jury must be permitted to consider sympathy for the defendant. (*Id.* at pp. 167-168 ["Inconsistent and ambiguous instructions" did not make clear to the jury "its option to reject death if the evidence aroused sympathy or compassion"].)

Moreover, the Eighth and Fourteenth Amendments require a jury to consider "any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) Relevant mitigating evidence encompasses the "compassionate or mitigating factors stemming from the diverse frailties of humankind." (*McCleskey v. Kemp* (1987) 481 U.S. 279, 304, quoting *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) It includes both "mitigating aspects of the crime" (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 245; see also *Roberts v. Louisiana* (1977) 431 U.S. 633, 637 (per curiam)), and "mitigation that is unrelated to the crime." (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 605.)

The constitutional requirement that a jury consider mitigating evidence is not satisfied by mere introduction of evidence; jury consideration of mitigating evidence must be ensured through proper instructions. "In the absence of jury instructions . . . that would clearly direct the jury to consider fully [defendant's] mitigating evidence as it bears on his personal culpability, we cannot be sure that the jury was able to give effect to the mitigating evidence . . . ." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 323; see also *Mills v. Maryland* (1988) 486 U.S. 367, 374-375;

Hitchcock v. Dugger (1987) 481 U.S. 393.) As this Court observed in *People v. Gordon* (1990) 50 Cal.3d 1223: "[U]nder *Lockett v. Ohio* [*supra*] and its progeny . . . [defendant] . . . had a right to 'clear instructions which not only do not preclude consideration of mitigating factors . . . but which also "guid[e] and focu[s] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender . . . ."'" (*Id.* at p. 1277, citations omitted.)

Here appellant was entitled to have the jurors instructed they could consider sympathy and compassion in deciding whether to sentence him to death. The instruction would have focused the jury's attention on the mitigating evidence presented, through appellant's relatives and friends, regarding his impoverished background, innocent character and good conduct, consistent with the theory of the defense at the penalty phase.

2. Non-statutory Aggravating Circumstances

Defense counsel also requested the jurors be instructed they could not consider as an aggravating circumstance anything other than the factors set out in the list of sentencing factors. (11 CT 2964.) Appellant was legally entitled to this instruction. (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 509; *People v. Gordon*, *supra*, 50 Cal.3d at p. 1275, fn. 14.) Here, the instruction requested would have clarified, for example, that what the prosecutor referred to as appellant's "normal" behavior *after* the homicides could not be considered a factor in aggravation. (12 RT 2274.) None of the CALJIC instruction given so stated; the instruction is incorporated in CALCRIM No. 763:

> [You may not consider as an aggravating factor anything other than the factors contained in this list that you conclude are aggravating in this case. You must not take into account any other facts or circumstances as a basis for imposing the

death penalty.]

(CALCRIM No. 763.)[17]

3. Double Counting

Finally, defense counsel requested the jurors be instructed that a factor could not be considered both a "special circumstance" and a "circumstance of the crime." (11 CT 2965.) None of the CALJIC instructions given prohibited double counting, leaving the jury free to consider the fact that appellant had been convicted of two counts of murder as both a special circumstance (multiple murder) and a circumstance of the crime under sentencing factor (a). Yet appellant was legally entitled to an instruction prohibiting such double counting. (*People v. Melton*, *supra*, 44 Cal.3d at p. 788.) CALCRIM No. 763 includes such an instruction:

> [Even if a fact is both a "special circumstance" and also a "circumstance of the crime," you may consider that fact only once as an aggravating factor in you weighing process. Do not double count that fact simply because it is both a "special circumstance" and a "circumstance of the crime."]

(CALCRIM No. 763.)[18]

In sum, at the time of appellant's trial all three of the specially-drafted instructions requested by defense counsel were legally required to be given, were encompassed by CALCRIM No. 763 and were not covered

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[17] The Authority and Commentary to CALCRIM No. 763 state that the trial court is required on request to instruct the jury to consider only the aggravating factors listed. (Authority and Commentary, CALCRIM No. 763, citing *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 509; *People v. Gordon*, *supra*, 50 Cal.3d at p. 1275, fn. 14.)

[18] The Instructional Duty section of CALCRIM No. 763 provides that this instruction must be given on request, citing *People v. Melton*, *supra*, 44 Cal.3d at p. 788.

by any of the CALJIC instructions given. The trial court erred in denying defense counsel's request to give these instructions.

D. The Court's Erroneous Refusal To Give the Instructions Requested By the Defense Violated Appellant's Right To Due Process and To a Reliable Sentencing Determination

Allowing the decision of life or death to turn on deficient or erroneous sentencing criteria is inconsistent with the degree of reliability required by the Eighth Amendment:

> The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case.

(*Mills v. Maryland*, *supra*, 486 U.S. at pp. 383-384.)

Moreover, when state law gives the jury a role in sentencing, the defendant has a liberty interest, protected under the due process clauses of the Fifth and Fourteenth Amendments, in having the sentence imposed by a jury accurately informed concerning the scope of their sentencing function under state law. (*Hicks v. Oklahoma*, *supra*, 447 U.S. 343; see also *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300-1301; *Fetterly v. Paskett* (9th Cir. 1994) 15 F.3d 1472, 1479-1481 (conc. opn. of Trott, J.).) The requested instructions were proffered as a means of "guid[ing] and focus[ing] the jury's objective consideration of the particularized circumstances of the . . . individual offender . . . ." (See *People v. Gordon*, *supra*, 50 Cal.3d at p. 1277, quoting *Spivey v. Zant* (5th Cir. 1981) 661 F.2d 464, 471.)

Further, while the due process clause does not generally compel any

specific instruction in criminal cases, it does "speak to the balance of forces between the accused and his accuser." (*Wardius v. Oregon* (1973) 412 U.S. 470, 474.)

Failing to give the requested instructions was prejudicial. There is a reasonable probability that, because the CALCRIM and other specially-drafted instructions were not given, the jurors did not understand that their fundamental role was to determine the appropriate sentence for appellant, did not give full mitigating weight to the evidence presented regarding appellant's background and good character, considered non-statutory aggravating circumstances and/or double counted the multiple murder special circumstance as a circumstance of the crime. (*People v. Brown* (1988) 46 Cal.3d 432, 463.) Had the jury been instructed in accordance with CALCRIM, or minimally the three specially-drafted instructions requested by the defense, there is a reasonable possibility of a different verdict. Accordingly, the trial court's refusal to give requested instructions was not harmless beyond a reasonable doubt and requires the reversal of the death judgment. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

IV.

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

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

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

A. Penal Code Section 190.2 Is Impermissibly Broad

To pass constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few murder cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) Meeting this criterion requires a state to genuinely narrow, by rational and objective criteria, the class of

murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, Penal Code section 190.2 listed 22 special circumstances which in total made 33 factually distinct murders eligible for the death penalty.

Given this large number of special circumstances, California's statutory scheme failed to identify the few cases in which the death penalty might have been appropriate, and instead made almost everyone convicted of first degree murder eligible for the death penalty. This Court has routinely rejected these challenges to the statute's lack of meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme because they are so over-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application Of Penal Code Section 190.3(a) Violated Appellant's Constitutional Rights

Penal Code section 190.3, factor (a), directed appellant's jurors to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 11 CT 2948-2949; Fourth Supp. CT 93-94; 12 RT 2264.) In capital cases throughout California prosecutors have urged juries to weigh in aggravation almost every conceivable circumstance of a crime, even those that, from case to case, are starkly opposite. In addition, prosecutors use factor (a) to embrace the entire spectrum of factual circumstances inevitably present in any homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the alleged motive for the

killing, the location of the killing, and the impact of the crime on the victim's surviving relatives.

Here, the centerpiece of the prosecutor's case in aggravation was the impact of the homicides on Veronica and Marion. The prosecutor also repeatedly reminded the jurors – both in his cross-examination of defense correctional consultant James Esten and in his closing argument – that Hope and Austin had been stabbed multiple times. (12 RT 2253; e.g., 12 RT 2268, 2271, 2284, 2290, 2291.) The prosecutor also stressed that the victims' age – Hope was a "grandmother" and Austin was only a "boy" – should be considered in aggravation. (12 RT 2268, 2275, 2281, 2283, 2290 [a "little" boy].)

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 7494 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factor" has been applied in such a random and arbitrary manner that almost every feature of every murder can be and has been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jurors to assess death upon no basis other than that the particular set of circumstances surrounding the murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware this Court has repeatedly rejected the claim that permitting the jurors to consider the "circumstances of the crime" within the

meaning of Penal Code section 190.3, factor (a), results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Appellant urges the Court to reconsider this holding.

C. California's Death Penalty Statute and the CALJIC Instructions Given In This Case Failed To Set Forth the Appropriate Burden Of Proof and the Requirement Of Unanimity

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

California law does not require, and at the time of the offense charged against appellant did not require, that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (CALJIC Nos. 8.86 and 8.87; *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, the trial court denied appellant's counsel's request that the following instruction be given at the penalty phase: "In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People *to prove beyond a reasonable doubt* every element of the charge against him . . . ." (11 CT 2960.) The jurors were not told they had to find beyond a reasonable doubt either the existence of any aggravating circumstances or that the aggravating circumstances outweighed the mitigating circumstances, before determining whether or not to impose a death

sentence. (11 CT 2956-2957; Fourth Supp. CT 101; 12 RT 2265-2266 [CALJIC No. 8.88].)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604 and *Cunningham v. California* (2007) 549 U.S. 270, now require that any fact used to support an increased sentence (other than a prior conviction) be submitted to the jurors and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jurors had to first make several factual findings: (1) that aggravating circumstances were present; (2) that the aggravating circumstances outweighed the mitigating circumstances; and (3) that the aggravating circumstances were so substantial as to make death an appropriate punishment. (11 CT 2956-2957; Fourth Supp. CT 102; 12 RT 2265-2266 [CALJIC No. 8.88].) Because these additional findings were required before the jurors could impose the death sentence, *Apprendi*, *Blakely*, *Ring*, and *Cunningham* require that each of these facts be found, by the jury, to have been established beyond a reasonable doubt. The court failed to so instruct the jurors in this case and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on another ground by *People v. Breverman* (1998) 19 Cal.4th 142, 149; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is aware this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson*, *supra*, 25 Cal.4th at p. 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595, disapproved on another ground in *People v. Riccardi* (2012) 54 Cal.4th

758, 819-821). The Court has rejected the argument that *Apprendi* and *Ring* impose a reasonable doubt standard on California's penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant also contends due process and the prohibition against cruel and unusual punishment mandate that the jurors in a capital case be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected the claim that either the Fourteenth Amendment or the Eighth Amendment requires the jurors be instructed that to return a death sentence it must find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances and that death is the appropriate penalty. (*People v. Blair*, *supra*, 36 Cal.4th at p. 753.) Appellant requests the Court reconsider this holding.

2. Some Burden Of Proof Should Have Been Required, Or the Jurors Should Have Been Instructed That There Was No Burden Of Proof

Evidence Code section 520, which provides that the prosecution always bears the burden of proof in a criminal case, creates a legitimate expectation as to the way a criminal prosecution will be decided under state law, and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346 [defendant constitutionally entitled

to procedural protections afforded by state law].) Accordingly, appellant's jurors should have been instructed, but were not, that the state had the burden of persuasion regarding the existence of any and all circumstances in aggravation, the determination whether aggravating circumstances outweighed mitigating circumstances, and the appropriateness of the death penalty, and that it was presumed life without parole was the appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given in this case (11 CT 2948-2949, 2956-2957; Fourth Supp. CT 93-94, 102), failed to provide the jurors with the guidance legally necessary for the imposition of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. The prosecutor in turn argued there was no burden of proof at the penalty phase, thereby exacerbating the problem. (12 RT 2272.) This Court has held capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal constitution and therefore urges the Court to reconsider its decisions in *Lenart* and *Arias*.

3. Appellant's Death Verdict Was Not Premised On Unanimous Jury Findings Regarding Aggravating Circumstances

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jurors, ever found a single set of aggravating circumstances that

rendered death the appropriate penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating circumstances is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona*, *supra*, 536 U.S. 584. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

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

The failure to require appellant's jurors to unanimously find any and all aggravating circumstances were established also violated the equal protection clause of the Fourteenth Amendment. In California, when a criminal defendant has been charged with certain special allegations that may increase the severity of his sentence, the jurors must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Because capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than to a capital defendant violates the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating

circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), by its inequity violates the equal protection clause of the Fourteenth Amendment and by its irrationality violates both the Fourteenth Amendment due process clause and Eighth Amendment cruel and unusual punishment clause, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal constitution.

D. California's Death Penalty Statute and the CALJIC Instructions Given In This Case On Mitigating and Aggravating Circumstances Violated Appellant's Constitutional Rights

1. The Instructions Given Failed To Inform the Jurors That the Central Sentencing Determination Is Whether Death Is the Appropriate Penalty

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 did not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same. (11 CT 2956; Fourth Supp. CT 102.) As explained more fully in Argument III.B., above, defense counsel requested that at the penalty phase the court to give exclusively CALCRIM instructions (10 RT 1766), which would have included CALCRIM No. 766, which conforms with the constitutional standard by instructing the jurors to

determine "which penalty is appropriate and justified." (CALCRIM No. 766.) The court refused. (12 RT 1766.)

The Court has previously rejected this challenge to CALJIC No. 8.88. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) If this Court rejects the argument set forth in Argument III.B., above, appellant urges this Court to reconsider that ruling.

2. The Use Of Adjectives In the List Of Potential Mitigating Circumstances Is Impermissibly Restrictive

The inclusion in the list of potential mitigating circumstances of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; Pen. Code, § 190.3, subd. (g); 11 CT 2948; Fourth Supp. CT 93; 12 RT 2264) impeded the jurors' consideration of mitigation, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. at p. 384; *Lockett v. Ohio, supra*, 438 U.S. at p. 604.) Appellant is aware the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

3. The Instructions Caused the Penalty Determination To Turn On An Impermissibly Vague and Ambiguous Standard

The question whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances [were] so substantial in comparison with the mitigating circumstances that it warrant[ed] death instead of life without parole." (11 CT 2956-2957; Fourth Supp. CT 102; 12 RT 2266 [CALJIC No. 8.88].) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to

minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violated the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright*, *supra*, 486 U.S. at p. 362.)

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

4. The Jurors Should Not Have Been Instructed On Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case because no evidence was presented to support them – specifically, factor (d) ("Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance"), factor (e) ("Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act"), and factor (h) ("Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication"). (11 CT 2948-2949; Fourth Supp. CT 93-94; 12 RT 2264-2265.) The trial court failed to omit those factors from the jury instructions (*ibid.*), likely confusing the jurors and preventing them from making a reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook* (2006) 39 Cal.4th 566, 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury instructions.

5. The Jurors Should Have Been Instructed That Statutory Mitigating Circumstances Were Relevant Solely As Potential Mitigation

In accordance with customary state court practice, nothing in the instructions given in appellant's case advised the jurors which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jurors' appraisal of the evidence. (11 CT 2948-2949; Fourth Supp. CT 93-94; 12 RT 2264-2265.) This Court has upheld this practice. (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigating circumstances. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289.) Appellant's jurors were not instructed that a "not" answer as to any of these "whether or not" sentencing factors did not establish an aggravating circumstance. Consequently, the jurors were free to aggravate appellant's sentence based on non-existent or irrational aggravating circumstances, precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, appellant asks the Court to reconsider its holding that the court need not instruct the jury that certain sentencing factors are only relevant as potential mitigation.

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

Penal Code section 190.3 directs the jury in a capital case to impose

a sentence of life imprisonment without possibility of parole if the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required by the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Here, the trial court gave CALJIC No. 8.88, which did not address this proposition, but only informed the jurors of the circumstances that permitted the rendering of a death verdict. (11CT 2956-2957; Fourth Supp. CT 102; 12 RT 2265-2266.) Because it fails to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that because CALJIC No. 8.88 tells the jurors that death can be imposed only if they find aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be appropriate, but failing to explain when a life without possibility of parole verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon*, *supra*, 412 U.S. at p. 473-474.)

7. The Instructions Given Erroneously Precluded the Jurors From Considering Sympathy For Appellant's Family and Limited Their Consideration Of the Impact His Execution Would Have On Them

The jurors in this case were instructed, pursuant to CALJIC No. 8.85, factor (k), that they could not consider sympathy for appellant's family as a factor in mitigation and should disregard evidence of the impact of appellant's execution on his family unless it "illuminate[d] some positive quality of the defendant's background or character." (11 CT 2948-2949; Fourth Supp. CT 93-94; 12 RT 2265.) Counsel argued accordingly: the prosecutor told the jurors they could not consider sympathy for appellant's family (12 RT 2281-2282), and defense counsel explained they could consider execution impact evidence to the extent it illuminated appellant's own character and background (12 RT 2309-2311).

The prohibition against the jurors' consideration of sympathy for defendant's family and the limitation on its consideration of the impact appellant's execution would have on them deprived appellant of his Eighth and Fourteenth Amendment right to have the jurors consider "as a mitigating factor, any aspect of a defendant's character or record *and any of the circumstances of the offense* that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 604, italics added; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112-114.) A defendant need not demonstrate a nexus between the mitigating circumstances and the crime. (*Tennard v. Dretke* (2004) 542 U.S. 274, 289; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5.) The "threshold of relevance" for admitting mitigation is low. (*Tennard v. Dretke*, *supra*, 542 U. S. at p. 285.) Thus, a state cannot bar "'the consideration of . . .

evidence if the sentencer could reasonably find that it warrants a sentence less than death.'" (*Ibid.*, quoting *McKoy v. North Carolina*, *supra*, 494 U.S. at p. 441; see also *People v. Gonzales* (2012) 54 Cal.4th 1234, 1287.) Under this standard, appellant's jurors should not have been precluded from considering sympathy for appellant's family or have been limited in their consideration of the impact of appellant's execution.

Considerations of fairness and parity, under the due process clause, further support a capital defendant's entitlement to have the jurors consider sympathy for his family and the impact of his execution on them. In *Payne v. Tennessee* (1991) 501 U.S. 808, in which the Supreme Court held that testimony as to the impact of a murder on the victim's family was relevant and admissible in aggravation, the underlying premise of the majority opinion is that capital sentencing requires an even balance between evidence available to the defendant and evidence available to the state. (*Id.* at pp. 820-826.) In his concurring opinion, Justice Scalia explicitly noted that because the Eighth Amendment required the admission of all mitigating evidence on the defendant's behalf, it could not preclude victim impact evidence because "the Eighth Amendment permits parity between mitigating and aggravating factors." (*Id.* at p. 833.) Parity means that if the state may introduce victim impact and sympathy evidence, the defendant should not be precluded from introducing comparable evidence.

The instruction given in appellant's case prohibiting the consideration of sympathy for his family and limiting the consideration execution impact evidence is also inconsistent with Penal Code section 190.3, which provides in pertinent part that: "In the proceedings on the question of penalty, evidence may be presented by both the people *and the defendant* as to *any* matter relevant to aggravation, mitigation *and sentence*,

. . . ." (Pen. Code, § 190.3, italics added.) The impact of the defendant's execution on his family, as such, is relevant to the "sentence." Because CALJIC No. 8.85 fails to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

Appellant recognizes this Court has upheld the giving of the instruction appellant challenges here. (*People v. Ochoa* (1999) 19 Cal.4th 353, 454-456; *People v. Bemore* (2000) 22 Cal.4th 809, 855-856.) Appellant urges the Court to reconsider its analysis. For one thing, while the Supreme Court's decision in *Payne* predated this Court's decisions in *Ochoa* and *Bemore*, the trials in *Ochoa* and *Bemore* occurred before *Payne* was decided; thus the juries in those cases were not permitted to consider *either* sympathy for the victim's family, *or* sympathy for the family of the defendant. (*People v. Ochoa*, *supra*, 19 Cal.4th, at pp. 454-455, fn. 9; *People v. Bemore*, *supra*, 22 Cal.4th at p. 856, fn. 21.) Thus, the parity concerns addressed in *Payne* were not implicated. In any event, appellant maintains *Ochoa* and *Bemore* were wrongly decided as a matter of federal constitutional law and urges their reconsideration.

8. The Jurors Should Have Been Instructed On the Presumption That Life Without Possibility Of Parole Was the Appropriate Sentence

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) At the penalty phase of a capital case, the presumption that life without possibility of parole is the appropriate penalty is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty

phase, there is no statutory requirement that the jury be instructed as to the presumption that life without possibility of parole is the appropriate sentence. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jurors that the law favors life and presumes the sentence of life imprisonment without possibility of parole to be the appropriate sentence violated appellant's Eighth Amendment right to be free from cruel and unusual punishment and to have his sentence determined in a reliable and non-arbitrary manner, and his Fourteenth Amendment right to due process and the equal protection of the laws.

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

E. Failing To Require the Jurors To Make Written Findings Violated Appellant's Right To Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), the jurors in this case were not required to make any written findings at the penalty phase of the trial. The failure to require written or other

specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments, as well as his right to meaningful appellate review to ensure the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook*, *supra*, 39 Cal.4th at p. 619.) Appellant urges the Court to reconsider its decisions on the necessity of written findings.

F. The Prohibition Against Intercase Proportionality Review Guarantees Arbitrary and Disproportionate Imposition Of the Death Penalty

California's capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between appellant's and other similar cases regarding the relative proportionality of the sentence imposed, i.e., intercase proportionality review. (*People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct intercase proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or in violation of the defendant's right to equal protection or to due process. For this reason, appellant urges the Court to reconsider its failure to require intercase proportionality review in capital cases.

G. California's Capital Sentencing Scheme Violates the Equal Protection Clause

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

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating circumstances must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rules 4.421 and 4.423.) At the penalty phase of a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges the Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but asks the Court to reconsider them.

H. California's Imposition Of the Death Penalty As a Regular Form Of Punishment Falls Short Of International Norms

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

V.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINE THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Even if this Court were to conclude that none of the errors in this case was sufficiently prejudicial, by itself, to require reversal of appellant's conviction or death sentence, the cumulative effect of the errors that occurred below nevertheless requires reversal of appellant's conviction and sentence. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may "so infect[] the trial with unfairness" as to violate due process and require reversal. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303; *Estelle v. McGuire. supra*, 502 U.S. at p. 72; *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927-928 [principle that cumulative errors may violate due process is "clearly established" by Supreme Court precedent]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error]; *People v. Hill* (1998) 17 Cal.4th 800, 844-845 [reversing guilt and penalty judgments in capital case for cumulative prosecutorial misconduct].)

The death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1243-1244 [cumulative effect of penalty phase errors prejudicial under state or federal constitutional standards]; *People v. Brown, supra*, 46 Cal.3d at p. 463 [applying reasonable possibility standard for reversal based on cumulative error].)

In this case, as set out in Argument I., above, appellant's conviction must be reversed because the trial court failed to suppress his confession, which appellant gave without knowingly and intelligently waiving his *Miranda* rights. The court also erroneously instructed the jury, pursuant to CALJIC No. 2.71.7 (Argument II., *ante*), that appellant had made a pre-offense statement of intent, plan, motive or design. Together these errors led the jurors to believe appellant had planned in advance to kill and then carried out his plan. These errors, alone or in combination, require reversal of appellant's conviction and adversely affected the jury's sentencing determination.

These errors were in turn exacerbated by the trial court's erroneous refusal, at the penalty phase, to give exclusively CALCRIM instructions, including CALCRIM No. 766, which instructs the jurors that their ultimate sentencing task is to determine the appropriate penalty, or any of the three specially-drafted instructions, all of which were legally mandated and would properly have instructed the jurors that they could consider sympathy for appellant, could not consider non-statutory aggravating circumstances, and were not to double count the multiple murder special circumstance as a circumstance of the crime (Argument III., *ante*). Numerous defects in California's death penalty statute and the CALJIC instructions given (Argument IV., *ante*) further warrant relief.

In this way, the errors at the guilt phase and the penalty phase – even if individually not found to be prejudicial – preclude the possibility that the jury reached an appropriate verdict in accordance with the state death penalty statute or the federal constitutional requirements of a fundamentally fair, reliable, non-arbitrary and individualized sentencing determination. Reversal of the death judgment is mandated because it cannot be shown that

the errors, individually, or collectively, had no effect on the penalty verdict. (See *Hitchcock v. Dugger*, *supra*, 481 U.S. at p. 399; *Skipper v. South Carolina*, *supra*, 476 U.S. at p. 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.) The cumulative effect of all of the errors set out herein requires a reversal of appellant's conviction and special circumstance finding as well.

VI.

THE $10,000 RESTITUTION FINE THE TRIAL COURT IMPOSED, WITHOUT ADDRESSING THE SUBJECT IN OPEN COURT IS EXCESSIVE, WARRANTING MODIFICATION OR REMAND

A. Introduction

When the trial court sentenced appellant to death it also ordered him to pay a $10,000 restitution fine, without addressing the issue of restitution in open court. (3 Supp. CT 4.)[19] Appellant was thus denied the right, under Penal Code section 1202.4, to demonstrate that his indigency and lack of meaningful future earning potential as an inmate on Death Row rendered him unable to pay any fine greater than the then-applicable $200 statutory minimum. Appellant requests this Court modify the restitution fine to $200 or, if the Court does not reverse appellant's conviction or sentence, remand the cause for a proper determination of the amount of restitution in light of his inability to pay.

B. The Trial Court Failed To Address the Issue Of Restitution In Open Court

The Minute Order for May 12, 2006, memorializes the court's sentencing order: life without possibility of parole, on count one (the murder of Hope Ragland); death, on count two (the murder of Austin Perez); and life with the possibility of parole, plus four years imprisonment, on count three (the attempted murder of Marion Ragland). (3 Supp. CT 3-4.)

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[19] Appellant was also ordered to pay a $10,000 parole revocation fine, which was suspended pending revocation of parole (on count three, for which appellant was sentenced to life with the possibility of parole). (3 Supp. CT 4.) Although appellant is not currently obligated to pay this fine, the arguments set out here with respect to the restitution fine apply with equal force to the parole revocation fine.

In addition, the May 12, 2006, Minute Order states:

> Pay restitution Fine pursuant to 1202.4(b) PC in the amount of $10000.00. (PRISON)
>
> Pursuant to section 2085.5 PC, Division of Adult Institutions is authorized to collect restitution Obligations.
>
> Additional Parole Revocation fine imposed pursuant to 1202.45 PC in the amount of $10000 suspended unless parole is revoked. (PRISON)

(3 Supp. CT 4.)[20]

However, the Reporter's Transcript of the proceedings conducted in open court on May 12, 2006, is silent on the issue of restitution. The transcript for that day begins with the trial court's consideration and denial of appellant's automatic motion, pursuant to Penal Code section 190.4, subdivision (e), for modification of the death sentence. (12 RT 2335-2339.) Then appellant's mother, Amelia Leon (12 RT 2339-2340), and Veronica, each addressed the court (12 RT 2340-2343). Finally, the court turned to the imposition of sentence, addressing counts one, two and three, the enhancements on count three and the special circumstance allegation. (12 RT 2343-2347.) The court concluded by ordering that appellant be remanded to the custody of the Sheriff for transportation to San Quentin State Prison. (12 RT 2347-2348.) There is no mention by anyone – the court or counsel – of restitution.[21]

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[20] Appellant was not ordered to pay victim restitution.

[21] Nor is restitution mentioned on the record in open court on any other occasion.

C. The Restitution Fine Should Be Modified To $200 In Light Of Appellant's Inability To Pay Any Greater Fine Or, If Necessary, the Issue Of Restitution Should Be Remanded For Redetermination

The version of Penal Code section 1202.4, subdivision (b), in effect at the time of appellant's offense required the trial court to impose a restitution fine of at least $200 but not more then $10,000, absent "compelling and extraordinary reasons." (Pen. Code, § 1202.4, subd. (b).) Subdivision (d) further provided that "in setting the amount of the fine pursuant to subdivision (b) in excess of the . . . minimum, the court *shall consider* any relevant factors, *including*, but not limited to, *the defendant's inability to pay* . . . ." (Pen. Code, § 1202.4, subd. (d), italics added.) As provided by Penal Code section 2085.5, subdivision (a), the Department of Corrections and Rehabilitation deducts "a minimum of 20 percent or the balance owing on the fine amount, whichever is less, up to a maximum of 50 percent from the wages and trust account deposits of a prisoner . . . ." (Pen. Code, § 2085.5, subd. (a).)[22]

Here the court failed to make any inquiry in open court of appellant or his counsel as to appellant's "inability to pay" a restitution fine greater than $200, much less a fine of $10,000. Had the court conducted such an inquiry appellant would have established that he did not and would not have the ability to pay any fine greater than the $200 minimum, for at least two reasons.

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[22] As a practical matter, this means that whenever a friend or relative of appellant's deposits so much as $25 to appellant's trust account for him to use to buy toiletries, stamps or food items at the prison "Canteen," up to half of the amount is deducted from the trust account toward payment of the $10,000 restitution fine.

First, appellant was indigent, as evidenced by the trial court's appointment of counsel (Riverside County Deputy Public Defender) at state expense. (1 RT 2.)

Second, as a condemned inmate on Death Row at San Quentin, appellant would have virtually no opportunity to work, much less to ever earn a sum even approaching $10,000. (See Pen. Code, § 2933.2 ["any person convicted of murder, as defined in Section 187, shall not accrue any [worktime] credit"]; *In re Barnes* (1985) 176 Cal.App.3d 235, 239 [Department of Corrections and Rehabilitation gives lowest priority for work assignments to condemned prisoners and prisoners in security housing units]; see also Pen. Code, § 2933, subd. (b) [a prisoner's "reasonable opportunity to participate" in work programs "must be consistent with institutional security and available resources"].) Thus, appellant was legally indigent at the outset, and, having been sentenced to death, would effectively remain so.

This case is distinguishable from *People v. Gamache* (2010) 48 Cal.4th 347, in which this Court rejected a capital defendant's challenge to a restitution order. First, the Court in *Gamache* found the defendant's challenge was forfeited for want of an objection at trial. (*Id.* at p. 409.) Here, defense counsel were not afforded an opportunity to address the matter of the restitution in open court, much less to object. Further, where in *Gamache* the Court faulted the appellant, in dictum, for failing to point to evidence of his inability to pay, apart from the fact of his impending incarceration, here appellant points to the trial court's determination of his indigency and to specific statutory and institutional restrictions on his earning capacity as a Death Row inmate. Finally, whereas in *Gamache* the Court noted that the trial court's failure to make specific findings as to the

defendant's ability to pay did not necessarily mean the court had not taken ability to pay into account, here the issue of restitution was not addressed in open court at all. Thus there is no basis on the record to assume the trial court took into account appellant's inability to pay, because counsel were not afforded the opportunity to present evidence or argument on the issue.

D. Conclusion

The trial court erred by including in its sentencing order the requirement that appellant pay a $10,000 restitution fine without affording him the opportunity to demonstrate his inability to pay any fine greater than the applicable $200 statutory minimum. Because the $10,000 restitution fine is excessive on its face, given appellant's established indigency and lack of meaningful earning capacity on Death Row, this court should order the restitution fine reduced to $200. In the alternative, appellant requests that, if the Court does not reverse appellant's conviction or sentence on any of the grounds asserted in this appeal, it remand the cause for a proper determination of the matter of restitution, pending further post-conviction proceedings.

CONCLUSION

For all of the reasons stated above, the entire judgment – the conviction, the special circumstance findings, the weapons use allegations and the sentence of death – must be reversed.

Dated: February 20, 2014

Respectfully Submitted,

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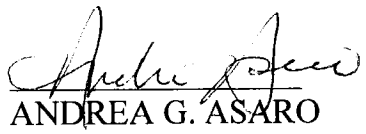
CERTIFICATE OF COUNSEL

(Cal. Rules of Court, Rule 8.630(b)(2))

I, Andrea G. Asaro, am the Senior Deputy State Public Defender assigned to represent appellant Jose Luis Leon in this automatic appeal. I conducted 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 28,959 words in length.

Dated: February 20, 2014



ANDREA G. ASARO
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Jose Luis Leon* California Sup. Ct. No. S143531
Riverside Co. Super. Ct. No. RIF109916

I, Randy Pagaduan, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, Suite 1000, Oakland, California, 94607; that I served a copy of the attached:

APPELLANT'S OPENING BRIEF

was served on each of the following, by placing same in envelopes addressed, respectively, as follows:

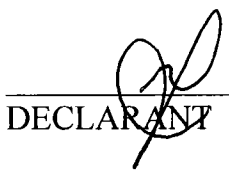
Kristen K. Chenelia
Deputy Attorney General
Attorney General's Office
P.O. Box 85266
San Diego, CA 92186

Clerk of the Court for Honorable
Christian F. Thierbach
Riverside County Superior Court
4100 Main Street
Riverside, CA 92501

Each said envelope was then, on February 20, 2014, sealed and deposited in the United States Postal Service mailbox at Alameda, California, the county in which I am employed, with the postage thereon fully prepaid.

Pursuant to Policy 4 of the Supreme Court Policies Regarding Cases Arising from Judgments of Death, the above-described document will be hand delivered to appellant, Jose Luis Leon, at San Quentin State Prison within 30 days.

I declare under penalty that the foregoing is true and correct and that this declaration was signed on February 20, 2014, in Oakland, California.



DECLARANT