SUPREME COURT COPY

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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. JOSE LUIS LEON, Defendant.	CAPITAL CASE Case No. S143531

SUPREME COURT
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Case No. RIF109916
The Honorable Christian F. Thierbach, Judge

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DEATH PENALTY

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STATEMENT OF THE CASE[1]

On December 4, 2003, the Riverside County District Attorney filed an information charging Appellant Jose Luis Leon (Leon), in count 1, with the murder of Hope Ragland (Pen. Code, § 187, subd. (a)), in count 2, with the murder of Austin Perez (Pen. Code, § 187, subd. (a)), and in count 3, with the attempted murder of Marion Ragland (Pen. Code, §§ 664/187, subd. (a)). It was further charged as to count 3 that Leon personally used a deadly and dangerous weapon, a hatchet (Pen. Code, §§ 12022, subd. (b)(1) & 1192.7, subd. (c)(23)), and personally inflicted great bodily injury upon Marion Ragland (Pen. Code, §§ 12022.7, subd. (a) & 1192.7, subd. (c)(8)). A special circumstance was alleged that Leon committed multiple murders. (Pen. Code, § 190.2, subd. (a)(3)). (1 CT 102-103.)

On January 30, 2004, Leon pled not guilty to all counts. (1 CT 111.)

The jury was sworn on February 8, 2006. (8 CT 2343.) On February 28, 2006, the jury found Leon guilty of murder in the first degree as to counts 1 and 2, and of attempted murder in count 3, and found that the multiple murder special circumstance allegation and enhancement allegations were true. (10 CT 2833-2840.)

On March 6, 2006, the penalty phase began. (10 CT 2872.) The jury began their penalty phase deliberations on March 11, 2006. (11 CT 2929.) On March 21, 2006, the jury returned a verdict of death for the murder of

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[1] The record on appeal consists of: Clerk's Transcripts Volumes 1 through 11, Third Supplemental Clerk's Transcript, Fourth Supplemental Clerk's Transcript, and Sixth through Ninth Supplemental Clerk's Transcripts; Reporter's Transcripts Volumes A, B, 1 through 13, and 13A. All of the citations herein are to the 11 volumes of Clerk's Transcripts and therefore designated herein as "CT." The Reporter's Transcripts are designated herein as "A RT," "B RT" or by the Arabic volume number, e.g., "1 RT."

Austin Perez (count 2) and life imprisonment without the possibility of parole for the murder of Hope Ragland (count 1). (11 CT 2968-2969.)

On May 12, 2006, the trial court denied Leon's motion to modify the verdict pursuant to Penal Code section 190.4, subdivision (e). (11 CT 3013-3017.) The trial court sentenced Leon to death for the murder of Austin Perez, life without the possibility of parole for the murder of Hope Ragland, and life with the possibility of parole plus four years for the attempted murder of Marion Ragland. (11 CT 3002-3004.)

STATEMENT OF FACTS

Appellant Jose Luis Leon was distraught by the fact his girlfriend Veronica Haft was ending their relationship. He saw Haft's family, in particular her grandmother Hope Ragland, driving a wedge in the relationship and an obstacle to their future. While Haft was studying in England, Leon came to the Ragland home and stabbed Hope Ragland to death while she sat in her chair. He then stabbed to death Haft's 13-year-old brother, Austin Perez when he arrived home. Finally, Leon hit Haft's grandfather, Marion Ragland over the head with a hatchet and left him for dead, but he managed to survive. Leon initially denied his involvement to the authorities. The next day Leon admitted to committing the crimes and demonstrated how the events unfolded. He claimed to have acted in imperfect self-defense. The jury rejected Leon's defense and found he committed two counts of first degree murder, one count of attempted first degree murder, and found true the multiple murder special circumstance. Leon was sentenced to death for killing Perez.

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Guilt Phase

A. Case-In-Chief

1. Leon's relationship with Veronica Haft

Veronica Haft lived with her grandparents, Hope Ragland and Marion,[2] Ragland, and her 13-year-old half-brother, Austin Perez in a gated community at 197 Breezewood Street in Corona. (5 RT 1326-1327.) Haft was very close with her grandmother Hope and called her "mom." (5 RT 1327.) Haft met Leon in February 2001, shortly before she turned 17 years old. (5 RT 1330-1331, 1333.) Leon had moved from Mexico two years earlier and told Haft he was 19 years old.[3] (5 RT 1333-1334.) The first year of the relationship was great. (5 RT 1334.) Leon initially came to their house a couple times a week. (5 RT 1336.) Leon spoke limited English, but both Haft and Hope were fluent in Spanish. (5 RT 1332-1333.) Perez and Marion did not speak Spanish, and their limited communication with Leon was in English. (5 RT 1332, 1402.)

In mid-2001, Hope bought a red Mustang for Leon in her name and he made monthly payments to her. (5 RT 1359.) Leon's parents moved back to Mexico and he began spending even more time at the Ragland home; coming over daily. (5 RT 1336, 1360.) Leon started losing jobs and missing car payments. (5 RT 1360.) Marion liked Leon at first, but his feelings for Leon changed by Leon's increased and constant presence in their home. (5 RT 1418.) Marion had little interaction with Leon and made it apparent to Leon that he was overstaying his welcome. (5 RT 1336,

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[2] To minimize any confusion arising from two victims having the same surname, Hope Ragland and Marion Ragland will hereafter be referred to by their first names.

[3] According to the felony complaint and probation officer's report, Leon's date of birth is June 5, 1979. (1 CT 1; 11 CT 2987.) This would make him 21 years old in February 2001.

1341, 1402.) In spite of Marion's feelings, Leon was still made welcome in the Ragland home and Hope would cook for him and do his laundry. (5 RT 1402.)

After a year or so, Haft's relationship with Leon began to change. (5 RT 1337.) Leon became possessive of Haft and no longer wanted her to spend time with her girlfriends or talk to her male friends. (5 RT 1337.) He also became progressively jealous; once refusing to take her out after accusing Haft of wearing a dress to get the attention of other men. (5 RT 1340.) When Haft suggested they should not be together Leon became angry, hit and broke his windshield. (5 RT 1338-1339.) Haft opened the car door to leave and Leon grabbed her wrist. (5 RT 1338.) Haft hit Leon on the arm with her purse and went inside. (5 RT 1338.)

Hope began to acknowledge Leon's manipulative behavior and stopped approving of him. (5 RT 1340.) Hope would tell Haft that just because Leon does not hit you, does not mean you are not in an abusive relationship. (5 RT 1342.) Hope and Leon would argue and bicker all the time. (5 RT 1345.) Marion said that he saw Hope and Leon get into an argument in the garage. (5 RT 1427.) Leon held his hands up and Hope pushed him lightly with her finger. (5 RT 1427.)

In the summer of 2002, after Leon's parents returned to Mexico, Leon moved in with a lady named "Maria" for a few months. (5 RT 1353.) Haft and Maria did not like each other. (5 RT 1353.) Hope, however, would have Maria "read her cards" and "have her future read." (5 RT 1352-1353.) Leon told Haft that Hope was involved in witchcraft with Maria and had put him under a spell. (5 RT 1377, 1392.) Haft assured him Hope was not practicing witchcraft and would get irritated and frustrated when he suggested it. (5 RT 1377, 1392.) Leon had taken Haft to a shop called a Botanica she described as a "witchcraft store" where they "had a lot of candles and stuff." (5 RT 1390-1391.) Haft said Leon was also "under the

care" of Maria and drank tea for his ulcer or hemorrhoid. (5 RT 1391-1392.)

In August 2002, Haft got pregnant. (5 RT 1369.) Haft told Hope and had the pregnancy terminated. (5 RT 1369-1370.) Haft told Leon that she had a miscarriage. (5 RT 1396.) Leon believed that Hope gave Haft something to drink that caused her to lose the baby, but Haft told him that was not so. (5 RT 1396.)

Towards the end of 2002, Haft and others would notice Leon's car parked in the Food-4-Less Shopping Center next door when he was supposed to be at work or taking English classes. (5 RT 1370-1372.) While Leon would deny parking in the shopping center parking lot, Haft disbelieved the denials because his car was distinct because it was a red Mustang with a white convertible top. (5 RT 1371.)

One Sunday when Haft was leaving church with Hope and Perez, Leon was waiting for them at Hope's car. (5 RT 1343-1344.) Hope got mad at Leon and told him to leave them alone. (5 RT 1344.) Hope and Leon began arguing and Leon said to Hope, "Shut up, you scandalous old woman." (5 RT 1346.) Hope was offended and went to slap Leon, but he backed away, and her fingertips only grazed his chin. (5 RT 1346-1347.) Hope chased after Leon and tried to hit him with her purse, but he ran away and laughed at her. (5 RT 1347.)

In January 2003, Haft was attending the University of Riverside and had earned a full scholarship to study at the University of Oxford in England for three months. (5 RT 1329, 1355.) On January 31, 2003, Leon came to the Ragland home upset that Haft was going to England and leaving him. (5 RT 1355.) Haft told Leon that if their relationship was meant to be then things would work out. (5 RT 1356.) Hope became upset with Leon and told him to leave them alone. (5 RT 1356.) They went outside and Leon asked Haft to leave with him so they could talk. (5 RT

1356.) Hope and Leon continued to argue and Hope threatened to report the Mustang stolen. (5 RT 1357.) She bent down, pretending that she was going to pick up a brick, but she never did. (5 RT 1357-1358, 1426.) Perez went inside and called the police. (5 RT 1358.) Hope said to Haft, "You don't see him. You don't see when he mocks me, he makes faces, he laughs at me behind your back." (5 RT 1358.) Haft turned around and saw Leon had a smirk on his face and then his expression changed. (5 RT 1358.)

In February 2003, Haft left for England. Before leaving, Haft told Leon "it was probably best that we break it off since I was going to be out there." (5 RT 1362.) Haft explained that for her, "the relationship was over, but [Leon] couldn't understand that." (5 RT 1362.) At first Leon would call Haft every day when she was in England. (5 RT 1360.) Then Leon started calling Haft 20 to 25 times a day so she stopped answering her phone. (5 RT 1361.)

Haft spoke with Leon on April 29, 2003, and the conversation began as usual with him wanting to get back together with her. (5 RT 1363.) Leon would always blame their break up on Hope and Haft would explain to him that it was Haft's decision. (5 RT 1364.) However, this conversation was different because for the first time Leon acted like everything was okay and was accepting of their break up. (5 RT 1363.) Haft was happy because she thought he finally accepted that their relationship was over. (5 RT 1363.) Haft was coming home in a few weeks and Leon asked to see her the Saturday after she returned. (5 RT 1363.)

2. Leon murders Hope Ragland and Austin Perez and attempts to kill Marion Ragland

Leon called Haft from California on the morning of May 1, 2003, and she answered, "What?" (5 RT 1366-1367.) He asked Haft where she was. (5 RT 1367.) Haft was irritated that Leon called her and responded, "What

does it matter?" (5 RT 1367.) Leon said to Haft, "No matter what happens, I'll always love you." (5 RT 1367.) Haft hung up, finding the call odd. (5 RT 1367.)

The Ragland home was in a gated community behind the Food-4-Less Shopping Center on McKinley Street in Corona. Shortly before 6:00 p.m., Monique Perez was on her way to work at Video Shores when she recognized Leon, a regular customer, driving very slowly around the parking lot in his red Mustang. (4 RT 1266-1269.) Thereafter, Monique Perez and her fellow employee, Yvette Alvarez, saw Leon walk by Video Shores towards the Ragland home wearing a black leather jacket. (4 RT 1271, 1278-1281.)

At 6:20 p.m., Marion left home in his truck to take their dogs to the park for their daily walk. (4 RT 1403, 1406.) Perez used to join him, but over the last few weeks had stayed home. (4 RT 1403.) On this particular day, Perez went to his friend Osvaldo Magdaleno's home across the street after school and played video games. (4 RT 1287-1288.)

Magdaleno looked out his window and saw Leon standing outside the gate to the gated community. (4 RT 1291.) To enter, an individual needed a gate opener or could call a resident on the panel to let them in. (5 RT 1320.) There were also pedestrian entrances to the community that required a key to open. (5 RT 1324-1325.) Jenyffer Soto, a resident of the community also saw Leon waiting by the gate. (5 RT 1321.) As soon as she opened the gate to drive through, Leon walked through the gate. (5 RT 1321-1322.) Knowing Haft was in England, Soto thought it was odd that Leon was there. (5 RT 1323.)

Leon entered the Ragland home with gloves and a ski mask. (6 RT 1489-1490.) He threw the cordless phone into the garage. (6 RT 1475.) Leon stabbed Hope with a kitchen knife eight times as she sat in the lounge chair in the living room. (6 RT 1468-1469.) Leon stabbed Hope once in

the neck, cutting through her larynx and into her jugular vein, and seven times in her torso. (6 RT 1512, 1514, 1517.) One stab wound was conducted with such force that it entered her right chest and exited her upper left shoulder, leaving a blood stain on the lounge chair cushion. (6 RT 1464, 1468-1469, 1514.) The seven wounds to her torso resulted in perforations to the pulmonary artery, aorta, lungs, liver and surface of the heart, causing her to bleed to death within a few minutes. (6 RT 1517-1518, 1522-1523.) Leon picked up Hope from the chair and moved her toward the closet. He set her down on the tile floor outside of the closet, where her lifeless body bled before he put her into the closet. (6 RT 1467, 1472-1474.)

Meanwhile, after playing video games and football, Perez and Magdaleno returned to Magdaleno's house. (4 RT 1292, 1294.) Magdaleno noticed Leon inside the Ragland house looking out the window. (4 RT 1292.) When it was time for Perez to leave, Magdaleno walked him outside to the mailbox. (4 RT 1294.) Perez could not open the front door so he walked around the home and jumped the fence. (4 RT 1294.)

Perez entered the sliding glass door into the dining area. Leon stabbed Perez to death with the same knife used to kill Hope, near the interior door leading to the garage. (6 RT 1479, 1530.) Leon stabbed Perez six times in his neck transecting his jugular veins, right carotid arteries and some of the strap muscles in his neck. (6 RT 1523, 1526.) He also stabbed Perez twice to the front of his torso and four times in his back causing incisions to the liver, and perforations to the stomach and aorta. (6 RT 1523-1527.) Perez's injuries caused him to bleed to death in a matter of minutes or less. (6 RT 1528, 1530.) Leon dragged Perez's body a few feet back towards the kitchen, and left him face down in a pool of blood. (6 RT 1457-1458.)

Leon emptied the contents of Hope's purse on the living room floor. (6 RT 1451.) He used Hope's lipstick to write "Austin is a bad student" on the living room mirror and then threw the lipstick in the kitchen garbage. (6 RT 1462.) He went upstairs and ransacked all the bedrooms and bathrooms. (6 RT 1484.) Leon went into the garage and armed himself with a green crowbar and a hatchet. (5 RT 1413-1414.) Leon placed the crowbar on the loveseat in the living room. (6 RT 1463.)

Marion returned home about 8:15 p.m., and noticed the house was darker than usual and the front door was locked. (5 RT 1408.) He entered the front door and Leon hit him on the head with the hatchet. (5 RT 1410.) Leon left the hatchet on a table in the back yard and tossed the knife behind some rolled up carpet near the table. (6 RT 1486-1487.) The knife had blood on it and the blade was bent. (6 RT 1486-1487.) Leon ran towards the nearby shopping center and past the video store wearing the same black jacket and a multicolored shirt underneath. (4 RT 1272, 1282-1283, 1297-1301.) Marion walked to the video store, his head covered and dripping blood, and summoned help. (4 RT 1273-1274, 1285, 1410-1411.) Marion suffered a skull fracture and severe concussion as a result of the blow to his head, and required 17 staples to bind his wound. (7 RT 1561.)

Leon arrived at the dairy in Ontario by 9:50 p.m. for his evening shift, prepping for work as usual. (4 RT 1306-1307; 7 RT 1558-1559.) Leon's car was searched. There was a ski mask in the car trunk and an open box of rubber gloves on the backseat. (6 RT 1489-1490.) Leon's keys tested positive for blood. (6 RT 1489.)

3. Leon's interview on May 2, 2003

Leon's interview on May 2, 2003, was played for the jury. (See People's Exh. 93; 9 CT 2399-2513; 6 RT 1531-1535.) Leon told officers that he went to the Ragland home at 5:30 p.m. to give Hope a car payment, but saw Marion's truck there and left. (9 CT 2405, 2413, 2430.) Leon then

returned at 7:30 p.m. and knocked on the door but there was no answer. (9 CT 2409, 2430-2431.) Leon waited until about 8:00 p.m., then returned to his car and drove home. (9 CT 2458-2459.)

Leon said he had spoken with Haft a few days earlier and she told him she was going to the movies and loved him. (9 CT 2424.) He said they had even exchanged engagement rings, but Haft lost hers in January.[4] (9 CT 2425-2426.) Leon said he had lost weight because he could not stand to lose Haft. (9 CT 2429.) He also said that Maria and Hope were doing bad things to him with witchcraft. (9 CT 2496-2499.)

4. Leon's interview and walkthrough on May 3, 2003

Leon was interviewed the following day and confessed to the killings. (See People's Exh. 94; 8 CT 2361-2398; 6 RT 1534-1535.) Leon said he went to the Ragland home and Hope told him Haft went to a movie with friends and to a club with another guy. (8 CT 2376.) They began to argue and Hope pulled out a knife, but did not do anything to him. (8 CT 2376.) Hope threatened to call the police so he took the phone away from her. (8 CT 2377.) He grabbed the knife and started stabbing her. (8 CT 2377.) Perez came home as Leon was fighting with Hope. (8 CT 2383.) Perez threw his skateboard at Leon and they began to fight. (8 CT 2377.) Leon put Hope in the closet. (8 CT 2382.) Hope had told Leon that Haft had changed her phone number so he searched the house for it. (8 CT 2385.) When Marion arrived home, Leon hit him and left. (8 CT 2378.)

Later that day, Leon walked the authorities through the crime scene and provided a more detailed version of what happened. (See People's Exh. 95; 9 CT 2522-2600; 10 CT 2601-2732; 7 RT 1552.) Essentially, Leon claimed Hope invited him in and following an argument, pulled a knife on

[4] Haft testified that Leon gave her a promise ring that she stopped wearing after arriving in England. (5 RT 1362.)

him. (9 CT 2531, 1559.) They fought over the knife and fell on the floor, with Leon in possession of the knife. (9 CT 2566, 2569.) Hope pushed Leon back and impaled herself on the knife. (9 CT 2569.) Leon then lost it and stabbed her multiple times. (9 CT 2570.) Perez arrived home and began attacking Leon. (9 CT 2580-2583.) Leon tried to calm him down and after a struggle ended up stabbing him. (9 CT 2599, 2616-2617, 2623, 2626, 2628, 2631-2632.) He knew Marion would be arriving home soon so he went into the garage and grabbed the crowbar and hatchet. (9 CT 2680, 2688-2689.) When Marion entered he threw the hatchet at him and then fled. (9 CT 2695, 2697-2698, 2700.) Leon claimed that everything he did was in self-defense. (9 CT 2731.)

B. Defense

Leon's defense sought to prove Leon committed manslaughter when killing Hope, not murder. Leon presented testimony that Hope would get physical with Leon during arguments in support of his claim of imperfect self-defense.

Corona Police Officer Jesus Jurado responded to the Ragland home on January 31, 2003, in reference to an allegation that Hope either battered or struck Leon in some fashion. (7 RT 1571-1572.) Officer Jurado said both Hope and Leon were cooperative, professional and nice. (7 RT 1574.) He was told their argument started because Hope and Marion did not approve of the relationship between Leon and Haft. (7 RT 1573-1574.) There was no mentioning of a brick being used when he spoke to the parties at the home. (7 RT 1573.) However, the notes generated by the dispatcher when the emergency call was made stated that a brick had been used. (7 RT 1573; 8 RT 1630.) Officer Jurado did not notice any injuries to the parties and Leon did not want to prosecute. (7 RT 1574-1575.)

Officer Robert Gonzalez interviewed Perez's friend Magdaleno on May 1, 2003. (7 RT 1568.) Magdaleno told him he saw Leon standing

outside of the Ragland home looking into the windows, and did not see anything in Leon's hands. (7 RT 1568-1569.) Magdaleno never told Officer Gonzalez that he saw Leon inside the home looking out. (7 RT 1569.)

On November 17, 2005, Defense Investigator William Sylvester served a subpoena on Marion and unexpectedly interviewed him. (7 RT 1576-1578.) The following week Investigator Sylvester had a second conversation with Marion, this time over the phone. (7 RT 1579-1580.) Neither interview was recorded. (7 RT 1578.) Marion said Hope had been "in and out" of witchcraft for many years, and had gotten back into it shortly before her death, although he could not prove it. (7 RT 1581-1582.) Hope was already a "fiery person," and when she was involved in witchcraft her physical and emotional health deteriorated, and her anger and temper worsened, making her more difficult to live with. (7 RT 1581.)

Marion witnessed Hope and Leon have "heated" arguments that became physical. (7 RT 1582.) On January 31, 2003, Hope and Leon were arguing in Spanish and Hope held a brick in a threatening manner. (7 RT 1583.) One of the responding officers told Marion that Hope came close to being arrested because she was being uncooperative. (7 RT 1583-1584.) Marion said Hope and Leon had an argument in the garage and Hope kicked Leon's shins and swung her hands at his head. (7 RT 1584-1585.) Marion never saw Leon strike back at Hope. (7 RT 1585.)

Haft did not recall telling dispatch that Hope threatened Leon with a brick, but thought she said Hope simulated that she was going to pick up the brick. (8 RT 1610-1611.) At the time Hope was upset that Leon bought Haft a ring and angry about the whole situation. (8 RT 1611-1612.) Hope was yelling at Haft not to go with Leon. (8 RT 1612.) When the officers arrived, they instructed Haft, Perez and Leon to step aside. (8 RT 1612.) Haft did not see Hope's interaction with the officers. (8 RT 1612.)

When Haft was preparing to leave for England at the end of February 2003, her relationship with Leon was "extremely rocky" because Hope did not approve of it and Haft said she "was starting to see things that [Leon] was doing that I didn't approve of." (8 RT 1612-1613.) One purpose of her going to England was to get away from the situation so she could have a fresh perspective on things. (8 RT 1613.) Haft began dating Leon when she was 16 years old, Leon had become obsessive with her, and her earlier attempts to break up with him had failed. (8 RT 1624.) At first Leon called her often and then it became overwhelming. (8 RT 1613.) Haft wrote multiple letters to Leon from England during the month of March telling him she loved him and missed him. (8 RT 1614.) It was also about this time that she had made the difficult decision to end their relationship because she knew Leon was not good for her. (8 RT 1625-1627.) Haft loved Leon as they had been together for years, he was always around, and a part of her family. (8 RT 1625.) Haft told Leon in April over the phone that she had made the decision to end their relationship, but he did not seem to accept this and continued to call her. (8 RT 1628.) In April Haft sent a postcard to Leon with a much more detached tone than her earlier letters. (8 RT 1627.)

C. Rebuttal

Marion said that Investigator Sylvester's report following their interviews was inaccurate and unfair. (8 RT 1632.) Marion made one reference to the word "witchcraft," but explained to Investigator Sylvester that he was hesitant and did not want to use that word. (8 RT 1633.) Marion said he never told Investigator Sylvester that Hope was hard to live with because of witchcraft, only that when her nerves were bad it was hard to talk to her. (8 RT 1633-1634.) Marion said the only two physical altercations involved Hope lightly tapping Leon on the chest. (8 RT 1634.)

Hope would mostly just raise her voice, and usually it was because Leon refused to leave when she told him to. (8 RT 1634.)

Penalty Phase

A. Victim Impact Testimony

Veronica Haft described Hope as a "wonderful and amazing" person, very lively, outgoing, happy, and witty. (10 RT 1789.) She was also a very hardworking Certified Nephrology Nurse (CNN) for 30 years, close with her patients, and well respected by her coworkers. (10 RT 1971-1973, 1800.) Religion was a big part of Hope's life, she attended church every Sunday, and Hope provided Haft with a religious upbringing. (10 RT 1797-1798.)

Hope was Haft's best friend, yet also very strict and protective of Haft, and "old-fashioned" in the way she was raising her. (10 RT 1790, 1799.) It was very important to Hope that Haft excelled in school and took advantage of the opportunities Hope never had. (10 RT 1700-1801.) Haft explained that Hope was an excellent parent: "I had my mom for 19 years, but me and her loved each other more than the average girl does with her own mother. I did everything with her. I loved her to the maximum. I knew she loved me. Everything. She was my life." (10 RT 1803.) Haft said that her close and open relationship with Hope was a reason why they got along so well and as a teenager, Haft never felt that she wanted to rebel. (10 RT 1803.) Haft said that if she ever has children, she wanted to be a parent like Hope; there no matter what, never judgmental, energetic, and full of pride. (10 RT 1809.)

Haft said she was raised by Hope and Marion because her birth mother Patricia had drug problems. (10 RT 1804-1805, 1816.) Patricia also had Perez and twin boys Dallas and Blake with "Rudy," lost custody of them and they were put into foster care. (10 RT 1804-1805.) Hope tried to

get custody of the boys, but was only able to get Perez and the twins ended up with their father. (10 RT 1805.) Perez joined their family when he was about six years old and seemed to settle in pretty well. (10 RT 1805.) At first Perez struggled in school because he had missed so much, but was a very intelligent kid and caught on to things very quickly. (10 RT 1816.) Perez was also very popular and athletic. (10 RT 1816-1817.) Haft always tried to make Perez feel comfortable in the family and played the role as a big sister giving him guidance in everything from fashion to schoolwork. (10 RT 1819.) Hope also tried to do all she could for Perez when he first joined their family so he never felt like an outsider or deprived. (10 RT 1820-1821.) He adapted quickly, and soon started calling Hope "mom" too. (10 RT 1820-1821.)

Haft said she feels guilty and at fault for bringing Leon into their lives. (10 RT 1828-1829.) She said she will never be the same after losing Hope, her irreplaceable best friend. (10 RT 1829.) Life is not the same, holidays are lonely. (10 RT 1830-1831.) She questions her ability to move on or ever become close with another man. (10 RT 1831.)

When Hope's nephew, Peter Flores, moved to Los Angeles from Fresno, he stayed with the family for some time and after that spent all of the holidays and many weekends with them. (11 RT 1905-1906.) He described Hope as a very nice and giving person. (11 RT 1906.) Perez was a very smart boy who had a lot of respect for Haft, Hope and Marion. (11 RT 1906-1907.) Since their deaths, holidays are basically like any other calendar day without their family getting together. (11 RT 1907.) The thing he misses most about Hope is her sense of humor and the funny messages she would leave him. (11 RT 1909.) Flores also said he misses Perez's politeness. (11 RT 1909.)

Perez joined their family from a foster home when he was seven. (11 RT 1913.) Marion was very close with Perez, and retirement allowed

Marion to spend a lot of time with him and take care of him daily. (11 RT 1910.) Perez had a lot of energy, loved sports, and was always respectful to adults. (11 RT 1910.) Most days they would take the dogs to the park and play catch. (11 RT 1912.) Perez also enjoyed working with Marion around the house, whether it was building a fence with the neighbor or decorating for Christmas. (11 RT 1913-1914.)

Marion was at the hospital when he first found out Hope and Perez were murdered. (11 RT 1915.) He could not believe it at first, and then his thoughts were how he would notify Haft. (11 RT 1915.) Marion and Haft remained in the home for about five months, but Haft especially was not comfortable so they sold it and rented an apartment. (11 RT 1915.)

Marion and Hope had a good relationship and he always enjoyed being around her. (11 RT 1917.) He mostly missed Hope's routine when she came home from work, told him about her day, sat in her chair and ate fruit and watched television, and then cooked dinner. (11 RT 1919.) Marion missed the fact Perez made things lively. (11 RT 1920.) He said they were good people and there is no excuse for what happened to them. (11 RT 1920.) Since their deaths, his only family life is Haft, who goes to school and works, so he spends a lot more time alone. (11 RT 1920.) Marion said the loss he feels will never go away completely, but he tries to handle it and let life go on. (11 RT 1921.)

Charles Johnston knew Perez because he also lived in the neighborhood. (11 RT 1922.) Charles Johnston spent a lot of time writing in his garage with the door open and interacting with others in the neighborhood, including Perez. (11 RT 1924.) He described Perez as "a bright young lad, mentally sharp, very deferential and respectful." (11 RT 1922-1923.) The loss has greatly impacted Charles Johnston as a member of the community knowing Perez was never able to realize his future. (11

RT 1923.) He also feels a level of malfeasance in not being able to intervene. (11 RT 1923-1924.)

B. Defense

1. Leon's employment

Leon's uncle, David Reyes Pavana said he frequently visited the house Leon grew up in, in Tulancingo, Hidalgo, about three hours south of Mexico City. (11 RT 1935, 1938.) When Leon was 17 years old, Pavana trained him to be a truck driver because Leon wanted to assist his family financially. (11 RT 1939-1940.) Pavana found Leon to be very intelligent, but had an innocent mentality, easily taken advantage of, and lacked a lot of basic knowledge of his surroundings. (11 RT 1942-1943.) He was very innocent, likely because he was raised in a very restricted family environment and not allowed to experience or made aware of what was beyond their town. (11 RT 1945-1946.)

Julio Castelan was Leon's neighbor in Tulancingo, Hidalgo. (11 RT 1953-1954.) Castelan's family has a business curing hides to make leather jackets. (11 RT 1954-1955.) Leon started working for them periodically when he was 12 years old for roughly eight years. (11 RT 1955-1957.) Leon's three sisters and at least three of his cousins also worked there. (11 RT 1957-1958.) Leon would mainly cure the hides by removing flesh and fat and treating them. (11 RT 1958.) Castelan said Leon was a responsible, hard working and trustworthy employee. (11 RT 1959.) He worked Monday through Saturday, and on Sunday would accompany them to the rodeo or play soccer. (11 RT 1965-1966.)

Octavio Martinez is the administrator of a suckling pig farm and ranch in Tulancingo. (11 RT 1967.) Leon worked at the ranch when he was 16 years old after finishing junior high school. (11 RT 1969.) He would watch the farm in the afternoon on the weekends. (11 RT 1971.) Leon was

responsible and a good worker. (11 RT 1971-1972.) Within two years Martinez had to let him go because his shift was no longer needed. (11 RT 1971-1972.)

2. Leon's friends and family

Placido Terrazas met Leon in secondary school and became good friends. (11 RT 2003.) He said Leon was easy to talk to, entertaining, and a good listener. (11 RT 2003-2004.) Terrazas described Leon as a very simple person, noble, and easily frightened. (11 RT 2004.) After secondary school Leon did not continue his studies because his family could not afford it so he worked to help his parents. (11 RT 1982-1984.) Leon struggled a lot to help his family. (11 RT 2005.) His mother was very important to him and he was extremely protective of her and his sisters. (11 RT 2005-2006.) His father was very strict, but not abusive. (11 RT 2011.)

Leon spoke of how he wanted to get married, have children, and his own house. (11 RT 1994-1995.) Leon liked rural areas and wanted to study at the agronomy school and work with animals. (11 RT 1995-1996.) Terrazas and Leon would also spend time together with their girlfriends. (11 RT 1998-1999.) Leon treated his girlfriend very well, spoiled her a lot, and paid attention to detail. (11 RT 1999-2000.) Leon said he was going to the United States to better his income, and he planned to form a household and have his own business. (11 RT 2002.)

Maria Guadalupe Ruiz Leon (hereafter "Lupe") spoke with Leon for the first time on September 16, 1997, at their town's annual independence celebration. (11 RT 2016-2017.) She was 16 years old and Leon was 18 years old. (11 RT 2018.) Lupe saw Leon about a month later and that is when their relationship began. (11 RT 2018-2019.) Lupe's parents worked at banquets on the weekends, and eventually Lupe began working with them. (11 RT 2025-2026.) Leon also began working with them so he

could spend time with Lupe, and his whole family started working with them. (11 RT 2026.) Lupe did not spend much time at Leon's home, but mostly at her home. (11 RT 2036.) From the beginning, Leon earned her parents' love and got along really well with her brothers. (11 RT 2036.) Leon was like a child, always happy, and charming. (11 RT 2036.)

They often spoke about getting married, having children and their own home. (11 RT 2032.) When Lupe asked Leon if he wanted to go to school or study, he was more concerned about having a stable and permanent job if they were married. (11 RT 2032.) Lupe said that Leon was a very generous person, always insisting on paying, and thinking of others. (11 RT 2033.) He also liked to give her gifts. (11 RT 2033-2034.) Leon was very supportive of Lupe attending University after high school and would see her when she came home on the weekends. (11 RT 2028.) During her first year, in 2000, Leon left for the United States. (11 RT 2029.)

Leon's father had come to the United States and his mother became very ill and depressed because she missed him. (11 RT 2038.) It was decided that Leon would accompany his mother to the United States because it was too dangerous for her to cross the border alone. (11 RT 2038.) Lupe begged him to stay and missed him terribly when he left. (11 RT 2038-2039.) Leon's family was very important to him and he always thought about them before anything else. (11 RT 2040.)

Leon had planned to come to the United States and earn money and then return to Mexico. (11 RT 2041.) He continued to speak with Lupe over the next year, and they planned on getting married when he returned. (11 RT 2041.) However, she also told him that if he chose to make his life with someone else in the United States, she would not get in the way and would move on. (11 RT 2042.) Leon started to call her less and eventually

told Lupe he met somebody else and from there they went their separate ways. (11 RT 2043.)

Ramiro Ruiz Lopez met Leon in 1997 when Leon began dating his daughter Lupe. (12 RT 2066-2067.) Lopez said Leon spent a lot of time at their house and he developed an affectionate relationship with him, treating Leon like one of his own children. (12 RT 2068-2069.) Leon would always help him around the house and with work. (12 RT 2069.) Lopez said that Leon would have had his blessing to marry Lupe because he loved him, trusted him, and believed he would make a good father. (12 RT 2070-2071.) Lopez missed Leon when he left, as did the rest of the family. (12 RT 2071-2072.)

Ofelia Leon Villa met Leon when he began courting her daughter Lupe. (12 RT 2076-2077, 2080.) Villa felt Leon had good intentions from the beginning because he wanted to get to know Lupe's family. (12 RT 2077-2078.) Leon spent a lot of time at their house, they trusted him and he became a member of their family. (12 RT 2079.) Leon was always very helpful around the house with the chores. (12 RT 2081-2082.) Even after Lupe left for University, Leon still stopped by the house daily to check in on Villa and see if she needed anything. (12 RT 2082.) Villa loved Leon and would have liked for him to be the father of her grandchildren. (12 RT 2083.)

Marina Leon Elias, the second of Leon's three younger sisters, said their entire family lived and owned property on Cuahutemoc Street. (12 RT 2105-2108.) Their grandfather inherited the land and then he gave a piece to all of his sons so they could each build a house. (12 RT 2118.) Leon was very close with their grandfather and helped him out at his ranch. (12 RT 2124-2125.) Leon especially loved to go there and ride horses. (12 RT 2124.) Leon always helped his family financially. (12 RT 2129-2130, 2132.) Leon was very close and affectionate with their mother. (12 RT

2136.) Marina Elias said they grew up in a humble home with a lot of love and good hardworking parents. (12 RT 2144-2145.)

Leon's sister, Adela Brisna Leon Elias, the oldest of his three younger sisters still lives on the same street where they grew up. (12 RT 2146-2148.) Leon repeated sixth grade and then they were in the same classes in Junior High school. (12 RT 2150-2151.) They spent a lot of time together going to and from school, and during breaks. (12 RT 2151.) To earn extra money, Leon and Adela Elias partnered together and charged other children to have her do their homework. (12 RT 2152-2153.) They took the entrance exam to attend the government funded Chapingo University but were not accepted. (12 RT 2153-2154.)

Adela Elias said Leon was a very good brother, he always worked, and would put the rest of the family before himself. (12 RT 2153-2155.) She said he loved life and always had positive thoughts. (12 RT 2157.) Leon was always trying to make everyone laugh, including their father who was on the more serious side. (12 RT 2160-2161.) Adela Elias missed Leon when he was in the United States, but spoke to him on the phone. (12 RT 2159.) She said what she missed most about Leon was his affection, in particular his closeness with her seven-year-old son. (12 RT 2184.)

Amelia Elias Leon, Leon's mother, said Leon was a good son, and accompanied her to the United States so nothing would happen to her. (12 RT 2193.) First they traveled to Tijuana, then Mexicali, and finally Sonora, where they were finally able to cross the border on their fifth attempt. (12 RT 2194.) She felt bad for her son because he wanted to stay in Mexico, but she wanted to join her husband. (12 RT 2196.) Amelia Leon said she missed Leon with all her heart, in particular his playfulness and affection. (12 RT 2202-2203.)

3. Leon as an inmate

Deputy Salvador Carrillo worked at the Robert Presley Detention Center from January 2004 through February 2006 where Leon was incarcerated. (12 RT 2203-2206.) One of his duties was to monitor the cell where Leon was housed with 17 other inmates. (12 RT 2206-2207.) Deputy Carrillo never had to write a report of Leon breaking any jail rules. (12 RT 2208.)

Daniel Johnston is in charge of adult education at the Robert Presley Detention Center. (12 RT 2213.) The program is a voluntary and independent study course that prepares inmates to take the test to get their GED and is entirely in the English language. (12 RT 2213-2214, 2216.) Leon participated in the program, receiving a certificate of completion for pre-algebra on January 6, 2004, and partial completion of American History on March 17, 2004. (12 RT 2215.)

Robert Irvine is a volunteer and the Vice President of Set Free Prison Ministries, a faith-based ministry which sends Bible courses to inmates at their request. (12 RT 2057-2058.) Leon had completed his first correspondence course on May 3, 2004, and a total of 11 courses with five more to go. (12 RT 2060.)

James Esten, a retired employee of the California Department of Corrections and Rehabilitation testified as a correctional consultant. (12 RT 2228-2233.) He was asked to meet Leon, review his history as an inmate and render an opinion on his amenability for a prison term of life without the possibility of parole and whether his background presented any indication of future dangerousness. (12 RT 2234.)

Leon had an incident in jail take place in June 2003 when he was speaking on the phone with his mother collect and inmate Baer demanded Leon place a three-way call for him. (12 RT 2235-2236.) Leon told Baer "no," words were exchanged, and Leon punched Baer in the jaw. (12 RT

2236-2237.) No action was taken by the jail. (12 RT 2237.) When Leon and Baer later saw each other there was no animus. (12 RT 2237.) Esten opined that Leon's response to Baer was appropriate in that setting and under the circumstances. (12 RT 2237-2238.)

If Leon were sentenced to life in prison without the possibility of parole, he would be housed as a level 4 prisoner. (12 RT 2238-2239.) Esten explained that unlike most inmates facing a capital charge or life in prison, Leon had been living with a significantly large number of inmates and with inmates of other races. (12 RT 2239-2240.) Based on that, he did not believe Leon would have any problem assimilating into a level 4 maximum security institution where he will be in a two-man cell that may be integrated. (12 RT 2240.) The only possible problem he saw was Leon's inability to communicate in English, which he had been working on. (12 RT 2240.) Esten was of the opinion that because Leon had no interactive problems being housed in a large unit with many other inmates, there is no reason why Leon presented a future dangerousness in a two-man cell which is a much easier living situation. (12 RT 2240.)

It was stipulated that Leon does not have any prior criminal record in Mexico or the United States. (12 RT 2254.)

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED LEON'S MOTION TO SUPPRESS HIS STATEMENTS TO THE AUTHORITIES IN VIOLATION OF *MIRANDA*[5] AND RIGHT TO CONSULAR NOTIFICATION

Leon challenged the admission of his statements made to the police on two grounds; that he did not knowingly and intelligently waive his *Miranda* rights, and he was denied his right to consular notification. He argues the

[5] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

trial court's refusal to suppress his post-arrest statements on these grounds was in violation of his federal and state constitutional rights and his rights under the Vienna Convention on Consular Relations (VCCR). (AOB 22-23.) To the contrary, the trial court properly found that Leon provided a knowing, intelligent, and voluntary waiver of his *Miranda* rights. Moreover, the trial court also correctly refused to grant relief under the VCCR because Leon never established prejudice.

A. Hearing on Motion to Suppress Leon's Statements

On January 5, 2006, Leon filed a motion to suppress the statements he made to police because they failed to advise Leon of his right to seek consular assistance and Leon did not knowingly and intelligently waive his right to remain silent pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. (1 CT 249-275; 8th Supp. CT 1-12.) The People contemporaneously filed oppositions. (1 CT 246-248; 2 CT 303-310.)

On January 9, 2006, the matter came before the trial court for an evidentiary hearing. (B RT 556.) In addition to testimony, the trial court reviewed the transcript and a video recording of the first interview at issue, wherein Leon was advised and waived his *Miranda* rights. (B RT 566; see pretrial Exhs. 1 [video] & 1A [transcript] 7 Supp. CT 26-59.)[6]

1. Corporal John Rasso

Corona Police Corporal John Rasso, a certified bilingual speaking officer, assisted as a translator in the interview of Leon on May 2, 2003. (B RT 557-559.) Detective Ron Anderson was also present for the interview. (B RT 559.) Corporal Rasso administered Leon *Miranda* warnings in Spanish. (B RT 560.) He explained that he is very careful when explaining

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[6] The entirety of the interview was later presented at trial as People's Exhibit 93. (See People's Exh. 93A [transcript] 9 CT 2399-2513; 6 RT 1531-1535.)

Miranda warnings in order to assure he is using a dialect of the Spanish language that is being understood. (B RT 561.) It appeared to Corporal Rasso that Leon understood him when he was speaking Spanish, and he understood Leon. (B RT 561.) Corporal Rasso went through each warning and made sure Leon understood his rights. (B RT 561-562.) Leon said he understood the rights and signed the *Miranda* form. (B RT 562.) Leon chose to waive his rights and speak to officers. (B RT 562.) In the first interview on May 2, 2003, Leon indicated he went to the house to make a car payment but never went inside. (B RT 563.) When told of Hope and Perez's deaths, Leon appeared sad and was quiet. (B RT 563-564.)

The prosecution also presented into evidence the Corona Police Department *Miranda* form provided to Leon. (B RT 567; see pretrial Exh. 2; 7 supp. CT 61.) Corporal Rasso testified he read Leon his rights in Spanish from the form. (B RT 567.) He then asked Leon if he understood the rights as explained to him and if he wished to speak with them. (B RT 568.) In response to each question, Leon answered in the affirmative and Corporal Rasso wrote "Si" on the form. (B RT 568.) Corporal Rasso asked Leon a second time if he was sure he wanted to speak with them. (B RT 572.) Corporal Rasso provided the form to Leon and Leon signed it. (B RT 572.) Corporal Rasso and Detective Anderson also signed the form. (B RT 568.) Corporal Rasso reminded Leon of his rights again the following day during the walkthrough of the crime scene. (B RT 573-574; 9 CT 2570.)

2. Defense Witness Dr. Francisco Gomez

Dr. Francisco Gomez conducted a psychological assessment and standard forensic evaluation of Leon for purposes of rendering an opinion on whether Leon comprehended *Miranda* and gave a knowing and intelligent waiver. (B RT 577-580.) Dr. Gomez said Leon scored in the borderline intellectual range, showing his intellectual range was low and

that he had particular difficulty with reading comprehension and memory. (B RT 581.) Leon read at a fifth grade level, whereas a person at a seventh grade level would understand *Miranda*. (B RT 582.) His memory testing also showed he functioned at a fifth grade level, or at about the level of an 11-year-old. (B RT 582.) Based on his personal observations and the personality tests he administered, Dr. Gomez opined that Leon was very passive, agreeable, anxious, had low self-esteem, and very dependent, "a follower, or someone who would be easily manipulated." (B RT 584.)

Leon had immigrated to the United States two years earlier, and Dr. Gomez opined that Leon had not been assimilated and had very low acculturation. (B RT 585.) He knew little about the legal systems in Mexico and the United States because he grew up in a small town and had never really been in trouble. (B RT 585.) Dr. Gomez explained how Leon's knowledge of the legal system was distorted by how it was portrayed in soap operas and left him with the impression it was severe and officers were aggressive. (B RT 586.) An example was when he asked one of the officers, "Are they gonna kill me today, or are they gonna kill me tomorrow?" (B RT 586.) Leon reported flunking sixth grade, which is consistent with people that are mildly retarded, borderline. (B RT 586.) He had always been in the care of his parents or at one point an uncle. (B RT 587.) Leon had secured labor jobs through the assistance of friends. (B RT 587-588.)

Upon reviewing the videotapes, Dr. Gomez said Leon was initially advised of his *Miranda* rights read from the card. (B RT 588.) He was reminded a second time when he was brought back for his second interrogation, and asked if he remembered his *Miranda* rights. (B RT 589.) Leon was reminded a third time during the walkthrough the following day after the prosecutor asked that Leon be advised that he was the attorney for the law. (B RT 589-590.) Leon was read his rights another time and made

aware that he could have an attorney present and he would be provided one in a few days at his arraignment. (B RT 590.) Leon responded, "Well, I'm gonna get one in court in two days, so why do I need one now?" (B RT 590.) Dr. Gomez drew the implication from this statement that Leon did not understand the rights read to him. (B RT 590.)

Dr. Gomez diagnosed Leon as having an adjustment disorder with depressed mood anxiety, meaning the fact he is incarcerated and facing major criminal charges is causing him to experience symptoms of anxiety and depression. (B RT 591.) He was also diagnosed as borderline intellectual functioning with dependent traits. (B RT 591.)

Dr. Gomez opined that Leon was just nodding affirmatively and agreeing to what was said by the officers because of his passive and low functioning nature. (B RT 593.) He further opined that Leon did not understand *Miranda* rights because he did not have the intellectual ability to understand, comprehend them and the abstraction involved in them. (B RT 593-594.) Dr. Gomez acknowledged that almost immediately after being given his *Miranda* warnings, Leon lied to the officers and gave them an alibi and continued his deception and lying throughout his interviews. (B RT 600-601.)

3. Trial court rulings

After hearing argument from the parties, the trial court denied Leon's motion to suppress his statements in violation of *Miranda*, giving the following detailed reasons:

> All right. Well, I guess in answer to your rhetorical question, yes, I reviewed the tape. In fact, that's all I was doing. I read transcripts separately. I felt it was imperative to view the defendant's demeanor throughout the interview. And it's my conclusion that the videotape is the best evidence we have on this question.

> It is my conclusion that there is not even a scintilla of evidence to suggest that he did not understand the rights that were read to him. He immediately responded in the affirmative, either through a nod or audible answer, that he understood them, that he was willing to waive them and talk to the officers.
>
> And of almost equal importance, in my opinion, as to his cognitive ability to understand and be 'fully' - - in your term - - aware of what he was waiving, was the story he concocted. Clearly, he knew he was in trouble and he needed to come up with some sort of explanation regarding the conduct that he was being accused of, and he set forth a story denying even being present.
>
> Obviously, that changed later.
>
> And your own expert acknowledged he was lying. And I don't think there's any doubt there. I think everybody is in agreement with respect to that.
>
> His response to questions were clear. He spoke in a clear voice and audible voice in that part of the videotape that I saw. There was no hesitation on his part in responding to questions. He didn't have to ask to have questions repeated over and over again.
>
> So, it is abundantly clear to me that, at least on a preponderance standard - - and, in fact, if the standard were even higher, it would be beyond a reasonable doubt that he understood his rights and voluntarily and intelligently waived them.
>
> In terms of voluntariness, there's absolutely no threats. Or to take it to the other side, no promise or any kind of reward. He spoke freely. So, on the *Miranda* issue, the motion to exclude his statements for a *Miranda* violation is denied.

(B RT 616-617.)

The trial court then shifted gears and heard argument on Leon's claim that he was entitled to a remedy because he was not advised of his right to speak with a Mexican Consulate under Penal Code section 843c and the

Vienna Convention on Consular Relations. (B RT 647.) The trial court issued the following ruling:

> All right. Well, it's pure speculation, at best, to reach the conclusion that Mr. Leon would have received a more favorable result had he consulted with a member of the consulate for the simple reason, and no other reason, there hasn't been a result yet.
>
> But looking into the crystal ball here, determining a result least favorable to Mr. Leon yet again requires me to speculate that he would have taken the advice of a member of the consulate and not said anything.
>
> You submitted a declaration last week from Mr. Cotsirilos, who I indicated earlier I have known for many years. I know he is an experienced death penalty lawyer and on retainer to the Government of Mexico. And I suspect he regularly advises representatives of the consulate to advise Mexican nationals; whenever they do meet with him, to keep their mouth shut; don't say a word.
>
> And any half-way competent criminal defense lawyer, if he or she were on the scene during the beginning of interrogation, would give the same advice. So, there's no shock value or surprise there. And I fully believe that when Mexican nationals avail themselves of the right and have the ability to meet with Mexican Consulate, that's the advice they get.
>
> Now whether that advice comes too late after they have been interrogated and confessed is yet another matter of speculation.
>
> Now, for purposes of this hearing, I don't rule out the possibility that suppression statements can and may and some day will become a remedy for violations of this treaty; although, I suspect a limited number of cases, given U.S. withdrawal, those cases that are pending when the U.S. was following the provisions of this treaty, I suspect that ultimately appellate courts will decide that a showing of prejudice is necessary. And in fact, courts have already made that decision; the Ninth Circuit itself, a case I cited earlier, *Lombera-Camorlinga*; the state court, *People versus Corona*, and even the unpublished opinion Mr. Hestrin submitted to me, *People versus Tapia-Fierro*. And I recognize, so the record is clear, *Tapia-Fierro* has absolutely no authority in terms of this case. But it is pretty clear to me, and it

is my ruling that, number one, the defendant was denied his right to speak to consul, with a member of the Mexican Consulate. He was not advised that he had that right. That is in violation of Penal Code 834c, as well as the treaty itself.

But I emphasize again, both the treaty and 834c have not set forth any remedy for such violations, nor has any appellate court and cases that I just referred to earlier.

The clear indication is that a showing of prejudice is necessary for a trial court to come up with a remedy. And in this case, I will adopt the reasoning I adopted in related *Miranda* issues, and I will conclude that the defendant was advised properly of his rights under the United States Constitution as noted in the *Miranda* decision and cases following it.

And as I indicated earlier, I find that the defendant's waiver of his *Miranda* rights was free and voluntary and was knowingly undertaken.

And, again, I point to the videotape of his interview as the best available evidence to show that there was no prejudice. He did understand his right to counsel. He did understand his right to remain silent, and he couldn't wait [to] get started talking about his lack of involvement in this.

Yes, ultimately his story changed and he did admit criminal conduct, but he had no hesitation whatsoever, none, in talking to the police officers. So, I find there is no prejudice here. And the request that I fashion a remedy for the violation of Penal Code 834c and the Vienna Convention - - well, the treaty itself, is denied.

There is no need to fashion a remedy because it is my conclusion that the defendant did not suffer any prejudice because of that violation.

(B RT 647-649.)

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B. Leon Has Failed to Demonstrate the Trial Court Erred in Finding He Knowingly and Intelligently Waived His *Miranda* Rights

Leon, relying almost entirely on parts of Dr. Gomez's testimony, asserts that the trial court erred when it found that he made a knowing and intelligent waiver of his *Miranda* rights. (AOB 40-49.) He further faults the trial court for not taking into consideration the totality of the circumstances—in particular Dr. Gomez's testimony—and the lack of consular notification. (AOB 40-49.) The trial court's factual and credibility findings are supported by the evidence, and this Court should affirm its ruling.

> Under the Fifth Amendment to the federal Constitution, as applied to the states through the Fourteenth Amendment, '[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . .' (U.S. Const., 5th Amend.) 'In order to combat [the] pressures [of custodial interrogation] and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights' to remain silent and to have the assistance of counsel. (*Miranda*, at p. 467.)

(*People v. Nelson* (2012) 53 Cal.4th 367, 374.)

"Critically, however, a suspect can waive these rights." (*Maryland v. Shatzer* (2010) 559 U.S. 98, 104 [130 S.Ct. 1213, 175 L.Ed 2d 1045].) "To establish a valid waiver of *Miranda* rights, the prosecution must show by a preponderance of the evidence that the waiver was knowing, intelligent, and voluntary." (*People v. Nelson, supra*, at pp. 374-375; *People v. Williams* (2010) 49 Cal.4th 405, 425; *People v. Lessie* (2010) 47 Cal.4th 1152, 1169; *People v. Dykes* (2009) 46 Cal.4th 731, 751.)

Determining whether a *Miranda* waiver was knowing, intelligent, and voluntary has "two distinct dimensions." (*Moran v. Burbine* (1986) 475 U.S. 412, 421 [106 S.Ct. 1135, 89 L.Ed.2d 410].)

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

(*Moran v. Burbine, supra,* 475 U.S. at p. 421.) A defendant is not required to "know and understand every possible consequence" of waiving his *Miranda* rights. (*Id.* at p. 422; *Colorado v. Spring* (1987) 479 U.S. 564, 574 [107 S.Ct. 851, 93 L.Ed.2d 954.) All that is required is that the defendant comprehend "all of the information the police are required to convey." (*Moran v. Burbine, supra*, 475 U.S. at p. 427.) "Determining the validity of a *Miranda* rights waiver requires 'an evaluation of the defendant's state of mind' (*Williams, supra*, 49 Cal.4th at p. 428) and 'inquiry into all the circumstances surrounding the interrogation' (*Fare v. Michael C.* (1979) 442 U.S. 707, 725 [61 L.Ed.2d 197, 99 S.Ct. 2560] *(Fare)*)." (*People v. Nelson, supra*, 53 Cal.4th at p. 375.)

On review, this Court will "accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence" and "independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained." (*People v. Enraca* (2012) 53 Cal.4th 735, 753, quoting *People v. Thomas* (2011) 51 Cal.4th 449, 476.)

The trial court properly found that Leon made a knowing and intelligent waiver of his *Miranda* rights. In addition to hearing testimony at the suppression hearing, the trial court was afforded the ability to observe the interview wherein Leon was advised of and waived his *Miranda* rights, and read the transcript of the interview. As the trial court pointed out, this

was the "best evidence" of the circumstances surrounding the waiver. (B RT 616.)

The video and corresponding transcript showed that Corporal Rasso informed Leon that he was there because something happened the night before at the home of Leon's "girlfriend and the grandparents." (7th Supp. CT 30.) Leon responded, "What happened to them?" (7th Supp. CT 30.) Corporal Rasso replied: "Uhm, someone robbed and killed them, okay." As Corporal Rasso continued speaking, Leon shook his head back and forth, put his hand on his forehead, and reached for a tissue to wipe his eyes. Detective Rasso informed Leon:

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

(7th Supp. CT 30-31.) Leon repeatedly affirmed his understanding by nodding his head up and down and saying "Uhm hm." When asked for an audible answer he said, "yes." (7th Supp. CT 31.) Corporal Rasso then asked Leon, "Having these rights with you do you want to speak about what of-, what happened last night?" Leon responded, "Yes, sir, okay." Corporal Rasso then took his time filling out the *Miranda* form and then passed it to Leon and told him, "You can sign it here." (7th Supp. CT 31.)

Preliminarily, there was no allegation or suggestion of coercive conduct on behalf of the officers. Thus, the voluntariness of Leon's waiver is not at issue. (See, *Colorado v. Connelly* (1986) 479 U.S. 157, 164 [107 S.Ct. 515, 93 L.Ed.2d 473] ["Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." (Fn. omitted.)].)

Leon was brought to the interrogation room, offered something to drink, and freely spoke to the officers. (7th Supp. CT 627-628.) As the trial court pointed out, "[i]n terms of voluntariness, there's absolutely no threats. Or to take it to the other side, no promise or any kind of reward. He spoke freely." (B RT 617; *People v. McWhorter* (2009) 47 Cal.4th 318, 346-347 ["'A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and state Constitutions.' [Citations.]"].)

As the record demonstrates, Leon was properly advised of his rights under *Miranda*. Corporal Rasso read them from the *Miranda* rights advisement form in Leon's native language of Spanish. (B RT 559.) He explained that he is very careful when explaining *Miranda* warnings in order to assure he was using a dialect of the Spanish language that Leon understood. (B RT 561.) A review of the videotape demonstrates Corporal Rasso delivered the advisements slowly and clearly to Leon. It appeared to Corporal Rasso that Leon understood him when he was speaking Spanish, and he understood Leon. (B RT 561.) Corporal Rasso went through each warning and made sure Leon understood his rights. (B RT 561-562.) Leon said he understood the rights and signed the *Miranda* form. (B RT 562.) (See, *Florida v. Powell* (2010) 559 U.S. 50, 60 [130 S.Ct. 1195, 175 L.Ed.2d 1009] [warnings must reasonably convey to suspect his or her rights as required by *Miranda*]; *People v. Samayoa* (1997) 15 Cal.4th 795, 830 [same].)

The trial court credited this interpretation of events noting that Leon immediately responded in the affirmative to the officers that he understood his rights and was willing to waive them. (B RT 616.) Further, Leon's "response to questions were clear," "he spoke in a clear and audible voice," he did not hesitate to respond to questions, and did not "have to ask to have questions repeated over and over." (B RT 617-618.)

Leon's demeanor throughout the interview supported the trial court's finding that he intelligently and knowingly waived his *Miranda* rights. Leon responded in the affirmative when asked if he understood those rights. Leon was very engaging with the officers. He responded to their questions attentively, clearly and without hesitation. There is no visual or auditory evidence indicating that Leon was not cognizant of his situation and "fully" aware of his surroundings and what was being communicated to him. Furthermore, Leon's emotional response to the news of the deaths did not appear to impact his ability to listen and comprehend what Corporal Rasso was telling him. Leon maintained mental acuity during the advisement and continued to respond directly to the statements. An objective observation of the evidence shows Leon understood the advisements. Further, Corporal Rasso testified that based on his interaction with Leon, it was his opinion that Leon understood the advisements.

Leon relies heavily on the "uncontradicted" testimony of Dr. Gomez opining that Leon did not understand his *Miranda* rights. (AOB 22.) The trial court, however, appropriately gave little weight to Dr. Gomez's testimony. As the trial court aptly noted, Leon had the cognitive ability to understand that he was in trouble and concoct a story to explain his presence. (B RT 616-617.) Further, even Dr. Gomez acknowledged that Leon was lying. (B RT 616.)

Dr. Gomez did not claim that Leon was mentally retarded, had a mental disorder, or was even a special education pupil. Instead, testing showed Leon scored in the borderline intellectual range, showing his intellectual range was low and had particular difficulty with reading comprehension and memory. (B RT 581.) Dr. Gomez opined Leon was just nodding affirmatively and agreeing to what was said by the officers because of his passive and low functioning nature. (B RT 593.)

However, Dr. Gomez's opinion that Leon was low functioning was solely based on self-reporting. It did not consider many aspects of Leon's life showing his ability to participate and navigate society. Examples raised by the prosecutor included Leon's ability to write a grammatically correct statement, "Austin is a bad student," that he took English as a second language (ESL) classes, rented himself apartments, and attained employment through a temporary employment agency. (B RT 604-605.) Also, contrary to Leon's purported passive nature, he took the initiative with the police. (B RT 605.) Leon's responses and explanations revealed that he engaged in a sophisticated thought process and had the cognitive ability to lie in a manner that matched the evidence. (See, *People v. Whitson* (1998) 17 Cal.4th 229, 248-250 [No evidence defendant lacked sufficient intelligence to understand those rights or the consequences of his waiver, "[a]lthough defendant possessed relatively low intelligence, he was sufficiently intelligent to pass a driver's test, and to attempt to deceive officers. . . ."].)

Essentially, Leon relies on his below-average intelligence as conclusive proof that he was incapable of intelligently waiving his *Miranda* rights. It is well-established that a confession is not inadmissible as a matter of law merely because the accused was of subnormal intelligence. (*People v. Jenkins* (2004) 122 Cal.App.4th 1160, 1171; *In re Norman H.* (1976) 64 Cal.App.3d 997, 1001.) To conclude otherwise would misconstrue and improperly extend the knowing element of the *Miranda* waiver. (*Ibid.*; see also, *People v. Watson* (1977) 75 Cal.App.3d 384, 396-397 [upholding *Miranda* waiver even though defendant had organic brain damage, schizophrenia and an I.Q. of 65.].) Dr. Gomez's opinion was based on generalities that are insufficient to establish an inability to understand, such as low intelligence. Therefore, for all the reasons expressed above, Dr. Gomez's testimony was of limited value.

An examination of the totality of the circumstances supports the conclusion that Leon's *Miranda* waiver was knowing and intelligent. Leon was advised of his rights in his native tongue and in simple straight-forward language. Leon confirmed he understood his rights and immediately began a dialogue with the detectives. He did not indicate any confusion or lack of comprehension about his rights. Based on the totality of the circumstances, the trial court's denial of the suppression motion should be upheld.

C. Leon's Waiver Was Not Implicated by His Lack of Consular Notification

Leon also argues the denial of his right to consular notification further demonstrates he did not knowingly and intelligently waive his *Miranda* rights. (AOB 46-49.) But in order to demonstrate it had bearing on the issue, Leon must show prejudice and he has not. Leon cannot establish his decision to waive his *Miranda* rights was connected to a consular notification violation.

The Vienna Convention on Consular Relations provides that when a national of one country is detained by authorities in another, the authorities must notify the consulate of his country without delay if the detainee requests notification.[7] Without deciding whether the Vienna Convention creates judicially enforceable rights, the United States Supreme Court held that suppression of a defendant's statement is not an appropriate remedy for a violation of the convention. (*Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331 [126 S.Ct. 2669, 2677-2690, 165 L.Ed.2d 557].) This Court has assumed for purposes of reviewing claims asserting a denial of consular notification rights that a defendant has individually enforceable rights under

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[7] California law also requires that arresting officers advise known foreign nationals of their right to communicate with officials from the consulate of their country. (Pen. Code, § 834c.)

article 36 of the Vienna Convention.[8] (*In re Martinez* (2009) 46 Cal.4th 945, 957, fn. 3; *People v. Cook* (2006) 39 Cal.4th 566, 600.) It is incumbent upon a defendant to demonstrate prejudice from the failure of authorities to notify a defendant of his right to consular notification. Where defendant shows what assistance the consulate claims it would have provided, it is incumbent upon defendant to show that he did not obtain that same assistance from other sources. (*People v. Mendoza* (2007) 42 Cal.4th 686, 711.)

Leon argues the trial court should have taken into consideration his lack of consular notification when assessing whether his *Miranda* waiver was knowingly and intelligently made. (AOB 47.) Leon concludes he is precisely the sort of person in need of consular assistance which would go beyond telling him to exercise his right to remain silent. (AOB 47-48.) But Leon fails to show that the response from the Mexican consulate upon notification of a Mexican national requesting assistance following arrest would have been so expeditious that it would have resulted in a conversation between a consular official and Leon before the point in time he waived his *Miranda* rights and agreed to talk to authorities. As the United States Supreme Court and this Court have made plain, the Vienna Convention "'secures only the right of foreign nationals to have their consulate informed of their arrest or detention - not to have law enforcement authorities cease their investigation pending any such notice or intervention.'" (*People v. Enraca* (2012) 53 Cal.4th 735, 758, quoting

[8] On March 7, 2005, the United States withdrew from the Optional Protocol and the International Court of Justice's jurisdiction over Vienna Convention disputes. (*Medellin v. Texas* (2008) 552 U.S. 491, 500 [128 S.Ct. 1346, 170 L.Ed.2d 190] [citing Letter from Condoleeza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations].)

Sanchez-Llamas v. Oregon, supra, 548 U.S. at p. 349, original emphasis.) Even if it is assumed that the Mexican consulate's response would have been exactly what was conveyed in the declaration of Mexican Consul Carlos Giralt Cabrales (8 CT 2337-2341), Leon failed to show that this response necessarily would have occurred prior to the point in time at which he waived his *Miranda* rights. Accordingly, Leon has failed to establish any link between the consular notification violation and waiver of his *Miranda* rights.

Moreover, Leon's insistence that he would have deferred to any advice provided in response to consular notification is sheer speculation and does not undermine the validity of his *Miranda* waiver. Leon was informed of his right to counsel and offered legal assistance which he immediately dismissed and opted to speak to the officers in order to convey to them his version of the events. His eagerness to speak to officers and disinterest in legal assistance belies his speculation that he would have pursued consulate assistance, let alone deferred to any advice provided as a result of consular assistance.

D. Harmless Error

The erroneous admission of extrajudicial statements obtained in violation of *Miranda* is not per se reversible error. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-310 [111 S.Ct. 1246, 113 L.Ed.2d 302].) Assuming arguendo that this Court found error, the harmless error analysis of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], is applicable. Accordingly, since any error is harmless beyond a reasonable doubt, the judgment must be affirmed. (*People v. Thomas* (2011) 51 Cal.4th 449, 498.)

As set forth in detail in the Statement of Facts, *ante*, while defendant's interview was incriminating, he nevertheless maintained he acted in self-defense. Moreover, even without the interviews, there was overwhelming

evidence he murdered Hope and Perez with the requisite intent and mental state for first degree murder, and the attempted murder of Marion.

"The very definition of 'premeditation' encompasses the idea that a defendant thought about or considered the act beforehand." (*People v. Pearson* (2013) 56 Cal.4th 393, 443.) A "deliberate" killing is one """"formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action."" [Citation.] [Citation.]'" (*People v. Houston* (2012) 54 Cal.4th 1186, 1216.) Accordingly, "'[a]n intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.'" (*People v. Pearson, supra*, at p. 443.)

Here, the evidence of premeditation and deliberation includes the manner in which he approached the Ragland home, i.e., on foot, having parked his vehicle outside of the gated community, and entering the home undetected with gloves and ski mask. (4 RT 1291; 5 RT 1321-1322; 6 RT 1489-1490.) Specifically, Leon was seen acting suspiciously around the time of the murders. First, Leon was driving around the parking lot very slowly, he ultimately parked farther away from the Ragland residence, and then walked there. (4 RT 1266-1269, 1271, 1278-1281.) He then was seen by two neighbors waiting for the gate to be opened by someone else and then entering. (4 RT 1291; 5 RT 1321-1322.) Leon was also seen at the Ragland home at the time of the murders and leaving. (4 RT 1292.) The lack of fingerprint evidence indicates the assailant used gloves and sure enough, vinyl gloves were found in Leon's car. (6 RT 1489-1490.) All of this evidence of planning activity contributes to the overwhelming evidence separate and apart from any incriminating statements that demonstrated Leon's guilty of premeditated and deliberate murder. (See, *People v. Perez* (1992) 2 Cal.4th 1117, 1126 [evidence of planning activity shown by the

fact that defendant did not park his car in the victim's driveway, he surreptitiously entered the house, and he obtained a knife from the kitchen].)

The exact manner of the killings also show Leon acted with premeditation and deliberation when he attacked Hope and Perez. Armed with a kitchen knife, Leon stabbed Hope while seated in a lounge chair. Leon stabbed her eight times to her neck and torso and she sustained only two cuts to her middle finger by way of defensive wounds. (6 RT 1468-1469, 1521-1522.) Perez was stabbed six times in his neck, twice to the front of his torso and four times in his back. (6 RT 1523-1527.) The large number of stab wounds, in particular targeting their necks, the stab wounds to Perez's back, and the precise blow to Marion's head with a hatchet, demonstrate evidence of an intent to kill. That is, the nature and manner of the deaths leave no doubt that they were murdered. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27; see, *People v. Sanchez* (2001) 26 Cal.4th 834, 849; see also, *People v. Wright* (1985) 39 Cal.3d 576, 594 [the manner of the crime could be said to have been "particular and exacting"].)

Motive also adds to the overwhelming evidence of premeditation and deliberation. Leon had a problematic history with the Raglands because they no longer approved of his relationship with Haft, especially Hope. He believed Haft's family was in the way of their relationship and had motive to kill them. (5 RT 1364.) That morning Leon called Haft and prophesied something terrible happening by saying, "No matter what happens, I'll always love you." (5 RT 1367.) In addition, Leon was tied to the killings by the fact his car keys tested positive for blood (6 RT 1489), and the rudimentary writing on the mirror was consistent with his limited level of English education (5 RT 1333, 1372). Accordingly, there was overwhelming evidence that Leon committed premeditated and deliberate

murder even without his confession. Therefore, even assuming arguendo that error occurred, it was harmless beyond a reasonable doubt.

II. The Trial Court Properly Instructed on Pre-Offense Statements by a Defendant with CALJIC No. 2.71.1

Leon contends the trial court prejudicially erred when it instructed the jury over the defense's objection with CALJIC No. 2.71.7 on a defendant's pre-offense statement. He argues his statement to Haft on the morning of the murders, "No matter what happens, I'll always love you" lacked the necessary evidentiary basis for the instruction and usurped the jury's role in determining whether it was an oral statement of intent, plan, motive or design. (AOB 55-67.) The trial court correctly instructed the jury with this cautionary instruction because Leon's statement might reasonably have been interpreted as a statement of his intent to commit the murders. Moreover, the instruction was for Leon's benefit and instructed the jury to be dubious of such statements. Even assuming the instruction was given in error, Leon was not prejudiced because it is not reasonably probable that Leon would have obtained a more favorable result in the absence of the instruction.

A. Instruction with CALJIC No. 2.71.7 Over Defense Objection

Haft testified Leon called her on April 29, 2003, and in the beginning of the conversation he said, "I know it's [Hope] that's making you think like this." (5 RT 1363-1364.) Haft explained it was "normal conversation" and Leon "would always blame" Hope and "felt that it was [Hope's] fault that [Haft] did not want to be with him." (5 RT 1364.)

Leon called Hope from California the morning of May 1, 2003. (5 RT 1366.) She answered her phone, "What?" (5 RT 1366-1367.) He asked Haft where she was. (5 RT 1367.) Haft responded, "What does it matter?" (5 RT 1367.) Leon said to Haft, "No matter what happens, I'll always love

you." (5 RT 1367.) Haft cut him off, saying "Okay. Whatever." And hung up. (5 RT 1367.) While Haft found Leon's statement odd, her reaction was more of being irritated that he called her. (5 RT 1367.)

The People requested the trial court instruct the jury on Leon's pre-offense statements with CALJIC No. 2.71.7. (8 RT 1603.) The specific statements the prosecution relied on were Leon's statements made to Haft over the phone about Hope being in the way and "No matter what happens, I'll always love you." (8 RT 1603.) Defense counsel objected to the instruction arguing it was only appropriate when "there is an actual statement that you can deduce that that's what he said." (8 RT 1603.) He added that the inference made from the statements did not require jury instruction. (8 RT 1603.) The trial court responded,

> You've kind of answered your own objection there. There is an inference that he's intending to do something in the future, something evil. Generally speaking, the law is that if there is some evidence that supports an instruction, it should be given.

(8 RT 1604.)

The trial court instructed the jury with CALJIC No. 2.71.7 as follows:

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

(10 CT 2761; 8 RT 1645.)

B. The Trial Court had a Sua Sponte Duty to Instruct the Jury with CALJIC No. 2.71.7 Because there was a Sufficient Evidentiary Basis the Statements were Made with the Intent to Commit the Charged Crimes

"CALJIC No. 2.71.7 must be given when supported by the evidence." (*People v. Clark* (2011) 52 Cal.4th 856, 957; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1157; *People v. Lang* (1989) 49 Cal.3d 991, 1021.) A trial

court has a sua sponte duty to instruct the jury with the appropriate cautionary instruction when there is evidence that a defendant made a pre-offense oral admission. (*People v. Williams* (1988) 45 Cal.3d 1268, 1315.) This Court has "held that both CALJIC Nos. 2.71 and 2.71.7 are standard cautionary instructions, intended for the defendant's benefit, which must be given sua sponte where applicable." (*People v. Zambrano, supra*, 41 Cal.4th at p. 1157; see also, *People v. Garceau* (1993) 6 Cal.4th 140, 194; *People v. Lang, supra*, 49 Cal.3d at p. 1021.) An evaluation of whether the evidence supports CALJIC No. 2.71.7 requires a review of reasonable inferences available from the evidence; it is not merely triggered by an express statement of intent or plan. (See, *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1136-1137; *People v. Farmer* (1989) 47 Cal.3d 888, 919.)

For example, in *Rodrigues*, this Court found CALJIC No. 2.71.7 was supported by witness testimony that she planned and agreed to commit a robbery with the defendant and another individual. (*People v. Rodrigues, supra*, 8 Cal.4th at pp. 1136-1137.) Even though the witness did not attribute any specific oral statements to the defendant, this Court concluded the jury "could reasonably infer from her testimony that defendant made a pre-offense oral statement by participating in the planned robbery, or at least assenting to the plan." (*Id.* at p. 1137.)

Likewise, in the case of *People v. Farmer*, this Court found sufficient evidence to support instructing the jury with CALJIC No. 2.71.7. (*People v. Farmer, supra*, 47 Cal.3d at p. 919.) In *Farmer*, the defendant made statements to a witness that he was going to the apartment of someone who owed him money. (*Ibid.*) He later asked the witness to obtain bullets for a gun stolen during an earlier burglary. (*Ibid.*) This Court determined a jury could reasonably infer the defendant's statements regarding going to the apartment, coupled with his request for bullets, were statements evidencing an intent or plan. (*Ibid.*)

Viewing Leon's statements in context with other evidence presented, a jury could easily infer his statements were evidence of his intent, plan, motive or design to commit murder. Contrary to Leon's argument (AOB 63), there was evidence Leon made a particular statement expressing his belief that Hope was the obstacle to his relationship with Haft. Haft testified Leon called her on April 29, 2003, two days before the murders, and said, "I know it's [Hope] that's making you think like this." (5 RT 1363-1364.) Haft further explained what Leon meant when he made this statement and that it was his belief that Hope was the reason they were not together. (5 RT 1364.) A jury could reasonably infer from this statement that Leon had a motive to kill Hope.

Leon also argues his statement to Haft the morning of the murders, "No matter what happens, I'll always love you," refers to something Haft might do, not something he might do. (AOB 61-62.) While this is one possible inference, it is not the only reasonable one and so it necessitated a cautionary instruction by the court. The fact Leon called Haft the morning of the murders and made this statement that Haft perceived as "odd" that foreshadowed some future event, supported the inference this was a statement of intent, plan, or design to commit the murders.

As correctly found by the trial court, the jury could reasonably infer from Leon's statements that Hope was an impediment to his happiness with Haft and that he intended to do something evil in the future. (8 RT 1604.) Leon's pre-offense statements potentially evidencing his intent, motive, plan and design mandated the trial court instruct the jury to view such evidence with caution. In light of the possibility the jury construed Leon's statements as expressions of intent, motive, plan, or design, the trial court properly instructed the jury with CALJIC No. 2.71.7 to determine if Leon made the unrecorded statements and if they were relevant to the charged offenses by evidencing his intent, plan, motive or design.

C. CALJIC No. 2.71.7 Did Not Usurp the Jury's Role as Factfinder and Lessen the Prosecution's Burden of Proof

Leon argues that CALJIC No. 2.71.7 effectively instructed the jury that Leon's statement was in fact a declaration that he intended or planned to kill, rather than informing the jury that its duty was to assess the statements and determine if they evidenced intent, plan, motive or design. (AOB 63-67.) This is not so. CALJIC No. 2.71.7 merely instructed the jury that it may draw a particular inference if it found the proffered statements were made, but due to the incriminatory nature of the statements they should be viewed with caution.

When the evidence warrants, the court must give the cautionary instruction sua sponte. (*People v. Carpenter* (1997) 15 Cal.4th 312, 392; *People v. Lang* (1989) 49 Cal.3d 991, 1021; *People v. Beagle* (1972) 6 Cal.3d 441, 455.) The purpose of the cautionary instruction is to help the jury determine whether the statement was in fact made. (*Beagle, supra*, at p. 456.) "For purposes of requiring independent evidence of the corpus delicti and cautionary instructions, we have not distinguished between actual admissions [citation] and pre-offense statements of intent [citation]. [Citations.]" (*Id.* at p. 455, fn. 5.) "We stated that although the risk of conviction because of a false preoffense statement alone is less than the risk of conviction upon a false confession or admission, we find the risk of an unjust result sufficient to justify our broader rule." (*Ibid.*)

Contrary to Leon's claim, the cautionary instruction did not direct the jury that his pre-offense statements were proof of his guilt. Rather, the jury was instructed it must determine whether Leon made statements evidencing his guilt. If the jury determined Leon made no pre-offense statements relative to the charged crimes, the instruction had no applicability. If the jury determined Leon in fact made relevant statements, then it was

instructed to view the statements with caution. The cautionary nature of the instruction benefited Leon, admonishing the jury to be circumspect regarding the evidence that might otherwise be considered unquestionably inculpatory and did not improperly lessen the prosecution's burden of proof. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1224.)

The cautionary instruction does not direct the jury to find that Leon's pre-offense statements constituted a plan, motive, intent or design to commit the charged crimes. As provided, the instruction informed the jury that it "may" find statements evidenced intent, plan, motive, or design. But did not direct or mandate the jury come to this conclusion. Instead, it benefitted Leon because it admonished the jury to be dubious of such statements: "It is for you to decide whether the statement was made by the defendant, and any evidence of such an oral statement ought to be viewed with caution."

D. Any Possible Error was Harmless

Even assuming for the sake of argument that the trial court erred in providing the cautionary instruction, any possible error was harmless. Such an error is assessed under the state-law standard of prejudice, "whether it is reasonably probable the jury would have reached a result more favorable to defendant" had the instruction not been given. (*People v. Carpenter, supra*, 15 Cal.4th at p. 393; *People v. Wilson* (2008) 43 Cal.4th 1, 19.) Here, it is not reasonably probable Leon would have received a more favorable verdict had CALJIC No. 2.71.7 not been given. Indeed, as argued above, the challenged instruction was for Leon's benefit, in that it advised the jury how to consider his prior statements to Haft over the phone and to view such evidence with caution.

Leon's pre-offense statements to Haft over the telephone were uncontradicted. Leon adduced no evidence that the statements were not made, fabricated, or inaccurately remembered or reported. There was no

conflicting testimony concerning the precise words used, their context or their meaning. (See, *People v. Bunyard* (1988) 45 Cal.3d 1189, 1224-1225; *People v. Beagle, supra,* 6 Cal.3d at p. 456.) To the extent there was evidence that Leon's statements were relevant to the charged crimes, "it is clear that defendant could not have been prejudiced by the giving of an instruction that the jury should view this evidence with caution." (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1200.)

Even if Leon's pre-offense statements did not support a permissible inference that he had the intent, motive, plan or design to commit the charged crimes, the cautionary instruction informed the jury to decide whether such inculpatory statements were made. In addition, the jury was further instructed that it should disregard any instructions that were inapplicable to the facts (CALJIC No. 17.31), and it is presumed to have followed the trial court's directive. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.)

Finally, in light of the overwhelming evidence in support of Leon's guilt, it is not reasonably probable that the cautionary instruction, even if unnecessary, played any significant role in the outcome. As demonstrated in the Statement of Facts and previous argument, with or without Leon's confessions, the evidence undoubtedly showed Leon murdered Hope and Perez, and attempted to kill Marion. His convictions were based on his statements to police, witnesses placing him near the scene, and the manner of the killings—not his statements to Haft over the phone. Any possible error was clearly harmless.

III. THE TRIAL COURT PROPERLY REFUSED THE DEFENSE REQUEST TO INSTRUCT THE JURY AT THE PENALTY PHASE EXCLUSIVELY WITH CALCRIM MODEL JURY INSTRUCTIONS AND THREE SPECIAL DEFENSE INSTRUCTIONS

Leon argues the trial court committed prejudicial constitutional error by refusing his requests to instruct the jury at the penalty phase exclusively

with CALCRIM model jury instructions and three special defense instructions. (AOB 68-77.) There was no instructional error. The trial court properly relied on CALJIC model jury instructions and refused the defense special instructions because they were unnecessary and duplicative.

A. The Trial Court Did Not Err in Refusing to Use CALCRIM Model Instructions in the Penalty Phase

Defense counsel requested the trial court instruct the jury with the CALCRIM model instructions at the penalty phase. (10 RT 1761-1762.) He contended CALCRIM No. 763 better explained aggravating and mitigating factors than CALJIC Nos. 8.85 and 8.88. (10 RT 1763-1766.) The trial court acknowledged that the CALCRIM model instructions reduced the separate number of instructions necessary to convey the applicable law in comparison with the CALJIC model instructions, noting for example that CALCRIM No. 763 basically contains everything set forth in CALJIC Nos. 8.85 through 8.88. (10 RT 1767.) The trial court reminded Leon's counsel that the court had indicated at the outset of the trial a reluctance to combine CALJIC and CALCRIM in instructing the jury, and Leon's counsel was given a choice as to which model instructions to utilize. (10 RT 1768; see 3 RT 1245-1247.) Having instructed the jury in the guilt phase with CALJIC instructions (see 10 CT 2737-2824), the trial court understandably expressed reluctance to switch to CALCRIM in the penalty phase of the trial. (10 RT 1768.) Given that defense counsel opted for CALJIC model instructions in the guilt phase after being advised the trial court did not want to mix CALJIC and CALCRIM model instructions, and finding no basic difference between CALJIC Nos. 8.85 and 8.88, and the requested CALCRIM No. 763, the trial court denied the request to use CALCRIM model instructions in the penalty phase. (10 RT 1768.)

On appeal, Leon argues that the trial court's refusal to give CALCRIM No. 766 resulted in his jury not being informed that the central determination was whether the sentence was "appropriate and justified." (AOB 69-72.) His argument is premised on the contention that instruction of the jury in the penalty phase with CALJIC No. 8.88 failed to provide sufficient guidance because it merely told jurors the death penalty had to be "warranted" in order to render a death judgment. (AOB 70.) Leon's criticism of CALJIC No. 8.88 has been repeatedly rejected by this Court and Leon offers no new arguments meriting reconsideration of the matter. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1361.)

The jury was instructed with CALJIC No. 8.88 in relevant part, "To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." CALCRIM No. 766 modified the instruction to read in relevant part, "To return a judgment of death, each of you must be persuaded that the aggravating circumstances both outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified."

Leon acknowledges, but dismisses earlier references to "appropriate" and "justified" contained in CALJIC No. 8.88 as merely "prefatory in effect and impact." (AOB 71.) But the instruction clearly informed the jury that a mitigating circumstance "may be considered as an extenuating circumstance in determining the *appropriateness* of the death penalty." (CALJIC No. 8.88, italics added.) Moreover, it plainly laid out the jury's role by instructing, "[i]n weighing the various circumstances you determine under the relevant evidence *which penalty is justified and appropriate* by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances." (CALJIC No. 8.88, italics added.) This

immediately preceded the sentence that "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole."

Leon mistakenly reads components of the instruction in isolation. When the instruction is considered as a whole, it properly informs the jury that it must first weigh the aggravating and mitigating factors to determine the penalty that is justified and appropriate. The next sentence reaffirms death can only be appropriate when the jury is "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances." (CALJIC No. 8.88.) "[T]he instruction properly conveyed to the jury that circumstances 'warrant[]' the death penalty when such punishment is appropriate in the eyes of the jury." (*People v. McKinzie, supra*, 54 Cal.4th at p. 1361, citing *People v. Breaux* (1991) 1 Cal.4th 281, 316 ["Essentially, the jury was told that it could return a death verdict only if aggravating circumstances predominated and death is the appropriate verdict."].) Accordingly, the trial court properly refused to instruct the jury with CALCRIM rather than CALJIC at the penalty phase.

B. The Trial Court Properly Refused Defense Special Instructions One and Two, and Leon Was Not Prejudiced by the Refusal of Special Instruction Three

After the trial court refused to instruct with CALCRIM, Defense counsel requested the following three special instructions (11 RT 1930-1933):

No. 1. "You may consider sympathy or compassion for the defendant." (11 CT 2963.)

No. 2. "You may not consider as an aggravating factor anything other than the factors contained in this list that you conclude are aggravating in

this case. You must not take into account any other facts or circumstances as a basis for imposing the death penalty." (11 CT 2964.)

No. 3. "Even if a fact is both a 'special circumstance' and also a 'circumstance of the crime,' you may consider that fact only once as an aggravating factor in your weighing process. Do not double-count that fact simply because it is both a 'special circumstance' and a 'circumstance of the crime.'" (11 CT 2965.)

The trial court refused to give the jury the defense special instructions because it found the information they were seeking to communicate was adequately covered in CALJIC No. 8.85. (11 RT 1993.)

CALCRIM No. 763 modified CALJIC No. 8.85 to include the three special defense instructions requested by Leon. As this Court has made plain, the trial court was not required to instruct on the defense special instructions 1 and 2 because they were duplicative and adequately covered by instructions provided. (*People v. Jackson* (2014) 58 Cal.4th 724, 767 ["the CALJIC penalty phase instructions """are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards.' [Citation.]""" (*People v. Jones* (2012) 54 Cal.4th 1, 74.).]) While the trial court should not have denied the request to instruct regarding double-counting, any error was harmless.

1. The trial court was not required to provide the proposed instruction that the jury may consider sympathy or compassion for Leon

Leon argues the trial court erred in failing to instruct the jury with the proposed defense special instruction that it could consider sympathy or compassion for Leon. (AOB 72-74.) However, this Court has consistently held that CALJIC No. 8.85, given below, "adequately instructs the jury concerning the circumstances that may be considered in mitigation,

including sympathy and mercy." (*People v. Burney* (2009) 47 Cal.4th 203, 261; *People v. Brasure* (2008) 42 Cal.4th 1037, 1070.)

The trial court instructed the jury pursuant to CALJIC No. 8.85, which provides under factor (k) that the jury may consider

> [a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

(CALJIC No. 8.85, factor (k).) The prosecutor clarified in his closing argument, "You can consider sympathy for the defendant, some sympathetic aspect of him but not sympathy for the family." (12 RT 2281.) Defense counsel also explained in closing argument that the jury could consider sympathy or compassion for Leon. (12 RT 2308.)

The trial court had no duty to further instruct the jury on compassion and sympathy for Leon because it was adequately conveyed in CALJIC No. 8.88. Moreover, the jury's ability to consider sympathy was properly addressed in closing arguments by both counsel. Accordingly, the trial court was entitled to refuse the proposed instruction because it was duplicative of CALJIC No. 8.88. (*People v. Jones, supra,* 54 Cal.4th at p. 83; see also, *People v. Champion* (1995) 9 Cal.4th 879, 943.)

2. The trial court was not required to provide the proposed instruction that the jury could consider only the listed statutory factors as circumstances in aggravation

The trial court declined to instruct with Leon's proposed instruction No. 2: "You may not consider as an aggravating factor anything other than the factors contained in this list that you conclude are aggravating in this case. You must not take into account any other facts or circumstances as a basis for imposing the death penalty." (11 CT 2964; 11 RT 1993.) Leon

argues he was legally entitled to the instruction and it would have clarified that his behavior after the crimes could not be considered a factor in aggravation. (AOB 74-75.) To the contrary, the trial court was not required to give the proposed instruction.

Leon cites to *People v. Hillhouse* (2002) 27 Cal.4th 469, 509 and *People v. Gordon* (1990) 50 Cal.3d 1223, 1275, footnote 14, "on request a court must give an instruction stating that the jury may consider only penalty factors (a) through (j), and evidence relating thereto, in determining aggravation." (AOB 74.) While those cases acknowledge that only factors specified in the statute can be considered in aggravation, they note there can be no prejudice in failing to provide the instruction when the prosecutor does not present extraneous, non-statutory factors.

In *Berryman* the same instruction was requested and rejected because it duplicated other instructions that specified applicable factors to be considered in determining penalty. This Court observed,

> What was express in this 'special' instruction was implicit in the instruction actually given. Reasonable jurors would have understood and employed the latter to 'allow [them] to consider [for purposes of aggravation] the listed penalty factors, "if applicable," and to prohibit [them] from considering others.' (*People v. Gordon, supra*, 50 Cal.3d at p. 1275 [arriving at a similar conclusion as to a similar instruction on a similar record].) There is no reasonable likelihood that the jury would have construed or applied the standard instruction otherwise.

(*People v. Berryman* (1993) 6 Cal.4th 1048, 1100.)

In this case, the prosecutor did not present extraneous, non-statutory factors. Nor can it be said that the prosecutor misled the jurors as to their consideration of factors in aggravation. Leon states, "the instruction requested would have clarified, for example, that what the prosecutor referred to as appellant's 'normal' behavior after the homicides could not be considered a factor in aggravation. (12 RT 2274.)" (AOB 74.) But the

prosecutor never argued Leon's behavior was a factor in aggravation. Rather, the prosecutor explained factor (d) asked the jury to determine if Leon was under the influence of extreme mental or emotional disturbance on the day he committed the murders; noting "it only applies to that day." (12 RT 2273.) He then argued the evidence surrounding the crimes that showed Leon was himself throughout the day meant that factor in mitigation did not apply to this case. (12 RT 2274.) Similar to *Berryman*, the prosecutor's comments merely reflected the fact that the jury could properly consider any evidence presented as applied to those factors listed for consideration in CALJIC No. 8.85, CALJIC No. 8.84.1 (determination of penalty) and CALJIC No. 8.88 (weighing of factors). Further, in these comments the prosecutor did not specifically point out, or even suggest, that evidence as being aggravating in nature.

Accordingly, the trial court properly declined to provide Leon's proposed instruction. In any event, any assumed error was harmless given that the prosecutor's comments did not mislead the jury to consider non-statutory factors and in light of the other properly provided instructions. Consequently, the claim fails.

3. Leon was not prejudiced by the trial court's failure to instruct the jury not to "double count" the crimes and special circumstances

Leon requested that the trial court instruct the jury with special instruction No. 3 against "double counting" of the crimes and special circumstances. The trial court denied the request. (11 RT 1993.) This Court has repeatedly held that the trial court has no duty to sua sponte instruct the jury against double counting. (*People v. Ramirez* (2006) 39 Cal.4th 398, 476.) But when as here, the instruction is requested, a trial court should instruct the jury against "double-counting" multiple felony-murder special circumstances (i.e., that the jury should not double count the

underlying felony—e.g., robbery or burglary—both as a circumstance of the murder and again as a special circumstance). (*People v. Monterroso* (2004) 34 Cal.4th 743, 789.) Contrary to Leon's contention (AOB at 76-77), he was not prejudiced by the failure to instruct the jury not to "double count" in reaching a penalty verdict.

Absent misleading argument by the prosecutor, any failure to provide the instruction is harmless. (*People v. Ayala* (2000) 24 Cal.4th 243, 289.) This is because in the absence of prosecutorial argument to the contrary, it is unlikely the jury would give undue weight under factor (a) to evidence which proved the circumstances of the offense and also proved the special circumstance. (*People v. Medina* (1995) 11 Cal.4th 694, 779.)

Here, the failure to provide the requested instruction was clearly harmless because no misleading comments were made by the prosecutor. And in any event, the trial court also instructed the jury with CALJIC No. 8.85, which stated in relevant part:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account, and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.

(11 CT 2948; 12 RT 2264-2265.) This Court has determined that the above language is not erroneous or misleading, and does not imply the jury may "double count" evidence under factors (a) and (c). (*People v. Mayfield* (1997) 14 Cal.4th 668, 805 (as to 1986 rev.).) Consequently, Leon's claim of prejudicial error should be rejected.

IV. CALIFORNIA'S DEATH PENALTY SCHEME, AS INTERPRETED BY THIS COURT AND APPLIED AT LEON'S TRIAL, DOES NOT VIOLATE THE UNITED STATES CONSTITUTION; VARIOUS CHALLENGES TO MURDER AND GUILT-PHASE INSTRUCTIONS ARE WITHOUT MERIT

Leon contends that many features of California's capital punishment scheme violate the United States Constitution. He correctly acknowledges that this Court has repeatedly rejected each of these claims, but raises these challenges to preserve them for federal review. (AOB 78.) Accordingly, his contentions fail. (*People v. Jackson* (2009) 45 Cal.4th 662, 699-702.)

A. Penal Code section 190.2 is Not Impermissibly Broad

Leon claims that section 190.2 is impermissibly broad because, at the time of his trial, it listed 22 special circumstances, which in total made 33 factually distinct murders eligible for the death penalty, and, therefore, it does not meaningfully narrow the pool of murderers eligible for the death penalty. (AOB 78-79.) This Court holds otherwise. (*People v. Contreras* (2013) 58 Cal.4th 123, 172.)

This Court has rejected this claim, holding that, "California's death penalty statute 'does not fail to perform constitutionally required narrowing function by virtue of the number of special circumstances it provides or the manner in which they have been construed.'" (*People v. Beames* (2007) 40 Cal.4th 907, 933, quoting *People v. Morrison* (2004) 34 Cal.4th 698, 730.) Also, this Court held that the California death-penalty scheme meets Eighth Amendment requirements and is not overbroad based on the number of special circumstances. (*People v. Cornwell* (2005) 37 Cal.4th 50, 102.) Thus, this Court should reject this claim.

B. Application of section 190.3, factor (a) Did Not Violate Leon's Constitutional Rights

Leon contends that section 190.3, factor (a) is too broadly applied such that the concept of "aggravating factors" has been applied to almost all

features of every murder, violating the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 79-81.) Appellant acknowledges, however, that this Court has rejected this claim. (AOB 80-81.)

Allowing the jury to consider the circumstances of the crime (§ 190.3, factor (a)) does not lead to the imposition of the death penalty in an arbitrary or capricious manner. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 33 Cal.4th 382, 401.) This case presents no compelling reason to reconsider this holding.

> Nor is section 190.3, factor (a) applied in an unconstitutionally arbitrary or capricious manner merely because prosecutors in different cases may argue that seemingly disparate circumstances, or circumstances present in almost any murder, are aggravating under factor (a).

(*People v. Carrington* (2009) 47 Cal.4th 145, 200.) Instead, "'each case is judged on its facts, each defendant on the particulars of his [or her] offense.'" (*Ibid.*, quoting *People v. Brown, supra*, 33 Cal.4th at p. 401, alteration in original.)

C. The Death Penalty Statute and Accompanying Jury Instructions Given in this Case Do Not Fail to Set Forth the Appropriate Burden of Proof and Requirement of Unanimity

Leon contends that California's death penalty statute and accompanying jury instructions fail to set forth the appropriate burden of proof and requirement of unanimity in three ways. (AOB 81-86.) None of his claims have merit.

1. Constitutionality of death penalty

Leon argues that his death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt. This Court has held otherwise.

> The death penalty law is not unconstitutional for failing to impose a burden of proof—whether beyond a reasonable doubt or by a preponderance of the evidence—as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence.

(*People v. Hoyos* (2007) 41 Cal.4th 872, 926; *People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1066.) Because the California death-penalty law requires a beyond-a-reasonable-doubt standard for proving special circumstances, and then requires the jury to consider and take into account all mitigating and aggravating circumstances in determining whether to impose the death penalty, it is constitutional. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1429.)

> Under the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense . . . ¶ Because any finding of aggravating factors during the penalty phase does not 'increase[] the penalty for a crime beyond the prescribed statutory maximum' (*Apprendi, supra*, 530 U.S. at p. 490), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings.

(*People v. Prieto* (2003) 30 Cal 4th 226, 263, italics in original.)

Leon acknowledges the holding in *Prieto* but urges this Court to reconsider it in light of *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]. (AOB 82-83.) But this Court has already done so, and has concluded, "[t]he recent decisions of the United States Supreme Court interpreting the Sixth Amendment's jury trial

guarantee do not compel a different result." (*People v. Bramit* (2009) 46 Cal.4th 1221, 1250; footnote omitted.)

This Court should also reject Leon's request to reconsider its holding in *People v. Blair* (2005) 36 Cal.4th 686 at page 753, that: "[N]either the cruel and unusual punishment clause of the Eighth Amendment, nor the due process clause of the Fourteenth Amendment, requires a jury to find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty." This claim should be rejected.

2. Burden of Proof

Leon contends that his jury should have been instructed that the State had the burden of persuasion regarding the existence and weighing of aggravating and mitigating factors, the appropriateness of the death penalty, and a presumption of life without parole as an appropriate sentence. (AOB 83-84.) However, he acknowledges that this Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (AOB 84; *People v. Jackson, supra*, 45 Cal.4th at p. 694; *People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) Thus, there is no requirement that the court instruct the jury that it had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors and that death was the appropriate penalty. (*People v. Contreras, supra*, 58 Cal.4th at p. 173; *People v. Medina, supra*, 11 Cal.4th at p. 782; *People v. Berryman, supra*, 6 Cal.4th at p. 1101; *People v. Diaz* (1992) 3 Cal.4th 495, 569.) Similarly, there is no requirement that the jury be instructed on a presumption of life in the penalty phase of a capital trial that is analogous to the presumption of innocence at the guilt trial. (*Contreras, supra*, at p. 173; *People v. Jackson, supra*, 45 Cal.4th at p. 701; *People v. Perry* (2006) 38 Cal.4th 302, 321; *People v. Kipp* (2001) 26 Cal.4th 1100, 1137.)

Leon also posits that the trial court should have instructed the jury that the prosecution had no burden of proof. (AOB 83.) This Court has also settled this issue. Since California does not specify any burden of proof, except for other-crimes evidence, the trial court should not instruct at all on the burden of proving mitigating or aggravating circumstances. (*People v. Holt, supra*, 15 Cal.4th at pp. 682-684; *People v. Carpenter, supra,* 15 Cal.4th at pp. 417-418.) Thus, the trial court need not instruct that "no party bears the burden of proof on the matter of punishment." (*People v. Lewis* (2009) 46 Cal.4th 1255, 1319; accord, *People v. McKinnon* (2011) 52 Cal.4th 610, 697-698.) This claim, too, should fail.

3. Unanimity

Leon contends that because his death verdict was not premised on unanimous jury findings regarding aggravating factors, the verdict violates the Sixth, Eighth, and Fourteenth Amendments. (AOB 84-86.) There is no requirement that the jury unanimously agree on the aggravating circumstances that support the death penalty, since aggravating circumstances are not elements of an offense. (*People v. Jackson, supra*, 45 Cal.4th at p. 701; *People v. Hoyos, supra*, 41 Cal.4th at p. 926; *People v. Stanley, supra*, 39 Cal.4th at p. 963; *People v. Medina, supra*, 11 Cal.4th at p. 782.) Leon acknowledges that this Court reaffirmed this holding after the decision in *Ring v. Arizona, supra*, 536 U.S. at page 584. (See, *People v. Prieto, supra*, 30 Cal.4th at p. 275; AOB 85.) He presents no compelling reason to revisit the decision.

Leon also argues the failure to require a finding of unanimity on the aggravating factors violates the equal protection clause of the Fourteenth Amendment by providing more protection to a noncapital defendant than to a capital defendant. (AOB 85-86.) He reasons that because under California law when a criminal defendant has been charged with certain special allegations that may increase the severity of the sentence, the jury

must render a separate and unanimous verdict on the truth of the allegations, then capital defendants are likewise guaranteed to this additional protection. (AOB 85-86.) Leon's claim fails as this Court has consistently held that "capital and noncapital defendants are not similarly situated and therefore may be treated differently without violating constitutional guarantees of equal protection of the laws or due process of law." (*People v. Manriquez* (2005) 37 Cal.4th 547, 590, *citing People v. Johnson* (1992) 3 Cal.4th 1183, 1242-1243.)

> The availability of certain procedural protections in noncapital sentencing—such as a burden of proof, written findings, jury unanimity and disparate sentence review—when those same protections are unavailable in capital sentencing, does not signify that California's death penalty statute violates Fourteenth Amendment equal protection principles. [Citations.]

People v. Pearson, supra, 56 Cal.4th at pp. 478-479, quoting *People v. Cowan* (2010) 50 Cal.4th 401, 510.) There is no need to reconsider this Court's holdings in *People v. Taylor* (1990) 52 Cal.3d 719, 749 and *People v. Prieto, supra,* 30 Cal.4th at page 275.

D. The Death Penalty Statute and Accompanying Jury Instructions on Mitigating and Aggravating Circumstances Given in this Case Did Not Violate Leon's Constitutional Rights

Leon presents eight challenges to the CALJIC instructions given to the jury on the subject of mitigating and aggravating circumstances and argues they violated his constitutional rights. (AOB 86-94.) These claims have all been addressed and rejected by this Court. Leon presents no arguments compelling reconsideration of this Court's prior holdings.

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1. The instructions provided properly informed the jury to determine whether death is the appropriate penalty

Leon reiterates his earlier argument that CALJIC No. 8.88 failed to adequately instruct the jury that the ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (AOB 86-87.) He acknowledges that this Court previously rejected this challenge to CALJIC No. 8.88 in *People v. Arias* (1996) 13 Cal.4th 92, 171. (AOB 87.) Leon offers no reasons for this Court to reconsider its finding that CALJIC No. 8.88 is not defective in requiring the jury to determine whether death is "warranted" as opposed to "appropriate." (*People v. McKinzie, supra,* 54 Cal.4th at p. 1361; *People v. Rogers* (2009) 46 Cal.4th 1136, 1179; *People v. Watson* (2008) 43 Cal.4th 652, 702.) Accordingly, this claim fails.

2. The use of adjectives in the list of potential mitigating circumstances is not impermissibly restrictive

Leon contends that the instructions on mitigating and aggravating factors violated his constitutional rights because the use of restrictive adjectives in the list of potential mitigating factors impeded the jurors' consideration of mitigation. (AOB 87.) Leon acknowledges this argument has been rejected, but urges reconsideration. (AOB 87.) The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" in CALJIC No. 8.85 did not prevent the jury from considering mitigating factors in violation of appellant's constitutional rights. (*People v. Avila, supra*, 38 Cal.4th at p. 614; *People v. Jackson, supra*, 45 Cal.4th at p. 700.) Appellant presents no compelling reason to reconsider these decisions.

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3. The standard for the penalty determination was not impermissibly vague and ambiguous

Leon argues that the death penalty determination hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warranted death instead of life without parole." (AOB 87-88.) He argues that the phrase "so substantial" is impermissibly broad and does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. (AOB 87-88.) He acknowledges, however, that this Court found use of this phrase does not render the instruction constitutionally deficient in *People v. Breaux, supra,* 1 Cal.4th at page 316, fn. 14. (AOB 88.) He provides no reason for this Court to reconsider the *Breaux* opinion or the many others holding that the requirement that the jury find the aggravating circumstances "so substantial" in comparison with the mitigating circumstances that it "warrants death" is not vague or directionless. (*People v. Chatman* (2006) 38 Cal.4th 344, 409; *People v. Arias, supra*, 13 Cal.4th at p. 170.) As such, this claim fails.

4. The trial court was not required to omit inapplicable sentencing factors

Leon contends the trial court's failure to omit from CALJIC No. 8.85 factors that were inapplicable to his case likely confused jurors or prevented them from making a reliable penalty determination, and asks this Court to reconsider its decision in *People v. Cook, supra,* 39 Cal.4th at page 618, rejecting this same contention. (AOB 88.) Reconsideration of the Cook holding is not warranted in this case as this Court has held that the trial court need not instruct jurors that certain sentencing factors in CALJIC No. 8.85, i.e., (d), (e) and (h), were relevant only as possible mitigating factors. (*People v. Hillhouse, supra*, 27 Cal.4th at p. 509.) Jurors are presumed to

follow the trial court's instruction, and here, the jury was instructed to consider and be guided by the factors "if applicable." (*People v. McKinzie, supra,* 54 Cal.4th at pp. 1364-1365, quoting *People v. Maury* (2003) 30 Cal.4th 352, 439-440.) Nothing more was required. Leon's claim should be rejected. (*People v. Bivert* (2011) 52 Cal.4th 96, 124.)

5. The trial court was not required to identify for the jurors the statutory factors relevant solely as mitigating circumstances

Leon argues that the trial court erroneously failed to instruct the jury which factors were relevant solely as mitigating circumstances. (AOB 89.) The trial court is not required to instruct the jury which factors are relevant solely as potential mitigating circumstances and which factors are relevant as aggravating circumstances. (*People v. Wilson* (2005) 36 Cal.4th 309, 360; *People v. Farnam* (2002) 28 Cal.4th 107, 191-192.) CALJIC No. 8.88 is not defective because "the aggravating and/or mitigating nature of the various factors is readily apparent without such labels, even in the face of contrary argument." (*People v. McKinzie, supra*, 54 Cal.4th at p. 1362, quoting *People v. Millwee* (1998) 18 Cal.4th 96, 163.)

> So long as the instructions 'focus the sentencer's consideration on "specific, provable, and commonly understandable facts" that properly bear on the appropriate penalty, they cannot be deemed unconstitutionally vague 'simply because they leave the sentencer free to evaluate the evidence in accordance with his or her own subjective values.' [Citation.]'

(*People v. McKinzie, supra*, at p. 1362, quoting *People v. Montiel* (1993) 5 Cal.4th 877, 945 [addressing § 190.3's failure to identify which factors are aggravating or mitigating].) This claim should be rejected.

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6. There is no requirement that the trial court instruct the jury that if mitigation outweighed aggravation then it must return a sentence of life without the possibility of parole

Leon contends that CALJIC No. 8.88 was defective for failing to tell the jury that if mitigating circumstances outweighed aggravating circumstances, then the jury must sentence him to a term of life without possibility of parole. (AOB 89-90.) He reasons the non reciprocity of CALJIC No. 8.88 conflicts with due process principles by emphasizing the prosecution theory of the case while ignoring or minimizing the defense theory. (AOB 90.) This claim should be denied.

CALJIC No. 8.88 "[i]s not unconstitutional for failing to inform the jury that if it finds the circumstances in mitigation outweigh those in aggravation, it is required to impose a sentence of life without the possibility of parole [citation]." (*People v. Moon* (2005) 37 Cal.4th 1, 42.) The instruction informs the jury regarding the proper weighing of aggravation and mitigation to determine whether death or life without parole is warranted. (*People v. Perry, supra,* 38 Cal.4th at p. 320; *People v. Smith* (2005) 35 Cal.4th 334, 370.)

Leon's proposed "'admonishment was unnecessary in light of the express instruction that a death verdict could be entered only if aggravating circumstances outweighed mitigating ones.'" (*People v. McKinzie, supra,* 54 Cal.4th at pp. 1361-1362, quoting *People v. Medina, supra,* 11 Cal.4th at p. 782; see, *People v. Ray* (1996) 13 Cal.4th 313, 356 ["By stating that death can be imposed in only one circumstance—where aggravation substantially outweighs mitigation—the instruction clearly implies that a sentence less than death may be imposed in all other circumstances."].) This Court should not disturb its earlier opinions on this matter. Accordingly, Leon's claim must be rejected.

7. The trial court did not err by instructing the jury not to consider sympathy for Leon's family

Leon argues CALJIC No. 8.85 erroneously precludes the jury from considering sympathy for his family as a factor in mitigation. (AOB 91-93.) He urges this Court to reconsider earlier decisions and find this portion of the instruction unconstitutional. (AOB 91-93.) This Court has addressed and rejected this claim. (*People v. Bemore* (2000) 22 Cal.4th 809, 855-856, accord, *People v. Livingston* (2012) 53 Cal.4th 1145, 1178-1179.)

> We have rejected similar claims before, and do so again here. ([Citations].) The foregoing cases make clear that while so-called victim impact considerations show the specific harm caused by the defendant and his moral culpability for purposes of determining whether he deserves to die, the impact of a death sentence on the defendant's family and friends has no similar bearing on the individualized nature of the penalty decision. Sympathy for defendant's loved ones, as such, and their reaction to a death verdict, as such, do not relate to either the circumstances of the capital crime or the character and background of the accused. Because the challenged instruction was consistent with the foregoing principles, the trial court did not err in giving it at defendant's trial.

(*People v. Bemore, supra*, 22 Cal.4th at p. 856.)

Moreover, Leon's contention that the majority decision in *Payne v. Tennessee* (1991) 501 U.S. 808, 827 [111 S.Ct. 2597, 2609, 115 L.Ed.2d 720] (*Payne*), supports his claim is also unavailing. (AOB 92-93.) Specifically, he argues that *Payne* "requires an even balance between the evidence available to the defendant and that available to the state" during the sentencing phase of a capital trial. (AOB 92.) This Court has previously rejected this claim. (*People v. Smithey* (1999) 20 Cal.4th 936, 1000)

More recently, this Court reaffirmed the principle that sympathy for a defendant's family is not a matter that a capital jury can consider in

mitigation. (See, *People v. Alexander* (2010) 49 Cal.4th 846, 929 [citing *People v. Ochoa* (1995) 19 Cal.4th 353, with approval for the proposition that "a capital jury cannot consider sympathy for a defendant's family in mitigation"]; *People v. Bennett* (2009) 45 Cal.4th 577, 601 [same]; *People v. Romero* (2009) 44 Cal.4th 386, 425 [same]; *People v. Harris* (2005) 37 Cal.4th 310, 355 [citing *People v. Bemore, supra*, 22 Cal.4th 809, with approval for the proposition that "sympathy for defendant's loved ones and their reaction to a death verdict do not relate to either the circumstances of the capital crime or the character and background of the accused"].) Leon has not advanced any persuasive arguments requiring this Court to reject its prior holdings.

8. There is no requirement that the trial court instruct the penalty jury on the presumption of life

Leon claims the trial court erred by not instructing the jury as to the presumption that life without the possibility of parole is the appropriate sentence. (AOB 93-94.) As he acknowledges, this Court has rejected the argument that such an instruction is required in capital cases. (AOB 94; *People v. Arias, supra*, 13 Cal. 4th at p. 190; see, *People v. Abilez* (2007) 41 Cal.4th 472, 532.) CALJIC No. 8.88 is "not unconstitutional for failing to inform the jury there is a presumption of life." (*People v. Moon, supra*, 37 Cal.4th at p. 43, citing *People v. Maury, supra,* 30 Cal.4th at p. 440.) Accordingly, this claim should be rejected.

E. Failing to Require the Jury to Make Written Findings Does Not Violate Appellant's Right to Meaningful Appellate Review

Leon contends that the failure to require written or other specific findings by the jury deprived him of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review. (AOB 94-95.) As acknowledged, this Court

has rejected this claim, holding that CALJIC No. 8.88 is not unconstitutional for failing to require written findings so as to facilitate "meaningful appellate review." (*People v. Moon, supra*, 37 Cal.4th at p. 43, citing *People v. Williams* (1997) 16 Cal.4th 153, 276.) Therefore, this claim should be rejected.

F. Intercase Proportionality is Not Required

Leon argues that intercase proportionality review should be required in capital sentencing and failure to conduct such a review violates his rights to equal protection and due process. (AOB 95.) Intercase proportionality review is not required and Leon has presented no persuasive reasoning to reconsider this Court's prior decisions. (*People v. McKinzie, supra*, 54 Cal.4th at p. 1365.) "Comparative intercase proportionality review by the trial or appellate courts is not constitutionally required." (*People v. Snow* (2003) 30 Cal.4th 43, 126; accord, *People v. Demetrulias* (2006) 39 Cal.4th 1, 44; *People v. Gray* (2005) 37 Cal.4th 168, 237; *People v. Blair, supra*, 36 Cal.4th at p. 753; *People v. Stitely* (2005) 35 Cal.4th 514, 574; *People v. Anderson* (2001) 25 Cal.4th 543, 602.)

G. California's Death Penalty Statute Does Not Violate Equal Protection

Leon contends that California's death penalty statute violates equal protection because it "provides significantly fewer procedural protections" than those afforded to non-capital defendants. (AOB 95-96.) To prevail on an equal protection claim, a defendant must establish that "the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." (*People v. Smith* (2007) 40 Cal.4th 483, 527, quotations and citations omitted.) Leon has not met his necessary burden.

This Court has rejected the claim that procedural differences in capital and non-capital cases, including the availability of certain "safeguards" such as intercase proportionality review, violate equal protection principles

under the Fourteenth Amendment. (See, *People v. Blair, supra*, 36 Cal.4th at p. 754; *People v. Ramos* (1997) 15 Cal.4th 1133, 1182.) As this Court has observed, capital case sentencing involves considerations wholly different from those involved in ordinary criminal sentencing. (*People v. Blair, supra*, 36 Cal.4th at p. 754.) "[B]y definition, a defendant in a non-capital case is not similarly situated to his capital case counterpart for the obvious reason that the former's life is not on the line." (*People v. Smith, supra*, 40 Cal.4th at p. 527, quotation and citation omitted). "Thus, California's death penalty law does not violate equal protection because it does not require juror unanimity on aggravating circumstances, impose a burden of proof on the prosecution, or require a statement of reasons for a death sentence. (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 333; *People v. Carey* (2007) 41 Cal.4th 109, 136-137; *People v. Smith, supra*, 40 Cal.4th at p. 527; *People v. Davis* (2005) 36 Cal.4th 510, 571; see also, *People v. Zamudio* (2008) 43 Cal.4th 327, 373 [death penalty law does not violate equal protection because sentencing procedures for capital and noncapital defendants are different].)

H. Use of the Death Penalty Does Not Violate International Law

Leon argues that use of the death penalty violates international law, the Eighth and Fourteenth Amendments of the United States Constitution, and "evolving standards of decency." (AOB 96.) He acknowledges this Court's rejection of these claims, but urges reconsideration in light of the decision in *Roper v. Simmons* (2005) 543 U.S. 551, 554 [125 S.Ct. 1183, 161 L.Ed.2d 1], that cites international law to support its prohibition of capital punishment against defendants that committed their crimes as juveniles. (AOB 96.) This Court has recently considered and rejected Leon's claim:

> California's death penalty scheme does not violate international law and norms. (E.g., *People v. Houston* (2012) 54 Cal.4th 1186, 1232 [144 Cal.Rptr.3d 716, 281 P.3d 799].) We are not persuaded otherwise by *Roper v. Simmons* (2005) 543 U.S. 551 [161 L.Ed.2d 1, 125 S.Ct. 1183], in which the high court cited evolving international standards as 'respected and significant' support for its holding that the Eighth Amendment prohibits imposition of the death penalty against persons who committed their crimes as juveniles. (*Roper*, at p. 578.)

(*People v. Mai* (2013) 57 Cal.4th 986, 1058.)

Moreover, international law does not require California to eliminate capital punishment. (*People v. Blacksher* (2011) 52 Cal.4th 769, 849; *People v. Martinez* (2010) 47 Cal.4th 911, 968; *People v. Doolin* (2009) 45 Cal.4th 390, 456.) Furthermore, California does not impose the death penalty as regular punishment in California for numerous offenses. (*Ibid.*) Instead,

> [t]he death penalty is available only for the crime of first degree murder, and only when a special circumstance is found true; furthermore, administration of the penalty is governed by constitutional and statutory provisions different from those applying to 'regular punishment' for felonies. (E.g., Cal. Const., art. VI, § 11; §§ 190.1-190.9, 1239, subd. (b).)

(*People v. Doolin, supra*, 45 Cal.4th at p. 456, quoting *People v. Demetrulias, supra,* 39 Cal.4th at p. 44.) Thus, California's death penalty law does not violate international law or the federal Constitution.

V. THERE IS NO REVERSIBLE CUMULATIVE ERROR

Leon contends that even if none of the errors he identified prejudiced him standing alone, the cumulative effect of the errors undermines confidence in the integrity of both phases of his capital trial. (AOB 97-99.) But, where, as here, the claims of error are defective, the defendant has presented nothing to cumulate. (*People v. Staten* (2000) 24 Cal.4th 434, 464; *People v. Rountree* (2013) 56 Cal.4th 823, 860.) Even a capital

defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box* (2000) 23 Cal.4th 1153, 1214, 1219.) Here, Leon's claims of errors have failed, and he cannot prevail on his argument that the cumulative effect of errors made during trial deprived him of his right to a fair trial. Accordingly, his claim fails and reversal is not warranted.

VI. The Trial Court Erred in Failing to Impose the Restitution Fine During the Sentencing Hearing

Leon correctly contends that at the time of sentencing he was denied his right to demonstrate that he is indigent and lacks meaningful future earnings as a death-row inmate to pay more than the statutory minimum restitution fine because the trial court failed to orally pronounce the imposition of a $10,000 restitution fine pursuant to Penal Code section 1202.4, subdivision (b), during his sentencing hearing that is reflected as part of his sentence in the Clerk's minutes and abstract of judgment. (AOB 100-104.) Accordingly, Leon requests this Court reduce the $10,000 restitution fine imposed by the trial court to $200, or in the alternative, remand the cause for a determination of restitution pursuant to Penal Code section 1202.4. (AOB 104.) In the event this Court affirms the judgment of conviction and Leon's death sentence in all other respects, then Leon's challenge to his $10,000 restitution fine should be resolved by amending the abstract of judgment to impose the statutory minimum fine of $200 pursuant to Penal Code section 1202.4.

As indicated in the minute order and abstract of judgment, the trial court ordered Leon to pay a restitution fine pursuant to Penal Code section 1202.4, subdivision (b), in the amount of $10,000.[9] (11 CT 3003; 3rd

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[9] At the time of Leon's crimes, section 1202.4, subdivisions (b) and (c) provided:

(continued...)

Supp. CT 4, 7.) However, victim restitution was not mentioned at any time on the record at Leon's sentencing hearing. (12 RT 2335-2349.) Where there is a discrepancy between the oral pronouncement of judgment and the minute order or abstract of judgment, the oral pronouncement necessarily controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.) Specifically, where a trial court does not include a fine in its oral pronouncement of sentence, the court clerk may not include the fine in the court's minutes or the abstract of judgment. (*People v. Mesa* (1975) 14 Cal.3d 466, 471; *People v. Zackery* (2007) 147 Cal.App.4th 380, 387-388.)

(...continued)

(b) In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record.

(1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars ($200), and not more than ten thousand dollars ($10,000), if the person is convicted of a felony, and shall not be less than one hundred dollars ($100), and not more than one thousand dollars ($1,000), if the person is convicted of a misdemeanor.

(2) In setting a felony restitution fine, the court may determine the amount of the fine as the product of two hundred dollars ($200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted.

(c) The court shall impose the restitution fine unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine. Inability to pay may be considered only in increasing the amount of the restitution fine in excess of the two-hundred-dollar ($200) or one-hundred-dollar ($100) minimum.

Accordingly, as Leon correctly notes, the record on appeal does not permit imposition of a restitution fine pursuant to Penal Code section 1202.4 greater than the statutory minimum of $200. Moreover, on remand for imposition of a restitution fine, Leon would be afforded the opportunity to present evidence in the trial court demonstrating his inability to pay. (*People v. Avila* (2009) 46 Cal.4th 680, 729; *People v. Zackery, supra*, 147 Cal.App.4th at pp. 388-389 [the presence of the defendant at the time of imposition of the fine serves a practical purpose].)

Where a death sentence is affirmed on appeal, a remand for a hearing solely to address imposition of a restitution fine pursuant to Penal Code section 1202.4, subdivision (b) greater than the statutory minimum, would entail an untenable expenditure of finite judicial and law enforcement resources by taxpayers, as well as the risk to the public safety inherent any time a condemned inmate is transported from death row to appear in court. (See, e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 769-770 (Chin, Conc.).) Accordingly, the appropriate remedy for the failure to orally impose the $10,000 restitution fine, in the event this Court affirms the judgment of conviction and death sentence in all other respects, would be to order the abstract of judgment to reflect imposition of a $200 restitution fine pursuant to Penal Code section 1202.4, subdivision (b).

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CONCLUSION

Accordingly, respondent respectfully asks this Court to amend the abstract of judgment to reflect the imposition of the minimum restitution fine pursuant to Penal Code section 1202.4, subdivision (b) and affirm the judgment of conviction in all other respects.

Dated: May 22, 2014 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 22,914 words.

Dated: May 22, 2014

KAMALA D. HARRIS
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DECLARATION OF SERVICE

Case Name: ***People v. Jose Luis Leon***
No.: **S143531**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On **May 22, 2014**, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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On **May 22, 2014**, I caused one electronic copy of the **RESPONDENT'S BRIEF** in this case to be served on the California Supreme Court by sending the copy to the Supreme Court's electronic service address pursuant to Rule 8.212(c).

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **May 22, 2014**, at San Diego, California.

S. McBrearty	S. McBrearty
Declarant	Signature

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