No. S048763

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

SERGIO D. NELSON,

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

On Automatic Appeal from a Judgment of Death
Rendered in the State of California, County of Los Angeles

HONORABLE CLARENCE STROMWALL, JUDGE

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PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. SERGIO D. NELSON, Defendant and Appellant.	)	No. S048763 (Los Angeles County Sup. Ct. No. KA019560)

APPELLANT'S REPLY BRIEF

INTRODUCTION

As in the opening brief, this reply brief shall refer to appellant Sergio Nelson by his given name to remind the Court that the tragic acts under examination here were committed by an immature, impulsive teenager, who, as the prosecutor acknowledged, had no history of violent behavior. (26RT 4705; 33RT 5591; *Roper v. Simmons* (2005) 543 U.S. 551, 569 [lack of maturity and underdeveloped sense of responsibility in teenagers often result in impetuous and ill-considered decisions and actions].)

The opening brief demonstrated that Sergio's trial was riddled with prejudicial error. Respondent, however, has endeavored to preserve Sergio's conviction and death sentence by ignoring pertinent facts, avoiding significant legal issues, and dismissing all error as harmless.

Moreover, while betraying a lack of faith in its own arguments, respondent has consistently failed to comply with rule 8.204(a)(1)(C) of the California Rules of Court and former rule 14(a)(1)(C), in effect when respondent's brief was filed, which both demand that every brief, let alone a capital brief, must support *any* reference to a matter in the record by a citation to the record where the matter appears.[1]

One especially obnoxious example of the Attorney General's failure to cite to the record is respondent's unsupported and repeated claim that Sergio told Dr. Wells he shot through the car windshield, an impossibility given the want of damage to the windshield. Sergio said no such thing. (1RB 47, 69, 71.) As Dr. Wells explained to the jury, he neglected to ask Sergio if he had shot through the windshield and merely assumed Sergio had done so. (8RT 2387-2388.)

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[1] See, e.g., Respondent's Brief ("RB") 47-50, 52-53, 135, 150, 172, 174-175; *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 989-990 (declining to consider parts of brief for violating rule 8.204(a)(1)(C)); *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738 (duty of counsel is to refer appellate court to portion of record supporting contentions on appeal); *Regents of Univ. of Calif. v. Sheily* (2004) 122 Cal.App.4th 824, 827, fn.1 ("It is not the task of the reviewing court to search the record for evidence that supports the party's statement; it is for the party to cite the court to those references"); *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239, fn. 16 (record citations in statement of facts at beginning of brief do not cure failure to include record citations in argument portion of brief; purpose of citation requirement is to enable appellate justices and staff attorneys to locate relevant portions of record expeditiously without rereading earlier portions of brief); *Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 743 (criminal case) (appellate court may consider as waived any assertion unsupported by appropriate record reference).

Consequently, this Court may strike respondent's brief. (Cal. Rules of Court, rule 8.204(e)(2)(B).) Sergio requests that, at the very least, the Court expressly admonish the Attorney General to adhere to rule 8.204(a)(1)(C) in the future.

Because respondent's arguments lack both legal merit and factual support and thus cannot refute the conclusion that grievous error occurred, the convictions and death judgment must be reversed.[2]

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

ARGUMENT

1.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON HEAT OF PASSION WITH RESPECT TO MALICE MURDER AND VOLUNTARY MANSLAUGHTER.

In his opening brief, Sergio argued that the trial court's understanding of heat of passion was unduly narrow and simply wrong in limiting "passion" to uncontrollable sexual jealousy and "provocation" to the most flagrant, observed acts of sexual infidelity. (AOB 30-60.) Respondent must agree because no effort is made in the answering brief to defend the trial court's "befuddled" misunderstanding of the law. Indeed, respondent cites with approval the very case, *People v. Berry* (1976) 18 Cal.3d 509, that the trial court rejected as no longer good law. (RB 51.) *People v. Berry*, which unquestionably remains the law, teaches that passion may be "any violent, intense, high-wrought or enthusiastic emotion" and that there is "no specific type of provocation required." (18 Cal.3d at p. 515; see also CALCRIM No. 570 ["Heat of passion does not require rage, or any specific emotion. It can be any violent or intense emotion . . . ."].)

Respondent also acknowledges that the trial court's exclusive "*focus*[] on a scenario where a husband discovers his wife in a sexual situation with another man" is inconsistent with the cases finding heat of passion in "a wider range of situations." (RB 51-52 [italics added].) Nevertheless, while effectively conceding that the trial judge misunderstood heat of passion, respondent resorts to the same misconception of the law in arguing that a heat of passion instruction was unjustified. Respondent's argument fails because, as demonstrated in the opening brief, there was ample evidence from which a properly instructed jury could reasonably

have concluded that Sergio committed voluntary manslaughter in the heat of passion.

A. There Was Sufficient Evidence of Passion and Provocation to Warrant an Instruction on Heat of Passion.

In his brief, Sergio canvassed the case law supporting his contention that he was entitled to a heat of passion instruction. (AOB 34-37.) Respondent does not dispute or distinguish this array of favorable cases – except to assert that they are collectively inapplicable.[3] Respondent thereby avoids grappling with the cases, among others, in which voluntary manslaughter verdicts were rendered based on less compelling evidence of heat of passion than was presented here. These cases establish that a properly instructed jury could reasonably have found voluntary manslaughter on heat of passion under the circumstances of this case.

For instance, in *People v. Bridgehouse* (1956) 47 Cal.2d 406, the Court held that the evidence, as a *matter of law*, showed that the defendant was guilty, at most, of voluntary manslaughter where the defendant, who had filed for a divorce, killed on sight a man he believed to be his wife's lover whom he found relaxing at the home of the defendant's mother-in-law. (*Id.* at p. 413.)

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[3] Respondent suggests that Sergio's reliance on *People v. Berry*, *supra*, 18 Cal.3d 509, was misplaced and the judge's rejection of the case therefore proper because, unlike here, *Berry* involved rage based on two weeks of verbal and sexual taunting of the defendant by his wife. (RB 51.) Respondent misses the point. Sergio did not rely on *Berry* for its precise facts, but rather for its articulation of the law governing heat of passion instructions. (AOB 30-31.) It was this legal standard that the trial judge erroneously rejected, believing it had been superseded by a statutory amendment. (8RT 2545-2546.)

In *People v. McCown* (1986) 182 Cal.App.3d 1, the court affirmed a jury verdict of voluntary manslaughter on heat of passion based on evidence that the defendant opened fire on his estranged wife and mother-in-law when the wife made an obscene gesture to him as he drove past her home. (*Id.* at p. 15.) The defendant killed the wife and wounded the mother-in-law. He then reloaded and drove to the home of his father-in-law, whom he shot and killed. Finally, the defendant went to the law offices of his wife's lawyer, but the lawyer was not there. (*Id.* at pp. 7-8.) Despite previous statements by the defendant that he wanted to kill his wife, her family and her lawyer, the court found that there was sufficient evidence that the defendant became enraged when his wife made the obscene gesture, and that he felt hatred for his father-in-law, to instruct on heat of passion manslaughter. (*Id.* at p. 16; see also *People v. Strickland* (1974) 11 Cal.3d 94 [verdict of voluntary manslaughter returned and affirmed where defendant shot the victim out of deep annoyance that the victim had left the front door of defendant's home unlocked and then involved two other persons in a cover-up effort].)

That voluntary manslaughter verdicts have been returned in such diverse circumstances underscores the trial court's error in not permitting "the jurors to say whether or not the facts and circumstances in evidence [were] sufficient to lead them to believe that the defendant did, or to create a reasonable doubt in their minds as to whether or not he did, commit his offense under a heat of passion." (*People v. Berry*, *supra*, 18 Cal.3d at p. 515.)

Conversely, that heat of passion instructions were denied in other, dissimilar cases is of no legal significance. The cases cited by respondent are readily distinguishable from Sergio's situation. For example,

respondent relies on *People v. Lujan* (2001) 92 Cal.App.4th 1389, where the defendant's request for a heat of passion instruction was denied, according to respondent, because his estranged wife's conduct, developing a romantic relationship, was not sufficiently provocative. (RB 46-50.) But that was not the only or predominant reason a heat of passion instruction was rejected in *Lujan*. Unlike here, where Sergio unexpectedly came upon the victims in apparent intimacy, the defendant in *Lujan* had stalked and menaced his wife for months. Despite repeated police warnings not to bother his wife, the defendant drove to her home and parked out of sight. He then watched his wife and her friend, a police deputy, conversing for an extended period of time and then ruminated for a while longer on earlier events in his marriage – and only then did he attack his wife and her friend. (*Id.* at pp. 1413-1414.)

In *People v. Hyde* (1985) 166 Cal.App.3d 463, which respondent also cites, a heat of passion instruction was denied, despite the defendant's extreme jealousy, because the evidence of premeditation was overwhelming. (RB 51.) The defendant had contrived an elaborate plan to abduct his former girlfriend's new boyfriend, including the defendant's masquerading as a police officer, and had stalked his victim for several days prior to the abduction. (*Id.* at pp. 472-473.)

Here, in contrast Sergio had never threatened Ms. Shirley during the three months that had elapsed since she received the promotion instead of him. (See, e.g., 6RT 1912 [Frances Voss: "I never saw anger. It was a crushness. . . . It would be like he was crushed."].) Sergio had no reason to believe, moreover, that Ms. Shirley and Mr. Thompson would be together, much less so close to each other, the night of the shooting. His reaction on seeing them, consistent with heat of passion, was instantaneous. Sergio's

merely pedaling past Target on this one occasion, dressed, as usual, in dark clothing, hardly amounts to the type of recurrent or premeditated behavior that was found to refute heat of passion in *Lujan* or *Hyde*.

Respondent asserts that there was no evidence that the victims were engaged in a romantic relationship, that Sergio believed they were so involved or that he had romantic feelings for Ms. Shirley. (RB 52.) Respondent's assertion is refuted by the copious testimony to the contrary. At page 38 of the opening brief, Sergio summarized the testimony of several witnesses who were aware of Sergio's infatuation with Ms. Shirley and their very close relationship, as well as Ms. Shirley's flirtatiousness with younger male co-workers. (6RT 1836, 1841-1842, 1851-1852, 1917.) At page 39, Sergio further referenced the testimony of Ms. Shirley's and Mr. Thompson's workplace friends who confirmed that a rivalry had developed between Mr. Thompson and Sergio stemming from Mr. Thompson's intervention in a conversation between Sergio and Ms. Shirley. (5RT 1380-1381.) Karen Horner testified that she believed Ms. Shirley and Mr. Thompson were having an affair. (4RT 1255.)

None of these witnesses endorsed respondent's mantra that Ms. Shirley's and Mr. Thompson's relationship was strictly "platonic." (RB 52.) Moreover, Sergio was being fed upsetting information by Ms. Horner regarding Ms. Shirley's flirtations. (AOB 38-39.) Respondent fails to grasp the relevance of Ms. Horner's deliberately inflammatory comments. (RB 52.) Sergio does not contend that Ms. Horner's comments constitute provocation by the victims, but rather, that the information was an objective factor explaining Sergio's subsequent reaction.

In applying the objective component of the heat-of-passion test, courts routinely consider pre-existing circumstances, not merely those

present at the time of the killing. For example, in *People v. McCown, supra*, 182 Cal.App.3d 1, a voluntary manslaughter verdict was sustained for the defendant's fatal shooting of his wife and father-in-law even though the only provocation on the date of the killing was an obscene gesture by the wife. (*Id.* at p. 15.) Clearly, no ordinary person would be so enraged by a mere gesture that he would rashly shoot three people, killing two of them. However, as the court and jury recognized, that gesture did not take place in a vacuum, but rather, against the background of bitter dissolution proceedings that had already engendered strong negative feelings. (*Id.* at p. 16.)

Similarly here, the question under the objective prong of the heat-of-passion inquiry is not how some ordinary person, having no emotional history with Ms. Shirley or Mr. Thompson, would have reacted to seeing them together in intimate conditions. Rather, the question is how a person with Sergio's prior complicated relationship with the victims would have interpreted their physical closeness – most likely, as romantic or sexual activity. In short, contrary to respondent's contention, there was substantial circumstantial support for Sergio's defense that he killed in a heat of passion provoked by the sight of the victims together.[4]

Respondent also argues that the physical evidence does not support a heat of passion defense. This argument, however, depends on the testimony of two prosecution witnesses whose reliability is subject to serious doubt.

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[4] The heat of passion doctrine does not require that the victim deliberately or actively provoke the defendant. For instance, in *People v. Bridgehouse, supra,* 47 Cal.2d 406, a verdict of voluntary manslaughter was returned where the victim was simply relaxing at the time the defendant saw and shot him.

First, respondent relies on the testimony of serologist Elizabeth Devine that Ms. Shirley was shot first. (RB 53.) Sergio has challenged all of Ms. Devine's conclusions, including the sequence of shots, based on her lack of qualifications as an expert to opine on the issue. (See AOB 71-93.) But, even if Ms. Devine's conclusion were correct, the scene was entirely consistent with the shootings having occurred in the heat of passion irrespective of the order in which Ms. Shirley and Mr. Thompson were shot.

Respondent also relies on the testimony of Richard Hart, who witnessed the incident in the dark, more than 130 yards from where the shootings occurred. (3RT 1055.) According to Hart, after shooting the victims five to eight times, Sergio walked away, but when a "gurgle" noise emanated from the vehicle, he walked back and shot the victims several more times – all in a period of 30-40 seconds. (3RT 1051.) No physical or forensic evidence supported Mr. Hart's testimony regarding the alleged gurgling and second set of shots. The evidence showed that a total of only seven shots were fired, all apparently in rapid succession without a sufficient cooling-off period to dissipate the heat of passion.[5] (See CALJIC No. 8.43.)

Respondent argues that the events leading up to the shootings, specifically, Sergio's failure to get the promotion, support the conclusion that the killings were premeditated. This is pure conjecture. The remote fact that Sergio was disappointed by the loss of promotion to Ms. Shirley hardly establishes a motive to kill Ms. Shirley and Mr. Thompson months

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[5] Sergio recalled only that he discharged his gun when he believed he saw Mr. Thompson reach for something below the dashboard. (7RT 2213-2214.) However, Sergio accepted the testimony that he might have walked away, returned and fired at least one more shot. (7RT 2214.)

later. That Sergio was disappointed, embarrassed, possibly envious and no longer interested in his work evidences at most his immaturity and emotional vulnerability, not any lethal intentions toward either of the victims.

Most striking here is the complete absence of evidence that Sergio assaulted, menaced or threatened Ms. Shirley during the several months that elapsed between the promotion and the shootings.[6] Such intervening aggressive conduct might support a finding of premeditation; an impulsive bicycle ride to Target does not.

Finally, that the jury did not return a voluntary manslaughter verdict based on imperfect self-defense with respect to Mr. Thompson did not preclude the jury from finding that Mr. Thompson's reaching down contributed to the provocation of Sergio's unexpectedly seeing Mr. Thompson and Ms. Shirley in a moment of intimacy. Although Sergio told Dr. Wells that he believed he saw Mr. Thompson bend down in the driver's seat as if to pick something up from the floor, Sergio thought it was probably a gun, and he regarded this as an "immediate danger" to himself,

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[6] The only testimony that there was anything more than slight "friction" between Sergio and Ms. Shirley, and other employees, came from Robert Comeau, Mr. Thompson's good friend and short-time co-worker. (See 5RT 1509-1514 [Karen Strickland]; 5RT 1380-1384 [Robert Comeau].) According to Ms. Strickland's testimony, Comeau was also the person who reported that Sergio made negative comments regarding Ms. Shirley. (5RT 1490.) The report was based on a single interaction between Sergio, Ms. Shirley and Mr. Thompson. According to Comeau's testimony, "Sergio came in and he said something to Robin. He was aggravated about something. Lee told him to get away and just leave us alone and don't cause problems. Sergio left. That was about it." (5RT 1380.)

Sergio did not tell Dr. Wells that he *needed* to fire his gun to defend himself. (7RT 2213, 8RT 2376.) Thus, the jury could have accepted as true that Mr. Thompson bent down but at the same time concluded that Sergio did not believe he needed to shoot to defend himself, given Mr. Thompson's position inside the car and Sergio's position outside. (CALCRIM No. 571 [imperfect self-defense requires that defendant actually believe *both* that he is in imminent danger *and* in the need of deadly force to defend himself].)

In sum, based on the evidence adduced at the trial, heat of passion was the most plausible, if not the only, explanation for the shootings of Ms. Shirley and Mr. Thompson. The trial court erred in refusing Sergio's requested instruction on this theory and thereby relieving the prosecution of its burden to prove beyond a reasonable doubt that the killing did not occur in the heat of passion.

B. The Trial Court's Erroneous Refusal to Instruct on Sergio's Defense that He Acted in the Heat of Passion Violated His Federal and State Due Process Rights.

Sergio argued in his opening brief that the erroneous denial of his requested heat of passion instruction violated provisions of both the state and federal Constitutions. (AOB 40-60.) State constitutional error is subject to review under the test set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 (reversal not warranted unless it appears "reasonably probable" the defendant would have achieved a more favorable result had the error not occurred). Federal constitutional error is reviewed under the *Chapman* standard. (*Chapman v. California* (1967) 368 U.S. 18, 24 [error not harmless absent "proof beyond a reasonable doubt that the error[s] complained of did not contribute to the verdict obtained"].) An

instructional defect that affects the very framework of jury deliberations is structural error requiring per se reversal. (*Conde v. Henry* (9th Cir. 2000) 198 F.3d 734, 740-741, citing, inter alia, *Sullivan v. Louisiana (*1993) 508 U.S. 275, 279.) The trial court's error in denying the requested heat of passion instruction was structural, and not harmless by any measure.

The sua sponte duty to instruct fully on all lesser included offenses suggested by the evidence arises from California law alone. (*People v. Breverman* (1988) 19 Cal.4th 142, 149.) The broader duty to "instruct the jury upon every material question upon which there is any evidence deserving of any consideration whatever "is grounded in federal, as well as state law. (*People v. Eid* (2010) 187 Cal.App.4th 859, 879, citing *People v. Burns* (1948) 88 Cal.App.2d 867, 871.)

A criminal defendant's right to adequate instructions on a defense theory of the case is "rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi* [(1973) 410 U.S. 284, 294], or in the Compulsory Process and Confrontation Clauses of the Sixth Amendment, [citations], as the [federal] Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (*Ibid.*)

In capital cases, this right also derives from the Eighth Amendment's requirement of heightened reliability in the determination that death is the appropriate sentence. (*Beck v. Alabama* (1980) 447 U.S. 625; *Spaziano v. Florida* (1984) 468 U.S. 447, 456 [reaffirming the "demands of reliability in decisions involving death and [] the defendant's right to the benefit of a lesser included offense instruction that may reduce the risk of unwarranted capital convictions"].) Sergio contends that the refusal to give his requested theory of the defense instruction on voluntary manslaughter violated the

Eighth Amendment, as well as the due process and fair trial guarantees of the state and federal Constitutions, by foreclosing the jury's consideration of a viable defense to capital murder. A violation of this magnitude necessarily affected the jury's verdict.

Nonetheless, respondent argues that the error in failing to instruct the jury on heat of passion was harmless because, in finding true the lying-in-wait special circumstance allegations, the jury necessarily decided the facts against Sergio. (RB 53-54.) Respondent's argument is logically flawed. All the cases cited by respondent to support its harmlessness argument involved first degree murder convictions based on a felony-murder theory. Because malice is not an element of felony murder, this line of cases is inherently inapposite here. For example, in *People v. Koontz* (2002) 27 Cal.4th 1041, 1086-1087, the court's failure to instruct sua sponte on imperfect self-defense was held harmless in light of the jury's finding of a robbery special circumstance. (See *People v. Tabios* (1998) 67 Cal.App.4th 1, 6-9 [holding that imperfect self defense is not a defense to felony murder because malice aforethought, which imperfect self defense negates, is not an element of felony murder].)

Malice aforethought is an element of non-felony murder, and deliberation, or its functional equivalent, must still be proved for a conviction of first degree murder under a lying-in-wait theory. (See CALJIC Nos. 8.10, 8.20, 8.25.) There was ample evidence from which the jury could have concluded that Sergio reacted rashly and instantaneously to the sight of the victims together, in less than the minimal time required for deliberation or the lying-in-wait special circumstance. However, absent an instruction on heat of passion, the jury had no framework for considering Sergio's sudden reaction which could have vitiated the mens rea required

for first degree murder under any theory, including lying in wait. Respondent's harmlessness argument, therefore, fails.

Respondent's argument fails, moreover, because the State's harmless error standard, endorsed in *People v. Sakarias* (2000) 22 Cal.4th 596, 621, is inapplicable here. *People v. Sakarias*, like *People v. Koontz*, *supra*, and *People v. Lewis* (1990) 50 Cal.3d 262, 276-277, upon which respondent also bases its harmless error analysis, involved a failure to instruct sua sponte with a lesser included offense instruction, not, as here, the refusal to give a requested defense instruction in violation of the federal Constitution. Even if per se reversal were not required, the minimal constitutional standard applicable to this case is, therefore, "harmless beyond a reasonable doubt" under *Chapman v. California*, *supra*, 386 U.S. at p. 24.

Respondent offers no more than a conclusory statement that the error here was harmless beyond a reasonable, without any analysis or legal support. In contrast, the thorough analysis of prejudice in Sergio's opening brief, with ample support in the record and the law, establishes that the trial court's erroneous denial of a theory of the defense instruction on heat of passion was not harmless under any standard of review. Accordingly, the entire judgment must be reversed. (See CALCRIM No. 522.)

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2.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO INSTRUCT THE JURY THAT IT COULD CONSIDER PROVOCATION IN DETERMINING WHETHER THERE WAS DELIBERATION AND PREMEDITATION OR LYING IN WAIT.

Sergio demonstrated at trial and in his opening brief that there was substantial evidence supporting his request for CALJIC No. 8.73 or equivalent provocation instruction. (AOB 61-70.) Elevating rhetoric over serious argument, respondent nonetheless asserts that evidence of provocation was nonexistent. (RB 58.) Respondent simply ignores Sergio's several-page summary of the supporting evidence, including extensive testimony establishing Sergio's emotional instability, impulsiveness, susceptibility to provocation, and romantic attachment to older women, such as Karen Horner and Robin Shirley, who also served as his surrogate mothers. (AOB 64-67.) Taking these emotional vulnerabilities into account, a properly instructed jury could readily have concluded that Sergio experienced Ms. Shirley's and Mr. Thompson's togetherness as an unbearable threat, betrayal and provocation, to which he reacted violently. A pinpoint instruction on provocation was thus fully warranted and would likely have resulted in a non-capital verdict.

Respondent assumes, moreover, that its prior argument regarding the voluntary manslaughter instruction suffices to address Sergio's provocation claim. (RB 58.) Respondent is mistaken. As previously noted, the test for provocation sufficient to negate malice and reduce a murder to manslaughter includes an objective, reasonableness component. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 32.) In contrast, the test for provocation sufficient to negate deliberation and premeditation, but not

malice, requires a determination solely of the defendant's subjective mental state. (*Ibid.*) Respondent nowhere acknowledges this critical distinction, nor discusses, much less distinguishes, a single relevant case on the issue. Respondent's argument is flawed throughout by a complete disregard for the record and the applicable case law.

Instead of facts and law, respondent proffers bare conjecture and assumption. Respondent asserts that the prosecution's evidence justified only one conclusion, i.e., that Sergio acted with deliberation and premeditation. This assertion both ignores the substantial evidence presented in Sergio's defense and greatly exaggerates the strength of the prosecution's case. As demonstrated more fully in Arguments 4 and 8 of the opening brief, the prosecution's evidence of deliberation or the equivalent mental state of lying in wait had significant, probative gaps. (AOB 94-100, 131-141.)

The most obvious gap was the absence of evidence that Sergio expressed violent animosity toward Ms. Shirley. Numerous friends and former co-workers testified regarding Sergio's mental state and not a single such witness reported any statements or actions by Sergio that threatened harm to Ms. Shirley or showed he planned vengeance against her. (See 4RT 1128, 1234; 5RT 1420; 1438, 1509, 1521; 6RT1847, 1867-1868, 1870, 1910.) Rather, all the witnesses concurred that Sergio was depressed and, as in the past, directed his disappointment and anger mostly at himself, not at any one else.[7]

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[7] Sergio had a few verbal confrontations with employees prior to losing the promotion, but overall Sergio was an "excellent worker, great listener, always performing." (5RT 1410.) On the day it was announced

(continued...)

There also was a complete absence of evidence fixing the timing of events crucial to differentiating provocation from premeditation. No evidence was adduced, for instance, as to when Sergio arrived at Target or what he did before he saw Ms. Shirley and Mr. Thompson. Thus, there was no evidence to contradict Sergio's defense that he came upon the victims suddenly without any expectation of seeing them together in seeming intimacy. These critical deficiencies in the evidence were masked, however, by the corresponding defects in the instructions given the jury.

Respondent further contends that, assuming provocation existed, it could apply only to the first victim, alleged to be Ms. Shirley. Respondent's argument has no support in logic or the record. First, the provocation in this case was the sight of Ms. Shirley and Mr. Thompson close together, not the sight of Ms. Shirley alone. Thus, irrespective of which victim was shot first, the provocation applied equally to both. Additionally, inasmuch as there was no evidence that substantial time elapsed between the initial fatal shots to Ms. Shirley and Mr. Thompson, the two killings are indistinguishable from the standpoint of deliberation or lying in wait. Finally, respondent is mistaken in its suggestion that relief from only one of Sergio's murder convictions would be a meaningless victory. (RB 59.) In fact, a reversal of one of the murder convictions would be a positive, albeit not the optimal, result at the guilt phase. The benefit at the penalty phase would be even greater.

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[7](...continued)
that Sergio had lost the promotion, a couple of employees taunted and humiliated him. (5RT 1418.) After that, Sergio was depressed all the time and kept to himself. (5RT 1420.) From that point, Sergio had little interaction with Ms. Shirley. (5RT 1421 [Witness Alejandro Sandoval: "Basically, he went his way and had nothing to do with her."].)

Lastly, respondent argues harmless error on two grounds: first, that Sergio's trial counsel was able thoroughly to argue the provocation theory to the jury during closing argument; and second, that in finding the lying-in-wait special circumstances true, the jury necessarily resolved the provocation question adversely to Sergio under other instructions.[8] (RB 59-60.) Both grounds lack merit for a common reason. Respondent is correct that trial counsel marshaled substantial evidence, which respondent now claims is nonexistent, and argued a theory of provocation to the jury. But that argument was deprived of legal significance because the jury was not given the instruction, CALJIC No. 8.73 or its equivalent, needed to validate the provocation defense. For the same reason, the jury's finding of the lying-in-wait special circumstances does not demonstrate harmlessness. The jury would not have known on its own and it was not instructed that provocation can negate the mens rea of lying in wait, as well as the mental elements of premeditated murder. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1142.)

Indeed, a holding of harmlessness is foreclosed by the closeness of the case. The lengthy jury deliberations, almost six hours, focused on a single issue – whether the killings were deliberate and premeditated. During the course of those deliberations, the jury requested readback of the testimony of three witnesses, Karen Horner, Dr. Wells and Dr. Markman, which related most directly to Sergio's mental state. In considering this critical evidence, the jury was limited, however, by CALJIC No. 3.32 (1992 revision, modified) to assessing whether Sergio's "mental disease, mental

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[8] Sergio maintained in his opening brief and will argue herein that there were major instructional errors that, in themselves, cast doubt on the validity of the jury's verdicts.

defect or mental disorder" prevented him from, among other things, actually deliberating or premeditating the shootings. The jury was not informed that these same elements could also be negated by Sergio's subjective mental condition, irrespective of clinical diagnosis, because it made him susceptible to provocation and rash reactions. In refusing the requested provocation instruction, the court effectively withdrew a viable defense, supported by substantial evidence, from the jury's consideration. Such instructional error cannot be deemed harmless under any constitutional standard. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119; *Conde v. Henry* (9th Cir. 2000) 198 F.3d 734, 739.) The judgment must be reversed.

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3.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING PREJUDICIAL, SPECULATIVE TESTIMONY ON CRIME SCENE RECONSTRUCTION BY AN UNQUALIFIED WITNESS.

Defense counsel conceded at trial that Sergio was the shooter and so counsel did not argue for total acquittal. Rather, the only defenses counsel advanced were aimed at negating one or more of the mental elements of murder. These defenses, whether categorized as mental disorder, heat of passion/provocation or unreasonable self defense, were all related and rooted in Sergio's psychological impairments, including long-standing depression and impulsivity. Significantly, none of Sergio's personal problems had ever resulted in violent or other such antisocial behavior.

In contrast, the prosecution's theory of premeditation and deliberation rested on the most attenuated motivation – alleged revenge for the lost promotion. To bolster his theory that Ms. Shirley was the intended victim – and rebut Sergio's mental defenses – the prosecution presented the testimony of Elizabeth Devine, a serologist, to opine that Ms. Shirley was shot first. Defense counsel objected to Ms. Devine's testimony on the subject of shot sequence. (5RT 1609-1610.) On appeal, Sergio renewed the challenge based on Ms. Devine's lack of expertise and the speculative basis for her opinion. (AOB 71-93.)

Respondent contends that Ms. Devine was qualified to render an opinion regarding the order of shots and that her opinion on the subject was not speculative. (RB 68-69.) Respondent also asserts that Sergio waived his constitutional objections to the admission of Ms. Devine's testimony because defense counsel failed to object on those grounds at trial. (RB 61.)

Finally, respondent contends that any error in admitting this evidence was harmless. (RB 71-72.) All of respondent's arguments lack merit and must be rejected.

A. Serologist Elizabeth Devine Was No Expert on Who Was Shot First.

On voir dire, Ms. Devine could not have been clearer about her qualifications as a serologist, or vaguer about her expertise on the determination of shot sequence, the subject upon which she presumed to testify. Respondent's arguments follow suit – using the blanket description "crime scene reconstruction" to obscure Ms. Devine's lack of the training and experience required to render an expert opinion in the relevant area. As noted in the opening brief, appellate counsel was unable to find a single published decision from any jurisdiction where an appellate court approved of an expert offering an opinion on which victim was shot first. (AOB 74-75.) Perhaps more significant, despite the implied challenge in the opening brief, the attorney general was also unable to find one.

Respondent asserts that Ms. Devine had *extensive training and field experience* in the area of crime scene reconstruction. (RB 68 [italics added].) The record compels the opposite conclusion. Ms. Devine testified that she had attended a class in bloodstain pattern interpretation and a class in crime scene investigation, level 3. (5RT 1616.) She detailed the types of questions that could be answered by bloodstain pattern analysis, but also explained that as a serologist, she worked mainly in the lab. (5RT 1616.) In contrast, with respect to the crime scene 3 class, Ms. Devine was vague and fairly dismissive of its value. She testified: "Crime scene 3 had some reconstruction issues that they addressed there, but really coming to those determinations, you do it by going to a lot of crime scenes and looking at a

lot of things." (5RT 1616.) In short, contrary to respondent's inflated description, Ms. Devine, in fact, had no demonstrable training or expertise in crime scene reconstruction involving shot sequence.

This Court's opinion in *People v. Hogan* (1982) 31 Cal.3d 815 is most instructive on this point. (*Id.* at p. 851 [overruled on other grounds in *People v. Cooper* (1991) 53 Cal.3d 771].) In *Hogan*, the Court held it was error to admit the testimony of a criminalist regarding blood pattern interpretation when his expertise was in blood identification and typing, i.e., serology. The trial court had allowed the criminalist to testify as an expert on the source of various blood stains on the pants and shoes the defendant was wearing at the time of his arrest. The criminalist testified in detail regarding the stains and opined that certain stains were "splatters," caused by blood flying through the air following impact rather than by mere contact with a bloody object. (*Ibid.*) The defendant objected that the criminalist was not qualified by reason of skill, experience, training or education to render an expert opinion on the subject of the origin of the bloodstains. (*Id.* at p. 852.)

The Court noted that Evidence Code section 720 requires a proponent of expert testimony to establish the qualifications of the witness if there is an objection. (*People v. Hogan*, *supra*, 53 Cal.3d at p. 852.) And, "[w]hile a trial court's decision as to the qualifications of a witness will be upheld absent an abuse of discretion [citation], error must be found if 'the evidence shows that a witness *clearly lacks* qualification as an expert and the judge has held the witness to be qualified as an expert witness.'" (*Ibid.* [italics in original].) The Court also noted that "the qualifications of an expert must be related to the particular subject upon which he is giving expert testimony. Qualifications on related subject matter are insufficient.

[citation]." (*Ibid.*)

The Court then surveyed the criminalist's qualifications. (*People v. Hogan*, *supra*, 53 Cal.3d at p. 852.) It found that his qualifications as an expert to determine whether blood has been spattered or transferred by contact were nonexistent. (*Ibid.*) The Court noted that the witness had never performed any laboratory analyses to make such determinations in the past or present case, had admittedly received no formal education or training to make such determinations. The witness's background on the subject consisted primarily in observing bloodstains at many crimes scenes and determined in his own mind whether they were spatters or "wipes," but had never verified his conclusions. (*Id.* at pp. 852-853.) The Court found that the criminalist's qualifications, "boiled down to having observed many bloodstains." (*Id.* at p. 853.) The Court concluded that the mere observation of preexisting stains without inquiry, analysis, or experiment, did not invest the criminalist with expertise to determine whether the stains were deposited by "spatters" or "wipes." (*Ibid.*)

The same reasoning applies here. Ms. Devine's qualifications on the particular subject of gunshot sequence boil down to having observed many crime scenes as a serologist but never as an expert on gunshot sequence. Indeed, it may be argued, based on her own testimony, that Ms. Devine employed no expert knowledge or skill whatsoever in proffering her opinion. Rather, she purported to rely on common knowledge. In actuality, she relied on neither expert nor common knowledge, but only unsubstantiated speculation to arrive at a predetermined conclusion.

By her own admission, Ms. Devine's opinion regarding the direction and path of the bullets was not based on any knowledge of firearms or ballistics. As she explained:

> I wanted a firearms person to look at the mark in the door, that was my request that I had made and they disagreed with me. They ignored me. They did not do it. They did not get anyone from ballistics or firearms to come here and say how those bullets traveled.

(5RT 1628.)

> . . . so I do not have an expertise in the trajectory; but bullets travel in straight lines and the bullet was recovered from the door, and it doesn't take a brain surgeon to figure out where the bullet came from.

(5RT 1629.)

In contrast, when asked to state an opinion regarding the direction of the bullets, Detective Dale Noncarrow, who conducted the initial crime scene investigation, responded, "I am not competent." (5RT 1606.) Clearly, there is more to determining the path and sequence of gun shots than the common experience that bullets travel in straight lines. If it were that simple, Ms. Devine would not have requested the assistance of a firearms or ballistics examiner. The court ignored the import of Ms. Devine's actions, as well as her explicit admission that she was not qualified as an expert on the subject of shot sequence crime scene reconstruction.

Alternatively, if Ms. Devine's opinion was based solely on the common observation that bullets travel in straight lines, it should have been excluded because it did not relate to a "subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801.)

In fact, Ms. Devine's opinion was based on neither expertise nor common experience, but rather on a set of assumptions tailored to fit the

prosecution's theory of the case. The only facts upon which she relied in forming her opinion were that (1) the bullet that entered the left lateral area of Ms. Shirley's neck exited below her right mandible, grazed the dashboard and lodged in the door; (2) the bullet that entered Mr. Thompson's temple exited and grazed Ms. Shirley's left shoulder; and (3) there were no bullet holes in the front seats. (5RT 1633-1634.) Even accepting that the shots were fired through the half-open rear window on the driver's side, these known facts do not conclusively establish the sequence in which the shots were fired. In fact, Mr. Thompson could have been shot first, and the shots could have been fired in the following order:

- The first shot entered Mr. Thompson's left temple, exited at the right toward the top of his head and grazed Ms. Shirley's shoulder.
- The next four shots in rapid succession were to Mr. Thompson's upper back.
- The final two shots were to Ms. Shirley's forehead and lateral neck.[9]

This alternative, hypothetical sequence assumes only that Mr. Thompson and Ms. Shirley were leaning forward when Sergio happened upon them and that Ms. Shirley leaned back in her seat after her shoulder

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[9] It might equally be posited that Ms. Shirley was shot after Mr. Thompson was shot in the temple, but before he was shot in the back, since the only constraints on the positions of the victims and hence the sequence of shots are that (1) Mr. Thompson and Ms. Shirley were seated in sufficient proximity that the shot to Mr. Thompson's temple grazed Ms. Shirley's shoulder when it exited; (2) Mr. Thompson was leaning forward in his seat when he sustained the entry wounds to his back; and (3) Ms. Shirley was not tilted too far forward or back when she was shot.

was grazed. There was no evidence presented at trial that would make this or any number of sets of assumptions about the victims' positions less plausible than those selected by Ms. Devine. Indeed, in his opening brief, Sergio described a variety of scenarios that were more plausible on their face than Ms. Devine's preconception that both Ms. Shirley and Mr. Thompson were sitting rigidly back against their seats when the first shots were fired. (AOB 77.) To have cloaked Ms. Devine's unsupported conjecture in the mantle of expert infallibility was misleading to the jury and a manifest abuse of the trial court's discretion.[10]

B. Admission of Ms. Devine's Unsupported Opinion that Ms. Shirley Was Shot First Violated Due Process.

Sergio has argued that the erroneous admission of Ms. Devine's opinion testimony violated his rights to due process and a fair trial, as well as the Eighth and Fourteenth Amendments requirements for heightened reliability in capital cases. (AOB 78-93.) First, respondent contends that Sergio's constitutional claims were waived because he failed to raise those grounds in the trial court. (RB 61.) Further, respondent argues that, if no

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[10] Respondent notes that the jury was instructed with CALJIC No. 2.80 (Expert Testimony) and CALJIC No. 2.82 (Expert Testimony Concerning Hypothetical Questions) but fails to explain why these instructions mitigated the court's error. (RB 70, fns. 19 and 20.) The error was to allow Ms. Devine to testify as an expert on shot sequence when she was not qualified to do so. Simply by qualifying her as an expert, the court enhanced her credibility, all the more so because the court declared her an expert on the subject of shot sequence in front of the jury. (RB 71; 5RT 1631.) Moreover, Ms. Devine's assumption regarding the shot sequence was presented as a fact, not as an answer to a hypothetical question. Thus neither instruction remedied the underlying error., i.e., admitting unsubstantiated assumptions in the guise of expert opinion.

waiver is found, any error in admitting Devine's testimony was harmless. Respondent is wrong on both counts.

1. No Waiver Occurred.

It is now well-established that a defendant's new constitutional arguments on appeal are not forfeited when "the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional *legal consequence* of violating the Constitution." (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17, citing *People v. Partida* (2005) 37 Cal.4th 428, 433-439 [analogizing a new constitutional argument on appeal to a prejudice argument under the *Watson* test without citing *Watson* as part of the trial objection]; *People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6; *People v. Yeoman* (2003) 31 Cal.4th 93, 117.) Sergio's constitutional claims are of this permissible type. He "merely invites [the Court] to draw an alternative legal conclusion" [i.e., that erroneously admitting the evidence violated the federal constitution] "from the same information he presented to the trial court" [i.e,. that the opinion testimony should have been excluded]. (*People v. Partida*, *supra*, 37 Cal.4th at p. 436.) Sergio's constitutional claims therefore are properly considered on appeal.

2. Sergio Was Deprived of a Fair Trial and Reliable Fact-Finding in the Guilt and Penalty Determinations.

Sergio has argued that the erroneous admission of Ms. Devine's baseless opinion testimony infected the jury's deliberations to such an extent that it deprived him of a fair trial and the reliable fact-finding mandated by the Constitution. Respondent does not specifically address this argument. Rather, it simply contends that any error was harmless. (RB

71-72.) Respondent is wrong. The error in admitting Ms. Devine's conjectures as expert opinion, in fact, was so manifestly prejudicial that it transgressed several constitutional bounds.

3. The Trial Court's Error in Admitting Ms. Devine's Testimony Was Prejudicial.

Sergio has asserted that the court's federal due process error in admitting Ms. Devine's opinion testimony was not harmless under any applicable prejudice test. With respect to the guilt phase error, respondent argues only that the error was harmless under the *Watson* reasonable probability standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) In support of this argument, respondent asserts that the sequence of shots was immaterial and that, even absent Ms. Devine's testimony, the jury would have rejected Sergio's version of events. (RB 71-72 [arguing that the jury did not need expert testimony to discern the positions of the victims and the order in which the shots were fired].)

Both these contentions are belied, in the first instance, by the prominence of Ms. Devine's testimony in the prosecution's closing argument. The prosecutor's description of the shootings was based entirely on Ms. Devine's testimony regarding the positions of the victims and the sequence of the shots. (9RT 2808-A, 2809-A.) That description was used in turn to support one of the prosecution's most inflammatory arguments to the jury: "It was an execution style killing, from the rear, head shots, and follow-up shots." (9RT 2804.) For respondent to argue now that Ms. Devine's testimony was inconsequential to the prosecution's case or the verdict is the height of revisionism.

While it is true that, even without Ms. Devine's testimony, the jury could have decided that no bullets were fired through the front windshield,

this is a long way from the jury "discerning" the precise order in which the shots were fired. (RB 71.) The prosecutor recognized he needed an expert witness to reconstruct the crime scene, but instead of an expert on gunshot sequence, the prosecutor called a serologist.

Respondent thus stands alone in its untenable assertion that the jury, unaided by an expert, had the training and knowledge required to determine the order in which the shots were fired. (RB 71-72.) Respondent clearly has not demonstrated that the erroneous admission of Ms. Devine's opinion testimony was harmless at the guilt phase.

Indeed, Sergio has elucidated at length the substantial and diverse prejudicial impact of Ms. Devine's testimony. (AOB 78-84.) Sergio has shown that her testimony was likely instrumental in the jury's rejection of his second degree murder argument that the shooting was an impulsive, unplanned act. Ms. Devine's testimony that Sergio first shot Ms. Shirley, the person seated farther from him, was critical to the prosecution's view that Ms. Shirley was the intended target, that the motive for the shooting was revenge, and that the shooting was premeditated and deliberate. Absent that testimony, the jury would have been far more receptive to the substantial evidence that Sergio was psychologically predisposed to act impulsively without any forethought or plan. As such, the first degree murder convictions were not "surely unattributable to the error" of admitting as expert opinion Ms. Devine's unsupported hypothesis that Ms. Shirley was shot first. This error was not harmless and the murder convictions should be reversed, the special circumstances findings should be set aside, and the death judgment should be vacated for the guilt phase

error.[11]

As to the corresponding penalty phase error, respondent argues that the error was harmless under the "reasonable possibility" standard of *People v. Jackson* (1996) 13 Cal.4th 1164, 1232. (See *People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11 [holding that the reasonable possibility standard for assessing prejudice at the penalty phase is effectively the same as the reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24]; RB 72.) The standard is correct; its application by respondent is wrong.

Respondent simply ignores the extended and vexed jury deliberations at the penalty phase. At the first trial, the jury failed to reach a verdict on the appropriate penalty. (2CT 417.) The second jury deliberated ten days without reaching a verdict. (34RT 5666.)

On the mitigation side of the balance, substantial evidence was presented, including his youth – at 19 years, 23 days (26RT 4705) – and no prior violence or criminal record, that placed Sergio outside the limited class of offenders "whose extreme culpability makes them 'the most deserving of execution.'" (*Roper v. Simmons* (2005) 543 U.S. 551, 569 [holding that the Eighth Amendment categorically prohibits imposing the death penalty on juvenile offenders]; see also *Graham v. Florida* (2010) __ U.S. __ [130 S.Ct. 2011, 2023] [holding that Eighth Amendment forbids the imposition of life without parole on non-homicide juvenile offenders] .) On the other side of the balance, the prosecution's aggravating factors were

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[11] Because the prosecution and defense theories were the same in relation to both the murder and special circumstances allegations, the error in admitting Ms. Devine's opinion testimony was equally prejudicial to the lying-in-wait special circumstances findings.

essentially the circumstances of the crime. The linchpin of the aggravating evidence was Ms. Devine's reconstruction of the shooting and her conclusion that Ms. Shirley was shot first. Accordingly, because there is a reasonable possibility that the erroneous admission of Ms. Devine's testimony affected the death verdict, the sentence must be reversed. (*People v. Brown* (1988) 46 Cal.3d 432, 447.)

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4.

THE COURT READ TWO ERRONEOUS INSTRUCTIONS THAT RELIEVED THE JURY FROM THE REQUIREMENT OF FINDING THE MENTAL STATES OF FIRST DEGREE MURDER.

Sergio has argued that the trial court's modification of CALJIC No. 2.02 (Sufficiency of Evidence to Prove Specific Intent or Mental State) and combination of CALJIC Nos. 3.31 (Concurrence of Act and Specific Intent) and 3.31.5 (Mental State) were erroneous and prejudicial in relieving the jury from finding the requisite specific intent and mental states of first degree murder. (AOB 94-100.) Respondent does not contend the modified instructions were correct. Rather, respondent argues that this claim was forfeited or, if not forfeited, the error was harmless. (RB 73.) Respondent's arguments must fail because they rest on unsupported assumptions and misapplication of the law.

A. No Waiver Occurred.

The general rule that a defendant, who fails to object in the trial court, forfeits any challenge to a jury instruction does not apply if the defendant asserts that the instruction was not legally correct, or if the instructional error affected the defendant's substantial rights. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503; *People v. Franco* (2010) 180 Cal.App.4th 713, 719, citing Pen. Code, § 1259; *People v. Lawrence* (2009) 177 Cal.App.4th 547, 553, fn. 11.) A standard version of an instruction may be erroneous, nonetheless, if not compliant with an applicable use note. (See, e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 248 [holding that trial court erred in failing to limit CALJIC No. 2.51 as suggested by the use note].) A claim that an instruction reduces the prosecutor's burden of proof implicates substantial rights and may be raised initially on appeal. (*People*

v. Salcido (2008) 44 Cal.4th 93, 111 [rejecting the Attorney General's argument that the defendant had forfeited his challenge to CALJIC No. 2.02 where the defendant claimed that the instruction lightened the prosecution's burden of proof].)

These exceptions to the general waiver rule apply here, in that (1) the challenged modified instructions were incorrect statements of the law; (2) as a result, the jury was misinstructed on the essential elements of first degree murder; thereby (3) reducing the prosecution's burden of proof; and (4) violating Sergio's constitutional rights to due process and a reliable verdict.[12]

1. The Instructions Are Not Correct Statements of the Law.

The crime of first degree premeditated murder requires the specific intent to kill, together with premeditation, deliberation and malice. (CALJIC No. 8.20; CALCRIM No. 521.) Where the crime requires both specific intent and another particular mental state, the notes to CALJIC Nos. 2.02 and 3.31.5 apply. The Use Note to CALJIC No. 2.02 mandates that "the word 'and' rather than 'or' in the first paragraph *must* be used" when both specific intent and another mental state must be proved. (Italics added.) The vice of using the disjunctive in that situation is that it relieves

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[12] In footnote 21, respondent posits that the prosecutor and Sergio's trial counsel jointly fashioned combined instruction Nos. 3.31/3.31.5. (RB 73.) The record does not support this supposition. First, the record reflects that the prosecutor had made all prior modifications to the court's proposed instructions. (8RT 2519.) It was the prosecutor, moreover, who suggested that instruction Nos. 3.31 and 3.31.5 be joined, not read separately. (8RT 2564.) The court stated that it would leave it to "counsel" to make the modifications. (8RT 2564.) The record is silent as to which counsel drafted the merged instruction.

the jury from the requirements of finding both specific intent and other required mental states. (*People v. Lizarraga* (1990) 219 Cal.App.3d 476, 481.)

Analogously, the Use Note to CALJIC No. 3.31.5 directs that if the crime requires specific intent as well as another mental state, CALJIC No. 3.31 should also be given.[13] CALJIC Nos. 2.02 and 3.31, as modified, clearly misstated the law and thus relieved the jury from finding both specific intent *and* the mental states of first degree murder. By its silence, respondent concedes the error.

2. The Erroneous Instructions Were Not Harmless.

Respondent contends, however, that the jury necessarily found the requisite specific intent and mental states for first degree murder because the trial court separately instructed the jury on the lying-in-wait theory of first degree murder and the jury returned true findings on the special circumstances allegation of lying in wait. (RB 76.) In support of this argument, respondent relies on *People v. Smithey* (1999) 20 Cal.4th 936. *Smithey* is readily distinguishable.

Unlike here, the challenged modification in *Smithey* was a correct statement of the law. At the prosecution's request, the trial court in *Smithey* modified CALJIC No. 8.20 (Deliberate and Premeditated Murder) to include a phrase taken verbatim from Penal Code section 189, to wit: "To prove the killing was deliberate and premeditated, it shall not be necessary to prove the defendant *maturely and meaningfully* reflected upon the gravity of the act." (*People v. Smithey*, *supra*, at p. 979.) The defendant had

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[13] Under *Lizarraga*, *supra*, 213 Cal.App.3d at p. 481, CALJIC Nos. 3.31 and 3.31.5 could have been combined if "and" had been used in place of "or" in the phrase "mental state or specific intent."

offered clarifying language, arguing that absent the clarification the jury was reasonably likely to be confused and to believe that it could convict him of first degree murder on a finding that he had "immaturely and frivolously reflected' on the gravity of his act. (*Id.* at p. 980.) The requested language was refused.

In affirming the ruling at trial, the Court emphasized that the modified language came directly from the Penal Code and that the phrase "maturely and meaningfully reflected," as commonly understood, required no clarification to conform to the law. (*People v. Smithey*, *supra*, at pp. 980-981.) As there was no error, the Court concluded that, considering the statute as a whole, there was no reasonable likelihood the jury was misled regarding the mental states for first degree murder. (*Id.* at pp. 981-982.)

In marked contrast, the modifications in this case misstated the law and expressly misinstructed the jury on its duty to find all the mental elements of first degree murder. Relieving the jury of this duty necessarily lightened the prosecution's corresponding burden of proof. Constitutional error of this type, in further contrast to *Smithey*, must be proven harmless beyond a reasonable doubt. (*In re Neder* (1999) 527 U.S. 1, 15 (guilt phase); *Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-333 (penalty phase); *People v. Beck* (2005) 126 Cal.App.4th 518, 524 (agreement by the Attorney General that *Chapman* standard of review applied).)

In *People v. Beck*, the appellate court reversed the defendant's conviction of attempted murder where the trial judge gave conflicting instructions on the required state of mind. (*People v. Beck*, *supra*,126 Cal.App.4th 518.) The first instruction, CALJIC No. 8.66, requiring the jury to find intent to kill, was correct; the second, CALJIC No. 8.11, reintroducing the definition of malice aforethought, including implied

malice, was confusing. (*Id.* at p. 524.) The Attorney General acknowledged that the trial court should not have reintroduced the concept of implied malice. (*Ibid.*) The appeals court, therefore, proceeded to a harmless error analysis under the *Chapman* standard. The court explained,

> Pursuant to that standard of review, "we must ultimately look to the *evidence* considered by defendant's jury under he instructions given in assessing the prejudicial impact or harmless nature of the error." [Citation omitted.] "[We] must inquire whether it can be determined, beyond a reasonable doubt, that the jury actually rested its verdict on *evidence* establishing the requisite [elements of the crime] independently of the force of the . . . misinstruction." [Citation omitted.]

(*Ibid.* [italics in original].)

Concluding that the evidence clearly permitted the jury to convict using the erroneous theory, the court was unable to say beyond a reasonable doubt that the instructional error did not contribute to the verdict on attempted murder. (*People v. Beck*, *supra*, 126 Cal.App.4th at p. 525.)

Respondent's assumption that the jury focused on the trial court's correct instructions (CALJIC Nos. 8.20 (Deliberate and Premeditated Murder), 8.25 (Murder by Means of Lying In Wait) and 8.81.15 (Special Circumstances - Murder While Lying In Wait) is just that, an unfounded assumption. The question, moreover, is not whether other correct instructions were given to the jury, but rather, whether it can be held beyond a reasonable doubt that the evidence considered by the jury established both specific intent and deliberation beyond a reasonable doubt. The answer is "no." The evidence of deliberation in this case was not strong and the evidence of lying in wait was correspondingly insufficient. (See AOB 131-141.)

Respondent's proffered evidence of deliberation is that Sergio arrived at the Target parking lot when he knew Ms. Shirley would be coming to work, that he was dressed in black, that he was armed, and that he fired through the rear window. (RB 77.) None of this evidence, however, is particularly probative of advance planning unless one blindly accepts the prosecution's theory that this was a revenge killing for a promotion lost to Ms. Shirley three months earlier. In actuality, no evidence supported this theory. Sergio's negative attitude at work showed at most immaturity and lack of motivation. His relationships with all his co-workers, not only Ms. Shirley, deteriorated after he was taunted and humiliated. (See, e.g., 4RT 1128, 1234; 5RT 1415, 1419.) Most importantly, there was no evidence of a single statement or action by Sergio during the intervening months that expressed a desire for revenge or the intent to harm Ms. Shirley in any way. (See, e.g., 6RT 1847.)

Viewed independently of the prosecution's preconceptions, the proffered evidence of deliberation was very thin. It is true that Sergio arrived at the Target parking lot close to when Shirley began her shift. But, it was not only Ms. Shirley who reported at that time. There was a regular shift that began after four o'clock and overlapped a shift that ended at six o'clock in the morning. (See 4RT 1132 [30 people on the "push team"], 4RT 1445-1446 [Kristin Strickland: "I worked at Target and arrived at the store somewhere close to four o'clock in the morning. I was the merchandise receiving manager. I had keys to the store. I opened the store to allow other employees to enter in the morning."]; 5RT 1649; 8RT 2449.) Having worked these hours, Sergio would not have expected the parking lot to be empty, except for Ms. Shirley, when he came by. Sergio also would have known that the parking lot was fairly well lit. (6RT 1811-1812.)

Consequently, Sergio would have had no reason to believe that he could catch the victims by surprise even if he dressed in black and approached the automobile from the rear of the driver's side.[14]

The evidence that Sergio habitually dressed in dark clothing and that he possessed the gun for protection from a street gang further weakened any inference of deliberation. (4RT 1314-1315, 1355.) In short, this was a close case on the issue of deliberation. It, therefore, cannot be determined beyond a reasonable doubt that the jury actually rested its verdict of first degree murder on evidence establishing both specific intent and deliberation independently of the critical misinstruction.

The jury's true findings of lying in wait do not change the weight of evidence and, thus, cannot alter the conclusion that the erroneous instructions were prejudicial. Accordingly, the judgment must be reversed. (See *People v. Lee* (1987) 43 Cal.3d 666, 676.)

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[14] There was no testimony that Sergio approached the vehicle from behind. That he may have fired through the rear driver's side window does not establish the direction from which he arrived at that position.

5.

THE COURT ERRED IN INSTRUCTING THE JURY WITH CALJIC NO. 2.70 BECAUSE GIVING THE INSTRUCTION SUGGESTED THAT SERGIO HAD CONFESSED TO AND WAS GUILTY OF FIRST DEGREE MURDER.

Respondent does not seriously contest Sergio's assertion that it was error to instruct the jury with CALJIC No. 2.70 (Confession and Admission - Defined) because there had been no confession in the case. (AOB 101-108.) Respondent argues, however, that the error was harmless because there is no likelihood the jury was misled. (RB 79.) Respondent is wrong for several reasons. First, respondent fails to appreciate the potential for juror confusion and misapplication of this instruction.[15] Although the jury was admonished pursuant to CALJIC No. 17.31 that it could disregard factually unsupported instructions, its default assumption would have remained that the court would not instruct on a random point of law with nonexistent evidence. Thus, the mere fact that the court elected to give the instruction would have encouraged the jury to seek a confession among Sergio's diverse statements.

Respondent, in fact, offers as a candidate for a confession Sergio's statement to Dr. Wells that he shot Mr. Thompson because he believed

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[15] In August, 2006, the Judicial Council officially adopted new criminal jury instructions. (Judicial Council of California, News Release No. 46 (August 26, 2005).) The purpose of drafting new instructions was to ensure that "instructions be clear so that Californians performing [jury service] reach informed conclusions, grounded in a true understanding of the law." (News Release No. 46, quoting Task Force Chair, Corrigan, C. A., J..) It is telling, therefore, that the Task Force rejected the language of CALJIC No. 2.70 in its entirety. In its place, the Task Force promulgated CALCRIM No. 358, Evidence of Defendant's Statements, which avoids the charged use of the term "confession."

Thompson was reaching for a gun. (RB 81.) This statement clearly does not qualify as a confession. Respondent is mistaken, and it is likely the jury made the same mistake.

Respondent also ignores the unique potency of confessions as evidence of guilt. (See *People v. Ellis* (1966) 65 Cal.2d 529, 536.) Once the jury was prompted to believe Sergio had confessed, it would have had difficulty setting aside this preconception when deciding Sergio's degree of culpability.

Finally, respondent overstates the strength of the prosecution's evidence. As repeatedly demonstrated by Sergio, this was a very close case on the issue of deliberation. The error in suggesting to the jury that Sergio had confessed was thus manifestly prejudicial under any applicable standard of review. Accordingly, the judgment must be reversed.

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6.

THE COURT VIOLATED SERGIO'S CONSTITUTIONAL RIGHTS WHEN IT FAILED TO HOLD A COMPETENCY HEARING DESPITE SUBSTANTIAL EVIDENCE THAT SERGIO MAY NOT HAVE BEEN COMPETENT TO PROCEED WITH TRIAL.

A. Sergio Was Denied a Fair and Reliable Penalty Trial.

Sergio has argued that the trial court's failure to suspend proceedings and conduct a competency hearing, despite substantial evidence that Sergio was incompetent to assist in his penalty defense, violated his statutory and federal constitutional rights. (AOB 109-123.) Respondent contends that Sergio failed to present substantial evidence of incompetence to stand trial. (RB 83.) Respondent, however, ignores compelling evidence that Sergio's self-destructive behavior at his penalty trial was the product of a disturbed mind and beyond Sergio's rational understanding or control.

Sergio was an immature 20 year-old at the time of the trial. (26 RT 4705; CT 435.) He had a long history of depression, suicidal ideation and gestures, and emerging symptoms of a paranoid disorder. (7RT 2042, 2151, 2156, 2172; 9RT 2608.) He was emotionally isolated and had no one close whom he trusted for support and advice. (See 6RT 1877, 1886; 7RT 2156-2158.)

Both Sergio's trial counsel and an appointed psychiatrist expressed serious doubts that Sergio's sudden silence and decision not to cooperate were voluntary or rational. (2CT 425-426; 14RT 3309-3310.) The trial court was convinced, at least, that Sergio was not malingering. (14RT 3338.) Nonetheless, the court pressed ahead to the penalty phase.

On this record, a reasonable judge would have experienced a bona fide doubt that Sergio possessed the ability to participate meaningfully in

the penalty process and would have conducted a full inquiry as to Sergio's competency. The court's failure to conduct such an inquiry deprived Sergio of a fair and reliable penalty determination.

B. The Death Penalty Verdict Must Be Vacated Because the Court Failed to Suspend Proceedings and Order a Competency Hearing after the Defense Presented Substantial Evidence that Raised a Good Faith Doubt About Sergio's Competency to Stand Trial.

Respondent's argument demonstrates no recognition that "death is different." The trial court seemed to appreciate there might be a difference in approaching competency in a "life and death situation" as compared to a minor matter. (15RT 3362.) But the obvious difference in the gravity of the consequences did not figure into the court's decision to forego a competency inquiry.

The qualitative difference between death penalty proceedings and all other matters is reflected in the requirement that a habeas court *must* conduct an inquiry sua sponte into mental capacity when a death row inmate, and only a death row inmate, seeks to abandon collateral review of his conviction and sentence. (See *Mata v. Johnson* (5th Cir. 2000) 210 F.3d 324, 329-330, citing *Pate v. Robinson* (1966) 383 U.S. 375 [italics added].) Such an inquiry is not mandatory when a defendant decides not to oppose the death penalty at the trial stage, but even then, a heightened level of scrutiny is warranted. As Dr. Coburn observed:

> Given the fact that it is a life versus death situation, I would urge the court to declare a doubt as to competency. . . . It is a continuum as to the gravity of the penalty . . . . In minor matters, we very often allow totally uncooperative defendants to proceed and let the chips fall where they may. Someone along the line where you start getting up into multiple decade penalties or death, I begin to feel a discomfort with allowing

that.

(15RT 3362.)

The trial court's response was that "to pursue a death penalty hearing, that – that it would be at least, quote, nice to know why he came to the conclusion that he came to, though, I don't think that makes him incompetent. . . . my views might be different were I so situated as maybe yours. But, I don't think that affects his competency. . . . I have no doubt he understands what we're talking about." (14RT 3336-3337, 3344.)

Although the court was correct that the standard for competency, in the abstract, is unaffected by the nature of the decision, it defies commonsense to ignore the magnitude and complexity of a decision in assessing its rationality. The cases cited by respondent, in aggregate, merely establish that the question of what constitutes substantial evidence under Penal Code section 1368 and the federal Constitution "cannot be answered by a simple formula applicable to all situations" and that, generally, no single fact, taken alone, amounts to substantial evidence. (See *People v. Laudermilk* (1967) 67 Cal.2d 272, 285.) Looking past these generalities, none of the cases cited by respondent involved a convergence of facts remotely similar to that encountered here. Most, if not all the cases, moreover, involved defendants who were mature adults,[16] with lengthy, generally violent, criminal histories and long experience with the criminal

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[16] The age of the defendant is not expressly stated in the cited cases. However, it is possible to estimate approximate age by events in the defendant's life. For example, in *People v. Ramos* (2004) 34 Cal.4th 494, the facts indicate that the defendant had served in the Vietnam war and had prior convictions dating back to 1976. Given this history, it is fair to infer that the defendant was at least in his late thirties in 1991 when the murders occurred.

and penal justice systems.

For example, in *People v. Ramos* (2004) 34 Cal.4th 494, 588, the defendant decided to plead guilty to all the charges and admit the special circumstances allegations. Prior to accepting the pleas, the court conferred in chambers with trial counsel with the defendant present. Counsel questioned the defendant's competence in seeking to have the death penalty imposed. (*Id.* at pp. 588-589.) As evidence of the defendant's lack of competency, counsel introduced evidence of the defendant's prior and continuing violent behavior, and his hoarding medications for a possible future suicide attempt. This Court affirmed the trial judge's ruling that the defendant's violence, suicidal ideation and history of psychiatric treatment did not warrant a competency hearing. (*Id.* at p. 589.)

Nothing in the subsequent change-of-plea colloquy with the defendant caused the trial court to revisit the competency question. Nonetheless, on appeal, the defendant also claimed that, even if the trial court's initial ruling on competency was proper, additional evidence surfaced at the penalty trial that required the court to order a competency hearing at that point. However, as characterized by the Court, the evidence at the penalty phase only confirmed that the defendant lived by his own rules without regard to the lives of others. (*People v. Ramos*, *supra*, 34 Cal.4th at p. 589.) There was no indication in the record that defense counsel sought a competency hearing at the penalty trial or complained of the defendant's lack of cooperation at any time.

Respondent cites *People v. Frye* (1998) 18 Cal.4th 894 for the proposition that a court is not compelled to conduct a competency hearing based *solely* upon counsel's view that a defendant is incompetent. (RB 91.) *Frye* is not apposite, however. In *Frye*, the issue of competency was not

raised in the trial court. Rather, on appeal, the defendant challenged his attorney's effectiveness for failing to raise the question and, as a corollary, the trial court's failure to order, sua sponte, a competency hearing. (*Id.* at p. 951.) In rejecting Frye's claims, this Court emphasized that "[c]ounsel did not suggest at any time that defendant was incapable of assisting in the defense or that counsel was having difficulty communicating with the defendant generally." (*Id.* at p. 952; see also *People v. Rogers* (2006) 39 Cal.4th 826, 848 [rejecting claim that trial court should have undertaken, sua sponte, competency inquiry and noting that "[c]ounsel never suggested, however, that defendant's alleged inability to consent to interrogation gave rise to a doubt concerning his competency to stand trial"].)

In *People v. Blair* (2005) 36 Cal.4th 686, 716, also cited by respondent, this Court held that the trial judge was not required, sua sponte, to hold a hearing to determine the competency of a defendant who, 15 years earlier, had been hospitalized for psychiatric problems. The Court noted that the defendant's advisory counsel did not inform the judge that there might be a competency issue. (*Ibid.*)

Similarly, in *People v. Guzman* (1988) 45 Cal.3d 915, this Court held that the trial judge did not err in failing to order, sua sponte, a psychiatric examination before allowing the defendant to "waive" his right to mitigation evidence at his penalty trial. In finding that the defendant's decision did not, by itself, constitute substantial evidence of incompetence, the Court explained,

> The record reveals that many months before the trial started defendant took the position that he did not want to spend the rest of his life in prison. By the time of the guilt phase, he had long contemplated his decision. At the in camera hearing before the penalty phase, *defense counsel told the court that*

> *he felt defendant decision was an 'informed choice*." Further, after weeks of observing the defendant, the court concluded the defendant knew what he was saying and was of "sound mind."
>
> Additional evidence the defendant's choice was thoughtful and informed is disclosed by the reasons he gave for the decision: He did not want to return to the violence and danger of the prison system; he did not want to be "alone" anymore, having spent virtually his entire adult life in prison; he felt life in prison with no possibility of parole would be a wasted existence; and finally, he did not want to live with the "memory of [the victim]."

(*Id.* at pp. 964-965 [italics added].)

In contrast, the record in this case is devoid of evidence of reasoned contemplation and informed decision-making. Rather, the record discloses intense emotional volatility, bizarre thought processes and a fatal avoidance of reality.

The cases cited by respondent, rather than support its position, underscore the profound flaws in the trial judge's approach to the competency issue here. First, it must be stressed that the competency test under Penal Code section 1368 is stated in the disjunctive. A defendant is not competent to stand trial if he is *either* unable to understand the nature of the criminal proceedings *or* unable to rationally assist defense counsel. (Pen. Code, § 1367, subd. (a) [italics added].)

Thus, in addressing the competency issue in federal habeas proceedings, courts have stressed that "'meaningful assistance of counsel is essential to the fair administration of the death penalty and capacity for rational communication is essential to meaningful assistance of counsel.'" (*Nash v. Ryan* (9th Cir. 2009) 581 F.3d 1048, 1052) (quoting *Rohan ex rel.*

Gates v. Woodford (9th Cir. 2003) 434 F.3d 803, 813 [holding that right of petitioner to be competent so as to assist and consult with counsel in federal habeas capital cases extends to an appeal from the denial of habeas relief].)[17]

Here, the trial judge was presented with substantial, unrebutted evidence that Sergio lacked the capacity for rational communication with his attorney, even when that meant sabotaging his own penalty defense. Dr. Coburn expressly stated that he "doubt[ed] that [Sergio] is competent to make decisions as to whether or not he could cooperate. . . ."; but, due to that very lack cooperation, Dr. Coburn could not draw any conclusions to a medical certainty. (14RT 3309.) Defense counsel was even firmer in his conviction that Sergio was not competent to make a life-or-death decision. (15RT 3364.) Dr. Coburn and defense counsel strongly urged the court to refer Sergio for psychiatric observation and/or medication. (15RT 3356.)

The court declined to initiate any further inquiry into Sergio's competency or take any steps to restore Sergio to rationality. The court made no effort to ascertain, much less evaluate, the reasons for Sergio's expressed wish to die and refusal to cooperate with counsel. Sergio's youth and immaturity, as well as the severity of his psychological disorders, should in themselves have triggered a more thorough inquiry into

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[17] In *Nash v. Ryan*, *supra*, 581 F.3d at pp.1054-1066, the court held that the right to competence would attach in cases where rational communication with the petitioner is essential to counsel's ability to meaningfully prosecute the appeal – i.e., whether the petitioner's claims include those that could benefit from the ability to communicate rationally. Rational communication with the defendant is indispensable, of course, to every facet of effective penalty phase preparation. (See, e.g., *Wiggins v. Smith* (2003) 539 U.S. 510, 524 [discussing defense counsel's duties at the penalty phase of a capital case].)

competency. (Cf. *Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847, 852 [holding that lack of competency to stand trial may be established by developmental immaturity]; *Roper v. Simmons* (2005) 543 U.S. 551, 574 [recognizing that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18"].)

Rather than try to understand the actual cause of Sergio's retreat into self-defeating silence, the court leapt to the wholly unfounded conclusion that Sergio was acting volitionally to delay the penalty retrial. (15RT 3366.) There is no evidence in the record that Sergio ever engaged in delaying tactics. His case came to trial less than one year from the date the information was filed, and within ten months of the prosecutor's notification that he intended to seek the death penalty. (1CT 149-151, 173.) The trial judge found good cause for each of defense counsel's continuance requests. (See 1CT 187, 191, 209, 423.) In fact, the last continuance of the trial date, for six weeks, was not sought by counsel, but rather was based on the lack of a suitable courtroom and the trial judge's schedule. (1RT 156.)

Had the court's conjecture been correct, Sergio would have reverted to normal behavior once the supposed strategy of delaying the penalty phase failed. But instead, he became increasingly withdrawn and uncooperative over the course of the proceeding. (36RT 5851 [Defense counsel: "I can indicate to this court that this young man is severely emotionally disturbed. [] I have argued to this court that, No.1, he was incompetent to assist me in the defense of this case. And, finally, I would argue your honor, he's definitely not competent to be put to death. [] This court has consistently refused to allow independent experts to get a hold of Sergio. My doctors haven't been able to pierce the veil."].)

In the face of the strong doubts as to competency expressed by defense counsel and Dr. Coburn, as well as Sergio's youth, extreme immaturity, impulsivity and history of mental disorders, the trial court should have inquired into Sergio's competency before consigning him to a fundamentally deficient penalty trial. The court's failure to conduct an inquiry when, as here, there was such substantial evidence of incompetence, mandates reversal of the death judgment. (*People v. Rogers*, *supra*, 39 Cal.4th at p. 846, citing *Drope v. Missouri* (1975) 420 U.S. 162, 183.)

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7.

BY REJECTING "SHOULD" FOR "MAY" AND USING THE EXPRESSION, "AND/OR," IN MODIFYING CALJIC NO. 3.32, THE COURT FAILED TO INSTRUCT THE JURY THAT IT *SHOULD* CONSIDER SERGIO'S MENTAL DISORDERS IN DETERMINING THE ISSUES OF DELIBERATION, INTENT TO KILL, MALICE, AND PREMEDITATION.

The distinctions among the degrees and types of unlawful homicide form a matrix of variable, complex mental states. Numerous instructions have been promulgated to capture these differences with precision to ensure that jurors understand which mental states are uniquely or jointly associated with each homicide offense. (See CALJIC Nos. 8.10-8.51.) In contrast, here, the court's instructions repeatedly muddled and obscured these critical distinctions by merging discrete mental states in a single, ambiguous charge.

Sergio has complained that modified CALJIC No. 2.02 (Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State) and combined CALJIC Nos. 3.31/3.31.5 (Concurrence of Act and Specific Intent or Mental State) relieved the jury from finding the conjunction of deliberation and specific intent required for a conviction of first degree murder. (See AOB 94-100.) Sergio further contends that the confusion arising from those erroneous instructions was only increased by the flaws in the court's modified version of CALJIC No. 3.32 (Evidence of Mental Disease - Received for Limited Purpose). Sergio points to two misleading directives in this single, crucial instruction: first, the use of the permissive "may" in place of the mandatory "should" in limiting the jury's consideration of Sergio's psychological defense; and second, the use of the alternative conjunction "and/or" in enumerating the range of potentially

affected mental states. The use of "may" allowed the jury to ignore, at its discretion, substantial evidence that Sergio did not harbor the required mental states of first degree murder. The "and/or" formulation injected further ambiguity as to the scope and effect of this defense. Specifically, the instruction, as framed, suggested that the jury may, but need not, consider whether Sergio's mental disorders prevented him from deliberating before he acted.

Respondent counters that there is no reasonable likelihood that the jury was misled in light of the other instructions. (RB 95.) However, as demonstrated in several of Sergio's arguments, the instructions were replete with confusing or deficient admonitions regarding the differential mental states of murder and manslaughter. (See AOB 30-60, 61-68, 94-100,142-156, 157-162 .)

Respondent relies on *People v. Smithey* (1999) 20 Cal.4th 936, in which the Court held that defense counsel was not ineffective for failing to request a pinpoint instruction on the combined effect of intoxication and mental disorder. (RB 97.) Respondent's reliance on *Smithey* is plainly misplaced. Neither the issue nor the instructions examined in *Smithey* were the same as those addressed in this case. The first and most obvious difference is that, unlike here, trial counsel in *Smithey* neither challenged the pattern instructions nor submitted a pinpoint instruction on the theory of the defense. Sergio's trial counsel did both. The defendant in *Smithey* also did not challenge the particular language of CALJIC No. 3.32 on appeal, but rather the alleged failure of the charge to "harmonize" the instructions on mental disease (CALJIC No. 3.32) and intoxication (CALJIC No. 4.21). The Court rejected that claim, holding that the instructions as a whole adequately informed the jury that mental disease or defect and intoxication

could operate together. (*Id.* at p. 986.)

In contrast to *Smithey*, in this case, no instruction, nor the instructions as a whole, clarified that the jury was required, rather than simply permitted, to consider Sergio's mental disorders in determining whether he possessed the conjunction of mental states required for first degree murder. Nothing in defense counsel's closing argument lessened the confusion. Counsel's argument that, due to paranoid schizophrenia, Sergio misconstrued the situation did not, and could not, override the instruction given by the judge. Furthermore, at the prosecution's request and over defense counsel's objection, the court effectively nullified counsel's argument by admonishing the jury that a bizarre and delusional motive or abnormal perception categorically would not defeat a first degree murder conviction. (9RT 2687-2688, 2721.)

The jury's likely confusion was compounded by the use of "and/or" in the same instruction. Respondent does not dispute that the construction "and/or" is ambiguous. (Cf. *Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1329 ["The fact that plaintiff, on appeal, continues to refer to her alleged contract as an 'oral and/or implied-in-fact contract, reflects the ambiguity of the jury's verdict – ultimately the result of fuzzy reasoning"].) Rather, respondent argues that the claim should be rejected because defense counsel did not specifically object to the "and/or" language. (RB 99.) However, the theory of defense instruction submitted by counsel did not use the problematic term and included the precise clarification lacking in the court's ambiguous formulation. (See also Pen. Code, § 1259 [authorizing appellate review of any instruction given even though no objection was made if the substantial rights of the defendant were affected].)

Because the modified instruction was confusing and ambiguous, it is reasonably likely the jury misunderstood or misapplied the applicable law. (*People v. Avena* (1996) 13 Cal.4th 394, 417, citing *Boyde v. California* (1990) 494 U.S. 370, 380-381.) As a result, Sergio was denied his federal constitutional rights to due process and reliable fact-finding in a capital case. (See *In re Winship* (1970) 397 U.S. 358; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-333.) Because this was a close case with respect to the element of deliberation, the instruction was not harmless beyond a reasonable doubt, and the judgment must be reversed.

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8.

THE COURT ERRED IN INSTRUCTING THE JURY ON A FACTUALLY INSUFFICIENT LYING-IN-WAIT THEORY OF FIRST DEGREE MURDER, AND BECAUSE THE JURY UNREASONABLY FOUND THE EQUALLY UNSUPPORTED LYING-IN-WAIT SPECIAL CIRCUMSTANCES, THE FIRST DEGREE MURDER VERDICTS AND LYING-IN-WAIT SPECIAL CIRCUMSTANCES MUST BE REVERSED.

Sergio contends that there was insufficient evidence of an adequate period of watching and waiting to sustain a lying-in-wait theory of first degree murder or the jury's findings on the lying-in-wait special circumstances. (AOB 131-141.) Respondent counters that Sergio's contentions lack merit. (RB 100.) However, respondent's opposing argument relies on layers of inferences bottomed on speculation and conjecture. Even when the record is viewed in the light most favorable to the verdict, it discloses no substantial or solid evidence to support a finding beyond a reasonable doubt that Sergio was lying in wait.

In contrast to the cases cited by respondent, there was no evidence in this case establishing Sergio's movements or location immediately prior to the shootings. (RB 104.) In *People v. Hillhouse* (2002) 27 Cal.4th 469, 500, the lying-in-wait special circumstance finding was upheld where the defendant's accomplice, his brother, testified that the defendant told him at an early stage of an intent to kill the victim and that the defendant stabbed the victim after a substantial period of watching and waiting until the victim got out of the truck to urinate and became particularly vulnerable. (*Id.* at pp. 500-501.)

In *People v. Moon* (2005) 37 Cal.4th 1, 23, the defendant confessed and provided a detailed account of his actions prior to killing the second

victim, after killing her daughter. Although he minimized the time he spent waiting for the second victim, the Court found that, based on the facts to which the defendant had confessed, the jury could have reasonably inferred that defendant, after killing the daughter, resolved to await the mother's arrival in order to kill her also, so as to eliminate the only witness who could place him in the home that day, linking him to the daughter's murder. (*Ibid.*; see also *People v. Ceja* (1993) 4 Cal.4th 1134, 1140-1141 [six eyewitnesses testified to the occurrences from the time the defendant approached the house to the shooting]; *People v. Superior Court (Lujan)* (1999) 73 Cal.App.4th 1123 [defendant, by his own admission, concealed himself from the victims by hiding between two trucks, armed with a weapon, waiting for the victims to approach]; RB 104.)

Here, there were no eyewitnesses to any event at the Target parking lot prior to the first gunshots. This case most closely resembles *People v. Lewis* (2008) 43 Cal.4th 415. In *Lewis*, the Court vacated a jury's true finding on the lying-in-wait special circumstance for insufficient evidence of a substantial period of watching and waiting. (*Id.* at p. 509.) For the shooting in question, the evidence consisted of eyewitness accounts, the defendant's statement, evidence that the victim's belongings were found in the defendant's possession, and physical evidence of the manner of the killing. (*Id.* at 508.)

The Court found the eyewitness descriptions unhelpful in establishing lying in wait in that they "recounted only the aftermath of the shooting"; i.e., the first perception of the incident was a witness hearing a gunshot. (*People v. Lewis, supra*, 43 Cal.4th at p. 508 .) The Court also found that the defendant's statement supplied no evidence of lying in wait because it commenced with his confronting and shooting the victim.

Finally, the Court noted, that "[a]lthough it is suggested that defendant shot [the victim] while [the victim] was sitting and facing forward, the physical evidence shed no light on what occurred before the confrontation with and the killing of [the victim]." (*Ibid.*; see also *People v. Richards* (1983) 146 Cal.App.3d 306, 315 [evidence that victim struck from behind by surprise insufficient to establish lying in wait].) The Court concluded that no inference of lying in wait arose from the evidence. (*People v. Lewis*, *supra*, 43 Cal.4th at p. 509.)

The evidence in this case is similarly deficient. The eyewitness testimony and the physical evidence shed no light on what occurred before the shootings. Sergio's statement negated lying in wait. Thus, as in *Lewis*, no sound inference of a substantial period of watchful waiting is supported by the evidence.

Respondent's contrary argument merely piles speculative inference upon inference with no solid evidence at its base. (See *People v. Raley* (1992) 2 Cal.4th 870, 890) [finding layers of inference far too speculative to support the conviction].) Accordingly, the jury's true finding of the lying-in-wait special circumstance must be vacated. Furthermore, because instructional error, as previously argued, broadly infected the prosecution's premeditation and deliberation theory, the first degree murder verdicts must be reversed pursuant to *People v. Guiton* (1993) 4 Cal.4th 1116, 1129 and *Griffin v. United States* (1991) 502 U.S. 46.

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9.

THE COURT ERRED IN INSTRUCTING THE JURY ON CONSCIOUSNESS OF GUILT.

Sergio asserts that consciousness-of-guilt instructions prejudicially violated his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and parallel provisions of the California Constitution. Specifically, Sergio contends that instructing the jury with CALJIC Nos. 2.03 (Consciousness of Guilt – Falsehood), 2.06 (Efforts to Suppress Evidence) and 2.52 (Flight After Crime) were unnecessary, unfairly argumentative in favor of the prosecution and permitted the jury to draw an irrational permissive inference regarding Sergio's guilt. (AOB 142-146.) Respondent cites several decisions of this Court approving the giving of the instructions but does not refute the reasons advanced by Sergio to explain why those decisions are erroneous and should be reconsidered. (RB 108-11.)

Respondent does not rebut Sergio's contention that the holding of *People v. Nakahara* (2003) 30 Cal.4th 705, rejecting the challenge to the consciousness of guilt instructions based on *People v. Mincey* (1992) 2 Cal.4th 408, improperly differentiates between instructions that are identical in structure and differ only in that one – approved – instruction highlights the prosecution's version of the facts while the other – rejected – instruction highlights the defendant's version. (AOB 145-146.) Respondent does not address Sergio's further argument that the opinion in *People v. Crandell* (1988) 46 Cal.3d 833 – the foundation for the case law rejecting Sergio's consciousness of guilt claim – should be reconsidered in light *In People v. Hayes* (1990) 52 Cal.3d 577, 608, in which the Court drew the very inference that *Crandell* asserted no reasonable jury would make. (AOB

154-155.) Accordingly, Sergio stands on the arguments in his opening brief.

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10.

THE INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURY TO FIND GUILT BASED ON MOTIVE ALONE.

Sergio asserts that instructing the jury under CALJIC No. 2.51 on motive improperly allowed the jury to determine guilt based on the presence of an alleged motive and shifted the burden of proof to Sergio to show an absence of motive to establish innocence in violation of state and federal constitutional guarantees. (AOB 157-162.) Respondent argues that Sergio's claims are waived. (RB 112.) Respondent is mistaken.

The very case respondent cites in arguing waiver, *People v. Cleveland* (2004) 32 Cal.4th 704, establishes that no waiver occurred. In *Cleveland*, the Court affirmed that, as here, a claim that the motive instruction "shifted the burden of proof to imply that [the defendant] had to prove innocence" was cognizable despite a failure to object because "if [the defendant] were correct, the instruction would have affected his substantial rights." (*Id.* at p. 750.)

Respondent also counters by citing several of this Court's decisions which rejected similar claims, but fails to rebut Sergio's arguments that call into question the soundness of those decisions. (RB 113-117.) Due to the constitutional defects detailed in Sergio's opening brief, this Court is urged to reconsider its prior analysis and reverse the judgment.

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11.

CALJIC NO. 2.90 WAS CONSTITUTIONALLY DEFECTIVE.

Sergio's asserts that former CALJIC No. 2.90 (1979 rev.), defining reasonable doubt and the presumption of innocence, was constitutionally deficient. (AOB 163-178.) Respondent relies on this Court's prior decisions to argue that the claim should be denied and offers no other argument. (RB 203.) Therefore, Sergio will stand on the arguments presented in the opening brief and re-assert that the judgment must be reversed.

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12.

THE INSTRUCTIONS IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT.

Sergio asserts that a number of the instructions given to the jury diluted the requirement of proof beyond a reasonable doubt and violated his constitutional rights. (AOB 179-191.)

Respondent counters by citing several of this Court's decisions which rejected similar claims, and contends that this Court should do so again in this case. (RB 120-128.) Sergio has previously acknowledged this Court's rejection of such claims, while urging this Court to reconsider those decisions.

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

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13.

THE COURT ERRED IN INSTRUCTING THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE LYING-IN-WAIT MURDER BECAUSE THE INFORMATION CHARGED SERGIO ONLY WITH SECOND DEGREE MALICE MURDER IN VIOLATION OF PENAL CODE SECTION 187.

Sergio asserts that because the information in his case charged him with only second degree murder in violation of Penal Code section 187, the trial court lacked jurisdiction to try him for first degree murder. (AOB 194.) Respondent asserts that this claim has been rejected by this Court in the past. (RB 129-131.)

Sergio has acknowledged these cases, while urging the Court to revisit the issue. Due to the constitutional deficiency of the State's practice in pleading murder, reversal of the judgment is required.

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14.

THE COURT SHOULD HAVE INSTRUCTED ON THE LESSER INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER WITH RESPECT TO BOTH VICTIMS BASED ON EVIDENCE THAT SERGIO'S MENTAL DISORDERS NEGATED MALICE.

Relying on *People v. Molina* (1988) 202 Cal.App.3d 1168, Sergio has argued that the trial court erred in refusing to instruct the jury on the defense theory of voluntary manslaughter based on mitigating evidence of Sergio's mental disorders. (AOB 200-205.) Respondent counters that *People v. Saille* (1991) 54 Cal.3d 1103 is controlling. (RB 133.) In *Saille,* the Court limited the ability of a defendant to reduce an intentional killing to voluntary manslaughter as a result of mental illness or voluntary intoxication. (*Id.* at pp. 1112-1113.) The *Saille* Court disagreed with the reasoning in *People v. Molina*, but did not expressly overrule the appellate decision.

Sergio anticipated respondent's argument and demonstrated that neither *Saille* nor the 1981 amendment of Penal Code section 188 (Malice Defined) foreclosed a voluntary manslaughter instruction based on evidence of mental illness. (AOB 201.) Moreover, respondent's interpretation of section 188, based on *Saille*, is unreasonable. Such interpretation is contrary to settled, prudential rules of statutory construction and, more importantly, raises serious constitutional concerns.

Pre-1981, Penal Code section 188 read in relevant part: "[Malice] is express where there is manifested a *deliberate intention unlawfully* to take away the life of a fellow creature." (Pen. Code, § 188, enacted 1872 [italics added].) In a series of cases culminating in *People v. Conley* (1966) 64 Cal.2d 310, 322 and *People v. Poddar* (1974) 10 Cal.3d 750, 758, the

Court established the diminished capacity defense by construing the mental element of malice aforethought to include a requirement that the defendant be able to comprehend his duty to act within the law and to act in accordance with the duty. (*People v. Saille*, *supra*, 54 Cal.3d at p. 1110.) Diminished capacity was not conceived as a complete defense, but as a "partial defense" that could reduce murder to voluntary manslaughter by negating malice. (*Ibid.*) In 1981, the legislature enacted Senate Bill No. 54, abolishing the defense of diminished capacity. The Bill added Penal Code sections 28 and 29, and amended sections 22, 188 and 189. (*Id.* at pp. 1111-1112.)

The decision in *People v. Saille*, *supra*, 54 Cal.3d 1103 is premised on the notion that the amended section 188 narrowed the statutory definition of malice, equating express malice with the intent to kill. However, the 1981 amendment did not change a single word of the 1872 definition. Rather, by expressed intention and wording, the amendment preserved the original definition and appended a two-sentence paragraph that disallowed the particular judicial interpretation of the statute – specifically, the term "unlawfully"– that supported the abolished diminished capacity defense. If the Legislature had wanted to go further, it could have stricken the term "unlawfully" from the statute; it did not do so. Nor, did it exclude malice aforethought from the surviving, permitted uses of evidence of mental illness enumerated in Penal Code sections 28 and 29.

Thus, it is *People v. Saille*, *supra*, 54 Cal.3d 1103, not the Legislature, that effectively excised the terms "deliberate" and "unlawfully" from the definition of express malice, though these terms have long possessed independent legal significance. "Unlawfully," in this context, continues to mean that there is no justification, excuse or mitigation for the

killing. (*Id.* at p.1115; *People v. Rios* (2002) 23 Cal.4th 450, 453; see Pen. Code, § 189.5 [Mitigation, Justification or Excuse of Homicide].) To convict a defendant of voluntary manslaughter, the jury must find the homicide to be "*both unlawful and intentional.*" (*People v. Rios*, *supra*, 23 Cal.4th at p. 454 [italics added].)

In *In re Christian S.* (1994) 7 Cal.4th 768, 778, this Court acknowledged the inherent ambiguity in section 188's definition of express malice, noting that the "inartful language leads to two conflicting views." The Court continued,

> Defendant contends the word "unlawfully" modifies the word "intention" so that the statute requires an intent to act unlawfully, or put in every day language, the defendant must have wrongful intent. Taking a different view, respondent construes the definition of express malice to mean that "unlawfully' refers not to the defendant's intent, but only to whether the act is later found to be unlawful. That is the defendant need not have intended to act unlawfully.

(*Ibid.*)

The Court adopted the defendant's construction. (*In re Christian S.*, *supra*, 7 Cal.4th at p. 780 [affirming that when the language of a penal statute is reasonably susceptible of two constructions, the construction which is more favorable to the defendant will ordinarily be adopted].) In rejecting respondent's view, the Court particularly criticized respondent's reliance on the notion of "legislation by accident," that is, "[A]n intention to legislate by implication is not to be presumed." (*Id.* at p. 776 (internal citations omitted).)

Respondent's argument here must be rejected for the same reasons. A review of the applicable statutory scheme post-1981 reveals no express or implied legislative intent that would support respondent's reading of *Saille,*

or conversely, that would negate the *Molina* court's construction of the law. As noted, the statutory definitions of malice aforethought and manslaughter have not changed since the enactment of sections 188 and 192. (See *People v. Saille*, *supra*, 54 Cal.3d at p. 1114.) The 1981 amendment of section 188 did not alter the historical definition of malice; rather, it expressly disapproved a particular judicial interpretation of the concept and correspondingly clarified the prosecution's burden of proof. As *People v. Saille*, *supra*, 54 Cal.3d at p. 1111 pointed out, the original version of the bill amending section 188 and related statutes swept more broadly than the final version. Respondent's argument is consonant with the bill's original, arguably unconstitutional, intention to bar mental health evidence at the guilt phase of a trial, confining such evidence to sentencing or a separate sanity or penalty phase. Respondent's argument does not comport with the far more circumscribed bill that actually passed.

It is a well-established tenet of statutory construction that "Judges should hesitate . . . to treat statutory terms in any setting [as surplusage], and resistence should be heightened when the words describe an element of a criminal offense." (*Jones v. United States* (2000) 529 U.S. 848, 857; *Ratzlaf v. United States* (1994) 510 U. S. 135, 140-141[interpreting the phrase "willfully violating" in the federal structuring statute (31 U.S.C., § 5322) to require proof beyond a reasonable doubt that the defendant knew of his duty not to avoid triggering a cash transaction report]; *Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1064-1066; *People v. Bailey* (2010) 187 Cal.App.4th 1142, 1153 [interpreting the phrase "unlawful departure of a prisoner *from the limits of custody*" in Penal Code § 4350 to require proof that the prisoner went beyond the boundary of the prison facility having custody of that prisoner].)

Respondent's interpretation of section 188, based on *Saille*, broadly disregards this rule, effectively writing "unlawfully" out of section 188, "malice aforethought" out of section 28 and "mitigation"out of section 189.5.

In *People v. Molina, supra*, 202 Cal.App.3d at p.1174, the court reasoned that the inclusion of malice aforethought in Penal Code section 28, subdivision (a) showed that the Legislature did not foreclose the reduction of murder to voluntary manslaughter where malice is lacking due to mental illness.

In rejecting this reasoning, the Court in *Saille* explained that section 28 necessarily incorporated the definition of malice in section 188, which the Court had equated with intent to kill. But this reading misconstrues the logical relationship between the two statutes. Section 28 is a constitutionally-compelled clarification of the amendment to section 188 that expressly limits its effect to abolishing *only* the diminished capacity defense and the *Conley-Poddar* interpretation of the elements of malice aforethought. (*People v. Saille*, *supra*, 54 Cal.3d at pp. 1110-1111, discussing *People v. Conley* (1966) 64 Cal.2d 310 and *People v. Poddar* (1974) 10 Cal.3d 750.)

Moreover, whereas the second sentence of the amendment expressly speaks to the definition of malice, the first sentence does not. The first sentence, read alone and in combination with sections 28, 189.5 and 192, addresses the prosecution's burden of proof, not the definition of malice. The sentence, at most, establishes a presumption of malice murder when "the killing resulted from the intentional doing of an act *with express or*

implied malice as defined above."[18] (Italics added.) The sentence does not and, for constitutional and statutory reasons, cannot abrogate a defendant's right to present evidence rebutting the presumption of malice within the framework of sections 28, 189.5 and 192.

If the defendant seeks a reduction from murder to voluntary manslaughter on statutory grounds, i.e, heat of passion or unreasonable self-defense, the prosecution bears the specific burden to prove the absence of heat of passion, sudden quarrel or grounds for unreasonable self-defense. (CALJIC No. 8.50.) If, instead, the defendant attempts to rebut the inference of malice pursuant to section 28, he must "'come forward with enough evidence to raise a reasonable doubt of guilt'" as to whether, due to mental disease, defect or disorder, he actually harbored malice aforethought. (*People v. Frazier* (2005) 128 Cal.App.4th 807, 819, quoting *People v. Loggins* (1972) 23 Cal.App.3d 597, 601 ["Because malice is an element of the crime of murder, however, this statutory mandate does not shift the burden of persuasion, but rather 'beckons [the defendant] to come forward with his evidence'"]; Pen. Code, § 28 and Pen. Code, § 189.5.) If the defendant has presented evidence of mitigation, the presumption of malice underlying section 189.5 (formerly section 1105) disappears and the jury must determine the question of malice for themselves without regard to that presumption. (*People v. Loggins*, *supra*, 23 Cal.App.3d at 603.) This is, essentially, what *Molina* held.

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[18] Of course, to sustain a conviction of murder, both the intentional act and malice must be established beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358; *Sandstrom v. Montana* (1979) 442 U.S. 510.)

To hold otherwise raises serious constitutional questions. The United States Supreme Court has repeatedly cautioned that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided" [the duty of the Court] is to adopt the latter." (*Jones v. United States*, *supra*, 529 U.S. at p.857 [citations omitted].) In keeping with this settled principle, the Court is respectfully urged to reconsider an interpretation of the 1981 amendments, collectively Senate Bill 54, that is constitutionally suspect and fails to accord with the rules of strict construction reserved for criminal statutes.[19]

Sergio presented substantial mitigating evidence that, due to his severe mental disorder, he did not actually harbor malice aforethought – that is, a deliberate intention unlawfully to kill. Pursuant to Penal Code sections 28 and 189.5, this evidence warranted a voluntary manslaughter instruction. The trial court's failure to instruct the jury on the lesser included offense was prejudicial error, requiring reversal of the entire judgment.

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[19] The U.S. Supreme Court in *Jones*, *supra*, 529 U.S. 848, also reaffirmed that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." (*Id.* at p. 858, citing *Rewis v. United States* (1971) 401 U.S. 808, 812.)

15.

THE COURT COERCED THE DEADLOCKED JURY INTO A DEATH VERDICT AND DENIED SERGIO DUE PROCESS.

Sergio has argued that the trial court coerced the jury into a death verdict by its inappropriate, suggestive comments, intrusive questions and eventual discharge of a holdout juror. (AOB 207-242.) Respondent contends that none of the court's statements or actions coerced a verdict or violated Sergio's constitutional rights. (RB 136.) However, despite its assertion to the contrary, respondent focuses on each challenged statement and action in isolation, never addressing their coercive cumulative impact. By the same token, each case cited by respondent focuses on a single judicial intervention in the jury process, not the totality of escalating invasions of juror secrecy as occurred here.

It bears repeating that the jury had deliberated for nine court days before informing the judge, on August 10th, that it was at an impasse. (RT 5661.) The jury's note included the numerical division of the ballots taken to that point, but no complaint regarding the participation of any juror. (34RT 5661-5665, 5666.) The jury was dismissed for the evening. (34RT 5668.)

On August 11th, the jury again voted and reported no movement in either direction. (34RT 5684-5685.) When so informed, the court proceeded, over defense counsel's objection, to distribute a probing, eight-part questionnaire to the jury. (34RT 5683-5686.) Some of the questions elicited yes or no answers; but some were open-ended. (AOB 214-215; RB 146.) After reviewing the completed questionnaires, the court concluded that the answers, which disclosed details of the jury's deliberations, were more problematic than helpful. After informing the jury that the

questionnaires had raised concerns that needed to be resolved, the court dismissed the jury and directed it to return Monday morning, August 14th. (34RT 5700-5702.) When the jury returned on Monday, the court summoned the foreman whom the court and prosecutor then questioned regarding the foreman's own and other jurors' responses to the questionnaire. (35RT 5725-5747.) More disclosures of juror attitudes and thought processes, as well as the questioning of two additional jurors, ensued. As a result of these inquiries, the court was able to identify which jurors were the holdouts. (35RT 5812 [the prosecutor: "I can guess that the other juror is Ms. Ortiz. . . . So maybe if she has somebody else to listen to, it is possible that she could come to a conclusion that is unanimous with this jury"].) The court then discharged one of the holdouts, Annora Hall.[20] (35RT 5770-5804.) That afternoon, the court substituted one of the alternate jurors for Ms. Hall and instructed the jury to begin deliberations anew. (35RT 5824-5826.)

The jury assembled to deliberate the next morning, August 15th, and returned with a verdict of death within 2-1/2 hours. (36RT 5828.) At no time during the intervening period, was there a single readback of trial testimony, a single supplemental instruction given or a single juror question answered by the court.[21] In short, nothing that would ordinarily assist jurors in resolving an impasse was offered to help them in this case. Rather, the

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[20] All issues related to the propriety of discharging juror Hall, as opposed to the coercive impact of her discharge on the remaining minority juror, are addressed in Argument 16, *infra*. (AOB 243-258.)

[21] The jury instructions given on August 14th pertained to the seating of the alternate juror, not the resolution of the deadlock. These last instructions are also challenged herein.

jury was subjected to increasingly intrusive questioning, culminating in the discharge of one of the holdout jurors, that served no purpose except to pressure the sole remaining minority juror to submit to the majority view.

Penal Code section 1140 vests discretion in the trial court to determine whether there is a reasonable probability that a deadlocked jury will reach agreement. This discretion is circumscribed, however, by the court's obligation to take care to exercise its power without coercing a juror into abdicating independent judgment. Thus, the court may direct further deliberations upon its reasonable conclusion that such direction would be perceived "'as a means of *enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered.*'[citation.]" (*People v. Proctor* (1992) 4 Cal.4th 494, 539 [italics added].) There was not a single action taken by the trial judge that would have been perceived, or functioned, as a means to "*enhance the jurors' understanding of the case*." (Cf. *People v. Rodriguez* (1986) 42 Cal.3d 730, 775 [finding that "subsequent events bore out the conclusion that there had been no coercion, where "on the next three days following the jury's final statement of deadlock, it requested and was read, five portions of testimony that had not previously been read to it during deliberations"].) Rather, the only new matters considered from the time the jury first reported a deadlock to the return of the verdict were the details of jurors' thought processes and attitudes toward the minority jurors. Along the way, the court crossed the line between permissible inquiry to resolve an impasse and coercive encroachment on the province of the jury.

Respondent's argument is based throughout on the fiction that the court and prosecutor never knew or inferred the direction of the jury

division or the identity of the minority jurors. First, the court and prosecutor knew that the prior jury had hung 11-1 in favor of a death verdict and that Sergio had refused to communicate with and assist his counsel in fighting the death penalty. Surely, the court and the prosecutor drew the only reasonable – indeed, the only possible – conclusion that the second jury also tilted in the direction of a death verdict. Moreover, even if not apparent at the outset, the number and identities of the holdout jurors could readily be inferred from the questionnaires and confirmatory information provided during subsequent juror questioning. (See 34RT 5675; 35RT 5812.) This knowledge undermined the neutrality – actual and perceived – of all the court's communications with the jury regarding the deadlock.

In *United States v. Williams* (9th Cir. 2008) 547 F.3d 1187, 1202, the Ninth Circuit held that the trial court was required to declare a mistrial where a juror's note revealed that she was a holdout. The court had responded to the note by giving a neutral form of an *Allen* charge. (*Id.* at p. 1204; see *Allen v. United States* (1893) 157 U.S. 675; *People v. Gainer* (1977) 19 Cal.3d 835, 845.) In rejecting the instruction, the Court of Appeals reasoned that, "Even when the judge does not inquire but is inadvertently told of the jury's division, reversal is necessary if the holdout jurors could interpret the charge as directed specifically at them – that is, if the judge knew which jurors were holdouts and each holdout knew that the judge knew he was a holdout."[22] (*Id.* at p. 1207; see also *United States v.*

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[22] Sergio recognizes that decisions of the lower federal courts, including the Ninth Circuit, although persuasive, are not binding on the state courts. The federal cases in Sergio's arguments are cited in this spirit, where the circuit court's analysis rests on principles common to both state and federal law.

Sae-Chua (9th Cir. 1984) 725 F.3d 530, 532-533 ["[T]he most rational inference to be drawn was that the eleven who favored continued deliberations constituted the majority favoring conviction and that the one who felt further deliberations would be fruitless was the [holdout juror]. Under these circumstances the charge could only be read by the dissenting juror as being leveled at him."]; *People v. Barber* (2002) 102 Cal.App.4th 145, 149.)

Similarly here, minority jurors were given many indications that they were being singled out for scrutiny. (See, e.g., 35RT 5712 [when asked what would be of assistance in achieving a verdict, at least one juror suggested replacing the minority jurors].) The court actually described the holdouts as problems. (35RT 5750.) Further, the court forced one of the holdout jurors, Annora Hall, to defend herself and her integrity against other jurors' animosity and misrepresentations of her position. (See, e.g., 35RT 5767-5768 [Juror Jackson: "Her reasoning, there is none. She cannot give you a complete sentence. . . . . We're saying, 'can you put that in English for us?' But those are her words. I'm talking about Annora Hall. One day I got so mad, I cursed her out."].)[23] Of course, the greatest pressure was exerted on Ms. Ortiz, who remained the lone holdout after Ms. Hall had been discharged and a pro-death verdict juror replaced her.

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[23] The court's questioning of Ms. Hall makes clear that it accepted juror Jackson's distortions of Ms. Hall's posture during deliberations, while rejecting both the jury foreman's and Ms. Hall's own lucid explanations of the holdout jurors' reasoning.

A. The Court's Statements to the Jury After Learning the Numerical Division of the Ballots Were Coercive and Endorsed the Majority Position.

After learning that the numerical division among the jurors had shrunk to 10-2, the trial court commented favorably on the jury's progress toward unanimity. (34RT 5668.) Sergio argued that the comments, like those in *Jimenez v. Myers* (9th Cir. 1993) 40 F.3d 976, amounted to a de facto *Allen* charge by sending a message to the minority jurors that they should join the majority. (AOB 211.)

Respondent does not contend that *Jimenez* was wrongly decided. Rather, respondent distinguishes *Jimenez* on the basis of a single word choice. (RB 143-144.) In this case, the trial judge commented on the jury's "progress"; in *Jimenez*, it was the jury's "movement." Contrary to respondent's intention, this distinction strengthens, rather than refutes, Sergio's argument. "Progress" connotes improvement and approbation; movement does not.[24] Thus, in commenting on the jury's progress, the court necessarily signaled its approval of the movement toward unanimity and thus pressured the shrinking number of minority jurors to yield to the growing majority.

Respondent argues that the trial court's comments were not rendered more coercive by the jury polling – an argument respondent attributes to Sergio. (RB 142.) Sergio, in fact, argued the reverse – that the judge's comments rendered the numerical polling more coercive. In *People v. Carter* (1968) 68 Cal.2d 810, upon which respondent relies, the Court

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[24] Common synonyms for "progress" are advancement, improvement, betterment and the like. (www.websters-online-dictionary.org) In contrast, synonyms for movement – such as action, motion, activity – are value neutral.

discussed the circumstances under which numerical polling may have a coercive effect. These include cases where the trial judge knows not only the numerical division among the jurors but also how many stand on each side of the issue or where the court's remarks more directly show its preference for a particular verdict. (*Id.* at p. 816.) As the Court observed, "It is clear, however, that coercion of the jury can occur absent any intimation, express or implied, that the court favors a particular verdict. . . . Such a displacement [of the independent judgment of the jury] may be the result of statements by the court constituting pressure upon the jury to reach a verdict, whatever its nature, rather than no verdict at all." (*Id.* at p. 817.)

That is precisely the type of pressure exerted here: numerical polling coupled with judicial statements commending the jury on its progress toward unanimity and encouraging more movement in that direction. (See *People v. Rodriguez*, *supra*, 42 Cal.3d at p. 748 [rejecting a challenge to numerical polling where the trial judge made no comments to the jury from that point until the jury returned a verdict four days later].) Moreover, the pressure on the minority jurors continued to mount with each subsequent question, statement and action taken by the court in the drive toward a unanimous verdict. Under all the circumstances, no minority juror would have perceived the court's intervention as anything other than pressure to join the majority and allow the jury to go home.

B. The Prosecutor's Questionnaire Pushed the Jury Toward a Verdict and Focused Impermissible Attention on the Holdout Jurors.

It should have been obvious to the court, as it was to defense counsel, that the prosecutor's questionnaire invited disclosure of juror thought processes and interpersonal grievances. By the time it recognized the vices of the questionnaire, the court had come into possession of

information that intruded upon the secrecy of the jury and focused discomfiting attention on the minority jurors.

In *Paulson v. Superior Court* (1962) 58 Cal.2d 1, 5-6, the Court outlined a procedure for ascertaining the existence of deadlock that ordinarily would include inquiring of each juror whether there was a reasonable probability of a verdict. The questionnaire in this case went far beyond the approved procedure – eliciting responses that led to more probing of the jury's thinking without in any way aiding its deliberations.

Respondent cites no authority for the questionnaire because none exists.

C. The Court Invaded the Sanctity of the Jury.

The questionnaire set in motion a series of judicial actions that irreversibly compromised the secrecy of jury deliberations. Jurors' responses to the questionnaire confirmed, as the court easily inferred, that the jury was split 10-2 in favor of death.

Questions 5, 6 and 7 were clearly problematic. Question 5, for instance, queried ambiguously whether any juror based their position on outside sources of information or expressed a view that the death penalty was inappropriate in this case and based that view on anything other than the evidence and law presented in the case. (34RT 5687-5688.) Naturally, such broad and ambiguous questions garnered even more opaque answers, including some jurors' skewed interpretations of other jurors' thought processes and motivations. The questions were accurately perceived by the jury as an investigation into the causes of the impasse, i.e, the reasoning and conduct of *only* the holdout jurors. The responses of both the majority and the minority jurors made clear that the questionnaire was viewed in this way.

If the questions themselves were not invasive enough, the ambiguity of the responses led to even more intrusive measures to uncover suspected irregularities in the deliberations of the minority jurors. The foreman, himself a deliberating juror, was placed in the untenable position of delving with the court into the thought processes of the holdouts. (See, e.g., 35RT 5722-5723, 5732.) It would be difficult to conceive of a course of judicial inquiry more coercive to the minority than the actions taken here by the trial judge, at the prosecutor's urging.

Respondent cites *People v. Pride* (1992) 3 Cal.4th 195 and *People v. Sheldon* (1989) 48 Cal.3d 935 for the proposition that the trial court's knowing the nature of the jury's division is not "necessarily coercive." (RB 149; but see *United States v. Williams*, *supra*, 547 F.3d 1187.) Even if that was the situation in *Pride* and *Sheldon*, those cases are readily distinguished from the case at bar.

In *Pride*, the court received a note from the foreman reporting that the jury was unable to reach a verdict at the time and that the split had been 11-1 for several ballots. (*People v. Pride*, *supra*, 3 Cal.4th at p. 264.) At the foreman's request, the judge asked each juror individually whether – and only whether – it was reasonably probable a verdict might be reached. Some jurors were hopeful and some were doubtful. Based on the mixed responses, the court asked the jury to continue to deliberate. Over the next two days, at their request, the jurors heard readback of penalty phase testimony. After the readback ended, the jury reached a verdict. (*Id.* at pp. 264-265.)

In *Sheldon*, the court received a note from the jury foreman reporting an 11-1 split in favor of the death penalty. (*People v. Sheldon*, *supra*, 48 Cal.3d 958.) As in *Pride*, the court next polled some of the jurors, several

of whom were hopeful that further instructions would result in a verdict. A few expressly requested rereading of the penalty instructions. The court complied with the request. The jury continued to deliberate after the readback and returned a verdict the next day. *(Id.* at pp. 958-959.)

Although, in *Pride* and *Sheldon*, the jury foreman may have volunteered excess information, the court never directly or impliedly solicited such information nor asked the juror's any questions that exceeded the inquiry approved in *Paulson*. (*Paulson v. Superior Court, supra*, 58 Cal.2d 1.) Moreover, in contrast to this case, the juries in *Sheldon* and *Pride* achieved unanimity after the readback of testimony or instructions, the usual means of enhancing a jury's understanding of the case.

Here, the questionnaire itself exceeded the outer limits of legitimate judicial inquiry in resolving a deadlock. But, the questionnaire was only the beginning of the court's misguided incursions on jury deliberations. Ultimately, the questioning and eventual discharge of one of the holdout jurors sent the clearest message to the lone remaining holdout – that it was time to fold. It is telling that, after the one holdout's dismissal, the other holdout juror quickly relinquished her position with only a few hours of additional deliberations. The only plausible inference to be drawn from the holdout juror's swift capitulation is that she had surrendered her independent judgment and succumbed to the pressure exerted by the court.

D. The Court Misinstructed the Jury on Its Duties After the Replacement of One of the Minority Jurors by an Alternate Juror.

Sergio has argued that the court's instruction to the jury after dismissing Ms. Hall was defective in two respects. The instruction did not alleviate the coercive effect of the court's preceding actions and it did not unambiguously direct the jury to begin deliberations anew. (AOB 239-

240.) Sergio's first point highlights the cumulative coercive impact of the course of judicial questioning, comments and actions targeting the holdout jurors.

Sergio's second point focuses on the court's qualification of the instruction that the reconstituted jury was required to "begin your deliberations again from the beginning." (35RT 5824.) After correctly admonishing the jury regarding its duty to disregard the earlier deliberations and begin anew, the court suggested that "because you have one additional juror, that, perhaps, you collectively can bring him up to speed and in the process cover what it is that you have covered previously in a matter of days and perhaps do it in a shorter time." (35RT 5826.) This suggestion, on its face, violated Sergio's constitutional right to a verdict reached only after full participation of all 12 jurors. (*People v. Collins* (1976) 17 Cal.3d 687, 694 [holding that Penal Code section 1089 must be construed on constitutional grounds to require an admonition after an alternate juror is seated to set aside all past deliberations and begin deliberating anew].)

People v. Odle (1988) 45 Cal.3d 386 is directly on point. In *Odle*, after the replacement of one of the jurors by an alternate, the court instructed the jury to "Start your discussions from scratch so that [the alternate juror] has the full benefit of everything that has gone between the jury up to the present time." (*Id.* at p. 405.) The Court found that the additional language "so that [the alternate juror] has the full benefit of everything that has gone on . . . up to the present time," implied that the jury should not disregard previous deliberations, but instead, start again in order to bring the new juror "*up to speed*" and thus would defeat the purpose of the instruction to insure full juror participation in deliberations. (*Ibid.* [italics added].)

Strikingly, "up to speed" are the precise, proscribed words used by the trial court in this case. Under *Collins* and *Odle*, the court clearly committed constitutional error.

In *Collins*, the Court grounded its ruling on the jury trial provision of the state Constitution, rather than the federal Constitution. (*People v. Renteria* (2001) 93 Cal.App.4th 552, 559 [citing *People v. Collins*, *supra*, 17 Cal.3d at p. 692; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Accordingly, in assessing harmlessness under *Collins*, California courts have examined two factors: the closeness of the case and the comparison of time spent deliberating before and after substitution of the alternate juror. (*People v. Odle*, *supra*, 45 Cal.3d at p. 405.) Both factors establish that the error in this case cannot be found harmless.

First, this was a close case on the question of penalty. The original jury was incurably deadlocked. (2CT 417.) The second jury began its deliberations with five jurors voting against or undecided on the question of death. (34RT 5666.) After nine days of deliberations, the jury still was divided, with two minority jurors holding out against a death verdict. (34RT 5666.) The aggravating factors in this case were confined to the circumstances of the crime, which involved no torture or other heinous or depraved acts. The mitigating factors included Sergio's youth, lack of a criminal or violent history and emotional instability. These mitigating characteristics could reasonably have supported a life verdict in removing Sergio from that narrow class of offenders "most deserving of execution." (*Roper v. Simmons* (2005) 543 U.S. 541, 568.)

In addition, the comparison of time spent deliberating before and after the substitution of the alternate juror – more than a week versus several hours – strongly indicates that the instructional error was

prejudicial. (*Griesel v. Dart Industries, Inc.* (1979) 23 Cal.3d 578, 585 [reversing for prejudicial *Collins* error where the jury had deliberated for seven days before a juror was replaced by an alternate, but reached a verdict in about four hours afterward].) Under the state Constitution, therefore, the judgment of death must be set aside.

This error also violated Sergio's right to trial by jury under the federal Constitution. Indeed, the extraordinary speed with which the newly constituted jury returned a death verdict leaves no doubt that the lone holdout juror was unable to withstand the inexorable pressure to conform to the majority. Sergio has argued that the coercion of the minority jurors was structural error, requiring automatic reversal under the federal constitution. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309.) The death verdict must be reversed on federal constitutional grounds, as well.

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16.

THE COURT ERRED IN DISCHARGING JUROR ANNORA HALL AS SHE DID NOT MISREPRESENT MATERIAL INFORMATION ON HER QUESTIONNAIRE TENDING TO SHOW BIAS AGAINST THE PROSECUTION TO A DEMONSTRABLE REALITY.

Sergio has fairly demonstrated that the discharge of holdout juror Annora Hall was unwarranted and, in violating statutory law, also violated his right to due process. (*Perez v. Marshal* (1997) 119 F.3d 1422, 1426; see also *People v. Hernandez* (2003) 30 Cal.4th 1, 8 [citing *Crist v. Bretz* (1978) 437 U.S. 28, 35]; AOB 243-258.) Intensive questioning of Ms. Hall disclosed no disqualifying illness, bias or deliberate material omissions. Respondent disputes these contentions, but fails to establish any legitimate basis for the dismissal of a juror, one of only two, who was holding out for a life verdict. (RB 169-175.)

A. No Waiver Occurred.

Preliminarily, respondent submits that Sergio waived his constitutional objections to the erroneous discharge of Ms. Hall. No waiver occurred. It is now well-established that a defendant's new constitutional arguments on appeal are not forfeited when "the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional *legal consequence* of violating the Constitution." (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17, citing *People v. Partida* (2005) 37 Cal.4th 428, 433-439 [analogizing a new constitutional argument on appeal to a prejudice argument under the *Watson* test without citing *Watson* as part of the trial objection]; *People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6;

People v. Yeoman (2003) 31 Cal.4th 93, 117.) Sergio's constitutional claims are of this permissible type. He "merely invites [the Court] to draw an alternative legal conclusion" [i.e, that erroneously admitting the evidence violated the federal constitution] "from the same information he presented to the trial court" [i.e,. that the opinion testimony should have been excluded]. (*People v. Partida*, *supra*, 37 Cal.4th at p. 436.) Sergio's constitutional claims therefore are properly considered on appeal.

B. Respondent Applied the Wrong Standard of Review.

Citing *People v. Cleveland* (2001) 25 Cal.4th 466, 474, Sergio argued in his opening brief that the correct standard of appellate review to determine whether a trial court abused its discretion in removing a deliberating juror for actual bias was whether the record tended to show bias to a demonstrable reality. (AOB 244.) Respondent has offered that the appropriate test is a less comprehensive and more deferential review, whether substantial evidence supported the discharge. (RB 170.) As this Court explained in *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052: "[W]e explicitly hold that the more stringent demonstrable reality standard is to be applied in review of juror removal cases. That heightened standard more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury." Thus, "the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied." (*Id.* at p. 1053.)

C. Juror Hall Did Not Intentionally Conceal Information that Would Have Supported an Inference of Bias or a Challenge for Cause.

Citing substantial authority, as well as the record, Sergio argued that Ms. Hall's failure to provide certain information during voir dire was inadvertent and immaterial. (AOB 244.) He further argued that her unintentional omissions did not tend to show bias against the prosecution to any degree, but that the prosecutor, nonetheless, pressed for her dismissal because Ms. Hall was the stronger of the two holdout jurors. (AOB 244-245.)

In opposition, respondent cites only two cases and fails to distinguish a single case on which Sergio relied. (RB 169-175.) One of the cases cited by respondent, *People v. Price* (1991) 1 Cal.4th 324, was discussed in Sergio's opening brief. (AOB 247.) The other case, *People v. Thomas* (1990) 218 Cal.App.3d 1477, is also inapposite, as discussed below. (*Id.* at p.1485 [upholding discharge of juror who had prejudged credibility of police officer witnesses].)

In *People v. Price*, 1 Cal.4th at p. 400, the information withheld included that (1) the juror had a criminal conviction and a subsequent arrest; (2) the juror was supervised on parole by a prosecution witness; and (3) the juror had sued the trial judge, formerly a county prosecutor, for a civil rights violation. The Court concluded that the concealed information was material and by its nature gave rise to an inference of bias against the prosecution as a demonstrable reality. (*Id.* at pp. 400-401.)

In contrast, no inference of bias could reasonably rise from the omissions in this case – to wit, that Ms. Hall lawfully possessed a gun in connection with her employment; was diagnosed with bipolar disorder

which had been controlled by medication for 19 years; and knew someone whose son was serving a life sentence.

Ms. Hall's explanation that she had forgotten about the gun until the subject arose during deliberations was both credible and compatible with impartiality. (35RT 5782-5783.) Notably, courts have declined to discharge jurors who failed to disclose far more pertinent and emotionally-charged information than that at issue here. (See, e.g., *People v. Jackson* (1985) 168 Cal.App.3d 700 [affirming denial of a motion to excuse juror who, in a drug case, failed to disclose that his nephew had died of an overdose]; *People v. Kelly* (1986) 185 Cal.App.3d 118 [affirming denial of a motion for new trial where, in a child molestation case, juror failed to reveal that she had been molested by her uncle].)

In the instant case, any jury questions related to Sergio's purpose for possessing a firearm had been resolved during the guilt phase and were no longer before the second – penalty phase – jury. Thus, Ms. Hall's gun ownership was immaterial to the prosecution's jury selection and could not have reflected any disqualifying bias against the prosecution in making the decision to impose a life or death sentence on Sergio.

Significantly, the trial court made no finding that Ms. Hall's failure to disclose her gun ownership was *material* to showing actual bias against the prosecution to a demonstrable reality. The prosecutor, too, could point to no reason why Ms. Hall's gun ownership even suggested bias. The most the prosecutor could offer on the issue of materiality was he "would have wanted to know why she owns a gun or why she carries a gun." (35RT 5807.) But having learned why Ms. Hall owned a gun, the prosecutor still could not bring himself to claim, as respondent does now, that "Hall owned and carried a gun for protection was material to whether she could

impartially weigh the *evidence* and credibility of *witnesses* and reach a fair and unbiased verdict." (RB 173, italics added.) Despite this bold assertion, respondent refers to no evidence or witnesses Ms. Hall would have been biased against due to her gun ownership.

Furthermore, as observed in the opening brief, the prosecutor's claim that he would have closely questioned Ms. Hall regarding the gun, had it been mentioned during voir dire, was belied by the same prosecutor's acceptance of five jurors who stated they owned guns. (AOB 249.) Respondent seeks to rationalize the prosecutor's failure to excuse these other jurors, or even question them, based on inconsequential differences contrived from the jurors' responses to the questionnaire. (1RB 172-173.) Respondent proffers that four of these five jurors did not *personally own* guns at the time of the penalty phase. (1RB 172 [italics added].) First, the purported distinction between personal ownership and possession is trivial, at best. If juror Dobard's husband owned a gun for personal protection at the time of trial, Ms. Dobard would have possessed the gun for the same purpose.

More importantly, respondent fails to explain why the timing of possession is of any significance if the asserted materiality of Ms. Hall's omission resides wholly in the purpose for which the gun is possessed. Logically and legally, the timing of possession is irrelevant to respondent's theory of relevancy.

Respondent also names several jurors who responded to the questionnaire that they had been trained to use weapons in the military. (1RB 173.) This argument rests on the dubious proposition that military weapons are not possessed for personal protection. Further, it is telling that these particulars jurors were asked no follow-up questions even though they

had technical weapons training. The trajectory and sequence of the shots retained considerable relevancy in the penalty phase as allegedly aggravating circumstances of the offense. In contrast, respondent fails to explain the continued, post-guilt phase significance of the evidence that Sergio possessed the gun for personal protection, much less that Ms. Hall was aware of this evidence when she completed her questionnaire. In reality, Ms. Hall simply had no reason deliberately to omit her possession of a gun from her responses on voir dire and the prosecutor would have had no cause to challenge her either way.

Where an omission is unintentional, the proper test is whether the juror is sufficiently biased to constitute good cause for the court to find the juror is unable to perform his duty. (*People v. Kelly*, *supra*, 185 Cal.App.3d at p. 127 [quoting *People v. Jackson, supra,* 168 Cal.App.3d at p. 706].) Where the concealment is deliberate, the standard for dismissal is whether the record discloses reasonable grounds for inferring bias as a demonstrable reality. (*People v. Price*, *supra*, 1 Cal.4th at p. 400.)

No good cause existed to discharge Ms. Hall under either test. This Court has stressed that a juror cannot be "fault[ed] for [the] decision to respond to a question *as phrased*." (*People v. Majors* (1998) 18 Cal.4th 385, 420 [italics added].) In *Majors*, the defendant claimed that the jury foreman had engaged in misconduct by concealing facts on voir dire. The claim focused on three questions. The first question asked, "Are you or any close friend or relative associated with any . . . law enforcement agency or governmental agency such as . . . the Department of Corrections?" The second question asked, "Have you or any close friend or relative ever been involved in a criminal case or assaultive crime either as a victim, defendant or witness?" The third asked, "Do you know anyone whom you believe to

be a drug user or seller?" The juror answered "no" to questions one and three and mentioned an incident involving a drunk driver in response to question two. (*Id.* at p. 418.)

The defendant was convicted of murder with special circumstances arising from a drug robbery. Following the return of a death verdict, the defendant brought a new trial motion raising the concealment claim based on the juror's statements to a defense investigator. The juror confirmed that he had "talked to my buddies who are [prison] guards" about the treatment the defendant would receive on death row" and that he had referred to the guards as "friends." The juror also described an incident in which his sister's husband's brother, a former correctional officer whom the juror referred to as his "cousin," had been slashed by an inmate. Finally, the jury stated that his wife had dealt cocaine when she was a teenager. (*People v. Majors*, *supra*, 18 Cal.4th. at p. 418.)

Although the omitted facts were self-evidently relevant to a capital murder case based on a drug robbery, the Court found no misconduct or intentional concealment where the juror had been literal in construing the call of the questions. Although he referred to the correctional officers as "buddies or friends" the juror stated that he did not consider them "close friends." Similarly, although he referred to his sister's husband's brother as "cousin," he did not consider him to be a "close friend[] or relative[]." Finally, because the question regarding drug use or sales was posed in the present tense, the juror's failure to disclose his wife's pre-marital drug involvement also was found not to be misconduct. (*People v. Majors*, *supra*, 18 Cal.4th at pp. 419-420; see also *Sanders v. Lamarque* (2004) 357 F.3d 943, 949 [finding no grounds for discharging a juror whose interpretations of the questions on voir dire were reasonable].)

The Court in *Majors* also rejected the defendant's alternative claim that his trial counsel had been ineffective in failing to draft a more comprehensive juror questionnaire. (*People v. Majors*, *supra*, 18 Cal.4th at p. 420.) Here, however, the trial judge selected the questionnaire prepared by the prosecutor, who then, according to *Majors*, had no cause to complain when literally true answers to the questions he framed did not disclose background information that he later deemed pertinent.[25] (1RT 96-97 ["The court: I looked at both questionnaires and they were both very good. I think [defense counsel's] is a little long, so I have taken the liberty of striking a bunch of things I did not like, how often do you communicate with your children and that sort of thing. What I have done with the people's questionnaire is, with a few exceptions, I have left that alone.[] The court: I like the district attorney's penalty questions better and that is probably because I am more familiar with them."]; cf. Civ. Code, § 1654 [ambiguities construed against party who drafted terms].)

This case is indistinguishable from *Majors* and thus no misconduct occurred. Here, no question asked whether any prospective juror had been diagnosed with a mood disorder or psychiatric, psychological or mental disorder of any kind. No question, moreover, asked whether any juror was taking psychotropic medication. Instead, jurors were asked: "Do you have

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[25] Respondent faults Ms. Hall because her answer to the question regarding her experience with a mental health professional did not alert the prosecutor to the fact that she had been in treatment. (RB 174.) As respondent acknowledges, the question "merely' asked if she had any "experience." (RB 174.) If the prosecutor wanted to know whether any prospective jury had been treated for mental health problems, he should have included that precise query in his proposed questionnaire.

any specific health problems or disabilities?" and "If yes, briefly describe. If yes, would this health problem or disability make it difficult for you to serve as a juror in this particular case?" (RB 173; Sup.II.-CT 3324.)

Ms. Hall truthfully answered the question as worded – and commonly understood – namely, that she had a physical health problem involving digestion. (Sup.II-CT 3324.) The only mental health question asked on the questionnaire was, "If you ever had any personal experience with [mental health professionals], did the experience impress you: Favorably, Unfavorably, Does not apply." Ms. Hall again answered truthfully that her experience was favorable. She could not be blamed for answering the questions as phrased rather than reading the prosecutor's mind.

Strikingly, nothing in Ms. Hall's demeanor, conduct or oral responses during voir dire alerted the prosecutor, defense counsel or the court to the possibility of a mental health problem. Nothing, moreover, in her answers to the court's and counsel's interrogation during the dismissal hearing demonstrated any irrationality, bias or refusal to follow the law. She expressly referenced the Penal Code section 190.3 factors – "(a)" through "(k)" – in explaining her own reasoning and in trying to explain the convoluted responses given by some of the other jurors to the deadlock questionnaire. (35RT 5772, 5794.) She showed herself tolerant of the diversity of views among the jurors and was clear when their discussions veered off to subjects that were not germane to their task. (See, e.g., 35RT 5778-5779 [Juror Hall: "There are some times that the questions was asked that we would get out of sync of what we were supposed to be discussing and go from things like whether they had color TV in prison or whatever. And the foreman tried to bring us back and say, wait a minute, that's not

what we need to focus on. The judge said you need to focus on not how much it cost or whatever it is. So sometimes they did stray. But 99 percent of the time, we brought back or the foreman was very successful bringing them back to the point, to the law."].)

When confronted with other jurors' negative responses, Ms. Hall reasonably explained that she viewed the problem as the notion that the jurors were supposed to be "team players, and if the team goes this way, then everybody should go the way of the team." (35RT 5780.)

Ms. Hall was forthcoming about her mental health history with her fellow jurors and the court. In fact, the jury foreman stated that, if she had not brought the subject up, he would not have guessed that Ms. Hall had such a problem. (35RT 5737.) The judge never stated that he observed any behavior by Ms. Hall that indicated she was mentally disabled or that her illness had any impact whatsoever on her deliberations as a juror. (35RT 5813.) At most, the court merely found that Ms. Hall was "not totally frank on her questionnaire as it relates to health problems." (35RT 5814-5815.) The onus, however, was not on Ms. Hall to be "totally frank," and volunteer information not asked for in voir dire. It was on the prosecutor to exercise more care in drafting the juror questionnaire or in following up on prospective jurors' responses.

The final alleged strike against Ms. Hall was her failure to disclose in answer to the questionnaire that her old babysitter's son had been in and out of custody virtually his whole life. (35RT 5799.) According to the court, this was a misrepresentation in response to the question: "do you know, or have you [or] any *acquaintances* ever been arrested?" (35RT 5815 [italics added].) That, however, was not the question. The actual question asked, "Have you, or anyone *close* to you, ever been arrested for or

accused of a crime?" (35RT 5815[italics added].) Ms. Hall hardly would have considered an old babysitter's imprisoned son an acquaintance, much less some one close. Ms. Hall's response was completely truthful.

Respondent fails to explain how the omission of non-responsive information counts as a misrepresentation. Rather, respondent focuses on the separate ground, not relied on by the trial court, that Ms. Hall demonstrated actual bias by relating to her fellow jurors that she knew an inmate who preferred life imprisonment to the death penalty. (1RT 175.) When queried about this allegation, Ms. Hall elaborated that the jury had engaged in a number of tangential conversations related, for example, to color televisions, the costs of imprisonment and which is worse, life in prison or death.[26] (35RT 5779-5780; see also 35RT 5735-5736 [foreman explaining that more than one juror offered an opinion on which was the more severe punishment – life imprisonment or death].) She credited the foreman with bringing the discussions back in focus on the balance of mitigating and aggravating factors. There was absolutely nothing in Ms. Hall's comments, in context, that suggested bias against the prosecutor or the death penalty, per se. The trial court, moreover, rejected the prosecutor's argument that Ms. Hall should be dismissed for bias or for refusing to deliberate. (35RT 5813-5814.)

Respondent relies on *People v. Thomas*, *supra*, 218 Cal.App.3d 1484 to support its argument that the omissions from the questionnaire, even if

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[26] There is no record as to which jurors were concerned with television sets and costs of imprisonment, wholly extraneous matters. However, because these jurors were undoubtedly in the majority, they evidently were not perceived as a problem and were not reported to the court.

inadvertent, were material. Its argument fails on the related grounds that: first, the trial court never made any findings of materiality and the omissions, in fact, were not material. In *Thomas*, the court upheld the discharge of a juror who first disclosed during deliberations that she believed, based on personal experience, that prosecution witnesses – namely, Los Angeles police officers – generally lied. (*Id.* at p. 1482.) The appeals court agreed with the trial judge that there was "ample cause to dismiss the juror in the instant case. [She] obviously had prejudged the credibility of the police officers who testified at trial and was unable to cast aside her personal bias in weighing the evidence." (*Id.* at p. 1485.)

In contrast, there was no cause whatsoever in this case to believe, based on the omitted information or her deliberations, that Ms. Hall had prejudged any of the prosecutor's evidence or that she was untruthful in proclaiming her neutrality with respect to the death penalty. Respondent's showing thus falls far short of what is required to support the discharge of a sitting juror.

As the Ninth Circuit emphasized in *Sanders v. LaMarque*, *supra*, 357 F.3d at p. 949, to establish bias based on answers to voir dire questions, it must be demonstrated both that the juror failed to answer honestly and that the correct answer would have a provided a valid basis for a challenge for cause. Actual bias exists when the juror's answers on voir dire establish that she was in fact partial. (*Id.* at p. 948.) Prejudice will be presumed only under circumstances in which "the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial under the circumstances." (*Id.* at p. 948 [citing *Tinsley v. Borg* (9th Cir. 1990) 895 F.2d 520, 527.) Implied bias will be found only in "exceptional" or "extraordinary" cases. (*Id.* at p. 949

[citing *Smith v. Phillips* (1982) 455 U.S. 209, 222 (conc. opn. of O'Connor, J.)].)

The trial court did not find actual or implied bias. The court never responded to counsel's question, "is the case prejudiced at this point?" (35RT 5814.) Instead, the court merely reiterated that it was discharging Ms. Hall because the nondisclosure of the gun was intentional, that she had not been candid about her mental health problems or that she had three acquaintances who had been arrested, including the babysitter's son, who had been in and out of custody for the better part of his life. (35RT 5814-5815.)

Respondent still has not demonstrated actual or implied prejudice – that is, grounds for a challenge for cause. Respondent has combed the record to uncover the slightest connection between Ms. Hall's omissions and her duties as a penalty phase juror, and found none. Respondent proffers, but fails to explain precisely how Ms. Hall's acquisition of a gun years earlier in connection with her employment demonstrated actual or implied bias at the penalty phase. In convicting Sergio of premeditated murder, with a firearm enhancement, and finding true the lying-in-wait special circumstances, the guilt phase jury settled any question regarding Sergio's acquisition of the gun for penalty phase purposes. Ms. Hall's acquisition of a gun years earlier in connection with her employment thus was of little or no consequence at the penalty phase, especially when Ms. Hall knew from her own experience that it was illegal to carry a concealed weapon. (35RT 5782.) In short, nothing about Ms. Hall's possession of a gun, when fully explored, would have supported her disqualification for cause.

Respondent also strains in attempting to demonstrate the purported significance of Ms. Hall's mental health problem. Respondent apparently conflates the first trial with the penalty retrial. While there was substantial expert testimony at the first trial regarding mental illness, no psychologist, psychiatrist or psychotherapist testified at the second penalty trial. (See RT 4944.) Other than percipient witnesses who testified to their observations of Sergio's emotional state during the relevant time frame, no expert opinion testimony was allowed regarding Sergio's mental status.

The only expert mental health testimony – in the broadest sense – presented by the defense was the testimony of Joseph A. Kinney regarding various features of workplace violence.[27] (28RT 4966 ["The Court: We are interested in the general principles of behavior in the workplace, how it relates to violence. . . . [28RT 4968] not interested in the opinion as it relates to Sergio."].) Dr. Kinney had no training or expertise as a psychologist or psychiatrist. His background was in public administration and political science. (28RT 5024-5026.)

In short, the mental state testimony, such as it was at the penalty retrial, pertained to a situational reaction to events at the workplace, not a settled mental disorder or illness. Despite her disorder, Ms. Hall had worked for 17 years for a single employer and had attained a management position. (Sup.II-CT 3318, 3320, 3322, 3334.) If anything, her history would have predisposed her against the defense theory that workplace stress was a mitigating factor. It is significant, moreover, that despite two weeks

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[27] Interestingly, it was juror no. 11, Ms. Jackson, not Ms. Hall, who complained to the court that the prosecutor was behaving improperly during defense counsel's examination of Dr. Kinney. (28RT 5019.)

of jury selection and two additional weeks of testimony and argument, no one involved in the case noted or reported any behavior by Ms. Hall that would have been grounds for her discharge for cause based on a mental disability. It was only when Ms. Hall stood by her principles that some of the majority jurors complained about her.

Finally, respondent maintains that Ms. Hall's awareness that her babysitter's son had spent most of his life in prison prejudiced her against the death penalty. (RB 175.) This argument is premised on Ms. Hall's allegedly having stated during deliberations that she knew some one who preferred life imprisonment to death. As her testimony during the dismissal hearing clarified, Ms. Hall had not had contact with anyone in prison facing life or even a death sentence and did not consider Sergio's preference relevant to her decision. (35RT 5792.) Her explanation defeated any inference of bias against the prosecution.

In sum, respondent has failed to show any grounds in the record for inferring actual bias or implied bias as a demonstrable reality. Ms. Hall's omission were unintentional and case-neutral in all respects. Accordingly, her discharge was not sanctioned by Penal Code section 1089.

In the absence of good cause as set forth in section 1089, excusing a holdout juror who favors acquittal or a life sentence violates the Sixth Amendment. (*Perez v. Marshal*, *supra*, 199 F.3d at p. 1426; *Sanders v. LaMarque*, *supra*, 357 F.3d at p. 948 [holding that trial court committed constitutional error when, after learning that the juror was unpersuaded by the government's case, it dismissed the holdout juror]; *People v. Hernandez*, *supra*, 30 Cal.4th at pp. 4-5 [adopting court of appeal's determination that the trial judge committed prejudicial error in discharging a juror who was critical of the prosecutor, but rejecting the further

conclusion that a retrial was barred by double jeopardy].)

In the instant case, the trial court erroneously discharged a competent juror who had no demonstrable bias against the prosecution, but who, nonetheless, favored a life verdict based on the statutory factors and the evidence. The error was prejudicial to Sergio and thus violated his rights to a fair trial and due process of law. The penalty judgment in this case must be reversed.

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17.

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES SERGIO'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Sergio asserts in his opening brief that California's failure to conduct intercase proportionality review of death sentences violates the Eighth and Fourteenth Amendments. (AOB 259-263.) Respondent, in its opposition, cites cases from this Court denying this very claim. (RB 176.)

Sergio acknowledges these cases and recognizes that these cases are in turn based upon the United States Supreme Court's holding in *Pulley v. Harris* (1984) 465 U.S. 37. (AOB 260.) However, the opinion in *Pulley v. Harris* was based on favorable assumptions regarding California's *post-Furman* [*Furman v. Georgia* (1972) 408 U.S. 238] death penalty scheme. (See *Tuilaepa v. California* (1994) 512 U.S. 967, 995 (dis. opn. of Blackmun, J.).) As Sergio contends in his opening brief, the subsequent implementation of the State's capital sentencing scheme has disclosed the inadequacy of critical safeguards such that proportionality review is required to ensure compliance with the Eighth Amendment and the Due Process Clause. This Court should revisit this issue and rule accordingly.

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18.

THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF.

In his opening brief, Sergio sets forth various deficiencies relating to the application of the California death penalty statute. (AOB 268-285.) Specifically, Sergio challenges the statute and instructions for failure to assign a burden of proof regarding the aggravating factors and the overall penalty determination (AOB 268-278); failure to require the state to bear at least some burden of persuasion at the penalty phase (AOB 278-281); and failure to require juror unanimity on the aggravating factors (AOB 281-285). More particularly, Sergio relies on the constitutional principles articulated in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 471-472 and *Ring v. Arizona* (2002) 536 U.S. 584, requiring a jury determination on proof beyond a reasonable doubt of facts necessary to increase sentencing beyond the maximum that the jury conviction itself would allow.

Rather than attempt to refute the arguments Sergio sets forth in his opening brief, respondent merely notes that this Court has previously rejected these claims. (RB 177-179.) However, such blanket reliance on prior case law does not survive the United States Supreme Court's more recent opinion in *Cunningham v. California* (2007) 549 U.S. 270, holding that the State's determinate sentencing scheme was unconstitutional under the Sixth Amendment, as interpreted in *Apprendi v. New Jersey*, *supra*, and *Blakely v. Washington* (2004) 542 U.S. 296, 304-305. *Cunningham v. California* strengthens Sergio's contention that the State's death penalty statute, much like its former noncapital sentencing law, violates the constitutional guarantee of trial by jury.

In *People v. Jennings* (2010) 50 Cal.4th 616, 689 and *People v. Solomon* (2010) 49 Cal.4th 792, 844, this Court acknowledged the United States Supreme Court's pronouncements on the Sixth Amendment jury trial right, including *Cunningham v. California*, *supra*. Nevertheless, without engaging in any analysis, the Court affirmed its previous decisions upholding the death penalty statute. Sergio urges the Court to reconsider those decisions to ensure that a defendant facing the death penalty enjoys the same Sixth Amendment rights as the most minor felon.

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19.

THE INSTRUCTION DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED SERGIO'S CONSTITUTIONAL RIGHTS.

Sergio argues that this Court should reconsider its previous rulings and hold that instructing the jury pursuant to CALJIC No. 8.88 violated his constitutional rights. (AOB 286-298.) Rather than attempt to refute the arguments Sergio sets forth in his opening brief, respondent merely notes that this Court has previously rejected this claim and urges the Court to decline Sergio's invitation to reconsider its prior rulings. (RB 180-182.) As explained at length in the opening brief, the cases relied upon by respondent were wrongly decided and contrary to federal constitutional law. Accordingly, this Court should hold that instructing the jury pursuant to CALJIC No. 8.88 violated Sergio's constitutional rights and vacate the death judgment.

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20.

THE INSTRUCTIONS ABOUT THE MITIGATING AND AGGRAVATING FACTORS IN PENAL CODE SECTION 190.3, AND THE APPLICATION OF THESE SENTENCING FACTORS, RENDER SERGIO'S DEATH SENTENCE UNCONSTITUTIONAL.

A. The Instruction on Penal Code Section 190.3, Subdivision (a), and Application of That Sentencing Factor Resulted in the Arbitrary and Capricious Imposition of the Death Penalty.

Sergio argues that the disparate use throughout the state of the "circumstances of the crime" factor set forth in Penal Code section 190.3 has resulted in a death penalty scheme that is arbitrary and capricious in practice and as particularly applied to this case. (AOB 300-307.) Respondent merely cites to many cases from this Court that have rejected this claim, and asks the Court to do so again. (RB 183-184.)

Sergio acknowledges in his opening brief that the United States Supreme Court rejected a facial challenge to this factor in 1994, finding that in the abstract it had a "common sense core of meaning" that juries could understand and apply. (AOB 300.) The reality has proven the abstract supposition to be false and this Court should revisit this issue and acknowledge the capricious manner by which this factor permits the arbitrary imposition of the death penalty both across the state and in this case.

B. The Failure to Delete Inapplicable Sentencing Factors Violated Sergio's Constitutional Rights.

In his opening brief, Sergio argues that the trial court's refusal to delete inapplicable statutory factors from the standard version of CALJIC No. 8.85 violated Sergio's fundamental constitutional rights. (AOB 307-309.) Respondent counters by citing several of this Court's decisions which

rejected similar claims. (RB 185-186.) Sergio has previously acknowledged this Court's rejection of such claims, while urging this Court to reconsider those rulings. (AOB 272.)

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

C. Failing to Instruct that Statutory Mitigating Factors Are Relevant Solely as Mitigators Precluded The Fair, Reliable, and Evenhanded Application of the Death Penalty.

Sergio argues that the failure to instruct the jury as to which of the statutory sentencing factors were mitigating factors precluded the type of reliable, individualized, capital sentencing determination required by the federal constitution. (AOB 309-310.) Respondent relies upon the fact that this Court has rejected this challenge in the past.[28] (RB 185-186.) Sergio

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[28] This Court should reject respondent's contention that Sergio has waived this claim. (RB 186.) Respondent, citing *People v. Hillhouse* (1996) 27 Cal.4th 469, 503, argues that Sergio was obliged to challenge this instruction or seek a clarifying instruction. That is incorrect. As this Court's decisions make clear, a defendant must seek a clarifying instruction when contending that the instruction given is inadequate or unclear, rather than incorrect. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192; *People v. Johnson* (1993) 6 Cal.4th 1, 52.) Sergio contends that the

(continued...)

stands on the arguments in his opening which set forth the reasons the Court should reconsider the issue.

D. Restrictive Adjectives Used in the List of Potential Mitigating Factors Impermissibly Impeded the Jurors' Consideration of Mitigation.

Sergio asserts that the use of terms such as "extreme" and "substantial" in CALJIC No. 8.85 acts as a barrier to the jury's consideration of mitigating evidence in violation of the Eighth Amendment. (AOB 310.) Respondent cites the line of cases where this Court has held that the use of these terms does not make the instruction unconstitutional. (RB 186-187.)

All of the cases cited by respondent predate the United States Supreme Court's decision in *Tennard v. Dretke* (2004) 542 U.S. 274. In that case, the high court made clear that in the context of introducing evidence bearing on mitigation in a capital case, the standard was no different than the general evidentiary standard, to wit: whether the evidence has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Once this low threshold is met, the Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence. (*Id.* at pp. 283-285.)

Yet, the standard jury instruction in California permits the jurors to give effect to this evidence only when it is substantial or produces a condition that is extreme. This violates the federal Constitution.

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[28](...continued)
instruction directly permitted the jury to utilize improper sentencing considerations to reach a death judgment. (See *People v. Smithey* (1999) 20 Cal.4th 996, 976, fn. 7; Pen. Code, § 1259.)

E. The Failure to Require the Jury to Base a Death Sentence on Written Findings Regarding the Aggravating Factors Violated Sergio's Constitutional Rights to Meaningful Appellate Review and Equal Protection of the Law.

Sergio asserts that California should require written findings from the jury regarding the aggravating factors it found in imposing the death penalty. (AOB 310-313.) Respondent submits this Court should continue to hold that such findings are not necessary. (RB 187.)

In his opening brief, Sergio established the existence of an emerging national consensus regarding the importance of written findings in capital sentencing. (AOB 312-313, fn. 102.) California's failure to require such findings renders its death penalty procedures unconstitutional.

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* (2002) 536 U.S. 584 has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective factfinding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also

the right to trial by jury guaranteed by the Sixth Amendment.

F. Sergio's Equal Protection Rights Were Violated by the Absence of the Previously Addressed Procedural Safeguards.

Alternatively, Sergio maintains that California's death penalty scheme violates the constitutional guarantee of equal protection by affording significantly fewer procedural protections to defendants facing death sentences than to those charged with noncapital crimes. (AOB 313-314.) Respondent cites *People v. Johnson* (1992) 3 Cal.4th 1138, 1242-1243 for the proposition that different procedures may apply in capital and noncapital cases. (RB 187.) However, in *Johnson*, the procedural difference was based on a rational and functional difference between the use of prior convictions for sentencing enhancements in noncapital cases as compared to their use as aggravating factors in capital penalty proceedings. (*People v. Johnson*, *supra*, 3 Cal.4th at p. 1242.) Respondent cites no case rejecting Sergio's specific claim and offers no reasoned argument in opposition to the claim. Accordingly, the equal protection implications of each, separately and in the aggregate, of the procedural deficiencies noted in Sergio's opening brief should be fairly examined by the Court.

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21.

SERGIO'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW, WHICH IS BINDING ON THIS COURT, AS WELL AS THE EIGHTH AMENDMENT.

Sergio argues that capital punishment violates the Eighth Amendment's prohibition because it is contrary to international norms of human decency. Sergio further argues that even if capital punishment itself does not violate the Eighth Amendment, using it as a regular punishment for substantial numbers of crimes, rather than as an extraordinary punishment for extraordinary crimes, does. (AOB 316-321.) Respondent cites the Court's cases, as well as a case from the Sixth Circuit Court of Appeals, rejecting the arguments advanced in the opening brief. (RB 189.)

As to the merits of the claim, respondent's opposition rests upon the ground that this Court has previously rejected the arguments advanced by Sergio. (RB 131-132.) Sergio is well aware of this Court's decisions in this area, but respectfully requests this Court to reconsider and disapprove them.

Recent developments in Eighth Amendment jurisprudence further support Sergio's claims. In *Roper v. Simmons* (2005) 543 U.S. 551, the United States Supreme Court struck down death as a constitutional penalty for juvenile offenders. In holding that the execution of juvenile criminals is cruel and unusual punishment, the Court looked to standards set by international law as informing the Eighth Amendment:

> Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's

> decision in *Trop* [*v. Dulles* (1958) 356 U.S. 86], the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." 356 U.S., at 102-103, 78 S.Ct. 590 (plurality opinion) ('The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime') . . . . (543 U.S. at p. 575.)

Respondent has not addressed the substance of Sergio's argument that the use of death as a regular punishment violates international law as well as the Eighth and Fourteenth Amendments. Sergio asks this Court to reconsider its position on this issue and, accordingly, to reverse the death judgment.

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22.

THE TRIAL COURT IMPROPERLY REJECTED SEVERAL PROPOSED PENALTY PHASE INSTRUCTIONS THAT WOULD HAVE GUIDED THE JURY'S DELIBERATIONS IN ACCORDANCE WITH THE LAW.

Sergio argues that the trial court's refusal to give his specially-tailored instructions at the penalty phase denied him a reliable sentencing determination. (AOB 322-323, 327.) Respondent acknowledges that a defendant is entitled to a pinpoint theory of defense instruction if it is not an incorrect statement of the law, argumentative or duplicative. (RB 190.) None of Sergio's requested instructions were inaccurate, argumentative or cumulative

A. The Trial Court Erred by Refusing Sergio's Special Requested Instruction on Mercy, Compassion and Sympathy.

Sergio contends that the trial court erred by refusing to give the jury the specific instructions on mercy, compassion and sympathy that he requested. (AOB 324.) Respondent submits that the requested instructions were cumulative and cites cases of this Court that have rejected claims similar to Sergio's on that ground. (RB 191-192.) However, by its nature, a claim that the trial court improperly refused a requested theory of the defense instruction is case – and fact – specific. Sergio believes that the instruction requested in this case was necessary for the jury to properly fulfill its job of determining punishment in a constitutionally acceptable fashion. Respondent has offered no argument which casts this proposition into doubt.

B. The Trial Court Erred by Rejecting Sergio's Request to Instruct the Jury that the Absence of a Mitigating Factor Could Not Be Considered to Be an Aggravating Factor and that the Aggravating Factors Are Limited to Those Specified in the Instructions.

CALJIC No. 8.85 advises the jury that it may take into account the factors set forth in Penal Code section 190.3 when making its choice between a sentence of life without the possibility of parole or death. What the instruction does not do is inform the jury that it cannot consider the absence of a mitigating factor to be an aggravating factor. (AOB 159-163.) Respondent believes that this instruction was unnecessary because the concept is implicit in CALJIC No. 8.85.[29] (RB 93-96.)

Respondent cites several decisions in which this Court has rejected similar claims. (RB 95.) Sergio addressed in his opening brief why the information conveyed by the instruction requested here differed from the information conveyed by CALJIC No. 8.85. (AOB 161-163.) More significantly, Sergio demonstrated why the requested instruction differed to the extent that the trial court's reliance upon *People v. Berryman* (1993) 6 Cal.4th 1048 was unwarranted. Respondent does not address this

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[29] Respondent also believes any constitutional basis for the argument is waived because no constitutional basis for the instruction was asserted at trial. (RB 95.) The cases cited for this proposition, however, do not support it. *People v. Earp* (1999) 20 Cal.4th 826, 893 involved a situation where the defendant was asserting on appeal a constitutional claim that was not raised in the trial court. *People v. Carpenter* (1997) 15 Cal.4th 312, 385 involved a situation where the defendant failed to object at all in the trial court. Here, the appellate claim is exactly the same as the one raised in the trial court. Sergio is merely addressing the constitutional violation that arises from the trial court's failure to grant his requested jury instruction. The constitutional claim is cognizable. (See *People v. Partida* (2005) 37 Cal.4th 428, 435.)

reasoning.

This Court's rejection of claims such as that raised herein rests primarily upon an erroneous premise, namely that the instructions as a whole adequately convey to the jury that the absence of mitigating evidence does not constitute aggravating evidence. (See, e.g., *People v. Ashmus* (1991) 54 Cal.3d 932, 1004-1005, abrogated on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.) However, as set forth in Sergio's Opening Brief, the unmodified version of CALJIC No. 8.85, which sets forth the factors the jury is to consider in determining the penalty, does not effectively guide the jury's consideration in the same manner as does the instruction requested by Sergio. For this reason, the trial court erred in denying the requested instruction.

C. The Trial Court Erred by Refusing to Instruct on Lingering Doubt.

Sergio requested at the penalty phase of the trial that the jury be given an instruction on the concept of lingering doubt. On appeal, he asserts that the failure to give this instruction was violative of both state law and the federal Constitution. (AOB 164-169.) Respondent believes that neither state nor federal law requires such an instruction and that CALJIC No. 8.85 is sufficient to address the principle encompassed in the requested instruction. (RB 96-97.)

The problem with respondent's position, as fully explicated by Sergio in his opening brief, is that the underpinning of the cases respondent relies upon is analytically flawed and is undermined by other cases decided by this Court. The cases relied upon by respondent all base their holdings on the logically-insupportable concept that an instruction directing the jury to consider factor (a) and factor (k) "necessarily encompass[es] the concept

of lingering doubt, and thus render[s] any special instruction on the concept unnecessary." (*People v. Earp* (1999) 20 Cal.4th 826, 904.) However, as Sergio points out in his opening brief (AOB 166), the gravity of the crime at issue is not extenuated, nor are the circumstances of the crime altered, depending upon who may have committed the crime. Consequently, the requested instruction and the instruction given by the trial court do not address the same concept.

The validity of this observation has been supported by the United States Supreme Court. In *Franklin v. Lynaugh* (1988) 487 U.S. 164, 174, the Court stated that the concept of lingering doubt does not relate to the circumstances of the offense. Yet, that is what the respondent would have this Court believe it does when it argues that the instruction given by the trial court embraces the concept of lingering doubt.

Moreover, as Sergio points out in his opening brief (AOB 164-167), this Court has itself held that a trial court may be required to give a properly formulated lingering doubt instruction when pertinent to the case and warranted by the evidence. (*People v. Cox* (1991) 53 Cal.3d 618, 678, fn. 20.) Since this Court has deemed the issue of lingering doubt of guilt to be relevant to the penalty determination (*People v. Cleveland* (2004) 32 Cal.4th 704, 739), it certainly is an issue upon which the jury should be instructed.

The instruction framed by Sergio directed the jurors to a proper consideration of a relevant principle of law affecting their consideration of whether to impose a death sentence. The instruction was properly formulated and should have been given by the trial court. (See *People v. Cox*, *supra*, 53 Cal.3d at p. 678, fn. 20.)

Finally, Sergio's claim is unaffected by the United States Supreme

Court's decision in *Oregon v. Guzek* (2006) 546 U.S. 517. As the Supreme Court itself stated: "the federal question before us is a narrow one." (*Id.* at p. 523.) That question was whether the Eighth and Fourteenth Amendments grant a defendant the right to present new evidence to a penalty jury that was inconsistent with his prior conviction of the crime charged. (*Ibid.*) The majority took great pains to make clear that was the only issue it was addressing in *Guzek*.

The issue before this Court differs from the issue that was before the Court in *Guzek*. Sergio sought to introduce no new evidence. He merely sought to ensure that the jury had a way of giving effect to the evidence it had already heard in a manner that comported with his Eighth and Fourteenth Amendment rights to a fundamentally fair sentencing proceeding. This right is not affected by the opinion in *Guzek*.

D. The Trial Court Erred by Failing to Instruct the Jury that It Could Return a Verdict of Life Imprisonment Without the Possibility of Parole even if It Failed to Specifically Find the Presence of any Mitigating Factors.

Sergio sought an instruction that made clear to the jurors that they could impose a sentence less than death despite the fact they may not find the presence of any of the statutory mitigating factors set forth in Penal Code section 190.3. (AOB 172.) Sergio and respondent agree that this Court has previously held that such an instruction is unnecessary because of its belief that CALJIC No. 8.88 embraces this concept. (AOB 172-173; RB 98-99.) Sergio will not belabor the argument already set forth in his opening brief, other than to reiterate that a careful reading of CALJIC No. 8.88 belies this belief. That instruction simply does not embrace the concept Sergio sought to have brought to the jury's attention. Sergio is at a

loss as to why, when the issue before the jury is the choice between life and death, this Court is reluctant to have trial courts provide the jury with a clear directive to guide its deliberations; but rather prefers to have the jury attempt to parse a less than clear instruction to try and intuit what a clear instruction would make manifest. This approach does not comport with a constitutional sentencing scheme.

E. The Trial Court Erred in Refusing Sergio's Special Requested Instructions on Deterrence or Cost.

Sergio contends that the trial court erred in rejecting a judicially-approved instruction directing the penalty phase jury not to consider the deterrent effect of the death penalty or relative costs of execution versus life-time imprisonment. (1RT 324-325.) In his opening brief, Sergio cited several of the Court's cases affirming the appropriateness of such an instruction. (See, e.g., *People v. Thompson* (1988) 45 Cal.3d 86, 132; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 145-146; *People v. Welch* (1999) 20 Cal.4th 701; AOB 324-325.) Respondent cites a different case in which the Court held that a similar instruction was properly rejected. (See *People v. Benson* (1990) 52 Cal.3d 754, 807; RB 192.) Respondent further argues that a failure to give the requested instruction was harmless. (RB 192.)

The rationale of the decision cited by respondent underscores the error in this case. In *People v. Benson*, *supra*, 52 Cal.3d at 807, the Court found that the requested instruction was not applicable because (1) the issue of deterrence or cost was not raised at trial; and (2) the defendant had put forth no basis for the assumption that there was a significant possibility jurors take deterrence and cost into account in determining penalty.

In contrast, this case establishes the likelihood that, even without

prodding from the prosecutor, jurors will spontaneously consider these impermissible factors. The deadlock questionnaire and ensuing inquiries disclosed that Sergio's jury, in fact, discussed the costs of imprisonment.[30] (See 35RT 5778-5779.) Indeed, the State's budgetary problems have increasingly focused the public's attention on the costs of incarceration making it highly probable that this factor will be considered by jurors in their penalty determinations. (Cf. *People v. Ramos* (1986) 37 Cal.4th 136, 159, fn. 12.) On this record, it was prejudicial error to refuse a deterrence/cost instruction.

F. The Trial Court Erred in Refusing to Instruct the Jury that Sergio's Character and Background May Be Considered Only as Factors in Mitigation.

Sergio maintains that the court erred in refusing his requested instruction limiting the use of character and background evidence to mitigation. (AOB 327-328.) Respondent relies on *People v. Farnam* (2002) 28 Cal.4th 107, 191, in arguing that the trial court has no obligation to advise the jury which statutory facts are relevant solely as mitigating or aggravating factors. (RB 194.) *Farnam* is not apposite. The issue addressed in *Farnam* was whether the trial judge had a sua sponte duty to segregate mitigating and aggravating factors for the jury, not, as here, whether the trial judge could refuse a defendant's particular instruction that directed the jury's attention to one such critical distinction.

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[30] In that the prosecutor promoted and engaged in the questioning that disclosed the details of the jury's deliberations, respondent cannot invoke Evidence Code section 1150's limitations on inquiries into jurors' mental processes.

G. The Trial Court's Failure to Give the Requested Instructions Was Prejudicial.

Sergio contends the court's refusal of his proffered penalty phase instructions was prejudicial error that denied him a fair, non-arbitrary and reliable sentencing determination. (AOB 327.) Respondent counters that any error was harmless because defense counsel's closing argument and the body of other instructions adequately covered the same principles as the requested instructions. (RB 195.) Respondent is wrong.

The jury takes the law from the judge's charge, not defense counsel's closing argument. Sergio argues, moreover, that, under the circumstances of this case, the standard instructions did not ensure that the jury properly considered aggravating and mitigating factors.

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23.

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

Sergio has argued that the cumulative effect of the errors at trial require reversal of the convictions and sentence of death even if any single error considered alone would not. (AOB 328-330.) Respondent offers only a rote response. (RB 218.) The issue is joined, and no further reply to respondent's argument is necessary.

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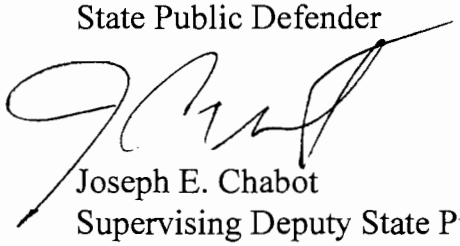
CONCLUSION

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

Dated: December 8, 2010

Respectfully submitted,

Michael J. Hersek
State Public Defender



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CERTIFICATE OF COUNSEL

(CAL. RULES OF COURT, RULE 8.630(b)(1)(C)

I, Joseph E. Chabot, am the Supervising Deputy State Public Defender assigned to represent appellant Sergio Nelson in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count I certify that this brief is 30321words in length.

JOSEPH E. CHABOT
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Sergio D. Nelson* No. S048763

I, Jon Nichols, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; and on December 8, 2010, I served a true copy of the attached:

APPELLANT'S REPLY BRIEF

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

Sergio D. Nelson
(Appellant)

Tita Nguyen
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ADDIE LOVELACE
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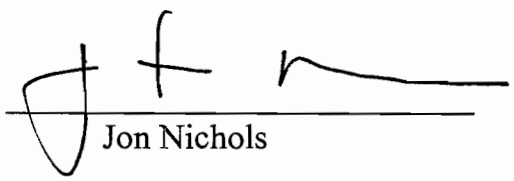
Each envelope was then, on December 8, 2010, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on December 8, 2010, at San Francisco, California.



Jon Nichols